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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 122 and 403

[FRL 2950-3]

### Water Pollution; General Pretreatment Regulations for Existing and New Sources

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) today is proposing revisions to the General Pretreatment Regulations (40 CFR Part 403). The proposed modifications are intended to clarify existing regulations; respond to recommendations of the Pretreatment Implementation Review Task Force (PIRT); and conform the pretreatment regulations, where appropriate, to the National Pollutant Discharge Elimination System (NPDES) permit regulations (40 CFR Part 122), and changes thereto published September 26, 1984 (49 FR 37998).

**DATES:** Comments must be received on or before August 11, 1986.

**ADDRESS:** Comments should be addressed to Hans I. E. Bjornson, Permits Division (EN-336), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The supporting information and all comments on this proposal will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2402. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** George E. Young, Permits Division (EN-336), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475-9539.

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Proposed Changes
  - A. Pretreatment Standards and Requirements
    - 1. Calculation of Equivalent Mass and Concentration Limits
    - 2. Centralized Waste Treatment
    - 3. Local Limits
    - 4. Combined Wastestream Formula
    - 5. Prohibition on Dilution
  - B. POTW Pretreatment Program Requirements
    - 1. Deadline for Program Approval—Newly Required POTW Pretreatment Programs
    - 2. POTW Program Requirements—Remedies
    - 3. Modification of Approved POTW Pretreatment Programs

- C. POTW and State Pretreatment Program Approval
  - 1. POTW Pretreatment Program and Removal Credit Application Submission—Approval Authority Action
  - 2. Approval of State Pretreatment Programs—State Regulations
  - 3. Approval Procedures for POTW Pretreatment Programs and Authority to Grant Removal Credit
- D. Reporting and Compliance Monitoring
  - 1. Baseline Monitoring Report—Deadline for New Sources
  - 2. Measurement of Pollutants
  - 3. Sampling Techniques
  - 4. Annual POTW Reports
  - 5. Signatory Requirements for Industrial User Reports
  - 6. Reporting Requirements—Extension to Non-Categorical Discharges
  - 7. Notification of Slug Loadings
  - 8. 90-Day Compliance Report
  - 9. Industrial User Compliance Reports—Monitoring Requirements
  - 10. Self-Monitoring vs. POTW Monitoring
  - 11. Notification by Industrial Users of Changed Discharge
- E. Miscellaneous
  - 1. New Source Criteria
  - 2. New Source Compliance Deadline
  - 3. Variance for Fundamentally Different Factors
  - 4. Net-Gross Calculations
  - 5. Upset
  - 6. Bypass
- III. Executive Order 12291
- IV. Paperwork Reduction Act
- V. Regulatory Flexibility Act
- VI. Judicial Review of Provisions Not Amended
- VII. EPA Documents Cited in This Notice

#### I. Background

On June 26, 1978, EPA promulgated the General Pretreatment Regulations, which established mechanisms and procedures for controlling the introduction of wastes from industry and other non-domestic sources into publicly owned treatment works (POTWs) (43 FR 27736). Following promulgation, several parties brought actions in Federal court challenging these regulations. Pursuant to the terms of a settlement agreement entered into by EPA and some of the parties to the litigation, the Agency promulgated amendments to the General Pretreatment Regulations for Existing and New Sources on January 28, 1981 (46 FR 9404).

Several provisions of the amended regulations were subsequently challenged. In *National Association of Metal Finishers et al. v. EPA*, 719 F.2d 624 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit upheld the removal credit provision (§ 403.7) and the combined wastestream formula (§ 403.6(e)) in their then existing forms. The Court also remanded to EPA the definitions of "pass through," "interference," and "new source" for

further action consistent with the Clean Water Act (CWA) and the Court's opinion. Essentially, the Court held that the definition of "interference" must provide for liability by the industrial user only when the user caused inhibition or disruption of the treatment processes. The court ruled that the definition of "pass through" had to be repromulgated according to the required procedures of the Administrative Procedures Act; the Court did not rule on the definition itself. The Court also held that the definition of "new source" was inconsistent with the CWA because it excluded sources that would be considered new sources under the Act.

On February 10, 1984, the Agency published a final rule in the *Federal Register* that suspended the definitions of "new source" (§ 403.3(k)), "interference" (§ 403.3(i)) and "pass through" (§ 403.3(n)). The "new source" definition was published as a final rule on July 10, 1984 (49 FR 28058). New definitions of "interference" and "pass through" were proposed by EPA on June 19, 1985 (50 FR 25526).

The Court in the NAMF decision also held that Section 301(l) of the Clean Water Act prohibited EPA from granting fundamentally different factors variances for toxic pollutants covered by categorical pretreatment standards. The Agency petitioned the Supreme Court to review this aspect of the Third Circuit's decision. On February 27, 1985, the Supreme Court overruled the Third Circuit's decision on FDF variances (*Chemical Manufacturers Assn., et al. v. Natural Resources Defense Council*, No. 83-1013 (1985)). Under the Supreme Court's decision, EPA has authority to grant FDF variances for toxic pollutant limits. Consistent with that decision, the Agency has reinstated the FDF provision (§ 403.13) in its original form (50 FR 38809, September 25, 1985).

Subsequent to the NAMF decision, EPA promulgated revisions to the removal credit provision (§ 403.7) to simplify the procedures for documenting consistent removal and obtaining removal credits. These revisions were published in the *Federal Register* on August 3, 1984 (49 FR 31212). The amended provision was recently struck down by the United States Court of Appeals for the Third Circuit in *Natural Resources Defense Council, Inc. v. EPA*, No. 85-3012 (3d Cir. 1986). EPA is reviewing this decision to determine the appropriate response.

Today's proposed revisions are intended to accomplish several goals. They make a number of substantive changes to address short-comings in the existing regulations that have been

discovered since the January 28, 1981, pretreatment amendments were promulgated. The revisions also respond to recommendations of the Pretreatment Implementation Review Task Force (PIRT). PIRT was established, in accordance with the Federal Advisory Committee Act, by the Administrator of EPA on February 3, 1984, to provide the Agency with recommendations on improving implementation of the national pretreatment program. The Task Force, which was made up of representatives of POTWs, States, industry, environmental groups and EPA Regional Offices, arrived at its recommendations through consensus among the members after extensive discussion. PIRT issued its Interim Report to the Administrator on June 12, 1984. The Task Force's Final Report to the Administrator was issued on January 30, 1985. Recommendations were made in the areas of program simplification and clarification, enforcement, resources, and roles and relationships within the national pretreatment program. The recommendations generally focus on the need for guidance, training programs, technical assistance, policy statements and regulatory amendments in these areas.

Finally, the revisions will make several provisions of the pretreatment regulations compatible, where appropriate, with their counterparts in the NPDES regulations (40 CFR Parts 122, 123, 124, and 125). Consistent regulations are generally appropriate because in many cases the logic supporting the NPDES provision is equally applicable in the pretreatment context. EPA promulgated final revisions to the NPDES regulations on September 26, 1984 (49 FR 38049).

There are twenty-eight amendments being proposed today. These fall into five major areas: (1) Pretreatment standards and requirements, (2) POTW pretreatment program requirements, (3) POTW and State pretreatment program approval procedures, (4) reporting and compliance monitoring, and (5) miscellaneous provisions. The overall impact of the proposal is to make the regulations easier to understand, reduce burdens on the regulated community, and generally improve the implementation of the national pretreatment program.

The proposed revisions do not alter the existing regulatory framework. Nor will they affect the ability of POTWs or industrial users to comply in a timely manner with existing or forthcoming pretreatment standards and other regulatory requirements. General

prohibitive discharge standards, specified in § 403.5 of the regulations, are unchanged. Similarly, categorical pretreatment standards are unaffected by this proposal. As before, most major POTWs are still required to develop and implement local pretreatment programs, pursuant to § 403.8 and § 403.9, to ensure that non-domestic users of the municipal system comply with applicable pretreatment requirements. Approval of State requests for authority to administer the pretreatment program will also continue as before. The basic reporting requirements of the regulations (e.g., § 403.12) remain intact.

## II. Proposed Changes

### A. Pretreatment Standards and Requirements

#### 1. Calculation of Equivalent Mass and Concentration Limits (40 CFR 403.6(c))

a. *Existing rule.* National categorical pretreatment standards establish limits on pollutants discharged to POTWs by certain industries. In some cases, the categorical standards set limitations in terms of pollutant concentration. Other standards establish limitations in terms of both concentration and pollutant mass, which is established on the basis of production (i.e., x pounds of pollutant per unit of production). However, in certain categorical standards EPA has set only production-based mass limitations. The purpose of such limitations is generally to reflect the use of flow reduction as part of the technological model for establishing the standard.

Production-based limitations are administratively more difficult for the Control Authority to implement than concentration limitations. To test for compliance with a concentration-based standard, one need only take a wastewater sample, measure the concentration of the regulated pollutant(s), and compare this result to the standard. For the production-based standards, however, one must also measure the flow of the regulated wastewater to translate the concentration measurement into a pollutant mass and determine the discharger's production rate at the time of sampling. The most difficult step in determining whether an industrial user is in compliance with a production-based standard, according to PIRT, is determining the applicable production rate. This rate will vary over time, and in some industries will even fluctuate daily.

For direct dischargers, the NPDES regulations simplify the implementation of production-based mass effluent limitations guidelines by requiring that the permit limits be based upon a

reasonable measure of the actual production. Generally, this should be a long-term average of the facility's production. The permit (or a fact sheet describing the basis for the permit) must specify the production level that was used to derive the permit limit. This process establishes a single mass limit that the permittee must meet, even though production and flows may vary over time. (However, if production and flows change significantly, the permittee must report these changes and the permitting authority may modify the permit accordingly. See 40 CFR 122.42(b) and 122.62(a)(1).)

The current pretreatment regulations contain no specific provisions relating to translation of production-based limitations into mass or concentration limits. Thus, an industrial user's compliance is determined based upon the categorical standard itself since users must at all times meet the standard. To determine compliance with production-based standards, the production and flow at the time of compliance evaluation must also be determined (since any monitoring results would be expressed in terms of concentration).

b. *Proposed change.* PIRT stated that POTWs would like to translate production-based categorical pretreatment standards into enforceable mass limits. Many POTWs would also like to convert these mass limits into equivalent concentration limits. Such conversions simplify compliance evaluation as noted above. However, PIRT indicated that POTWs are unsure of whether this is allowed under the pretreatment regulations, and, to the extent allowed, of the methodology to be used and the legal status of the equivalent limits. As explained in EPA's Guidance Manual for the Use of Production Based Categorical Pretreatment Standards and the Combined Wastestream Formula (1985), the existing regulations allow Control Authorities to calculate equivalent concentration (or mass) limits as a tool for determining compliance with applicable categorical standards. However, an industrial user's compliance with such equivalent limits does not relieve the user of the legal requirement to be in compliance with the production-based standard itself. Thus, the equivalent mass and concentration limits do not shield the industrial user from direct EPA or State enforcement of the production-based standard. Obviously, this undercuts the benefits of the equivalent limits.

Based on PIRT's recommendation, EPA is proposing today to revise the

pretreatment regulations to change the legal status of equivalent concentration or mass limits calculated by Control Authorities from production-based categorical standards. Today's proposal adds a new paragraph to §403.6(c) stating that these equivalent limits, when properly calculated using procedures included in today's proposal, will be deemed pretreatment standards for the purposes of section 307(d) of the Clean Water Act and shall be enforceable as such. In addition, the proposal specifically states that industrial users will be required to comply with the equivalent limits, when established, in lieu of the promulgated categorical standards from which these limits were derived. As a result, industrial users that are in compliance with equivalent concentration or mass limits calculated in accordance with the procedures specified in today's proposal will not be subject to direct EPA enforcement actions based on the production-based standard itself. Rather the equivalent limits will be federally enforceable. The proposed rule will support the efforts of POTWs to establish such limits as part of their approved pretreatment programs.

As part of today's proposal, EPA is also setting forth in the regulations the procedures to be used by Control Authorities to calculate equivalent concentration and mass limits for production-based categorical standards. To convert a production-based standard to a mass limitation, the limit in the standard is multiplied by an appropriate production rate. Consistent with 40 CFR 122.45(b)(2) of the NPDES regulations, this production rate is based not upon the designed production capacity but rather upon a reasonable measure of the facility's actual long-term average daily production (e.g., the daily average during a representative year). This is to ensure that facilities operating below the full capacity are treating their wastewater to the extent required by the Clean Water Act's technology-based pretreatment requirements, rather than reducing their level of treatment due to unused production capacity. Such an approach also ensures equity among facilities in the same industry, regardless of their design capacity.

To arrive at a concentration limitation, this mass limitation is further divided by the industrial user's average daily flow rate of process wastewater regulated under the standard. Like the production rate, this flow rate must be based on a reasonable measure of the actual long-term average daily flow of the regulated process wastewater. The same production and flow figures should

be used for calculating both the maximum daily and maximum monthly average (or 4-day average) limitations. Examples of these calculations appear below.

#### Method No. 1. Equivalent Mass Limits.

|   |   |
|---|---|
| Standards:                                  |   |
| Daily maximum.....                          | .004 kg Cu/ton of product.                |
| Maximum monthly average....                 | .002 kg Cu/ton of product.                |
| Conditions:                                 |   |
| Production.....                             | 500 ton of product/day, 12-month average. |
| Flow .....                                  | Not Applicable.                           |
| Calculations:                               |   |
| .004 kg Cu/ton × 500 ton/day = 2 kg Cu/day. |   |
| .002 kg Cu/ton × 500 ton/day = 1 kg Cu/day. |   |
| Equivalent Limits:                          |   |
| Daily maximum.....                          | 2 kg Cu/day.                              |
| Maximum monthly average....                 | 1 kg Cu/day.                              |

#### Method No. 2. Equivalent Concentration Limits

|                           |   |
|---------------------------|---|
| Standards:                |   |
| Daily Maximum.....        | .004 kg Cu/ton of product.                |
| Maximum Monthly Average.. | .002 kg Cu/ton of product.                |
| Conditions:               |   |
| Production.....           | 500 ton of product/day, 12-month average. |
| Flow .....                | .2 million gal/day, 12-month average.     |
| Calculations:             |   |

$$\frac{.004 \text{ kg Cu/ton} \times 500 \text{ ton/day}}{.2 \text{ mil gal/day} \times 3.78^*} = 2.6 \text{ mg/l}$$

$$\frac{.002 \text{ kg Cu/ton} \times 500 \text{ ton/day}}{.2 \text{ mil ga./day} \times 3.78^*} = 1.3 \text{ mg/l}$$

|                           |              |
|---------------------------|--------------|
| Equivalent Limits:        |              |
| Daily Maximum.....        | 2.6 mg/l Cu. |
| Maximum Monthly Average.. | 1.3 mg/l Cu. |

\* This factor converts kg/mil gal to mg/l.

Today's proposal also requires the industrial user to immediately notify the Control Authority if either the long-term production or flow rate changes substantially. Periodic fluctuations should not be reported under this requirement; these variations are factored into the development of the categorical standard. However, significant additions to or reductions in the production level that will represent the facility's production over the long-term must be reported. The Control Authority will then adjust the equivalent mass and concentration limits to reflect the changes.

EPA is also proposing to revise the periodic compliance report in §403.12(e) to require that for industrial users subject to production-based categorical pretreatment standards, the compliance reports described in that section must

include the user's actual average production rate for the reporting period. This is to ensure that the Control Authority has up-to-date production information.

## 2. Centralized Waste Treatment (40 CFR 403.6(e))

a. *Background.* The centralized treatment of industrial wastewater has received increased attention recently. The number of centralized waste treatment (CWT) facilities also has increased as compliance deadlines for categorical pretreatment standards are reached. Therefore, it is appropriate to provide the public with a statement of EPA's policy for regulating CWT facilities. Today's preamble will discuss the requirements applicable to CWT facilities and the regulatory changes proposed by the Agency to clarify these requirements.

Typically, to comply with CWA requirements a plant will install the necessary control system(s) on site to treat its process wastewater prior to discharging the effluent either directly into receiving waters or indirectly through a POTW. For large industrial concerns, on-site treatment is likely to be the most cost-effective treatment alternative. However, due to construction and operation and maintenance costs, on-site treatment may not be preferable for some smaller plants generating small amounts of process wastewater. CWT represents an alternative approach to on-site treatment, particularly for this latter group. CWT facilities are constructed to treat industrial waste from multiple contributors. Instead of constructing facilities to provide on-site treatment of its effluent, a plant conveys its wastewater through pipes, by truck, in drums, or by some other means to a CWT facility. The CWT facility treats the wastewater, frequently in conjunction with other compatible wastes, using predominantly the same technology as would be used had the individual industrial contributor established treatment facilities on-site. The CWT facility then discharges the treated wastewater to either a receiving stream (subject to NPDES permitting requirements) or to a POTW (subject to pretreatment requirements).

Several factors have contributed to the growing interest in CWT. First, used appropriately, CWT can result in considerable cost savings over the construction and operation and maintenance of on-site treatment at individual plants. Second, CWT facilities are generally operated by professional waste handlers and

therefore offer the possibility of more effective treatment and management of industrial users' waste. Finally, CWT offers increased potential for resource recovery, which often requires large volumes of waste in order to be cost-effective. Of course, the full realization of these benefits is contingent upon assuring that only compatible wastes are combined at CWT facilities.

A CWT facility that is a direct discharger is required to have an NPDES permit. The permit must impose all applicable permit requirements under sections 301 and 402 of the Act, including technology-based requirements based on best available technology (BAT) and best conventional control technology (BCT). The Agency can issue the permit either to the CWT facility alone or jointly to the CWT and one or more of its contributors. In Decision of the General Counsel No. 43 (June 1976), the Agency discussed its statutory authority to provide in an NPDES permit that a directly discharging CWT facility and its industrial users are jointly and severally responsible for compliance with the provisions of a joint NPDES permit issued to all of them. In that Decision, EPA also determined that it may include monitoring requirements at both the CWT facility and at individual or joint wastestreams upstream of the CWT facility, and require each industrial user to provide information on production rates for each product and consumption rates for each raw material. The Decision noted that where an industry uses a separate contracting facility to treat its wastes, that treatment choice would not insulate the industry from the requirements of the Act.

The Agency is treating CWT facilities that are indirect dischargers (i.e., those discharging wastewater to a POTW) analogously. These CWT facilities are industrial users of POTWs and are subject to all applicable pretreatment standards and requirements. Accordingly, CWT facilities are subject to the General Pretreatment Regulations, categorical pretreatment standards and local pretreatment standards. (It should also be noted that CWT facilities that accept wastes defined as "hazardous wastes" under 40 CFR Part 261 may be subject to additional requirements under the Resource Conservation and Recovery Act ("RCRA") and implementing EPA regulations.) Industrial users must comply with any categorical standard(s) applicable to the wastes they treat. For example, if the CWT facility handles wastewaters from a contributor subject to the electroplating categorical pretreatment

standard, the CWT facility's discharge of these wastewaters would also be subject to this standard. If the contributor were a member of, for instance, the "electroplating of common metals" subcategory, the limited parameters would include, among others, cyanide, lead and cadmium.

The Agency's treatment of indirect discharging CWT facilities derives from the Clean Water Act. In section 307(b), Congress directed EPA to promulgate pretreatment standards "to prevent the discharge of any pollutant through treatment works . . . which are publicly owned, which pollutant interferes with, passes through, or is otherwise incompatible with such works." The categorical pretreatment standards promulgated by EPA apply to the wastewaters generated by certain industrial processes and discharged to a POTW, regardless of whether they are finally discharged from the industrial generator or through some intermediate conduit. In other words, it is not by whom these wastewaters are ultimately discharged to the POTW, but rather their nature and origin that determines the applicability of EPA's categorical standards.

If all the contributors to a CWT facility are covered by a single categorical pretreatment standard, then the CWT facility must meet the limits contained in that standard. Where that standard is production-based, the limit would be derived using a reasonable measure of the production from all the contributors. It is likely, however, that a CWT facility's customers will include members of more than one industrial category covered by categorical standards and/or "non-categorical" industrial users (i.e., those not currently subject to federal categorical pretreatment standards). In such cases, CWT facilities, like all other industrial users that mix process effluent regulated by various categorical standards prior to treatment or mix process effluent regulated by a categorical standard with wastewater that is not subject to those standards prior to treatment, must calculate an adjusted pretreatment standard using the combined wastestream formula (see § 403.6(e)). This ensures that the treatment of combined wastes performed at a CWT facility is equivalent to on-site treatment of the same combined wastes at equivalent integrated industrial facilities. It also protects against dilution as a substitute for treatment of combined wastewater flows. (See 46 FR 9419-9423, January 28, 1981). For a more detailed discussion of how to use the combined wastestream formula, see

EPA's Guidance Manual for the Use of Production-Based Categorical Pretreatment Standards and the Combined Wastestream Formula (1985).

Application of the combined wastestream formula requires several steps when a CWT facility accepts wastewater from an industrial contributor regulated by a categorical pretreatment standard expressed only in terms of mass of pollutant per unit of production (i.e., a "production-based" standard). The CWT facility must obtain sufficient production and wastewater flow information to calculate an adjusted concentration or mass standard for each contributor. All applicable limits must be converted to the same terms. The procedure for calculating concentration or mass-per-day limits from production-based standards has been described above in this preamble. (See also EPA's Guidance Manual for the Use of Production-Based Categorical Pretreatment Standards and the Combined Wastestream Formula, mentioned above, which addresses the conversion of production-based standards to equivalent mass-per-day or concentration limits.) The adjusted limit should be used in the combined wastestream formula to calculate the applicable standard for the CWT's discharge. If the industrial user sends only a portion of its waste to the CWT facility, then the CWT facility must calculate the portion of the adjusted standard allocable to the CWT facility. Generally, this should be a flow-proportioned adjustment.

Although the wastewaters accepted by CWT facility for treatment can vary over time, application of the combined wastestream formula will not necessarily mean that these facilities will be required to recalculate the applicable limits on a daily basis. CWT facilities need to know in advance the nature of the wastewaters they are accepting in order to ensure compatibility with their treatment systems. EPA assumes that most CWT facilities will have an established core of customers regularly sending in their wastewaters for treatment, and that therefore, the composition of incoming wastewaters will generally be fairly stable. The Agency invites comments on whether this reflects actual practice. Moreover, EPA does not expect CWT facilities to recalculate their limits every time there is any change in their incoming wastewaters. Rather, only when there are substantial changes in the make-up of wastewaters being accepted for treatment by the CWT facility will the limits need to be recalculated.

Choosing a CWT facility for treatment of its wastewater does not necessarily relieve the industrial user of responsibility for those wastes it generates. NPDES Decision of the General Counsel No. 43 explained the Agency policy that industrial contributors to a privately owned, directly discharging CWT facility may be held jointly and severally liable for the CWT facility's noncompliance with a single permit issued to the CWT facility and its industrial contributors, to the extent that the noncompliance is attributable to wastes from such industrial contributors. Similarly, a plant sending its wastewater to an indirectly discharging CWT may be held responsible for the proper treatment of its wastes. This includes compliance by the CWT facility with pretreatment standards, including categorical pretreatment standards, the prohibitive discharge standards in § 403.5(a) and (b), and local limits developed under § 403.5(c). Normally, EPA and the States will hold the CWT facility itself liable for any violation. However, where this is not adequate, the contributors can be included.

A question has arisen as to whether on-site treatment facilities used for clean-up actions taken pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and discharging to POTWs are CWT facilities for purposes of these regulations. Although these CERCLA treatment facilities may treat industrial wastes that were initially generated by processes currently covered under one or more categorical pretreatment standards, it will in most cases not be possible to identify the wastes' origins. Even where this is possible, it may be difficult to determine relative quantities of categorical and non-categorical wastes. The combined wastestream formula is intended to apply where discrete, identifiable discharges are combined prior to treatment. It does not apply to situations where categorical wastes cannot be identified and quantified. However, where the treated waste is subsequently discharged to a POTW, other pretreatment standards, such as the prohibitive discharge standards in § 403.5 (a) and (b) and any local limits established under § 403.5(c), are applicable. In addition, if discrete wastestreams contributing to the waste can be identified, categorical standards and the combined wastestream formula apply as well.

Under EPA's recent policy entitled "CERCLA Compliance With Other Environmental Statutes," published at

50 FR 47946 (November 20, 1985), requirements of Federal environmental and public health laws other than CERCLA that are "applicable" or "relevant and appropriate" to CERCLA response actions will be attained or exceeded except in certain limited circumstances. Under this policy, "applicable" requirements are those Federal requirements that would be legally applicable to a response action if the action were not undertaken pursuant to CERCLA. As noted above, although it will often be impossible to apply the combined wastestream formula to CERCLA response actions, the prohibitive discharge standards in § 403.5 (a) and (b), and any local limits established under § 403.5(c) would apply to these actions but for the fact that they are undertaken pursuant to that statute. Therefore, these standards are "applicable," and must be attained or exceeded except in the limited situations enumerated in the policy.

b. *Existing rule.* As discussed above, indirectly discharging CWT facilities are "industrial users" under existing regulatory language and definitions. They are, therefore, subject to the General Pretreatment Regulations, categorical pretreatment standards and local pretreatment standards. As with other industrial users, the Agency has applied the combined wastestream formula to determine applicable limits where CWT facilities treat different wastes. Accordingly, the Agency has not issued specific regulatory language imposing separate requirements on these facilities.

c. *Proposed change.* In order to further promote public awareness of EPA's position on the regulation of indirect discharging CWT facilities, the Agency is proposing to add a paragraph (4) to § 403.6(e) of the pretreatment regulations stating that the combined wastestream formula is applicable to CWT facilities when calculating discharge limits for the facility. As discussed above, this proposal does not change existing requirements but merely clarifies their application. Since it is important that a CWT facility be adequately apprised of the wastes it is receiving, EPA is also proposing to add specific regulatory language requiring that industrial contributors provide to the CWT facility information on the nature of their processes (including relevant production and flow rates, where necessary), volume of wastes, pollutant constituents, and any categorical pretreatment standards applicable to the contributor's processes. This information is necessary for the CWT facility to apply the

combined wastestream formula, and thus determine effluent limits. The Agency solicits comments on whether other information is necessary for such an analysis and on whether EPA and/or the States should develop a form to standardize the information provided to CWT facilities. (For transported wastes classified as "hazardous" under 40 CFR Part 261, EPA regulations already require the preparation of a "Uniform Hazardous Waste Manifest" identifying the waste, its volume and its destination. However, CWT facilities need additional information (e.g., applicable categorical standards, production information, etc.) in order to comply with applicable pretreatment standards and requirements.) To ensure that industrial contributors to CWT facilities have the same confidentiality protections as other industrial users, EPA is also proposing to add a new paragraph (n)(4) to § 403.12. This new paragraph would require industrial contributors to maintain, and make available to EPA, the State, and the POTW, records of the information they submit to the CWT facility under the new § 403.6(e)(4) being proposed today. Any of this information ultimately submitted to these governmental entities would be covered under § 403.14, which sets forth the applicable confidentiality requirements.

d. *Alternatives.* Over the past several years, a number of alternative regulatory schemes have been suggested for controlling the discharges from CWT facilities. One such alternative is the promulgation of specific categorical standards for CWT facilities. However, it may not be possible to characterize CWT facilities and thus to establish appropriate uniform national limits since the types of wastes to be treated could vary not only from facility to facility, but also from time to time at the same facility. This alternative could also result in years of delay in obtaining treatment of discharges from CWT facilities.

Another alternative is to rely solely on POTW-developed local limits to regulate CWT facilities. This could be done either through local limits applicable to all of the POTW's industrial users, or by establishing limits specifically applicable to CWT facilities contributing to the POTW. Both approaches would provide considerable leeway at the local level to take account of exact waste loading characteristics and POTW treatment capabilities. However, they could also effectively allow industries in categories covered by national pretreatment standards to avoid compliance with categorical

standards simply by sending their wastewaters to a CWT facility. Such an interpretation is inconsistent with the technology-based treatment requirements of the Act.

A third alternative is to control each pollutant discharged by a CWT facility by applying the most stringent numerical limit for the pollutant taken from all the categorical standards applicable to the wastes received by the facility. However, this alternative may be too stringent in certain cases where the applicable limit is determined by a very small volume of wastewater.

EPA solicits comments on these alternatives and invites suggestions for other possible approaches. The Agency also requests additional comments on the following: (1) The types and volumes of wastes received by CWT facilities that discharge to POTWs; (2) the types of contractual arrangements entered into by these facilities and their contributors (e.g., long- or short-term); (3) whether, and if so how often, wastes are accepted from contributors with whom the CWT facility does not have a contractual agreement; (4) the type of information provided by the contributor to the CWT facility; and (5) the extent, type and frequency of monitoring performed by the CWT facility on incoming wastes.

### 3. Local Limits (40 CFR 403.8(f))

*a. Background.* The pretreatment program is intended to prevent the introduction to POTWs of pollutants that pass through or interfere with the treatment works. One means to achieve this purpose is through categorical pretreatment standards promulgated by EPA under section 307(b) of the Clean Water Act (CWA). These standards are technology-based minimum requirements, each applicable to a different industry category. However, categorical standards are intended to apply to a broad group of dischargers. Because they are not site-specific, and because they only apply to dischargers in selected industrial categories, these standards do not necessarily prevent all problems caused by industrial discharges that might occur at a particular POTW. Therefore, § 403.5(c) requires POTWs to develop additional limits where necessary to ensure that the objectives of the pretreatment program are met. Section 403.5(c)(1) provides that POTWs required to establish local pretreatment programs under § 403.8(a) must develop and enforce specific limits to implement the general prohibitions against pass through and interference in § 403.5(a) and the specific prohibitions listed in § 403.5(b). As stated in the preamble to

the 1981 amendments to the General Pretreatment Regulations:

These limits are developed initially as a prerequisite to POTW pretreatment program approval and are updated thereafter as necessary to reflect changing conditions at the POTW. The limits may be developed on a pollutant or industry basis and may be included in a municipal ordinance which is applied to the affected classes. In addition, or alternatively, the POTW may develop specific limits in the facility and incorporate these limits in the facility's municipally-issued permit or contract. By translating the regulations' general prohibitions into specific limits for Industrial Users, the POTW will ensure that the users are given a clear standard to which they are to conform.

POTWs not required to develop local pretreatment programs must also establish local limits if interference or pass through has occurred at the POTW and is likely to recur (§ 403.5(c)(2)).

The development of local limits involves three basic steps. The POTW must first determine which, if any, of the pollutants contributed to it by its industrial users have a reasonable potential for passing through or interfering with the POTW, contaminating the POTW's sludge, or jeopardizing the health or safety of the POTW's workers. In making this determination, a POTW should take a broad look at the types of pollutants being discharged and not limit itself to pollutants regulated in its NPDES permit, regulated under established sludge criteria, or known to have interfered with plant operations or threatened worker health or safety. Local limits are intended to be preventative as well as reactive. Therefore, the POTW should, for example, consider overall impacts on sludge quality to protect against likely restrictions on sludge use resulting from future standards. Similarly, a POTW should consider State water quality standards, even though these may not yet have been incorporated in the permit. Although the POTW need not set limits on all pollutants that may some day cause pass through or interference, they should consider whether local limits on such pollutants are appropriate.

For each of the pollutants the POTW concludes may be of concern, the POTW must then determine, using the best information available, the maximum loading that can be accepted by the treatment facility without the occurrence of pass through, interference or sludge contamination. A procedure for performing this analysis is provided in the EPA Guidance Manual for POTW Pretreatment Program Development (October 1983). Once maximum

allowable headworks loadings are determined for each of the pollutants of concern, the POTW must implement a system of local limits to assure that these loadings will not be exceeded. The POTW may implement its local limits in a variety of ways, such as uniform maximum allowable concentrations applied to all significant industrial dischargers, or maximum mass discharge limits on certain major dischargers. The POTW may select any method of control, so long as the selected method is enforceable and accomplishes the required objectives. When setting these limits, the POTW may also consider whether to add a safety factor to the maximum loads determined to be necessary to prevent problems. A safety factor would also allow for future additions of industrial contributors without the need for readjusting the local limits (which may entail a new headworks analysis). EPA strongly encourages POTWs to incorporate such a safety factor and to reserve some capacity for industrial expansion.

There is no single method of setting local limits which is best in all situations. The EPA Guidance Manual for POTW Pretreatment Program Development mentioned above discusses several alternative methods that a POTW might use to allocate the acceptable pollutant load to industrial users. The manual also provides an example of the calculations a typical POTW would use to determine the maximum allowable headworks loadings for a pollutant and to allocate that load to significant industrial users.

After local limits have been set, they must be updated as necessary to reflect changing conditions at the POTW such as increased domestic wastewater flow, changes in the POTW's industrial user population, or adjustments to the POTW's maximum allowable headworks loadings. Minor changes in the amount of sanitary sewage entering the facility may not require an update of the limits. But any changes in wastewater contributions to the POTW that could cause the local limits to be inadequate must result in a new analysis of the pollutant loadings and, if necessary, modification of the local limits.

In accordance with § 403.10(e) of the General Pretreatment Regulations, some States have assumed responsibility for implementing State-wide pretreatment programs in lieu of requiring POTWs to develop individual local programs. In these States, the NPDES permits of POTWs that otherwise would have been required to develop local pretreatment

programs may need to be modified to require the development of local limits as provided in § 403.5(c)(1). POTWs that may have recurring pass through or interference problems are still required to develop local limits in such States under § 403.5(c)(2). Alternatively, the State can perform the required analyses at each of the POTWs that would normally develop such limits and implement the appropriate local limits necessary to assure that the goals of the program are achieved. These limits would then be enforced in the same manner as other pretreatment requirements, in accordance with procedures included in the approved State-run program. Where States assume POTW responsibility for carrying out pretreatment program requirements, the Regional Offices of EPA will monitor all aspects of the State-run pretreatment program, including the development of local limits, to ensure that the requirements of the national pretreatment program are met.

Guidance on the development of local limits is available from several sources. EPA's Guidance Manual for POTW Pretreatment Program Development (October 1983), mentioned above, contains a detailed description, with examples, of the process of developing local limits. The Agency is currently developing additional technical guidance for POTWs to supplement the local limits material now available in that document. The Agency has also developed a computer program that greatly reduces the time required to calculate the maximum allowable headworks loading. The program also calculates industrial user limits under a number of optional allocation methods, using data provided by the POTW. For additional information on this program, contact Robert F. Eagen, Permits Division (EN-336), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475-9529.

**b. Existing Rule.** As discussed, § 403.5 states when specific local limits must be developed by POTWs. POTWs required under § 403.8 to develop pretreatment programs must develop local limits to implement the general prohibitions against interference and pass-through in § 403.5(a) and the specific prohibitions listed in § 403.5(b). See § 403.5(c)(1).

Section 403.8(f) sets forth the required elements of an approvable POTW pretreatment program. That section requires a POTW seeking pretreatment program approval to demonstrate that it has sufficient legal authority to enforce local limits developed pursuant to § 403.5(c), but does not explicitly make

the actual promulgation of such limits (if needed) a prerequisite to local program approval.

**c. Proposed change.** Questions have arisen regarding whether POTWs required to develop pretreatment programs must develop any needed local limits prior to receiving program approval. In the preamble to the 1981 amendments to the General Pretreatment Regulations, EPA stated that "[local] limits are developed initially as a prerequisite to POTW pretreatment program approval." However, the regulations themselves are not explicit on this point. Therefore, the Agency is proposing today a revision to the regulations to clarify that the development of local limits (or a demonstration that they are not necessary) is a prerequisite to POTW pretreatment program approval (and the continuing legal acceptability of a local program). The proposal will add a new paragraph to the local program requirements in § 403.8(f). As a minimum, all POTWs submitting local programs must evaluate the need for local limits, as described above. Where the evaluation indicates that local limits are needed to protect the treatment works against interference, pass through or sludge contamination, the POTW must develop appropriate limits before its program can be approved. A POTW that proposes to rely solely upon the application of the specific prohibitions listed in § 403.5(b) and categorical pretreatment standards in lieu of numerical local limits should demonstrate that: (1) It has determined that the industrial pollutants of concern will not cause problems at the treatment facility, (2) it has adequate resources and procedures for monitoring and enforcing compliance with the prohibitive discharge and categorical standards, and (3) full compliance with the applicable categorical standards will meet the objectives of the pretreatment program.

When a POTW is identified as requiring a pretreatment program, the requirement to develop such local limits as are necessary will be incorporated into its NPDES permit as part of the requirement to develop a program. When the approved program is incorporated into the POTW's permit, a requirement that these local limits be updated as necessary will also be included. Like all other applicable pretreatment requirements, the failure to develop (and update, as needed) necessary local limits will, of course, continue to be subject to enforcement, either by EPA or an approved NPDES

State, as a violation of the POTW's permit.

Any POTW whose program has already been approved without the analysis of the impact of the pollutants of concern and adoption of local limits will be required to initiate an analysis as described above and adopt appropriate local limits. This requirement will be incorporated in the POTW's NPDES permit as soon as feasible. POTWs that have previously adopted local limits but have not demonstrated that those limits are based on sound technical analysis, also will be required to demonstrate that the local limits are sufficiently stringent to protect against pass-through, interference and sludge contamination. POTWs which cannot demonstrate that their limits provide adequate protection will be required to revise those limits within a specific time set forth in a permit modification.

#### 4. Combined Wastestream Formula (40 CFR 403.6(e))

**a. Existing rule.** The combined wastestream formula (40 CFR 403.6(e)) is a method for calculating alternative pollutant limits at industrial facilities where regulated process effluent is mixed with other wastewaters (either regulated or non-regulated) prior to treatment. As stated in the preamble to the 1981 amendments to the general pretreatment regulations (46 FR 9419), the formula is of primary importance to large, diversified industrial users with multiple processes:

These Industrial Users of POTWs frequently have a number of individual processes producing different wastestreams that are not regulated by the same categorical Pretreatment Standard or are not regulated at all. Many of these integrated facilities have combined process sewers and a number have already constructed combined waste treatment plants. In these situations, the Industrial User often prefers to install, or continue to use, a pretreatment system on the combined stream rather than installing separate parallel systems on each individual stream. A combined wastestream formula permits a facility to mix wastestreams prior to treatment by providing it with an alternative effluent limit for this combined discharge.

EPA wishes to minimize the need for separation of wastestreams and for treatment by parallel systems when comparable levels of treatment can be attained in combined treatment plants. Separate treatment of wastes at an integrated plant can be costly, wasteful of energy, inefficient and environmentally counterproductive. In addition, such an approach reduces the environmental gains resulting from the voluntary treatment of unregulated streams prior to the imposition of regulatory requirements. However, the Agency also

recognizes that the countervailing concerns of avoiding the attainment of limits through dilution and ensuring that adequate treatment is provided may sometimes lead to the conclusion that segregation of streams is the only appropriate way to meet applicable pretreatment limits. The combined wastestream formula attempts to strike a proper balance between these considerations. It is the Industrial User's choice whether to combine or segregate its wastestreams. However, if the User decides to combine wastestreams prior to treatment, and at least one of these wastestreams is covered by a categorical pretreatment standard, then alternative limits for all regulated pollutants in the combined wastestream must be calculated using the combined wastestream formula.

b. *Proposed rule.* Where an industrial user combines wastestreams prior to treatment, compliance with an applicable categorical standard can be determined either prior to combining the wastestreams or following treatment of the combined wastestream (by applying the combined wastestream formula). Some industrial users have indicated that they would like to be able to switch between monitoring at these two points for purposes of evaluating compliance with categorical standards. The current regulations are silent on whether this option is allowed.

Today, EPA is proposing to add a new paragraph (e)(5) to the combined wastestream provision in § 403.6 to clarify the approach to be taken in such cases. Under the proposed rule, an industrial user has an initial choice of monitoring either the segregated wastestream(s) or the combined wastestream and then applying the appropriate numerical limits. If, at some later date, the industrial user wishes to change its initial choice of monitoring points, it may do so only after receiving approval from the Control Authority. This is necessary to enable the Control Authority to verify the applicable limits (e.g., alternative limits calculated using the combined wastestream formula) and ensure that the change in sampling points will not allow the industrial user to substitute dilution (either by non-regulated process water or by "dilution flow" as defined in § 403.6(e)) for pretreatment.

EPA is also proposing today to add stormwater and reverse osmosis or demineralizer backwash to the definition of "F<sub>p</sub>" in § 403.6(e)(1), which refers to streams that are treated as dilute for purposes of calculating alternative limits under the combined wastestream formula. Like the other streams included in this definition, stormwater and reverse osmosis or demineralizer backwash streams do not generally contain significant concentrations of regulated pollutants. Today's proposal takes this fact into account.

As with boiler blowdown and non-contact cooling water streams, however, in certain circumstances a stormwater stream or reverse osmosis or demineralizer backwash stream could contain a significant amount of a pollutant that could be substantially reduced if the industrial user combined this stream with its regulated process wastestream(s) prior to treatment. Under today's proposal, the industrial user could request the Control Authority to classify the stream as an "unregulated" stream rather than a "dilution" stream. The industrial user would be required to provide engineering, production, and sampling and analysis information sufficient to allow a determination by the Control Authority on how the stream should be classified. The Control Authority would have discretion to classify the stream in question as either a "dilution" or an "unregulated" stream.

EPA is also proposing to revise § 403.6(e)(3). That section describes the self-monitoring required to insure compliance with alternative limits derived using the combined wastestream formula, and references self-monitoring requirements in categorical pretreatment standards. However, the categorical standards do not contain such self-monitoring requirements. The Agency is proposing to delete the existing § 403.6(e)(3) to reflect this fact. In place of the deleted provision, the Agency is proposing a new § 403.6(e)(3) that will require compliance with the monitoring requirements in § 403.12(g), which is also being proposed to be amended today (see discussion below).

c. *Additional clarifications.* Several other questions have recently been raised concerning application of the combined wastestream formula. Since these questions have broad applicability, it is appropriate to address them here. One question is which industrial facilities must use the formula to determine alternative discharge limits. Under the regulations, any industrial user who combines a regulated process wastestream prior to treatment with any other wastestream—be it some other regulated stream, a dilution stream (as defined in the formula) or an unregulated stream (one not covered by a categorical standard and not a dilution stream)—and who chooses to monitor the combined wastestream for compliance must use the combined wastestream formula to determine the applicable discharge limits. If the industrial user chooses instead to monitor the regulated process wastestream separately, the formula does not apply and the user must comply with the limits in the applicable categorical standard immediately downstream from the regulated process

(prior to combining with other wastestreams). A detailed discussion of the formula can be found in EPA's Guidance Manual for the Use of Production-Based Categorical Pretreatment Standards and the Combined Wastestream Formula (1985).

A second question concerns the applicability of the combined wastestream formula where wastestreams are combined after treatment (i.e., a treated regulated process wastestream is combined with a non-regulated wastestream prior to being discharged to the POW). The industrial user may choose to monitor the combined wastestream, rather than monitoring the individual regulated streams prior to their combination with other streams. Many of these facilities are covered by local limits which are applicable at the point the discharge enters the sewerage system. By sampling after combining waste streams, the industrial user would only need to sample once to determine compliance with both local limits and categorical standards. Some Control Authorities have required sampling at a single point for this reason.

By its terms, the combined wastestream formula does not apply where wastestreams are combined after treatment because, as stated in § 403.6(e), the formula applies only "[w]here process effluent is mixed prior to treatment" with other wastewaters (emphasis added). Where wastestreams are mixed after treatment, the user must meet the categorical standard at the treatment facility, prior to combination. However, EPA recognizes the need for translating the standard into a limit after all streams are combined. To do this, all wastestreams contributing to the combined stream must be properly accounted for to ensure that compliance is not achieved through dilution. In some cases, the combined wastestream formula may be used, even though it is not technically applicable. However, as discussed below, use of the combined wastestream formula will not be appropriate in other cases, because it would allow dilution. In these cases, a different, but similar, calculation must be performed.

The combined wastestream formula represents a careful compromise of competing concerns. It allows dilution in cases where the actual pollutant concentration in an unregulated stream is less than the categorical standard for the regulated stream. This result is tolerated as a trade-off for the benefit of treating unregulated streams as well as regulated streams. See the discussion in 46 FR 9419-9423 (January 28, 1981). However, where unregulated streams are untreated and combined with regulated streams only after the

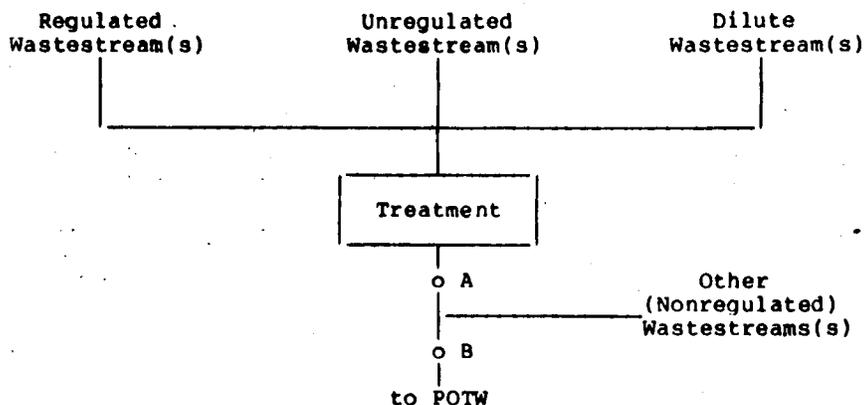
regulated streams have been treated, no such trade-off exists to justify the acceptance of dilution in some cases. Thus, consistent with the prohibition against using dilution to achieve compliance with pretreatment standards (see preamble discussion on dilution under § 403.6(d), the use of the combined wastestream after treatment is prohibited where it would allow dilution.

To establish an equivalent alternative limit where monitoring takes place after treated and untreated streams are combined, the Control Authority must use a flow-weighted average or more stringent approach. (Where the combined wastestream formula is available, as discussed above, it will be at least as stringent as a flow-weighted average.) The applicable standard(s) must be adjusted to reflect the actual amount of a particular regulated

pollutant in the non-regulated wastestream. If the standard is expressed in terms of mass-per-day, the levels of the regulated pollutant in the individual non-regulated wastestreams are simply added together with the mass limits on the regulated streams to determine the applicable limit on that pollutant in the combined wastestream. For concentration-based standards, a flow-proportioning calculation must be performed in order to properly account for the level of the regulated pollutant in the non-regulated wastestream(s). If the resulting adjusted standard is below the limit of detectability, monitoring of the individual regulated wastestreams for compliance must be performed prior to the point of combination with the non-regulated wastestreams.

Figure 1 illustrates the situation where wastestreams are combined after treatment.

Figure 1



At Point A, the industrial user must comply with an alternative limit calculated using the combined wastestream formula. At Point B, the combined wastestream formula may be used if the nonregulated wastestream(s)

being added after treatment contain(s) regulated pollutants in at least the level indicated in the applicable categorical standard(s) (i.e., no dilution occurs). Otherwise, the following formulas must be used:

$$(1) \text{ Adjusted Concentration Limit} = \frac{\text{(Combined Wastestream Formula Concentration Limit for Point A)} \times \text{(Flow at Point A)} + \text{(Actual Mass of Pollutant in Nonregulated Wastestreams Added After Treatment)}}{\text{(Flow at Point B)}}$$

$$(2) \text{ Adjusted Mass Limit} = \text{(Combined Wastestream Formula Mass Limit for Point A)} + \text{(Actual Mass of Pollutant in Nonregulated Wastestreams Added After Treatment)}$$

For example, if the alternative limit calculated under the combined wastestream formula for Point A is 10 milligrams per liter (mg/l), the flow at Point A is 3,000 liters per day (l/day), the mass of the regulated pollutant in

the nonregulated wastestream added after treatment is 5,000 mg/day, and the flow at Point B is 5,000 l/day, the adjusted concentration limit applicable at Point B would be calculated as follows:

$$\frac{10 \text{ mg/l} \times 3,000 \text{ l/day} + 5,000 \text{ mg/day}}{5,000 \text{ l/day}} = \frac{35,000 \text{ mg/day}}{5,000 \text{ l/day}} = 7 \text{ mg/l}$$

Calculating an adjusted mass limit for Point B would be even simpler. If the

mass limit calculated under the combined wastestream formula for point

A is 10,000 mg/day, the adjusted mass limit at Point B would be calculated as follows:

$$10,000 \text{ mg/day} + 5,000 \text{ mg/day} = 15,000 \text{ mg/day}$$

Today's clarification is merely a logical extension of the dilution prohibition in § 403.6(d), and therefore does not necessitate a regulatory change. Categorical standards apply to specific process wastestreams, where these are combined with other wastestreams prior to treatment, the regulations require application of the combined wastestream formula. However, the formula by its terms does not apply where other, nonregulated wastestreams are added after treatment. Therefore, in those cases where compliance monitoring is performed after these additional streams are added, the actual amount of regulated pollutants in any nonregulated wastestreams added after treatment must be accounted for in order to ensure that compliance with applicable standards is not achieved through dilution, as prohibited by § 403.6(d).

The Agency realizes that its position on this issue has not been made clear in the past and, in fact, may have been stated incorrectly to allow use of the combined wastestream formula where dilution would result. This may have resulted in some confusion and misunderstanding on the part of Control Authorities and industrial users. Therefore, those who have in good faith acted on the assumption that the formula is applicable where wastestreams are combined after treatment will be given a reasonable amount of time to make any necessary adjustments. Industrial users subject to limits made more stringent by these changes will have a reasonable amount of time to comply with the new limits. EPA solicits comments on possible implementation problems resulting from today's clarification.

Another question that has arisen with regard to the combined wastestream formula is how to calculate alternative limits when an industrial user is subject to one or more categorical standards expressed only as production-based limits and others expressed only as concentration limits. In these cases, the user and/or Control Authority should translate the terms into a common standard, either mass or concentration (since most POTWs will determine compliance using concentration limits and analysis, the common standard generally will be concentration). These calculations should be done in the same manner mass and concentration limits are normally derived. Thus, where the alternative limits are to be expressed in terms of concentration, the production-

based standard is multiplied by a reasonable measure of the industrial user's long term average daily production rate (e.g., the average daily production rate during the last 12 months) and the product is divided by a reasonable measure of the long-term average daily flow of the regulated process wastestream (e.g., the average daily flow from the regulated process during the last 12 months). (An amendment to § 403.6(c), also being proposed by EPA today, would codify this calculation for those situations where the Control Authority wishes to apply an equivalent concentration limit to an industrial user subject to a production-based categorical standard.) Where the alternative limit is to be expressed in terms of mass, the concentration limit is converted to a mass limit by multiplying the concentration limit by the appropriate flow of the stream to which the concentration limit applies. The relevant formula would then be applied.

#### 5. Prohibition Against Dilution (40 CFR 403.6(d))

*a. Existing Rule.* Section 403.6(d) of the current regulations prohibits the use of dilution as a means of achieving compliance with categorical pretreatment standards in place of adequate treatment. It has been EPA's consistent policy that dilution may not be substituted for treatment of pollutants. The General Pretreatment Regulations promulgated in 1978 clearly stated this policy. The underlying policy of the Clean Water Act is to reduce the amount of pollutants entering the Nation's waters (Section 101.) This policy will not be met if industrial users meet concentration limits by dilution and thereby discharge the same mass of pollutants at a lower concentration. While dilution may in the short term minimize some water quality problems, it does not reduce the mass of pollutants entering the POTW. The prohibition on dilution is supported by the Act's legislative history and subsequent case law. (See the detailed discussion of the prohibition on dilution in the preamble to the 1981 amendments to the General Pretreatment Regulations (46 FR 9419, January 28, 1981)).

*b. Proposed change.* The language of the existing prohibition in § 403.6(d) applies only to the use of dilution to achieve compliance with categorical pretreatment standards. However, the underlying statutory policy of reducing the total mass of pollutants entering waters of the United States is also applicable to other pretreatment standards and requirements, such as more stringent local limits developed

under § 403.5(c). To the extent that local limits regulate pollutants that the POTW is not able to effectively treat (i.e., those that pass through the POTW or contaminate the POTW's sludge), dilution is not an acceptable substitute for adequate treatment. Therefore, EPA is proposing to modify the dilution prohibition to clarify that it is not limited to categorical pretreatment standards. This will more clearly track the statutory intent.

Under the proposal, industrial users will be prohibited from diluting to comply with local limits. This prohibition will not affect the POTW's development of such limits and its ability to factor in the dilution impact of the sanitary sewage contribution to the POTW. However, once the POTW determines its local limits in accordance with § 403.5(c), the industrial users may not use dilution to meet those limits.

#### B. POTW Pretreatment Program Requirements

##### 1. Deadline for Program Approval—Newly Required POTW Pretreatment Programs (40 CFR 403.8(b))

*a. Existing Rule.* Under the current regulations, POTWs required to develop pretreatment programs under § 403.8(a) must request and receive approval of such programs within three years of permit reissuance or modification to require program development, but not later than July 1, 1983 (§ 403.8(b)). Although the regulations recognize that EPA or States may subsequently require other POTWs to develop programs after this date, the existing rules do not specify a deadline for program submittal or approval.

*b. Proposed change.* EPA is today proposing to amend § 403.8(b) to establish an outside compliance date for program development and submission where the Approval Authority identifies a POTW as needing a pretreatment program after July 1, 1983. EPA proposes to require program submission to the Approval Authority as soon as possible, but no later than one year after the date on which the POTW was notified by the Approval Authority, in writing, of its responsibility to develop a program. While this time period is shorter than the "up to three year" period authorized for POTWs prior to July 1, 1983, experience indicates that one year is reasonable for POTWs newly required to develop programs. Moreover, the existing three-year deadline includes receiving approval of the program; the deadline being proposed today applies only to the submission of an approvable program. Based upon the POTWs that have developed programs, EPA has

determined that, in most cases a complete program submission can be developed within 6 to 12 months. Moreover, EPA and the approved pretreatment States have already identified most POTWs that will be required to develop pretreatment programs; those identified in the future will be able to benefit from the work and experience that has taken place since 1978. In addition, EPA has developed and disseminated guidance on program development and in conjunction with the States will provide guidance and assistance to POTWs where needed.

Under the proposal, Approval Authorities will impose program development requirements on POTWs using the same procedures as for programs previously required. When a new POTW is identified as requiring a pretreatment program, the Approval Authority will modify the POTW's NPDES permit as provided under § 403.8(e) (1) and (5) to incorporate a compliance schedule that includes a program submission date, progress reports and such other interim dates as are needed to insure timely program development.

##### 2. POTW Program Requirements—Remedies (40 CFR 403.8(f))

*a. Existing Rule.* POTWs seeking approval of local pretreatment programs must have adequate legal authority to administer the local program. The required minimum legal authorities include the authority to obtain remedies against industrial users that violate pretreatment standards and requirements (§ 403.8(f)(1)(vi)(A)). In addition to having authority to seek injunctive relief, POTWs must be able to impose monetary penalties. The pretreatment regulations do not specify the minimum penalty amounts that POTWs must be able to collect.

POTWs that have legislative power under State law can meet the requirement to obtain monetary penalties by simply passing appropriate legislation (i.e., local ordinances or an equivalent). However, where a POTW does not have the authority to enact ordinances or other local legislation, the regulations require the POTW to enter into contracts with its industrial users. Monetary penalties are to be imposed through the use of liquidated damages clauses. A liquidated damages clause is a contract provision that sets the amount of money to be paid by a party who breaches the contract (i.e., an industrial user who violates a pretreatment standard or requirement).

b. *Proposed changes.* It is a general principle of contract law that damages for a breach of contract should adequately compensate the loss resulting from the breach. Where a contract includes a liquidated damages clause, the amount of money to be paid for a breach of the contract must be reasonably related to the amount the parties anticipate will compensate for the loss. Moreover, the law in some States may bar the imposition of penalties through such clauses.

Under the pretreatment regulations, liquidated damages clauses in contracts between POTWs and their users must provide for damages that compensate for any violation of pretreatment standards. However, it is difficult to determine, in advance of a breach, the extent of damage to a POTW caused by the breach and thus difficult to select an appropriate sum to be included in a liquidated damages clause in a contract between a POTW and an industrial user. Furthermore, Congress clearly intended that a violation of pretreatment standards be deterred by the possibility of substantial penalties that are not necessarily tied to measurable damage caused by the violations. See section 309 of the Act. Since liquidated damages clauses may not contain penalties, contracts do not appear to be an adequate enforcement mechanism.

To require POTWs to have adequate enforcement authority, EPA is proposing to delete that portion of § 403.8(f)(1)(vi)(A) that provides for the use of contracts as a mechanism for assuring compliance with pretreatment standards and requirements. The effect of today's proposal would be to require all POTWs developing POTW pretreatment programs to pass local legislation enabling them to assess civil or criminal penalties against industrial users in violation of pretreatment standards and requirements. POTWs that do not already have authorization to pass such legislation under State law would have to seek such authority prior to program approval. Those POTWs with approved pretreatment programs that depend upon contracts for implementation and enforcement of pretreatment standards and requirements would also be required to obtain the necessary authority from the State to enable them to directly assess civil or criminal penalties against violating industrial users. This authority would have to be obtained within one year of the effective date of this amendment unless the State would be required to enact or amend a statutory provision, in which case the POTW

would have two years in which to obtain this authority.

Today's proposal is not likely to have a widespread impact on the national pretreatment program. It appears that a relatively small percentage of industrial users are currently being regulated through contracts with POTWs. However, the Agency invites comments on this approach and suggestions for other approaches, such as retaining the option to use contracts, but requiring the POTW's legal representative (e.g., the City Solicitor) to certify that such contracts, and particularly the liquidated damages provisions, are valid under State law. The certification under this option would also have to state that a reasonable penalty could also be required in the contract.

Today's proposal is not intended to discourage the use of liquidated damages clauses in contracts between POTWs and their industrial users. Where these provisions are currently in use, POTWs should continue to invoke them where a user violates the contract. EPA's intent is to ensure that POTWs required to develop pretreatment programs have adequate authority to impose monetary penalties for all violations of pretreatment standards and requirements, including those that do not cause any measurable damage to the POTW. The proposed change would merely ensure the use of mechanisms that provide adequate enforcement and remedial authorities.

EPA is also proposing another change to the remedies provision of § 403.8(f) today. Section 403.8(f)(1)(vi) speaks in terms of civil or criminal penalties, but does not contain any guidance as to minimum amounts that POTWs must be able to collect. This has created some confusion and inconsistency in setting penalties. As a result, EPA is proposing to require that all POTWs with pretreatment programs have authority to obtain a maximum penalty of at least \$300 per day of violation for both civil and criminal penalties. This amount is consistent with EPA's Procedures Manual for Reviewing a POTW Pretreatment Program Submission (1983) and provides a minimally acceptable deterrent effect. The POTW should provide for larger penalties where appropriate (e.g., where the industrial user has a history of violations, etc.). Of course, by stating this minimum amount in the regulations, EPA in no way limits its (or the States') ability to seek larger penalties in appropriate cases. The \$300 amount is simply a minimum for purposes of the POTW's authority to assess civil and criminal penalties. It may not be used as a defense in an

enforcement action, brought by the POTW, the State, or EPA against an industrial user, in which a larger amount is sought.

In proposing the \$300 minimum today, EPA does not mean to imply that this amount will in all cases be sufficient to deter violations or force compliance by recalcitrant industrial users. In some cases, monetary penalties may need to be coupled with termination of sewerage service or other measures in order to achieve compliance. However, the Agency believes it is important to ensure that POTWs developing pretreatment programs have authority to impose sufficient monetary penalties regardless of whatever other measures might also be appropriate in a given case.

EPA solicits comments on this proposal, and also invites suggestions as to other appropriate minimum penalty amounts. The Agency is particularly interested in receiving comments on the alternatives of requiring POTWs to be able to collect at least \$1,000 (per day of violation), and using the same penalty amounts that are required for State NPDES programs in 40 CFR 123.27(a)(3)(i), (ii), (i.e., a maximum of \$5000 per day of violation for civil penalties, \$10,000 for criminal fines).

### 3. Modification of Approved POTW Pretreatment Programs (40 CFR 403.18)

a. *Existing rules.* A POTW seeking approval of a POTW pretreatment program must submit a program containing the information specified in § 403.9(b). This submission must include a statement by the POTW's legal representative identifying the legal authorities and procedures under which the POTW plans to operate the program. It must also contain a copy of all relevant legal authorities, a description of the POTW's organization with respect to program administration and a description of available resources.

When EPA or the State approves the program, conditions requiring implementation of the program are incorporated into the POTW's permit (see § 403.8(c)). The POTW is then required to operate the program in compliance with applicable regulations, the approved program submission and any other conditions incorporated into the permit. However, changing conditions at the POTW may warrant changes in the operation of the program. These changes in program operation may result in a program that differs from that described in the approved program submission and required to be followed by the permit conditions. Changes that may require program modification

include the addition of new industrial users, new connections with outlying jurisdictions, the establishment of new water quality standards, the use of new treatment techniques or sludge use or disposal methods, changing resource conditions, a desire by the POTW to modify its control mechanism or its inspection and monitoring program, detection of new pollutants in the POTW's influent, and a finding of deficient legal authority. The current regulations, however, contain no specific provisions on when or how POTW pretreatment programs should be modified to reflect such changes.

b. *Proposed change.* EPA is proposing today to add a new § 403.18 establishing procedures and criteria for modification of approved programs. This section largely tracks the program approval process. Under the proposal, either a POTW or the Approval Authority could initiate the program modification process to reflect changing conditions at the POTW. This would ensure that these changing conditions are fully considered by the Approval Authority just as existing conditions are fully considered prior to initial program approval. Moreover, the modification will ensure that the program remains enforceable and that changes do not undermine the effectiveness of the approved program.

To modify its pretreatment program, a POTW would be required to submit to the Approval Authority: (1) A statement explaining why the program modification is being sought, (2) a modified program submission indicating those aspects of the program submitted by the POTW pursuant to § 403.9(b) at the time the POTW initially requested POTW pretreatment program approval that would be affected by the requested program modification (including the legal authorities, program description, or resource commitments), and (3) any other relevant documents the Approval Authority determines to be necessary under the circumstances, including, for example, any supporting technical documents. Where the Approval Authority initiates the modification, it may request the POTW to submit any necessary information, including the items listed above.

Under proposed § 403.18, all program modifications must be approved by the Approval Authority. After the POTW submits a modification request, the Approval Authority reviews the submission to determine whether the program modification is consistent with the local program requirements of § 403.8(f). If the Approval Authority determines that the program modification is substantial, the review

and approval must be in accordance with the procedures in § 403.11(b)-(f), including adequate public notice. It would be administratively impossible to use these full procedures for all program modifications. Therefore, today's proposal provides that for all modifications other than those determined by the Approval Authority to be substantial, the Approval Authority is not required to follow these procedures, but may act on the request without notice.

Substantial modifications are those affecting the fundamental operation of the program. Today's proposal lists four examples of substantial modifications: (1) Changes to the POTW's enforcement authorities (e.g., remedies available for violations of pretreatment standards and requirements by industrial users); (2) changes to local limits contained in municipal ordinances; (3) changes to the POTW's control mechanism, as described in § 403.8(f)(1)(iii); and (4) changes to the POTW's method for implementing categorical pretreatment standards (e.g., incorporation by reference, separate promulgation, etc.). The Approval Authority would determine whether other modifications are substantial on a case-by-case basis. Criteria include: (1) Whether the change would have a significant impact on the operation of the program, (2) whether the change would result in an increase in pollutant loadings at the POTW, and (3) whether the change would impose less stringent requirements on industrial users of the POTW. Where the change meets one or more of these criteria, the modification would be considered substantial. EPA solicits comments on these criteria and on what other substantial modifications, if any, should be identified in § 403.18, as well as any other comments on the proposed approach.

The procedures for review by Approval Authorities of substantial modifications under today's proposal (§ 403.11(b)-(f)) are identical to the procedures for approving local programs and provide for public notice and comment on the proposed modification (and an opportunity for a hearing). Significant changes to an approved program, like program approvals, are likely to be of interest to the public and regulated community and should only be acted on after the public has been notified and had an opportunity to comment on the changes. Moreover, public notice and comment enhances the enforceability of any modified or new provisions that are subsequently approved. The program modification procedures proposed today are

consistent with EPA regulations governing State NPDES program revisions (40 CFR 123.62). The public notice requirement for substantial modifications is also consistent with the encouragement of public participation, which is a fundamental policy of the Clean Water Act (section 101(e)).

Today's proposal provides that modifications to POTW pretreatment programs become effective upon approval by the Approval Authority. Notice of approval of substantial modifications must be published in the largest daily newspaper within the jurisdiction(s) served by the POTW. Notice of approval of non-substantial program modifications may also be given by such publication, or by a letter from the Approval Authority to the POTW, a copy of which the POTW shall send to its industrial users. This procedure is identical to the equivalent process in the NPDES regulations for State program revisions. As with State program reviews, POTWs must continue to operate their approved program until a modification is approved by the State or EPA.

Under today's proposal, program modifications must be incorporated into the POTW's NPDES permit, since the permit contains conditions based upon the original program. For substantial modifications, the permit must be modified as soon as possible after approval of the modification. Since these modifications will already have been subject to the public notice requirements of § 403.11, a second round of public notice and comment should not be required when the POTW's permit is modified to incorporate the program changes. Therefore, EPA is proposing to amend 40 CFR 122.63(g) of the NPDES regulations (paragraph (g) was added in a final rule recently published by the Agency in the *Federal Register*) to allow the incorporation of substantial POTW pretreatment program modifications into a POTW's NPDES permit to be carried out as a minor permit modification. Alternatively, the Approval Authority may conduct concurrent program and permit modification, thus combining the public notice and comment processes. (Many Approval Authorities have adopted this approach for local program approvals.) For non-substantial program modifications, today's proposal provides that these are to be incorporated into the POTW's permit when it is next reissued or modified for any other reason.

The procedures proposed by EPA today would require all POTW pretreatment program modifications to be approved prior to adoption and

implementation by the POTW. However, the Agency recognizes that some modifications (e.g., minor changes to the POTW's data management system) are so minor that the effort required to review and approve them may outweigh their significance with respect to the operation of the POTW's program as a whole. In light of this, EPA is considering alternatives to the approach being proposed today that would allow the POTW to make certain changes in the operation of its pretreatment program without receiving prior approval from the Approval Authority. First, the Agency could specify in § 403.18 all modifications for which the POTW would not be required to obtain prior approval. This approach would require an exhaustive listing of non-substantial modifications. Another approach would be to specify substantial modifications (as in the proposal) and provide additional criteria (such as those outlined above) for determining when a modification is substantial, and require prior approval only for changes specified as substantial or meeting these criteria. This approach would leave to the POTW the determination of whether a given change (other than one specified as substantial) meets the criteria for being a substantial modification. EPA solicits comments on these alternative approaches. In particular, the Agency requests detailed comments regarding which specific modifications should be identified as not requiring prior approval under the first approach.

### C. POTW and State Pretreatment Program Approval

#### 1. POTW Pretreatment Program and Removal Credit Application Submission—Approval Authority Action (40 CFR 403.9(e))

a. *Existing Rule.* A POTW seeking pretreatment program approval must submit to the Approval Authority certain information described in § 403.9(b), including a statement certifying that the POTW has adequate authority to carry out the program, copies of all relevant legal authorities, a description of the POTW's organization for administering the program, and a discussion of resources available for program implementation. POTWs applying for removal credit authority must submit an application containing the information required in § 403.79(e) including a list of pollutants for which removal credits are proposed, data on the POTW's consistent removal of these pollutants, proposed revised limits, a certification that the POTW has an approved pretreatment program, a

description of the POTW's sludge use and disposal methods, and a certification that granting removal credits will not cause a violation of the POTW's NPDES permit. The procedures for Approval Authority review and action of these requests are the same. After receiving the applicable submission(s), the Approval Authority is required to make a preliminary determination of whether the submission contains all the items required under § 403.9(b) or, if appropriate, § 403.7(e). If the submission is determined to be complete, the Approval Authority must notify the POTW and initiate the public notice and review procedures set forth in § 403.11. Following public comment, the Approval Authority completes its review of the program submission and issues its final determination. The regulations require the Approval Authority to issue its final decision within 90 days, unless the comment period is extended beyond 30 days, in which case the Approval Authority shall have an additional 90 days to complete its review. However, the existing regulations do not specify how much time the Approval Authority has in which to make its initial completeness determination.

b. *Proposed changes.* PIRT's final report stated that the lack of a deadline for the Approval Authority's completeness determination for POTW Pretreatment Program and removal credit submissions has led to unnecessary delays. To address this perceived problem, PIRT recommended that the Approval Authority should have 60 days from the date of a POTW pretreatment program or removal credit application to determine whether this submission meets the applicable requirements of paragraphs (b) and (d) of § 403.9. Therefore, EPA is proposing to amend § 403.9(e) to add such a 60-day time limit. The proposed time limit, in conjunction with current time periods for final Approval Authority action, should help ensure that local program and removal credit requests are acted on within a maximum of 240 days, assuming the request is complete.

#### 2. Approval of State Pretreatment Programs—State Regulations (40 CFR 403.10(g)(1)(iii))

a. *Existing rule.* The CWA amendments of 1977 required that all State NPDES programs include pretreatment programs. For new State programs, a pretreatment program must be included as part of the NPDES submission. Approved NPDES States were required to request modification to include pretreatment by March 27, 1980 (§ 403.10(a)).

In general, States seeking approval of pretreatment programs must have detailed regulations in place before program approval. However, under § 403.10(g)(1)(iii) EPA may authorize an NPDES State to operate a pretreatment program without implementing regulations in effect if the State has sufficiently detailed statutory authority and has submitted a detailed description of the procedures by which it proposes to implement the program. There is no comparable provision in the NPDES regulations, which require all implementing regulations to be in effect prior to NPDES program approval. See 40 CFR 123.21(a).

EPA adopted § 403.10(g)(1)(iii) in 1980 for several reasons. First, several States suggested that having pretreatment regulations in effect was not essential to ensure implementation of the pretreatment program in NPDES States that had already demonstrated their ability to carry out a complex NPDES permit program on a statewide level. Second, the delay resulting in some cases from the promulgation of regulations was seen as an impediment to substantial environmental benefits that would follow from early approval of State pretreatment programs. Third, some of the authorities necessary for successful implementation of the pretreatment program are part of the NPDES program as well and are encompassed by the State's existing NPDES regulations. For those matters unique to the pretreatment program, EPA believed that a comprehensive statement describing how the State intended to carry out this portion of the program and indicating the State's readiness to promulgate regulations in the future, in concert with detailed statutory authority, would provide sufficient public notice and assurance of the State's authority and intention to carry out the program.

This revision was intended to facilitate State program approval where the State had adequate authorities. Even where States were approved without regulations, it was expected that the State would promulgate pretreatment regulations at a later date. Moreover, EPA recognized that all States would need to revise their NPDES regulations to conform to the May 19, 1980 Final Consolidated Permits Regulations. The addition of § 403.10(g)(1)(iii) allowed States to coordinate those rule changes with promulgation of pretreatment regulations.

b. *Proposed change.* EPA is proposing to delete § 403.10(g)(1)(iii), thus requiring all States to have adequate regulations at the time of program approval. Under

existing regulations, the option of not developing regulations prior to program approval is available only if the State program description fully describes the procedures it intends to use and how it intends to implement each of the required legal authorities in the absence of regulations. This also necessitates a detailed discussion of how each of these required legal authorities can be directly applied and enforced. In addition, the Attorney General's Statement must fully explain the State's legal authority, with special emphasis on the direct applicability and enforceability of the State statute without implementing regulations. Obviously, a State can only meet this burden if the statute is so detailed as to be "self-implementing."

EPA's experience has shown that it is highly unlikely that a State will have sufficiently detailed statutory authority to operate a pretreatment program without implementing regulations. In those States whose programs were approved without regulations in effect, problems have arisen, particularly with regard to enforcement of categorical pretreatment standards against industrial users. One State that has since developed regulations informed EPA that it found it could not enforce its pretreatment program, notwithstanding the commitments in its program description. In its Final Report to the Administrator, PIRT noted these problems and recommended that § 403.10(g)(1)(iii) be deleted. EPA agrees with the Task Force's recommendation. In order to eliminate this problem, the Agency is proposing today to delete the provision. This will make the pretreatment regulations consistent with the NPDES regulations and mean that in the future, States requesting approval of their State pretreatment programs will have to have all necessary implementing regulations in place before their programs can be approved. In addition, those approved States lacking pretreatment regulations will have to promulgate regulations where the absence makes their program deficient under the revised § 403.10.

### 3. Approval Procedures for POTW Pretreatment Programs and Authority to Grant Removal Credits (40 CFR 403.11(b))

*a. Existing Rule.* Section 403.11 sets out the procedures for approving POTW pretreatment programs and applications for removal credit authority. Upon receipt of a local program submission or removal credit application, the Approval Authority must first determine whether the submission is complete. The elements of a complete submission are set out in § 403.9(b) for POTW program

approvals and §§ 403.7(e) and 403.9(d) for removal credits. After determining that a submission is complete, the Approval Authority must provide notice and an opportunity to request a public hearing. Section 403.11(b) requires issuance of the public notice within 5 days after the completeness determination.

*b. Proposed change.* PIRT has recommended changing the 5-day time limit for issuing public notice following a completeness determination to 20 work days. PIRT concluded that 5 days was too short because Approval Authority procedures are often not sufficiently expeditious to meet that limit. EPA agrees with PIRT's recommendation. A longer time period in which to issue public notice and an opportunity to request a hearing appears to be both necessary and appropriate. The 20-day limit recommended by PIRT and proposed by EPA today is more realistic while still conforming to the basic intent of providing prompt public notice of submissions that are under Agency review. Moreover, since elsewhere in this *Federal Register* notice, EPA is proposing a time limit for the Approval Authority to determine whether the submission is complete (see discussion of proposed amendment to § 403.9(e) above), Approval Authorities must act expeditiously at all stages of the review process.

### D. Reporting and Compliance Monitoring

#### 1. Baseline Monitoring Report—Deadline for New Sources (40 CFR 403.12(b))

*a. Existing rule.* To establish an effective local pretreatment program, it is essential that the POTW have complete information on the nature and quantity of pollutants contributed by each of its industrial users. Section 403.12(b) requires that all industrial users, including new sources, that are subject to categorical pretreatment standards submit baseline monitoring reports ("BMRs") to the Control Authority. These reports supply basic information to identify each contributing industrial user, the characteristics of the user's discharge and the user's compliance status. Information required to be reported in BMRs includes: a list of environmental control permits held by the industrial user, a description of the user's operations, information on flow and amounts of regulated pollutants discharged to the POTW, and a certification of whether the user is currently in compliance with the applicable categorical standard(s). If the industrial user is not in compliance when the BMR is prepared, the report

must also include a compliance schedule showing the shortest time by which compliance will be achieved. The baseline monitoring report does not apply to industrial users not covered by categorical standards. (Elsewhere in this *Federal Register* notice, EPA is proposing to clarify that POTWs must require appropriate reports where the POTW determines that information on these "noncategorical" discharges is necessary. [See discussion of proposed § 403.12(h) below.]

Section 403.12(b) requires industrial users to submit BMRs to the Control Authority within 180 days after the effective date of the applicable categorical standard, or within 180 days after a final decision on a category determination request, whichever is later. However, there is no deadline specified for new sources. Nor does § 403.12(b) contain a deadline for submission of BMRs by directly discharging existing sources that become indirect dischargers subsequent to the promulgation of an applicable categorical pretreatment standard.

*b. Proposed change.* Today's proposal would revise § 403.12(b) to require new sources, and existing sources that become industrial users subsequent to the promulgation of an applicable categorical standard, to submit a baseline monitoring report at least 90 days prior to commencement of the facility's discharge to a POTW. EPA is also proposing to clarify that for new sources, the industrial user shall provide estimates for the information on production, flow, and the presence and quantity of regulated pollutants in its wastestream requested in § 403.12(b)(3)-(5).

EPA solicits comments on whether the 90-day pre-discharge BMR deadline is adequate. It should be borne in mind that BMRs are not intended to be the first contact between a new industrial user and the POTW. EPA encourages the earliest possible communication between POTWs and new source industrial users. Early contact can occur in several ways. Many new sources will be constructing new facilities, and will thus be required to obtain a construction permit from the municipality long before they begin to discharge. Even where there is no new construction (e.g., the new source is moving into an existing facility), the new source will need to apply for water and sewer service well in advance of any discharge. The POTW may also learn of potential new industrial users through its inspection of existing industrial users. When contact with a new industrial user is made, the POTW should obtain as much

information as possible regarding the nature of the user's expected discharge and should inform the user of applicable pretreatment standards and requirements, including, to the extent possible at that time, any local limits to which the user will be subject. (Of course, if the user is a member of a trade association (e.g., the National Association of Metal Finishers), it will generally be kept up-to-date on applicable categorical standards.) Therefore, the BMR functions not as a preliminary assessment of the expected pollutant loading from a new source, but rather as a final check prior to commencement of discharge. By the time the BMR is due, the industrial user should already be aware of most, if not all, of its pretreatment responsibilities and will have had an opportunity to start taking whatever actions are necessary to fulfill them.

EPA recognizes that BMRs submitted by new sources under the proposed deadline cannot be complete; for instance, new sources cannot certify whether they will be in compliance with applicable categorical standards since they have not yet commenced discharge. For this reason, the current regulations do not require new sources to include a compliance certification or compliance schedule in their BMRs. Similarly, new sources cannot monitor the flow or pollutant constituents and concentrations of their wastestreams, nor can they provide actual production data. However, an industrial user that is a new source can, and under today's proposal would be required to, provide estimated data on these items. This information will allow the Control Authority to assess the potential impact of the new source on the POTW, the receiving waters into which the POTW discharges and current and alternative sludge use or disposal options. The Control Authority can also use this information to make a preliminary determination of whether additional limits beyond those in the applicable categorical pretreatment standard (i.e., local limits) will be necessary to prevent pass-through and interference at the POTW. In some cases, the POTW may need to set more stringent local limits on other contributors to the system to avoid permit violations. Early submission of this information provides the POTW adequate time to determine whether such steps are needed. Without such estimates, the POTW would only learn too late that local limits were needed to avoid a permit violation. Obviously, it is preferable to avoid such violations.

Within 90 days after discharge has commenced, § 403.12(d) requires the

new source to submit actual flow and pollutant data in addition to a compliance certification and, if necessary, a statement of what additional steps are necessary to achieve compliance. The POTW can then reevaluate the impact of the industrial user's discharge using actual data on pollutant loadings and adjust its limits if needed. The approach being proposed today, i.e., requiring estimated data that is later followed up with actual data, is consistent with proposed amendments to the NPDES regulations, which would require directly discharging new sources to use estimated data in preparing their NPDES permit applications (see 49 FR 38815, October 1, 1984).

## 2. Measurement of Pollutants (40 CFR 403.12(b)(5)(iv))

a. *Existing Rule.* Section 403.12(b)(5)(iv) establishes the frequency with which an industrial user must sample and analyze its wastestream to compile data for its baseline monitoring report. Under the present scheme, an industrial user must take multiple samples of each regulated wastestream, with the frequencies determined by the flow of those streams being sampled. Where the flow of the stream being sampled is less than or equal to 250,000 gallons per day, the industrial user must take three samples within a one-week period. Where the flow of the stream being sampled is greater than 250,000 gallons per day, the industrial users must take six samples within a two-week period. Each of these samples must be analyzed separately and the data submitted on the baseline monitoring report. The purpose of this sampling is to provide information to determine whether the industrial user is in compliance with the applicable categorical pretreatment standard(s).

b. *Proposed change.* EPA is proposing to reduce the baseline sampling requirements for industrial users and set a uniform, minimum sampling requirement applicable to all industrial users. Today's proposal requires that at a minimum, for purposes of compiling data for the baseline report, only one sampling analysis of pollutants is required. This proposal would not alter the required sampling techniques (i.e., 24-hour composite sampling), as provided in § 403.12(b)(5)(iii).

A pretreatment baseline report is comparable to the industry NPDES permit application form for direct dischargers (i.e., form 2C). Both are means of collecting preliminary information about the particular facility and its discharge, and are used as a basis for determining whether additional

steps need to be taken to achieve compliance with applicable discharge limits. Only one sampling and analysis of the specific pollutants is required for the NPDES permit application. See 40 CFR 122.21(g)(7). The proposed change to the baseline monitoring report sampling requirement will, therefore, bring it in line with that required by its counterpart in the NPDES program.

Today's proposed amendment would significantly reduce the paperwork burden associated with baseline monitoring reports without significantly impairing EPA's ability to identify and control pollutants. A single sampling analysis is generally adequate to provide Control Authorities with a preliminary picture of an industrial user's processes and wastestream characteristics. However, in more variable industries, more sampling may be necessary to ensure that the Control Authority obtains representative data. The single sampling proposed today is intended to be a minimum. If the Control Authority determines that additional data and sampling are needed to evaluate the impact of the user's discharge or to set local limits, it can, and should, require such analysis. To determine compliance with categorical standards, the Control Authority will use an industrial user's self-monitoring program and compliance reports, in addition to any sampling program conducted by the Control Authority. The reduced sampling for the baseline report will not affect other sampling and analysis requirements.

## 3. Sampling Techniques (40 CFR 403.12(b)(5)(iii))

a. *Existing rule.* Section 403.12(b)(5)(iii) provides that, where feasible, the samples required in preparing an industrial user's baseline monitoring report must be obtained using "the flow-proportional composite sampling techniques specified in the applicable categorical Pretreatment Standard." Where composite sampling is not feasible, industrial users may take a single grab sample instead of each required composite sample.

b. *Proposed change.* In its Final Report to the Administrator, PIRT pointed out that the categorical pretreatment standards do not specify required sampling techniques. Accordingly, EPA is proposing to revise § 403.12(b)(5)(iii) to correct this error. The proposal would require that, except for five named pollutants, the industrial user must obtain 24-hour composite samples through flow proportioned techniques where feasible.

For five pollutants—pH, cyanide, total phenols, oil and grease, and sulfide—today's proposal would require the use of grab samples. These pollutants are subject to rapid degradation and therefore cannot be accurately sampled through 24-hour composite methods. This proposal would make the sampling requirements of the General Pretreatment Regulations consistent with the NPDES regulations. Those rules require the use of 24-hour composite samples in permit applications, except for seven pollutants for which grab sampling must be used (pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform). 40 CFR 122.21(g)(7). Unlike the NPDES rules, temperature, residual chlorine and fecal coliform are not included on the list of pollutants for which grab samples are required because they are not regulated under categorical pretreatment standards and thus need not be reported on the BMR. EPA is proposing to add sulfide, which is not included in the NPDES provision, since it is regulated under categorical standards and tends to rapidly oxidize and/or gasify.

PIRT also recommended that time-proportional sampling be allowed where flow-proportional automatic sampling is not feasible. In support of its recommendation, the Task Force stated that time-proportioned samples, while not as accurate as flow-proportioned samples, are more representative of an industrial user's daily discharge than the single grab sample currently allowed in the regulation.

In response to PIRT's recommendation, EPA is proposing to change the type of sampling that will be allowed by industrial users where flow-proportional composite sampling is not feasible to allow time-proportioned or grab sampling. Under today's proposal, the industrial user must demonstrate to the Control Authority that the use of an automatic sampler is infeasible and that time-proportional sampling or grab sampling will provide a representative sample of the effluent being discharged. The proposal also would require the Control Authority to make the determination of whether flow-proportional sampling is feasible. Where the Control Authority determines that flow-proportional sampling is infeasible, it would waive the requirements and allow grab or time-proportional sampling.

Consistent with recent revisions to the NPDES regulations (49 FR 38046, September 26, 1984) EPA is also proposing to amend § 403.12(b)(5)(iii) to provide that where grab sampling is

used, a minimum of four grab samples must be taken.

#### 4. Annual POTW Reports (40 CFR 403.12(i))

a. *Existing rule.* As a means to oversee the implementation of POTW pretreatment programs, EPA and many approved States usually include in the POTW's NPDES permit a condition requiring that the POTW periodically submit a report describing its program implementation activities during the period covered by the report. These permit conditions, which are inserted at the time the conditions of the approved program are added, generally require the submission of an annual report. These reports are typically required to include an update of the POTW's industrial user population, information on the compliance status of the industrial users, information on the POTW's compliance monitoring and enforcement activities, and information on modifications to the POTW's approved pretreatment program. The majority of POTWs with approved programs have conditions requiring such reports in their NPDES permits. Although these permit conditions are authorized by law (see sections 402(b)(8) and 308 of the CWA) the General Pretreatment Regulations do not contain a specific provision describing the contents of the reports POTWs should submit on the status of their pretreatment program implementation.

b. *Proposed change.* PIRT has recommended that EPA set forth in the general pretreatment regulations the requirement of an annual POTW report for all POTWs with pretreatment programs. This report would be submitted to the Approval Authority and would describe program implementation activities conducted by the POTW during the preceding year. The Task Force stated that such a report is essential to the adequate oversight, by EPA or approved States, of POTW pretreatment programs. By describing the annual report in the regulations, EPA could ensure some degree of uniformity among reports and thus obtain a clearer picture of the status of program implementation on a national scale.

In response to PIRT's recommendation, EPA is proposing to add a new paragraph (i) to § 403.12 requiring each POTW with an approved pretreatment program to submit a report to the Approval Authority at least annually describing program implementation activities. (The submission date will be set in the POTW's NPDES permit.) The report must contain, among other things, an updated list of the POTW's industrial

users (or a list of additions and deletions keyed to a previous list) showing the categorical pretreatment standards and/or local limits applicable to each, a summary of the compliance status of each industrial user over the period covered by the report, a summary of compliance monitoring and enforcement activities (including inspections) conducted by the POTW during the reporting period, and any other information requested by the Approval Authority, as appropriate for adequate oversight of the POTW's pretreatment program. This information will provide the Approval Authority with the means to effectively perform its oversight responsibilities with respect to the POTW pretreatment programs within its jurisdiction. By adding the provision to the regulations, all such reports will be required to contain at least the same minimum information, thus providing some consistency. Of course, the Approval Authority may impose such other requirements as may be necessary or appropriate. By expressly providing for adequate oversight in this way, the obligations of EPA, the State, and POTWs with respect to the implementation of the national pretreatment program can be met more effectively.

EPA is currently preparing a guidance document entitled "Pretreatment Compliance Monitoring and Enforcement Guidance," which will contain additional information on these reports. This document will be available in the near future.

#### 5. Signatory requirements for industrial user reports (40 CFR 403.12(k))

a. *Existing rule.* The signatory requirements for industrial user reports in the general pretreatment regulations were patterned after a similar provision in the NPDES regulations. Section 403.12(i)(1) currently states that reports submitted on behalf of a corporation must be signed by a "principal executive officer of at least the level of vice president" or an authorized representative of that person who is responsible for the overall operation of the facility from which the discharge originates. The signatory requirement is intended to ensure that the corporation is legally accountable for the information submitted. The signature on reports or authorization by a principal executive officer provides this accountability.

b. *Proposed change.* In the past two years, EPA has revised the NPDES signatory requirements governing permit application (48 FR 39611, September 1, 1983) and reports from permittees (49 FR

37998, September 26, 1984). These changes were made to reduce the burden of investigating and signing applications and reports for officers of large corporations while continuing to maintain a sufficiently high level of corporate responsibility. This rationale applies equally to industrial user reports in the pretreatment program. Therefore, EPA is proposing to amend the pretreatment signatory provision (§ 403.12(i)) to make it consistent with its NPDES counterpart. (EPA is also proposing to redesignate this paragraph as § 403.12(k) to account for the insertion of new paragraphs (h) and (i) in § 403.12, also being proposed today.)

Today's proposal would change the existing regulations to allow reports to be signed by "a responsible corporate officer," or an authorized representative of that individual. "Responsible corporate officer" includes the president, secretary, treasurer, or a vice-president of the corporation in charge of a principal business function. It also incorporates into the regulation EPA's interpretation of "executive officer of the level of vice president" adopted in a previously published policy statement regarding the NPDES permit process (45 FR 52149, August 6, 1980). That statement clarified that an officer performing "policymaking functions" similar to those performed by a corporate vice-president could sign NPDES permit applications submitted by direct dischargers. In addition, the manager of one or more manufacturing, production, or operating facilities of a corporation can now qualify as a "responsible corporate officer" if the facility (or facilities) employs more than 250 persons or has gross national sales or expenditures exceeding \$25 million, as long as the manager has been authorized to sign reports in accordance with proper corporate procedures. Formal assignments or delegations of authority are not necessary for corporate officers identified in the proposed provision; it is presumed that these responsible corporate officers have the requisite authority unless the Control Authority has been notified otherwise.

Consistent with the NPDES regulations, the proposal would also allow a "duly authorized representative" of a "responsible corporate officer", to sign reports required under the pretreatment program. This reduces the burden on the regulated community while at the same time providing an equal degree of legal accountability on the part of the "responsible corporate officer." By authorizing a representative to sign

reports, the responsible official does not lose legal accountability for the accuracy of the information that is submitted. A "duly authorized representative" may be an individual or position responsible for the overall operation of an industrial user's facility (e.g., a plant manager). It may also be the individual in charge of all environmental matters for the industrial user. The person will, in many cases, have the best knowledge of the company's facility. Since he or she must have overall environmental responsibility within the company, and since their authorization to sign the report must come from a responsible corporate officer, the proposal will also ensure corporate responsibility.

This provision also is proposed to be revised by including the requirement that all reports submitted pursuant to that subsection shall include the oath set forth in § 403.6(a)(2)(ii). This is consistent with the NPDES regulations, which require a similar certification from signatories to NPDES permit applications and reports (see 40 CFR 122.22(d)).

#### 6. Reporting Requirements—Extension to Non-categorical Discharges (40 CFR 403.12(h))

a. *Existing rule.* Section 403.12 describes the reports industrial users subject to categorical pretreatment standards must submit. These reports, individually discussed in more detail elsewhere in this preamble, include baseline monitoring reports (BMRs) required under § 403.12(b), 90-day compliance reports required under § 403.12(d), and periodic compliance reports required under § 403.12(e). The purpose of these reports is to provide the Control Authority with information, together with additional data obtained through the Control Authority's own monitoring program, on the quantity and nature of discharges to the POTW and on the industrial user's compliance with applicable pretreatment standards and requirements.

b. *Proposed change.* The industrial categories for which categorical pretreatment standards have been and are being developed by EPA include those from which significant toxic pollutant discharges occur across the industry nationally. However, individual industrial users that are not covered by categorical standards ("non-categorical" industrial users) have the potential to discharge significant amounts of toxic pollutants to POTWs, resulting in water quality, sludge disposal or other problems. In addition, non-categorical industrial users may discharge other pollutants in quantities sufficient to

cause serious interference or pass through problems at the POTW. Although the regulations generally require that such discharges be regulated by the POTW, they do not specifically require non-categorical industrial users to submit reports to the Control Authority regarding their compliance with applicable pretreatment requirements.

The lack of any specific reporting requirements for non-categorical industrial users in the regulations has caused some confusion as to whether Control Authorities are expected to require reporting from these industrial users. Most POTWs currently require some reporting from their non-categorical industrial users as a means to have an effective compliance program; some POTWs even require reports from all of their industrial users.

Although specific reporting requirements are listed only for categorical industrial users, it has never been EPA's intent to exempt non-categorical industrial users from all reporting requirements. One of the regulatory requirements for an approvable POTW pretreatment program is legal authority to require, from all industrial users, such reports as are necessary to assess and assure compliance with applicable pretreatment standards and requirements. See § 403.8(f)(1)(iv). This requirement is explicitly not limited to the specific reports required of categorical industrial users. Adequate information on the quantity and nature of pollutant discharges to the sewer system by all industrial users is essential if the POTW is to effectively regulate its users and prevent violation of pretreatment standards.

Because of the confusion on the reporting required by non-categorical users, EPA is proposing to add a new paragraph (h) to § 403.12 (and redesignating the existing paragraph (h) accordingly) clarifying that the Control Authority must impose appropriate reporting requirements on industrial user discharges that are not regulated by categorical standards. POTWs should use this authority to require sampling for pollutants not regulated by categorical standards where those pollutants may cause passthrough or interference. Of course, the appropriate monitoring and reporting to be required of non-categorical industrial user discharges will vary depending on the circumstances. Factors to be considered include the size of the industrial user, the percentage of the POTW's total flow attributable to the industrial user, the nature of the industrial user's discharge

(e.g., whether the industrial user is discharging pollutants of concern to the POTW), and the industrial user's compliance history. These and other relevant factors should be considered by the Control Authority in establishing appropriate reporting requirements for its non-categorical industrial users. Under the proposal, if the Control Authority determines that reporting by these users is appropriate, the Control Authority would be required to impose some monitoring and reporting requirements.

Industrial users covered by categorical pretreatment standards may also discharge significant amounts of pollutants that are not addressed in those standards. These discharges may be of pollutants in the regulated wastestream that are not limited in the categorical standard, or they may be from other wastestreams to which the standard does not apply. Today's proposal also applies to these discharges from categorical industrial users. Under the proposed provision, the Control Authority must require appropriate reporting concerning all pollutant discharges to the POTW that are not specifically regulated in a categorical standard (and thus are not subject to the other reporting requirements of § 403.12), including those from industrial users that are otherwise subject to categorical standards.

#### 7. Notification of Slug Loadings (40 CFR 403.12(f))

*a. Existing rule.* Section 403.12(f) requires industrial users to immediately notify the POTW to which they are discharging of any slug loading. A slug loading is defined in § 403.5(b)(4) as the discharge of any pollutant at a flow rate and/or pollutant concentration that will cause "interference" (as defined in § 403.3(i)) with the POTW. Section 403.5(b)(4) specifically prohibits slug loadings. The notification requirement is intended to ensure that POTWs are promptly alerted to any loadings to their systems that would cause problems at the treatment plant. The language of § 403.12(f) and its location in a section that deals primarily with reporting requirements for industrial users subject to categorical pretreatment standards has raised questions about whether the slug load notification requirement applies only to categorical industrial users. Despite its location, EPA intended that this requirement apply to any such discharge by industrial users.

*b. Proposed change.* Therefore, EPA is proposing to change the language of § 403.12(f) to clarify that this slug load notification requirement applies to non-

categorical, as well as categorical, industrial users.

The Agency is also proposing to expand § 403.12(f) to reference § 403.5(b)(1)-(5) instead of only § 403.5(b)(4). The reason for this change is that there are some slug loadings (e.g., sulfides) that may not cause interference at the POTW (and thus are not prohibited by § 403.5(b)(4)), but are corrosive and hazardous to workers' safety. Referencing § 403.5(b)(1), (2), (3), and (5) in addition to § 403.5(b)(4) in § 403.12(f) will ensure that the POTW will be promptly notified of all dischargers that might cause problems, including interference, at the POTW.

#### 8. 90-day Compliance Report (40 CFR 403.12(d))

*a. Existing rule.* Within 90 days after the compliance date of a categorical pretreatment standard, each existing industrial user subject to the categorical standard must submit to the Control Authority a report indicating whether the user is in compliance with the standard (§ 403.12(d)). New sources must submit this report within 90 days following commencement of discharge into the POTW. The report required by § 403.12(d) must contain information on the nature and concentration of regulated process pollutants in the industrial user's discharge, the average and maximum daily flow of these regulated process wastestreams and a signed statement indicating whether the user is in compliance with the applicable standard(s). If the user is not in compliance, the report must indicate the additional steps that are necessary to achieve compliance. The purpose of this report is to provide information that will allow the Control Authority to determine whether those industrial users subject to categorical pretreatment standards have met the applicable deadlines for compliance with these standards.

*(b). Proposed change.* The information required in 90-day compliance reports is basically the same as that required for baseline monitoring reports (BMRs) (§ 403.12(b)), although the latter report must contain certain additional information. Under both reporting requirements, the industrial user must indicate the nature and concentration of regulated pollutants in the user's discharge, the flow of the user's regulated process wastestreams, whether the user is in compliance with applicable categorical pretreatment standards, and, if not, what steps are necessary to bring the user into compliance. (BMRs must also contain information identifying the industrial users, a list of any environmental

permits held by the user, and a brief description of the user's operations.) Although this same basic information is required in both reports, the regulatory requirements for BMRs (§ 403.12(b)(4)(6)) are much more detailed than those for the 90-day compliance reports in § 403.12(d). To better specify the information to be submitted in 90-day compliance reports, therefore, the Agency is proposing to revise § 403.12(d) to specify the information required in these reports in the same detail as the equivalent BMR provision. The proposed revision does not change the existing requirements, but is merely intended to clarify the contents of the 90-day compliance report.

Elsewhere in this **Federal Register** notice, EPA is proposing to revise the BMR sampling requirements in § 403.12(b)(5) to require a minimum of one sampling analysis (see discussion of proposed amendment to § 403.12(b)(5)(iv) above). This same minimum would apply to 90-day compliance reports. As with BMRs, the Control Authority may require additional sampling and analysis where necessary to obtain representative data sufficient to determine compliance.

EPA is also proposing another amendment to § 403.12(d) today. For those industrial users subject to categorical pretreatment standards expressed only in terms of mass per unit of production, it is imperative that the Control Authority have current production data in order to determine whether compliance with the standard has been attained. Although all industrial users are required to include production data as part of the baseline monitoring report (see § 403.12(b)(3)), this data may be outdated by the time the compliance report required under § 403.12(d) is submitted (usually several years later). Therefore, the Agency is proposing to amend § 403.12(d) to require that these reports also contain the industrial user's current actual average production rate. This will ensure that the Control Authority has up-to-date production data for determining whether the deadlines for compliance with applicable production-based standards have been met.

#### 9. Industrial User Compliance Reports—Monitoring Requirements (40 CFR 403.12(g))

*a. Existing rule.* Under the current General Pretreatment Regulations, industrial users subject to categorical pretreatment standards must submit compliance reports in June and December (or more frequently as

required by the Control Authority). See § 403.12(e). These reports must contain information on the nature and amount of pollutants that are subject to the categorical standard(s) in the industrial user's effluent. The industrial user must also include measured or estimated average and maximum daily flows for the reporting period, or more detailed flow information as required by the Control Authority. Section 403.12(g) provides that these compliance reports must contain the results of sampling and analysis of the industrial user's discharge, but does not specify the amount of sampling and analysis that must be performed for each report. Nor do the categorical standards contain such monitoring frequency requirements. (EPA has recently published a technical amendment deleting from § 403.12(g) the sentence stating that monitoring frequency requirements for industrial users are found in the appropriate categorical standard.)

b. *Proposed change.* Although the pretreatment regulations do not specify the amount of monitoring required for these reports, POTWs may, of course, specify monitoring frequencies in their own sewer use ordinances and individual industrial user permits. Many POTWs have in fact done this. However, the lack of any monitoring frequency requirements, either in the General Pretreatment Regulations or the categorical pretreatment standards, has resulted in some confusion as to the amount of monitoring required for periodic compliance reports under § 403.12(e).

Therefore, to establish an adequate level of monitoring for the periodic compliance report, the Agency is proposing today to raise § 403.12(g) to clarify that the reports required under § 403.12(e) must be based on an appropriate amount of sampling and analysis performed during the period covered by the report. Implicit in § 403.12(e) is that each biannual report contain at least some data for the period covered by the report.

The appropriate monitoring frequency for indirect dischargers will vary from facility-to-facility, and must be determined by the Control Authority on a case-by-case basis. In making this determination for a particular industrial user, the Control Authority should consider the monitoring frequency considered by EPA in developing, and determining the costs associated with, the applicable categorical standard. This information can be found in the preamble and/or development document accompanying each categorical standard. The Control

Authority should also consider such factors as the size of the industrial user's flow and the user's compliance history. Control Authorities may also choose to consider the monitoring frequency that would be imposed on a similar direct discharger in its NPDES permit. Ultimately, the choice is the Control Authority's. EPA would like to clarify that this is not a substantive change to existing requirements. By its lack of specificity, the Agency intended to require that each report be based on an appropriate amount of sampling for the particular industrial user. However, today's proposal should eliminate any confusion.

EPA is proposing two additional changes to § 403.12(g) today. The first is a provision requiring that all monitoring performed by the industrial user be reported in the compliance reports under § 403.12(e). Industrial users, like other dischargers, may monitor more frequently than required by the regulations or the Control Authority. The proposed revision would prevent an industrial user that performs extra sampling from selecting the most favorable monitoring results to report to the Control Authority. Otherwise, dischargers whose sample indicates a violation could perform additional monitoring once compliance is attained and report only the latter results. Clearly, the intent of self-monitoring is that all monitoring be reported. This provision is consistent with § 122.44(i) of the NPDES regulations, which requires that permittees report all monitoring results.

The Agency is also proposing to add a provision stating that if sampling and analysis performed by the industrial user indicates a violation, the user must repeat the sampling and analysis and submit the results of both analyses to the Control Authority within 21 days. This provision would allow the Control Authority to detect patterns of continuing noncompliance by its industrial users, and thus assist in distinguishing isolated violations from chronic noncompliance. EPA invites comments on the scope of this requirement, i.e., whether it should apply to all industrial users or to a limited group of industrial users, such as those subject to categorical pretreatment standards.

#### 10. Self Monitoring vs. POTW Monitoring (40 CFR 403.12(g))

a. *Existing rule.* Industrial users are required to perform certain sampling and analyses for purposes of preparing the various reports described in § 403.12 (the baseline monitoring report, 90-day compliance report, and period

compliance reports). See § 403.12(g). The Control Authority is also required to conduct its own independent compliance monitoring program. See § 403.8(f)(2)(v). In addition, States and EPA periodically sample industrial users. These industrial user reports based on the results of self-monitoring are the primary means by which Control and Approval Authorities determine compliance with pretreatment standards. However, compliance sampling by Control and Approval Authorities is used primarily as a periodic check on the industrial user's monitoring and to generate additional data for enforcement.

b. *Proposed change.* PIRT has recommended that § 403.12 be amended to expressly allow POTW monitoring in lieu of self-monitoring by industrial users. According to the Task Force, some POTWs have indicated they would prefer to base their compliance program on sampling and analysis they perform themselves rather than on self-monitoring by industrial users because the reports submitted by some industrial users are not reliable. PIRT also noted that some industrial users would prefer that the POTW conduct the monitoring procedures. The General Pretreatment Regulations are not clear as to whether this is allowed.

In response to PIRT's recommendation, EPA is proposing to amend § 403.12(g) to allow the Control Authority to perform the sampling and analyses required for baseline monitoring reports, 90-day compliance reports and periodic compliance reports in lieu of the industrial user. POTWs choosing to perform their own sampling and analyses for purposes of the reports in § 403.12 must perform at least the same amount of sampling and analysis as is required of industrial users. (Elsewhere in this *Federal Register* notice, EPA is clarifying that the reports required under § 403.12(e) must be based on an appropriate amount of sampling and analysis performed during the period covered by the report [see discussion of other proposed amendments to § 403.12(g) above].)

Where the Control Authority chooses to perform the required sampling and analysis itself, the industrial user would still have to submit any other information required by the applicable paragraph of § 403.12. For example, where the Control Authority is performing the sampling and analyses otherwise required of the industrial user for a BMR, the user would still be required to submit the identifying information, list of environmental permits, production information and

description of operations described in § 403.12(b)(1)-(3). The user would also remain responsible for providing the Control Authority with the compliance certification described in § 403.12(b)(6) and, if necessary, the compliance schedule described in § 403.12(b)(7).

If the Control Authority chooses to monitor in lieu of the industrial users, it is not bound by the July and December reporting frequency for periodic reports in § 403.12(e). Under § 403.12(e), the Control Authority has the discretion to alter the months during which these reports are to be submitted, and thus the months during which it must perform the required sampling and analysis.

EPA solicits comments on this proposal and invites additional suggestions as to how PIRT's recommendation can best be implemented.

#### 11. Notification by Industrial Users of Changed Discharge (40 CFR 403.12(j))

*a. Existing rules.* Under 40 CFR 122.42(b)(2) of the NPDES regulations, POTWs are required to notify their permitting authority of any substantial change in the volume or character of pollutants being introduced into the POTW by its industrial users. Of course, in order to fulfill this requirement, the POTW must obtain the necessary information from its industrial users. However, the current pretreatment regulations do not require an industrial user to notify the POTW of substantial changes in the user's discharge to the POTW. The industrial user compliance reports under § 403.12(e) are required to contain information on the nature and concentration of pollutants in the industrial user's effluent that are regulated under categorical pretreatment standards. However, these reports are not adequate to provide the POTW with the information required by 40 CFR 122.42(b)(2) because: (1) They are not required to contain information on wastestreams not regulated by categorical standards (except for flows of these streams as necessary to allow use of the combined wastestream formula under § 403.6(e)), and (2) they are only required to be submitted biannually (unless the Control Authority requires more frequent submittal).

*b. Proposed change.* EPA is proposing to add a new paragraph (j) to § 403.12 requiring all industrial users to promptly notify the POTW of any substantial change in the volume or character of pollutants in the user's discharge to the POTW. This will ensure that the POTW has the necessary information to meet its obligation under 40 CFR 122.42(b)(2).

#### E. Miscellaneous

##### 1. New Source Criteria (40 CFR 403.3(k))

*a. Existing rule.* "New source" is defined for the purpose of the pretreatment program at 40 CFR 403.3(k) of the General Pretreatment Regulations. Under the original definition, a facility was a new source if construction commenced after an applicable categorical pretreatment standard was proposed under section 307(c) of the Clean Water Act as long as the standard was thereafter promulgated within 120 days of the proposal. If the standard was not promulgated within 120 days, the facility was not a new source unless construction commenced after the standard was promulgated. This definition was challenged by the Natural Resources Defense Council on the grounds that the exclusion of those sources whose construction began after the publication of the proposed standard, but prior to promulgation of final rule, was inconsistent with the Act. The United States Court of Appeals for the Third Circuit, in *National Association of Metal Finishers (NAMEF) et al. v. EPA*, 719 F.2d 624 (3d Cir. 1983), agreed, finding the regulatory definition of "new source" to be inconsistent with the definition of that term in section 306(a)(2) of the Act, which does not contain a similar 120-day time limit. The Court remanded the definition to EPA for action in accordance with its decision. On July 10, 1984, the Agency repromulgated the new source definition to comport with the Third Circuit ruling (49 FR 28058). The new definition eliminates the 120-day deadline and basically restates the statutory definition.

*b. Proposed change.* The General Pretreatment Regulations do not, however, address the basis for determining whether construction creates a new source at a site, and thus makes the industrial user subject to pretreatment standards for new sources, or merely modifies an existing source. The NPDES regulations, at 40 CFR 122.29(b), contain specific criteria for new source determinations for direct dischargers. This provision was revised on September 26, 1984 (49 FR 37998). As stipulated in § 122.29(b), construction activities could result in a "new source" if (1) it is construction of a source at a new or "greenfield" site; (2) it is construction at a site of an existing source which totally replaces the process or production equipment causing the discharge at an existing source; or (3) it creates not only a new "building, structure, facility, or installation," but it is "substantially independent" of an existing source at

the same site. The new source determination criteria in § 122.29(b) also include factors to be considered in applying the "substantial independence" test, and provide a clarification of when construction is deemed to commence.

It is equally important that Approval and Control Authorities, indirect dischargers and the public be able to determine whether construction at the site of an indirect discharger's existing facility would result in a new source or simply a modification of an existing source. Like direct dischargers, indirect dischargers that are new sources must meet different, and generally more stringent standards than existing sources. Therefore, EPA is today proposing to add new source determination criteria identical to those found in the NPDES regulations to the pretreatment definition of "new source."

As in the NPDES regulations, the proposed changes set out three criteria. Construction by an industrial user would be classified as a new source if: (1) The construction is carried out at a site at which no other source is located, (2) the construction totally replaces the process or production equipment that causes the discharge of pollutants at an existing source, or (3) the production or wastewater generating processes of the constructed facility are substantially independent of an existing source at the same site. The first two criteria deal with situations where it is obviously appropriate to impose the generally more stringent new source standards. The third criterion, the "substantial independence" test is based on the notion that in those situations where there is new construction but less than total replacement at an existing facility, the classification decision should be based on the degree to which the constructed facility functions independently of the existing source. The proposed substantial independence test also sets forth two factors that should be considered in making the determination of whether construction at an existing facility results in processes that are substantially independent and therefore qualify as a new source: (1) The extent to which the new facility is integrated with the existing plant; and (2) the extent to which the new facility is engaged in the same general type of activity as the existing source. Any construction at the site of an existing facility that does not meet the above criteria will not result in a new source.

Today's proposal, like the parallel NPDES provision, also states that construction is deemed to commence when the following are begun as part of

a continuous on-site construction program: (1) Installation or assembly of facilities or equipment, or (2) significant site preparation work necessary for such installation or assembly. Construction is also deemed to commence when the owner or operator of the facility has entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. The proposal also clarifies that options to purchase or contracts that can be terminated or modified without substantial loss, and contracts for feasibility, engineering and design studies do not constitute such a contractual obligation.

## 2. New Source Compliance Deadline (40 CFR 403.6(b))

**Existing rule.** The current regulations state that compliance with categorical pretreatment standards for new sources will be required "upon promulgation." 40 CFR 403.6(b). However, new sources generally will commence discharge after promulgation of a categorical standard applicable to them. For these industrial users, compliance "upon promulgation" is meaningless and essentially requires them to comply with the pretreatment standard for new sources upon commencement of discharge. Interpreting this provision to require immediate compliance by new sources is inconsistent with the NPDES regulations, which instead require compliance by direct dischargers that are new sources "within the shortest feasible time (not to exceed 90 days)," although new sources must "install and have in operating condition, and start-up all pollution control equipment . . . before beginning to discharge." 40 CFR 122.29(d)(4). These NPDES provisions recognize that when after the appropriate technology is installed, dischargers may need a short initial operation period to adjust treatment levels or start up certain treatment systems (e.g., biological treatment).

**Proposed change.** Today EPA is proposing to amend § 403.6(b) in language identical to that in 40 CFR 122.29(d)(4) with respect to the deadline for compliance for new sources. Under this proposal, new source indirect dischargers and new source direct dischargers would be required to install and start-up necessary pollution control equipment before beginning to discharge. These sources would then be required to achieve compliance with applicable categorical standards within the shortest feasible time, not to exceed 90 days, after commencement of discharge. Today's proposal would ensure that indirect discharges that are

new sources have a meaningful compliance deadline consistent with that for direct dischargers.

## 3. Variance for Fundamentally Different Factors (40 CFR 403.13)

**a. Existing rule.** Under § 403.13, any interested person or EPA may request a fundamentally different factors (FDF) variance from the limits in a categorical pretreatment standard. An FDF variance request must generally be submitted within 180 days after the effective date of the categorical pretreatment standard for which the variance is sought. However, if the industrial user has requested a category determination pursuant to § 403.6(a), the FDF variance request must be made within 30 days after a final decision has been made on the category determination request. The requestor must submit data specific to an industrial user indicating that factors relating to the discharge controlled by the categorical standard are fundamentally different from the factors considered by EPA in establishing the standard. Under current regulations, applications must be submitted to the State Director (in approved States), or the Administrator of EPA or his delegate (in unapproved States). (On April 30, 1986, EPA published a final rule revising § 403.13 to provide that the final decision on an FDF variance request is to be made by the Administrator or his delegate. 51 FR 16028. This authority is currently delegated to the Regional Administrators. See 51 FR 16029.) When the initial application is submitted to the Director, his decision to deny the request is final. However, if the Director finds that fundamentally different factors do exist, he may recommend approval to the Administrator (or his delegate). The Administrator (or his delegate) makes the final decision, subject to any subsequent request for a hearing on the matter (see § 403.13(m)). POTW participation in this process is limited to receiving notice of and an opportunity to review and comment on the application, and being notified of the final decision.

**b. Proposed change.** POTWs with approved pretreatment programs have primary responsibility for controlling discharges to their systems. Accordingly, these POTWs should have more input into whether industrial users discharging into their treatment plants will be granted a variance under § 403.13. POTWs are best positioned to know whether granting a variance in a particular case will cause problems at the POTW. For example, one of the criteria applicable to adjustments making limits less stringent is whether the alternative limits will result in a

violation of prohibitive discharge standards under § 403.5, including both the prohibited discharge standards listed in § 403.5 (a) and (b) and local limits established by POTWs under § 403.5(c). See § 403.13(c)(12)(ii). If such a violation would occur, the variance request cannot be approved. POTWs are especially qualified to judge whether the granting of an FDF variance in a particular case is likely to cause interference, pass through, sludge contamination or the violation of local limits. In addition, POTWs are always allowed to impose more stringent limits on industrial users than the Federal regulations (unless otherwise provided under State law). See § 403.4. Where a POTW wants to impose more stringent limits than those resulting from approval of an FDF request, it should be able to prevent a less stringent variance from being granted.

Therefore, EPA is proposing to amend paragraphs (j)(2) and (j)(3) to provide POTWs with a greater role in the FDF process. Under the proposal, if the POTW objects to the request for an FDF variance during the 30-day comment period, the request will automatically be deemed denied. The POTW will provide, in writing, its reasons for objecting to the request. The Director or the Administrator (or his delegate) will notify the requestor (and the industrial user where they are different) of the denial and provide a copy of the reasons given by the POTW. If the requestor wishes to challenge the denial, this must be done in State or local court. If the POTW does not object to the request during the comment period, the Director or the Administrator (or his delegate) will make a determination on the request taking into consideration any comments received. Notice of this final decision will be provided to the requestor (and the industrial user where they are different), the POTW and all persons who submitted comments on the request.

Today's proposal is consistent with the ability of States with approved pretreatment programs to deny FDF variance requests (see § 403.13(k)). Unlike States, however, POTWs would not recommend approval of an FDF variance request, but would only be given the opportunity to deny the request. POTWs cannot reasonably be expected to have the detailed knowledge regarding the basis and scope of national pretreatment standards that is necessary to determine whether fundamentally different factors exist in a given case. Today's proposal recognizes this while still allowing the POTW to impose more stringent limits

where it chooses to do so by preventing the granting of an FDF variance.

Today's proposal will not affect the remainder of § 403.13. As always, the industrial user remains liable for any violations of applicable categorical pretreatment standards until a final decision is made on a pending FDF variance request.

#### 4. Net/Gross Calculations (40 CFR 403.15)

a. *Existing rule.* Section 403.15 allows industrial users to request that EPA adjust an applicable categorical pretreatment standard to reflect credit for pollutants in the intake water. This section was patterned after a similar provision in the NPDES regulations (40 CFR 122.45(f)). It differs from the NPDES provision by providing that only EPA may grant net credits, where the NPDES provision allows approved States to grant credits.

An industrial user may obtain a credit under § 403.15 if it demonstrates that: (1) Its intake water is drawn from the same body of water into which the discharge from its publicly owned treatment works is made, (2) the pollutants present in the intake water will not be entirely removed by the treatment system operated by the industrial user, (3) the pollutants in the intake water do not vary chemically or biologically from the pollutants limited by the applicable standards, and (4) the industrial user does not significantly increase concentrations of pollutants in the intake water, even if the total mass of pollutants remains the same. Net/gross credits are available only to the extent that pollutants are not removed by intake and effluent treatment systems used by the industrial user.

b. *Proposed changes.* EPA recently promulgated a revised net/gross provision for the NPDES program (§ 122.45(g); 49 FR 37998, September 26, 1984). The revised rule was designed to be a less complicated and more workable approach to granting requests by direct dischargers for a limitation on a net basis. A full discussion of the considerations underlying EPA's amendment of the NPDES provision can be found at 49 FR 38025-38028 (September 26, 1984). These same considerations are equally applicable to the pretreatment program. EPA is therefore proposing today to amend the net/gross provision in the General Pretreatment Regulations to make it consistent with the revised NPDES provision.

Today's proposal would provide that upon the request of an industrial user, an applicable categorical pretreatment standard will be adjusted to reflect

credit for pollutants in the intake water if the user demonstrates that the control system it proposes or uses to meet the categorical standard would, if properly installed and operated, meet the standard in the absence of pollutants in the intake water. The basic principle is that such a control system must be applied to the discharger's effluent, but that credit is available as necessary to meet applicable limitations after the control system is applied. In addition, under today's proposal, credit for generic pollutants (e.g., BOD, COD, TSS, oil and grease) is not allowed unless the industrial user demonstrates that the constituents of the generic measure in its 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. The purpose of this restriction is to prevent the discharge of wastes that are more toxic than intake water pollutants, but are controlled by a limitation that does not measure this difference in toxicity, such as an oil and grease limit.

Under today's proposal, credit for intake pollutants is only allowed to the extent necessary to meet the applicable categorical standard, up to a maximum value equal to the influent value. Also, the user must generally demonstrate that the intake water is drawn from the same body of water as that into which the POTW discharges. While an industrial user should not be held responsible for pollutants already existing in its water supply if the POTW discharges into the same body of water from which the user takes its water, the same reasoning cannot support allowance of a credit where the POTW's discharge is into another body of water. The grant of a credit in the latter case would allow a discharger to transfer pollutants from one body of water to another, thus resulting in the addition of pollutants to particular receiving waters for the first time. Today's proposal allows the Control Authority to waive this "same body of water" requirement if he finds that no environmental degradation will result. An example might be where intake waters are taken from a relatively clean tributary of a relatively dirty body of water and discharged by the POTW to the latter body, possibly adjacent to where the tributary itself flows into the large body.

Today's proposal also incorporates a PIRT recommendation that Control Authorities be allowed to make net/gross determinations. The Task Force based its recommendation of several factors. First, PIRT pointed out that net/gross determinations for direct

dischargers are routinely made by the NPDES permit issuing authority, which is the functional equivalent of the pretreatment Control Authority. Second, PIRT stated that net/gross determinations for indirect dischargers are an activity that can be delegated to POTWs and States implementing the pretreatment program, provided that EPA develops suitable guidance on making such determinations. Finally, PIRT noted that § 403.15 currently provides that net/gross determinations can only be made by the EPA "Enforcement Division Director," a position that no longer exists at the Regional level. (EPA has recently issued a final rule in the Federal Register making technical amendments to the General Pretreatment Regulations, including changing all references to the "Enforcement Division Director" to read "Water Management Division Director" to correctly reflect the Agency's current organization.) EPA agrees with PIRT's recommendation and is therefore proposing to amend § 403.15 to allow net/gross determinations to be made by the Control Authority. The Agency will provide appropriate guidance as needed.

#### 5. Upset (40 CFR 403.16)

a. *Existing rule.* Existing § 403.16 provides an affirmative defense in an enforcement action if the industrial user shows that noncompliance with a categorical pretreatment standard was due to factors beyond the reasonable control of the discharger. This provision in the pretreatment regulations is patterned after that found in the NPDES regulations at 40 CFR 122.41(n) (47 FR 52072).

b. *Proposed change.* EPA revised the upset provision for direct dischargers on September 26, 1984. EPA is today proposing to revise § 403.16 of the pretreatment regulations to make it consistent with the 1984 revisions to the NPDES rule to clarify the showing necessary to prove that an upset has occurred. The existing rule requires a discharger to prove that an upset occurred and that the "the Industrial User can identify the specific cause(s) of the upset . . .". In some cases, overly literal application of this requirement would require a discharger to produce a level of proof that is not scientifically possible to obtain. The proposed deletion of the word "specific" from § 403.16(c)(1) clarifies that the regulation does not require investigation to an impossible degree of certainty. There may be cases where biological activity is disrupted in a treatment system (for example, where no change in raw waste characteristics could be identified) and

where a thorough investigation by the industrial user could not identify the precise cause of the violation. Such evidence could be adduced to show the "cause" required by the regulation, even though the precise cause eluded detection. In these cases, it is sufficient that the available evidence vindicates the industrial user although it does not specifically identify the responsible party or event.

In the context of the upset provision of the NPDES regulations, several persons inquired whether a demonstration of "cause" of an upset can be based upon circumstantial evidence rather than direct evidence. Proof of fact may be made through circumstantial as well as direct evidence. Indeed, circumstantial evidence may be all that is available. However, it is not enough simply to show that normal operating procedures were followed at the time effluent limitation were exceeded. The regulation requires at least a thorough investigation of the causes of an incident. Obviously, a claim of upset will require a stronger showing where previous violations have occurred and no efforts or insufficient efforts were made to identify and remedy the cause or causes.

#### 6. Bypass (40 CFR 403.17)

a. *Existing rule.* For direct dischargers, the NPDES regulations prohibit bypass, which is defined as the intentional diversion of waste streams from any portion of a discharger's treatment facility except in certain situations. This provision thus requires NPDES permittees to operate their entire treatment facility at all times. There are, however, exceptions to the strict prohibition on bypass even where effluent limitations may be violated as a result. Bypass may be excused if the bypass was unavoidable to prevent loss of life, personal injury or severe property damage, and where 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. The "no feasible alternatives" criterion is not satisfied if, in the exercise of reasonable engineering judgment, the permittee should have installed adequate back-up equipment as preventative maintenance or to prevent a bypass that occurred during normal periods of equipment downtime.

The prohibition of bypass in the NPDES regulations applies even where the permittee does not violate permit limitations during the bypass. However, permittees may bypass if they do not exceed effluent limitations and if the

bypass was for essential maintenance to assure efficient facility operations.

The NPDES bypass provision serves two basic purposes. First, it excuses certain unavoidable or justifiable violations of permit effluent limitations, provided the permittee can meet the bypass criteria. Second, it requires that permittees operate pollution control equipment at all times, thus obtaining maximum pollutant reductions consistent with technology-based requirements mandated by section 301 of the Clean Water Act. Thus, the bypass provision furthers the Act's goal of eliminating the discharge of all pollutants. Section 101(a)(1) of the Act. Without such a provision, dischargers could avoid appropriate technology-based control requirements.

b. *Proposed change.* EPA today is proposing to add a bypass provision to the general pretreatment regulations similar to that in the NPDES program. The purposes served by the NPDES bypass provision are equally important in the pretreatment context, and, therefore, the prohibition against bypass should also apply to industrial users discharging to POTWs. Like the NPDES provision, today's proposal would require industrial users to operate their treatment systems at all times.

Today's proposal, like the parallel NPDES provision, generally prohibits bypass, even where the discharger would still comply with applicable categorical standards and local limits. However, the proposal would allow an industrial user to bypass where the bypass does not cause a violation of any applicable pretreatment standards or requirements, if it is made for essential maintenance purposes to assure efficient operation of treatment equipment. EPA's rationale for prohibiting bypass even where no violation of applicable limitations would result is stated in the preamble to the September 26, 1984, NPDES rule-making (49 FR 38036-38037):

EPA's effluent limitations guidelines and standards-setting process are predicated [sic] upon the efficient operation and maintenance of removal systems. A number of the effluent limitations guidelines and standards upon which NPDES permits are based do not contain specific limitations for all of the pollutants of concern for the given industry.

The data available to EPA show that effective control of these [unregulated] pollutants can be obtained by controlling the discharge of the pollutants regulated by the standard . . . to levels achievable by the model treatment technology upon which the effluent guideline limits are based.

If bypass of treatment equipment is allowed, there is no assurance that these unlimited pollutants will be controlled, even though those specifically limited still meet permit limitations.

Consistent with the parallel NPDES provision, today's proposal also would not prohibit bypasses that violate applicable limitations when they are unavoidable to prevent loss of life, personal injury, or severe property damage, and there are no feasible alternatives to bypassing, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. As with the NPDES rule, this "no feasible alternatives" condition is not met if, in the exercise of reasonable engineering judgment, adequate back-up equipment should have been installed to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance. Proper engineering practices often involve the use of redundant or back-up systems for equipment such as pumps or power supplies. Such practices can eliminate any noncompliance during periods of equipment malfunction or maintenance. Under the proposal, the Control Authority will take into account whether back-up equipment should have been available in a given case.

EPA is also proposing to establish a notice requirement for situations where a bypass by an industrial user results in the violation of applicable pretreatment standards or requirements (including local limits established in accordance with § 403.5(c)). If the industrial user knows in advance of the need for a bypass, it must give prior notice to the Control Authority, if possible at least ten days before the date on which the bypass is to occur. If the bypass is not anticipated, the industrial user must notify the Control Authority orally within 24 hours of becoming aware of the bypass. This 24-hour notice must be followed within five days by a written description of the bypass, its cause, its duration (or, if it has not been corrected, how long it is expected to continue), and what has been done to rectify the problem. Consistent with the NPDES bypass provision, the Control Authority may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

#### III. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. These amendments generally

clarify the meaning of pretreatment requirements and do not impose significant new burdens on affected parties. They do not satisfy any of the criteria specified in section 1(b) of the Executive Order. Therefore, this is not a Major rulemaking.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any comments from OMB and EPA and any EPA response to those comments are available for public inspection at the EPA Public Information Reference Unit, Room 2402, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

#### IV. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Information Collection Request documents (ICR Nos. 0088, 0822, 1291) have been prepared by EPA and copies may be obtained from: Nanette Liepman; Information Policy Branch; EPA; 401 M St., SW. (PM-223); Washington, DC 20460 or by calling 202-382-2742. Submit comments on these requirements to EPA and: Office of Information and Regulatory Affairs; OMB; 726 Jackson Place, NW.; Washington, DC 20503; Attention: Richard Otis. The final rule will respond to OMB or public comments on the information collection requirements.

#### V. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, EPA is required to prepare a Regulatory Flexibility Analysis to assess the impact of rules on small entities. No regulatory flexibility analysis is required, however, where the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Today's proposed amendments to the regulations clarify the meaning of several pretreatment requirements and do not impose any significant new burdens on affected parties. Accordingly, I hereby certify, pursuant to 5 U.S.C. 605(b), that these amendments will not have a significant impact on a substantial number of small entities.

#### VI. Judicial Review of Provisions Not Amended

In the regulatory section of this notice, EPA has, for the sake of clarity, sometimes reprinted portions of regulatory text that would not be amended by today's proposal. Those

portions of the June 26, 1978 regulations and the January 28, 1981 regulatory amendments that are not substantively amended in today's Federal Register were only subject to judicial review in those petitions for review that were filed within 90 days of the date of issuance of the June 26, 1978 regulations, and the January 28, 1981 amendments thereto, respectively. Moreover, EPA does not solicit comments on regulatory provisions for which no amendments are proposed.

#### VII. EPA Documents Cited in This Notice

The following EPA documents are referenced in the preamble section of this notice:

*Guidance Manual for the Use of Production Based Categorical Pretreatment Standards and the Combined Wastestream Formula* (1985).

*Guidance Manual for POTW Pretreatment Program Development* (1983).

*Procedures Manual for Reviewing POTW Pretreatment Program Submission* (1983).

*Pretreatment Implementation Review Task Force—Final Report to the Administrator* (1985).

*Pretreatment Compliance Monitoring and Enforcement Guidance* to be available in the near future.)

Copies of these documents can be obtained by contacting Hans I.E. Bjornson, Permits Division (EN-336), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 475-9530.

#### List of Subjects in 40 CFR Part 403

Confidential business information, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: May 27, 1986.

Lee M. Thomas,  
Administrator.

For the reasons set out in the preamble, Chapter I of Title 40 of the Code of Federal Regulations is proposed to be revised as follows:

#### PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES

1. The authority citation for Part 403 continues to read as follows:

Authority: Sec. 54(C)(2) of the Clean Water Act of 1977 (Pub. L. 95-217), Sections 204(b)(1)(C), 208(b)(2)(C)(iii), 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(b)(2)(C), 301(h)(5), 301(i)(2), 304(e), 304(g), 307, 308, 309, 402(b), 405, and 501(a) of the Federal Water Pollution Control Act (Pub. L. 92-500), as amended by the Clean Water Act of 1977.

2. Section 403.3 is proposed to be amended by revising paragraph (k) to read as follows:

#### § 403.3 Definitions.

(k)(1) The term "New Source" means any building, structure, facility or installation from which there is or may be a Discharge of pollutants, the construction of which commenced after the publication of proposed Pretreatment Standards under section 307(c) of the Act which will be applicable to such source if such Standards are thereafter promulgated in accordance with that section, *provided that*:

- (i) The building, structure, facility or installation is constructed at a site at which no other source is located; or
- (ii) The building, structure, facility or installation totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
- (iii) The production or wastewater generating processes of the building, structure, facility or installation are substantially independent of an existing source at the same site. In determining whether these are substantially independent, factors such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source should be considered.

(2) Construction on a site at which an existing source is located results in a modification rather than a new source if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (k)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment.

(3) Construction of a new source as defined under this paragraph has commenced if the owner or operator has:

(i) Begun, or caused to begin as part of a continuous onsite construction program:

(A) Any placement, assembly, or installation of facilities or equipment; or

(B) Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

(ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or

contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this paragraph.

3. Section 403.6 is proposed to be amended by revising paragraph (b), redesignating paragraph (c) as paragraph (c)(1), adding new paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6) and (c)(7), revising paragraph (d), revising the definition of "F<sub>D</sub>" in paragraphs (e)(1) (i) and (ii), revising paragraph (e)(3), and adding paragraphs (e)(4), and (e)(5) to read as follows:

**§403.6 National Pretreatment Standards: Categorical Standards.**

(b) *Deadline for Compliance With Categorical Standards.* Compliance by existing sources with categorical Pretreatment Standards shall be within 3 years of the date the Standard is effective unless a shorter compliance time is specified in the appropriate subpart of 40 CFR Chapter I, Subchapter N. Direct dischargers with NPDES permits modified or reissued to provide a variance pursuant to section 301(i)(2) of the Act shall be required to meet compliance dates set forth in any applicable categorical Pretreatment Standard. Existing sources which become Industrial Users subsequent to promulgation of an applicable categorical Pretreatment Standard shall be considered existing Industrial Users except where such sources meet the definition of a New Source as defined in § 403.3(k). New Sources shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet applicable Pretreatment Standards before beginning to Discharge. Within the shortest feasible time (not to exceed 90 days), the New Source must meet all applicable Pretreatment Standards.

(c)(1) \* \* \*  
(2) When the limits in a categorical Pretreatment Standard are expressed only in terms of mass of pollutant per unit of production, the Control Authority may convert the limits to equivalent limitations expressed either as mass of pollutant discharged per day or effluent concentration for purposes of calculating effluent limitations applicable to individual Industrial Users.

(3) A Control Authority calculating equivalent mass-per-day limitations under paragraph (c)(2) of this section shall calculate such limitations by multiplying the limits in the Standard by the Industrial User's average rate of

production. This average rate of production shall be based not upon the designed production capacity but rather upon a reasonable measure of the Industrial User's actual long-term daily production, such as the average daily production during a representative year. For new sources, actual production shall be estimated using projected production.

(4) A Control Authority calculating equivalent concentration limitations under paragraph (c)(2) of this section shall calculate such limitations by dividing the mass limitations derived under paragraph (c)(3) of this section by the average daily flow rate of the Industrial User's regulated process wastewater. This average daily flow rate shall be based upon a reasonable measure of the Industrial User's actual long-term average flow rate, such as the average daily flow rate during a representative year.

(5) Equivalent limitations calculated in accordance with paragraphs (c)(3) and (c)(4) of this section shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act and this Part. Industrial Users will be required to comply with the equivalent limitations in lieu of the promulgated categorical standards from which the equivalent limitations were derived.

(6) Many categorical pretreatment standards specify one limit for calculating maximum daily discharge limitations and a second limit for calculating maximum monthly average, or 4-day average, limitations. Where such Standards are being applied, the same production or flow figure shall be used in calculating both types of equivalent limitations.

(7) The Industrial User shall immediately notify the Control Authority of any significant change in the production or flow rates described in paragraphs (c)(3) and (c)(4) of this section. The Control Authority shall then adjust the applicable equivalent limitation(s) to account for such change.

(d) *Dilution Prohibited as Substitute for Treatment.* Except where expressly authorized to do so by an applicable Pretreatment Standard or Requirement, no Industrial User shall ever increase the use of process water, or in any other way attempt to dilute a discharge as a partial or complete substitute for adequate treatment to achieve compliance with a Pretreatment Standard or Requirement. The Control Authority (as defined in § 403.12(a)) may impose mass limitations on Industrial Users which are using dilution to meet applicable Pretreatment Standards or Requirements, or in other cases where the imposition of mass limitations is appropriate.

- (e) \* \* \*
- (1) \* \* \*
- (i) and (ii) \* \* \*

F<sub>D</sub>=the average daily flow (at least a 30-day average) from (a) boiler blowdown streams, non-contact cooling streams, stormwater streams, and reverse osmosis or demineralizer backwash streams; provided, however, that where such streams contain a significant amount of a pollutant, and the combination of such streams, prior to treatment, with an Industrial User's regulated process wastestream(s) will result in a substantial reduction of that pollutant, the Control Authority, upon application of the Industrial User, may exercise its discretion to determine whether such stream(s) should be classified as diluted or unregulated. In its application to the Control Authority, the Industrial User must provide engineering, production, sampling and analysis and such other information so that the Control Authority can make its determination, or (b) sanitary wastestreams where such streams are not regulated by a categorical Pretreatment Standard, or (c) from any process wastestreams which were or could have been entirely exempted from categorical Pretreatment Standards pursuant to paragraph 8 of the NRDC v. Costle Consent Decree (12 ERC 1833) for one or more of the following reasons (see Appendix D):

- (1) the pollutants of concern are not detectable in the effluent from the Industrial User (paragraph (8)(a)(iii));
- (2) the pollutants of concern are present only in trace amounts and are neither causing nor likely to cause toxic effects (paragraph (8)(a)(iii));
- (3) the pollutants of concern are present in amounts too small to be effectively reduced by technologies known to the Administrator (paragraph (8)(a)(iii)); or
- (4) the wastestream contains only pollutants which are compatible with the POTW (paragraph (8)(b)(i)).

\* \* \* \* \*  
(3) *Self-monitoring.* Self-monitoring required to insure compliance with the alternative categorical limit shall be conducted in accordance with the requirements of § 403.12(g).

(4) *Centralized Waste Treatment.* An alternative pretreatment limit shall be derived by the combined wastestream formula and applied to the Discharge of a privately owned centralized waste treatment facility where such facility receives wastes from one or more industrial contributors whose process wastewaters are regulated by one or more categorical Pretreatment Standards and combines such

wastewater(s) prior to treatment. Each industrial contributor shall inform the centralized waste treatment facility, prior to conveyance of its waste(s) to such facility, of the nature of its processes (including relevant production and flow rates, where applicable), the volume and pollutant constituents of the waste(s), and any categorical Standard(s) applicable to such waste(s). An industrial contributor remains responsible for compliance by the centralized waste treatment facility with applicable Pretreatment Standards.

**(5) Choice of monitoring location.**

Where a treated process wastestream is combined prior to treatment of wastewaters other than those generated by the regulated process, the Industrial User may monitor either the segregated process wastestream or the combined wastestream for the purpose of determining compliance with applicable Pretreatment Standards. If the Industrial User chooses to monitor the segregated process wastestream, it shall apply the applicable categorical Pretreatment Standard. If the User chooses to monitor the combined wastestream, it shall apply an alternative discharge limit calculated using the combined wastestream formula as provided in this section. The Industrial User may change monitoring points only after receiving approval from the Control Authority. The Control Authority shall ensure that any change in an Industrial User's monitoring point(s) will not allow the User to substitute dilution for adequate treatment to achieve compliance with applicable Standards.

4. Section 403.8 is proposed to be amended by revising paragraphs (b) and (f)(1)(vi)(A), and adding a new paragraph (f)(4) to read as follows:

**§ 403.8 POTW pretreatment programs: Development by POTW.**

(b) *Deadline for Program Approval.* A POTW which meets the criteria of paragraph (a) of this section must receive approval of a POTW Pretreatment Program no later than 3 years after the reissuance or modification of its existing NPDES permit but in no case later than July 1, 1983. POTWs whose NPDES permits are modified under section 301(h) of the Act shall have a Pretreatment Program within less than 3 years as provided for in 40 CFR Part 125, Subpart G (44 FR 34783 (1979)). POTWs identified after July 1, 1983 as being required to develop a POTW Pretreatment Program under paragraph (a) of this section shall develop and submit such a program for approval as soon as possible, but in no case later than one year after written

notification from the Approval Authority of such identification. The POTW Pretreatment Program shall meet the criteria set forth in paragraph (f) of this section and shall be administered by the POTW to ensure compliance by Industrial Users with applicable Pretreatment Standards and Requirements.

\* \* \* \* \*

(f) \* \* \*  
(l) \* \* \*  
(vi)(A) Obtain remedies for noncompliance by any Industrial User with any Pretreatment Standard and Requirement. All POTW's shall be able to seek injunctive relief for noncompliance by Industrial Users with Pretreatment Standards and Requirements. All POTWs shall also have authority to assess civil or criminal penalties in at least the amount of \$300 a day for each violation by Industrial Users of Pretreatment Standards and Requirements. POTWs whose approved Pretreatment Programs require modification to conform to the requirements of this paragraph shall submit a request for approval of a program modification in accordance with § 403.18 by [one year from effective date of amendment] unless the State would be required to enact or amend a statutory provision, in which case the POTW shall submit such a request by [two years from effective date of amendment].

(4) *Local limits.* The POTW shall develop local limits as required in § 403.5(c)(1).

5. Section 403.9 is proposed to be amended by revising paragraph (e) to read as follows:

**§ 403.9 POTW pretreatment programs and/or authorization to revise pretreatment standards: submission for approval.**

(e) *Approval authority action.* Any POTW requesting POTW Pretreatment Program approval shall submit to the Approval Authority three copies of the Submission described in paragraph (b), and if appropriate, (d) of this section. Within 60 days after receiving the Submission, the Approval Authority shall make a preliminary determination of whether the Submission meets the requirements of paragraph (b) and, if appropriate, (d) of this section. If the Submission is determined to meet these requirements, the Approval Authority shall:

(1) Notify the POTW that the Submission has been received and is under review; and

(2) Commence the public notice and evaluation activities set forth in § 403.11.

**§ 403.10 [Amended]**

6. Section 403.10 is proposed to be amended by removing paragraph (g)(1)(iii).

7. Section 403.11 is proposed to be amended by revising the introductory text of paragraph (b) to read as follows:

**§ 403.11 Approval procedures for POTW pretreatment programs and POTW granting of removal credits.**

\* \* \* \* \*

(b) *Public notice and opportunity for hearing.* Upon receipt of a Submission the Approval Authority shall commence its review. Within 20 work days after making a determination that a Submission meets the requirements of § 403.9(b), and, where removal allowance approval is sought, §§ 403.7(d) and 403.9(d), or at such later time under § 403.7(c) that the Approval Authority elects to review the removal allowance Submission, the Approval Authority shall:

\* \* \* \* \*

8. Section 403.12 is proposed to be amended by revising the introductory text of paragraph (b), revising paragraphs (b)(5)(iii), (b)(5)(iv), (d), (f), and (g), redesignating paragraphs (h) through (l) as (k) through (o), revising newly designated paragraph (l), adding (o)(4) to newly designated paragraph (o), and by adding new paragraphs (e)(3), (h), (i), and (j) to read as follows:

**§ 403.12 Reporting requirements for POTWs and industrial users.**

\* \* \* \* \*

(b) *Reporting requirements for industrial users upon effective date of categorical pretreatment standard—baseline report.* Within 180 days after the effective date a categorical Pretreatment Standard, or 180 days after the final administrative decision made upon a category determination submission under § 403.6(a)(4), whichever is later, existing Industrial Users subject to such categorical Pretreatment Standards and currently discharging to or scheduled to discharge to a POTW shall be required to submit to the Control Authority a report which contains the information listed in paragraph (b) (1)–(7) of this section. Where reports containing this information already have been submitted to the Director or Regional Administrator in compliance with the requirement of 40 CFR 128.140(b) (1977), the Industrial User will not be required to submit this information again. At

least 90 days prior to commencement of discharge, New Sources, and sources that become Industrial Users subsequent to the promulgation of an applicable categorical Standard, shall be required to submit to the Control Authority a report which contains the information listed in paragraphs (b) (1)-(5) of this section. New Sources may give estimates of the information requested in paragraphs (b) (4) and (5) of this section:

(5) \* \* \*

(iii) Grab samples must be used for pH, cyanide, total phenols, oil and grease, and sulfide. For all other pollutants, 24-hour composite samples must be obtained through flow-proportional composite sampling techniques where feasible. The Control Authority may waive flow-proportional composite sampling for any Industrial User that demonstrates that the use of an automatic sampler is infeasible. In such cases, samples may be obtained through time-proportional composite sampling techniques or through a minimum of four (4) grab samples where the User demonstrates that this will provide a representative sample of the effluent being discharged.

(iv) The User shall take a minimum of one representative sample to compile that data necessary to comply with the requirements of this paragraph.

(d) *Report on compliance with categorical pretreatment standard deadline.* Within 90 days following the date for final compliance with applicable categorical Pretreatment Standards or in the case of a New Source following commencement of the introduction of wastewater into the POTW, any Industrial User subject to Pretreatment Standards and Requirements shall submit to the Control Authority a report containing the information described in paragraphs (b) (4)-(6) of this section. This report shall also contain the Industrial User's current actual average production rate.

(e) \* \* \*

(3) For Industrial Users subject to categorical Pretreatment Standards expressed only in terms of mass per unit of production, the reports required by this section shall include the User's actual average production rate for the reporting period.

(f) *Notice of slug loading.* All Industrial Users shall notify the POTW immediately of any slug loading, as defined by § 403.5(b) (1)-(5), by the Industrial User.

(g) *Monitoring and analysis to demonstrate continued compliance.* The

report required in paragraphs (b), (d), and (e) of this section shall contain the results of sampling and analysis of the discharge, including the flow and the nature and concentration or production and mass where requested by the Control Authority, of pollutants contained therein which are limited by the applicable Pretreatment Standards. The frequency of monitoring shall be prescribed in the applicable Pretreatment Standard. This sampling and analysis may be performed by the Control Authority in lieu of the Industrial User. These reports shall also contain the results of all sampling and analysis performed by the Industrial User during the period covered by the report. If sampling and analysis performed by the Industrial User indicates a violation, the User shall repeat the sampling and analysis and submit the results of both analyses to the Control Authority within 21 days. The reports required in paragraph (e) shall be based upon data obtained through appropriate sampling and analysis performed during the period covered by the report, which data is representative of conditions occurring during the reporting period. The Control Authority may require whatever frequency of monitoring it deems necessary to assess and assure compliance by Industrial Users with applicable Pretreatment Standards and Requirements. All analyses shall be performed in accordance with procedures established by the Administrator pursuant to section 304(h) of the Act and contained in 40 CFR Part 136 and amendments thereto or with any other test procedures approved by the Administrator. (See §§ 136.4 and 136.5.) Sampling shall be performed in accordance with the techniques approved by the administrator. Where 40 CFR Part 136 does not include sampling or analytical techniques for the pollutants in question, or where the Administrator determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analyses shall be performed using validated, analytical methods or any other sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the Administrator.

(h) *Reporting requirements for Industrial Users with discharges not subject to categorical Pretreatment Standards.* The Control Authority shall require appropriate reporting from those Industrial Users with discharges that are not subject to categorical Pretreatment Standards.

(i) *Annual POTW reports.* POTWs with approved Pretreatment Programs shall provide the Approval Authority with a report that briefly describes the POTW's program activities, including activities of all participating agencies, if more than one jurisdiction is involved in the local program. The report required by this section shall be submitted no later than one year after approval of the POTW's Pretreatment Program, and at least annually thereafter, and shall include, at a minimum, the following:

(1) An updated list of the POTW's Industrial Users, including their names and addresses, or a list of deletions and additions keyed to a previously submitted list. The POTW shall provide a brief explanation of each deletion. This list shall identify which Industrial Users are subject to categorical Pretreatment Standards and specify which Standards are applicable to each such Industrial User. The list shall also indicate which Industrial Users are subject to local Standards that are more stringent than the categorical Pretreatment Standards. The POTW shall also list the Industrial Users that are subject only to local Standards.

(2) A summary of the compliance status of each Industrial User over the reporting period;

(3) A summary of compliance and enforcement activities (including inspections) conducted by the POTW during the reporting period; and

(4) Any other relevant information requested by the Approval Authority.

(j) *Notification of changed Discharge.* All Industrial Users shall promptly notify the POTW of any substantial change in the volume or character of pollutants in their discharge.

(l) *Signatory requirements for industrial user reports.* The reports required by subsections (b), (d), and (e) of this section shall include the certification statement as set forth in § 403.6(a)(ii), and shall be signed as follows:

(1) By a responsible corporate officer, if the Industrial User submitting the reports required by paragraph (b), (d) and (e) of this section is a corporation. For the purpose of this paragraph, a responsible corporate officer means (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operation facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25

million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) By a general partner or proprietor if the Industrial User submitting the reports required by paragraphs (b), (d) and (e) of this section is a partnership or sole proprietorship respectively.

(3) By a duly authorized representative of the individual designated in paragraph (e)(1), or (e)(2) of this section if:

(i) The authorization is made in writing by the individual described in paragraph (l)(1) and (l)(2);

(ii) The authorization specifies either an individual or a position having responsibility for the overall operation of the facility from which the Industrial Discharge originates, such as the position of plant manager or a position of equivalent responsibility, or having overall responsibility for environmental matters for the Industrial User; and

(iii) The written authorization is submitted to the Control Authority.

\* \* \* \* \*

(o) \* \* \*

(4) Any industrial contributor to a privately owned centralized waste treatment facility that discharges to a POTW shall maintain records of all information provided to the centralized waste treatment facility pursuant to § 403.6(e)(4), including any results of monitoring activities carried out for the purpose of complying with that section. Records of monitoring data shall include the information listed in paragraph (l)(1) of this section. The industrial contributor shall retain the records described in this paragraph for a minimum of 3 years and shall make such records available for inspection and copying by the POTW, the Director, and the Regional Administrator. This period of retention shall be extended during the course of any unresolved litigation regarding the industrial contributor or the centralized waste treatment facility, or when requested by the POTW, the Director, or the Regional Administrator.

9. Section 403.13 is proposed to be amended by revising paragraphs (j)(2) and (j)(3) to read as follows:

**§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.**

\* \* \* \* \*

(j) \* \* \*

(2) The public notice shall provide for a period of not less than 30 days following the date of the public notice during which time interested persons may review the request and submit their written views on the request. If the

POTW into which the Industrial User discharges objects to the request during the comment period, the request shall automatically be deemed denied. The POTW shall provide, in writing, its reasons for objecting to the request. The Director or Administrator (or his delegate) shall notify the requestor (and the Industrial User where they are not the same) of the denial and provide a copy of the reasons given by the POTW therefor.

(3) Following the comment period, and provided that the POTW into which the Industrial User discharges has not objected to the request, the Director or Administrator (or his delegate) will make a determination on the request taking into consideration any comments received. Notice of this final decision shall be provided to the requestor (and the Industrial User where they are not the same), the POTW into which the Industrial User discharges and all persons who submitted comments on the request.

\* \* \* \* \*

10. Section 403.15 is proposed to be revised to read as follows:

**§ 403.15 Net/Gross calculation.**

Categorical Pretreatment Standards may be adjusted to reflect the presence of pollutants in the Industrial User's intake water in accordance with this section:

(a) *Application.* Any Industrial User wishing to obtain credit for intake pollutants must make application to the Control Authority. Upon request of the Industrial User, the applicable Standard will be calculated on a "net" basis, i.e., adjusted to reflect credit for pollutants in the intake water, if the requirements of paragraph (b) of this section are met.

(b) *Criteria.* (1) The Industrial User must demonstrate that the control system it proposes or uses to meet applicable categorical Pretreatment Standards would, if properly installed and operated, meet the Standards in the absence of pollutants in the intake waters.

(2) Credit for generic pollutants such as biochemical oxygen demand (BOD), total suspended solids (TSS), and oil and grease should not be granted unless the Industrial User demonstrates that the constituents of the generic measure in the User's 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 categorical Pretreatment Standard(s), up to a maximum value equal to the

influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with Standard(s) adjusted under this section.

(4) Credit shall be granted only if the User demonstrates that the intake water is drawn from the same body of water as that into which the POTW discharges. The Control Authority may waive this requirement if he finds that no environmental degradation will result.

11. Section 403.16 is proposed to be amended by revising paragraph (c)(1) to read as follows:

**§ 403.16 Upset provision.**

\* \* \* \* \*

(c) \* \* \*

(1) An Upset occurred and the Industrial User can identify the cause(s) of the Upset;

\* \* \* \* \*

12. Part 403 of Title 40 of the Code of Federal Regulations is proposed to be amended by adding a new § 403.17 to read as follows:

**§ 403.17 Bypass.**

(a) *Definitions.* (1) "Bypass" means the intentional diversion of wastestreams from any portion of an Industrial User's treatment facility.

(2) "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.

(b) *Bypass not violating applicable Pretreatment Standards or Requirements.* An Industrial User may allow any bypass to occur which does not cause Pretreatment Standards or Requirements to be violated, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provision of paragraphs (c) and (d) of this section.

(c) *Notice.* (1) If an Industrial User knows in advance of the need for a bypass, it shall submit prior notice to the Control Authority, if possible at least ten days before the date of the bypass.

(2) An Industrial User shall submit oral notice of an unanticipated bypass that exceeds applicable Pretreatment Standards to the Control Authority within 24 hours from the time the Industrial User becomes aware of the bypass. A written submission shall also be provided within 5 days of the time

the Industrial User becomes aware of the bypass. The written submission shall contain a description of the bypass and its cause; the duration of the bypass, including exact dates and times, and, if the bypass 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 bypass. The Control Authority may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

(d) *Prohibition of bypass.* (1) Bypass is prohibited, and the Control Authority may take enforcement action against an Industrial User for a 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 back-up 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 preventative maintenance; and

(iii) The Industrial User submitted notices as required under paragraph (c) of this section.

(2) The Control Authority may approve an anticipated bypass, after considering its adverse effects, if the Control Authority determines that it will meet the three conditions listed in paragraph (d)(1) of this section.

13. Part 403 of Title 40 of the Code of Federal Regulations is proposed to be amended by adding a new § 403.18 to read as follows:

**§ 403.18 Modification of POTW Pretreatment Programs.**

(a) *General.* Either the Approval Authority or a POTW with an approved POTW Pretreatment Program may initiate program modification at any time to reflect changing conditions at the

POTW. Program modification is necessary whenever there is a significant change in the operation of a POTW Pretreatment Program that differs from the information in the POTW's Submission, as approved under § 403.11.

(b) *Procedures.* POTW Pretreatment Program modifications shall be accomplished as follows:

(1) The POTW shall submit to the Approval Authority a statement of the basis for the desired modification, a modified program description (see § 403.9(b)), and any other documents as the Approval Authority determines to be necessary under the circumstances.

(2) The Approval Authority shall approve or disapprove all modifications based on the requirements of § 403.8(f). For substantial modifications, the Approval Authority shall follow the procedures in § 403.11 (b)-(f).

(3) Modifications shall be incorporated into the POTW's NPDES permit after approval. For substantial modifications, the permit will be modified to incorporate the approved modification as soon as possible as provided in 40 CFR 122.63(f). For all other modifications, the permit will be modified to incorporate the approved modification the next time the permit is reissued or modified for any other reason.

(4) POTW Pretreatment Program modifications shall become effective upon the approval of the Approval Authority. Notice of approval of substantial modifications shall be published in the same newspaper as the notice of the original request for approval of the modification under § 403.11(b)(1)(i)(B). Notice of approval of non-substantial modifications may also be given by such publication, or by a letter from the Approval Authority to the POTW, a copy of which the POTW shall also send to its Industrial Users.

(c) *Substantial modifications.* (1) Substantial modifications include, but are not limited to, the following:

(i) Changes to the POTW's enforcement authorities (e.g., remedies

available for violations of Pretreatment Standards and Requirements by Industrial Users);

(ii) Changes to local limits contained in municipal ordinances;

(iii) Changes to the POTW's control mechanism, as described in § 403.8(f)(1)(iii); and

(iv) Changes to the POTW's method for implementing categorical Pretreatment Standards (e.g., incorporation by reference, separate promulgation, etc.).

(2) The Approval Authority will determine, on a case-by-case basis, whether other modifications are substantial. The criteria to be applied in making such determinations include:

(i) Whether the modification would have a significant impact on the operation of the POTW's Pretreatment Program;

(ii) Whether the modification would result in an increase in pollutant loadings at the POTW; and

(iii) Whether the modification would result in less stringent requirements being imposed on Industrial Users of the POTW.

**PART 122—[AMENDED]**

14. The authority citation for Part 122 continues to read as follows:

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

15. 40 CFR 122.63 is proposed to be amended by adding paragraph (g) to read as follows:

**§ 122.63 Minor modifications of permits.**

(g) Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in 40 CFR 403.11 (or a modification thereto that has been approved in accordance with the procedures in 40 CFR 403.18) as enforceable conditions of the POTW's permit.

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