ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 124 and 125

[WH-FRL 2228-6]

Consolidated Permit Regulations; Revision In Accordance With Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: On June 7, 1982, EPA entered into a settlement agreement on Clean Water Act issues with numerous industry petitioners in the consolidated permit regulations litigation (*NRDC* v. *EPA* and consolidated cases, No. 80–1607 (D.C. Cir. filed June 2, 1980)). This rulemaking proposes to revise certain provisions of the consolidated permit regulations affecting National Pollutant Discharge Elimination System (NPDES) permits in accordance with that settlement. The proposed changes will have the effect of reducing the regulatory burdens imposed on permittees under the NPDES permitting program administered by EPA or approved States, while still achieving the environmental goals the program is intended to achieve.

These proposed changes, and others that we expect to make, are also intended to deal with concerns raised by the President's Task Force on Regulatory Relief. The Task Force has asked that the Agency review the consolidated permit regulations with the objective of enhancing efficiency and eliminating unnecessary regulatory burdens.

DATES: EPA will accept public comments on the proposed amendments until January 17, 1983.

ADDRESSES: Interested persons may participate in the rulemaking by submitting written comments to George E. Young, Office of Water Enforcement and Permits, Permits Division (EN–336), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Karen Wardzinski, Office of General Counsel, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, 202–755–0753.

SUPPLEMENTARY INFORMATION:

I. Introduction

On May 19, 1980, EPA published in the **Federal Register** (45 FR 35290) final consolidated permit regulations. These rules are consolidated requirements and procedures for five EPA permit programs, including the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA), Hazardous Waste Management Program (HWMP) under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), State "Dredge or Fill" permit programs under section 404 of the CWA, and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act (CAA). For more information on the development of these regulations, see 47 FR 25546–47 (June 14, 1982).

Petitions to review the final consolidated permit regulations were filed in several United States Courts of Appeals and subsequently consolidated in the District of Columbia Circuit (*NRDC* v. *EPA*, and consolidated cases (No. 80–1607)). EPA held extensive discussions on all issues raised in these petitions and subsequently signed four separate settlement agreements with industry litigants. The first of these addresses substantive issues affecting only the UIC program, and was signed on July 22, 1981. Final amendments implementing that agreement were published in the **Federal Register** on September 27, 1981 (46 FR 43156), and on February 3, 1982, (47 FR 4992). The second agreement, signed on November 16, 1981, addresses substantive issues affecting only the RCRA program. On April 8, 1982, EPA issued technical amendments and a Regulatory Interpretation Memorandum in partial fulfillment of its obligations under that Agreement, (47 FR 15304 and 47 FR 15307). In addition, EPA has recently proposed one substantive amendment to the RCRA portion of the consolidated permit regulations (47 FR 32038, July 23, 1982) and intends to propose additional amendments implementing the remainder of the settlement agreement before the end of the year.

The third agreement, also signed on November 16, 1981, and filed with the D.C. Circuit, relates to issues raised by the parties which were common to at least two of the three programs involved in the litigation [i.e. RCRA, NPDES, and UIC]. This agreement also resolves three NPDES issues which affect the definition of "new discharger" and its effect on mobile drilling rigs. Proposed regulations under this third agreement (the "Common Issues/New Discharger Agreement") were published on June 14, 1982 (47 F.R. 25546).

This proposal implements the fourth and final settlement agreement, dealing with those NPDES issues not resolved by the Common Issues/New Discharger Agreement. Copies of the settlement agreement are available for inspection and copying from the EPA Office of General Counsel or Regional Counsels at the following addresses:

Associate General Counsel, for Water and Solid Waste, 401 M Street, SW., Washington , DC 20460
Regional Counsel, Region I, John F. Kennedy Federal Building, Room 2203, Boston, Massachusetts 02203
Regional Counsel, Region II, 26 Federal Plaza, Room 1009, New York, New York 10007
Regional Counsel, Region III, Curtis Building, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106
Regional Counsel, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia 30308
Regional Counsel, Region V, 230 South Dearborn Street, Chicago, Illinois 60604
Regional Counsel, Region VI, First International Building, 1201 Elm Street, Dallas, Texas 75270
Regional Counsel, Region VII, 324 East 11th Street, Kansas City, Missouri 64108
Regional Counsel, Region VIII, 1860 Lincoln Street, Denver, Colorado 89203
Regional Counsel, Region IX, 215 Fremont Street, San Francisco, California 94111
Regional Counsel, Region X, 1200 6th Avenue, Seattle, Washington 98101

Under the terms of the NPDES agreement, EPA must propose the rules set forth below. As part of the settlement, EPA also agreed to include, and has included, certain language in this preamble. If EPA issues final rules which are substantially the same as the proposed rules and do not alter their meaning, the parties to the settlement will withdraw their challenges to these regulations.

These proposed regulations were developed in settlement of claims under the Clean Water Act affecting the NPDES program. However, some of the proposed changes (we believe inadvertently) would affect the RCRA, PSD, and UIC programs as well. Although EPA does not believe it is necessarily appropriate to amend the rules governing these programs, we solicit comment on the extent to which the proposed changes should affect RCRA, PSD, and UIC permitting.

Petitioners The Natural Resources Defense Council and Citizens for a Better Environment are not parties to this settlement. Their challenge will not necessarily be withdrawn as a result of final promulgation of new amended regulations. Industry expects to litigate three NPDES issues raised by industry

which are not covered by any of the settlement agreements. In addition, two of the industry parties (Mobil Oil Company and the American Iron and Steel Institute (AISI) did not join in the settlement of the net/gross issue (40 CFR 122.63(g), (h)), and AISI did not join in the settlement of the total metals issue (40 CFR 122.63(c)). These parties may challenge these provisions in court if they are issued in final form.

Elsewhere in today's **Federal Register**, EPA is proposing to suspend several sections of the regulations pending final Agency rulemaking on this proposal. The proposal suspensions are also identified in this preamble.

EPA solicits, and will consider carefully, public comments on this proposal before issuing final regulations. Comments should include supporting date where necessary to support the commenter's conclusions.

In addition, the President's Task Force on Regulatory Relief has designated the consolidated permit regulations for review by EPA. Settlement of the litigation and implementation of the agreements represents a major portion of the Agency's response to the Task Force. The Agency also expects to propose other changes to the consolidated permit regulations, consistent with those proposed below, in the course of this review. These changes will include reorganization of the consolidated permit regulations to eliminate the consolidated format. Each part of the deconsolidated regulations will pertain solely to one permit program. EPA also expects to propose further substantive changes to portions of the NPDES regulations not addressed in the litigation and substantive changes to the section 404 State program requirements under the Clean Water Act. We expect that these other changes will be proposed later this year.

II. Proposed Changes

A. Storm Water Runoff Discharges (40 CFR 122. 57)

1. *Existing Rules.* Section 122.57 describes those storm water discharges which are considered "point source" discharges under the CWA and thus are subject to NPDES permitting requirements. Two types of storm water dischargers are identified. First, a "separate storm sewer" is defined as a conveyance or system of conveyances primarily used for collecting and conveying storm water runoff which is located in an urbanized area as designated by the Bureau of the Census or which is designated by the Director, on a case-by-case basis, as a "separate storm sewer" for any of the reasons discussed in § 122.57(c). A second type of storm water discharge is a conveyance which discharges process wastewater or storm water runoff contaminated by contact with wastes, raw materials, or pollutant-contaminated soil from areas used for industrial or commercial activities. Such conveyances are not included in the definition of "separate storm sewer," but are nonetheless, considered point sources which must obtain NPDES permits. A conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff which does not fit within either of the above described categories is not considered a point source and need not obtain an NPDES permit.

Section 122.57(a) explains that a single NPDES permit can be written for a separate storm sewer system even though there may be several owners or operators of conveyances into the system.

Industry representatives have expressed several concerns with the NPDES requirements for storm water discharges. In particular, they contend that storm water discharges that pose no significant environmental danger should not be considered "point sources" subject to permitting requirements, that the definition of "contaminated" runoff is ambiguous and overbroad, and that the testing requirements for applicants for individual permits for storm water discharges are unduly burdensome.

2. *Proposed Changes.* EPA has carefully considered these and other views and agrees that the NPDES permit program for storm water discharges should be revised. Several changes to the regulations are proposed.

Definitions

The categories of storm water discharges which would be considered "point sources" subject to NPDES permitting would be limited. The term "separate storm sewer" would be eliminated and replaced with the term "storm water discharge." A storm water discharge would be defined as a conveyance or system of conveyances primarily used for collecting and conveyance or system of conveyances primarily used for collecting and conveying storm water runoff which is either:

(1) Contaminated by contact with process wastes, raw materials, toxic pollutants, hazardous pollutants listed in Table V of Appendix D to Part 122, or oil and grease; or

(2) Designated as a storm water discharge by the Director.

A conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff that does not constitute a "storm water discharge" under this definition would not be considered a point source subject to the requirements of the Clean Water Act, (see *NRDC* v. *Train*, 568 F.2d 1393 (D.C. Cir. 1977), noting EPA's discretion to determine what is a "point source" for purposes of the Clean Water Act). EPA believes that such discharges are generally *de minimis* sources of pollution which Congress did not intend to regulate through the NPDES program.

Conveyances that discharge storm water runoff combined with municipal sewage are not considered "storm water discharges" under the definition in this section, but are point sources subject to NPDES permit requirements. Today's proposed rule changes for storm water have no affect on these municipal discharges.

Application Requirements

EPA also proposes to reduce many of the NPDES application requirements as they apply to storm water discharges. Though the proposed redefinition of point source storm water discharges focuses on "contaminated" discharges, most such discharges are expected to pose far less environmental concern than typical industrial discharges. In many cases, the extensive testing and reporting required by the regulations would not be necessary in order to issue adequate permits. In addition, EPA and the States must reissue large numbers of expired NPDES permits. Since priority is given to the issuance of permits to new sources and new dischargers and to major existing industrial and municipal sources, the issuance of permits to storm water dischargers may not receive immediate attention. Any data supplied now probably would be outdated by the time permit writers acted to issue or reissue permits for storm water discharges. Therefore, we propose to eliminate many of the application requirements for storm water discharges.

The amount of information an applicant will be required to submit would depend upon the particular category of storm water discharge involved. We have divided storm water discharges into two broad groups based upon their potential for significant pollution problems, imposing fewer substantive application requirements on those discharges less likely to include significant sources of pollution. This would substantially lessen the burdens on applicants whose discharges are

minor sources of pollution, yet would provide permit writers with minimum information with which to fashion permit requirements or to determine what further information may be necessary in particular cases.

• *Group I*

The first group of storm water discharges potentially poses more significant pollution problems than the second group. This first group consists of 3 categories of storm water discharges:

(1) Those which are subject to specific effluent limitations guidelines or toxic pollutant effluent standards;

(2) Those which are designated as significant contributors of pollution by the Director under § 122.57(c); or

(3) Those which are located at industrial facilities in areas immediately adjacent to the industrial plant or in plant associated areas, if there is a potential for a significant discharge of runoff contaminated by contact with process wastes, raw materials, toxic pollutants or hazardous substances. This third category covers conveyances that discharge storm water runoff that has the potential for becoming contaminated from contact with raw materials, intermediate or finished products, wastes, or substances used in production or treatment operations. The term "plant associated areas" includes such areas as industrial plant yards, immediate access roads, drainage ponds, refuse piles, storage piles or areas, and material or product loading and unloading areas. The term excludes commercial areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots, since we do not expect significant contamination from process operations to occur there.

Group I storm water dischargers would be required to submit NPDES applications that comply with all the requirements of §§ 122.4 and 122.53(d), and EPA consolidated permit application Forms 1 and 2c (see 45 FR 33516), with one exception. We propose to delete the requirements in § 122.53(d)(7)(iii) that applicants report *quantitative* data. Group I dischargers would be required only to indicate in Items V–B and V–C of Form 2c whether they believe any of the listed pollutants are present or absent and briefly describe why. Applicants would not be required to test for pollutants that they believe to be present. Elsewhere in today's **Federal Register** we are proposing to suspend these same provisions pending issuance of final rulemaking on this proposal.

Because many storm water discharges may prove to be minor sources of pollution, EPA does not believe that such dischargers should be required to bear the cost of testing for pollutants listed in Items V–B and V–C of Form 2c. Applicants must still test for those pollutants listed in Item V–A of Form 2c (see § 122.53(d)(7)(i)). This testing is less expensive than the testing required for Items V–B and V–C. The testing data submitted under Item V–A may alert a permit writer to the possible significant pollution problems, and thus prompt a request for testing or additional information. EPA expects to provide guidance to aid permit writers in issuing general permits for many of the discharges within Group I based upon the information they receive through these revised requirements.

• *Group II*

The second group consists of all point source storm water discharges required to be permitted under § 122.57 that are not included in Group I (for example, point source runoff from office buildings or parking lots physically separate from industrial areas). In general, the storm water discharges included in Group II are less likely than those in Group I to create significant pollution problems. Moreover, the potential numbers of discharges falling into Group II is even greater than those in Group I. Accordingly, EPA proposes to further reduce the information these dischargers must submit to the permitting authority. The proposed rules would require only basic information to identify the type, number, and location of Group II storm water discharges. Testing for pollutants listed in Item V would be eliminated. Group II dischargers would, however, submit all of Form 1 of the NPDES consolidated permit application, except for Item XI (§ 122.4(d)) which requires a topographic map of the permitted area. Since our primary purpose in requesting information from Group II dischargers is to obtain general identification information, the detail provided by a topographic map is not necessary at this time.

In addition, the only requirements of Form 2c that are applicable to Group II discharges would be Items I and II–B (see §§ 122.53(d)(1), (d)(3), and (d)(4), indicating the location and flow of each storm water outfall, the name of the receiving water, and any treatment being done. These requirements would enable EPA to identify and locate storm water outfalls and to confirm that such discharges should not be regulated as Group I discharges. Group II permit applicants would also have to complete the requirements of Item IX (see § 122.6(d)), certification of the permit application. All other provisions of Form 2c (Items II–A, III, IV, V, VI, VII, and VIII) would be deleted. Thus, for Group II permit applicants, we would delete the requirements of § 122.53(d)(2), (d)(5), (d)(6), (d)(7), (d)(9), (d)(10), (d)(11), and (d)(12)). Elsewhere in today's **Federal Register** we are proposing to suspend the same provisions pending final rulemaking on this proposal. Again, permit writers would retain the authority to require additional information.

Flow Information

For the purposes of § 122.53(d)(3), EPA proposes that both Group I and Group II storm water discharges be allowed to estimate the average flow of their discharge based on actual prior experience and to indicate the rainfall event on which the estimate is based. Since storm water generally flows intermittently or seasonally, it would be difficult to report average flows accurately as required by § 122.53(d)(3).

Signatories

Section 122.6(a) and (b) specify who is required to sign permit applications. EPA proposes to amend § 122.6(b) to allow permit applications for Group II storm water dischargers to be signed by a duly authorized representative of the person or position identified in § 122.6(a) as responsible for signing applications. Storm water discharges would thus be treated like Class II UIC wells. Group II storm water dischargers are large in number, yet, as a group, much less complex than most point source discharges. While EPA continues to believe that Group II storm water discharges should continue to be treated as point sources regulated under the NPDES program, we believe that this regulation should be no more burdensome than needed to protect the environment.

Application Deadlines

EPA proposes that existing unpermitted storm water dischargers be given six months from the date new final storm water regulations are issued to submit applications. For a discharged designated by the Director as a "storm water discharge" under § 122.57(c), the application would be due six months from the date of notification of its designation. This will allow storm water dischargers sufficient time to gather and submit any information that final regulations may require, yet avoid the premature collection and submission of information which ultimately may not be required.

Multiple Dischargers

As in the current regulations (§ 122.57(a)), the Director may issue one permit covering any and all storm water discharges which are part of a storm water discharge system. We propose to revise this section to clarify that, where there is more than one owner or operator of such discharges, each must be identified in an application form submitted by the owner or operator of the portion of the system discharging directly into waters of the U.S. Any permit written to cover more than one owner or operator must identify the limitations applicable to each discharge and could not, without the source's consent, impose limitations on a source for discharges from another source.

B. Signatories—Reports (40 CFR 122.6(b)(2))

Section 122.6(b)(2) requires all reports and other information required by an NPDES permit to be signed by a principal executive officer of a corporation or by a duly authorized representative of the executive officer. Such representatives must, however, have responsibility for the overall operations of the regulated facility or activity. EPA proposes additionally to allow an individual or position having overall responsibility for environmental matters for the company to be authorized as a representative. Many companies have environmental managers who are responsible for ensuring compliance with environmental laws. These managers are often in charge of the personnel who do the monitoring and sampling and should best be able to judge the accuracy and completeness of NPDES reports. Such individuals must have overall responsibility for environmental matters for the facility or activity, thus ensuring high level attention to the facility's monitoring and reporting responsibilities.

C. NPDES Application Requirements and Toxic Control Strategy (40 CFR 122.15, 122.53, 122.61, 122.62)

Several sections of the consolidated permit regulations establish EPA's strategy for the control of toxic pollutants through the NPDES permit process. The primary mechanism for the identification of discharges of toxic pollutants is the NPDES application form. The consolidated permit regulations and NPDES Form 2c (specifically, Items V and VI of the form) require that existing industrial dischargers submit, in their applications for renewal, quantitative and qualitative data for certain pollutants discharged, used or produced at their facilities (40 CFR 122.53(d) (7), (9), and (10)). Section 122.53(d)(7) requires the submission of quantitative data obtained through analysis of the applicant's discharge. Certain mandatory testing is required for process discharges from primary industry categories. In addition, all dischargers are required to test for any pollutant listed in the Appendices to Part 122 which they have reason to believe may be present in their discharges. Section 122.53(d)(9) requires that the applicant list the toxic pollutants it uses or expects to use or manufacture during the next five years. Section 122.53(d)(10) requires the applicant to include descriptive information on pollutants that it has reason to believe will exceed certain values during the next five years.

Section 122.62(e)(1)(ii) requires the Director to set limitations in a permit to control all toxic pollutants which the discharger does or may use or manufacture as an intermediate or final product or by-product. Section 122.61(a) imposes, as a permit condition, a burden on all existing manufacturing, commercial, mining and silvicultural dischargers to notify the Director as soon as they know or have reason to believe that they will be discharging any toxic pollutant not limited in the permit in amounts above specified "notification levels" (generally 100 μg/l or 5 times the maximum value reported in the application, whichever is higher). Permittees must also notify the Director when they have begun or expect to begin to use or manufacture any toxic pollutant not reported in the permit application. (§ 122.61(a)(2)). Based on such new use or manufacture of toxic substances, § 122.15(a)(5)(ix) authorizes EPA to modify an NPDES permit.

EPA is proposing extensive revisions to these sections to eliminate unnecessary and burdensome testing and reporting requirements on NPDES applicants and permittees. As part of the settlement, EPA also agreed to propose changes to portions of the application form instructions corresponding to the sections affected by today's proposal. The Agency is expecting to propose further changes to application requirements in the near future. To minimize confusion, EPA will make revisions to the application form and instructions at one time.

Quantitative Data Requirements

Several of the proposed changes would affect the type and amount of information which must be submitted in the NPDES application Form 2c. The regulations at 40 CFR 122.53(d)(7) will continue to require that all applicants indicate whether they have reason to believe that toxic pollutants listed in the tables of Appendix D to Part 122 will be or are being discharged. In requesting this quantitative data, however, EPA proposes to establish a threshold level at or above which applicants will be required to test for the presence of such pollutants. Below this level, applicants have the option either to explain why they expect the pollutant to be discharged or to report quantitative data. In establishing this cut-off level for testing purposes, we are minimizing the burden of analytical requirements on permittees, while still providing permit writers with sufficient information to evaluate accurately a discharger's effluent and to impose adequate limitations.

For those pollutants listed in Tables II and III of Appendix D (the toxic pollutants and total phenols) (§ 122.53(d)(7)(iii)(A)), EPA would require permit applicants to report quantitative data for pollutants they expect to be discharged in concentrations of 100 μg/l or parts per billion (ppb) or greater, with the exception of four pollutants for which the threshold is 500 ppb or greater. This cut-off does not apply to process discharges from applicants in the primary industry categories for which applicants must still report quantitative data as specified in § 122.53(d)(7)(ii) and Appendix D to Part 122.

EPA believes that 100 ppb is a reasonable threshold level. Insufficient information is available to set different threshold limits accurately for each toxic pollutant which potentially requires testing. EPA therefore set a level at which discharges may be a concern for at least a substantial number of pollutants. EPA water quality criteria indicate that many of the pollutants required to be analyzed are known to cause significant adverse impact to aquatic organisms and human health at levels of 100 ppb or less. Of course, in imposing water quality based effluent limitations permit writers should consider stream flow, mixing zones, and other site-specific factors, but these factors should be evaluated in connection with the quantitative data for a given discharge. In addition, based on an assessment of Gas Chromatography/Mass Spectrometry (GC/MS) methods 624 and 625, proposed by EPA on December 3, 1979, 44 FR 69464, the Agency has determined that 100 ppb represents a technically achievable level of measurement for most toxic pollutants. For those toxic pollutants in GC/MS methods 624 and 625 with method detection limits of 10

ppb or less, EPA allowed a factor of 10 or more for analytical variability at the lower concentration levels. The Agency finds this factor of 10 to be a conservative estimate of analytical variability based on our experience in using GC/MS to analyze hundreds of wastewater samples during Effluent Guidelines Division industrial surveys. EPA has determined, using these same criteria for evaluating toxic pollutants, that in the case of four pollutants (acrolein, acrylonitrile, 2,4-dinitrophenol, and 2-methyl-4,6-dinitrophenol) a higher threshold level is appropriate. Since these four pollutants have method detection limits of 100–250 ppb (see 44 FR 69464), EPA has raised the threshold level (for application form purposes) for these four pollutants to 500 ppb. A factor of 10 is not used, nor is it appropriate at these higher concentration levels, since there is less analytical variability at 500 ppb.

EPA solicits comments on additional pollutants for which the 100 ppb cut-off level may be either too high or too low, and requests supporting data indicating a more appropriate level for these pollutants.

The 100 ppb level is intended only to be a threshold level for application purposes. It does not mean that permit limitations should necessarily be set for pollutants present at 100 ppb, or that it may never be appropriate to set limitations below this level. The submission of quantitative data, whether under § 122.53(d)(7)(iii), (d)(7)(ii) (for specified GC/MS fractions), or otherwise, does not automatically trigger the establishment of effluent limitations for the pollutants reported. Before setting technology-based limitations on pollutants present in a discharger's effluent at any level, the permit writer must consider whether the appropriate technology can reduce the pollutants in question to that level, and whether the analytical uncertainty and variability that may exist are so significant that the imposition and enforcement of specific limitations at that level may be unreasonable.

For those pollutants listed in Table IV of Appendix D (certain conventional and nonconventional pollutants) (§ 122.53(d)(7)(iii)(B)), EPA proposes that applicants submit quantitative data only for those pollutants which are either directly, or indirectly through means of an indicator, limited in an effluent limitations guideline applicable to the point source category. A different threshold level has been established for this group of pollutants because a numeric threshold level is inappropriate for many of these pollutants (e.g., color, fecal coliform, radioactivity). Here the effluent limitations guidelines will indicate to permit writers which pollutants are of concern. As with the toxic pollutants, applicants would still be required to indicate any pollutant in this section believed to be discharged on a routine basis and, at a minimum, explain why the pollutant is expected to be discharged.

Section 122.53(d)(7)(i)(B) authorizes the Director, upon the request of the permittee, to waive the reporting requirements for pollutants listed in paragraph (d)(7)(i)(A) of § 122.53. EPA proposes to revise the language of this section to clarify that in order to obtain such a waiver, the applicant must demonstrate that reduced reporting requirements will provide sufficient information to write adequate permits. Waivers from the requirement to test for pollutants listed in Item V–A may be requested from the Director for individual facilities. In addition, EPA will consider requests for eliminating this testing for a particular industry catgory or subcategory. Any such request, with a justification for the request, should be submitted to the Director of the Office of Water Enforcement and Permits. For primary industry categories or subcategories EPA will continue to reevaluate the mandatory requirement of § 122.53(d)(7)(ii) to test for organic pollutants in the GC/MS fractions listed under Item V–C of Form 2c (Table II, Appendix D to Part 122).

Future Discharges

EPA proposes to delete § 122.53(d)(9) and (10) (Item VI of consolidated permit application Form 2c). These sections require permittees to predict potential future use, manufacture, or discharge of toxic pollutants. EPA initially believed it was appropriate to require applicants to predict potential increases in the discharge of toxic pollutants. This allowed permit writers to set appropriate limitations at the time the permit was issued and helped to ensure the installation of necessary treatment equipment before discharges began. EPA has reevaluated these requirements in light of its desire to minimize regulatory burdens on applicants. Though prediction of future discharges may be useful information, it is not essential to writing adequate permit limitations. Permittees still must notify the Director when they become aware of increases in the discharge of toxic pollutants, see § 122.61(a). Based on this information, permits may be modified to impose adequate controls. Elsewhere in today's **Federal Register** we are proposing to suspend these provisions pending issuance of final rulemaking on this proposal.

Sampling

In addition to reducing the testing required of applicants, EPA proposes to allow greater flexibility in the type of samples that must be collected. The current regulations, in §122.53(d)(7), require that grab samples be taken for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be taken. EPA now proposes to allow grab samples in certain circumstances where a representative sample of the effluent being discharged is still assured. EPA also proposes to authorize the Director to waive composite sampling for any outfall for which an applicant can demonstrate that the use of an automatic sampler is infeasible and that the minimum required four grab samples will still yield a representative sample of the discharged effluent.

Grab samples would be allowed for effluents from holding ponds or other impoundments with a retention period greater than 24 hours. In this situation, a minimum of one grab sample will generally be sufficient to ensure a representative sample. The grab samples would be allowed whether the holding ponds were located at the end of a treatment system, or were themselves treatment systems.

Finally, because of the infrequent and unpredictable nature of the discharge, we propose to allow grab samples, in place of composite samples, for storm water discharges. In this case, a minimum of one to four grab samples would be required depending on the duration of the discharge.

Used/Manufactured Pollutants

EPA proposes to delete the requirement of §122.62(e)(i)(ii) that the Director control, through effluent limitations imposed in a permit, all toxic pollutants used or manufactured by a discharger. The intent of the Clean Water Act is to control the discharge of pollutants. Although facilities often may discharge pollutants that are used in plant processes or that are manufactured as products or by-products, discharge of all such pollutants will not necessarily occur. EPA therefore believes that the requirement of §122.62(e)(1)(ii) is too broad. The requirement of §122.62(e)(1)(i) to impose effluent limitations on all toxic pollutants which are or may be discharged at levels greater than levels that can be achieved by applicable technology-based

treatment requirements should provide adequate control of toxic discharges. Elsewhere in today's **Federal Register** we are proposing to suspend this provision pending issuance of final rulemaking on this proposal.

Notification of Toxics

Changes are also proposed to §122.61(a). Section 122.61(a) requires an existing industrial permittee to notify the Director when some activity has occurred or will occur causing it to discharge toxic pollutants that were not previously limited in the permit. EPA's intent in imposing this requirement was to receive notification of toxic discharges that occur on a relatively frequent basis and which therefore may be appropriately controlled through permit limitations. The proposed change would make this clear. In general, when such a discharge of a toxic pollutant occurs on a routine or frequent basis, the permittee must notify the Director if that discharge exceeds 5 times the level reported in the permit application form, or 100 ppb, whichever is higher. The choice of 100 ppb as a threshold level for notification purposes was explained above in connection with the application testing requirements.

Although EPA's primary concern is with frequent or routine toxic discharges, infrequent discharge may also be of concern and may indicate the need for a closer examination of the facility's operation and maintenance. Therefore, a permittee must also notify the Director when any one occurrence of a discharge exceeds 10 times the reported value or 500 ppb, whichever is greater. This requirement is proposed as new § 122.61(a)(2). The notification requirements of § 122.61(a) are not intended to impose on a permittee a burden of continuous monitoring throughout the term of the permit. Rather, if the permittee discovers through any means available (*e.g.*, routine monitoring required by the permittee, or a professional judgment that a reasonable potential for discharge exists based on a knowledge of changes in the facility or process operations) that it now expects toxic pollutants not limited or reported in the permit application to be discharged, the permittee must notify the Director. In determining whether a discharge is routine or frequent within the level specified, the permittee should examine the circumstances of the discharge and the operations of its facility or activity to determine whether additional self-monitoring is necessary to make an accurate determination of whether it is routine or frequent.

We propose to delete existing § 122.61(a)(2) because its purpose—to determine the potential for discharge of pollutants—is met by § 122.61(a)(1) and proposed new § 122.61(a)(2), and because the added requirement to report all new toxics used or manufactured is unnecessarily burdensome. Finally, we propose to delete § 122.15(a)(5)(ix) to correspond with the deletion of §§ 122.61(a)(2) and 122.62(e)(1)(ii).

D. Deferral of Hearing on New Source Determination (40 CFR 122.53(h)(4))

The existing rules (§ 122.53(h)) allow the Regional Administrator to defer any requested evidentiary hearing on a tentative new source determination until a final permit decision is made. EPA proposes to amend this rule to preclude deferral of the hearing unless all parties agree. An early hearing will resolve issues relating to the performance standards that the plant must be designed and constructed to meet and the scope of EPA's obligations under the National Environmental Policy Act (NEPA). To defer these issues to the permit issuance stage (which may be years after the new source determination), raises the possibility that, at that time, it may be inordinately expensive to alter the facility to meet standards, or that alternatives EPA must consider under NEPA may no longer be available. When these considerations are not present, on the other hand, and the parties do not object, it may be more efficient to consolidate the hearing on the permit with the hearing on the new source determination. The proposed rule would still allow this to be done.

E. Construction Prohibition (§ 122.66(c)(4), (c)(5))

In issuing permits to "new sources" (see § 122.3 for definition) in States without approved NPDES programs, EPA must comply with NEPA. NEPA requires, among other things, the preparation of an environmental impact statement (EIS) on any major federal action significantly affecting the environment. Existing § 122.66(c) (4) and (5) prohibit the construction of a new source, for which an environmental impact statement is required, before EPA completes its review of environmental impacts under NEPA, unless the applicant signs an agreement to comply with appropriate NEPA-based requirements or the Regional Administrator makes a finding that such construction will not cause significant or irreversible adverse environmental impact.

Many dischargers and applicants have questioned EPA's legal authority to adopt and enforce a ban on construction. The ban was originally intended to ensure that EPA was not deprived, at the time of issuing a permit, of the ability to consider all alternatives to the proposed action, including alternative sites or not constructing the discharging source at all. Those objecting to the ban have argued that the Clean Water Act regulates discharges, not construction, and that EPA is without authority to adopt a prohibition against construction in its regulations.

EPA has carefully considered these arguments and has decided to rescind the ban. In contrast to other federal regulatory statutes (such as the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*), the Clean Water Act does not regulate construction of facilities, only discharges from them. See Section 301. Accordingly, if an applicant began construction in defiance of EPA's ban, the enforcement remedies under Section 309 of the Clean Water Act would not apply. EPA proposes to delete this prohibition entirely. (For a discussion of EPA's authority to condition permits based on NEPA, see Section F of this preamble, *infra.*) Elsewhere in today's **Federal Register** we are proposing to delete the same provisions pending issuance of final rulemaking on the proposal.

Although EPA proposes to lift the construction ban, applicants should bear in mind that the Agency will fully discharge its NEPA obligations for any discharge associated with a new source. Accordingly, the regulation would state that if construction commences before EPA completes any required NEPA review, EPA will not consider in the permit issuance process any costs which the applicant might incur in restoring the site or in altering construction plans. Before beginning construction, the owner or operator of a facility that may be a new source still must submit sufficient information to the Regional Administrator to enable him to make an initial new source determination, see 40 CFR 122.53(h)(2)(i). We strongly recommend that all applicants submit such information, as well as their permit applications, sufficiently early to enable NEPA review to be completed prior to the commencement of construction. Simple prudence dictates that a project should not be constructed in the face of potential unresolved issues relating to siting, design, and construction. These issues can and should be resolved through early NEPA review by the Regional Administrator.

F. Incorporation of NEPA Conditions in NPDES Permits (40 CFR 122.12(g), 122.62(d), 122.66, 124.85)

We are proposing to revise §§ 122.12(g), 122.62(d)(9), and 122.66(c)(3) to make clear that the National Environmental Policy Act (NEPA) cannot be used to review effluent limitations or other requirements established under the Clean Water Act or to set such effluent limitations. Section 511(c)(2) of the CWA expressly prohibits the use of NEPA for such purposes. Sections 122.12(g), 122.62(d)(9), and 122.66(c)(3) would make clear in accordance with the Settlement Agreement in *NRDC* v. *EPA* that, in all other respects, the regulations take no position on the circumstances under which NEPA conditions (other than effluent limitations) may be imposed in NPDES permits.

New § 124.85(e) would provide that evidence on environmental impacts of a facility may be submitted at a hearing for a new source subject to NEPA if the evidence would be relevant to the Agency's obligations under § 122.66(c)(3). That section, in turn, requires EPA, to the extent allowed by law, to conduct an evaluation of significant environmental impacts of the proposed action. Thus, the scope of the evidence on environmental impacts admissible at an NPDES hearing turns ultimately on the scope of the analysis required by NEPA.

In order to minimize delay and duplication of effort, § 124.85(e) also would provide that where a source holds a final RCRA, PSD, UIC, or ocean dumping permit, no evidence may be admitted or cross-examination allowed with respect to issues that were considered or could have been considered in those permit proceedings, even as to matters that may have been within the proper scope of a NEPA analysis. In such cases, the Presiding Officer may (to the extent required by NEPA) instead admit relevant portions of the record of the PSD, RCRA, UIC, or ocean dumping permit proceedings. This evidence may be used to perform the balancing of costs and benefits required by NEPA.

The proposal would also revise § 124.121(f) to make § 124.85(d)(2) and (e) applicable to panel hearings. The purpose of proposed § 124.85(e) is to provide a limited *res judicata* effect in NPDES permit proceedings to determinations in related RCRA, PSD, UIC, or ocean dumping permit proceedings. EPA does not believe that the limited applicability of NEPA to new source NPDES permit proceedings provided in § 511(c) was intended by Congress to provide a vehicle for wholesale reexamination of determinations made by EPA under other statutes to which NEPA plainly does not apply. For example, PSD determinations, like all EPA determinations under the Clean Air Act, are exempt from NEPA's EIS requirements by statute. (See section 7(c)(1) of the Energy Supply and Environmental Coordination Act, 15 U.S.C. 793(c)(1)). Other EPA actions have been uniformly held by courts not to be subject to the EIS requirements. (*See, e.g., Wyoming* v. *Hathaway*, 525 F.2d 66 (10th Cir. 1975).)

EPA's proposal also would minimize duplication of effort and the waste of time and resources that attend relitigation of the same or similar issues in two or more agency proceedings. This approach would help carry out Congress' directive in Section 101(f) of the CWA that "the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."

G. Compliance Schedule Prohibition (40 CFR 122.10(a)(2))

Existing § 122.10(a)(2) prohibits schedules of compliance in the first permits for new sources, new dischargers, and recommencing dischargers. These sources must have in operating condition and "start up" all necessary control equipment before they begin discharging, and they must comply with requirements within the shortest feasible time, not to exceed 90 days. (See section 122.66(d)(4).) However, water quality standards, effluent limitations guidelines, and other CWA requirements may be issued or revised shortly before the source is to begin discharge. In these cases, a source should be allowed a period of time to come into compliance with the newly issued or revised requirements. The proposed amendment would allow a schedule of compliance if any such requirements are issued or revised less than three years before commencement or recommencement of discharge; but new sources or new dischargers would qualify for a schedule only if the new or revised requirement was issued after construction began. Of course, the proposed regulation cannot authorize EPA or a State to issue a permit with a schedule of compliance extending beyond a statutory deadline under the CWA. *Bethlehem Steel Corp.* v. *Train*, 544 F.2d 657 (3rd Cir. 1976).

H. Proper Operation and Maintenance (40 CFR 122.7(e))

Section 122.7(e) requires the permittee to properly operate and maintain all facilities and systems of treatment and control which are installed or used by the permittee to achieve compliance with permit conditions. The provision defines "proper operation and maintenance" to include effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory controls, including appropriate quality assurance procedures.

EPA proposes to amend this section to eliminate most of these examples of proper operation and maintenance. This does not imply that these examples are not elements of proper operation and maintenance. Rather, the proposed change would provide facilities and sources with greater flexibility in establishing internal plant management procedures to assure that proper operation and maintenance is achieved. Adequate quality assurances in laboratory testing and analyses are of particular importance in maintaining the integrity of the self-monitoring requirements of the NPDES program. Therefore, the reference to adequate laboratory controls will be maintained.

EPA also proposes to amend the last sentence of § 122.7(e) to clarify that this provision is not intended to require the installation of back-up equipment, but rather to require *operation* of back-up equipment which is installed by a permittee, where operation of such equipment is necessary to achieve compliance with the conditions of the permit.

I. Notice of Physical Alterations or Additions (40 CFR 122.7(l)(1))

Section § 122.7(l) requires permittees to give notice as soon as possible of "any planned physical alterations or additions to the permitted facility," whether or not the change will require a permit modification or will result in a permit violation. However, many industrial facilities frequently undergo physical alteration or addition. Often such changes are minor and have little or no impact on a permittee's discharge. EPA has evaluated the requirement of § 122.7(l) in light of these concerns and in light of its goal of minimizing reporting requirements on the regulated community. EPA believes that a requirement to report all physical changes to a facility, regardless of the effect on the permittee's discharge, is

unnecessarily burdensome. Instead we propose that a permittee be required to report only those changes or additions which could significantly change the nature or increase the quantity of pollutants being discharged, and for which we would not otherwise receive notice through compliance reporting for pollutants limited in the permit or toxic notification under § 122.61. This should significantly decrease reporting requirements on permittees, yet continue to provide the Agency with appropriate information to determine permit violations or circumstances indicating a need for permit modifications.

J. Bypass (40 CFR122.60(g))

Section 122.60(g)(2) provides that a permittee may allow any bypass which does not cause effluent limitations to be exceeded, but only if the bypass is for essential maintenance to assure efficient facility operations. In all other cases, a bypass is prohibited and enforcement action may be taken unless certain conditions are satisfied. Among these is the condition that there be no feasible alternatives to the bypass. This "no feasible alternative" condition is not satisfied if the permittee could have installed adequate back-up equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance.

EPA proposes to amend the bypass provision to eliminate the restriction which prohibits bypass except where necessary for essential maintenance purposes. This would allow any bypass which does not cause a violation of permit effluent limitations or other permit conditions. EPA believes that as long as a permittee complies with the effluent limitations in its permit, specific methods of treatment should not be required.

Except for discharges of produced water from offshore oil and gas exploration and production facilities, the amendment would require permittees to monitor all affected discharge points at the time of any bypass to assure compliance with permit limitations. The oil and gas industry has pointed out the difficulty and expense of monitoring at the site of offshore facilities. Cost is a particular concern because samples must be transported onshore for analysis. In order to minimize the burden of monitoring for offshore facilities, EPA proposes to authorize the Director to waive these additional monitoring requirements for offshore oil and gas exploration and production facilities where the permittee can demonstrate that effluent limitations will not be exceeded during bypas periods.

EPA also proposes to revise the second sentence of § 122.60(g)(4)(i)(B) to make it clear that permittees need not install back-up equipment in all cases merely because such equipment could prevent the need for bypass. The restriction will apply only if back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent bypass during normal periods of equipment downtime or for preventive maintenance.

K. Upsets for Water Quality Standards-based Limits (40 CFR 122.60(h))

Existing § 122.60(h) provides an affirmative defense in an enforcement action if the discharger shows that noncompliance with technology-based effluent limitations resulted from factors beyond the reasonable control of the discharger. The courts have ruled that EPA must allow for "upsets" in applying technology-based effluent limitations because the technology that underlies those limitations is inherently subject to failure for reasons beyond the control of the operator. *See Marathon Oil* v. *EPA,* 564 F.d 1253 (9th Cir. 1977). Although the same rationale does not apply to effluent limitations based on water quality standards, EPA sees no reason to penalize a discharger that can prove that an upset occurred and that water quality standards were met despite its non-complying discharge. By deleting the words "technology-based" from § 122.60(h)(l), EPA would extend the upset defense provided by § 122.60(h) to encompass violations of permit conditions based on water quality standards. However, § 122.60(h)(4) limits this defense to circumstances in which the discharger can show that the violation of such permit conditions was not accompanied by a violation of the water quality standards.

The proposed rules also clarify the showing necessary to prove that an upset occurred. The existing rules require a discharger to prove that an upset occurred and that "the permittee 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 it is not scientifically possible to obtain. The deletion of the word "specific" from § 122.60(h)(3)(i) simply 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 permitee could not identify the precise cause of the change resulting in the violation. Such evidence could be adduced to show the "cause" required by the regulation, even though the precise cause eluded detection.

Several persons have inquired whether a demonstration of "cause" of an upset required under § 122.60(h) can be based upon circumstantial evidence rather than direct evidence. It is EPA's intent that any demonstration of cause acceptable as proof of fact in court be available to a permittee seeking to utilize the upset defense. 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 limitations were exceeded. The regulation requires at least a thorough investigation of the causes of an incident. Obviously, a claim of upset will be disfavored where previous violations have occurred and no efforts or insufficient efforts were made to identify and remedy the cause or causes.

L. Toxicity-based Limits (40 CFR 125.3(c)(4))

We are proposing to delete § 125.3(c)(4) which provided that effluent limitations based on a permit writer's best professional judgment could be expressed in terms of toxicity provided it was shown that the toxicity limits reflected the appropriate limits (*e.g.,* technology or water quality-based limits) authorized by the Clean Water Act. EPA is in the process of studying toxicity testing and the proper role for such testing in the NPDES permit program. Draft toxicity testing manuals have been prepared, and comments elicited from various members of the public. Questions have been raised by industry as to the appropriateness of setting toxicity-based limits, as to the extent to which effluent toxicity-based limits can be correlated with water quality standards or technology-based limits, and as the need to develop approved measurement protocol for effluent toxicity. Until EPA has completed its review of the manuals and comments, and has adopted a position on whether and how toxicity testing should be used in the permitting process, EPA does not recommend that permit writers set toxicity-based limits in permits.

The permit writer may continue the use of bioassays and biosurveys (or other toxicity tests) to determine the potential toxicity of the effluent discharge on resident aquatic organisms in the receiving water body for the purpose of developing water quality-

based permit limitations under approved or revised State water quality standards. EPA is stressing the need to develop an adequate field data base (including physical, chemical and biological data) upon which determinations can be made by the regulatory authority as to whether permit limitations more stringent than those specified in promulgated effluent guidelines are needed to protect designated uses under State water quality standards. EPA has published a permitting policy, *"Policy for the Second Round Issuance of National Pollutant Discharge Elimination System (NPDES) Permits for Industrial Sources, June 2, 1982,"* that will guide EPA, where it is the permitting authority, in setting priorities for dischargers according to their known or suspected impairment of designated uses in the receiving waters and in the use of toxicity testing to determine water quality-based permit limits, where justified.

In carrying out toxicity testing, EPA will coordinate with State agencies responsible for water quality standards, planning and monitoring to assure maximum utilization of available data and resources in the design and implementation of field studies that may include toxicity testing. The permitting agency may require bioassays or other types of toxicity testing in the permit to complement its own evaluation. Water quality-based permits will be written by EPA in full coordination with the State agency responsible for water quality standards and in accordance with the Continuing Planning Process (Section 303(e) of CWA) and will meet the spirit and intent of Section 303 of the CWA.

EPA, where appropriate, will also continue to test the toxicity of effluents to evaluate the effectiveness of existing technology and water quality-based limitations.

M. Best Professional Judgment (BPJ) (40 CFR 125.3)

In the absence of applicable effluent limitations guidelines, or if those guidelines do not control pollutants of concern at a particular facility, EPA and State Directors may establish effluent limitations on a case-by-case basis, based upon the permit writer's "best professional judgment" (BPJ) as to what limitations the permittee would achieve after applying the technologies representing the "best practicable control technology currently available" (BPT), the "best available technology economically achievable" (BAT), or the "best conventional pollutant control technology" (BCT). Such case-by-case permits have come to be known as "BPJ permits."

This proposal details, for the first time, the statutory factors that must be considered and explained in the fact sheet for a BPJ permit, Section 125.3(c)(2) already requires the permit writers to consider "statutory factors" in issuing BPJ permits, so these changes simply clarify an existing requirement. EPA permit writers also should be familiar with the series of legal opinions issued in connection with evidentiary hearings under the pre-1979 NPDES rules See NILS Publishing Company, *EPA General Counsel Opinions,* "NPDES Permits."

We are proposing to revise § 125.3(c)(2) and (c)(3) to require a permit writer in setting case-by-case permit limitations under section 402(a)(1) of the Act, to make explicit in the fact sheet his consideration and analysis of the relevant statutory factors (now enumerated in § 125.3(d)), and any other factors and documents considered. This requirement will facilitate informed comment by permit applicants as well as subsequent review, if necessary.

We are proposing to delete the parenthetical clause in § 125.3(c)(2)(i) to make clear that in establishing case-by-case permit limitations under section 402(a)(1) of the Act, permit writers are not bound by EPA draft or proposed development documents or guidance. We continue to believe, however, that permit writers must consider all pertinent information, including these documents, in developing case-by-case limits, just as they must consider significant comments and criticisms of the data they contain.

N. Net/Gross Limits (40 CFR 122.63(g), (h))

Section 122.63(g) and (h) spell out the circumstances under which a discharger's technology-based effluent limitations are adjusted to account for the effect of pollutants in the intake water. This proposal clarifies ambiguities in the existing regulation and eases some restrictions on the availability of net credit. However, the proposal is limited to technology-based limitations and does not apply to water quality-based limitations.

The new proposed rule would establish a clear test for the avilability of net credit in cases where the applicable effluent limitations guidelines do not specifically provide that they are to be applied on a net basis. Under the proposed test, net credit is allowed if the discharger operates a control system that would meet the effluent limitations in the absence of intake water pollutants, but fails to do so because of the effects of intake water pollutants. 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 determining eligibility for net credit for nonprocess effluent streams (*e.g.,* noncontact cooling water) which were not considered in the development of applicable effluent limitations guidelines, the "control system" referred to in proposed § 122.63(h)(1)(ii) means any control measure actually applied to the nonprocess stream in order to meet the applicable technology-based limitations and standards. If the guideline does not require that the nonprocess stream be treated by the same type or level of treatment used for process effluent discharges, the permittee need only demonstrate that the control measures actually applied would, if properly installed and operated, meet the applicable limits and standards in the absence of intake pollutants.

One question that arises under this approach is whether the discharger is required to operate its control system in such a manner as to achieve incidental removal of intake water pollutants, even if to do so would require the discharger to incur more costs than would be required in the absence of intake water pollutants. The modified net/gross provision provides as a general rule that a discharger will get credit for pollutants in its intake water only to the extent necessary to enable the discharger to comply with its effluent limitations. If, however, the discharger would incur significant additional costs above those contemplated in the effluent limitations guidelines, in achieving the incidental removal of intake pollutants (*e.g.,* by incurring additional operating costs) the discharger will qualify for a higher credit to account for intake pollutants.

In calculating best professional judgement (BPJ) effluent limitations, the permit writer must determine what limits can be achieved by installation of the required technology, for example, best available technology economically achievable. In calculating BPJ limits, the permit writer should determine what the selected technology would achieve absent pollutants in the intake water, and adjust those limitations if necessary to account for the effects of intake water pollutants on the performance of the selected technology. Higher credits will be allowed where the discharger can show that it would incur significant additional costs above what would otherwise be required to meet BPJ limits, in the absence of intake pollutants, to

achieve the incidental removal of pollutants in its intake water.

Similarly, if a permittee is adding chemicals to remove pollutants, then "proper" operation of the control system identified pursuant to 122.63(h)(1)(ii) could arguably require the permittee to incur a significant additional expense to treat as much of the pollutants present in the effluent as the installed technology is capable of removing. In these cases, the permittee need only operate the control systems in such a manner as to meet the applicable limitations and standards in the absence of pollutants in the intake water. Thus, for example, when the permittee is adding chemicals to remove chlorine added by the permittee's processes, it would only be required to add that amount of chemicals necessary to treat the chlorine added by the facility if it would require a significant additional expense to add more chemicals to also control those pollutants present in the intake water.

Where a company is adding a particular pollutant only during certain periods of the day it would not be required to treat its effluent continuously for that pollutant, but rather to properly operate its treatment system as necessary to remove the pollutant added by process operations. During such periods the discharger is required to treat for the total quantity of pollutants present in the effluent which the installed technology is capable of removing unless to do so would result in a significant additional expense as discussed above.

EPA also proposes to delete the requirement, in existing § 122.63(h)(1), that net credit be allowed only if the discharge is into the same body of water from which the intake is drawn. Many dischargers use intake water from public water supplies, lakes, or streams other than those into which wastes are discharged. The rationale of EPA's proposed rule hinges upon the inability of the discharger to meet effluent limitations with appropriate treatment because of the presence of pollutants in intake water. Of course, this provision would not allow the violation of water quality standards through use of polluted intake water from a saline well or other source. But these problems would be controlled through limitations based on water quality standards, not through the technology-based standards.

The existing rule prohibits net credit for the discharge of pollutants to the extent that intake water pollutants vary physically, chemically, or biologically from the pollutants limited in the permit. The purpose of this restriction was explained in the preamble to the June 7, 1979 NPDES regulations (44 FR 32866). EPA sought to prevent the discharge of wastes that were more toxic than intake water pollutants, but that were controlled by a limitation that did not measure this difference in toxicity, such as a TSS limit. This same purpose is achieved more flexibly by proposed § 122.63(h)(3). Under this provision, net credit would be allowed for pollutants that are "indicators" for toxic pollutants if the discharger agrees to an appropriate effluent limitation on the toxics, or shows that the effluent is similar in chemical characteristics or not substantially greater in toxicity than intake water pollutants.

EPA anticipates the use of three basic techniques to demonstrate similarity in influent and effluent chemical characteristics or toxicity. One is to analyze influent and effluent for priority pollutants and to demonstrate that the levels of priority pollutants in the effluent are not substantially higher than in the influent. A second method is to show that the operation is inherently incapable of producing toxic pollutants. For example, a gravel washing operation would produce water which could reasonably be expected not to be higher in toxicity than incoming river water. A third method would be to perform toxicity testing (such as bioassays) on influent and effluent, to demonstrate that toxicity levels are not substantially higher in the effluent.

Proposed § 122.63(h)(4) clarifies the availability of "net" credit for raw water clarifier sludge. This is sludge that results from treatment of intake water to make the water useable for process purposes. Under existing § 122.63(2)(i), it is not clear that net credit is available for these sludges, because the rules there provide that effluent limitations "shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the discharger." But this provision is no longer necessary under the new test described above, because pollutants removed by intake water treatment systems will have no effect upon the effluent treatment systems proposed or used to meet applicable technology-based limitations and standards. To make it clear that the sludges may be discharged, § 122.63(h)(4) allows the discharges of raw water clarifier sludge provided water quality standards are not violated (for example, by massive sludge discharges resulting in high concentrations of pollutants). Of course, the credit does not extend to water treatment chemicals that may be present in the sludge, and these should be considered by permit writers to determine whether case-by-case limits are necessary.

The net/gross provision does not mandate how a net credit must be determined and applied. EPA continues to recognize the discretion of individual permit writers to adjust permit limits to allow either a fixed net limit or a limit that varies with intake pollutant concentration. Permit writers should apply net limits in such a manner as to allow for straightforward determinations of compliance.

Demonstrations of eligibility for a net limit made in the past under prior regulatory provisions may be accepted in determining eligibility in future permit issuance where such demonstrations meet the requirements of this provision, and where no changes have occurred which would require the adoption of new permit terms or limitations.

In circumstances where a permittee cannot demonstrate the substantial similarity for generic pollutants or otherwise fails to qualify for a net credit, it may, as an alternative, apply for a Fundamentally Different Factors Variance. It should be noted, however, that an FDF demonstration involves a showing that the removal cost is wholly disproportionate to removal costs considered in developing national limits or that a non-water quality environmental impact fundamentally more adverse than the impact considered during the development of the national limit would result.

O. Total Metals (40 CFR 122.63(c))

Under existing § 122.63(c), all limitations on discharges of metals in guidelines-based permits must be expressed in terms of "the total metal (that is, the sum of the dissolved and suspended fractions of the metal)" unless the guideline specifies another technique. Case-by-case permits must also be expressed in terms of total metals unless a limitation on the dissolved or valent form is necessary to carry out the provisions of the CWA. EPA now proposes to amend this regulation to substitute a more flexible requirement.

There are three basic methods for sampling metals in effluents. In "dissolved metals," effluents are carefully filtered before analysis to exclude essentially all solid matter; therefore, only metals that are already dissolved are measured. In "total metals," effluents are treated with hot concentrated acids to dissolve essentially all solid matter; therefore, metals are measured in both dissolved and solid form. "Total recoverable metals" represents an intermediate

method by which effluents are treated with a mild acid to dissolve readily soluble solids, and then filtered to remove relatively insoluble solids from the measurement.

While the chemistry of natural water systems is exceedingly complex, environmental fate studies (see, for examle, "Water Related Environmental Fate of 129 Priority Pollutants," (EPA–440/4–79–029a)) indicate that metals in solid form frequently dissolve in receiving waters and that ambient conditions are more important than effluent conditions in determining the ultimate fate of metals. In addition, metals are frequently removed from raw effluents by precipitating the metal hydroxides. These precipitates, while in sold form, are easily soluble given small changes in pH. On the other hand, industry has argued that the "total metals" mehtod inappropriately measures metals that would dissolve slowly, if at all, under instream conditions. The present regulation proposes the use, generally, of "total recoverable metals." EPA believes that the short-term acid treatment is a reasonable way of approximating the metals that will rapidly dissolve in receiving waters. This change will result in reduced analytical costs, since "total recoverable metals" measurements are cheaper than "total metals." The "total metals" or "dissolved metals" techniques would still be employed where required by applicable effluent limitations guideline. In this respect, it is important to note that data required to be measured or which has been measured by the "total recoverable metals" technique can not be used in place of data required to be measured or whcih has been measured using the "total metals" technique.

P. Actual Production (40 CFR 122.63(b)(2))

Section 122.63(b)(2) requires that production-based permit effluent limitations be based on some "reasonable measure of actual production of the facility, such as the production during the high month of the previous year, or the monthly average for the highest of the previous 5 years." Some industry representatives have questioned whether § 122.63(b)(2) limits "actual production" to one of these two measures discussed in the regulation. The operative requirement of this provision is that the permit be based on a reasonable measure of actual production. The examples given are simply examples, and merely illustrate typical acceptable measures. Other measures of actual production are entirely acceptable if the Director finds them "reasonable." For example, in a cyclical industry that experiences sustained periods of low production and has sharply fluctuating production levels in any one year, the monthly average for the highest month of the previous ten years may be an acceptable measure of expected actual production.

We are proposing a new § 122.63(b)(2)(ii) to address a problem unique to the automotive manufacturing industry. This industry produces a consumer product for which the design changes yearly, the demand is extremely volatile, and the production quotas may need to be adjusted to meet consumer demand with as little as a week's notice. Industry representatives have claimed that a number of plants have been at depressed production levels, far below design capacity, for a number of years. Thus, the auto industry presents a case in which historic production may fall far short of capacity and in which the Director may not be able to modify the permit to increase effluent limitations with sufficient speed to allow production to meet consumer demand.

If an automotive manufacturing applicant shows that actual production has been substantially below capacity but has a reasonable potential for an increase during the permit term, the proposal requires that EPA permit writers establish higher, alternate limits in the permit. The higher limits apply *only* when the permittee's production increases. To qualify for the higher limits, the permittee must provide advance notice at least two business days before each month in which increased production is expected. The actual, not the anticipated, level of production for that month will determine the applicable effluent limitations. The permittee must report both the level of production and the applicable limits on its Discharge Monitoring Report. For example, consider a hypothetical automotive plant with historic production of only 60% of capacity and, based on that production level, permit limits on pollutant "X" of 2 pounds per day. Its alternative limits might be 2.5 pounds per day for production in the range of 61–80% of capacity and 3 pounds per day for 81–100%. On June 20, the plant notifies the Director that it expects to qualify for the alternate limits for the period July 1–15 (the plant need not specify the level of production it anticipates). If its actual production for that period is in the 61–80% range, it would be subject to the 2.5 pound daily limit during that period.

Because we are unsure how frequently this rather complex system of alternate limits will actually be necessary, we have authorized, but not required, its use by approved NPDES States. The proposal is limited to the automobile manufacturing industry because only that industry has provided information justifying the need for permit limits to be adjusted in an extremely short time. If other industries have circumstances that require short-time permit limit adjustment, we invite commenters to provide information (such as data on production variability) that would justify more extensive coverage under this regulation.

Q. Disposal of Pollutants into Wells, POTWs, or Land Application (40 CFR 122.65)

These proposed regulations make several important changes to the provisions of the rules (§ 122.65) governing dischargers that do not dispose of all their wastes to waters of the United States. The existing regulations set forth a formula for adjusting technology-based effluent limitations in such cases to reduce the amount discharged so as to ensure the application of the same level of treatment to the remaining wastes as would have been applied to the total waste stream.

EPA now proposes to amend this rule to recognize that land application and well disposal are forms of treatment which prevent wastes from reaching waters of the United States. Accordingly, no adjustment to technology-based effluent limitations is necessary for wastes that are disposed by these methods. However, pollutants discharged into publicly owned treatment works (POTWs) will be discharged into waters of the United States after treatment. Accordingly, to ensure that use of this means of disposal does not result in more discharge of pollutants than would be the case if the discharger applied technology-based requirements to all its wastes, EPA has retained the adjustment formula to cover industries which discharge a portion of their wastes into POTWs.

We are proposing a new provision to allow the Director to adjust the effluent limitations yielded by the formula if those limitations would require a greater degree of effluent reduction (taking into account both reduction of the POTW and reduction at the permittee's facility) than would have been required if the industry had treated and discharged all its wastes directly to the receiving waters. The proposal is limited to technology-based limitations and would not allow adjustment to water quality based limitations.

Another proposed provision deals with the situation in which effluent limitations guidelines control conventional or nonconventional pollutants that are indicators for toxic pollutants. In these cases, disposal to wells or land disposal may enable the discharger to avoid the technology or technologies that the guidelines assumed would be applied. If this would result in the discharge of more toxic pollutants to waters of the United States than would have been the case had the entire waste stream been treated and discharged, proposed § 122.65(b) authorizes the Director to adjust the limitations as necessary to assure adequate control of toxic pollutants.

The revisions to § 122.65 apply specifically to the calculation of effluent limitations using applicable effluent limitation guidelines. Permit writers should also consider well and POTW disposal and land application in calculating BPJ limits. In particular, EPA recognizes that well and POTW disposal and land application are treatment methods that may be used to meet effluent limitations. Therefore, the costs associated with these treatments should be considered part of the overall treatment costs evaluated in determining the control measures which constitute BAT or BCT for the facility as a whole, and which underlie effluent limits to be applied to the portion of the waste stream which is to be discharged to waters of the United States.

R. Permit Conditions Stayed by State Court or Agency (40 CFR 122.62(d)(3))

Under section 401 of the CWA, before issuing an NPDES permit EPA must obtain a certification from the State in which the discharge originates that the discharge will comply with State legal requirements, including water quality standards. EPA may issue a permit without certification, however, if the State waives certification, or fails to act within a "reasonable period of time (which shall not exceed one year)" after receipt of the request.

Generally, this system has worked well. Occasionally, however, the permit process can become bogged down if a certification is embroiled in State administrative or judicial review proceedings. The purpose of this proposal is to provide a mechanism for breaking the log jam and allowing a permit to be issued, but only after first allowing the State an opportunity to complete review proceedings. If a certification is stayed by a State court or administrative authority, EPA will notify the State that certification will be deemed waived if EPA does not receive a final certification within sixty days (the time allowed under § 124.53(c)(3) for State certification of draft permits). Thereafter, if EPA does not receive a certification, EPA will be free to proceed with permit issuance proceedings, including any necessary hearings, and to apply State standards under section 301(b)(1)(C) of the Act.

This proposal would not amend § 124.55(b). Under that provision, if the State completes review of a certification after a waiver has occurred under this proposal, EPA will nevertheless incorporate the conditions required under the certification if it is received prior to final Agency action on the permit.

S. Non-Adversary Panel Hearing Procedures (40 CFR Part 124, Subpart F)

In the June 7, 1979, revisions to the NPDES regulations, EPA first adopted non-adversary panel procedures (NAPP) for hearings on initial licenses. As the preamble to those regulations explained (44 FR 32887–32892), these new procedures took advantage of the less restrictive requirements of the Administrative Procedure Act (APA) governing initial licensing. The regulations contain a number of innovative features. For example, permit hearings are conducted by a panel of agency experts sitting with an administrative law judge, not by the law judge alone. The procedures also allow the public comment period and the formal hearing to be collapsed into a single proceeding. Separation-of-functions requirements are less restrictive than those for evidentiary hearings. Although no NAPP hearings have yet been held, some industry representatives have challenged some of the procedures.

EPA continues to believe that these procedures will provide a sensible, expeditious framework for hearings raising technical and scientific issues. To some extent, however, the procedures are necessarily in a developmental phase. Little will be learned about their usefulness if they are thrust upon unwilling and uncooperative permit applicants. Accordingly, we are proposing at this time to amend the rules to provide that the panel hearing procedures will not be used unless the applicant consents.

EPA also proposes to extend to NAPP hearings the provisions of § 124.85(b)(16) pertaining to the scope of cross-examination. The proposed regulations would provide in § 124.121(b) (as required in existing § 124.85(b)(16)) that no cross-examination shall be allowed on questions of policy except to the extent required to disclose the factual basis for permit requirements. This does not preclude cross-examination on facts which form the basis for EPA policy, if such cross-examination relates to the factual basis for permit requirements. Thus, for example, if it were EPA policy to require a specified frequency of monitoring for dischargers of certain pollutants, and if a permittee challenged such a proposed monitoring requirement in a permit subject to a hearing, the permit applicant would be allowed to cross-examine a witness on the factual basis for the required monitoring frequency or why the policy was applied to the applicant's situation. The witness (or EPA counsel) would not be able to terminate the examination simply by answering that the required frequency was EPA "policy."

EPA also proposes to prohibit persons who helped formulate the draft from serving as members of the panel in a NAAP proceeding. Such persons will be designated as members of EPA trial staff, and excluded from membership on the decisional body as explained below.

T. Revisions to Evidentiary Hearing Procedures (40 CFR Part 124, Subpart E)

EPA proposes to amend the procedures governing evidentiary hearings in two ways. First, the Agency proposes to disallow *ex parte* communications between EPA witnesses, or persons who helped EPA formulate the draft permit, and members of the decisional body by designating such witnesses and persons as members of the EPA trial staff. For the reasons outlined in the preamble to the final Consolidated Permit Regulations, EPA does not believe this step is required by law. See 45 FR 33415 (May 19, 1980). However, it is being taken to avoid any appearance of unfairness.

The second change significantly alters the requirements of §§ 124.13 and 124.76 that all evidence supporting a party's position be submitted by the close of the informal comment period on the permit. Under the revised provision, parties would still be required to raise all reasonably ascertainable issues and all resonably available arguments during the informal comment period on the permit but would not be required to submit all supporting information. This additional requirement of the existing rules that all factual grounds and supporting material be submitted during the public comment period could be invoked in either of two cases. First, the Regional Administrator could reopen the initial comment period and require all supporting evidence to be submitted at that time only if he believed it would expedite decision-making (proposed § 124.14(a)(1)). Second, section

124.14(a)(3) would authorize the Regional Administrator to require the submission of all evidence during the initial comment period where it reasonably appears that issuance of the permit will be contested and collapsing the comment periods may substantially expedite the decision-making process.

Collapsing the comment periods in this manner may impose greater burdens on permit applicants and participants in the permitting process. Accordingly, the Regional Administrators should exercise this discretion with care. Also, Regional Administrators are encouraged to consult with permit applicants and other known interested persons before exercising their discretion to collapse the comment periods. Such consultation will tend to ensure that the decision is an informed one. EPA anticipates that Regional Administrators will apply these procedures during the initial comment period primarily for major permits, such as for new factories or nuclear power plants, which are likely to be contested and which will involve complex technical issues.

A new § 124.14(a)(4) recognizes that applying the procedures of § 124.14(a)(1) to a permit may require a lengthier than normal comment period.

U. Mistake and Failure of Technology to Meet BPJ Limits as Grounds for Permit Modification (40 CFR 122.15(a)(5))

We are proposing a new § 122.15(a)(5)(xii) to provide for permit modifications to correct technical mistakes or mistaken interpretations of law. Whether the mistake results in overly lenient or overly stringent permit conditions, it makes sense to authorize permit modifications to correct the mistake. An example might be a arithmetical mistake made in calculating a water quality-based limit; however, a claim that the model used to calculate the limit was itself invalid would not constitute a "technical mistake." Similarly, the Director would be authorized to modify a permit that was based on a mistaken determination that a new facility built after proposal of applicable new source performance standards was a "new source" under § 122.3 even though final standards were never promulgated in accordance with § 306 of CWA.

We also are proposing a new § 122.15(a)(5)(xiii) to authorize permit modifications in situations in which a facility with a BPJ permit has installed and properly operated and maintained the treatment technology considered by the Director in developing effluent limitations, but nevertheless has been unable to meet its permit limits. Although such situations seldom should arise, when they do it is unfair to force a discharger who can make the required showing to remain in violation of its permit until a modified renewal permit can be issued under existing § 122.62(1)(2)(i).

This cause for modification would be limited to BPJ permits because a discharger's failure to meet guideline-based permit limits is more appropriately remedied through other means and is generally the result of one of three circumstances. The first is that the discharger has improperly designed, installed, operated or maintained the treatment system, in which case no relief should be granted. The second is that the discharger's facility is fundamentally different from the facilities considered in developing the guideline, in which case the discharger may be eligible for a "fundamentally different factors" variance under Part 125, Subpart D. The third is that the guideline itself is faulty, in which case the discharger should petition EPA to amend the guideline. Because EPA itself has promulgated the guideline on the basis of an extensive rulemaking record it is more appropriate to request the Agency to judge a claim that the guideline is defective than it is to allow an individual permit writer to respond to the request with a change to one individual permit.

V. Anti-backsliding (40 CFR 122.62(l))

Section 122.62(l) reflects EPA's "anti-backsliding policy" which prohibits the renewal or reissuance of an NPDES permit containing effluent limitations less stringent than those imposed in the previous permit, except in limited circumstances recognized under the existing regulations at § 122.62(l). EPA is today proposing to additionally eliminate this anti-backsliding policy in situations where (1) The previous permit limitations were imposed on a case-by-case basis under section 402(a)(1) of the CWA in the absence of final effluent limitations guidelines, and (2) final effluent limitations guidelines are subsequently promulgated which are less stringent. In this case, upon the request of the permittee, the Regional Administrator must revise the permit limitations to reflect the limitations established by the less stringent effluent limitations guideline for those parameters directly covered by the guideline. He may also revise other parameters limited in the permit when the permittee shows they are no longer "appropriate," for example, when they will be adequately controlled through limitations on the parameters specified in the guideline. EPA also is proposing to apply the new policy to existing permits during their terms by adding a new cause for permit modification, § 122.15(a)(5)(xi). NPDES States are free to adopt this new policy, but may of course impose more stringent limitations.

EPA is abandoning its "anti-backsliding" requirement in this circumstance for several reasons. EPA believes that in the application of nationally promulgated effluent imitations guidelines permittees should be given equal treatment, so that companies who have made good faith efforts to comply with previously imposed permit limitations will not be penalized nor placed at a disadvantage with respect to companies operating under subsequently issued, less stringent limitations.

In addition, EPA is now involved in its "second round" of NPDES permitting under the Clean Water Act (CWA). A large number of NPDES permits have expired and must be re-issued. As with the first round of issuance, it is expected that some of these permits will be issued on a case-by-case basis under the authority of section 402(a)(1) because of the absence of nationally promulgated effluent limitations guidelines. If the anti-backsliding rule remains in effect it is likely that many permittees will challenge any permit limitation issued in the absence of guidelines. Thus, the proposed changes would help to avoid widespread challenges to second round permits, a situation which could force the Agency to divert resources from permit issuance proceedings to evidentiary hearings and further legal challenges.

Industry also raised concerns with interpretation of the "information" exception to the anti-backsliding policy in the context of water quality based limitations. For purposes of implementing the anti-backsliding provision in § 122.62(1) for a reissued permit, where limitations in the expiring permit were based on water quality standards, "information" under § 122.15(a)(2) may include alternative grounds (including necessary methodology, mathematical parameters, and other assumptions) for translating water quality standards into water quality based limitations.

W. Modification of NPDES Permits (40 CFR 122.15, 122.17)

The changes in today's proposal do not affect or modify existing permits. Permittees must comply with the terms of their permits, even if those terms differ from the requirements in the regulations. See CWA, § 402(h). However, in order to prevent

unnecessary administrative hearings and litigation during rulemaking proceedings on these proposals, EPA has agreed to propose a new § 122.15(a)(5)(xiv) allowing NPDES permits that became final after March 9, 1982, to be modified to conform to any final rule adopted under the Settlement Agreement for §§ 122.60(g)(2)(ii) (bypass), 122.63(b) (actual production), 122.63(c) (total metals), 122.65 (discharge into POTWs, wells, or by land disposal). A permittee would be required to demonstrate that it qualifies for the modification and that good cause exists to modify the permit. The good cause requirement calls for the permittee to show something more than that it qualifies for the modification since such a showing must be made in any modification request. For example, the permittee might show good cause by demonstrating that the modification would result in cost savings, reduce energy consumption, allow the use of simpler or more reliable control technologies, or otherwise significantly alleviate the burdens imposed by its current permit terms and conditions, including permit limits.

We are also proposing to add a new § 122.17(g) to allow modifications for the following provisions to be processed as minor permit modifications: §§ 122.7(e) (proper operation and maintenance), 122.7(l) (planned facility change), 122.60(g)(2)(i) (bypass), 122.60(g)(4)(i)(B) (bypass), 122.60(h) (upset), and 122.61(a) (toxic notification). Changes to a permit to reflect these new provisions could thus occur through the more streamlined minor modification procedure, which does not entail public notice and comment.

Changes proposed today relating to other provision would not allow modification of the terms or conditions of existing permits. The cut-off date is proposed so as to prevent unnecessary modifications that could place an unreasonable strain on Agency or State resources.

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 clarify the meaning of several generic permit requirements and generally make the regulations more flexible and less burdensome for affected permittees. They do not satisfy any of the criteria specified in section 1(b) of the Executive Order and, as such, do not constitute major rulemakings. This regulation was submitted to the Office of Management and Budget for review.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, EPA must submit to the Director of OMB for review and approval, new or revised requirements for collection of information. To a large extent the amendments proposed today decrease of eliminate requirements for the collection of information. Any final rule will include an explanation of how the information provisions respond to OMB comments.

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 generic permit requirements and otherwise make the regulations more flexible and less burdensome for all permittees. Accordingly, I hereby certify, pursuant to 5 U.S.C. 605(b) that these proposed amendments, if issued in final form will not have a significant impact on a substantial number of small entities.

List of Subjects

40 CFR Part 122

Administrative practice and procedures, Air pollution control, Hazardous materials, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control, Water supply, Confidential business information.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous materials, Waste treatment and disposal, Water pollution control, Water supply, Indians—lands.

40 CFR Part 125

Water pollution control, Waste treatment and disposal.

(Clean Water Act, 33 U.S.C. 1251 *et seq.*)

Dated: November 8, 1982.

Anne M. Gorsuch,

Administrator.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM; THE HAZARDOUS WASTE PERMIT PROGRAM; AND THE UNDERGROUND INJECTION CONTROL PROGRAM

Subpart A—Definitions and General Program Requirements

1. Section 122.4 is proposed to be amended by revising paragraph (d)(7) to read as follows:

§ 122.4 Application for a permit.

* * * * *

(d) * * *

(7) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area. Group II storm water discharges, as defined in § 122.57(b)(3), are exempt from the requirements of this paragraph (d)(7).

* * * * *

2. Section 122.6 is proposed to be amended by revising the introductory text of paragraph (b) and revising paragraph (b)(2) to read as follows:

§ 122.6 Signatories to permit applications and reports.

* * * * *

(b) All reports required by permits, other information requested by the Director, all permit applications submitted for Class II wells under § 122.38 for the UIC program, and all permit applications submitted for Group II storm water discharges under section 122.57 for the NPDES program shall be signed by a person described in paragraph (a), or by a duly authorized representative of that person. A person is a duly authorized representative only if:

* * * * *

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent

responsibility; or, for NPDES only, an individual or position having overall responsibility for environmental matters for the company.

* * * * *

3. Section 122.7 is proposed to be amended by revising paragraph (e) and paragraph (l)(1) to read as follows:

§ 122.7 Conditions applicable to all permits.

* * * * *

(e) *Proper operation and maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also include adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

* * * * *

(l) *Reporting requirements.* (1) *Planned changes.* The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. For NPDES permittees, notice is required only when the alteration or addition could significantly change the nature or increase the quantity of pollutants discharged which are subject neither to effluent limitations in the permit, nor to notification requirements under § 122.61(a)(1).

* * * * *

4. Section 122.10 is proposed to be amended by revising paragraph (a)(2) to read as follows:

§ 122.10 Schedules of compliance.

(a) * * *

(2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

* * * * *

5. Section 122.12 is proposed to be amended by revising paragraph (g) as follows:

§ 122.12 Considerations under Federal law.

* * * * *

(g) *For NPDES only,* the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.,* may require preparation of an Environmental Impact Statement and consideration of EIS-related permit conditions (other than effluent limitations) as provided in § 122.66(c).

6. Section 122.15 is proposed to be amended by removing paragraph (a)(5)(ix), redesignating paragraphs (a)(5)(x) and (a)(5)(xi) as (a)(5)(ix) and (a)(5)(x) respectively and adding new paragraphs (a)(5) (xi), (xii), (xiii), and (xiv) as follows:

§ 122.15 Modification or revocation and reissuance of permits.

(a) * * *

(5) * * *

(xi) When the permittee's effluent limitations were imposed under section 402(a)(1) of the CWA and these limitations are more stringent than an applicable, subsequently promulgated effluent limitations guideline. Upon the permittee's request, the State Director may, and the Regional Administrator shall, modify the permit (A) by conforming the permit to the subsequently promulgated guidelines for pollutants directly limited by those guidelines, and (B) by deleting or adjusting permit limitations for pollutants not directly limited by the guidelines upon a showing by the permittee that such limitations are not appropriate. Nothing in paragraph (a)(5)(xi) of this section shall limit the availability of a fundamentally different factors variance under § 125.30.

(xii) To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

(xiii) When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under section 402(a)(1) of the CWA and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluents limitations. If there is a subsequently promulgated, applicable effluent limitations guideline, see paragraph (a)(5)(xi) of this section to determine the modified limitations.

(xiv) When the permit becomes final and effective on or after March 9, 1982, and the permittee applies for the modification no later than 90 days after the effective date of final regulations issued under the Settlement Agreement dated June 7, 1982 in connection with *Natural Resources Defense Council* v. *EPA,* No. 80–1607 and consolidated cases, if the permittee shows good cause in its request and that it qualifies for the modification, to conform to changes respecting the following regulations issued under that Settlement Agreement:

40 CFR 122.60(g)(2)(ii)
40 CFR 122.63(b)
40 CFR 122.63(c)
40 CFR 122.65.

* * * * *

7. Section 122.17 is proposed to be amended by adding a new paragraph (g)(3) to read as follows:

§ 122.17 Minor modifications of permits.

* * * * *

(g) * * *

(3) When the permit becomes final and effective on or after March 9, 1982, to conform to changes respecting §§ 122.7(e), 122.7(1), 122.60(g)(2)(i), 122.60(g)(4)(i)(B), 122.60(h) and 122.61(a) issued under the Settlement Agreement dated June 7, 1982 in connection with *Natural Resources Defense Council* v. *EPA,* No. 80–1607 and consolidated cases.

* * * * *

Subpart D—Additional Requirements for National Pollutant Discharge Elimination System Programs Under the Clean Water Act

8. Section 122.53 is proposed to be amended by designating the existing paragraph (b) as (b)(1) and adding a new paragraph (b)(2); by revising the introductory text of paragraph (d)(7), revising paragraphs (d)(7) (i)(B), (d)(7)(iii), and (d)(9); by removing paragraph (d)(10); by redesignating paragraphs (d)(11) through (d)(13) as (d)(10) through (d)(12); and by revising paragraph (h)(4) to read as follows:

§ 122.53 Application for a permit.

* * * * *

(b) * * *

(2) Any existing storm water discharger under § 122.57 which does not have an effective permit shall submit an application by (6 months after publication of this regulatory revision in the **Federal Register**). Any discharger designated under § 122.57(c) shall submit an application within 6 months of notification of its designation.

* * * * *

(d) * * *

(7) *Effluent characteristics.* Information on the discharge of pollutants specified in this subparagraph. When "quantitative

data" for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. When an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outfalls. The requirements in paragraphs (d)(7) (iii) and (iv) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. However, a minimum of one grab sample may be taken for effluents from holding ponds or other impoundments with a retention period greater than 24 hours, and a minimum of one to four (4) grab samples may be taken for storm water discharges depending on the duration of the discharge. One grab shall be taken in the first hour (or less) of discharge with one additional grab taken in each succeeding hour of discharge up to a minimum of four grabs for discharges lasting four or more hours. In addition, the Director may waive composite sampling for any outfall for which the applicant demonstrates that the use of an automatic sampler is infeasible and that the minimum of four (4) grab samples will be a representative sample of the effluent being discharged. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(i) * * *

(B) The Director may waive the reporting requirements for individual point sources or for a particular industry category for one or more of the pollutants listed in paragraph (d)(7)(i)(A) of this section if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

* * * * *

(iii)(A) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table IV of Appendix D (certain conventional and nonconventional pollutants) is discharged from each outfall. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator, the applicant must report quantitative data. For every pollutant discharged which is not so limited in an effluent limitations guideline, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

(B) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in Table II or Table III of Appendix D (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under paragraph (d)(7)(ii) of this section, is discharged from each outfall. For every pollutant expected to be discharged on a routine or frequent basis in concentrations of 100 ppb or greater the applicant must report quantitative data. For acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, where these four pollutants are expected to be discharged on a routine or frequent basis in concentrations of 500 ppb or greater the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than 100 ppb, or in the case of acrolein, acrylonitrile, 2,4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, in concentrations less than 500 ppb the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under paragraph (d)(8) of this section is not required to analyze for pollutants listed in Table II of Appendix D (the organic toxic pollutants).

* * * * *

(9) *Storm water discharge exemption.* (i) An applicant that qualifies as a Group I storm water discharger under § 122.57(b)(2) is exempt from the requirement in paragraph (d)(7)(iii) of this section that it report quantitative data for those pollutants listed in Tables II, III, or IV that it knows or has reason to believe are discharged from the outfall. However, the applicant must indicate whether it knows or has reason to believe that any of those pollutants are present. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged.

(ii) An applicant that qualifies as a Group II storm water discharger under § 122.57(b)(3) is exempt from the requirements of paragraphs (d)(2), (d)(5), (d)(6), (d)(7), (d)(10), and (d)(11) of this section.

(iii) For the purpose of paragraph (d)(3) of this section, both Group I and Group II storm water dischargers may estimate the average flow of their discharge and must indicate the rainfall event this estimate is based on.

(iv) The Director may require additional information under paragraph (d)(12) of this section.

* * * * *

(h) * * *

(4) Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under Subpart E of Part 124 within 30 days of issuance of the public notice of the initial determination. If all parties to the evidentiary hearing on the determination agree, the Regional Administrator may defer the hearing until after a final permit decision is made, and consolidate the hearing on the determination with any hearing on the permit.

* * * * *

9. Section 122.57 is proposed to be revised to read as follows:

§ 122.57 Storm Water Discharges.

(Applicable to State NPDES programs, see § 123.7)

(a) *Permit requirement.* Storm water discharges, as defined in this section, are point sources subject to the NPDES permit program. The Director may issue an NPDES permit or permits for discharges into waters of the United States from a storm water discharge covering all conveyances which are a part of that storm water discharge. Where there is more than one owner or operator of a single system of such conveyances, any or all discharges into the storm water discharge system may be identified in the application submitted by the owner or operator of the portion of the system that discharges directly into waters of the United States. Any such application shall include all information regarding dischargers into the system that would be required if the dischargers submitted separate applications. Dischargers so identified shall not require a separate permit unless the Director specifies otherwise. Any permit covering more than one

owner or operator shall identify the effluent limitations, if any, which apply to each owner or operator. Where there is more than one owner or operator, no discharger into a storm water discharge may be subject to a permit condition for discharges into the storm water discharge other than its own discharges into that system without its consent. (*See* § 122.53(b)(2) for application deadlines for existing storm water discharges.)

(b) *Definitions.* (1) "Storm water discharge" means a conveyance or system of conveyances (include pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and which

(i) Discharges storm water runoff contaminated by contact with process wastes, raw materials, toxic pollutants, hazardous pollutants listed in Table V of Appendix D, or oil and grease; or

(ii) Is designated under paragraph (c) of this section.

"Storm water discharge" excludes conveyances which discharge storm water runoff combined with municipal sewage.

(2) "Group I storm water discharge" means any 'storm water discharge' which is

(i) Subject to effluent limitations guidelines or toxic pollutant effluent standards;

(ii) Designated under paragraph (c) of this section; or

(iii) Located at an industrial plant or in plant associated areas, if there is a potential for significant discharge of storm water contaminated by contact with process wastes, raw materials, toxic pollutants, or hazardous pollutants listed in Table V of Appendix D. "Plant associated areas" means industrial plant yards, immediate access roads, drainage ponds, refuse piles, storage piles or areas, and material or products loading and unloading areas. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots. (See § 122.53(d)(9)(i) for exemptions from certain application requirements.)

(3) "Group II storm water discharge" means any "storm water discharge" not included in paragraph (b)(2) of this section. (See § 122.4(d)(7) and § 122.53(d)(9)(ii) for exemptions from certain application requirements.)

(4) A conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff which does not constitute a "storm water discharge" under paragraph (b)(1) of this section is not considered a point source subject to the requirements of CWA.

(5) Whether a system of conveyances is or is not a storm water discharge for purposes of this section shall have no bearing on whether the system is eligible for funding under Title II of CWA. See 40 CFR § 35.925–21.

(c) *Case-by-case designation of storm water discharges.* The Director may designate a conveyance or system of conveyances primarily used for collecting and conveying storm water runoff as a storm water discharge. This designation may be made when:

(1) A Water Quality Management plan under section 208 of CWA which contains requirements applicable to such point sources is approved; or

(2) The Director determines that a storm water discharge is a significant contributor of pollution to the waters of the United States. In making this determination the Director shall consider the following factors:

(i) The location of the discharge with respect to waters of the United States;

(ii) The size of the discharge;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

10. Section 122.59 is proposed to be amended by revising paragraph (a)(2) to read as follows:

§ 122.59 General permits.

* * * * *

(a) * * *

(2) *Sources.* The general permit may be written to regulate, within the area described in paragraph (a)(1) of this section, either:

(i) Storm water discharges; or

(ii) A category of point sources other than storm water discharges if the sources all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes;

(C) Require the same effluent limitations or operating conditions;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

* * * * *

11. Section 122.60 is proposed to be amended by revising paragraphs (g)(2), (g)(4)(i)(B), (h)(1), (h)(2), and (h)(3)(i); by redesignating paragraph (h)(4) as (h)(5) and by adding a new paragraph (h)(4) to read as follows:

§ 122.60 Additional conditions applicable to all NPDES permits.

* * * * *

(g) * * *

(2)(i) The permittee may allow any bypass to occur if combined discharges from the outfall being bypassed and from any bypass discharge points do not exceed effluent limitations, on the following conditions:

(A) Except for discharges of produced water from offshore oil and gas exploration and production facilities, all such discharge points shall be monitored during reporting periods affected by by-passes, and all results shall be reported to the Director in the Discharge Monitoring Report. The permit shall include such additional monitoring requirements as the Director finds necessary to assure that effluent limitations are not exceeded.

(B) For discharges of produced water from offshore oil and gas exploration and production facilities, the Director, upon demonstration by the permittee that effluent limitations will not be exceeded during certain bypass conditions, may allow such bypasses to occur without monitoring.

(ii) These bypasses are not subject to the provisions of paragraph (g)(3) and (g)(4) of this section.

* * * * *

(4) * * *

(i) * * *

(B) 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 preventive maintenance; and

* * * * *

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

(2) *Effect of an upset.* An upset constitutes an affirmative defense to an action brought for noncompliance with technology-based permit effluent limitations if the requirements of paragraph (h)(3) of this section are met. No determination made during administrative review of claims that

noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) * * *

(i) An upset occurred and that the permittee can identify the cause(s) of the upset;

* * * * *

(4) *Upsets where limitations are based on water quality.* In addition to the demonstration required under paragraph (h)(3) of this section, a permittee who wishes to establish the affirmative defense of upset for a violation of effluent limitations based upon water quality standards shall also demonstrate that the standards were achieved in all stream segments, and for all pollutants or parameters, which could have been affected by the noncomplying discharge.

* * * * *

12. Section 122.61 is proposed to be amended by revising the introductory text of paragraph (a)(1), (a)(1)(iii), and (a)(2) to read as follows:

§ 122.61 Additional conditions applicable to specified categories of NPDES permits.

(a) * * *

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

* * * * *

(iii) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.53(d)(7); or

* * * * *

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

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

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

(iii) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with § 122.53(d)(7);

(iv) The level established by the Director in accordance with § 122.62(f).

* * * * *

13. Section 122.62 is proposed to be amended by revising paragraphs (d)(3), (d)(9) and (l)(1) to read as follows; by removing paragraph (e)(1)(ii); and by redesignating paragraph (e)(1)(i) as paragraph (e)(1):

§ 122.62 Establishing NPDES permit conditions.

* * * * *

(d) * * *

(3) Conform to the conditions of a State certification under section 401 of the CWA which meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit which may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

* * * * *

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* and section 511 of the CWA, when EPA is the permit issuing authority (See § 122.66(c)).

* * * * *

(l) *Reissued permits:* (1) When a permit is renewed or reissued, limitations, standards, or conditions which are at least as stringent as the final limitations, standards, or conditions in the previous permit (unless there exists cause for permit modification under § 122.15(a)).

* * * * *

14. Section 122.63 is proposed to be amended by revising paragraphs (b)(2), (c), (g), and (h) to read as follows:

§ 122.63 Calculating NPDES permit conditions.

* * * * *

(b) * * *

(2)(i) Except in the case of POTWs or as provided in subparagraph (ii) of this paragraph, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility, such as the production during the high month of the previous year, or the monthly average for the highest of the previous 5 years. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

(ii) *(Applicable to the automotive manufacturing industry)* If the applicant satisfactorily demonstrates to the Director at the time the application is submitted that its actual production, as indicated in (b)(2)(i) of this section, is substantially below maximum production capability and that there is a reasonable potential for an increase above actual production during the duration of the permit, the State Director may and the Regional Administrator shall include a condition establishing alternate permit limitations, standards, or prohibitions based upon the increased production levels anticipated (not to exceed maximum production capability). The condition shall authorize discharges in compliance with the higher alternate limitations, standards, or prohibitions upon written notice to the Director at least two business days before the month in which increased production is anticipated. The notice shall state that the permittee anticipates qualifying for alternate limits for a period not to exceed thirty days. If increased production is anticipated to continue beyond the period identified in the notice, a new notice shall be submitted at least two business days prior to the commencement of the new period. The permittee shall comply with the limitations, standards, or prohibitions that reflect the level of actual production for that period not to exceed the maximum level. The permittee shall submit with the DMR for that period the level of production that actually occurred and the limitations, standards, or prohibitions applicable to that level of production.

(c) *Metals.* All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as defined in 40 CFR Part 136 unless:

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

(2) In establishing permit limitations on a case-by-case basis under § 125.3, it is necessary to express the limitation on the metal in the dissolved or valent or total form to carry out the provisions of the CWA; or

(3) All approved analytical methods for the metal inherently measure only its dissolved form (*e.g.*, hexavalent chromium).

* * * * *

(g) *Pollutants in intake water.* Except as provided in paragraph (h) of this

section technology-based effluent limitations in permits shall not be adjusted for pollutants in the intake water. This paragraph (g) and paragraph (h) do not preclude taking into account, as appropriate, the presence of pollutants in intake water in implementing water quality standards.

(h) *Net Limitations:* (1) Upon request of the discharger, technology-based effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, adjusted to reflect credit for pollutants in the discharger's intake water, if:

(i) The applicable effluent limitations and standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis; or

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

(2) A permit containing effluent limitations or standards imposed on a net basis must require that:

(i) The permittee conduct additional monitoring (for example, for flow and concentration of pollutants) as necessary to determine continued eligibility for and compliance with any such adjustments; and

(ii) The permittee notify the Director if eligibility for an adjustment under this section has been altered or no longer exists. In that case, the permit may be modified accordingly under § 122.15.

(3) Permit effluent limitations or standards adjusted under this subsection shall be calculated on the basis of the amount of pollutants present in the intake water, only to the extent the discharger demonstrates is necessary to meet the applicable limitations and standards after applying the control system identified pursuant to § 122.63(h)(1)(ii) except to the extent that the applicant can show that the costs of control are significantly greater than the costs reflected in applicable effluent limitations guidelines, as a result of the presence of intake pollutants. Where the Director concludes that limitations on generic measures of pollution, such as Oil and Grease, Total Suspended Solids, Biochemical Oxygen Demand, or Total Organic Carbon are necessary to control toxic or non-conventional pollutants not otherwise limited in the permit, effluent limitations or standards for such generic measures of pollution may be adjusted only if:

(i) The permittee agrees to the inclusion of specific effluent limitations on those nonconventional or toxic pollutants; or

(ii) The permittee shows that the effluent is not substantially greater in toxicity than the intake water; or

(iii) The permittee shows that the constituents of the generic measure in the effluent are substantially similar in chemical characteristics to the same constituents of the generic measure in the intake water, in which case the limitations may be adjusted to the extent such similarity is demonstrated. The showing of substantial similarity required under § 122.63(h)(3) may be made by showing similarity in the levels of priority toxic pollutants in the intake water and effluent, performing an aquatic toxicity test on the intake water and effluent, or in appropriate cases, by demonstating that the nature of the facility, its processes, or other circumstances make clear that the intake water and effluent are similar.

(4) Discharges of raw water clarifier sludge and filter backwash are discharges subject to NPDES permits and thus are eligible for a net limit in accordance with the procedures outlined in this provision. In showing eligibility for a net limitation the permittee need not make the demonstration required by paragraph (h)(1)(ii) of this section as to the use of control technology to meet the applicable effluent limitations. However, in calculating a net limit, the permit writer shall provide that the discharge does not result in the violation of applicable water quality standards. The permit writer should consider in setting effluent limitations those chemicals, if any, added to the discharge. Net limits for discharges of raw water clarifier sludge or filter backwash shall be available for those discharges at the outfall at which the discharge actually occurs, whether this is through a separate outfall or in combination with other discharges.

* * * * *

15. Section 122.65 is proposed to be amended by revising the introductory text of paragraph (a) and paragraph (a)(2), redesignating paragraphs (b) and (c) as (c) and (d), adding a new paragraph (b), and by revising the introductory text of newly redesignated paragraph (c) to read as follows:

§ 122.65 Disposal of pollutants into wells, into publicly owned treatment works or by land application.

(Applicable to State NPDES program, see § 123.7.)

(a) *Disposal into POTWs.* When part of a discharger's process wastewater is not being discharged into waters of the United States or contiguous zone because it is disposed into a POTW, thereby reducing the flow or level of pollutants being discharged into waters of the United States, applicable effluent standards and limitations for the discharge in an NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

* * * * *

(2) In all cases other than those described in paragraph (a)(1) of this section, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the United States, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated shall be further adjusted by the Director if application of this paragraph would require a greater degree of effluent reduction (taking into account both reduction at the POTW and reduction at the permittee's facility) than would have been required by the effluent limitations guideline if the permittee had discharged all wastewater directly.

This method may be algebraically expressed as:

$$P = ExN/T$$

where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total wastestream, N is the wastewater flow to be treated and discharged to waters of the United States, and T is the total wastewater flow.

(b) *Disposal into wells or by land application.* If all the wastes from a particular process are discharged into wells or to land application, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards. If a portion of the wastes from the process is discharged to wells or to land application, the discharger shall receive the full amount of allocation authorized under the applicable effluent limitations guidelines unless:

(1) The allocation is for a pollutant which is an indicator for a toxic pollutant; and

(2) The levels of toxic pollutants which will be discharged are higher than they would be if the guidelines were applied to the entire waste stream. In such cases, the Director shall adjust the effluent limitations as necessary to ensure the degree of control of toxic

pollutants contempleted by the applicable effluent limitations guidelines.

(c) Paragraphs (a) and (b) of this section shall not apply to the extent that promulgated effluent limitations guidelines:

* * * * *

16. Section 122.66 is proposed to be amended by revising paragraphs (c)(3) and (c)(4), and removing (c)(5) to read as follows:

§ 122.66 New sources and new dischargers.

* * * * *

(c) * * *

(3) The Regional Administrator, to the extent allowed by law, shall issue, condition (other than imposing effluent limitations), or deny the new source NPDES permit following a complete evaluation of any significant beneficial and adverse impacts of the proposed action and a review of the recommendations contained in the EIS or finding or no significant impact.

(4) An applicant for a new source permit for which an EIS may be required under NEPA should submit the application sufficiently early to allow for completion of NEPA review prior to commencement of construction. If the applicant commences construction prior to completion of NEPA review, EPA will not consider, in balancing costs and benefits, any costs which might be incurred by the applicant in restoring the site or in altering construction plans.

Appendix D to Part 122—NPDES Permit Application Testing Requirements (§122.53) [Amended]

17. Appendix D of Part 122 is proposed to be amended by retitling Table III to read as follows:

Table III: Other Toxic Pollutants (Metals and Cyanide) and Total Phenols

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart A—General Program Requirements

18. Section 124.13 is proposed to be revised to read as follows:

§ 124.13 Obligation to raise issues and provide information during the public comment period.

All persons, including applicants, who believe any condition of a draft permit is inapporpriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10. Any supporting materials which are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the administrative record available to EPA as directed by the Regional Administrator. (A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted under § 124.10 to the extent that a commenter who requests additional time demonstrates the need for such time.)

19. Section 124.14 is proposed to be amended by redesignating paragraphs (a) through (d) as (b) through (e) and by adding a new paragraph (a) to read as follows:

§ 124.14 Reopening of the public comment period.

(a)(1) The Regional Administrator may order the public comment period reopened if the procedures of this paragraph could expedite the decision-making process. When the public comment period is reopened under this paragraph, all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Regional Administrator's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting material, by a date, not less than sixty days after public notice under paragraph (a)(2) of this section, set by the Regional Administrator. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than twenty days after the date set for filing of the material, set by the Regional Administrator.

(2) Public notice of any comment period under this paragraph shall identify the issues as to which the requirements of § 124.14(a) shall apply.

(3) On his own motion or on the request of any person, the Regional Administrator may direct that the requirements of paragraph (a)(1) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying the paragraph (a)(1) of this section requirements will substantially expedite the decision-making process. The notice of the draft permit shall state whenever this has been done.

(4) A comment period of longer than 60 days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they shall be granted under § 124.10 to the extent they appear necessary.

* * * * *

Subpart D—Specific Procedures Applicable to NPDES Permits

20. Section 124.56 is proposed to be amended by adding a new paragraph (b)(1)(iv) to read as follows:

§ 124.56 Fact sheets.

* * * * *

(b) * * *

(1) * * *

(iv) Limitations set on a case-by-case basis under § 125.3(c)(2) or (c)(3).

* * * * *

Subpart E—Evidentiary Hearing for EPA-Issued NPDES Permits and EPA-Terminated RCRA Permits

21. Section 124.76 is proposed to be revised to read as follows:

§ 124.76 Obligation to submit evidence and raise issues before a final permit is issued.

In any case where the Regional Administrator elected to apply the requirements of § 124.14(a), no evidence shall be submitted by any party to a hearing under this Subpart that was not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit, unless good cause is shown for the failure to submit it. No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as Part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced. Good cause exists for the introduction of data available on

operation authorized under § 124.60(a)(2).

22. Section 124.78 is proposed to be amended by revising paragraph (a)(1) to read as follows:

§ 124.78 Ex parte communications.

(a) * * *

(1) "Agency trial staff" means those Agency employees, whether temporary or permanent, who have been designated by the Agency under § 124.77 or § 124.116 as available to investigate, litigate, and present the evidence, arguments, and position of the Agency in the evidentiary hearing or nonadversary panel hearing. Any EPA employee, consultant, or contractor who is called as a witness by EPA trial staff, or who assisted in the formulation of the draft permit which is the subject of the hearing, shall be designated as a member of the Agency trial staff;

* * * * *

23. Section 124.85 is proposed to be amended by adding a new paragraph (e) to read as follows:

§ 124.85 Hearing procedures.

* * * * *

(e) *Admission of Evidence on Environmental Impacts.* If a hearing is granted under this Subpart for a new source subject to NEPA, the Presiding Officer may admit evidence relevant to any environmental impacts of the permitted facility if the evidence would be relevant to the Agency's obligations under § 122.66(c)(3). If the source holds a final RCRA, PSD, or UIC permit, or an ocean dumping permit under the Marine Protection, Research, and Sanctuaries Act (MPRSA), no such evidence shall be admitted nor shall cross-examination be allowed relating to (1) effects on air quality, (2) effects attributable to underground injection or hazardous waste management proctices, or (3) effects of ocean dumping subject to the MPRSA, which were considered or could have been considered in the PSD, RCRA, UIC, or MPRSA permit issuance proceedings. However, the presiding officer may admit without cross-examination or any supporting witness relevant portions of the record of PSD, RCRA, UIC, or MPRSA permit issuance proceedings.

Subpart F—Non-Adversary Panel Procedures

24. Section 124.111 is proposed to be amended by revising the introductory text of paragraph (a) as follows:

§ 124.111 Applicability.

(a) Except as set forth in this Subpart, the Regional Administrator may, with the consent of the applicant, apply the procedures of this Subpart in lieu of, and to complete exclusion of, Subparts A through E in the following cases:

* * * * *

25. Section 124.120 is proposed to be amended by revising paragraph (a) as follows:

§ 124.120 Panel hearing.

(a) A Presiding Officer shall preside at each hearing held under this Subpart. An EPA panel shall also take part in the hearing. The panel shall consist of three or more EPA temporary or permanent employees having special expertise or responsibility in areas related to the hearing issue, none of whom shall have taken part in formulating the draft permit. If appropriate for the evaluation of new or different issues presented at the hearing, the panel membership, at the discretion of the Regional Administrator, may change or may include persons not employed by EPA.

26. Section 124.121 is proposed to be amended by revising paragraphs (a)(1), (b) and (f) to read as follows:

§ 124.121 Opportunity for cross-examination.

(a) * * *

(1) The disputed issues(s) of material fact. This shall include an explanation of why the questions at issue are factual, the extent to which they are in dispute in light of the then-existing record, and the extent to which they are material to the decision on the application; and

* * * * *

(b) After receipt of all motions for cross-examination under paragraph (a) of this section, the Presiding Officer, after consultation with the hearing panel, shall promptly issue an order either granting or denying each request. No cross-examination shall be allowed on questions of policy except to the extent required to disclose the factual basis for permit requirements, or on questions of law, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in permit issuance proceedings. Orders granting requests for cross-examination shall be served on all parties and shall specify:

(1) The issues on which cross-examination is granted;

(2) The persons to be cross-examined on each issue;

(3) The persons allowed to conduct cross-examination;

(4) Time limits for the examination of witnesses by each cross-examiner; and

(5) The date, time and place of the supplementary hearing at which cross-examination shall take place.

* * * * *

(f) The provisions of §§ 124.85(d)(2) and 124.84(e) apply to proceedings under this Subpart.

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

27. Section 125.3 is proposed to be amended by revising paragraphs (c)(2) and (c)(3), removing paragraph (c)(4), redesignating paragraphs (d) through (g) as (e) through (h) and adding a new paragraph (d) to read as follows:

§ 125.3 Technology-based treatment requirements in permits.

* * * * *

(c) * * *

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in § 125.3(d) and shall consider:

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

(ii) Any unique factors relating to the applicant. The fact sheet required by § 124.56 shall set forth the basis for any case-by-case limitations imposed under this section. This basis shall include an analysis of the permit writer's application of the appropriate factors listed in § 125.3(d), an analysis of the selection and application of any other factors considered by the permit writer (*e.g.*, any unique site-specific factors), and specific references to and explanations of the use of and the applicability of any federal or state guidance memoranda, materials or documents relied on in setting the limitations.

(3) Through a combination of the methods in paragraphs (c)(1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act. The fact sheet required by § 124.56 shall set forth the basis for these limitations as required under paragraph (c)(2) of this section and, if effluent limitations guidelines are applicable to the facility covered by the permit, shall also explain why regulation of pollutants or activities not regulated by the applicable effluent limitations guidelines is needed.

(d) In setting case-by-case limitations pursuant to § 125.3(c), the permit writer must apply the following factors:

(1) For BPT requirements:

(i) The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

(ii) The age of equipment and facilities involved;

(iii) The process employed;

(iv) The engineering aspects of the application of various types of control techniques;

(v) Process changes; and

(vi) Non-water quality environmental impact (including energy requirements).

(2) For BCT requirements:

(i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

(ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;

(iii) The age of equipment and facilities involved;

(iv) The process employed;

(v) The engineering aspects of the application of various types of control techniques;

(vi) Process changes; and

(vii) Non-water quality environmental impact (including energy requirements).

(3) For BAT requirements:

(i) The age of equipment and facilities involved;

(ii) The process employed;

(iii) The engineering aspects of the application of various types of control techniques;

(iv) Process changes;

(v) The cost of achieving such effluent reduction; and

(vi) Non-water quality environmental impact (including energy requirements).

* * * * *

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BILLING CODE 6560-50-M

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40 CFR Part 122

[WH-FRL-2228-6a]

Consolidated Permit Regulations; Suspension of NPDES Application Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed suspension of portion of final rule.

SUMMARY: On June 7, 1982, EPA entered into a Settlement Agreement with numerous industry petitioners in the consolidated permit regulations litigation (*NRDC* v. *EPA*, No. 80-1607 and consolidated cases, (D.C. Cir., filed June 2, 1980)). The Settlement Agreement resolved many issues relating to requirements of the National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA). This notice proposes to suspend certain provisions of the consolidated permit regulations and related provisions of consolidated permit application forms 1 and 2c to correspond with proposed changes to the regulations agreed to in that settlement. This proposal would make three types of changes. First, certain reporting requirements which apply to all existing industrial dischargers applying for NPDES permits would be suspended. Second, several application requirements would be suspended only as they apply to storm water discharges. Finally, the ban on construction of "new sources" prior to issuance of a final NPDES permit would be eliminated. These suspensions would minimize the regulatory burdens imposed on applicants for an NPDES Permit pending final rulemaking on proposed changes to these regulations. Notice of these proposed changes is found elsewhere in today's **Federal Register.**

DATE: EPA will consider written comments on the proposed suspensions which are received by December 20, 1982.

ADDRESS: Send written comments to Gail Goldberg, Office of Water Enforcement and Permits, Environmental Protection Agency (EN-336), 401 M Street, S.W., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Gail Goldberg, Office of Water Enforcement and Permits (202/426-7010) or Karen Wardzinski, Office of General Counsel (202/755-0753).

SUPPLEMENTARY INFORMATION: On May 19, 1980, EPA issued regulations consolidating the requirements and procedures for five EPA permit programs, including the NPDES program under the CWA, the Hazardous Waste Management Program (HWMP) under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), State "Dredge and Fill" permit programs under section 404 of the CWA, and, in limited part, the Prevention of Significant Deterioration (PSD) Program under the Clean Air Act (CAA), (45 FR 35290). (For a more detailed description of the development of these regulations and challenges filed against them, see 47 FR 25546). At the same time, EPA published consolidated permit application forms, two of which—forms 1 and 2c—implemented NPDES regulations on application requirements for existing industrial dischargers, (45 FR 33516).

Petitions which were filed in several courts of appeals for review of the NPDES Portion of the consolidated permit regulations challenged, among others, several of the regulatory provisions which established NPDES application requirements and the provision which imposed a pre-permit construction ban on "new sources." EPA participated in extensive negotiations with both industry and environmental groups on issues raised in the petitions for review and on June 7, 1982 signed a Settlement Agreement with industry litigants only, which resolved many of the NPDES issues. To implement this Settlement Agreement, the Agency has elsewhere in today's **Federal Register** proposed revisions to the regulations. Several of these proposed revisions affect application requirements for NPDES Permits. One provision affects the current prohibition on construction of "new sources" until the issuance of an NPDES permit. In order to provide expedited relief to affected permittees and prevent the collection and submission of what may ultimately be unnecessary information, EPA proposes to suspend certain portions of the regulations which relate to application requirements. The proposed suspensions would affect certain NPDES permit application information requirements applicable to all existing manufacturing, commercial, mining and silvicultural point source discharges, and certain additional application information requirments as they apply to point source storm water discharges. In addition, EPA is proposing to suspend the construction ban. Nothing in the Clean Water Act or NEPA requires such a ban. Moreover, retention of the ban would place unwarranted restrictions on construction of new sources; accordingly, no purpose is served by retaining the requirement during the rulemaking process. Thus, applicants for a new source NPDES permit for which an EIS is required would no longer be prohibited from beginning construction prior to final agency action issuing a final permit. These suspensions would, if adopted, carry out the objectives of enhancing efficiency and eliminating unnecessary regulatory burdens, as part of the Agency's response to the President's Task Force on Regulatory Relief.

A. Application Requirements for Existing Industrial Dischargers

Elsewhere in today's **Federal Register**, EPA has proposed several revisions to the NPDES portion of the consolidated permit regulations which will significantly alter the type and amount of information an NPDES permit applicant must submit. Several of the current regulatory provisions focus on the "use or manufacture" of toxic pollutants in requesting information from permitees or in requiring action on the part of permit writers in issuing or modifying permits. The intent of the Clean Water Act is to control the discharge of pollutants. Although facilities may often discharge pollutants that are used in plant processes or that are manufactured as products or by-products, discharge of all such pollutants will not necessarily occur. EPA believes it is more appropriate to focus on the discharge or potential discharge of toxic pollutants, rather than on their use or manufacture by an applicant. Application and permit requirements which concentrate on potential for discharge should provide adequate control of toxic discharges. In the meantime, no useful purpose would be served by retention of those requirements which focus on "use or manufacture", and which impose a significant burden on applicants and permittees.

With this in mind EPA proposes to suspend the following sections:

Section 122.53(d)(9) (Item VI–A of consolidated permit application form 2c), which requires permit applicants to predict potential future use or manufacture of toxic pollutants; § 122.62(e)(1)(ii), which requires the Director to control, through effluent limitations imposed in a permit, all toxic pollutants used or manufactured by a discharger; and § 122.15(a)(5)(ix), which authorizes EPA to modify permits based on information of new use or manufacture of toxic pollutants.

In addition, EPA proposes to suspend § 122.53(d)(10) (Item VI–B of consolidated permit application form 2c). This provision requires an applicant to describe discharges of any pollutants which the applicant believes will exceed two times the values reported in the application. The provision, in conjunction with § 122.53(d)(9), requires the applicant to predict potential future use, manufacture, or discharge of pollutants. EPA believes this information would be useful to permit writers in setting appropriate limitations at the time the permit was issued and in ensuring that necessary treatment equipment would be installed to control the discharge of such pollutants at the commencement of their discharge. Although EPA continues to believe that this information is useful, it is not essential for writing adequate permit limitations and conditions and thus imposes an unnecessary regulatory burden on permit applicants. Permittees will be required to notify the permitting authority when they begin or expect to begin to discharge toxics at levels above those reported in the application (see, § 122.61(a)). This should provide permit writers with information with which to determine if a permit modification is necessary.

Elsewhere in today's **Federal Register**, EPA has proposed to delete each of the four sections discussed above. That notice contains a more detailed explanation of the basis and purpose of this proposal.

B. Application Requirements for Storm Water Discharges

Elsewhere in today's **Federal Register**, EPA has also proposed revisions to the regulations which affect only storm water discharges. That proposal intends to limit the types of storm water dischargers which are considered "point sources" subject to NPDES permitting and reduce the amount of information these dischargers must submit in an NPDES application. Today's proposed suspension differs somewhat from those intended proposed revisions. We do not think it appropriate for EPA to eliminate particular sources from the definition of "point source" through the suspension process, since our action in that case would be a substantive change to the current regulation and not merely a suspension of its applicability to given sources. In most other respects, however, today's suspension tracks the proposed amendments to the regulations. Thus, today's suspensions will propose to suspend certain application requirements as they affect storm water discharges considered to be "point sources" under the current regulations. The suspensions would prevent the collection and submission of testing and reporting requirements which may be eliminated in final rules. A more detailed explanation of EPA's proposal to suspend appears in the preamble to the proposed revisions found elsewhere in today's **Federal Register**.

The amount of information an applicant will be required to submit will depend upon the type of storm water discharge involved. We have divided storm water discharges into two broad groups based upon their potential for significant pollution problems, imposing fewer substantive requirements on those discharges which we believe are less likely to be significant sources of pollution.

1. *Group I.* This first group consists of storm water discharges which (1) are subject to specific effluent limitations guidelines or toxic pollutant effluent standards, (2) are designated as significant contributors of pollution by the Director under § 122.57(c), or (3) are located at industrial facilities in areas immediately adjacent to the industrial plant or in plant associated areas, if there is a potential for significant discharge of storm water contaminated by contact with process wastes, raw materials, toxic pollutants, or hazardous substances listed in Table V of Appendix D. This third category covers conveyances which discharge storm water runoff from lands or buildings of an industrial plant where runoff has the potential for becoming contaminated from contact with raw materials, intermediate or finished products, wastes, or substances used in production or treatment operations. The term "industrial plant associated areas" includes such areas as industrial plant yards, immediate access roads, drainage ponds, refuse piles, storage piles or areas, and material or products loading and unloading areas. The term excludes commercial areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots, since it is not expected that significant contamination from process operations will occur here.

Persons whose storm water discharges fall within any of the three categories in Group I will be required to submit applications which comply with all the requirements of §§ 122.4 and 122.53, and consolidated permit application forms 1 and 2c (see 45 FR 33516), with one exception. The requirements in § 122.53(d)(7)(iii) that applicants report *quantitative* data is proposed to be suspended. For Group I discharges, applicants would be required only to indicate in Items V–B and V–C of form 2c whether they believe any of the listed pollutants are present or absent and briefly describe why. Applicants would not be required to test for pollutants which they believe to be present. However, Group I applicants will report quantitative data under § 122.53(d)(7)(i)(A), Item V–A of form 2c.

2. *Group II.* The second group consists of all point source storm water discharges required to be permitted under current § 122.57 that are not included in Group I. In general, it is expected that the storm water

discharges included in Group II are less likely than those in Group I to create significant pollution problems. Accordingly, EPA has proposed to further reduce the information these dischargers must submit to the permitting authority. Only basic information to identify the type, number, and location of Group II storm water discharges would be required. No testing for any pollutants listed in Item V of application form 2c (§ 122.53(d)(7)) would be required. Group II dischargers would be required to submit all of form 1 of the consolidated permit application except the requirement of Item XI (§ 122.4(d)(7)) to submit a topographic map of the permitted area. Since our purpose in requesting information from Group II dischargers is to obtain general identification information, the detail provided by a topographic map is not necessary at this time. In addition, only limited provisions of form 2c would be required to be submitted. Group II dischargers would submit Items I and II-B and C (see §§ 122.53(d)(1), (d)(3) and (d)(4)), indicating the location and flow of each storm water outfall, the name of the receiving water and any treatment being done. Group II permit applicants would also have to complete the requirement of Item IX (see § 122.6(d)), certification of the permit application. All other provisions of form 2c (Items II-A, III, IV, V, VI, VII, and VIII) are proposed to be suspended. Thus, for Group II permit applicants, the requirements of § 122.53(d)(2), (d)(5), (d)(6), (d)(7), (d)(9), (d)(10), (d)(11), and (d)(12) are all proposed to be suspended. As always, permit writers retain the authority to require additional information where necessary to issue adequate permits.

The terms of the proposed suspension for storm water discharges are summarized in the following chart:

Group I	Group II
Coverage	**Coverage**
Storm water discharges: (1) Subject to specific effluent guidelines or toxic pollutant effluent standards (2) Designated as significant contributors of pollution, or (3) Located at industrial facilities in areas immediately adjacent to the industrial plant or in plant associated areas, if there is a potential for significant contamination with process wastes, raw materials, toxic pollutants or hazardous substances	Storm water discharges: All storm water discharges currently identified as "point source" discharges under § 122.57, but which are not covered in Group I.
Provisions Suspended	**Provisions Suspended**
Form 2c, Items— V-B—testing only (§ 122.53(d)(7)(iii)(B)) v-C—testing only (§ 122.53(d)(7)(iii)(A)) A permit applicant must indicate whether it believes the listed pollutant to be present or absent VI (§ 122.53(d)(9), (10)	Form 1, Item—XI—(§ 122.4(d)(7)) Form 2c, Items— II-A (§ 122.53(d)(2)) III (§ 122.53(d)(5)) IV (§ 122.53(d)(6)) V (§ 122.53(d)(7)) VI (§ 122.53(d)(9), (10)) VII (§ 122.53(d)(11)) VIII (§ 122.53(d)(12))
Provisions Still Applicable	**Provision Still Applicable**
Form 1, All Items (§ 122.4) Form 2c, Items— I (§ 122.53(d)(1)) II (§ 122.53(d)(2), (3), (4)) III (§ 122.53(d)(5)) IV (§ 122.53(d)(6)) V-A (§ 122.53(d)(7)(i)) V-B (§ 122.53(d)(7)(iii)(B))[1] V-C (§ 122.53(d)(7)(iii)(A))[1] V-D (§ 122.53(d)(7)(iv)) VII (§ 122.53(d)(11)) VIII (§ 122.53(d)(12)) IX (§ 122.6(d))	Form 1, Items (§ 122.4) I-X XII XIII Form 2c, Items— I (§ 122.53(d)(1)) II-B&C (§ 122.53(d)(3), (4)) IX (§ 122.6(d) NOTE.—For Items V-B and V-C indicate only whether the pollutants listed are believed to be present or absent.

C. Construction Ban

Elsewhere in today's **Federal Register**, the Agency has proposed to eliminate the "construction ban" imposed on "new sources" prior to issuance of an NPDES permit. See 40 CFR 122.66(c)(4).

In issuing permits to "new sources" (see § 122.3 for definition) in States without approved NPDES programs, EPA must comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4231 *et seq.* NEPA requires, among other things, the preparation of an environmental impact statement (EIS) on any major federal action significantly affecting the environment. Existing § 122.66(c) (4) and (5) prohibits the construction of a new source, for which an environmental impact statement is required, before EPA completes its review of environmental impacts under NEPA, unless the applicant signs an agreement to comply with appropriate NEPA-based requirements or the Regional Administrator makes a finding that such construction will not cause significant or irreversible adverse environmental impact.

Many dischargers and applicants have questioned EPA's legal authority to adopt and enforce a ban on construction. The ban was originally intended to ensure that EPA was not deprived, at the time of issuing a permit, of the ability to consider all alternatives to the proposed action, including alternative sites or not constructing the discharging source at all. Those objecting to the ban have argued that the Clean Water Act regulates discharges, not construction, and that EPA is without authority to adopt a prohibition against construction in its regulations.

EPA has carefully considered these arguments and has decided to rescind the ban. In contrast to other federal regulatory statutes (such as the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*), the Clean Water Act does not regulate construction of facilities, only discharges from them. See Section 301. Accordingly, if an applicant began construction in defiance of EPA's ban, the enforcement remedies under Section 309 of the Clean Water Act would not apply.

EPA therefore proposes to suspend this provision pending final Agency action on the proposal to eliminate the "construction ban". For a more detailed explanation of this decision, refer to the **Federal Register** notice proposing deletion of this provision found elsewhere in today's publication.

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 proposed suspensions make the regulations more flexible and less burdensome for affected permittees. They do not satisfy any of the criteria specified in section 1(b) of the Executive Order and, as such, do not constitute major rulemakings. This regulation was submitted to the Office of Management and Budget (OMB) for review.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, EPA must submit a copy of any proposed rule which contains a collection of information requirement to the Director of OMB for review and approval. These amendments contain no new information collection requests but rather propose to suspend existing information collection requests. Therefore the Paperwork Reduction Act is not applicable.

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

entities. Today's proposed suspensions would make the regulations more flexible and less burdensome for all permittees. Accordingly, I hereby certify, pursuant to 4 U.S.C. 605(b), that these amendments will not have a significant impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 122

Administrative practice and procedures, Air pollution control, Hazardous materials, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control, Water supply, Confidential business information.

(Clean Water Act, 33 U.S.C 1251 *et seq.*)

Dated: November 8, 1982.

Anne M. Gorsuch,

Administrator.

PART 122—[AMENDED]

The following regulations and, where appropriate, corresponding permit application provisions are proposed to be suspended:

1. Section 122.15(a)(5)(ix).
2. Section 122.62(e)(1)(ii).
3. Section 122.66(c)(4) and (c)(5).
4. For all NPDES existing manufacturing, commercial, mining and silvicultural dischargers, the requirements of § 122.53 (d)(9) and (d)(10) (Item VI of consolidated permit application form 2c, EPA Form 3510–2c).
5. For NPDES point source storm water discharges under 40 CFR 122.57 that are (a) subject to specific effluent guidelines of toxic pollutant effluent standards, (b) designated as significant contributors of pollution, or (c) located at industrial facilities in areas immediately adjacent to the industrial plant or in plant associated areas, if there is a potential for significant discharge of storm water contaminated by contact with raw materials, process wastes, toxic pollutants, or hazardous substances listed in Table V of Appendix D to 40 CFR Part 122, the requirements of § 122.53(d)(7)(iii), and corresponding Items V–B and V–C of consolidated permit application form 2c (EPA Form 3510–2c), that quantitative data be reported.
6. For all other NPDES point source storm water discharges required to be permitted under § 122.57, the requirements of § 122.4(d)(7) (Item XI of the consolidated permit application form 1 (EPA Form 3510–1)), and § 122.53 (d)(2), (d)(5), (d)(6), (d)(7), (d)(9), (d)(10), (d)(11) and (d)(12) and corresponding Items II–A, III, IV, V (all subparts), VI, VII, and VIII of consolidated permit application form 2c (EPA Form 3510–2c).

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