

7/22/93

MEMORANDUM

SUBJECT: 40 CFR 403.18 Pretreatment Program Modifications

FROM: Cynthia C. Dougherty, Director
Permits Division

TO: Regional Permits Branch Chiefs

Attached is guidance on the implementation of 40 CFR 403.18 procedures for approving changes to Approved Pretreatment Programs. It provides suggestions on how State and EPA Approval Authorities might reduce the effort necessary to comply with 40 CFR 403.18, especially its public notice requirements. We believe that we have incorporated the consensus comments that you and others provided on previous drafts and at last year's National Pretreatment Meeting.

We will continue to consider the need for a rulemaking to revise 40 CFR 403.18, as several of you have recommended. If you would continue to supply up-to-date evidence of the resource requirements of complying with this rule, it would help to support a decision whether to modify it.

Thank you for the comments that many of you provided on drafts of this document. Please contact Louis Eby, (202) 260-2991, if you have questions or would like to discuss this guidance.

Attachment

cc: Regional Pretreatment Coordinators
State Pretreatment Coordinators

GUIDANCE ON PRETREATMENT PROGRAM
MODIFICATION REQUIREMENTS OF 40 CFR 403.18

I. BACKGROUND

This guidance addresses issues related to compliance with procedures for modifying approved publicly owned treatment works (POTWs) pretreatment programs under 40 CFR 403.18. It provides guidance on what types of program changes are "substantial" and, therefore, trigger the section 403.18 public notice requirements, and what forms of public notice satisfy those requirements.

POTWs that meet certain requirements under the Clean Water Act (CWA) are required to develop pretreatment programs to regulate industrial discharges into their systems. These programs must be approved by the Environmental Protection Agency (EPA) or the State (in States that have been approved by EPA to act as the pretreatment program "Approval Authority"). Due to changes in circumstances or legal requirements, these Approved Pretreatment Programs may need to be modified from time to time to ensure that they comply with the minimum pretreatment program requirements specified in 40 CFR 403.

Prior to the October 17, 1988, amendments (the "PIRT" rule), the federal regulations did not address the procedures for modifying Approved POTW Pretreatment Programs. Many programs were not being kept up to date. EPA promulgated the program modification procedures in section 403.18 in order to make sure that program changes are consistent with the requirements of Part 403. Section 403.18 requires that "substantial modifications" to approved POTW pretreatment programs be adopted following the procedures in 40 CFR 403.11(b)-(f). The intent of section 403.18 is to assure consistency by requiring Approval Authorities to review "substantial modifications" and to provide opportunity for public comment. Another objective of section 403.18 is to assure that changes are considered part of the Approved Pretreatment Program and, therefore, are enforceable. Section 403.18 is summarized in an attachment.

Early in 1992, EPA solicited comments on section 403.18 from EPA Region and State Pretreatment Coordinators. Perhaps the single most dominant theme of their comments was that the public notice requirements impose a substantial cost but generate almost no response from the public. Many commenters suggested limits on what should be considered a "substantial modification", while others proposed limits on the need to publish a public notice of both the proposed and final adoption of pretreatment program modifications.

Several of the recommendations would require changes to the regulations. Those changes cannot be implemented at this time. EPA will continue to consider whether it is necessary to amend section 403.18. It is unlikely, however, that the rule will be

amended in the near future. In the interim, program modifications must be in compliance with the minimum requirements of section 403.18. This memo is intended to help delineate those minimum requirements.

II. PUBLIC NOTICE REQUIREMENTS

A. Adequacy of Notice at the Local Level

Section 403.18 requires that public notice of a request for pretreatment program modification be issued. [See 40 CFR 403.18(b)(1)(ii); 403.11(b)(1)]. Many Approval Authorities have complained about the cost of providing this notice, especially in light of the fact that it frequently duplicates notice that was already given by POTWs in the process of making changes to their programs.

To eliminate duplication of notice, POTWs and Approval Authorities should consider jointly issued public notices. Notice given by the Approval Authority either alone or jointly with a POTW best satisfies the requirements of section 403.18.

Approval Authorities do, however, have some discretion to consider public notices provided solely by POTWs adequate for purposes of 403.11(b)(1). As noted in the preamble to the rulemaking that adopted 403.18:

"EPA agrees that where public participation in the process of amending the ordinance is equivalent to that required under 403.11, additional public notice and comment for the program modification procedures would be duplicative. However, because not all municipalities may have equivalent public participation procedures for amending their ordinances, the Agency has concluded that it would be inappropriate to allow a blanket exemption from the 403.11 procedures for program modifications that involve amendments to local ordinances." 53 FR 40580.

Although EPA still does not believe that a blanket exemption would be appropriate, the Agency's experience with administering the rule has confirmed that Approval Authorities should be able to deem public notice given at the local level to be sufficient to satisfy the notice requirement for requests for program modification.

Public notices performed at the local level may be considered to fulfill the obligations of 403.11(b)(1) only in certain narrow circumstances. Any such local notice, at a minimum, should contain language such as the following:

"This notice is intended to serve as the notice of request for approval of pretreatment program modification required by 40 CFR 403.18(b)(1)(ii) and 403.11(b)(1)(i). Anyone may

submit comments to [] within 30 days. If there is significant public interest in this proposal, a public hearing will be held by [State or U.S. EPA] pursuant to 40 CFR 403.11"

In advance of providing notice, POTWs should work with their Approval Authorities to make sure that the changes are approvable and to determine what notice will be deemed adequate. Approval Authorities should agree in advance to provide the hearing required by 40 CFR 403.11(b)(2) if there is significant public interest.

EPA Regions acting as Approval Authorities also have the flexibility to work out arrangements by which POTWs provide notice that satisfies the requirements of 403.11(b)(1). This may or may not be desirable, depending on whether or not the Region is willing and able to get involved in early stages of changes to the POTW's program. It also should be noted that the Regions cannot require the POTWs to give the notice required by the federal regulations.

B. Need for Two Notices

Section 403.18 requires public notice of both the request for approval of a substantial program modification and the Approval Authority decision to approve or deny the request. Many commenters have criticized this requirement. EPA believes that, in limited circumstances, a single notice might satisfy this requirement. Such notice could serve as the notice of both the request for approval and the decision to approve if:

- 1) the notice states that, if no comments are received, the proposal will be adopted as proposed and without further notice,
- 2) no substantive comments are received, and
- 3) the request is approved without changes.

Interested parties should be given the opportunity to request individual notice of the final decision. The public notice should include a statement such as the following:

Anyone may submit written comments or request a public hearing on this proposal within 30 days of this notice. If no comments to this notice are received, the proposed Pretreatment Program modification will be approved as set forth herein without changes and without further public

notice. In such event, this notice shall constitute the "notice of approval or disapproval" required by 403.11(e) and no additional notice shall be provided; the approved modification will be noted in [the POTW's] NPDES permit file at [insert NPDES permitting office]. Anyone who wishes to be sent a notice of the approval of the modifications should send a request for such notice to [].

If this procedure is followed, the need to expeditiously modify the POTW's National Pollutant Discharge Elimination System (NPDES) permit to incorporate the approved changes becomes all the more important. The permit modification provides a record that the changes have in fact been adopted.

This procedure may be used only by Approval Authorities; notices of requested changes given solely by a POTW as discussed in the preceding section should not also serve as the Approval Authority's notice of approval.

C. Joint Notice With Revision of POTW's NPDES Permit

Another way to reduce the cost of 40 CFR 403.18 public notice requirements is to combine the notice of pretreatment program modifications with notice of renewal of the POTW's NPDES permit. EPA has acknowledged that the public notice and comment process for modifications to a POTW's NPDES permit and Approved Pretreatment Program may be combined. [See 53 FR 40578]. If a POTW's pretreatment program modification happens to occur shortly before the time a POTW's NPDES permit is being renewed, the Approval Authority may consider combining the notices of request for and approval of pretreatment program modifications with the notices of the draft and final NPDES permits.

When a POTW is strengthening its authorities in a way that goes beyond what is required by its NPDES permit or its Approved Pretreatment Program (as incorporated in the permit), it could elect not to submit the change for approval under 403.18 and thereby not make the change part of its Approved Pretreatment Program until its NPDES permit is modified. The POTW could still enforce those requirements at any time under local law, although EPA and States could only enforce approved program requirements. If a POTW weakens its Approved Pretreatment Program, it will probably be in violation of its NPDES permit unless it follows the procedures for modifying the Approved Program and the permit.

III. WHAT CONSTITUTES A SUBSTANTIAL MODIFICATION

A. General

Section 403.11(b) notice requirements are triggered by section 403.18 only if the modification to the pretreatment program is considered substantial under section 403.18(c). Many of the commenters suggested that Approval Authorities need guidance on what is considered a substantial modification.

Some commenters took an unduly restrictive interpretation of what modifications must be treated as substantial under section 403.18(c). Substantial modifications generally do not include changes to the requirements of a single industrial user, but rather modifications to the POTW's program. Changes to specific details of a POTW's pretreatment program should not be considered substantial modifications if they are more specific than the level of detail that is required when a program is initially submitted for approval. The approved program should not be so specific that an amendment to the program and the NPDES permit is needed for every action taken by the POTW, nor should it be so vague that it fails to clarify the POTW's responsibilities to run an effective pretreatment program.

For example, the program description that is part of a POTW's approved program must include a general description of the control mechanisms, not a description of the actual control mechanism that will be issued to each individual significant industrial user (SIU). Therefore, a substantial modification under 40 CFR 403.18(c)(1)(iii) does not include the addition of a single SIU to the system or the issuance of a control mechanism to that SIU, provided that the action is consistent with the existing approved POTW program. A decrease in the frequency with which one facility is inspected is not a significant change under 403.18(c)(1)(vi), provided that it is consistent with the approved program. The same analysis would apply to a change to one SIU's self-monitoring requirements under 403.18(c)(1)(v).

B. Enforcement Response Plans

Whether or not the adoption of an Enforcement Response Plan (ERP) is a substantial modification is left to the discretion of the Approval Authority under section 403.18(c)(2). Approval Authorities should promptly notify POTWs whether the modification might be considered substantial; this will avoid confusion that might stem from the fact that non-substantial modifications are deemed to be approved if the Approval Authority does not act within a certain time. It has been the experience of many Approval Authorities that ERPs frequently have to be revised between their initial submittal and final approval.

If the ERP merely restates and consolidates existing authorities and procedures, it might not constitute a substantial

modification to the approved program. Even if it is not considered a substantial modification, however, it must be processed as a non-substantial modification so that it is made an enforceable element of the POTW's program.

C. Legal Authority

Most changes to local ordinances that are necessary for POTWs to have the minimum authority necessary for an approved program will be considered substantial. Substantial modifications would not include the correction of typographical errors or amendments of authorities that are not mandatory requirements of approved programs. Many substantial legal authority changes will be merely the adoption of provisions required by State and Federal law. The burden of providing public notice of such changes, however, should be minimized since they are unlikely to result in changes between request for approval and approval of the changes. They should, therefore, qualify for the single combined notice procedure outlined in Section II.B. above.

D. Local limits

Section 403.18(c)(1)(ii) defines "changes to local limits which result in less stringent local limits" as a substantial modification. The Preamble to the PIRT rule indicates that all such changes are substantial and that regulators have very little flexibility in this area. As initially proposed, the public notice requirements would have only applied to local limits that were contained in municipal ordinances. The final rule clarified that it applied to all changes which result in less stringent limits, "not only those contained in ordinances". 53 FR 40579.

New local limits and revisions to local limits that make them more stringent are not defined as substantial modifications under Part 403.18(c)(1)(ii). Part 403.5(c)(3) does require that notice of local limit development be given to persons or groups who have requested such notice, and 403.5(e) specifies that these changes are federally enforceable.

IV. NPDES Permit Modifications to Incorporate Pretreatment Program Modifications

Regardless of what procedures are used to process a program modification, the approved modifications must be incorporated into the POTW's NPDES permit. POTWs are legally required to implement their existing program until the modifications are approved and placed in their permit. An enforcement action cannot be brought against a POTW for failure to implement the modifications to an Approved Pretreatment Program until the modifications are incorporated into the POTW's NPDES permit.

In addition, when program modification procedures have not been followed, it creates uncertainty about the requirements to which industrial dischargers are subject under federal law. The industrial user could be subject to state or federal enforcement action for the "old" requirements that are still part of the Approved Program, while also being subject to enforcement for modifications that have been put into effect under the POTW's local authorities. Note, however, that modifications that result in new or more stringent local limits on industrial users that are developed pursuant to 40 CFR 403.5(c) are immediately enforceable under 40 CFR 403.5(e) regardless of whether 40 CFR 403.18 procedures have been commenced or completed.

Modifications to NPDES permits may be processed as minor permit modifications under 40 CFR 122.63(g) once they have been approved pursuant to section 403.18. To perform a minor modification, the NPDES permit issuing authority may simply attach an amendment to the permit in its files and send a copy to the permittee and, if a State is the permit issuing authority, to EPA.

The Approved Program should be incorporated by reference in the POTW's NPDES permit. Because the Approved Program may be too long to include in the permit, it may be referenced by title and date in the permit. The Approved Program should be described in one document, which might incorporate other documents by reference. After the Approved Program is modified, the reference to the Approved Program might be changed to "POTW XYZ's Approved Pretreatment program as modified through [date of most recent modification]."

This process may prove more difficult if the POTW's Approved Pretreatment Program has not been kept up to date so that it cannot be identified and incorporated by reference in the permit. If that is the case, the POTW should be required to resubmit its program. A good time to require a POTW to do this is when it is in the process of developing its Enforcement Response Plan. Once a program is up to date and well documented, future modifications will be greatly facilitated.

ATTACHMENT

SUMMARY OF 40 CFR 403.18

A. Section 403.18 requires that program changes that are considered "substantial modifications" undergo the following procedures prior to their being put into effect:

- 1) POTW must submit necessary documents.
- 2) Approval Authority reviews.
- 3) Approval Authority determines whether the modification is substantial.
- 4) If substantial, the Approval Authority approves or disapproves the proposed change under procedures in 403.11(b)-(f):
 - (b)(1) public notice including mailing and publication in paper, 30 day comment period, etc.;
 - (b)(2) opportunity for public hearing;
 - (c) Approval Authority decision within 90 days;
 - (d) EPA opportunity to object where a State is the Approval Authority;
 - (e) Notice of decision in same newspaper; and
 - (f) public access to submission.
- 5) NPDES permit amended in accordance with 122.63(g) [minor modification, which requires no further public notice.].

B. Non-substantial modifications are reviewed under simpler procedures:

- 1) POTW must submit 30 days before they go into effect.
- 2) They are deemed to be approved unless, within 90 days, the Approval Authority determines that they were in fact substantial (in which case the process for substantial modifications is commenced).
- 3) NPDES permit amended in accordance with 122.63(g).

Approval Authority can deny a non-substantial modification only if the Approval Authority first deems the modification to be substantial and then denies it.□