Federal Register

Friday,
October 14, 2005

Part II

Environmental Protection Agency

40 CFR Parts 9, 122, and 403
Streamlining the General Pretreatment Regulations for Existing and New Sources of Pollution; Final Rule
Availability of and Procedures for Removal Credits; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122 and 403

[OW–2002–0007; FRL–7980–4]

RIN 2040–AC58

Streamlining the General Pretreatment Regulations for Existing and New Sources of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today's final rule revises several provisions of the General Pretreatment Regulations that address requirements for, and oversight of, Industrial Users who introduce pollutants into Publicly Owned Treatment Works (POTWs). This final rule includes changes to certain program requirements to be consistent with National Pollutant Discharge Elimination System (NPDES) requirements for direct dischargers to surface waters. Today's action will reduce the regulatory burden on both Industrial Users and State and POTW Control Authorities without adversely affecting environmental protection and will allow Control Authorities to better focus oversight resources on Industrial Users with the greatest potential for affecting POTW operations or the environment.

DATES: This regulation is effective November 14, 2005. For judicial review purposes, this final rule is promulgated as of 1 p.m. (Eastern Time) on October 28, 2005, as provided at 40 CFR 23.2.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OW–2002–0007. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the EPA Docket Center, EPA/DC, EPA West, Room B102, y1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket Office is (202) 566–2426.

FOR FURTHER INFORMATION CONTACT: Jan Pickrel, Water Permits Division, Office of Wastewater Management, Office of Water, (4203), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–7904, e-mail address: *pickrel.jan@epa.gov*. Greg Schaner, Water Permits Division, Office of Wastewater Management, Office of Water, (4203), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–0721, e-mail address: *schaner.greg@epa.gov*.

SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

A. General Information

1. Does this final rule apply to me?

Entities potentially affected by this action are governmental entities responsible for implementation of the National Pretreatment Program and industrial facilities subject to Pretreatment Standards and Requirements. These entities include:

Category	Examples of regulated entities
Local government	Publicly Owned Treatment Works.
State government	States and Tribes acting as Pretreatment Program Control Authorities or as Approval Authorities.
Industry	Industrial Users of POTWs.
Federal Government	EPA Regional Offices acting as Pretreatment Program Control Authorities or as Approval Authorities.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization or facility is regulated by this action, you should carefully examine the applicability criteria in 40 CFR 403.3, 403.5, 403.6, 403.7, 403.8, 403.12, and 403.15 of Part 403 of Title 40 of the Code of Federal Regulations.

If you have questions about the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

2. How can I get copies of this document and other related information?

a. *Docket.* EPA has established an official public docket for this action under Docket ID No. W–00–27. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

b. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/* or at the ''Pretreatment'' page at *http://cfpub.epa.gov/npdes/home.cfm?program_id=3.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section A.2.a. Once in the system, select ''search'', then key in the appropriate docket identification number (OW–2002–0007).

3. What process governs judicial review of this rule?

Under Section 509(b)(1) of the Clean Water Act (CWA), judicial review of today's rule may be obtained by filing a petition for review in the United States Circuit Court of Appeals within 120 days from the date of promulgation of this rule. For judicial review purposes, this final rule is promulgated as of 1 p.m. (Eastern time) on October 28, 2005 as provided at 40 CFR 23.2. Under section 509(b)(2) of the CWA, the requirements of this regulation may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

B. Under What Legal Authority Is This Final Rule Issued?

Today's final rule is issued under the authority of Sections 101, 208(b)(2)(C)(iii), 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(h)(5) and 301(i)(2), 304(e) and (g), 307, 308, 309, 402(b), 405, and 501(a) of the Federal Water Pollution Control Act as amended.

C. How is This Preamble Organized?

There is an outline for the preamble to today's final rule in the opening of this **SUPPLEMENTARY INFORMATION** section. For each distinct issue of the final rule, the preamble is written in a question-and-answer format that is designed to help the reader understand the information in the rule. Under each issue, there are subsections that provide the context for the final rule, including a discussion of the rules in place prior to today's rulemaking, the changes that were proposed, the changes that are being finalized (including significant differences from the proposal), and a summary of major comments and EPA response.

List of Acronyms

BAT—best available technology economically achievable
BCT—best conventional pollutant control technology
BOD—biochemical oxygen demand
BPJ—best professional judgment
BMP—Best Management Practice
BPT—best practicable control technology currently available
CIU—Categorical Industrial User
CFR—Code of Federal Regulations
CWA—Clean Water Act
ELG—effluent limitations guideline
EMS—environmental management system
EPA—Environmental Protection Agency
EQIP—Environmental Quality Incentives Program
FR—**Federal Register**
ICR—Information Collection Request
IU—Industrial User
NODA—Notice of Data Availability
NOI—notice of intent
NPDES—National Pollutant Discharge Elimination System
NSCIU—Non-Significant Categorical Industrial User
NTTAA—National Technology Transfer and Advancement Act
OMB—U.S. Office of Management and Budget
POTW—Publicly Owned Treatment Works
PSES—Pretreatment Standards for Existing Sources
RFA—Regulatory Flexibility Act
SBA—U.S. Small Business Administration
SBAR (panel)—Small Business Advocacy Review Panel
SBREFA—Small Business Regulatory Enforcement Fairness Act
SIU—Significant Industrial User
SNC—Significant Noncompliance
SRF—State Revolving Fund
UMRA—Unfunded Mandates Reform Act
WWTP—wastewater treatment plant

D. What Is the Comment Response Document?

EPA received more than 220 comments on the proposed rule. EPA evaluated all the significant comments submitted and prepared a Comment Response Document containing the Agency's responses to those comments. The Comment Response Document complements and supplements this preamble by providing more detailed explanations of EPA's final actions. The Comment Response Document is available at the Water Docket. See Section E below for additional information.

E. What Other Information Is Available To Support This Final Rule?

In addition to this preamble, today's final rule is supported by other information that is part of the administrative record, such as the Comment Response Document, and the key supporting documents listed below. These supporting documents and the administrative record are available at the Water Docket and via e-Docket:

- Information Collection Request
- Past EPA guidance manuals and policy documents
- Stakeholder communications
- EPA data collected in support of this rulemaking

I. Background Information

A. What Is the National Pretreatment Program?

The National Pretreatment Program is part of the Clean Water Act (CWA)'s water pollution control program. The program is a joint regulatory effort by local, state, and Federal authorities that require the control of industrial and commercial sources of pollutants discharged to municipal wastewater plants (called ''Publicly Owned Treatment Works'' or ''POTWs''). Control of pollutants prior to discharge of wastewater to the sewer minimizes

the possibility of pollutants interfering with the operation of the POTW and reduces the levels of toxic pollutants in wastewater Discharges from the POTW and in the sludge resulting from municipal wastewater treatment.

The Pretreatment Program is a core part of the CWA's National Pollutant Discharge Elimination System (NPDES) program, and it has helped communities:

- Maintain and restore watershed quality;
- Encourage pollution prevention;
- Increase beneficial uses of sewage sludge;
- Prevent formation of poisonous gases in the sanitary sewer system;
- Meet wastewater Discharge standards; and
- Institute emergency-prevention measures.

B. What Regulation Is EPA Revising?

EPA is today streamlining and clarifying various provisions of the General Pretreatment Regulations for Existing and New Sources of Pollution codified at 40 CFR Part 403. The CWA directs EPA to develop regulations in order to control pollutants which may pass through or interfere with POTW treatment processes or contaminate sewage sludge. On June 26, 1978, EPA promulgated the General Pretreatment Regulations, which established standards and procedures for controlling the introduction of wastes into POTWs (43 FR 27736). There have been a number of revisions to the General Pretreatment Regulations. The last major revisions were to implement improvements arising from the Domestic Sewage Study (Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works) (55 FR 30082, July 24, 1990).

The General Pretreatment Regulations require POTWs that meet certain criteria to develop Pretreatment programs to control industrial Discharges into their sewage collection systems. These programs must be approved by either EPA or states acting as the Pretreatment ''Approval Authority.'' More than 1,400 POTWs have developed Approved Pretreatment Programs pursuant to the regulations in 40 CFR 403.8. These POTWs act as the Pretreatment ''Control Authority'' with respect to the Industrial Users that discharge to their systems. In the absence of an approved POTW Pretreatment Program, the State or EPA Approval Authority serves as the Control Authority.

Industrial Users of POTWs must comply with Pretreatment Standards prior to introducing pollutants into a POTW. POTWs are required to impose ''local limits'' to prevent Pass Through and Interference from the pollutants discharged into their systems. The General Pretreatment Regulations also include general prohibitions that forbid Industrial Users from causing Pass Through and Interference, and specific prohibitions against the discharge of pollutants that cause problems at the POTW such as corrosion, fire or explosion, and danger to worker health and safety. EPA has also developed National categorical Pretreatment Standards that apply numeric pollutant limits to Industrial Users in specific industrial categories. The General Pretreatment Regulations include reporting and other requirements necessary to implement these categorical Standards (40 CFR 403.12 (b)).

Today's final rule modifies several provisions of the existing Pretreatment Regulations. The rule includes a variety of changes which will be described further in Section E.

C. Why Is EPA Revising the Existing General Pretreatment Regulations?

By finalizing today's rule, EPA is working to improve the National Pretreatment Program to protect public health and the environment, while maintaining or improving the program's effectiveness. Although adoption of the General Pretreatment Regulations has resulted in more consistent implementation of the Pretreatment program on a national basis, many individual POTWs and Industrial Users have experienced problems implementing various requirements.

EPA's objective in finalizing today's streamlining regulation is to achieve better environmental results at a lower cost by allowing Control Authorities to better focus oversight resources where they will do the most good. The revisions in today's final rule achieve this objective by reducing the burden of technical and administrative requirements that EPA has determined provide minimal environmental benefit but consume significant resources of Industrial Users, and POTW and state Control Authorities. In designing these revisions, EPA took care to ensure that the changes being finalized do not reduce the current environmental protections in place.

The importance of finalizing today's streamlining rule was highlighted in two recent reports. The Office of Management and Budget (OMB) included the issuance of the final rule among a list of steps the Federal government would take to reduce the cost burden on the manufacturing sector. See Regulatory Reform of the U.S. Manufacturing Sector (OMB, 2005), which is posted at *http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf*. EPA's Office of Inspector General (OIG) also recommended that the Office of Water set milestones for finalizing this streamlining rule as part of a broader effort to improve the effectiveness of the National Pretreatment Program. See Recommendation # 4.2 of EPA Needs to Reinforce Its National Pretreatment Program (OIG, Report 2004–P–00030, September 2004), posted at *http://www.epa.gov/oig/reports/2004/20040928–2004–P–00030.pdf.*

D. What Are the Roles of Key Entities Involved in the Final Rule?

EPA recognizes the role of many interested parties in the development of, and, ultimately, the successful implementation of this final rule. To the greatest extent possible, EPA has attempted to strike a reasonable balance among the many interests. A short summary of their roles is provided below.

1. *POTWs.* Publicly Owned Treatment Works (POTWs) collect wastewater from homes, commercial buildings, and industrial facilities and transport it via a series of pipes, known as a collection system, to the treatment plant. Today, there are an estimated 14,800 POTWs. Most POTWs are not designed to treat the toxics in commercial and industrial wastes which can cause serious problems. The General Pretreatment Regulations require POTWs that meet certain criteria to develop Pretreatment programs to control industrial Discharges into their sewage collection systems. These POTWs act as the Pretreatment ''Control Authority'' with respect to the Industrial Users that discharge to their systems. POTWs play a key role in the enforcement of the Pretreatment program through the development and implementation of Enforcement Response Plans.

2. *States.* Thirty-four states are authorized to serve as Approval Authorities for implementation of the Pretreatment Program. In the absence of an Approved POTW Pretreatment Program, the state may serve as the Control Authority.

3. *EPA.* EPA's statutory responsibility is to establish national regulations such as those covering the Pretreatment Program, which protect and restore the chemical, physical, and biological integrity of the Nation's waters. EPA also develops policy and guidance and provides training and oversight for program implementation. EPA's regional offices also serve as the Approval Authority for state

Pretreatment programs, where the state is not authorized to run the program, and as the Control Authority for POTWs without an approved Pretreatment Program in these states.

4. *Industrial Dischargers.* Industrial Users of POTWs must comply with Pretreatment Standards prior to introducing pollutants into a POTW. The General Pretreatment Regulations include general prohibitions that forbid Industrial Users from causing Pass Through and Interference, and specific prohibitions against the discharge of pollutants that cause problems at the POTW such as corrosion, fire or explosion, and danger to worker health and safety.

EPA has also developed National categorical Pretreatment Standards that apply numeric and narrative pollutant limits to Industrial Users in specific industrial categories. The General Pretreatment Regulations include reporting and other requirements necessary to implement these categorical Standards (40 CFR 403.12(b)).

5. *Other stakeholders.* Trade associations, professional organizations, environmental interest groups, and the public have an interest in the Pretreatment of industrial and commercial waste and have been involved in this rulemaking through comments and participation in stakeholder meetings.

E. What Principles Guided EPA's Decisions in This Rule?

EPA has considered the implementation of the current General Pretreatment Regulations, changes in industry, the comments on the proposed rule, and relevant studies, data, and reports in developing this final rule. The Agency has tried to ensure this final rule is based on sound science, protects existing water quality gains, and is consistent with current Pretreatment guidance and policy documents. EPA made this final rule as simple and easy to understand as possible, and has attempted to provide a clear understanding of who is affected and what they are expected to do. The hallmark of this rule is that it reduces the burden of compliance with the General Pretreatment Regulations, while at the same time protecting the environment.

F. What Are the Major Elements of This Final Rule? Where Do I Find Specific Requirements?

This section provides a summary of the major elements of this final rule and a brief index on where each of the requirements is located in the final regulations. The rule makes the following changes:

- Provides POTWs with the authority to grant monitoring waivers to industrial facilities where they document that pollutants are not present at the facility or anywhere in the wastestream. EPA notes that this authority is already available in the National Pollutant Discharge Elimination System (NPDES) regulations for point sources discharging directly to surface waters.
- Authorizes POTWs to use general control mechanisms (e.g., permits) to regulate multiple industrial dischargers that share common characteristics.
- Clarifies that POTWs can use Best Management Practices (BMPs) as an alternative to numeric limits that are developed to protect the POTW, water quality, and sewage sludge.
- Clarifies certain requirements regarding the frequency of on-site industrial facility inspections to evaluate the adequacy of controls for ''Slug Discharges''.
- Provides greater flexibility in the use of certain sampling techniques, and establishes greater consistency with the sampling protocols in other parts of EPA's regulations.
- Provides the Control Authority with the discretion to authorize the use of equivalent concentration limits in lieu of mass limits for certain industrial categories, and allows the conditional use of equivalent mass limits in lieu of concentration-based limits where appropriate to facilitate adoption of new, water-conserving technologies.
- Authorizes POTWs to establish alternative sampling, reporting, and inspection requirements for certain classes of categorical Industrial Users (CIUs).
- Clarifies the definition of significant noncompliance (SNC) as it applies to violations of instantaneous and narrative requirements, and late reports, and provides additional options for publishing lists of industrial facilities in SNC annually in the newspaper. The rule also retains existing rules and policies regarding the application of Technical Review Criteria (TRC) and the use of the ''rolling quarter'' approach in determining SNC status.
- Provides updated references relating to requirements that POTWs must meet to adjust removal credits for combined sewer overflows (CSOs).
- Makes other miscellaneous changes designed to maintain consistency with the NPDES regulations or to correct typographical errors.

The following table indicates where these changes can be found in the General Pretreatment Regulations at 40 CFR part 403.

Issue	Section of 40 CFR 403 rules
Sampling for pollutants not present	403.8(f)(2)(v), 403.12(e)
General control mechanisms	403.8(f)(1)(iii)
Best Management Practices	403.5, 403.8(f), 403.12(b), (e), (h)
Slug control plans	403.8(f)(1)(iii)(B)(6), 403.8(f)(2)(vi))
Equivalent concentration limits for flow-based Standards	403.6(c)(6)
Equivalent mass limits for concentration-based Standards	403.6(c)(5)
Use of grab and composite samples	403.12(b), (d), (e), (g), (h)
Significant noncompliance criteria	403.8(f)(2)(viii)
Removal credits	403.7(h)
Non-Significant CIU	403.3(v)(2), 403.8(f)(2)(v), (6), 403.12(e)(1), (g), (i), (q)
Middle Tier CIU	403.8(f)(2)(v)(C), 403.12(e)(3), (i)
Miscellaneous changes	403.12(g), (j), (l), (m)

II. How Was This Final Rule Developed?

EPA initiated this effort in response to a Presidential Report on ''Reinventing Environmental Regulations'' (March 1995). The Report pledged to provide ''more common sense and fairness in our regulations'' with an ultimate goal of providing greater flexibility, reducing burden, and achieving greater environmental results at less cost. In 1995, EPA's Office of Wastewater Management started an evaluation of all of the General Pretreatment Regulations in order to identify streamlining opportunities. Based on input from various stakeholders, EPA developed issue papers that summarized 11 areas

in which the Pretreatment Regulations might be streamlined.

In May 1996, the issue papers were distributed to stakeholders (States, cities, trade associations, professional organizations, and environmental interest groups) for comment. The Agency also considered recommendations developed through a joint Association of Metropolitan Sewerage Agency (''AMSA'', now the ''National Association of Clean Water Agencies'') and Water Environment Federation workshop held in 1996, which included Pretreatment experts from many stakeholder perspectives. In response to comments received on the issue papers and the joint workshop's recommendations, EPA prepared a draft proposal and preamble and distributed it for comment in May 1997. The proposed rule was published in the **Federal Register** on July 22, 1999 (64 FR 39564).

EPA received 221 sets of comments on the proposed rule. Comments were received from individual POTWs and Industrial Users, trade groups representing those interests, states, and one environmental organization (the Natural Resources Defense Council). In finalizing this rule, EPA carefully reviewed the issues raised in the public comments. Due to the intervening time between the proposed and final rules, EPA also revisited the major assumptions underlying each rule change to verify that these assumptions were still valid. In a few areas, this process required research or additional data to support certain provisions, and discussions with stakeholders expressing continued interest in the rule regarding their comments on the proposed rule.

III. Description of Final Rule Actions

Today's final rule addresses 12 specific issues and a few miscellaneous changes pertaining to the General Pretreatment Regulations. This section describes the context of these changes, records how the proposal and final rule differ, and summarizes EPA's rationale for specific actions and how the Agency responded to significant comments.

EPA notes that capitalized terms in this and other sections (e.g., categorical Pretreatment Standards, Interference, Pass Through, etc.) should signal to the reader that these are terms defined in 40 CFR 403.3.

A. Sampling for Pollutants Not Present (40 CFR 403.8(f)(2)(v) and 403.12(e))

Today's rule allows the Control Authority to authorize an Industrial User subject to categorical Pretreatment Standards to forgo sampling of a pollutant if the Industrial User demonstrates through sampling and a technical evaluation of its facility operations, that a given pollutant is neither present nor expected to be present in the Discharge, or is only present at background levels from intake water without any increase in the pollutant due to the activities of the Industrial User. There is similar language in EPA's NPDES permitting regulations for direct dischargers. See 40 CFR 122.44(a)(2). The POTW Control Authority to which the Industrial User discharges may also reduce its monitoring for the pollutant to once during the term of the Categorical Industrial User's control mechanism. Note that in the discussion of this issue, when EPA uses the phrase ''pollutants not present'' it is using this phrase as short-hand for ''pollutants neither present nor expected to be present above background levels''. In addition, because the requirements of 40 CFR 403.8(f)(2) apply to POTWs with approved Pretreatment programs rather than Control Authorities in general, the discussion here distinguishes between the authority granted to Control Authorities in 40 CFR 403.12(e) to waive monitoring for pollutants not present, and the reduction in monitoring requirements for POTWs for these pollutants in 40 CFR 403.8(f)(2)(v).

1. What Were the Rules in Place Prior to Today's Rulemaking?

Section 403.12(e)(1) required Industrial Users subject to categorical Pretreatment Standards to submit reports to the Control Authority at least twice each year indicating the nature and concentration of all pollutants in their effluent that are limited by an applicable Standard. Prior to today's rulemaking, the Control Authority was not authorized to reduce monitoring of pollutants regulated by the applicable categorical Pretreatment Standard to less than twice per year. 40 CFR 403.8(f)(2)(v) also required POTWs to sample these Industrial Users at least annually to independently verify compliance with the Standard. Semiannual sampling by the Industrial User and annual sampling by the POTW was required for all pollutants limited by the categorical Pretreatment Standard even if certain pollutants regulated by the Standard were not reasonably expected to be present.

2. What changes did EPA propose?

The proposal would amend the current regulation to authorize the Control Authority to waive the sampling requirements for an Industrial User subject to a categorical Pretreatment Standard for a pollutant if the pollutant was not expected to be present in the wastestream in a quantity greater than the background level present in its water supply, with no increase in the pollutant in the wastewater attributable to the industrial process. In lieu of monitoring for the pollutants determined not present, the Industrial User would submit a certification as part of its semiannual monitoring reports that there had been no increase in the pollutant in its wastewater due to its activities. This change would also reduce a POTW's sampling requirement once it had determined that a pollutant was not expected to be present. However, as proposed, the reduced sampling would not have been available to facilities subject to the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) guidelines, 40 CFR part 414.

3. What changes is EPA finalizing in today's rule?

Today, EPA is adopting the proposed changes which authorize a Control Authority to waive the monitoring requirements in semiannual reports required under 40 CFR 403.12(e) for individual pollutants, including indicator or surrogate pollutants, for an Industrial User subject to a categorical Pretreatment Standard. A Control Authority may waive this requirement if it determines that the pollutant is neither present nor expected to be present, at levels greater than that of the intake water, without any increase in the pollutant due to the activities of the Industrial User. The waiver will not be available for monitoring required for the baseline monitoring report required under 40 CFR 403.12(b) or the 90-day compliance report required under 40 CFR 403.12(d). The Industrial User must continue to conduct at least twice-per-year monitoring until the waiver is both granted by the Control Authority and incorporated into the Industrial User's control mechanism. The POTW's annual monitoring requirements for the pollutant for which a monitoring waiver is granted may be reduced to a minimum of once during the effective period of the Industrial User's control mechanism.

In finalizing the rule, EPA is making the following changes to the proposed rule:

Coverage for OCPSF Facilities: EPA has determined that it is appropriate for the monitoring waiver to be available to Industrial Users subject to the OCPSF guidelines and is not limiting the availability in any way different from other Categorical Industrial Users.

Industrial User Sampling Data: The final rule requires that to demonstrate that the pollutant is not present, the Industrial User must provide the results of one or more samples prior to treatment which are representative of all process wastewater.

Notice to Control Authority if Pollutant Found to be Present: The final rule includes a provision which requires that in the event that a pollutant is subsequently found to be present or is expected to be present, the Industrial User must immediately resume monitoring and notify the Control Authority.

Control Mechanism Issues: EPA clarifies that the Control Authority must include any waiver granted to an Industrial User in the User's control mechanism. The Control Authority must also document the reasons for authorizing the waiver and maintain any information submitted by the User in support of the waiver for at least three years after expiration of the waiver. The waiver is valid only for the duration of the control mechanism. In order to continue the waiver for the period of the next control mechanism, the Industrial User will need to reapply for the waiver, including the submission of appropriate monitoring data. The control mechanism must include the requirement for the Industrial User to immediately notify the Control Authority in the event that the pollutant is found or suspected to be present, and to resume monitoring at least semiannually. The control mechanism still must include all applicable categorical Standards, even those Standards for which monitoring has been waived.

Waiver Does Not Supercede Other Certifications: EPA has included a provision which states that the waiver of monitoring requirements cannot replace any certification requirements that have been established in specific categorical Pretreatment Standards.

4. Summary of Major Comments and EPA Response

How does EPA define ''not present?'' In the preamble to the proposed amendments, EPA specifically requested comment on how to define what is meant by ''not present.'' Several commenters suggested that a precise definition was not necessary based on the regulatory context. Other commenters suggested that it be defined in terms of a percentage of the applicable limit, while others suggested that the term be defined as at or below the levels found in the water supply. The final regulatory language clearly indicates that monitoring for a pollutant can be waived as long as the levels in the untreated wastewater do not exceed the levels in the intake water based on ''sampling and other technical factors.'' EPA did not promulgate a definition of not present when the similar NPDES revision was finalized, and EPA continues to view the final regulatory language as sufficiently clear to avoid confusion.

In response to commenters that suggested that ''not present'' be defined as a percentage of the applicable categorical Standard, EPA notes that today's waiver is not for pollutants that are not reasonably expected to violate the Standard, but rather for pollutants that are neither present nor expected to be present in the Discharge above background levels. Therefore, the level of pollutant in the Discharge in relation to the Standard is not the relevant benchmark for the Control Authority's determination whether the waiver request should be granted. Instead, what matters in the determination is whether the Industrial User's practices or industrial processes add the pollutant. The Control Authority already has the ability to reduce monitoring to as infrequently as twice per year for any pollutants that are in the Discharge but are not reasonably expected to violate the Standard. However, if the background level from the Industrial User's intake water already exceeds the applicable categorical Standard, a waiver of the monitoring requirements would not be available unless the Control Authority has adjusted the categorical Standard using the net/gross provision of 40 CFR 403.15, and the pollutant is not added to the wastewater by the discharger's practices or processes.

Several commenters also suggested that if a pollutant is added in ''negligible'' amounts or in amounts equal to ''typical'' domestic levels, the Control Authority should still be authorized to grant the monitoring waiver. EPA addressed this issue in the preamble to the final NPDES regulation dealing with a waiver of monitoring requirements for direct dischargers. There, EPA stated:

> ''EPA declines to allow monitoring waivers for pollutants that are added by dischargers in minute amounts (e.g., use of common cleaners or from research operations) because human activity might lead to substantial increases in those pollutant Discharges which may threaten the aquatic environment. Consequently, there is a continuing need to monitor those pollutants. EPA also notes that at least one national effluent guideline addresses the introduction of incidental amounts of pollutants from cleaning, maintenance, or research operations and EPA does not believe it is appropriate to apply the waiver to a pollutant that is added to the wastestream and subject to an effluent guideline. See 40 CFR 414.11(b) (applying the Organic Chemicals, Plastics, and Synthetic Fibers Effluent Guidelines to wastewater Discharges from research and development operations). Metals or other pollutants that can leach from pipes may also pose a threat to the environment and EPA believes monitoring should be retained for such Discharges. With respect to pollutants which occur in amounts below ''levels of concern'', the discharge of such pollutants can also increase from human activity and EPA believes that monitoring is necessary to ensure that an appropriate level of treatment continues to be provided.'' (65 FR 30892, May 15, 2000).

Nothing submitted by commenters has changed the Agency's mind in the case of indirect dischargers with respect to its earlier conclusion.

Some commenters also suggested that EPA clarify that the term ''quantities'' as used in the proposal may mean mass loading in addition to concentration. EPA agrees that there may be instances where the use of mass may be more appropriate than concentration, and therefore will allow Control Authorities to use pollutant mass to compare the levels of pollutants in the wastewater to the levels of pollutants in the intake water. If the Industrial User can demonstrate through its technical evaluation that a specific pollutant is not added, and can demonstrate through a mass balance that any increases in the wastestream concentration are due only to evaporative losses or other similar reductions in the volume of wastewater discharged, then a monitoring waiver may be approved by the Control Authority. Note that accurate flow measurements will be necessary to perform the appropriate mass-balance calculations and demonstrate that small amounts of the pollutant are not added in the course of the facility activity. One example submitted by a commenter notes that cooling tower maintenance chemicals may add the pollutant of concern to the wastestream. If the pollutant of concern is added by the User in any way to the wastestream, then the Industrial User would not be eligible for the waiver. To the extent that the concentration is increased significantly such that it may impact the POTW, EPA would expect that a monitoring waiver would not be granted. In response to this comment, EPA is revising the language in the final regulation to refer to the ''levels'' of pollutants in the intake water rather than the ''concentration'' of pollutants in the intake water. This wording change is consistent with the similar NPDES permitting requirement for

direct dischargers (see 40 CFR 122.44(a)(2)(i)).

One commenter noted that EPA's use of the phrase ''with no increase in the pollutant due to the regulated process'' could create confusion in how to handle pollutants that are added in other facility wastestreams that are not regulated by the applicable categorical Pretreatment Standard. EPA agrees that the phrase ''with no increase in the pollutant due to the regulated process'' is not appropriate. Although the phrase was used in the preamble to the proposal and not the proposed regulation, EPA is revising the final regulatory language to include the phrase ''without any increase in the pollutant due to the activities of the Industrial User''. This phrase better reflects EPA's intent that the waiver would not be available for a pollutant where the Industrial User may add the pollutant through means other than the regulated industrial process (except for sanitary wastewater—see below).

Should Industrial Users have the authority to waive sampling requirements rather than the Control Authority? Several commenters suggested that it would be appropriate for the Industrial User to have the authority to make the determination on whether a pollutant is present and monitoring requirements should be waived rather than the Control Authority. EPA disagrees that Industrial Users rather than the Control Authority should have the authority to waive monitoring for pollutants not present. The Control Authority is the regulatory agency responsible for ensuring compliance with applicable Standards, and is therefore the most appropriate agency for determining the monitoring requirements necessary for it to fulfill that responsibility. In addition, placing the authority with the Industrial User eliminates oversight that, in EPA's view, is necessary to ensure that this provision is implemented correctly.

What information is necessary to determine if a pollutant is not present at a facility? EPA received many comments suggesting what type of data is needed in order to make an informed decision on whether a pollutant is neither present nor expected to be present. Commenters noted that information contained in control mechanism applications and baseline monitoring reports, as well as data obtained through a thorough facility inspection could all be used to support a determination that a pollutant is not present. The commenters noted that these are all mechanisms for obtaining data on the raw materials, products, and by-products used and generated at an Industrial User. EPA agrees that these are valid sources of information that can contribute to an Industrial User's demonstration that a pollutant is neither present nor expected to be present. EPA notes that the Industrial User monitoring waiver in today's rule applies to the semiannual monitoring required under 40 CFR 403.12(e), and does not apply to monitoring required for the baseline monitoring report or the 90-day compliance report. EPA has also concluded that if the Control Authority uses a control mechanism application form, such a form is an appropriate place for the Industrial User to request the monitoring waiver, although the mechanism for how the request is made is largely up to the discretion of the Control Authority.

Commenters also suggested that material safety data sheets would be a valuable tool in determining whether specific pollutants are present in the raw materials or other chemicals used at the facility. EPA notes that material safety data sheets do not identify all of the pollutants present in a given material, and therefore cannot be relied upon to determine whether a pollutant is present in the raw materials or other chemicals at the Industrial User's facility. In order for the Control Authority to accurately determine the presence of a pollutant in a given raw material or other chemical, the Industrial User will need to analyze the material in question, or obtain a certificate of analysis from the manufacturer of the material demonstrating the absence of the pollutant. In addition, the evaluation needs to include materials not necessarily used for the product, such as chemicals used in equipment cleaning and wastewater treatment. Although wastewater treatment chemicals are used to reduce the levels of pollutants in the Discharge, analysis of the chemicals can show significant levels of contaminants that can be added to the wastewater stream. Additional information, such as intermediate products, final products, and byproducts generated in the process will need to be considered as well, and therefore a detailed knowledge and evaluation of the process chemistry involved in the manufacturing operations will be necessary.

Some commenters suggested that the determination of whether a pollutant is present should be based exclusively on a review of available information. While available information should certainly be used in the determination, and EPA would expect that most Industrial Users requesting the waiver would have a fairly extensive knowledge of the pollutants present in their wastewater, because the pollutants are either directly added or generated as byproducts, an Industrial User cannot assume that a pollutant is not present in its Discharge simply because it has not generated any information to suggest otherwise. EPA notes that the Industrial User has the burden to demonstrate that the pollutant is not present, and if this demonstration cannot be made to the satisfaction of the Control Authority, the waiver may not be granted.

EPA does agree that the determination of whether a pollutant is present should be based on whether or not that pollutant would have the potential to enter the wastestream to the POTW. Such an evaluation must include the potential for the pollutants to enter the wastestream through spills and other potentially infrequent events, in addition to whether the pollutant would be routinely expected to enter the wastestream. Therefore, in order for monitoring for the pollutant to be waived, there must be a high degree of certainty that the pollutant will not show up in the Discharge to the POTW.

EPA also notes that for facilities that use the combined wastestream formula, ''unregulated'' wastestreams may be covered by the categorical Standard through the adjusted Standard. Therefore, EPA has concluded that it is not appropriate to allow a monitoring waiver where wastestreams other than those regulated by the categorical Standard contribute the pollutant of concern. However, since pollutants, especially metals, may be present in sanitary wastestreams at higher than background concentrations, and because sanitary wastestreams are not typically regulated through categorical Standards specifically or the Pretreatment program in general, the revised regulation provides that waivers may be granted where the only source of the increase in the pollutant from human activity is sanitary wastewater, provided that the sanitary wastewater is not regulated by an applicable categorical Standard and does not include the pollutant at levels that are significantly higher than typical domestic levels for the POTW's service area. See 40 CFR 403.12 (e)(2)(i).

One commenter noted several industries that claimed that a pollutant was not present in their Discharge, only to have it show up in monitoring results. EPA is aware of similar instances and knows of circumstances where the pollutants are later detected in the sampling data at fairly high levels. This is one of the reasons why EPA is requiring that the technical evaluation of the facility to determine the presence of the pollutant be

supported by sampling data, including data prior to treatment. Even though EPA is generally not requiring a minimum amount of data (with the exception of the one sample required prior to treatment), Control Authorities are expected to have sufficient sampling data to support the technical evaluation. Where monitoring data shows that the pollutant is present at levels above the background intake water level, the Control Authority must deny the request for the monitoring waiver.

How much sampling data is necessary to make a determination that a pollutant is not present? Comments on this issue varied from suggesting that no sampling is necessary to providing suggestions on specific sampling frequencies for the intake water as well as the effluent Discharge. One commenter suggested that no influent monitoring data was necessary if the effluent data shows no detectable levels of the pollutant. Although EPA has concluded that some sampling data is necessary to document the absence of a pollutant in the Discharge, the amount of sampling necessary for the determination is most appropriately determined on a site-specific basis, and will depend, in part, on how convincing are the arguments regarding the ''other technical factors''. Therefore, EPA is not establishing a minimum monitoring frequency. This is also consistent with the NPDES regulations, which do not establish a minimum sampling frequency. EPA is, however, establishing a minimum requirement that one sample be collected prior to treatment. Data prior to treatment is necessary to demonstrate that the measured levels reflect any pollutants that are added to the wastewater rather than the levels after they have been reduced by treatment, since effective treatment could become less effective over time. Other data that may be used in the evaluation include final effluent data and in many cases the facility intake water.

It is important to note that the pollutant monitoring waiver is based on a facility-wide evaluation and, therefore, sampling data must be representative of all wastestreams, as well as any seasonal or other variability in the Discharge. In addition, note that the monitoring waiver is for pollutants that are neither present nor expected to be present, and not for pollutants which are added but for which no violation of the applicable Standard is expected. In some cases, the existing monitoring data will be sufficient to evaluate the presence of the pollutant in the Discharge. The data prior to treatment is less likely to have been collected in the past, although historic data, if still representative, can be used.

EPA has concluded that a sequential approach to sampling is the most appropriate way to evaluate the request for a monitoring waiver based on sampling data. If monitoring of the Industrial User's wastewater prior to treatment (and after treatment where appropriate) shows no detectable levels of the pollutant based on the most sensitive EPA approved method, then no sampling of the intake water is necessary because the levels of the pollutant in the Discharge will already have been shown to be at or below the levels in the intake water. However, if a pollutant is present in the Industrial User's wastewater, data on the levels in the influent water are necessary to determine whether the presence of the pollutant is solely the result of levels in the influent water, or the result of the Industrial User adding the pollutant to some extent. Background levels of pollutants in an Industrial User's influent water will vary from POTW to POTW, and possibly from Industrial User to Industrial User based on many factors. If historical data is available, based on prior sampling by either the Industrial User or the POTW, or based on drinking water system data that is representative of the Industrial User's intake water, additional sampling may not be necessary.

EPA notes that data for intake water must be representative of the water typically used at the facility, but prior to any water treatment or conditioning provided by the Industrial User. This generally means that the data, especially for lead and copper, should reflect pollutant levels of intake water that have been running continuously for at least several minutes, rather than pollutant levels of intake water that have been sitting in the pipes for several hours. Water system data for lead and copper will typically reflect the levels of pollutants in the water after it has been sitting in the pipes for at least six hours. Because this data is not generally representative of the levels of lead and copper in the typical facility intake water, drinking water data for lead and copper may not be representative of the Industrial User's actual intake water and should not be used unless the Industrial User can demonstrate to the satisfaction of the Control Authority that the lead and copper levels are actually representative.

How should Control Authorities and Industrial Users address analytical variability when determining if a pollutant is present above background levels? One commenter requested clarification on how to handle a situation where the Industrial User and the Control Authority had determined that a pollutant was not present, but subsequently found slightly higher levels based on monitoring data. EPA acknowledges that there is some variability in sample results. Therefore, it is possible that slightly higher levels of pollutants may be measured in the Industrial User's wastewater than in the intake water. If the higher levels are within the method variability and the technical evaluation shows that the pollutant is neither present nor expected to be present, then the results should be considered equal. If the higher levels are above the method variability, then the pollutant should be considered to be present unless the Industrial User can demonstrate that the sample result was in error, or that the intake levels of the pollutant have risen to the same extent. EPA notes that the burden is on the Industrial User to demonstrate that an analytical error has occurred through re-analysis of the sample or other similar means. An unexpected result is not sufficient justification to consider a sample result to be in error since, as noted above, sampling data at times finds pollutants which were not expected to be present. Likewise, the Industrial User would need to provide sampling data demonstrating that the levels of the pollutant in question have risen in the intake water if it believes that this is the reason for the higher levels of the pollutant in its wastewater.

Should any ongoing POTW monitoring be required to demonstrate that the waived pollutant continues to be absent from the Discharge? Not all commenters agreed with the EPA proposal requiring POTW's to monitor for any waived pollutants at least once during the effective period of the Industrial User's control mechanism. These commenters believed that the combination of the certification and the requirement to report changes in the Discharge were sufficient to ensure that the Control Authority would become aware of changes that would require a resumption of monitoring. Other commenters believed that the once per control mechanism term was appropriate and would not burden POTWs, while other commenters believed that monitoring once per year for the waived pollutants was appropriate. EPA disagrees that annual monitoring will be necessary to determine whether or not the pollutant is present. As stated in the preamble of the proposal, EPA asserts that if the Control Authority has determined, based on both sampling data and a

technical evaluation, that a pollutant is not present at levels above background, and if the Industrial User continues to certify that there is no increase in the pollutant in its wastewater due to the activities of the Industrial User, then it is appropriate to allow the Control Authority to determine whether to sample the facility more frequently than once during the term of the control mechanism. EPA received no data to suggest that more frequent monitoring is necessary. EPA notes that the Control Authority has the discretion to determine that the Industrial User must monitor for a pollutant despite the User having demonstrated that it is not present. Where the Control Authority elects to require monitoring in such circumstances, it may determine the appropriate frequency of monitoring, including frequencies that are less than twice per year. In addition, the Industrial User may also monitor on its own, even though the requirement to do so has been waived, but in this case the Industrial User must report the results of that monitoring to the Control Authority in accordance with 40 CFR 403.12(g)(6).

Although EPA is not requiring annual monitoring by the POTW, EPA has concluded that at least one effluent sample during the term of the Industrial User's control mechanism is necessary to confirm that no changes have occurred, and that the monitoring waiver is still appropriate. EPA is requiring that this monitoring be done by the POTW to ensure an independent assessment of the Industrial User. EPA has concluded that the most appropriate time for the monitoring to occur is during the renewal of the control mechanism. However, EPA also asserts that the timing is best left to the discretion of the POTW and, therefore, is not requiring that the monitoring occur at any specific time during the duration of the control mechanism.

Should the waiver be available for pollutants that in the past have caused Pass Through or Interference, or otherwise caused problems at the POTW? One commenter suggested that the monitoring waiver for pollutants not present should not be available for pollutants which have been problematic for the POTW in the past. EPA agrees that POTWs must be more careful when waiving the monitoring requirements for pollutants for which the POTW has previously experienced problems. In these instances, more monitoring data and a more careful review of the technical evaluation is warranted. However, if the pollutant is truly not present at the facility or in the Discharge and there is no potential for spills or slug loads of the pollutant, EPA does not view it as necessary to require monitoring at that Industrial User's facility merely because the pollutant was associated with past POTW problems and, therefore, will not prohibit granting a waiver in these circumstances. Granting the waiver is at the discretion of the Control Authority, and where there has been a history of problems with a pollutant at the POTW, the Control Authority may deny a waiver, if it deems this necessary to prevent future problems.

Is the waiver available for facilities subject to the Organic Chemicals, Plastics, and Synthetic Fibers category? Most comments supported allowing waiver of the monitoring requirements for pollutants not present for facilities subject to the OCPSF Standards. EPA agrees that Control Authorities should be able to grant the monitoring waiver to OCPSF dischargers if appropriate. Several commenters indicated that they know of OCPSF facilities that manufacture a limited number of products and have fairly consistent Discharges. A monitoring waiver for some regulated pollutants may be appropriate for such facilities and, therefore, a blanket exclusion for all OCPSF facilities from the waiver would not be appropriate. However, EPA notes that production and Discharges from OCPSF facilities can be highly variable. Control Authorities must ensure that sufficient information, including sampling data, is available to assess whether a particular pollutant is present at any time, taking into consideration all of the variability in production. When a particular pollutant may be present at some time based on the products that are manufactured at the facility, even if the pollutant is not currently present, a monitoring waiver for that pollutant would not be appropriate. If any facility's operations, regardless of whether they are subject to OCPSF Standards or not, are sufficiently variable that a reasonable determination cannot be made as to whether a pollutant will consistently be absent from the Discharge, the Control Authority may not grant a waiver.

How does the waiver for pollutants neither present nor expected to be present affect other waivers specifically included in a categorical Pretreatment Standard, such as the option under the metal finishing Standards allowing for implementation of a toxic organics management plan in lieu of monitoring for total toxic organics? Several commenters compared the waiver of monitoring for pollutants not present being promulgated today to other monitoring waivers such as the management plan and certification option under the metal finishing Standards in lieu of total toxic organics monitoring. In order to avoid any potential confusion, EPA is adding specific language to today's regulations which states that the monitoring waiver and certification for a pollutant that is not present cannot be used in place of any certification process established in categorical Pretreatment Standards. Therefore, today's monitoring waiver would not be available, for example, for total toxic organics under the metal finishing regulations. Rather, in order to reduce its monitoring for total toxic organics, a metal finisher would need to use the management plan and certification process contained in 40 CFR 433.12. Since the metal finishing and other category-specific certifications were established for an identified set of facilities based on an evaluation of those facilities, while today's monitoring waiver is being established generally without a reevaluation of each categorical Pretreatment Standard, EPA has concluded that it is not appropriate for today's waiver to supercede these more specific certifications. EPA notes that the equivalent NPDES Permit requirement includes this same provision. See 40 CFR 122.44(a)(2)(v). However, while the general waiver for pollutants neither present nor expected to be present cannot substitute for a category-specific certification requirement, the data and analyses that would otherwise be used to support such a waiver may be relevant to, and if so form part of the basis for, the category-specific certification.

While today's rule provides that the monitoring waiver and certification for a pollutant that is not present cannot be used in place of any certification process already established in existing categorical Pretreatment Standards, the monitoring waiver is available for pollutants that are analyzed as surrogates for other pollutants.

What happens if a facility's operations change so that a pollutant for which a monitoring waiver has been granted is now present at the facility? Several commenters correctly noted that 40 CFR 403.12(j) requires that Industrial Users provide notification of any substantial changes in the volume or character of pollutants in the Discharge. This notification requirement would apply in the event that a pollutant for which monitoring was waived became present at the Industrial User for any reason. However, the language in 40 CFR 403.12(j) refers to pollutants in the Industrial User's Discharge rather than any pollutant at the facility which is or may be added to the wastestream.

Therefore, in order to clarify the requirement for waived pollutants, EPA has added language to the final regulation that states that notification is necessary, and that the Industrial User must immediately resume monitoring, if the pollutant is found or suspected to be present. The requirement to resume monitoring would apply even before the Industrial User's control mechanism is revised to reflect the resumed monitoring. Control mechanisms that include the monitoring waiver must also include language requiring notification and the resumption of monitoring in the event that a pollutant is subsequently determined to be present at the facility. Failure to provide the required notification or to resume monitoring is a violation of the Industrial User's control mechanism and the General Pretreatment Regulations. EPA also recommends that any control mechanism issued incorporating a monitoring waiver includes a reopener clause which allows the Control Authority to revise or revoke the waiver if appropriate.

Where a facility has been granted a waiver of monitoring for a pollutant that has been determined not to be present and it installs or constructs new production lines or processes, the Industrial User must evaluate the new production lines or processes and determine whether they may cause the pollutant to be present, in which case the facility must resume monitoring.

How often will certification that the pollutant is not present in the Discharge be required? EPA proposed that certification that a pollutant is not present at the facility be submitted twice-per-year with the semiannual reports otherwise required under 40 CFR 403.12(e). Several commenters supported this approach, while others believed that a once-per-year certification would be sufficient, or that no certification should be required, especially since the Industrial User is required to report changes at the facility to the POTW. EPA has concluded that twice-per-year certification will not impose a significantly greater burden on Industrial Users than once-per-year certification since in most cases the reports would still be submitted at least twice-per-year even if monitoring for some pollutants is waived. In addition, it often may be easier for the Industrial User to include the certification with every report rather than determining which reports need the certification and which do not. Although required to report changes in the facility, an Industrial User's willingness to certify that the pollutant is not present in the Discharge provides an additional assurance that the pollutant is not present above background levels. Accordingly, EPA has decided to maintain the twice-per-year certification requirement.

In addition, EPA has clarified the language of the certification requirement to state that once an Industrial User has received a monitoring waiver, the certification is required and is not optional. If the Industrial User is no longer certain that the pollutant is not present, it must notify the Control Authority and immediately begin monitoring. EPA intends that the monitoring waiver be used in instances where a pollutant is consistently not present at a facility, and is not to be used for short periods of time when the pollutant is not present.

It should be noted that the certification provided in the 40 CFR 403.12(e)(2)(v) includes two blank spaces which are to be filled in by the Industrial User. In the first blank space, the Industrial User is to specify the applicable Pretreatment Standard(s) that apply to the facility (e.g., 40 CFR 433.15). In the second blank space, the Industrial User is to list the pollutants for which the monitoring waiver has been granted. As noted above, the certification must include all of the pollutants for which a monitoring waiver has been granted. The Control Authority may also fill in the blank spaces before incorporating the certification language into the Industrial User's control mechanism for use by the Industrial User with the semiannual or more frequent reports.

Should the waiver be available for new Industrial Users, or during an Industrial User's first control mechanism? EPA noted in the preamble to the proposed rule that the equivalent NPDES provision did not allow the monitoring waiver to be granted to New Sources/New Dischargers for the term of their first NPDES Permit. Comments on this issue were divided, with some commenters noting that the term of the first control mechanism is a good time to collect data on the presence of the pollutant at the facility, while other commenters believed that the Control Authority would generally be able to determine the presence of the pollutant, even for the first control mechanism. It is EPA's view that the Control Authority may need time to collect enough data to appropriately assess whether pollutants at a new Industrial User are consistently not present and, therefore, should be cautious in approving a waiver for new Industrial Users. Time may be necessary to determine whether there are seasonal or other variations in the operations that would result in the pollutants being present periodically. However, the length of time needed to collect the data and make the assessment will vary depending on site-specific factors. Therefore, EPA has not included language in the regulation restricting the eligibility of a new Industrial User for a monitoring waiver for pollutants that are not present.

What documentation of the waiver is required? Several commenters noted the need to document the waiver when it is approved by the Control Authority. EPA agrees that this documentation is important for the Approval Authority and the general public to ensure that waivers are properly granted. Pursuant to 40 CFR 403.14, this information must be made publicly available. It has always been EPA's intent that any monitoring waivers would be documented in the Industrial User's control mechanism. Today's regulation also specifically requires that the Control Authority's rationale for granting the waiver and any information submitted by the Industrial User in its request for a monitoring waiver be maintained by the Control Authority for at least three years after the expiration of the waiver.

B. General Control Mechanisms (40 CFR 403.8(f)(1)(iii))

Today's final rule clarifies that POTWs may use general control mechanisms, such as general permits, to regulate the activities of groups of Significant Industrial Users (SIUs). Provided that the necessary legal authority exists, the POTW may use a general control mechanism for any facilities that meet certain minimum criteria for being considered substantially similar.

In the NPDES permitting context, the use of general permits (see 40 CFR 122.28) allows the permitting authority to allocate resources in a more efficient manner and to provide timelier permit coverage. For example, direct dischargers with common characteristics may be covered under a general permit without the permitting authority expending time and money to issue individual permits to each of these facilities. The use of a general permit also ensures consistency of permit conditions for similar facilities. In the Pretreatment context, POTWs might benefit from the use of control mechanisms for Discharges from SIUs to POTWs which are similar to the general permits used in the NPDES program.

This modification should help POTWs by providing a cost-effective method to cover large numbers of similar facilities under a single mechanism. This is expected to reduce

the administrative burden of issuing separate mechanisms to similar facilities.

1. What were the rules in place prior to today's rulemaking?

Prior to today's rulemaking, the Pretreatment Regulations allowed POTWs to use general control mechanisms to control non-Significant Industrial Users, but required individual control mechanisms for SIUs. Section 403.8(f)(1)(iii) required POTWs to ''Control through, order, or similar means, the contribution to the POTW by each Industrial User to ensure compliance. * * * In the case of Industrial Users identified as significant * * *, this control shall be achieved through s or equivalent individual control mechanisms issued to each such User.'' The preamble to the regulation which originally required control mechanisms for SIUs emphasized the importance of POTWs evaluating SIUs on an individual basis to determine the need for individual requirements as necessary. See 55 FR 30082 (July 24, 1990).

2. What changes did EPA propose?

EPA proposed to revise the regulation by authorizing POTWs to use ''general permits'' to regulate SIUs in certain circumstances. Under the proposal, all of the facilities to be covered by a general permit must employ the same or substantially similar types of industrial processes; discharge the same types of wastes; require the same effluent limitations; and require the same or similar monitoring. These requirements reflect the existing criteria for using general permits for direct dischargers at 40 CFR 122.28(a)(2)(i). EPA also indicated that the use of a general permit does not relieve the SIU from any reporting or compliance obligations under Part 403.

3. What changes is EPA finalizing in today's rule?

In today's rule, EPA is finalizing the proposed rule's change to allow the use of general control mechanisms for SIUs. Section 403.8(f)(1)(iii) contains the revisions which authorize general control mechanisms.

EPA notes that today's rule replaces the term ''general permit'' with ''general control mechanism''. This terminology is more consistent with the existing Pretreatment Regulations which require that SIUs be controlled through ''permits or equivalent individual control mechanisms.'' Just as EPA has not precluded the use of an ''order or similar means'' to regulate individual SIUs, it also is not ruling out the use of other mechanisms besides permits to address groupings of SIUs. This decision is based on the rationale EPA provided when the Agency first promulgated the requirement that POTWs regulate SIUs through individual control mechanisms to SIUs. See 55 FR 30107, July 24, 1990. EPA is including the relevant passage from this final rule for reference:

> ''* * * the Agency will require issuance of ''individual Discharge permits or equivalent control mechanisms.'' An adequate equivalent control mechanism is one which ensures the same degree of specificity and control as a permit. To clarify that the conditions of the individual control mechanism must be enforceable against the Significant Industrial User through the usual remedies for noncompliance (set forth in 40 CFR 403.8(f)(1)(vi)(A), EPA has amended the language of 40 CFR 403.8(f)(1)(vi)(B) to provide that Pretreatment requirements enforced through the remedies of 40 CFR 403.8(f)(1)(vi)(A) shall include the requirements set forth in individual control mechanisms. In addition, the Agency has added to proposed 40 CFR 403.8(f)(1)(iii) a statement that individual control mechanisms must be enforceable.

What types of facilities may be subject to a general control mechanism? SIUs that are covered by concentration-based Standards and Best Management Practices may be subject to general control mechanisms. However, due to the requirement that all facilities covered under the same mechanism ''require the same effluent limitations'', facilities regulated by categorical Standards expressed as mass limits, which are inherently unique to each individual User, can not receive coverage under a general control mechanism. The one exception to this exclusion would be situations where the POTW has imposed the same mass-based local limit on a number of facilities, and any categorical Standards are expressed as concentration limits or BMPs. In addition, general control mechanisms are not available for Industrial Users whose limits are based on the Combined Wastestream Formula or Net/Gross calculations, or other calculated categorical Pretreatment Standard equivalents (40 CFR 403.6(e) and 40 CFR 403.15).

How does an SIU apply for coverage under a general control mechanism? For an individual SIU to be covered by a general control mechanism, it must file a ''written request for coverage'' with the POTW. Through the request for coverage, the Industrial User should identify its production processes, the types of waste generated, and the monitoring location or locations at which all regulated wastewaters will be monitored. The request for coverage should also include a finding that the SIU properly falls within the category of facilities covered by the general control mechanism. In addition, the SIU's request for coverage should include an indication of whether the User is requesting a monitoring waiver for pollutants not present.

The POTW does not necessarily need to establish an entirely new application process for SIUs seeking coverage under a general control mechanism. Existing procedures or forms may be used to provide coverage. The POTW may find that it is necessary to supplement existing procedures or forms to add the information EPA recommends for inclusion in the requests for coverage, as discussed in the preceding paragraph.

How does the POTW adopt general control mechanisms? A POTW must have the necessary legal authority if it wants to issue general control mechanisms. Legal authority changes would include the adoption of ordinance language consistent with today's changes to 40 CFR 403.8(f)(1)(iii) and the development of any policies or procedures that would support the issuance and implementation of general control mechanisms. Refer to Section VI for a more detailed discussion of Program modifications.

In addition, general control mechanisms have to be enforceable to the same extent as an individual control mechanism. The POTW should also have enforcement authority to take action against Industrial Users that fail to file the required request for a general control mechanism, i.e., an IU that fails to file is subject to enforcement for discharging without authorization.

The POTW should develop the general control mechanism and provide notice that it is available. The general control mechanism should, of course, specify exactly what characteristics or conditions make an Industrial User eligible for coverage. The general control mechanism must also impose all of the conditions of individual control mechanisms listed in 40 CFR 403.8(f)(1)(iii)(B)(*1*)–(*6*).

A POTW may make coverage by the general control mechanism mandatory or optional. In either case, if an Industrial User is to be covered by the general control mechanism, it must file the written request for coverage to be covered by the general control mechanism. The POTW should consider how it will notify SIUs, subsequent to their filing a written request for coverage, that they are authorized to discharge under the general control mechanism, including how it will memorialize certain facility-specific factors such as sampling location. EPA

notes that the POTW's annual report should indicate which SIUs are covered by each general permit.

Today's final rule does not preclude POTWs from requiring individual control mechanisms for specific Industrial Users, even if they might otherwise satisfy the conditions for a general control mechanism, where necessary or otherwise determined to be appropriate by the POTW. Today's final rule also does not restrict POTWs' existing authority to use general control mechanisms to regulate facilities that are not considered Significant Industrial Users.

What significant changes were made to the proposed rule?

Today's rule makes the following changes to the proposed rule:

Criteria for Coverage: In proposing the criteria for coverage under a general control mechanism, EPA omitted one of the criterion used in the NPDES general permit requirements. In today's final rule, EPA is adding this criterion, which is similar to 40 CFR 122.28(a)(2)(i)(E), to the list of criteria for coverage. The following language is included in 40 CFR 403.8(f)(1)(A)(5): ''in the opinion of the POTW, [the SIUs] are more appropriately controlled under a general control mechanism than under individual control mechanisms.''

Request for Coverage: EPA has deleted all references to the requirement to submit a ''Notice of Intent'' (NOI) to be covered under a general control mechanism. The NOI is an instrument that is applicable to the NPDES general permit program. Although the proposal indicated that an alternative instrument could be used by the POTW, EPA has concluded that the ''written request for coverage'' better reflects the Agency's intention not to restrict the POTW's decision about the type of application it chooses to use in covering SIUs with a general control mechanism.

Coverage for SIUs with Monitoring Waivers for Pollutants Not Present: EPA makes coverage under a general control mechanism available for SIUs which are requesting monitoring waivers for pollutants neither present nor expected to be present. The proposal did not state whether such facilities could still meet the required criteria for being considered substantially similar. EPA also specifies that the monitoring waiver is effective in the general control mechanism only after the SIU obtains written approval from the POTW that the monitoring waiver request has been approved.

Coverage for SIUs with Mass Limits: The proposed rule excluded all facilities subject to mass limits from coverage under a general control mechanism. Today's final rule provides one exception to that exclusion. EPA clarifies in 40 CFR 403.8(f)(1)(iii)(A) that general control mechanisms are unavailable for facilities subject to categorical Standards expressed as mass of pollutant discharged. This language does not prevent a POTW from using a general control mechanism for a group of SIUs that all have the same mass-based local limits (as distinguished from mass-based categorical Standards), as long as the SIUs are not subject to categorical Standards that are mass-based. In addition, the final rule also clarifies that the mass-based categorical Standards excluded from coverage under a general control mechanism includes those limits that are expressed as mass of pollutant discharged per day or that are production-based.

Recordkeeping Requirements: EPA is adding a requirement for the POTW to maintain for three years after the expiration of the general control mechanism, a copy of the general control mechanism itself, documentation to support the POTW's determination that the group of SIUs to be covered meets the required criteria, and copies of all related requests for coverage. This documentation will serve as a record for the POTW to support its actions in establishing the facility category and for authorizing coverage under the general control mechanism for individual facilities.

4. Summary of Major Comments and EPA Response

Is use of a general control mechanism in conflict with EPA's original intent in requiring individualized control mechanisms for SIUs? One commenter expressed concern that using general control mechanisms would not provide the specificity of control over SIUs that the Domestic Sewage Exclusion (DSE) study (Report to Congress on the Discharge of Hazardous Wastes to Publicly Owned Treatment Works—EPA 530–SW–86–004) indicated was necessary. Today's rule provides an exception to the requirement that the POTW issue SIUs ''permits or equivalent individual control mechanisms''. The commenter is correct in observing that the adoption of the requirement to issue control mechanisms to SIUs after EPA's issuance of the DSE study in 1986, was intended to provide a mechanism for the POTW to impose individualized Pretreatment requirements on SIUs. See 55 FR 30105–30110 (July 24, 1990). However, EPA has now concluded that general control mechanisms can provide an equivalent level of control for facilities that meet all of the requirements in 40 CFR 403.8(f)(1)(iii)(1–6), and will not lessen the POTW's enforcement capabilities.

Use of a general control mechanism does not relieve the POTW of any of its oversight or implementation requirements under its Pretreatment program. The purpose of the general control mechanism is to streamline the administrative requirements associated with issuing control mechanisms to multiple Industrial Users that are substantially similar. The level of control over an SIU with a general control mechanism should not be any different than if that User were covered by an individual control mechanism. Both individual and general control mechanisms must be enforceable and must contain the minimum conditions provided in 40 CFR 403.8(f)(1)(iii)(B)(1–6). In addition, EPA notes that it is within the POTW's discretion to exclude particular Industrial Users from general control mechanisms in order to treat those dischargers with more individually tailored requirements. EPA's intent is to leave these case-by-case determinations to the POTW, which should be in the best position to determine whether it is appropriate to use a general control mechanism for a particular User.

Is a Notice of Intent (NOI) required for an SIU requesting coverage under a general control mechanism? Several commenters found EPA's use of the term ''Notice of Intent'' (NOI) problematic because it suggested that POTWs would be required to use such an instrument. These commenters requested that EPA delete the reference to NOI or make it clear that the POTW can choose the appropriate mechanism for SIUs to use in seeking coverage under a general control mechanism. EPA acknowledges these concerns, and has removed the reference to ''notice of intent'' in today's final rule. The revised rule instead refers only to a ''written request for coverage.'' The decision regarding the type of application to use for general control mechanisms is entirely the POTW's. EPA emphasizes, however, that regardless of the type of instrument chosen, the request for coverage must identify, at a minimum, the information required under new 40 CFR 403.8(f)(1)(iii)(A). POTWs must also request basic contact information (e.g., contact name, address, phone number, etc.) and specification of the general control mechanism category for which the SIU is seeking coverage. See 40 CFR 403.8(f)(1)(iii)(A). The POTW will need to obtain sufficient information to verify that the User is appropriately classified under the general control mechanism, such as

information to determine the applicability of categorical Standards.

Should there be additional criteria for a User to be eligible for coverage under a general control mechanism? One commenter requested that EPA include additional criteria for determining whether a group of Users are substantially similar enough to merit use of a general control mechanism. The criteria included in the proposal (e.g., that facilities to be covered involve the same or substantially similar types of operations, discharge the same types of wastes, require the same effluent limitations, and require the same or similar monitoring) are taken from the criteria used for general permits for direct dischargers in 40 CFR 122.28(a)(2)(i). The direct Discharge criteria contain one additional limitation, not included in the proposal, requiring the NPDES permitting authority to document that, in his or her opinion, the dischargers ''are more appropriately controlled under a general permit than under individual permits.'' See 40 CFR 122.28(a)(2)(i)(E). In consideration of the commenter's request, and to be consistent with the criteria used for grouping direct dischargers within general permits, EPA has modified the proposed list of criteria to include a similar requirement that the POTW document why it believes that its SIUs are more appropriately regulated by a general control mechanism. EPA does not expect that this added criterion will impose additional burden on the POTW. This criterion merely requires that the POTW provide some written record of why it believes a particular grouping of SIUs is substantially similar, using the criteria in 40 CFR 403.8(f)(1)(iii)(A)(1–5).

Another commenter suggested that an SIU's compliance record should be used as an additional criterion for determining whether to allow general control mechanism coverage for a facility. EPA agrees that there will be factors, outside of the criteria in 40 CFR 403.8(f)(1)(iii)(A), which may support a POTW's decision to exclude a particular Industrial User from general control mechanism coverage. EPA also agrees that the need to impose a compliance schedule or enforcement order on a particular Industrial User is a good example of an additional criterion that the POTW may use to exclude an SIU from general control mechanism coverage. EPA notes that the criteria listed in 40 CFR 403.8(f)(1)(iii)(A) are minimum requirements. The POTW may include additional criteria if it chooses. However, EPA is reluctant to add additional criteria at this time, as the Agency has concluded that many of these factors will be site-specific and are best left to the POTW to judge whether they are appropriate for use in their program.

One commenter suggested that general control mechanisms not be available for SIUs that have multiple sampling locations, are subject to more than one categorical Standard, or have both federal categorical and non-categorical wastestreams. EPA agrees that situations such as this make it difficult to use a general control mechanism in some cases. However, EPA declines to adopt the additional criteria suggested by the commenter. The minimum required criteria in 40 CFR 403.8(f)(1)(iii)(A) provide some flexibility regarding the availability of coverage for any particular User. EPA prefers to leave to the POTW the site-specific judgments as to whether a class of dischargers meets the substantially similar criteria. The POTW may determine that a User which has multiple sampling points or which is subject to both categorical Standards and non-categorical requirements is sufficiently dissimilar from other Users to justify precluding that discharger from general control mechanism coverage. There may be some instances where these differences may still be accommodated under a general control mechanism, and therefore EPA has concluded that eliminating this flexibility is inappropriate.

Additionally, a general control mechanism may still be used to cover a class of Users subject to more than one categorical Standard as long as they are covered by the same Standards, in addition to meeting all other criteria for coverage. This is consistent with the requirement that all Users share the same effluent limits. See 40 CFR 403.8(f)(1)(iii)(A)(*3*). However, EPA expects that where there is one User in the class which is subject to at least one different categorical Standard than the others, even if it has one or more categorical Standards in common with the other Users, such a User would be unable to obtain coverage under a general control mechanism covering the other Users due to the differences in effluent limits.

Must the SIUs be exactly the same to be covered under a general control mechanism? Several commenters questioned EPA's intentions behind requiring that facilities meet the ''substantially similar'' criteria in order to qualify for use of a general control mechanism. Some of these commenters were concerned that the criteria would be interpreted too restrictively, and that industries would essentially have to be identical to be included in a general control mechanism group. One commenter believed that industries which are similar in many respects, but which are different in terms of operations and wastewater Discharges, should not be excluded from coverage.

EPA's view is that the criteria for inclusion in a general control mechanism category are appropriate as stated. The opportunity to develop and issue the same control mechanism for multiple SIUs comes with the tradeoff that these industries share certain minimum characteristics. In response to the commenter's observation that general control mechanisms should be available for industries which are similar in many respects, but different in terms of operations and wastes discharged, EPA agrees and notes that the criteria require that the operations be ''the same or substantially similar'' and the Discharge be of ''the same types of wastes.'' EPA does not intend for these criteria to be interpreted as requiring the operations and wastes discharged to be exactly the same; rather, the intent is that industries covered under the same control mechanism be substantially similar.

EPA acknowledges that industries are rarely the same in every respect. In order for an SIU to be included in a general control mechanism category, it must meet the criteria in 40 CFR 403.8(f)(1)(iii)(A). With the exception of the SIU's effluent limits, which must be the same as other SIUs in the general control mechanism category, EPA does not expect each SIU in a general control mechanism category to be identical.

Can a general control mechanism be used for facilities which obtain a monitoring waiver for pollutants neither present nor expected to be present? One commenter recommended that general control mechanisms not be made available for SIUs which receive a monitoring waiver for pollutants neither present nor expected to be present at the facility. The commenter reasoned that such facilities require individual control mechanisms due to the variation in sampling requirements from other facilities. EPA disagrees with the commenter. Categorical Industrial Users (CIUs) that qualify for a sampling waiver for pollutants neither present nor expected to be present can still be accommodated under a general control mechanism even if other Users in the same general control mechanism category are still required to sample for all pollutants. There is flexibility inherent in the criterion requiring all industries covered by a general control mechanism to be subject to the ''same or similar monitoring''. If a particular CIU

is similar in every other respect to other CIUs, except for a sampling waiver for pollutants neither present nor expected to be present, it is EPA's view that a general control mechanism may still be used to cover this discharger. However, a POTW could choose as a matter of its own discretion to exclude CIUs with sampling waivers from coverage under the general control mechanism.

To assist the POTW in coordinating the implementation of general control mechanisms and processing requests for monitoring waivers, EPA is requiring Users to include in their requests for general control mechanism coverage any sampling waiver requests. Such a requirement will ensure that the POTW is able to process both the sampling waiver request and the general control mechanism application simultaneously, and provide the POTW with sufficient opportunity to determine what type of control mechanism is most appropriate. Where the POTW chooses to still cover those CIUs which receive monitoring waivers under a general control mechanism, 40 CFR 403.8(f)(1)(iii)(A) specifies that the monitoring waiver is effective only after the POTW has specifically notified the affected CIUs. Also, because all control mechanisms must include SIU self-monitoring requirements, unless all of the monitoring requirements and waivers for all pollutants are the same, the POTW will need to establish a common set of monitoring requirements in a general control mechanism and determine what mechanism it will use to incorporate site-specific monitoring waivers into a general control mechanism. Some possible mechanisms for addressing facility-specific monitoring waivers include issuing a separate monitoring supplement to the general control mechanism for individual CIUs, using the waiver approval notice as a site-specific modification to the general control mechanism, or appending the general control mechanism with specific monitoring waivers. See Section III.A. for discussion of requirements associated with monitoring waivers.

Can an SIU opt out of an existing general control mechanism? Several commenters expressed opinions on one side or the other in terms of whether general control mechanisms can be made mandatory or optional by the POTW. Industrial facilities generally commented that EPA should prevent POTWs from making general control mechanisms mandatory, while POTW commenters supported keeping this decision a matter of the local program's discretion. EPA is sensitive to the concerns regarding the need for flexibility on the type of control mechanism used for individual SIUs. The industry commenters argue that the SIU should be able to choose whether it wants to be covered by an individual or general control mechanism. EPA does not specify in today's rule whether the use of general control mechanisms should be optional or mandatory. However, provided that the SIUs in a category meet the required criteria, the POTW has the discretion to determine whether coverage under the general control mechanism is required or whether the Industrial User will have the option of being covered under an individual control mechanism. EPA emphasizes that there should be minimal if any difference between an individual and general control mechanism since the POTW is required to include in a general control mechanism all of the conditions of individual control mechanism listed in 40 CFR 403.8(f)(1)(iii)(B)(*1*)–(*6*). Even if the POTW chooses to make general control mechanism coverage mandatory, the SIU may be able to demonstrate to the POTW that it does not meet one of the criteria and therefore should be issued an individual control mechanism.

C. Best Management Practices (40 CFR 403.5, 403.8(f) and 403.12(b), (e), and (h))

Today's final rule clarifies that Best Management Practices (BMPs) may be used in lieu of numeric local limits. EPA also clarifies the reporting requirements that apply when BMPs are used as Pretreatment Standards.

1. What are the existing rules?

What are Best Management Practices?

Best Management Practices (BMPs) are management and operational procedures that are intended to prevent pollutants from entering a facility's wastestream or from reaching a Discharge point. BMPs are distinguished from numeric effluent limits that regulate the pollutants once they enter a wastestream. Although the General Pretreatment Regulations have not previously defined BMPs, the NPDES regulations at 40 CFR 122.2 define BMPs as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

There are two different circumstances in which BMPs may be Pretreatment Standards. The first is when a POTW establishes BMPs as local limits to implement the general and specific prohibitions. The second is when the BMPs are categorical Pretreatment Standards established by EPA.

What regulations address the use of BMPs as local limits?

Prior to today's rule, the Pretreatment Regulations did not specifically address the use of BMPs as local limits. Thus, 40 CFR 403.5(c) required POTWs to develop ''specific limits'' and ''specific effluent limits'', without defining the term ''limits.'' (emphasis added)

The Local Limits Development Guidance (EPA 833–R–04–002A, July 2004) includes a discussion in support of BMPs as local limits, and provides references and case studies to illustrate situations where BMPs have been utilized. EPA indicates also that the development and implementation of numeric local limits is not always the only appropriate or practical method for preventing pollutant Pass Through and Interference, or for protecting POTW worker health and safety. For instance, control of chemical spills and Slug Discharges to the POTW through formal chemical or waste management plans can go a long way toward preventing problems. A local requirement for an Industrial User to develop and submit such a plan can be considered as a type of narrative local limit and can be a useful supplement to numeric limits.

What regulations address the use of BMPs as categorical Standards?

Certain categorical Pretreatment Standards allow the use of BMPs as an alternative means of complying with, or in place of the established numeric effluent limit. For example, facilities may develop toxic organic management plans in lieu of sampling to demonstrate compliance with the total toxic organic limit in 40 CFR Part 433 (Metal Finishing category). The Pesticides Formulating, Packaging, and Repackaging (PFPR) regulation provides a pollution prevention alternative as an option that may be chosen rather than complying with the ''zero discharge'' limitations. See 40 CFR Part 455 (61 FR 57518, November 6, 1996).

Although the PFPR and some other categorical Standard regulations have provided for reporting compliance data related to BMPs, the Part 403 Pretreatment Regulations did not. See 40 CFR 403.12(b), (d), and (e). Those requirements focused on sampling data to demonstrate compliance with numeric limits rather than

documentation to determine compliance with a BMP.

2. What changes did EPA propose?

EPA proposed to clarify the regulations to provide specifically that BMPs developed by POTWs may serve as local limits required by 40 CFR 403.5(c)(3). The BMPs would be enforceable under 40 CFR 403.5(d). They would be included as local control mechanism requirements under 40 CFR 403.8(f)(1)(iii)(C).

EPA also proposed to modify 40 CFR 403.12(b), (e), and (h) to clarify the reporting requirements that apply when BMPs are used as Pretreatment Standards. This would include any documentation required by the Control Authority or the Standards themselves to demonstrate compliance with BMPs that are included in categorical Standards, as well as any documentation required by the Control Authority to demonstrate compliance with BMPs that serve as local limits. EPA also proposed a change to the definition of significant noncompliance (SNC) to facilitate POTW oversight of these practices. The proposal would broaden the SNC definition at 40 CFR 403.8(f)(2)(vii)(C) to include non-numeric violations such as BMPs. In addition, EPA proposed to revise the reference to ''pretreatment effluent limit'', and replace it with the more inclusive reference to ''Pretreatment Standard or Requirement''.

3. What changes is EPA adopting today?

Today's rule adopts the proposed rule changes to the Pretreatment Regulations relating to the use of BMPs as local limits, and the reporting requirements when BMPs are used as national categorical Standards.

What significant changes were made to the proposed rule?

The only significant change made to the proposed rule was the inclusion in 40 CFR 403.3(e) of a definition of BMPs consistent with the NPDES definition.

4. Summary of Major Comments and EPA Response

Does the CWA authorize POTWs to require implementation of BMPs as local limits? A few commenters questioned the authority under the CWA for POTWs unilaterally to require Industrial Users to implement BMPs instead of or in addition to numeric local limits. POTW authority to establish limits and other controls on Discharge derives from state law, not the CWA. The Act, together with the Pretreatment Regulations, specifies authorities that POTWs must have, and establishes the conditions under which local requirements become federally enforceable. There is nothing under the Act that would preclude POTWs from setting BMP-based limits, or EPA from making such limits established by a POTW federally enforceable.

How are BMPs defined? Several commenters felt that the use of the NPDES definition of BMPs would be appropriate in the Pretreatment context. EPA agrees that such a definition would be useful, and is adopting the NPDES definition, modified slightly to reference relevant Pretreatment Standards.

Is a regulatory change needed for BMPs developed by POTWs to be considered enforceable local limits? Some commenters expressed the view that BMPs could already serve as enforceable local limits, and that a regulatory change was unnecessary. As discussed in the preamble to the proposal, the existing regulations do not specifically address this issue, although EPA has supported their use in its local limits guidance. EPA has concluded that revision of the regulations is necessary to clear up any questions on this issue. As will be discussed below, by providing this clarification EPA is ensuring that POTWs have additional means at their disposal as they seek to control pollutants and sources not amenable to more traditional numeric limits.

Will POTWs be limited in their ability to develop BMPs as local limits? Some commenters recommended that the POTW's ability to use BMPs as local limits be limited to certain situations, such as where it is impracticable to obtain representative sampling data from a type of discharger, the Discharge flow is minimal or variable, or where operations or processes of a type of discharger are similar enough that effective BMPs can be established. In general, EPA anticipates that POTWs will choose to use BMPs instead of numeric local limits where determination of compliance with numeric limits is infeasible, or as a supplement to numeric limits as appropriate to meet the requirements of the CWA. As the commenters pointed out, BMPs may be appropriate for regulating releases when the types of pollutants vary greatly over time, when chemical analyses are impracticable, and when other Discharge control options are inappropriate. It may also be appropriate for IUs to be required to comply with both BMPs and numeric limits. While use of BMPs is not appropriate in all situations, their use, either in conjunction with or instead of numeric limits, will be at the discretion of the POTW, with oversight by EPA and the state Approval Authority.

What are some specific situations where BMPs would be appropriate? Numerous commenters representing POTWs, Industrial Users and trade associations provided specific examples where BMPs would be well-suited to address certain types of industrial or commercial Discharges, either in lieu of or in addition to numeric local limits. Examples involving requirements for photoprocessors to use silver recovery systems and/or management practices were frequently cited to address silver Discharges from large numbers of commercial facilities. Also cited were requirements for dental facilities to follow BMPs to control mercury Discharges from dental amalgam where individual monitoring on a large scale is impractical and where Discharges are episodic in nature. Similarly, other commenters referred to use of shop towel management and other BMPs to address Discharges from printing facilities, or setting requirements for ''no Discharge'' of tetrachloroethene from dry cleaning facilities as an alternative to complying with a numeric limit. The Agency agrees that these are good examples of situations where BMPs may be appropriate.

BMPs may also be used to supplement categorical Standards or numeric local limits at larger facilities. One commenter described the use of chemical management plans to address specific pollutants in individual IU Permits. These plans, which were required by the POTW, require IUs to identify within 60 days of Permit issuance all sources of a given pollutant within the plant site; specify actions to be taken to control these identified sources; provide a schedule for implementing the plan; and identify individuals responsible for implementation of the plan. Upon approval by the POTW, the chemical management plan is incorporated into the IU's Permit as an enforceable requirement.

Who decides whether a POTW will require an IU to comply with a BMP or numeric limit? Some industries and trade associations asked EPA to ensure that IUs have the option of whether to meet BMPs or numeric limits. While POTWs are encouraged to work with affected Users in developing local limits, and must comply with applicable public participation requirements, the POTW is responsible for developing, implementing and enforcing local limits as it deems appropriate to meet its program requirements. As discussed above, whether BMPs are used in conjunction with or instead of numeric

limits will be at the discretion of the POTW, upon approval by the Approval Authority.

How are BMPs factored into the technical evaluation of local limits? The preamble to the proposed rule stated that for BMPs to be considered local limits under 40 CFR 403.5(c), the practices must protect against Pass Through and/or Interference. This will require the POTW to evaluate the BMPs during the technical evaluation of its local limits. Some commenters raised questions regarding whether a POTW would need to quantify the effects of a BMP in its calculation of its maximum allowable industrial loading (MAIL), and if so, how that should be done.

As discussed in the preamble to the proposal, BMPs are expected to be used where calculation of numeric effluent limitations is not feasible, such as when the types of pollutants vary over time or when chemical analyses are inappropriate. Nevertheless, a POTW needs to assign an allocation of pollutants to Users covered by the BMP either in its calculation of Maximum Allowable Industrial Loadings (MAIL), or in calculation of separate allowable loadings for commercial facilities. For instance, a POTW could estimate the loading of a pollutant from a given sector prior to imposition of BMPs by multiplying the average loading per User by the number of facilities. Expected loading reductions from required BMPs could then be estimated and incorporated into the MAIL. Thus, the POTW should be able to provide an evaluation that implementation of the numeric limit plus implementation of BMPs for specific sectors will result in the calculated Maximum Allowable Headworks Loading (MAHL) being met. Where it is expected to take a significant amount of time for BMP-based reductions to be realized, the Apre-BMP'' loading from the sector should be used in the MAIL calculations. Initial estimates of loading reductions could then be verified through sampling of selected Users that have implemented the BMPs or evaluating influent loadings for pollutants being addressed by BMPs to see if adjustments are needed for the allowable headworks loadings, the numeric limits or BMPs for any affected sectors.

May States and EPA Regions establish BMPs as local limits? One commenter observed that the language in 40 CFR 403.5(c)(4), allowing POTWs to develop BMPs as local limits, would not pertain to states that administer authorized Pretreatment programs. The commenter supported broadening this language to allow authorized states and Regions, acting in their capacity as Control Authorities, to develop and enforce BMPs. Section 40 CFR 403.5(d), states that ''where specific prohibitions or limits on pollutants (i.e., local limits) are developed by a POTW in accordance with (40 CFR 403.5(c)), such limits shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act.''

An authorized state which does not approve POTW programs but assumes local responsibility by acting as the Control Authority under 40 CFR 403.10(e) is required to implement all elements of the Pretreatment program established for POTWs in 40 CFR 403.8(f), including the establishment of local limits (40 CFR 403.8(f)(4)). Local numeric limits or BMPs established in this situation would be federally enforceable Pretreatment Standards under 40 CFR 403.5(d) provided such limits are authorized by state law.

An authorized state acting as the Approval Authority, and as Control Authority for Industrial Users which discharge to a POTW without an approved program, may develop and implement BMPs or other local limits applicable to those Industrial Users provided such limits are authorized by state law. In the case where EPA acts as the Approval Authority and Control Authority, for a local limit to be federally enforceable under 40 CFR 403.5(d), the limit would need to be incorporated into the local POTW's sewer use ordinance or other legal authority.

What are some of the common elements of an enforceable BMP? Many commenters expressed the view that without additional guidance on the structure of BMPs, their use could be subjective and difficult to evaluate or enforce. Others felt that because of their subjective and potentially arbitrary nature, BMPs should not be allowed to serve as local limits. BMPs developed by a POTW to protect against Pass Through and Interference can be structured in such a manner that compliance with their terms can be verified by a POTW, and can provide a useful alternative to numeric limits in situations where such limits are infeasible or impractical. In addition, BMPs established by POTWs as local limits will be subject to oversight from the POTW's state and EPA Region. These BMPs will be evaluated by states and EPA based on factors such as legal authority, effectiveness, and enforceability.

Based on EPA's experience and observations of situations where BMPs have been effective, enforceable BMPs should generally include the following elements. Depending on the sector being controlled, however, certain elements such as installation of treatment or prohibitions on practices may not be applicable.

- *Specific notice to IUs of requirements and enforceability.* This notice, provided through POTW sewer use ordinances or individual or general control mechanisms, should make clear which Users are subject to the BMPs, and what affected Users must do to comply with their requirements.
- *Installation of treatment.* POTWs should provide criteria or specifications that the equipment must satisfy. For example, a requirement for use of oil/water separators at auto repair facilities could include sizing or design criteria. EPA cautions POTWs to avoid endorsing the use of specific brands or vendors.
- *Requirements for or prohibitions on certain practices, activities or Discharges.* POTWs should include specific requirements or prohibitions where necessary to ensure that the use of such BMPs is protective. An example would be a prohibition on Discharges of tetrachloroethene from dry cleaning facilities.
- *Requirements for operation and maintenance (O&M) of treatment units.* POTWs should spell out their O&M expectations to ensure that treatment systems continue to perform as designed and installed. For example, restaurants could be required to have grease interceptors cleaned out at a specified frequency.
- *Timeframes associated with key activities.* POTWs should provide timeframes for when management practices must be implemented, or when required treatment must be installed and fully operational. Other milestones should be added to the schedule where necessary to facilitate the oversight of BMP implementation.
- *Compliance certification, reporting and records retention.* Establishing specific procedures for such requirements will enable POTWs to verify whether required equipment has been installed, or whether required maintenance has been performed at the specified frequency.
- *Provision for re-opening or revoking the BMP conditions.* As with numeric limits, POTWs should include language in the sewer use ordinance and/or facility control mechanisms that enables them to revoke the control mechanism at any time to include modified numeric limits or BMPs. For example, the POTW may find it necessary to revoke an Industrial User's control mechanism where the POTW determines that the User has not complied with applicable BMPs, or where the POTW determines

that it is easier to determine compliance with a numeric limit.

• *Other requirements as determined by the POTW.*

What local legal authority changes will be necessary? POTWs wishing to establish BMPs instead of or in addition to numeric local limits will need to evaluate their sewer use ordinances to ensure they provide adequate authority to require compliance with BMPs by affected Users. Further, BMP requirements such as those discussed above, and which IUs they cover, should be specified in POTW sewer use ordinances and/or Industrial User control mechanisms.

How will compliance and significant noncompliance be determined? Concerns were expressed regarding the ability of Control and Approval Authorities to determine whether a User is in compliance with BMPs. In EPA's view, BMPs that set specific requirements, incorporating as appropriate the common elements presented above, (i.e., requirements or prohibitions on practices, activities or Discharges; requirements for installation, operation and maintenance of treatment units; timeframes for key activities; reporting and records retention; certification and reporting of compliance, etc.) will aid POTWs and Approval Authorities in their compliance determinations. Once these requirements are established for one or more facilities in a sector, an IU's compliance status should be able to be verified through a combination of self-reporting and verification inspections. Where a facility subject to BMPs has not satisfied the requirements in the sewer use ordinance or control mechanism, the POTW would need to use its enforcement response plan (ERP) to determine the appropriate response, and relevant significant noncompliance criteria to assess whether the facility is in significant noncompliance. For example, a facility that fails to install required treatment equipment within a specified timeframe would generally be viewed as being in significant noncompliance 90 days after the schedule date. See 40 CFR 403.8(f)(2)(vii)(E). Likewise, a facility would be in significant noncompliance if it failed to submit a compliance certification within 45 days from the due date. See 40 CFR 403.8(f)(2)(vii)(F). POTWs adopting BMPs as local limits, or that have Categorical Industrial Users whose categorical Standards include BMPs, should evaluate their ERPs to ensure that they reflect the need to enforce non-numeric requirements.

D. Slug Control Plans (40 CFR 403.8(f)(1)(iii)(B)(6) and 403.8(f)(2)(vi))

Today's final rule addresses the requirement that POTWs evaluate the need for a slug control plan for SIUs every two years. The rule will provide POTWs with the flexibility to determine how frequently to evaluate the need for such plans, based on local conditions. At the same time, the new rule specifies that an evaluation must be undertaken for each SIU once within a specified timeframe. Today's rule also clarifies that an actual slug control plan (e.g., the physical document itself) is not the POTW's only option for controlling facilities with a higher potential for Slug Discharges. The regulation states that the POTW may choose to require that the SIU take specific, preventative actions instead of requiring the development of a slug control plan. Regardless of the requirements imposed by the POTW, today's rule will require that where actions to control Slug Discharges are determined to be necessary, the SIU's control mechanism must include provisions addressing those requirements.

These revisions do not alter current requirements regarding annual monitoring and inspections of SIUs. POTWs are still required to conduct their annual facility inspections and effluent monitoring for each of their SIUs. The revisions also do not change the POTW's requirement to prevent disruptions caused by Slug Discharges. EPA expects that, as an integral part of its ongoing oversight of all SIU facilities, the POTW will consider whether adequate measures are in place to avoid Slug Discharges. The POTW is authorized to use its own discretion in determining the timing, level of detail, and commitment of resources necessary to ensure the facility has adequate measures in place to protect against Slug Discharges. POTWs may still require the SIU to develop a slug control plan or take specified preventative measures to prevent Slug Discharges whenever the facility's slug control measures are judged to be inadequate.

Today's rule does not impose any new requirements on Industrial Users. SIUs remain subject to current requirements to eliminate or mitigate the effects of a Slug Discharge. These actions may include constructing physical containment facilities as well as implementing sound management practices to prevent Slug Discharges.

1. What were the rules in place prior to today's rulemaking?

A Slug Discharge is defined as ''* * * any Discharge of a non-routine, episodic nature, including but not limited to an accidental spill or non-customary batch Discharge'' (40 CFR 403.8(f)(2)(v)). EPA notes that the subparagraph numbers have changed slightly in the final rule due to other, unrelated modifications. The appropriate rule reference is now 40 CFR 403.8(f)(2)(vi). The regulations require POTWs to ensure that Industrial Users have policies and procedures in place to prevent or mitigate the effects of Slug Discharges. Section 40 CFR 403.8(f)(2)(v), prior to today's rulemaking, required POTWs to ''* * * evaluate, at least once every two years, whether each such Significant Industrial User needs a plan to control Slug Discharges.'' The function of such a plan is to ensure that an SIU has a planning and implementation tool to prevent Interference at a POTW treatment facility by a non-routine or accidental Discharge. The minimum elements required in a slug control plan are (1) a description of Discharge practices, (2) a description of all stored chemicals at the facility, (3) procedures for immediately notifying the POTW of the Slug Discharge and providing written follow-up notification, and (4) a variety of procedures (e.g., inspection and maintenance of chemical storage areas) for preventing adverse impacts from any accidental spills (40 CFR 403.8(f)(2)(v)(A) to (D)).

The requirement for a once every two years review of the need for a slug control plan was part of the Domestic Sewage Study rulemaking (55 FR 30082, July 24, 1990). In the preamble discussion to that rulemaking, EPA explained the need for POTWs to implement slug control programs. As part of the discussion, EPA referenced the guidance manual, *Control of Slug Loadings to POTWs* (EPA 21W–4001, February 1991, see *http://www.epa.gov/npdes/pubs/owm021.pdf*), which was then under preparation. This manual provides detailed guidance for POTWs to evaluate whether SIUs need to develop slug control plans. It also provides guidance for SIUs in developing those slug control plans. In addition, the manual recognizes that POTWs need to determine whether existing on-site conditions may impact their treatment works, while industries are in the best position to solve problems relative to their physical plants or production processes. Part 403 requires that, where found to be necessary, a POTW must require an SIU to develop a plan or impose some specified control actions to prevent Slug Discharges.

2. What changes did EPA propose?

The proposed rule suggested eliminating the requirement that POTWs evaluate the need for a slug control plan for each SIU every two years. Instead, EPA proposed giving POTWs the flexibility to review the need for slug control plans or other actions as part of their ongoing oversight of Industrial Users. The proposal would have added language to clarify that requiring an actual slug control plan is one of several options the POTW has at its disposal for controlling facilities with a higher potential for Slug Discharges. The proposed rule would have clarified that a POTW could choose to require that the SIU take certain specified preventative actions to control the Slug Discharge potential, instead of developing a slug control plan. In addition, to ensure that slug controls are enforceable to the same extent as other Standards and requirements, the proposal would have added language to require that, where a slug control plan or other action is found to be necessary, appropriate requirements would be placed in the Industrial User's control mechanism.

3. What changes is EPA finalizing in today's rule?

In today's final rule, consistent with the proposal, EPA removes the required minimum frequency for conducting POTW evaluations for the need for slug control plans or other control actions. The final rule also formalizes the requirement for SIUs to address Slug Discharges by requiring that the POTW include language in the User's control mechanism to control Slug Discharges, if it determines that a slug control plan or other action is necessary. These rule revisions appear in 40 CFR 403.8(f)(1)(iii)(F) and 403.8(f)(2)(vi).

What significant changes were made to the proposed rule?

Today's rule makes the following changes to the proposed rule:

Minimum evaluation frequency: Today's rule specifies that POTWs must evaluate at least once the SIU's need for a slug control plan or other action to control Slug Discharges. See 40 CFR 403.8(f)(2)(vi). While the POTW may choose how frequently to assess slug-related concerns, it is EPA's view that it is important to impose a minimum frequency of one time per SIU to ensure that each SIU receives at least one thorough evaluation. The provision specifies that this evaluation must have occurred within one year of the effective date of today's rule for SIUs identified as significant (yet never evaluated for the need for a slug control plan) prior to the rule's effective date. Also, SIUs identified as significant after the effective date of the rule must be evaluated for the need for a slug control plan within one year of being identified as significant.

Notification of significant facility change: EPA also adds a requirement that SIUs must notify the POTW immediately of any changes at their facilities, not already addressed in their slug control plan or other slug control requirements, which may affect the potential for a Slug Discharge. This requirement is especially relevant in the case of those Users for which the POTW has determined, from some prior assessment, that a slug control plan or other action is unnecessary. However, EPA emphasizes that this requirement affects all SIUs, even those that already have slug control plans or other measures in place. See 40 CFR 403.8(f)(2)(vi). This provision places an affirmative duty on such Users to provide the POTW with updated information on the potential slug risks that are posed by industrial process changes. This provision is consistent with, but differs from the existing notification of changed Discharge in 40 CFR 403.12(j), which focuses on advance notice of change in the volume or character of pollutants in the Discharge itself.

4. Summary of Major Comments and EPA Response

The following summarizes the major comments received and EPA's response.

Should POTWs be required to conduct annual inspections of SIUs to determine the adequacy of slug control plans? One commenter supported the proposed rule change, but recommended adding language to require the POTW to verify during an inspection that a slug control plan, if required, is adequate. EPA agrees with the commenter that the POTW should be assessing the adequacy of existing slug control plans during its annual inspection of SIUs. However, EPA has not included a specific requirement in the regulation to this effect since existing inspection and sampling guidance already recommend that POTWs assess the adequacy of slug control plans during the POTW's annual inspection.

EPA emphasizes that this provision does not affect the POTW's requirements to conduct inspections of its SIUs, nor has EPA changed its recommendations about how to assess slug-related issues at each facility. According to EPA's *Industrial User Inspection & Sampling Manual for POTWs* (1994) (*http://www.epa.gov/npdes/pubs/owm0025.pdf*), POTW inspectors should ask SIU staff if they are familiar with slug control procedures, and request that a copy of the slug control plan be provided for an assessment of its adequacy. EPA's guidance document *Control of Slug Loadings to POTWs* (1991) (*http://www.epa.gov/npdes/pubs/owm021.pdf*) recommends that inspectors verify compliance with slug control requirements and plans (see p. 2–44). In addition, EPA's slug loading guidance indicates that ''the inspector should ascertain the Industrial User's status with regard to compliance with the Plan, report any deficiencies observed in the Industrial User's current Plan, and suggest alternatives or modifications'' (see p. 2–44).

Can existing control measures or planning documents substitute for slug control plan requirements at SIU facilities? Several commenters, while supporting the proposal, requested that EPA clarify that existing spill containment procedures or plans may adequately fulfill the Pretreatment requirements concerning slug control plans. EPA agrees with the commenter that there will be situations where existing containment and spill planning documents at an Industrial User facility describe adequate means for protection against Slug Discharges. EPA recognizes that a number of existing requirements under other statutes and regulations could serve as components of slug control plans. For example, Spill Prevention, Control, and Countermeasures (SPCC) plans may address some components of a slug control plan. A POTW could also consult existing Emergency and Hazardous Chemical Inventory reports (EPCRA Section 312, 40 CFR 370) typically submitted to local fire marshals or other Local Emergency Planning Committee offices for the facility. If an SIU is covered by any of these pre-existing plans, the POTW may accept such plans in partial or complete fulfillment of the slug control requirements, as long as each element set forth in 40 CFR 403.8(f)(2)(vi)(A)–(D) is addressed in an acceptable manner in some document or collection of documents, and a reference to the need to comply with these procedures is included in the User's control mechanism pursuant to 40 CFR 403.8(f)(1)(iii)(F). However, EPA notes that many of these pre-existing plans have been developed for purposes other than control of Slug Discharges to POTWs, and the POTW must carefully review the plans to ensure that they

meet the requirements of a slug control plan and the needs of the POTW.

In summary, under today's rule, a POTW has the discretion to determine, based on an initial inspection or previous evaluations, that existing procedures and control measures at the facility make the development of a slug control plan unnecessary. The POTW should document this finding as part of its records, and, consistent with existing EPA guidance, should annually assess the adequacy of these existing procedures and control measures as part of its annual inspections. Also, implementation of these procedures or control measures should be included as requirements in the facility's control mechanism.

How should the POTW determine how often to conduct evaluations at individual facilities concerning whether a slug control plan is needed? One commenter pointed out that how frequently a POTW should evaluate the need for a slug control plan may vary for different facilities. The commenter emphasized that at some facilities, conducting such an evaluation once every two years may not be sufficient. Regarding the commenter's concerns about the frequency of Slug Discharge evaluations, under today's rule, each POTW will need to determine what evaluation frequency is appropriate for its program and/or for individual facilities. EPA also recommends that POTWs consult with the Agency's guidance document, *Control of Slug Loadings to POTWs* (1991) (*http://www.epa.gov/npdes/pubs/owm021.pdf*), which suggests different ways to prioritize industrial facilities according to Slug Discharge potential and strategies for assessing the adequacy of existing plans and programs. To ensure that POTWs are provided with sufficient notice of a change in Slug Discharge potential, EPA has added an additional requirement for SIUs which are not required to develop a slug control plan to notify the POTW immediately of any changes at their facilities affecting the need for plans or other actions to address Slug Discharges. It is EPA's position that placing the affirmative duty on the SIUs to notify the POTW of such changes further reduces the potential for Slug Discharge in the time between on-site inspections.

Although supporting the proposal, several commenters suggested that EPA adopt further criteria for determining when a slug control plan is necessary at an individual facility. Among the suggested criteria were the following: (1) Slugs from an industrial facility violated the Pretreatment requirements or otherwise harmed the POTW; or (2) the amount of stored materials, the absence of sufficient secondary containment, and the proximity of drains to the sewer create a significant risk of a harmful slug. EPA agrees with the commenter in general that criteria suggesting when a slug control plan should be developed would assist POTWs in making this decision. On the other hand, EPA decided that it should not develop rigid criteria in its regulation establishing when slug control plans should be required.

EPA emphasizes that a POTW is in the best position to make such determinations and, since such requirements will help ensure continued compliance with its NPDES Permit, it is in the interest of the POTW to do so. However, in lieu of providing a list of strict criteria, EPA suggests that POTWs and SIUs consult the Agency's guidance document, Control of Slug Loadings to POTWs (1991) (*http://www.epa.gov/npdes/pubs/owm021.pdf*), for recommendations on significant factors and types of industries to consider in determining which facilities pose a greater risk of Slug Discharge, and, therefore, should be required to develop a slug control plan. For instance, the guidance document highlights the following as the most significant factors to consider: Quantity and types of materials used or stored at an IU and their potential for causing violation of local limits or the general or specific prohibitions; potential for such materials to enter the sewer system and cause damage (i.e., whether control measures are in place); and adequacy of existing controls to prevent any potential slug loading (see p. 2–19). EPA points out, though, that the guidance also clarifies that these evaluations should be conducted on a plant-by-plant basis and that the list of factors and target industries provides generalizations from which to start. (see p. 2–7).

In response to the commenter's recommended criteria, EPA agrees that facilities which have had Slug Discharges, thus violating the Pretreatment Requirements or otherwise harming the POTW, will need a slug control plan. The slug control plan requirements were adopted to provide POTWs with a mechanism to prevent slug-related impacts. EPA is concerned that this criterion may suggest to POTWs that it is sufficient to wait for circumstances to arise (e.g., an instance of Interference at the treatment plant) before addressing the need for a slug control plan at a potentially higher risk facility. EPA does not agree that the only situations where an SIU should be required to develop a slug control plan are those where a violation of the POTW's Pretreatment program requirements has occurred. Part of what the POTW must evaluate at each SIU is whether there is the ''reasonable potential'' for Interference or Pass Through from a Slug Discharge, thereby necessitating a slug control plan or other preventative action. EPA suggests that waiting for a violation to occur before requiring a slug control plan conflicts with the proactive intent behind 40 CFR 403.8(f)(2)(vi) and may result in unnecessary Interference or Pass Through occurrences.

EPA does agree that the commenter's second suggested criterion, that the amount of stored materials, the absence of sufficient secondary containment, and the proximity of drains to the sewer create a significant risk of a harmful slug, would be appropriate POTW considerations for requiring the development of a slug control plan. These considerations are contemplated in the above referenced guidance.

How does the rule affect the current practice of evaluating SIUs annually for the adequacy of slug controls? A few commenters were opposed to the proposal because they considered it to be unnecessary. These commenters emphasized the limited burden imposed by the current biannual review requirement and the current practice of conducting annual SIU inspections which focus on, among other things, the adequacy of controls or existing plans for addressing the potential for Slug Discharges. Another commenter objected to the proposal because of concern that POTWs would no longer dedicate the necessary attention to evaluating SIU facilities for the potential for Slug Discharges.

The evaluation of slug control procedures and measures is already occurring at POTWs on an annual basis, typically during the inspection of the SIU. This practice is consistent with EPA's guidance document, Industrial User Inspection and Sampling Manual for POTWs (1994) (*http://www.epa.gov/npdes/pubs/owm0025.pdf*). EPA's modification of the frequency of the POTW's evaluation of the necessity of slug control plans should not affect the POTW's practice of conducting annual inspections of relevant slug control procedures and measures. The final rule changes do not absolve POTWs from the requirement to prevent disruptions caused by Slug Discharges. In many instances, operating conditions at an SIU will not have changed significantly since the issuance of its individual control mechanism and the facility will be in compliance with all of its Permit conditions. Under these circumstances,

the requirement to review and evaluate the need for a slug control plan or other preventative actions could be an unproductive use of resources by the POTW. In addition, today's revision to 40 CFR 403.8(f)(2)(vi) requires that each POTW evaluate the need for a slug control plan or other action at least one time at every SIU. Following this evaluation, the POTW may determine its own schedule for conducting further evaluations for the need for a plan.

In practical terms, EPA expects POTWs to take the following actions with regard to Slug Discharges: Evaluate all of their SIUs at least once for the need for a slug control plan, conduct follow-up evaluations for facilities not required to develop a slug control plans or take other actions as necessary, and inspect each SIU annually to determine the adequacy of and compliance with existing procedures and control measures. While today's revision may reduce the administrative resources currently devoted to biannual reviews for the need for a slug control plan, the POTW's overall level of oversight over Slug Discharges will not be reduced.

EPA also points out that Approval Authority audits and Pretreatment Compliance Inspections (PCIs) of POTW Pretreatment Programs will offer a valuable opportunity to evaluate how today's revisions are being implemented. During these audits or PCIs, the POTW will need to demonstrate that each SIU has been evaluated at least once (or that there is a plan to conduct such an evaluation within the coming year). EPA suggests that where a slug control plan or other action was not deemed necessary, a plan to re-evaluate the SIU for the need for a plan or other action as necessary exists. The POTW may choose a specified frequency level to re-evaluate the SIU, or it may choose to re-evaluate the facility following a notification of changed Discharge pursuant to 40 CFR 403.12(j) or 40 CFR 403.8(f)(2)(vi). EPA notes that SIUs will now be required to notify the POTW of any changes at their facility that affect the need for a slug control plan or other actions to address Slug Discharges, although POTWs still have the responsibility during the facility inspections to ensure that these notifications have been made. In addition, during the audit or PCI, the Approval Authority should determine whether the POTW is conducting an assessment of the SIU's on-site procedures and measures to control for potential slug-related Discharges.

Does the slug control plan, if required, need to be included in the SIU's control mechanism? One commenter was opposed to what it interpreted as EPA's requirement in 40 CFR 403.8(f)(1)(iii)(B)(*6*) to include the entire slug control plan document in the SIU's control mechanism. The commenter further emphasized that the slug control plan should be retained as a separate document, and suggested that the plan be incorporated by reference into the control mechanism requiring compliance with the approved plan.

EPA disagrees with the commenter as far as reading 40 CFR 403.8(f)(1)(iii)(B)(*6*) to require the inclusion of the entire slug control plan in the SIU's control mechanism. Section 403.8(f)(1)(iii)(B)(*6*) provides that the control mechanism must include ''requirements to control Slug Discharges.'' EPA expects that POTWs will include language in the control mechanism that requires control of Slug Discharges, rather than the terms of a particular SIU's plan. Including the entire slug control plan may prove to be administratively burdensome since changes made to the plan during the term of the control mechanism would potentially require that the control mechanism be modified, or be reopened and reissued.

E. Equivalent Concentration Limits for Flow-Based Standards (40 CFR 403.6(c)(6))

Today's amendment to the Pretreatment Regulations authorizes the use of concentration-based limits in lieu of flow-based mass limits for the facilities in the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) (40 CFR part 414), Petroleum Refining (40 CFR part 419), and Pesticide Chemicals (40 CFR part 455) categories. The Control Authority may use the concentration limits listed in the categorical Pretreatment Standards for these three categories as an alternative to the current requirement to convert those concentration limits to flow-based mass limits. Control Authorities establishing concentration-based Pretreatment Standards instead of mass-based limits must document that dilution is not being used as a substitute for treatment (*see* §§ 403.6(d), 414.111(a), 419, and 455). Additionally, the Control Authority is required to adjust Permit limits using the combined wastestream formula in § 403.6(e) when the wastestream used for demonstrating compliance with the Permit limits is mixed with non-process wastewater or wastewater from other processes.

1. What are the current rules?

What is a flow-based mass limit?

National categorical Pretreatment Standards establish limits on pollutants discharged to POTWs by specific industrial sectors. The Standards establish limitations on the amount of pollutants to be discharged by individual dischargers in different ways for different categories. The regulations establishing Pretreatment Standards for new and existing indirect dischargers in the Organic Chemicals, Plastics, and Synthetic Fibers Category (OCPSF), for new indirect dischargers in the Petroleum Refining category, and for new and existing indirect dischargers in the Pesticide Chemicals category currently require limits of certain pollutants to be expressed in terms of mass, based on the promulgated concentrated-based Standards and the average daily flow rate of the Industrial User's regulated process wastewater (*see* §§ 414.111(a), 419.17(b), 419.27(b), 419.37(b), 419.47(b), and 419.57(b), 455.26, 455.27). For an OCPSF indirect discharger, a pesticide chemicals indirect discharger, or a new petroleum refining indirect discharger, the Control Authority develops a mass limit by multiplying the applicable pollutant concentration that EPA promulgated in the effluent guidelines (expressed in terms of mass of pollutant per volume of Discharge) by the average daily flow rate of the Industrial User's regulated process wastewater (expressed in terms of volume per day). The result is a Permit limit on the mass of pollutants per day (*see* 58 FR 36890, July 9, 1993).

The average daily flow rate should be based upon a reasonable measure of the Industrial User's average daily flow for at least a 30-day period (*see* 40 CFR 403.6(e)(1)). Additionally, EPA ''strongly urges the Control Authority to develop an appropriate process wastewater flow for use in computing the mass effluent or internal plant limitations based on water conservation practices,'' (*see* 58 FR 36890, July 9, 1993). Finally, a Permit may be modified during its term, either at the request of the permittee (or another interested party) or on the Control Authority's initiative, to increase or decrease the flow basis in response to a significant change in production (40 CFR 124.5, 122.62). A change in production could be an ''alteration'' of the permitted activity or ''new information'' that would provide the basis for a Permit modification (40 CFR 122.62(a)(1),(2)) (*see* 58 FR 36891, July 9, 1993).

Why was the mass limit approach developed?

Effluent guidelines may be specified in a number of ways including production normalized (mass-pollutant/production unit) and concentration-

based limitations (mass-pollutant/volume of wastewater). These two types of effluent guidelines limits can be converted to a mass-based Standard by using a reasonable measure of the Industrial User's actual long-term daily production (for production normalized limitations) or the Industrial User's actual long-term average daily flow rate (for concentration-based limitations). EPA prefers setting production normalized limitations, where feasible, since production normalized limitations can require flow reduction and reduces any potential for the substitution of dilution for treatment. Specifically, production normalized limitations are calculated from production normalized flows (volume of wastewater/production unit) and incorporate wastewater flow reductions representing Best Available Technology Economically Achievable (BAT) (technology basis for Pretreatment Standards for Existing Sources, or PSES) or New Source Performance Standards (technology basis for Pretreatment Standards for New Sources, or PSNS).

EPA has established concentration-based Standards when production and achievable wastewater flow cannot be correlated nationally. EPA has explained how to calculate a mass limit in the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) regulation. A mass limit is developed from the concentration-based Standard by multiplying the promulgated Pretreatment Standard (expressed as a concentration) by the Industrial User's actual long-term average daily flow rate. This approach re-enforces the requirements of the combined wastestream formula (*see* 40 CFR 403.6(e)) to minimize the potential for dilution of process wastewaters by non-process wastewater. The combined wastestream formula of Section 403.6(e) applies to indirect dischargers where process wastewater is mixed prior to treatment with wastewater other than that generated by the regulated process.

What are the problems with mass limits based on flow?

Flow-based mass limits can, however, be difficult for the Control Authority to implement. To develop a flow-based mass limit, the Control Authority must determine the average daily flow rate of the Industrial User's regulated process wastewater and then multiply that value by the appropriate promulgated concentration Standard. This may be difficult in situations where the facility has highly variable production that leads to flows that often vary week-to-week or day-to-day. This is especially true for smaller facilities where: (1) The average daily flow rate of the Industrial User's regulated process wastewater may be infrequent or low and difficult to monitor; and (2) production tends to be more variable as the installation of equipment to provide flow equalization may not be practical.

In addition, testing for compliance with the flow-based mass limit requires having accurate information on the flow from all regulated processes at the time the sample is taken. Testing for compliance with a concentration limit only requires taking the wastewater sample and comparing the sampled concentration to the limit. In particular, since promulgation of the OCPSF Pretreatment Standards, there have been difficulties in getting Control Authorities and OCPSF facilities to correctly calculate flow-based mass limits, and to provide necessary data to determine compliance with the Standards. Deficiencies in Permits and control mechanisms have in the past hindered enforcement actions against these facilities. Enforcing mass-based Standards also becomes more complicated because there is an additional factor in the formula to calculate mass-based limits. In order to measure compliance, both flow and concentration of the pollutant need to be accurate and verified in order to produce legally enforceable mass-based results.

May alternative limits be developed for flow-based categorical Standards?

Currently, 40 CFR 403.6(c) allows Control Authorities to apply an equivalent concentration limit in addition to a current mass limit to implement a Pretreatment Standard. However, the regulations do not allow equivalent concentration limits in lieu of mass limits when the Pretreatment Standard requires a mass limit to be calculated from the promulgated concentration-based Standards and the average daily flow rate of the Industrial User's regulated process wastewater.

2. What changes did EPA propose?

EPA proposed to allow Control Authorities to use promulgated concentration-based limits instead of flow-based mass limits in establishing limits for Industrial Users in the OCPSF, Petroleum Refining, and Pesticide Chemicals categories. EPA proposed that the Control Authority would be allowed to apply such equivalent concentration limits only if the flow from the facility is so variable that the development of mass limits is impractical. EPA stipulated that 40 CFR 403.6(d) would continue to prohibit facilities from increasing flow in order to meet their concentration limits through dilution.

3. What changes is EPA finalizing in today's final rule?

The final rule allows Control Authorities to use concentration-based limits instead of flow-based mass limits for new and existing indirect dischargers in the OCPSF category, new indirect dischargers in the Petroleum Refining category, and new and existing indirect dischargers in the Pesticide Chemicals category. EPA is not limiting the Control Authority's authority to develop concentration limits to circumstances in which the Control Authority determines that the facility's flow is ''so variable as to make mass limits impracticable.'' EPA notes that Section 40 CFR 403.6(d) will continue to prohibit facilities from increasing flow in order to meet their concentration limits through dilution. As with other concentration limits, the Control Authority should be certain that dilution is not occurring and that the Discharge represents regulated process wastewater flows. The concentration may need to be adjusted using the combined wastestream formula in 40 CFR 403.6(e) if the wastestream is mixed with non-process wastewater or wastewater from other processes.

New 40 CFR 403.6(c)(6), applicable only to facilities in the OCPSF, Petroleum Refining, and Pesticide Chemicals categories, requires Control Authorities to document that dilution is not being substituted for treatment. To verify that equivalent concentration limits are not subsequently being met through use of dilution flows, Control Authorities should note that 40 CFR 403.12(e)(1) requires Categorical Industrial Users to provide information regarding maximum and average daily flows in their periodic reports, and enables them to require more detailed flow data as necessary. Using this authority, EPA recommends that Control Authorities consider specifying appropriate flow monitoring requirements and including evaluation of flow data in the review of periodic reports for Industrial Users subject to equivalent concentration Standards. This will enable Control Authorities to determine if there have been changes in flows that may indicate dilution, such as increases in process, non-process or overall flows, especially those not accompanied by production increases.

When are the equivalent concentration limits effective?

EPA notes that flow-based mass Standards, like all National categorical Pretreatment Standards, are self-

implementing for new and existing indirect dischargers in the OCPSF category and for new indirect dischargers in the Petroleum Refining category. Facilities to which these Standards are applicable must comply with the flow-based mass Standards unless a Permit or other control mechanism is issued by the Control Authority which establishes equivalent concentration limits under 40 CFR 403.6(c)(6). Where the Control Authority has not issued a control mechanism that establishes categorical concentration-based limits, the Industrial User must comply with the default flow-based mass limits as established in the applicable categorical Pretreatment Standard.

EPA notes that, for the Pesticides Chemicals category, in certain circumstances, an Industrial User may already be subject to concentration based limits rather than the otherwise required mass limits. Where the Control Authority has not established flow-based mass limits as required, Sections 40 CFR 455.26 and 455.27 provide that Industrial User must comply with the default concentration-based limits as established in the categorical Pretreatment Standard.

EPA emphasizes that for facilities in the OCPSF, Petroleum Refining, and Pesticide Chemicals categories, where the Control Authority has properly authorized the use of an equivalent concentration limit and has incorporated that limit into the Industrial User's control mechanism, the concentration limit replaces the mass limit. The final rule requires that an Industrial User must comply with the equivalent limit in lieu of the promulgated categorical Pretreatment Standard once the limit is incorporated into its control mechanism. The Control Authority may also determine that an Industrial User should be subject to both the flow-based mass limit as well as the concentration-based limit. When incorporated into the issued control mechanism, the Industrial User would have to comply with both limits. As with other equivalent concentration limits, as currently provided in 40 CFR 403.6(c), the equivalent limits being authorized under today's final rule are Pretreatment Standards for the purposes of Sec. 307(d) of the Clean Water Act and are federally enforceable.

4. Summary of Major Comments and EPA Response

A majority of the commenters supported the proposed rule as written, and most of the remaining commenters stated qualified support. Only one commenter opposed the proposal. The following section summarizes the most significant comments received and EPA's response.

Is Approval Authority review required of an Industrial User's proposed concentration limit prior to Control Authority approval? A total of 22 commenters disagreed that it would be appropriate to require Approval Authority review of an Industrial User's proposed concentration limit prior to Control Authority approval. The primary reasoning stated was that such a requirement is not necessary and would create additional burden.

EPA notes that this provision is intended to allow the permit limit to be expressed in alternate units. It is not anticipated that this revision will change the Control Authority's enabling legislation to issue and enforce a control mechanism. As such, EPA does not consider this provision to be a modification of a POTW Pretreatment Program under 40 CFR 403.18, and, therefore, finds that a POTW's use of this provision is not subject to the specified approval procedures in this section. The new equivalent limit is subject to review as part of routine Approval Authority oversight activities, such as a Pretreatment Compliance Inspection or a Control Authority audit. In accordance with current regulations, Industrial User control mechanisms and information necessary for determining permit limitations and compliance must be publicly available.

Is this provision limited to highly variable flows? Numerous commenters addressed the question of whether this provision should only be applied to highly variable flows as well as how to define the term ''highly variable flow.'' A total of 12 commenters stated that the rule should not be limited to only highly variable flows. Many mentioned the existence of factors in addition to highly variable flows that make implementation of flow-based mass limits impractical, such as the cost of obtaining accurate samples or the difficulty of sampling at facilities with very low flows. Ten commenters suggested that the Control Authority have the ability to define ''highly variable flows'' on a case-by-case basis since the basis for such a determination is highly site-specific and can vary from seasonal variations in flow to hourly variations in flow. Ten commenters thought that a 20 percent deviation from average flow is an adequate measure for ''highly variable flow,'' while five commenters requested that EPA not specify a definition for ''highly variable flow'' in the regulations.

EPA acknowledges that the there are numerous factors, many of which are site-specific, involved in determining that a facility has ''highly variable flow(s)'', and agrees that it would be difficult to establish a clear-cut definition of ''highly variable flow'' that would apply to all facilities. To be consistent with the goals of providing flexibility in this rule, and to support the Control Authority's discretion on this site specific issue, EPA has decided to allow Control Authorities to determine when the acceptable circumstances exist to allow the use of concentration limits.

Is this provision consistent with the Clean Water Act? The commenter that opposed this provision stated that EPA lacks the authority to create a variance or an alternative implementation mechanism and therefore will violate sections 307 and 402 of the Clean Water Act. The commenter also questioned the need for this proposed change, suggested that it will interfere with ongoing enforcement of the categorical Standards and the statutory deadlines for achieving them, and suggested that the record does not demonstrate that this proposed change will protect POTWs and the environment.

EPA is promulgating the changes to its Pretreatment Regulations in part under section 307(b) of the Clean Water Act. Section 307(b) clearly authorizes EPA from time to time to revise Pretreatment Standards as ''control technology, processes, operating methods or other alternatives change.'' Therefore, today's action is not in violation of section 307(b) to the extent this provision amends the Pretreatment Standards for the OCPSF, the Petroleum Refining, and the Pesticide Chemicals Categories. As EPA has explained, the amendments to the regulations will facilitate both User's compliance and POTW oversight. EPA notes that compliance evaluation and enforcement will be more straightforward and less burdensome with new equivalent concentration limits.

Moreover, the current regulations prohibit introduction of pollutants that will adversely affect POTW operations and receiving waters quality. Currently, 40 CFR 403.5 requires approved pretreatment programs and POTWs receiving pollutants from Industrial Users with potential to pass through or interfere with the POTWs' operations to develop and implement local limits to protect the POTW operations and prevent Pass Through and Interference. Consequently, the use of concentration limits in lieu of mass limits would not be authorized if it resulted in a violation of local limits approved under 40 CFR 403.5. Furthermore, this provision may be implemented only following

determination of its feasibility by Control Authorities, and not unilaterally by Industrial Users. Control Authorities' local limits will continue to ensure protection of the POTW operations and its receiving environment.

F. Use of Grab and Composite Samples (40 CFR 403.12(b), (d), (e), (g), and (h))

This section discusses: (1) The application of minimum required grab samples for pH, cyanide, total phenols, oil and grease, sulfide, and volatile organics to the periodic compliance reports; (2) when a time-proportional sample may be used instead of a flow-proportional sample; (3) when multiple grab samples may be composited prior to analysis; (4) whether four grab samples are required whenever grab sampling is appropriate; and (5) the sampling of facilities that discharge less than 24-hours per day. Other issues raised by commenters are also discussed.

1. What are the existing rules?

What are ''grab samples''?

A grab sample is ''* * * a sample which is taken from a wastestream without regard to the flow of the wastestream and over a period of time not to exceed 15 minutes'' (Industrial User Inspection and Sampling Manual for POTWs, EPA 831/B–94–001, April 1994, *http://www.epa.gov/npdes/pubs/owm0025.pdf*). Grab samples of volatile organic compounds (VOCs) must be collected almost instantaneously (*i.e.*, less than 30 seconds of elapsed time) and properly preserved (Comparison of Volatile Organic Analysis Compositing Procedures, EPA 821/R–95–035, September 1995). An analysis of an individual grab sample provides a measurement of pollutant concentrations in the wastewater at a particular point in time. Grab samples are usually collected manually, but can be obtained with a mechanical sampler.

Grab samples are required in order to accurately analyze those pollutant parameters that may be affected by biological, chemical, or physical interactions and/or exhibit marked physical and compositional changes within a short time after collection. Grab samples should be used when: (1) Wastewater characteristics are relatively constant; (2) parameters to be analyzed are likely to be affected by the compositing process, such as the procedures used for oil and grease; (3) composite sampling is infeasible or the compositing process is liable to introduce artifacts of sampling; and (4) the parameters to be analyzed are likely to change with storage. In particular, accurate determination of pH, temperature, total phenols, oil and grease, sulfide, volatile organic compounds, and cyanide requires properly collecting and carefully preserving grab samples.

What are composite samples?

A composite sample is formed by mixing discrete samples or ''aliquots.'' For a ''flow-proportional'' composite sample, each individual aliquot is collected after the passage of a defined volume of Discharge (*e.g.*, every 2,000 gallons). For a ''time-proportional'' composite sample, the aliquots are collected after the passage of a defined period of time (e.g., once every two hours), regardless of the volume or variability of the rate of flow during that period. Flow-proportional compositing is usually preferred when effluent flow volume varies appreciably over time. The number of discrete samples necessary for a composite sample to be representative of the Discharge depends upon the variability of the pollutant concentration and the flow.

Automatically collected composite samples are usually preferred to collecting grab samples and then manually compositing the grabs into a single sample. Possible handling errors made during the compositing process could yield a sample that is not truly representative of the Discharge. However, composite samples can be prepared from manually collected grab samples if each grab contains a fixed volume that is retrieved at intervals that correspond to the periods of wastewater Discharge or time of the facility's operation.

When may the requirement for flow-proportional composite samples be waived?

The regulations in effect prior to today's rule allowed Control Authorities to waive the requirement for flow-proportional compositing of samples for baseline monitoring reports and 90-day compliance reports in limited circumstances. These regulations allowed the Control Authority to accept sample data that are obtained from time-proportional composite sampling or a minimum of four grab samples if flow-proportional sampling is infeasible (*e.g.*, the facility cannot accurately measure flow) and the Industrial User demonstrated that these alternative sampling techniques will provide a representative sample of the effluent (40 CFR 403.12(b)(5)(iii)). The section on periodic compliance reports was silent on the subject of grab and flow-proportional sampling.

2. What changes did EPA propose?

EPA proposed to clarify the sampling requirements in 40 CFR 403.12 in the following ways:

Do the sampling requirements apply to periodic reports on continued compliance? EPA proposed to extend the requirements of 40 CFR 403.12(b)(5)(iii), which were explicitly applicable to the baseline monitoring reports and 90-day reports required by 40 CFR 403.12(b) and (d), to the periodic reports required in 40 CFR 403.12(e) and (h). These changes would be accomplished by consolidating the new requirements for all of the reports in 40 CFR 403.12(g). Redundant sections would be removed.

Is a minimum frequency required for grab samples? EPA proposed that for periodic monitoring reports, a minimum of four grab samples would not need to be taken in all instances to measure pH, cyanide, total phenols, oil and grease, sulfides, and volatile organic compounds. Instead, Control Authorities would have the flexibility to determine the appropriate number of grab samples required for periodic compliance reports. For new facilities, the Industrial User would still be required to take a minimum of four grab samples to measure pH, cyanide, total phenols, oil and grease, sulfide, and volatile organic compounds to meet baseline monitoring and 90-day compliance report requirements. For existing facilities, where historical sampling data are available, the Control Authority may authorize a lower minimum.

When and what type of grab samples can be manually composited? EPA proposed to explicitly state that compositing of certain types of grab samples prior to their analysis would be permitted.

When can time-proportional or grab samples be used in lieu of flow-proportional composite samples? EPA proposed that Control Authorities may authorize time-proportional or grab sampling in lieu of flow-proportional sampling as long as the samples are representative of the Discharge.

What are the sampling requirements for those facilities that do not discharge continuously? EPA proposed language intended to clarify that, although a ''24-hour composite sample'' must be taken within a 24-hour period, the sample should only be collected during that portion of the 24-hour period that the Industrial User is discharging from the regulated process and/or from the treatment unit.

3. What changes are being finalized by EPA in today's rule?

EPA is finalizing language intended to clarify the sampling requirements in 40 CFR 403.12. Specific changes to the regulations, as well as pertinent details related to their implementation, are discussed below.

Do the sampling requirements apply to periodic compliance reports? Today's rule finalizes the extension of sampling requirements, which previously were only explicitly applicable to the baseline monitoring reports and 90-day reports required by 40 CFR 403.12(b) and (d), to the periodic reports required in 40 CFR 403.12(e) and (h). These changes are accomplished by consolidating the new requirements for all of the reports in 40 CFR 403.12(g). Redundant sections are removed.

Is a minimum frequency required for grab samples? The final regulatory changes eliminate the requirement that a minimum of four grab samples be taken in all instances to measure pH, cyanide, total phenols, oil and grease, sulfides, and volatile organic compounds. Control Authorities will have the flexibility to determine the appropriate minimum number of grab samples Industrial Users are required to take. The Control Authorities will be responsible for documenting the site-specific circumstances in the Industrial User's file. New facilities and facilities that make changes or install new treatment are still required to take a minimum of four grab samples to measure pH, cyanide, total phenols, oil and grease, sulfide and volatile organic compounds to meet baseline monitoring and 90-day compliance report requirements. For facilities where historical sampling data are available, the Control Authority may authorize a lower minimum number of grab samples.

There are some cases where a single grab sample can be reasonably expected to be representative of a Discharge. Appendix V to the EPA guidance (Industrial User Inspection and Sampling Manual for POTWs, EPA 831/B–94–001, April 1994, *http://www.epa.gov/npdes/pubs/owm0025.pdf*) lists cases where a single grab sample may appropriately be substituted for a single composite sample, including small batch Discharges. For example, a homogeneous batch Discharge is consistent with existing guidance on the appropriate use of a single grab sample.

When and what type of grab samples can be manually composited? Today's final rule clarifies that multiple grab samples for cyanide, total phenols, sulfide, oil and grease, and volatile organic compounds collected during a 24-hour period may be composited prior to analysis. Control Authorities also will be allowed to authorize manually composited grab samples for other parameters that are unaffected by compositing procedures. Using protocols (including appropriate preservation) specified in 40 CFR Part 136 and appropriate EPA guidance, EPA clarifies in the rule that multiple grab samples collected during a 24-hour period may be composited prior to the analysis as follows: for cyanide, total phenols, and sulfides, the samples may be composited in the laboratory or in the field; for volatile organics and oil and grease, the samples may be composited in the laboratory.

It is important that a composite sample provides an accurate representation of the pollutant in the wastewater. The composite sample should provide analytical results that are comparable to averaged results of the individual grab samples taken over a specific time interval. In all cases where a series of grab samples is manually composited, those parameters that have preservation requirements in 40 CFR Part 136 must be properly preserved and/or stored at the time of collection as required by the specific analytical method employed prior to compositing. In addition, EPA wishes to reaffirm that some pollutants are not amenable to the compositing process. For example, total residual chlorine, pH, and temperature samples cannot be ''composited'' under any circumstances because the results would be changed by the compositing process. Today's final rule does not allow Control Authorities to authorize composite samples for these parameters.

Although analytical procedures for compositing oil and grease samples have been developed, the general consensus among laboratory experts is that current techniques do not provide consistently reliable results. However, continuing advances in analytical technology may provide methodologies that will make accurate compositing of oil and grease samples technically less cumbersome and more cost effective in the future. Under today's rule, the Control Authority has the flexibility to allow Industrial Users to submit data from composited oil and grease samples as long as the samples were composited in the laboratory and the sampling and analytical procedures used are sanctioned by EPA in 40 CFR Part 136.

EPA guidance (*Industrial User Inspection and Sampling Manual for POTWs,* EPA 831/B–94–001, April 1994, *http://www.epa.gov/npdes/pubs/owm0025.pdf*) describes procedures for manually compositing individual grab samples that will provide accurate results. The reader should also consult the regulations in 40 CFR Part 136 to identify the accepted analytical protocols for specific classes of compounds or individual parameters. A separate guidance manual (*Comparison of Volatile Organic Analysis Compositing Procedures,* EPA 821/R–95–035, 1995, *http://www.epa.gov/clariton/clhtml/pubtitleOW.html*) discusses procedures for accurate compositing of volatile organic compounds.

When can time-proportional or grab samples be used in lieu of flow-proportional composite samples?

Today's final rule will allow Control Authorities to waive the requirement that Industrial Users collect flow-proportional samples. The regulation no longer requires Control Authorities to require the Industrial User to demonstrate that flow-proportional samples are ''infeasible.''

The Industrial User must demonstrate that the time-proportional or grab samples are representative of the Discharge before the Control Authority may allow the Industrial User to submit such samples. Where time-proportional composite sampling or grab sampling is authorized by the Control Authority, the samples must be representative of the Discharge and the decision to allow the alternative sampling must be documented in the individual Industrial User records for that facility. The use of statistical approaches to determine representativeness may be appropriate in certain circumstances. See for example, the March 2, 1989, Office of Water Regulations and Standards (OWRS) Memorandum to Region 9 describing the results of a statistical analysis of sampling data from a single industrial facility. Refer to *http://www.epa.gov/region09/water/pretreatment/program_impl.html.* In addition to demonstrating that the samples are representative, the Control Authority must ensure that compliance samples are taken with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions as required by the section modified today at 40 CFR 403.8(f)(2)(vii).

What are the sampling requirements for those facilities that do not discharge continuously?

As will be discussed below in the response to comments section, the final rule does not include the sentence in the proposed rule that read, ''For those

Industrial User Discharges subject to categorical Pretreatment Standards that do not operate on a 24-hour per day schedule, the samples must be collected at equally spaced intervals during the period that process wastewater is being discharged.'' EPA interprets a ''day'' to be a 24-hour period which does not have to occur within a calendar day. This interpretation is consistent with the definition of ''daily discharge'' in the NPDES regulations at 40 CFR 122.2. Daily discharge means the ''discharge of a pollutant'' measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. During parts of the day when there is no discharge of process wastewater, standing water should not be disproportionately sampled and analyzed as it would not be representative of the Discharge from the facility. As always, the Control Authority must prescribe a sampling protocol that produces representative results. The selected protocol should take into consideration all of the operation conditions and the physical configuration of the Industrial User facility.

What significant changes were made to the proposed rule?

EPA did not make significant changes to the proposed rule. The changes made from the proposal to the final rule include minor wording changes, a clarification to compositing methods, the reinstatement of a sentence that was removed in the proposal, and the removal of a sentence from the proposal.

The changes (other than minor wording changes intended to provide clarification) are as follows:

The following sentence, which had been deleted in the proposal, is returned to the regulations: ''The Control Authority shall require that frequency of monitoring necessary to assess and assure compliance by Industrial Users with applicable Pretreatment Standards and Requirements.'' (EPA notes that non-significant CIUs (NSCIUs) may satisfy this requirement through certification.) This sentence had been taken out in the proposed rule. However, because the sentence adds clarity, EPA has decided to retain it. The rationale is discussed in the response to comments section below.

The following sentences at 40 CFR 403.12(g)(3) were removed from the regulations: ''For those Industrial User Discharges subject to categorical Pretreatment Standards that do not operate on a 24-hour per day schedule, the samples must be collected at equally spaced intervals during the period that process wastewater is being discharged. Multiple grab samples for cyanide and volatile organic compounds that are collected during a 24-hour period may be composited in the laboratory prior to analysis using protocols specified in 40 CFR Part 136 and appropriate EPA guidance.'' The rationale is discussed in the response to comments section below.

For parameters that require grab sampling, EPA explicitly states which parameters may be composited in the field and the laboratory and which parameters may only be composited in the laboratory. This addition further clarifies the issue of compositing for samples that require collection by grab methods in order to preserve sample integrity.

4. Summary of Major Comments and EPA Response

Commenters were generally supportive of the sampling changes that EPA proposed. Some of the comments requested further clarification of issues. The following section summarizes EPA's response to these comments.

Will the final rule on compositing increase workload for sampling personnel? A commenter stated that manually compositing cyanide and volatile organics samples should be avoided for sample integrity and workload increase.

Regardless of whether multiple grab samples are individually analyzed or composited, samples must be properly preserved. Therefore, any workload change will likely occur at the laboratory, and increased workload for compositing the sample would be offset by decreased workload for analysis. EPA further clarifies in the final rule which parameters currently may be composited in the laboratory and which ones may be composited in the field. Under the current EPA-approved methods, oil and grease, and volatile organics may only be composited in the laboratory. Whether samples are composited in the lab or the field, sample integrity must be preserved, including preserving each grab sample in accordance with 40 CFR Part 136.

May Industrial Users determine the appropriate sampling flexibility without Control Authority approval? Industrial Users commented that EPA should give more flexibility to Industrial Users to determine what sampling schemes are appropriate for their facility. EPA disagrees. Control Authorities are responsible for ensuring that compliance samples are taken with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions as required by 40 CFR 403.8(f)(2)(vii) and for ensuring compliance by IUs with Pretreatment Standards and Requirements. To the extent that sampling is representative of the Discharge, the Control Authorities will be able to determine the appropriate sampling flexibility. The Control Authorities retain the responsibility for documenting site-specific circumstances and allowing alternate sampling by including the alternate sampling in the Industrial User control mechanisms.

May Control Authorities determine the appropriate number of grab samples for baseline monitoring and 90-day compliance reports? EPA requested comment on whether Control Authorities should be allowed the flexibility to determine the appropriate number of grab samples required to meet baseline monitoring and 90-day compliance report requirements for facilities without historical sampling data. Commenters supported the proposal to eliminate the requirement that a minimum of four grab samples be taken to measure pH, cyanide, total phenols, oil and grease, sulfides, and volatile organic compounds. Commenters stated that Control Authorities should be given flexibility to determine the appropriate number of grab samples required to meet reporting requirements, but did not provide concrete reasons as to how this would ensure that the sampling was representative of the Discharge.

EPA stresses that the flexibility should only be provided to the extent that the sampling is representative. The Control Authority will be responsible for documenting site-specific circumstances and allowing alternate sampling in the Industrial User control mechanisms. Baseline Monitoring Reports (BMRs) will likely provide the first samples for a parameter, and 90-day compliance reports will provide samples after any treatment has been added. Therefore, it is likely that at a minimum this data will be needed in order to document that alternative sampling is representative. Because it is unlikely that a Control Authority could properly document that sampling is representative without data from BMRs and 90-day compliance reports, EPA retains the requirement for a minimum of four grab samples for BMRs and 90-day compliance reports in order to document potential future sampling decisions for new facilities. For existing facilities where there is historic data representative of the current Discharge, Control Authorities may authorize a lower minimum number of grab samples for pH, cyanide, total phenols, oil and grease, sulfides, and volatile organic compounds. Of course, where there has

been a change to existing facilities, for example, the addition of treatment, historic data that does not represent the current Discharge would not be able to be used to justify a lower minimum of grab samples.

As stated previously, Control Authorities must ensure that compliance samples are taken with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions as required by 40 CFR 403.8(f)(2)(vii). To further strengthen this point, the following sentence, which the proposed rule would have deleted, is retained in 40 CFR 403.12(g)(3): ''The Control Authority shall require that frequency of monitoring necessary to assess and assure compliance by Industrial Users with applicable Pretreatment Standards and Requirements.'' Sampling and analysis techniques must yield analytical data that is representative of the Discharge. The Control Authority will still need to document how alternate sampling techniques are representative of the Discharge, and may require that more than four grab samples be taken and separately analyzed to ensure that sampling is representative. Where the Control Authority cannot verify that previous techniques were representative, such data will not support the use of this alternative practice. EPA notes that ''non-significant CIUs'' (discussed in Section III.K of the final rule) may be authorized to substitute annual certification for sampling and analysis. See 40 CFR 403.12(q).

Will EPA define ''representative'' sampling in the rule? Commenters noted that the rules repetitively use the concept of ''representative'' samples, but do not precisely define what the samples are supposed to represent. In the proposed rule preamble (64 FR 39582, July 22, 1999), EPA indicated that it would not offer a comprehensive definition of what constitutes a ''representative sample'' or specific guidance. EPA is not defining ''representative sample'' in the final rule. Guidance on the subject may be found in Industrial User Inspection and Sampling Manual for POTWs (EPA, 1994, *http://www.epa.gov/npdes/pubs/owm0025.pdf*).

Sampling methods to yield a representative sample may vary depending on the site-specific situations of an individual discharger and the parameter that must be analyzed. Issues for the Control Authority to consider and document in prescribing sampling protocols include: (1) The appropriate sampling period (e.g., 24 hours or during the period of discharge); (2) use of flow proportional versus time-proportional methods; (3) use of grab samples versus composite samples; (4) use of grab samples for pH monitoring; (5) use of grab samples for degradable and volatile parameters; (6) allowing manual compositing of samples when the methodology is approved by EPA; and (7) applying the criteria to instantaneous, daily maximum, and monthly average limits.

Is EPA providing further clarifying language for collection of samples during process wastewater Discharges in the final rule? A commenter asked EPA to clarify whether a sample taken during a 24-hour period must be taken during a calendar day, or whether a sample may be taken over the course of two days. For example, if a facility discharges 24 hours per day, must the sample be taken from midnight to midnight, or may it be taken for other twenty-four hour periods (e.g., noon to noon)?

EPA interprets a ''day'' to be a 24-hour period and does not require that it occur within a calendar day. This is consistent with the definition for ''daily discharge'' in the NPDES regulations at 40 CFR 122.2. Daily discharge means the ''discharge of a pollutant'' measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the ''daily discharge'' is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the ''daily discharge'' is calculated as the average measurement of the pollutant over the day. This is existing policy and was not proposed to be modified in the rule, and therefore has not been added to the final rule. EPA recognizes that Control Authorities may define a more specific sampling period.

Another commenter asked for EPA to clarify whether a sample may be taken over the course of two calendar days in other circumstances. For example, if a facility discharges from 7 a.m. to 7 p.m., must a sample be taken from 7 a.m. to 7 p.m., or may a sample be taken from noon on one day to noon on the next day so long as only regulated wastewater is sampled? In the example provided, the sampling for compliance would need to be representative of the categorical process Discharge, and would need to account for other factors such as ensuring that stagnant water is not sampled if the facility is not discharging, and that process wastewater is not being discharged during the 7 p.m. to 7 a.m. period (for instance in an overtime situation). Where a sampler is placed from noon to noon, and wastewater samples (with volume proportionate to Discharge) are only collected during the discharge period (e.g., there is not a process wastewater Discharge, and no samples are collected from 7 p.m. to 7 a.m.), and the samples are properly preserved, then it is likely that the sample would be appropriate for use to determine compliance during a 24-hour period. Since this example addresses a site-specific situation, EPA is not inclined to revise the rule to address one particular set of circumstances. While other industries may have similar situations, the Control Authorities will need to consider all of the site-specific circumstances in detailing the sampling requirements for the facility in the individual Industrial User's control mechanism.

A commenter expressed concern with the proposed language pertaining to required sampling periods. The section originally clearly pertained only to sampling required for reporting under subsections 40 CFR 403.12(b), (d) and (e), of all categorical streams. As revised in the proposal, the requirements also apply to reports required under subsection (h) as well as to all other non-categorical waste streams. The commenter stated that the discussion in the preamble to the proposed rule seemed to indicate these very specific requirements only apply to categorically regulated wastestreams. However, the commenter indicated that this intent was not adequately stated in the regulation itself.

The commenter went on to state, ''Local limits are developed based on total daily average influent loadings and total daily flows from all sources tributary to the receiving treatment plant. Many IUs, particularly larger ones, will have wastewater flows, from sources such as cooling systems, boilers, etc. that continue throughout the 24-hour day, as well as flows from maintenance and clean-up activities that often occur during non-process periods. In some cases, continuing composite sampling during these 'off-process' periods may, in fact, reduce the daily average concentration of a pollutant. In other cases, pollutant Discharges during maintenance or clean-up activities, may contribute higher levels of pollutants than during normal processing periods. In either case, to determine compliance with local limits, it seems sampling should be conducted throughout the period of discharge, regardless of whether or not 'process' operations are occurring the entire time.''

In response, EPA removed the sentence from the proposed rule that read, ''For those Industrial User Discharges subject to categorical Pretreatment Standards that do not operate on a 24-hour per day schedule, the samples must be collected at equally spaced intervals during the period that process wastewater is being discharged.'' It would be too complicated to try to address all local limits variations in this section of the regulation, and as indicated by the commenter, the proposed language did not clarify the issue.

G. Significant Noncompliance Criteria (40 CFR 403.8(f)(2)(viii))

1. What were the rules in effect prior to today's rule?

How is ''Significant Noncompliance'' (SNC) currently defined?

The previous 40 CFR 403.8(f)(2)(vii) defined ''Significant noncompliance'' (SNC), as it applies to Industrial Users to include violations that meet one or more of eight criteria. The criteria are: (1) Chronic violations of Discharge limits (where 66 percent or more of all measurements taken for the same pollutant parameter during a six-month period exceed the daily maximum limit or the average limit); (2) Technical Review Criteria (TRC) violations (where 33 percent or more of all measurements taken for the same pollutant parameter during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC (TRC equals 1.4 for BOD, TSS, fats, oil and grease and 1.2 for all other pollutants except pH)); (3) any other violation of a Pretreatment effluent limit that the Control Authority determines has caused, alone or in combination with other Discharges, Interference or Pass Through; (4) any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment or has resulted in the POTW's exercise of its emergency authority to halt or prevent such a discharge; (5) failure to meet, within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order for certain activities; (6) failure to provide required reports within 30 days after the due date; (7) failure to accurately report noncompliance; and (8) any other violation or group of violations which the Control Authority determines will adversely affect the operation or implementation of the local Pretreatment Program.

What are the background and purpose of the SNC criteria?

On July 24, 1990, EPA modified 40 CFR 403.8(f)(2)(vii) to include the existing definition of SNC (55 FR 30082). The purpose of this modification was to provide some certainty and consistency among POTWs for publishing their lists of Industrial Users in significant noncompliance. EPA modeled the modification after the criteria under the NPDES program used to determine SNC violations for direct dischargers. By making the modifications, EPA also established more parity in tracking violations by direct and indirect dischargers.

What happens when an Industrial User facility is in SNC?

POTWs are required to publish annually a list of Industrial Users in SNC at any time during the previous twelve months. In the previous rules, the POTW was required to publish this list in the largest daily newspaper published in the municipality in which the POTW is located.

The Agency has emphasized that Industrial Users are liable for any violation of applicable Pretreatment Standards and Requirements, and has strongly encouraged Control Authorities to take some type of enforcement response for each such instance of noncompliance. Supporting this approach, EPA notes that the very underlying premise of the Enforcement Response Plan (40 CFR 403.8(f)(5)) is that there be some type of POTW response for each instance of noncompliance. Appropriate types of enforcement responses are addressed in the POTW's Enforcement Response Plan, although EPA guidance recommends that violations rising to the level of SNC be met with some type of formal enforcement action like an enforceable order (Guidance For Developing Control Authority Enforcement Response Plans, EPA 832–B–89–102, September 1989, (see *http://www.epa.gov/npdes/pubs/owm0015.pdf.*)

2. What changes did EPA propose?

EPA proposed the following modifications to the SNC provision in 1999:

a. Publication

EPA proposed to amend the previous 40 CFR 403.8(f)(2)(vii) to allow publication of the SNC list in any paper of general circulation within the jurisdiction served by the POTW that provides meaningful public notice rather than in the largest daily newspaper published in the municipality as is currently required.

b. Applicability

EPA proposed to amend the SNC criteria to apply only to Significant Industrial Users (SIUs). Under the existing regulations, SNC can apply to any Industrial User.

c. Daily Maximum or Average Limit Violations

EPA proposed to amend the previous 40 CFR 403.8(f)(2)(vii)(A), (B), and (C) to include a broader set of violations than just daily maximum and average limits.

d. Other Issues

EPA also took comment on several other issues, but did not propose specific changes. These issues include Technical Review Criteria (TRC), late reports, and rolling quarters.

3. What changes is EPA finalizing in today's rule?

EPA is finalizing four changes to amend 40 CFR 403.8(f)(2)(vii).

a. Publication

EPA is amending 40 CFR 403.8(f)(2)(vii) (now 40 CFR 403.8(f)(2)(viii)) to allow publication of the SNC list in any paper of general circulation that provides meaningful public notice within the jurisdiction served by the POTW. EPA's intent in modifying this requirement is to be consistent with the July 17, 1997 amendments to Part 403 regarding modifying POTW Pretreatment Programs (62 FR 38406). Under the amended 40 CFR 403.11(b)(1)(i)(B), publication can be in any paper of general circulation within the jurisdiction served by the POTW that provides public notice. It is EPA's view that this new performance standard for publishing SNC violations properly balances the need to give the POTW the flexibility to choose an appropriate newspaper within its community, with the need to ensure effective public notice and deterrence of ''bad actors.''

b. Applicability

EPA is amending the SNC criteria so that SNC will apply only to SIUs and to those Industrial Users that have caused Pass Through or Interference, have a Discharge that resulted in the POTW's exercise of its emergency authority to halt or prevent such a Discharge, have caused imminent endangerment to human health, welfare, or the environment, or have otherwise adversely affected the POTW's ability to operate its Pretreatment program. This approach is consistent with the NPDES

SNC policy which only applies to major dischargers. See ''Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits,'' memorandum from Steven A. Herman, Assistant Administrator for the Office of Enforcement and Compliance Assurance, September 21, 1995. Additionally, EPA emphasizes that the SNC criteria apply not only to SIUs, but also to IUs that cause significant adverse impacts to the POTW, human health or the environment. These modifications should cut down on administrative burdens and allow better resource targeting. These modifications ensure the POTW's ability to address all potentially problematic Users adequately. The Agency wants to make it clear that this change is focused only on the POTW's publication and reporting requirements. EPA fully expects POTWs to take appropriate enforcement actions against any Industrial User that violates a Pretreatment Standard or requirement. POTWs still have the option of publishing non-significant Industrial Users with violations that do not fall within one of the above-mentioned categories.

c. Daily Maximum or Average Limitations

EPA is amending 40 CFR 403.8(f)(2)(vii)(A) and (B) (now 40 CFR 403.8(f)(2)(viii)(A) and (B)) to apply to a broader range of violations such as other numeric limits, instantaneous limits, narrative limits, or operational standards, and amending 40 CFR 403.8(f)(2)(vii)(C) (now 40 CFR 403.8(f)(2)(viii)(C)) to address other Pretreatment Standards and requirements. This change is important since some local limits may be expressed as instantaneous limits or narrative limits. The revised language addresses other types of requirements like operational standards. The amendment is generally consistent with EPA's revision to its NPDES SNC policy where EPA broadened the criteria to address non-monthly average limitations. See ''Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits,'' memorandum from Steven A. Herman, Assistant Administrator for the Office of Enforcement and Compliance Assurance, September 21, 1995.

d. Late Reports

EPA is amending 40 CFR 403.8(f)(2)(vii)(F) (now 40 CFR 403.8(f)(2)(viii)(F)) so that SNC applies to reports that are provided more than 45 days after the due date, instead of to reports that are 30 days late. The change applies to required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules. EPA is making this change because many Control Authorities and Industrial Users that commented on the late report issue argued that the 30-day timeframe was too restrictive. EPA notes that Industrial Users that submit reports even one day late are in violation.

4. What significant changes were made to the proposed rule?

a. Applicability

EPA modified the proposal by adding to the scope of SNC those non-significant IUs that cause Pass Through or Interference, have a Discharge that resulted in the POTW's exercise of its emergency authority to halt or prevent such a Discharge, cause imminent endangerment to human health, welfare, or the environment, or otherwise adversely affect the POTW's ability to operate its Pretreatment program.

b. Daily Maximum or Average Limit Violations

In the proposal, EPA proposed to modify the provisions of the then current 40 CFR 403.8(f)(2)(vii)(A), (B) and (C) (now 40 CFR 403.8(f)(2)(viii)(A), (B) and (C)) to address not only violations of daily maximum or longer-term average limits, but also a broader range of violations such as other numeric limits, instantaneous limits, narrative limits, or operational Standards. EPA has modified the proposal in the following ways:

Chronic violations (40 CFR 403.8(f)(2)(viii)(A): EPA has clarified the revised language to more accurately describe the target violations. The term ''numeric'' was added to clarify that only Standards or Requirements that can be numerically quantified can be examined for possible chronic violations. Also, EPA specifies that chronic violations include violations of both ''Standards and Requirements'; the term ''Requirements'' was not included in the proposal. The inclusion of this term provides the intended broader scope that EPA sought in the proposal. EPA also clarifies that violations of instantaneous limits are also to be considered for chronic violations.

During the process of revising the chronic and TRC violations provision, EPA found the difference between the use of the phrase ''for the same pollutant parameter'' for chronic violations, and the phrase ''for each pollutant parameter'' for TRC violations, may have led to some unintended misinterpretation. It is EPA's intention that the chronic and TRC criteria be applied to the ''same pollutant parameter.'' To avoid potential confusion, EPA modified both the chronic and TRC provisions to use the same phrase (*i.e.,* for the same pollutant parameter), and to place the phrase in the most appropriate place in the provision to improve its clarity.

TRC (40 CFR 403.8(f)(2)(viii)(B): EPA adopted the same changes for TRC violations that were made for chronic violations.

Any other violations: EPA has modified the proposed rule by including clarifying language on what is meant by a ''Pretreatment Standard or Requirement.'' EPA provides parenthetical examples, including daily maximum, long-term average, instantaneous, or narrative Standards.

c. Late Reports

EPA did not propose any changes to the then current 40 CFR 403.8(f)(2)(vii)(F) (now 40 CFR 403.8(f)(2)(viii)(F)), which contains the SNC criterion for late reports. Instead, EPA sought comments on several options for the late report criterion. The options included tying SNC to a pattern of late reporting; applying the SNC criterion to a late report only if the report indicated that a violation of monitoring requirements or numeric limitations had occurred; allowing POTWs to extend ''waivers'' in some circumstances to Industrial Users that offered a satisfactory reason why reports were late; limiting the types of reports to which the SNC criterion applies; retaining the 30-day late report criterion, but changing the publication requirement as it pertains to late reports; extending the time after which a late report puts an Industrial User in SNC (*e.g.,* to 45 days or 60 days); or providing the POTW with complete authority for determining when late reports trigger SNC. EPA is amending the criterion so that Industrial Users are in SNC if reports are not provided within 45 days after their due date.

5. Summary of Major Comments and EPA Response

a. Publication

Most commenters were in favor of making the change that EPA is adopting in today's rule. EPA is amending the regulation to allow publication of the SNC list in any paper of general circulation that provides meaningful public notice within the jurisdiction served by the POTW. One reason given

for supporting this change included possible lower costs to the municipality. Other commenters pointed out that the previous use of the largest daily newspaper requirement did not make sense in certain situations. Such examples included that the largest daily newspaper may not always have provided the most effective notice, and the fact that some municipalities may only have a weekly publication and no daily publication.

EPA also sought comment on an appropriate definition for ''meaningful public notice'' to ensure some level of consistency across the Pretreatment programs. Some commenters provided suggestions for defining ''meaningful public notice'' such as linking it to the service area population, the circulation rate of the newspaper, or the official daily newspaper as determined by the Control Authority. Other commenters stated that the definition of ''meaningful public notice'' should be determined by the Control Authority because defining it by service population or circulation rate could be overly burdensome and not necessarily meet the intent of the Standard. EPA agrees with the commenters who suggested that defining ''meaningful public notice'' could be overly burdensome. Therefore, at this time, EPA has decided not to define ''meaningful public notice.''

b. Applicability

The majority of commenters supported either modifying the application of SNC to SIUs only, or to SIUs and those Industrial Users which caused Pass Through or Interference, had a Discharge that resulted in the POTW's exercise of its emergency authority to halt or prevent such a Discharge, caused imminent endangerment to human health, welfare, or the environment, or otherwise adversely affected the POTW's ability to operate its Pretreatment program. Some commenters did not want to limit SNC to apply only to SIUs because not all Industrial Users which should be are properly identified as SIUs. The commenters also noted that all Industrial Users are required to comply with Pretreatment Standards and Requirements, regardless of whether they are designated as SIUs. (Several commenters also indicated that changing the SNC definition to apply only to SIUs would be unfair, because, with such a change, this definition would no longer apply to other Industrial Users that could cause the same types of impacts as SIUs.) EPA agrees that certain non-Significant Industrial Users should continue to be covered under the SNC provisions. By including the application of SNC to SIUs and those Industrial Users which cause the specific problems referenced above, the rule should address the commenters' concerns.

The distinction EPA is making today is not focused on the size of the facility; rather, EPA focuses on those dischargers with the largest potential to impact the system. EPA continues to strongly encourage POTWs to use their existing authority under what will now be codified as 40 CFR 403.3(v) to designate any Industrial Users as significant if they have the reasonable potential to adversely affect the POTW's operation or to violate any Pretreatment Standard or Requirement. This includes considering smaller facilities that have the potential (either individually or collectively) to impact the system. Furthermore, all Industrial Users are required to comply with Pretreatment Standards and Requirements, regardless of whether they are designated as SIUs, and EPA expects appropriate enforcement to be taken for each violation by any Industrial User.

c. Daily Maximum or Average Limit Violations

Commenters were divided on this proposed rule language. One commenter mentioned that the revision would be much more consistent nationally if it were to apply only to numeric categorical Pretreatment Standards. Another commenter indicated that the Control Authorities often are required to make ''subjective judgments regarding compliance with narrative Standards, instantaneous limits and some general prohibitions,'' and that such a subjective judgment would be an inappropriate basis for an SNC determination. Another commenter indicated that all applicable Pretreatment Standards are enforced now, and that there would be no discernible benefit to expanding the types of violations that could trigger a SNC determination. Some commenters cited the possible increased burden on the Control Authorities if such additional Standards were used to make SNC determinations.

On the other hand, several commenters were supportive of the proposed rule change. Some commenters indicated that the revision would better reflect the fact that Industrial Users must be in compliance with all applicable Pretreatment Standards and requirements in order to meet the goals of the national Pretreatment program. Other commenters focused on the fact that Interference or pass-through could be caused by violations of Standards other than categorical Pretreatment Standards, and therefore they saw a need to expand the SNC criteria.

EPA agrees with those commenters who supported an expansion of the range of SNC criteria consistent with the proposed rule, and has added other numeric limits, instantaneous limits, narrative Standards, or operational Standards as part of the SNC criteria. This approach will give more equal weight to categorical Standards, local limits, and other Standards as applicable Pretreatment Standards and Requirements. This expansion of SNC criteria would also potentially enhance the Control Authority's ability to address such violations (*i.e.*, other numeric limits, instantaneous limits, narrative Standards, or operational Standards) by placing a higher priority on these violations. EPA has concluded that such a change would still provide national consistency and be more protective by better ensuring compliance with all applicable Pretreatment Standards and Requirements. Control Authorities are currently expected to address violations of all applicable Pretreatment Standards and Requirements, so that this proposal should not necessarily impose any increased enforcement responsibilities on the Control Authorities. In addition, as the preamble to the proposed rule states (64 FR 39593), this approach would be consistent with ''EPA's recent revision to its NPDES SNC policy where EPA broadened the criteria to address non-monthly average limit violations.'' See ''Revision of NPDES Significant Noncompliance (SNC) Criteria to Address Violations of Non-Monthly Average Limits,'' memorandum from Steven A. Herman, Assistant Administrator for the Office of Enforcement and Compliance Assurance, September 21, 1995.

Under the NPDES SNC policy, when a parameter has both a monthly average and a non-monthly average limit, a facility is only considered in SNC for the non-monthly average if the monthly average is also violated to some degree (but less than SNC). EPA sought comment on whether such a caveat is also appropriate for the Pretreatment Regulations. Very few commenters focused on this particular topic. A few commenters indicated that a determination that a particular violation or set of violations constituted SNC should only occur if there was a meaningful violation of the POTW's NPDES Permit limit for that particular parameter. In the absence of significant comment and in recognition that effluent violations other than monthly average violations could have significant impacts on the POTWs, EPA

has decided not to modify the regulations to restrict SNC for violations of non-monthly averages.

d. Technical Review Criteria (TRC)

In the existing regulations, the Technical Review Criteria (TRC) may be found at 40 CFR 403.8(f)(2)(vii)(B) (now found at 40 CFR 403.8(f)(2)(viii)(B)). As described in the preamble to the proposed rule (64 FR 39593), these TRC ''* * * are numeric thresholds used to define a subcategory of SNC * * * based on the magnitude of an effluent violation. A TRC violation occurs where 33 percent or more of all of the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC.'' TRC is equal to 1.4 times the applicable Standard for BOD, TSS, fats, oils and grease; TRC is also equal to 1.2 times the applicable Standard for all other pollutants except pH.

As further stated in the preamble to the proposed rule (64 FR 39593), EPA was not proposing to amend the TRC. However, EPA did seek comment on this topic, particularly regarding local limits. EPA stated that it was ''* * * interested in suggestions for workable alternatives * * * that would ensure that the magnitude of a violation * * *'' continues to be part of the definition of SNC, with the condition that such alternatives ''* * * would not unduly increase the workload on either the Control Authority or the Approval Authority.'' Based on its review of the comments, EPA is not considering any further changes to TRC.

Several commenters expressed a clear preference that TRC not be modified. Several commenters also provided alternative numeric thresholds for TRC. However, there was no consensus among the comments for an alternate threshold and a sufficient justification for the use of such alternative thresholds was not provided. As explained in the preamble to the proposed rule (64 FR 39593), the existing regulations are ''consistent with the NPDES approach which has generally been accepted over the years as an indicator of a 'significant' level of exceedance which should be reviewed for enforcement purposes.'' Furthermore, as that same preamble stated, ''(T)he same considerations apply to the TRC as it is applied to categorical Standards in the Pretreatment program and may be relevant for local limits.'' In a sense, by keeping the TRC the same for both direct dischargers to surface waters and indirect dischargers to POTWs, the criteria help maintain a ''level playing field'' by ensuring that this subcategory of SNC is linked to some nationally-consistent designated magnitude above the applicable Standard, whether that Standard is an NPDES Permit effluent limit, a categorical Pretreatment Standard, or a local limit.

Several commenters, using similar language, stated that ''it is incumbent on EPA to develop TRC that are germane to the objectives of the Pretreatment program, developed in a manner that lends credence to application of effluent guidelines and local limits, and are technically sound and defensible.'' Just as best achievable technology Standards (BAT) and stream use are factors considered in the development of effluent limits, BAT and protection of the POTW's operations are factors considered in the establishment of categorical Pretreatment Standards and local limits respectively. Therefore, if these Pretreatment limits are properly derived for their intended purpose, the TRC are simply intended to represent numeric thresholds at magnitudes above these applicable Standards such that, above this level, such significant non-compliance should make the authority sufficiently concerned and warrant appropriate action. As such, EPA concludes that there is not sufficient reason to try to account only for instances of potential Pass Through or Interference, or to make allowances for the range of treatment plant performance, or to have different TRC for individual pollutant parameters for different POTWs. Such revisions would be contrary to EPA's intent to keep the regulations simple to understand and implement, and to not unduly increase the workload on the Control Authority or Approval Authority.

Some of the commenters advocated the elimination of the TRC entirely. EPA disagrees with these commenters. As indicated above, EPA asserts that a measure of the magnitude of the violation is an appropriate consideration in determining SNC. The preamble to the proposed rule (64 FR 39593) stated that EPA was not proposing to amend the TRC, and EPA believes that radical revisions to the TRC are not warranted.

One commenter indicated that TRC should only apply if the levels are at least five times the applicable Standard. EPA concludes that this level is far too high a threshold to serve as a proper deterrent to dischargers and as an adequate indicator of potential compliance problems. EPA emphasizes that POTWs should be concerned about reported results, the adequacy of industrial treatment, and potential impacts on the plant operations or receiving waters at levels which are much less than five times the applicable Standard.

Some commenters sought to adjust the TRC by having them only apply to daily maximum limitations. Other commenters suggested that for the violations to rise to the level of SNC EPA modify the percentages for TRC and chronic criteria from 33 to 34% and from 66 to 67% of all measurements taken, respectively. EPA disagrees with these commenters, because it is not clear how these changes will improve the application of TRC or provide equal if not added environmental protection when compared to the existing TRC criteria.

As stated above and in the preamble to the proposed rule (64 FR 39593), EPA did seek comment on the TRC, particularly regarding local limits. No commenters focused on whether TRC may be inappropriate for local limits, based upon a distinction in the derivation, site-specific variability and intent of local limits as compared to categorical Pretreatment Standards. Therefore, EPA did not adopt changes to reflect the use of TRC for local limits.

e. Late Reports

The existing regulations require that Industrial Users that submitted reports more than 30 days late be considered in SNC. This is consistent with the NPDES SNC approach for late reports. EPA did not propose any specific changes to this part of the SNC definition, but did solicit comment on possible options or combinations of options to modify this portion of the definition. The options included tying SNC to a pattern of late reporting; applying the SNC criterion to a late report only if the report indicated that a violation of monitoring requirements or numeric limitations had occurred; allowing POTWs to extend ''waivers'' in some circumstances to Industrial Users that offered a satisfactory reason why reports were late; limiting the types of reports to which the SNC criterion applies; retaining the 30-day late report criterion, but changing the publication requirement as it pertains to late reports; extending the time after which a late report puts an Industrial User in SNC (*e.g.*, to 45 days or 60 days); or providing POTWs with complete flexibility for determining when late reports trigger SNC.

Comments on this issue were mixed. Many commenters noted that reporting is important in and of itself and it serves a vital role in ensuring adequate implementation and oversight of the Pretreatment program. Commenters

noted that failure to submit or late submittal of reports impede POTWs from meeting goals of their approved programs. Because of the importance of reporting, a few commenters (POTWs) argued that EPA should retain the existing SNC criterion for late reports.

However, a majority of commenters asked EPA to modify the SNC criterion for late reports in some way. They noted that reports are sometimes late because of circumstances that are beyond the control of the Industrial Users. Commenters also stated that publication should be reserved to Industrial Users that violate numeric Pretreatment Standards or fail to monitor, rather than for violations that some commenters characterized as ''administrative'' violations. One commenter also noted that a 30-day criterion may be appropriate for NPDES permittees, but not for the Pretreatment Program because NPDES permittees generally submit reports more frequently than Industrial Users regulated by the Pretreatment Program and because the Pretreatment Program also relies on surveillance by the POTWs. Based on these comments, EPA agrees that modifications to the SNC criterion for late reports are appropriate.

Although most commenters favored modifications to the SNC criterion for late reports, commenters disagreed on how the provision should be modified. Some commenters stated that POTWs should be given complete flexibility in determining whether late reports constitute SNC. Others argued that POTWs should be provided some amount of flexibility, but not total flexibility. It is EPA's position that the definition of SNC should be consistent throughout the Pretreatment Program. Therefore, the Agency has chosen to establish a consistent SNC criterion for late reports that would avoid the use of different SNC criterion by various POTWs for the same type of reporting violations.

Some commenters suggested that the SNC criterion for late reports should recognize a pattern of late reporting, or should consider the Industrial User's compliance history. For example, some commenters suggested that a late reporter be considered in SNC if 33 percent or more of required reports in a specified reporting period are provided more than 30 days late. Another commenter suggested that three monitoring reports submitted more than thirty days late could constitute a history of chronic late reports, and another commenter suggested that failure to submit a completed discharge monitoring report in any two months of any consecutive six month period should trigger SNC. EPA agrees that POTWs should take steps to address Industrial Users that demonstrate a pattern of late reporting. In addition, EPA strongly asserts that the SNC criterion for late reports must address reports that are submitted extremely late or that are never submitted, even if the extremely late submittal or failure to submit is a one-time occurrence.

Some commenters argued that SNC for late reports should apply only if the report, once submitted, indicates that the Industrial User has violated a numeric Pretreatment Standard or failed to monitor. Others supported a provision in which reports provided more than 30 days late, but less than 45 days, should trigger SNC only if they indicated another violation. EPA views this suggested change as potentially minimizing the importance of reporting as a tool for POTWs to implement local Pretreatment Programs. Also, EPA asserts that the SNC criterion for late reports must address reports that are submitted extremely late or that are never submitted, even if the extremely late submittal or failure to submit is a one-time occurrence and even if the report does not indicate monitoring or effluent violations.

A number of commenters supported extending the number of days until which late reports trigger SNC from 30 days to 45 days. EPA agrees that this change is appropriate and easy to implement. A few commenters suggested the option of extending the period from 30 days to 60 days. EPA has concluded that this change is not appropriate because most cases of late laboratory reports or other miscommunications can be addressed quickly. EPA also concludes that receiving data 60 days late would be more likely to jeopardize POTWs' management of their Pretreatment Programs and have the potential to adversely impact the POTW and its receiving water.

A few commenters suggested that the SNC criterion for late reports should only apply to periodic self-monitoring reports and 90-day self compliance reports. EPA asserts that, in order to avoid confusion and ease tracking of late reports, the same criterion should be applied to all reports. One commenter asked that EPA amend the regulations so that SNC for late reports applies to ''baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, *or* reports on compliance with compliance schedules'' (rather than ''baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules''). The commenter was concerned that the provision could be interpreted to imply that Industrial Users must submit both the 90-day compliance reports and the periodic self-monitoring reports to avoid being in SNC. The list of reports comprises a list of examples of ''compliance reports.'' EPA does not agree that changes are needed to this language, nor does the Agency find the commenter's arguments to be valid.

In considering revisions to the late reporting criterion for SNC, EPA notes that implementation of the Pretreatment Program relies heavily on a self-policing and self-reporting system. This self-reporting is important to enforcement. If a failure to report becomes routine, the entire program can be weakened. EPA expects POTWs to take some level of enforcement action against any Industrial User that provides late reports. EPA would also like to emphasize that there is current flexibility in the existing rule to address some of the concerns related to one late report putting an Industrial User in SNC. For example, the Control Authority has some flexibility in setting the due date and can set it to coincide with some other established reporting or billing cycle. Also, in the enforcement response policy the POTW can have an escalation policy, whereby, for example, the Industrial User would receive a warning letter that the report is 5–10 days late past the due date and/or fines associated with the report before it rises to the level of being in SNC.

f. Rolling Quarters

EPA memoranda circa 1991 and 1992 form the basis of EPA's policy that SNC for IUs should be calculated on a rolling quarter basis. (September 9, 1991 memorandum from Michael B. Cook, Director of EPA's Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I–X and approved Pretreatment State coordinators, ''Application and Use of the Regulatory Definition of Significant Noncompliance for Industrial Users,'' *http://www.epa.gov/npdes/pubs/application_use_regulatory.pdf*, and January 17, 1992 memorandum from Mark B. Charles, Chief of RCRA and Pretreatment Enforcement Section, to the Regional Pretreatment Coordinators, Regions I–X, ''Determining Industrial User Significant Noncompliance—One Page Summary,'' *http://www.epa.gov/npdes/pubs/industrial_user.pdf*). The term ''rolling quarters,'' under EPA's national policy, refers to an approach which requires the Control Authority to evaluate an Industrial User's compliance status at the end of each

quarter by using data from the previous six-month period. In the regulations, determinations of significant noncompliance are based upon six-month periods (40 CFR 403.8(f)(2)(viii)(A) and (B)).

Many commenters expressed concern regarding the concept of rolling quarters and instead endorsed the adoption of static six-month periods that do not overlap. Many commenters were concerned that the use of rolling quarters could result in the need to publish the name of the Industrial User in two separate years for SNC for the same violation.

Many commenters who supported the static six-month approach voiced concerns that the use of rolling quarters unnecessarily complicated the calculations of SNC and the annual publication of those IUs in SNC, without apparent benefits over the use of static six-month periods. They indicated that the concept was complex, difficult to implement and would only result in confusion for the Industrial Users and increased burden for the control authorities.

Some commenters preferred to begin to ''roll'' time periods after a violation occurs, thus giving, as one commenter stated, the possibility to ''* * * allow Industrial Users to achieve compliance and obtain additional samples'' to verify compliance, all within the given time period. The commenters explained that this could give Industrial Users an opportunity to demonstrate compliance rather than being listed as being in SNC for violations that were corrected months ago. EPA noted in the preamble to the proposed rule (64 FR 39594, July 22, 1999) that while the Agency provided some discussion of the various opinions regarding the use of rolling quarters, EPA did not ultimately propose a specific change regarding rolling quarters national policy, did not seek comment on whether to discontinue EPA's national policy regarding the use of rolling quarters, and did not propose an alternative approach. It remains EPA's intention to continue the existing national policy that SNC for Industrial Users be evaluated on a rolling quarter basis. This approach, which is the same as the one used in the NPDES program for the determination of SNC by direct dischargers, will remain the same.

EPA did seek comment on whether the concept of rolling quarters should be codified in the Pretreatment Regulations. Some commenters expressed their opposition to such codification, based largely upon their preference to use an alternative to rolling quarters. A few commenters supported codification, indicating that by making the use of the rolling quarters approach mandatory, EPA would help ensure national consistency in its use by Control Authorities. One commenter recommended codification of the due date for the annual publication of Industrial Users in SNC. After considerable internal discussion and careful deliberation, EPA has decided not to codify rolling quarters in the Pretreatment Regulations.

In the preamble to the proposed rule (64 FR 39594, July 22, 1999), EPA specifically sought comment on whether the regulations should be revised to allow Control Authorities to waive the second publication (as described above) ''where that second publication is based solely on the violations occurring in the last quarter of the previous Pretreatment year.'' Many commenters sought the elimination of this double publication issue through a specific rule change to the publication requirements, particularly if the final rule implements the concept of rolling quarters. Those commenters indicated that such duplicate publications in the newspaper would be unfair to the Industrial User which had corrected its compliance problems and would mislead the public regarding the status of such an Industrial User.

EPA's 1991 memorandum, cited previously, addressed the issue of possible publication in two different years of an Industrial User that is in SNC for the same violation. EPA was clear on the point that double publication is not intended by the use of rolling quarters. It stated that ''(I)f a facility has been determined to be in SNC based solely on violations which occurred in the first quarter of the 15-month evaluation period (*i.e.*, the last quarter of the previous Pretreatment year) and the facility has demonstrated consistent compliance in the subsequent four quarters, then the POTW is not required to republish the Industrial User (IU) in the newspaper if the IU was published in the previous year for the same violations.'' It is EPA's position that no revisions are needed on this point. However, EPA wishes to clarify that a facility does not need to have full compliance to avoid double publication. Rather, if a facility was already determined to be in SNC during the previous pretreatment year, and the facility would not be in SNC in the current year but for violations occurring during the last three months of the previous year, then the facility is not considered in SNC for the current year.

H. Removal Credits—Compensation for Overflows (40 CFR 403.7(h))

1. General Background

Section 307(b) of the CWA which requires EPA to establish pretreatment standards also authorizes a discretionary program for POTWs to grant ''removal credits'' to their industrial users. The credit in the form of a less stringent categorical Pretreatment Standard would allow an Industrial User to discharge a greater quantity of a pollutant than would otherwise be authorized because the POTW's treatment processes sufficiently reduce the concentrations of the pollutant.

Section 307(b)(1) establishes a three-part test that a POTW must meet in order to obtain removal credit authority for a given pollutant. Removal credits may be authorized only if (1) the POTW ''removes all or any part of such toxic pollutant,'' (2) the POTW's ultimate discharge would ''not violate that effluent limitation or standard which would be applicable to that toxic pollutant if it were discharged'' directly rather than through a POTW, and (3) the POTW's discharge would ''not prevent sludge use and disposal by such [POTW] in accordance with section [405] * * *'' (Sec. 307(b)). EPA promulgated removal credit regulations that are codified at 40 CFR 403.7 (See 43 FR 27736, 46 FR 9404, 49 FR 31212, and 52 FR 42434).

In this rulemaking, EPA proposed only one limited change to the removal credits provision of the General Pretreatment Regulations. A number of commenters, however, asked EPA to consider changes to the regulations to allow greater availability of removal credits for a broader range of pollutants. The Agency's current plans with respect to sewage sludge regulations and removal credits are discussed in detail in a Notice published today with this rule.

2. What are the existing rules governing how removal credit authority is affected by the occurrence of overflows in the POTW sewer system?

Section 403.7 of the General Pretreatment Regulations describes the conditions under which removal credits may be available to an Industrial User. Among other things, the regulation provides that, given certain conditions are met, a POTW may grant a removal credit to an Industrial User equal to or less than its consistent removal rate for that pollutant. The regulation defines ''consistent removal rate.'' In circumstances where a POTW ''annually Overflows'' untreated wastewater to

receiving water, the POTW may claim consistent removal of the pollutant only under the conditions specified either in 40 CFR 403.7(h)(1) or (2). ''Overflow'' means the intentional or unintentional diversion of flow from the POTW before the POTW treatment plant.

Under subsection (h)(1), a POTW may claim consistent removal only if, for example, the POTW has established plans for notifying Industrial Users in the event of a potential overflow and the Industrial User has, among other things, taken certain actions to provide containment of, or ceases or reduces, its discharges of the pollutant for which the removal credit is sought. Alternatively, in subsection (h)(2), the current rule provides that consistent removal may be claimed under a mathematical formula that reduces consistent removal to take account of the Overflows so long as the POTW has taken steps required by an EPA guidance document on combined sewer overflows (CSOs) published on December 16, 1975 (*i.e.*, PRM 75–34). This latter requirement was intended to ensure that POTWs granting removal credits were taking appropriate steps to address CSOs as outlined in EPA's then-current guidance. Since then, EPA has adopted the CSO Control Policy with updated requirements for addressing CSOs. Section 402(q) of the CWA provides that all NPDES permits must be consistent with the CSO Control Policy.

3. What changes did EPA propose?

EPA proposed to make Industrial Users that are upstream of Overflows ineligible for removal credits unless they could establish that their discharges would be consistently treated. Consistent with that approach, the proposal would have deleted the existing provision in 40 CFR 403.7(h)(2) which allows removal credits for discharges that are subject to Overflows, but reduces the credit by a percentage equal to the percentage of time in a year that the POTW is subject to Overflows. In addition, references in the regulation to the now obsolete guidance on construction grants review procedures for developing CSO control were to be removed by deleting Appendix A as well as discussion of that guidance in 40 CFR 403.7(h)(2).

4. What changes is EPA finalizing in today's rule?

Today, EPA is limiting its action to updating the references to obsolete guidance published in 1975, for the construction grants program. Existing 40 CFR 403.7(h)(2)(ii) and (iii) and Appendix A are deleted and replaced with a requirement for the POTW to be in compliance with all NPDES permit requirements and other requirements in any orders or decrees issued pursuant to the 1994 CSO Control Policy. As noted above, CWA 40 CFR402(q) requires all NPDES permits to conform to this policy. The existing formula in 40 CFR 403.7(h)(2)(i) for adjusting removal credits based on the number of hours of Overflow discharges occurring in a year is retained.

EPA decided not to adopt the proposed revision which would have required that removal credits be limited to the percentage of the pollutant that was removed during the Overflow event. EPA does not have sufficient information to determine the impacts of such a change on existing programs using removal credits and is concerned that the adoption of this change may have disrupted these programs with little environmental benefit.

Today's rule also makes one technical correction in response to comments received. EPA corrects footnote 1 in Appendix G, Table I (Regulated Pollutants in Part 503 Eligible for a Removal Credit) by including a reference to the use of carbon monoxide. The Part 503 regulations now allow the use of either total hydrocarbon (THC) or carbon monoxide concentrations to represent organic compounds in exit gas from incinerators. EPA amended Part 503 subpart E (59 FR 9095, February 25, 1994) to authorize the demonstration of compliance with the 100 ppm THC operational standard by meeting a 100 ppm CO limit. Therefore, EPA is modifying footnote 1 to reflect the fact that either total hydrocarbon or carbon monoxide, as a surrogate monitoring parameter, may be used.

I. Miscellaneous Changes (40 CFR 403.12(g), (j), (l), and (m))

Signatory Requirements for Industrial User Reports and POTW Reports (40 CFR 403.12(l) and (m))

Today's rule revises the signatory requirements for Industrial Users at 40 CFR 403.12(l)(1)(ii) to adopt more flexible standards for determining who must sign reports on behalf of a corporation. EPA's NPDES regulations include similar requirements for NPDES Permits. See 40 CFR 122.22(a)(1)(ii). Today's amendments make similar changes to the signatory requirements for ''duly authorized employees'' of POTWs. See 40 CFR 403.12(m) and 122.22(a).

1. What were the rules in place prior to today's rulemaking?

Sections 403.12(l)(1)(ii) previously limited the circumstances in which a plant manager could sign a Pretreatment report as a responsible corporate officer. Prior to today's rule, in order to sign a report on behalf of a company, the manager was required to manage a facility with more than 250 employees or $25 million in sales or expenditures.

Section 403.12(i) addresses annual reporting requirements for POTWs. Prior to today's rule, 40 CFR 403.12(m) required these reports to be signed by ''a principal executive officer, ranking elected official or other duly authorized employee if such employee is responsible for overall operation of the POTW.' ''

2. What changes did EPA propose?

EPA proposed to revise the signatory requirements for Industrial Users at 40 CFR 403.12(l)(1)(ii) to adopt the same language that EPA proposed in 1996 (61 FR 65268) and now uses for direct dischargers at 40 CFR 122.22(a)(1)(ii). On May 15, 2000, EPA finalized revisions to 40 CFR 122.22(a)(1)(ii) to replace the numeric criteria for designating an appropriate signer with more flexible narrative criteria (64 FR 39595). Rather than conditioning signature authority on resource management size, the revised criteria describe the necessary signer in terms of general management authority and responsibilities. The revised criteria require the manager to have the authority to make capital investment decisions and assure long term environmental compliance.

In addition, EPA also proposed to revise the signatory requirements for POTW reports at 40 CFR 403.12(m) so the requirement would be more consistent with signatory requirements in the current 40 CFR 122.22(a). EPA proposed to allow signature by a duly authorized employee having responsibility for the overall operation of the facility or activity such as the position of POTW Director, Plant Manager, or Pretreatment Program Manager. This authorization could be made in writing by the principal executive officer or ranking elected official, and submitted to the Approval Authority prior to the report being submitted.

3. What changes is EPA finalizing in today's rule?

In today's final rule, EPA adopts the proposed rule's changes. The following modifications to the proposed rule were made:

Duly Authorized Employee: The proposed rule provided examples of which POTW personnel could sign as a ''duly authorized employee.'' EPA was concerned that the specific examples

given (*e.g.*, POTW Director, Plant Manager, or Pretreatment Program Manager) might have unintentionally limited the designation of ''duly authorized employee'' at a POTW in the case of an employee that did not have the same exact position title as any of the ones listed in the proposal. To avoid any confusion and provide intended flexibility, today's rule adopts the proposal's requirement that the duly authorized employee be ''an individual or position having responsibility for the overall operation of the facility'', yet simplifies the language by deleting the examples of specific POTW positions from the proposal.

Authorization for Duly Authorized Employee: EPA clarifies in today's rule that the POTW's authorization of a duly authorized employee to sign POTW reports can be submitted to the Approval Authority ''together with'' the next annual report. The proposal only provided the option of submitting such authorization ''prior to'' the annual POTW report.

4. Summary of Major Comments and EPA Response

The following is a summary of major comments received and EPA's response:

Do individuals previously authorized to sign POTW reports need to comply with the new ''duly authorized representative'' requirements? Several commenters observed that individuals currently signing POTW reports for their program, who may have been signing such reports for numerous years, would now need to receive Approval Authority approval prior to signing the next report after today's rule becomes effective. The commenter suggested that EPA add a grandfather provision which enables such individuals to continue signing POTW reports without having to comply with the ''duly authorized representative'' requirements at 40 CFR 403.12(m).

EPA has not adopted the commenter's suggestion. In EPA's view, the new language provides greater flexibility to POTWs than is currently provided by the Pretreatment Regulations and clarifies any uncertainty about which employees may be ''duly authorized'' to sign and submit Pretreatment reports. If the commenter chooses to continue its practice of delegating a duly authorized representative to sign relevant reports, this authorization, consistent with 40 CFR 403.12(m) ''must be made in writing and submitted to the Approval Authority prior to or together with the report being submitted.''

EPA notes that the proposed rule made it seem as if the Approval Authority's approval of duly authorized representatives needed to occur prior to the submission of the next report. Because this is inefficient for the POTW, EPA modified the proposed language in 40 CFR 403.12(m), to indicate that the POTW can request such approval either ''prior to or together with'' the POTW report being submitted. It is EPA's opinion that this change addresses the commenters' concerns about the inefficiency of waiting for approval from the Approval Authority before submitting a report. EPA sees no reason why the POTW's request to use a duly authorized employee signatory not be considered by the Approval Authority at the same time that it receives the POTW's report.

For Industrial User reports, why is EPA no longer requiring the signatory to be a high level person of authority ultimately responsible for the overall management of the business? One commenter disagreed with the change to 40 CFR 403.12(l) observing that the signatory should continue to be a high level person of authority who is ultimately responsible for the overall management of the business. EPA clarifies that today's rule merely provides greater flexibility in the type of ''responsible corporate officer'' who may sign reports on behalf of an Industrial User. The revised requirements do not significantly alter the type of official designated as signatory. The Industrial User is still given the same level of flexibility as existed prior to today's rule to choose between a responsible corporate officer, a general partner or proprietor, or a duly authorized representative.

Net/Gross Calculations (40 CFR 403.15)

Today's rule corrects an unintended error in the net/gross procedures for adjusting categorical Pretreatment Standards to reflect the presence of pollutants in the Industrial User's intake water. The error appeared to make the test for using these procedures unintentionally difficult to meet.

1. What were the rules in place prior to today's rulemaking?

Net/gross calculations allow pollutants in intake water to be considered when developing technology-based limitations. EPA modified 40 CFR 403.15, the section of the Pretreatment Regulations addressing net/gross calculations, in 1988 so that this provision would be consistent with the NPDES provision for net/gross which had been revised earlier. See discussion at 53 FR 40602–40605, October 17, 1988. The NPDES provision (40 CFR 122.45(g)) is an ''or'' test which allows net/gross adjustments either where effluent Standards are specified on a net basis or where control systems meet Standards in the absence of pollutants in the intake water. That is, meeting either condition allows consideration of adjustment. However, the actual language EPA used to modify 40 CFR 403.15 in 1988 erroneously used the term ''and'' instead of ''or'', thus inadvertently establishing a test in which both conditions would have to be met. As there are no categorical Standards which specify application on a net basis, this resulted in an unintended prohibition on the use of the net/gross provision in the Pretreatment Program.

2. What changes did EPA propose?

EPA proposed to revise the language in section 40 CFR 403.15 to be consistent with the NPDES regulations and with the intent of the 1988 modification. According to the proposal, categorical Pretreatment Standards could be adjusted on a ''net'' basis if either the applicable Pretreatment Standards allow for this calculation or the Industrial User demonstrates its control system meets those Pretreatment Standards.

3. What changes is EPA finalizing in today's rule?

EPA has adopted the proposed rule change. No modifications were made to the proposal in the final rule.

4. Summary of Major Comments and EPA Response

There were no significant comments on this proposed change.

Requirement To Report All Monitoring Data (40 CFR 403.12(g))

Today's rule updates a requirement for Categorical Industrial Users (CIUs) to report all monitoring data to reflect the fact that this provision should similarly apply to non-categorical SIUs, since both types of Users are required to submit monitoring reports to the Control Authority.

1. What were the rules in place prior to today's rule?

EPA changed 40 CFR 403.12(g) in 1988 (see 53 FR 40614, October 17, 1988) to require all monitoring by Industrial Users to be reported. This was done to avoid the situation in which an Industrial User that performs extra sampling might select the most favorable monitoring result to report to the Control Authority. At the time of this change, only CIUs were required by the regulations to report on a regular basis, and therefore, this requirement was limited to CIUs. In 1990, 40 CFR

403.12(h) was added to the regulations (see 55 FR 30131, July 24, 1990), requiring all non-categorical Significant Industrial Users to also sample and report. However, at the time this change was made, the regulations at 40 CFR 403.12(g) were not updated to require all SIUs, categorical and non-categorical, to report all monitoring results to the Control Authority.

2. What changes did EPA propose?

EPA proposed to change the Pretreatment Regulations to require all SIUs, both categorical and non-categorical SIUs, to report all monitoring results for regulated parameters at the point of compliance, obtained using procedures specified in Part 136, to the Control Authority.

3. What changes is EPA finalizing in today's rule?

EPA adopted the proposed rule change to 40 CFR 403.12(g)(6). No modifications were made to the proposal in the final rule.

4. Summary of Major Comments and EPA Response

Should non-SIUs be required to report all monitoring results? Two commenters suggested that EPA revise the scope of its provision to include all Industrial Users. While there are likely important reasons to apply this provision to non-SIUs on a case-by-case basis, EPA declines to do so in a requirement affecting all Pretreatment programs. First, EPA did not consider such a revision in the proposal, and it would be inappropriate to do so in this action. Second, while it may make sense to require reporting of all monitoring results for SIUs since they are already required to monitor and report to the POTW, non-SIUs are not currently required by the Pretreatment Regulations to monitor or report. Of course, POTWs may require non-SIUs to report all monitoring data to POTWs on a case-by-case basis if local laws allow. Such a decision is a matter of local discretion.

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

Today's rule clarifies that when the Industrial User provides notification of a changed Discharge it should go to the ''Control Authority'', or the Control Authority and the POTW, where the POTW does not have an approved Pretreatment program.

1. What were the rules in place prior to today's rule?

In 1988, the regulations were changed to add 40 CFR 403.12(j) (53 FR 40614, October 17, 1988) requiring all Industrial Users to promptly notify the POTW of any substantial change in volume or character of pollutants in the User's Discharge to the POTW. This notification requirement did not include the Control Authority, which, in some cases, is not the POTW.

2. What changes did EPA propose?

EPA proposed to expand the notification requirement in 40 CFR 403.12(j) so that the Industrial User must notify the ''Control Authority'', as opposed to the ''POTW'', and in cases where the Control Authority and the POTW are different organizations, the Industrial User would notify both the Control Authority and the POTW of any substantial change in volume or character of pollutants in the User's Discharge to the POTW.

3. What changes is EPA finalizing in today's rule?

EPA has adopted the proposed rule's revision of 40 CFR 403.12(j). No modifications were made to the proposal in the final rule.

4. Summary of Major Comments and EPA Response

There were no significant comments on this proposed change.

J. Equivalent Mass Limits for Concentration Limits (40 CFR 403.6(c)(5))

This section of today's final rule addresses the establishment of equivalent mass limits for concentration-based categorical Standards. EPA is finalizing provisions that allow Industrial Users to request (and, at their discretion, Control Authorities to approve) the conversion of concentration-based categorical limits to equivalent mass-based limits. The current rule requires that the Control Authority must control contributions to a POTW by all Significant Industrial Users (which include Categorical Industrial Users) through a Permit or equivalent individual control mechanism. See 40 CFR 403.3(t) (now found at 40 CFR 403.3(v)) and 40 CFR 403.8(f)(1)(iii). Today's change authorizes the Control Authority to calculate an equivalent mass limit for the Industrial User's Permit (or control mechanism) for those categorical Pretreatment Standards that are expressed in terms of concentration. Once inserted into the Industrial User's control mechanism, the equivalent limit replaces the promulgated concentration-based Pretreatment Standard. See 40 CFR 403.6(c)(7). The final rule includes requirements that an Industrial User must satisfy in order to qualify for this conversion. These include a requirement for the Industrial User to use water conservation methods and technologies during the term of the Industrial User's control mechanism. The rule also specifies the procedures which the Control Authority must follow in calculating the equivalent mass limit. After the equivalent mass limits are in effect, the rule conditions the continued use of the limits on the Industrial User's compliance with several requirements, including, at a minimum, the maintenance and effective operation of treatment technologies adequate to achieve compliance with the equivalent mass limits, the continuous recording of flow rates, the notification of the Control Authority where production is expected to be substantially changed, and the retention of water conservation measures.

1. What were the rules in place prior to today's rulemaking?

National categorical Pretreatment Standards establish different types of pollutant limitations for different categories. EPA has established categorical Pretreatment Standards that include the following types: (1) Concentration-based Standards that are implemented directly as concentration limits; (2) mass limits based on production rates; (3) both concentration-based and production-based limits; and (4) mass limits based on a concentration Standard multiplied by a facility's process wastewater flow. Currently, 40 CFR 403.6(c)(2) authorizes the Control Authority to convert production-based mass limits to equivalent daily mass limits or concentration limits. In addition, 40 CFR 403.6(d) allows the Control Authority to impose equivalent mass limits in addition to concentration-based Standards where the Industrial User is using dilution to meet applicable Pretreatment Standards or where the imposition of mass limits is appropriate. Under 40 CFR 403.6(d), both the mass limit and concentration limit are then enforceable, so the mass limit would not be an equivalent, ''in-lieu-of'' limit. The regulations do not currently, however, authorize establishment of alternative mass limitations in the case of concentration-based Standards except in the limited circumstances described in 40 CFR 403.6.

2. What changes did EPA propose?

EPA proposed to revise the Pretreatment Regulations to authorize the Control Authority to establish equivalent mass limits in lieu of

promulgated concentration-based limits for Industrial Users. The equivalent mass limit would only be available to Industrial Users that had installed control measures at least as effective as the model treatment technologies that serve as the basis for a particular categorical Pretreatment Standard and that are employing water conservation methods and technologies that substantially reduce water use. The Control Authority would be required to document how the equivalent mass limits were derived and make this information publicly available.

3. What changes is EPA finalizing in today's rule?

EPA is finalizing changes to enable Control Authorities in limited circumstances to express a concentration-based categorical Standard as an equivalent mass limit in a control mechanism issued to an Industrial User. The equivalent mass limit replaces the promulgated categorical Pretreatment Standard once it is incorporated into the Industrial User's control mechanism. To qualify for an equivalent mass limit, the CIU must meet certain eligibility conditions. These conditions require the CIU to: (1) Implement water conservation measures that substantially reduce water use; (2) use control and treatment technologies adequate to achieve compliance with categorical Pretreatment Standards, and demonstrate that it has not used dilution as a substitute for treatment; (3) provide monitoring data to establish its actual average daily flow rate and its baseline long-term average production rate; (4) demonstrate that it does not have daily flow rates, production rates, or pollutant levels that fluctuate so significantly that establishing equivalent mass limits would not be appropriate; and (5) have consistently complied with the applicable categorical Pretreatment Standards.

Under the final rule, while a CIU may request an equivalent limit, the Control Authority has the discretion to decide whether an equivalent mass limit is appropriate. If the Control Authority approves the request, it then calculates the equivalent mass limit by multiplying the promulgated Pretreatment Standard (expressed as concentration) by the Industrial User's actual average daily flow rate and the appropriate unit conversion factor. For example, the unit conversion factor is 8.34 when multiplying a concentration limit (expressed as milligrams/liter) by flow (expressed as millions of gallons per day). The CIU is subject to the equivalent mass limit when its control mechanism containing the mass limit is effective. During the term of the control mechanism, or in a subsequent control mechanism term, the Control Authority may determine that it is necessary to revise the mass limit to reflect a significant change in the rate of production. The Control Authority is not required to recalculate the equivalent mass limits in subsequent control mechanism terms if the actual average daily flow rates were reduced solely as a result of implementing water conservation methods and technologies, and the flow rates used in the original calculation of the equivalent mass limits were not based on the use of dilution as a substitute for treatment pursuant to 40 CFR 403.6(d), and the Industrial User is not bypassing its treatment technologies pursuant to 40 CFR 403.17.

After the Control Authority develops an equivalent mass limit and issues a control mechanism with the mass limits, the continued applicability of the equivalent mass limit depends on the Industrial User's continued compliance with certain requirements. To comply with these requirements, the Industrial User must: (1) Maintain and effectively operate control and treatment technologies adequate to achieve compliance with the equivalent mass limits; (2) record the facility's flow rates through the use of a continuous effluent flow monitoring device; (3) continue to record the facility's production rates and notify the Control Authority if the rates vary by more than 20 percent from the production rates used as the basis for the equivalent mass limits; and (4) continue to employ the same or comparable water conservation measures which made the facility eligible for receiving the equivalent mass limits. The Control Authority should consider including the four conditions listed above in the CIU's control mechanism to make it clear to all such Industrial Users that continued use of the equivalent mass limits is subject to ongoing compliance with these minimum requirements. Failure to comply with these conditions will disqualify the CIU from coverage by the equivalent mass limit. The pre-existing concentration-based Pretreatment Standards will be automatically enforceable at the time of disqualification.

Section 403.8(f)(1) requires that POTW Pretreatment Programs must have the legal authority to control the contribution to POTWs from each Industrial User to ensure compliance with Pretreatment Standards and other requirements. In the case of Significant Industrial Users, this control must be achieved through a Permit or other equivalent control mechanism. The Permit or control mechanism must contain, among other things ''* * * [e]ffluent limits based on applicable general Pretreatment Standards in part 403 of this chapter, categorical Pretreatment Standards, local limits, and State and applicable local law.'' 40 CFR 403.8(f)(1)(iii)(C). When a Control Authority develops equivalent mass limits under today's provision, these limits will meet the requirement that the Permit or control mechanism include ''effluent limits based on categorical Pretreatment Standards.'' As is the case with any equivalent Standard established under 40 CFR 403.6(c), in order for the Approval Authority and the public to be able to verify compliance by the CIUs with these equivalent Standards, the Control Authority will need to document how the mass limit calculations were derived and make the documents publicly available (*i.e.*, to the Approval Authority, EPA, the general public or any third party requesting this information).

Establishing mass limits that are equivalent to promulgated concentration-based categorical Pretreatment Standards does not improperly transfer Standard-setting authority to the Control Authority. As noted above, EPA's current regulations already require the inclusion in Industrial User Permits (or other control mechanisms) of effluent limits based on the categorical Standard. Moreover, current 40 CFR 403.6(c)(6) provides that equivalent limits calculated in accordance with the regulation are deemed Pretreatment Standards for purposes of section 307(d) of the CWA. If a Control Authority develops an equivalent mass limit, in lieu of the concentration-based categorical Standard, the equivalent limit is a Pretreatment Standard. Where it is determined that the equivalent mass limit is not properly calculated, the Control Authority must modify the Industrial User's control mechanism to require immediate compliance with the correctly calculated limits.

Which categorical industries are potentially affected by this provision? Section 403.6(c)(5) applies to qualifying indirect dischargers that are currently subject to Pretreatment Standards expressed as concentration limits. Currently, there are 14 categorical Pretreatment Standards that are expressed as concentration limits alone and are therefore eligible for equivalent mass limits under new 40 CFR 403.6(c)(5). The following categories are included in this list:

- Inorganic Chemicals (40 CFR part 415)

- Fertilizer Manufacturing (40 CFR part 418)
- Petroleum Refining (40 CFR part 419)
- Steam Electric Power Generating (40 CFR part 423)
- Leather Tanning (40 CFR part 425)
- Glass Manufacturing (40 CFR part 426)
- Rubber Manufacturing (40 CFR part 428)
- Metal Finishing (40 CFR part 433)
- Pharmaceutical Manufacturing (40 CFR part 439)
- Transportation Equipment Cleaning (40 CFR part 442)
- Paving and Roofing Materials (40 CFR part 443)
- Commercial Hazardous Waste Combustors Subcategory of the Waste Combustors Point Source Category (40 CFR part 444)
- Carbon Black Manufacturing (40 CFR part 458)
- Electrical and Electronic Components (40 CFR part 469)

In finalizing the rule, EPA is making the following changes to the proposed rule:

Discretionary Use of Equivalent Mass Limits: The final rule emphasizes that the decision on whether to convert the CIU's concentration-based categorical Pretreatment Standard to an equivalent mass limit rests with the Control Authority. Though EPA intended that the Control Authority's decision would be discretionary, there was considerable uncertainty and concern among the commenters that the proposed language was not clear on this issue (*e.g.*, ''* * * the Control Authority may convert the limits * * *''). Several Industrial Users expressed concern that they might be compelled to accept equivalent mass limits. EPA has clarified the language of the final rule. The rule now states that Industrial Users initiate the process by requesting that their concentration-based limits be converted to equivalent mass limits. The final rule states it this way: ''* * * the Industrial User may request that the Control Authority convert the limits to equivalent mass limits. The determination to convert concentration limits to equivalent mass limits is within the discretion of the Control Authority.''

Industrial User Eligibility Conditions: EPA has included requirements that the Industrial User must first meet before the Control Authority may establish an equivalent mass limit. Several of these eligibility requirements are also conditions that must be met in order to continue use of equivalent mass limits after becoming effective. The final rule includes the following requirements:

(1) *Implementation of Water Conservation:* EPA has revised the proposed language requiring the Industrial User to be ''employing water conservation methods and technologies that substantially reduce water use'' to make it clear that current as well as future water conservation efforts can both qualify for the use of equivalent mass limits. The final rule also requires water conservation during the initial term of the Industrial User's control mechanism which includes equivalent mass limits. The revised rule language is as follows: ''the Industrial User must employ, or demonstrate that it will employ, water conservation methods and technologies that substantially reduce water use during the term of its control mechanism.'' See 40 CFR 403.6(c)(5)(i)(A). The final rule also requires that the Industrial User ''continue to employ the same or comparable water conservation methods and technologies as those implemented pursuant to paragraph (5)(i)(A) so long as it discharges under an equivalent mass limit.'' See 40 CFR 403.6(c)(5)(ii)(D).

(2) *Use of Effective Control and Treatment Technologies:* The proposed rule required ''control measures at least as effective as the model treatment technologies that serve as the basis for that particular Standard.'' The final rule revises this language, while retaining the principle of requiring the installation and use of effective control measures to meet the applicable Pretreatment Standards for Existing Sources (PSES) or Pretreatment Standards for New Sources (PSNS). The revised language is as follows: ''The Industrial User must * * * currently use control and treatment technologies adequate to achieve compliance with the applicable categorical Pretreatment Standard, and not have used dilution as a substitute for treatment.''

The proposal discussed the fact that the Pretreatment Regulations in 40 CFR 403.6(d) contain a strict prohibition against the use of dilution as a substitute for treatment, and that requirement remains. This provision states that no Industrial User introducing wastewater pollutants into a POTW may increase the use of process wastewater or otherwise dilute the wastewater as a partial or total substitute for adequate treatment to achieve compliance with a Pretreatment Standard. EPA has concluded that it is appropriate to require CIUs seeking to use an equivalent mass limit to demonstrate their past compliance with the dilution prohibition in 40 CFR 403.6(d). See 40 CFR 403.6(c)(5)(i)(B). For example, the Industrial User can compare its current flows to the flows that are assumed as part of the model technology for the categorical Pretreatment Standard. Consistent with the dilution requirement, this requirement is intended to provide the Control Authority with a means of identifying facilities that may have used dilution in the past. Such CIUs would be precluded from obtaining less stringent equivalent mass limits by taking advantage of historically high flows based on dilution. The Control Authority may review historical monitoring and inspection reports, and process descriptions from the appropriate categorical Standard Technical Development Document published with each categorical Standard, when evaluating the Industrial User's demonstration of no dilution. See 40 CFR 403.6(c)(5)(i)(B). The final rule also requires, as a condition of using equivalent mass limits, that Industrial Users ''maintain and effectively operate control and treatment technologies adequate to comply with the equivalent mass limits.'' See 40 CFR 403.6(c)(5)(iii)(A). EPA revised the proposed rule language because of a concern that Industrial Users not be locked into a particular control technology or be required to make a complex technical showing that one treatment system is ''no less effective'' than another. By requiring that existing treatment be ''adequate to achieve compliance with applicable categorical Pretreatment Standards'' and that Industrial Users ''maintain and effectively operate control and treatment technologies adequate to comply with the equivalent mass limits'', EPA has concluded that the final rule language ensures that CIUs with equivalent mass limits continue to provide appropriate treatment. See 40 CFR 403.6(c)(5)(ii)(A).

(3) *Establishment of Actual Average Daily Flow Rate and Baseline Long-Term Average Production Rate:* The proposal had indicated that it would be sufficient to provide a ''reasonable estimate of the flow required to achieve the facility's production goals using BAT and in the absence of the water saving technology.'' See 64 FR 39570, July 22, 1999. The final rule changes this approach to require, consistent with current regulations and guidance, that equivalent mass limits be based on the CIU's actual average daily flow rate and that flows be measured, as opposed to estimated, using a continuous effluent flow monitor. The final rule requires that the flow rate used be representative of current operating conditions; the actual period of flow used to develop the equivalent limits should reflect actual current production and water usage. See 40 CFR 403.6(c)(5)(i)(C). EPA

also conditions the use of equivalent mass limits on the continued use of an effluent flow monitoring device to record the facility's flow rates. See 40 CFR 403.6(c)(5)(iii)(B).

In addition, the preamble of the proposed rule suggested that the flow component of the equivalent mass limit be based on estimated flows ''required to achieve the facility's production goals.'' See 64 FR 39570, July 22, 1999. EPA did not discuss in the preamble how the mass limit may need to change if the Industrial User changed its production goals, resulting in potentially substantial changes in process wastewater flow. In adopting a later amendment to its regulations that authorized the establishment in limited circumstances of equivalent mass limits for certain Industrial Users in the City of Owatonna, Minnesota, however, EPA did require Industrial Users subject to equivalent mass limits to notify the Control Authority where ''production rates are expected to vary by more than 20 percent from a baseline production rate'' determined when the mass limit was first established. See 65 FR 59741 (October 6, 2000); see 40 CFR 403.19(b). Accordingly, EPA has modified the final rule to include a similar requirement for the Industrial User to provide the Control Authority with sufficient information to establish an average daily production rate. See 40 CFR 403.6(c)(5)(i)(C). The Industrial User must also notify the Control Authority of substantial changes in the rate so that the Control Authority is given an opportunity to alter the equivalent mass limit in the event of such changes (*e.g.*, greater than 20 percent from the baseline rate). See 40 CFR 403.6(c)(5)(ii)(C) and (iii)(B).

(4) *Use of Equivalent Mass Limits for Relatively Uniform Operating Conditions:* The final rule includes an additional requirement that the Industrial User demonstrate that it must ''not have daily flow rates, production levels, or pollutant levels that vary so significantly that an equivalent mass limit is not appropriate to control the Discharge.'' See 40 CFR 403.6(c)(5)(i)(D).

(5) *Consistent Compliance with Standards:* The availability of equivalent mass limits is also conditioned on consistent compliance with applicable categorical Pretreatment Standards. The final rule does not specify the period during which the CIU must have demonstrated full compliance, but allows the Control Authority to assess the available compliance records to the extent that they are representative of current operating conditions and reflect the Industrial User's understanding of the regulatory obligations that must be achieved for compliance with these and related regulations. See 40 CFR 403.6(c)(5)(i)(E).

(6) *Calculation of Equivalent Mass Limit:* The final rule specifies how Control Authorities are to calculate the equivalent mass limit. The following language is used to describe the calculation: In the first term of the control mechanism, ''A Control Authority which chooses to establish equivalent mass limits must * * * calculate the equivalent mass limit by multiplying the actual average daily flow rate of the regulated process(es) of the Industrial User by the concentration-based daily maximum and monthly average Standard for the applicable categorical Pretreatment Standard and the appropriate unit conversion factor.'' See 40 CFR 403.6(c)(5)(iii)(A). The rule further provides that the Control Authority ''may retain the same equivalent mass limit in subsequent control mechanism terms if the Industrial User's actual average daily flow rate was reduced solely as a result of the implementation of water conservation methods and technologies, and the actual average daily flow rates used in the original calculation of the equivalent mass limit were not based on the use of dilution as a substitute for treatment pursuant to 40 CFR 403.6(d). The Industrial User must also be in compliance with 40 CFR 403.17 (regarding the prohibition of bypass).'' See 40 CFR 403.6(c)(5)(iii)(C).

(7) *Pollutants Excluded from Equivalent Mass Limits:* EPA has adopted specific language from 40 CFR 122.45(f)(1)(i) which identifies the following pollutants as being inappropriate for the use of equivalent mass limits: pH, temperature, and radiation. See 40 CFR 403.6(c)(5)(iv).

4. Summary of Major Comments and EPA Response

Discretionary Use of Equivalent Mass Limits: Several commenters raised concerns regarding who would initiate the use of equivalent limits and how much discretion the Control Authority has in imposing these limits. A consistent theme raised among commenters representing Industrial Users was the concern that the proposed rule would enable the Control Authority to impose equivalent mass limits over the objection of the Industrial User. Where POTW and state commenters provided comments on this issue, they expressed concern that equivalent mass limits would create additional burden and generally emphasized that the decision to use equivalent mass limits to regulate a particular indirect discharger should be left to the POTW's discretion. EPA notes that these positions appear consistent with one another. The final rule allows for an Industrial User to request equivalent mass limits and emphasizes that the decision to convert concentration-based limits to equivalent mass limits lies within the Control Authority's discretion. EPA does not anticipate that an Industrial User would request the implementation of equivalent mass limits if it would create an unacceptable amount of additional burden for the facility, nor would the Control Authority accept an undue burden upon itself if a benefit would not be foreseen.

What level of treatment must be in place prior to being eligible for equivalent mass limits? A few commenters objected to the proposal's requirement that in order to be eligible to use equivalent mass limits the Industrial User be utilizing control measures at least as effective as the model treatment technologies that serve as the basis for the particular categorical Standard. These commenters instead supported the availability of equivalent mass limits where the Industrial User could demonstrate that the concentration limits can be met without treatment. One POTW and an environmental organization took the opposite position, indicating that treatment must be in place prior to the use of equivalent mass limits. Today's final rule requires that the Industrial User be using control and treatment technologies adequate to achieve compliance with the applicable categorical Pretreatment Standard. The final rule also requires that the Industrial User maintain and effectively operate control and treatment technologies adequate to achieve compliance with the equivalent mass limits.

EPA is imposing this requirement for a number of reasons. First, the use of technologies adequate to achieve compliance with applicable Standards provides the Control Authority with a level of assurance that qualifying Industrial Users have not been meeting their concentration-based Standards through dilution, which is prohibited in 40 CFR 403.6(d). Second, although water conservation typically increases the concentrations of pollutants in the process wastewater prior to treatment, facilities with on-site treatment typically show a reduction of pollutant loadings in the final effluent prior to its discharge to the POTW sewer system even where the facility has instituted water conservation. This reduction can be attributed to the fact that many wastewater treatment technologies are

limited more by physical/chemical properties of the pollutants in the wastewater, than by influent concentrations. Therefore, reducing the wastewater Discharge flow will generally reduce the overall pollutant load from the facility. This is based on the assumption that the reduced wastewater flow to the treatment system will allow the system to more successfully treat the increased pollutant concentrations in the wastewater treatment influent stream. This is a key reason EPA has concluded it is appropriate to provide this incentive for water conservation. More information on water conservation techniques and methods can be found in the rule docket (see OW–2002–0007–0091).

In assessing whether the Industrial User has installed adequate control and treatment technologies, the Control Authority may review the corresponding categorical Standard Development Document for potential control options. For instance, the Development Document for Effluent Limitations Guidelines and Standards for the Metal Finishing Point Source Category (EPA 440/1–83/091, June 1983) identifies that PSES for the waste streams containing complexed metals is based on the segregation of the complexed metals waste stream with separate treatment for the precipitation of metals and the removal of suspended solids. A figure depicting the different model treatment technologies for the complexed metals and other wastestreams can be found in Figure 10–1 (page X–2) of the Development Document. (pages X–1–4, and XII–1) The Control Authority might also review current trade association literature for other control options that have become available since the Development Document was produced, as well as sources available through EPA's ''Sector Strategies'' programs and EPA's Office of Compliance Assistance: *http://www.epa.gov/sectors/program.html, http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/index.html*.

Prohibition Against Dilution: A few commenters indicated their concern that implementation of equivalent mass limits might allow Industrial Users to secure lenient standards through the calculation of equivalent mass limits based on flows that reflect diluted wastestreams. The proposal discussed the fact that the Pretreatment Regulations have a strict prohibition against the use of dilution as a substitute for treatment (see 40 CFR 403.6(d)). This provision indicates that no User introducing wastewater pollutants into a POTW may increase the use of process wastewater or otherwise dilute the wastewater as a partial or total substitute for adequate treatment to achieve compliance with a Pretreatment Standard. EPA has concluded that it should require CIUs seeking to obtain an equivalent mass limit to demonstrate their past compliance with the dilution prohibition in 40 CFR 403.6(d). This requirement is intended to provide the Control Authority with a means of screening out those facilities that may have used dilution in the past in order to prevent their benefiting from higher than necessary flow rates when calculating a mass limit. (There are a number of ways the Control Authority may evaluate whether the CIU was diluting its flows. This evaluation can be made by comparing the CIU's product to flow ratio relative to that of other facilities within its industry or requesting an explanation of why it uses the level of process water that it uses.)

How should compliance status affect an Industrial User's eligibility for equivalent mass limits? Several POTWs and one environmental organization recommended that the proposed rule be revised to require the Industrial User to demonstrate that it is able to maintain compliance with applicable Pretreatment Standards prior to water conservation and to restrict eligibility based on such compliance. EPA agrees with the commenters' suggestions. The final rule adopts the requirement that interested Industrial Users must have consistently complied with all applicable categorical Standards prior to the request to be subject to mass-based limits. Compliance with the underlying categorical Standards is an appropriate benchmark for the Control Authority to use in determining the eligibility of an individual discharger. Where the Industrial User has demonstrated consistent compliance, the Control Authority will be given some level of confidence that the User will be able to adjust to the use of a limit that is considered equivalent to the concentration-based Standard. It is EPA's view that the reverse is also true in that the lack of compliance may indicate a User's inability to comply with an equivalent limit. EPA is not specifying a minimum time period over which an Industrial User must be in consistent compliance. EPA notes that regulations in 40 CFR 403.12(o) require that Industrial Users maintain records of all information from any monitoring activities for a minimum of three years. These records should be reviewed and considered to the extent that they reflect compliance with current conditions. At a minimum, EPA expects that no Industrial User found to have been in significant noncompliance (SNC) at any time during the previous two years would be considered to have achieved consistent historical compliance.

Incompatibility of equivalent mass limits with particular industries: One trade association commented that the use of mass limits is incompatible with their industry due in large part to the fluctuating conditions in their operations. It is EPA's view that certain facilities do not have operations that are compatible with the use of equivalent mass limits. For example, a high degree of variability in a CIU's flows, production, or pollutant Discharge levels will likely make it an inappropriate candidate to use mass limits to control its Discharge. For this reason, the final rule now requires Industrial Users to ''not have daily flow rates, production levels, or pollutant levels that vary so significantly that an equivalent mass limit is not appropriate to control the Discharge.'' See 40 CFR 403.6(c)(5)(i)(D).

Water Conservation as a Qualifier for Eligibility: Several commenters stated that the implementation of equivalent mass limits should not be restricted to Industrial Users that have already implemented water conservation measures. EPA agrees that this provision's intent is to encourage innovative water conservation methods and should not include the pre-condition that Industrial Users have already employed water conservation measures. This will allow ongoing as well as future water conservation efforts by enabling both to use equivalent mass limits. Regardless of whether a facility's water conservation methods are ongoing or have yet to be implemented, this final rule does require that the Industrial User demonstrate that it will employ water conservation methods and technologies that will substantially reduce water use during the term of its control mechanism. The Industrial User is also required to employ water conservation to remain eligible for equivalent mass limits.

This final rule does not specify the amount of water conservation that should be achieved or that constitutes a substantial reduction in water use. EPA notes that several existing programs define thresholds that the Control Authority may consider for use in this context. For example:

- The final rule for the Pretreatment Community XL (XLC) Site-Specific Rulemaking for Steele County, MN (65 FR 59743) of 40 CFR 403.19(b),

indicates that the participating Industrial Users committed as a group to reduce water usage by 10% over the initial 5 year project period.

• National Metal Finishing Strategic Goals Program promotes a 50% water reduction from each particular participating industry's baseline 1992 water usage. *http://www.strategicgoals.org/coregoals.cfm.*

• EPA considers a ± 20% change in flow rate to be a significant change in a flow rate. See page 2–14 of the EPA Guidance Manual for the Use of Production Based Pretreatment Standards and the Combined Wastestream Formula (Sept. 1985).

How do facilities employ water conservation? Currently there are many water reduction technologies in use in manufacturing facilities across the United States. Many of the technologies that EPA evaluated when establishing the categorical Standards included water conservation techniques and technologies. The Technical Development Document for a particular categorical Standard is a valuable tool for information on these technologies. Technologies that reduce wastewater Discharge rates usually increase the concentrations of pollutants in the wastewater leaving the industrial operation. However, for facilities with wastewater treatment systems on site, these technologies may still reduce the final effluent pollutant loading, because many of the wastewater treatment technologies are limited more by physical/chemical properties of the pollutants in the wastewater, than by influent concentrations. Therefore, reducing the wastewater Discharge flow will generally reduce the overall pollutant load from the facility.

In the Metal Finishing (MF) industry, facilities apply flow reduction practices to process baths or rinses to reduce the volume of wastewater discharged. One method that conserves water is cascade rinsing: when water is reused from one rinsing operation to another, less critical rinsing operation, before being discharged to treatment. Facilities can also reduce water use by coordinating and closely monitoring rinse water requirements. Matching water use to rinse water requirements optimizes the quantity of rinse water used for a given work load and tank arrangement. More information on water conservation techniques and methods can be found in rule record (see OW–2002–0007–0091).

Assessing how reduced Discharges will affect POTWs: One commenter asserted that EPA would be violating Section 307 if the Agency finalizes the proposal by failing to address the issue of whether the more highly concentrated wastestreams that would result from reduced water consumption ''would cause environmental harm at either the POTW or in the receiving stream or result in long-term sediment contamination.'' EPA disagrees that the wastestreams resulting from water conservation present a potential problem for the environment or POTWs for a number of reasons. First, in order to qualify for an equivalent mass limit, the Industrial User must have been in consistent compliance with its categorical Pretreatment Standards prior to the Industrial User's request to be subject to equivalent mass limits. Second, the Control Authority must properly convert the concentration-based Pretreatment Standard to an equivalent mass limit using the CIU's actual long-term average daily flow rate. This will ensure that there will be no adverse impacts to human health or the environment as the pollutant concentrations discharged under the equivalent mass limits will be no greater than the concentration-based Pretreatment Standard. Third, EPA's existing regulations ensure continued protection of receiving waters and POTW operations.

EPA emphasizes that the use of equivalent limits to regulate individual Industrial Users does not relieve the Control Authority of the need to establish and enforce local limits in accordance with 40 CFR 403.5(d) and require compliance with the General and Specific Prohibitions of 40 CFR 403.5(a) and (b) which are protective of the POTW operations, and prevent Pass Through and Interference. Consequently, the use of equivalent mass limits would not be authorized if it resulted in a violation of any of the General and Specific Prohibitions or local limits established under 40 CFR 403.5(d). Furthermore, this provision may be implemented only following determination of its feasibility by Control Authorities, and not unilaterally by Industrial Users. Control Authorities' local limits will continue to ensure protection of the individual POTW operations and its receiving environment. Finally, the requirements of today's rule ensure that there will be no increase in the quantity of pollutants reaching the POTW as a result of adopting equivalent mass limits.

How should the equivalent mass limit be calculated? One POTW commenter suggested that EPA clarify how to calculate the Industrial User's equivalent mass limit in order to specify which flow to use. EPA agrees that it is important to provide specific instructions on how the equivalent limit is to be calculated, especially with regard to which flow rate is the correct one to use. Today's final rule at 40 CFR 403.6(c)(5)(iii)(A) includes the following formula to be used to calculate the equivalent mass limits:

• For converting daily maximum concentration Standards to equivalent daily maximum mass limits: The product of the facility's actual average daily flow rate and the applicable concentration-based categorical daily maximum Standard, and the appropriate unit conversion factor. The unit conversion factor is 8.34 when multiplying a concentration limit (expressed as milligrams/liter) by flow (expressed as millions of gallons per day).

• For converting monthly average concentration Standards to equivalent monthly average mass limits: The product of the facility's actual average daily flow rate and the applicable concentration-based categorical monthly average Standard, and the appropriate unit conversion factor. The unit conversion factor is 8.34 when multiplying a concentration limit (expressed as milligrams/liter) by flow (expressed as millions of gallons per day).

It is important to note that the same flow value, the CIU's actual long-term average daily flow rate, is used in the calculation of both the daily maximum and monthly average equivalent mass limits.

Why are equivalent mass limits calculated using the actual average daily flow rate? EPA specifies in 40 CFR 403.6(c)(5)(iii)(A) that the equivalent mass limits are calculated by multiplying the actual average daily flow rate by the applicable concentration-based categorical Pretreatment Standard and the appropriate conversion factor. The use of the actual average daily flow rate as the flow basis for the limits is consistent with existing EPA regulations and guidance. The current Pretreatment Regulations already require the Control Authority to calculate ''equivalent concentration limits'' by using the ''average daily flow rate of the Industrial User's regulated process wastewater.'' See 40 CFR 403.6(c)(4). The provision further states that ''this average daily flow rate shall be based upon a reasonable measure of the Industrial User's actual long-term average flow rate, such as the average daily flow rate during a representative year.'' CIUs are elsewhere required to report in the baseline monitoring report (BMR) flow measurements showing the ''measured average daily and maximum daily flow, in gallons per day, to the POTW'' (see 40 CFR 403.12(b)(4)) and to include in

the periodic report ''a record of measured or estimated average and maximum daily flows'' (see 40 CFR 403.12(e)(1)).

Perhaps most importantly, use of the long-term average daily and monthly flow is the only way to ensure that mass-based limits are truly equivalent; that is, that they do not result in any increased discharge of pollutants to the POTW or the environment. If a higher than average flow rate were used, it would be possible for the total Discharge of pollutants to increase, which would violate the fundamental basis of this streamlining change.

EPA notes that its decision to use long-term average daily flows has been discussed in numerous categorical Pretreatment Standard rulemakings, including the final Pesticides Manufacturing Standard. See 58 FR 50679 (September 28, 1993). In addition, Chapter 2.8 of EPA's Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula (September 1985) describes important considerations when determining the appropriate flow rate for use in developing equivalent limits including that the same average rate is to be used to calculate both daily maximum and maximum monthly average alternative limits, to avoid the use of data for too short a time period (particularly, ''estimating the average rate based on data for a few high days, weeks, or months is not appropriate'') (page 2–14). Likewise, it is important here to use a long-term average that reflects current operating conditions (''actual long-term average flow''). Use of flow data from a period that does not represent current production and water use would result in mass limits that are not equivalent. Thus, the period of time used to compute the actual long-term average must reflect recent production changes as well as reductions in water use.

Why are continuous effluent flow monitoring devices required? The final rule requires that an Industrial User subject to equivalent mass limits must continuously monitor its flow.

(1) *Flow monitoring is required to ensure the equivalency to Federal categorical Pretreatment Standards:* When calculating the equivalent limits and determining compliance, the Control Authority must accurately characterize the existing conditions. EPA is therefore requiring that the flow value used in the translation of the concentration limit to the equivalent mass limit and the flows utilized during compliance assessment be based upon a measured value using a continuous flow measuring device.

Several industry commenters and one trade association representing municipalities indicated that they would support the use of estimation methods to derive facility flow rates for establishing the mass limit and for determining compliance. These commenters emphasized that estimation methods have been proven to be accurate and cost-effective. Some commenters supported the proposal's allowance for ''a reasonable estimate of the flow * * *'', but did not indicate whether they would support a requirement to use only measured flows. Several commenters, including three states, two POTWs, and one environmental interest group agreed that the level of accuracy obtained from flow measurements, in contrast to flow estimation, is required in order to ensure equivalency with the categorical Standards in calculating the mass limits. These commenters stressed that flow measurement was also necessary in order to adequately assess compliance with the equivalent Standard. One state went so far as to declare that the proposal was flawed in that it had not required flow measuring devices. These factors as well support EPA's decision to require continuous effluent flow monitors.

(2) *The relative costs and benefits of using flow monitoring devices should be considered:* In terms of the relative cost of implementing flow monitoring devices, the CIU and Control Authority may wish to evaluate the expense of the installation of the continuous flow measuring device with the benefits that may be achieved by institution of water conservation methods and technologies. Cost effective flow measurement devices are estimated to cost $400–$1500. See Utility Supply of America, 2004–05. USA BlueBook: Everything for Water & Wastewater Operations, Vol. 115. In contrast, commercial/industrial facilities using municipal water and sewer systems incur an average $28,000 monthly charge for their water and sewer use (survey of 194 U.S. cities, conducted by Raftelis Financial Consulting), consisting of over $12,000 per month for water charges and over $16,000 per month for wastewater charges (2000 Water and Wastewater Rate Survey, Exhibit 2, page 19, and Exhibit 5, page 44). Based on these figures, it is EPA's view that it is likely that benefits of water conservation will outweigh the cost of the meter in many situations. However, if this is not the case, the Industrial User does not have to request equivalent mass limits.

Furthermore, measurement of water usage may bring water conservation benefits over and above those resulting from other technology changes. Accurate measurement of the water use is beneficial to identifying the amounts and usage of water so that behavioral practices can be modified and tracked. ''Monitoring the amount of water used by an industrial/commercial facility can provide information on quantities of overall company water use, the seasonal and hourly patterns of water use, and the quantities and quality of water use in individual processes. Baseline information on water use can be used to set company goals and to develop specific water use efficiency measures. Monitoring can make employees more aware of water use rates and makes it easier to measure the results of conservation efforts. The use of meters on individual pieces of water-using equipment can provide direct information on the efficiency of water use'' (Cleaner Water Through Conservation, EPA 841–B–95–002, April 1995, page 7).

(3) *Flow monitoring is required to determine compliance with equivalent mass limits:* Accurate flow measurement is required to determine compliance with a mass limit based on a concentration sample result received from the laboratory. To such end, ''Relying on water consumption records when determining compliance with mass-based limits is not an acceptable practice'' (Industrial User Inspection and Sampling Manual for POTW's (EPA 831–B–91–001, April 1994, page 88). A permanent device that continuously records the flow allows the POTW to ensure compliance with mass-based limits.

On the day(s) that the Control Authority conducts its mandatory one-per-year monitoring of the Industrial User, the relevant actual flow from the facility is required to assess whether the User is in compliance with its mass limits. Requiring the use of an effluent flow monitoring device, therefore, will also facilitate the accurate assessment of compliance.

For compliance assessment purposes, EPA advises Control Authorities to use the following approach:

- For a daily maximum equivalent mass limit, EPA recommends determining compliance by comparing the limit with the total mass of the pollutant discharged over the day, calculated as the product of the actual pollutant concentrations in the Industrial User's Discharge sampled pursuant to 40 CFR 403.12(g) and the actual flow from the Industrial User on the day the sample is taken based on measurements from the continuous effluent flow monitoring device and an appropriate conversion factor.

• For an average monthly equivalent mass limit, EPA recommends determining compliance by comparing the limit with the sum of all daily mass Discharges measured during a calendar month divided by the number of days measured during that month. The monthly limit must still be met when only one discharge day is sampled.

This approach mirrors the approach of EPA's NPDES regulations based on the definition of 'daily discharge' in 40 CFR 122.2 defined as the ''discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the 'daily discharge' is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the 'daily discharge' is calculated as the average measurement of the pollutant over the day.''

How are limits established for new Industrial Users? Several POTW commenters noted that the proposed rule was silent regarding whether equivalent mass limits would be available to new Industrial Users. The commenters observed that flow rate information is available for many existing Users, but a baseline of information will not exist for new dischargers. Today's final rule is silent regarding specific procedures to follow in establishing limits for new Discharges. The rule does not prohibit Control Authorities from calculating equivalent mass limits for such Dischargers. However, EPA notes that in general it will not be possible for new dischargers to satisfy the requirements in today's rule unless some historical information about them is available.

First, recognizing that 40 CFR 403.6(c)(5)(i)(E) requires the Industrial User to ''have consistently complied'' with Pretreatment Standards'', before considering the use of equivalent mass limits, the Control Authority will need to allow for a sufficient period of time to pass in order to properly assess the User's compliance record.

Second, the new discharger will need some time to collect an adequate amount of flow rate data from its continuous effluent flow monitor to establish its actual average daily flow rate and, in turn, to provide the Control Authority with sufficient information to calculate the equivalent mass limit. Although 40 CFR 403.6(c)(5)(i)(C) does not specify a minimum amount of time over which the long-term flow rate is developed, the rule does specify that the flow rate must be ''representative of current operating conditions.'' Therefore, EPA recommends that the Control Authority establish some minimum period of time during which it will require the new discharger to have monitored its flow before considering equivalent mass limits.

Third, new dischargers will be subject to Pretreatment Standards for New Sources (PSNS), and as such will be expected to begin discharging in conformance with Standards that represent the most stringent controls attainable through the application of the best available demonstrated control technology for pollutants that pass through, interfere with, or are otherwise incompatible with the operation of POTWs. 67 FR 64219 (October 17, 2002). EPA does not anticipate that new dischargers will immediately need to reduce water use. Presumably, these dischargers will have had the opportunity prior to commencing their discharge to implement optimal water consumption practices that meet their own production demands and cost efficiency standards. Over time, and after considering such factors as the cost of water and production needs, the facility may become interested in pursuing further water conservation measures.

Recalculation of equivalent mass limits to adjust for production changes during the term of the control mechanism: A few commenters were concerned that once set, the equivalent mass limits would be locked in place permanently and Industrial Users would be forced to comply with one mass limit forever. They specified that this would potentially restrict a facility from increasing production. The final rule requires that the Industrial User notify the Control Authority whenever production rates are expected to vary by more than 20 percent from baseline production rate. Upon notification of a change in production rate, the Control Authority would then reassess the appropriateness of the equivalent mass limit. The Control Authority may determine that it is necessary to change the equivalent mass limit to reflect flow changes that may result from substantial changes in production. As such production-based flow changes may occur, the approach EPA is adopting for alternative mass limits is consistent with regulations at 40 CFR 403.6(e) that discuss alternative limits based on the combined wastestream formula:

''The Industrial User shall comply with the alternative daily maximum limit and monthly limits fixed by the Control Authority until the Control Authority modifies the limits or approves an Industrial User modification request. Modification is authorized whenever there is a material or significant change in the values used in the calculation to fix alternative limits for the regulated pollutant.''

Recalculation of equivalent mass limits in subsequent terms of the Industrial User's control mechanism: A few commenters asked whether and to what extent equivalent mass limits would need to be recalculated to reflect changed circumstances at the facility prior to reissuance of the control mechanism. When a Control Authority reissues an Industrial User's control mechanism, the Control Authority may determine that changed conditions suggest the need to revisit the equivalency of the mass limits to the categorical Pretreatment Standards that were included in the prior control mechanism. For example, EPA anticipates that the Control Authority may choose not to recalculate equivalent mass limits if effluent flow was reduced as the result solely of the implementation of water conservation techniques and methods. See 40 CFR 403.6(c)(5)(iii)(C). However, the Control Authority may determine that, in cases where a reduction in discharged effluent flow was accompanied by a decrease in production, a reevaluation is warranted. This reevaluation is consistent with EPA's long-standing approach under existing section 403.6(c) with respect to equivalent mass or concentration limits. See 53 FR 40563–67 (October 17, 1988).

Today's rule conditions an Industrial User's eligibility for the establishment of equivalent mass limitations on the requirement that the Industrial User is providing adequate treatment to achieve compliance with the Pretreatment Standards and is not using dilution to achieve compliance in lieu of treatment (in accordance with 40 CFR 403.6(d)). Industrial Users must continue to operate and maintain their treatment systems as a requirement to continue to benefit from the flexibility granted by equivalent mass limitations. This approach, in addition, is consistent with 40 CFR 403.17, which prohibits the intentional diversion of wastestreams, including categorical process wastewater, from any portion of an Industrial User's treatment facility unless such is ''unavoidable to prevent loss of life, personal injury, or severe property damage [and] 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,'' and proper notice has been submitted to the Control Authority. Where a bypassing of treatment may still result in discharged

effluent that complies with the applicable Pretreatment Standards or Requirements, an Industrial User may only allow the bypass of its treatment facility if it ''is for essential maintenance to assure efficient operation.'' Therefore, Industrial Users, in order to continue to qualify for equivalent mass limit conversions from categorical Pretreatment Standards, must continue to effectively operate and maintain their control and treatment technologies.

Is this provision consistent with the Clean Water Act? One commenter objected to the proposed rule stating that EPA lacks the authority to delegate its standard-setting authority to Control Authorities, an authority which Congress gave to EPA alone under Section 307 of the Clean Water Act. The commenter reasoned that the provision would require that local authorities make ''significantly more complicated decisions than mere arithmetic'', and that the proposal would require them to become ''expert in both pollution control and water conservation in each regulated industry.''

EPA is promulgating the changes to its Pretreatment Regulations in part under section 307(b) of the Clean Water Act. Section 307(b) clearly authorizes EPA from time to time to revise Pretreatment Standards as ''control technology, processes, operating methods or other alternatives change.'' Therefore, today's action is not in violation of section 307(b) to the extent this provision authorizes Control Authorities to establish equivalent mass limits for the Pretreatment Standards for certain categories of industry subject to concentration-based Standards. See list of affected industries in Section III.J.3 above. As EPA has explained, the amendments to the regulations will facilitate both User's compliance and POTW oversight for industries engaging in water conservation, a practice EPA wants to encourage.

EPA's decision to authorize the establishment of equivalent mass limits for Industrial Users in limited circumstances is not inconsistent with its decision in some circumstances to adopt categorical Pretreatment Standards for specific industry categories whose Standards are expressed in 40 CFR Subchapter N as concentration limits. A number of reasons support this conclusion. First, EPA's general preference in most cases is to express wherever possible effluent limitations and Pretreatment Standards in terms of mass limitations. EPA's decision to establish concentration-based Pretreatment Standards, however, for certain industrial categories, is the result, in part, of the wide variation in process water use within a particular industrial category. These variations prevented EPA from developing water allowances associated with particular achievable treatment technologies. Due to the complexity and variation among facilities covered by categorical Standards, EPA did not have enough data, could not adequately measure production or could not find a consistent production normalizing relationship in order to establish mass limits on a nationwide basis. The effect of concentration limits also is, over time, to reduce mass Discharges of pollutants as water use is reduced in some circumstances. But concentration limits may in some circumstances serve as a disincentive to water conservation.

Second, the establishment of an equivalent mass limit would not result in any increase in the mass of pollutants discharged. Eligibility for an equivalent limit is dependent on a number of conditions including implementation of water conservation measures and demonstration of a history of compliance with the concentration-based Pretreatment Standard. As noted above, the implementation of water conservation efforts may have already resulted in some reduction of total mass Discharges. Further, because the mass limit is based on water use during the period of compliance with the concentration limit, in no event, could mass Discharges under the new equivalent limit exceed these mass Discharge levels. Another condition for the establishment of mass limits is that the facility report to the Permitting Authority in the event of substantial changes in production rates. This provides the Permitting Authority with an opportunity to monitor the equivalent limits and determine whether some modification to the limit may be required.

There will be no adverse consequences either to POTWs or to receiving waters from the adoption of the provision authorizing the expression of concentration-based Pretreatment Standards as mass limits. Industrial Users must continue to comply with the General and Specific Prohibition in 40 CFR 403.5(a) and (b). Thus, Discharges under an equivalent limit may not result in Discharges that result in Pass Through or Interference, create hazards to the POTW, or threaten the health and safety of POTW workers. Section 403.5(c) would prohibit the establishment of an equivalent mass limit if the equivalent limit would result in a violation of these General and Specific Prohibitions.

Finally, EPA disagrees that the final rule would illegally transfer the Agency's Standard-setting authority to Control Authorities. As noted previously, a Control Authority is already required to translate categorical Pretreatment Standards into Permit (or control mechanism) effluent limits. EPA also disagrees with the commenter's observation that this provision would be too complicated for Control Authorities to use and oversee. EPA notes that the use of this provision is solely at the discretion of the Control Authority. If a particular Control Authority is concerned that it does not have the expertise to develop and oversee equivalent mass limits, today's final rule does not in any way allow the Industrial User to demand that the Control Authority convert existing concentration-based Standards to equivalent mass limits or require that the Control Authority implement mass-based limits if requested by the Industrial User. As a matter of daily implementation of approved Pretreatment Programs, states and POTW Control Authorities conduct complex activities: Review Baseline Monitoring Reports (40 CFR 403.12(b)) and other data to issue control mechanisms to Industrial Users, calculate production-based standards and alternative limits using the Combined wastestream formula when necessary, and evaluate and assess the POTW plant processes to determine technically based local limits that are protective of Pass Through and Interference.

Public Review and prior Approval Authority approval: Many commenters (21) did not support requiring public and/or Approval Authority review of an Industrial User's proposed mass limit prior to Control Authority approval. Most were concerned that such a requirement would create additional administrative burden. EPA notes that this provision is intended to allow the Permit limitation to be expressed in an equivalent manner and is not anticipated to require a change in a Control Authority's enabling legislation to issue and enforce control mechanisms. Changes affecting individual Industrial Users are not substantial modifications within the principles of 40 CFR 403.18(b)(6). '' 'Changes to the POTW's control mechanism' refers to a change in the type of mechanism used (*e.g.*, permit versus orders) and not to change[s] in one facility's permit or to changes in the boilerplate or other details of the permit.'' (62 FR 38408) However, the new equivalent limit is subject to review

as part of routine Approval Authority oversight activities, such as a Pretreatment Compliance Inspection or a Control Authority Audit, as are other control mechanisms that implement categorical Standards, local limits, and any other equivalent limits. Also, in accordance with current regulations, Industrial User Permit files and information necessary for determining Permit limitations and compliance, must be publicly available. Therefore, EPA has decided not to require additional review or approval mechanisms for implementation of equivalent mass limits.

K. Oversight of Categorical Industrial Users (40 CFR 403.3(v)(2), 403.8(f)(2)(v), 403.12(e), (g), (i), (q)

Today's rule authorizes a Control Authority to reduce certain of its oversight responsibilities and sampling and inspection requirements for a newly established class of indirect discharger, the ''non-significant categorical Industrial User'' (NSCIU). A NSCIU is a discharger that discharges no more than 100 gallons per day of total categorical wastewater to the POTW. Today's final rule also allows Control Authorities to reduce the reporting requirements for certain Categorical Industrial Users with a record of consistent compliance with applicable Pretreatment Standards and Requirements in the following circumstances. Reduced reporting may be approved when the Industrial User's categorical wastewater flow does not exceed (1) the smaller of 5,000 gallons per day or 0.01 percent of the POTW's design dry weather hydraulic capacity; (2) 0.01 percent of the POTW's design organic treatment capacity; and (3) 0.01 percent of the maximum allowable headworks loading (MAHL). The POTW may also now be authorized to reduce its own required annual inspections and monitoring of those Categorical Industrial Users eligible for reduced reporting.

1. What are the existing rules?

The current regulations require certain minimum oversight of SIUs by POTWs with Approved Pretreatment Programs (and States acting as Pretreatment Control Authorities). The required minimum oversight includes inspection and sampling of each SIU annually, reviewing the need for a slug control plan, and issuing a Permit or equivalent control mechanism with a duration not to exceed five years (40 CFR 403.8(f)(1)(iii) and (2)(v) and 403.10(f)(2)(i)). Industrial Users that are not SIUs are not specifically subject to this oversight.

The definition of ''Significant Industrial User,'' previously at 40 CFR 403.3(t) (now found at 40 CFR 403.3(v)), includes two types of facilities. The first includes all Industrial Users that are subject to categorical Pretreatment Standards under 40 CFR 403.6 and 40 CFR chapter I, subchapter N. The facilities subject to these Standards are now described as Categorical Industrial Users (CIUs). There are no current exceptions to the classification of all CIUs as SIUs. The second category of facilities included in the definition of SIU are certain facilities that are not CIUs, that Discharge 25,000 gallons per day or more of process wastewater, facilities that contribute a process wastestream constituting 5 percent or more of the POTW's capacity, and any Industrial User that the Control Authority designates on the basis that it has a reasonable potential for adversely affecting the POTW's operation or for violating any Pretreatment Standard or requirement. The Control Authority may exclude facilities meeting any of the second category's criteria from the SIU definition based upon a finding that it does not have a reasonable potential to adversely affect the operation of the plant or violate any Pretreatment Standard or requirement. However, a Control Authority may not similarly exclude CIUs from the classification as an SIU.

The regulations require that all CIUs submit to their Control Authority twice per year, unless required more frequently, a report indicating the flow, nature, and concentration of pollutants in their effluent which are limited by the applicable categorical Pretreatment Standards (40 CFR 403.12(e)(1)). The report must be based on data obtained through sampling and analysis of the effluent which is representative of conditions occurring during the reporting period at a frequency necessary to assess and assure compliance with applicable Standards (40 CFR 403.12(g)). The regulations make clear that these are minimum requirements and Control Authorities have the flexibility to increase sampling and reporting requirements.

2. What changes did EPA propose?

EPA proposed to allow Control Authorities to exempt certain CIUs from the definition of SIU. The proposal would have defined NSCIUs as (1) facilities that never discharge untreated concentrated wastes that are subject to the categorical Pretreatment Standard as identified in the development document for the Standard, and never discharge more than 100 gallons per day (gpd) of other process wastewater, and (2) Industrial Users subject only to certification requirements after having met baseline monitoring report requirements (*e.g.*, pesticide formulators and packagers). In addition to proposing to set the NSCIU definitional threshold at 100 gpd, EPA also requested comment on alternative criteria for determining ''non-significant'' status, such as a percentage of a POTW's total flow discharged by a particular Categorical Industrial User (64 FR 39574, July 22, 1999).

In conjunction with the establishment of a NSCIU category, EPA also proposed that such Users not be subject to minimum inspection and sampling requirements. Instead, the new requirements would have allowed the Control Authority to establish the appropriate level of inspection and sampling for these facilities. In addition, EPA would have established new minimum reporting requirements for NSCIUs. EPA proposed that at a minimum, a non-significant facility would be required to annually report and certify its status as a non-significant facility, and certify that it is in compliance with the applicable Pretreatment Standards. A Control Authority could have required more frequent sampling, inspections, or reporting as it finds necessary to ensure compliance with the categorical Standards.

3. What changes is EPA finalizing in today's rule?

EPA is establishing an NSCIU category based on the 100 gpd threshold. If a POTW chooses to treat a qualifying Categorical Industrial User as an NSCIU, the oversight requirements for the NSCIU (and POTW with respect to the NSCIU) will be significantly reduced. In response to support among commenters for establishing alternative criteria for oversight reduction, EPA is also creating a ''Middle Tier'' category of Categorical Industrial Users which will still be considered SIUs, but will be eligible for reductions in reporting and Control Authority monitoring and inspections. These changes will be discussed in detail below.

In the period before the Agency proposed regulatory changes to streamline elements of its Pretreatment Regulations, EPA engaged in an extensive effort to solicit the views of the interested public. In 1995, EPA's Office of Wastewater Management initiated an evaluation of all of the General Pretreatment Regulations in 40 CFR Part 403 in order to identify streamlining opportunities. Based on input from various stakeholders, EPA developed issue papers that

summarized 11 areas in which the Pretreatment Regulations might be streamlined. In May 1996, the issue papers were distributed to a broad base of external stakeholders (States, cities, trade associations, professional organizations, and environmental interest groups). As EPA explained in the preamble to the proposal (64 FR 39573–74, July 22, 1999), in 1997, EPA solicited comment on revising the definition of Significant Industrial User to reduce the reporting and permitting requirements for certain non-significant facilities that are subject to National categorical Pretreatment Standards. An earlier Water Environment Federation (WEF)/Association of Metropolitan Sewerage Agencies (AMSA) Pretreatment Streamlining Workshop had recommended excluding facilities under 100 gpd from the definition of Significant Industrial User, exempting from the definition of SIU any CIU that has no reasonable potential to adversely affect the POTW's operation and allowing Control Authorities more flexibility in the oversight of facilities that would continue to be defined as SIUs. EPA's 1997 letter sought comment on these recommendations and also on whether to allow POTWs more flexibility in sampling SIUs that had been in consistent compliance.

Most commenters on the earlier options supported allowing POTWs to reduce oversight of non-significant CIUs, recommending NSCIU be defined as below thresholds of from 100 gpd to 4,000 gpd. Some commenters opposed any definition based on flow and preferred one based on total mass or impact on the POTW. The record to the proposed rule included all of the material submitted by commenters as well as the information developed by the WEF/AMSA workshop.

While EPA based its 1999 proposed streamlining revision of the definition of SIU on a 100 gpd threshold, the Agency did seek comments on a number of alternative thresholds that reflected the earlier suggestions from the public. As EPA stated:

''In today's proposal EPA is again requesting comment on alternative criteria for determining non-significant status. Such alternative criteria might include a higher flow cutoff or a numeric cutoff based on some alternative criteria such as the estimated mass of pollutant loadings or the percentage of a POTW's total flow discharged by a particular CIU. Alternatively, the criteria might be narrative and include a qualitative description of what constitutes a Significant Industrial User. Commenters are encouraged to provide data on the likely effects of alternate criteria, including the number of CIUs that would be eligible for non-significant status and any adverse impacts on POTWs or the environment that might result.'' 64 FR 39574, July 22, 1999.

Today's final rule provides reduced oversight responsibilities for POTWs and reporting requirements for CIUs that represent an accommodation between the alternatives considered by EPA in the proposal (including the recommendations earlier submitted to the Agency and discussed in detail in the proposal) and those suggested by commenters in response to the proposal's solicitation of views. Thus, the final rule combines EPA's proposed approach to non-significant CIUs and reduced POTW oversight requirements, with the suggestions of many commenters provided both in comments before and after proposal that EPA consider thresholds based on POTW treatment capacity. Consequently, the final rule adopts a fixed threshold requirement for NSCIUs, while establishing threshold expressed in terms of percentage of POTW flows for the ''Middle Tier'' CIUs. EPA views this approach as balancing the need for required minimum oversight of larger dischargers with the appropriate flexibility to POTWs to target oversight resources where they will provide the greatest benefit in terms of reducing the risk to the POTW and the environment.

For the reader's assistance, the following chart distinguishes between NSCIUs, ''Middle Tier'' Significant Categorical Industrial Users, and all other Significant Categorical Industrial Users:

	Control mechanism required?	Minimum CIU reporting requirements	Minimum POTW inspection/sampling requirements
NSCIUs	No*	Certification only (no reporting), one time per year.	Not required.
''Middle Tier'' Significant CIU	Yes	One time per year (if representative of Discharge conditions during reporting period).	One time every other year.
All Other Significant CIUs	Yes	Two times per year (at a minimum).	One time per year.

*If the Control Authority determines that an existing NSCIU no longer meets a required criterion for being categorized as non-significant, such as the requirement to be in consistent compliance with Pretreatment Standards and Requirements, the User becomes an SIU and must be issued a control mechanism.

EPA emphasizes that a Control Authority's decision to categorize certain CIU facilities as ''non-significant'' or ''Middle Tier'' does not in any way relieve the affected CIUs of the duty to comply with the applicable categorical Pretreatment Standards. The provisions in this final rule merely affect the reporting and inspection frequency imposed on these Users.

a. Non-Significant CIU—Definition and Oversight Requirements

Today's final rule adopts the proposed definition of ''non-significant categorical Industrial User'' (NSCIU) with minor modifications and the proposal's approach of, if the Control Authority chooses to do so, reducing required oversight for such Users. A few modifications, which will be detailed further below, were made to the proposed provisions in response to concerns raised by commenters. The final rule retains the 100 gpd threshold for defining a NSCIU, as well as the condition that the User never discharges ''untreated concentrated wastes''. However as pointed out by one commenter, the proposed rule would have applied the 100 gpd threshold to ''other process wastewater'' rather than ''categorically regulated process wastewater,'' which the commenter thought was a more appropriate basis for the threshold. Because facilities are deemed to be CIUs by virtue of their discharges of categorical process wastewater, rather than process

wastewater generally, EPA agrees that it is appropriate to base the threshold for non-significant CIUs on their discharge of categorically-regulated process wastewater and has revised the definition of NSCIU accordingly in the final rule. As was the case with the proposed rule, in order to be considered an NSCIU, the User must fulfill its annual certification requirement. The final rule also retains the Control Authority's discretion to reduce the NSCIU's sampling and reporting requirements as long as the User annually reports and certifies that it still meets the definition of a NSCIU. In addition, because the User is no longer an SIU, there is no requirement to control the User through a permit or other control mechanism. POTWs will be required to provide a list of the facilities that are being regulated as non-significant CIUs in the POTWs annual Pretreatment report. After an initial list is provided, deletions and additions should be keyed to the previously submitted list.

Regardless of whether an Industrial User is determined to be a NSCIU, it is still a categorical discharger and, as such, is still required to comply with applicable categorical Pretreatment Standards and related reporting and notice requirements in 40 CFR 403.12(b), (c), (d), (f), (j), and (p). Control Authorities will still be required to perform the same minimum oversight of a NSCIU that is required for other facilities that are not SIUs, including notifying the CIU of its status and requirements (403.8(f)(2)(iii)); receiving and reviewing required reports (403.8(f)(2)(iv) and 403.12(b), (d), & (e)); random sampling and inspection (403.8(f)(2)(v)); and investigating noncompliance as necessary (403.8(f)(2)(vi)).

Why did EPA choose the 100 gpd threshold for NSCIUs? EPA recognizes that any numeric flow cutoff will have both advantages and disadvantages. The 100 gpd criterion was supported by commenters, although many suggested alternative, higher volume cutoffs. The 100 gpd flow cutoff is a conservative number. EPA estimates 15 percent of current CIUs might be eligible for NSCIU status, based on an extrapolation of data from a range of POTWs across the country.

Does EPA expect the annual NSCIU certification to be supported by sampling data? Today's final rule does not require that each certification statement be supported by sampling data. NSCIU facilities, however, must have a reasonable basis for their compliance certifications. When sampling is not performed, the non-significant CIU must describe the basis for its compliance certification, such as, for example, the absence of changes in processes that generate categorical wastewaters or in raw materials used since the last sampling data was analyzed.

Does EPA expect the Industrial User or Control Authority to perform annual monitoring for NSCIUs? Today's final rule does not establish any minimum sampling requirements for the Industrial User or Control Authority. However, EPA recommends that sampling by the Industrial User or Control Authority be performed from time to time to confirm compliance with the categorical Standards.

Significant Changes to the Proposed Rule

EPA made the following significant changes to the provisions affecting NSCIUs:

Discharge Volume Cutoff: The definition of NSCIU now specifies that the 100 gpd cutoff is to be measured as the ''total categorical wastewater (excluding sanitary, non-contact cooling and boiler blowdown wastewater, unless specifically included in the Pretreatment Standard)'' discharged. The term ''total'' clarifies that the volume discharged is a maximum limit. Averaging the Discharge volume for purposes of meeting the 100 gpd cutoff is not authorized (*e.g.*, enabling a discharger to exceed the limit on some days as long as the average is 100 gpd or less). EPA had requested comments in the proposal on whether to allow the non-significant definition to include facilities that discharge up to 500 gallons of process wastewater once-per-week. EPA has concluded that requiring a definitive, total daily cutoff is the easiest and most efficient way to oversee and implement the NSCIU provisions.

EPA also notes that the definition of NSCIU specifically enables Users to exclude non-categorical wastewater Discharges such as sanitary, non-contact cooling and boiler blowdown wastewater in the determination of the Discharge volume, unless specifically included in the Pretreatment Standard. See 40 CFR 403.3(v)(2).

Additional Definitional Conditions: The final rule includes a few modifications to the conditions that a User must meet to be considered ''non-significant''. These modifications include:

(1) *Consistent Compliance with Pretreatment Standards:* In order to be considered an NSCIU, the User, prior to the Control Authority's findings, must have consistently complied with all applicable categorical Pretreatment Standards and Requirements. See 40 CFR 403.3(v)(2)(i) and discussion above regarding the consistent compliance criteria for equivalent mass limits.

(2) *Documentation and Certification of Compliance:* The final rule also requires that the NSCIU certify that its Discharge is in compliance with all applicable categorical Pretreatment Standards and requirements and annually submit the certification using the statement in 40 CFR 403.12(q). See 40 CFR 403.3(v)(2)(ii).

Signatory Requirements: Today's final rule clarifies that the annual certification statement must be signed in accordance with requirements in 40 CFR 403.12(l). See 40 CFR 403.12(q).

Annual List of NSCIUs: The final rule makes explicit what was discussed in the preamble to the proposed rule that a Control Authority is required to include a list of Users considered to be NSCIUs in its annual report to the Approval Authority. See 40 CFR 403.12(i).

Annual Evaluation of NSCIU Status: The proposed rule is modified to require that a Control Authority evaluate, at least once per year, whether an Industrial User previously determined to be an NSCIU still meets the ''non-significant'' criteria in 40 CFR 403.3(v)(2). See 40 CFR 403.8(f)(2)(v). EPA anticipates that this evaluation will primarily involve the Control Authority's verification that certification forms have been submitted by the NSCIUs documenting continued eligibility for NSCIU status and compliance with applicable Pretreatment Standards and Requirements.

b. Middle Tier Categorical Industrial Users—Definition and Oversight Requirements

EPA is today establishing a new category of Categorical Industrial Users (CIUs), the ''Middle Tier'' CIUs. The term ''Middle Tier'' is used because the applicable requirements for these CIUs are more stringent than for NSCIUs, but authorize less reporting than for other (larger) Significant CIUs. Note that both ''middle tier'' and other CIUs (except NSCIUs) are still considered SIUs. Refer to above table comparing applicable requirements of all types of CIUs in Section III.K.3. An Industrial User may be considered a Middle Tier CIU if its Discharge of categorical wastewater does not exceed any of the following:

- 0.01 percent of the design dry weather hydraulic capacity of the POTW, or 5,000 gpd, whichever is smaller, as measured by a continuous effluent flow monitoring device unless

the Industrial User discharges in batches;

• 0.01 percent of the design dry weather organic treatment capacity of the POTW; and

• 0.01 percent of the maximum allowable headworks loading for any pollutant for which approved local limits were developed by a POTW.

The Control Authority must also demonstrate that the CIU has not been in significant noncompliance for any time in the past two years, and that the CIU does not have daily flow rates, production levels, or pollutant levels that vary so significantly that decreasing the reporting requirement for this Industrial User would result in data that are not representative of conditions occurring during the reporting period. See 40 CFR 403.12(e)(3)(i–iii).

What are the reporting and monitoring requirements for Middle Tier CIUs? Once eligible for Middle Tier CIU status, the Control Authority may reduce the required periodic monitoring report for such Users from a minimum of twice per year to a minimum of once per year. EPA notes that any reduction in reporting must satisfy the requirements of 40 CFR 403.12(g)(3) which states that reports such as Industrial User periodic monitoring reports must be based upon ''data obtained through appropriate sampling and analysis performed during the period covered by the report, which data are *representative of conditions occurring during the reporting period.*'' (emphasis added) Therefore, it is important that facilities authorized to use the new minimum sampling frequency conduct their sampling on representative wastewater flows. For example, while certain batch dischargers will have sufficiently uniform processes, such that reduced sampling will be representative and able to meet the Middle Tier criterion concerning variable flow rates, production levels, or pollutant levels (40 CFR 403.12(e)(3)(iii)), other batch dischargers may vary their processes seasonally or unpredictably, hence making it difficult for the Control Authority to demonstrate both that a minimum of one sample per year will be representative, and that the discharger complies with 40 CFR 403.12(e)(3)(iii). In addition, POTWs may also reduce their own obligations to inspect and sample these Middle Tier CIUs from once per year to once every two years. See 40 CFR 403.8(f)(2)(v)(C).

Why is EPA proposing the Middle Tier CIU category? In the preamble to the proposed rule, EPA solicited comment on ''alternative criteria for determining non-significant status * * * [such as] the percentage of a POTW's total flow discharged by a particular CIU.'' See 64 FR 39574 (July 22, 1999). Eighteen (18) POTW commenters responded by suggesting that EPA adopt the following three tier system. The first tier would encompass CIUs discharging less than 100 gpd. Referred to as ''de minimis'' CIUs, this tier is similar to today's promulgation of the NSCIU category. The second tier (referred to by the commenters as ''non-significant CIUs'') would have included CIUs that meet all of the following conditions:

• The CIU's discharge of categorical wastewater does not exceed 0.01 percent of the design dry weather hydraulic capacity of the receiving POTW, nor does it exceed 10,000 gpd;

• The CIU's discharge of categorical wastewater does not exceed 0.01 percent of the design dry weather organic treatment capacity of the receiving POTW;

• The CIU's discharge of categorical wastewater does not exceed 0.01 percent of the maximum allowable headworks loading (MAHL) for the receiving POTW of any pollutant detected at the POTW headworks for which the CIU is subject to a categorical Pretreatment Standard; and

• The CIU has not been in significant noncompliance (SNC) for the most recent four consecutive six-month periods.

Where a CIU met the criteria of the second tier, the Control Authority would have the option of reducing the Industrial User's monitoring to once per year (as compared to the current minimum of twice per year) and the Control Authority's inspection and monitoring requirements to once every two years (as compared to the current minimum requirement of once every year). It is important to note that the commenters' second tier would not have enabled the Control Authority to reduce oversight requirements to the degree that the first tier would. The third tier of the commenters' system would have included all other CIUs subject to the full array of oversight requirements.

In August 2000, EPA approved a project under the Agency's Project XL program for the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC) to pilot the use of the ''non-significant CIU'' criteria supported by the POTW commenters on the proposed rule. In exchange for agreeing to a variety of measures to improve the level of environmental performance by the POTW, MWRDGC was given authority to apply the ''non-significant CIU'' criteria (similar to the criteria referred to in this final rule as the ''Middle Tier'' CIU criteria) to its CIUs. For more information, refer to EPA's website for the pilot project *http://www.epa.gov/projectxl/mwrd/page1.htm.* EPA notes that this project is no longer active due to intergovernmental issues.

EPA has concluded that the basic approach suggested by the commenters in their second tier (referred to now as ''Middle Tier'' CIUs), and approved for use by the Metropolitan Water Reclamation District of Greater Chicago's Project XL initiative, has merit in its focus on reducing reporting, inspection, and monitoring requirements for CIUs contributing a very small fraction of the POTW's design flow and pollutant loading. However, while adopting the basic criteria for the second tier (now referred to as the ''Middle Tier''), EPA has decided to adopt a ceiling of 5,000 gpd as compared to the recommended 10,000 gpd. EPA has concluded that the 5,000 gpd ceiling will provide significant streamlining while providing additional assurance that larger dischargers which may have significant potential to cause Pass Through or Interference will continue to receive full SIU oversight.

In addition, EPA has added additional safeguards designed to ensure the selection of appropriate CIUs and the proper documentation of data supporting the inclusion of individual CIUs in the Middle Tier. For instance, new 40 CFR 403.12(e)(3)(iii) binds the Control Authority's discretion by requiring eligible CIUs to ''not have daily flow rates, production levels, or pollutant levels that vary so significantly that decreasing the reporting requirement for this Industrial User would result in data that are not representative of conditions occurring during the reporting period pursuant to paragraph (g)(3) of this section.'' In addition, EPA specifies that any documentation supporting the Control Authority's finding that a specific CIU fits the Middle Tier criteria must be retained for a period of three years after the expiration of the term of the affected CIU's control mechanism. See 40 CFR 403.12(e)(3)(v).

How should the Control Authority develop its site-specific Middle Tier criteria? The criteria in 40 CFR 403.12(e)(3)(i) must first be translated into thresholds that are meaningful for the specific POTW. Each site-specific threshold will then be used to determine whether individual CIUs qualify for Middle Tier status. To complete the necessary calculations, the Control Authority will need to have the following information:

• The POTW's design dry weather hydraulic treatment capacity: These

values, typically expressed in units of millions of gallons per day, are generally found in the POTW's design and specifications documents, and in many cases are identified in its NPDES Permit or Fact Sheet.

• The POTW's design dry weather organic treatment capacity: These values, typically expressed as pounds per day, are also generally found in the POTW's design and specifications documents, and Operations and Maintenance manuals. Biochemical Oxygen Demand (BOD) measurements are used as a measure of the organic strength of wastes in wastewater. The Control Authority must use the design organic treatment capacity value that has been documented in their records for use in translating to useable thresholds for the Middle Tier CIUs.

• The MAHL (Maximum Allowable Headworks Loading) for any pollutant for which approved local limits were developed by the POTW: The MAHL for each pollutant will be found in the POTW's approved technically based local limits supporting document and may also be identified in the POTW's local sewer use ordinance. EPA notes that a MAHL for a pollutant is not the same thing as the local limit for that pollutant. An MAHL is an estimate of the upper limit of pollutant loading to a POTW, intended to prevent Pass Through or Interference. MAHLs are the building blocks for local limits, as distinct from a local limit which is an allocation of the industrial portion of the headworks loading (MAHL) specific to one or more Industrial Users. Therefore, the Middle Tier criterion relating to MAHL is calculated as a percentage of the MAHL, not a percentage of a local limit. For additional information regarding the development of MAHLs and local limits, refer to Local Limits Development Guidance (EPA 833–R–04–002A, July 2004).

Once the Control Authority has located this information, it will then need to multiply each value by 0.01% to translate those numbers into the criteria to be used to determine whether individual CIUs are eligible for Middle Tier status. Where the design hydraulic treatment capacity is concerned, if the product of 0.01 percent and the hydraulic capacity exceeds 5,000 gpd, then the regulations require the Control Authority to use the smaller number, or in this case 5,000 gpd.

In addition, EPA recommends that the Control Authority list out the applicable Middle Tier eligibility criteria in the Industrial User's control mechanism. This will ensure that the CIU is specifically aware that its Middle Tier status only applies as long as it meets the eligibility criteria.

How will Control Authorities determine if a specific Industrial User is eligible for Middle Tier status? EPA recommends that the initial determination of whether or not an Industrial User is eligible be made by comparing the User's actual Discharge (in units of flow or mass loading depending on the specific criterion) for the previous two years to each of the criterion to verify that the industry meets all of the criteria on a consistent basis. EPA notes that CIUs are required to establish eligibility by measuring their flow through the use of a continuous effluent flow monitor. See 40 CFR 403.12(e)(3)(i)(A). However, recognizing that continuous flow monitors are not appropriate for use in batch Discharges, the final rule provides an exception for those CIUs that discharge by batch. In such circumstances, EPA recommends that the batch discharger provide some other similarly accurate measure of flow, such as by providing a reasonable estimate of actual volume discharged from process wastewater containers.

What documentation is required to designate Middle Tier CIUs? The Control Authority is required to document the specific criteria used in determining whether specific Industrial Users are considered Middle Tier CIUs. This documentation should show: (1) The translation of the 40 CFR 403.12(e)(3)(i)(A)–(C) criteria into values that are specific to each Control Authority, and (2) the basis for including specific CIUs in the Middle Tier category. This information must be retained for a period of three years after the expiration of the term of the control mechanism. See 40 CFR 403.12(e)(3)(iv).

Industrial Users will also need to retain sufficient information to verify that they continue to be eligible for Middle Tier CIU status, such as records showing their daily flows of categorical wastewater. The Control Authority (and Approval Authority in some instances) will use this information to validate the inclusion of Industrial Users in the Middle Tier CIU category. Industrial Users will find it necessary to have records of daily flows to be able to provide notification to the Control Authority if they exceed the flow criteria in 40 CFR 403.12(e)(3)(i)(A).

How often would an individual POTW's Middle Tier criteria be expected to change? It is not anticipated that the values upon which an individual POTW assigns Middle Tier status would change during the term of the POTW's NPDES control mechanism. Some scenarios which may necessitate a change to the POTW's Middle Tier criteria are:

• Operations and maintenance work to correct excessive inflow and infiltration in the collection system: Where such changes affect actual wastewater flow, the POTW's local limits may need to be adjusted to account for this capacity change, thereby affecting the calculation of the plant's maximum allowable headworks loading (MAHL). Such adjustments to the MAHL may necessitate a recalculation of the POTW's Middle Tier criteria, which in turn may affect which CIUs are eligible for inclusion.

• Collection System Expansions or Extensions/Treatment Plant Upgrades: Such modifications typically are conducted over a period of time and the effect on the treatment capability or efficiency of the POTW may not be instantaneously realized. When such improvements are completed, the Middle Tier criteria may need to be modified accordingly to reflect the new hydraulic and organic treatment capacities, as well as the MAHL. EPA notes that these situations are each identified in the Agency's local limits guidance as reasons to re-evaluate a POTW's local limits. See Chapter 7 of Local Limits Development Guidance (EPA 833–R–04–002A, July 2004). EPA's guidance (page 7–5) indicates ''usually, a POTW will undertake a detailed reevaluation of its local limits in response to one of more significant changes at the treatment works or in the Discharges it receives. Recalculating existing MAHLs or determining MAHLs for new [pollutants of concern] is generally an appropriate response to changes in: Removal efficiencies; Total POTW or [Industrial User] loading; Limiting criteria (NPDES Permits, water quality standards, sludge criteria); Sludge characteristics or method of disposal (*e.g.,* percent solids, disposal site life); Background concentrations of pollutants in receiving water.'' In addition, treatment efficiencies are verified annually, when the POTW submits its annual report, to the Approval Authority, which summarizes the changes within the Control Authority's Pretreatment program over the past year.

• Local Limits Reevaluations: Formal reevaluations of a POTW's technically based local limits must be conducted with each renewal of the POTW's NPDES Permit. See 40 CFR 122.21(j)(2)(ii) EPA recommends, therefore, that recalculation of the Middles Tier criteria be performed and coordinated for submittal to the Approval Authority at the same time as the periodic local limits reevaluation,

easing the burden of separate reviews for both the Approval and Control Authorities.

EPA notes that in situations where the Middle Tier criteria are modified, the Control Authority must submit the revised criteria to the Approval Authority as a modification to the POTW Pretreatment Program. Depending on the specific situation, Approval Authorities will determine whether a modification is a substantial or non-substantial modification of the approved Pretreatment Program. In either case, at a minimum, such modifications must be submitted to the Approval Authority by the Control Authority at least 45 days prior to implementation pursuant to 40 CFR 403.18.

What criteria should a Control Authority apply if the Approved POTW Pretreatment Program involves more than one treatment plant? Similar to guidance provided in page 9–2 of the Local Limits Development Guidance (EPA 833–R–04–002A, July 2004), the Control Authority has options for how it applies or allocates its MAHLs. The Control Authority could decide to provide local limits to the Industrial Users based on the evaluation for the individual treatment works which serve those Users. Alternatively, the Control Authority could select the lowest (most stringent) local limit for each pollutant across all of the treatment plants. When establishing the Middle Tier criteria, the Control Authority can either apply the MAHL on a per POTW Treatment plant basis to only those IUs serviced by the individual treatment works, or it could identify and use the most stringent MAHL across all of its treatment plants.

What happens if the CIU, after becoming eligible for Middle Tier status, exceeds the Middle Tier criteria? As stated previously, the CIU's eligibility for Middle Tier status depends on its ability to meet all of the criteria in 40 CFR 403.12(e)(3). If for any reason, a Middle Tier CIU finds that it no longer meets the conditions in 40 CFR 403.12(e)(3)(i), (ii), or (iii), the CIU must notify the Control Authority and must immediately begin complying with the full SIU reporting requirements in 40 CFR 403.12(e)(1). For example, if a CIU exceeds its eligibility criterion for flow on any day as determined by its continuous effluent flow monitor, that User no longer meets the conditions for Middle Tier status, and must immediately notify the Control Authority and begin complying with the non-reduced frequency of SIU reporting requirements. Although not specified in the Middle Tier provisions, EPA recommends that Control Authorities consider whether they should preclude those CIUs which lose their Middle Tier status from regaining that status for at least the remainder of the term of the control mechanism. Where the Industrial User can demonstrate its ability to once again meet the eligibility conditions after sufficient passage of time (*e.g.,* the remainder of the term of the control mechanism), the Control Authority may then consider renewing the User's status as a Middle Tier CIU.

What type of oversight will EPA provide over the implementation of the Middle Tier CIU provisions? As with any new regulatory provision, given the number of conditions involved in the Middle Tier CIU category, EPA expects that the Agency will need to ensure that these provisions are implemented as intended. EPA will pay close attention to the Control Authority's adherence to these eligibility conditions and the overall implementation of these provisions. POTW Pretreatment Program audits and Pretreatment Compliance Inspections (PCIs) will provide EPA, as well as state Approval Authorities, with important opportunities to assess how the Control Authorities' are implementing this measure. Like any implementation issue in the Pretreatment Program, if a Control Authority has incorrectly applied the eligibility conditions such that one or several Industrial Users are erroneously considered Middle Tier CIUs, EPA will recommend in its audit or PCI findings that the Middle Tier status be revoked for those Users.

4. Summary of Major Comments and EPA Response

Should EPA establish an NSCIU category? The overwhelming majority of commenters supported the proposed establishment of the NSCIU category, although many differed on what flow threshold would be the most appropriate for identifying such Industrial Users. One commenter expressed strong opposition to the creating the NSCIU category. This commenter indicated that EPA had not shown a basis in the record for this regulatory change, any evidence that the facilities and Control Authorities to be given streamlined oversight actually comply with applicable requirements, any evidence that Control Authorities will be able to detect noncompliance in a timely fashion without these oversight requirements, and any evidence that the change adequately protects POTWs and the environment. As outlined above, EPA is today finalizing provisions which enable Control Authorities to designate certain Categorical Industrial Users as NSCIUs, at their discretion, if the facilities meet all of the eligibility conditions, including discharging fewer than 100 gpd of total categorical wastewater.

EPA disagrees with the commenter's rationale for opposing the establishment of the NSCIU category and the opportunity to reduce oversight for such Users. First, there is a basis in the record for this regulatory change. In the preamble to the proposed rule, EPA discussed the concerns of Control Authorities which supported the need for the proposal. Such concerns included the widely held perception that SIU oversight requirements are rigid, ''especially with respect to smaller facilities that are subject to categorical Pretreatment Standards and facilities that they believe have no potential to cause Pass Through or Interference.'' See 64 FR 39572 (July 22, 1999). EPA sought comment on the concept of allowing the Control Authority to identify Users as NSCIUs where they discharged fewer than 100 gpd, and to reduce the oversight required for such non-significant facilities. EPA provided an estimate of the percentage of CIUs that might be affected (1–2 percent), and has since projected that this number may be as high as 15 percent. Because these facilities will need to be good actors to be eligible (*e.g.,* the regulations require a record of consistent compliance and annual certification of compliance with applicable Standards and Requirements), and because they individually contribute an insignificant amount of flow to the POTW, the Agency has concluded that it has an adequate basis for allowing Control Authorities to reduce oversight requirements for such facilities.

Second, although EPA agrees that an Industrial User's compliance is a critical factor in whether the Control Authority may treat the User as an NSCIU, the Agency has concluded that it is unnecessary to evaluate overall compliance among these small CIUs prior to finalizing these provisions. What EPA is establishing in the final rule is the discretionary ability for Control Authorities to reduce oversight for select small Users. EPA is not requiring that this optional authority be used for any specific Industrial Users or that it be used in all cases. In fact, EPA would expect that the Control Authority will be reluctant to designate any particular CIU as an NSCIU if it has any concerns about the potential for any particular CIU to affect adversely the POTW or receiving water. Thus, the final rule requires, as a condition of eligibility for designation, that an Industrial User has a record of consistent compliance with applicable

Pretreatment Standards and Requirements prior to being defined as an NSCIU. See 40 CFR 403.3(v)(2)(i). After becoming an NSCIU, the User is then required to annually certify that it meets the definition of ''non-Significant Categorical Industrial User'' and that it has complied with all applicable Pretreatment Standards and Requirements. See 40 CFR 403.12(q). With these safeguards in place, EPA concludes that the final rule addresses the commenter's concern about the lack of evidence on overall compliance.

Third, EPA does not agree with the commenter's argument that Control Authorities will not have sufficient information to detect noncompliance in a timely fashion. It should be noted that the NSCIU provisions do not compel the Control Authority to reduce or eliminate applicable reporting, monitoring, and inspection requirements for every CIU with non-significant status. In fact, EPA expects that the Control Authority should assess each NSCIU to determine the extent to which oversight should be reduced. In addition, the combination of the NSCIU provisions and other existing regulatory requirements provide mechanisms for timely detection of noncompliance. Each Industrial User qualifying for NSCIU status must first demonstrate that it has consistently complied with applicable Pretreatment Standards and Requirements. After becoming an NSCIU, the User must annually certify that it still meets the requirements for non-significant status, and that it has complied with applicable Standards and Requirements. Lastly, as with all Industrial Users, the NSCIU is affected by the notification requirement in 40 CFR 403.12(j), which requires facilities to ''promptly notify the Control Authority (and the POTW if the POTW is not the Control Authority) in advance of any substantial change in the volume or character of pollutants in their Discharge * * *.'' And, each NSCIU must also comply with 40 CFR 403.12(f), which provides that ''all categorical * * * Industrial Users shall notify the POTW immediately of all Discharges that could cause problems to the POTW * * *.''

Fourth, EPA has concluded that the NSCIU provisions will not affect protection of the POTW and the environment, contrary to the commenter's position. While the discretionary decision to treat an Industrial User as an NSCIU does relieve the Control Authority of certain oversight requirements with respect to the affected Industrial User, the facility's requirement to meet all applicable categorical Pretreatment Standards and its status as a CIU are not changed. Just because the CIU has been categorized as an NSCIU does not relieve it of its obligation to comply with categorical Pretreatment Standards and other applicable Pretreatment requirements, such as the notification provisions of 40 CFR 403.12(f) and (j). Also, the NSCIU is required to annually certify that it has met applicable Pretreatment Standards and Requirements. Therefore, with these safeguards in place, EPA finds that the NSCIU provisions are fully protective of the POTW and the environment.

How should the 100 gpd and Middle Tier criteria be applied to CIUs that commingle categorical and non-categorical wastestreams? Several commenters asserted that EPA should change the terms of the NSCIU language to indicate that only categorical wastestreams should be included when assessing whether an individual CIU meets the threshold for being designated as non-significant. EPA agrees, and has changed the definition of NSCIU to indicate that the CIU never discharges more than 100 gpd of ''total categorical wastewater.'' EPA finds it important to note that in many instances, all or most process wastewater discharged by NSCIUs will be categorical wastewater. And where facilities co-mingle different types of categorical wastewater, the threshold for determining whether or not a facility may be considered a non-significant CIU would be based on the total amount of categorical wastewater discharged. That is, the breakdown of categorical wastewater flows by industrial category would not affect the threshold determination. However, EPA recognizes that there may be cases where facilities discharge both categorical wastewater and non-categorical process wastewater. This would occur where some of a facility's process wastewater Discharges were regulated under a National categorical Standard, while others were not, either because they were generated by operations from a different (non-regulated) industrial category, or because they were specifically excluded from coverage at the time the categorical Standards were promulgated. In cases where categorical and non-categorical process wastewater flow volumes cannot be reliably distinguished, the threshold determination should be based on total process wastewater flow volume.

Middle Tier CIUs (discussed further below) also apply flow thresholds that are measured against an Industrial User's ''total categorical wastewater'' flow. EPA notes that the same approach for co-mingled wastewater that applies to NSCIUs also applies to the Middle Tier CIUs.

Do POTW's need to conduct annual inspections or sampling of NSCIUs? Several commenters recommended that EPA specifically reduce oversight of NSCIUs by limiting Control Authority inspections and/or sampling. The recommended frequencies ranged between every other year to as often as once-per-year. Other commenters supported completely eliminating inspection and sampling requirements. With the adoption of today's rule, EPA is not establishing any minimum inspection and sampling requirements for NSCIUs. Today's rule instead requires the Control Authority to perform an evaluation, at least once per year, on whether the NSCIU meets the criteria of 40 CFR 403.3(v)(2). As part of the annual evaluation, EPA recommends that the Control Authority conduct an on-site inspection of the facility in order to maintain awareness of the facility's process and to determine to the extent possible whether the discharger is complying with its Pretreatment Program requirements. As part of the evaluation, the Control Authority should verify the NSCIU's certification under 40 CFR 403.12(q) and review any other documentation provided by the facility. The level of effort devoted to an evaluation can be tailored to the facility. EPA again notes that it anticipates that this evaluation will primarily involve the Control Authority's verification that certification forms have been submitted by all NSCIUs documenting eligibility for NSCIU status and compliance with applicable Pretreatment Standards and Requirements. The Control Authority is not required to control the NSCIU through a Permit or other control mechanism. However, the Control Authority could, on a case by case basis, determine whether individual control mechanisms are necessary for NSCIUs and develop adequate sampling and inspection frequencies.

One commenter suggested that some type of annual correspondence, at minimum, be incorporated into the Pretreatment Regulations to remind the NSCIU and Control Authority of their responsibilities and obligations under the Pretreatment Program. EPA agrees with the comment and has modified the rule language to include requirements that NSCIUs annually certify they are in compliance with all applicable Pretreatment Standards using the certification statement at 40 CFR 403.12(q). Further, the Control Authority must perform an NSCIU evaluation, at least once per year, and provide an updated list of NSCIUs to the

Approval Authority as part of its annual POTW Pretreatment report.

Can EPA provide some clarification of the NSCIU definition? Commenters expressed the need for clarification in the proposed definition of NSCIU. Several commenters were concerned that the language, as proposed, would allow Control Authorities to exempt a greater number of Industrial Users from Pretreatment Program requirements than what was intended under the proposal. These commenters interpreted the proposed definition to potentially allow an unlimited amount of treated concentrated wastewater (the proposal prohibited ''untreated concentrated wastes'') to be discharged to the POTW while still falling under the NSCIU threshold since it only required that Discharges of ''other process wastewater'' not be more than 100 gpd. Many commenters stated that a CIU could be deemed ''non-significant'', under the proposed definition, if it could merely demonstrate that it did not discharge ''untreated concentrated wastes'' subject to the categorical Pretreatment Standards and not more than 100 gpd of other process wastewater. Upon further consideration, EPA agrees that the proposed criteria for becoming a NSCIU was open to more than one interpretation and has revised the language in the final rule to further clarify the definition. Therefore, with the adoption of today's rule, EPA is clarifying the NSCIU definition to include ''100 gpd of total categorical wastewater'' in order to emphasize the fact that it is the ''total'' Discharge of 100 gpd or less of categorical process wastewater which qualifies a User for NSCIU status (as long as the other required conditions of 40 CFR 403.3(v)(2) are met), not some smaller subset of treated concentrated wastewaters.

Why didn't EPA promulgate a higher flow threshold? Many commenters supported the concept of creating a flow cut-off threshold, but suggested that the 100 gpd ceiling was too low to provide any significant relief in burden. Commenters suggested alternative flow thresholds ranging from 300 gpd to 25,000 gpd, and also suggested that facilities that have little or no potential to impact the operation of the receiving POTW be included in this classification. Other POTW commenters supported the Association of Metropolitan Sewerage Agencies (AMSA, now renamed as the National Association of Clean Water Agencies) proposal of an alternative cutoff which would be specific to the POTW.

EPA's intent in establishing the NSCIU category was to reduce the burden on Control Authorities of regulating Industrial Users which could truly be considered to present minimal impact to the treatment plant and the Pretreatment Program in general. It was not EPA's intention to remove a large segment of contributing CIUs from Pretreatment Program oversight, and the Agency has a limited amount of flow or other Discharge data from which to establish with any certainty the impact on the Pretreatment Program of allowing the NSCIU category to include a greater number of Users. EPA generally views the 100 gpd threshold as corresponding to the de minimis dischargers.

In the proposal, EPA estimated that about 2 percent of the current CIUs might be eligible for non-significant status. A recent evaluation of 75 POTW Pretreatment Programs indicated that an average of 15 percent of all CIUs in these municipalities would meet the 100 gpd threshold for NSCIU. EPA anticipates that the 100 gpd threshold will result in NSCIU eligibility for higher numbers of CIUs in select cities or regions.

One commenter was opposed to any higher flow or narrative threshold for batch dischargers based on the fact that the proposal would have eliminated minimal, but critical, requirements for annual inspection and sampling, biennial slug control plan reviews, and permit reviews once every 5 years, while ignoring the compliance history and the discharger's potential to harm the POTW. EPA wishes to clarify that a Control Authority will have discretion to designate certain CIUs as NSCIUs if they meet specific criteria, and to exercise that discretion in the case of any individual CIUs, but will not be obligated to exercise this discretion in any particular case. Although certain facilities may be considered NSCIUs, EPA does not specify what types of reporting requirements are necessary. Although the Control Authority may choose a lesser amount of currently required sampling and reporting, the final rule does not mandate this decision. [As stated above, EPA does require that the Control Authority conduct at a minimum an annual evaluation.] EPA expects that this evaluation will primarily involve the Control Authority's verification that certification forms have been submitted by all NSCIUs documenting eligibility and compliance with Pretreatment Standards and Requirements. EPA has also created conditions that address the commenter's concern about facility compliance. For example, to be eligible for NSCIU status, a facility must have consistently complied with all applicable categorical Pretreatment Standards and Requirements prior to the Control Authority's findings. Further, the NSCIU must certify on an annual basis (per the certification requirement in 40 CFR 403.12(q)) that its Discharge is in compliance with all applicable categorical Standards and Requirements.

May averaging be allowed in the NSCIU determination? EPA solicited comment on whether averaging should be allowed in determining whether a CIU fell under the 100 gpd threshold. Several commenters indicated that they concurred with the 100 gpd flow threshold, but suggested that the Agency include facilities that discharge up to 500 gallons per week. Today's final rule does not authorize the use of averaging to meet the 100 gpd threshold. EPA is concerned that allowing such an approach could be difficult to oversee from the Control Authority's perspective, and could be burdensome to implement from the CIU's perspective. A greater degree of precision and a higher frequency of reporting would be needed to support a threshold that allows for an averaging of flow values. For instance, the CIU would need to record precise flow measurements every day to be able to determine whether its average discharge volume falls below the threshold, requiring the Industrial User to establish a more sophisticated approach for tracking the facility's Discharge. Also, the use of an averaging approach will make it harder for the Control Authority to be able to determine compliance on the days it conducts its inspections. Because the 100 gpd approach is applied as a threshold which cannot be exceeded, it can be implemented in a more straightforward manner which is expected to minimize the opportunity for misinterpretation. If a facility is a batch discharger and currently discharges more than 100 gpd, EPA recommends that the Industrial User install some form of flow restrictor that will ensure that its discharge of categorical process wastewater will never exceed 100 gallons on any single day.

Does a facility have to treat its wastewater to be considered non-significant? Several commenters expressed concern that it appeared from the proposal that a facility would need to install and provide treatment for all its wastewater prior to discharge. EPA clarifies that a facility does not need to have treatment in place in order to be considered non-significant, consistent with the fact that the categorical Standards do not dictate what types of treatment technologies the CIU must use so long as the facility's Discharge, with

or without treatment, remains in compliance with the categorical Standard. The Standards only provide the limits with which any Industrial User's Discharge must comply. On the other hand, the final NSCIU criteria require that the facility not discharge any ''untreated concentrated wastewater'' since it may be assumed that untreated concentrated wastewater (*i.e.*, plating baths and rinses, solvents, sludges, etc.) would not be in compliance with the categorical Standard. Regardless of whether treatment exists at the CIU, the final rule requires that the facility must have consistently complied with all applicable categorical Pretreatment Standards and Requirements in order to be considered an NSCIU. Furthermore, the facility must, at minimum, annually certify that its Discharge is in compliance with all applicable categorical Pretreatment Standards and requirements.

EPA should adopt a third tier of CIUs which provide further oversight flexibility based on the impact of the Industrial User on the specific POTW: As stated previously, eighteen (18) POTW commenters recommended that EPA adopt the following category of CIU in addition to the NSCIU and SIU categories:

- The CIU's categorical wastewater Discharge does not exceed 0.01 percent of the design dry weather hydraulic capacity of the receiving POTW, nor does it exceed 10,000 gpd;
- The CIU's categorical wastewater Discharge does not exceed 0.01 percent of the design dry weather organic treatment capacity of the receiving POTW;
- The CIU's categorical wastewater Discharge does not exceed 0.01 percent of the maximum allowable headworks loading (MAHL) for the receiving POTW of any pollutant detected at the POTW headworks for which the CIU is subject to a categorical Pretreatment Standard; and
- The CIU has not been in significant noncompliance (SNC) for the most recent four consecutive six-month periods.

As explained in Section III.K.3.b, EPA has included this basic approach in the final rule, with the exception of changing the volume ceiling from 10,000 gpd to 5,000 gpd.

IV. Description of Areas Where EPA Is Not Taking Action on the Proposed Rule

A. Specific Prohibition Regarding pH (40 CFR 403.5(b)(2))

This section discusses EPA's proposal to amend 40 CFR 403.5(b)(2) to authorize the introduction of Discharges with pH less than 5.0 in certain circumstances. EPA has decided not to adopt the proposed changes to 40 CFR 403.5(b). EPA concluded that inadequate scientific information was available to determine the effects of short-term, low pH Discharges on the integrity of the POTW collection systems to support a change to the current prohibition on the introduction of Discharges with a pH lower than 5.0 into POTWs.

1. What is the existing rule?

Acidic wastes can corrode sewer pipes with a resulting release of pollutants into the environment. To address this concern, the current regulations include a limit on the acidity of wastes, a minimum pH limit, in the specific prohibitions at 40 CFR 403.5(b). This prohibition applies to all nondomestic dischargers to POTWs. Section 403.5(b)(2) prohibits the discharge of ''pollutants which will cause corrosive structural damage to the POTW, but in no case discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such Discharges.''

2. What changes did EPA propose?

EPA proposed to allow POTWs with Approved Pretreatment Programs to authorize temporary excursions below pH 5.0 provided that the POTW maintain a written technical evaluation supporting the finding that the alternative pH requirements did not have the potential to cause corrosive structural damage to the POTW or otherwise violate 40 CFR 403.5(a) and (b). This change would have allowed POTWs to accept Discharges below pH 5.0 from Industrial Users that continuously monitored the pH of their Discharges, or to accept such temporary excursions by a limited group of Industrial Users. EPA proposed that any alternative pH requirement developed by a POTW would be enforceable as a Pretreatment Standard under the Clean Water Act. (The general narrative prohibition against pollutants that cause corrosive structural damage at 40 CFR 403.5(b)(2) would still have applied.)

3. What action is EPA taking today?

EPA has decided not to adopt any changes to 40 CFR 403.5(b)(2). The existing specific prohibition against Discharges with pH lower than 5.0 will remain in effect.

In arriving at this decision, EPA has found that most of the current literature on the relationship between low pH and corrosion of sewer pipes is general and qualitative. References rarely address short-term Discharges of low pH and tend to only discuss effects of continuous exposure. Furthermore, predicting the effects of corrosion on POTW sewer pipes is complicated by a variety of factors, including wastewater characteristics such as pH, temperature, volume, velocity, turbulence, alkalinity, dissolved oxygen, as well as sewer pipe characteristics such as size, age, material of construction, pipe configuration, and time since last cleaning. EPA has concluded that insufficient research is available that investigates the synergistic effects of these factors as well as data on the effects of short-term Discharges of low pH and therefore modifications to the current regulations are not appropriate at this time.

What significant changes were made to the proposed rule?

EPA has decided not to change the current rule regarding Discharges less than pH 5.0. EPA lacks sufficient information on the effects of short-term or long-term Discharges with pH lower than 5.0 on the structural integrity of POTWs. The current regulations at 40 CFR 403.5(b) remain in effect.

4. Summary of Major Comments and EPA Response

Many commenters gave qualified support for the proposed modifications with suggestions for implementation. EPA also received comments on the proposed rule stating that the proposal did not adequately protect POTWs. One commenter cautioned that systems constructed of acid-resistant materials often include manhole inverts constructed of concrete and similar materials that are susceptible to corrosion, and are thus rarely entirely resistant to such effects. Some requested that EPA make the current pH limit more stringent (*i.e.,* above pH 5.0) because there are systems that are currently experiencing corrosion damage. A few commenters questioned whether the proposed modifications would actually provide a significant burden relief for POTWs, on the basis that adequate evidence does not exist that shows POTWs devote a substantial amount of resources to dealing with short-term violations. Several commenters requested guidance on various implementation topics,

including how POTWs should assess and maintain the integrity of their systems with respect to corrosion. These outstanding issues influenced EPA's decision not to finalize the proposed modifications at this time.

Even though EPA has decided not to finalize this proposed provision, all comments that were submitted on the proposal will be carefully considered as EPA further explores the issue of short-term pH Discharges. Please see the Response to Public Comment Document for responses to specific comments.

Application of 40 CFR 401.17 Criteria: Some commenters suggested that the pH provisions at 40 CFR 401.17 could serve as a basis for alternative pH requirements. The effluent guideline regulations list certain conditions under which excursions from pH limits are allowed for direct dischargers. EPA developed 40 CFR 401.17 based on the Agency's determination that direct dischargers could continuously meet a pH limit between 6.0 and 9.0. In comparison, Pretreatment requirements are based on preventing corrosion in POTWs and are much less restrictive. It is EPA's view that it would be inappropriate to attempt to use 40 CFR 401.17 as a basis for alternative pH requirements because the reason behind establishing the pH requirement is different. However, POTWs may implement and enforce local pH limits in a manner that is more stringent than the federal regulations. EPA refers commenters to EPA's May 13, 1993 letter to Mary Jo M. Aiello of the New Jersey Department of Environmental Protection and Energy, for a discussion of an acceptable analogous application to the Pretreatment program. See *http://www.epa.gov/npdes/pubs/owm0113.pdf*.

Use of Enforcement Response Plans to Address pH Violations: Several POTW commenters expressed concern over the level of burden imposed on them by the existing pH limit since they are obligated to treat all exceedances as violations. In EPA's view, it is relevant to clarify the inherent flexibility present in a POTW's Enforcement Response Plan provisions to define varying levels of response to temporary pH violations. EPA advises POTWs to incorporate a preferred method of dealing with violations of local limits into their Enforcement Response Plans and refers commenters to the Guidance for Developing Control Authority Enforcement Response Plans (EPA, 1989). See *http://www.epa.gov/npdes/pubs/owm0015.pdf*. EPA notes that POTWs make their own decisions regarding the utilization of resources in response to low pH Discharges when developing an Enforcement Response Plan. Excursions under pH 5.0 are Pretreatment Standard violations (40 CFR 403.5(b)(2)), and, in determining the appropriate response, EPA recommends that the Control Authority consider the following criteria: frequency, duration, magnitude, effect, and/or compliance. A record should be made of the response, and the person responsible for screening the data should alert enforcement personnel to the noncompliance. EPA recognizes that the Control Authority's appropriate response (including no further action, a phone call, or a notification letter) may vary. This flexibility may help reduce the burdens on the commenters' programs.

V. Changes to Part 122

EPA is also making the following changes to the part 122 regulations:

- 40 CFR 122.21(j)(6)(ii): Change reference to definition of ''Significant Industrial User'' to 40 CFR 403.3(v), instead of 40 CFR 403.3(t). This reference change is a direct result of renumbering associated with today's rule.
- 40 CFR 122.44(j)(1): Correct typographical error referring to ''significant indirect dischargers'' instead of the correct term, ''Significant Industrial Users discharging''.
- 40 CFR122.62(a)(7): Correct typographical error referencing an incorrect provision relating to modifications. The correct reference should be 40 CFR 403.18(e).

VI. Considerations in Adopting Today's Rule Revisions

How does a POTW adopt today's rule provisions?

Section 40 CFR 403.18(a) generally requires review and approval by the Approval Authority of modifications to the POTW Pretreatment Program when there is a ''significant change in the operation of a POTW Pretreatment Program that differs from the information in the POTW's [program] submission * * *.'' Consistent with this rule, before many of today's streamlining provisions may be implemented by local Pretreatment authorities, POTWs will need to modify their Pretreatment Program procedures and authorities. Once the POTW has determined what program revisions it will make in response to today's streamlining provisions, the modifications must then be submitted to the Approval Authority (either the State, if it has Pretreatment Program authority, or the EPA Regional Administrator) for approval. The regulations also require that the program modification be accompanied by a statement of basis for the changes, a description of the modifications and other information the Approval Authority may request as appropriate. See 40 CFR 403.18(c)(1).

Although not required as part of today's final rule, EPA encourages a POTW to submit its Pretreatment Program modifications to its Approval Authority as a package, rather than sending changes piecemeal. This will help make the review process more efficient and less burdensome.

Is the POTW required to make any of today's streamlining changes?

EPA notes that many of today's streamlining provisions are changes that the POTW may adopt at its discretion. Many of these changes (*e.g.*, the authority to use general control mechanisms, monitoring waivers for pollutants neither present nor expected to be present, BMPs in lieu of numeric local limits, application of equivalent concentration limits in place of flow-based mass limits for OCPSF, petroleum refining, or pesticide chemicals facilities, creation of a category of non-significant CIUs, and application of equivalent mass limits for concentration based categorical Standards) involve features that provide program flexibility and are not required to be incorporated into the POTW's Pretreatment Program.

However, a few of today's rule provisions are changes that the POTW is required to make because they clarify certain minimum requirements, and to the extent that the POTW's approved program is inconsistent with these requirements, it would need to be modified. These required changes include:

(1) 40 CFR 403.8(f)(1)(iii)(B)(6): Clarification that slug control requirements must be referenced in SIU control mechanisms. The POTW is required to adopt this change because it specifies new minimum requirements for all SIU control mechanisms.

(2) 40 CFR 403.8(f)(2)(viii)(A)(B)(C): Revisions to the significant noncompliance (SNC) definition. These revisions are required because they expand the definition of SNC to include additional types of Pretreatment Standards and Requirements which were not clearly covered in previous definitions.

(3) 40 CFR 403.12(g): Modifications to the sampling requirements and a clarification to the requirement to report all monitoring results. SIUs are now required to follow sampling requirements in 40 CFR 403.12 for periodic compliance reports (40 CFR 403.12(e)), whereas they were

previously only explicitly applicable to baseline monitoring reports and 90-day compliance reports. Also, the final rule now requires that non-categorical SIUs report all monitoring results, whereas the previous regulations only made this requirement explicit for categorical SIUs. The POTW is required to adopt these revisions because they set new minimum requirements for sampling and notification.

What is the difference between a ''substantial modification'' and a ''non-substantial'' modification?

Different review procedures apply to program modifications depending on whether the modification is substantial or non-substantial.

The Approval Authority's review of a substantial modification, unlike a non-substantial modification, must follow the same procedures used for approving the initial POTW Pretreatment Program, including the issuance of a public notice to inform the public of the POTW's modification Submission. By contrast, where the Submission is reviewed as a non-substantial modification, the Approval Authority has 45 days to either approve or disapprove the modification. Where the Approval Authority does not notify the POTW within 45 days of its decision to approve or disapprove the modification, or to treat the modification as substantial, the POTW may implement the modification as if it were approved by the Approval Authority.

How will the POTW's adoption of today's streamlining provisions be reviewed by the Approval Authority?

EPA has concluded that all of the changes related to today's rule may be treated as non-substantial if the changes to a POTW's local ordinance to incorporate the changes directly reflect the federal requirements. The current regulations provide that modifications that relax a POTW's legal authorities are substantial modifications ''except for modifications that directly reflect a revision to this Part 403 or to 40 CFR Chapter I, subchapter N, and are reported pursuant to paragraph (d) of this section.'' EPA has explained its reasons for adopting this provision as follows:

• ''Today's regulation excludes from the definition of 'substantial modification' those changes in POTW legal authority that results in less prescriptive programs, but which directly reflect a revision to Federal Pretreatment Regulations (for example, if the federal regulations are streamlined). 40 CFR 403.18(b)(1). Such modifications would have already undergone public notice and comment when promulgated by EPA. As long as the POTW's local ordinance is revised to directly reflect the new federal requirements, further public notice would be unnecessary * * *.'' 62 FR 38406, 38409 (July 17, 1997).

The Approval Authority, however, may treat such modifications as substantial when appropriate. 40 CFR 403.18(b)(7) authorizes the Approval Authority to designate modifications as substantial if the Approval Authority concludes that the modification could have a significant effect on POTW operation, could result in an increase in POTW pollutant loadings or could result in less stringent requirements being imposed on Industrial Users. For example, a POTW may wish to make adjustments to the wording of some of the streamlining provisions so that they fit better with the way the specific Pretreatment program is operated. Such adjustments may or may not trigger the need to review individual modifications as substantial, which would not otherwise need to be treated as substantial if today's provisions are adopted directly.

Will the POTW's NPDES Permit need to be modified? In general, the Pretreatment provisions of the POTW's NPDES Permit will need to be modified. This regulatory action does not modify individual state regulations or authorities, POTW legal authorities, nor modify NPDES Permits issued to POTWs. Consequently, today's rule does not relieve a POTW from operating in accordance with existing state laws, regulations, Permits, and similar actions. If a POTW's Pretreatment program ''modification relates to an enforceable element of the POTW's NPDES Permit'', then the program ''modification requires a permit modification,'' in accordance with 40 CFR 403.8(c). 62 FR 38408 (July 17, 1997). After a POTW's Pretreatment program modification has been approved in accordance with the procedures in 40 CFR 403.18, those conditions may be incorporated into the POTW's NPDES Permit as a minor NPDES modification under 40 CFR 122.63(g).

VII. Regulatory Requirements

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, [58 **Federal Register** 51,735 (October 4, 1993)] the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action.'' As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040–0009.

The regulatory changes in today's rulemaking are designed to reduce the overall burden from technical and administrative requirements that affect Industrial Users, local Control Authorities and Approval Authorities. The estimated savings in annual burden hours and costs to the affected respondents (*i.e.*, Industrial Users, POTWs, and States) is about 240,000 hours or $10.1 million.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Although the regulatory changes in today's final rule provide greater flexibility to regulated entities, it is necessary to collect certain types of information to assure that Pretreatment Program requirements continue to be met and that the final benefit meets EPA's stated goal of providing better environmental results at less cost.

Today's final rule includes regulatory changes that cover a variety of technical and administrative changes. Most of the regulatory changes result in either reduced annual cost and burdens on a continuing basis or have no measurable effect on cost or burden. There are a few regulatory changes (equivalent concentration limits for flow based Standards, monitoring waivers for pollutants not present, and general control mechanisms) that will impose additional short-term increases in burden on those POTWs or Industrial Users that elect to exercise this flexibility. However, when considered over a longer time period, these costs are outweighed by the expected benefits of the provisions.

The table below (Table 1) shows an estimate of burden hours and cost savings for each rule provision.

TABLE 1.—ESTIMATED CHANGES IN BURDEN AND COST

Provision	Total respondents			Change in total number of responses	Hours per response	Annual responses per respondent	Change in burden
	States	POTWs	IUs				
Mass Limits		24	40	80 over 3 yrs	8	Varies	512
Equivalent Concentration Limits.		1,464		15	8.0	0.01	122.67
NSCIUs/Middle-Tier CIUs	34	1,464	2,374	NA	See Note 1	Varies	−113,381
Slug Control Plans	34	1,464		−13,394	0.5	1	−6,697
Pollutants Not Present—CIUs.	34	1,464	12,362	NA	See Note 2	2	−117,703
General Control Mech's, Savings for CAs.	34	20		1,500	−20.0	0.2	−6,000
General Control Mech's, Requests for Coverage.			1,500	1,500 over 3 yrs	0.5	One-Time	250
General Control Mech's, CA Use of Data.	34	20		1,500 over 3 yrs	0.5	One-Time	250
Total	34	1,464	12,362				−242,645

Note 1: For 34 states, the annual number of responses for permit issuance (20 hrs) drops by 0.6 per state. For 34 states, the number of inspections per year (8 hours) drops by 4.6 per state. For 34 states, the number of CIUs sampled per year (15.2 hours) drops by 4.6 per state. For 34 states, the number of NSCIU evaluations (2 hours) increases by 3.0 per state. For 34 states, total hours for review of CIU monitoring reports drops by 424 hours per year. For 1,464 POTWs, the annual number of responses for permit issuance (20 hrs) drops by 0.15 per POTW. For 1,464 POTWs, the number of inspections per year (8 hours) drops by 1.1 per POTW. For 1,464 POTWs, the number of CIUs sampled per year (16.2 hours) drops by 1.1 per POTW. For 1,464 POTWs, the number of NSCIU evaluations (2 hours) rises from 0 to 0.73 per POTW. POTW burden for review of CIU monitoring reports drops a total of 8,664 hours. In addition, 796 CIUs reduce sampling and analysis (15.6 hours) from twice per year to never, 372 CIUs reduce sampling and analysis from twice per year to once every 5 years, and 1,206 CIUs reduce monitoring from twice to once per year. Also, 2,374 CIUs reduce reporting (1 hour) from twice to once per year. IU recordkeeping is eliminated for 1,168 IUs, saving 2337 hours (2 hrs per IU) per year; state recordkeeping decreases by 513 hours per year. POTW recordkeeping is assumed to be unchanged.

Note 2: Hours per response drops from 18.8 to 15.2 for states, 10.0 to 8.1 for POTWs, and 14.3 to 11.6 for CIUs.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business according to RFA default definitions for small business (based on SBA size standard; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

As previously explained, the modifications to the Pretreatment requirements in this final rule will reduce the regulatory costs to POTWs and Industrial Users of complying with Pretreatment requirements. The regulatory changes will provide certain POTWs and Industrial Users with less costly alternatives to the current requirements. For example, this rule includes a modification that would allow a POTW, in specified

circumstances, to control contributions from Industrial Users through general permits or control mechanisms rather than more costly individual permits or control mechanisms. This rule also authorizes a POTW to relieve an Industrial User of its sampling and analyzing requirements if the User demonstrates and certifies that the pollutant is neither present nor expected to be present in its process waste stream or is present only in background levels in the intake water.

The final rule includes provisions that provide flexibility for POTWs and Industrial Users. For instance, POTWs will be allowed to use Best Management Practices (BMPs) as local limits in lieu of numeric effluent limits. This option will give POTWs a feasible alternative when numeric local limits are not the appropriate or practical method to prevent pollutant Pass Through or Interference. EPA does not expect that any POTW or Industrial User will choose the voluntary regulatory requirements over current requirements if the cost of the alternative were greater than the cost of complying with current regulations. We have therefore concluded that today's final rule will either relieve regulatory burden or have no significant impact for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's final rule is ''deregulatory'' in nature and reduces burden on the affected State, local, and tribal governments and the private sector. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Additional flexibility is granted to all POTWs, which will provide opportunities for reducing the burden of administering their Pretreatment programs.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's rule is basically deregulatory in nature and is expected to reduce administrative and resource burdens on affected State, local, and tribal governments and the private sector. Thus, Executive Order 13132 does not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with representatives of State and local officials in developing this rule. Annual EPA/State National Pretreatment Workshops have provided the opportunity for EPA and States to discuss current technical and policy issues as well as the future direction of the National Pretreatment Program. Representatives of EPA, States, and local Pretreatment programs have also convened annually at the Association of Metropolitan Sewerage Agencies' (AMSA's) Pretreatment Workshop. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communication between EPA and State and local governments, EPA solicited comment on the proposed rule from all stakeholders. A summary of EPA's response to concerns raised is provided in Sections III and IV of the preamble (see specifically subsections entitled ''Summary of Major Comments and EPA Response'' for each separate streamlining issue) and in the response to comment document in the record.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This final rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. There are no Pretreatment programs administered by Indian tribal governments. This final rule will neither ''significantly nor uniquely'' affect the communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this rule.

Moreover, in the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule from all stakeholders. EPA did not receive any comments from tribal governments.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This final rule does not impose any new or amended Standards for discharged wastewater or the sludge resulting from treatment of a POTW. (EPA notes that the final rule does enable POTWs to use alternative, equivalent concentration limits for an industry's current flow-based mass Standards and equivalent mass limits where conditions warrant. However, EPA considers these new limits to be equivalent to the Standards previously used, and therefore does not involve the establishment of new or amended Standards.) Treatment and disposal of wastewater occurs in a restricted system (*e.g.,* buried sewer lines and fenced wastewater treatment facilities) that children are unlikely to come in contact with on a routine basis. This rule has no identifiable direct impact upon the health and/or safety risks to children and the regulatory changes will not disproportionately affect children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The final rule does not contain any compliance requirements that will:

1. Reduce crude oil supply in excess of 10,000 barrels per day;
2. Reduce fuel production in excess of 4,000 barrels per day;
3. Reduce coal production in excess of 5 million tons per year;
4. Reduce electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity;
5. Increase energy prices in excess of 10 percent;
6. Increase the cost of energy distribution in excess of 10 percent;
7. Significantly increase dependence on foreign supplies of energy; or
8. Other similar adverse outcomes, particularly unintended ones.

Thus, EPA has concluded that this rule is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards, except to the extent that various sampling procedures in the Pretreatment Regulations are being updated to reflect current EPA methods. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A Major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on November 14, 2005.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 403

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

Dated: September 27, 2005.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671, 21 U.S.C 331j, 356a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. In § 9.1 the table is amended by adding an entry in numerical order under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paper Work Reduction Act.

* * * * *

40 CFR citation	OMB control No.
General Pretreatment Regulations for Existing and New Sources of Pollution	
* * *; * * * * *	
403.12(q)	2040–0009
* * * * * *	

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

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

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

■ 4. Section 122.21 is amended by revising paragraph (j)(6)(ii) introductory text to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

* * * * *

(j) * * *

(6) * * *

(ii) POTWs with one or more SIUs shall provide the following information for each SIU, as defined at 40 CFR 403.3(v), that discharges to the POTW:

* * * * *

■ 5. Section 122.44 is amended by revising the first sentence of paragraph (j)(1) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(j) * * *

(1) Identify, in terms of character and volume of pollutants, any Significant Industrial Users discharging into the POTW subject to Pretreatment Standards under section 307(b) of CWA and 40 CFR part 403.

* * * * *

■ 6. Section 122.62 is amended by revising paragraph (a)(7) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(7) *Reopener.* When required by the ''reopener'' conditions in a permit, which are established in the permit under § 122.44(b) (for CWA toxic effluent limitations and Standards for sewage sludge use or disposal, see also § 122.44(c)) or 40 CFR 403.18(e) (Pretreatment program).

* * * * *

PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

■ 7. The authority for Part 403 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 403.3 is amended by redesignating paragraphs (e) through (u) as paragraphs (g) through (w); by revising newly designated paragraphs (m)(2) and (v); and by adding new paragraphs (e) and (f) to read as follows:

§ 403.3. Definitions.

* * * * *

(e) The term *Best Management Practices* or *BMPs* means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to implement the prohibitions listed in § 403.5(a)(1) and (b). BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw materials storage.

(f) The term *Control Authority* refers to:

(1) The POTW if the POTW's Pretreatment Program Submission has been approved in accordance with the requirements of § 403.11; or

(2) The Approval Authority if the Submission has not been approved.

* * * * *

(m) * * *

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

* * * * *

(v) *Significant Industrial User.* (1) Except as provided in paragraphs (v)(2) and (v)(3) of this section, the term Significant Industrial User means:

(i) All Industrial Users subject to Categorical Pretreatment Standards under 40 CFR 403.6 and 40 CFR chapter I, subchapter N; and

(ii) Any other Industrial User that: discharges an average of 25,000 gallons per day or more of process wastewater to the POTW (excluding sanitary, noncontact cooling and boiler blowdown wastewater); contributes a process wastestream which makes up 5 percent or more of the average dry weather hydraulic or organic capacity of the POTW Treatment plant; or is designated as such by the Control Authority on the basis that the Industrial User has a reasonable potential for adversely affecting the POTW's operation or for violating any Pretreatment Standard or requirement (in accordance with 40 CFR 403.8(f)(6)).

(2) The Control Authority may determine that an Industrial User subject to categorical Pretreatment Standards under § 403.6 and 40 CFR chapter I, subchapter N is a Non-Significant Categorical Industrial User rather than a Significant Industrial User on a finding that the Industrial User never discharges more than 100 gallons per day (gpd) of total categorical wastewater (excluding sanitary, non-contact cooling and boiler blowdown wastewater, unless specifically included in the Pretreatment Standard) and the following conditions are met:

(i) The Industrial User, prior to the Control Authority's finding, has consistently complied with all applicable categorical Pretreatment Standards and Requirements;

(ii) The Industrial User annually submits the certification statement required in § 403.12(q) together with any additional information necessary to support the certification statement; and

(iii) The Industrial User never discharges any untreated concentrated wastewater.

(3) Upon a finding that an Industrial User meeting the criteria in paragraph (v)(1)(ii) of this section has no reasonable potential for adversely affecting the POTW's operation or for violating any Pretreatment Standards or

requirement, the Control Authority may at any time, on its own initiative or in response to a petition received from an Industrial User or POTW, and in accordance with 40 CFR 403.8(f)(6), determine that such Industrial User is not a Significant Industrial User.

* * * * *

■ 9. Section 403.5 is amended by revising paragraph (b)(1) and adding a new paragraph (c)(4) to read as follows:

§ 403.5 National pretreatment standards: Prohibited discharges.

* * * * *

(b) * * *

(1) Pollutants which create a fire or explosion hazard in the POTW, including, but not limited to, wastestreams with a closed cup flashpoint of less than 140 degrees Fahrenheit or 60 degrees Centigrade using the test methods specified in 40 CFR 261.21;

* * * * *

(c) * * *

(4) POTWs may develop Best Management Practices (BMPs) to implement paragraphs (c)(1) and (c)(2) of this section. Such BMPs shall be considered local limits and Pretreatment Standards for the purposes of this part and section 307(d) of the Act.

* * * * *

■ 10. Section 403.6 is amended as follows:

■ a. By revising paragraph (b).

■ b. By revising paragraph (c)(2).

■ c. By redesignating paragraphs (c)(5) through (c)(7) as paragraphs (c)(7) through (c)(9).

■ d. By adding new paragraphs (c)(5) and (c)(6).

■ e. By revising newly designated paragraphs (c)(7) and (c)(8).

■ f. By revising paragraph (d), and the first sentence of paragraph (e) introductory text.

§ 403.6 National pretreatment standards: Categorical standards.

* * * * *

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

(c) * * *

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

* * * * *

(5) When the limits in a categorical Pretreatment Standard are expressed only in terms of pollutant concentrations, an Industrial User may request that the Control Authority convert the limits to equivalent mass limits. The determination to convert concentration limits to mass limits is within the discretion of the Control Authority. The Control Authority may establish equivalent mass limits only if the Industrial User meets all the following conditions in paragraph (c)(5)(i)(A) through (c)(5)(i)(E) of this section.

(i) To be eligible for equivalent mass limits, the Industrial User must:

(A) Employ, or demonstrate that it will employ, water conservation methods and technologies that substantially reduce water use during the term of its control mechanism;

(B) Currently use control and treatment technologies adequate to achieve compliance with the applicable categorical Pretreatment Standard, and not have used dilution as a substitute for treatment;

(C) Provide sufficient information to establish the facility's actual average daily flow rate for all wastestreams, based on data from a continuous effluent flow monitoring device, as well as the facility's long-term average production rate. Both the actual average daily flow rate and long-term average production rate must be representative of current operating conditions;

(D) Not have daily flow rates, production levels, or pollutant levels that vary so significantly that equivalent mass limits are not appropriate to control the Discharge; and

(E) Have consistently complied with all applicable categorical Pretreatment Standards during the period prior to the Industrial User's request for equivalent mass limits.

(ii) An Industrial User subject to equivalent mass limits must:

(A) Maintain and effectively operate control and treatment technologies adequate to achieve compliance with the equivalent mass limits;

(B) Continue to record the facility's flow rates through the use of a continuous effluent flow monitoring device;

(C) Continue to record the facility's production rates and notify the Control Authority whenever production rates are expected to vary by more than 20 percent from its baseline production rates determined in paragraph (c)(5)(i)(C) of this section. Upon notification of a revised production rate, the Control Authority must reassess the equivalent mass limit and revise the limit as necessary to reflect changed conditions at the facility; and

(D) Continue to employ the same or comparable water conservation methods and technologies as those implemented pursuant to paragraph (c)(5)(i)(A) of this section so long as it discharges under an equivalent mass limit.

(iii) A Control Authority which chooses to establish equivalent mass limits:

(A) Must calculate the equivalent mass limit by multiplying the actual average daily flow rate of the regulated process(es) of the Industrial User by the concentration-based daily maximum and monthly average Standard for the applicable categorical Pretreatment Standard and the appropriate unit conversion factor;

(B) Upon notification of a revised production rate, must reassess the equivalent mass limit and recalculate the limit as necessary to reflect changed conditions at the facility; and

(C) May retain the same equivalent mass limit in subsequent control mechanism terms if the Industrial User's actual average daily flow rate was reduced solely as a result of the implementation of water conservation methods and technologies, and the actual average daily flow rates used in the original calculation of the equivalent mass limit were not based on the use of dilution as a substitute for treatment pursuant to paragraph (d) of this section. The Industrial User must also be in compliance with § 403.17 (regarding the prohibition of bypass).

(iv) The Control Authority may not express limits in terms of mass for

pollutants such as pH, temperature, radiation, or other pollutants which cannot appropriately be expressed as mass.

(6) The Control Authority may convert the mass limits of the categorical Pretreatment Standards at 40 CFR parts 414, 419, and 455 to concentration limits for purposes of calculating limitations applicable to individual Industrial Users under the following conditions. When converting such limits to concentration limits, the Control Authority must use the concentrations listed in the applicable subparts of 40 CFR parts 414, 419, and 455 and document that dilution is not being substituted for treatment as prohibited by paragraph (d) of this section.

(7) Equivalent limitations calculated in accordance with paragraphs (c)(3), (c)(4), (c)(5) and (c)(6) of this section are deemed Pretreatment Standards for the purposes of section 307(d) of the Act and this part. The Control Authority must document how the equivalent limits were derived and make this information publicly available. Once incorporated into its control mechanism, the Industrial User must comply with the equivalent limitations in lieu of the promulgated categorical standards from which the equivalent limitations were derived.

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

* * * * *

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

(e) *Combined wastestream formula.* Where process effluent is mixed prior to treatment with wastewaters other than those generated by the regulated process, fixed alternative discharge limits may be derived by the Control Authority or by the Industrial User with the written concurrence of the Control Authority. * * *

* * * * *

■ 11. Section 403.7 is amended by revising paragraphs (h) introductory text and (h)(2) to read as follows:

§ 403.7 Removal credits.

* * * * *

(h) *Compensation for Overflow.* ''Overflow'' means the intentional or unintentional diversion of flow from the POTW before the POTW Treatment Plant. POTWs which at least once annually Overflow untreated wastewater to receiving waters may claim Consistent Removal of a pollutant only by complying with either paragraphs (h)(1) or (h)(2) of this section. However, paragraph (h) of this section shall not apply where Industrial User(s) can demonstrate that Overflow does not occur between the Industrial User(s) and the POTW Treatment Plant;

* * * * *

(2)(i) The Consistent Removal claimed is reduced pursuant to the following equation:

$$r_c = r_m \frac{8760 - Z}{8760}$$

Where:

r_m = POTW's Consistent Removal rate for that pollutant as established under paragraphs (a)(1) and (b)(2) of this section

r_c = removal corrected by the Overflow factor

Z = hours per year that Overflows occurred between the Industrial User(s) and the POTW Treatment Plant, the hours either to be shown in the POTW's current NPDES permit application or the hours, as demonstrated by verifiable techniques, that a particular Industrial User's Discharge Overflows between the Industrial User and the POTW Treatment Plant; and

(ii) The POTW is complying with all NPDES permit requirements and any additional requirements in any order or decree, issued pursuant to the Clean Water Act affecting combined sewer overflows. These requirements include, but are not limited to, any combined sewer overflow requirements that conform to the Combined Sewer Overflow Control Policy.

■ 12. Section 403.8 is amended as follows:

■ a. By revising paragraphs (f)(1)(iii), (f)(1)(v), and the first sentence of paragraph (f)(1)(vi)(B).

■ b. By revising paragraph (f)(2)(v).

■ c. By redesignating paragraphs (f)(2)(vi) and (f)(2)(vii) as paragraphs (f)(2)(vii) and (f)(2)(viii);

■ d. By adding a new paragraph (f)(2)(vi).

■ e. By revising newly designated paragraphs (f)(2)(viii) introductory text, (f)(2)(viii)(A), (f)(2)(viii)(B), (f)(2)(viii)(C), (f)(2)(viii)(F), and (f)(2)(viii)(H).

■ f. Revising paragraph (f)(6).

§ 403.8 Pretreatment Program Requirements: Development and implementation by POTW.

* * * * *

(f) * * *

(1) * * *

(iii) Control through Permit, order, or similar means, the contribution to the POTW by each Industrial User to ensure compliance with applicable Pretreatment Standards and Requirements. In the case of Industrial Users identified as significant under § 403.3(v), this control shall be achieved through individual permits or equivalent individual control mechanisms issued to each such User except as follows.

(A)(*1*) At the discretion of the POTW, this control may include use of general control mechanisms if the following conditions are met. All of the facilities to be covered must:

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

(*ii*) Discharge the same types of wastes;

(*iii*) Require the same effluent limitations;

(*iv*) Require the same or similar monitoring; and

(*v*) In the opinion of the POTW, are more appropriately controlled under a general control mechanism than under individual control mechanisms.

(*2*) To be covered by the general control mechanism, the Significant Industrial User must file a written request for coverage that identifies its contact information, production processes, the types of wastes generated, the location for monitoring all wastes covered by the general control mechanism, any requests in accordance with § 403.12(e)(2) for a monitoring waiver for a pollutant neither present nor expected to be present in the Discharge, and any other information the POTW deems appropriate. A monitoring waiver for a pollutant neither present nor expected to be present in the Discharge is not effective in the general control mechanism until after the POTW has provided written notice to the Significant Industrial User that such a waiver request has been

granted in accordance with § 403.12(e)(2). The POTW must retain a copy of the general control mechanism, documentation to support the POTW's determination that a specific Significant Industrial User meets the criteria in paragraphs (f)(1)(iii)(A)(*1*) through (*5*) of this section, and a copy of the User's written request for coverage for 3 years after the expiration of the general control mechanism. A POTW may not control a Significant Industrial User through a general control mechanism where the facility is subject to production-based categorical Pretreatment Standards or categorical Pretreatment Standards expressed as mass of pollutant discharged per day or for Industrial Users whose limits are based on the Combined Wastestream Formula or Net/Gross calculations (§§ 403.6(e) and 403.15).

(B) Both individual and general control mechanisms must be enforceable and contain, at a minimum, the following conditions:

(1) Statement of duration (in no case more than five years);

(2) Statement of non-transferability without, at a minimum, prior notification to the POTW and provision of a copy of the existing control mechanism to the new owner or operator;

(3) Effluent limits, including Best Management Practices, based on applicable general Pretreatment Standards in part 403 of this chapter, categorical Pretreatment Standards, local limits, and State and local law;

(4) Self-monitoring, sampling, reporting, notification and recordkeeping requirements, including an identification of the pollutants to be monitored (including the process for seeking a waiver for a pollutant neither present nor expected to be present in the Discharge in accordance with § 403.12(e)(2), or a specific waived pollutant in the case of an individual control mechanism), sampling location, sampling frequency, and sample type, based on the applicable general Pretreatment Standards in part 403 of this chapter, categorical Pretreatment Standards, local limits, and State and local law;

(5) Statement of applicable civil and criminal penalties for violation of Pretreatment Standards and requirements, and any applicable compliance schedule. Such schedules may not extend the compliance date beyond applicable federal deadlines;

(6) Requirements to control Slug Discharges, if determined by the POTW to be necessary.

* * * * *

(v) Carry out all inspection, surveillance and monitoring procedures necessary to determine, independent of information supplied by Industrial Users, compliance or noncompliance with applicable Pretreatment Standards and Requirements by Industrial Users. Representatives of the POTW shall be authorized to enter any premises of any Industrial User in which a Discharge source or treatment system is located or in which records are required to be kept under § 403.12(o) to assure compliance with Pretreatment Standards. Such authority shall be at least as extensive as the authority provided under section 308 of the Act;

(vi) * * *

(B) Pretreatment requirements which will be enforced through the remedies set forth in paragraph (f)(1)(vi)(A) of this section, will include but not be limited to, the duty to allow or carry out inspections, entry, or monitoring activities; any rules, regulations, or orders issued by the POTW; any requirements set forth in control mechanisms issued by the POTW; or any reporting requirements imposed by the POTW or these regulations in this part. * * *

* * * * *

(2) * * *

(v) Randomly sample and analyze the effluent from Industrial Users and conduct surveillance activities in order to identify, independent of information supplied by Industrial Users, occasional and continuing noncompliance with Pretreatment Standards. Inspect and sample the effluent from each Significant Industrial User at least once a year, except as otherwise specified below:

(A) Where the POTW has authorized the Industrial User subject to a categorical Pretreatment Standard to forego sampling of a pollutant regulated by a categorical Pretreatment Standard in accordance with § 403.12(e)(3), the POTW must sample for the waived pollutant(s) at least once during the term of the Categorical Industrial User's control mechanism. In the event that the POTW subsequently determines that a waived pollutant is present or is expected to be present in the Industrial User's wastewater based on changes that occur in the User's operations, the POTW must immediately begin at least annual effluent monitoring of the User's Discharge and inspection.

(B) Where the POTW has determined that an Industrial User meets the criteria for classification as a Non-Significant Categorical Industrial User, the POTW must evaluate, at least once per year, whether an Industrial User continues to meet the criteria in § 403.3(v)(2).

(C) In the case of Industrial Users subject to reduced reporting requirements under § 403.12(e)(3), the POTW must randomly sample and analyze the effluent from Industrial Users and conduct inspections at least once every two years. If the Industrial User no longer meets the conditions for reduced reporting in § 403.12(e)(3), the POTW must immediately begin sampling and inspecting the Industrial User at least once a year.

(vi) Evaluate whether each such Significant Industrial User needs a plan or other action to control Slug Discharges. For Industrial Users identified as significant prior to November 14, 2005, this evaluation must have been conducted at least once by October 14, 2006; additional Significant Industrial Users must be evaluated within 1 year of being designated a Significant Industrial User. For purposes of this subsection, a Slug Discharge is any Discharge of a non-routine, episodic nature, including but not limited to an accidental spill or a non-customary batch Discharge, which has a reasonable potential to cause Interference or Pass Through, or in any other way violate the POTW's regulations, local limits or Permit conditions. The results of such activities shall be available to the Approval Authority upon request. Significant Industrial Users are required to notify the POTW immediately of any changes at its facility affecting potential for a Slug Discharge. If the POTW decides that a slug control plan is needed, the plan shall contain, at a minimum, the following elements:

(A) Description of discharge practices, including non-routine batch Discharges;

(B) Description of stored chemicals;

(C) Procedures for immediately notifying the POTW of Slug Discharges, including any Discharge that would violate a prohibition under § 403.5(b) with procedures for follow-up written notification within five days;

(D) If necessary, procedures to prevent adverse impact from accidental spills, including inspection and maintenance of storage areas, handling and transfer of materials, loading and unloading operations, control of plant site run-off, worker training, building of containment structures or equipment, measures for containing toxic organic pollutants (including solvents), and/or measures and equipment for emergency response;

* * * * *

(viii) Comply with the public participation requirements of 40 CFR part 25 in the enforcement of National Pretreatment Standards. These

procedures shall include provision for at least annual public notification in a newspaper(s) of general circulation that provides meaningful public notice within the jurisdiction(s) served by the POTW of Industrial Users which, at any time during the previous 12 months, were in significant noncompliance with applicable Pretreatment requirements. For the purposes of this provision, a Significant Industrial User (or any Industrial User which violates paragraphs (f)(2)(viii)(C), (D), or (H) of this section) is in significant noncompliance if its violation meets one or more of the following criteria:

(A) Chronic violations of wastewater Discharge limits, defined here as those in which 66 percent or more of all of the measurements taken for the same pollutant parameter during a 6-month period exceed (by any magnitude) a numeric Pretreatment Standard or Requirement, including instantaneous limits, as defined by 40 CFR 403.3(l);

(B) Technical Review Criteria (TRC) violations, defined here as those in which 33 percent or more of all of the measurements taken for the same pollutant parameter during a 6-month period equal or exceed the product of the numeric Pretreatment Standard or Requirement including instantaneous limits, as defined by 40 CFR 403.3(l) multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, fats, oil, and grease, and 1.2 for all other pollutants except pH);

(C) Any other violation of a Pretreatment Standard or Requirement as defined by 40 CFR 403.3(l) (daily maximum, long-term average, instantaneous limit, or narrative Standard) that the POTW determines has caused, alone or in combination with other Discharges, Interference or Pass Through (including endangering the health of POTW personnel or the general public);

* * * * *

(F) Failure to provide, within 45 days after the due date, required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules;

* * * * *

(H) Any other violation or group of violations, which may include a violation of Best Management Practices, which the POTW determines will adversely affect the operation or implementation of the local Pretreatment program.

* * * * *

(6) The POTW shall prepare and maintain a list of its Industrial Users meeting the criteria in § 403.3(v)(1). The list shall identify the criteria in § 403.3(v)(1) applicable to each Industrial User and, where applicable, shall also indicate whether the POTW has made a determination pursuant to § 403.3(v)(2) that such Industrial User should not be considered a Significant Industrial User. The initial list shall be submitted to the Approval Authority pursuant to § 403.9 or as a non-substantial modification pursuant to § 403.18(d). Modifications to the list shall be submitted to the Approval Authority pursuant to § 403.12(i)(1).

■ 13. Section 403.12 is amended as follows:

■ a. By removing and reserving paragraph (a).

■ b. By revising paragraphs (b)(4)(ii) and (b)(5)(ii).

■ c. By removing paragraph (b)(5)(iii).

■ d. By redesignating paragraphs (b)(5)(iv) through (b)(5)(viii) as paragraphs (b)(5)(iii) through (b)(5)(vii).

■ e. By revising paragraph (b)(6).

■ f. By revising paragraph (e)(1).

■ g. By redesignating paragraphs (e)(2) and (e)(3) as paragraphs (e)(3) and (e)(4).

■ h. By adding a new paragraph (e)(2).

■ i. Revising newly designated paragraph (e)(3).

■ j. Revising paragraphs (g)(1), (g)(2) and (g)(3).

■ k. By redesignating paragraphs (g)(4) and (g)(5) as paragraphs (g)(5) and (g)(6).

■ l. By revising newly designated paragraph (g)(6).

■ m. By adding paragraph (g)(4).

■ n. By revising paragraph (h).

■ o. By revising paragraph (i)(1).

■ p. By revising paragraph (j).

■ q. By revising paragraph (k)(2).

■ r. By revising paragraphs (l) introductory text, (1)(1) introductory text, (l)(1)(ii), (l)(2), (m), (o)(1) introductory text, and the first sentence of paragraph (o)(2).

■ s. By adding paragraph (q).

§ 403.12 Reporting requirements for POTWs and Industrial Users.

* * * * *

(b) * * *

(4) * * *

(ii) Other streams as necessary to allow use of the combined wastestream formula of § 403.6(e). (See paragraph (b)(5)(iv) of this section.)

* * * * *

(5) * * *

(ii) In addition, the User shall submit the results of sampling and analysis identifying the nature and concentration (or mass, where required by the Standard or Control Authority) of regulated pollutants in the Discharge from each regulated process. Both daily maximum and average concentration (or mass, where required) shall be reported. The sample shall be representative of daily operations. In cases where the Standard requires compliance with a Best Management Practice or pollution prevention alternative, the User shall submit documentation as required by the Control Authority or the applicable Standards to determine compliance with the Standard;

* * * * *

(6) *Certification.* A statement, reviewed by an authorized representative of the Industrial User (as defined in paragraph (l) of this section) and certified to by a qualified professional, indicating whether Pretreatment Standards are being met on a consistent basis, and, if not, whether additional operation and maintenance (O and M) and/or additional Pretreatment is required for the Industrial User to meet the Pretreatment Standards and Requirements; and

(e) * * *

(1) Any Industrial User subject to a categorical Pretreatment Standard (except a Non-Significant Categorical User as defined in § 403.3(v)(2)), after the compliance date of such Pretreatment Standard, or, in the case of a New Source, after commencement of the discharge into the POTW, shall submit to the Control Authority during the months of June and December, unless required more frequently in the Pretreatment Standard or by the Control Authority or the Approval Authority, a report indicating the nature and concentration of pollutants in the effluent which are limited by such categorical Pretreatment Standards. In addition, this report shall include a record of measured or estimated average and maximum daily flows for the reporting period for the Discharge reported in paragraph (b)(4) of this section except that the Control Authority may require more detailed reporting of flows. In cases where the Pretreatment Standard requires compliance with a Best Management Practice (or pollution prevention alternative), the User shall submit documentation required by the Control Authority or the Pretreatment Standard necessary to determine the compliance status of the User. At the discretion of the Control Authority and in consideration of such factors as local high or low flow rates, holidays, budget cycles, etc., the Control Authority may modify the months during which the above reports are to be submitted.

(2) The Control Authority may authorize the Industrial User subject to a categorical Pretreatment Standard to forego sampling of a pollutant regulated by a categorical Pretreatment Standard if

the Industrial User has demonstrated through sampling and other technical factors that the pollutant is neither present nor expected to be present in the Discharge, or is present only at background levels from intake water and without any increase in the pollutant due to activities of the Industrial User. This authorization is subject to the following conditions:

(i) The Control Authority may authorize a waiver where a pollutant is determined to be present solely due to sanitary wastewater discharged from the facility provided that the sanitary wastewater is not regulated by an applicable categorical Standard and otherwise includes no process wastewater.

(ii) The monitoring waiver is valid only for the duration of the effective period of the Permit or other equivalent individual control mechanism, but in no case longer than 5 years. The User must submit a new request for the waiver before the waiver can be granted for each subsequent control mechanism.

(iii) In making a demonstration that a pollutant is not present, the Industrial User must provide data from at least one sampling of the facility's process wastewater prior to any treatment present at the facility that is representative of all wastewater from all processes.

The request for a monitoring waiver must be signed in accordance with paragraph (l) of this section and include the certification statement in § 403.6(a)(2)(ii). Non-detectable sample results may only be used as a demonstration that a pollutant is not present if the EPA approved method from 40 CFR part 136 with the lowest minimum detection level for that pollutant was used in the analysis.

(iv) Any grant of the monitoring waiver by the Control Authority must be included as a condition in the User's control mechanism. The reasons supporting the waiver and any information submitted by the User in its request for the waiver must be maintained by the Control Authority for 3 years after expiration of the waiver.

(v) Upon approval of the monitoring waiver and revision of the User's control mechanism by the Control Authority, the Industrial User must certify on each report with the statement below, that there has been no increase in the pollutant in its wastestream due to activities of the Industrial User:

Based on my inquiry of the person or persons directly responsible for managing compliance with the Pretreatment Standard for 40 CFR _____ [specify applicable National Pretreatment Standard part(s)], I certify that, to the best of my knowledge and belief, there has been no increase in the level of _____ [list pollutant(s)] in the wastewaters due to the activities at the facility since filing of the last periodic report under 40 CFR 403.12(e)(1).

(vi) In the event that a waived pollutant is found to be present or is expected to be present based on changes that occur in the User's operations, the User must immediately: Comply with the monitoring requirements of paragraph (e)(1) of this section or other more frequent monitoring requirements imposed by the Control Authority; and notify the Control Authority.

(vii) This provision does not supersede certification processes and requirements established in categorical Pretreatment Standards, except as otherwise specified in the categorical Pretreatment Standard.

(3) The Control Authority may reduce the requirement in paragraph (e)(1) of this section to a requirement to report no less frequently than once a year, unless required more frequently in the Pretreatment Standard or by the Approval Authority, where the Industrial User meets all of the following conditions:

(i) The Industrial User's total categorical wastewater flow does not exceed any of the following:

(A) 0.01 percent of the design dry weather hydraulic capacity of the POTW, or 5,000 gallons per day, whichever is smaller, as measured by a continuous effluent flow monitoring device unless the Industrial User discharges in batches;

(B) 0.01 percent of the design dry weather organic treatment capacity of the POTW; and

(C) 0.01 percent of the maximum allowable headworks loading for any pollutant regulated by the applicable categorical Pretreatment Standard for which approved local limits were developed by a POTW in accordance with § 403.5(c) and paragraph (d) of this section;

(ii) The Industrial User has not been in significant noncompliance, as defined in § 403.8(f)(2)(viii), for any time in the past two years;

(iii) The Industrial User does not have daily flow rates, production levels, or pollutant levels that vary so significantly that decreasing the reporting requirement for this Industrial User would result in data that are not representative of conditions occurring during the reporting period pursuant to paragraph (g)(3) of this section;

(iv) The Industrial User must notify the Control Authority immediately of any changes at its facility causing it to no longer meet conditions of paragraphs (e)(3)(i) or (ii) of this section. Upon notification, the Industrial User must immediately begin complying with the minimum reporting in paragraph (e)(1) of this section; and

(v) The Control Authority must retain documentation to support the Control Authority's determination that a specific Industrial User qualifies for reduced reporting requirements under paragraph (e)(3) of this section for a period of 3 years after the expiration of the term of the control mechanism.

* * * * *

(g) * * *

(1) Except in the case of Non-Significant Categorical Users, the reports required in paragraphs (b), (d), (e), and (h) of this section shall contain the results of sampling and analysis of the Discharge, including the flow and the nature and concentration, or production and mass where requested by the Control Authority, of pollutants contained therein which are limited by the applicable Pretreatment Standards. This sampling and analysis may be performed by the Control Authority in lieu of the Industrial User. Where the POTW performs the required sampling and analysis in lieu of the Industrial User, the User will not be required to submit the compliance certification required under paragraphs (b)(6) and (d) of this section. In addition, where the POTW itself collects all the information required for the report, including flow data, the Industrial User will not be required to submit the report.

(2) If sampling performed by an Industrial User indicates a violation, the User shall notify the Control Authority within 24 hours of becoming aware of the violation. The User shall also repeat the sampling and analysis and submit the results of the repeat analysis to the Control Authority within 30 days after becoming aware of the violation. Where the Control Authority has performed the sampling and analysis in lieu of the Industrial User, the Control Authority must perform the repeat sampling and analysis unless it notifies the User of the violation and requires the User to perform the repeat analysis. Resampling is not required if:

(i) The Control Authority performs sampling at the Industrial User at a frequency of at least once per month; or

(ii) The Control Authority performs sampling at the User between the time when the initial sampling was conducted and the time when the User or the Control Authority receives the results of this sampling.

(3) The reports required in paragraphs (b), (d), (e) and (h) of this section must be based upon data obtained through appropriate sampling and analysis

performed during the period covered by the report, which data are representative of conditions occurring during the reporting period. The Control Authority shall require that frequency of monitoring necessary to assess and assure compliance by Industrial Users with applicable Pretreatment Standards and Requirements. Grab samples must be used for pH, cyanide, total phenols, oil and grease, sulfide, and volatile organic compounds. For all other pollutants, 24-hour composite samples must be obtained through flow-proportional composite sampling techniques, unless time-proportional composite sampling or grab sampling is authorized by the Control Authority. Where time-proportional composite sampling or grab sampling is authorized by the Control Authority, the samples must be representative of the Discharge and the decision to allow the alternative sampling must be documented in the Industrial User file for that facility or facilities. Using protocols (including appropriate preservation) specified in 40 CFR part 136 and appropriate EPA guidance, multiple grab samples collected during a 24-hour period may be composited prior to the analysis as follows: For cyanide, total phenols, and sulfides the samples may be composited in the laboratory or in the field; for volatile organics and oil & grease the samples may be composited in the laboratory. Composite samples for other parameters unaffected by the compositing procedures as documented in approved EPA methodologies may be authorized by the Control Authority, as appropriate.

(4) For sampling required in support of baseline monitoring and 90-day compliance reports required in paragraphs (b) and (d) of this section, a minimum of four (4) grab samples must be used for pH, cyanide, total phenols, oil and grease, sulfide and volatile organic compounds for facilities for which historical sampling data do not exist; for facilities for which historical sampling data are available, the Control Authority may authorize a lower minimum. For the reports required by paragraphs (e) and (h) of this section, the Control Authority shall require the number of grab samples necessary to assess and assure compliance by Industrial Users with Applicable Pretreatment Standards and Requirements.

* * * * *

(6) If an Industrial User subject to the reporting requirement in paragraph (e) or (h) of this section monitors any regulated pollutant at the appropriate sampling location more frequently than required by the Control Authority, using the procedures prescribed in paragraph (g)(5) of this section, the results of this monitoring shall be included in the report.

(h) *Reporting requirements for Industrial Users not subject to categorical Pretreatment Standards.* The Control Authority must require appropriate reporting from those Industrial Users with Discharges that are not subject to categorical Pretreatment Standards. Significant Non-categorical Industrial Users must submit to the Control Authority at least once every six months (on dates specified by the Control Authority) a description of the nature, concentration, and flow of the pollutants required to be reported by the Control Authority. In cases where a local limit requires compliance with a Best Management Practice or pollution prevention alternative, the User must submit documentation required by the Control Authority to determine the compliance status of the User. These reports must be based on sampling and analysis performed in the period covered by the report, and in accordance with the techniques described in part 136 and amendments thereto. This sampling and analysis may be performed by the Control Authority in lieu of the significant non-categorical Industrial User.

(i) * * *

(1) An updated list of the POTW's Industrial Users, including their names and addresses, or a list of deletions and additions keyed to a previously submitted list. The POTW shall provide a brief explanation of each deletion. This list shall identify which Industrial Users are subject to categorical Pretreatment Standards and specify which Standards are applicable to each Industrial User. The list shall indicate which Industrial Users are subject to local standards that are more stringent than the categorical Pretreatment Standards. The POTW shall also list the Industrial Users that are subject only to local Requirements. The list must also identify Industrial Users subject to categorical Pretreatment Standards that are subject to reduced reporting requirements under paragraph (e)(3), and identify which Industrial Users are Non-Significant Categorical Industrial Users.

* * * * *

(j) *Notification of changed Discharge.* All Industrial Users shall promptly notify the Control Authority (and the POTW if the POTW is not the Control Authority) in advance of any substantial change in the volume or character of pollutants in their Discharge, including the listed or characteristic hazardous wastes for which the Industrial User has submitted initial notification under paragraph (p) of this section.

(k) * * *

(2) No increment referred to in paragraph (k)(1) of this section shall exceed nine months;

* * * * *

(l) *Signatory requirements for Industrial User reports.* The reports required by paragraphs (b), (d), and (e) of this section shall include the certification statement as set forth in § 403.6(a)(2)(ii), and shall be signed as follows:

(1) By a responsible corporate officer, if the Industrial User submitting the reports required by paragraphs (b), (d), and (e) of this section is a corporation. For the purpose of this paragraph, a responsible corporate officer means:

* * * * *

(ii) The manager of one or more manufacturing, production, or operating facilities, provided, the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiate and direct other comprehensive measures to assure long-term environmental compliance with environmental laws and regulations; can ensure that the necessary systems are established or actions taken to gather complete and accurate information for control mechanism requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

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

* * * * *

(m) *Signatory requirements for POTW reports.* Reports submitted to the Approval Authority by the POTW in accordance with paragraph (i) of this section must be signed by a principal executive officer, ranking elected official or other duly authorized employee. The duly authorized employee must be an individual or position having responsibility for the overall operation of the facility or the Pretreatment Program. This authorization must be made in writing by the principal executive officer or ranking elected official, and submitted to the Approval Authority prior to or together with the report being submitted.

* * * * *

(o) * * *

(1) Any Industrial User and POTW subject to the reporting requirements established in this section shall maintain records of all information resulting from any monitoring activities required by this section, including documentation associated with Best Management Practices. Such records shall include for all samples:

* * * * *

(2) Any Industrial User or POTW subject to the reporting requirements established in this section (including documentation associated with Best Management Practices) shall be required to retain for a minimum of 3 years any records of monitoring activities and results (whether or not such monitoring activities are required by this section) and shall make such records available for inspection and copying by the Director and the Regional Administrator (and POTW in the case of an Industrial User). * * *

* * * * *

(q) *Annual certification by Non-Significant Categorical Industrial Users.* A facility determined to be a Non-Significant Categorical Industrial User pursuant to § 403.3(v)(2) must annually submit the following certification statement, signed in accordance with the signatory requirements in paragraph (l) of this section. This certification must accompany any alternative report required by the Control Authority:

Based on my inquiry of the person or persons directly responsible for managing compliance with the categorical Pretreatment Standards under 40 CFR _____, I certify that, to the best of my knowledge and belief that during the period from _____ _____, to _____, _____ [month, days, year]:

(a) The facility described as _____ [facility name] met the definition of a non-significant categorical Industrial User as described in § 403.3(v)(2); (b) the facility complied with all applicable Pretreatment Standards and requirements during this reporting period; and (c) the facility never discharged more than 100 gallons of total categorical wastewater on any given day during this reporting period. This compliance certification is based upon the following information:

_____

_____

■ 14. Section 403.13 is amended by revising the first sentence of paragraph (g)(3) to read as follows:

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

* * * * *

(g) * * *

(3) Where the User has requested a categorical determination pursuant to § 403.6(a), the User may elect to await the results of the category determination before submitting a variance request under this section. * * *

* * * * *

■ 15. Section 403.15 is revised to read as follows:

§ 403.15 Net/gross calculation.

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

(b) Criteria. (1) Either:

(i) The applicable categorical Pretreatment Standards contained in 40 CFR subchapter N specifically provide that they shall be applied on a net basis; or

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

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

(3) Credit shall be granted only to the extent necessary to meet the applicable categorical Pretreatment Standard(s), up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with Standard(s) adjusted under this section.

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

Appendix A to Part 403 [Removed and Reserved]

■ 16. Appendix A to part 403 is removed and reserved.

■ 17. Appendix G to part 403 is amended as by revising Footnote 1 to Table I to read as follows:

Appendix G to Part 403—Pollutants Eligible for a Removal Credit

I. Regulated Pollutants in Part 503 Eligible for a Removal Credit

* * * * *

1 The following organic pollutants are eligible for a removal credit if the requirements for total hydrocarbons (or carbon monoxide) in subpart E in 40 CFR Part 503 are met when sewage sludge is fired in a sewage sludge incinerator: Acrylonitrile, ldrin/Dieldrin(total), Benzene, Benzidine, Benzo(a)pyrene, Bis(2-chloroethyl)ether, Bis(2-ethylhexyl)phthalate, Bromodichloromethane, Bromoethane, Bromoform, Carbon tetrachloride, Chlordane, Chloroform, Chloromethane, DDD, DDE, DDT, Dibromochloromethane, Dibutyl phthalate, 1,2-dichloroethane, 1,1-dichloroethylene, 2,4-dichlorophenol, 1,3-dichloropropene, Diethyl phthalate, 2,4-dinitrophenol, 1,2-diphenylhydrazine, Din-butyl phthalate, Endosulfan, Endrin, Ethylbenzene, Heptachlor, Heptachlor epoxide, Hexachlorobutadiene, Alphahexachlorocyclohexane, Beta-hexachlorocyclohexane, Hexachlorocyclopentadiene, Hexachloroethane, Hydrogen cyanide, Isophorone, Lindane, Methylene chloride, Nitrobenzene, N-Nitrosodimethylamine, N-Nitrosodi-n-propylamine, Pentachlorophenol, Phenol, Polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzo-p-dioxin, 1,1,2,2,-tetrachloroethane, Tetrachloroethylene, Toluene, Toxaphene, Trichloroethylene, 1,2,4-Trichlorobenzene, 1,1,1-Trichloroethane, 1,1,2-Trichloroethane, and 2,4,6-Trichlorophenol.

* * * * *

[FR Doc. 05–20001 Filed 10–13–05; 8:45 am]

BILLING CODE 6560–50–P