federal register

Monday
October 17, 1988

Part IV

Environmental Protection Agency

40 CFR Parts 122 and 403
General Pretreatment Regulations for Existing and New Sources; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 403

[FRL 3295-4]

General Pretreatment Regulations for Existing and New Sources

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today is finalizing revisions to the General Pretreatment Regulations (40 CFR Part 403). These revisions will clarify existing regulations, respond to recommendations of the Pretreatment Implementation Review Task Force (PIRT), and conform the pretreatment regulations, where appropriate, to the National Pollutant Discharge Elimination System (NPDES) permit regulations (40 CFR Part 122).

DATES: This regulation shall become effective November 16, 1988. For purposes of judicial review, this regulation is issued at 1:00 p.m. eastern time on October 31, 1988.

ADDRESSES: Comments of a technical nature should be addressed to: George Utting, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The record for this rulemaking, including all public comments received on the proposal, will be available for inspection and copying from 8:00 a.m. to 4:30 p.m. at the EPA Public Information Reference Unit, Room 2904, 401 M Street SW., Washington, DC. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: George Utting, Permits Division (EN-336), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-9534.

SUPPLEMENTARY INFORMATION:

I. Background

On June 12, 1986, the Environmental Protection Agency (EPA) proposed revisions to the General Pretreatment Regulations 40 CFR Part 403 (51 FR 21454). These proposed revisions were intended to achieve several goals. They made several substantive changes to address shortcomings in the existing regulations that had been discovered since the January 28, 1981, pretreatment amendments were promulgated. The proposed revisions also responded to recommendations of the Pretreatment Implementation Review Task Force (PIRT). PIRT was established, in accordance with the Federal Advisory Committee Act, by the Administrator of EPA on February 3, 1984, to provide the Agency with recommendations on improving implementation on the national pretreatment program. The Task Force, which was made up of representatives of POTWs, States, industry, environmental groups and EPA Regional Offices, arrived at its recommendations through consensus among the members after extensive discussion. The Task Force's Final Report to the Administrator was issued on January 30, 1985. Recommendations were made in the areas of program simplification and clarification, enforcement, resources, and roles and relationships within the national pretreatment program. The recommendations generally focused on the need for guidance, training programs, technical assistance, policy statements and regulatory amendments in these areas.

Finally, the proposed revisions also made several provisions of the pretreatment regulations compatible, where appropriate, with their counterparts in the NPDES regulations (40 CFR Parts 122, 123, 124 and 125). Consistent regulations are generally appropriate because in many cases the logic supporting the NPDES provision is equally applicable in the pretreatment context.

The June 12 notice set a period of 60 days for the receipt of public comments. In response to requests to lengthen the comment period, the Agency extended the comment period, on August 21, 1986, until September 22, 1986 (51 FR 29950).

In all, the Agency received comments from 94 commenters. This group included States, POTWs, industries, trade associations, and environmental groups. The range of comments received was very broad and represented many divergent points of view. Significant comments are addressed below in the discussion of each issue. Additional discussion of comments is contained in the record for this rulemaking.

There were twenty-eight separate issues in the proposed rule. Of these, twenty-six are included in today's final rule. One change omitted from the final rule is a revision of the fundamentally different factors (FDF) provision (40 CFR 403.13). EPA proposed to modify the pretreatment FDF rule to provide POTWs with the opportunity to object

to a FDF request filed by an industrial user (or other interested party) discharging to its system. If the POTW objected, the request would automatically have been denied. However, because of statutory amendments in the Water Quality Act of 1987 directly affecting FDFs, the Agency has decided not to finalize the change as proposed in June 1986. Rather, this change will be considered in a later rulemaking.

The second issue omitted from the final action concerns the application of pretreatment standards and requirements to centralized waste treatment (CWT) facilities. The specific regulatory action proposed on June 12, 1986, was to codify the application of the combined wastestream formula to the calculation of discharge limits for such a facility. In addition, EPA proposed to add specific regulatory language requiring that industrial contributors provide the CWT facility information on the nature of their processes (including relevant production and flow rates where necessary), volume of wastes, pollutant constituents, and any categorical pretreatment standards applicable to the contributor's processes. This information was deemed necessary for the CWT facility to apply the combined wastestream formula, and thus determine effluent limits.

This issue was the most controversial aspect of the June 12, 1986, proposal and clearly received the most comments. Commenters generally focused on two points: The practical difficulties of applying the combined wastestream formula to CWT facilities, and the legal issue regarding the extension of pretreatment standards and requirements to CWTs. Rather than withhold finalization of all of the other regulatory changes until the CWT issue could be resolved, the Agency has decided to omit the regulatory change affecting CWT facilities from today's action and address CWTs and pretreatment requirements in a later rulemaking forum. In the future, additional changes to the General Pretreatment Regulations will be proposed to address the findings and recommendations of the Congressionally-mandated Domestic Sewage Study (*see*, 51 FR 30166). Reconsideration of the CWT issue will be made part of that effort.

The twenty-six revisions being finalized today fall into five major areas: (1) Pretreatment standards and requirements, (2) POTW pretreatment program requirements, (3) POTW and State pretreatment program approval procedures, (4) reporting and compliance monitoring, and (5) miscellaneous provisions. The overall impact of the revisions is to make the regulations easier to understand and to improve the implementation of the national pretreatment program generally.

The final revisions do not alter the overall existing regulatory framework, nor do they affect the ability of POTWs or industrial users to comply in a timely manner with existing or forthcoming pretreatment standards and other regulatory requirements. General prohibitive discharge standards, specified in § 403.5 of the regulations, are unchanged. Similarly, categorical pretreatment standards are unaffected by these revisions. As before, most major POTWs are still required to develop and implement local pretreatment programs, pursuant to §§ 403.8 and 403.9, to ensure that non-domestic users of the municipal system comply with applicable standards and pretreatment requirements. Approval of State requests for authority to administer the pretreatment program will continue as before. The basic reporting requirements of the regulations (e.g., § 403.12) remain intact.

II. Regulatory Changes

A. Pretreatment Standards and Requirements

1. Concentration and Mass Limits [40 CFR 403.6[c]]

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

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

For direct dischargers, the NPDES regulations simplify the implementation of production-based mass effluent limitations guidelines by requiring that the permit limits be based upon a reasonable measure of the actual production. Generally, this should be a long-term average of the facility's production. The permit (or a fact sheet describing the basis for the permit) must specify the production level that was used to derive the permit limit. This process establishes a single mass limit that the permittee must meet, even though production and flows may vary over time. (However, if production and flows change significantly, the permittee must report these changes and the permitting authority may modify the permit accordingly. *See*, 40 CFR 122.45(b) and 122.62(a)(1).)

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

In its final report, PIRT stated that POTWs would like to translate production-based categorical pretreatment standards into enforceable mass limits. Many POTWs would also like to convert these mass limits into equivalent concentration limits. As noted above, such conversions simplify compliance evaluation. However, PIRT indicated that POTWs are unsure whether this is allowed under the pretreatment regulations, and, to the extent it is allowed, POTWs are unsure of the methodology to be used and the legal status of the equivalent limits. As explained in EPA's "Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula" (1985), the existing regulations allow

Control Authorities to calculate equivalent concentration (or mass) limits as a tool for determining compliance with applicable categorical standards. However, an industrial user's compliance with such equivalent limits does not relieve the user of the legal requirement to be in compliance with the production-based standard itself. Thus, the equivalent mass and concentration limits do not shield the industrial user from direct EPA or State enforcement of the production-based standard. Obviously, this undercuts the benefits of the equivalent limits.

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

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

To arrive at a concentration limitation, this mass limitation is further divided by the industrial user's average daily flow rate of process wastewater regulated under the standard. Like the production rate, this flow rate must be based on a reasonable measure of the actual long-term average daily flow of the regulated process wastewater. The Agency proposed that the same production and flow figures should be used for calculating both the maximum daily and maximum monthly average (or 4-day average) limitations. Examples of these calculations appeared in the proposal.

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

EPA also proposed to revise the periodic compliance report in § 403.12(e) to require that, for industrial users subject to production-based categorical pretreatment standards, the compliance reports must include the user's actual average production rate for the reporting period. This is to ensure that the Control Authority has up-to-date production information.

c. *Response to comments.* Seven of the twenty-eight commenters on this provision gave unqualified support for the proposed revision. All seven were Control Authorities who commented that the revision was long overdue, it would help them implement their pretreatment programs and it would ease the burden of sampling by the POTW because an enforceable concentration limit could be employed without the need for data on the production and flow rates of the industrial user during the sampling period. Only one industrial user commented that this change should not be made and that continued reliance on design capacity should be required. The commenter stated that a facility operating below design capacity when the control mechanism limits mass discharge should not be penalized later when it increases production. This commenter stated that reliance on industrial user notification of an increased production rate along with a request for modification of the pretreatment permit, contract or other control mechanism could not be assured. This commenter also stated that industrial users will not dilute wastestreams in order to comply with pretreatment standards because of the prohibition against dilution.

The Agency does not agree with this commenter. Modification of the control mechanism can be accomplished in sufficient time to avoid a hardship on the industrial user. Industrial users generally have sufficient advanced knowledge of significant changes in production levels to request a permit modification, for example, before the fact. Changed capacity generally should not significantly alter compliance with properly developed equivalent limits because water use will proportionally change as production rates change. Furthermore, as stated in the preamble (51 FR 21454, at 21457):

> Consistent with 40 CFR 122.45(b)(2) of the NPDES regulations, this production rate is based not upon the designed production capacity but rather upon a reasonable measure of the facility's actual long-term average daily production (e.g., the daily average during a representative year). This is to ensure that facilities operating below the full capacity are treating their wastewater to the extent required by the CWA's technology requirements, rather than reducing their level of treatment due to unused production capacity. Such an approach also ensures equity among facilities in the same industry, regardless of their design capacity.

The remaining 20 commenters all agreed with the intent of the proposed change, but suggested some minor revisions to the proposal. One comment submitted by this group suggested that the Agency define the terms "significant change in production rate or flow rate," "immediate notification of significant change," and "representative year." One commenter suggested that "significant change in production rate and flow rate" be defined as a change on the order of plus or minus two standard deviations from the quarterly or monthly mean production rate. Another commenter suggested a 10 percent change, and two others suggested a 20 percent change from the long term average rate.

The Agency agrees that a definition of "significant change" is needed, and is relying on the definition provided in the "Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Waste Stream Formula" (1985). That document provides that "as a general rule, the average rate is considered to have changed significantly if the change is greater than 20 percent." For the purpose of today's rule, any increase or decrease in production (or flow) rates will generally be deemed significant if the change is equal to or greater than 20 percent of the long term average production (or flow) rate at the facility.

In order to allow some flexibility for POTWs, however, the Agency is not adding this definition of "significant change" to the General Pretreatment Regulations. A POTW may choose to use a different relative change in the production or flow rate as the threshold for notification. Because no two POTWs are exactly alike, an absolute relative change should not be placed in these regulations.

One commenter requested that EPA define the term "immediate notification" of a significant change. The Agency agrees that a definition is needed and, in the interest of consistency between the NPDES and pretreatment regulations, is relying on the NPDES definition for immediate notification of change in production rate found at 40 CFR 122.45(b)(2)(ii)(B)(1) for today's regulation. In response to this commenter's suggestion, EPA is adding the following definition to § 403.6(c): "Any industrial user operating under a control mechanism incorporating equivalent mass or concentration limits calculated from a production based standard shall notify the Control Authority within two (2) business days after the user has a reasonable basis to know that the production level will significantly change within the next calendar month. Any user not notifying the Control Authority of such anticipated change will be required to meet the mass or concentration limits in its control mechanism that were based on the original estimate of the long term average production rate."

Industrial users often plan long term production quotas or rates at the facility and can easily notify their Control Authority when these changes are significant. This would include long-term (greater than four consecutive workweeks) seasonal shutdowns or production slowdowns, or increased production to meet seasonal demands. However, the change in production or flow rate must be greater than 20% of the long term average rate before the industrial user must notify the Control Authority.

Finally, six of these commenters requested that EPA define the term "representative year." Several suggested that the Agency should adopt the language in Application Form 2–C for NPDES direct dischargers that allows the use of production information from a one month period, "such as production for the highest month during the last twelve months, or the monthly average production for the highest year of the last five years, or some other reasonable measure of actual operation." Four of the commenters suggested that EPA should include the NPDES regulatory language in a pretreatment definition of representative year. Section 122.45(a)(2)(i) provides that, "The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations."

The Agency agrees with these commenters that a definition of "representative year" is needed and is relying on the description contained in the "Guidance Manual for Production-Based Pretreatment Standards and the Combined Waste Stream Formula" (1985). A representative year would be the highest year of the last five years excluding years in which production was extraordinarily high or after which production lines were discontinued. Another reasonable estimate would be the average annual production rate over the last five years, excluding any extremely high production year or years after which production lines were discontinued. An industrial user could use the high production years if they are the majority of the last five years (e.g., three of the last five), but when only one or two years are high production years then they should not be included in the average production rate. Furthermore, if the industrial user reasonably expects that production will shortly return to the higher rate, then it is justified in using the higher rate in the calculation of the average rate. An example would be where an industrial user has been modernizing its facility and has sequentially shut-down production lines temporarily.

This method of estimating the average production and flow rates is more reasonable because of the way pretreatment standards are developed. EPA selects several individual industrial users from different areas of the United States to monitor and sample within the category being developed. When most standards are developed, a long term average production rate is established and the relationship between production rate and flow is determined for each user studied. Variability factors are developed using the effluent concentrations or mass loading data obtained during the sampling program at the facilities. This variability analysis produces a determination of the achievable maximum daily or monthly average concentration or mass. The long-term average production rate to be used in developing equivalent limits should thus take into account the normal range of variation in production.

The Agency does not agree that the suggested language from the NPDES Applications Form 2–C should be included in the definition of representative year. This language was removed from the NPDES regulation [40 CFR 122.45(b)(2)] by the final regulation package dated September 26, 1984 (49 FR 37998, at 38054). (*See*, 49 FR 38029 for a discussion of the change, and 49 FR 38054–76 for the revised form 2–C. The new forms package was published in February 1985 as EPA Form 3510–2C. Previous editions are obsolete.) Therefore, the language will not be added to these pretreatment regulations. The Agency agrees, however, that the language contained in § 122.45(a)(2)(i) should be incorporated into the equivalent limit setting process for pretreatment control mechanisms. This language merely requires that the average production in a representative year be adjusted to reflect the limitation time period. For example, if the categorical standard contains a monthly average limitation, then the production rate for a representative year would be divided by 12 to arrive at an average monthly production level. This language does not need to be incorporated into the regulation, because the Control Authority will do so when writing the control mechanism.

One Control Authority commented that POTWs can easily determine flow rates at industrial users by monitoring user fee bill volumes on a quarterly basis and by noting changes during industrial user monitoring by the POTW. Although these may be available sources of information for Control Authorities, industrial users still need to notify the Control Authority of significant changes in production or flow rates so that the Control Authority may adjust reported volumes for increased flows occurring during any non-scheduled inspection and sampling, or in evaluating semi-annual reports from the industrial user.

One commenter requested that tiered equivalent limits should be allowed where tiered production-based limits are allowed by the pretreatment standard. Tiered equivalent limits are not necessary for any industrial user. If categorical pretreatment standards are set on a tiered basis there may not be adequate information for the Control Authority to determine the long-term average production rate. In that case, the better method of controlling these users would be to use the tiered production standard with sampling for flow rate coupled with information on the actual production rate at the time of sampling. If a Control Authority decides to issue a control mechanism that includes alternate mass or concentration standards for a facility covered by tiered production-based standards, then the Control Authority must ensure that it has adequate long term average production rate information for that facility before issuing the control mechanism.

One commenter noted that pretreatment standards contemplate greater flow reductions than may have been attained traditionally by an industrial user. Therefore, determining the average flow rate based on historical flow data gathered prior to the reduction in flow may lead to a concentration limit that is too stringent for the reduced flow rate. The commenter suggested that an industrial user should be able to use projected flow rate rather than the historical rate to establish the average flow rate. The Agency agrees, in part, with this commenter's suggestion, but shall require that the projected flow rate be based on more than just the design flow for the facility. Information regarding: (a) The facility's expected production rate; (b) the characteristics of its pretreatment system, wastewater, and industrial process; and (c) the number of employees, work stations, and work shifts, for example, might be needed to better estimate the expected long term average production and flow rates for a new facility. Another option would be to continue use of the production based standard for a period of time until sufficient flow rate data are obtained to estimate accurately the average flow rate.

Two commenters suggested that the Control Authority and industrial user should be involved in determining equivalent concentration or mass based limits. Cooperation between these parties is necessary in order to ensure that truly equivalent standards are developed. Establishing the long term average production and flow rates will require the industrial user to provide information to the Control Authority. Nothing in today's regulation would preclude such cooperative development of the equivalent standards.

An environmental group commented that EPA had failed to comply with two of the "central aspects of the PIRT recommendation: (1) To ensure that, where 'legally' appropriate, POTWs had authority to calculate equivalent mass and concentration limits, and (2) to specify how [the above conversion] could be implemented." This is not an accurate interpretation of the PIRT recommendation on this issue. PIRT questioned: (1) Whether equivalent limits similar to those available to direct dischargers are available to industrial users; (2) how such limits could be implemented; and (3) whether a POTW could establish the production rate and flow rate for a facility and then calculate the equivalent limit by multiplying the production rate by the production-based standard and then dividing by the flow rate. PIRT recommended that the Agency issue a statement informing Control Authorities of the ways in which control mechanisms may be legally used to convert production based standards to equivalent mass or concentration limits. The Agency is responding to this recommendation by promulgating today's regulatory change.

The same commenter also stated that any process established under this proposal should allow public notice of such equivalent limits and public access to the materials on which such equivalent limits are based and should provide for EPA and State oversight of the Control Authority decision-making process. Nothing in today's regulation precludes public access to nonconfidential materials contained in the files of a Control Authority. Under the CWA, the NPDES regulations, and the General Pretreatment Regulations, materials submitted by dischargers are to be made readily available to the public. In compliance with § 403.14 and 40 CFR Part 2, information submitted by an IU to be used in developing an equivalent mass of concentration limit would be available to the public as prescribed by 40 CFR Part 2.

The Agency does intend to review equivalent limit determinations as part of its ongoing POTW pretreatment audit and permit compliance inspection (PCI) programs. These programs are sufficient to ensure that the appropriate equivalent limitations are established and enforced by the Control Authorities. Finally, with respect to the legal validity of equivalent limits, this regulatory change recognizes equivalent limits, making them legally valid and enforceable.

In addition to the changes to § 403.6(c) discussed above, EPA also proposed on June 12, 1986, to amend § 403.12(e) to require inclusion of current production data in the periodic compliance reports. Several commenters stated that this revision should not be made because it could result in a fluctuation of effluent limits from one reporting period to another. An environmental group, on the other hand, urged that this requirement be maintained and requested that the Agency also include a monitoring and reporting requirement for flow rates.

In view of the discussion above concerning long term production data needed for calculating equivalent concentration or mass limitations, today's final rule differs from the June 12 proposal. The regulation specifies that at facilities for which a Control Authority has established equivalent limits pursuant to § 403.6(c), production data to be reported in the periodic compliance report should be based upon the same measure (i.e., long term average) as the production rate used by the Control Authority in establishing the equivalent limits. This is the production data necessary to determine whether the user is in compliance with the applicable categorical pretreatment standard, since the equivalent limits are enforceable in lieu of the standard itself. For other Industrial Users subject to production-based effluent limits, however, the production data necessary for determining compliance, and therefore the data that must be included in the § 403.12(e) report, is the production corresponding to the period during which the sampling for the report was performed. This same requirement will apply for the 90 day initial compliance report (see discussion in Part II.D.8. below).

d. *Today's rule.* EPA is promulgating § 403.6(c) as proposed with the addition of language to reflect the commenters' concerns regarding the definition of immediate notification. As noted above, § 403.6(c)(7) is amended to read: "Any Industrial User operating under a control mechanism incorporating equivalent mass or concentration limits calculated from a production based standard shall notify the Control Authority within two (2) business days after the User has a reasonable basis to know that the production level will significantly change within the next calendar month. Any User not notifying the Control Authority of such anticipated change will be required to meet the mass or concentration limits in

its control mechanism that were based on the original estimate of the long term average production rate."

Regarding § 403.12(e), the final rule differs from the proposal in that it specifies that for industrial users subject to equivalent mass or concentration limits established by the Control Authority under the procedures in revised § 403.6(c), the periodic compliance report must include a reasonable measure of the user's long-term production rate. For all other uses subject to production-based standards, the production rate included in the periodic report is to be the actual production during the sampling period.

A.2. Local Limits [40 CFR 403.8(f)]

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

Section § 403.8(f) sets forth the required elements of an approvable POTW pretreatment program. That section requires a POTW seeking pretreatment program approval to demonstrate that it has sufficient legal authority to enforce local limits developed pursuant to § 403.5(c), but does not explicitly make the actual promulgation of such limits (if needed) a prerequisite to local program approval. Questions have arisen as to whether POTWs required to develop pretreatment programs must develop any needed local limits prior to receiving program approval. In the preamble to the 1981 amendments to the General Pretreatment Regulations, EPA stated that "[local] limits are developed initially as a prerequisite to POTW pretreatment program approval." (46 FR 9417, January 28, 1981). However, the current regulations themselves are not explicit on this point.

b. *Proposed change.* The Agency proposed to revise the regulations to clarify that the development of local limits (or a demonstration that they are not necessary) is a prerequisite to POTW pretreatment program approval (and the continuing legal acceptability of a local program). The proposal added a new paragraph to the local program requirements in § 403.8(f). As a minimum, all POTWs submitting local programs must evaluate the need for local limits, as described above. Where the evaluation indicates that local limits are needed, the POTW must promptly adopt and enforce local limits that will protect the treatment works against interference, pass-through and sludge contamination. A POTW that proposes to rely solely upon the application of the specific prohibitions listed in § 403.5(b) and categorical pretreatment standards in lieu of numerical local limits must demonstrate that: (1) It has determined that the industrial pollutants of concern will not cause problems at the treatment facility, (2) it has adequate resources and procedures for monitoring and enforcing compliance with the prohibitive discharge and categorical standards, and (3) full compliance with the applicable categorical standards will meet the objectives of the pretreatment program.

Under the proposal, when a POTW is identified as requiring a pretreatment program, the requirement to develop such local limits as are necessary will be reflected in the POTW's approved pretreatment program and incorporated in its NPDES permit under § 403.8(c). The permit will also include a requirement that these limits be updated as necessary. Like all other applicable pretreatment requirements, the failure to develop (and update, as needed) necessary local limits will, of course, continue to be subject to enforcement, either by EPA or an approved NPDES State, as a violation of the POTW's permit.

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

c. *Response to comments.* Of the 25 comments received by EPA on this proposed change, only 12 were pertinent to the revision. The remainder merely commented on the need for more or better guidance on how to develop local limits, on whether EPA should have approval of local limits submissions, on the need to define the terms interference and pass-through in the regulations, on the need for local limits in general, and on the need to address those pretreatment programs that were approved but lack local limits. The intent of the revision was to clarify that the development of local limits is required as a prerequisite for program approval—not to reconsider or invite comment on whether local limits are necessary or how they should be developed and implemented. It should be noted that the revised definitions of pass-through and interference, which had not been finalized when this revision was proposed, were promulgated on January 14, 1987 (52 FR 1586, at 1600). The Agency has also prepared additional guidance for the development of technically based local limits ("Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program" (1987)).

As of March 31, 1987, the Agency had identified 1519 POTWs needing pretreatment programs (45 of which were newly designated). Of the 1519, 1450 (95%) were approved. (If the 45 newly identified programs are removed from the total, 98% of the programs have been approved.) The Agency expects that only a few new programs will be identified in the future. As noted above, existing pretreatment programs will be reviewed during audits to ensure that technically based local limits are in place. Local limits that are technically based are local limits that are developed based upon a site-specific engineering determination, generally utilizing a headworks analysis. (*See*, "Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program", pp. 1–12 to 1–15 (1987).) An August 5, 1985 memorandum from the Office of Water Enforcement and Permits to the EPA Regional Water Management Division Directors provided guidance as to how the NPDES permits for POTWs will be modified at reissuance to include a requirement to develop technically based local limits if they have not already been developed. The more recent 1987 guidance manual expands upon the provisions of the 1985 memorandum.

In general, 11 of the 13 commenters on this proposed revision agreed that POTWs need to develop local limits prior to submission of their pretreatment programs. However, each of them had comments regarding how this should be done.

Three of these 11 commenters strongly urged EPA to consider the cost of developing local limits when requiring a POTW to develop them. One State Approval Authority indicated it could not fully and immediately implement this requirement due to insufficient

resources. The guidance in the above-referenced August 1985 memorandum provides State Approval Authorities some flexibility in addressing deficient existing programs. The Agency intends that as newly designated programs are developed, local limits will be included in the program submission, while deficient existing programs will have to develop local limits and incorporate these requirements into their programs as soon as feasible.

Two Control Authorities, commenting on this provision, stated that development of local limits by small POTWs should not be required until EPA provides the expertise to develop the local limits for the POTWs. These two commenters also suggested that EPA should do the analysis of the data supplied by the POTW to reduce costs. The Agency does not agree with these commenters because EPA provided initial guidance for local limits development in August 1985, and developed additional, more detailed guidance on this subject in December 1987. The Agency has also made a personal computer compatible software package (Prelim 3.0) available to POTWs at no cost to enable them to develop appropriate local limits. Thus, adequate tools are available, even to small POTWs, to develop local limits. With regard to cost reduction, the greatest cost in developing local limits is the sampling and analysis of influent, effluent, and sludge. These analyses are already performed by the POTW. The commenters' proposal would not alleviate that cost. Furthermore, the POTW, not EPA, is in the best position to evaluate case-specific criteria to determine the appropriate local limits.

One State agency agreed with the proposed change, but stated it would not require local limits where problems have not occurred, or are not expected to occur, at the POTW. The intent of the proposed revision was to require local limits development for pretreatment programs that had, or expect to have, problems with pass-through, interference, sludge quality, or worker health and safety. Under this regulation, POTWs are given an option of describing why local limits are not necessary. Therefore, this commenter's statement that it will not require local limits development where problems do not exist or where problems are not expected to exist complies with the intent of this provision.

Two environmental groups stated that the regulatory language of this provision should be made more explicit by inserting the preamble discussion of the goals and requirements of local limits development into the regulation. The preamble discussion of the items necessary to develop technically based local limits was meant to further explain the regulation's language. As noted above, the Agency has developed a new pretreatment guidance document on development of technically based local limits. This document will serve to explain the items needed to develop local limits. The Agency will continue to assess the needs of POTWs and will update the guidance as necessary.

One environmenal group supported the proposed revision, but stated it was not necessary because the current pretreatment regulatory requirements at § 403.5(c)(1) require POTWs to develop and enforce local limits. This commenter stated that this regulatory language mandates that EPA cannot approve a pretreatment program submission that lacks local limits. However, this new provision is a needed clarification of the existing regulation because it will ensure that POTWs developing new pretreatment programs are clearly on notice that the program submission must include local limits.

One industrial user commented that industries should assist POTWs in determining whether local limits are necessary. This commenter also stated that perhaps a more cost efficient approach would be for industrial users to pay a surcharge to allow the POTW to upgrade its treatment, rather than having the user install pretreatment facilities. Although Control Authorities and industrial users need to work together in running effective pretreatment programs, the decision and supporting documentation on the necessity of local limits is to be made by the Control Authority. Nothing in today's action prevents an industrial user from financially assisting a POTW. However, in determining whether local limits are necessary or what the limits should be, the Control Authority should consider the effects of the discharge of the wastestream into the POTW, including the sewer system and the treatment plant. Problems caused by the interference of a pollutant are not limited to the treatment plant; sewer pipe deterioration, plugging, or explosions could result from wastestreams discharged by industrial users that have not been adquately pretreated.

Two commenters noted that the parenthetical statement "or a demonstration that they are not necessary" which is contained in the preamble, was not placed in the regulation, and suggested that the language be included in the regulation. Although the intent of the provision, as clearly spelled out in the preamble, was to allow a POTW to make the finding that local limits are not needed, the regulatory language could more clearly reflect this intent. Therefore, today's regulatory language incorporates the phrase, "or demonstrate that they are not necessary." Two commenters were opposed to the proposed revision. One commenter stated that Control Authorities may be unable to demonstrate that local limits are unnecessary because of the broad language in the preamble regarding the need to analyze for pollutants that may cause pass-through or interference at the plant. The Agency does not expect that a POTW will be able to foresee all pollutants that will be discharged into the sewer system by IUs, but a reasonable approach by the POTW is required. The Agency expects that a POTW will evaluate the likelihood that its system will expand to serve more industrial users, or that current industrial users will move out of the system and be replaced by different industrial users. This analysis should be a part of the development of local limits by a Control Authority.

Another commenter stated that local limits are only a small part of a pretreatment program and should not delay the approval of the total program. This commenter suggested that POTWs should be given six to twelve months after program approval to develop local limits. The Agency does not agree with this suggestion. Local limits are one of the most important aspects of a POTW's local program. National categorical standards may not provide enough treatment to protect a POTW from pass-through, interference, or sludge inhibition. POTWs cannot afford to violate their NPDES permits, have influent disrupt or destroy the treatment plant, or have sludge contaminated so that it cannot be handled in the usual way (e.g., composting, land application, or land filling). The Agency expects that the Control Authority will use local limits to prevent such occurrences, and maintain the integrity of the treatment facility.

d. *Today's rule.* EPA is promulgating this change as proposed with the addition of the phrase "or demonstrate that they are not necessary" as discussed above.

A. 3. Combined Wastestream Formula [40 CFR 403.6(e)]

a. *Existing rule.* The combined wastestream formula (40 CFR 504.6(e)) is a method for calculating alternative pollutant limits at industrial facilities

where regulated process effluent is mixed with other wastewaters (either regulated or non-regulated) prior to treatment. As stated in the preamble to the 1981 amendments to the General Pretreatment Regulations (46 FR at 9419), the formula is of primary importance to large, diversified industrial users with multiple processes:

> These Industrial Users of POTWs frequently have a number of individual processes producing different wastestreams that are not regulated by the same categorical Pretreatment Standard or are not regulated at all. Many of these integrated facilities have combined process sewers and a number have already constructed combined waste treatment plants. In these situations, the Industrial User often prefers to install, or continue to use, a pretreatment system on the combined stream rather than installing separate parallel systems on each individual stream. A combined wastestream formula permits a facility to mix wastestreams prior to treatment by providing it with an alternative effluent limit for this combined discharge.
>
> EPA wishes to minimize the need for separation of wastestreams and for treatment by parallel systems when comparable levels of treatment can be attained in combined treatment plants. Separate treatment of wastes at an integrated plant can be costly, wasteful of energy, inefficient and environmentally counterproductive. In addition, such an approach reduces the environmental gains resulting from the voluntary treatment of unregulated streams prior to the imposition of regulatory requirements. However, the Agency also recognizes that the countervailing concerns of avoiding the attainment of limits through dilution and ensuring that adequate treatment is provided may sometimes lead to the conclusion that segregation of streams is the only appropriate way to meet applicable pretreatment limits. The combined wastestream formula attempts to strike a proper balance between these considerations. It is the Industrial User's choice whether to combine or segregate its wastestreams. However, if the User decides to combine wastestreams prior to treatment, and at least one of these wastestreams is covered by a categorical pretreatment standard, then alternative limits for all regulated pollutants in the combined wastestream must be calculated using the combined wastestream formula.

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

EPA proposed to add a new paragraph (e)(5) (§ 403.6(e)(4) in today's final rulemaking) to the combined wastestream provision in § 403.6 to clarify the approach to be taken in such cases. Under the proposed rule, an industrial user has an initial choice of monitoring either the segregated wastestream(s) or the combined wastestream and then applying the appropriate numerical limits. If, at some later date, the industrial user wishes to change its initial choice of monitoring points, it may do so only after receiving approval from the Control Authority. This is necessary to enable the Control Authority to verify the applicable limits (e.g., alternative limits calculated using the combined wastestream formula) and ensure that the change in sampling points will not allow the industrial user to substitute dilution (either by non-regulated process water or by "dilution flow" as defined in § 403.6(e)) for pretreatment.

EPA also proposed to add stormwater and demineralizer backwash to the definition of "FD" in § 403.6(e)(1), which refers to streams that are treated as dilute for purposes of calculating alternative limits under the combined wastestream formula. Like the other streams included in this definition, stormwater and demineralizer backwash streams do not generally contain significant concentrations of regulated pollutants.

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

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

c. *Response to comments.* Thirteen commenters responded on the proposal. EPA's responses to these comments are grouped by specific issue below.

1. *Notification of changed monitoring location.* All three industry commenters on this issue supported the proposal. Two POTWs also submitted comments. One POTW concurred with the proposal to allow a choice of compliance monitoring locations, but stated that POTWs should have a say in where samples are taken for compliance monitoring performed by the POTW. Another POTW found the language in proposed § 403.6(e)(5) "very confusing," and stated that it was not clear whether the reference to a "treated process wastestream" meant a regulated or non-regulated stream. It was also unclear to the commenter what was being combined with this wastestream.

As to the first POTW commenter's concern, EPA does not intend to preempt the Control Authority's ability to determine the point at which it collects samples in monitoring the compliance of an industrial user. Regardless of where the industrial user wishes to conduct self-monitoring, the Control Authority may select its own monitoring location, so long as the chosen location is an appropriate one for determining compliance with the applicable categorical standard(s). Moreover, POTWs with pretreatment programs must have authority to require such self-monitoring and reporting by industrial users as is necessary to assess and assure compliance with pretreatment standards (*see,* § 403.8(f)(1)(iv)(B)). Such authority should include, at a minimum, the ability to ensure that a sampling location chosen by an Industrial User will provide the necessary data. Some POTWs may also have more extensive authority under State and/or local law allowing them to direct the industrial user to monitor at a specific location. Today's final rule would not limit such authority. It merely provides that for purposes of determining compliance with the federal categorical pretreatment standards, an industrial user combining a process wastestream with other wastestreams prior to

treatment may monitor either the regulated stream(s) separately (in which case the individual categorical standard(s) would be applied) or the combined stream (in which case the combined watestream formula would apply). The rule does not affect the ability of the Control Authority, under its own authorities, to impose specific requirements on the industrial user regarding monitoring location.

Regarding the second POTW's comments, the term "treated process wastestream" was intended to refer to wastestreams regulated by categorical standards. To clarify this, the term has been changed to read "treated regulated process wastestream" in the final rule. The commenter's confusion as to what the regulated stream was being "combined" with is probably at least partly due to the inadvertent use of the word "of" after "treatment" in the first sentence of proposed paragraph (e)(5). The "of" should have been "with," and has been changed accordingly in the final rule (paragraph (e)(4)). This change clarifies that the regulated stream is being combined with "wastewaters other than those generated by the regulated process," whether they be "regulated" (i.e., covered under a categorical standard), "dilute" under the definition in § 403.6(e), or "unregulated" (i.e., neither regulated nor dilute).

2. *"Dilution" definition.* Of the six commenters on this issue, three supported the rule as proposed. The others, a POTW, an industry trade association, and an environmental group, expressed opposition to various aspects of the proposal.

The POTW and the industry trade association were concerned about how the proposal would effect stormwater and demineralizer and reverse osmosis backwash streams that may be covered under categorical pretreatment standards. The industry trade association suggested that EPA clearly indicate in the final rule that where these streams have been included as process wastewaters for categorical standards development, they should not be defined as dilute, but instead should be classified as either regulated or unregulated streams, depending on the situation. The POTW asserted that reverse osmosis and demineralizer backwash wastestreams should be considered part of the regulated wastestream for some categories for which they are essential and integral components, and gave as examples of such categories electrical and electronic components, electroplating and metal finishing. In support of its comment, the POTW stated that these wastestreams contain pollutants similar to those from other regulated processes, but have minimum dilution potential because they are irregular and infrequent.

Both commenters apparently misunderstood the scope of the proposed rule. EPA does not intend to include under the definition of dilute streams in § 403.6(e) wastestreams resulting from application of reverse osmosis or demineralization to process wastewaters. The proposal was intended to apply only to reverse osmosis and demineralizer backwash streams resulting from treatment by the industrial user of its raw intake water (e.g., for use in industrial processes requiring high quality water). Unlike process wastewater, these streams should not contain regulated pollutants in significant amounts. Moreover, in cases where they do, the final rule would allow the Control Authority to classify them as unregulated rather than dilute.

The environmental group stated that the proposal would allow an industrial user to classify stormwater as "unregulated," or not, depending upon the most favorable status of the wastestream to the facility; i.e., for purposes of determining compliance. The commenter recommended that (1) all stormwater be classified as "dilution" for purposes of the combined wastestream formula and control authorities should be encouraged to develop local limits for significant stormwater contamination, or (2) EPA should conduct a rulemaking to determine which stormwater streams should be treated as "unregulated" for purposes of the formula.

Both the proposal and today's final rule state that the Control Authority, not the industrial user, is responsible for determining the classification of stormwater as either "dilution" or "unregulated." The industrial user may request the classification, but the Control Authority is the decisionmaker. At the outset, there is a presumption that the stormwater is dilution for purposes of the formula. Stormwater is to be evaluated, as are all the wastewaters included in the "FD" definition, using the regulatory criteria to determine if the wastestream is to be deemed "unregulated."

Section 403.5 of the pretreatment regulations contains general and specific prohibitions against interference and pass through, and requires POTWs to develop specific local limits to implement these prohibitions. If pollutants found in stormwater introduced to a POTW cause interference and/or pass through, the POTW already is required by the pretreatment regulations to establish local limits. Additional authority specified in the regulations is not necessary. In addition, EPA has considered contaminated stormwater in promulgating effluent guidelines limitations and categorical pretreatment standards (e.g., iron and steel (40 CFR Part 420); petroleum refining (40 CFR Part 419)).

3. *Combined wastestream formula after treatment.* Most of the comments on the combined wastestream formula were directed at EPA's clarification, in the preamble to the proposal, of the procedures to be used where treated regulated process wastestreams are combined with other wastestreams. Several commenters expressed reservations about the approach described in the preamble. Moreover, the comments revealed a considerable amount of misunderstanding among the commenters. Therefore, although there was no regulatory change proposed on this issue, it is appropriate to address some of the commenters' concerns and resolve any misunderstandings.

One commenter stated that it preferred to separately sample the industrial user's treatment plant effluent and the end-of-pipe combined stream for determining compliance with categorical standards and local limits, respectively. The commenter seemed to think that this would not be allowed under the approach explained in the preamble to the proposal. In fact, the flow-proportioning method discussed by EPA would not foreclose the commenter's approach, because it applies only where end-of-pipe sampling is being used to determine compliance with categorical standards as well as local limits. Separate sampling of the industrial user's pretreatment facility effluent for categorical standard compliance may generally be used regardless of what other wastestreams might be added further downstream.

Another commenter described a scenario where large industrial users might be pretreating only the concentrated regulated wastes and adding the less concentrated remainder of the regulated wastewaters after treatment. The commenter stated that using the combined wastestream formula at the end-of-pipe sampling manhole allows translation of end-of-process limits (i.e., categorical standards) into end-of-pipe limits, and thereby minimizes the amount of monitoring done by the Control Authority at the industrial user. Again, there appears to be some misunderstanding of the Agency's

preamble explanation in the proposed rule. The flow-proportioning approach (or a more stringent approach) must be used where wastestreams *other than regulated process* wastestreams are added after treatment. Where all streams added after treatment are regulated process wastestreams, the combined wastestream formula may still be used since these added streams must meet the applicable categorical standard(s), regardless of whether they are treated or not. Since there are no unregulated streams being added, the trade-off between obtaining treatment of otherwise unregulated wastewaters and allowing some dilution in certain limited situations, which underlies the combined wastestream formula, is irrelevant.

Another commenter contended that proper use of the combined wastestream formula would produce accurate results for the purpose of determining compliance regardless of whether it is applied before or after treatment. However, as EPA explained in the preamble to the proposed rule, this is not the case. In certain situations, the combined wastestream formula allows a limited amount of dilution. Where the formula is used prior to combined treatment, this dilution is viewed as an acceptable trade-off for treatment of otherwise unregulated wastewaters that is obtained in other situations. This careful balance of competing concerns is upset if unregulated streams are added after treatment, because there is no opportunity to obtain incidental treatment of the unregulated streams. Therefore, EPA disagrees with the commenter's contention.

The same commenter also maintained that the flow-proportioning calculation would increase administrative and data handling burdens for POTWs and industrial users. EPA recognizes that some additional burdens may be experienced by Control Authorities and industrial users that have been using the combined wastestream formula in situations where they should have been performing a flow-proportioning calculation. However, this latter calculation is relatively straightforward and, as discussed above, is necessary to ensure that compliance with categorical standards is not achieved through dilution.

An industry commenter recommended that the approach described in the preamble to the proposal be applied only to new facilities. The commenter asserted that requiring existing metal finishers to meet limits derived using the flow-proportioning calculation where wastestreams are added after treatment would significantly affect their ability to show compliance. The commenter also argued that the burden of periodically sampling each source at large plants would be enormous while the potential for disrupting the POTW would be minuscule. According to the commenter, another effect of the approach described by EPA would be that some parameters (e.g., cyanide) would be limited to below detectable levels, thus requiring plant-wide source sampling and elimination of the benefit of the combined wastestream formula.

EPA disagrees with the commenter's contentions. First, the prohibition against dilution to achieve compliance with categorical standards applies to existing, as well as new, sources. It would not be appropriate to exempt existing industrial users from this basic rule. Second, while the potential for disrupting the POTW may be relatively small, the net effect of allowing the combined wastestream formula to be used where dilution would result would be increased pollutant loadings to receiving waters, thus contravening the basic goal of the CWA to eliminate the discharge of pollutants to the Nation's waters. Finally, the commenter provided no data to support its assertion that certain pollutants would be limited at below detectable levels. While this may occur in some situations, based upon all the comments received, this does not appear to be a pervasive problem. Moreover, where use of the flow-proportioning calculation would present this or other problems, the solution is to monitor the treated and untreated wastestreams separately, not to allow dilution through the combined wastestream formula.

Another industry commenter was under the mistaken impression that EPA is *requiring* use of the combined wastestream formula where wastestreams are combined after treatment and the level of a particular pollutant in a nonregulated wastestream exceeds the limit on that pollutant in the applicable categorical standard. This is not the case. Whenever nonregulated wastestreams are combined with treated regulated wastestreams and monitoring for compliance with applicable categorical standards is performed on the combined wastestream, the flow-proportioning calculation described by EPA in the preamble to the proposed rule may be used. In the instance described by the commenter, the combined wastestream formula may also be used, because it would result in a more stringent limit than straight flow-proportioning. The Control Authority has the final say as to which formula will be required in such cases. For purposes of compliance with federal requirements, however, either formula would be acceptable.

A comment by an industry trade association similarly displayed confusion regarding the correct formula to apply in a given situation. The commenter requested clarification on whether, in a case where the combined wastestream formula may be used (i.e., the pollutant level in an unregulated stream added after treatment is at least at the level allowed in the applicable categorical standard), the flow-proportioning formula may be used instead. As stated above, for purposes of determining compliance with federal standards, the answer to the commenter's question is yes (although the Control Authority may choose to use the combined wastestream formula instead). The "bottom line" is that whatever approach is used must produce limits that are at least as stringent as those produced using the flow-proportioning calculation.

Finally, one commenter requested clarification of what would be considered a "reasonable amount of time" for industrial users to comply with any more stringent limits that might result from Control Authorities applying the flow-proportioning calculation where they had previously (and incorrectly) been applying the combined wastestream formula. The commenter, a federal agency, noted that federal facilities may need to submit budget requests to enable them to meet more stringent limits. Although EPA is sensitive to the commenter's concerns, it cannot provide a generic definition of a "reasonable amount of time." Instead, this will be a case-by-case determination by the Control Authority taking into account such factors as the magnitude of the change in the applicable limit(s) and treatment changes necessary to respond to the change.

d. *Today's rule.* EPA is promulgating the final rule as proposed with two minor modifications. First, in the first sentence of new § 403.6(e)(4), the term "treated process wastestream" has been changed to "treated regulated process wastestream" to clarify that the term refers to wastestreams regulated by categorical standards. Second, the first "of" in the same sentence has been changed to "with" to correct an inadvertent error in the proposed rule.

A.4. Prohibition Against Dilution [40 CFR 403.6(d)]

a. *Existing rule.* The underlying policy of the CWA is to reduce the amount of

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

b. *Proposed change.* The language of the existing prohibition in § 403.6(d) applies only to the use of dilution to achieve compliance with categorical pretreatment standards. However, the underlying statutory policy of reducing the total mass of pollutants entering waters of the United States is also applicable to other pretreatment standards and requirements, such as more stringent local limits developed under § 403.5(c). To the extent that local limits regulate pollutants that the POTW is not able to effectively treat (i.e., those that pass through the POTW or contaminate the POTW sludge), dilution is not an acceptable substitute for adequate treatment. Therefore, EPA proposed to modify the dilution prohibition to clarify that it is not limited to categorical pretreatment standards. This will more clearly track the statutory intent.

Under the terms of the proposal, industrial users would be prohibited from diluting to comply with local limits. This prohibition will not affect the POTW's development of such limits and its ability to factor in the dilution impact of the domestic sanitary sewage contribution to the POTW. EPA intends that an industrial user will not increase the flow of water into the discharge to assure compliance with the local limit. However, where a local limit allows an industrial user to mix wastestreams, using pre-existing flow rates of non-process wastewater to "dilute" the process wastes, then today's regulation will not restrict such action. However, once the POTW determines its local limits in accordance with § 403.5(c), the industrial user may not use dilution to meet those limits.

c. *Response to comments.* EPA received comments on this proposed change from 22 commenters. A number of commenters supporting the change stated that the proposal would:

(1) Recognize what the Control Authority was already doing;

(2) Strengthen their regulatory control and enforcement;

(3) Be consistent with sections 307 and 402(b)(8) of the CWA.

Several other commenters requested further clarification of the language in the clarification of the language in the preamble or regulation, or requested further EPA guidance regarding the prohibition. An industrial user inquired whether the dilution prohibition applied to pollutants (such as methanol) that are hazardous in large concentrations, but also provide a food source for POTWs. This commenters stated that methanol can be sufficiently diluted to a low concentration so that its flammability will be reduced. The dilution prohibition reflects the clear intent of the CWA and the pretreatment regulations that dilution is not a substitute for treatment as a means to comply with the applicable discharge requirements. However, nothing in today's regulation would deter an industrial user from containing this type of pollutant in a holding tank and slowly discharging the pollutant into its wastestream. This is different from using clean water to dilute the pollutant in the wastestream while increasing the total flow from the industrial user.

Several commenters were concerned that POTWs that have developed local limits based on the pollutant characteristics and hydraulic loading of the total flow at the headworks would need to redevelop those local limits based on the amount of process water discharged. These commenters questioned whether a POTW that already accounted for dilution in setting local limits would need to recalculate its local limits after discounting the dilution flow. The answer to this question is no. This regulatory change prohibits dilution as a means to comply with either a categorical pretreatment standard or a properly derived local limit. Another commenter noted that this dilution prohibition should only apply to process wastestreams. The Agency does not agree with this commenter. Many other non-process wastestreams may, if they contain significant levels of pollutants, also need to comply with local limits (e.g., boiler blowdown, noncontact cooling water) and should also be subject to the dilution prohibition.

One commenter suggested that the Agency provide some further guidance regarding the prohibition. This commenter specifically stated that procedures are needed to assist Control Authorities in determining whether dilution is being used by an industrial user to meet a limit. The most effective method of determining whether an industrial user is diluting its wastestream is the industrial user site visit conducted by the Control Authority. Close inspection of floor drains, batch discharge areas, pretreatment systems, and the sewer line can indicate whether an industrial user is using dilution water to ensure compliance with the pretreatment standards. Control Authorities could also review an industry's water use bill to determine whether excessive amounts of water were being used at the facility. Control Authorities may evaluate an industrial user's water consumption against the water consumption noted in development documents for the categorical standard applicable to that facility, or compare similar industrial users within the Control Authority's jurisdiction or in a neighboring jurisdiction. Of course no two IUs are identical, but similarities in size, production rate, and water usage can be useful.

Several commenters requested clarification on whether the combined wastestream formula was needed to determine compliance with local limits. Under Federal regulations, the combined wastestream formula is a means to assess compliance with categorical pretreatment standards. Many Control Authorities have developed local limits to be applied at the end of the pipe from the industrial user and apply to the total wastestream, process and non-process wastewater. In these cases, there is no reason to segregate wastestreams.

One commenter stated that the proposed revision and its accompanying preamble language were unclear. This Control Authority stated that its local limits are enforced as total industrial user facility discharge standards without factoring out domestic waste, cooling water, etc. EPA did not intend for this proposed regulation to change how local limits are developed and implemented at a Control Authority. This provision is being implemented merely to prevent an industrial user from increasing water usage and discharge flow to dilute its wastestream to be in compliance with the local limits.

A commenter opposed to the revision indicated that the broad scope of the prohibition would cover non-toxic discharges which could be adequately

treated by the POTW. The commenter provided an example where a high concentration conventional waste could be adequately treated by the POTW if the wastestream was combined with other low concentration conventional wastes. The commenter stated that under the proposed revision, the high concentration waste would have to be pretreated prior to mixing with the other wastes to comply with the dilution prohibition. The Agency is not convinced by this commenter's arguments and believes the commenter has misinterpreted the regulatory requirement. Conventional pollutants for non-categorical industrial users would be controlled by local limits and the industrial user could commingle the wastestreams prior to discharge, as long as the final wastestream complied with the local limit. If the industrial user was a categorical industry, then the combined wastestream formula would be applied to its total discharge to ensure compliance with the categorical limit. Under either situation, dilution with clean water could not be used to ensure compliance with the appropriate limit.

Two Control Authorities also raised the issue of dilution and pollutants that a POTW could treat. Both stated that by prohibiting dilution to reduce the concentration of conventional pollutants, there may be a greater potential for large slug loadings of the conventional pollutants to the POTW. The Control Authorities were concerned that the POTW might not be able to adequately treat the large slug loadings, but could easily treat the less concentrated diluted flows. The Agency is not convinced that the prohibition should not be required for these pollutants by this description of the situation. Although it is true that a POTW could more easily treat the diluted conventional pollutants rather than the slugs, the increased water flow into the POTW might lead to hydraulic overloading at the POTW that could decrease its removal efficiency or cause discharge of untreated wastes. Furthermore, it is generally easier to treat the higher concentration of conventional wastes than the diluted concentration. Any high concentration wastes discharged by an industrial user will mix in the sewer lines with other wastes and be diluted prior to arriving at the POTW. In addition many POTWs have mass based limits in their NPDES permits as well as concentration based limits. Although the diluted wastestreams may be treated by the POTW sufficiently to be in compliance with the concentration based limit, the total mass discharged by the POTW may violate the mass based permit limit. Technically based local limits should prevent interference or pass-through at the POTW from slugs of high-strength conventional pollutants.

One industrial user trade group questioned whether any increase in process wastewater flow rate would be prohibited by this regulation. This commenter suggested that the language be changed so that increases in process water flow would be allowed, unless the intention of the IU was to dilute the wastestream. EPA finds the suggested change to be highly unworkable. POTWs and Control Authorities would be hard pressed to discover an industrial user's true intent. The Agency has therefore not made this change. However, nothing in today's regulation would prohibit an industrial user from increasing its process wastewater flow if the facility modifies its process, but this is clearly different from the situation where an industrial user uses clear water to dilute its wastestream to comply with the pretreatment standards.

d. *Today's rule.* EPA is promulgating this change as proposed.

B. POTW Pretreatment Program Requirements

1. Deadline for Program Submission—Newly Required POTW Programs [40 CFR 403.8(b)]

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

b. *Proposed change.* EPA proposed to amend § 403.8(b) to establish an outside compliance date for program development and submission where the Approval Authority identifies a POTW as needing a pretreatment program after July 1, 1983. EPA proposed to require program submission to the Approval Authority as soon as possible, but no later than one year after the date on which the POTW was notified by the Approval Authority, in writing, of its responsibility to develop a program. While this time period is shorter than the "up to three year" period authorized for POTWs prior to July 1, 1983, experience indicates that one year is reasonable for POTWs newly required to develop programs. Moreover, the existing three-year deadline includes receiving approval of the program; the deadline being proposed today applies only to the submission of an approvable program. Based upon the POTWs that have developed programs, EPA has determined that, in most cases a complete program submission can be developed within six to twelve months. Moreover, EPA and the approved pretreatment States have already identified most POTWs that will be required to develop pretreatment programs; those identified in the future will be able to benefit from the work and experience that has taken place since 1978. In addition, it is anticipated that the new programs will be identified over a period of time.

c. *Response to comments.* EPA received several comments regarding the timing for program submission. One State Approval Authority suggested that the regulation should also include a deadline for EPA to review and approve the submission. No such deadline is necessary. EPA does not expect a large number of new programs to be required in the future. Therefore, there will not be a surge of program submissions needing review and approval by EPA in a short time period, and turnaround time on the new programs submitted will be minimal.

Several other commenters stated that the one year development limit was sufficient, but that an Approval Authority should be granted the discretion to extend that time period by two or three years. An extension of the one year time period is not justified. As noted above, the Agency has determined that a complete program submission can be developed within one year. Given the available guidance documents produced by EPA and the experience gained by State Approval Authorities to date, future programs identified by Approval Authorities will easily be submitted within the one year time frame.

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

d. *Today's rule.* EPA is promulgating the final regulation identical to the proposed regulation.

B.2. *POTW Program Requirements—Remedies* [40 CFR 403.8(f)]

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

POTWs that have legislative power under State law can meet the requirement to obtain monetary penalties by simply passing appropriate legislation (i.e., local ordinances or an equivalent). However, where a POTW does not have the authority to enact ordinances or other local legislation, the existing regulations only require the POTW to enter into contracts with its industrial users. In this manner, POTWs can obtain monetary compensation for breaches of contract which result in losses to the POTW, but liquidated damages are not penalties, as discussed below.

b. *Proposed change.* It is a general principal of contract law that damages for a breach of contract should adequately compensate the non-breaching party for the loss resulting from the breach, but should not be punitive in nature. Where a contract which includes a liquidated damages clause is breached, the compensation to be paid by the breaching party must be reasonably calculated to compensate the non-breaching party for the loss.

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

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

It was not thought that the proposed regulation would have a widespread impact on the national pretreatment program. It appeared to EPA that a relatively small percentage of industrial users are currently being regulated through contracts with POTWs. However, the Agency invited comments on this approach and suggestions for other approaches, such as retaining the option to use contracts, but requiring the City Solicitor (or other appropriate person) to certify that such contracts, and particularly the liquidated damages provisions, were valid under State law.

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

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

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

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

c. *Response to comments.* EPA received 38 comments on this proposal, of which twenty-one were submitted by

POTWs. Other commenters included five states, four trade associations, five corporations, and three environmental groups.

Most commenters addressed issues concerning the requirement of POTW authority to seek or assess monetary penalties. Some commenters, however, apparently misread what was proposed. Thus, some commenters were concerned that POTWs would be required to have authority to directly assess penalties. There also appeared to be some confusion as to whether the proposed regulation would eliminate all use of contracts by POTWs and thereby undermine existing agreements between POTWs and their users.

In proposing this amendment to the existing rule, the Agency stated that it did not anticipate that this change would have a widespread impact on the national pretreatment program. The Agency believed that only a small percentage of industrial users are currently being regulated through contracts with POTWs. The comments received in response to the proposed rule did not dispute this opinion. Nevertheless, POTWs that lack authority to seek or assess monetary penalties will be affected by today's rule. Therefore, it is important that POTWs that depend upon various contractual arrangements for implementation of their programs do not misread the purpose or effect of this regulation.

The existing rule at the time this regulation was proposed required those POTWs without authority to obtain legislation to seek or assess damages to enter into contracts with their industrial users which would provide for liquidated damages for violations of pretreatment standards and requirements. This use of liquidated damages was intended to be an alternative means of assuring compliance on the part of industrial users with the POTW's pretreatment program.

The Agency has since recognized that the use of liquidated damages for the imposition of penalties is not enforceable as a matter of contract law. Therefore, the Agency proposed to eliminate the use of liquidated damages as satisfying the minimum legal authority required of POTWs. Among the few commenters who addressed this issue, several commenters agreed that such clauses were not punitive in nature and thus not adequate as an enforcement mechanism. None of the commenters asserted that the use of liquidated damages for the imposition of penalties was a legally sufficient enforcement mechanism.

Some commenters adopted EPA's suggestion that certification of the validity of such penalty clauses under state law by a city solicitor or other public official might be a workable alternative. One commenter stated that certification would remedy the problems associated with the use of contract penalties and be a less drastic approach than imposing a requirement that all POTWs have penalty authority. None of the comments cited any precedent for this approach, however. One regional POTW admitted that it was unable to certify that the provisions in question would be enforced under all circumstances. EPA agrees with the commenter who asserted that certification is not acceptable as a substitute for authority to seek or assess penalties because: (1) Certification would not provide criminal enforcemet, and (2) because contract law prohibits the use of liquidated damages for the assessment of penalties, an attorney general's statement to the contrary would have little practical effect.

The majority of commenters took the position that POTWs should be required to have penalty authority, and most of the POTWs who commented indicated that they already had some degree of authority to seek or assess penalties. Commenters who opposed the proposed changes expressed concerns that to require POTWs to obtain the requisite penalty authority might jeopardize the ability of POTWs to continue to operate approved pretreatment programs, primarily because of difficulties associated with obtaining the necessary enabling legislation under state law. Some of these commenters expressed the concern that, if the effort failed, contracts between industries and POTWs might have to be terminated. These commenters questioned whether it made sense to upset a successful POTW program in order to implement this regulation.

A few of the commenters who opposed the change felt that the present mechanism was working effectively, without the need for requiring POTW penalty authority. Two commenters took the position that termination of services or revocation of permits present an alternative deterrent to monetary penalties that is sufficient to compel compliance with contract provisions by POTW users. One commenter stated that the municipality's self interest in protecting its treatment works and in preventing unnecessary degradation of the quality of its effluent was the best assurance that appropriate and effective concessions would be extracted from a user before it was allowed to use the POTW's services. Another commenter stated that where an existing POTW pretreatment program had demonstrated adequate enforcement of categorical and local standards without levying civil or criminal penalties, there would be no requirement for imposition of fines.

Although the proposed rule stated that all POTWs should have the authority to assess monetary penalties, what was intended was that each POTW should have the authority to seek or assess penalties. This was in keeping with the Agency's own penalty authority at the time these regulations were proposed. The legal authority contemplated by the rule, similar to that required of State agencies under the NPDES regulations, was that a POTW should have the power to assess or sue to recover in court civil penalties or criminal penalties (of course, POTWs may have both civil and criminal authority) (*cf.*, 40 CFR 123.27(a)(3) (NPDES State required to have authority "[t]o assess or sue to recover in court civil penalties and to seek criminal penalties * * *")). To avoid further confusion in this regard, the final rule has been amended to clearly state that all POTWs shall have authority to seek or assess civil or criminal penalties.

In proposing this rule, EPA did not intend to suggest that POTWs should void all contracts or that they should do away with all contractual mechanisms concerning enforcement by POTWs. One state recommended that all reference to contracts as an acceptable control mechanism be deleted because they are seldom as effective a control mechanism as a permit and are difficult, time consuming and expensive to negotiate. However, the rule was merely intended to eliminate the use of liquidated damages as an alternative to POTW authority to seek or assess penalties. POTWs may continue to employ contract mechanisms for other purposs (e.g., to enable POTWs to enforce compliance through contracts with neighboring jurisdictions). Moreover, POTWs should continue to invoke such provisions when a user violates the contract, even under today's regulation. Today's regulation estalishes the minimum legal authority which a POTW must have in order to operate an approved pretreatment program.

In response to the principal concern of those opposed to the proposed rule (that some POTWs may encounter substantial difficulty in obtaining the requisite authority), it is EPA's position that, where a POTW lacks authority to seek or assess civil or criminal penalties, effective administration of the POTW's program is substantially impaired. Such enforcement power is a

basic feature of an effective pretreatment program without which a POTW program does not merit approval. Concerning POTW pretreatment program requirements generally, § 403.8(f) states, inter alia, that a POTW "(1) [S]hall operate pursuant to legal authority * * *, which authorizes or enables the POTW to apply *and to enforce* the requirements of secs. 307(b) and (c), and 402(b)(8) of the Act [concerning pretreatment standards and compliance therewith] and any regulations implementing those sections." (Emphasis added.) EPA does not now intend to relax this minimum requisite legal authority for approval of a POTW pretreatment program where it lacks the minimum authority necessary to compel compliance with its pretreatment program merely in order to allow certain POTWs to continue to operate approved programs.

The revised rule provides that POTWs which are prohibited by state law from seeking or assessing fines for violations will have two years in order to obtain the necessary changes in state law which would enable them to impose such penalties and to implement such penalty authority. Two years is sufficient time to allow states and POTWs to make the necessary changes in their laws and regulations to enable POTWs to continue to operate approved pretreatment programs without disrupting their operations. One POTW stated that the proposed penalties were contrary to its state constitution, but did not provide information on the specific constitutional provision. No such prohibition was identified in a review of that State's constitution. States with an interest in having approved POTW pretreatment programs will enact the necessary enabling legislation for POTWs to have at least this minimal authority to enforce compliance with POTW programs.

Some POTWs commented that they did have authority to seek fines through local courts and requested clarification whether such authority fulfilled the requirement of the revised regulation. Other commenters sought clarification as to whether allowing state environmental protection agencies to impose penalties on a POTW's behalf was acceptable as an alternative. The language in the preamble for the proposed rule was not sufficiently clear on this issue, but the final rule makes it clear that a POTW must have authority either to directly assess penalties or to seek civil or criminal penalties through local courts. The rule does not impose a mandatory administrative penalty authority requirement, but only requires that a local ordinance or other local law imposes penalties for noncompliance by POTW's industrial users. However, the Agency's position is that other alternatives, including that of state agencies acting on behalf of POTWs, are not acceptable. The POTW itself must have the authority to seek or assess civil or criminal penalties.

In response to those commenters who favored termination of services and revocation of permits as alternatives to POTW penalty authority, EPA's position is that these are extreme measures and that it is therefore questionable whether such measures would be undertaken by a POTW except under extraordinary circumstances. One POTW stated that it used these measures as its primary enforcement authority. Another POTW commented, however, that disconnection of water service was not politically feasible and plugging of sewer lines without water service disconnection could create health problems. Because termination of service does not have the flexibility of less extreme civil and criminal penalties, such measures are not adequate primary enforcement mechanisms as required by § 403.8(f)(1). POTWs are required to have authority, for instance, under § 403.8(f)(1)(vi)(B), to immediately halt or prevent any discharges of pollutants which pose an immediate threat to the health or welfare of persons, to the endangerment of the environment, or to interfere with the operation of the POTW. Of course, such measures as revocation of permits and termination of services are vital complementary enforcement tools which should be utilized in addition to normal enforcement mechanisms.

A number of the commenters focused on problems presented by extraterritorial users and multi-jurisdictional concerns. Some of the POTWs who responded with such concerns apparently do have the power to assess penalties within their jurisdictional boundaries, but either have extra-jurisdictional users in their system or are contemplating the possibility of such a contingency and lack the authority to directly assess penalties against extra-jurisdictional users. Some POTWs went into the details of their present multi-jurisdictional arrangements. One municipal POTW, for instance, described its contractual arrangements with its suburban communities which provide that each suburban community is required to have its own ordinance which provides for civil or criminal penalties which, by virtue of its delegation agreements, the POTW may seek to impose.

Various arrangements may be necessary to insure compliance by extra-jurisdictional users. While multi-jurisdictional concerns are valid, the Agency has discussed them in the past and has issued guidance to resolve the difficulties presented by them. (*See*, e.g., "Guidance Manual for POTW Pretreatment Program Development", pp. 3–9 to 3–10 (1983); "Procedures Manual for Reviewing a POTW Pretreatment Program Submission", pp. 2–13 to 2–14 (1983).) Due to the unique circumstances of each multi-jurisdictional situation, problems on this type ultimately must be resolved on a case by case basis. For purposes of today's regulation, it is sufficient to emphasize that a POTW must have penalty authority which will enable it to directly enforce compliance with the terms of its pretreatment program with all of its users.

In addition to its proposal to require that POTWs have penalty authority in order to operate approved pretreatment programs, EPA proposed to set a minimum penalty authority for POTWs of $300 per day of violation. EPA also solicited comments on alternative amounts of $1,000 per day and the amounts required for state NPDES programs in 40 CFR 123.27(a)(3)(i), (ii). While most of the commenters supported some minimum amount, there was again some confusion as to what was proposed. Some commenters mistakenly though that the proposed rule called for a minimum penalty amount to be imposed by POTWs for all violations. Thus, some commenters stated that it was inconsistent with other penalty provisions for EPA to set a minimum penalty amount for POTW pretreatment programs. One commenter noted, for instance, that section 309(d) of the CWA sets maximum penalties but not minimum penalties. Another commenter thought it was inappropriate for EPA to set minimum penalties regardless of the nature or extent of the violation.

The Agency would like to clarify that this provision is intended to require that each POTW have the authority to seek or assess penalties up to a certain minimum amount. Such minimum penalty authority will allow a POTW to seek or assess penalties less than the stated figure, but will ensure that the POTW has adequate authority to penalize serious violations. The minimum penalty authority proposed was for at least $300 per violation per day. Today's rule requires that each POTW have a minimum penalty

authority of at least $1,000 per violation per day.

One trade association commented that a minimum penalty was not within EPA's authority because the Agency lacks explicit authorization similar to that of section 402(b)(7) of the Act, which requires state NPDES programs to include adequate penalty authority to enforce compliance. Another commenter opposed to minimum penalty amounts took the position that any minimum penalties should be set by states or municipalities. Another commenter opposed the imposition of a minimum penalty amount because the minimum was not necessary due to the fact that EPA already uses a minimum figure as a criterion in reviewing and approving POTW pretreatment program submissions. It was not clear from these comments whether these commenters opposed a requirement of a minimum penalty amount or a minimum penalty authority. In either event, the Agency was not persuaded by these comments that EPA does not have the authority to require that POTWs have a minimum penalty authority. It is the Agency's position that it is within the scope of EPA's authority to require such authority for POTWs and that this requirement comports with sections 307 and 402 of the CWA.

A principal issue of concern to most commenters was the amount of penalty authority to be required by today's rule. Some POTWs indicated that they had lower penalties already in place and asked that EPA lower the minimum amount. Other POTWs indicated that they had maximum penalties of $300 and asked that EPA not exceed this figure as a minimum amount. Some commenters expressed the opinion that $300 was a reasonable minimum and a sufficient deterrent. One POTW indicated that it intended to raise its maximum penalty to $1,000 per day, but that to raise the penalty any higher might create a conflict with the State's criminal law concerning misdemeanors and felonies. This commenter took the position that $1,000 per day is quite sufficient in light of stiff federal fines under section 309 of the CWA.

In determining what amount to set as a minimum amount for civil or criminal penalties, the Agency has considered the comments of POTWs with such limitations on their penalty authority. It is precisely because there may be such limitations on a POTWs penalty authority under state law that the Agency has allowed two years for POTW's without sufficient authority under their enabling legislation to obtain the necessary statutory authority and to amend their regulations accordingly. Most of the commenters who opposed increases in their penalty authorities appeared to be more concerned about the impact that this revised rule would have on their present penalty authority than whether such increases would have a greater deterrent effect on potential violators of their pretreatment program. A POTW's legal authority should be an effective deterrent to violations by a POTW's industrial users. One commenter, a waste treatment facility, stated that a maximum penalty of at least $300 per day is inadequate because it does not approach the enforcement liability for a direct discharger and, therefore, provides a discharger with "enforcement insulation." In proposing a $300 minimum, EPA did not intend to limit the penalty authority of POTWs to that figure, but rather intended to achieve a minimally acceptable deterrent effect and to reduce confusion and inconsistency in setting penalties.

Commenters who saw no need for POTW minimum penalty authority because of the stiff state and federal penalties set forth in section 309 of the CWA should understand that POTWs need to have such enforcement authority because they serve as the first line of enforcement. This is what the CWA and the national pretreatment program requires.

In promulgating its final rule, EPA has decided to establish a minimum POTW penalty authority of $1,000. In so doing, the Agency relies on comments which indicated that the proposed $300 amount was inadequate to achieve the objectives sought to be achieved by the Agency. A number of commenters supported a minimum penalty authority of $1,000 or greater and some commenters supported implementation of the NPDES amounts. The Agency was persuaded by comments such as that of one POTW that the proposed $300 amount was insufficient to deter violations and ensure compliance. This commenter recommended that the penalty be increased to a minimum of "$1,000 and preferably higher." The POTW cited above recommended implementation of the NPDES amounts. An environmental group stated that, since the CWA and the NPDES program allow the collection of up to $5,000 per day of violation, for civil fines, $300 falls far short. This commenter recommended a minimum penalty authority of at least $1,000 per day. Another commenter cited section 402(b)(8) of the CWA to the effect that $300 was far too small to "assure compliance with * * * pretreatment standards by each source."

One commenter stated that the Agency had an explicit directive from Congress to make pretreatment standards as stringent as BAT standards for direct discharges and expressed its concern about the inequity which might be created because of differences between the penalties assessed for violations by direct dischargers and those assessed for violations by POTW users. This commenter added that a penalty authority of $300 per day is unreasonable on its face because it is too low to enforce compliance with categorical standards. EPA recognizes this problem and agrees that the CWA requires equity between pretreatment standards and standards for direct discharges. The CWA does not require equivalent penalties, however, and thus today's action addresses the problem raised by this commenter by setting the minimum penalty authority for POTWs at $1,000 per day for violations by industrial users.

d. *Today's rule.* The final rule incorporates one change from the rule as proposed. It requires all POTWs with approved pretreatment programs to have the authority to seek or assess civil or criminal penalties for violations of pretreatment standards and other requirements by POTW users. It also sets a minimum penalty authority for all approved POTW programs of $1,000 per day for each day that an industrial user is in violation of the POTW's pretreatment program.

B.3. Modification of Approved POTW Pretreatment Programs [40 CFR 403.18]

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

When EPA or the State approves the program, conditions requiring implementation of the program are incorporated into the POTW's permit (*see,* § 403.8(c)). The POTW is then required to operate the program in compliance with applicable regulations, the approved program submission and any other conditions incorporated into the permit. However, changing conditions at the POTW may warrant changes in the operation of the program. These changes in program operation

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

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

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

Under proposed § 403.18, all program modifications were to be approved by the Approval Authority. After the POTW submitted modification request, the Approval Authority was to review the submission to determine whether the program modification was consistent with the local program requirements of § 403.8(f). Upon determination by the Approval Authority that the program modification was substantial, the review and approval was to be in accordance with the procedures in § 403.11(b)–(f), including adequate public notice. It would be administratively impossible to use these full procedures for all program modifications. Therefore, the proposal provided that for all modifications other than those determined by the Approval Authority to be substantial, the Approval Authority was not required to follow these procedures, but could act on the request without notice. Under the proposed rule, substantial modifications were those affecting the fundamental operation of the program. The proposed rule listed four examples of substantial modifications: (1) Changes to the POTW's enforcement authorities (e.g., remedies available for violations of pretreatment standards and requirements by industrial users); (2) changes to local limits contained in municipal ordinances; (3) changes to the POTW's control mechanism, as described in § 403.8(f)(1)(iii); and (4) changes to the POTW's method for implementing categorical pretreatment standards (e.g., incorporation by reference, separate promulgation, etc.). The Approval Authority would determine whether other modifications were substantial on a case by case basis. Criteria to be considered included: (1) Whether the changes would have a significant impact on the operation of the program, (2) whether the change would result in an increase in pollutant loadings at the POTW, and (3) whether the change would impose less stringent requirements on industrial users of the POTW. Where the change met one or more of these criteria, the modification would be considered substantial. EPA solicited comments on these criteria and on what other substantial modifications, if any, should be identified in § 403.18, as well as any other comments on the proposed approach.

The procedures for review by Approval Authorities of substantial modifications under the proposed rule (§ 403.11(b)–(f)) were identical to the procedures for approving local programs and provide for public notice and comment on the proposed modification (and an opportunity for a hearing). Significant changes to an approved program, like program approvals, are likely to be of interest to the public and regulated community and should only be acted on after the public has been notified and had an opportunity to comment on the changes. Moreover, public notice and comment enhances the enforceability of any modified or new provisions that are subsequently approved. The program modification provision is consistent with EPA regulations governing State NPDES program revisions (40 CFR 123.62). The public notice requirement for substantial modifications is also consistent with the encouragement of public participation, which is a fundamental policy of the Act (section 101(e)).

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

Under the proposed rule, program modifications were to be incorporated into the POTW's NPDES permit, because the permit contains conditions based upon the original program. For substantial modifications, the permit was to be modified as soon as possible after approval of the modification. Since these modifications would already have been subject to the public notice requirements of § 403.11, a second round of public notice and comment would not be required when the POTW's permit was modified to incorporate the program changes. Therefore, EPA also proposed to allow the incorporation of substantial POTW pretreatment program modifications into a POTW's NPDES permit to be carried out as a minor modification under 40 CFR 122.63 of the NPDES regulations. Alternatively, the Approval Authority might conduct concurrent program and permit modification, thus combining the public notice and comment process. (Many Approval Authorities have adopted this approach for local program approvals.) For non-substantial program modifications, the proposed rule provided that these were to be incorporated into the POTW's permit

when it is next reissued or modified for any other reason.

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

c. *Response to comments.* This issue generated a relatively large number of comments, the majority from POTWs. A number of States also commented on the proposal. In addition, comments were received from two industries, a trade association, and an environmental group. Two commenters supported the provision as proposed. Of the other commenters, only two expressed opposition to the idea of establishing regulatory procedures and criteria for modifications of POTW pretreatment programs.

Most of the commenters opposed the requirement that all program modifications receive prior approval from the Approval Authority on the ground that this would present a significant obstacle to continuous program improvement and would impose an unnecessary time burden on the POTW and Approval Authority. Numerous suggestions were offered as to which modifications should require prior approval. Several POTWs preferred the alternative, mentioned in the preamble to the proposal, of requiring prior approval only for "substantial" modifications, and defining "substantial" to include certain identified modifications and others meeting specified criteria, with this later determination to be made by the POTW. A number of POTWs suggested requiring prior approval only for modifications that make applicable limits and other requirements less stringent or otherwise relax or weaken the approved program. A State commented that deletion of significant industrial users identified in a POTW's original program submission should be considered a substantial modification requiring Approval Authority approval. Commenters also identified several modifications for which, they argued, prior approval should not be required, including: (1) Changes in administrative procedures that comply with the federal pretreatment regulations, (2) increases in budgets, equipment and personnel, (3) changes to local limits, and (4) changes in response to changes to the federal regulations. An industry trade association recommended that the criteria for substantial modifications requiring prior approval be expanded to include changes that would result in more stringent requirements being imposed on industrial users.

EPA agrees with these commenters that prior approval of all program modifications is impracticable and unnecessary, and is modifying the final rule to require prior approval only for "substantial" modifications. The Agency further agrees with those commenters who supported the alternative of identifying certain specific modifications as "substantial" and providing additional criteria for determining, on a case by case basis, whether other modifications are "substantial." The final rule has been modified accordingly. Under the rule, prior approval is required for the specific modifications identified as "substantial" and for other modifications meeting the enumerated criteria. The list of identified "substantial" modifications has been expanded from the four in the proposal to include the following additional modifications: (1) Changes to all local limits (not only those contained in ordinances), which result in less stringent local limits, (2) changes to the POTW's legal authorities (in addition to changes to the POTW's enforcement authorities), (3) a decrease in the frequency of self-monitoring or reporting required of industrial users, (4) a decrease in the frequency of industrial user inspections or sampling by the POTW, (5) changes to the POTW's confidentiality procedures, (6) significant reductions in the POTW's program resources (including personnel commitments, equipment, and funding levels), and (7) changes in the POTW's sludge disposal and management practices.

EPA does not agree with the commenter who recommended classifying deletions of significant industrial users identified in a POTW's original program submission as a substantial modification. Such deletions are presumably based upon the fact that the industrial user no longer discharges to the POTW, and would therefore generally not be expected to have a significant impact on the operation of the POTW's program. However, where there would be such an impact, the deletion would meet one of the criteria for substantial modifications and the POTW would be required to treat it as such. Moreover, if in response to the deletion the POTW wishes to make the remaining industrial users' local limits less stringent, this would meet another of the criteria and the change would be considered substantial.

EPA also does not agree with the commenter who recommended that the criteria for substantial modifications requiring prior approval be expanded to include changes that would result in more stringent requirements being imposed on industrial users. The commenter's concern appears to be that unless these changes are included in the criteria, industrial users will not have an adequate opportunity to participate in changes having a major impact on their operation. However, federal law does not prohibit POTWs from making their programs more stringent than when they were approved, and adequate protection of industrial users' due process rights can be addressed at the local level. Users should already have ample opportunity to be heard in the context of individual permit actions, ordinance amendments, and other local proceedings affecting them.

Under today's final rule, the determination of whether a particular modification not included on the list of "substantial" modifications nonetheless meets the specified criteria for being classified as such would be made in the first instance by the POTW, subject to subsequent review by the Approval Authority. One commenter asserted that EPA cannot legally delegate to a POTW the authority to determine whether a modification is "substantial." The

commenter misconstrues the Agency's action. EPA has provided a comprehensive list of POTW program modification which the Agency has identified as "substantial" modifications. In addition, the Agency has set general standards which any other program modification may be determined to be substantial, and thus subject to prior approval by the Approval Authority. These standards are merely to be applied by the POTW to situations not included on the list of substantial modifications. EPA acknowledges that this process could conceivably result in some modifications that are actually substantial not being subjected to prior Approval Authority approval. The likelihood of this has been reduced, however, by the expansion of the proposed list of identified "substantial" modifications in the final rule, so that substantial modifications which are not listed and which do not clearly meet the general standards of the rule are likely to be of less significance and thus properly the subject of subsequent review by the Approval Authority. Therefore, it is the Agency's position that this does not constitute a "delegation" of authority to POTWs. In the event that a POTW should designate as "non-substantial" a program modification that is in fact "substantial," the POTW would face a "penalty" in that the POTW will then have to resubmit the program modification for approval as a "substantial" program modification.

Commenters offered a number of approaches for dealing with modifications not requiring prior approval (i.e., "non-substantial" modifications), including evaluation during program audits, and notification in the POTW's annual report. Audits are not an appropriate mechanism for dealing with "non-substantial" program modifications. A particular program might not be audited more than once in every five years. Although "non-substantial" modifications are presumed to be relatively insignificant, the Approval Authority should nonetheless be informed of them in a timely fashion. These modifications should be reported to the Approval Authority at least 30 days in advance of when they are to be implemented by the POTW. The final rule has been modified to provide for this. Consequently, "non-substantial" program modifications will be thus deemed to have been "approved" by the Approval Authority, unless the Approval Authority determines that a modification reported as a "non-substantial" modification is in fact a substantial modification, within 90 days of the submission of a statement to the Approval Authority.

One POTW suggested that instead of being required to obtain prior approval for "substantial" program modifications, POTWs should only be required to give notice of program modifications to the Approval Authority, who would then have only retroactive veto authority for all program modifications. However, for unauthorized program modifications, disapproval prior to implementation by the POTW is preferable to disapproval "after the fact." The Agency understands the concern expressed by several POTWs that prior review by the Approval Authority may delay changes and hinder effective program implementation. However, where an approved program is being substantially modified, prior review by the Approval Authority is necessary to ensure that the modified program will continue to comply with all applicable requirements. Moreover, as discussed below, the POTW's NPDES permit will also need to be modified to correctly reflect the program as modified. By requiring prior review and public notice of "substantial" program modifications, it becomes possible to allow even significant program modifications to be processed as minor permit modifications under 40 CFR 122.63, as amended today (see discussion below) thereby simplifying the entire process.

A State commenter suggested that where a program modification involves a change to the POTW's ordinance (which, according to the commenter, would be the case for all four of the substantial modifications specified in the proposal), additional public notice is unnecessary because public input is already solicited in the ordinance revision process. EPA agrees that where public participation in the process of amending the ordinance is equivalent to that required under § 403.11, additional public notice and comment for the program modification would be duplicative. However, because not all municipalities may have equivalent public participation procedures for amending their ordinances, the Agency has concluded that it would be inappropriate to allow a blanket exemption from the § 403.11 procedures for program modifications that involve amendment to a local ordinance.

Several commenters addressed the issue of incorporation of program modifications in the POTW's NPDES permit. Two commenters, a POTW and a State, asserted that a permit modification is not necessary every time a POTW's program is modified, since the permit language incorporating the original program may be general enough to also encompass the modified program. Another POTW commented that only major program modifications with substantial operational impact should be incorporated in the POTW's permit. In response, EPA notes that the program initially incorporated into the POTW's permit is the program *as originally approved.* Changes in the operation of the program that differ from the original program submission are thus beyond the scope of what has been incorporated in the permit, and the permit must be modified accordingly in order for the POTW to be in compliance.

One commenter apparently misunderstood the proposal to require incorporation of program modifications in the POTW's permit only on permit reissuance. Under the proposal, substantial program modifications would be incorporated into the POTW's permit through a minor permit modification under 40 CFR 122.63 of the NPDES regulations (as amended on June 4, 1986, 51 FR 20426). Other program modifications would have been incorporated into the permit the next time the permit was reissued or modified for another reason. Thus, it appears the commenter was referring to the proposed permit modification procedure for non-substantial program modifications.

Under today's final rule, § 122.63 is being amended, as proposed, to add a new paragraph (g) which will allow "substantial" program modifications to be incorporated into the POTW's permit through the minor permit modification provision of 40 CFR 122.63. As discussed, this is a reasonable approach because, even though these are not minor changes in the POTW's program, they are subject to the full notice and comment procedures of §403.11(b)–(f). Under the final rule, "non-substantial" program modifications, although not subject to prior review and public notice, are deemed to be "approved" by the Approval Authority and thus will also fall within the ambit of 40 CFR 122.63. In this way, the Agency has adopted, at least in part, the request of the environmental group that commented that, since the permit forms the basis for enforcement, the permit should be kept up to date for all modifications to the POTW's program. Since "non-substantial" program modifications do not raise the concerns presented by "substantial" program modifications, it is not necessary to require full notice and comment procedures and thus the Agency has determined that "non-substantial"

program modifications can be treated as minor permit modifications without such procedures. In the event that the Approval Authority should determine, upon subsequent review, to reject "non-substantial" program modifications as "substantial" program modifications, then such program modifications would, of course, then be subject to full notice and comment procedures.

Several POTWs recommended setting a time limit for Approval Authority review of program modifications. The recommended times ranged from 30 to 90 days. EPA agrees that a time limit for these reviews is desirable to avoid undue delay in acting on proposed program modifications. Approval Authorities have 90 days from the date of public notice to review original program submissions (*see,* § 403.11(a)). Since review of modifications to these programs after approval can generally be expected to be considerably less complicated than review for original program approval, 60 days is a reasonable period for reviewing such modifications, especially in view of the importance of avoiding delay in implementing necessary modifications. Therefore, the Agency is also modifying § 403.11(a) to impose a 60-day time limit on Approval Authority reveiw of substantial program modifications.

Since non-substantial program modifications may be submitted only for review by the Approval Authority because they may be numerous and because they are presumed to result only in incidental changes to a POTW's program, the Approval Authority should have 90 days to review such modifications to determine whether they need to be resubmitted as substantial program modifications. The final rule has thus been modified to provide for this. In the event that such program modifications are then resubmitted for approval as substantial program modifications, the Agency will then have 60 days to review such modifications, as with other substantial program modifications.

Finally, in response to a request from one commenter, EPA emphasizes that only those portions of a POTW's program that are being substantially modified are subject to public notice. This is consistent with the procedures for modifying NPDES permits (*see,* 40 CFR 122.62, 40 CFR Part 124).

d. *Today's rule.* The final rule has been modified from the proposed rule in the following respects: (1) Prior approval is required only for "substantial" modifications; (2) the list of identified "substantial" modifications has been expanded to include changes to *all* local limits (not only those contained in a local ordinance) resulting in less stringent local limits, changes to the POTW's legal authorities (in addition to changes in the POTW's enforcement authorities), a decrease in the frequency of industrial user inspections or sampling by the POTW, a decrease in the frequency of self-monitoring or reporting required of industrial users, changes to the POTW's confidentiality procedures, significant reductions in the POTW's program resources (including personnel commitments, equipment, and funding levels), and changes in the POTW's sludge disposal and management practices; (3) the determination of whether a particular modification not included on the list of "substantial" modifications nonetheless meets the specified criteria for being classified as such would be made in the first instance by the POTW, subject to later review by the Approval Authority; (4) non-substantial modifications are required to be reported to the Approval Authority at least 30 days prior to implementation subject to subsequent review by the Approval Authority within 90 days; and (5) the Approval Authority has 60 days to review substantial program modifications. The final rule also provides that the Approval Authority may designate as "substantial" other specific modifications in addition to those listed in the rule. The Agency is also finalizing the change to § 122.63, by adding new paragraph (g), as proposed.

C. POTW and State Pretreatment Program Approval

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

a. *Existing rule.* A POTW seeking pretreatment program approval must submit to the Approval Authority certain information described in § 403.9(b), including a statement certifying that the POTW has adequate authority to carry out the program, copies of all relevant legal authorities, a description of the POTW's organization for administering the program, and a discussion of resources available for program implementation. POTWs applying for removal credit authority must submit an application containing the information required in § 403.7(e) including a list of pollutants for which removal credits are proposed, data on the POTW's consistent removal of these pollutants, proposed revised limits, a certification that the POTW has an approved pretreatment program, a description of the POTW's sludge use and disposal methods, and a certification that granting removal credits will not cause a violation of the POTW's NPDES permit. The procedures for Approval Authority review of and action on these requests are the same. After receiving the applicable submission(s), the Approval Authority is required to make a preliminary determination of whether the submission contains all the items required under § 403.9(b) or, if appropriate, § 403.7(e). If the submission is determined to be complete, the Approval Authority must notify the POTW and initiate the public notice and review procedures set forth in § 403.11. Following public comment, the Approval Authority completes its review of the program submission and issues its final determination. The regulations require the Approval Authority to issue its final decision within 90 days, unless the comment period is extended beyond 30 days, in which case the Approval Authority shall have an additional 90 days to complete its review. However, the existing regulations do not specify how much time the Approval Authority has in which to make its initial completeness determination.

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

c. *Response to comments.* Nine commenters submitted comments on this proposed change. Six of the nine fully supported this change to help ensure timely completion of Approval Authority action on pretreatment program or removal credits authority requests. These six commenters included POTWs, industries, an industry association, and an environmental group.

One Approval Authority was opposed to this change, citing its current workload, and stating that "it is unlikely that adequate review of pretreatment

program submittals can consistently be accomplished in 60 days * * * ." As noted above, the Agency agreed with the PIRT finding and proposed the 60-day deadline for completeness determinations. The Agency does not believe that this will be a significant burden on Approval Authorities. This change will only require that an Approval Authority review a submission for completeness, not adequacy. The Agency does not expect that the Approval Authority will be able to state at the end of the 60 days whether the program submitted is approved, only that the submission is complete.

One POTW and one industry group submitted comments on this proposed regulatory change that questioned the legal status of removal credits. This issue is discussed below in the response to comments for Approval Procedures for POTW Pretreatment Programs and POTW Revisions of Categorical Standards. This change only pertains to the timing of completeness determinations on removal credits applications, not whether such applications are allowed.

d. *Today's rule.* EPA is promulgating this change as proposed.

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

a. *Existing rule.* The CWA amendments of 1977 required that all State NPDES programs include pretreatment programs. For new State programs, a pretreatment program must be included as part of the NPDES submission. Approved NPDES States were required to request modification to include pretreatment by March 27, 1980 (§ 403.10(b)). The Water Quality Act (WQA) of 1987 amends this requirement to allow partial program approvals provided certain requirements are met. The requirements would allow approval of NPDES authority without pretreatment program submission. However, the WQA also requires that where a partial program is approved, the program be part of a phased effort resulting in complete assumption of all aspects of the program within five years.

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

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

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

b. *Proposed change.* EPA proposed to delete § 403.10(g)(1)(iii), thus requiring all States to have adequate regulations at the time of program approval. As noted above, under existing regulations, the option of not developing regulations prior to program approval is available only if the State program description fully describes the procedures it intends to use and how it intends to implement each of the required legal authorities in the absence of regulations. This also necessitates a detailed discussion of how each of these required legal authorities can be directly applied and enforced. In addition, the Attorney General's Statement must fully explain the State's legal authority, with special emphasis on the direct applicability and enforceability of the State statute without implementing regulations. Obviously, a State can only meet this burden if the statute is so detailed as to be "self-implementing."

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

c. *Response to comments.* EPA received several comments regarding this proposed regulation. One Control Authority and two national environmental interest groups supported this change. The Control Authority merely stated that the change seemed reasonable, although it had no effect on that Authority. One environmental interest group cited its litigation against a State pretreatment program that did not have effective regulations as the obvious reason why this change was needed. Another environmental group supported the proposed revisions based on the recommendations at pages 66 and 67 of the PIRT report.

The one environmental group also stated that the Agency should allow no more than 30 days for States with approved pretreatment programs that do not have sufficient regulations to submit regulations to rectify the situtation. This group believes the 30-day time period is justified for three reasons: (1) It is the deadline recommended by PIRT; (2) it is the deadline mandated by Congress in

the CWA; and (3) States have had almost seven years to adopt the necessary regulations and should not be rewarded for recalcitrance. One State Approval Authority also suggested that the Agency establish a time frame for deficient State pretreatment programs to promulgate regulations. The commenter suggested that the Agency keep in mind that regulation development at the State level is a lengthy process. EPA agrees with the commenters that a time frame for adopting State regulations is necessary, but does not agree with the commenter that 30 days is a sufficient time period for promulgating new State regulations. EPA's State NPDES program regulations already require State programs to establish regulations or amend statutes within certain time periods after federal regulations or statutes are amended. (*See,* 40 CFR 123.62(e).) Adoption of State pretreatment regulations should be consistent with the NPDES regulations. Thus, the Agency is today promulgating a requirement in § 403.10(g) that a State establish pretreatment regulations within one year from the effective date of today's rule, unless a statutory change is required in which case regulations must be in place within two years after the effective date of today's rule.

One State Approval Authority recommended that EPA not go forward with this proposed change. That Authority stated that the current requirements are adequate to determine if a State program can be approved, and that the requirement to have State regulations in place could unnecessarily delay implementation of the program. EPA does not agree with this commenter. As noted above in section (b), the Agency has received information and is convinced that State pretreatment programs cannot be run effectively without implementing regulations in place.

d. *Today's rule.* The Agency is amending § 403.10(g) as proposed, and adding the requirement that States promulgate necessary regulations within one year after the effective date of today's rule, unless a statutory change is necessary in which case regulation must be adopted within two years after the effective date of today's rule.

C.3. Approval Procedures for POTW Pretreatment Programs and POTW Revisions of Categorical Standards [40 CFR 403.11(b)]

a. *Existing rule.* Section 403.11 sets out the procedures for approving POTW pretreatment programs and applications for removal credit authority. Upon receipt of a local program submission or removal credit application, the Approval Authority must first determine whether the submission is complete. The elements of a complete submission are set out in § 403.9(b) for POTW program approvals and §§ 403.7(e) and 403.9(d) for removal credits. After determining that a submission is complete, the Approval Authority must provide notice and an opportunity to request a public hearing. Section 403.11(b) requires issuance of the public notice within 5 days after the completeness determination.

b. *Proposed change.* PIRT recommended changing the 5-day time limit for issuing public notice following a completeness determination to 20 work days. PIRT concluded that 5 days was too short because Approval Authority procedures are often not sufficiently expeditious to meet that limit. EPA agreed with PIRT's recommendation and the 20-day limit recommended by PIRT.

c. *Response to comments.* Commenters included a POTW, an industry, a trade association, a State and an environmental group. Most supported the proposal. The State commenter, however, felt that the time period for issuing public notice following a completeness determination should be extended to 45 instead of 20 days. The commenter maintained that more time is needed to accommodate all necessary interactions with the public and internal communications.

EPA maintains that PIRT's original recommendation of 20 days is adequate for issuing public notice of POTW pretreatment program submission and applications for removal credit authority after a completeness determination. As stated in the preamble to the proposed rule, the 20-day time limit is more realistic than a 5-day limit while still conforming to the basic intent of providing prompt public notice of submissions that are under Agency review. The State commenter did not provide any details as to why 45 days was required. In the absence of such information, it is appropriate to follow PIRT's recommendation.

One commenter noted that the proposed language referring to § 403.7(c), which covers provisional removal credits, requires clarification. The proposed language requires public notice within 20 days after "the approval authority elects to review the removal allowance submission." The commenter requested clarification of when the approval authority election is triggered. The reference to § 403.7(c) in the proposal was an error. The intended section is § 403.7(d), which allows POTWs required to develop pretreatment programs to conditionally grant removal credits subject to certain terms and conditions. Section 403.7(d)(6) allows the Approval Authority to delay review of conditional removal credit applications, with the conditionally revised limits remaining in effect until such review is conducted. The language in the proposed rule was intended to provide for such delayed review. However, because the vast majority of required POTW pretreatment programs have already been approved, and in light of the recent decision by the United States Court of Appeals for the Third Circuit striking down the existing removal credit provision (§ 403.7), *Natural Resources Defense Council, Inc. v. EPA,* 780 F.2d 289 (3d Cir. 1986), the Agency has decided to delete this reference from the final rule.

d. *Today's rule.* EPA is promulgating the rule as proposed, except that the language referencing § 403.7(c) has been deleted.

D. Reporting and Compliance Monitoring

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

a. *Existing rule.* To establish an effective local pretreatment program, it is essential that the POTW have complete information on the nature and quantity of pollutants contributed by each of its industrial users. Section 403.12(b) requires that all industrial users, including new sources, that are subject to categorical pretreatment standards submit baseline monitoring reports ("BMRs") to the Control Authority. These reports supply basic information to identify each contributing industrial user, the characteristics of the user's discharge and the user's compliance status. Information required to be reported in BMRs includes: a list of environmental control permits held by the industrial user, a description of the user's operations, information on flow and amounts of regulated pollutants discharged to the POTW, and a certification of whether the user is currently in compliance with the applicable categorical standard(s). If the industrial user is not in compliance when the BMR is prepared, the report must also include a compliance schedule showing the shortest time by which compliance will be achieved. The baseline monitoring report does not apply to discharges not covered by categorical standards. Elsewhere in today's rulemaking, EPA is clarifying that POTWs should require such reports where the POTW determines that

information on these discharges is necessary.

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

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

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

c. *Response to comments.* EPA received comments from numerous POTWs, several industries, two States, an environmental group and a Federal agency. Most of the commenters supported the proposal. However, several commenters expressed opposition to various aspects of the proposal.

Two commenters found the 90-day time period to be inadequate. One of these commenters gave no support for its position, but the other, an environmental group, argued that there would be substantial political pressure on the POTW to allow start-up of a new facility 90 days prior to the planned commencement of operations, even if a violation of the POTW's permit would result. The commenter suggested that instead of 90 days, EPA require 6 to 12 months' notice to the POTW by new dischargers to the system. EPA realizes that in some cases political pressure might be present, particularly where new construction is involved. However, the Agency feels this factor is adequately addressed by making 90 days the minimum amount of time required between submittal of a BMR and commencement of discharge. Based on the other comments received on this issue, it is the Agency's belief that in most cases 90 days will allow sufficient time for the POTW to ensure that the proposed discharge is acceptable and will not cause permit violations or other problems at the POTW. Of course, where 90 days is not adequate, the POTW should require earlier submittal of the BMR. In all cases, EPA encourages the earliest possible contact between the POTW and new dischargers to its system prior to the commencement of discharge. This is especially important in cases of new construction, where various pressures are more likely because of the relatively large investment involved.

Three POTWs commented that 90 days is not always necessary, and that a shorter time period may be appropriate in some cases. One POTW expressed concern that the industrial user would be unnecessarily burdened where a shorter time is sufficient. Another POTW contended it would be illogical to require submittal of the BMR earlier than a permit application (e.g., where the POTW requires that permit applications be submitted less than 90 days prior to discharge). Two of the commenters felt the time period should be left to the POTW's discretion. One commenter recommended that the BMR deadline should be either: (1) At least 90 days prior to discharge, or (2) at the time an application for a sewer connection permit, building permit, or plumbing permit is made.

Although in some cases a shorter period may be adequate, based on all the comments received, 90 days is a reasonable minimum. To avoid having different deadlines for BMRs and permit applications, POTWs with permit application deadlines of less than 90 days may want to lengthen these deadlines to match the BMR deadline. (Making these deadlines coincide in all cases may not be possible, however, because the appropriate BMR submittal deadline may vary from case to case, depending, for instance, on whether new construction is involved.)

Two commenters suggested that BMRs for new sources should include information on the proposed pretreatment, if any, a new source plans to install. EPA agrees with this suggestion and is modifying the final rule to include this requirement. This will assist the POTW to more thoroughly assess the potential impact on the POTW and the facility's ability to achieve compliance with applicable standards.

A State commented that it seems unnecessary to require new sources to estimate the concentration of pollutants for purposes of the BMR, which would probably be very difficult and provide only a rough estimate, since actual data is required in the compliance report submitted 90 days after commencement of discharge. This comment overlooks the fact that the POTW needs some preliminary information on the nature of the industrial user's discharge, whether actual or estimated, in order to be able to make an initial determination of appropriate discharge limits prior to the industrial user's commencing discharge. With new sources, this will necessarily be estimated information. When actual data is received in the 90-day compliance report, it will be used to adjust the industrial user's limits as necessary.

Finally, an industrial commenter noted that § 403.12(b) does not require resubmittal of information in a BMR if the information has previously been submitted to the State Director or the Regional Administrator in compliance with 40 CFR 128.140(b) (1977), an earlier reporting requirement predating the Part 403 pretreatment regulations. The commenter stated that existing

industrial users that become part of an industrial category (e.g., through promulgation of an applicable categorical standard) may already have reported some of the required BMR information to the POTW, and should not be required to resubmit such data in a BMR.

The old regulatory provision cited by the commenter contained certain reporting requirements for industrial users. These required reports were to be submitted to either the State Director or the Regional Administrator. When the current Part 403 pretreatment regulations were initially promulgated, a provision was included so that industrial users that had submitted information under the old Part 128 provision would not be required to resubmit this data as part of their BMR under § 403.12(b) of the new regulations. However, there was no provision in the old regulations regarding submittal of reports to the POTW. The commenter, however, wants to extend the allowance for previously submitted information in § 403.12(b) to include any data previously submitted to the POTW. EPA declines to follow this suggestion. The old regulatory provision contained specific reporting requirements for industrial users. To compile current BMR data on an industrial user who had submitted reports under this provision, the POTW need only compile at most a relatively small number of documents. However, under the commenter's suggested approach, the POTW may need to retrieve numerous documents submitted over time by the industrial user, each of which may contain only a small fragment of the required BMR data. The considerable burden this may represent for the POTW outweighs any inconvenience to the industrial user of resubmitting some previously submitted data.

d. *Today's rule.* EPA is promulgating the rule as proposed, except that BMRs for new sources will now be required to include information on the pretreatment equipment the new source proposes to install to meet inapplicable discharge limits. Again, it should be emphasized that the 90-day BMR deadline for new sources (and sources that become industrial users after promulgation of an applicable categorical pretreatment standard) is a minimum. The POTW may (and should) require earlier submission where appropriate. The Agency also wishes to reemphasize the importance of early contact between the POTW and new dischargers to its system, particularly in cases involving new construction.

D.2. Measurement of Pollutants [40 CFR 403.12(b)(5)(iv)]

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

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

A pretreatment baseline report is comparable to the industry NPDES permit application form direct dischargers (e.g., form 2C). Both are means of collecting preliminary information about the particular facility and its discharge, and are used as a basis for determining whether additional steps need to be taken to achieve compliance with applicable discharge limits. Only one sampling and analysis of the specific pollutants is required for the NPDES permit application [40 CFR 122.21(g)(7)]. The proposed change to the BMR sampling requirement would, therefore, bring it in line with that required by its counterpart in the NPDES program.

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

c. *Response to comments.* Twenty-six responses were received on the proposal to reduce the minimum number of samples needed for a BMR.

One commenter suggested that the former regulatory minimum of three samples be retained unless the industrial user can demonstrate that fewer samples are sufficient. This suggestion would not be feasible. An industrial user would be adequate prior to starting any sampling effort. However, the industrial user might not be able to determine the adequacy of only one or two samples until after the sampling is complete. The current regulation requires that the BMR is to be written from data that is collected over a one or two week period. This time period might prove to be too short to allow adequate analysis of the data received from one or two samples. Therefore, in order to ensure the adequacy of the information, industrial users would perform three (or six) samples anyway. It is better for an industrial user to be required to perform only one sample unless the Control Authority determines more are needed after reviewing the BMR.

Several other commenters stated that one sample was not sufficient to provide an accurate description of an IU's discharge. The commenters noted that an industrial user's wastestream can be highly variable, and requested that the Agency not change the regulatory requirement of performing three (or six) samples. The Agency is not convinced that a one sample minimum is not adequate. The BMR is meant to serve as a "snapshot" of an industrial user's discharge for purposes of ascertaining the compliance potential of the facility with the categorical pretreatment standards applicable to that facility. BMRs may also be used by an industrial user to request a compliance schedule to meet the mandatory pretreatment

standards. The Control Authority has many other sources of information about the industrial user's discharge including EPA-issued guidance and development documents for the categorical industries, and information from BMRs submitted for similar facilities discharging to the Control Authority's POTW(s). The information in these documents can be compared to the information in the BMR from an industrial user so that the Control Authority can determine whether the BMR data accurately reflects discharges from the facility or whether further sampling is required. Where the data submitted with a BMR indicates the discharge is similar to that expected from that type of industry (as delineated in the development document, guidance document, or another BMR), then no further sampling should be needed. However, where the data contained in a BMR is vastly different from that contained in the references, then further sampling would be indicated.

Furthermore, this system would be more likely to obtain better information on the nature of an industrial user's discharge. As these commenters noted, an industrial user's discharge can be highly variable. Three samples in a one week period (or six samples in two weeks) may not detect this variability. However, a POTW could specify a sampling protocol that would more effectively detect the variability in this discharge.

Two commenters stated that because most BMRs have already been submitted, this change will either reward recalcitrant industrial users, or is moot. Although it would appear that this change rewards recalcitrant industrial users, those that have missed deadlines for submission of BMRs are subject to enforcement actions for failure to comply with the pretreatment requirements.

Several commenters made some suggestions as to points needing further clarification. One Control Authority stated that it does the BMR sampling and that it will do more sampling as appropriate. Another commenter suggested that the industrial user should be given the option of doing more sampling without being asked by the Control Authority. Nothing in the proposed regulation would prevent a POTW from sampling an industrial user in lieu of the industry sampling its wastestream. Nor would it limit the amount of samples an industrial user may perform. The requirement of § 403.12(b)(5) is a minimum requirement. However, where an industrial user decides to sample more than once for the BMR, this fact and the total number of samples taken should be noted on the BMR so that the Control Authority can better analyze the data.

Two commenters requested that EPA clarify that further sampling could be required by the Control Authority; another commenter suggested that the regulatory language be changed so that further sampling would be required if one sample was found to be inadequate. The language in the proposal clearly establishes that the single sample is a minimum requirement. The preamble to the June 1986 proposal, today's preamble and these responses to comments should be read together to indicate that further sampling is not prohibited if one sample proves to be inadequate. Nothing in any of this language indicates a prohibition on a Control Authority requiring further sampling. In fact, the Agency encourages Control Authorities to require more sampling if they find that the one sample is inadequate. However, the Agency does not agree that further testing by an industrial user should be made mandatory because this could constrain several options that a Control Authority might want to pursue after determining that a single sample is inadequate. For instance, after making the inadequacy determination, a Control Authority might want to perform further sampling itself, or have an outside contract laboratory do the work. Therefore, the Agency has chosen not to include the suggested language.

d. *Today's rule.* EPA is promulgating this rule as proposed.

D.3. Sampling Techniques [40 CFR 403.12(b)(5)(iii)]

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

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

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

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

In response to PIRT's recommendation, EPA proposed to change the type of sampling that will be allowed by industrial users where flow-proportioned composite sampling is not feasible to allow time-proportioned or grab sampling. Under today's proposal, the industrial user must demonstrate to the Control Authority that the use of an automatic sampler is infeasible and that time-proportional sampling or grab sampling will provide a representative sample of the effluent being discharged. The proposal also would require the Control Authority to make the determination of whether flow-proportional sampling is feasible. Where the Control Authority determines that flow-proportional sampling is infeasible, it would waive the requirements and allow grab or time-proportional sampling. Consistent with recent revisions to the NPDES regulations (49 FR 38046, September 26, 1984) EPA also proposed to amend § 403.12(b)(5)(iii) to provide that where grab sampling is used, a minimum of four grab samples must be taken.

c. *Response to comments.* EPA received comments from 24 entities on these proposed regulation revisions.

Eight of the commenters stated that they were in favor of the proposal and three commenters stated that they were not in favor of the proposal. The remaining thirteen commenters seemed to favor the intent of the proposal, but suggested major changes be made to the proposed regulation. It appears that several of the commenters in this last group were confused about the application of this provision. These commenters thought that the provision applied to samples taken for compliance monitoring by an industrial user. However, this provision applies to sampling performed by an industrial user in developing the baseline monitoring report for the facility.

The Agency has decided to promulgate the regulation as proposed with only minor revisions as suggested by some of these commenters. The intent of the proposed regulation revision was to remove the requirement in the existing regulation that an industrial user must use "the flow-proportional composite sampling techniques specified in the applicable categorical Pretreatment Standard." This change was being made in response to a PIRT notation that Pretreatment Standards do not specify any required sampling techniques. Although the proposal dropped the reference to the pretreatment standards, it incorporated the requirement that an industrial user use flow-proportional techniques except when sampling for five specific pollutants: pH, cyanide, total phenols, oil and grease, and sulfide, where grab samples would be allowed. Almost all of the commenters on this provision noted that certain pollutants should or should not be sampled by a particular technique (e.g., total toxic organics should be sampled by a grab sample, pH can be sampled by other than a grab sample, and volatile organics should be a grab sample). The Agency agrees that volatile organics are more properly sampled by grab sampling. Therefore, today's final rule adds volatile organics to the list of pollutants to be sampled by a grab sample. The Agency has taken this step to alleviate the confusion over whether volatile organics are more appropriately sampled as a grab sample or composite sample. If a POTW or Industrial User needs further information on what type of sample should be obtained, the methods described on pages 3–21 and 3–22 in the "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986) discuss when time-proportional or grab samples may be used for sampling wastewater pollutants at an industrial user's facility.

One clarification that the Agency would make regarding the proposal is in defining the term "infeasible." The PIRT recommendation centered on the infeasibility of flow-proportional sampling. The problem identified was not with the ability to get a sample, but rather in the inability to measure flow through the industrial user's sewer connection. The Agency's experience, as verified by the PIRT recommendation, is that the infeasible aspect of flow-proportional sampling is the measurement of the flow. In many instances, time-proportioned sampling will use the same automatic sampler as used in flow-proportional sampling. However, because a flowmeter is not required, time-proportional sampling can be performed.

Today's final rule allows the use of time-proportional automatic or individual grab sampling where it is infeasible to monitor flow or perform flow-proportional sampling. The only requirement is that the sampling be representative of the facility's discharge. The only time grab sampling is required is for the six pollutants listed.

d. *Today's rule.* EPA has altered the proposed provision to reflect the commenters' concerns regarding specific pollutants. The final rule clarifies that four (4) grab samples are required for the listed pollutants, and the list has been expanded to include volatile organics. Time-proportional or grab sampling is allowed if flow-proportioned sampling is not feasible, including where flow metering is not feasible. Otherwise, flow-proportional monitoring is required.

D.4. Annual POTW Reports [40 CFR 403.12(i)]

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

b. *Proposed change.* PIRT recommended that EPA set forth in the General Pretreatment Regulations the requirement of an annual POTW report for all POTWs with pretreatment programs. This report would be submitted to the Approval Authority and would describe program implementation activities conducted by the POTW during the preceding year. The Task Force stated that such a report is essential to the adequate oversight by the Approval Authority, whether EPA or approved States, of POTW pretreatment programs. By describing the annual report in the regulations, a greater degree of uniformity will be ensured among the reports submitted to Approval Authorities.

In response to PIRT's recommendation, EPA proposed to add a new paragraph (i) to § 403.12 requiring each POTW with an approved pretreatment program to submit a report to the Approval Authority at least annually describing program implementation activities. (The submission date will be set in the POTW's NPDES permit.) Under the proposed rule, the report would contain, among other things, an updated list of the POTW's industrial users (or a list of additions and deletions keyed to a previous list) showing the categorical pretreatment standards and/or local limits applicable to each, a summary of the compliance status of each industrial user over the period covered by the report, a summary of compliance monitoring and enforcement activities (including inspections) conducted by the POTW during the reporting period, and any other information requested by the Approval Authority, as appropriate for adequate oversight of the POTW's pretreatment program. This information would provide the Approval Authority with the means to effectively perform its oversight responsibilities with respect to the POTW pretreatment programs within its jurisdiction. By adding the provision to the regulations, all such reports would be required to contain at least the same minimum information, thus providing some consistency. Of course, the Approval Authority could impose such other requirements as may be necessary or appropriate.

The proposed rule also referenced additional information on these reports made available in EPA's "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986). By expressly providing for adequate oversight in this way, the obligations of EPA, the State, and POTWs with respect to the implementation of the national pretreatment program could be met more effectively.

c. *Response to comments.* The majority of commenters on this issue were POTWs. Comments were also received from several States, two environmental groups and one industry. All of the commenters supported the annual report concept. Many of them supported the provision as proposed. Several others offered comments on various aspects of the proposal, including the scope of the report, the relationship of annual reports to audits, terms requiring definition or clarification, the degree of Approval Authority discretion allowed, resource implications, and the usefulness of a standardized form for annual reports.

Three commenters suggested that the coverage of the report be limited to a certain group of industrial users. One of the commenters recommended limiting the report to "significant" industrial users, and leaving the definition of "significant" to the Control Authority. Another commenter preferred that the report be limited to categorical industrial users. The third commenter recommended limiting the required compliance monitoring and enforcement information to "significant violators," but did not define this term. The new regulatory requirement provides sufficient flexibility for making appropriate judgments concerning which industrial users should be included in the summary of compliance status and enforcement activities sections of POTWs' annual reports (§ 403.12(i) (2) and (3)). The "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986) provides a recommended definition of "significant industrial user" to assist in making these judgments.

This does not, however, affect the requirement of § 403.12(i)(1) that the annual report must contain an updated list of all industrial users or (optional for a POTW that has previously submitted a list of its industrial users to its approval authority) a list of additions and deletions keyed to a previously submitted list. Section 403.12(i)(1) also requires the POTW to provide a brief explanation of each deletion. This does not require a detailed explanation. A brief, one-line answer in the section of the Annual Report on delisting will suffice. This rule does not require approval or disapproval of such deletions by the Approval Authority.

Another commenter recommended that POTW pretreatment program audits conducted by the Approval Authority should be used instead of annual reports to evaluate program implementation because the reports do not always represent a true picture of the POTW program's effectiveness or inefficiencies. This commenter apparently misunderstands the relationship between audits and annual reports. These two activities play related but distinct roles in the national pretreatment program. The annual report supplies basic information on industrial user compliance and POTW compliance monitoring and enforcement activities during the year. The audit is a more detailed evaluation of the POTW's program, including the adequacy of the underlying legal authorities and procedures. The purpose of the annual report is to provide a relatively brief self-assessment of the POTW's performance in implementing its program. The audit is a much closer look by the Approval Authority at the POTW's program implementation, and also is geared more toward identifying deficiencies in the POTW's program that need to be corrected. Moreover, the annual report is required to be submitted at least annually, while the minimum audit frequency is once every five years. Because of these differences, EPA does not agree with the commenter that audits should be used in lieu of annual reports and declines to follow this recommendation in the final rule promulgated today.

Two commenters requested more specificity with respect to the information required to be included in annual reports, and in particular the type of information required on industrial user compliance and POTW compliance monitoring and enforcement activities. The final rule differs in this respect from the rule as proposed. Today's regulation does not require a detailed case-by-case report of IU compliance or of POTW compliance monitoring and enforcement activities. Rather, a composite summary of IU compliance and of POTW compliance monitoring and enforcement activity will suffice. Such a summary can be reported on a form simply by filling in appropriate boxes.

EPA's "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986), mentioned above, explains in considerable detail the kind of information that should be included in annual reports, including information on industrial user compliance and POTW monitoring and enforcement activities. Approval Authorities and POTWs should consult this document for guidance on complementing the regulatory annual report requirement. The guidance includes a model pretreatment performance summary report form as a suggested format for reporting the information required by § 403.12(i) (2) and (3).

Another two commenters objected to the provision in proposed § 403.12(i)(4) allowing Approval Authorities to require additional information in annual reports as being too broad and potentially creating unreasonable paperwork burdens. EPA does not agree that the provision would result in unreasonable burdens. Any additional information required by the Approval Authority must, under the proposed provision, be "relevant" and, as explained in the preamble to the proposal, "appropriate for adequate oversight of the POTW's pretreatment program." (*See*, 51 FR 21469.) Moreover, as is also noted in the preamble to the proposal, the Approval Authority may always impose such other reporting requirements on its POTWs as it deems necessary or appropriate.

One State contended that the proposed amendment would force it to change its existing requirements for POTW reporting because of a State statute that does not allow State requirements to be more stringent than federal requirements. However, the proposed annual report provision states that the reports are to be submitted "at least annually" and the listed contents are characterized as the "minimum" required. Therefore, States with laws similar to the commenter's will not be adversely affected by the rule as proposed in this respect, since it allows for more stringent requirements to be imposed.

The industrial commenter asserted that annual reports should be limited to information necessary to evaluate progress of program implementation since the previous report and should concentrate on POTW actions rather than those of industrial users. EPA disagrees. The ultimate goal of the pretreatment program is to prevent adverse impacts on POTWs and receiving waters from industrial discharges to sewer systems. Existing standards and requirements have been developed to achieve this goal. The extent of compliance with these standards and requirements is thus an important measure of the success of the pretreatment program. Moreover, a POTW's compliance monitoring and

enforcement activities cannot be evaluated in a vacuum, but must be related to the nature and compliance status of the POTW's industrial user population.

Two commenters were concerned about the increased resource demand that would result from the proposal. As stated in the preamble to the proposed rule, however, most Approval Authorities already require annual (or more frequent) reports from their POTWs. Therefore, the new provision should not significantly increase the overall resource demand for POTWs. Environmental groups noted that PIRT recommended that EPA develop a standardized form for annual reports in order to enhance uniformity. The above mentioned "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986) contains a suggested format that includes most of the information required in the new regulatory provision. EPA may develop a required form in the future but will rely on this suggested format in the near term.

d. *Today's rule.* EPA is promulgating the final rule as proposed, with one minor change. Instead of requiring that annual reports contain information on the compliance status of *each* industrial user, the final rule requires inclusion in the reports of "a summary of the status of Industrial User compliance." This will provide sufficient flexibility for tailoring the annual report requirement to specific industrial user populations.

D.5. Signatory Requirements for Industrial User Reports [40 CFR 403.12(l)]

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

b. *Proposed change.* In the past four years, EPA has revised the NPDES signatory requirements governing permit application (48 FR 39611, September 1, 1983) and reports from permittees (49 FR 37998, September 26, 1984). These changes were made to reduce the burden of investigating and signing applications and reports for officers of large corporations while continuing to maintain a sufficiently high level of corporate responsibility. This rationale applies equally to industrial user reports in the pretreatment program. Therefore, EPA proposed to amend the pretreatment signatory provision (§ 403.12(i)) to make it consistent with its NPDES counterpart. (EPA also proposed to redesignate this paragraph as § 403.12(l) to account for the insertion of new paragraphs (h) and (i) in § 403.12, also proposed).

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

Consistent with the NPDES regulations, the proposal also allowed a "duly authorized representative" of a "responsible corporate officer", to sign reports required under the pretreatment program. This reduced the burden on the regulated community while at the same time providing an equal degree of legal accountability on the part of the "responsible corporate officer." By authorizing a representative to sign reports, the responsible official does not lose legal accountability for the accuracy of the information that is submitted. A "duly authorized representative" might be an individual or position responsible for the overall operation of an industrial user's facility (e.g., a plant manager). It might also be the individual in charge of all environmental matters for the industrial user. The person will, in many cases, have the best knowledge of the company's facility. Because he or she must have overall environmental responsibility within the company, and since their authorization to sign the report must come from a responsible corporate officer, the proposal would also ensure corporate responsibility.

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

c. *Response to comments.* All twelve commenters on this issue supported the basic concept of making the pretreatment signatory requirements consistent with the NPDES requirements. Several commenters, however, provided additional comments and suggestions.

Several commenters noted differences between the proposed provision and the corresponding NPDES provision, and requested either clarification or that the pretreatment provision be made consistent with the NPDES provision. For example, one commenter requested clarification of the phrase "having overall responsibility for environmental matters for the Industrial User" as used in proposed § 403.12(l)(3)(ii). The commenter noted that a strict interpretation of this language might suggest that the plant environmental engineer could have signatory power, even though he would not have responsibility for the overall operation of the facility. EPA does not intend such an interpretation. The Agency's intent in revising the pretreatment signatory requirements is to make them consistent with the NPDES signatory requirements, which allow reports to be signed by the "individual or position having overall responsibility for environmental matters for the *company*" (emphasis added). (*See*, 40 CFR 122.22(b)(2) (1986).) The Agency agrees with the commenter that the proposed language needs clarification, and is therefore changing the final rule to refer to "company" instead of "Industrial User," consistent with the parallel NPDES language.

Two commenters objected to the fact that the proposed provision differed

from the NPDES provision in not including "superintendent" among those positions to whom signatory authority may be delegated. One of these commenters asserted that this deletion imposes an additional burden where a superintendent has been entrusted by the plant manager with responsibility for overall environmental operation at the plant. It appears that this commenter misunderstands the meaning of the term "superintendent" as used in the NPDES regulations. The term is intended to refer to a position having responsibility equivalent to that of a "plant manager" (i.e., having responsibility for the overall operation of the plant). It is not intended to include positions having responsibility for environmental matters at the plant. Although the commenter thus appears to have misunderstood the existing NPDES provision, it is true that the term "superintendent" appears in the NPDES provision but not in the proposed pretreatment provision. EPA agrees that the two provisions should be consistent, and is thus modifying the final rule to add this term.

One commenter noted that the list of potential "duly authorized representatives" in the proposed provision also did not include "operator of a well or well field," and that this should be included to be consistent with the NPDES provision. EPA agrees and has modified the final rule to include this term.

Two commenters had reservations about the certification language in § 403.6(a)(2)(ii), which, under the proposed provision, must be included in each industrial user report. This certification language, which originally appeared in the amended pretreatment regulations published on January 28, 1981 (51 FR 9404), was reinserted into the regulations in a final rule published on June 4, 1986 (51 FR 20426). (*See,* preamble at 51 FR 20427 for a more detailed discussion of the history of the pretreatment certification language.) As pointed out by the commenters, however, this certification language differs from that in the current NPDES regulations. To make the certifications in the pretreatment and NPDES regulations consistent, EPA is modifying the pretreatment provision to mirror the NPDES language.

Another commenter requested clarification of the proposal as it applies to complex, milti-plant industrial sites. The commenter recommended adding a provision to the proposal that would permit multiple signatories on industrial user reports from multi-plant sites with shared wastewater treatment facilities. This commenter stated that each individual (i.e., plant manager who has responsibility for the overall operation of a single plant within a multi-plant site) should be allowed to sign the industrial user reports. EPA recognizes that complex industrial sites certainly exist (e.g., automobile manufacturing sites), but disagrees with commenter. An individual who has responsibility for shared treatment facility should be the "authorized representative" signing the industrial user report. Because individual plant managers within a multi-plant site may not have this responsibility, the Agency disagrees with the proposal of having multiple signatories on the reports. One person (not several) should sign the required reports on behalf of the corporation and be ultimately responsible for ensuring the accuracy and truthfulness of the reports. Although the individual most knowledgeable about the treatment plant operations is likely to be the treatment plant operator, this individual does not qualify as a "duly authorized representative" of the company and therefore cannot have the authority to sign the reports.

Two commenters recommended adding a provision dealing with changes in authorizations consistent with 40 CFR 122.22(c) in the NPDES regulations. One of the commenters also suggested expanding this provision (for both the NPDES and pretreatment regulations) to cover changes to authorization concerning the individual or position having overall responsibility for environmental matters within the company. The commenter argued that the same rationale applies as for the individual or position responsible for operating the facility, who is already covered by the rule. EPA agrees with both commenters, and is modifying the final rule accordingly. The Agency will make the necessary changes to the NPDES signatory provision in a future rulemaking.

The State commenter contended that documenting gross annual sales or expenditures in order to demonstrate that they exceed $25 million will be difficult, and requested guidance on methods to obtain annual sales figures. In response to this comment, EPA wishes to clarify that if a company wishes to have a manager of one or more manufacturing, production, or operating facilities sign industrial user reports, the company will be responsible for demonstrating that the facility (or facilities) for which the manager is responsible meet the $25 million criterion. If the company is unable or unwilling to make this demonstration, the manager in question will not be considered a "responsible corporate officer" under § 403.12(l)(1) (although, of course, he or she may still qualify as a "duly authorized representative" under § 403.12(l)(3)).

d. *Today's rule.* The final rule being promulgated today differs from the proposed rule in the following ways: (1) § 403.12(l)(3)(ii) now refers to the "company" instead of the "Industrial User;" (2) "superintendent" and "operator of a well or well field" have been added to § 403.12(l)(3)(ii); (3) the certification language in § 403.6(a)(2)(ii) now mirrors the NPDES language in 40 CFR 122.22(d); and (4) a provision consistent with 40 CFR 122.22(c), dealing with changes to authorizations, has been added. This final rule will ensure that indirect dischargers are subject to signatory requirements for reports that are consistent with those for direct dischargers.

D. 6. Reporting Requirements—Extension to Non-Categorical Discharges [40 CFR 403.12(h)]

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

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

specifically require non-categorical industrial users to submit reports to the Control Authority regarding their compliance with applicable pretreatment requirements.

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

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

Because of the confusion on the reporting required of non-categorical users, EPA proposed to add a new paragraph (h) to § 403.12 (and redesignating the existing paragraph (h) accordingly) to clarify that the Control Authority must impose appropriate reporting requirements on its industrial users with non-categorical discharges. Control Authorities should use this authority to require sampling for pollutants not regulated by categorical standards where those pollutants may cause pass-through or interference. Of course, the appropriate monitoring and reporting to be required of non-categorical industrial users will vary depending on the circumstances. Factors to be considered include the size of the industrial user, the percentage of the POTW's total flow attributable to the industrial user, the nature of the industrial user's discharge (e.g., whether the industrial user is discharging pollutants of concern to the POTW), and the industrial user's compliance history. These and other relevant factors should be considered by the Control Authority in establishing appropriate reporting requirements for its non-categorical industrial users. Under the proposal, if the Control Authority determines that reporting by these users is appropriate, the Control Authority would be required to impose monitoring and reporting requirements.

Industrial users subject to categorical pretreatment standards may also discharge significant amounts of pollutants that are not addressed in those standards. The proposal also applied to these industrial users. Under the proposed provision, the Control Authority must require appropriate reporting concerning all non-categorical discharges to the POTW, including those from industrial users that are otherwise subject to categorical standards.

c. *Response to comments.* Several commenters supported the requirements as proposed. Most of the commenters, however, had additional comments on the proposal.

Three commenters asserted that adequate authority already exists to require reporting from non-categorical industrial users and that therefore the proposed requirement is unnecessary. As stated in the preamble to the proposal, it is true that under the current regulations POTWs with approved pretreatment programs are required to have authority to require reports from non-categorical, as well as categorical, industrial users. Furthermore, State Control Authorities are required to have authorities at least as broad as those granted to EPA under section 308 of the Clean Water Act, which would include sufficient authority to require such reporting. Notwithstanding these existing authorities, however, there has been some confusion concerning whether Control Authorities were expected to require reporting from non-categorical industrial users, as was noted in the preamble to the proposal (and restated in today's preamble). The change being finalized today is warranted to dispel this confusion.

Several commenters emphasized that the Control Authority should have discretion in determining appropriate reporting requirements for non-categorical industrial users. EPA agrees. Under the new provision, it is the Control Authority who determines what is appropriate in a given case (i.e., what pollutants are to be covered, the level and frequency of reporting, etc.). This determination is, of course, subject to oversight by the Approval Authority, who may require additional monitoring and reporting where it feels this is warranted.

One POTW felt that unannounced POTW sampling of non-categorical industrial users is better than self-reporting for assessing compliance with local limits. It is perfectly acceptable to rely on POTW sampling instead of requiring self-monitoring and reporting by industrial users. (See discussion of POTW versus self-monitoring for categorical industrial users below.) POTWs must receive an appropriate level of information on non-categorical discharges to their systems to ensure that interference and pass through do not occur. If a Control Authority chooses to rely primarily on self-monitoring by the industrial user, then some reporting by the user will be necessary. If, however, the POTW performs all monitoring activities itself, there is no need to require additional reporting from the industrial user. The rule being promulgated today allows for this. Where the POTW performs all monitoring, it might be "appropriate" not to require any reporting by the industrial user, since the POTW would already have all the necessary information.

A State commenter suggested that non-categorical industrial users be required to submit semi-annual reports similar to those required in § 403.12(e) for categorical industrial users, thereby establishing a minimum monitoring frequency of twice per year. Because of the diversity of the non-categorical industrial user population, however, EPA prefers to leave the determination of what is appropriate reporting for a given industrial user to the Control Authority's discretion. Semi-annual monitoring and reporting may not be necessary for some users whose contributions to the POTW are truly insignificant. The commenter also mentioned that its suggested approach would be consistent with EPA guidance stating a recommended industrial user monitoring frequency of twice per year. However, this recommended frequency applies to "significant" industrial users (as defined in the "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986)), and was not intended to cover all users.

Two commenters appeared to be under the mistaken impression that the new requirement would automatically require reporting on all pollutants in an industrial user's discharge. This is not the case. The new provision simply requires the Control Authority to require *appropriate* reporting. This does not mean that all industrial users will be required to report on all pollutants in their effluents. It does mean, however, that where the Control Authority

determines that it is appropriate to require reporting on a particular non-categorical pollutant (i.e., because it has a reasonable potential for causing problems at the POTW), the Control Authority will be expected to require such reporting.

d. *Today's rule.* EPA is promulgating the final rule as proposed. Under the rule, Control Authorities must require appropriate reporting from their industrial users on discharges to the POTW of pollutants that are not covered under categorical pretreatment standards. The determination of what is appropriate is to be made on a case-by-case basis by the Control Authority (subject to normal Approval Authority oversight) based on such factors as the size of the industrial user, the volume of the industrial user's flow relative to the POTW's total flow, and whether the industrial user is discharging pollutants of concern to the POTW.

D.7. Notification of Slug Loadings [40 CFR 403.12(f)]

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

b. *Proposed change.* To clarify its intent, EPA proposed to change the language of § 403.12(f) to state that the slug load notification requirement applies to non-categorical, as well as categorical, industrial users.

The Agency also proposed to expand § 403.12(f) to reference all five of the specific prohibited discharge standards listed in § 403.5(b) (the "specific prohibitions") instead of only § 403.5(b)(4). EPA proposed this change because some slug loadings (e.g., sulfides) may not cause "interference" at the POTW (and thus are not within § 403.5(b)(4)), but are corrosive and hazardous to workers safety. The proposed change would ensure that the POTW will be promptly notified of all discharges that might cause problems, including interference, at the POTW.

c. *Response to comments.* EPA received 14 comments on its proposed changes to the slug notification requirements. None of the commenters objected to EPA's proposal to clarify that § 403.12(f) applies to all industrial users, not just those which are subject to categorical standards. Several supported this aspect of the proposal based on the reasons given in the preamble to the proposed rule. POTW commenters who further explained their support stated that the clarification would reinforce their existing practices and/or ordinances. Finally, one commenter supported it on the general premise that the more information the POTW has about discharges to its system the better it can reduce the potential for such problems as dilution, pass through, interference, or undesirable contamination. EPA agrees with all these commenters and accordingly, is promulgating the clarification that the slug notification requirement applies to all industrial users as proposed.

Response to EPA's proposal to expand the notification requirement to include discharges which would violate any of the specific prohibitions in § 403.5(b) was divided. POTWs and the environmental group commenter generally supported the proposed expansion of this part of the notification requirements. However, some POTWs and all industry commenters objected to the lack of specificity in the proposed rule about when the notification requirement is triggered. Each of the commenters' various concerns about this issue are discussed below.

Initially, it would be useful to address some concerns which seems to be based on a misunderstanding about the purpose and effect of the proposal. One commenter read the proposal to require notification of any discharge which was significantly more than normal flow or concentration and stated that notification should be limited to discharges that interfere with the POTW's operation. Because of site-specific variables, the commenter suggested that it would be better for the industrial user and POTW together to determine which discharges were slug loads and therefore should be reported. Along the same lines, one POTW objected to the proposal as requiring notification of slug loadings that have no measurable impact, "e.g., a pH of 4.9 with a duration of 60 seconds."

These concerns are largely unfounded given the purpose and effect of the notification requirement and the specific prohibitions. The proposed rule would require notification of slug loadings which could violate any of the specific prohibitions in § 403.5(b). The commonly understood meaning of "slug loading," which is reflected in the above comments, is a discharge which significantly exceeds the usual flow and/or pollutant loading (volume or concentration). Typical "slugs" involve batch discharges or accidental spills. Under the existing requirement, industrial users must notify the POTW only of slug loads that would violate § 403.5(b)(4) (i.e., those which would cause "interference"). "Interference" means a discharge which inhibits or disrupts the POTW's operation or processes and results in the POTW violating its NPDES permit or requirements applicable to the POTW's chosen sludge use or disposal methods. 40 CFR 403.3(i). (*See,* 52 FR 1586, January 14, 1987.) The proposed rule would require notification for slug loads which could violate any of the specific prohibitions listed in § 403.5(b). In addition to § 403.5(b)(4) covered by the existing regulation, two other specific prohibitions reference "interference" §§ 403.5(b)(3) and (5)). The specific prohibitions which do not require "interference" (§ § 403.5(b)(1) and (2)) nonetheless address types of discharges which could significantly disrupt a POTW's system or threaten human health and safety, and potentially could result in violations of the POTW's NPDES permit or sludge requirements (e.g., corrosives, flammables). The commenter mistakenly suggests, however, that EPA is limited to requiring notification of discharges leading only to interference. In referencing all of the specific prohibitions of § 403.5(b), the Agency is ensuring the implementation of each of them, including those which do not specifically reference interference. The purpose of this notification requirement is to ensure that all industrial users will notify the POTW of any discharges that might cause problems, including interference at the POTW.

Immediate notification to the POTW of slug loadings that could violate any of the specific prohibitions allows the POTW, where possible, to take action to eliminate or discharge the likely adverse impact of slug loadings. Although it is conceivable that the rule could result in notification of slugs that ultimately have no measurable impact on the POTW, for example because of their extremely short duration, such instances will be the exception rather than the rule. Moreover, since the notification

requirements serve to supply the POTW with the information it would need to determine whether and how to institute preventive measures in response to the slug loading, this notification fulfills its purpose even where the effect of the slug is mitigated before it can actually cause harm at the POTW.

A major concern raised about the proposal was its apparent application (and consequently a user's potential liability for failure to notify) even where the user did not know that a slug loading either had occurred or would result in a violation of a specific prohibition. Some commenters requested that the notification requirements apply to slug loadings that are known to the industrial user (e.g., the notification requirements applicable to oil spills under the CWA or releases of hazardous wastes under CERCLA). Others stated it would be an undue burden on an industrial user to evaluate the impact of its discharge given the presence of other discharges or lack of information about the POTW's operation. For similar reasons, another commenter requested that the user be excused from liability for failure to notify if it were in compliance with existing Federal, State, and local discharge standards (a "safe harbor"). Finally, several commenters requested that the industrial user be required to notify the POTW only when their discharges exceeded predetermined limits set by the POTW or EPA (e.g., site-specific limits or a list of "reportable quantities" similar to that in 40 CFR Part 117).

In general, the industrial user is in the best position to know what its normal discharge is and when its discharge will be significantly greater in volume or strength (e.g., due to an upset, bypass, or accidental spill). In some cases, the likely effect of a particular discharge and therefore duty to notify is easy to ascertain (e.g., discharge of flammables, discharge that exceeds daily maximum discharge limits). In addition, an industrial user has an implicit, if not explicit, duty to assess the potential impact of its discharge to a POTW (as discussed in the preamble to the final rule promulgating the definitions of interference and pass through, 40 CFR 403.3(i) and (n) (52 FR 1590, 1595; 1598)). Therefore, it is appropriate, as well as consistent with the regulatory scheme, to hold the industrial user accountable for knowing its discharge activity and the likely effect of its discharge in the event of a slug loading.

The purpose of the notification requirement is not to accumulate evidence of non-compliance, but to give the POTW the opportunity to mitigate any potential damage due to a slug loading. Therefore, it is not necessary to know with certainty whether a slug would indeed violate a specific prohibition. EPA agrees that the regulation could be clearer on this point. Thus, it has been redrafted to require notice of slug loads which could violate a specific prohibition.

EPA opposes a "safe harbor" for notification of a slug loading for essentially the same reasons set forth in the rule-making establishing the definitions of pass through and interference (52 FR 1590, January 14, 1987). Existing national categorical standards and local limits do not address all local environmental problems. Therefore, compliance with existing standards will not prevent pass through or interference due to, for example, spills, process changes, raw material changes, or other sources not identified by industrial users or anticipated by the POTW. While EPA agrees that site-specific limits are desirable and often necessary, many POTWs have not yet acquired the expertise necessary to set comprehensive local limits based upon a thorough analysis of the POTW's influent and capacity to treat it. Since it is unlikely that even site-specific limits will address all possible contingencies and pollutants, and since the purpose of notification is not to determine compliance but to facilitate POTW response to a slug load, a "safe harbor" provision would thus be inappropriate.

It is EPA's position that failure to properly assess the impact or likely effect of a slug load or to give notification for any other reason is no defense to an enforcement action for failure to notify. EPA does recognize, however, that there may be instances where a slug loading may occur without the knowledge of the industrial user. In such instances, lack of knowledge would be a factor in determining the appropriate enforcement response.

d. *Today's rule.* EPA is promulgating essentially the same rule as that which was proposed. Thus, it will require notification of any slug loading by categorical and non-categorical industrial users and will encompass all of the prohibitions of § 403.5(b). The only difference is that the final rule clarifies that industrial users are required to notify the POTW of any slug loading which could violate any of the prohibited discharge standards, whether or not such violation actually results.

D. 8. 90-Day Compliance Report [40 CFR 403.12(d)]

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

b. *Proposed change.* The information required in 90-day compliance reports is basically the same as that required for baseline monitoring reports (BMRs) (§ 403.12(b)), although the latter report must contain certain additional information. Under both reporting requirements, the industrial user must indicate the nature and concentration of regulated pollutants in the user's discharge, the flow of the user's regulated process wastestreams, whether the user is in compliance with applicable categorical pretreatment standards, and, if not, what steps are necessary to bring the user into compliance. (BMRs must also contain information identifying the industrial users, a list of any environmental permits held by the user, and a brief description of the user's operations.) Although this same basic information is required in both reports, the regulatory requirements for BMRs (§ 403.12(b)(4)–(6)) are much more detailed than those for the 90-day compliance reports in § 403.12(d). To better specify the information to be submitted in 90-day compliance reports, therefore, the Agency proposed to revise § 403.12(d) to specify the information required in these reports in the same detail as the equivalent BMR provision. The proposed revision did not change the existing requirements, but was merely intended to clarify the contents of the 90-day compliance report.

EPA also proposed to revise the BMR sampling requirements in § 403.12(b)(5) to require a minimum of one sampling

analysis. This same minimum would apply to 90-day compliance reports. As with BMRs, the Control Authority may require additional sampling and analysis where necessary to obtain representative data sufficient to determine compliance.

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

c. *Response to comments.* None of the commenters were opposed to referencing the more detailed language of § 403.12(b)(4)–(6) in § 403.12(d). However, one industry commenter suggested extending the proposal to include § 403.12(b)(7), which requires that industrial users that are not in compliance with the categorical standard at the time the BMR is submitted must include in the report the shortest schedule by which additional pretreatment and/or operation and maintenance (O & M) required to achieve compliance will be provided. Section 403.12(b)(7) states that the completion date given in a BMR for installing additional necessary pretreatment equipment or providing additional O & M may not be later than the compliance date for a particular categorical standard. This provision is not applicable to the 90-day compliance report under § 403.12(d), since these reports are submitted after the compliance date. Section 307(d) of the CWA makes it unlawful to violate a categorical standard after its compliance date; thus, EPA cannot provide in its regulations for industrial users to establish schedules for coming into compliance after the compliance date.

One industry and one POTW were opposed to the proposed requirement for the industrial user to include a current average production rate in the 90-day report. The industrial commenter pointed out that requiring current production data in 90-day reports would be inconsistent with the NPDES regulations, and would result in limitations changing every day that the production rate changes. One commenter felt that the required production data should be changed to "representative average daily production," consistent with the language proposed for § 403.6(c)(3) (see II.A.1. above), to facilitate direct comparison to the production rate on which equivalent limits calculated under § 403.6(c)(3) are based.

For industrial users for whom the Control Authority has established equivalent mass-per-day or concentration limits under the procedures in revised § 403.6(c), EPA agrees that the production rate included in the 90-day report should be based on the same measure (i.e., long-term average) as the production rate used by the Control Authority in establishing the equivalent limits. This is the production data necessary to determine whether the user is in compliance with the applicable categorical standard, since the equivalent limits are enforceable in lieu of the standard itself. For other industrial users, however, the production data necessary for determining compliance, and therefore the data that must be reported in the 90-day report, is the production corresponding to the period during which the sampling for the report was performed. EPA recognizes that the proposal was not clear on this point, and is modifying the language of the final rule accordingly.

A POTW commented that production rates for new sources within 90 days of commencement of discharge are rarely indicative of future peak rates, and are therefore not useful. With respect to new sources, the Agency agrees that a production rate based on 90 days of production may not accurately reflect future peak rates, but disagrees with the commenter's assertion that this renders such data useless. Although it may not be indictive of future long-term production rates, the 90-day data does give the Control Authority some actual data on the industrial user's production level data necessary to assess compliance. Additionally, for Control Authorities that have established equivalent limits under the revised § 403.6(c) being promulgated today (see II.A.1. above), this data will be important for verifying projected produciton rates provided by the industrial user.

A State, industry and trade association commented that production data should be required only for industrial users subject to production-based standards. EPA agrees with this comment and the final rule contains this qualification.

One POTW commented that the POTW should have discretion to require the BMR information in industrial user reports. However, it appears that this commenter was confusing the 90-day report with the periodic report under § 403.12(e), since the commenter referred to a semi-annual determination of what should be contained in the report.

An industry commenter suggested allowing for a different reporting schedule (i.e., over 90 days) if expressly agreed to by the Control Authority. The issue addressed by this comment was not part of the proposed rule and is thus beyond the scope of this rulemaking.

d. *Today's rule.* EPA is promulgating the final rule as proposed with respect to referencing the requirements in §§ 403.12(b)(4)–(6) and 403.12(d). The final rule differs from the proposal in that it specifies that for industrial users subject to equivalent mass or concentration limits established by the Control Authority under the procedures in revised § 403.6(c), the 90-day compliance report must include a reasonable measure of the user's long-term production rate. For users not subject to such equivalent limits, the production rate included in the 90-day report is to be the actual production during the sampling period.

D.9. Industrial User Compliance Reports—Monitoring Requirements [40 CFR 403.12(g)]

a. *Existing rule.* Under the current General Pretreatment Regulations, industrial users subject to categorical pretreatment standards must submit compliance reports in June and December (or more frequently as required by the Control Authority) (§ 403.12(e)). These reports must contain information on the nature and amount of pollutants that are subject to the categorical standard(s) in the industrial user's effluent. The industrial user must also include measured or estimated average and maximum daily flows for the reporting period, or more detailed flow information as required by the Control Authority. Section 403.12(g) provides that these compliance reports must contain the results of sampling and analysis of the industrial user's discharge, but does not specify the

amount of sampling and analysis that must be performed for each report. Nor do the categorical standards contain such monitoring frequency requirements.

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

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

The appropriate monitoring frequency for indirect dischargers will vary from facility to facility, and must be determined by the Control Authority on a case-by-case basis. In making this determination for a particular industrial user, the Control Authority should consider the monitoring frequency considered by EPA in developing, and determining the costs associated with, the applicable categorical standard. This information can be found in the preamble and/or development document accompanying each categorical standard. The Control Authority should also consider such factors as the size of the industrial user's flow and the user's compliance history. Control Authorities may also choose to consider the monitoring frequency that would be imposed on a similar direct discharger in its NPDES permit. Ultimately, the choice is the Control Authority's. EPA would like to clarify that this is not a substantive change to existing requirements. By its lack of specificity, the Agency intended to require that each report be based on an appropriate amount of sampling for the particular industrial user. However, todays' rule should eliminate any confusion.

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

The Agency also proposed to add a provision stating that if sampling and analysis performed by the industrial user indicates a violation, the user must repeat the sampling and analysis and submit the results of both analyses to the Control Authority within 21 days. This provision would allow the Control Authority to detect patterns of continuing noncompliance by its industrial users, and thus assist in distinguishing single events from chronic noncompliance.

c. *Response to comments.* The proposed changes generated a significant amount of comment from POTWs, industry, States, an environmental group, and others. Most of the commenters were generally supportive of the changes, although many offered suggestions for improving the proposal.

1. *Monitoring frequency.* Most of the commenters on this issue supported the change as proposed. Those who did not were generally concerned with the lack of any minimum monitoring frequency requirement in the regulations, and recommended specific frequencies ranging from once per compliance report (i.e., once ever six months) to the frequency used in the economic analysis for the applicable categorical standard (which can be as high as several times per week). However, none of these commenters provided specific support for its recommended frequency, other than to say that it would ensure an "adequate amount of sampling," that any longer frequency would "allow violations to continue undetected (and unabated) for too long," or that Control Authorities need frequent self-monitoring because they do not have sufficient resources to detect violations independently. One commenter asserted that it is inappropriate to give Control Authorities discretion in determining industrial user monitoring frequencies because they did not participate in the development of the categorical pretreatment standards and do not have sufficient expertise to determine all of the variables that could influence a discharge at a particular facility. The commenter, a member of PIRT, noted it was this concern that led the task force to recommend that EPA provide Control Authorities with guidance on appropriate monitoring frequencies. (*See,* "PIRT Report", pp. 18–19.) EPA appreciates the concerns of those commenters recommending specific monitoring frequencies for industrial users. However, the Agency is also mindful of the fact that the appropriate monitoring frequency may vary considerably from industrial user to industrial user, and is thus hesitant to add a specific minimum frequency to the regulations. Instead, in response to PIRT's recommendation EPA has included guidance on this issue in the "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986) (*see,* pp. 2–11 to 2–15). This guidance document lists a number of factors for Control Authorities to consider in determining an appropriate monitoring frequency, including the industrial user's compliance history, impact on the operation of the POTW, water quality impacts on the receiving stream, the industrial user's discharge flow rate, and cost. The guidance also provides recommended self-monitoring frequencies to be used as a starting point in developing longer-term requirements. These recommended frequencies range from once per month to three times per week for conventional pollutants, inorganic pollutants, cyanide, and phenol, and twice per year to four times per month for organics, depending on the industrial user's flow. As is emphasized in the guidance, these are suggested frequencies to be adjusted depending on the circumstances of a particular industrial user. This approach of providing guidance on monitoring frequencies is preferable to establishing specific regulatory requirements. The combination of this guidance and a regulatory provision requiring an appropriate amount of monitoring by industrial users assures that Control Authorities have sufficient information for determining and incentive for establishing proper monitoring frequencies for their industrial users.

2. *Requirement to report all monitoring data.* Several POTWs supported the change as proposed. Most of the commenters, however, expressed concern about the scope of the requirement. Specifically, several commenters objected to the requirement to submit all monitoring data collected during the reporting period, arguing that

without some qualification this could require submittal of data not relevant to an industrial user's effluent quality. Another commenter pointed out that the additional monitoring data should be allowed to be submitted in summary form to avoid having to submit large volumes of data from, for example, automatic pH control systems with continuous readout, where a compilation would be adequate. With this same concern in mind, one commenter recommended that the proposal be modified to parallel more closely the comparable provision in the NPDES regulations (40 CFR 122.41(1)(4)(ii)), which requires permittees monitoring more frequently than required by the permit, using test procedures approved under 40 CFR Part 136 (or as otherwise specified in the permit), to include the results of this additional monitoring in their discharge monitoring reports. EPA agrees that the pretreatment provision should be consistent with the NPDES provision, and has modified the final rule accordingly. This modification should adequately address the concerns of those commenters who found the scope of the proposal to be too broad with respect to the data required to be submitted.

Commenters raised two additional concerns with the proposed requirement to report the result of all monitoring. The first is that such a requirement would be difficult to enforce. EPA is aware of the inherent difficulties of enforcing this requirement. However, in the Agency's judgment this is not by itself a sufficient reason not to include such a requirement in the regulations, particularly in light of the fact that without such a requirement, industrial users may legally select for submission to the Control Authority that monitoring data most favorable to them, depriving the Control Authority of a representative picture of the industrial user's compliance status. In extreme cases, this could allow an industrial user to submit only that data showing compliance, even though additional monitoring data shows noncompliance.

The other additional concern, which was raised by a number of commenters, is that industrial users performing additional monitoring would be penalized by having to report the results of this monitoring, and that the requirement would therefore act as a disincentive to additional monitoring. Although this argument may be facially appealing, EPA is not aware of any such disincentive effect resulting from the parallel NPDES provision, and is thus not persuaded that this would occur in the pretreatment context. Moreover, industrial users whose required amount of monitoring indicates noncompliance will still have an incentive to perform additional monitoring in order to demonstrate that the noncompliance has been corrected or is not as serious as it may appear based solely on the required amount of monitoring.

Finally, one POTW suggested that instead of having to submit all monitoring data, industrial users should only be required to make the additional data available to the Control Authority upon request. Industrial users subject to the reporting requirements of § 403.12 are already required to retain all monitoring data for three years (or longer if required by the State Director or the Regional Administrator of EPA). However, the purpose of the proposed revision is to make these data available in the periodic reports submitted by industrial users so that the Control Authority can consider them in evaluating industrial user compliance without having to make a special request for them. EPA feels the proposed revision is warranted to accomplish this purpose.

3. *Resampling requirement.* This issue generated the most comment of any issue concerning the proposed revisions to § 403.12(g). Several commenters supported the provision as proposed. Most, however, while supporting the basic concept, disagreed to some extent with its proposed implementation. A small number of commenters opposed the resampling idea for a variety of reasons.

Several commenters addressed the 21-day period for resampling and submitting the results of the original and repeat samplings to the Control Authority. Two of these commenters asked for a clarification that the time period starts to run upon the industrial user's receipt of the results of the original sampling showing a violation. This was the intended meaning of the proposal, and EPA has modified the final rule to clearly state this.

Most of the commenters addressing the 21-day period asserted that 21 days is too short because it does not adequately account for lab turnaround and time in transit. Based on EPA's experience, the 21-day period is not unachievable. Several commenters noted that this period would require accelerated analysis at certain labs, which could add substantial premiums to the regular cost of analysis, thus placing an unreasonable financial burden on the regulated industry. EPA wishes to remind these commenters that under the proposal, resampling is required only where there is a document *violation* of an applicable pretreatment standard, and thus should not be treated as routine monitoring. In the Agency's view, it is not unreasonable to require industrial users that have violated applicable standards to go to special lengths to resample their effluent to facilitate evaluation by the Control Authority of the seriousness of the violation. At the same time, however, the Agency does not want to impose on industrial users requirements with which it is impossible or unreasonably difficult to comply. Although it is possible to comply with the 21-day period, this may be unreasonably short in some instances. The Agency has therefore extended the time period in the final rule to 30 days. Little, if any, expedited handling should be necessary to meet the modified deadline, and any that might be required is deemed by the Agency to be warranted by the fact that a violation has already occurred.

Several commenters objected to the resampling requirement, arguing that a determination of what, if any, resampling is necessary is properly left to the Control Authority's discretion. While Control Authorities should generally be given a large measure of discretion in determining sampling requirements for their industrial users, the sampling requirement is nevertheless warranted in order to ensure that a minimum amount of data will be available regarding all violations of pretreatment standards. Moreover, the resampling requirement does not, contrary to a suggestion by one of these commenters, undermine the Control Authority's determination of an appropriate monitoring frequency. The requirement deals not with routine monitoring and its frequency, but rather with gathering a minimal amount of additional data where violations are revealed by such monitoring. It should not have any adverse effect on the Control Authority's determination of monitoring frequencies.

On a related issue, one POTW commented that for POTWs that monitor their industrial users monthly the resampling requirement within 30 days would be duplicative. EPA agrees that where the Control Authority monitors an industrial user at a frequency of at least once per month, resampling by the industrial user is not necessary, since the Control Authority will always have data from consecutive sampling that are not more than 30 days apart (the same period allowed under the proposed requirement). Indeed, even if the Control Authority monitors the industrial user at a lower frequency than once per month, if a Control Authority

monitoring event occurs between the industrial user's original sampling and the user's receipt of results from this sampling, the industrial user should not have to resample because the Control Authority will already have its own "resampling" data to compare to the user's data. Accordingly, EPA is modifying the requirement to allow for this. Of course, if the Control Authority does not perform its own monitoring until after the industrial user has received results of its own sampling indicating a violation, and the Control Authority is not monitoring on at least a monthly basis, the industrial user will have to resample and submit both results within the 30-day time period.

Only two commenters, one State and one municipality, responded to EPA's solicitation of comments regarding the scope of the resampling requirement (i.e., whether the requirement should apply to all industrial users or to some group, such as categorical users). (Another State misunderstood the Agency to be soliciting comment on the scope of the biannual reporting requirement itself.) Both commenters recommended limiting the requirement to categorical industrial users, while allowing the Control Authority to extend it to other users. The State provided no specific justification for its position. The city cited the "unnecessary cost" of an all-inclusive requirement, but failed to offer any explanation of why the cost would be unnecessary. Based on this limited response, EPA is not persuaded that the resampling requirement should apply only to categorical industrial users. Applying the requirement to all users should not result in "unnecessary cost" or other undue burdens. EPA fails to see why resampling for violations of local limits is any less necessary than for violations of categorical standards. Moreover, as noted above, the need to resample can be avoided altogether simply by maintaining compliance. Therefore, the Agency has drafted the final rule so as to apply to all industrial users whose self-monitoring discloses a violation of applicable pretreatment standards.

Several commenters recommended requiring industrial users to notify the Control Authority of violations without waiting for the results of resampling. Suggested time periods for such notification ranged from immediately to within 5 days of receipt of the sampling results. An industry commenter suggested modifying the proposal to parallel 40 CFR 122.41(1)(6) of the NPDES regulations, which requires oral notification of certain violations within 24 hours, followed by written notification within 5 days. One city even suggested requiring submission of *all* monitoring results (not just violations) within 30 days of collection.

EPA agrees with the concept of requiring prompt notification of violations without waiting until the resampling results are received. As noted by one commenter, this would give the Control Authority flexibility to take whatever other steps might be necessary, including performing its own monitoring, without imposing an unreasonable additional burden on the industrial users. For serious violations that might endanger health (e.g., of workers at the POTW) or the environment (e.g., through impacts on receiving water), prompt notification to the Control Authority is particularly important, and is not required under any existing provision of the pretreatment regulations (see, II.D.7., above). Therefore, EPA is modifying the final rule to require, in addition to the resampling discussed above, notification of violations to the Control Authority within 24 hours of the industrial user becoming aware of the violation. This notification may be either oral or written, and will be followed up by the resampling results within 30 days. Like the resampling requirement, this notification requirement will apply to all industrial users.

Finally, an industry commenter suggested a relatively complex scheme involving different submission deadlines depending on whether the limit violated is a daily maximum or other (e.g., monthly or weekly) limit. Although it was not clearly stated in the proposal, the resampling requirement is intended to apply only to daily maximum limits in the categorical pretreatment standards. Because monthly and weekly limits are based on *averaging* sampling results, a single sampling event will not necessarily demonstrate whether the industrial user is in compliance.

d. *Today's rule.* EPA is promulgating the rule as proposed, with the following modifications. First, under the final rule the only results of additional monitoring performed by the industrial user that must be included in the periodic reports required under § 403.12(e) are those arrived at using test procedures approved under 40 CFR Part 136 or approved alternatives. This is consistent with the comparable requirement in § 122.41(1)(4)(ii) of the NPDES regulations. Second, the time period for resampling and submitting both sets of results has been extended to 30 days to allow sufficient time for transmittal time and lab turnaround. Third, where the Control Authority monitors at least once a month, or monitors between industrial user sampling and receipt of results of the sampling, the industrial user is not required to resample. Fourth, the final rule clearly states that the 30-day period starts to run on the industrial user's receipt of the results of its original sampling. Finally, in addition to the resampling requirement, the final rule also requires industrial users to notify the Control Authority within 24 hours of any violation of an applicable pretreatment standard. This last requirement ensures that prior to its receipt of the results of the industrial user's resampling, the Control Authority will be in a position to take whatever additional actions may be necessary or appropriate in response to the reported violation(s).

D.10. Self Monitoring vs. POTW Monitoring [40 CFR 403.12(g)]

a. *Existing rule.* Industrial users are required to perform certain sampling and analyses for purposes of preparing the various reports described in § 403.12 (the baseline monitoring report, 90-day compliance report, and periodic compliance reports). (*See,* § 403.12(g).) The Control Authority is also required to conduct its own independent compliance monitoring program (*see,* § 403.8(f)(2)(v)). In addition, States and EPA periodically sample industrial users. These industrial user reports based on the results of self-monitoring are the primary means by which Control and Approval Authorities determine compliance with pretreatment standards. However, compliance sampling by Control and Approval Authorities is used primarily as a periodic check on the industrial user's monitoring and to generate additional data for enforcement.

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

In response to PIRT's recommendation, EPA proposed to amend § 403.12(g) to allow the Control Authority to perform the sampling and analyses required for baseline

monitoring reports, 90-day compliance reports and periodic compliance reports in lieu of the industrial user. POTWs choosing to perform their own sampling and analyses for purposes of the reports in § 403.12 must perform at least the same amount of sampling and analysis as is required of industrial users.

Where the Control Authority chooses to perform the required sampling and analysis itself, the industrial user would still have to submit any other information required by the applicable paragraph of § 403.12. For example, where the Control Authority is performing the sampling and analyses otherwise required of the industrial user for a BMR, the user would still be required to submit the identifying information, list of environmental permits, production information and description of operations described in § 403.12(b)(1)–(3). The user would also remain responsible for providing the Control Authority with the compliance certification described in § 403.12(b)(6) and, if necessary, the compliance schedule described in § 403.12(b)(7).

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

c. *Response to comments.* EPA received comments on this issue from several POTWs, two industries, a State and one trade association. All of the commenters supported the proposal. Several commenters also had additional suggestions for implementing PIRT's recommendation.

One POTW recommended that the proposal be expanded to eliminate the need for industrial users to automatically submit the 90-day and periodic compliance reports (§§ 403.12(d) and (e), respectively), because in most cases flow data is not essential to the POTW unless production or mass limits are used. The commenter also questioned whether the industrial user can certify its compliance status based on monitoring data generated by the POTW. Finally, the commenter recommended that if the reports are to remain mandatory, this fact should be clearly stated in the regulation itself. EPA first wishes to point out that flow data is important even where the industrial user is subject only to concentration limits. Under § 403.6(d) of the pretreatment regulations, dilution is prohibited as a partial or complete substitute for adequate treatment to achieve compliance with pretreatment standards (see II.A4., above). Dilution may occur without a significant increase in the concentration of a particular pollutant in an industrial user's effluent. It is thus important that the Control Authority have flow data to detect possible dilution; concentration data alone may not reveal dilution, because the concentration may stay substantially the same while the flow increases. However, in some cases the POTW may perform the necessary flow measurement as well as all other sampling and analysis required for the report. In such cases, EPA agrees with the commenter that it is not necessary for the industrial user to submit a separate report, because the POTW already has all relevant information. EPA also agrees with the commenter that industrial users should not be expected to certify to their compliance status based on data collected by the POTW. The Agency is modifying the final rule to provide that this certification will not be required where the POTW performs all of the required monitoring. In response to the commenter's final concern that the regulations should clearly state whether the industrial user will be required to submit a report when the POTW is performing the required monitoring, the Agency is also modifying the final rule to provide that where the POTW collects all the data required under § 403.12 for a 90-day or periodic report, including flow data, the industrial user will not be required to submit the report. In such cases, submittal by the industrial user would be unnecessarily duplicative.

An industry commenter recommended providing the industrial user with the right to obtain split samples and results of any analyses conducted by the Control Authority. While EPA understands the commenter's concern for verification of analyses performed by the Control Authority, a specific regulatory provision to this effect is not necessary. If the industrial user wishes to receive split samples or other data on its discharge collected by the Control Authority, it should make this request directly to the Control Authority. Some POTWs already provide their industrial users with such information. For purposes of the federal regulations, however, EPA feels it is sufficient to require that adequate sampling, analysis and reporting be performed, and to allow this monitoring and reporting to be performed by either the industrial user or the POTW.

Another industry commenter conditioned its support of the proposal on EPA's clarifying that the amount of monitoring performed by the POTW in lieu of the industrial user should be based on the same criteria that would be used by the POTW to determine the appropriate monitoring amount for the industrial user if self-monitoring were relied on. POTWs have wide latitude in devising appropriate monitoring requirements for their industrial users. The revisions to § 403.12(g) being promulgated today (see II.D.9., above) require that for periodic compliance reports under § 403.12(e), the frequency of monitoring required is that which is necessary to assess and assure compliance by the industrial users. This criterion applies whether the monitoring is performed by the industrial user or the POTW. For more detailed guidance on monitoring frequencies and other aspects of compliance monitoring and enforcement, see EPA's "Pretreatment Compliance Monitoring and Enforcement Guidance" (1986).

The industry trade association commented that POTWs electing to perform monitoring in lieu of their industrial users should be required to follow appropriate procedures, including chain-of-custody and QA/QC requirements. Section 403.8(f)(2)(vi) of the regulations already requires that sampling and analysis be performed with sufficient care to produce evidence admissible in enforcement proceedings or in judicial actions. Satisfying this requirement necessarily entails the use of proper monitoring procedures. Therefore, no additional requirement is necessary.

Finally, a POTW commented that to be compatible with cost recovery requirements in the federal construction grants regulations, POTWs monitoring in lieu of their industrial users should be required to recover those costs directly from the monitored industrial user. EPA disagrees with the commenter. POTWs with approved pretreatment programs are already required to perform monitoring of their industrial users to independently determine whether the users are in compliance with applicable pretreatment standards and requirements. (*See*, § 403.8(f)(2)(v).) Moreover, there is nothing in the federal regulations, including the grants regulations, that requires such cost recovery for such monitoring, and EPA declines to add such a requirement to the pretreatment regulations. Of course, the regulations do not prohibit a POTW from charging its industrial users for monitoring it performs.

d. *Today's rule.* EPA is promulgating the final rule as proposed, with the following modifications. The final rule provides that where the POTW performs all of the required sampling and analysis, the industrial user will not be required to submit a compliance certification. In addition, the final rule provides that where the POTW collects all of the data required for the report, the industrial user is not required to submit the report. (Of course, the POTW may impose additional or more stringent reporting requirements than those in the federal regulations.)

D.11. Notification by Industrial Users of Changed Discharge [40 CFR 403.12(j)]

a. *Existing rule.* Under 40 CFR 122.42(b)(2) of the NPDES regulations, POTWs are required to notify their permitting authority of any substantial change in the volume or character of pollutants being introduced into the POTW by its industrial users. This notification allows the NPDES permitting authority to determine whether additional limits are needed in the POTW's permit because of industrial user discharges to the POTW. Of course, in order to fulfill this requirement, the POTW must obtain the necessary information from its industrial users. Although industrial users must submit semi-annual compliance reports describing the nature and concentration of pollutants regulated by categorical standards (§ 403.12(e)), the current pretreatment regulations do not require all industrial users to notify the POTW of any substantial change in their discharges to the POTW. Accordingly, there currently is no mechanism in the general pretreatment regulations for POTWs to obtain the information necessary to comply with § 122.42(b).

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

C. *Response to comments.* Nearly all commenters, including POTWs, affected industries, and one environmental group, supported the proposed rule. Several POTW commenters noted that they already required such notification from their industrial users. About half of the commenters, however, expressed concern about the subjectivity of the term "substantial" in the proposed rule and/or offered suggestions on quantifying the term. One industry commenter flatly opposed the proposed rule as an unnecessary burden on POTWs and industrial users, unless the reporting requirement was limited to changes in the industrial user's discharge which exceed permit limits.

The proposed rule is necessary regardless of whether the change in the industrial user's discharge would cause it to violate limits in its permit or other control mechanism. The purpose of this reporting requirement is not to collect information on users' noncompliance, but to establish a procedure for POTWs to receive timely information on changes to industrial contributions to its system (including changes in pollutant loadings that may not be specifically regulated by a current control mechanism) so that the POTW can comply with the notification requirements of its NPDES permit. EPA does not understand how this can be a burden to POTWs and none objected to receiving this information. In fact, the comments from POTWs indicate that the kind of reporting envisioned by the proposed rule is already commonly required by POTWs. This suggests that for many industrial users, the rule will not impose additional burdens.

Just as importantly, the information on changed discharges will allow a POTW responsible for implementing a local pretreatment program to determine whether it needs to consider adjustments to its local limits based on changed characteristics or volume of wastewater in its system. As discussed above (see II.A.2.), POTWs with approved programs are required to have local limits which implement the general and specific prohibitions in § 403.5(c) and to update them as necessary. EPA does not anticipate that the industrial user's report of changed discharge alone will be a sufficient basis to adjust limits, but will provide the POTW with relevant information to determine if the adequacy of local limits should be reevaluated.

An industrial user is required to promptly notify its POTW of any substantial change in the volume or character or pollutants discharged to the POTW. This notification requirement is in addition to other reporting requirements in the General Pretreatment Regulations, such as regular compliance reporting in § 403.12(e). Users are required to notify the POTW of a substantial change in any characteristic of the User's wastewater discharge including volume of flow, the amount or concentration of regulated (under categorical standards or local limits) or unregulated pollutants, and the discharge of new pollutants not previously reported to the POTW.

As explained in the preamble to the proposed rule, the purpose of the "changed discharge" notification is to ensure that the POTW has the necessary information to comply with the notification requirements in its NPDES permit required by 40 CFR 122.42(b)(2). After the POTW receives the relevant information from an industrial user, the POTW is responsible for passing this information along to the NPDES permitting authority together with information about the anticipated impact of the change on the quantity or quality of the effluent to be discharged from the POTW (§ 122.42(b)(3)). Based upon this and other relevant information (e.g., notice of newly-connected users to the POTW's system), the NPDES permitting authority can determine whether the POTW's NPDES permit limits should be changed to adequately control pollutant discharges from the POTW. In addition, the POTW can use the same information to determine whether it needs to change controls on the wastewater entering the treatment works (or take other appropriate measures) to adequately protect its system and receiving water quality.

The comments received by EPA suggested a wide range of possibilities for defining "substantial change." In addition to requiring notice only when permit limits are violated, these suggestions include: Changes of more than 50 percent, deviations of 25 percent or more, a flow increase of more than 1500 gallons per day resulting from process modifications or increased size or number of facilities, and a change of 20 percent or more from previously reported values (consistent with EPA's "Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula" (1985)). One commenter, suggesting a possible quantification, also noted that "substantial change" may have to be defined by the POTW on a case-by-case basis depending on the particular pollutant and the amount of flow contributed by a particular user.

Neither the POTW's requirement to notify its NPDES permitting authority about substantial changes in its industrial users' contributions (40 CFR 122.42) nor existing Agency guidance define "substantial change" for this provision. While EPA agrees that there is a legitimate need for guidance on the meaning of this term, it has determined that a regulatory definition of "significant change" is inadvisable because, as noted by one commenter, what is substantial in a given situation will depend on several variables, particularly the type of pollutant being discharged and the percentage of flow

contributed by the discharger. To preserve necessary flexibility, EPA declines to adopt one specific measure as suggested by several commenters. Instead, for purposes of this regulation, "substantial change" should be determined by the comparable notice requirements for direct dischargers under the NPDES regulations and supplemental, or more stringent, notice requirements adopted by the POTW or required by the permitting authority in the POTW's NPDES permit.

As suggested by the purpose of the changed discharge notification, only changes which the industrial user expects to occur on a regular or routine basis over an extended period of time (three months or more) need to be reported. Sporadic or episodic changes in the volume of character of a discharge are not covered by the changed discharge notification. (However, depending on the circumstances, the industrial user may have to report these discharges in accordance with other pretreatment requirements, e.g., the "slug load" notification requirements (§ 403.12), the upset provision (§ 403.16), or bypass provision (§ 403.17) discussed at Parts II.D.7., II.E.4., and II.E.5., of this preamble, respectively.) In most cases, a substantial change in the volume or characteristic of a user's discharge will result from a deliberate or planned change to the user's facility or operations. Accordingly, the industrial user should notify the POTW as soon as it knows of plans to change its facilities or operations which will affect its discharge. In no case should the POTW be notified later than when the changed discharge occurs. Industrial users need only notify the POTW of "substantial changes" in the volume or character of pollutant discharges to the POTW. Industrial users should know the volume and characteristics of their pollutant discharges to a POTW and if their discharges have or will change in the future on a regular basis. However, as discussed above, determining whether a change is "substantial" may depend on several other factors. For purposes of the change discharge notification requirement promulgated today, "substantial" should be based on the magnitude of change to the industrial user's existing discharge and not on the anticipated effect of the changed discharge on the POTW. Therefore, absolute numbers such as an increase or decrease of X gallons of flow discharged would not be appropriate. Although this approach may result in notifications about changed discharges which will not have a demonstrable effect on the POTW's influent, effluent or sludge quality, EPA has determined that any incidental "over notification" is justified by the need of the POTW (and NPDES permitting authority) to have information on a timely basis to determine whether, considering other changes to the POTW's system or pollutant control requirements, new limits on pollutant discharges are necessary or should be further evaluated. Note, however, a POTW may have other legitimate reasons for requiring industrial users to notify the POTW of changes in the volume or characteristic of their wastewater flow. Today's rule does not negate such local notice requirements.

Because comparable NPDES notification requirements use the "discharger's perspective" approach, they should be considered general guidance for determining when an industrial user should notify the POTW of changed discharges. For example, § 122.41(l)(1) requires a discharger to give notice as soon as possible of "any planned physical alterations or additions to the permitted facility * * * when (i) the alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source * * * [see § 403.3(k), as amended by today's final rule]; or (ii) the alteration or addition could significantly change the nature or increase the quantity of pollutants [or flow for pretreatment program purposes] discharged" for pollutants which are not specifically limited in the permit or subject to specific notification requirements. For toxic pollutants which are not specifically limited, the discharger must give notice of any activity which has occurred or will occur that would result in a changed discharge which will exceed the notification levels specified in § 122.42(a)(1).

Discharges which are specifically regulated are subject to different rules. Dischargers who are subject to production-based standards should use the notification levels established in § 403.6(c) (as amended today) for determining when a change in the user's flow or production compels notice to the POTW of the changed discharge. The comparable NPDES notification requirements should serve as general guidance of the minimum requirements for notifying the POTW of a changed discharge under today's final rule. Of course, a POTW may further refine the notification requirements to take into account site specific factors such as the percentage of total flow or pollutant loading contributed by a particular discharger. Most POTWs also limit or closely monitor flow, which is not as uniformly important in the NPDES program. As a practical matter, industrial users which anticipate changes to their facilities or production processes can benefit from keeping the POTW well informed about the nature of their discharges. Whether or not a user complies with the changed discharge notification requirement, it remains subject to liability for violating the general or specific prohibitions in § 403.5. However, it may be able to establish an affirmative defense based on compliance with an applicable local limit established in accordance with § 403.5(c)(1). (*See,* 52 FR 1586, January 14, 1987, for a thorough discussion of this affirmative defense and one based on "unchanged discharge.") Because only POTWs can establish local limits which serve as the basis for the affirmative defense, the industrial user must work with the POTW to obtain these limits and supply adequate information, including changes in discharge activities, for the POTW to develop and maintain technically sound limits.

d. *Today's rule.* EPA is promulgating the final rule as proposed, except to clarify that prompt notification shall be made "in advance" of a changed discharge.

E. Miscellaneous

1. New Source Criteria [40 CFR 403.3(k)]

a. *Existing rule.* "New source" is defined for the purpose of the pretreatment program at § 403.3(k) of the General Pretreatment Regulations. The regulations, however, do not address the basis for determining whether construction creates a new source at a site—thus making the industrial user subject to pretreatment standards for new sources—or merely modifies an existing source. The NPDES regulations (§ 122.29(b)) contain specific criteria for new source determinations for direct dischargers. This provision was revised on September 26, 1984 (49 FR 37998). As stipulated in § 122.29(b), construction, activities could result in a "new source" if (1) it is construction of a source at a new or "greenfield" site; (2) it is construction at a site of an existing source which totally replaces the process or production equipment causing the discharge at an existing source; or (3) it creates not only a new "building, structure, facility, or installation," but it is "substantially independent" of an existing source at the same site. The new source determination criteria at 40 CFR 122.29(b) also include factors to be

considered in applying the "substantial independence" test, and provide a clarification of when construction is deemed to commence.

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

As in the NPDES regulations, the proposed changes set out three criteria. Construction by an industrial user would be classified as a new source if: (1) The construction is carried out at a site at which no other source is located, (2) the construction totally replaces the process or production equipment that causes the discharge of pollutants at an existing source, or (3) the production or wastewater generating processes of the constructed facility are substantially independent of an existing source at the same site. Any construction at the site of an existing facility that does not meet the above criteria will not result in a new source.

The first two criteria deal with situations where it is obviously appropriate to impose the generally more stringent new source standards. The third criterion, the "substantial independence" test is based on the notion that in those situations where there is new construction but less than total replacement at an existing facility, the classification decision should be based on the degree to which the constructed facility functions independently of the esisting source. The proposed substantial independence test also set forth two factors that should be considered in making the determination of whether construction at an existing facility results in processes that are substantially independent and therefore quality as a new source: (1) The extent to which the new facility is integrated with the existing plant; and (2) the extent to which the new facility is engaged in the same general type of activity as the existing source.

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

c. *Response to comments.* Fifteen commenters responding to this proposed change agreed with the Agency's intent in making the change. These commenters agreed with the Agency that the change was necessary to clarify the criteria used in determining whether an indirect discharger is a new source. Nine of the fifteen commenters fully agreed with the proposed change. The remainder agreed with the intent of the change, but suggested some clarification or examples were needed.

Several commenters suggested that the term "totally replaces" in proposed § 403.3(k)(1)(ii) be changed to "substantial change not independent of an existing source." Furthermore, these three commenters suggested defining "substantial change not independent of an existing source" as "a change in the process operation that results in a significant change in the volume or nature of the wastewater so that existing methods of control and pretreatment applied needs to be modified or upgraded." These commenters suggested these changes so that an indirect discharger could not change over all the equipment in a building, except for one piece, thereby remaining an existing source.

The Agency does not agree with these commenters' suggested changes. As noted in the preamble to the September 26, 1984, NPDES regulations package, "EPA proposed that, in the situations where there was new construction but less than total replacement at existing facilities, the (new source) classification decision should be based on the degree to which the constructed facility functions independently of the existing source." (49 FR 38043) This same substantial independence test should be used for indirect discharges that do not totally replace an existing facility. This situation is covered by proposed § 403.3(k)(1)(iii). As noted in the September 26, 1984 preamble, "(T)he substantial independence test was aimed as ascertaining whether an existing source which undertakes major construction that legitimately provides it with the opportunity to install the best and most efficient production process and wastewater treatment technologies should be required to meet new source performance standards at that facility." (49 FR 38403) Therefore, the change to § 403.3(k)(1)(ii) suggested by these commenters would be redundant, since the situation is already covered by § 403.3(k)(1)(iii).

One Control Authority suggested that "totally replaces" should be changed to "substantially replaces". This commenter also suggested that the term "substantially independent process" be clarified. As noted above, changing "totally replaces" to "substantially replaces" would cause redundant provisions in the regulations. However, clarification of the term "substantially independent process" is appropriate. The proposed change to the General Pretreatment Regulations contained the language describing the two factors used in determining whether new construction is substantially independent of an existing facility, § 403.3(k)(1)(iii) (51 FR 21444, 21473). However, since these factors were previously described in greater detail in response to the same issue, the Agency reproduces that discussion, as set forth in the September 26, 1984, NPDES regulations (49 FR 37998, 38043–38044):

> The first factor is the degree of integration of a new process with existing processes. Under the first factor, if the new facility is fully integrated into the overall existing plan, the facility will not be a new source. For example, a plant may decide to improve the quality of a product by installing a new purification step into its process, such as a new filter or distillation column. Such a minor change would be integral to existing operations and would not require the facility to be as a new source. However, on the other extreme, if the only connection between the new and old facility is that they are supplied utilities such as steam, electricity, or cooling water from the same source or that their wastewater effluents are treated in the same [onsite] treatment plant, then the new facility will be a new source.
>
> Four commenters [on the NPDES proposed regulations] argued that if a new process or plan used existing treatment equipment, for that reason alone it should not be considered a new source. EPA disagrees with these comments [on the NPDES regulations]. The legislative history of the CWA indicates that new source requirements were intended to apply where new construction allows flexibility to incorporate new pollution control technology. The fact that a facility can be constructed to utilize an existing waste treatment plant does not address the issue of whether new technology could have been installed. To allow the use of an existing treatment system, by itself, to preclude the application of new source

requirements would frustrate clear statutory intent.

* * * * *

The second clarifying factor that EPA has added is the extent to which the construction results in facilities or processes that are engaged in the same general type of activity as the existing source. Under this second factor, if the proposed facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source. For example, if a plant begins to produce a new product, e.g., nylon synthetic fiber, which is very similar to the product currently being produced by the plant, e.g., polyester synthetic fiber, using equipment that is essentially the same as the existing production equipment, this would likely be considered an existing source. However, if a plant producing a final product, e.g., polyester synthetic fiber, adds new equipment to produce the raw materials for that product, e.g., terephthalic acid or ethylene glycol, the proposed structure would likely constitute a new source. Of course to the extent the construction results in facilities engaged in the same type of activity because it essentially replicates, without replacing, the existing source, the new construction would result in a new source.

Two other commenters suggested that EPA should further clarify the term "substantially independent" by including several examples. The first commenter questioned whether "substantial independence" was determined by the physical location of a new facility or product line within a facility, the function of a new process, or the route the wastewater takes to get to the sewer. This commenter provided the example of a job shop electroplater that adds a new anodizing line to its facility. The commenter questioned whether the new line would be a new source if no anodizing line existed there previously, and also questioned the status of the new line if previously an anodizing line was in operation. In determining whether a new facility is a new source, the three factors (physical location, function, and wastewater flow route) should be considered. Furthermore, the examples given in the September 26, 1984, NPDES rulemaking should also be considered in making this determination. The Agency cannot respond to the two specific situations above without further information regarding the facility. In determining whether a facility is a new source, the totality of the situation needs to be addressed.

Finally, one local Control Authority requested a clarification of the status (new source or existing source) of a facility that moves existing equipment into a new building or into an existing building that did not previously have an industrial discharge to the sewer. Under today's rule, discharges from such facilities would be new sources if the other requirements regarding construction of the source after proposal of new source standards were met.

d. *Today's rule.* EPA is promulgating this change as proposed.

E.2. New Source Compliance Deadline [40 CFR 403.6(b)]

a. *Existing rule.* The current regulations state that compliance with categorical pretreatment standards for new sources will be required "upon promulgation." (40 CFR 403.6(b).) However, new sources generally will commence discharge after promulgation of a categorical standard applicable to them. For these industrial users, compliance "upon promulgation" is meaningless. Furthermore, requiring immediate compliance by new sources is inconsistent with the NPDES regulations, which require compliance by direct dischargers that are new sources "within the shortest feasible time (not to exceed 90 days)." (40 CFR 122.29(d)(4).) The NPDES regulations also require directly discharging new sources to "install and have in operating condition, and [to] start-up all pollution control equipment * * * before beginning to discharge." *Id.*

b. *Proposed change.* EPA proposed to insert in § 403.6(b) language identical to that in 40 CFR 122.29(d)(4) with respect to the deadline for compliance by new sources. Under that proposal, new source indirect dischargers, like new source direct dischargers, would be required to install and start-up any necessary pollution control equipment before beginning to discharge. These sources would then be required to achieve compliance with applicable categorical standards within the shortest feasible time, not to exceed 90 days, after commencement of discharge. The proposed regulatory changes would ensure that indirect dischargers that are new sources have a meaningful compliance deadline consistent with that for direct dischargers.

c. *Response to comments.* All eleven commenters agreed with this proposed change. Commenters stated that the 90-day period was feasible, logical, realistic, and desirable as being consistent with the requirements for direct dischargers. However, one commenter agreed with the intent of the change, but commented that, from the standpoint of POTWs and environmental health, 90 days appeared to be far too long. This commenter suggested that 10 days would be more reasonable, but only if no significant interference or pass through problems were likely to occur from the noncompliant discharge during that time period. Today's regulation would not deter a Control Authority from requiring a shorter "grace-period" for a new source to be in compliance with the standards. A POTW that may experience pass through or interference due to the start-up of a new source could certainly require compliance upon start-up.

A Control Authority agreed with the need to allow a certain start-up period before a new source must be in compliance with the categorical limit. But this commenter stated that the local pretreatment program administrator, who is most familiar with the facts of the situation, should be allowed to determine the consequences of the non-compliance and decide on the appropriate enforcement action to be taken. This commenter suggested that such decisions could include lengthening or shortening the time period for compliance. The Agency does not agree with this commenter's suggestions. National consistency is needed on this issue to avoid "forum shopping" by new sources looking for a lenient Control Authority that will allow a longer start-up period. As noted above, this change was proposed to provide consistency between direct and indirect discharger regulations.

d. *Today' rule.* EPA is promulgating this regulation as proposed.

E.3. Net/Gross [40 CFR 403.15]

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

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

intake and effluent treatment systems used by the industrial user.

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

The proposal provided that upon the request of an industrial user, an applicable categorical pretreatment standard would be adjusted to reflect credit for pollutants in the intake water. The user must demonstrate that the control system it proposes to use or is using to meet the categorical standard would, if properly installed and operated, meet the standard in the absence of pollutants in the intake water. The basic principle is that such a control system must be applied to the discharger's effluent, but that credit is available as necessary to meet applicable limitations after control system is applied. In addition, under the proposal, credit for generic pollutants (e.g., BOD, COD, TSS, oil and grease) would not be allowed unless the industrial user demonstrates that the constituents of the generic measure in its effluent are substantially similar to the constituents of the generic measure in the intake water, or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere. The purpose of this restriction is to prevent the discharge of wastes that are more toxic than intake water pollutants, but are controlled by a limitation that does not measure this difference in toxicity, such as an oil and grease limit (i.e., indicator pollutants).

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

The proposal also incorporated a PIRT recommendation that control Authorities be allowed to make net/gross determinations. The Task Force based its recommendation on several factors. First, PIRT pointed out that net/gross determinations for direct dischargers are routinely made by the NPDES permit issuing authority, which is the functional equivalent of the pretreatment Control Authority. Second, PIRT stated that net/gross determinations for indirect dischargers are an activity that can be delegated to POTWs and States implementing the pretreatment program, provided that EPA develops suitable guidance on making such determinations. Finally, PIRT noted that § 403.15 currently provided that net/gross determinations can only be made by the EPA "Enforcement Division Director," a position that no longer exists at the Regional level. (EPA issued a final rule in the **Federal Register** on June 4, 1986 (51 FR 20426) making technical amendments to the General Pretreatment Regulations, including changing all references to the "Enforcement Division Director" to read "Water Management Division Director" to correctly reflect the Agency's current organization.) EPA agreed with PIRT's recommendation and proposed to amend § 403.15 to allow net/gross determinations to be made by the Control Authority. The Agency proposed to provide appropriate guidance as needed.

c. *Response to comments.* Of the seven commenters responding to the proposed revision, only one fully agreed with the proposal. Three other commenters agreed with the intent of the proposed change, but provided suggestions on clarifying or strengthening the provision. Three other commenters, two industrial associations and an industrial user, opposed the revision.

All three commenters opposed to the revision stated that EPA has no statutory authority to require a discharger to remove pollutants in its intake water. The Agency is not convinced that this proposed revision is contrary to the Clean Water Act. The clear intent of the Act was to reduce the discharge of pollutants into the nation's waters. Requiring a direct or indirect discharger to remove pollutants contained in the intake water is justified when the discharge occurs to a different body of water. The proposed revision would allow the net/gross credit if the effluent was discharged to the same body of water from which the intake was drawn.

Three commenters objected to the conditions under which a credit would be granted and suggested that the various conditions be deleted. EPA has not deleted any of the conditions necessary for achieving a credit allowance and, therefore, receiving a control mechanism calculated on a net basis. EPA considers these conditions as reasonable and necessary for achieving the goals of the Act. The limitations on the net/gross provisions in the final regulation grow out of the technical basis on which pretreatment standards are established. Generally, EPA has developed pretreatment standards on a gross, not a net, basis. The standards assume that a treatment technology will achieve a final effluent concentration that is independent of fluctuations in effluent concentration.

Several commenters objected to the requirement that restricts the availability of a net credit to those industrial users who discharge their effluent into a POTW that discharges into the same body of water from which the industrial users water supply was drawn. While a discharger should not be held liable for pollutants already existing in its water supply if the discharge is into the same body of water from which the supply was drawn, the same reasoning cannot support allowance of the credit where the discharge is into another body of water. The grant of a credit in the latter case would allow the industrial user to transfer pollutants from one water body to another, thus adding pollutants to a water body. An exception to this rule is where the POTW discharges to a tributary of the stream from which the supply was drawn. In such a case, the credit may be granted since the tributary will be considered to be the same body of water as the downstream lake or river

for the purposes of the same body or water requirement.

Three commenters objected to the requirement that generic pollutants in intake waters be identical in concentration and type with the generic pollutants in the discharge before a net credit could be allowed. These commenters argued that an onerous burden will be placed on the industrial user in making this demonstration. One commenter suggested that a generic pollutant credit should be granted *unless* there is some reason for the Control Authority to believe that the industrial user is generating the specific generic pollutant constituent. EPA disagrees. Generic pollutant parameters such as BOD, COD, total organic carbon, and total suspended solids (TSS) are broad measurements of a number of specific chemicals or materials. TSS, as measured at a supply water intake point, may consist mostly of river silt. After being used in an industrial process, however, the TSS as measured at the industrial user's sewer connection may include substantial quantities of metals or other materials with toxic characteristics. EPA considers it essential to avoid allowance of credit when the pollutants in the discharge water vary significantly in toxicity from the pollutants in the intake water. Dischargers should not be allowed an unrestricted right to add more toxic pollutants to their discharge waters.

Another commenter disfavoring the proposal suggested that the following language be inserted into the regulation: "The applicable effluent limitation and standards contained in 40 CFR , Subchapter N specifically provide that they shall be applied on a net basis;" (40 CFR 122.45(g)(i)) so that the pretreatment and NPDES regulations would be consistent. The Agency agrees with this comment. The intent of this provision in the NPDES regulations is to allow a permit writer to issue an NPDES permit based on net discharge limits where an effluent guideline is written on a net basis. Although few, if any, pretreatment standards are written on a net basis, more may be developed in the future, and it is appropriate to place a contingency in the pretreatment regulations to cover that situation. Therefore, the Agency has included wording similar to § 122.45(g)(i) in today's regulation as § 403.15(e).

One commenter, although supporting the intent of the proposed change, stated that empowering the Control Authority with making decisions about the "same body of water" requirement and the "no environmental degradation" requirement was misplaced. This commenter suggested that the NPDES permit issuance authority (i.e., EPA or the State) should be empowered to make these decisions, not the Control Authority. The commenter noted that the NPDES authority, not the Control Authority, regulates discharges to the environment from the POTW and should therefore be making the decision. EPA does not agree with this commenter's suggestion.

First, Control Authorities with approved pretreatment programs have primary responsibility for controlling discharges to their systems. Accordingly, these Control Authorities should have more input into whether industrial users discharging into their POTWs will be granted a net credit under § 403.15. Control Authorities are best positioned to know whether granting net credits in a particular case will cause problems at the POTW. For example, one of the criteria applicable to granting the net credit adjustment is that the adjustment shall be given only to the extent that intake water pollutants limited by the categorical standard are not removed by the pretreatment technology employed by the industrial user. (*See*, § 403.15(c).) Control Authority are especially qualified to determine what limit the treatment technology at the industrial user's facility will be able to meet. Control Authorities are also best qualified to judge whether such adjustments are likely to cause interference, pass-through, sludge contamination, or a violation of local limits. In addition, Control Authorities are always allowed to impose more stringent limits on industrial users than the Federal regulations would allow (unless otherwise provided under State law). (*See* § 403.4.) Where a Control Authority wants to impose more stringent limits than those resulting from approval of net credits, it should be able to prevent a less stringent credit from being granted. If the NPDES issuance authority was granting the credit, then the Control Authority might not be able to prevent the less stringent credit from being approved.

Furthermore, Control Authorities have the best information regarding industrial users' discharges, characteristics of the total inflow to the POTW, and treatment efficiencies and mechanics at the POTW, so that the Control Authorities can best decide when "no environmental degradation" will be caused by issuing net credits to industrial users. It should also be noted that Control Authorities have a strong interest in not violating their NPDES permits. The Agency expects that Control Authorities will be somewhat conservative in evaluating and approving requests for net credits. Finally, the Control Authorities will not be operating in a vacuum. Control Authorities can easily request technical assistance from their Approval Authority.

Another commenter who favored this proposed revision noted that EPA should clarify that it is more important for Control Authorities to assure no environmental degradation will result from the granting of net credits, than that the same body of water requirement is met. The Agency does not entirely agree with this comment. When determining whether to grant a credit for pollutants in a facility's intake water, the first step is to determine whether the same body of water from which the water supply is drawn is receiving the discharge from the POTW. If this condition is not met, then the Control Authority should consider whether the use classification of the water body changes between the industrial user's water supply intake and the discharge pipe of the POTW. If a water body has a higher value at the point of discharge. then a credit may not be allowed or only a partial credit may be granted. If the water bodies are different, then the Control Authority should analyze whether environmental degradation would occur if the credit is granted. This tiered approach does place an emphasis on the no environmental degradation analysis. However, it does not apply where the same body of water requirement is met.

A commenter in favor of this proposed revision had several additional comments on the proposal. The first comment concerned the deadline for applying for a credit for pollutants in the intake water. This commenter agreed with the PIRT recommendation that "timely application" for a credit is desired. However, this commenter noted that EPA had removed the 60-day notification deadline and had not replaced this provision with any definition of "timely" in the proposal.

This provision was deleted from the pretreatment regulations (51 FR 20426, at 20428; June 4, 1986), just prior to the proposal of today's regulations. The June, 1986 change was a technical correction deleting the 60-day deadline requirement from the regulations, but the original reasoning for doing this was contained in the January 28, 1981 (46 FR 9404) final General Pretreatment Regulations. In that regulations package the Agency deleted the 60-day deadline based on several commenters Statements. ("In addition, several

commenters objected to the 60-day deadline for requesting a net/gross credit, noting that the Consolidated Permit (NPDES) regulations do not impose a similar constraint. These commenters pointed out that in many cases treatment technology would need to be installed before a user could satisfy the demonstrations needed to receive a credit. EPA agrees with this comment and accordingly has deleted the time limitation on applying for a net/gross credit.") However, the specific deletion was not written into the regulatory language at 46 FR 9457. Therefore, the June 1986 technical corrections package deleted the requirement.

The Agency does agree with this commenter that timely applications are necessary. However, the term "timely" implies that a date will be chosen from which the time period will run. A strict time period is not needed. Rather, a reasonable length of time between when the industrial user knows that pollutants in its intake water are not being treated by the pretreatment system at the facility and when the user must request a net credit. Control Authorities will have the discretion to deny net credit requests that are filed long after the industrial facility learned of the problem.

The commenter also stated that certain provisions previously contained in 40 CFR 403.15(a) (3)–(4), and (c) should be retained. Specifically, these provisions require: no chemical or biological variation between the pollutants in the intake water and the pollutants limited by the categorical standard; no significant increase in the concentrations in the intake water; and notification of enforcement personnel if any significant change in the quantity of the pollutants in the intake water or the level of treatment occurs. As noted in the preamble to the proposal and today's regulation, the Agency has decided to rewrite this entire provision to make it "less complicated and more workable." Furthermore, the NPDES and pretreatment regulations should be more consistent, and the proposed changes achieve this intent. The provisions suggested by this commenter were contained in the NPDES regulations. The Agency proposed to delete the requirements from the NPDES regulations on November 18, 1982 (47 FR 52072, at 52090). A discussion of why these requirements were to be deleted appears at 47 FR 52080. These requirements were deleted from the NPDES regulations on September 26, 1984 (49 FR 37998, at 38050). The decision to delete the requirements was further explained in the Response to comments for that regulation (49 FR 38025–28). The Agency still agrees with the reasoning of that decision, and does not believe that the pretreatment regulations should differ from the NPDES provisions. Therefore, the suggested provisions have not been included in today's regulation.

d. *Today's rule.* EPA is promulgating this rule as proposed, with the following additions as noted above: (1) Add a reference to paragraph (c) in paragraph (a) as follows "* * * if the requirements of paragraphs (b) and (c) are met.", and (2) a new paragraph (c) "The applicable categorical pretreatment standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis."

E.4. Upset Provision [40 CFR 403.16]

a. *Existing rule.* Existing § 403.16 provides an affirmative defense in an enforcement action if the industrial user shows that noncompliance with a categorical pretreatment standard was due to factors beyond the reasonable control of the discharger. This provision in the General Pretreatment Regulations is patterned after that found in the NPDES regulation at 40 CFR 122.41(n) (49 FR 37998, at 38049, September 26, 1984).

b. *Proposed change.* EPA revised the upset provision for direct dischargers on September 26, 1984 (49 FR 37998). The Agency proposed to revise § 403.16 of the pretreatment regulations to clarify the showing necessary to prove that an upset has occurred consistent with the 1984 revisions to the NPDES rule. The existing rule requires a discharger to prove that an upset occurred and that the "Industrial User can identify the specific cause(s) of the upset * * *" In some cases, overly literal application of this requirement would require a discharger to produce a level of proof that is not scientifically possible to obtain. The proposed rule deletes the word "specific" from § 403.16(c)(1) to clarify that the regulation does not require investigation to an impossible degree of certainty.

c. *Response to comments.* EPA received nine comments on the proposed change to the upset defense from industry, POTWs, and an environmental group. Most commenters supported the proposed rule for the reasons stated by EPA in the preamble and discussed below. One POTW commenter, however, opposed making the upset defense available because industrial users should be liable for any damage they cause to the sewers or treatment systems and because the defense would discourage users from providing dependable pretreatment systems. Some industry commenters, on the other hand, not only supported the proposed change, but also argued that the availability of the upset should be broadened to include violations of local limits if the user can demonstrate that the prohibited discharge standards (§ 403.5) have not been violated. Finally, one commenter who supported the proposed change stated that the regulatory language did not fully convey the intent of the change as explained in the preamble discussion about investigating upsets.

EPA disagrees that the purpose or effect of the upset defense is to discourage industrial users from providing dependable pretreatment systems. By definition, an upset is unintentional, only occurs in exceptional circumstances, and is due to factors beyond the reasonable control of the industrial user. It does not include treatment process disruptions resulting from "operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation." 40 CFR 403.16(a). Rather than encourage unreliable pretreatment systems, the upset provision merely recognizes that the technology upon which the national categorical pretreatment standards are based may not function as intended 100 percent of the time, regardless of the actions taken by the industrial user. Furthermore, EPA does not intend the upset defense to be available to industrial users at the expense of POTWs. As discussed more fully below, the upset defense can only excuse violations of the categorical pretreatment standards. It does not provide a defense in any other actions that may be brought against an industrial user, such as a suit for damages to the POTW's system caused by the industrial user or an action to enforce violations of local limits. In addition, under section 510 of the CWA, a POTW (or a State) may decide to impose more stringent requirements than required by federal law by disallowing the upset defense even for violations of the categorical pretreatment standards (assuming the Control Authority has authority under State or local law).

Although the upset defense is justified for violations of the categorical pretreatment standards, it does not follow that the defense should also be allowed for violations of local limits. The commenters who supported broadening the defense generally argued that industrial users should not be held liable whenever violations are

unavoidable. Specifically they assert that: (1) Upsets which result in local limits violations are just as inevitable due to control technology failures (and other factors such as change in weather or wastewater characteristics) as upsets which result in violations of national categorical pretreatment standards; (2) the proof necessary to establish an upset defense in the case of local limits violations (including proof that the prohibited discharge standards have not been violated) is no more difficult than the proof required to establish the defense in the case of national categorical pretreatment standards; and (3) an upset defense for local limits violations must be codified because industrial users cannot rely on prosecutorial discretion to escape liability for unavoidable violations in the case of citizen suits. These arguments are similar to those advanced by industry, in previous rulemakings and litigation, in support of extending the upset defense for NPDES permittees beyond violations of technology-based effluent limitations to include violations of water-quality based limits.

At the outset, EPA notes that it proposed to change only one part of the upset regulation for the narrow purpose of making it consistent with a change made to the NPDES upset regulation. Neither the proposed rule nor the accompanying preamble discussion contemplated any other change. Therefore, the Agency concludes that it would be inappropriate to substantively revise the scope of the upset defense in this rulemaking. However, even assuming that the Agency could properly consider extending the upset defense to cover violations of local limits, it would reject the commenters' arguments for some of the same reasons it rejected similar arguments in the context of the NPDES upset regulation.

The rationale for providing an upset defense for violations of the national categorical standards does not apply to violations of local limits. As discussed more thoroughly in previous rulemakings, the upset defense was designed, in part, in response to court rulings which found that to address situations where the equipment underlying technology-based limitations fails for reasons beyond the control of the operator, EPA must allow for upsets in applying these technology based standards. See discussions at 49 FR 37998, 38038 (September 14, 1984) and 44 FR 32863 (June 7, 1979). Unlike the categorical pretreatment standards, local limits developed pursuant to § 403.5(c) are not designed to reflect what certain technologies can achieve. Instead, they are designed to prevent a specific result, i.e., violations of the general prohibitions against pass through and interference in § 403.5(a) and the specific prohibitions in § 403.5(b). Prevention of pass through and interference is the ultimate goal of the entire pretreatment program. Although the pollution control equipment installed to meet local limits may also be subject to inherent failures beyond the industrial user's control, the legal basis for requiring the upset defense—accommodating the rare, but inevitable, technological failures which were assumed in establishing technology-based requirements—is not applicable in the case of local limits designed to prevent violations of the general and specific prohibitions. Therefore, EPA has concluded that the CWA does not require that an upset be provided for violations of local limits. Because compliance with local limits is the ultimate factor in achieving the goals of the national pretreatment program, excusing violations of local limits is unwarranted as a matter of policy. This decision is consistent with the Agency's recent action to establish limited affirmative defenses for violations of the general and specific prohibitions only when applicable local limits have not been violated. (*See*, 52 FR 1586 (January 14, 1986).)

To protect the integrity of local limits and their role in achieving pretreatment goals, EPA also deems it inappropriate to include local limit violations in the upset defense even where the industrial user can prove that the general and specific prohibitions have not been violated. Therefore, the Agency concludes that it is unnecessary to address the commenters' arguments concerning the practicability of proving compliance with national prohibited discharge standards.

EPA's decision not to extend the scope of the upset defense does not preclude the Agency from exercising its enforcement discretion when determining whether to bring an action pursuant to § 403.5(e) for violations of local limits or in evaluating the appropriate enforcement response when it decides to take action. EPA also anticipates that courts will consider an industrial user's good faith efforts to follow upset defense requirements (e.g., prompt notice to the POTW and efforts to mitigate damage caused by the upset and to identify and remedy the cause), as well as other relevant factors, when fashioning the appropriate relief in any citizen suit which may be brought under section 505 of the CWA to enforce violations of local limits. Commenters who argued that industrial users should not have to rely on the Agency's enforcement discretion to avoid liability assume that they are legally entitled to an upset defense for local limits.

In response to the final comment noted above, EPA disagrees that the proposed rule fails to convey the intent of the preamble discussion about the investigation of upsets. The preamble explained that under the proposed rule an industrial user would still be required to undertake a thorough investigation of the cause of the upset (and not just show that it has followed normal operating procedures), but that it would not have to pinpoint with absolute certainty the specific cause. The preamble further clarified that proof of the cause of an upset could be through circumstantial, as well as direct, evidence. 51 FR 21475, 21476 (June 12, 1986). The commenter does not indicate how the proposed rule could be revised to more fully convey EPA's intent (e.g., by codifying specific investigation duties the industrial user would be required to undertake or by codifying the types of evidence that would be acceptable as proof of cause).

The preamble discussion about investigating upsets and establishing the defense reflects typical rules of evidence that would apply in a proceeding to determine whether the affirmative defense should be allowed and explains how they might apply to the upset defense in particular. Under § 403.16(d), the industrial user has the burden of demonstrating that each element of the defense exists, including the demonstration of the cause of the upset. (The other elements which the user must demonstrate are listed in § 403.16(c).) This burden clearly requires that the user come forward with evidence of cause. A user would have to undertake a thorough investigation of how the upset occurred in order to discover and adduce the necessary evidence to meet this burden. However, the specific type of investigation techniques and proof necessary to establish the cause of the upset may not be the same in all situations. Accordingly, EPA has determined that it would be inappropriate to further specify in the regulation how the user must demonstrate cause.

This makes the upset provision in the general pretreatment regulations consistent with the upset provision in the NPDES regulations and thus eliminates any inequity that may have existed between the treatment of direct and indirect discharges in the requirements for establishing an upset

defense to violations of national technology-based discharge limitations.

As explained in the preamble to the proposed rule, the purpose of deleting the word "specific" from § 403.16(c)(1) is to clarify that the regulation does not require a discharger to produce a level of proof that is not scientifically possible to obtain or to require investigation and demonstration of the cause of an upset to an impossible degree of certainty. For example, there may be cases where biological activity is disrupted in a treatment system, where no change in raw waste characteristics could be identified, and where a thorough investigation by the user could not identify the precise cause of the violation. Such evidence could be adduced to show the "cause" required by today's regulation, even though the precise cause eluded detection. In these cases, it is sufficient that the available evidence vindicates the industrial user although it does not specifically identify the responsible party or event.

The Agency reiterates that a demonstration of the cause of an upset can be based on evidence that would be acceptable as proof of a fact in court. Thus, demonstration of cause can be based upon circumstantial, as well as direct, evidence. In many cases, circumstantial evidence may be all that is available. However, under the final rule, it is not enough simply to show that normal operating procedures were followed at the time the categorical standards were exceeded. By implication, the final rule requires at least a thorough investigation of the causes of the upset. Further, subsequent claims of upset would require a stronger showing where previous violations had occurred and no effort, or insufficient effort, was made to identify and remedy the cause or causes.

Finally, EPA would like to clarify that the upset defense is available only for factors beyond the reasonable control of the industrial user. In arguing for extension of the upset defense to cover local limit violations, one commenter listed changes in wastewater characteristics as an instance in which a violation would be unavoidable and therefore should be excused. EPA disagrees that a change in wastewater characteristic is beyond the reasonable control of the industrial user. Indeed, the industrial user is in the best, and perhaps only, position to control the characteristics of the wastewater entering its pretreatment facilities. Therefore, EPA would not consider an upset resulting from changes in wastewater characteristics eligible for the upset defense.

d. *Today's rule.* Today's final rule is the same as the proposed rule. As proposed, the word "specific" is deleted from § 403.16(c)(1) so that in establishing an upset defense, an industrial user must identify the cause of the upset, but no longer needs to identify the specific cause of the upset as required by the previous rule. No other aspects are changed by this rulemaking.

E.5. Bypass Provision [40 CFR 403.17]

a. *Existing rule.* For direct discharges, the NPDES regulations prohibit bypass, which is defined as the intentional diversion of waste streams from any portion of a discharger's treatment facility. This provision thus requires NPDES permittees to operate their entire treatment facility at all times. There are, however, exceptions to the strict prohibition on bypass even where effluent limitations may be violated as a result. Bypass may be excused if the bypass was unavoidable to prevent loss of life, personal injury or severe property damage, and where there were no feasiblle alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. The "no feasible alternatives" criterion is not satisfied if, in the exercise of reasonable engineering judgment, the permittee should have installed adequate back-up equipment as preventative maintenance or to prevent a bypass that occurred during normal periods of equipment downtime. The prohibition of bypass in the NPDES regulations applies even where the permittee does not violate permit limitations during the bypass. However, permittees may bypass if they do not exceed effluent limitations and if the bypass was for essential maintenance to ensure efficient facility operations.

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

b. *Proposed change.* EPA proposed to add a bypass provision to the General Pretreatment Regulations similar to that in the NPDES program. The purposes served by the NPDES bypass provision are equally important in the pretreatment context, and, therefore, the prohibition against bypass should also apply to industrial users discharging to POTWs. Like the NPDES provision, the proposal would require industrial users to operate their treatment systems at all times. It would also excuse bypasses under the same circumstances as does the NPDES bypass regulation.

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

c. *Response to comments.* Several commenters supported EPA's proposed rule without reservation for the reasons stated in the preamble. Nearly all commenters expressed support for some aspects of the proposal, but had objections to various other parts. In most cases, these objections paralleled objections to the NPDES bypass provision stated in previous rulemakings and pending litigation. Only one commenter, a POTW, objected entirely to adding a bypass provision to the General Pretreatment Regulations.

The commenter who argued that EPA should not promulgate the proposed rule stated that industrial users should not be given any incentive to bypass treatment systems and should be liable without exception for any damage they cause at the POTW. Instead, the incentive should be to require them to operate dependable pretreatment systems (e.g., use of dual equipment, "slop" tanks) to avoid the need for bypass. Another POTW stated that there is "no rationale" for allowing bypass for maintenance.

Clearly, EPA's intent in proposing the bypass provision was not to discourage

dependable pretreatment systems. On the contrary, the rule prohibits bypass except under very limited circumstances and in no case would excuse bypass where the user failed to properly operate and maintain its treatment system. Even when a violation of pretreatment standards would not result, the rule prohibits bypass unless the bypass was for essential maintenance to assure efficient operation. "Maintenance" in this instance does not refer to maintenance of the user's general facility, but means maintenance essential to the efficient operation of the user's pretreatment system. Moreover, the maintenance must be essential, of an emergency nature, not routine or based on economic considerations alone. Generally, this means repairs and maintenance that cannot wait until the production process is not in operation. For example, if the seal on a valve malfunctions or a pipe bursts during production hours at an industrial facility, and the facility operator bypasses that particular unit process in the pretreatment system in order to perform corrective maintenance, such maintenance would be considered essential. (A more complete discussion of "essential maintenance" appears at 49 FR 38037, September 26, 1984.) Recognizing the need for essential maintenance should encourage, not discourage, dependable pretreatment systems.

The rule does not excuse bypass in certain situations where pretreatment standards are violated. Significantly, bypass would not be excused if there were feasible alternatives to the bypass such as the use of auxiliary equipment. The rule specifically states that the "no feasible alternatives" test is not met if "adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance." (§ 403.17(1)(ii).) Thus, to the extent reasonable engineering judgment would dictate use of dual equipment or "slop" tanks so that bypass would not occur during routine maintenance, EPA agrees with the commenter that these back-up facilities should be required. However, EPA cannot agree that the rule should require an industrial user to have certain back-up equipment in all cases.

In contrast to these comments, another POTW suggested that back-up equipment should not be required where the system has already been built and adding back-up equipment is not feasible, for example where the user does not have enough land to install the additional equipment. In lieu of back-up equipment, users should be required to keep an adequate spare parts inventory on hand. As noted above, the regulation does not mandate back-up equipment in all cases, but includes a flexible requirement based on "reasonable engineering judgment." Thus, whether installation of back-up equipment or keeping a spare parts inventory is sufficient for purposes of the no feasible alternative test depends on whether, in the exercise of reasonable engineering judgment, one or the other should have been present to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance.

Because of the flexibility built into the bypass provision, EPA also does not agree with the commenter who suggested that EPA should allow bypass in all cases of floods. This commenter reasoned that although floods may jeopardize or damage operation of the system, they don't often cause "severe property damage." The commenter expressed particular concern about hurricane/monsoon rains that exceed the industrial users capacity to contain and treat storm water runoff. In such cases, the commenter argued, bypass during floods could reduce or prevent environmental harm by eliminating the "flushing out" of contaminants in the treatment system.

EPA is aware that flood situations may present users with a difficult dilemma concerning whether or not to bypass. The underlying premise of the CWA, however, is that undertreated or untreated wastewater should not be discharged. Only very exceptional circumstances should justify the intentional diversion of a wastestream from required treatment processes. In effect, the "severe property damage" test of the bypass provision reflects the Agency's determination of when the harm of not bypassing (e.g., when it avoids causing the treatment system from becoming inoperable or prevents substantial and permanent damage to natural resources) exceeds the benefits of requiring treatment in any event and thus justifies excusing a bypass. Therefore, the Agency has already taken into account the factors mentioned by the commenter (damage to the treatment system, environmental harm) in a manner consistent with the CWA.

In response to the comment that the regulation should make an industrial user liable any time it causes damage at the POTW, EPA notes that the bypass provision merely allows an industrial user to avoid an enforcement action for violations of pretreatment standards. It does not provide a defense to other action a Control Authority may have against an industrial user such as an action for damages. Also, as with the upset defense, section 510 of the CWA allows a POTW (or a State) to establish more stringent requirements, such as prohibiting bypass or requiring back-up equipment in all cases.

The remaining comments related to the prohibition against bypass even when violations of pretreatment standards would not result (the "constant treatment" requirement). One commenter suggested that the Agency reword the regulation because it seemed to require the use of pretreatment equipment even if the quality of the discharge would not be improved as a result. Another commenter stated that promulgating this provision in the pretreatment regulations would violate the NPDES settlement agreement between EPA and industry. Others asserted that the "constant treatment" requirement violates the CWA, listing three basic reasons: (1) It dictates how to comply, rather than what standard to comply with; (2) the rationale used by EPA to support the requirement (i.e., ensuring appropriate control of pollutants that are not specifically regulated) constitutes de facto regulation and circumvents the standard setting procedures contained in the Act; and (3) by failing to compare the costs of the requirement with the environmental benefits of reducing "unregulated" pollutants, the Agency acted arbitrarily.

The Agency disagrees with all these comments. The settlement agreement between EPA and industry groups required EPA to propose certain revisions to the NPDES bypass provision, but did not, and could not, require EPA to agree to promulgate those proposed revisions in the final rule. EPA's decision not to promulgate the proposed revisions resulted in a suit against EPA challenging the NPDES bypass provision. The challenge is based on the merits of the regulation and not because of any alleged breach of the settlement agreement. The Court of Appeals for the D.C. Circuit recently upheld the cited NPDES regulations on bypass *(NRDC v. EPA, et al.,* 26 ERC 1153, June 30, 1987). Therefore, this commenter's suggestions regarding the "constant treatment" requirement have not been incorporated into today's regulation. EPA's position continues to be that requiring users to operate the pretreatment facilities at all times even though bypassing these facilities would not result in violations of pretreatment standards does not violate the CWA

and, in fact, furthers the goals of the CWA. The preamble to the September 26, 1984, NPDES rulemaking explained EPA's rationale for the "constant treatment" requirement:

> EPA's effluent limitations guidelines and standards-setting process are predicted [sic] upon the efficient operation and maintenance of removal systems. A number of the effluent limitations guidelines and standards upon which NPDES permits are based do not contain specific limitations for all of the pollutants of concern for the given industry.
> * * * * *
> The data available to EPA show that effective control of these [unregulated] pollutants can be obtained by controlling the discharge of the pollutants regulated by the standard . . . to levels achievable by the model treatment technology upon which the effluent guideline limits are based.
> * * * * *
> If bypass of treatment equipment is allowed, there is no assurance that these unlimited pollutants will be controlled, even though those specifically limited still meet permit limitations.

(49 FR 38036–38037.)

Like the effluent guidelines in the NPDES program, the national categorical pretreatment standards do not necessarily regulate all pollutants of concern in a particular industry, but instead rely on the technology required to control the specifically regulated pollutants to also regulate other pollutants of concern, assuming proper operation and maintenance of the treatment facilities. For example, control of oil and grease by a pretreatment system will also serve to control some toxic components of a discharge and some portion of the BOD loading of that discharge. The bypass prohibition thus supplements the categorical standards and furthers the Act's goals of eliminating the discharge of pollutants.

Like the upset provision, the bypass regulation is a general requirement which, although it works in conjunction with the categorical pretreatment standards, is not itself an effluent standard. The CWA clearly authorizes the Administrator to promulgate regulations which are necessary to carry out the purposes of the Act (Section 301). EPA has not "circumvented" the standard setting procedures established by the Act in promulgating the bypass provision, because it was not limited to establishing categorical standards in developing regulations to implement the national pretreatment program. The Agency has determined that the bypass provision, which mandates full use of treatment facilities and encourages proper operation and maintenance of those facilities is a reasonable measure to ensure compliance with pretreatment standards.

Likewise, nothing in the Act requires the Agency to justify each of its program regulations with a cost benefit analysis as the commenters suggest. Of course, the Agency does not ignore these factors. In this case, however, because the bypass provision merely "piggybacks" existing requirements, it does not itself impose costs that have not already been taken into account in the development of categorical standards. In addition to capital costs, these costs include the costs of operating and maintaining pretreatment facilities. (*See*, for example, "Development Document for the Electroplating Category".) Moreover, the Agency decided to adopt the approach of controlling some pollutants of concern through controlling "indicator" pollutants in part to reduce compliance costs (e.g., sampling, monitoring, and reporting of each pollutant specifically limited by the standards) in response to industry concerns. On the other hand, the incidental removal of pollutants not specifically regulated clearly conforms to the environmental benefits envisioned by Congress of eventually eliminating the discharge of all pollutants.

The bypass provision does not dictate how users must comply because it does not dictate what pretreatment technology the user must install. Instead the bypass provision merely requires that the user operate the technology it has chosen. Although termed the "constant treatment" requirement, the bypass provision does not mean that the pretreatment facilities must operate twenty-four hours a day regardless of the activities at the user's facility. Instead, the user must operate the treatment system in a manner consistent with appropriate engineering practice. Thus, if the facility is designed to use scrubbers twice a day, the bypass regulation does not require the facility to run the scrubber 24 hours a day. Similarly, the bypass prohibition does not require operation of the treatment system if the facility is not operating and there are no wastewater discharges. Nor does it require operation of treatment systems 24-hours a day if wastes are collected and retained for eventual treatment and released in batch discharges. For users who must operate continuously, the bypass prohibition recognizes that bypass may be unavoidable and therefore allows bypass for essential maintenance that cannot be conducted during normal downtimes.

In sum, EPA has considered all of the comments objecting to a bypass prohibition when pretreatment standards would not be violated because of the bypass. These comments mirror comments the Agency considered and rejected during consideration of the NPDES bypass regulation. Nothing in the comments convince the Agency that its decision should be different because of material differences between NPDES permittees and industrial users. As with the NPDES bypass provision, EPA has determined that a bypass provision in the General Pretreatment Regulations is necessary to ensure that users properly operate and maintain their treatment facilities and thus fulfill the purpose and assumptions underlying technology-based standards. This is consistent with Congressional intent and within its authority to promulgate regulations necessary to achieve the purposes of the Act.

d. *Today's rule.* For the reasons stated in the preamble and in the response to comments above, EPA is promulgating the bypass regulation as proposed.

III. Judicial Review of Provisions Not Amended

In the regulatory section of this notice, EPA has, for the sake of clarity, sometimes reprinted portions of regulatory text that have not been amended by today's proposal. Those portions of the June 26, 1978 regulations and the January 28, 1981 regulatory amendments that are not substantively amended in today's **Federal Register** were only subject to judicial review in those petitions for review that were filed within 90 days of the date of issuance of the June 26, 1978 regulations, and the January 28, 1981 amendments thereto, respectively.

IV. Technical Revisions

In addition to the substantive changes made by today's rulemaking, certain sections of the General Pretreatment Regulations must be revised in order to conform to today's changes. Thus, the reference to "contract(s)" is deleted from §§ 403.8(f)(1)(iii) and 403.9(b). The reference in new § 403.12(n) (*Provisions governing fraud and false statements*) to the reports required by old paragraphs (b), (d), (e), and (h) of that section has been changed to the reports required in new paragraphs (b), (d), (e), (h), and (i), and (k) of that section. Similarly, new § 403.12(o) has been revised to include as subject to the record-keeping requirements of that paragraph any reports required pursuant to new paragraph (h) of that section. In addition, the references in § 403.10(d) to § 403.12(h) have been revised to reflect the redesignation of that paragraph as § 403.12(k).

V. List of Subjects in 40 CFR Part 403

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

VI. EPA Documents Cited in This Notice

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

Guidance Manual for POTW Pretreatment Program Development (1983)

Procedures Manual for Reviewing a POTW Pretreatment Program Submission (1983)

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

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

Pretreatment Compliance Monitoring and Enforcement Guidance (1986)

Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program (1987)

Copies of these documents can be obtained by contacting Chuck Prorok, Permits Division (EN-336), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 426-7053.

VII. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. These amendments generally clarify the meaning of pretreatment requirements and do not impose significant new burdens on affected parties. They do not satisfy any of the criteria specified in section 1(b)—an effect on the economy of $100M or more per year; a major increase in costs or prices for consumers or individual industries, agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or competition with foreign producers—of the Executive Order. These amendments will not produce a compliance cost of more than $100M per year, will not cause a major increase in costs or prices for any segment of the affected population, and will not create any of the enumerated significant adverse effects. Therefore, this is not a major rulemaking. This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

VIII. 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.

IX. Regulatory Flexibility Act

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

Dated: September 29, 1988.

Lee M. Thomas,

Administrator.

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

PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES

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

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

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

§ 403.3 Definitions.

* * * * * *

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

(i) The building, structure, facility or installation is constructed at a site at which no other source is located; or

(ii) The building, structure, facility or installation totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

(iii) The production or wastewater generating processes of the building, structure, facility or installation are substantially independent of an existing source at the same site. In determining whether these are substantially independent, factors such as the extent to which the new facility is integrated with the existing plant, and the extent to which the new facility is engaged in the same general type of activity as the existing source should be considered.

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

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

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

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

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

(ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under this paragraph.

* * * * *

3. Section 403.6 is amended by redesignating paragraph (c) as paragraph (c)(1), adding new paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), and (c)(7), revising paragraphs (a)(2)(ii), (b), (d), and (e)(3), revising the defintion of "F_D" in paragraphs (e)(1) (i) and (ii), and adding a new paragraph (e)(4) to read as follows:

§ 403.6 National Pretreatment Standards: Categorical Standards.

* * * * *

(a) * * *

(2) * * *

(ii) Citing evidence and reasons why a particular subcategory is applicable and why others are not applicable. Any person signing the application statement submitted pursuant to this section shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaulate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

* * * * *

(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(k). New Sources shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet applicable Pretreatment Standards before beginning to Discharge. Within the shortest feasible time (not to exceed 90 days), 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 of effluent concentration for purposes of calculating effluent limitations applicable to individual Industrial Users.

(3) A Control Authority calculating equivalent mass-per-day limitations under paragraph (c)(2) of this section shall calculate such limitations by multiplying the limits in the Standard by the Industrial User's average rate of production. This average rate of production shall be based not upon the designed production capacity but rather upon a reasonable measure of the Industrial User's actual long-term daily production, such as the average daily production during a representative year. For new sources, actual production shall be estimated using projected production.

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

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

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

(7) Any Industrial User operating under a control mechanism incorporating equivalent mass or concentration limits calculated from a production based standard shall notify the Control Authority within two (2) business days after the User has a reasonable basis to know that the production level will significantly change within the next calendar month. Any User not notifying the Control Authority of such anticipated change will be required to meet the mass or concentration limits in its control mechanism that were based on the original estimate of the long term average production rate.

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

(e) * * *

(1) * * *

(i) * * *

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

(1) The pollutants of concern are not detectable in the effluent from the Industrial User (paragraph (8)(a)(iii));

(2) The pollutants of concern are present only in trace amounts and are neither causing nor likely to cause toxic effects (paragraph (8)(a)(iii));

(3) The pollutants of concern are present in amounts too small to be effectively reduced by technologies known to the Administrator (paragraph (8)(a)(iii)); or

(4) The wastestream contains only pollutants which are compatible with the POTW (paragraph (8)(b)(i)).

* * * * *

(ii) * * *

F_D=the average daily flow (at least a 30-day average) from: (a) boiler blowdown streams, non-contact cooling streams, stormwater streams, and demineralizer backwash streams; provided, however, that where such streams contain a significant amount of a pollutant, and the combination of such streams, prior to treatment, with an Industrial

User's regulated process wastestream(s) will result in a substantial reduction of that pollutant, the Control Authority, upon application of the Industrial User, may exercise its discretion to determine whether such stream(s) should be classified as diluted or unregulated. In its application to the Control Authority, the Industrial User must provide engineering, production, sampling and analysis and such other information so that the Control Authority can make its determination; or (b) sanitary wastestreams where such streams are not regulated by a categorical Pretreatment Standard; or (c) from any process wastestreams which were or could have been entirely exempted from categorical Pretreatment Standards pursuant to paragraph 8 of the *NRDC v. Costle* Consent Decree (12 ERC 1833) for one or more of the following reasons (see Appendix D of this Part):

(1) The pollutants of concern are not detectable in the effluent from the Industrial User (paragraph (8)(a)(iii));

(2) The pollutants of concern are present only in trace amounts and are neither causing nor likely to cause toxic effects (paragraph (8)(a)(iii));

(3) The pollutants of concern are present in amounts too small to be effectively reduced by technologies known to the Administrator (paragraph (8)(a)(iii)); or

(4) The wastestream contains only pollutants which are compatible with the POTW (paragraph (8)(b)(i)).

* * * * *

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

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

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

§ 403.8 POTW pretreatment programs: Development by POTW.

* * * * *

(b) *Deadline for Program Approval.* A POTW which meets the criteria of paragraph (a) of this section must receive approval of a POTW Pretreatment Program no later than 3 years after the reissuance or modification of its existing NPDES permit but in no case later than July 1, 1983. POTWs whose NPDES permits are modified under section 301(h) of the Act shall have a Pretreatment Program within three (3) years as provided for in 40 CFR Part 125, Subpart G. POTWs identified after July 1, 1983 as being required to develop a POTW Pretreatment Program under paragraph (a) of this section shall develop and submit such a program for approval as soon as possible, but in no case later than one year after written notification from the Approval Authority of such identification. The POTW Pretreatment Program shall meet the criteria set forth in paragraph (f) of this section and shall be administered by the POTW to ensure compliance by Industrial Users with applicable Pretreatment Standards and Requirements.

* * * * *

(f) * * *

(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;

* * * * *

(vi)(A) Obtain remedies for noncompliance by any Industrial User with any Pretreatment Standard and Requirement. All POTW's shall be able to seek injunctive relief for noncompliance by Industrial Users with Pretreatment Standards and Requirements. All POTWs shall also have authority to seek or assess civil or criminal penalties in at least the amount of $1,000 a day for each violation by Industrial Users of Pretreatment Standards and Requirements. POTWs whose approved Pretreatemnt Programs require modification to conform to the requirements of this paragraph shall submit a request for approval of a program modification in accordance with § 403.18 by November 16, 1989, unless the State would be required to enact or amend a statutory provision, in which case the POTW shall submit such a request by November 16, 1990.

* * * * *

(4) *Local limits.* The POTW shall develop local limits as required in § 403.5(c)(1), or demonstrate that they are not necessary.

5. Section 403.9 is amended by revising paragraphs (b)(1)(ii) and (2), and (e) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(ii) Identify the manner in which the POTW will implement the program requirements set forth in § 403.8, including the means by which Pretreatment Standards will be applied to individual Industrial Users (e.g., by order, permit, ordinance, etc.); and,

* * * * *

(2) A copy of any statutes, ordinances, regulations, agreements, or other authorities relied upon by the POTW for its administration of the Program. This Submission shall include a statement reflecting the endorsement or approval of the local boards or bodies responsible for supervising and/or funding the POTW Pretreatment Program if approved;

* * * * *

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

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

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

* * * * *

6. Section 403.10 is amended by revising the references in paragraphs (d)(1) and (3) to "§ 403.12(h)" to read "§ 403.12((k)" and also by revising paragraph (g)(1)(iii) to read as follows:

§ 403.10 Development and submission of NPDES State pretreatment program.

* * * * *

(g) * * *

(1) * * *

(iii) States with approved Pretreatment Programs shall establish

Pretreatment regulations by November 16, 1989, unless the State would be required to enact or amend statutory provision, in which case, such regulations must be established by November 16, 1990.

* * * * *

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

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

* * * * *

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

* * * * *

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

§ 403.12 Reporting requirements for POTWs and industrial users.

* * * * *

(b) *Reporting requirements for industrial users upon effective date of categorical pretreatment standard—baseline report.* Within 180 days after the effective date of a categorical Pretreatment Standard, or 180 days after the final administrative decision made upon a category determination submission under § 403.6(a)(4), whichever is later, existing Industrial Users subject to such categorical Pretreatment Standards and currently discharging to or scheduled to discharge to a POTW shall be required to submit to the Control Authority a report which contains the information listed in paragraphs (b)(1)–(7) of this section. Where reports containing this information already have been submitted to the Director or Regional Administrator in compliance with the requirement of 40 CFR 128.140(b) (1977), the Industrial User will not be required to submit this information again. At least 90 days prior to commencementof discharge, New Sources, and sources that become Industrial Users subsequent to the promulgation of an applicable categorical Standard, shall be required to submit to the Control Authority a report which contains the information listed in paragraphs (b)(1)–(5) of this section. New sources shall also be required to include in this report information on the method of pretreatment the source intends to use to meet applicable pretreatment standards. New Sources shall give estimates of the information requested in paragraphs (b) (4) and (5) of this section:

* * * * *

(5) * * *

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

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

* * * * *

(d) *Report on compliance with categorical pretreatment standard deadline.* Within 90 days following the date for final compliance with applicable categorical Pretreatment Standards or in the case of a New Source following commencement of the introduction of wastewater into the POTW, any Industrial User subject to Pretreatment Standards and Requirements shall submit to the Control Authority a report containing the information described in paragraphs (b) (4)–(6) of this section. For Industrial Users subject to equivalent mass or concentration limits established by the Control Authority in accordance with the procedures in § 403.6(c), this report shall contain a reasonable measure of the User's long term production rate. For all other Industrial Users subject to categorical Pretreatment Standards expressed in terms of allowable pollutant discharge per unit of production (or other measure of operation), this report shall include the User's actual production during the appropriate sampling period.

(e) * * *

(3) For Industrial Users subject to equivalent mass or concentration limits established by the Control Authority in accordance with the procedures in § 403.6(c), the report required by paragraph (e)(1) shall contain a reasonable measure of the User's long term production rate. For all other Industrial Users subject to categorical Pretreatment Standards expressed only in terms of allowable pollutant discharge per unit of production (or other measure of operation), the report required by paragraph (e)(1) shall include the User's actual average production rate for the reporting period.

(f) *Notice of potential problems, including slug loading.* All categorical and non-categorical Industrial Users shall notify the POTW immediately of all discharges that could cause problems to the POTW, including any slug loadings, as defined by § 403.5(b), by the Industrial User.

(g) *Monitoring and analysis to demonstrate continued compliance.* (1) The reports required in paragraphs (b), (d), and (e) of this section shall contain the results of sampling and analaysis 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 §§ 403.12(b) (6) and 403.12(d). 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, except the Industrial User is not required to resample 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 User performs its initial sampling and the time when the User receives the results of this sampling.

(3) The reports required in paragraph (e) of this section shall be based upon data obtained through appropriate

sampling and analysis performed during the period covered by the report, which data is representative of conditions occurring during the reporting period. The Control Authority shall require that frequency of monitoring necessary to assess and assure compliance by Industrial Users with applicable Pretreatment Standards and Requirements.

(4) All analyses shall be performed in accordance with procedures established by the Administrator pursuant to section 304(h) of the Act and contained in 40 CFR Part 136 and amendments thereto or with any other test procedures approved by the Administrator. (*See*, §§ 136.4 and 136.5.) Sampling shall be performed in accordance with the techniques approved by the Administrator. Where 40 CFR Part 136 does not include sampling or analytical techniques for the pollutants in question, or where the Administrator determines that the Part 136 sampling and analytical techniques are inappropriate for the pollutant in question, sampling and analyses shall be performed using validated analytical methods or any other sampling and analytical procedures, including procedures suggested by the POTW or other parties, approved by the Administrator.

(5) If an Industrial User subject to the reporting requirement in paragraph (e) of this section monitors any pollutant more frequently than required by the Control Authority, using the procedures prescribed in paragraph (g)(4) 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 shall require appropriate reporting from those Industrial Users with discharges that are not subject to categorical Pretreatment Standards.

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

(1) An updated list of the POTW's Industrial Users, including their names and addresses, or a list of deletions and additions keyed to a previously submitted list. The POTW shall provide a brief explanation of each deletion. This list shall identify which Industrial Users are subject to categorical pretreatment Standards and specify which Standards are applicable to each 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.

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

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

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

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

* * * * *

(l) *Signatory requirements for industrial user reports.* The reports required by 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 (i) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing, production, or operation facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

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

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

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

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

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

(4) If an authorization under paragraph (l)(3) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, or overall responsibility for environmental matters for the company, a new authorization satisfying the requirements of paragraph (l)(3) of this section must be submitted to the Control Authority prior to or together with any reports to be signed by an authorized representative.

* * * * *

(n) *Provisions governing fraud and false statements.* The reports required by paragraphs (b), (d), (e), (h), (i), and (k) of this section are subject to the provisions of 18 U.S.C. 1001 relating to fraud and false statements and the provisions of section 309(c)(2) of the Act governing false statements, representations or certifications in reports required under the Act.

(o) * * *

(3) Any POTW to which reports are submitted by an Industrial User pursuant to paragraphs (b), (d), (e), and (h) of this section shall retain such reports for a minimum of 3 years and shall make such reports available for inspection and copying by the Director and the Regional Administrator. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the Industrial User or the operation of the POTW Pretreatment Program or when requested by the Director or the Regional Administrator.

9. Section 403.15 is revised to read as follows:

§ 403.15 Net/Gross calculation.

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

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

of paragraphs (b) and (c) of this section are met.

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

(2) Credit for generic pollutants such as biochemical oxygen demand (BOD), total suspended solids (TSS), and oil and grease should not be granted unless the Industrial User demonstrates that the constituents of the generic measure in the User's effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropirate 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.

(c) The applicable categorical pretreatment standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis.

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

§ 403.16 Upset provision.

* * * * *

(c) * * *

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

* * * * *

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

§ 403.17 Bypass.

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

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

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

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

(2) An Industrial User shall submit oral notice of an unanticipated bypass that exceeds applicable Pretreatment Standards to the Control Authority within 24 hours from the time the Industrial User becomes aware of the bypass. A written submission shall also be provided within 5 days of the time the Industrial User becomes aware of the bypass. The written submission shall contain a description of the bypass and its cause; the duration of the bypass, including exact dates and times, and, if the bypass has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the bypass. The Control Authority may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

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

(i) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(ii) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventative maintenance; and

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

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

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

§ 403.18 Modification of POTW Pretreatment Programs.

(a) *General.* Either the Approval Authority or a POTW with an approved POTW Pretreatment Program may initiate program modification at any time to reflect changing conditions at the POTW. Program modification is necessary whenever there is a significant change in the operation of a POTW Pretreatment Program that differs from the information in the POTW's Submission, as approved under § 403.11.

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

(1) For substantial modifications, as defined in paragraph (c) of this section:

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

(ii) The Approval Authority shall approve or disapprove the modification based on the requirements of § 403.8(f), following the procedures in § 403.11(b)–(f).

(iii) The modification shall be incorporated into the POTW's NPDES permit after approval. The permit will be modified to incorporate the approved modification in accordance with 40 CFR 122.63(g).

(iv) The modification shall become effective upon approval by the Approval Authority. Notice of approval shall be published in the same newspaper as the notice of the original request for approval of the modification under § 403.11(b)(1)(i)(B).

(2) The POTW shall notify the Approval Authority of any other (i.e., non-substantial) modifications to its Pretreatment Program at least 30 days prior to when they are to be implemented by the POTW, in a statement similar to that provided for in paragraph (b)(1)(i) of this section. Such non-substantial program modifications shall be deemed to be approved by the Approval Authority, unless the Approval Authority determines that a modification submitted is in fact a substantial modification, 90 days after the submission of the POTW's statement. Following such "approval" by the Approval Authority, such

modifications shall be incorporated into the POTW's permit in accordance with 40 CFR 122.63(g). If the Approval Authority determines that a modification reported by a POTW in its statement is in fact a substantial modification, the Approval Authority shall notify the POTW and initiate the procedures in paragraph (b)(1) of this section.

(c) *Substantial modifications.* (1) The following are substantial modifications for purposes of this section:

(i) Changes to the POTW's legal authorities;

(ii) Changes to local limits, which result in less stringent local limits;

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

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

(v) A decrease in the frequency of self-monitoring or reporting required of industrial users;

(vi) A decrease in the frequency of industrial user inspections or sampling by the POTW;

(vii) Changes to the POTW's confidentiality procedures;

(viii) Significant reductions in the POTW's Pretreatment Program resources (including personnel commitments, equipment, and funding levels); and

(ix) Changes in the POTW's sludge disposal and management practices.

(2) The Approval Authority may designate other specific modifications, in addition to those listed in paragraph (c)(1) of this section, as substantial modifications.

(3) A modification that is not included in paragraph (c)(1) of this section is nonetheless a substantial modification for purposes of this section if the modification:

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

(ii) Would result in an increase in pollutant loadings at the POTW; or

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

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

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

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

14. 40 CFR 122.63(g) is revised to read as follows:

§ 122.63 Minor modifications of permits.

* * * * *

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

[FR Doc. 88-22907 Filed 10-14-88; 8:45 am]
BILLING CODE 6560-50-M