

HEINONLINE

Citation: 53 Fed. Reg. 40600 1988



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Feb 4 15:19:53 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

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 or 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 character 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 existing 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 qualify as a new source: (1) The extent to which the new facility is integrated with the existing plant; and (2) the extent to which the new facility is engaged in the same general type of activity as the existing source.

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's 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 feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. The "no feasible alternatives" criterion is not satisfied if, in the exercise of reasonable engineering judgment, the permittee should have installed adequate back-up equipment as preventative maintenance or to prevent a bypass that occurred during normal periods of equipment downtime. The prohibition of bypass in the NPDES regulations applies even where the permittee does not violate permit limitations during the bypass. However, permittees may bypass if they do not exceed effluent limitations and if the bypass was for essential maintenance to 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).