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Streamlined Procedures for Modifying Approved Publicly Owned Treatment Works Pretreatment Programs; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 403

[FRL–5859–8]

RIN 2040–AC57

Streamlined Procedures for Modifying Approved Publicly Owned Treatment Works Pretreatment Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Today, EPA is revising the procedures for modifying the requirements of approved Publicly Owned Treatment Works (POTW) Pretreatment Programs incorporated into National Pollutant Discharge Elimination System (NPDES) permits issued to POTWs. The new regulations will reduce the administrative burden and cost associated with maintaining approved pretreatment programs without affecting environmental protection.

DATES: This rule is effective on August 18, 1997. In accordance with 40 CFR 23.2, this rule shall be considered final for the purposes of judicial review at 1:00 P.M. EDT on July 31, 1997.

ADDRESSES: Copies of comments submitted and the docket for this rulemaking are available for public inspection at EPA's Water Docket, Room L–102, 401 M Street, S.W. (MC–4101), Washington, D.C. 20460. The public may inspect the administrative record for this rulemaking between the hours of 9 a.m. and 3:30 p.m. on business days. For access to docket materials, please call (202) 260–3027 for an appointment during those hours. As provided in 40 CFR part 2, a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Jeff Smith, EPA, Office of Wastewater Management (OWM), Permits Division (4203), 401 M Street, S.W., Washington, D.C. 20460, (202) 260–5586.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities regulated by this action are governmental entities responsible for implementation of the National Pretreatment Program. Regulated entities include:

Category	Examples of regulated entities
Local government.	Publicly Owned Treatment Works with Approved Pretreatment programs.
State government.	States that act as Pretreatment Program Approval Authorities.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization is regulated by this action, you should carefully examine the applicability criteria in 40 CFR 403.18 and other applicable criteria in Part 403 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **''FOR FURTHER INFORMATION CONTACT''** section.

Information in this preamble is organized as follows:

I. Background
A. Prior Program Approval Process
B. Summary of Today's Rule
C. Summary of Public Comments
1. General
2. Comments on Further Streamlining
II. Section by Section Analysis
A. Characterization of Modifications
1. General
2. Changes That Relax Legal Authority
3. Changes That Mirror Federal Regulations
4. Changes to pH Limits
5. Reallocation of MAIL
6. Enforcement Response Plans
B. Public Notice Procedures for Substantial Modifications
1. Single Public Notice
2. Adequency of Local Notice
3. Other Changes to Notice Requirements
C. Procedures for Non-substantial Modifications
D. Changes Reported in Annual Reports
III. Regulatory Requirements
A. Execute Order 12866
B. Executive Order 12875
C. Regulatory Flexibility Act
D. Paperwork Reduction Act
E. Unfunded Mandates Reform Act
F. Submission to Congress and the General Accounting Office

I. Background

Today, EPA is revising the procedures for modifying the requirements of approved Publicly Owned Treatment Works (POTW) Pretreatment Programs incorporated into National Pollutant Discharge Elimination System (NPDES) permits issued to POTWs under the Clean Water Act (CWA).

A. Prior Program Approval Process

EPA provided an extensive discussion of the background for today's rule in the proposed rule published in the July 30, 1996, **Federal Register** document (61 FR 39804). For the sake of brevity, EPA refers the reader to that notice and only repeats the background necessary to explain the need for today's final rule.

POTWs that meet certain requirements must develop pretreatment programs to control industrial discharges into their sewage systems. CWA section 402(b)(8); 40 CFR 403.8(a). EPA or the State (in States approved by EPA to act as the pretreatment program ''Approval Authority'') must approve the POTW's pretreatment program request according to the procedures in 40 CFR 403.11

Regulations at 40 CFR 403.8 and 403.9 describe the substantive content of and documentation required for a POTW pretreatment program. Under 40 CFR 403.8(f), the POTW pretreatment program submission must reflect specified legal authorities, compliance assurance procedures, adequate funding, a local limit development demonstration, an enforcement response plan (ERP), and a list of significant industrial users. After approval by the Approval Authority, the entire approved pretreatment program is then incorporated as an enforceable condition of the POTW's NPDES permit. 40 CFR 122.44(j)(2) and 403.8(c).

Regulations at 40 CFR 403.18 specify the procedures used to modify approved POTW programs. EPA originally promulgated those procedures on October 17, 1988. 53 FR 40562, 40615. Section 403.18(a) requires the POTW to follow program modification procedures whenever there is a ''significant change'' in the approved POTW pretreatment program. Section 403.18(c) and (d) outlines specific procedures for Approval Authority review and approval of ''substantial program modifications'' and other non-substantial program modifications. Section 403.18(b) contains a list of changes which are ''substantial program modifications'' and gives the Approval Authority power to designate other modifications as substantial modifications.

Section 403.18(c) describes the procedure for Approval Authority action on ''substantial program modifications.'' Under this section, the POTW submits specified documents; the Approval Authority uses the procedures in 40 CFR 403.11 (b)–(f) to act on the proposed modification; and the approved modification is incorporated into the POTW's NPDES permit as a minor permit modification under 40 CFR 122.63(g). Under these procedures, the Approval Authority determines whether the submission is

complete, issues public notice of the complete request for substantial program modification, acts on the submission within 90 days, and publishes notice of approval or disapproval.

To provide notice of the request for approval, the Approval Authority mails notices to specified individuals, publishes notice of the request in the largest daily newspaper within the jurisdiction served by the POTW, provides a 30-day public comment period, provides an opportunity to request a public hearing, and holds a public hearing at the POTW's request or if there is significant public interest in doing so. 40 CFR 403.11(b)(1). To provide notice of the approval or disapproval decision, the Approval Authority provides written notice to all persons who submitted comments or participated in the public hearing if held, and publishes notice in the same newspaper as the original notice of request for approval was published. 40 CFR 403.11(e).

Under the existing § 403.18(b)(2) procedures for approval of non-substantial program modifications, the POTW must notify the Approval Authority at least 30 days prior to implementation of a non-substantial modification. The modification is considered approved unless the Approval Authority decides within 90 days that the change is substantial and initiates the procedures for approval of substantial program modifications. Once again, the approved non-substantial change is incorporated into the NPDES permit as a minor permit modification under 40 CFR 122.63(g).

B. Summary of Today's Rule

Today's rule streamlines the procedures for modifying approved POTW Pretreatment Programs in several ways. First, fewer categories of modifications are considered ''substantial'' and, therefore, automatically subject to the detailed public notice procedures. Modifications that will no longer automatically be considered ''substantial'' include: changes that result in more prescriptive POTW legal authority; changes to legal authority that reflect changes to the Federal regulations; changes to local limits for pH; reallocations of local limits that do not increase the authorized discharge of the pollutant from the POTW; and other changes discussed below. 40 CFR 403.18(b). Second, the rule no longer requires the Approval Authority to issue a public notice of its final approval of a modification if it received no comments on its proposed approval of the modification and the modification is approved as proposed. 403.18(c)(3). Third, public notice provided by a POTW will satisfy the Approval Authority's obligation to provide notice in certain circumstances. 40 CFR 403.18(c)(4). Fourth, the rule allows a POTW to report changes to its list of industrial users in the POTW's annual reports, rather than being required to obtain advance approval. 40 CFR 403.8(f)(6) and 403.12(i)(1). Fifth, the period of notice that POTWs must provide for non-substantial modifications and the time for review by Approval Authorities will both be 45 days; POTWs may implement a non-substantial modification if the Approval Authority does not disapprove it within that time. 40 CFR 403.18(d). Sixth, the rule grants additional flexibility regarding the type of newspaper that may publish the notices and the government agencies that receive individual notice of all modifications. 40 CFR 403.11(b)(1)(1) (A) and (B).

C. Summary of Public Comments

1. General

EPA proposed regulations on July 30, 1996, responding to problems experienced in administering the existing rule (61 FR 39804). The preamble to the proposed rule explains the proposed changes in the regulation. The public comment period was open for a period of 60 days and closed on September 30, 1996. Although one comment was not received until October 2, EPA has responded to all comments received.

EPA received 25 comments, including those from five States, 10 municipalities, one attorney and one trade group that represent municipalities, one contract operator, one industrial facility, five trade groups that represent industry, and one environmental public interest group. A brief summary of the comments is set out below. A more detailed discussion of the comments received is set out later in this preamble in the section-by-section analysis.

Virtually all of the commenters recognized the need to streamline the current procedures for modifying POTW pretreatment programs. One commenter stated that it supported efforts to reduce the number of modifications that go through the ''grueling approval process'' and noted that its last major modification took 6 years to complete. A few Approval Authorities commented that they rarely receive public comments. One State commented that cities are required by State law to issue public notice and that no one had ever commented on the State's notices.

Commenters also generally supported the details of the proposal. No commenter opposed the proposal to allow modifications to be approved following a single public notice when there is no comment on the modification. No commenter strongly opposed the proposal to allow changes to legal authority that reflect changes to the Federal regulations, redistribution of the Maximum Available Industrial Load and changes to pH limits to be processed as ''non-substantial'' modifications. Although most commenters supported the other deletions from the definition of ''substantial'' modifications, a few commenters strongly opposed them. Only one commenter opposed allowing changes to Industrial User inventories to be reported in annual reports. Most commenters supported reducing to 45 days the time for review of non-substantial modifications.

One commenter recommended restricting the time for review of substantial modifications to 60 days. The commenter noted that the preamble to the October 18, 1988, revisions to the pretreatment regulations indicates that EPA would adopt a 60 day limit, but the regulatory language included the 90 day limit. (53 FR 40562, 40581). Given that some Approval Authorities are having difficulty performing reviews within the current 90 day time frame, EPA has decided not to revise this provision.

2. Comments on Further Streamlining

Several commenters, including a trade association for POTWs, recommended that streamlining would be best accomplished by removing the Approved Pretreatment Program from the POTW's NPDES permit, thereby eliminating the need for permit modifications.

They recommended that the Pretreatment program could be implemented by direct reference to the regulatory requirements or by placing performance measures into the POTW's permit. Some commenters suggested that whether a modification is ''substantial'' should be tied to specific measures such as whether the modification increases the total load or has a direct effect on the environment.

One commenter argued that it should not be necessary to get a permit modification for a ''non-substantial'' modification. The commenter's State charges thousands of dollars for a permit modification, including one to incorporate non-substantial modifications. While expressing no opinion on the reasonableness of such

fees for a minor permit modification, EPA notes that a program modification requires a permit modification if the modification relates to an enforceable element of the POTW's NPDES permit. 40 CFR 403.8(c).

EPA acknowledges that removing the Pretreatment Program from the NPDES permit would increase POTW flexibility and eliminate any issues regarding the need to provide public notice of modifications to the POTW's program. On the other hand, incorporation of the program into the permit provides all concerned with the greatest certainty as to the program's scope and content. As mentioned in the preamble to the proposal, some stakeholders were concerned that Part 403 standing alone may not be sufficiently specific to create objective, enforceable requirements that could be directly implemented. Although one commenter responded to EPA's request for more specific regulatory language with the recommendation that streamlining could be accomplished with language similar to NPDES boilerplate, no commenter provided specific language.

Today's rule does not remove the Pretreatment Program from the POTW's NPDES permit. EPA will continue its ongoing efforts to identify ways to orient the Pretreatment Program towards the accomplishment of performance measures. Implementation of that approach might involve NPDES permits that incorporate by reference boilerplate regulatory language rather than detailed Approved Programs.

II. Section by Section Analysis

A. Characterization of Modifications

1. General

Today's rule reduces the number of categories of Pretreatment Program modifications that are automatically deemed ''substantial''. 40 CFR 403.18(b). The number of categories that would no longer be deemed substantial is not, however, as large as EPA proposed. Under the July 30 proposal, only modifications to the POTW's Approved Pretreatment Program legal authority and local limits that relax the requirements applicable to industrial users would have continued to be processed as ''substantial'' modifications. Only for these modifications would Approval Authorities be required to follow the detailed public notice procedures of 40 CFR 403.11. The proposal would have defined all other modifications as non-substantial modifications.

While the majority of commenters supported this approach, a few commenters were very forceful in their opposition to it. One environmental public interest group objected to the reduction in public notice. One POTW argued that the problems with the proposal were due to recategorizing certain significant modifications as ''non-substantial'' and that streamlining could be accomplished without creating these problems. One industrial trade association asserted that allowing NPDES permit requirements to be amended without public notice violated various regulations, statutory requirements and the U.S. Constitution. These commenters argued that at a minimum, more categories of modifications should be considered ''substantial'', although they disagreed on which categories.

Today's rule addresses the concerns of these latter commenters by retaining as substantial modifications some of the categories that were proposed to be considered ''non-substantial''. 40 CFR 403.18(b). Under today's rule, three new categories of program modifications are now considered ''non-substantial'', specifically: Changes to the POTW's method of incorporating categorical pretreatment standards; certain reductions in POTW resources; and changes to sewage sludge management and disposal practices. In addition, as is discussed below, today's rule also increases the number of non-substantial modifications by creating exceptions to two categories of substantial modifications, namely, changes to legal authorities and changes that result in less stringent local limits.

Four of the seven categories that EPA proposed to delete from the definition of ''substantial'' modifications will be retained as substantial modifications. 40 CFR 403.18(b). The following changes will continue to constitute ''substantial'' modifications: changes to the POTW's control mechanism as described in § 403.8(f)(1)(iii); decreases in the frequency of self-monitoring and reporting required of industrial users; changes in the POTW's confidentiality procedures; and decreases in inspections or sampling by the POTW.

It is important to remember that ''decrease in the frequency of self-monitoring'' and ''decrease in the frequency of industrial user inspections'' refer to changes in the POTW's general policy and not to decisions affecting individual industrial users. Similarly, ''changes to the POTWs control mechanism'' refers to a change in the type of mechanism used (e.g., permit versus orders) and not to change in one facility's permit or to changes in the boilerplate or other details of the permit. Changes affecting individual industrial users are not substantial modifications.

EPA believes that the remaining three categories may be deleted from the definition of substantial modifications. Changes to the POTW's method of incorporation of categorical Pretreatment Standards are not considered substantial unless the change results in relaxed legal authority, in which case the change is still required to be reported as a substantial modification. Significant reductions in POTW resources are not substantial unless the reductions result in the POTW being unable to fulfill its other Approved Program requirements, in which case the POTW still may be held accountable under it NPDES permit. Changes to the POTW's sewage sludge disposal and management practices are not themselves part of the Pretreatment Program and, thus, would not constitute substantial modifications. Like a change to the POTW's water quality-based NPDES permit limits, sewage sludge practice changes may affect the program but are not part of the program. These three categories of modifications are not ''substantial'', although Approval Authorities would still have the discretion to designate the first two as substantial.

The proposed regulatory language did not describe criteria for identifying other substantial modifications or explicitly allow Approval Authorities to designate other modifications as substantial. As one commenter noted, the preamble and rulemaking record did not address this change. Another commenter recommended that Approval Authorities be able to designate a modification as substantial if it meets the specified criteria. In response, EPA notes that under the old rule, if an Approval Authority wanted to disapprove a non-substantial modification, the Approval Authority would first designate the change as a substantial modification. That extra designation step is unnecessary under today's rule, which allows Approval Authorities to disapprove non-substantial modifications directly. 40 CFR 403.18(d)(2). Today's rule does, however, give Approval Authorities the option of designating additional modifications as ''substantial'' if they meet the specified criteria. 40 CFR 403.18(b)(7).

One commenter recommended that the relaxation of other non-federally mandated limits such as particle size, malodorous liquids, numeric limits for non-petroleum oil and grease, and color limits be considered non-substantial. EPA did not adopt this suggestion. While many POTWs may not have local

limits for these pollutants, in some instances local limits on these pollutants will be appropriate to prevent pass through or interference. If such local limits are part of an Approved Pretreatment Program, the presumption would be that the relaxation of these local limits would be a substantial modification.

2. Changes That Relax Legal Authority

EPA is adopting the proposed revision so that only changes that result in less stringent POTW legal authority are subject to substantial modification procedures. 40 CFR 403.18(b)(1). One commenter argued that nothing in the rulemaking record supports this change. In response, EPA notes that a POTW is free under the CWA to impose additional requirements on IUS under State and local law; such additional requirements may go beyond the minimum requirements of the POTW's NPDES permits. Such modifications that do not relax legal authorities would not cause the POTW to be in violation of its existing NPDES permit and could be implemented by the POTW without modifying the permit. EPA does not want to discourage such ''beyond the minimum'' actions by requiring review of the changes.

The commenter further suggested that allowing more prescriptive legal authorities to be adopted by the POTW without being approved as a substantial modification is an unconstitutional delegation of authority to the POTW. EPA disagrees. A POTW requirement on an IU that goes beyond the scope of the existing Approved Program only becomes part of the Approved Program after it is processed by the Pretreatment Approval Authority as a program modification. The general public interest in program modifications is served by the opportunity for public comment on substantial modifications that result in less prescriptive programs. The general public interest may also be served in expeditious implementation of more prescriptive programs when necessary. EPA assumes that POTW's will faithfully abide by notice requirements of the federal and State constitutions prior to imposing a more prescriptive program requirement on an individual affected by a program modification.

Another commenter noted that designating certain modifications to legal authority as ''non-substantial'' will provide little relief because Approval Authorities will still need to determine if the modification does or does not result in less stringent legal authority. Although that may be the case in some instances, EPA believes that, overall, Approval Authorities will benefit from the flexibility to consider these modifications substantial or non-substantial.

3. Changes that Mirror Federal Regulations

Today's regulation excludes from the definition of ''substantial'' modification those changes to POTW legal authority that result in less prescriptive programs, but which directly reflect a revision to the Federal pretreatment regulations (for example, if the federal regulations are streamlined). 40 CFR 403.18(b)(1). Such modifications would have already undergone public notice and comment when promulgated by EPA. As long as the POTW's local ordinance is revised to directly reflect the new federal requirements, further public notice would be unnecessary. No commenter opposed this change.

One commenter asked whether the rule would apply to program modifications that are already required by the federal regulations, such as modifications to implement the revisions published on October 17, 1988 (53 FR 40562) and July 24, 1990 (55 FR 30082). In response, a modification could be processed under the revised procedures so long as the modification mirrors changes to the federal regulation made since the program's legal authority was approved or last modified. 40 CFR 403.18(b)(1).

One commenter recommended that a program should always be able to modify its program down to the federal minimum if, e.g., the POTW committed to additional sampling in the initial program. EPA is not adopting this approach. While minimum oversight requirements (e.g., annual sampling of Significant Industrial Users) are appropriate for some facilities, additional oversight is required for other facilities. It would not be appropriate to reduce oversight to the minimum for all facilities. As long as a specific element of the program is an enforceable permit requirement, permit modifications will be necessary if the POTW wants to do less than its permit requires.

4. Changes to pH Limits

Like the proposed rule, today's rule excludes all changes to local limits for pH from the definition of substantial modifications. 40 CFR 403.18(b)(2). No commenter opposed the proposal. The proposal noted that it would not affect the prohibition of discharges with a pH of less than 5.0 in 40 CFR 403.5(b)(2). One commenter understood this language to mean that only modifications to minimum pH limits would no longer be considered substantial. The commenter recommended that the revisions also include modifications to upper pH limits. EPA intended that the proposal include modifications to upper pH limits, and only discussed § 403.5(b)(2) in order to clarify that it remained in force. This revision is adopted as proposed. All changes to pH limits in Approved POTW Pretreatment Programs may be processed as non-substantial modifications. The prohibition in 40 CFR 403.5(b)(2) is unchanged.

5. Reallocation of MAIL

Today's rule adopts the proposal to exclude from the definition of substantial modifications revisions to local limits resulting from reallocations of the Maximum Allowable Industrial Loading (MAIL) for a given pollutant, provided that the reallocation does not increase the total MAIL for that pollutant. 40 CFR 403.18(b)(2). Some POTWs' local limits are expressed in terms of a MAIL for a pollutant, which is then allocated to individual industrial users as limits on the total mass of the pollutant that each user may discharge. Those mass limits are placed in the industrial users' permits or other individual control mechanisms and are enforceable under 40 CFR 403.5(d). Under today's rule, reallocations of the MAIL to individual industrial users could be processed as non-substantial modifications as long as the MAIL is not increased.

One commenter stated that all changes to local limits should be deemed substantial because of their impact on the industrial user. EPA is not changing the rule. Approval Authorities may continue to process modifications that impose more stringent local limits as non-substantial modifications. Such limits may only be imposed, however, following the notice required by 40 CFR 403.5(c)(3) and such additional notice as is required by local law. Today's rule only addresses the reallocation of MAILs.

When a POTW allocates the MAIL to individual industrial users, the POTW generally retains a portion of the MAIL as a safety factor so that new industrial users can be given a mass allocation out of the existing MAIL. Such an allocation to a new industrial user would not constitute a substantial modification. Today's rule specifies that a reallocation of an existing MAIL is not a substantial modification. Only where the POTW increases the total mass of a pollutant that all industrial users collectively could be authorized to discharge would the modification be considered substantial.

One commenter stated that the reallocation of a MAIL should not be considered a program modification at all. EPA agrees that if the POTW's approved program specifies the MAIL but does not specify how it is allocated, a reallocation of the MAIL that does not increase the MAIL would not constitute a program modification. Only if the reallocation would violate the POTW's permit would a modification be necessary. If the allocation is specified in the POTW's permit, a reallocation of a MAIL that does not increase the total pollutants may be submitted as a non-substantial modification. A reallocation that does increase the MAIL must be submitted as a substantial modification.

One commenter noted that a MAIL should be able to provide for residential growth by, for example, providing an index of allowable MAILs based on growth factors. Another stated that an increase in MAIL should be considered non-substantial if it is tied to an increase in the POTW's capacity. Today's rule would not prevent a POTW from submitting sufficient technical information as part of its local limits analysis to support a variable MAIL depending on the total flow to the POTW. The tiered MAIL would have to be an enforceable element of the POTW's permit. An increase to the higher tiered MAIL (provided for in the approved local limits) would not require a program modification.

Another POTW stated that the definition of MAIL was problematic because many POTWs do not know the contribution of commercial users. While the comment raises an important issue in local limit development, it is beyond the scope of today's rule. POTWs must determine the background level of a pollutant before they can determine the maximum level that their industrial users may discharge.

One commenter stated that a switch from local limits expressed as concentration to local limits expressed as mass should be considered non-substantial if the change does not increase the total mass. Similarly, one commenter stated that a switch from concentration-based or mass-based local limits to controls based on Best Management Practices (BMPs) should be considered non-substantial. Another commenter took the opposite view and argued that only reallocations of existing MAILs should be non-substantial. EPA agrees that, in most instances, the initial adoption of a MAIL or BMP will be a substantial modification where it replaces a different form of local limits. Unless the mass-based limit or BMP is specifically tied to an existing concentration limit, the switch to mass-based limits or to BMPs will likely result in less stringent local limits for at least some group of industrial users. The POTW's Approved Pretreatment Program will need to be modified to reflect such change. There may be limited circumstances, such as where the POTW documents that a BMP achieves an existing concentration limit, where the Approval Authority might consider such a change to be a non-substantial modification.

One commenter stated that for the reallocation of the MAIL to be considered non-substantial, the reallocation should be enforceable and should not be due to pollutant trading. Under a trading program, POTWs might allocate mass limit to individual industrial users and allow the industrial users to sell or otherwise transfer their allocations to another industrial user. EPA does not agree that all reallocations due to trading need to be processed as substantial modifications. Whether or not a local limit is the result of trading, any reallocation must be enforceable in order for it to satisfy the substantive requirements of 40 CFR 403.5(c).

6. Enforcement Response Plans

The preamble to the proposal solicited comment on whether changes to Enforcement Response Plans (ERPs) should be processed as non-substantial modifications. Most commenters supported the proposed list of substantial modifications, which did not include ERPs. Only two commenters, both of which were State Approval Authorities, supported treating revisions to ERPs as substantial modifications. One thought that all such changes should be treated as substantial modifications. The other thought that such changes should be substantial unless the State had a model ERP. Today's rule does not require all modifications of ERPs to be processed as substantial modifications.

ERPs are standard operating procedures or policies that implement existing legal authorities. An ERP should not be used to create additional authorities for a POTW, nor should an ERP relax existing authorities. Where an ERP does conflict with the POTW's legal authority, the ERP would have to be changed to be consistent with the POTW's legal authority, the POTW's legal authority may be revised through the modification process.

As with all non-substantial modifications, Approval Authorities retain the flexibility to designate them as substantial where appropriate. Some Approval Authorities may elect to treat all modifications to ERPs as substantial.

B. Public Notice Procedures for Substantial Modifications

1. Single Public Notice

Today's rule allows approval of proposed modifications after one public notice in certain circumstances. No commenters opposed this change. Prior to today's rule, section 403.18(b)(1) required the issuance of one public notice of a proposed modification and a second public notice once the modification is approved. Both notices needed to comply with the procedures in § 403.11(b)–(f). Today's rule revises § 403.18(c)(3) so that the Approval Authority would not need to publish a second notice of decision if the following conditions were met: (1) The first notice states that the modification will be approved without further notice if no comments are received; (2) the Approval Authority receives no substantive comments on that notice; and (3) the modification request is approved without change.

2. Adequacy of Local Notice

Under today's rule, Approval Authorities may consider local notice by the POTW to constitute a program modification request and notice of decision under § 403.11(b)–(f). EPA did not propose any regulatory changes covering local notice because, as noted in the preamble to the proposal, the Agency believed this option is available under the existing regulations. Several comments confirmed EPA's position on the adequacy of local notice to achieve the purposes of § 403.11(b)–(f). EPA has decided, as one commenter specifically recommended, to formally codify this position by including specific language in Part 403. 40 CFR 403.18(c)(4).

Under today's rule, Approval Authorities remain ultimately responsible for assuring the publication of the notice. POTWs are not required to provide the notice described in § 403.11. Today's rule leaves POTWs and Approval Authorities free to negotiate arrangements for the publication of the required notice. In the absence of voluntary and adequate notice by the POTW, the Approval Authority would still be required to provide the notice. In order for a local POTW public notice to substitute for an Approval Authority notice, the local notice must meet the requirements of § 403.11(b)(1). Today's rule merely acknowledges that Approval Authorities may find the notice provided by POTWs to be legally adequate. 40 CFR 403.18(c)(4).

One industry trade association argued that local procedures were not adequate. The commenter noted that there was no

record that most significant changes are worked out in advance at the local level. The commenter asserted that a more objective forum is needed than the local forums, where decisions are diverse and not always based on environmental considerations. Because local participation varies, the commenter asserted that § 403.18 is needed to level the playing field.

EPA agrees that Approval Authority review of modifications helps assure their consistency with state and federal regulations. State and EPA Approval Authorities retain the right to review modifications under today's rule regardless of who issues the notices. The lack of comments on State and EPA issued notices suggests that many issues are resolved at the local level. Approval Authorities must assure that notice provided at the local level is adequate and includes an opportunity to request a hearing from the Approval Authority.

3. Other Changes to Notice Requirements

Today's rule includes two additional changes to streamline the detailed notice procedures in § 403.11(b)(1). The first change involves the method of notice. The second involves who receives the notice.

Today's rule revises § 403.11(b)(1)(i)(B) to allow public notices to be published in any paper of general circulation within the jurisdiction served by the POTW. Today's rule revises the current requirement that the paper be in the largest daily paper of general circulation. One commenter noted that a weekly paper might be more appropriate for providing notice to a small community. Today's rule conforms the Pretreatment program notice requirement with the existing notice requirement for issuance of NPDES permits at 40 CFR 124.10(c)(2).

Today's rule also deletes the requirement from § 403.11(b)(1)(i)(A) that Approval Authorities always mail notices to designated 208 planning Agencies, and Federal and State fish, shellfish and wildlife resource agencies. One State commented that, in its experience, no comments are submitted by these agencies. While EPA does not believe that it is appropriate to discontinue all notices to these agencies, today's rule provides that the notices may be discontinued if requested by an agency listed in § 403.11(b)(1)(i)(A).

EPA also solicited comment on how the public might be educated as to the importance of Pretreatment Program requirements, so that public input will occur in response to notice of program modifications. One industry commenter stated that the content of public notices is not adequate for business to know what is being proposed. The commenter recommended that POTWs be required to directly notify businesses and to hold seminars to educate the businesses. One POTW supported allowing POTWs to provide notice but specifically opposed requiring POTWs to educate the public on the importance of the program. EPA believes that the public notice requirements of § 403.18 are adequate to provide reasonable notice to the public, and that the requirements to make data publicly available at §§ 2.302 and 403.14(c) are adequate for the public to educate itself about the program. Notices should contain sufficient information to alert the public about what is being proposed. While many POTWs do have public education programs, EPA does not believe that it is necessary to impose an affirmative obligation on POTWs to educate the public about the pretreatment program. The Pretreatment Program is a mature regulatory program that has operated for over 20 years.

An environmental group commented that public participation would be improved if POTWs were required to maintain a mailing list, with annual solicitation to be on the list, of parties wanting notice of non-substantial modifications. A similar procedure is already in place for substantial modifications. 40 CFR 403.11(b)(1)(i)(A). EPA does not believe that this procedure is necessary for non-substantial modifications, especially in light of today's decision to retain most categories of substantial modifications.

C. Procedures for Non-substantial Modifications

Under the pre-existing regulation, non-substantial modifications were deemed approved unless, within 90 days from their submission, the Approval Authority decided to review them as substantial modifications. Under today's rule, Approval Authorities have 45 days to act on a request for non-substantial modification by either approving or disapproving it, deciding to process it as a substantial modification, or determining that the request is incomplete and requesting that the POTW provide more supporting information. 40 CFR 403.18(d). If the Approval Authority takes no action within the 45 days, the modification is deemed approved and may be implemented by the POTW. 40 CFR 403.19(d)(3).

Under the July 30 proposal, non-substantial modifications would not be deemed approved, but would require affirmative approval by the Authority within 45 days. One reason that EPA proposed to eliminate the provision that non-substantial modifications could be deemed approved was that the proposal would also have expanded the list of non-substantial modifications to include most modifications currently classified as substantial. In addition, reducing the period of review to 45 days might have resulted in a greater number of potentially substantial modifications being deemed approved because of the inability of the Approval Authority to review them in that time period.

One commenter summarized the flaws with the proposed procedures for non-substantial modifications, which other commenters also noted. First, the proposal would have eliminated all notice of changes that might be significant. Second, the proposal would not have allowed the Approval Authority to decide that a modification is substantial. Third, the proposal would not have specified the outcome of the failure of the Approval Authority to act within 45 days. Fourth, because the public might not have received notice of a modification, a change which was deemed approved might be challenged up to several years later at NPDES permit renewal, frustrating continuity in administration of pretreatment programs.

The commenter noted that most of the problems with the proposed regulation resulted from EPA's proposal to redesignate certain modifications from substantial to non-substantial. If EPA retained the current definitions of substantial modification, the commenter noted, there would be no need to allow a lengthy review or require affirmative approval (as opposed to ''deemed'' approvals) of non-substantial modifications. Finally, the commenter noted that almost all of the proposed streamlining could be accomplished with fewer problems if the regulations allowed for one notice at the local level.

Today's rule incorporates most of these suggestions. As discussed above, fewer modifications will be considered non-substantial than would have been under the proposal. 40 CFR 403.18(b)(1). Approval Authorities will be given 45 days to review non-substantial modifications. 40 CFR 403.18(d)(2). If the Approval Authority does not disapprove the proposed modification or determine that it is substantial, the modification is deemed approved and the POTW may implement it. 40 CFR 403.18(d)(3).

Today's rule directs the Approval Authority to notify the POTW within 45 days of receipt of a non-substantial modification of its decision to approve

or disapprove the modification, rather than the 90 days currently allowed under existing § 403.18(b)(2). 40 CFR 403.18(b)(2)(ii). Only one commenter opposed reducing the period for review of non-substantial modifications. This commenter argued that 45 days might be inadequate if a modification included a revised procedure manual and Enforcement Response Plan. While this concern is legitimate, EPA believes the 45 day period balances the desires of POTWs to modify their programs expeditiously and the needs of Approval Authorities for sufficient time to review proposed modifications.

Several commenters objected to the proposed elimination of the procedure by which modifications could be deemed approved. One commenter went further and recommended that POTWs should not have to submit non-substantial modifications in advance. Instead, the commenter suggested that a POTW should be able to immediately implement a modification and the Approval Authority should be allowed 45 days for an after-the-fact objection. Two State commenters, however, opposed having modifications deemed approved at all.

EPA believes that the regulations should continue to allow non-substantial modifications to be deemed approved. Today's rule specifies that POTWs may implement the proposed modification if the Approval Authority does not disapprove it within 45 days. 40 CFR 403.18(d)(3). Unlike the existing rule, however, today's rule allows the Approval Authority to disapprove a non-substantial modification without going through the substantial modification procedures. 40 CFR 403.18(d)(2). If the Approval Authority needs additional information to review a proposed modification, it should notify the POTW that the request is disapproved until the information is received and reviewed. This process should allow the Approval Authority and POTW to resolve matters more efficiently than the current process, which requires the Approval Authority to process as a substantial modification any modification that it proposes to disapprove.

EPA solicited comment on whether only certain categories of non-substantial modifications could be deemed approved if not disapproved by the Approval Authority within 45 days. Commenters did not support this approach. EPA is not adopting this approach and believes it is unnecessary in light of its decision to exclude from the list of non-substantial modifications those modifications that are more likely to be of concern if deemed approved.

D. Changes Reported in Annual Reports

Today's rule adopts the proposal to allow POTWs to submit changes to their industrial user inventory at the time they submit their Annual Report. 40 CFR 403.8(f)(6). The preexisting regulations had required such changes to be submitted as non-substantial modifications and also required that the industrial user inventory be updated in the POTW's Annual Report to the Approval Authority.

Commenters overwhelmingly supported this approach. The only commenter that recommended that it not be adopted expressed concern that State inspectors would ''write 'em up'' if notification has not been submitted. EPA believes this revision should not hinder State and EPA inspectors. Many requirements related to POTW oversight of IUs are annual requirements, and changes to the list of IUs will still be reported annually. 40 CFR 403.12(i)(1). POTWs are still required to maintain a current list of their SIUs that Approval Authorities can use during inspections. 40 CFR 403.8(f)(6).

One commenter recommended that POTWs be required to submit a demonstration that a change in the IU inventory does not necessitate a change to its local limits. EPA believes that it is not necessary to add this requirement to the regulations. POTWs should anticipate the need for a new local limit analysis where appropriate, and Approval Authorities should consider this issue in their reviews.

EPA also solicited comment on whether other modifications should be reported retroactively by the POTW to the Approval Authority in the POTW's annual report rather than in advance. Two commenters recommended that changes that do not result in the POTW doing less than its permit requires be reported in the annual report. One commenter recommended that all non-substantial changes be reported in the annual report. One State, however, opposed reporting modifications in the annual report because of the risk that the State would subsequently overrule the modification. Today's rule allows a modification to be reported for the first time in the POTW's annual report only if the modification does not result in the POTW doing less than is currently described in its Approved Program as incorporated in the POTW's NPDES permits. 40 CFR 403.12(i)(4). If the activity is not compelled by the POTW's permit and does not result in the POTW doing less than the permit requires, the POTW should be free to report it in its annual report.

III. Regulatory Requirements

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

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

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

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

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

It has been determined that this rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Executive Order 12875

Under Executive Order 12875 (58 FR 58093 (October 28, 1993)), entitled ''Enhancing the Intergovernmental Partnership,'' the Agency is required to develop an effective process to permit elected officials and other representatives of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals.

EPA sought the involvement of those persons who are intended to benefit from or expected to be burdened by this rule before issuing the notice of proposed rulemaking. Following informal consultation in May 1994, EPA circulated a draft proposal to interested persons, including States, POTWs and trade and environmental organizations. EPA received approximately 20 comments, which were addressed in the proposal and today's rule. The Agency made several presentations outlining possible revisions to the pretreatment regulations to a number of stakeholder groups, including Regional, State and POTW personnel. EPA encouraged these groups to provide formal input to the proposed regulatory streamlining process. In addition, the Agency

provided notice of the availability of the draft proposal for review and comment in the September 1994 issue of the ''Water Environment & Technology,'' the principal publication of the Water Environment Federation.

EPA published the proposed rule in the July 30, 1996, **Federal Register** document (61 FR 39804). EPA mailed notice of the proposal and summaries of the preamble to the stakeholders identified in the Communication Strategy for the proposed rule. EPA received 25 comments on the proposal and responds to those comments in today's preamble. Copies of all comments received relating to this rulemaking are included in the docket for this rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, provides that, when an agency promulgates a final rule under section 553 of the Administrative Procedure Act after being required by that section to publish a general notice of proposed rulemaking for a proposed rule, the agency must prepare a final regulatory flexibility analysis (FRFA). The agency must prepare a FRFA for a final rule unless the head of the agency certifies that it will not have a significant economic impact on a substantial number of small entities.

When EPA proposed this rule, the Administrator certified, pursuant to section 605(b) of the RFA, that it would not have a significant economic impact on a substantial number of small entities. In today's final rule, the Administrator is certifying that the final rule will not have a significant economic impact on a substantial number of small entities.

The RFA defines ''small entity'' to mean a small business, small organization or small governmental jurisdiction. RFA section 601(5) defines the term ''small governmental jurisdiction'' as the government of cities, counties, towns, townships, villages, school districts or special districts with a population of less than 50,000 unless an agency proposes to use and publishes an alternative definition that is appropriate to the agency's activities. Today's rule revises requirements applicable only to publicly owned treatment works (POTW). The only RFA ''small entity'' that may be affected by EPA adoption of these changes to the pretreatment regulations is a small governmental jurisdiction with a population of less than 50,000 that owns and operates a POTW required to develop a pretreatment program.

As previously explained, today's rule amends the current requirements applicable to all POTWs that must have an approved pretreatment program. The modifications promulgated here only change the procedures that a State or EPA must follow in approving changes to a POTW's Approved Pretreatment Program. The effect of these changes is, therefore, deregulatory. It will reduce the burden on affected POTWs of obtaining approval for program modifications. Consequently, EPA's action today will either reduce or not change the cost to affected small governmental entities of complying with the pretreatment regulations as compared with the currently effective procedural requirements. In no event, however, will today's changes increase the economic costs of compliance.

For this reason, I am certifying that today's rule will not have a significant economic effect on a substantial number of small entities.

D. Paperwork Reduction Act

Today's rule is designed specifically to streamline the regulatory process and does not impose any additional information collection requirements on either the Approval Authorities or the POTWs. Therefore, EPA did not prepare an Information Collection Request (ICR) document for approval by the Office of Management and Budget.

The information collection requirements being streamlined were approved by the Office of Management and Budget under control number 2040–0009, which was last approved on October 18, 1996. The reductions in burden achieved by today's rule will be reflected when the ICR approval is revised during its regular triennial review.

E. Unfunded Mandates Reform Act

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

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

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector. The rulemaking is basically ''deregulatory'' in nature and does not impose any additional burdens on the affected State, local or tribal governments. As the preceding preamble language demonstrates, EPA considered alternatives to the proposed changes in the regulations governing modification of a POTW's pretreatment program.

This rule will provide flexibility to the regulated community. It does not impose any new requirements, so costs to the regulated community should remain unchanged or be minimal. Therefore, EPA has determined that an unfunded mandates statement is unnecessary.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. As previously stated, EPA believes that the rule will reduce the regulatory burden on all governmental agencies operating POTWs. This overall reduction will be applied across the board to all POTWs, with attendant benefits being provided to both large and small governments. Although EPA cannot document the effects for each and every POTW, smaller governments may benefit the most from the proposed modifications. The avoided compliance costs attendant to modifying their programs may be a larger percentage of their total operating budgets than those costs borne by the larger POTWs.

In compliance with E.O. 12875 and section 203 of the UMRA, EPA conducted a wide outreach effort and actively sought the input of representatives of state, local and tribal governments in the process of developing the proposed regulation. Agency personnel have communicated with State and local representatives in a number of different forums.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this final rule revising procedures for modification of approved pretreatment programs (and other required information) to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 403

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

Dated: July 10, 1997.

Carol M. Browner,

Administrator.

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

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

1. The authority citation for part 403 is revised to read as follows:

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

2. Section 403.8 is amended by revising paragraphs (c) and (f)(6) to read as follows:

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

* * * * *

(c) *Incorporation of approved programs in permits.* A POTW may develop an appropriate POTW Pretreatment Program any time before the time limit set forth in paragraph (b) of this section. The POTW's NPDES Permit will be reissued or modified by the NPDES State or EPA to incorporate the approved Program as enforceable conditions of the Permit. The modification of a POTW's NPDES Permit for the purposes of incorporating a POTW Pretreatment Program approved in accordance with the procedure in § 403.11 shall be deemed a minor Permit modification subject to the procedures in 40 CFR 122.63.

* * * * *

(f) * * *

(6) The POTW shall prepare and maintain a list of its industrial users meeting the criteria in § 403.3(u)(1). The list shall identify the criteria in § 403.3(u)(1) applicable to each industrial user and, for industrial users meeting the criteria in § 403.3(u)(ii), shall also indicate whether the POTW has made a determination pursuant to § 403.3(u)(2) that such industrial user should not be considered a significant industrial user. The initial list shall be submitted to the Approval Authority pursuant to § 403.9 as a non-substantial modification pursuant to § 403.18(d). Modifications to the list shall be submitted to the Approval Authority pursuant to § 403.12(i)(1).

3. Section 403.11 is amended by revising paragraphs (b)(1)(i) (A) and (B) to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(i) * * *

(A) Mailing notices of the request for approval of the Submission to designated 208 planning agencies, Federal and State fish, shellfish and wildfish resource agencies (unless such agencies have asked not to be sent the notices); and to any other person or group who has requested individual notice, including those on appropriate mailing lists; and

(B) Publication of a notice of request for approval of the Submission in a newspaper(s) of general circulation within the jurisdiction(s) served by the POTW that meaningful public notice.

* * * * *

4. Section 403.12 is amended by redesignating paragraph (i)(4) as paragraph (i)(5), revising paragraph (i)(3), and adding a new paragraph (i)(4) to read as follows:

§ 403.12 Reporting requirements for POTWs and industrial users.

* * * * *

(i) * * *

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

(4) A summary of changes to the POTW's pretreatment program that have not been previously reported to the Approval Authority; and

* * * * *

5. Section 403.18 is revised 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) *Substantial modifications defined.* Substantial modifications include:

(1) Modifications that relax POTW legal authorities (as described in § 403.8(f)(1)), except for modifications that directly reflect a revision to this Part 403 or to 40 CFR chapter I, subchapter N, and are reported pursuant to paragraph (d) of this section;

(2) Modifications that relax local limits, except for the modifications to local limits for pH and reallocations of the Maximum Allowable Industrial Loading of a pollutant that do not increase the total industrial loadings for the pollutant, which are reported pursuant to paragraph (d) of this section. Maximum Allowable Industrial Loading means the total mass of a pollutant that all Industrial Users of a POTW (or a subgroup of Industrial Users identified by the POTW) may discharge pursuant to limits developed under § 403.5(c);

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

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

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

(6) Changes to the POTW's confidentiality procedures; and

(7) Other modifications designated as substantial modifications by the Approval Authority on the basis that the modification could have a significant impact on the operation of the POTW's Pretreatment Program; could result in an increase in pollutant loadings at the POTW; or could result in less stringent requirements being imposed on Industrial Users of the POTW.

(c) *Approval procedures for substantial modifications.*

(1) The POTW shall submit to the Approval Authority a statement of the basis for the desired program

modification, a modified program description (see § 403.9(b)), or such other documents the Approval Authority determines to be necessary under the circumstances.

(2) The Approval Authority shall approve or disapprove the modification based on the requirements of § 403.8(f) and using the procedures in § 403.11(b) through (f), except as provided in paragraphs (c)(3) and (4) of this section. The modification shall become effective upon approval by the Approval Authority.

(3) The Approval Authority need not publish a notice of decision under § 403.11(e) provided: The notice of request for approval under § 403.11(b)(1) states that the request will be approved if no comments are received by a date specified in the notice; no substantive comments are received; and the request is approved without change.

(4) Notices required by § 403.11 may be performed by the POTW provided that the Approval Authority finds that the POTW notice otherwise satisfies the requirements of § 403.11.

(d) *Approval procedures for non-substantial modifications.*

(1) The POTW shall notify the Approval Authority of any non-substantial modification at least 45 days prior to implementation by the POTW, in a statement similar to that provided for in paragraph (c)(1) of this section.

(2) Within 45 days after the submission of the POTW's statement, the Approval Authority shall notify the POTW of its decision to approve or disapprove the non-substantial modification.

(3) If the Approval Authority does not notify the POTW within 45 days of its decision to approve or deny the modification, or to treat the modification as substantial under paragraph (b)(7) of this section, the POTW may implement the modification.

(e) *Incorporation in permit.* All modifications shall be incorporated into the POTW's NPDES permit upon approval. The permit will be modified to incorporate the approved modification in accordance with 40 CFR 122.63(g).

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