

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 122, 123, 124, and 131**

[OW-FRL-6424-3]

[RIN-2040-AD36]

Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation**AGENCY:** Environmental Protection Agency.**ACTION:** Proposed rule.

SUMMARY: Today's action revises, clarifies and strengthens the Environmental Protection Agency's (EPA's) National Pollutant Discharge Elimination System (NPDES) Program and Water Quality Standards (WQS) Regulation under the Clean Water Act (CWA). Today's proposed rule is intended to achieve two objectives. The first objective is to achieve reasonable further progress toward attaining water quality standards in impaired waterbodies prior to EPA approval or establishment of a Total Maximum Daily Load (TMDL). To achieve this objective, EPA is proposing explicit language describing the Agency's discretionary authority to object to, and reissue, if necessary, State-issued expired and administratively-continued permits authorizing discharges into impaired waterbodies in the absence of an EPA approved or established TMDL. EPA would exercise this authority to ensure that those permits are consistent with water quality standards. Also to achieve this objective, EPA is proposing to require that selected dischargers offset any increase in mass loadings of a pollutant(s) causing the nonattainment of water quality standards in an amount that would result in reasonable further progress toward attainment of water quality standards.

The second objective is to achieve reasonable assurance that an established TMDL will be implemented. To achieve this objective, EPA is proposing explicit language describing EPA's discretionary authority to object to, and reissue, if necessary, State-issued expired and administratively-continued permits authorizing discharges into impaired waterbodies with established and approved TMDLs. EPA would exercise this authority to ensure that those permits are consistent with applicable wasteload allocations in a TMDL. Also to achieve this objective, EPA is proposing explicit language describing

the authority of both EPA and States with approved NPDES programs, to designate certain currently unregulated sources as sources that would require an NPDES permit.

DATES: Comments on this proposal must be received, postmarked or delivered by hand on or before October 22, 1999.

ADDRESSES: Send written comments on the proposed rule to W-99-04, NPDES/WQS, Comment Clerk, Water Docket, Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Comments can also be submitted electronically to OW-Docket@epa.gov (see "DOCKET" section below). A copy of the supporting documents cited in this proposal is available for review at EPA's Water Docket; 401 M Street, SW, Mail code: EB57, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kim Kramer, Office of Wastewater Management, 401 M St., SW, Washington, DC 20640, Mail Code 4203, e-mail: Kramer.Kim@epa.gov, telephone: (202) 260-9541 for information regarding the NPDES provisions, or Susan Gilbertson, Office of Science and Technology, 401 M St., SW, Washington, DC 20460, Mail Code 4305, e-mail: Gilbertson.Sue@epa.gov, telephone: (202) 260-7301 for information regarding the water quality standards provisions.

SUPPLEMENTARY INFORMATION:**A. Table of Contents of This Preamble**

- I. Purposes and Objectives of Today's Proposed Rules
- II. Proposed Requirements for New and Significantly Expanding Dischargers Located on Impaired Waters
 - A. Who Would Be Subject to This Proposal?
 1. Which Sources Discharge New Pollutant Loads to a Waterbody?
 2. Would Dischargers Who are Currently Discharging but Move Their Outfall(s) to Another Waterbody Be Subject to This Proposal?
 3. Will The Proposed Changes to the Definitions of a New Discharger and an Existing Source Affect Their Application Elsewhere in the Regulations?
 4. Would Any Existing Dischargers Be Subject to This Proposal?
 5. How is EPA Proposing to Define A "Significant Expansion" of an Existing Discharger?
 - B. What are the Proposed Changes to the Federal Antidegradation Policy?
 1. What is the Current Federal Antidegradation Policy?
 2. What Were the Recommendations of the TMDL Federal Advisory Committee?
 3. What Revisions is EPA Proposing Today?
 - i. Why is EPA Proposing to Require Dischargers Subject to This Proposal to Achieve Reasonable Further Progress

Toward Attaining Water Quality Standards?

- a. How Does This Relate to the TMDL FACA Committee's Recommendations?
- b. Has This Approach Been Used in Other Statutes?
 - ii. How is EPA Proposing to Define Reasonable Further Progress?
 - a. Has Reasonable Further Progress Been Defined Under Other Statutes?
 - iii. What Offsets Would Affected Dischargers Need to Obtain to Ensure Reasonable Further Progress?
 - a. Could Offsets be Obtained From Existing Nonpoint Sources?
 - b. Could the Director Vary the Amount of the Offset?
 - iv. Would the Reasonable Further Progress Requirements Apply to Affected Dischargers Proposing to Discharge to All Waters of the U.S.?
 - v. Why is EPA Proposing to Subject Only New Dischargers and Existing Dischargers Undergoing a Significant Expansion to These Requirements?
 - vi. Would All New Dischargers and Existing Dischargers Undergoing a Significant Expansion Be Subject to These Proposed Requirements?
 - a. How Would This Proposal Facilitate the Establishment of Trading Markets?
- C. How Would EPA Ensure any Needed Changes to the Antidegradation Policies in State, Territorial and Tribal Water Quality Standards?
- D. How Would These Changes Be Implemented Through NPDES Permits?
 1. Must the New or Significantly Expanding Discharger Obtain an Offset of the Same Pollutant(s) the New or Significantly Expanding Discharger Would Be Required to Offset?
 2. From What Geographic Area Would the Pollutant Load Reductions Need to Be Obtained?
 3. Could the Pollutant Load Reductions Come From a Source With Existing Requirements to Reduce its Loads?
 4. When Would the Pollutant Load Reductions Need to Be Obtained?
 5. How Long Would the Pollutant Load Reductions Need to Be Maintained?
 6. What Would Be Required When the Source of the Offset is an Existing Point Source?
 7. What Would Be Required When the Source of the Offset is an Existing Nonpoint Source?
 8. How Would Offsets Be Obtained From Sources Seeking Coverage Under a General Permit?
 - i. What Options is the Agency Considering?
 - ii. What If a Notice of Intent Form is Not Required?
 - iii. Who and Under What Circumstances Would Need to Submit a Supplemental Certification?
 - iv. How Would Offsets Be Determined for Dischargers Regulated Solely by BMPs?
- E. Additional Proposed Modifications to Related NPDES Provisions
 1. How is EPA Proposing to Modify the Water Quality-Based Permitting Regulations?

2. How is EPA Proposing to Modify the Regulations Pertaining to the Statement of Basis and Permit Fact Sheet?
- III. Proposed Authority to Designate Additional Sources of Pollutants to the NPDES Program
 - A. How Would Animal Feeding Operations and Aquatic Animal Production Facilities Be Affected by Today's Proposal?
 1. How Do These Sources Become Subject to the NPDES Program?
 - i. Under What Circumstances Are CAFOs Designated on a Case-By-Case Basis?
 - ii. Under What Circumstances are CAAPFs Designated on a Case-by-Case Basis?
 2. Why is EPA Proposing Changes to the CAFO and CAAPFs Jurisdictional Regulations?
 - i. How Do Animal Feeding Operations Impact Water Quality?
 - ii. How Do Aquatic Animal Production Facilities Impact Water Quality?
 3. What Changes is EPA Proposing to Make to the CAFO and CAAPFs Jurisdictional Regulations?
 - i. When Would EPA Designate These Sources?
 - ii. How Will This Proposal Affect States?
 - iii. Who Would Issue Permits to These Sources Once Designated?
 4. How Would EPA Revise Regulatory Text?
 - B. How Would Silvicultural Activities Be Affected by Today's Proposal?
 1. Which Sources Are Currently Excluded From the Definition of a "Point Source"?
 2. Are All Discharges From Silvicultural Activities Currently Excluded From the NPDES Program?
 3. Which Silvicultural Discharges Would Be Designated Under Today's Proposal as Sources Subject to the NPDES Program?
 4. Why is EPA Proposing to Remove the Regulatory Exclusion for These Silvicultural Discharges?
 5. When Would Silviculture Sources Be Required to Obtain an NPDES Permit?
 6. How Would States Be Affected by This Proposal?
- IV. Proposed EPA Authority to Reissue State-Issued Expired and Administratively-Continued NPDES Permits
 - A. Can EPA Object to State-Issued Expired and Administratively-Continued Permits?
 - B. How Would EPA Review and Object to a State-Issued Expired and Administratively-Continued Permit?
 - C. When Would EPA Withdraw its Objection?
 - D. When Could EPA Invoke This Authority?
 - E. Will EPA Work With the States Before Invoking This Authority?
 - F. What If a Permit Has Expired but the Permittee Has Not Submitted a Timely and Complete Application for Renewal to the State?
 - G. What Authority Supports Today's Proposed Changes?
 - H. Conclusion
- V. Regulatory Assessment Requirements
 - A. Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996

- B. Executive Order 12866
- C. Unfunded Mandates Reform Act
- D. Paperwork Reduction Act
- E. Executive Orders on Federalism
- F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
- H. National Technology Transfer and Advancement Act
- I. Executive Order 12898: Environmental Justice

B. Potentially Regulated Entities

Entities discharging pollutants to certain waters of the U.S. could be regulated by this rulemaking if they are subject to National Pollutant Discharge Elimination System (NPDES) program. Potentially regulated entities include:

Category	Examples of potentially regulated entities
State, Territorial or authorized Tribal Governments.	States, territories and authorized Tribes issuing NPDES permits
Federal Government.	EPA
Industry	Industries, including municipal construction sites, discharging pollutants to waters of the U.S.
Municipalities	Owners and operators of publicly-owned treatment works, municipal separate storm sewer systems, and municipal construction and industrial activities discharging pollutants to waters of the U.S.

This table is not intended to be exhaustive, but rather provide a guide for readers to identify entities that EPA believes could potentially be affected by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility may be regulated by this proposed action, you should carefully examine the applicability criteria in 40 CFR 122.4, 122.23, 122.24, 122.26, 123.44 and 131.12 of today's proposed rulemaking. If you have any questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the **FOR FURTHER INFORMATION CONTACT** section.

C. Docket

The record for this notice has been established under docket number W-99-04 and includes supporting documentation. EPA requests that commenters submit any references cited in their comments. EPA also requests that commenters submitting written comments include an original and 3

copies of their written comments and enclosures. Commenters that want receipt of their comments acknowledged should include a self-addressed, stamped envelope. No facsimiles (faxes) will be accepted.

Electronic comments are encouraged and may be submitted to the Water Docket (see **ADDRESSES** section above). Electronic comments must be submitted as an ASCII file or a WordPerfect file. Electronic comments must be identified by the docket number, (W-99-04). Comments and data will also be accepted on disks in WP8 format or ASCII file format. No confidential business information (CBI) should be sent via e-mail.

For access to docket materials, call EPA's Water Docket at (202) 260-3027 between 9:00 a.m. and 3:30 p.m. for an appointment. An electronic version of this proposal will be available via the Internet at: <http://www.epa.gov>.

I. Purposes and Objectives of Today's Proposed Rules

Today's proposed rule is intended to clarify and strengthen EPA's NPDES and WQS regulations governing discharges into waterbodies that are not attaining water quality standards. Today, EPA is separately proposing revisions to its Total Maximum Daily Load regulations so that TMDLs can more effectively contribute to improving the nation's water quality. Today's proposal complements that effort by ensuring that two objectives are met. The first objective applies in impaired waterbodies prior to the establishment of a TMDL. The purpose of this objective is to achieve reasonable further progress toward attaining water quality standards. The second objective applies in impaired waterbodies after the establishment of a TMDL. The purpose of this objective is to ensure more effective implementation of TMDLs.

To meet the reasonable further progress objective, EPA is adding a new antidegradation requirement and revising the NPDES permitting regulations to implement that requirement. Today's proposal would require all large new dischargers and existing dischargers undergoing a significant expansion proposing to discharge the pollutant(s) of concern into an impaired waterbody, to offset that new or increased discharge. This requirement is in addition to otherwise applicable requirements of the CWA and will ensure that there will be reasonable further progress toward attaining water quality standards despite the addition of the new load from those dischargers. Today's

proposal also establishes a number of requirements, under the NPDES program, to ensure compliance with the antidegradation offset requirement. Those requirements include boundaries on when and where pollutant load reductions would need to be obtained. Therefore, today's proposal will result in reasonable further progress toward attainment of water quality standards. In some cases, such progress may even result in the attainment of water quality standards so that a TMDL is no longer required.

The Agency notes that this requirement is in addition to existing requirements found at 40 CFR 122.44(d)(1)(vii) and 122.4(i). Section 122.44(d) requires dischargers, where necessary, to receive limits that derive from and comply with water quality standards. Section 122.4(i) requires that no permit be issued to a new source or a new discharger if the discharge will cause or contribute to a violation of water quality standards.

Today, EPA is also proposing to explicitly describe a Regional Administrator's authority to trigger existing provisions for reviewing and objecting to State-issued NPDES permits. Under the proposal, the Regional Administrator will have the discretion, under certain circumstances, to trigger these review and objection procedures when a State fails to reissue an expired, State-issued permit that has been administratively continued for more than 90 days. This proposal is designed to address lengthy administrative continuance of permits that authorize discharges into impaired waterbodies and which contain limits that are insufficient to protect applicable water quality standards. By not reissuing these permits, there is a delay in the implementation of needed water quality-based effluent limitations. This provision will serve both purposes of today's proposal. Prior to the establishment of a TMDL, the provision can be used to ensure that more stringent effluent limitations which derive from and comply with water quality standards are implemented. Subsequent to the establishment of a TMDL, this provision will enable the Regional Administrator to ensure that existing dischargers receive permit limits consistent with wasteload allocations in a TMDL.

EPA is today proposing additional revisions to the permitting regulations to ensure that TMDLs are implemented. These revisions include changes to the NPDES jurisdictional regulations regarding designation of point sources for regulation under the NPDES permitting program. EPA is proposing

explicit language describing its authority, in States with approved NPDES programs, to designate animal feeding operations (AFOs) and aquatic animal production facilities (AAPFs) as sources subject to NPDES requirements on a case-by-case basis. EPA is also proposing to eliminate the current regulatory exclusion for certain discharges from silvicultural activities. These discharges may also become subject to NPDES requirements on a case-by-case basis. EPA is constraining its discretion to exercise the authority to subject these sources to the NPDES program to those circumstances when EPA establishes a TMDL for a waterbody and determines that designation is necessary to ensure that the wasteload allocations and load allocations under the TMDL are achieved. The proposed rule does not place any constraint on the discretion of State program Directors, in NPDES delegated States, to designate silvicultural activities as point sources. EPA recommends however, that States use this authority only on a limited basis, in circumstances similar to those in which EPA intends to use it (i.e., when there is no other means of providing reasonable assurance that a load allocation or wasteload allocation in a TMDL will be met).

Each of today's proposed revisions is designed to achieve the water quality goals of the Clean Water Act. EPA believes that today's proposal will ensure that those goals are met more quickly and that one of the most important tools for achieving those goals, a TMDL, will be implemented more effectively.

II. Proposed Requirements for New and Significantly Expanding Dischargers Located on Impaired Waters

A. Who Would Be Subject to This Proposal?

EPA is today proposing to establish new requirements for dischargers proposing to add new pollutant loads to an impaired waterbody in the absence of a TMDL. These new requirements are located in 40 CFR 122.4(j) and 131.12(a)(1)(ii). Section 122.4(j) applies to all new dischargers and existing dischargers undergoing a significant expansion proposing to add new pollutant loads to a waterbody. Section 131.12(a)(1)(ii) applies to large new and significantly expanding dischargers proposing to add new pollutant loads to an impaired waterbody for which EPA has not approved or established a TMDL. EPA is also proposing to modify the definitions of a new discharger and

an existing source under 40 CFR 122.2 and 122.29.

EPA intends these new requirements to apply only to those dischargers who are proposing to add new loads of pollutants to a waterbody. Because the current definition of a new discharger can be read to include some dischargers who are not adding new loads to a waterbody, EPA is proposing to modify the existing definitions of both a new discharger and an existing source. The definition of a new discharger is currently found at 40 CFR 122.2 and the definition of an existing source is currently found at 40 CFR 122.29. EPA is also proposing to define the term "significant expansion." All of these definitions will be moved to 40 CFR 122.2.

A new discharger, as currently defined in 40 CFR 122.2, means any building, structure, facility, or installation from which there is a discharge of pollutants which commenced after August 13, 1979; which is not a new source; and has never received a finally effective NPDES permit. An existing source, as defined in 40 CFR 122.29, is any source which is not a new source or a new discharger. The plain reading of the current definition of a new discharger would subject certain sources to today's proposed sections (122.4(j) and 131.12(a)(1)(ii)), including the proposed offset requirements explained below). Under the current definition, these sources would be subject to today's proposal even though they would not propose to discharge new pollutant loads to a waterbody. Such sources include sources that have been and currently are discharging pollutants that are not now subject to the NPDES program but may in the future become subject to the NPDES program. These sources would be subject to the requirements of the NPDES program once designated.

Designation of sources can be made on a case-by-case basis involving an individual source. For example, an individual medium-sized animal feeding operation (AFO) may be designated as a medium-sized concentrated animal feeding operation (CAFO).¹ Designation can also be made

¹ An example of a source that may be designated as a point source on an individual basis and which at the time of designation, would fall within the current definition of a new discharger, is a medium-sized animal feeding operation (AFO) designated as a medium-sized concentrated animal feeding operation (CAFO). This would be the case where that AFO started discharging pollutants after August 13, 1979. This source is not a new source (there is no applicable NSPS yet) and this source has never received a finally effective NPDES permit. As an AFO, the source is not subject to the NPDES

by category. For example, sources that will become subject to the NPDES program under the Storm Water Phase II rule will be designated on a categorical basis.² Although these sources have been discharging before and at the time of designation, they would fall within the current definition of a new discharger. As a result, unless EPA amends the definitions of a new discharger and an existing source for this purpose, these sources would be subject to the proposed requirements of 40 CFR 122.4(j) and 131.12(a)(1)(ii). As mentioned above, EPA intends these sections to apply only to sources proposing to discharge new pollutant loads to a waterbody.

1. Which Sources Discharge New Pollutant Loads to a Waterbody?

Sources that are proposing to discharge new pollutant loads to a waterbody are dischargers that have not yet begun discharging but are proposing to discharge. Also discharging new pollutant loads are those dischargers that have been discharging to one waterbody and, for example, propose to move their outfall to another location not within the "same body of water." Existing dischargers that expand or increase their loads, discharge new pollutant loads to a waterbody as well.

For proposed 40 CFR 122.4(j) and 131.12(a)(1)(ii) to apply only to dischargers that propose to discharge new pollutant loads to a waterbody, EPA is proposing to modify the definition of a new discharger. In addition, EPA is proposing to delete the current definition of an existing source at 40 CFR 122.29 and replace it with a new term, "existing discharger," which will be defined in 40 CFR 122.2. EPA believes that consolidating these definitions into one section provides greater clarity. The proposed modifications would result in dischargers that fall into two classes, those that are currently discharging to the same body of water (or existing dischargers) and those that are not now discharging but wish to discharge in the future (or new dischargers). For

purposes of 40 CFR 122.4(j) and 131.12(a)(1)(ii), however, although dischargers would be classified as either "new dischargers" or "existing dischargers," a new discharger may also be a new source and an existing discharger may also be a new source.³

2. Would Dischargers Who Are Currently Discharging but Move Their Outfall(s) to Another Waterbody Be Subject to This Proposal?

Some dischargers move their outfalls from one waterbody to another waterbody. In order to protect impaired waterbodies, EPA believes it is appropriate to subject these dischargers to the new requirements reflected in today's proposal. This is consistent with the Agency's intent to subject sources introducing new pollutant loads to a waterbody to today's new requirements. An outfall would not be subject to today's new requirements if it was moved within the "same body of water" as the existing outfall location. In determining whether the outfall is moved within the "same body of water" as its original location, the permitting authority should consider whether: (1) The background concentration of the pollutant in the receiving water (excluding any amount of the pollutant in the facility's discharge) is similar at and between both outfall points; (2) there is a direct hydrological connection between outfall points; and (3) water quality characteristics (e.g., temperature, Ph, hardness) are similar at and between both outfall points. Dischargers who move an outfall(s) within the same body of water would remain existing dischargers.

The proposed modifications to the definitions of a new discharger and an existing source will capture these sources as sources that would be subject to proposed 40 CFR 122.4(j) and 131.12(a)(1)(ii).

3. Will the Proposed Changes to the Definitions of a New Discharger and an Existing Source Affect Their

Application Elsewhere in the Regulations?

In modifying the definition of a new discharger, deleting the definition of an existing source and proposing a definition for a new term, an existing discharger, EPA does not intend to affect any other existing regulations or effluent guidelines, including EPA's permit decisionmaking regulations. Under 40 CFR 124.16 and 124.60 of EPA's permit decisionmaking procedures, a "new discharger," whose permit is the subject of a pending administrative appeal, is without a permit until the appeal process has concluded and the Agency's action has become final. On the other hand, an existing facility, whose permit is the subject of a pending administrative appeal, is not without a permit until the appeal process has concluded. The uncontested terms of an existing facility's permit take effect pending the conclusion of an administrative appeal. Although today's proposal would change the definitions of a new discharger and an existing source, EPA does not intend to change the application of 40 CFR 124.16 or 124.60 at this time. Accordingly, a discharger who, under the existing definitions, is a "new discharger" and who, under the definitions in today's proposal, would be an "existing discharger," would be treated as a "new discharger" for purposes of 40 CFR 124.16 and 124.60. That is, a discharger who would become an "existing discharger" by virtue of the changes in today's proposal, would still be without a permit pending the conclusion of an administrative appeal of the discharger's permit. EPA believes that this interpretation of 40 CFR 124.16 and 124.60 makes sense because dischargers who become "existing dischargers" by virtue of the changed definitions proposed today would not have been operating under an existing permit (this class of dischargers are those that are discharging and not subject to NPDES regulation (discharging legally without a permit) but are designated as sources subject to NPDES regulation at some point in the future). EPA has long required that those who wish to contest permit terms do so on their own time. 43 FR 37,087 (Aug. 21, 1978). This principle is especially compelling when the Agency has never acted to approve the discharge on any set of terms or conditions.

EPA believes that an amendment to 40 CFR part 124 would clarify how EPA intends the stay provisions in 40 CFR 124.16 and 124.60 to apply to "existing dischargers"; however, EPA has not included revised language in today's proposal because the Agency has,

permit program because AFOs are exempt from permit requirements under 40 CFR 122.3(e). However, if that source is designated as a CAFO (under 40 CFR 122.23) at any time in the future, it would fall within the current definition of a new discharger.

² An example of a source which may become subject to the NPDES program as a result of a categorical designation of point sources and which would fall within the current definition of a new discharger is any Storm Water Phase II source that currently is and has been discharging pollutants at any point after August 13, 1979. These sources are not new sources (there is no applicable NSPS) and these sources have never received a finally effective NPDES permit.

³ The definition of a new source remains unchanged. A new source is a source which began construction after the promulgation of applicable new source performance standards (NSPS). Under this unchanged definition of a new source, existing dischargers and new dischargers (under this proposal) can be new sources subject to NSPS. For example, if a discharger is a new discharger under this proposal and that discharger began construction after the promulgation of applicable NSPS, then that discharger would also be a new source (subject to NSPS). Likewise, if a discharger is an existing discharger under this proposal and that discharger began construction after the promulgation of applicable NSPS, then that discharger would also be a new source (subject to NSPS). If there are no applicable NSPS for either discharger, then neither would be a new source.

elsewhere, proposed changes to 40 CFR 124.16 and 124.60 which have not yet been finalized. 61 FR 65,268 (Dec. 11, 1996)(Amendment to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round 2). EPA proposes to amend 40 CFR 124.16 and 124.60 in a way that more clearly reflects its understanding of their applicability to "existing dischargers" and which will conform to the revisions made to these provisions in the Round 2 NPDES Streamlining Rule once the contours of those revisions have become final. EPA solicits comment on whether or not a new discharger that would become an existing discharger under the definitions in today's proposal should be treated as an existing discharger for purposes of 40 CFR 124.16 and 124.60.

EPA also invites comment on whether the modifications to these definitions will have an effect on their application elsewhere in the NPDES regulations. EPA may amend the respective sections so that these definitional changes do not affect those sections.

4. Would Any Existing Dischargers Be Subject to This Proposal?

EPA has consistently believed that the mere fact that an existing discharger currently discharges does not give them the privilege to discharge any amount of additional loads without consequence. Therefore, EPA is also proposing to subject existing dischargers undergoing a significant expansion to proposed 40 CFR 122.4(j) and 131.12(a)(1)(ii). The term "significant expansion" will be newly defined in 40 CFR 122.2.

5. How Is EPA Proposing To Define What Constitutes a "Significant Expansion" of an Existing Discharger?

EPA is proposing to define the term "significant expansion" to mean a twenty percent or greater increase in loadings above the discharger's current permit limit. Twenty percent is consistent with EPA's "Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula," September 19, 1985. There, the Agency stated that an industrial user (IU) is required to notify the Control Authority immediately where the IU's average production and flow rate data have "significantly" changed. The guidance further explains that as a general rule, the average rate is considered to have changed significantly if the change is greater than twenty percent. Where there is a significant change in these rates, it is suggested that the Control Authority reevaluate the limits in the IU's permit. In the preamble to the

revision to the General Pretreatment Regulations for Existing and New sources, FR 40562, 40565, October 17, 1988, EPA confirmed the use of twenty percent as the level at which an average rate is considered to have changed significantly. The Agency stated that "for purposes of today's rule, any increase or decrease in production (or flow) rates will generally be deemed significant if the change is equal to or greater than twenty percent of the long term average production (or flow) rate at the facility." Therefore, in order to maintain consistency with its current guidance, EPA is proposing a twenty percent increase in loadings above the discharger's current permit limit as the threshold level which defines a significant expansion.

The Agency believes however, that using an increase in "loadings" rather than "production or flow rates" is more appropriate. Today's proposal is applicable to dischargers proposing to discharge new pollutant loads into a waterbody and there may be cases where an increase in production rates may not result in a corresponding increase in pollutant loads. EPA invites comment on the appropriateness of a twenty percent increase in loadings above the discharger's current permit limit as the threshold level which defines a significant expansion.

EPA is also considering the use of a fifty rather than a twenty percent increase in loadings above the discharger's current permit limit as the threshold level to define a "significant expansion." A threshold level of fifty percent is consistent with other Agency guidance. On December 18, 1984, EPA put out guidance on the "Calculation of Production-Based Effluent Limits" (Memorandum from J. William Jordan to Regional Branch Chiefs). The purpose of the guidance was to clarify the procedure for calculating production-based effluent limitations and to provide guidance on the use of alternate limitations.

Effluent limitations guidelines are often derived from production rates and are set at levels which include some variations in production. However, certain facilities may have large random or cyclic fluctuations in production rates where it would be appropriate to have alternative effluent limitations which are applicable at some increased production rate. The guidance mentioned above suggests that if production rates are expected to change "significantly" during the life of the permit, the permit should include alternate limits. The guidance identifies that it is generally agreed that a ten to twenty percent fluctuation in

production is within the range of normal variability and thus, would not need alternate limits. Further, it states that changes in production rates which are substantially higher, "such as fifty percent," would warrant the consideration of alternate limits. EPA seeks comment on whether a fifty percent increase in loadings above the discharger's current permit limits should be used to define a significant expansion.

Other statutes and regulations also establish thresholds over which a source cannot change without incurring different requirements. The Resource Conservation and Recovery Act (RCRA) permit regulations hold that "reconstruction" occurs when capital investment in the changes to the facility exceed fifty percent of the capital cost of a comparable entirely new hazardous waste management facility. 40 CFR 270.72(b). An interim status facility (a facility that is in existence on the effective date of statutory or regulatory amendments that render the facility subject to the requirement to have a RCRA permit), is treated as having been issued a permit and may make changes short of reconstruction, but cannot make changes amounting to reconstruction until the facility receives a permit.

Under the Clean Air Act, new source review applies to new major sources and modifications to existing major sources. 42 U.S.C. 7411. A modification of an existing major source triggers review if it is a physical or operational change that increases emissions by a "significant" amount. By regulation, EPA has defined "significant" based on the pollutant emitted. 40 CFR 51.165.

EPA invites comment on whether a threshold level other than twenty or fifty percent should trigger the applicability of 40 CFR 122.4(j) and 131.12(a)(1)(ii). One option would be to allow the permitting authority to determine what constitutes a significant expansion on a case-by-case basis, without establishing a specific threshold level.

The Agency notes that where an existing discharger undergoes a "significant expansion," only the expanded portion of the discharge (the new loadings) would be subject to the offset requirements under 40 CFR 131.12(a)(1)(ii). For existing dischargers with a current permitted load, the definition of a significant expansion and the amount for which offsets are required would be based on the increase in the permitted load.

Based on an initial analysis of potentially affected sources, EPA believes that the cost to dischargers of using a threshold of twenty percent to

define a significant expansion would not be significantly greater than the cost of using a threshold of 50 percent. EPA requests comment on this initial conclusion and any supporting data commenters can provide.

EPA also invites comment on how to measure a significant expansion and to calculate the corresponding offset requirements for those dischargers who increase the loadings of a pollutant for which the waterbody is impaired but for which there is no current permitted load (there is no effluent limit for that particular pollutant in the discharger's permit). It is EPA's intent that the offset requirements apply to new pollutant loads and in the case of an existing discharger, "significant" new pollutant loads.

B. What Are the Proposed Changes to the Federal Antidegradation Policy?

EPA is proposing to amend 40 CFR 131.12(a) to require a new discharger, or an existing discharger undergoing a significant expansion, proposing to discharge to a waterbody not attaining water quality standards, the pollutant(s) causing the nonattainment, to achieve reasonable further progress toward attaining water quality standards. This requirement, in addition to otherwise applicable requirements of the CWA, would apply where there is no EPA approved or established Total Maximum Daily Load (TMDL). When EPA has approved or established a TMDL, a new discharger proposing to discharge the pollutant(s) for which the TMDL was established, may discharge only in accordance with that TMDL or a revised, approved TMDL. It would apply only to new dischargers and existing dischargers undergoing a significant expansion that are not a small business or entity as defined in 5 U.S.C. 601(6). Therefore, a new discharger or existing discharger undergoing a significant expansion which is not a small business or entity, would need to comply with a permit limit that derives from and complies with water quality standards and this new requirement for reasonable further progress. With this proposed change, EPA intends to ensure reasonable further progress toward restoring water quality standards in impaired waters prior to the completion of TMDLs. EPA emphasizes that this is an interim approach to attaining water quality standards; these requirements apply only until the TMDL is approved or established by EPA, and the TMDL is implemented with respect to the discharger subject to these requirements.

1. What Is the Current Federal Antidegradation Policy?

Section 303(c) of the CWA establishes the basis for federal water quality standards. EPA regulations implementing section 303(c) are published at 40 CFR part 131. Under these rules, the minimum elements that must be included in a State's water quality standards include: use designations for all waterbodies in the State, water quality criteria sufficient to protect those use designations, and an antidegradation policy. See 40 CFR 131.6. States may also include in their standards, policies generally affecting the standards' application and implementation. See 40 CFR 131.13. These policies are subject to EPA review and approval.

The current federal antidegradation policy performs an essential function in protecting and maintaining water quality. Designated uses establish the water quality goals for the waterbody, water quality criteria define the minimum conditions necessary to achieve those goals and the antidegradation policy specifies the framework to be used in making decisions regarding changes in water quality. The intent of an antidegradation policy is to ensure that in all cases, at a minimum: (1) Water quality necessary to support existing uses is maintained (Tier 1); (2) that where water quality is better than the minimum level necessary to support protection and propagation of fish, shellfish and wildlife, and recreation in and on the water ("fishable/swimmable"), that water quality is also maintained and protected unless, through a public process, some lowering of water quality is deemed to be necessary to allow important economic or social development to occur (Tier 2); and (3) where waterbodies are of exceptional recreational or ecological significance, water quality is maintained and protected (Tier 3). Antidegradation plays a critical role in allowing States and Tribes to maintain and protect the finite public resource of clean water and ensure that decisions to allow reductions in water quality are made in a public manner and serve the public good. States and authorized Tribes are required to adopt antidegradation policies at least as stringent as the federal antidegradation policy.

Section 131.12(a) of the antidegradation policy, contained in the federal water quality standards regulation, requires that existing uses and the water quality necessary to protect them be maintained and protected. This provision, in effect,

establishes the floor of water quality for all waters of the U.S., and that all waters of the U.S. are subject to Tier 1 protection. In general, waters that are subject only to Tier 1 antidegradation policies are those waterbodies that do not exceed the CWA section 101(a) goals. These waters either do not have any remaining assimilative capacity to receive additional loads of pollutants without causing the loss of the existing use or the water quality already is degraded below that necessary to maintain an existing use. "Existing uses" are defined at 40 CFR 131.3(c) as those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards. Antidegradation policies are generally implemented for Tier 1 by reviewing and determining whether a discharge would impair an existing use. Tier 1 currently requires that water quality necessary to protect existing uses shall be maintained and protected. In addition, the State or Tribe should ensure that all existing uses are designated in accordance with 40 CFR 131.10(i).

2. What Were the Recommendations of the TMDL Federal Advisory Committee?

The Federal Advisory Committee on the Total Maximum Daily Load Program recommended a number of ways to improve the effectiveness and efficiency of EPA, State, Territorial and Tribal programs under section 303(d) of the CWA. These recommendations address many of the TMDL program's complex technical and policy issues, and include recommendations on several new policy and program directions. In particular, the Committee recognized that there could be a considerable time lag between the initial listing of a waterbody on a section 303(d) list of impaired or threatened waters and the actual completion, approval and implementation of the TMDL. Some on the Committee noted that water quality should not be allowed to further degrade during that time period. The Committee recommended that EPA actively encourage and support stakeholders stabilizing and enhancing water quality before a TMDL is in place (Committee Report at page 17). The Committee noted that the most successful stakeholder efforts would lead to the full restoration of water quality and attainment of water quality standards and ultimately the water's removal from the section 303(d) list before a TMDL is developed. The Committee recommended an optional stabilization plan that would identify mechanisms that might allow for

exceptions from point source discharge restrictions upon demonstration that the optional stabilization plan results in parameter specific net progress in water quality through means other than those restrictions.

EPA believes that further degradation of already impaired waterbodies must be prevented and also recognizes the need for progress toward attaining water quality standards in this interim period. Therefore, EPA believes that by creating a new requirement under the federal antidegradation policy as reflected in today's proposal, not only will further degradation of water quality be prevented, but reasonable further progress towards restoring water quality standards will be achieved.

3. What Revisions Is EPA Proposing Today?

i. Why Is EPA Proposing to Require Dischargers Subject to This Proposal to Achieve Reasonable Further Progress Toward Attaining Water Quality Standards?

Water quality standards serve as the foundation for the water-quality based approach to pollution control and are a fundamental component of watershed protection. Under the Clean Water Act, States, Territories and authorized Tribes adopt water quality standards to protect public health or welfare, enhance the quality of the nation's water and serve the purposes of the Act. A primary objective of the Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." CWA section 101(a). To date, EPA's implementing regulations at 40 CFR 131 have addressed the mandate for restoring the nation's waters through the specification of designated uses. Designated uses are defined as those uses specified for each waterbody or segment, whether or not those uses are being attained. Designated uses focus on the attainable condition of the waterbody, in contrast to existing uses which focus on the past or present condition of the waterbody. It is through the designation of uses that the environmental goals for specific waterbodies are established. States, Territories and authorized Tribes have the flexibility to establish goals for waters that require improvements in water quality, thus establishing a requirement for restoration. Today's proposal supplements the restoration provisions of the current regulations. By establishing the requirement for reasonable further progress as a component of the federal antidegradation policy, EPA believes the objectives of the Act will be advanced.

Prior to today's proposal, Tier 1 of the federal antidegradation policy has been aimed at protecting and maintaining existing uses of waterbodies. EPA believes extending the protection of existing uses to include a provision aimed at promoting reasonable further progress toward restoring water quality in impaired waterbodies is both consistent with the goals of the Act, and is a logical means for meeting those goals.

The Agency's policy choice is supported by the Act's legislative history. The Senate Report states:

In those waterbodies which are not pristine, it should be the national policy to take those steps which will result in change toward the pristine state in which the physical, chemical and biological integrity of the waterbody can be said to exist. Striving toward, and maintaining the pristine state is an objective which minimizes the burden to man in maintaining a healthy environment, and which will provide for a stable biosphere that is essential to the well-being of human society. S. Rep. No. 92-414, 92d Cong. 1st. Sess. at 76-77 (1971).

Establishing a requirement for reasonable further progress will result in improvements in water quality and progress toward attaining water quality standards, pending the establishment, approval and implementation of the TMDL.

Today, EPA is proposing to require large new and significantly expanding dischargers proposing to discharge to nonattained waterbodies to achieve reasonable further progress toward attaining water quality standards before discharging additional loadings of the pollutant causing the nonattainment. In effect, certain dischargers will be required to show net progress toward improving water quality as a condition of being authorized to discharge to a nonattained waterbody. EPA believes this proposal is consistent with the recommendations of the Federal Advisory Committee on the Total Maximum Daily Load Program, and the approach chosen by the Agency when faced with the need to address a similar problem under the Clean Air Act.

a. How Does This Relate to the TMDL Federal Advisory Committee's Recommendations?

As noted above, the Committee recommended that EPA actively encourage and support stakeholders stabilizing and enhancing water quality before a TMDL is in place. While EPA is not adopting all of the Committee's recommendations, the Agency believes that progress toward the section 101(a) goals of the Act should occur before allowing some new and significantly expanding dischargers to add new loads

of the pollutant causing the nonattainment to an impaired waterbody.

b. Has This Approach Been Used in Other Statutes?

Just as the Clean Water Act establishes the goal to " * * * restore and maintain the chemical, physical and biological integrity of the Nation's waters," the Clean Air Act declares its purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA section 101(b)(1). Given these similar goals, the actions and reasoning of the Agency and Congress in dealing with areas which are not meeting air quality standards can serve to guide EPA's policy choices when dealing with waterbodies which are not attaining water quality standards.

In 1970, the Clean Air Act required generally, that State programs had to ensure that new sources did not interfere with the attainment of national ambient air quality standards (NAAQS). In 1976, EPA issued an interpretive ruling on the preconstruction review requirements for major new stationary sources proposing to locate in an area that exceeded a NAAQS. Given a standard and an area not in attainment with a standard, the Agency believed that it was reasonable to allow a new addition of the pollutant causing the nonattainment only if the new source ensured that reasonable progress was made toward meeting that standard. 41 FR 55524. Congress agreed that EPA's requirement was reasonable. As a result, Congress clarified in the Clean Air Act Amendments of 1977 that, in general, a new permit to construct and operate a new major stationary source or a major modification to an existing source proposing to emit the pollutant of concern in a nonattainment area may only be issued if reasonable further progress toward attainment of the NAAQS was made and the source met the most stringent emissions limits. CAA section 173.

Given the similar statutory goals and the similar circumstances, EPA again believes it would be reasonable to require new and significantly expanding existing dischargers proposing to discharge additional loads of the pollutant(s) causing the nonattainment of water quality standards to ensure that progress is made toward attainment of the standards in the future. EPA believes that establishing a similar requirement for reasonable further progress as a component of the federal antidegradation policy is the best way to meet the goals of the Clean Water Act

when faced with new and significantly expanding existing dischargers wishing to locate on impaired waterbodies.

EPA invites comments on this proposed change to Tier 1 of the federal antidegradation policy. EPA also invites comment on whether some other approach could serve as an appropriate means to ensure reasonable further progress toward restoring water quality standards in the interim period between listing of waterbodies under CWA section 303(d), and the establishment, approval and implementation of the TMDL.

ii. How is EPA Proposing to Define Reasonable Further Progress?

As stated above, EPA is proposing to require reasonable further progress as a means of achieving the objectives of the Clean Water Act. EPA is also today proposing a definition of reasonable further progress for some new and existing dischargers. EPA believes reasonable further progress is best achieved by offsetting any new loading of the pollutant of concern to an impaired waterbody by reducing loads of the same pollutant from existing sources located on the same waterbody. EPA further believes that an offset of at least one and a half to one is generally appropriate as means of ensuring reasonable further progress. Offsets are not only the most feasible means to achieve reasonable further progress for new and significantly expanding dischargers, they are a logical means to actually achieve such progress. Further, they are a means the Agency has chosen in similar circumstances.

EPA is thus proposing that, in general, pollutant load reductions must be one and a half times the new loads of the pollutant to the waterbody (see discussion below). Under such a requirement, reasonable further progress toward meeting the applicable water quality standard would be achieved because the total load of the pollutant to the waterbody is reduced. An added benefit of requiring offsets as the means for achieving reasonable further progress is that the requirement creates an incentive for pollution prevention. A discharger subject to the requirement can reduce the burden of finding sufficient offsets by reducing the amount of pollutant(s) the discharger is proposing to add to the impaired waterbody.

EPA also believes that this proposed requirement will serve as a catalyst for the establishment of a trading market between large new dischargers and existing dischargers undergoing a significant expansion, and existing point source dischargers or nonpoint sources. (See discussion below). EPA

believes that the establishment of a trading market will give dischargers more options to achieve any future permit limits required by TMDLs more efficiently.

a. Has Reasonable Further Progress Been Defined Under Other Statutes?

In 1977, Congress amended the Clean Air Act and adopted the general requirements for a new permit to construct and operate a new major stationary source or a major modification to an existing source proposing to emit the pollutant of concern in a nonattainment area. Such permits may be issued if, by the time the source begins operating, sufficient offsetting emissions reductions have been attained such that the total emissions in the area will be sufficiently less than the emissions from existing sources prior to the application for a new permit so as to represent reasonable further progress. CAA section 173. The term "reasonable further progress" was defined as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may be reasonably required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standards by the applicable date." CAA section 171(1). Congress adopted this new provision "to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date. * * *" 95 Cong. House Report 294 at *211.

EPA believes that the Agency's experiences under the Clean Air Act serve as a useful guide for its policy choices with respect to treatment of new loads of pollutants to impaired waterbodies under the Clean Water Act. EPA's proposals today are, therefore, similarly designed to allow continued growth in areas which are not meeting water quality standards while ensuring that progress toward meeting water quality standards is not halted or reversed.

iii. What Offsets Would Affected Dischargers Need to Obtain to Ensure Reasonable Further Progress?

EPA is proposing to require that large new and significantly expanding dischargers obtain and maintain offsets, i.e., pollutant load reductions, in general, in the amount of one and a half to one. In other words, these dischargers would need to obtain and maintain an offset of least of one and a half times the amount of the new or additional pollutant loadings they are proposing to discharge. The specific requirements for an individual discharger would be dependent upon the type of pollutant

for which the waterbody is impaired (which is also the pollutant the discharger is proposing to discharge), the source from which the discharger is proposing to obtain and maintain the offsetting load reductions, and the large new or significantly expanding discharger itself. In addition, EPA is proposing specific permitting requirements to implement this offset requirement. (See discussion below).

In considering the amount by which a proposed discharge should be offset, EPA considered the burdens associated with achieving the necessary pollutant load reductions. Based upon the Agency's analysis of the costs, discussed below in section VI. A, EPA believes that in most cases an offset in the amount of one and a half times the proposed discharge is both reasonable and achievable.

a. Could Offsets Be Obtained From Existing Nonpoint Sources?

EPA believes further that this proposed requirement will result in load reductions from sources that EPA and States authorized to administer the NPDES program can not regulate under the NPDES program. Under today's proposal, large new or significantly expanding dischargers would need to obtain and maintain pollutant load reductions to compensate for their proposed increases in pollutant loads. These reductions would need to be obtained from existing point source discharger(s) or nonpoint sources located on the same waterbody as the discharge from the new discharger or existing discharger undergoing a significant expansion. EPA believes the ability to obtain offsets from nonpoint sources, in addition to point source dischargers, is a crucial element in ensuring reasonable further progress toward restoring water quality pending the completion of a TMDL. Nonpoint sources, in some areas, are significant contributors of pollutants to waters of the United States, and high pollutant levels persist in many waterbodies. Furthermore, in many cases it is more cost effective to obtain significant reductions from non-point sources than to impose more stringent limitations on point sources.

b. Could the Director Vary the Amount of the Offset?

Today's proposal generally requires that the amount of the proposed discharge be offset by pollutant load reductions of one and a half times the increase in mass loadings. The amount of the offset however, could be varied, at the discretion of the Director. The Director may determine that an offset greater than one and a half times the proposed discharge is necessary in order

to ensure reasonable further progress toward restoring water quality standards. The Director may also determine that an offset less than one and a half times, but at least more than, the amount of the proposed discharge will ensure reasonable further progress. Each of these cases is discussed below.

EPA recognizes the potential for a significant amount of uncertainty in both obtaining and maintaining the pollutant load reductions, depending on the source of the reductions. For example, if the discharger enters into an agreement with an existing point source, the discharger would be presumed to have an offset requirement of one and a half times the amount of the proposed discharge. However, when entering into an agreement with a nonpoint source, it may be somewhat more difficult to determine exactly how much reduction will be achieved and whether the reductions would be maintained over time, due to the uncertainties regarding the effects of management practices designed to reduce loads from nonpoint sources. In addition, since nonpoint sources are not subject to an NPDES permit, the permitting authority may have less ability to ensure that offsets are implemented and maintained. EPA notes however that many States have additional authorities beyond those specified in the CWA, to implement load reductions from nonpoint sources.

The location of the offsetting source(s) within the impaired waterbody may also impact the potential for achieving reasonable further progress in attaining water quality standards. If the source(s) of the offsetting pollutant load reductions are located at the margins of the impaired waterbody, the overall impact of the pollutant load reductions in terms of attaining water quality standards is more difficult to determine. In such cases, the Director may require that a greater amount of reductions must be realized and require an offset greater than one and a half to one. Specifically, the final offset may be determined by factors such as how great a pollutant load reduction the offsetting source(s) would actually be able to realize; the likelihood that the offsetting source(s) will be able to maintain the offset; and the location of the offsetting source(s) within the impaired waterbody.

EPA believes allowing the Director the discretion to require an offset greater than one and a half times the amount the discharger is proposing to discharge is appropriate in order to compensate for uncertainties associated with obtaining load reductions from offsetting sources. EPA also believes this discretion is appropriate to account for other factors which may include the

type of pollutant and the degree of impairment of the waterbody.

EPA also recognizes that situations may exist where offsets of one and a half times the proposed discharge are difficult to obtain, such that an offset of less than one and a half to one (but greater than one to one) may satisfy the requirement for reasonable further progress. For example, there may only be a few other sources of the pollutant causing the impairment, the other sources may discharge a very limited amount of the pollutant, or it may be very costly to control the discharge. While EPA believes these situations are limited in number, allowing the Director the discretion to require an offset less than one and a half times the proposed discharge but at least more than the amount of the proposed discharge will still ensure reasonable further progress toward restoring water quality standards in the interim.

To assure appropriate implementation of the offset provisions by authorized State permitting authorities, EPA would implement its oversight role through the permit objection provisions of CWA section 402(d) (The Agency proposes changes to the permit objection regulations elsewhere in today's notice. Those changes involve EPA's authority to object to expired and administratively-continued permits). Under CWA section 402(d), EPA may object to the issuance of an NPDES permit by an authorized State if the permit would be outside the guidelines and requirements of the Act. If the issuance of a State NPDES permit to a source required to obtain an offset would not result in reasonable further progress toward attainment of water quality standards, EPA could object to such a permit.

EPA envisions two instances when an objection might be warranted: specifically, when the State Director would propose to issue a permit with an offset less than 1.5 and, as discussed further on in today's notice, when the State Director would waive the offset provision concluding that the offset would result in further degradation of water quality. The 1.5 offset criterion is not absolute and the Director has discretion to require a lesser offset. The exercise of that discretion, however, would still need to ensure reasonable further progress toward attainment of water quality standards. If a lesser offset would not ensure reasonable further progress, today's proposal would maintain the Agency's authority to object to the issuance of the permit.

Today's notice does not propose changes to the regulatory text describing the Regional Administrator's grounds

for permit objections because the Agency believes the existing regulations would provide the bases for such objections. If the Agency were to object to a State permit for failure to ensure reasonable further progress, the objection would be based on 40 CFR 123.44(c)(1), (3), (4), (7) and/or (8). Subsection (c)(1) refers to a permit that fails to apply or ensure compliance with any applicable requirement of 40 CFR part 123. Though the 1.5 offset criterion would not be a requirement, today's proposal would require offsets that ensure reasonable further progress. If an offset less than 1.5 would not ensure reasonable further progress, the permit would fail to apply a requirement of 40 CFR part 123 (section 123.25 specifies the NPDES permitting requirements in 40 CFR part 122 that apply to State NPDES programs, including 40 CFR 122.4). Subsection (c)(3) refers to a permit issued using procedures that fail to comply with procedures required by the CWA, implementing regulations, or by the Memorandum of Agreement. If a State did not adequately explain why an offset less than 1.5 would ensure reasonable further progress, the issuance of such a permit would not comply with applicable procedural requirements. Subsection (c)(4) refers to a permit that misinterprets the CWA or any guidelines or regulations or misapplies them to the facts. Issuance of a State permit that would not ensure reasonable further progress would misinterpret the CWA or misapply applicable requirements. Subsection (c)(7) restates the statutory standard that the issuance of the proposed permit could not be outside the requirements of the CWA or implementing regulations. Finally, subsection (c)(8) refers to the effluent limits of a permit that fails to satisfy the requirements of 40 CFR 122.44(d) (section 122.44(d) requires that effluent limits achieve water quality standards). The issuance of any permit to a source required to obtain an offset would not satisfy the requirements of 40 CFR 122.44(d) if the permit would not ensure reasonable further progress toward attainment of water quality standards.

While the Agency believes that changes to regulatory text are unnecessary, EPA invites comment on whether to include an explicit basis for objection in any final rule. The purpose of any explicit regulatory text would be to clarify that the Agency could object to the issuance of a State permit to a source required to obtain an offset if the issuance would not ensure reasonable further progress toward attainment of water quality standards.

EPA also recognizes there may be limited circumstances where requiring

offsets will result in further degradation of water quality, and loss of an existing use. Therefore, EPA is proposing that the Director also have the discretion to not require an offset, if it is determined that any offset would result in further degradation of water quality. Such degradation may occur, for example, when the sole NPDES discharger, with a low volume but high concentration of a pollutant such as phosphorus, discharges to an ephemeral or low flow waterbody which is currently not attaining the water quality criteria for phosphorus and where the only other sources of phosphorus are from irrigation return flows. If the sole discharger negotiates a reduction of irrigation return flows to offset its phosphorus loads, it may result in increased ambient phosphorus concentrations due to the loss of volume in the waterbody, and further degradation of water quality. In circumstances such as these, although limited and infrequent, EPA believes the Director should have the discretion to waive the requirement for any offset in order to prevent further degradation of water quality and the loss of an existing use. For the reasons described earlier, the Agency also proposes to retain authority to object to the issuance of a State permit for a source required to obtain an offset if the State Director inappropriately waived the offset requirement concluding that the offset would result in further degradation of water quality.

Finally, the new provision at 40 CFR 131.12(a) proposes that reasonable further progress for large new dischargers and existing dischargers undergoing a significant expansion means, *at a minimum*, an offset greater than the amount of the proposed discharge. The proposed regulation, therefore, provides the permitting authority with the discretion to require additional measures to attain reasonable further progress. The permitting authority may choose to exercise this discretion depending upon, for example, the severity of the impairment of the waterbody, the type of pollutant, or the distance of the offsets from the new discharge. Such additional measures could include pollution prevention plans or conservation easements which could ensure continued reasonable further progress. EPA invites comment on what measures, in addition to the offset requirement, permitting authorities should consider requiring of large new dischargers and existing dischargers undergoing a significant expansion.

EPA believes an offset requirement of one and half times the amount of the

increased loading the discharger is proposing to discharge (with exceptions) is appropriate and invites comment on whether a different amount would be better suited to ensuring reasonable further progress toward restoring water quality standards prior to the approval or establishment by EPA of TMDLs. EPA invites comment on whether there may be reasons, other than uncertainty, why the Director may find it necessary to adjust the offset requirements in amounts greater than one and half times the proposed discharge. EPA also invites comments on whether the Director should have the discretion to allow an offset less than one and half times the proposed discharge, but at least greater than the amount of the proposed discharge and if so, for what reasons. One option would be to require an offset at least equal to the amount of the proposed discharge, but allow the Director the discretion to determine how much progress beyond a one to one offset is necessary to ensure reasonable further progress. Finally, EPA invites comment on whether the Director should have the discretion to waive the requirement for an offset if any offset would result in further degradation of water quality. If not, for what reasons and also, if the concurrence of EPA should be required before the Director makes such a determination.

iv. Would the Reasonable Further Progress Requirements Apply to Affected Dischargers Proposing to Discharge to All Waters of the U.S.?

EPA is establishing a new provision at 40 CFR 131.12(a)(1)(ii) that requires a new discharger or existing discharger undergoing a significant expansion discharging into a waterbody that does not meet water quality standards, and for which EPA has not yet approved or established a TMDL, the pollutant(s) causing the non-attainment to achieve reasonable further progress toward attaining water quality standards. Thus, this provision applies to a new discharger or existing discharger undergoing a significant expansion discharging into any waterbody of the United States that does not attain water quality standards (as defined in 40 CFR 131). Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife. Exceedance of a narrative criterion in a waterbody means that the waterbody does not attain water quality standards.

v. Why is EPA Proposing to Subject Only New Dischargers and Existing

Dischargers Undergoing a Significant Expansion to These Requirements?

EPA is proposing today to establish the offset requirement discussed above only for large new and significantly expanding dischargers of the pollutant of concern into an impaired waterbody. EPA believes that this new requirement is appropriate for these dischargers because it will enable discharges to occur in impaired waterbodies while ensuring that progress toward attaining water quality standards is achieved in those waterbodies. EPA believes that subjecting large new and significantly expanded dischargers to more stringent water quality standards is supported by the same logic which led Congress to establish more stringent technology based requirements for new sources under other provisions of the CWA.

Given that this offset provision would be a requirement only until a TMDL is approved or established by EPA for a waterbody not attaining water quality standards, it makes sense as a practical matter to apply this requirement only to large sources which are adding new loads of the pollutant of concern to the waterbody. Existing dischargers are likely to be in a poorer position to bargain for offsets because they may not have a realistic option to locate on a different waterbody. Furthermore, it might be very disruptive to existing dischargers if they were required to offset their discharge before a TMDL is established only to possibly receive different permit limits and conditions once wasteload allocations and a margin of safety are established in a TMDL. EPA seeks to avoid these disruptions if possible. Finally, new dischargers will be undertaking construction and will be in a better position to modify their design so as to minimize pollution, and thus minimize the amount of their offset.

EPA also believes that subjecting for new and significantly expanding dischargers to these new requirements is consistent with the CWA more generally. In its technology-based provisions, the Act provides a higher standard (best available demonstrated technology under new source performance standards) for new sources than for existing sources (best available technology economically available). Although in this regulation, EPA is addressing new dischargers and significantly expanding dischargers rather than "new sources," EPA believes Congress' rationale for its treatment of new sources applies equally to new dischargers and significantly expanding dischargers. Congress chose to place more stringent technology based requirements on new sources both to

prevent new water quality impairments and because imposing stricter standards on new sources would be the most efficient means of solving existing water quality problems. Here, the Agency is proposing to regulate more stringently two types of dischargers which are adding new loads of a pollutant of concern to ensure reasonable further progress toward attaining of water quality standards.

First, consistent with other provisions in EPA regulations, EPA is proposing to treat new dischargers more stringently than existing dischargers. An example of such treatment is the extent to which variances to water quality standards are available to new dischargers when compared to existing dischargers. See 63 FR 36761. Compliance schedules have also not been available to new dischargers to the same extent that they are available for existing dischargers. 40 CFR 122.47. EPA is proposing to further develop this differential treatment of new dischargers by creating new provisions at 40 CFR 122.4(j) and 131.12(a)(1)(ii). These provisions together will subject new and significantly expanding dischargers proposing to discharge into impaired waterbodies to the new requirements outlined but not existing dischargers under the same or similar circumstances.

Second, EPA also believes that it is appropriate to extend these requirements to significant expansions of existing discharges due to the similar impacts which occur as a result of significant new pollutant loads. EPA believes this is consistent with the general approach of the CWA to prevent new water quality pollution problems. Although these sources are existing sources, their "significant expansions" will have the same or similar effect with respect to creating new water quality impairments as the truly new source. Undertaking a significant expansion may provide certain opportunities for a discharger to achieve efficiencies in solving water pollution problems, similar to the opportunities available to new sources. EPA's proposed definition of "significant expansion" is discussed above (see Section A5).

EPA invites comments on whether the requirement for offsets should apply to both new and significantly expanding dischargers, and reasons why the requirement should apply to one class of discharger versus another.

vi. Would All New Dischargers and Existing Dischargers Undergoing a Significant Expansion Be Subject to These Proposed Requirements?

EPA is proposing today to subject only those new and significantly

expanded dischargers not meeting the definition of a small entity under the Regulatory Flexibility Act (see 5 U.S.C. 601(6)) to the offset requirements of this rule. The Regulatory Flexibility Act ("RFA") states that the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act (SBA). This meaning holds unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. 5 U.S.C. 601(3). EPA has not proposed to establish a different definition of the term for this proposed rule.

The SBA defines "small-business concern" as one which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632. Pursuant to the SBA, the Small Business Administration has specified additional detailed definitions or standards by which a business concern may be determined to be a small business concern. Also under the RFA, the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. This meaning holds unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. 5 U.S.C. 601(4). The term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. This meaning also holds unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the **Federal Register**. 5 U.S.C. 601(5). Again, EPA has not proposed alternative definitions for purposes of this rule. Finally, the term "small entity" has the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in the RFA. 5 U.S.C. 601(6).

EPA is proposing to limit the scope of this new provision because it is a new requirement which is needed only in

the interim before TMDLs are approved or established by EPA. Also, such narrowed coverage is more likely to ensure development of a successful market for pollutant trading.

In today's proposal, EPA is requiring large (i.e., not meeting the definition of a small entity under the Regulatory Flexibility Act (see 5 U.S.C. 601(6)) new and significantly expanding dischargers to offset any increase in mass loadings. EPA believes this is an important step toward achieving the CWA goal to " * * * restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a). In exercising its discretion to impose this new requirement on large dischargers, EPA notes that all dischargers will continue to need permit limits that derive from and comply with water quality standards (see 40 CFR 122.44(d)). In evaluating the significant number of the nation's waters on State section 303(d) lists, and the amount of time necessary for States to establish and implement TMDLs, EPA concluded that in the interim period before a TMDL is approved or established by EPA, it is necessary to establish a new requirement in an effort to ensure reasonable further progress toward attaining water quality standards, consistent with the goals of the Act. The requirement is thus, both incremental and interim, and at this time EPA is choosing to impose it only on those dischargers the Agency believes are in the best position to achieve offsets.

a. How Would This Proposal Facilitate the Establishment of Trading Markets?

In developing these revisions to the federal antidegradation policy, EPA considered the most likely approach by which to establish a trading mechanism between new and existing dischargers undergoing a significant expansion, and existing sources of pollutants. In effect, EPA is seeking to establish a market for pollutant trading, in the hopes of creating more effective and efficient mechanisms for restoring water quality. EPA believes that requiring offsets from facilities which are not small entities, as defined by the Regulatory Flexibility Act, will focus the initiation of such a market on those entities which have the greatest likelihood of securing offsets. Large dischargers are more likely to have access to data and information, both environmental and economic, that can be used in identifying, analyzing and allocating offsets. Large dischargers are also more likely to have the resources to devote to negotiating offsets with other entities.

EPA recognizes that establishing the framework for such a market in pollutant trading presents many challenges. Nonetheless, EPA believes that creating the offset requirement would provide a valuable mechanism for ensuring reasonable progress toward attaining water quality standards. EPA believes the expenditure of resources to establish a market in pollutant trading will be compensated for by such factors as reduced overall costs in meeting water quality standards, the ability to locate a new enterprise or expand an existing enterprise, and increased flexibility in designing pollution control systems. Such a market, once established, would also provide other, more efficient opportunities for improving water quality, as States and Tribes implement watershed protection programs. EPA has developed draft guidance on how to conduct watershed-based trading which addresses the benefits and types of trades and how trading can be implemented to attain and maintain water quality standards. Draft Framework for Watershed-based Trading, EPA 800-R-96-001, May, 1996.

Trading in pollutant discharges is not a retreat from the CWA goals. It can be a more efficient, market driven approach to meeting these goals. EPA supports only trades that meet CWA requirements. Through trading, EPA seeks to encourage innovative approaches and the flexibility to implement load reductions in ways that maximize water quality improvements and minimize costs. In allowing offsets as the means to ensure reasonable further progress toward attaining the water quality standard, EPA is seeking to generate environmental benefits in the most cost-effective manner.

EPA invites comments on whether the requirement for offsets as a means of ensuring reasonable further progress should be limited to entities which are not small entities as defined by the Regulatory Flexibility Act. EPA also invites comments on extending this requirement to other entities which may be small entities under SBREFA.

C. How Would EPA Ensure Any Needed Changes to the Antidegradation Policies in State, Territorial and Tribal Water Quality Standards?

With this notice of proposed rulemaking, EPA is initiating development of Federal water quality standards pursuant to section 303(c)(4)(B) of the CWA. EPA intends to promulgate, as the EPA Administrator determines necessary, Federal water quality standards for any State, Territory or Tribe which does not adopt or already have in place water quality

standards which include provisions consistent with 40 CFR 131.12(a)(1)(ii) as ultimately promulgated. EPA believes such a Federal promulgation could be necessary to ensure consistent, nationwide application of any final provisions of 40 CFR 131.12(a)(1)(ii) in the period before the establishment of TMDLs for waterbodies that do not meet water quality standards. EPA is today providing notice of the Agency's intent for the Administrator to make a determination whether a Federal promulgation is necessary for any State, Tribe or Territory. EPA will delay this determination to allow States, Territories and Tribes the opportunity to adopt their own water quality standards. Any State, Territory or Tribe which expeditiously acts to adopt standards consistent with the Agency's final promulgation of this section would not be included in the proposed Federal water quality standards. Further, EPA would initiate withdrawal of any Federal promulgation for a State, Territory or Tribe that adopts standards consistent with 40 CFR 131.12(a)(1)(ii).

EPA acknowledges that many States, Territories and Tribes may face difficulties in completing adoption of water quality standards in the time frame envisioned by the Agency. Nonetheless, EPA believes it is important to have this mechanism firmly established in State, Territorial or Tribal water quality standards in order to ensure reasonable further progress toward restoring designated uses in the period of time prior to the completion of TMDLs. This requirement would only apply prior to the establishment and implementation of the TMDL for a waterbody not meeting water quality standards.

D. How Would These Changes Be Implemented Through NPDES Permits?

New dischargers or existing dischargers undergoing a significant expansion are required, under 40 CFR 122.4(i), to have permit limits or conditions that ensure that they will not cause or contribute to a violation of water quality standards. A new discharger or an existing discharger undergoing a significant expansion required to offset their proposed discharge pursuant to 40 CFR 131.12(a)(1)(ii), would also be subject to additional requirements relating to the mechanics of obtaining and maintaining an offset. EPA believes that these additional, new requirements are necessary to ensure that the offsets will in fact be realized. Each of these requirements are specified in a new section 40 CFR 122.4(j)(2), and explained in detail below.

1. Must the New or Significantly Expanding Discharger Obtain an Offset of the Same Pollutant(s) the New or Significantly Expanding Discharger Would Be Required To Offset?

Proposed 40 CFR 122.4(j)(2)(i) would require the discharger seeking an offset to obtain the pollutant load reductions from one or more sources of the pollutant(s) for which the waterbody is impaired. This pollutant(s) must also be the same pollutant(s) the new or existing discharger undergoing a significant expansion would be required to offset. For example, the waterbody may be impaired by both copper and lead. If a new discharger wishes to discharge copper (and not lead), the discharger must obtain the requisite amount of pollutant load reductions from a source(s) that is currently discharging copper into the waterbody.

EPA recognizes that there may be circumstances where reasonable further progress toward attaining water quality standards could best be served by allowing the Director the discretion to offset a new or expanded discharge of one pollutant with a load reduction of a different pollutant for which the waterbody is also impaired. EPA, however, is concerned with the technical difficulties of implementing such an option and therefore, is not proposing it. EPA requests comment on the possibility of allowing such discretion and on how the technical difficulty of determining an appropriate offset for a different pollutant could be resolved.

2. From What Geographic Area Would the Pollutant Load Reductions Need To Be Obtained?

Proposed 40 CFR 122.4(j)(2)(ii) would require the discharger to obtain the pollutant load reductions from one or more sources located on the same waterbody as the discharge from the new discharger or existing discharger undergoing a significant expansion. To determine if a source(s) is located on the same waterbody, for purposes of obtaining an offset under 40 CFR 131.12(a)(1)(ii), there would need to be a direct hydrological connection between two sources. For example, there must be a direct hydrologic connection between the outfall of the existing point source where the reductions are realized and the outfall of the proposed discharge.

States should be able to assist in the determination of whether a source is located on the same waterbody. States often identify their waters and assign waterbody identification numbers to specific hydrologic units, often called

segments. States are also required to identify all waterbodies not attaining water quality standards for the purposes of establishing a TMDL. For the purposes of section 303(d) listing, a waterbody pollutant combination will have a unique identifier so that the status of each listed waterbody can be tracked over time. States often delineate these segments based on hydrologic features, such as the presence of a dam, the confluence of two rivers, or gradations of salinity in an estuary. If a source is located on a waterbody with the same identification number, this would be a good indication that it is located on the same waterbody for purposes of obtaining an offset. EPA invites comment on other conditions that would identify whether a source is located on the same waterbody. EPA believes this requirement is reasonable, as is 40 CFR 122.4(j)(2)(i), because it ensures that the results from the offset will be effective in benefitting waterbodies not attaining water quality standards for a particular pollutant(s).

EPA intends the offset to result in reasonable further progress toward attaining water quality standards. The most appropriate hydrologic unit, and therefore geographic area within the same waterbody, depends on site-specific hydrologic conditions such as water chemistry, ecological parameters, and the location, number and types of sources already discharging to that waterbody. An offset can be obtained from a source located downstream from the new or significantly expanding discharger provided that source is discharging to the same body of water. An offset would not be appropriate if obtained outside of the impaired waterbody in which the new or significantly expanded discharger is located. EPA would also like comment on whether sources providing pollutant load reductions for offsets, should be located only upstream of the new or significantly expanding source.

EPA recognizes that air deposition contributes to some of the water quality problems that exist today. EPA is considering whether to allow an offset from an air pollution source emitting the same pollutant the new or significantly expanded discharger is proposing to discharge. EPA would consider this only where the air pollution source directly affects the waterbody in the vicinity of the new or significantly expanded discharge. EPA invites comment on how some of the additional requirements related to obtaining an offset would be met if EPA allowed dischargers to obtain offsets from an air pollution source(s). In particular, EPA invites comment on

whether the requirement in 40 CFR 122.4(j)(2)(v) (discussed below) to modify an offsetting source's NPDES permit to reflect the required reductions should be expanded to require permit modifications when offsets are obtained from permitted air pollution sources. 40 CFR 122.4(j)(2)(v) would require the permit regulating the source from which the offset is obtained to be modified to reflect the pollutant load reductions.

3. Could the Pollutant Load Reductions Come From a Source With Existing Requirements To Reduce its Loads?

Proposed 40 CFR 122.4(j)(2)(iii) would require that the pollutant load reductions be the result of pollutant control measures implemented by, or secured and assured by, the new discharger or existing discharger undergoing a significant expansion. To satisfy this requirement, the discharger must obtain the reductions from one or more sources discharging the pollutant(s) of concern to the same waterbody. If the discharger wishes to obtain the reductions from another source in the same waterbody, the pollutant control measures must be the result of an entirely new agreement and/or requirement for the offsetting source. In other words, if the offsetting source, for any reason other than to satisfy the proposed discharger's offset requirements, was already required to construct or install the pollutant control measures, the proposed discharger could not receive credit for the resulting reductions. EPA believes this requirement is reasonable because the load reductions would be a new requirement on the offsetting source intended to result in reasonable further progress toward attaining water quality standards where such progress was not otherwise required.

4. When Would the Pollutant Load Reductions Need To Be Obtained?

Proposed 40 CFR 122.4(j)(2)(iv) would require the discharger to achieve the pollutant load reductions on or before the date the new or significantly expanding discharger begins to discharge. For reductions to be achieved on or before the discharger begins to discharge, the pollutant control measures would have to be in place. The discharger would also need to satisfy any requirements that the Director determined were necessary to demonstrate that the pollutant control measures were in place and the requisite amount of pollutant load reductions are and will continue to be realized. Such requirements might include sampling, either at the discharge point or instream, and

reporting the results of those samples both before and after the pollutant control measures were put in place. The results would need to show that the requisite amount of pollutant load reductions are and will continue to be realized. EPA invites comment on other ways the discharger may make this demonstration.

EPA is also proposing to give the Director the discretion to not require that the pollutant load reductions be obtained on or before the date the discharge commences. The Director would have this discretion in circumstances where the Director determines that a different time frame for obtaining and maintaining the offset would best serve the goal of reasonable further progress toward attaining water quality standards. One example of such circumstances is where it is not possible for the new or significantly expanding discharger to demonstrate that the pollutant load reductions are being realized on or before the date the discharge commences. An example of such a case is where the source of the offset involves a reforestation effort. In this instance, it will take time to produce reduction results because of the time required for trees and/or shrubs for example, to grow.

In exchange for not requiring that the offsets be achieved on or before the date the discharge commences, the Director must require that the discharger obtain pollutant load reductions by an amount of at least twice the amount of the new or expanded discharge. The Agency believes this requirement is reasonable because in exchange for the degree of uncertainty involved in whether the pollutant load reductions will in fact be realized, the discharger will be able to discharge prior to obtaining the reductions. In addition, it ensures that the Director's discretion will be exercised in a way that best serves the goal of reasonable further progress toward attaining water quality standards.

Also, to provide assurances that the offsets will be achieved there would need to be an enforceable and defined schedule with milestones identified and sufficiently laid out in the proposed discharger's permit. The use of this discretion would not be permitted in instances where the TMDL is scheduled to be established before the offset is fully realized. EPA invites comment on this aspect of the proposal including whether the Agency should provide for these exceptions to the requirement that the pollutant load reductions be achieved on or before the date the discharge commences.

5. How Long Would the Pollutant Load Reductions Need To Be Maintained?

Reductions would also need to be maintained until the TMDL for the waterbody is approved or established by EPA or until the new or significantly expanding discharger ceases to discharge. Where a TMDL has been approved or established by EPA, the new or significantly expanding discharger would need to maintain the reductions until its permit contained effluent limits or conditions consistent with its WLA in the TMDL. To maintain the reductions, regular monitoring reports would need to be submitted to ensure their continued achievement. Depending on the source(s) from which the discharger is obtaining the reductions (see discussion below under sections D6 and D7), the reports might be submitted by either the discharger or the offsetting source(s). The permitting authority would determine the appropriate number of samples and how often monitoring reports would need to be submitted. The Agency emphasizes that it is not sufficient for the TMDL to be approved or established by EPA; the new or significantly expanding discharger would also need to have limits or conditions in its NPDES permit that reflect its WLA in the TMDL. At that point, the discharger's WLA under the TMDL would supercede the offset requirements.

Also, if the discharger stops discharging prior to the time a TMDL for the waterbody is approved or established, the discharger would no longer be required to maintain the reductions. For example, if a new construction operation is expected to last eight months and the TMDL will not be established for six years, the new discharger (construction operation) need only maintain the reductions for the time in which the discharge from the operation is ongoing (eight months).

EPA believes this requirement is reasonable because the offset is a condition of being permitted to discharge. Therefore, it should be in place on or before the discharger starts to discharge, unless this requirement is modified by the Director under 40 CFR 122.4(j)(2)(iv)(B), and remain in place until the discharger either stops discharging or until the TMDL is established and implemented with respect to that discharger. Again, EPA intends that this requirement be an interim measure and notes that the TMDL process is the appropriate means of determining WLA/LAs that are necessary to attain and maintain water quality standards. EPA does, however, invite comment on requiring the offset

to be maintained indefinitely (before and after the TMDL is established). Requiring the offset to be maintained both before and after the TMDL would prevent reintroducing pollutants to a waterbody where they have already been removed, although this issue should be addressed in the development of the TMDL itself.

6. What Would Be Required When the Source of the Offset Is an Existing Point Source?

Proposed 40 CFR 122.4(j)(2)(v) would require that where a discharger obtains pollutant load reductions from an existing point source(s), as defined in the CWA, that existing point source(s)'s NPDES permit would need to be modified to reflect the reductions. The permitting authority would also need to consider the need for any additional monitoring and reporting requirements to ensure that the reductions are being maintained. This modification would need to take place on or before the date the new permit is issued to the proposed discharger. EPA believes this requirement is reasonable because requiring that the permit for the existing point source(s) be modified to reflect the reductions creates a level of accountability. This accountability stems from the reductions being contained as permit limits in an enforceable permit. If the existing point source(s)'s discharge monitoring reports do not show that the reductions are being realized, the point source(s) would not be in compliance with its permit and thus, would be subject to an enforcement action.

The Agency again, notes that because the existing point source(s)'s permit would be modified to reflect the reductions, the offset requirement would be accounted for as a result of that modification. Therefore, it would not be necessary to incorporate the offset requirements in the new or significantly expanding discharger's permit. The Agency recognizes that there may be additional costs and delays associated with modifying the offsetting source's permit to reflect the reductions and therefore, requests comment on suggestions for a streamlined approach to accounting for the offset requirements. In particular, the Agency invites comment on incorporating the offset requirement in the new or significantly expanding discharger's permit rather than the modifying the existing point source(s)'s permit.

Today's proposal would require the existing, offsetting point source(s)'s permit to be modified to reflect the pollutant load reductions on or before the date a permit is issued to the new

or significantly expanding discharger. EPA notes that there may be a time period during which the existing offsetting point source(s)'s permit has been modified but the proposed discharger has not yet begun discharging. EPA expects that this time period, if any, would be short-term. However, if there is a significant delay before the new or significantly expanding discharger starts to discharge, one option would be to place alternate effluent limits in the existing discharger's permit. One limit would be applicable before the proposed discharger starts to discharge and the other limit would be applicable after the proposed discharger starts to discharge. EPA invites comment on the idea of placing alternate effluent limits in the permit for the offsetting source.

EPA also recognizes that the source from which the offset is obtained may be discharging at levels less than their current permit limits. In these cases, the baseline used to calculate the appropriate reductions would be the offsetting source's actual and current loads not their current permit limit. It is EPA's intent that the offsets result in corresponding reductions in actual loads despite the existence of a higher permit limit. The offsetting source's permit would then need to be modified to reflect the corresponding reductions in actual loads. This does not necessarily mean that the permit limits would be adjusted to match the new actual load. Sources often target a discharge level below the permitted amount in order to ensure continuous compliance. In fact, EPA believes that well operated sources should do this. It is likely that a source which was discharging below its original permit limits would continue to target a discharge level below any new permit limits designed to implement an offset. The exact permit limits necessary to implement the offset would be determined on a case-by-case basis by the permitting authority.

7. What Would Be Required When the Source of the Offset Is an Existing Nonpoint Source?

Proposed 40 CFR 122.4(j)(2)(vii) would require that where a discharger obtains pollutant load reductions from an existing nonpoint source(s), the discharger's NPDES permit would need to contain any conditions necessary to ensure that the load reductions from the nonpoint source will be realized. These include such things as the offset requirements themselves and any accompanying monitoring and reporting requirements to ensure continued achievement of the pollutant load

reductions (from the nonpoint source(s)). The Director may also wish to establish alternate effluent limits in the permit for the new discharger that would become effective if and when the pollutant load reductions are not maintained. EPA invites comment on whether to require the permitting authority to include alternate effluent limits in the new or significantly expanded discharger's permit.

EPA believes the requirement in proposed 40 CFR 122.4(j)(2)(vi) is reasonable for the same reasons stated above for 40 CFR 122.4(j)(2)(v). Requiring the offset and accompanying monitoring and reporting requirements to be placed in the proposed discharger's permit creates a level of accountability as a result of being contained in an enforceable permit. If the discharger's monitoring reports do not show that the reductions are being realized or if the discharger is not in compliance with an alternate permit limit, the discharger would not be in compliance with its permit and would be subject to an enforcement action. Assuming there is an enforceable contract between the new or significantly expanding discharger and the nonpoint source (the agreement under which the pollutant load reductions will be achieved and maintained), in the event that there is a lack of reported reductions which is at the fault of the nonpoint source, the discharger should have an enforceable remedy against the nonpoint source (e.g., under contract law). Contract law may allow the new or significantly expanding discharger to recover costs or other remedies they negotiated in their agreement (any remedies the new or significantly expanding discharger may have against the nonpoint source would be a product of State contract law, outside of the NPDES permitting context).

8. How Would Offsets Be Obtained From Sources Seeking Coverage Under a General Permit?

Determining whether and in what amount an offset would be required from dischargers seeking coverage under a general permit would necessarily differ from the same determinations for dischargers applying for individual permits. Several issues arise with respect to dischargers seeking coverage under a general permit when the discharge would be to a waterbody not attaining water quality standards. The first issue is whether and how the discharger would know if the receiving water is one that does not meet water quality standards. Most discharges seeking coverage under a general permit

are required to submit a notice of intent (NOI) form to claim authorization to discharge. However, there is typically no information requested on the NOI, other than identifying the latitude and longitude of the facility that would help to identify the water quality status of the receiving water. The second issue is whether the discharger and/or permitting authority would know if the discharger's proposed effluent would contain the pollutant(s) causing the impairment. The third issue is if the pollutant(s) of concern is detected, how would the permitting authority obtain the information indicating the amount of that pollutant(s) the discharger is proposing to discharge. An NOI form typically does not request information on the pollutant(s) expected in the discharge. Absent any explicit information requirement for NOI forms, it is unlikely that the discharger or permitting authority could determine whether a discharger would be required to obtain an offset under proposed 40 CFR 131.12(a)(1)(ii). EPA invites comment on how to fill this information need.

i. What Options Is the Agency Considering?

One option that the Agency is considering to fill this information need would be to amend the general permit regulations at 40 CFR 122.28(b)(2)(ii) and 40 CFR 122.28(b)(2)(v) to require the general permit applicant to provide this additional information. Section 122.28(b)(2)(ii) discusses the contents of an NOI. For purposes of notifying the permitting authority about the localized attainment of water quality standards and to determine whether a proposed discharger would be required to obtain an offset, EPA is considering whether the following language should be included in the general permit provision:

"New dischargers or existing dischargers undergoing a significant expansion (as defined in 40 CFR 122.2) but not those that are small entities (as defined in 5 U.S.C. 601(6)) (see discussion under proposed 40 CFR 131.12) must determine whether the receiving water meets water quality standards. Operators that are discharging or proposing to discharge to a waterbody that does not meet water quality standards and for which a TMDL has not been established and approved must certify that the discharge does not add the pollutant(s) for which the waterbody is impaired. Dischargers that do add the pollutant(s) for which the waterbody is impaired and for which a TMDL has not been established or approved must apply for an individual permit and are subject to the requirements in 40 CFR 122.4(j)."

EPA notes that the Director already has authority to require a general permit applicant to apply for and obtain an

individual permit under 40 CFR 122.28(b)(3)(i).

To determine whether the receiving water is impaired, the applicant could contact the appropriate State agency or check the State's 303(d) list of waters not attaining water quality standards. The State may have several ways for the public to access the information in the 303(d) list, including access via the World Wide Web.

The supplemental certification could request the applicant to provide information on the expected contents and amount of pollutant(s) in its proposed discharge. This type of information would assist the applicant and the permitting authority in identifying whether the pollutant of concern is in the proposed discharge and if it is, to determine what, if any, offset is required. The contents of this supplemental certification could be similar to the contents of Item V on Form 2D but focused on the pollutant(s) for which the waterbody is impaired. Some new applicants for EPA-issued individual permits use NPDES application Form 2D. EPA Form 3510-2D (9/86). The permit application regulations at 40 CFR 122.21(k)(5) (as reflected at Item V on Form 2D) require each applicant to estimate and report data on the pollutants that the applicant expects to discharge (per outfall). Sampling and analysis are not required for purposes of the application requirement. If data from such analyses are available, however, then that data should be reported. Section 122.21(k)(5) and Parts A-C of the application require the applicant to provide an estimate of the maximum daily and average daily value for certain identified pollutant(s). This estimate is based on the applicant's determination of whether a pollutant will be present in their discharge. The applicant could base this determination on knowledge of the proposed facility's raw materials, maintenance chemicals, intermediate and final products, byproducts, and any analyses, if available, of their effluent or of any similar effluent.

Other sources upon which to base the estimate could include available in-house or contractor's engineering reports and any other studies performed on the proposed facility. Also, if an effluent guideline applies to the facility or similar facilities, then the development document to the effluent guideline may provide additional information. If there is an applicable effluent guideline and the pollutant(s) of concern is not addressed in the guideline, however, this would not be conclusive evidence that the pollutant(s) of concern is not present. If

the applicable effluent guideline does address the pollutant(s) of concern, that recognition should be considered as a rebuttable presumption that the pollutant(s) of concern will, in fact, be present in the discharge.

EPA is also considering another option to fill this information need. This option would require these dischargers to submit a supplemental certification that they have already obtained and are continuing to maintain the requisite offset requirements. However, EPA has concerns about how this would work. In particular, EPA is concerned with how this permit applicant would determine the amount of the pollutant(s) of concern in its proposed discharge and in turn, determine the amount of required offset. When determining the proper offset required in an individual permit, the Director would have discretion to consider a number of variables. For example, if the applicant decides to obtain offsets from a nonpoint source, maintenance of the offset could remain highly uncertain. To compensate, the Director could appropriately require the applicant to obtain and maintain a greater offset (see discussion above in section (B)(3)(iii)(b)). Given discretionary considerations such as these, offset determinations may be difficult to implement for general permittees. EPA requests comments on how such compensation could be implemented, where necessary, for general permit applicants under this option.

EPA is considering a third option for general permittee offsets. This option would allow the general permits themselves to contain alternative sets of requirements depending on whether the discharge would be to a waterbody meeting water quality standards or a waterbody not meeting water quality standards. For permitted discharges to waterbodies not meeting water quality standards, requirements would be more stringent and/or prescriptive than those required for discharges to waterbodies that do meet water quality standards. Some general permits currently provide such differing requirements. For purposes of satisfying an offset requirement, an option might be to establish the more stringent and/or prescriptive requirements for discharges into impaired waterbodies in lieu of an individualized offset. The reductions needed to ensure reasonable further progress toward meeting water quality standards would be "built in" to the general permit. As with the second option discussed above, the permitting authority would not be able to tailor the offset requirements to the specific circumstances and discharge of the

individual new or significantly expanding discharger. However, this option could allow the permitting authority to establish conditions in the general permit necessary to ensure that collectively, new and significantly expanding dischargers obtained offsets sufficient to achieve reasonable further progress toward attaining water quality standards. EPA invites comments on whether to allow more stringent and/or prescriptive requirements for discharges into impaired waterbodies in the general permit in lieu of requiring an individual permit.

General permitting also creates complications regarding the requirements in 40 CFR 122.4(j)(2). In particular, the Agency anticipates it would be difficult to implement the specific requirements applicable when offsets are obtained from an existing nonpoint source(s). In these cases, an individual permit would need to include conditions necessary, including the offset requirements and any accompanying monitoring and reporting requirements, to ensure continued achievement of the reductions. EPA invites comment on how this requirement should be addressed in general permits.

EPA requests comment on these three options as well as other possible approaches for satisfying the offset requirements for new or significantly expanding dischargers applying for a general permit and proposing to discharge into impaired waterbodies. In particular, EPA requests information on the burdens these options impose on regulated entities and State permitting authorities. EPA also requests comment on the water quality benefits of the three options and on whether the definition of a significant expansion should be different for general permittees than for individual permittees.

ii. What If a Notice of Intent Form Is Not Required?

General permitting presents additional implementation problems when an NOI form is not required. One option would be to amend 40 CFR 122.28(b)(2)(v), which authorizes the Director to allow certain dischargers to be covered under a general permit without submitting an NOI. This section also identifies some sources for which the Director does not have this discretion. EPA is considering including new dischargers and existing dischargers undergoing a significant expansion (but not those that are "small entities" as defined in 5 U.S.C. 601(6)), in the list of sources for which the Director would not have the discretion to waive the submission of an NOI. EPA

invites comment on how this additional concern might be addressed.

iii. Who and Under What Circumstances Would Need To Submit a Supplemental Certification?

EPA recognizes that the language suggested above for an amendment to 40 CFR 122.28(b)(2)(ii) would require only new dischargers and existing dischargers undergoing a significant expansion that are not small entities as defined in 5 U.S.C. 601(6) to provide an additional certification for discharges to a waterbody not attaining water quality standards. Not requiring all new dischargers and existing dischargers undergoing a significant expansion to make this certification is consistent with the proposed requirements at 40 CFR 131.12(a)(1)(ii) because the offset requirement would only apply to those dischargers who are not considered "small entities" (as defined in 5 U.S.C. 601(6)). Dischargers who do not fall within the definition of a small entity would be able to seek coverage under a general permit.

iv. How Would Offsets Be Determined for Dischargers Regulated Solely by BMPs?

Once it is determined that an offset is required, the amount of offset required must be determined as well. This issue is particularly important for applicants seeking coverage under a general permit. This issue involves how to determine the appropriate offset requirements (or offset equivalents) for dischargers regulated solely by best management practices (BMPs). For example, would it be appropriate to require more stringent BMPs, or additional "offsetting" BMPs from other sources in lieu of a pound-for-pound offset? EPA invites comment on how to address this issue as well.

E. Additional Proposed Modifications to Related NPDES Provisions

1. How Is EPA Proposing To Modify the Water Quality-Based Permitting Regulations?

EPA is today proposing to include the phrase "State antidegradation provisions" in its water quality-based permitting regulations at 40 CFR 122.44(d)(1). Section 122.44 contains the requirements for establishing limitations, standards and other permit conditions in NPDES permits necessary to ensure that NPDES permits are protective of water quality standards. Including this phrase is clarifying only and not intended to create a substantive change. Including this phrase in these provisions gives added notice and clarification to EPA's longstanding policy which is well understood by the

States and the public, including regulated entities, that antidegradation policies and implementation procedures are required elements of State water quality standards.

2. How Is EPA Proposing To Modify the Regulations Pertaining to the Statement of Basis and Permit Fact Sheet?

EPA is also proposing to change both 40 CFR 124.56 and 124.7. EPA believes this is necessary in light of the proposed changes to 40 CFR 122.4(j) and 131.12. Section 124.56 lists specific items which must be placed in the fact sheet required by 40 CFR 124.8 of the NPDES regulations. EPA believes it is necessary to include, in the fact sheet, an explanation of how and why any decision was made by the Director with respect to any offsets required under 40 CFR 131.12. These include such things as the amount of the proposed discharge the new or significantly expanding discharger is required to offset as well as any monitoring and reporting requirements. Section 124.7 requires that a statement of basis be prepared in all situations where a fact sheet is not required. The contents of a statement of basis are similar to that of a fact sheet. EPA believes including this information in the fact sheet or in the alternative, the statement of basis, is appropriate for several reasons. The decisions regarding any offset will be dependent upon the specific facts and circumstances of a given scenario and therefore, those facts and circumstances should be made apparent. The public has a right to know how and why these decisions were made. EPA, to facilitate its authority to review permits, needs this information as well. This information is necessary for any appeals brought against the issuance of the permit or conditions therein contained.

III. Proposed Authority To Designate Additional Sources of Pollutants as Subject to the NPDES Program

The NPDES regulations, in several provisions and under certain circumstances, allow the permitting authority and/or EPA to subject certain previously non-designated sources to NPDES program requirements. EPA established these jurisdictional regulations in 1973 when the Agency and the States focused permitting resources primarily on continuous discharges, for example, industrial and municipal sources. Also, in the early stages of CWA implementation, the Agency and the States focused on implementation of technology-based standards. At that time, EPA attempted to limit the scope of the NPDES permitting program to certain types of

point sources. The D.C. Circuit rejected that attempt, however, and explained that EPA could not exempt point sources from the NPDES program. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Although the Court rejected this attempt, it did recognize the Agency's discretion to define "point source" and "nonpoint source." The existing NPDES regulations identifying animal production and silvicultural sources represents an early attempt to do so.

Today EPA is proposing certain changes to the NPDES regulations regarding designation of point sources for regulation under the NPDES permitting program. These point sources include discharges from animal production and silvicultural activities. EPA is proposing explicit language describing its authority, in States with approved NPDES programs, to designate animal feeding operations (AFOs) and aquatic animal production facilities (AAPFs) as sources subject to NPDES program requirements on a case-by-case basis. EPA regulations currently provide that "the Director" may, under certain circumstances, designate such facilities as point sources subject to NPDES requirements. The term "Director" is defined as the EPA Regional Administrator or the State Director, as the context requires, or an authorized representative. See 40 CFR 122.2. The definition explains that when there is an approved State program, "Director" normally means the State Director but that in some circumstances, EPA retains the authority to take certain actions even when there is an approved State program. Today's proposal includes explicit language describing EPA's authority, under certain conditions, to designate animal production facilities as sources subject to NPDES permitting. Today's proposal would also modify the regulation that identifies silvicultural point sources.

A. How Would Animal Feeding Operations and Aquatic Animal Production Facilities Be Affected by Today's Proposal?

Some of the sources that would be affected by today's proposal include animal feeding operations (AFOs) and aquatic animal production facilities (AAPFs) located in States authorized to administer the NPDES program. In a 1995 guidance document, entitled "Guide Manual on NPDES Regulations for Concentrated Animal Feeding Operations," EPA stated that in authorized States, only the State Director may designate an AFO as a concentrated animal feeding operation (CAFO). Today, EPA proposes to revise

the regulations to state that EPA may, under certain circumstances, designate AFOs as CAFOs and also designate AAPFs as concentrated aquatic animal production facilities (CAAPFs), in NPDES-authorized States. The revised regulations would facilitate EPA's provision of reasonable assurance that EPA-established TMDLs will be implemented where States fail to establish an approvable TMDL.

This proposal applies to aquatic animal production facilities and not aquaculture projects. Although both types of operations produce aquatic livestock, aquatic animal production facilities differ from aquaculture projects. Aquaculture projects confine aquatic stock within jurisdictional waters of the United States. An aquatic animal production facility does not confine aquatic stock in jurisdictional waters of the United States. The aquatic area of confinement (e.g., manmade pond, raceway, etc.) may, however, discharge to jurisdictional waters of the United States. Aquaculture is specifically addressed in the CWA. CWA section 318. The statute does not specifically address aquatic animal production outside of waters of the United States, however, it is addressed in EPA regulations, as discussed above.

1. How Do These Sources Currently Become Subject to the NPDES Program?

Under existing regulations, concentrated animal feeding operations and concentrated aquatic animal production facilities are subject to the NPDES program. One situation in which an animal feeding operation or an aquatic animal production facility is considered "concentrated" and thus subject to NPDES permitting, is when the Director so designates the operation or facility on a case-by-case basis. See 40 CFR 122.23(c) and 122.24(c). Case-by-case designations are based on a determination that the operation or facility is a significant contributor of pollutants to waters of the United States. In designating an operation or facility as a significant contributor of pollutants, the Director essentially finds that the facility's discharges are more like point sources already subject to NPDES regulation than those agricultural nonpoint sources that are not.

i. Under What Circumstances Are CAFOs Designated on a Case-By-Case Basis?

EPA regulations define which AFOs qualify as CAFOs based on various criteria set out in the regulations. These criteria were established for a "basic national standard and practical administrative approach." See 40 FR

54182, 54183 (11/20/75). To supplement this approach, EPA included a designation mechanism in the regulations. Through this mechanism, even where a source did not meet all of the regulatory criteria to become a CAFO, the Director, upon determining that the source is a significant contributor of pollutants to waters of the United States, could exercise its discretion and designate the source as a CAFO to ensure that the source would be regulated. In making this determination, the Director conducts an on-site inspection of the facility and considers the following factors: (1) The size of the animal feeding operation and the amount of wastes reaching waters of the United States; (2) the location of the animal feeding operation relative to waters of the United States; (3) the means of conveyance of animal wastes and process waste waters into waters of the United States; (4) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and (5) other relevant factors. 40 CFR 122.23(c). One such relevant factor could be the water quality of the receiving water including the degree of nonattainment.

ii. Under What Circumstances Are CAAPFs Designated on a Case-by-Case Basis?

Permitting authorities can also designate any warm or cold water aquatic animal production facility for regulation under the NPDES permitting program on a case-by-case basis. 40 CFR 122.24. The Director, upon determining that the source is a significant contributor of pollutants to waters of the United States, may designate an aquatic animal production facility as a concentrated aquatic animal production facility. To make this determination, the Director conducts an on-site inspection of the facility and considers the following factors: (1) The location and quality of the receiving waters of the United States; (2) the holding, feeding and production capacities of the facility; (3) the quantity and nature of the pollutants reaching waters of the United States; and (4) other relevant factors. 40 CFR 122.24(c).

2. Why is EPA Proposing Changes to the CAFO and CAAPFs Jurisdictional Regulations?

In some areas, pollutant contributions from small unregulated (by NPDES) animal production sources (terrestrial and aquatic) are the primary cause of impairment in some water segments. As indicated in the 1996 Report to Congress under CWA section 305(b), agriculture,

including both animals and cropland, is the leading source of water quality impairment of rivers and lakes. Based on data collected by the States and Territories, EPA estimated that, of the waters assessed, 25 percent of the impaired river miles, 19 percent of the impaired lake acres, and 10 percent of the impaired estuarine square miles are polluted due to agricultural nonpoint sources of pollutants (EPA, 1996). Thirty-eight of the States included specific agricultural sources of pollution in rivers.

i. How do Animal Feeding Operations Impact Water Quality?

Studies show that animal feeding operations, and particularly a concentration of these facilities in a single watershed, can increase nutrient pollution to a river or stream. A study of Herrings Marsh Run in the coastal plain of North Carolina showed that nitrate levels in streams and ground water were highest in areas with the greatest concentration of swine and poultry production. (Hunt, P.G., et al. 1995. Impact of animal waste on water quality in an eastern coastal plain watershed. *IN: Animal Waste and the Land-Water Interface*, Kenneth Steele, Ed., Lewis Publishers, Boca Raton, FL, 589 pp.). Ortho-phosphate levels were affected only slightly by animal waste applications because most of the phosphorus was bound by the soil. (Hunt, et al., 1995).

Results from an Illinois case study indicated that two types of activities at small to medium-sized swine operations contributed to water quality problems. First, many producers had constructed open-front facilities without including manure collection systems to contain feedlot runoff. Second, many producers practiced "misting" and/or used on-site watering systems to cool off animals, which in turn generated conditions that caused uncontrolled pollutant runoff. This case study demonstrated how even small operations contributed significant amounts of pollutants to the receiving waters. (Ackerman and Taylor, 1995, Stream Impacts due to Feedlot Runoff. *IN: Animal Waste and the Land-Water Interface*, Kenneth Steele, Ed., Lewis Publishers, Boca Raton, FL, 589 pp.).

AFOs can also cause catastrophic effects locally. In June 1995, animal waste contained in an eight-acre lagoon in North Carolina burst through its dike, spilling approximately 22 million gallons of animal waste into the New River. The spill reportedly killed fish along a 19-mile downstream area. This was the worst of six reported spills in the State during the summer of 1995. (EPA Office of the Inspector General, March 1997, Animal Waste Disposal

Issues, Audit Report No. E1XWF7-13-0085-7100142).

Several case studies have also been performed to document the water quality benefits of installing animal waste management systems. In South Dakota, for example, 9 feedlots were monitored to determine which most negatively impacted water quality through increased loads of nutrients. After installation of animal waste management systems, several feedlots exhibited evidence of improving water quality in streams. (South Dakota Association of Conservation Districts, South Dakota Department of Environment and Natural Resources, and USDA Natural Resources Conservation Service, 1996, Final Report—Animal Waste Management Team). EPA invites commenters to identify and submit additional data to support or refute these conclusions.

ii. How Do Aquatic Animal Production Facilities Impact Water Quality?

Other studies also indicate that aquatic animal production facilities cause significant adverse impacts on water quality. Such impacts include but are not limited to, oxygen depletion in surrounding waters, degradation of benthic (bottom) ecosystems, and increases in the severity of toxic algae blooms. The impact on water quality, however, varies per fish species and production facility. Pond and tank systems, for example, often discharge pulses of highly concentrated waste discharges during cleaning and harvesting. (Bergheim, A., A. Sivertsen, and A.R. Selmer-Olsen. 1982. Estimated Pollution Loading From Norwegian Fish Farms. I. Investigations 1978-1979. *Aquaculture* 28:347-361). Catfish ponds, for instance, release effluents containing high concentrations of nutrients, often at concentrations exceeding water quality limits set by EPA and state governments. (Tucker, C.S. 1996. The Ecology of Channel Catfish Culture Ponds in Northwest Mississippi. *Reviews in Fisheries Science* 4(1):1-55). EPA invites commenters to identify and submit additional data to support or refute these conclusions.

3. What Changes Is EPA Proposing To Make to the CAFO and CAAPFs Jurisdictional Regulations?

As stated previously, currently only the "Director" may designate these sources as subject to the NPDES program on a case-by-case basis and "Director" is defined as the EPA Regional Administrator or the State Director, as the context requires. 40 CFR 122.2. EPA foresees the need to make

future designations itself in authorized States in particular circumstances, although the Agency has only done so on occasion. Therefore, EPA is proposing to revise 40 CFR 122.23 and 122.24 to include explicit language describing that the Agency has the authority (under certain circumstances discussed below) to make such designations in instances when the State has not already done so.

i. When Would EPA Designate These Sources?

The proposed regulatory change would limit the exercise of this discretion to the situation when EPA establishes a TMDL for a waterbody in an authorized State and determines that designation is necessary to provide reasonable assurance that the wasteload allocations and load allocations under the TMDL will be achieved. By restricting the exercise of its discretion to this high priority circumstance, the Agency recognizes its own resource limitations, as well as the special role of authorized NPDES States in the federal system.

States must submit each TMDL they establish to EPA for approval. Elsewhere in today's **Federal Register**, EPA proposes regulations to require States to submit a plan to implement the load allocations and wasteload allocations of a TMDL as a component of the TMDL. EPA would evaluate the adequacy of the implementation plan (a required element of a TMDL) in determining whether to approve a TMDL. If EPA disapproves a TMDL based on a determination that the implementation plan is inadequate, EPA would establish the TMDL itself, including an implementation plan.

One of the proposed required elements of the implementation plan is that it contain reasonable assurance that the control actions and/or management measures required to implement the load allocations and the wasteload allocations established by the TMDL will be put in place and the load allocations and wasteload allocations will be met. Thus, EPA may disapprove the TMDL if it determines that the implementation plan lacks reasonable assurances. For example, EPA may determine that the implementation plan lacks reasonable assurances that certain animal feeding operations will achieve and maintain their respective pollutant load allocations. If working with the State to achieve reasonable assurance has failed, EPA would disapprove the TMDL and would be required to establish a TMDL, including an implementation plan. EPA may then determine that some animal feeding operations are significant contributors of

pollutants to waters of the United States and that the best way for EPA to provide reasonable assurance that such an animal feeding operation achieves and maintains its assigned pollutant load allocation is through the issuance (and enforcement) of an NPDES permit.

Under today's proposal, EPA could then invoke its designation authority and subject the animal feeding operation to the NPDES program. In similar circumstances, EPA could designate an unregulated aquatic animal production facility. The language in today's proposal about the Agency's intention and authority to designate unregulated animal production sources in authorized States—where EPA establishes a TMDL—supports the fulfillment of the CWA goals to attain and maintain water quality standards. The proposal also supports EPA's backstop authority, as specified in CWA section 303(d)(2), to establish TMDLs (including all required elements) for waterbodies for which the State fails to do so.

ii. How Would This Proposal Affect States?

The proposed regulation limits the exercise of this discretionary authority to situations where EPA establishes a TMDL. Many States have opportunities to provide "reasonable assurances" to control nonpoint source pollutants and/or pollution in ways (and based on authorities) that are not available to the federal EPA. When EPA establishes a TMDL, the federal authority to designate otherwise unregulated sources as point sources would provide a federally enforceable "reasonable assurance" that the allocation would be achieved. The Agency stresses that the authority proposed today would be used only in those circumstances where other means of working with the State have failed.

iii. Who Would Issue Permits to These Sources Once Designated?

EPA does not have authority to issue permits to the animal production facilities that the Agency designates for regulation in a State authorized to administer the NPDES program. That authority remains exclusively with the authorized State. CWA section 402(c). Instead, EPA relies on its authority to designate point sources under the CWA in general and the specific authority provided by CWA section 501(a) to support the Agency's authority to designate point sources subject to regulation under the NPDES program, even in States authorized to administer the NPDES permit program. The interpretive authority to define point sources and nonpoint sources was recognized by the D.C. Circuit in *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir.

1977). This interpretive authority arises from CWA section 501(a) when EPA interprets the term "point source" at CWA section 502(14).

4. How Would EPA Revise the Regulatory Text?

EPA recognizes that many State agencies have limited resources to implement their NPDES programs and in many cases, a State's inaction in the designation of additional sources is not a result of an authorized State's unwillingness to assert regulatory authority over additional sources, but rather the perceived inability to assure timely issuance of individual permits for these sources in the face of competing priorities. Given increased reliance and success in control of point sources under State NPDES general permits, however, the Agency believes that EPA designation in these jurisdictions and in these instances will expedite the attainment of water quality standards without undue burden on authorized States.

In order to achieve this result, EPA is proposing to modify 40 CFR 122.23(c)(1), (3) and (4) and 40 CFR 122.24(c)(1)–(3) as reflected in proposed regulatory text. These modifications would specify that, in jurisdictions where EPA is not the NPDES permitting authority, EPA could (under certain circumstances) designate an animal feeding operation as a "concentrated animal feeding operation" where the Regional Administrator or his/her delegate makes a determination that the operation is a significant contributor of pollutants to waters of the United States. Similarly, today's proposal would accomplish the same objective for the designation of an aquatic animal production facility as a "concentrated" aquatic animal production facility (i.e., the aquatic form of a concentrated animal feeding operation). These modifications would also specify that EPA would only designate these facilities where pollutants are discharged into waters for which EPA establishes a TMDL to provide reasonable assurance that the wasteload allocations and load allocations under the TMDL will be achieved.

The Agency invites comments on this proposal, including the limitation of the federal designation authority (in authorized States) to discharges to waters for which EPA establishes a TMDL.

B. How Would Silvicultural Activities Be Affected by Today's Proposal?

1. Which Sources Are Currently Excluded From the Definition of a "Point Source?"

EPA is today proposing to modify its current interpretation of the term "point source" with respect to discharges associated with silviculture. The term "point source" is defined in regulations at 40 CFR 122.3 to exclude certain discharges from NPDES requirements. Section 122.3(e) specifically excludes "Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands and forest lands." As a preliminary matter, the Agency notes that, though the regulatory exclusions have existed since the 1970's, Congress did not enact the specific statutory ratification for the agricultural exclusions, for "return flows from irrigated agriculture" and "agricultural storm water" until 1977 and 1987, respectively. Neither of the 1977 nor the 1987 amendments provided any ratification of the silvicultural exclusions.

Since that time, the Agency and the States have begun the implementation of regulatory controls on intermittent "wet weather" sources. In 1987, Congress directed EPA to focus on water quality concerns associated with storm water. One of the types of storm water discharges that the Agency identified as appropriate for regulatory control under the NPDES program was storm water discharges associated with construction activity, including clearing, grading, and excavation activities. See 40 CFR 122.26(b)(14)(x). Storm water discharges resulting from land disturbance have significant potential for water quality impairment due for example, to excessive sediment loads. Sediment adversely affects aquatic ecosystems by reducing light penetration, impeding sight-feeding, smothering benthic organisms, abrading gills and other sensitive structures, reducing habitat by clogging interstitial spaces within a streambed, and reducing the intergravel dissolved oxygen by reducing the permeability of the bed material. (Everest, F.H., Beschta, J.C., Scrivener, K.V., Koski, J.R., Sedell, J.R., and C.J. Cederholm. 1987. *Fine Sediment and Salmonid Production: A Paradox Streamside Management: Forestry and Fishery Interactions*, Contract No. 57, Institute of Forest Resources, University of Washington, Seattle, WA. pp. 98-142).

To date, NPDES regulation of storm water discharges associated with

construction activity has protected water quality from the runoff associated with for example, the construction of roads. A gap in regulatory coverage exists, however, in that the existing NPDES regulations categorically exclude silvicultural road construction and maintenance from the definition of "point source." 40 CFR 122.27(b). Therefore, the silviculture regulation excludes discharges from forest roads from the universe of sources that can be regulated under the NPDES permitting program.

2. Are All Discharges From Silvicultural Activities Currently Excluded From the NPDES Program?

Not all discharges from silvicultural activities are currently excluded from the definition of a "point source." EPA regulations at 40 CFR 122.27(b)(1) specify which discharges associated with silvicultural activities are point source discharges, namely, discharges from rock crushing, gravel washing, log sorting and log storage facilities. Discharges from these activities are categorically subject to regulation under the NPDES program. EPA regulations at 40 CFR 122.27(b)(1) also currently identify certain discharges associated with silviculture activities that may be "nonpoint source" discharges, thus, not subject to NPDES permits. These include runoff from nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance. Currently, runoff from these activities is categorically excluded from the NPDES program. Also, as noted in the regulation, some discharges associated with silvicultural activities (such as stream crossing for roads) may involve point source discharges of dredged and fill material. In these cases, a CWA section 404 permit may be required. See 33 CFR 209.120 and part 233.

EPA acknowledges that CWA section 404(f)(1) exempts certain discharges of dredged or fill material from CWA permitting requirements for, among other activities, normal silvicultural activities and the construction or maintenance of forest roads. The CWA section 404(f) exemption for discharges of dredged and fill material applies to permit requirements under both section 404 and section 402, except as provided in section 404(f)(2). Section 402, however, does not regulate discharges of dredged or fill material. EPA has consistently interpreted the apparent inconsistency of including section 402 in the section 404(f) "exemptions" to

reflect the intent that discharges of dredged or fill material that are exempt from section 404 permit requirements would not be regulated under section 402 instead. EPA has not interpreted the inclusion of section 402 in section 404(f) to mean that discharges other than dredged or fill material (from the activities listed in section 404(f)) are exempt from permit requirements under section 402. Today's proposal would not address dredged or fill material or otherwise affect the section 404(f) exemption. Today's proposal would apply to discharges of pollutants other than dredged or fill material, for example, from contaminated storm water discharges.

EPA also notes that the section 404(f) exemption for discharges of dredged or fill material associated with the construction or maintenance of forest roads is dependent on case-by-case application of best management practices. Best management practices provide effective mechanisms to address potential adverse impacts to aquatic resources, including degradation of physical, chemical, and biological characteristics.

3. Which Silvicultural Discharges Would Be Designated Under Today's Proposal as Sources Subject to the NPDES Program?

By today's action, the Agency proposes to remove the regulatory gap in coverage with respect to those silvicultural discharges that are currently identified as a discrete category of "non-point sources" excluded from the opportunity for regulation under the NPDES permitting program. The only silvicultural discharges, however, that would be subject to regulation under the NPDES program on a categorical basis are those that are currently regulated as categories today: rock crushing; gravel washing, log sorting, and log storage facilities. For the sources that were categorically excluded previously (nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance), the categorical exclusion from the definition of "point source" would be removed. Instead, on a case-by-case basis, selected sources could be designated for regulation under the NPDES program for storm water discharges under 40 CFR 122.26(a)(v). This case-by-case designation, made by the Director or EPA, would be based upon a determination that the source contributes to a violation of water

quality standards or is a significant contributor of pollutants to waters of the United States. To make this determination the Director could consider the following factors: (1) The location of the discharge with respect to waters of the United States; (2) the size of the discharge; (3) the quantity and nature of the pollutants discharged to waters of the United States; and (4) other relevant factors. 40 CFR 122.26(a)(v).

4. Why Is EPA Proposing To Remove the Regulatory Exclusion for These Silvicultural Discharges?

Silviculture contributes approximately 3 to 9 percent of nonpoint source pollution to the Nation's waters. (Neary, D.G., and J.L. Michael, 1989, Effect of sulfometuron methyl on ground water and stream quality in coastal plain forest watersheds. *Water Resources Bulletin*. 25(3):617-623). Twenty-three States have identified silviculture as a problem source contributing to nonpoint source pollution in their 1996 water quality assessments submitted to EPA under CWA section 305(b). (USEPA, 1996, EPA-841-R-97-008 April 1998).

Several types of silvicultural activities that are currently exempt from NPDES regulation may cause significant adverse impacts on water quality. These include, but are not limited to, road construction and maintenance, site preparation, prescribed burning, clearcutting, and harvesting operations. As mentioned above, the construction and maintenance of roads, other than those constructed for silvicultural operations, are currently subject to NPDES requirements. The construction and maintenance of roads related to silvicultural activities, however, is exempt. Studies demonstrate that some such road construction may create significant water quality problems. Results of a study on forest management activities in a small watershed indicated that suspended sediment yields increased almost 8 fold in the first year following road construction, and two-fold following logging in the second year. (B. Anderson and D.F. Potts, 1987, *Suspended Sediment and Turbidity Following Road Construction and Logging in Western Montana*, *Water Resources Bulletin*, Vol. 23, No. 4).

Mechanical site preparation by large tractors that shear, disk, drum-chop, or root-rake a site may result in considerable soil disturbance over large areas and has a high potential to deteriorate water quality. (Beasley, R.S. 1979. Intensive site preparation and sediment loss on steep watersheds in the Gulf Coastal plain. *Soil Science*

Society of America Journal. 43(3):412-416). Site preparation techniques that result in the removal of vegetation and litter cover, soil compaction, exposure or disturbance of the mineral soil, and increased stormflows due to decreased infiltration and percolation, all can contribute to increases in stream sediment loads. (Golden, M.S., C.L. Tuttle, J.S. Kush, and J.M. Bradley, 1984, *Forestry activities and water quality in Alabama: Effects, recommended practices, and an erosion-classified system*. Auburn University, Agricultural Experiment Station. Bulletin 555). Prescribed burning is another method used to prepare sites that may also have effects on water quality as a result of increased erosion and the altering of soil properties. *Id.*

The actual harvesting of timber can also contribute to water quality problems. Results from studies have indicated that clearcutting, which is often a method used for timber harvesting, can have significant effects on the nutrient levels and temperatures of nearby waters. The resulting impacts of a logging operation in the Bull Run Watershed of Oregon include increased nitrate-nitrogen levels for up to 7 years after the harvest and an increase in annual stream temperatures by 2-3 degrees Celsius for the following 3 years after the harvest. (Harr, R.D., and R.L. Fredriksen. 1988. *Water quality after logging small watersheds within the Bull Run Watershed, Oregon*. *Water Resources Bulletin*. 24(5):1103-1111). EPA invites commenters to identify and submit additional data to support or refute these conclusions.

5. When Would Silvicultural Sources Be Required To Obtain an NPDES Permit?

The effect of today's proposed elimination of the categorical silviculture exclusion would be limited. The currently unregulated silvicultural sources would only be required to obtain NPDES permit authorization (1) upon a case-by-case designation by EPA or the authorized State and (2) for the purposes of EPA designation, only for sources that discharge to waters for which EPA establishes a TMDL to ensure that the wasteload allocations and load allocations under the TMDL are achieved. The existing regulations for storm water associated with industrial activity (also known as "Phase I" storm water regulations) issued pursuant to CWA section 402(p)(4)(A), would not apply to the discharges that would become subject to regulation by the revision to 40 CFR 122.27(b). For example, storm water discharges associated with construction and maintenance of forest roads would

not be considered "storm water discharges associated with industrial activity" under 40 CFR 122.26(b)(14). The construction of silviculture roads would not be a category of storm water discharge that is automatically subject to NPDES permitting like other kinds of road building. Instead, point source discharges of storm water associated with currently unregulated silviculture would only be designated for regulation on a case-by-case basis pursuant to CWA section 402(p)(2)(E) or 402(p)(6).

As noted above, EPA proposes that any final rule would limit EPA designation of silviculture point sources to discharges to waters for which EPA establishes a TMDL because, as a result of proposals elsewhere in today's rule, these circumstances would provide a considered and focused basis for regulation. The limitation on federal designation would apply both in authorized States, as well as in States where EPA administers the NPDES program. Given the Agency's limited resources, as well as the potentially huge universe of silvicultural sources that could become subject to NPDES permitting, today's rule focuses those limited EPA resources on these priority waterbodies. In States where EPA administers the NPDES program, the Agency does not propose silviculture point source designation authority to the same extent as would be available to authorized States. Unlike authorized States that might designate silviculture point sources outside of the TMDL context, EPA would only designate a source when the Agency establishes a TMDL itself to ensure that the wasteload allocations and load allocations under the TMDL are achieved. In addition, EPA would work with and assist those States (where EPA administers the NPDES program) in development of their nonpoint source control programs (so that the State could provide its own reasonable assurances), rather than federally designating silviculture point sources prior to that State's establishment of its TMDLs. As noted above, EPA does not propose to limit designation by authorized States, who may have other opportunities to assure "reasonable assurances" that nonpoint sources attain load allocations under TMDLs. Additionally, CWA section 510 preserves more expansive designation authority for States.

EPA expects that only in extremely rare circumstances would the Agency need to exercise its authority to establish an NPDES permit requirement for discharges associated with silvicultural activities. Indeed, enhanced implementation of State programs and authorities designed to

protect water quality from silvicultural activities may be strong enough, in the aggregate, to satisfy "reasonable assurance" that silvicultural sources would attain load allocations under TMDLs through State means alone. EPA would only use the proposed new designation authority as a "last resort" because EPA lacks authority to regulate silvicultural sources directly through other means than through the NPDES permitting program. As noted above, States might choose to use the new authority more broadly, but EPA would encourage them to focus their limited regulatory resources in the same limited manner that EPA would use it.

6. How Would States Be Affected by This Proposal?

State capacity to address silvicultural sources is exemplified by the breadth and depth of State programs. A significant number of States have comprehensive forest practice management acts, while most others have at least some sort of backup authority, such as enforceable water quality standards or "bad actor" laws. At least ten States administer regulatory programs that are as comprehensive as EPA anticipates would be imposed if sources were designated under today's proposal for regulation under the NPDES permitting program. (Olafson, PV, Cheng A.S., and R.D. Moulton. 1995. Regulation of Private Forestry Practices by State Governments. University of Minnesota, Minnesota Agricultural Experiment Station. Bulletin 605). Nearly all States have developed and published BMPs for silviculture, about half of the States conduct annual compliance audits to determine landowner use of BMPs, and in most States, the State forestry agency plays a role in the State nonpoint source plan. (Stuart, Gordon W., 1996. The National Association of State Foresters 1996 Progress Report, State Nonpoint Source Pollution Control Programs for Silviculture. National Association of State Foresters).

In general, EPA envisions that permits for silvicultural activities would be based on an approach emphasizing the development of pollution prevention plans and/or specification of best management practices rather than quantitative discharge limits for specific pollutants. EPA would work with States and stakeholders in developing these permits.

EPA invites comments on removing the categorical exemption for runoff from certain silvicultural activities and on its intention to limit federal designation authority to discharges into

waters for which EPA establishes a TMDL.

IV. Proposed EPA Authority To Reissue State-Issued Expired and Administratively-Continued NPDES Permits

Under the NPDES program regulations, a Regional Administrator may review and object to State-issued NPDES permits. The procedures by which a Regional Administrator may review and object to these permits are found in 40 CFR 123.44. The existing objection authority, under section 402(d) of the Act, grants EPA 90 days within which to object to a proposed State permit that fails to meet the guidelines and requirements of the Act. If a State fails to respond to an EPA objection within 90 days of objection, exclusive authority to issue the NPDES permit to that discharger passes to EPA.

A. Can EPA Object to State-Issued Expired and Administratively-Continued Permits?

Today's proposal describes a new mechanism by which a Regional Administrator may trigger the existing review and objection procedures in 40 CFR 123.44 for State-issued NPDES permits. EPA is proposing to grant the Regional Administrator the discretion to trigger these procedures when a State fails to revise an expired, State-issued permit that has been administratively-continued for more than 90 days. This authority could be triggered when the expired permit authorizes a discharge to an impaired waterbody where there is a need for a change in the existing permit limits (referred to as an "environmentally-significant permit"). The Agency's NPDES regulations require that an existing permittee submit a new permit application at least 180 days before an existing permit expires. 40 CFR 122.21(d)(2). When a permittee has submitted a timely application for renewal, but the State Director fails to act on the permittees' application before the existing permit expires, State law often provides that the existing permit continues in effect by operation of law. The permit remains in effect by operation of law until the State takes final action on the permittee's application—that is, until the State makes a final decision to grant or deny a new permit. This is often referred to as administrative continuance. These State laws, like the corresponding provisions in 40 CFR 122.6 and the federal Administrative Procedure Act, 5 U.S.C. 558(c), aim to protect a permittee who has submitted a timely application for renewal. State law protects a permittee from losing its

authorization to discharge simply because the permit-issuing authority has not issued a new permit before the existing permit expires.

Administrative continuance may provide States the necessary flexibility without significant adverse impacts on the NPDES permitting scheme. However, it may also lead to inappropriate delays in reissuing permits that need revision in order to remain in compliance with applicable requirements. State administrative-continuance laws typically allow an expired permit to remain administratively-continued indefinitely. Therefore, a lengthy administrative continuance of a permit for a discharge into an impaired water can greatly delay the implementation of needed water quality-based effluent limitations, including effluent limitations implementing wasteload allocations established in a TMDL for an impaired waterbody. Under EPA's existing regulations, no mechanism currently exists by which to invoke the Agency's permit veto authority to address this situation. Today's proposal would provide that needed procedural mechanism.

This proposed provision is designed to address a subset of expired and administratively-continued permits. EPA uses the term backlog to describe the larger set of permits that are either expired and administratively-continued or have not yet been issued to first time applicants. Notwithstanding the Agency's own permit backlog, EPA recognizes that many expired permits for discharges into impaired waters have not been reissued and expects to exercise this discretion in very rare instances involving environmentally-significant permits. The Agency intends to use its discretion under the proposed provision as one way to help ensure that these permits will be issued in a timely manner.

B. How Would EPA Review and Object to a State-Issued Expired and Administratively-Continued Permit?

Today's proposal provides that, if the State failed to submit to EPA a draft or proposed permit for a discharge into an impaired waterbody within 90 days following the permit expiration date, the Regional Administrator would be able to treat the expired and administratively-continued permit as equivalent to the State's submission of a draft or proposed permit for EPA review under 40 CFR 123.44. For EPA to trigger this discretionary review mechanism, EPA would give the State and the discharger 90-days notice of its intent to do so. EPA could provide this notice at any time

following the 90-day period after permit expiration. The use of this new mechanism would be discretionary on the part of EPA. Like a veto of a proposed permit under the existing 40 CFR 123.44, this would not constitute final agency action until EPA had completed the permit issuance process under 40 CFR part 124 and issued or denied the permit. *District of Columbia v. Schramm*, 631 F.2d 854, 816 (D.C. Cir. 1980); *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899, 909 n.24 (2nd Cir. 1976) (discretion). *Champion Intl Corp. v. U.S. EPA*, 850 F.2d 182, 187 (4th Cir. 1988) (reviewability).

EPA believes that the 90 days provided after permit expiration, plus the 90 days provided after notice by the Agency that it intends to trigger Agency review, plus the 90 days provided for a State to respond to Agency objection would provide enough time for a State to reissue an expired permit. EPA notes that under the proposed mechanism, the Agency would effectively have the authority to extend the period of time for the State to reissue a permit beyond the 270 days effectively provided under the proposed regulation. This would occur by delaying the date upon which the Agency notifies the State of its intent to trigger Agency review. Nonetheless, the Agency invites comment on whether EPA should provide a grace period of longer than 90 days after the permit expires and is administratively-continued before the Agency may provide notice that it intends to trigger Agency review.

C. When Would EPA Withdraw its Objection?

Once the environmentally-significant, administratively-continued permit is subject to review under 40 CFR 123.44 procedures, EPA would be able to comment on, object to, or recommend changes to the permit. If the State, under 40 CFR 123.44(a), submitted a draft or proposed permit for EPA review at any time before exclusive authority to issue the permit passes to EPA under 40 CFR 123.44(h), EPA would withdraw its notice of intent to assume permit authority. At this point, existing rules on EPA objection to State-issued permits would govern. Therefore, EPA may take any appropriate action, including transmission of comments on or possible objection to the new draft or proposed permit submitted by the State. Furthermore, the ability to invoke this authority would continue until the State issues the final permit. In other words, if a State submits a draft or proposed permit that EPA believes resolves all of the concerns under the objection, but

fails to issue the final permit, EPA may in fact, invoke this authority again and object to the original (expired and administratively-continued) permit.

D. When Could EPA Invoke This Authority?

Proposed 40 CFR 123.44(k) describes two situations in which EPA would be able to treat an expired and environmentally-significant, administratively-continued permit as the State's submission of a permit for EPA review under 40 CFR 123.44. This authority could be invoked if the discharge is subject to a TMDL, established or approved by EPA, and the expired permit does not incorporate the relevant wasteload allocations established in the TMDL. Second, this authority could be invoked if the permit authorizes a discharge of a pollutant(s) of concern (a pollutant(s) for which the waterbody is impaired) to a waterbody that does not meet water quality standards and for which EPA has not established or approved a TMDL.

EPA is considering providing explicit language describing that this authority is available to the Agency with respect to all expired and administratively continued permits which are not consistent with new CWA provisions. Examples of such permits, other than those covered by today's proposal, would be permits that do not reflect newly-adopted water quality standards and effluent limitations guidelines. EPA invites comment on these and other circumstances in which it would be appropriate for EPA to assert this authority.

E. Would EPA Work With the State Before Invoking This Authority?

The Agency stresses that the new review mechanism proposed today would be used only in those circumstances where other means of working with the State to reissue the permit have failed. The Agency may invoke this authority where leaving the administratively-continued permit in place would frustrate the attainment of water quality standards in impaired waterbodies prior to the establishment of a TMDL. The Agency may also invoke this authority in instances where leaving the administratively-continued permit in place would frustrate the implementation of a TMDL. Leaving the administratively-continued permit in place in both of these instances would be inconsistent with the goals and purposes of the Act. At any time during this process, the State is encouraged to explain to EPA the reasons for its failure to reissue the expired permit. The Agency will carefully consider any such

explanation before proceeding with these objection procedures. Similarly, the Agency would not expect to depend heavily upon the proposed mechanism in States whose administrative continuance laws operate for periods of time not much in excess of the 270 days effectively provided for reissuance by this proposal.

F. What If a Permit Has Expired but the Permittee Has Not Submitted a Timely and Complete Application for Renewal to the State?

EPA also notes that proposed 40 CFR 123.44(k) would apply only to those expired, State-issued permits for which a timely and complete application for renewal has been submitted to the State, and for which State law has provided for continuation of the expired permit. The new provision would not apply to unpermitted discharges or discharges of new sources or new dischargers that may or may not have filed a permit application. In these cases, existing authority allows the Agency to institute judicial or administrative actions against these dischargers for discharging without a permit, even if they have submitted an application to the State and the State has not issued the permit.

G. What Authority Supports Today's Proposed Changes?

Section 402(d) of the Act provides EPA with authority to object to and veto a proposed permit that violates the requirements of the Act. As discussed below, neither the Act nor its legislative history expressly speaks to the issue of whether the Agency may object to and veto permits that have effectively changed under administrative continuance. When Congress has not spoken directly to an issue of statutory construction, courts recognize agency discretion to reasonably interpret a statute that the Agency is charged to administer. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Therefore, the Agency has long held that, based on the congressional purpose underlying CWA section 402(d), the Agency's objection and veto authority exists not only when a permit has been formally proposed and submitted to the Agency for review but also when a State or a court has taken action to change a permit such that it requires new review by the Administrator. Memorandum of July 18, 1973 from Robert V. Zener, Acting Deputy General Counsel, to Dale S. Bryson, Acting Director Enforcement Division, Region V, regarding Extent of EPA Concurrence on NPDES Permits; Memorandum of July 3, 1975 from Robert V. Zener, General Counsel, to

James O. McDonald, Director, Enforcement Division, Region V, regarding US EPA Authority to Review State Permit Modifications. Similarly, the Agency has concluded that administrative continuance of an expired permit in the face of newly established wasteload allocations or an impairment listing may constitute a circumstance where a new review by the Administrator is warranted.

EPA's authority to promulgate the proposed revision to 40 CFR 123.44 is a reasonable interpretation of several statutory provisions. The authority stems primarily from EPA's responsibility to ensure that permits include water quality-based effluent limitations as necessary to meet water quality standards. This is especially important in waters where TMDLs and wasteload allocations have been established to meet applicable water quality standards. Section 303(d) of the Act requires EPA to ensure that a TMDL is established for impaired waters. The wasteload allocations derived from the TMDL indicate the water quality-based effluent limitations that permittees discharging to the impaired water must meet for the waterbody to meet applicable water quality standards. Section 301(b)(1)(C) of the Act directs EPA and the States to include water quality-based effluent limitations in NPDES permits that will enable the waterbody to meet the applicable water quality standards.

Listing a water under CWA section 303(d) and the subsequent establishment of a TMDL, may indicate that new or more stringent water quality-based effluent limitations are necessary for point source discharges to that waterbody. If so, a lengthy administrative continuance of the permit may interfere with the Administrator's responsibility to ensure that permits are consistent with the requirements of the CWA. The Administrator bears a statutory responsibility under CWA section 303(d) to ensure timely establishment of TMDLs and an obligation under CWA section 301(b)(1)(C) to ensure that permits include water quality-based effluent limits as necessary to meet water quality standards. CWA section 501(a) allows the Agency to promulgate a regulation that relies upon EPA's authority in CWA section 402(d), to prevent a State from avoiding or postponing by lengthy administrative-continuance, what otherwise would be required by reissuance. The Agency also bears an obligation under CWA section 402(c)(2) of the Act to ensure that State programs and State-issued permits comply with the requirements of the

Act. NPDES permits may not be issued for period exceeding five years (CWA section 401(b)(1)) and should be reviewed and revised in a timely fashion to ensure compliance with the CWA and applicable regulations. It would be difficult for the Agency to fully discharge its duty under CWA section 402(c)(2) to ensure that States not violate the requirements of CWA section 402(b)(1) if the only statutorily-authorized remedy were program withdrawal. Therefore, Congress provided EPA the objection and veto authority found in CWA section 402(d). EPA believes that it must be able to invoke this authority as provided in the proposed 40 CFR 123.44(k) to implement the goals of the CWA and the requirements of CWA section 402(b).

EPA also believes that today's proposal is consistent with the purpose of CWA section 402(d). The Agency's objection and veto authority, under CWA section 402(d), is necessary to correct program and permit inadequacies before they have become so systemic that program withdrawal is justified. The Agency should reserve withdrawal authority for gross inadequacies in a State program. This distinction was recognized by Representative Reuss, then chairman of the House Conservation and Natural Resources Subcommittee, who explained that:

* * * Federal takeover should not be necessary when EPA finds that only a few of the permit applications are being "improperly" issued. Such total takeover would result in chaos both at the State and Federal level. It should be exercised with great care and only when there is clear evidence that the entire State program has fallen into disrepair.

118 Cong. Rec. 10,240 (1972).

Accordingly, he argued that the Agency required the authority in CWA § 402(d) to ensure uniform implementation of the Act's requirements in individual permits:

The EPA Administrator should not have to veto a State's total program just to get at permits granted improperly to a couple of polluters. So we still need a veto on individual permits to check those that are improperly granted, and this concept is already embodied for interstate waters in section 402 (d) (2) of the House bill.

Id. EPA's interpretation of the veto authority conferred in section 402(d) is consistent with the explanation of the relationship between sections 402(d) and 402(c) as articulated in these floor statements. Without the authority to object to expired permits on impaired waters, EPA's only recourse is program withdrawal. EPA believes this is clearly

inconsistent with the intent of CWA section 402(d).

Also, it would make little sense for Congress to have left the Agency without discretion under CWA section 402(d) to address, at the time of permit expiration, the problem of lengthy administrative extension. EPA could have addressed the problem by objecting to and vetoing the permit at the time it was initially proposed had the Agency known then that the permit would be administratively extended for an unreasonable length of time. EPA believes that, instead, the statute can reasonably be read under *Chevron* to allow States to issue 5-year permits and provide for administrative continuance without an initial EPA objection or veto by preserving the Agency's objection and veto authority to ensure that the use of administrative continuance is consistent with the statutory scheme that underlies section 303(d) of the Act.

H. Conclusion

It is important to note that the Agency is not here considering imposing newly formulated water quality-based effluent limitations during the term of the existing permit. Nor would the proposed change interfere with the proper operation of State administrative continuance laws. The Agency would exercise its discretion to veto an administratively-continued permit when the Agency perceives a need to issue a permit that reflects water quality-based effluent limitations necessary for the water to achieve applicable water quality standards. But the permit would remain administratively-continued until the Agency or the State issued a new permit (with the wasteload allocation incorporated). In no instance would a permittee go without authorization to discharge simply for failure of the State to take action on the permittees timely application for renewal. The Agency invites comment on other statutorily-authorized mechanisms by which the Agency might address expired and administratively-continued permits for sources discharging to impaired waterbodies. EPA also requests comment on whether it should limit the exercise of this authority to impaired waters for which a TMDL has not been developed and approved and to waters for which a TMDL has been approved and a change to the administratively-continued permit is necessary to implement a WLA in the approved TMDL.

EPA recognizes that State agencies have limited resources to implement their NPDES programs and often expired, administratively-continued

permits are not a result of State unwillingness to reissue permits. EPA recognizes that a State may be unable to reissue permits because of competing priorities. EPA faces similar resource constraints when it issues permits. The Agency also recognizes the State's role as primary implementers of the NPDES program. The Agency, after carefully weighing these considerations with the risks associated with allowing critical permits to remain unrevised, has concluded that the proposal of this provision is appropriate.

V. Regulatory Assessment Requirements

A. Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Administrator certifies that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities for the reasons explained below. Consequently, EPA has not prepared a regulatory flexibility analysis.

The first of today's proposed new provisions would amend EPA's water quality standards regulations to require that States adopt and implement antidegradation policies that ensure new and significantly expanding dischargers who are large entities on impaired waterbodies offset their discharges by more than a 1.5:1 ratio. (The proposal would also amend the NPDES regulations to prohibit EPA from issuing an NPDES permit unless the discharger complies with applicable antidegradation requirements that are to include provisions requiring offsets.) Because the provision would require a State (or EPA) to obtain offsets only from large entities, there is no impact on small entities.

The second provision being proposed today would extend EPA's current authority under the NPDES regulations to designate and require NPDES permits for certain presently unpermitted

sources. The proposal would authorize EPA under certain conditions to require permits for animal feeding operations (AFO), aquatic animal production facilities (AAPF) or silvicultural activities. The current regulations provide that, where EPA is the permitting authority, EPA may designate an AFO or AAPF as a point source requiring an NPDES permit if the Agency determines it is a significant contributor of pollution to waters of the U.S. The proposed changes would extend this discretionary designation authority to authorize EPA action in States with approved NPDES programs but only in narrow circumstances. EPA could invoke this authority only in those instances where the Agency establishes a TMDL and designation is necessary to satisfy the reasonable assurance standard under that TMDL.

In addition, under the current regulations, most silviculture stormwater sources are exempt from NPDES regulation. Under the proposal, these stormwater sources would continue to be exempt unless and until EPA, or a State with an approved NPDES program, designated them as subject to NPDES regulation. The effect of today's proposed elimination of the categorical silviculture exclusion would be limited. The currently unregulated silvicultural sources would only be required to obtain NPDES permit authorization (1) upon a case-by-case designation by EPA or the authorized State and (2) for the purposes of EPA designation, only for sources that discharge to waters for which EPA establishes a TMDL to ensure that the wasteload allocations and load allocations under the TMDL are achieved. NPDES-authorized States, however, might choose to use the new authority more broadly, but EPA would encourage them to use it in the same limited manner that EPA would use it. In fact, EPA expects that States would exercise this authority infrequently, because many States have additional nonpoint source authorities, unavailable to EPA, to control discharges from these sources. EPA has concluded that this provision would not impose significant new costs on a substantial number of small entities.

EPA assessed the potential costs associated with the permitting of newly designated sources under several different scenarios. The results of this evaluation show that there would not be a significant impact on a substantial number of small entities if this proposal were adopted. As a first step in its evaluation, EPA identified those small entities potentially affected by the proposal. In identifying these small

entities, EPA used the definitions of small businesses established by the RFA. Small governmental jurisdictions and small organizations (e.g. nonprofit organizations) are not expected to be affected by the designation provisions. Only businesses in sectors which include silviculture, animal feeding operations and aquatic animal production facilities would potentially be impacted by this limited extension of EPA's (and in the case of silviculture, State) authority to designate point sources.

There would be additional costs to small entities if EPA, following promulgation of the designation provision, were to designate a particular discharger for permitting. As noted previously, this would occur only when a State fails to submit a TMDL or submits a TMDL that EPA finds will not reasonably assure compliance with the load allocations. EPA assumes that States will make every effort to develop effective TMDLs and employ their existing programs and legal authority to ensure compliance. Currently, every State has a nonpoint source control program which in many cases includes legal authority to address those industrial sectors that are the focus of the limited designation authority (AFOs, silviculture activities and aquaculture). EPA also expects further enhancements to State point and nonpoint source control programs as the States develop their TMDLs. In these circumstances, EPA can predict with a high degree of confidence that the occasion on which it may need to exercise its proposed new designation authority will not be great. EPA, however, cannot predict specifically how often this authority may be used, or exactly how often States will use their new designation authority with respect to silviculture.

The analysis of potentially regulated silviculture entities was based on a modified sales test that compared the estimated per acre cost of compliance with per acre sales revenue. The results show that the potential costs of implementing BMPs per acre are less than 1% of sales revenues from one acre of timber. Both compliance cost based on anticipated BMPs and sales per acre were calculated regionally, to account for regional variations in timber practices and timber sales values. This analysis concluded that both logging operations and timber land owners (i.e. nurseries, etc.) are expected to experience costs of much less than 1% of sales in every scenario tested.

While EPA's exercise of the limited new proposed designation authority for silviculture, may at some point in the future, result in the imposition of these

additional costs on dischargers, including small entities, it is the Agency's view that adoption of the provisions giving EPA and the States authority to subject these sources to NPDES permitting requirements does not impose additional costs on dischargers now. Further, because the proposed authority is discretionary, it is not possible to identify which nonpoint source dischargers, if any, would be designated as point sources and required to obtain a permit. No sources would be automatically so designated. Only in the event EPA or a State acted to designate a particular discharger would there be any costs to the discharger.

In analyzing potentially regulated animal feeding operations (AFOs), EPA performed a sales test. The analysis determined that the average potential costs of permit compliance are less than 1% of most small entity sales revenue. However, this analysis was constrained by two factors. First, the sales test relied on revenue data by farm, which resulted in an underestimate of sales revenue from small operations that own more than one farm and also underestimated sales revenue from operations that receive revenue from more than one type of source (sell more than one type of item). Second, EPA used the more complete State 305(b) lists of impaired waterbodies (rather than 303(d) lists) to estimate the number of entities that might be designated under the proposed rule. Because waters listed as impaired under 305(b) may still be attaining water quality standards and thus not require a TMDL, this overestimates the number of entities used in EPA's assessment. AFOs located on waterbodies that do attain standards are not affected by today's proposal. Taking into account these constraints, EPA's best estimate is that very few small entities (less than 100 annually) would experience impacts greater than one percent of sales revenue, and even fewer will experience impacts of greater than three percent of sales revenue as a result of being designated. Therefore, EPA's evaluation shows that there would not be a significant impact on a substantial number of small AFOs.

The analysis of potentially regulated Aquatic Animal Production Facilities (AAPFs) indicates that very few are located on impaired waterbodies. EPA estimates that only two to ten operations could potentially be designated annually. If these entities are designated however, a sales test indicates that a few small entities may experience permit compliance costs of approximately 4% of sales revenue. Since so few AAPFs discharge to impaired waterbodies,

EPA's evaluation shows that there would not be a significant impact to a substantial number of small AAPFs.

In the case of animal feeding operations and aquatic projects, the proposed authority merely would backstop existing State authority under the Clean Water Act. Thus, EPA designation authority would not impose any new costs on nonpoint source dischargers potentially subject to designation because any costs to the potentially designated sources that would result if EPA exercised its designation authority are the same costs that would result if the State exercised its designation authority under existing State and Federal laws and regulations. Thus, the costs to animal feeding and aquatic projects would be the same whether the State or EPA designated the source as subject to NPDES.

Moreover, when and how often EPA might exercise the proposed authority is unpredictable for several reasons. First, the proposal would authorize EPA action in only a limited set of circumstances: (1) Where a State has either failed to submit a TMDL (or submitted a deficient TMDL); (2) EPA has established a TMDL for the water body; and (3) EPA determines that the nonpoint source is a significant contributor of pollution and that designation (and permitting) of the source are needed to ensure that load and waste load allocation are met. EPA cannot predict when it may be required to establish TMDLs. However, the Agency's expectations are that States with approved NPDES programs will be submitting approvable TMDLs with load and waste load allocations that will reflect achievement of the TMDLs, and that EPA thus will need to exercise its designation authority infrequently. Because EPA does not know for which water bodies in which States it will need to establish TMDLs, it cannot predict what nonpoint source dischargers it may need to consider for designation under the proposed authority.

These intervening steps between today's proposal and any exercise of EPA's authority (if the rule were promulgated as proposed) underscore EPA's position that adoption of the designation provisions would not impose significant costs on a substantial number of small entities. Promulgation of the proposal is only one step in a series of actions that must occur before any costs are imposed on any particular nonpoint source discharger.

The third provision in the proposal would authorize EPA, in certain circumstances, to object to state-issued permits that have not been reissued

following the expiration of their 5-year term. Where water quality standards (or applicable effluent limitations guidelines) change during a permit term, the permittee is generally protected during the permit term against new or more stringent permit conditions necessary to implement the new water quality standards or effluent limitations guidelines, until a new permit is issued. In most cases, permittees submit timely applications for renewal and permitting authorities reissue these permits in a timely manner. In some cases, authorized States may fail to reissue NPDES permits at the end of their 5-year term as is currently required, and the existing permits continue in effect under general principles of administrative law. (Administrative continuance protects the permittee who has submitted a timely application for renewal from being penalized for discharging without a permit.)

This proposal, if promulgated, would authorize EPA to take action to reissue an expired permit in those cases where the State failed to reissue the permit after a specified period. EPA's exercise of this authority is limited to circumstances in which a permit authorizes discharges to impaired waterbodies or the permit does not currently contain limits consistent with an applicable waste load allocation in an EPA approved or established TMDL. While EPA assumes that authorized States will expeditiously reissue permits with the required water quality-based effluent limits, where States fail to reissue such permits, EPA would use this new authority to issue such permits in a timely manner.

This provision also would not impose any additional costs on dischargers, including small entities. Because as a matter of law, the discharger's new permit, when issued, already must include any applicable new or more stringent conditions. Therefore, the effect of the proposed change is, at most, to accelerate the timing of the legally-mandated compliance with the new conditions. Consequently, EPA has concluded that adoption of a proposal to authorize future discretionary action by EPA would not result in the imposition of any new costs on small entities.

For the reasons explained herein, EPA concluded that it could properly certify the proposal. See e.g., *United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). ("[N]o [regulatory flexibility] analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule," *United*

Distribution at 1170, quoting *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution court*); see also *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 & n.18 (D.C. Cir. 1998) (the RFA imposes no obligation on an agency to conduct a small entity analysis on entities it does not regulate); *American Trucking Association, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (the RFA requires an agency to prepare a small entity impact analysis only of the effects on those entities that are subject to the requirements of a rule or directly regulated by a rule). Additional information supporting EPA's assessment is described in the administrative record supporting the proposal.

B. 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 Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

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

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written

statement, including a cost-benefit analysis, for proposed and final rules with "Federal Mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The costs to State, local and tribal governments, in the aggregate, or the private sector in any one year to implement the requirements in today's proposal are not expected to exceed \$65.2 million in any one year. The total cost to State, local and tribal governments is not expected to exceed \$0.96 million in any one year, with a majority of these costs born by State government. The remaining \$64.24 million is expected to be born by the private sector. Thus, today's proposed rule is not subject to the requirements of section 202 and 205 of UMRA.

A detailed discussion of the costs and impacts of the proposed rule, and the methodologies used to assess them, are included in the *Analysis of the Incremental Cost of Proposed Revisions to the NPDES Permit and Water Quality Standards Rules* which is available in

the docket for this rule-making. While the analysis is based on the best data currently available to the agency, it necessarily includes assumptions where needed to fill data gaps. One such assumption is the percentage of large construction sites that would be required to obtain offsets under the proposed rule. Based on the percentage of waters identified in State 305(b) reports where construction activity contributed to impairment, EPA has estimated that 2-3% of large construction sites would discharge pollutants of concern to impaired waters and thus be required to obtain offsets. EPA requests comment on this assumption and any data that commenters may have that would support their comments. EPA also requests comment more generally on all of the assumptions and methodologies used in the economic analysis.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely impact small governments. As explained in the Regulatory Flexibility Act section of the preamble, this proposed rule establishes no requirements applicable to small governmental entities. Further, regulated entities are not expected to negatively impact small governmental entities. Therefore, this proposed rule will not significantly affect small governmental entities.

In addition, today's proposal will not significantly or uniquely affect Tribal governments. Currently, there are only fifteen Tribes with EPA approved or promulgated water quality standards and there are no Tribes authorized to administer the NPDES program or to establish TMDLs under section 303(d). As a result, this proposal will not significantly or uniquely affect Tribal governments. However, as Tribes continue to build their Clean Water Act capacity and establish water quality programs, more Tribes are likely to adopt water quality standards and seek approval to administer the NPDES program and establish TMDLs. If today's proposed rulemakings were to result in changes to these future Tribal water quality programs, the costs for Tribal governments would be analyzed. Moreover, whether or not Tribes choose to do so, they have a strong interest in protecting water quality on Tribal lands. Thus, even though today's proposal will not significantly or uniquely affect Tribal governments, Tribes may in the future be subject to the requirements in today's proposal. Recognizing the need to consider the views and concerns of Tribal governments in any comprehensive evaluation of how

TMDLs are established, EPA determined it was appropriate to include a Tribal representative on the TMDL FACA Committee. The committee's final report addresses Tribal issues, recommending that EPA increase efforts to educate Tribes about water quality programs, including TMDLs, and ensure that EPA and State water quality staff respect the government-to-government relationship with Tribes in all TMDL activities.

D. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No.1920.01) and a copy may be obtained from Sandy Farmer, OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M Street, SW; Washington, DC 20460 or by calling (202) 260-2740.

The offset provision will result in either the modification of NPDES permits, the issuance of new NPDES permits, or the issuance of an individual NPDES permit in lieu of coverage under a General Permit. The designation provisions will result in the issuance of NPDES permits (either individually or under a General Permit) to operations that would not have previously have required to obtain them. The NPDES permitting authorities, in the form of NPDES authorized States and Territories or EPA Regions in Non-NPDES authorized States and Territories, intend to use the information collected to set appropriate permit conditions, track discharges, and assess permit compliance. EPA has examined available databases and determined that these databases revealed no duplicate requirements. EPA has concluded that no government information collection activity duplicates the information requested by this and, therefore, it has no other way to obtain the information. Therefore, these responses are mandatory. In addition to the NPDES permitting authorities, EPA's Office of Wastewater Management (Office of Water), OECA, and environmental groups will most likely use the information collected to assess the regulated community's level of compliance and help evaluate the effectiveness of these provisions. Although highly unlikely, permit applications may contain confidential business information. If this is the case, the respondent may request that such information be treated as confidential. All confidential data will be handled in

accordance with 40 CFR 122.7, 40 CFR part 2, and EPA's Security Manual Part III, Chapter 9, dated August 9, 1976. However, CWA section 308(b) specifically states that effluent data may not be treated as confidential.

The total projected burden associated with the information collection requirements of this proposal is estimated to be 71,996 hours annually and to impose an estimated cost of \$2,415,320 annually. The annual burden to each private sector respondent for collecting information required by the rule is estimated to be: (1) An average of 23 hours per each construction respondent; (2) an average of 28.6 hours per other storm water respondent; (3) an average of 55 hours per respondent requiring process water offsets; (4) an average of 84 hours per silviculture activity that is designated; (5) an average of 47 hours per animal feeding operation that is designated; and (6) an average of 88 hours per aquatic animal production facility that is designated. The annual burden to NPDES authorized States and Territories is (1) An average of 1,040 hours per general permit issued; (2) an average of 1.5 hours to process and review each storm water NOI; (3) an average of 2 hours to process and review each submitted or updated silviculture or animal feeding operation NOI; and (4) an average of 80 hours to issue an NPDES permit to designated aquatic animal production facility. The Agency's burden is estimated to be 4,646 hours annually. These burden estimates include the time required to review the instructions, search existing data sources, gather and maintain (usually in electronic databases) all necessary data, and complete and review the information required to be collected.

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

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information

unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

Comments are requested on EPA's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OP Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M Street, SW; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW; Washington, DC 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after August 23, 1999, a comment to OMB is best assured of having its full effect if OMB receives it by September 22, 1999. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

E. Executive Orders on Federalism

Under Executive Order 12875, "Enhancing the Intergovernmental Partnership," EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

EPA has concluded that this proposed rule will create a mandate on State governments and authorized Tribes and that the Federal government will not provide all of the funding necessary to pay the direct costs incurred by the State governments and authorized Tribes in complying with the mandate.

However, EPA has substantially increased funding for States, Territories, and authorized Tribes through the State-matched CWA section 106 and 319 grant programs. In developing this proposed rule, EPA consulted with State, local, and tribal governments to enable them to provide meaningful and timely input in the development of this rule.

Before beginning to develop today's proposal, EPA convened a Federal Advisory Committee to make recommendations for improving the efficiency and effectiveness of TMDLs. The TMDL FACA Committee was comprised of 20 members, including four senior level State officials, an elected local official, and a Tribal consortium representative. Over a period of one and one-half years, the TMDL FACA Committee held six meetings at locations throughout the country. These meetings were open to the general public, as well as representatives of State, local, and Tribal governments, and all included public comment sessions. The TMDL FACA Committee focused its deliberations on four broad issue areas: identification and listing of waterbodies; development and approval of TMDLs; EPA management and oversight; and science and tools. On July 28, 1998, the TMDL FACA Committee submitted its final report to EPA containing more than 100 consensus recommendations for changes and improvements to TMDLs. As explained throughout this preamble, EPA carefully reviewed the TMDL FACA Committee's consensus recommendations and incorporated, in whole or in part, most of those recommendations in this proposal.

Following completion of the FACA Committee process, EPA continued to meet with State and local government officials to seek their views on needed changes to the Water Quality Standards and NPDES regulations. While expressing support for many of the proposed changes being considered by EPA, State officials and their representatives also expressed general concerns about the capacity of State governments to carry out the new requirements proposed today. In particular, States were concerned about writing NPDES permits which satisfy the offset requirements, in the absence of a well established market for pollutant trading. The proposed regulation establishes some explicit requirements for States to use in establishing an offset sufficient to satisfy the offset requirements. States were also concerned about the role of EPA in reissuing State-issued expired and administratively-continued NPDES

permits. EPA determined that the exercise of its authority in limited circumstances is necessary to assure reasonable further progress in impaired waterbodies prior to the establishment of a TMDL and to provide reasonable assurance that TMDLs will be implemented. In developing today's proposal, EPA considered the concerns of State and local governments and determined the need to revise the NPDES and Water Quality Standards regulations to provide opportunities for further progress toward meeting water quality standards in impaired waterbodies and to provide reasonable assurance of effective TMDL development. Today's proposal improves the effectiveness, efficiency and pace of water quality improvement and TMDL establishment.

Finally, while there is a new executive order on federalism, it will not go into effect for ninety days. In the interim, under the current E.O. 12612 on federalism, this rule does not have a substantial direct effect upon States, upon the relationship between the national government and the States, or upon the distribution of power and responsibilities among the various levels of government. The only provisions in this rule that directly affect States are those requiring States to adopt and implement antidegradation policies that ensure new and significantly expanding dischargers who are large entities on impaired waterbodies offset any proposed increases in their discharges by more than a 1.5:1 ratio. These provisions are not substantial in the context of State's overall water quality and permitting program. States already are required to have, and do have, antidegradation policies. This rule simply would require States to add one discrete provision to their existing policies. With respect to the remaining provisions, authorizing EPA to designate certain sources as point sources and to reissue expired permits where the State failed to do so, these provisions authorize EPA to act only where the State has failed to act. Accordingly, these provisions will not have a substantial direct effect on States or on intergovernmental relationships or responsibilities.

F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the

Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with these governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

As explained above in the discussion of UMRA requirements, today's rule proposal does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of Section 3(b) of Executive Order 13084 do not apply to this proposed rule.

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

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

This rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866.

H. National Technology Transfer and Advancement Act

Under section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), EPA is required to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or is otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials

specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. Where available and potentially applicable voluntary consensus standards are not used by EPA, the Act requires the EPA to provide Congress, through OMB, an explanation of the reasons for not using such standards.

This proposed rule does not involve any technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rulemaking and specifically, EPA invites the public to identify any potentially applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

List of Subjects

40 CFR Part 122

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

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Hazardous substances, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 131

Reporting and recordkeeping requirements, Water pollution control.

Dated: August 12, 1999.

Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR Parts 122, 123, 124, and 131 as follows:

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

1. The authority for part 122 continues to read as follows:

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

2. Amend § 122.2 as follows:
 - a. Adding the definition of “*Existing discharger*,”
 - b. In the definition of “*New discharger*,” revising the introductory text and paragraphs (a) through (d);
 - c. Adding the definition of “*Significant expansion*.”

§ 122.2 Definitions.

Existing discharger means any building, structure (including an outfall or a pipeline), facility, or installation:

(a) From which there is a “discharge of pollutants” to “waters of the United States” that has received or been permitted under a finally effective NPDES permit; or

(b) From which pollutants have been and are currently added to waters of the United States that has never received nor been permitted under a finally effective NPDES permit, but only if it becomes subject to NPDES permitting requirements pursuant to a regulatory designation (on an individual or categorical basis).

(c) This term includes those dischargers who move an outfall(s) within the “same body of water.” In determining whether an outfall is moved within the “same body of water” as its original location, the permitting authority should consider whether:

(1) The background concentration of the pollutant in the receiving water (excluding any amount of the pollutant in the facility’s discharge) is similar at and between both outfall points;

(2) There is a direct hydrological connection between outfall points; and

(3) Water quality characteristics (e.g., temperature, pH, hardness) are similar at and between both outfall points.

New discharger means any building, structure (including an outfall or a pipeline), facility, or installation:

(a) From which there is or may be a “discharge of pollutants” to “waters of the United States;”

(b) Which has never received or been permitted under a finally effective NPDES permit; and

(c) Which is not an existing discharger.

(d) This term includes those dischargers who move an outfall(s) to another location not within the same body of water.

Significant expansion means a twenty percent or greater increase in loadings above the discharger’s current permit limit.

3. In § 122.4, add new paragraph (j) to read as follows:

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

(j)(1) To a new discharger or existing discharger undergoing a significant expansion unless the discharger complies with the antidegradation provisions of State water quality standards applicable to such waters, including the antidegradation provisions adopted pursuant to 40 CFR 131.12(a)(1)(ii).

(2) Where a permit is issued subject to paragraph (j)(1) of this section and where the discharger is required to obtain and maintain pollutant load reductions required as offsets to meet antidegradation requirements adopted pursuant to 40 CFR 131.12(a)(1)(ii), the discharger must also comply with each of the following:

(i) The pollutant load reductions must be achieved from a source(s) of the pollutant(s) for which the waterbody is impaired and that the new or existing discharger undergoing a significant expansion is required to offset;

(ii) The pollutant load reductions must be achieved from a source(s) located on the same waterbody as the discharge from the new discharger or existing discharger undergoing a significant expansion;

(iii) The pollutant load reductions must be the result of pollutant control measures implemented by, or secured and assured by, the new discharger or existing discharger undergoing a significant expansion (credit will not be given for reductions already required for some other reason);

(iv)(A) The pollutant load reductions must be achieved on or before the date the discharge commences and remain in place until

(1) A TMDL for the waterbody is approved or established by EPA, and the discharger’s permit reflects its wasteload allocation under the TMDL; or

(2) The discharger ceases to discharge the pollutant(s) causing the impairment;

(B) The Director has the discretion not to require that the pollutant load reductions be achieved on or before the date the discharge commences, but as soon thereafter as possible, in exchange for requiring the discharger to obtain pollutant load reductions by an amount of at least twice the amount of the new or expanded discharge.

(v) Where a discharger obtains pollutant load reductions from an existing point source(s), the NPDES permit(s) for the existing point source(s) must be modified to reflect those reductions on or before the date the permit is issued to the new discharger

or existing discharger undergoing a significant expansion; and

(vi) Where a discharger obtains pollutant load reductions from an existing nonpoint source(s), the discharger's permit must include any conditions, including the offset requirements and any accompanying monitoring and reporting requirements, necessary to ensure continued achievement of the pollutant load reductions from the nonpoint source(s).

(3) An explanation of the development of the requirements for the discharger to meet the criteria of paragraphs (j)(1) and (2) of this section must be included in the fact sheet or statement of basis for the permit required under 40 CFR 124.7 and 124.8.

(4) The terms "new discharger" and "significant expansion" are defined in § 122.2 of this part.

4. Amend § 122.23 to revise paragraphs (c)(1) introductory text and (c)(3) and to add new paragraph (c)(4) to read as follows:

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

* * * * *

(c) *Case-by-case designation of concentrated animal feeding operations.*

(1) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the United States. In making this designation the Director shall consider the following factors:

* * * * *

(3) A permit application shall not be required from a concentrated animal feeding operation designated under this paragraph until the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

(4) In States with approved NPDES programs, EPA shall only designate animal feeding operations where pollutants are discharged into waters for which EPA establishes a TMDL to ensure that wasteload allocations and load allocations under the TMDL are achieved.

5. Amend § 122.24 to revise paragraphs (c)(1) and (c)(2) introductory text and to add new paragraph (c)(3) to read as follows:

§ 122.24 Concentrated aquatic animal production facilities (applicable to State NPDES programs, see § 123.25).

* * * * *

(c) *Case-by-case designation of concentrated aquatic animal production facilities.*

(1) The Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

* * * * *

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

(3) In States with approved NPDES programs, EPA shall only designate aquatic animal production facilities where pollutants are discharged into waters for which EPA establishes a TMDL to ensure that the wasteload allocations and load allocations under the TMDL are achieved.

6. Amend § 122.26 to revise paragraphs (a)(1)(v) and (b)(14)(x) to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

(a) * * *

(1) * * *

(v) A discharge which the Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. This designation may include a discharge from any conveyance or system of conveyances used for collecting and conveying storm water runoff or a system of discharges from municipal separate storm sewers, except for those discharges from conveyances which do not require a permit under paragraph (a)(2) of this section or agricultural storm water runoff which is exempted from the definition of point source at § 122.2. The Director may designate discharges from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination the

Director may consider the following factors:

(A) The location of the discharge with respect to waters of the United States as defined at 40 CFR 122.2;

(B) The size of the discharge;

(C) The quantity and nature of the pollutants discharged to waters of the United States;

(D) Other relevant factors;

(E) EPA shall only designate discharges from silvicultural activities into waters for which EPA is establishing the TMDL to ensure that the wasteload allocations and load allocations under the TMDL are achieved.

* * * * *

(b) * * *

(14) * * *

(x) Construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale (This term does not include construction activity associated with silviculture, except rock crushing, gravel washing, log sorting, and log storage facilities);

* * * * *

7. Amend § 122.27 to revise paragraph (b)(1) to read as follows:

122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. This term also includes discharges composed entirely of storm water from silvicultural activities that are designated under 40 CFR 122.26(a)(1)(v) as requiring a 402 permit. Some activities (such as stream crossing for roads) may involve point source discharges of dredged and fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

* * * * *

8. Amend § 122.29 by revising paragraph (a)(3) to read as follows:

§ 122.29 New sources and new dischargers.

(a) * * *

(3) Existing discharger is defined in § 122.2;

* * * * *

9. Amend § 122.44 to revise paragraph (d) introductory text and paragraph

(d)(1) introductory text to read as follows:

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

* * * * *

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality and State antidegradation provisions.

* * * * *

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority for part 123 continues to read as follows:

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

2. Amend § 123.44 to add paragraph (k) to read as follows:

§ 123.44 EPA review of and objections to State permits.

* * * * *

(k)(1) Where a State fails to submit a new draft or proposed permit to EPA within 90 days after the expiration of the existing permit, EPA may review the administratively-continued permit, using the procedure described in paragraphs (a)(1) through (h)(3) of this section, if:

(i) The administratively-continued permit allows the discharge of pollutants into a waterbody for which EPA has established or approved a TMDL and the permit is not consistent with an applicable wasteload allocation; or

(ii) The administratively-continued permit allows the discharge of a pollutant(s) of concern into a waterbody that does not meet water quality standards and for which EPA has not established or approved a TMDL.

(2) To review an expired and administratively-continued permit under this subsection, EPA must give

the State and the discharger at least 90 days notice of its intent to consider the expired permit as a proposed permit. At any time beginning 90 days after permit expiration, EPA may submit this notice.

(3) If the State submits a draft or proposed permit for EPA review at any time before EPA issues the permit under paragraph (h) of this section, EPA will withdraw its notice of intent to take permit authority under this subsection and will evaluate the draft or proposed permit under this section.

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act 42 U.S.C. 7401 *et seq.*

2. Section 124.7 is revised to read as follows:

§ 124.7 Statement of basis.

EPA shall prepare a statement of basis for every draft permit for which a fact sheet under 124.8 is not prepared. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. The statement of basis must also include the reasons for any determinations made, limitations derived or requirements set to satisfy the provisions under § 122.4(j) of this chapter.

3. Amend § 124.56 by revising (b)(1)(ii); (b)(1)(iii) and (b)(1)(iv) and by adding paragraph (b)(1)(v) to read as follows:

§ 124.56 Fact sheets.

* * * * *

(b)(1) * * *

(ii) Limitations on internal waste streams under § 122.45(i) of this chapter;

(iii) Limitations on indicator pollutants under Sec. 125.3(g) of this chapter;

(iv) Limitations set on a case-by-case basis under Sec. 125.3 (c)(2) or (c)(3) of this chapter, or pursuant to Section 405(d)(4) of the CWA; or

(v) Limitations and/or requirements derived to satisfy the provisions under § 122.4(j) of this chapter.

* * * * *

PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

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

2. Amend § 131.12 to redesignate paragraph (a)(1) as paragraph (a)(1)(i) and add new paragraph (a)(1)(ii) to read as follows:

§ 131.12 Antidegradation policy.

(a) * * *

(i) * * *

(ii) In order to authorize a new discharger or an existing discharger undergoing a significant expansion as defined in 40 CFR 122.2, that is not a small entity as defined in 5 U.S.C. 601(6), to discharge into a waterbody that does not attain water quality standards the pollutant(s) causing the nonattainment and for which EPA has not approved or established a Total Maximum Daily Load for a pollutant(s) causing the nonattainment, reasonable further progress shall be made toward attaining the water quality standard. Reasonable further progress for these dischargers means, at a minimum, that any increase in mass loadings of the pollutant(s) causing the nonattainment will be offset by pollutant(s) load reductions of the pollutant(s) causing the nonattainment by a ratio of at least equal to 1.5:1.

(A) The Director may determine that an offset in pollutant load reduction(s) at a ratio of less than 1.5:1, but more than 1:1, is sufficient to achieve reasonable further progress.

(B) Where the Director determines that any offset may result in further degradation of water quality, the Director need not require an offset.

(C) A discharger required to obtain an offset shall comply with the requirements under § 122.4(j)(2) of this chapter.

* * * * *

[FR Doc. 99-21415 Filed 8-20-99; 8:45 am]

BILLING CODE 6560-50-P