

**ENVIRONMENTAL PROTECTION
AGENCY****40 CFR Part 125****[FRL-5601-2]****Modification of Secondary Treatment
Requirements for Discharges Into
Marine Waters****AGENCY:** Environmental Protection
Agency (EPA).**ACTION:** Final Rule.

SUMMARY: EPA is promulgating a final amendment to the regulations which implement section 301(h) of the Clean Water Act (CWA) or "Act". Section 301(h) provides for waivers of secondary treatment requirements for discharges into marine waters by publicly owned treatment works (POTWs) that demonstrate their compliance with the 301(h) criteria. This final amendment promulgates without change a previously proposed rule to amend the 301(h) regulations to remove a certain restriction on the eligibility of 301(h) POTWs to request a longer-than-monthly averaging period to calculate compliance with the Act's requirement to remove a minimum of 30 percent of the biochemical oxygen demanding material (BOD) in the influent. EPA determined that this restriction should be eliminated to provide additional flexibility to POTWs in demonstrating compliance with the requirements for a waiver. As a result of this amendment, all 45 applicants for a 301(h) waiver will be able to request a longer than monthly averaging period for calculating compliance with the BOD removal requirement.

EFFECTIVE DATE: These regulations take effect on September 30, 1996. In accordance with 40 CFR 23.2, the Administrator's promulgation occurs at 1:00 p.m. EDT on September 12, 1996.

ADDRESSES: Copies of comments submitted and the docket for this rulemaking are available for review at EPA's Water Docket; Room 2616 Mall, 401 M Street, SW, Washington, DC 20460. For access to the Docket materials, call (202) 260-3027 between 9 a.m. and 3:30 p.m., Monday through Friday, excluding legal holidays, for an appointment. The EPA public information regulation (40 CFR part 2) provides that a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Virginia Fox-Norse, Office of Wetlands, Oceans and Watersheds, Oceans and Coastal Protection Division (4504F), U.S. Environmental Protection Agency,

401 M Street, SW, Washington, DC 20460; (202) 260-8448.

SUPPLEMENTARY INFORMATION:**I. Regulated entities**

The entities potentially affected by today's action are those publicly owned treatment works that discharge into marine waters and that have applied under section 301(h) of the Clean Water Act, 33 U.S.C. § 1311(h), for a waiver of secondary treatment requirements. Regulated categories and entities include:

Category	Examples of regulated entities
Local governments	Publicly owned treatment works SIC Code 4952.

(Although EPA is using the term "regulated" entities, the effect of today's action is generally to relax the regulatory restrictions on these entities.) This table, however, is only a guide and is not intended to be exhaustive. You should consult today's final regulations themselves to determine their full impact and applicability. If you have further questions about whether today's action affects your regulatory obligations, contact the person or persons listed above (see **FOR FURTHER INFORMATION CONTACT** section).

II. Today's Final Action

On February 4, 1987, Congress passed the Water Quality Act of 1987 (WQA) (Pub. L. 100-4), which amended CWA section 301(h) in several important respects. Among other things, the WQA added a new section 301(h)(9), which requires that:

At the time the 301(h) modification becomes effective, the applicant will be discharging effluent which has received at least primary or equivalent treatment.

Section 301(h)(9) of the CWA defines primary or equivalent treatment as:

Treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biochemical oxygen demanding material (BOD) and of the suspended solids (SS) in the treatment works influent, and disinfection, where appropriate.

EPA published final regulations implementing the WQA amendments to section 301(h) on August 9, 1994 (59 FR 40642). Among other things, the regulations added 40 CFR 125.60(c), which provided flexibility to POTWs, in certain specified circumstances, to use a longer-than-monthly (not to exceed yearly) averaging period to calculate compliance with the 30-percent removal requirements for BOD. However, under the second sentence of § 125.60(c)(1)

(the "eligibility provision"), facilities that had demonstrated an ability to achieve 30 percent removal of BOD on a monthly average basis over the calendar year prior to August 9, 1994, (the date the rule was published) were excluded from eligibility to apply for this longer-than-monthly averaging period. In December, 1994, four Alaskan municipalities filed a petition for review of the final regulations in the U.S. Court of Appeals for the Ninth Circuit. (*Anchorage Water & Wastewater Utility, et al, v. U.S. EPA*, No. 94-70913 (9th Cir.)) The petitioners claim that the eligibility provision should be eliminated from the regulations.

After reexamining the need for the eligibility provision, EPA published a proposed rule to delete it. [61 FR 7404, February 27, 1996.] The Agency received only six comments on this proposal, from five POTWs, including the four petitioners in the lawsuit, and one State wastewater control association. All commenters firmly supported the proposed rule's deletion of the eligibility provision. Accordingly, EPA is today promulgating a final rule that, as proposed, deletes the eligibility provision.

Several of the commenters also offered some technical information to explain why they feel they cannot or will not be able in the future to meet the BOD removal requirement on a monthly basis. These latter remarks are not comments on the eligibility provision, and are thus outside the scope of this particular rulemaking action. We have forwarded this information to the appropriate EPA Regional offices for their information.

As a result of today's final rule, a POTW's historical data cannot cause the POTW to be automatically ineligible for longer-than-monthly averaging. However, the Agency emphasizes that removing the eligibility provision does not automatically provide any POTW with a longer averaging period for determining compliance with the 30-percent removal requirement for BOD. Instead, it simply allows all POTWs to request a longer averaging period in its permit application. Under the amended regulations, POTWs who apply will continue to be required to demonstrate to the satisfaction of the Regional Administrator that a longer period is warranted in order to be granted relief from the requirement to meet BOD removal on a monthly basis. The Regional Administrator will still consider the historical data and could base a decision to grant or deny the longer averaging period in whole or in part on these data. EPA also notes that even if it grants a longer averaging

period, the required frequency of monitoring for BOD will remain the same as if the period for calculating compliance for BOD removal were the monthly average basis.

The remaining provisions of the 301(h) regulations remain in full force and effect, and are not the subject of this final rule.

III. Supporting Documentation

Analyses under E.O. 12866, the Unfunded Mandates Reform Act of 1995, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

Today's action simply removes provisions of an existing rule from the CFR that limit the ability of affected POTWs to request flexibility in calculating compliance with removal requirements for BOD. Therefore, this action has no regulatory impact and is not a "significant" regulatory action within the meaning of E.O. 12866, and no regulatory impact analysis is required.

This action also does not impose any Federal mandate on State, local or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995. For the same reasons, pursuant to the Regulatory Flexibility Act, I certify that this action will not have a significant economic impact on a substantial number of small entities. Finally, deletion of these provisions from the CFR does not affect

requirements under the Paperwork Reduction Act.

Submission to Congress and the General Accounting Office

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

List of Subjects in 40 CFR Part 125

Environmental protection, Marine point source discharges, Reporting and recordkeeping, Waste treatment and disposal, Water pollution control.

Dated: August 21, 1996.

Carol M. Browner,

Administrator.

For the reasons set forth in the preamble, part 125 of title 40, chapter I of the Code of Federal Regulations is amended as set forth below:

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 125 continues to read as follows:

Authority: Clean Water Act, as amended by the Clean Water Act of 1977, 33 U.S.C. 1251 et seq., unless otherwise noted.

Subpart G—Criteria for Modifying the Secondary Treatment Requirements Under Section 301(h) of the Clean Water Act

2. Section 125.60 is amended by removing paragraph (c)(1); by redesignating paragraphs (c)(2) and (c)(3) as (c)(1) and (c)(2); and by revising the introductory text of newly redesignated paragraph (c)(1) to read as follows:

§ 125.60 Primary or equivalent treatment requirements.

* * * * *

(c)(1) An applicant may request that the demonstration of compliance with the requirement under paragraph (b) of this section to provide 30 percent removal of BOD be allowed on an averaging basis different from monthly (e.g., quarterly), subject to the demonstrations provided in paragraphs (c)(1)(i), (ii) and (iii) of this section. The Administrator may approve such requests if the applicant demonstrates to the Administrator's satisfaction that:

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