

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 125

[FRL-5428-9]

RIN 2040-AC72

### Modification of Secondary Treatment Requirements for Discharges Into Marine Waters

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing an amendment to the regulations contained at 40 CFR Part 125, Subpart G, which implement section 301(h) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. 1311(h). Section 301(h) provides for modifications of secondary treatment requirements for discharges into marine waters by publicly owned treatment works (POTWs) that demonstrate their compliance with the 301(h) criteria. As required by statutory amendments, a provision was added to the 301(h) regulations in 1994 that requires 301(h) POTWs to show they are removing a minimum of 30 percent of the biological oxygen demanding material (BOD) from their influent. Under the rule, compliance with the 30-percent removal requirement of BOD was generally to be achieved on a monthly-average basis. The rule did, however, allow some applicants, subject to an eligibility provision, to request that they be allowed to average their BOD removal percentages over a longer than monthly period. The eligibility provision excluded facilities that had demonstrated an ability to achieve 30-percent BOD removal on a monthly-average basis over the calendar year prior to August 9, 1994. Today's proposal would amend 40 CFR 125.60(c)(1) to provide increased flexibility by removing the eligibility provision, thereby allowing any 301(h) POTWs to apply for a longer than monthly BOD averaging period. The remaining provisions of the 301(h) regulations remain in full force and effect, and are not the subject of this proposed rule.

**DATES:** Comments on this proposed amendment must be submitted by March 28, 1996.

**ADDRESSES:** Comments on this proposed amendment should be addressed to: Virginia Fox-Norse, Oceans and Coastal Protection Division (4504F), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460; (202) 260-8448. The official record for this rulemaking is available for viewing

at EPA's Water Docket; Room L-102, 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 St., SW, Washington, D.C. 20460; (202) 260-8448.

#### SUPPLEMENTARY INFORMATION:

##### Preamble Outline

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##### I. Background

###### A. Water Quality Act Amendments of 1987

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), the provision relevant to this rulemaking. Section 301(h)(9) 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) also defined 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."

###### B. Final Rulemaking of 1994

EPA published the final regulations implementing the WQA amendments to section 301(h) on August 9, 1994 (59 FR 40642). That rulemaking added provisions in 40 CFR 125.60 regarding, among other things, the statutory requirement for a minimum of primary or equivalent treatment. Under the proposed regulations (January 24, 1991, 56 FR 2814) applicants would have had to demonstrate compliance with the 30 percent BOD removal requirement using a monthly averaging period for calculating compliance. However, a

number of commenters indicated that the 30 percent removal rate for BOD may be difficult to achieve on a monthly average basis in certain cases. In response, in the August 1994 final rule, EPA added § 125.60(c) to provide flexibility to POTWs, in certain specified circumstances, to use up to a yearly averaging period to calculate compliance with the 30-percent removal requirements for BOD. The flexibility is only for the averaging period used to calculate compliance. The rule still requires all applicants to meet the statutory 30-percent removal requirement for BOD. As discussed in the preamble to the final regulations (59 FR 40648-40649), EPA believed that the monthly averaging period would still be appropriate for most applicants.

Under the second sentence of § 125.60(c)(1), 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. Specifically, this sentence (the "eligibility provision") states:

If, however, the applicant has 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 applicant shall not be eligible for an averaging basis other than monthly.

This provision was based on the assumption that facilities that had consistently achieved 30 percent removal of BOD on a monthly average basis would continue to be capable of achieving the 30 percent performance standard on a monthly basis.

###### C. Legal Challenge to Regulations

In December 1994, four Alaskan municipalities filed a petition for review in the U.S. Court of Appeals for the Ninth Circuit challenging, in particular, the above-described limitation on eligibility for applying for a longer than monthly averaging period to calculate compliance with the 30-percent removal requirement for BOD. [*Anchorage Water & Wastewater Utility, et al. v. U.S. EPA*, No. 94-70913 (9th Cir.)] Petitioners claim that all POTWs should be eligible at least to *apply* for alternative averaging periods for removal of BOD. Because the issues raised by these parties concern the eligibility provision—which EPA added at the time of the final rule in response to public comments on the proposal—they are arising now for the first time.

The petitioners believe the eligibility provision is unwarranted and inappropriate because there may be

cases in which a POTW may have met the 30-percent removal requirement for the preceding year, but may not be able to meet it on a monthly basis in the future for reasons beyond their control.

## II. Today's Proposal

EPA has considered the issues raised by the Alaskan municipalities. In response, EPA agrees that the absolute bar represented by the eligibility provision is unnecessary and could be too inflexible. Therefore, EPA today proposes to delete the eligibility provision (i.e., the second sentence of 125.60(c)(1)). This proposal would not change the showing that POTWs must make to have the longer than monthly averaging period approved, and EPA continues to expect that situations where the longer averaging period is shown to be justified will be the exception rather than the rule.

The Agency emphasizes that removing the eligibility provision would 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. Under the regulations, POTWs who make such a request 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. In determining whether to grant a POTW's request for longer than monthly averaging under § 125.60(c)(2)(iii), the Regional Administrator will still consider the POTW's historical removal data as a relevant factor. EPA also notes that 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 was the monthly average basis.

As noted above, all POTWs remain subject to the statutorily required 30 percent BOD removal condition, and all POTWs that want a longer than monthly averaging period will need to make a showing to the Regional Administrator that a longer period is warranted, and actual monitoring frequencies for BOD will not change. These safeguards, coupled with the continued requirement that the discharge must meet all the other 301(h) environmental criteria, lead EPA to believe that the level of environmental protection would not be changed by this proposal in any material way, and the flexibility provided is appropriate.

## III. Discussion of Alternatives

The Agency considered other alternatives for providing relief from the strict bar on requesting a longer averaging period represented by the eligibility provision, such as: (1) deleting the eligibility provision of § 125.60(c)(1) and restricting the factors in the Regional Administrator's determination to grant or deny the longer averaging period; (2) retaining the eligibility provision, but adding a provision that allows an applicant that achieved 30-percent removal of BOD on a monthly average basis over the year preceding August 9, 1994, to satisfy the Regional Administrator that the data did not reflect representative conditions; and (3) retaining a modified eligibility provision that would be based on the BOD removal rates achieved over longer than one year preceding August 9, 1994, e.g., 2 years, to account for a range of conditions.

EPA rejected these alternatives because simply eliminating the eligibility provision in § 125.60(c)(1) best provided the necessary flexibility while still providing adequate environmental safeguards. EPA believes that removing the eligibility provision while still making past monitoring performance a relevant factor in determining a longer than monthly averaging period, will not result in any decrease in environmental protection. Deleting this provision will form the basis for a settlement of the legal challenge brought by the Alaskan municipalities. EPA also proposes to delete a parallel clause in § 125.60(c)(2), as a conforming change.

Nevertheless, the Agency requests comments on all aspects of today's proposal, including whether any of these alternatives or other alternatives not discussed here, including not changing the eligibility provision, would be a more appropriate course of action on this issue. EPA will consider adopting any of the above alternatives or others that are advocated in any public comments.

## IV. Supporting Documentation

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

Because today's action simply proposes to remove 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, this action has no regulatory impact and is not a "significant" regulatory action

within the meaning of E.O. 12866, and is therefore not subject to OMB review.

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 would 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.

## 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: February 15, 1996.

Carol M. Browner,  
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 125, subpart G as follows:

### **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 proposed to be amended by removing paragraph (c)(1); by redesignating paragraphs (c)(2) as (c)(1) and (c)(3) as (c)(2); and by revising the introductory text of newly designated 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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