ILLINOIS POLLUTION CONTROL BOARD
December 3, 1987

IN THE MATTER OF:	)	
	)	R86-44
PRETREATMENT REGULATIONS	)	

FINAL ORDER. ADOPTED RULES

OPINION OF THE BOARD (by J. Marlin):

On October 9, 1986, the Board opened this Docket for the purpose of promulgating regulations establishing a pretreatment program pursuant to Section 13.3 of the Environmental Protection Act (Act), as amended by P.A. 84-1320. On March 5, 1987 the Board proposed, and on July 16, 1987 adopted, amendments to 35 Ill. Adm. Code 307 and 309, and a new 35 Ill. Adm. Code 310. On September 4, 1987 the Board vacated the July 16 Opinion and Order. On October 1, 1987 the Board adopted a revised Proposed Opinion and Order, requesting public comment through October 30, 1987. As is discussed below, the comment period is over, and the Board is now adopting this revised Opinion and accompanying Order.

Section 13.3 of the Act requires the Board to adopt regulations which are "identical in substance" with federal regulations promulgated by the United States Environmental Protection Agency (USEPA) to implement the pretreatment requirements of Sections 307 and 402 of the Clean Water Act (CWA), which was previously known as the Federal Water Pollution Control Act. Section 13.3 creates an abbreviated procedure similar to that provided by Sections 13(c) and 22.4(a) of the Environmental Protection Act (Act) for the UIC and RCRA programs. Section 13.3 provides that Title VII of the Act and Sections 5 and 6.02 of the Administrative Procedure Act (APA) do not apply to "identical in substance" regulations adopted to establish the pretreatment program. Section 13.3 requires the Board to provide for notice and public comment before rules are filed with the Secretary of State. The Board provided for such notice and comment by way of the Proposed Opinion and Order. As provided by Section 13.3, the rules are not subject to the first notice requirements or to second notice review by the Joint Committee on Administrative Rules (JCAR). Section 13.3 also provides that the Department of Energy and Natural Resources (DENR) may conduct an economic impact study (EcIS) on the rules, but the study and hearings are not required before the rules are filed.

The Board appreciates the assistance of Morton Dorothy in drafting the rules and this Opinion.

To avoid confusion, the Board published its proposal of March 5, 1987 in the Illinois Register utilizing a format similar to the "first notice" procedures under the APA. The Board allowed 45 days for public comment.

PUBLIC COMMENT ON MARCH 5 PROPOSAL

PC 1 through PC 8 were preliminary comments wh ch were referenced in the Proposed Opinion. Preliminary comments referenced in this Opinion will be listed for convenience of readers:

PC 1	Illinois Environmental Protection Agency (IEPA) preliminary draft proposal, July 24, 1986
PC 4	Letter from David Rankin (USEPA) to Angela Tin (IEPA), August 11, 1986
PC 7	IEPA revised preliminary draft proposal, November 12, 1986
PC 8	Summaries of Categorical Pretreatment Standards, prepared by Angela Tin and Joe Subsits, IEPA, February 5, 1987

The March 5, 1987 proposal appeared on April 3, 1987, at 11 Ill. Reg. 5453. The Board received the following public comment in response to the March 5 Order and publication in the Illinois Register:[1,2]

PC 9	USEPA, March 27, 1987
PC 10	USEPA, May 18, 1987 (USEPA)
PC 11	Metropolitan Sanitary District of Greater Chicago, May 18, 1987 (MSD)
PC 12	IEPA, May 20, 1987 (IEPA)
PC 13	Illinois Steel Group, May 21, 1987 (Steel)
PC 14	Chicago Association of Commerce and Industry and Illinois Manufacturer's Association, May 21, 1987 (IMA)
PC 15	JCAR, May 6, 1987.
PC 16	North Shore Sanitary District, June 1, 1987 (NSSD)

These comments will sometimes be referenced by the initials or abbreviated name of the commenter in parentheses rather than the PC number.

During the public comment period the Board received a series of questions from JCAR. Although Section 22.4(a) of the Act

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[1]Most of the public comment arrived after the close of the comment period on May 18, 1987. Motions to file late were granted.

[2]The Proposed Opinion included specific requests for comment from the Attorney General. The Board received no comment in response to the request.

exempts these fast-track "identical in substance" rulemakings from formal interaction with JCAR, the Board will attempt to respond to JCAR's general questions at the end of the Opinion.

The Board also received codification comments from the Administrative Code Unit.

MOTIONS FOR RECONSIDERATION

On July 16, 1987, the Board adopted a final Opinion and Order in this matter. The Board indicated that it would withhold filing the rules until after the opportunity for motions for reconsideration. As is detailed in the Orders of August 20 and September 4, 1987, the Board granted motions for reconsideration and vacated the July 16, 1987 Opinion and Order. The Agency filed and withdrew several motions for reconsideration. IMA and Steel similarly filed several documents which, to the extent not dealt with in the earlier Orders, are now moot. The post-adoption filings relating to the vacated July 16 Order which are discussed in this Opinion are as follows:

PC 17	Letter from Charles H. Sutfin, USEPA, August 5, 1987
*	Amended Motion for Reconsideration, Agency, August 20, 1987
PC 18	Sanitary District of Rockford, August 19, 1987
*	Removal Credit Regulatory Proposal, IMA and Steel, September 2, 1987
*	Letter from James B. Park, Agency, September 3, 1987.

PC 18 was simply a public comment on the Board's proposal which arrived months after the close of the comment period on May 18, 1987, and after the Board's action of July 16. The Board therefore struck it.[3]

In the July 16, 1987 Order the Board solicited motions for reconsideration from the agencies involved in the authorization process. In PC 17 USEPA reiterated some of its earlier comments, which are fully addressed in the July 16 Opinion, and in this Opinion. The letter is not framed as a motion for reconsideration, and references further review to be conducted by USEPA. The Board therefore did not address the letter. If necessary, the Board will open another Docket to address any issues USEPA may raise in the future.

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[3]However, the Board has added the Sanitary District of Rockford to the notice list to receive this and future Opinions and Orders.

The Agency's amended motion for reconsideration raised a number of minor issues which are discussed below in connection with the Sections involved. This is referenced below as "IEPA Motion for Reconsideration."

The major issue on reconsideration concerned whether to include removal credits in the proposal. This was first raised by IMA and Steel, which ultimately filed proposed regulatory language. The Agency eventually endorsed this change in the letter of September 3, 1987. As is discussed below, the Board included removal credits in the revised proposal. The Board solicited additional comment for before taking final action.

APPEALS

The Board has received notice of two appeals of the July 16 Order. These are mooted by the Board's action in vacating the July 16 Opinion and Order. On October 1, 1987 the Rockford Sanitary District moved to dismiss its appeal. The Board assumes that the IMA and Steel appeal will also be dismissed promptly. However, because of the need for prompt adoption of a pretreatment program to meet the requirements of Section 13.3, the Board will not await the dismissal before adopting this revised Opinion and Order.

PUBLIC COMMENT ON REVISED PROPOSAL

The Board requested public comment through October 30 on the revised Opinion and Order adopted October 1, 1987.[4] The Board received the following public comment:

PC 19 IEPA, November 2, 1987.

PC 20 Illinois Steel Group, LTV Steel Company, Inc., and Acme Steel Company, November 5, 1987

PC 21 USEPA, November 19, 1987

All of the comments were filed significantly late. However, on November 19, 1987 the Board extended the comment period to afford everyone an opportunity to review their comments in light of USEPA's amendments which appeared at 52 Fed. Reg. 42434, November 5, 1987, and which related to removal credits, the major

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[4]The Board mailed copies of the October 1 revised Opinion and Order to persons on the mailing list in this matter. The Board did not republish the Proposal in the Illinois Register, or allow the 45 days for public comment which would be required by Section 5 of the APA. The Board did this for several reasons. Full APA publication would have introduced an additional delay of at least 60 days. Section 13.3 of the Act exempts this rulemaking from the APA. And, the Board assumes that everyone interested in the proposal placed themselves on the mailing list as a result of the earlier Illinois Register publication.

issue at this stage of this proceeding which is discussed below in connection with Section 310.300 et seq.

FEDERAL TEXT USED

The federal pretreatment program is contained in 40 CFR 401 through 471. The proposal should be consistent with the 1986 edition of the Code of Federal Regulations, Title 40 of which is current through June 30, 1986. The Board has incorporated amendments through March 30, 1987.[5] These include:

51 Fed. Reg. 23759, July 1, 1986
51 Fed. Reg. 30816, August 28, 1986
51 Fed. Reg. 40421, November 7, 1986
51 Fed. Reg. 44911, December 15, 1986
52 Fed. Reg. 1600, January 14, 1987.

The Board intends to update the rules in a new docket to be opened as soon as possible after these rules are adopted. The Board will not attempt to play keep up with USEPA in this Docket, which involves a large volume of paper leading to original adoption of the program. The Board's long experience with the RCRA and UIC programs has taught that it would be a futile effort to try to keep up. By the time the Board completed the process of revising the proposal to accomodate new amendments, USEPA would be ready with another set. (PC 19)

RESPONSE TO GENERAL COMMENTS

The Agency and USEPA comments on the March 5, 1987 Order include some general comments to which the Board responded in the October 1 revised Proposed Opinion and earlier Opinions. Of special note was PC 9 from USEPA. The Board believes that PC 21 was intended to replace this earlier comment which was obscured by a major misunderstanding of the March 5 Proposal. The Board will include only a summary in this Final Opinion. To the extent this may still be relevant, interested persons are referred to the October 1 revised Proposed Opinion.

In summary, Section 13.3 of the Act does not allow the contents of the regulations to be finally determined by negotiation between the Agency and USEPA. The Agency filed no proposal with the Board, and did not seek to inform the Board of any agreements. On the points in question the Board's proposal appears to be consistent with USEPA rules and comments, and with the supposed agreement. However, the Board does not understand why USEPA is concerned about much of this, since matters such as appeal routes seem to be intrinsically a matter of State law.

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[5]The proposal utilized a September 30, 1986 cut-off date for USEPA amendments. It was necessary to extend the cut-off date to include USEPA amendments to the important definitions of "interference" and "pass through" in the January 14, 1987 amendments.

OVERVIEW OF PRETREATMENT PROGRAM

The following is a general discussion of the pretreatment program. A detailed discussion appears after this portion of the Opinion.

When the Board adopted regulations protecting water quality it focused primarily on discharges to surface waters. These are regulated through the NPDES permit program under Section 12(f) of the Act and 35 Ill. Adm. Code 309. Surface dischargers include industries which discharge directly to surface waters, and publicly-owned treatment plants (POTW's) which receive wastewater from households, businesses and industry, treat the wastewater and discharge it to surface waters. The pretreatment program greatly expands Board regulation of industries which discharge to a POTW rather than directly to surface waters.

POTW's are generally designed to provide biological treatment of household wastewater. They can also treat much industrial wastewater. However, some industrial wastewater is of a nature such that it should not be discharged to the POTW without pretreatment. Some wastewater, such as strong acids, would damage physical structures such as iron and concrete sewers. Flammable solvents pose dangers to persons working on sewers or in the treatment plant. Toxic materials may kill bacteria in the treatment works so that biological treatment ceases, allowing household wastewater to be discharged without adequate treatment. Toxic materials may accumulate in sludge, preventing its use or disposal as a soil additive. Other industrial pollutants may pass through the treatment works and cause water quality violations in the receiving stream. The pretreatment rules are designed to prevent interference with or pass through at the POTW.

The Board already has some general pretreatment rules in 35 Ill. Adm. Code 307. Section 307.105 prohibits discharges to POTW's in violation of USEPA pretreatment requirements. The Agency has a rudimentary pretreatment program which includes review of 102 municipal pretreatment programs which has resulted in the establishment of 48 pretreatment programs operated by POTW's. (IEPA). These have apparently been established through direct application of federal law through USEPA intervention in the NPDES surface discharge permit process.

The rules require that the larger POTW's serving industrial users prepare a pretreatment program proposal for submission to the Agency. The approved program will become a part of the POTW's NPDES surface discharge permit. Following approval of the program the POTW will administer the pretreatment program at the local level. Industrial users will be required to obtain an authorization to discharge from the POTW before discharging wastewater to sewers.

The rules also involve incorporation by reference of detailed USEPA pretreatment regulations for several hundred types of industrial dischargers. Through the pretreatment program the POTW will require that industrial users comply with these detailed pretreatment requirements.

The Board has set up the pretreatment program in a manner parallel with the NPDES program. The requirements for program approval and permit issuance will be placed in a new Part 310, which will follow the similar Part 309 NPDES rules. The sewer discharge standards will be added to the existing requirements in Part 307.

PART 307: PRETREATMENT STANDARDS

The Board's existing pretreatment regulations have been renumbered and incorporated into the framework of the pretreatment program.

Section 307.1001 Preamble

The existing language of Section 307.101 is preserved in paragraph (a). The Board's pretreatment rules have been merged with the general USEPA pretreatment rules from Part 403 and placed in Subpart B. While existing Section 307.102 and the USEPA pretreatment rules apply to discharges to publicly owned treatment works (POTW's), the Board's mercury and cyanide rules have a broader scope.

The general[6] standards of Subpart B will function as back-up standards for the categorical standards. Except where the contrary is indicated, a categorical discharger will have to comply with any more stringent general requirement. Dischargers which do not fit into any of the categories will also have to comply with the general standards.

The Illinois Administrative Procedure Act prohibits incorporation by reference of future amendments to federal rules ("forward incorporation"). Also, it requires the Board to so state each time it makes an incorporation by reference, and requires prior approval of incorporated material by the Joint Committee on Administrative Rules. Section 12.3 generally exempts the Board from compliance with the incorporation by reference procedures. For the reasons discussed below, the Board construes this as exempting only the JCAR prior approval, but not as allowing forward incorporations by reference.

The USEPA standards usually contain references to other

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[6]As is discussed below, the USEPA rules differentiate "general" from "specific" and "categorical" standards. As used in this Opinion, the Board means "general and specific" in the sense used in the USEPA rules.

USEPA rules. USEPA intends to refer to future amendments of the referenced Sections. The Board's incorporation of these Sections raises a possibility of an "imbedded forward incorporation:" the indirect incorporation of future amendments to the Section referred to in the reference. These imbedded forward incorporations are mostly procedural requirements which the Board will adopt in Part 310. Section 307.1001(c)(2) provides that these are to be construed as references to the comparable Board rules, or, if there are none, as references to the USEPA rules as they existed when referenced. The Board intends to adopt complete procedural rules, utilizing incorporation only for standards, requirements and definitions. In no instance does the Board intend to make a forward incorporation.

Section 307.1002 Definitions

The Board will utilize a separate definition set for the pretreatment rules rather than the Part 301 definitions. Alteration of the general definitions would require a review to ascertain whether the changes were modifying the other water rules. The preferable course is to utilize the USEPA definition sets associated with the pretreatment program.

The 40 CFR 401 definitions include terms which relate only to the surface water program. It is not necessary to include these. The Board has identified the definitions which are relevant to pretreatment, and set them out in the Part 310 definitions which are discussed below. The Board will utilize the same definition set for Part 307.

Section 307.1003 Test Procedures

This Section is drawn from 40 CFR 401.13, which in turn references 40 CFR 136, which establishes test procedures for measurement of pollutant concentrations. 40 CFR 401.13 contains an imbedded forward incorporation by reference. Simply incorporating this provision would be open to the interpretation that the Board was indirectly making a forward incorporation. As noted above, the Board believes this would violate the APA. For this reason the Board has incorporated by reference 40 CFR 136.

IEPA has suggested that it is not necessary to incorporate 40 CFR 136 by reference. However, USEPA has indicated that it will retain exclusive authority to approve alternatives, thereby implying that the test methods are indeed an important portion of the program. (IEPA and USEPA). (IEPA Motion for Reconsideration)

IEPA has asked that the Board update the incorporation by reference of 40 CFR 136, to include a September 3, 1987 amendment. The Board has advanced the incorporation to include the 1987 edition of the Code of Federal Regulations, which includes amendments through June 30, 1987, but declines to further advance the date at this time for the reasons noted

above. The Board will instead open a new Docket to include recent amendments. (PC 19)

IEPA has correctly pointed out that it would be difficult to maintain the references to Part 136 in the Proposal. Most of the Sections in Part 307, and some of Part 310, reference federal rules in the order they appear in the CFR, so it will be easy to update them in future rulemakings. However, there are a few references, mainly to Part 136, which could only be found after extensive searching. The Board has therefore reviewed the incorporations by reference and consolidated the odd ones in Section 310.107. (PC 19)

As finally adopted, Section 307.1003 paraphrases 40 CFR 401.13, referencing 40 CFR 136, which is now incorporated by reference in Section 310.107. All references to 40 CFR 136 have been changed to Section 307.1003. Section 310.602(e)(6) now incorporates by reference the USEPA procedure for adjusting analytical methods (40 CFR 403.12(b)). All other references to Section 403.12(b) have been changed to reference Section 310.602.

Section 307.1005

This incorporates 40 CFR 401.15 which lists toxic pollutants. The Board solicited comment as to the necessity of this in the Illinois pretreatment program. The Board has retained Section 307.1005, the definition of "toxic pollutant," since it is needed for the definition of "industrial user" and for Section 310.401.[7]

In its earlier comments, the Agency suggested that the definition of "toxic pollutants" is controlled by "40 CFR 122.21, Appendix D," (sic) rather than 40 CFR 401.15, which the Board incorporated by reference in Section 307.1005. (PC 12) On page 10 of the July 16 Opinion the Board asked the Agency for its rationale. The Agency responded in its Motion for Reconsideration that the list of toxic pollutants is controlled by NRDC v. Train, 8 ERC 2120 (District of Columbia, June 8, 1976.

The list of toxic pollutants on 40 CFR 401.15 appears to be identical to the list in Appendix A of NRDC v. Train, except for certain modifications which are identical to the modifications the Agency mentions in its motion. The Board therefore believes that the list of 40 CFR 401.15 is a current, valid reflection of the settlement agreement in NRDC v. Train.

After considerable vacillation the Agency has settled on 40

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[7]The Board has dropped the definition of "conventional pollutant," from 40 CFR 401.16, since it is not used in the proposal.

CFR 122, Appendix D, Tables II and III as what it believes constitutes the list of toxic pollutants from the settlement agreement in NRDC v. Train as updated. (IEPA Motion for Reconsideration)

Section 401.15 includes several generic listings, such as "halomethanes," while Appendix D includes specific listings within the generic class, such as bromoform and carbon tetrachloride. Although the Section 401.15 list appears to be much shorter than the Appendix D lists, it is actually much more inclusive than the Appendix D list.[8]

The 40 CFR 122, Appendix D lists are also not framed as listings of toxic pollutants. Rather, they are a part of the NPDES permit application testing requirements. Table II is oriented toward referencing specific test methods. The apparent equivalence with Section 401.15 could be accidental.[9]

The Board therefore concludes that not only is 40 CFR 401.15 the correct definition of "toxic pollutant" for purposes of the pretreatment program, but that use of 40 CFR 122, Appendix D, Tables II and III alone would be incorrect. However, the Board will include an alternative reference to Appendix D, recognizing that it presently appears to be an equivalent list which is set out in a clearer form for actual use by people who have to deal with these rules.

Due to a clerical error, the revised Proposed Order did not conform with the discussion in the Opinion. The Board has corrected this. Also, for the same reasons as discussed in connection with the references to 40 CFR 136, the odd reference to 40 CFR 122 has been moved to Section 310.107. (PC 19)

Section 307.1007 pH Monitoring (Not adopted)

The Board earlier proposed to adopt the equivalent of 40 CFR 401.17, which contains the averaging rule for pH. However, it appears that this is not necessary for the pretreatment program, since USEPA does not regulate pH with the categorical standards. Note, however, that Section 307.1101 prohibits the discharge of corrosives and other materials which would be

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[8]For example, iodoform would fall within the generic listing of "halomethanes" in Section 401.15, but is not specifically listed in Appendix D. The absence of iodoform from Appendix D may have resulted from USEPA's determination that it is not actually produced or used in sufficient amounts to justify promulgation of standards or testing. However, its discharge would amount to the discharge of a toxic pollutant under 40 CFR 401.15, triggering the requirement that the receiving POTW develop a pretreatment plan, and the requirement of a pretreatment permit or authorization to discharge.

[9]What would happen if USEPA added to the list of toxics, but took a totally different approach to deciding whether the new toxics were present in NPDES discharges?

injurious to structures or equipment. (IEPA Motion for Reconsideration)

Section 307.1101 General and Specific Requirements[10]

Subpart B contains the generic pretreatment standards. These are derived from existing Part 307 and from 40 CFR 403. They function as back-ups to the categorical standards.

The Proposal tracked 40 CFR 403.5(b) in stating these prohibitions in terms of "persons other than domestic sources." However, existing Section 307.102 prohibits essentially the same actions by any person, domestic or not.[11] The Board has therefore modified this Section to apply to all persons.

Existing Section 307.102 includes pretreatment requirements which are similar to 40 CFR 403.5(b). The Board has merged these provisions. The language is mainly drawn from 40 CFR 403.5. The Section 307.102 language which is not fully present in Section 403.5 has been inserted at the appropriate places. The additional requirements in existing Board rules are included in the following subsections:

(b)(2) Pollutants which would cause safety hazards other than fire or explosion.

(b)(5) Pollutants other than low pH which would be injurious to structures.

(b)(10) Pollutants which would cause the effluent to violate NPDES permit conditions.

One commenter suggested that Section 307.1101(b)(7) did not adequately address slug loading or interference with sludge disposal. (NSSD) The Board has reviewed this Section and finds that it adequately reflects 40 CFR 403.5(b)(4).

Another commenter suggested confusion as to whether Section 307.1101(b)(9) regulates temperature at the influent or effluent to the POTW. (IEPA) The Board has modified this to indicate expressly that the influent temperature is intended, and to reference the pretreatment plan as the portion of the NPDES permit in which the influent temperature would be specified.

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[10] The Proposal referenced these as the "general standards." However, the USEPA rules differentiate "general" and "specific" standards within the subject matter of this Section. The "general" standards prohibit interference and pass through, while the "specific" standards prohibit such things as causing fire or explosion. The Board has corrected the title of this Subpart and Section to recognize this distinction.

[11] As is discussed below, the Board equates "non-domestic source" with "industrial user."

Section 307.1102 Mercury

This Section has been moved more or less verbatim from Section 307.103. It applies to publicly regulated sewers, as well as POTW's. Categorical discharges would have to meet this standard even if there is no mercury standard specified in the categorical standards. The generic standard would override any less stringent categorical standard, unless the Board in adopting the categorical standard expressly stated that it was to be applied in lieu of the generic standard.

Section 307.1103 Cyanide

This Section has been moved more or less verbatim from Section 307.104. It applies to publicly regulated sewers, as well as POTW's. It would function like the mercury standards with the categorical standards.

Section 307.1501 et seq. Categorical Standards

What follows in the rules is the Board's equivalent of the USEPA categorical pretreatment rules. The text is around 250 pages long. These will be discussed in summary only, except where the Board received a comment on a specific Section.[12]

The USEPA pretreatment standards are contained in 40 CFR 405 et seq. They are arranged by industry category and subcategory, which follow the scheme established by the federal SIC Codes. The USEPA rules devote a Subpart to each industry subcategory, with individual Sections typically used to state the scope of the Subpart, special definitions, surface effluent standards and pretreatment standards for existing and new sources. The Board has incorporated the necessary material by reference.

GENERAL OUTLINE OF CATEGORICAL PRETREATMENT STANDARDS

The Board rules are arranged in the same order as the USEPA rules. However, the levels of subdivision are one step lower than in the USEPA rules: In the Board rules, one Subpart is devoted to each regulated industry category, and one Section is devoted to each regulated industry subcategory. Most Sections follow the following outline:

1. The subcategory is defined in an applicability statement.

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[12]The March 5 Proposed Opinion included substantial discussion of alternatives and solicited comment, most of which went unanswered. The Board has made no major changes in the general outline of this portion of the rules. The Board has therefore shortened this discussion in the Final Opinion. Persons who may be interested in a more complete discussion are referred to the Proposed Opinion.

2. Specialized definitions are incorporated by reference.

3. The pretreatment standards for existing sources (PSES) are incorporated by reference, and existing sources are required to comply with the standards.

4. The pretreatment standards for new sources (PSNS) are incorporated by reference, and new sources are required to comply with the standards.

5. The cut-off date for new sources for the subcategory is specified.

There are a few isolated instances in which the incorporations do not follow the above outline. These should be self-explanatory.

A few of the USEPA Parts have applicability statements defining the entire category, along with specialized definitions and rules affecting the entire category. These USEPA provisions are reflected in Sections with two zeros at the end. For example, Section 307.2000 is drawn from the introductory material 40 CFR 410.

Some of these introductory provisions include Sections on "compliance dates."[13] These have generally been incorporated by reference where they are present. (IEPA) (For example, 40 CFR 415.01/Section 307.2500.) Compliance dates are discussed further in connection with Section 310.222 below.

ALTERNATIVE APPROACHES

The above general outline resulted in several hundred pages of rules. The Board addressed alternative approaches and solicited comment in the proposed Opinion. The Agency requested that the Board reconsider the format of PC 1 as a template for adopting categorical standards. (IEPA). The Board cannot find the "template" in PC 1.

Although it is lengthy, the approach taken by the Board has several desirable features. It avoids incorporation of irrelevant surface discharge provisions. During maintenance rulemaking it will allow publication in the Illinois Register of short Sections which will include a clear description of the subcategory affected. "New source" dates will be clearly set out without reference to old Federal Registers which are not readily available to the public. The approach also is clearly in compliance with the incorporation by reference requirements of

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[13]These "compliance dates" should not be confused with the "new source" dates in item 5 above.

the APA.

The Agency has suggested that Section 13.3 of the Act empowers the Board to ignore all incorporation by reference requirements provided the regulatory process meets the due process notice requirements in the APA. (IEPA). However, the Board believes that incorporation by reference of unavailable material, such as "new source" dates, and of future amendments is a regulatory process which does not meet the due process notice requirements.

APPLICABILITY STATEMENT

Each Section starts with an applicability statement which defines the subcategory. Because the USEPA equivalent also functions to define the applicability of the surface discharge standards, and in order to provide notice to dischargers in Illinois, the Board has set the applicability statement out in full rather than incorporating it by reference.

The Board received some specific comments which will be discussed below in connection with specific Sections.

The Board also received a general comment from the Agency as to which USEPA Subparts, or subcategories, the Board is required to adopt. The Agency recommends that the list of industrial categories be limited to those listed in 40 CFR 403, Appendix C. (IEPA) Apparently adoption of rules for these categories would be sufficient for authorization.[14]

The "identical in substance" mandate of Section 13.3 of the Act is similar to the mandate of Sections 13(c) and 22.4(a) with respect to UIC and RCRA. It is not related to USEPA's standard for deciding whether the pretreatment program is sufficient for authorization. The Board has not interpreteted the UIC and RCRA mandate as being one of adopting a minimally sufficient program. Indeed, the Board has held that the UIC mandate is "to maintain its rules as nearly verbatim as possible with the UIC rules as applied by USEPA in States where USEPA administers the UIC program." (R85-23, Opinion of June 20, 1986). Therefore, the Board will not attempt to restrict the categorical standards to those which are necessary for program approval, but will adopt all USEPA standards which appear to apply in Illinois.

DEFINITIONS

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[14]At first sight this seems to be a minor change, since many of the optional provisions just require compliance with general requirements, which would be the same result as omitting the categories. However, under Sections 310.401 and 310.501, the existence of a categorical standard makes the discharger subject to the pretreatment permit requirement and the receiving POTW subject to the pretreatment plan requirement.

A "definitions" subsection follows "applicability" in the outline of each subcategory. The Board has incorporated by reference any special definitions applicable to the subcategory. If there is no special definitions Section in the USEPA rules for the subcategory, the Board has inserted "none" after the heading for definitions.[15]

PRETREATMENT STANDARDS

The next portion of the general outline is the incorporation by reference of the pretreatment standards for existing sources ("PSES") and for new sources ("PSNS"). There are five possibilities, all of which exist in the rules:

1. There are no pretreatment standards for any subcategory in a category, but only surface discharge standards.

2. There are pretreatment standards for at least one subcategory within a category, but another subcategory has no pretreatment standards.

3. There is a PSNS, but no PSES for a subcategory.

4. There are both a PSNS and a PSES for a subcategory.

5. There is a PSES, but no PSNS for a subcategory.

In the first case, the Board has completely excluded those industry categories for which there are no pretreatment standards in any subcategory. An example is the coal mining category, for which there are surface discharge standards only. Any dischargers to a POTW in these categories would have to comply with the general and specific pretreatment rules.

In the second case, in which there are pretreatment standards for some, but not all subcategories, the Board has adopted a Section defining each USEPA subcategory. If there is no pretreatment standard for a subcategory, the Board has provided a reference to the general and specific pretreatment standards of Subpart B.

In the third case, where there is a PSNS but no PSES, the Board has incorporated the PSNS by reference, and provided a

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[15]Some of the special definitions reference the special definitions used for another subcategory. This raises the possibility of an imbedded forward incorporation by reference. For example, see 40 CFR 419.31/ Section 307.2903, which reference 40 CFR 419.11/ Section 307.2901. In these situations, as provided by Section 307.1001, the Board's incorporation of the USEPA reference is to be construed as a reference to the equivalent Board rule, rather than the imbedded USEPA reference. If the Board has not adopted the equivalent, the reference will be to the USEPA rule at the time of adoption of the reference.

reference to the general and specific pretreatment standards of Subpart B for existing sources.

In the fourth case the Board has incorporated the PSES and PSNS by reference.

In the fifth case USEPA has promulgated a standard for existing sources, but none for new sources. Where USEPA has proposed no new source rule, all sources are "existing sources," including those built after the existing source standard is adopted. In this case the Board rule provides that all sources are regulated as existing sources.[16]

Some of the USEPA standards reference other standards. This carries a risk of an imbedded forward incorporation by reference similar to that discussed in connection with the definitions above. Where the reference is to another pretreatment standard which the Board is incorporating elsewhere, the Board will construe these as referencing the related Board standard. If the Board has not adopted the referenced provision, the reference will be construed as a reference to the USEPA rule as it existed when the Board referenced it.

NEW SOURCE DATES

USEPA rules define "new source" in terms of the date the proposal to regulate the subcategory appeared in the Federal Register. These dates are not readily available to the public. The Board has therefore adopted for each subcategory a definition of "new source" containing the actual date.[17]

These dates go back to 1973. There may be people who have been in business for as much as 14 years who are to be regulated as new sources. The Agency indicated that it has only a "rudimentary" pretreatment program in Illinois. (IEPA). There may be thousands of dischargers subject to these rules who have not yet been brought into a formal pretreatment program. It seems to be asking a lot for each of them to journey to a major

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[16]In the proposal, the Board provided a heading for "new sources," and provided that they were subject to the PSES. This was not quite accurate, since strictly speaking, there are no new sources. The Board modified this to provide that all sources are regulated as "existing sources." (USEPA and MSD) This format may have produced a problem which is discussed below in connection with Sections 307.2300.

[17]In the March 5 Proposed Opinion the Board noted a number of problems with ascertaining what these dates are, and solicited comment. USEPA has apparently reviewed these rules, and has noted some specific problems which are discussed below. USEPA urged the Board to review the dates and make sure they are correct. (USEPA) On the other hand, IEPA simply recommended that the dates be deleted. (IEPA). The uncertainty these agencies have for whether the Board's dates are correct underscores the problem which the public would face if it were forced to research the dates.

law library to find back issues of the Federal Register to discover whether they are a new or existing source.

COMMENTS ON SPECIFIC SECTIONS IN PART 307

The following are responses to comments on specific Sections in the categorical pretreatment standards portion of Part 307. Comments which just address typographical errors in the Order are not discussed here.

Section 307.2004

40 CFR 410.50 is reflected in the language of Section 307.2005(a). (USEPA).

Section 307.2300

The applicability Section for the electroplating industry has been updated to include amendments at 51 Fed. Reg. 40421, November 7, 1986.

The electroplating rules are a category for which USEPA has promulgated a PSES, but no PSNS. The Board's generic approach, which is discussed above, of stating that all sources are regulated as existing sources appears to be misleading. (PC 10, 11, IEPA Amended Motion for Reconsideration, PC 19 and 21) In fact certain electroplaters are regulated as new source metal finishers if they are "new" as defined in the metal finishing rules, the new source date for which is August 31, 1982. IEPA and USEPA have offered specific regulatory language to fix this problem. (PC 19 and 21) This is rejected, in part because both suggestions misuse the term "new". The Board has fixed this problem by stating for each electroplating subcategory that "Sources the construction of which commenced after August 31, 1982 are subject to Subpart BH."[18]

Section 307.2501

The Board has generally edited the applicability statements to remove language relating to the surface discharge program and to establish a uniform style. The Board believes that the applicability statement in this Section is identical to the substance of 40 CFR 415.10 as applied to pretreatment. (USEPA).

Section 307.2801

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[18]This really is fixing a problem which exists within the USEPA rules. An electroplater searching the USEPA rules would come first to the 40 CFR 413 standards, determine that there were no new source standards and conclude that he was an existing source electroplater. Only through a complete reading of the rules would he find that he was also a new source metal finisher subject to 40 CFR 433.

The Water Quality Act has recently been amended to mandate the repeal of the NSPS for phosphate fertilizer manufacturing. This has not yet been reflected in amendments to 40 CFR 418. Since this standard applies only to four facilities in Louisiana, the Board will not attempt to modify its rules until USEPA modifies Part 418. (USEPA)

Section 307.3000

This Section has been modified to include a reference to removal credits, which are discussed below in connection with Section 310.300 et seq.

Section 307.3100

The Board has reviewed the applicability statement for the nonferrous metals manufacturing category against 40 CFR 421.1. The Board deleted material concerning surface discharges, and edited the statement to remove unnecessary circular language. The Board cannot find any difference in the substance of this and the USEPA Section. (NSSD)

This Section has been modified to include a reference to removal credits, which are discussed below in connection with Section 310.300 et seq.

Section 307.4300

This Section has been updated to include USEPA amendments at 51 Fed. Reg. 40421, November 7, 1987.

Section 307.6500

This Subpart has been updated to include USEPA amendments at 51 Fed. Reg. 44911, December 15, 1986, which resulted from a remand of the pesticide chemicals category standards. The amendments virtually eliminate this Subpart. (USEPA)

Section 307.7700

This Section has been modified to include a reference to removal credits, which are discussed below in connection with Section 310.300 et seq.

PART 309: MODIFICATION OF EXISTING PERMIT REQUIREMENT

Subpart B of existing Part 309 requires construction and operating permits for certain pretreatment facilities. (IEPA) As is discussed below in connection with Section 310.401 et seq., the Board has modified the proposed pretreatment permit requirement to track the existing permit requirements of Part 309. Since this would create a duplicative permit requirement, the Board has modified Part 309 to exempt discharges covered by Part 310 permits. As adopted, this would include both

pretreatment permits issued by the Agency as the control authority, and authorizations to discharge issued by the POTW.

Part 309 includes both a construction and an operating permit requirement. Because Part 310 does not include an explicit construction permit requirement, the Board will retain the Part 309 construction permit requirement. (IEPA) Therefore, new pretreatment facilities will continue to require an Agency construction permit, even if the discharge is to a POTW with an approved pretreatment plan. However, the Part 310 pretreatment permit or authorization to discharge will replace the Part 309 operating permit.

PART 310: PRETREATMENT PROGRAMS

Part 310 establishes the pretreatment program. It specifies how POTW's set up pretreatment programs, and sets requirements which users must meet to get "authorizations to discharge" from the POTW, or "pretreatment permits" from the Agency in some cases.

Part 310 is drawn from 40 CFR 403. Immediately following is a general discussion of how Part 403 was modified to form Part 310. Following on this is a detailed discussion of the Sections involved.

40 CFR 403 serves a larger function than Part 310: In addition to the functions noted above for Part 310, Part 403 specifies how a state obtains approval of its pretreatment program from USEPA, specifies certain minimal requirements which must be present in state law for program approval, specifies how USEPA acts in certain situations with an approved state program and how USEPA acts in the absence of an approved program. Part 403 also includes broad introductory material and statements of purpose relating to the national program. This type of material has generally been deleted. In particular, Part 310:

1. Assumes that the Agency will administer an approved program. (See 40 CFR 403.3(c))

2. Does not purport to regulate actions to be taken by USEPA. (See 40 CFR 403.6(a)(4))

3. Does not purport to specify which offices within USEPA approve various aspects of the pretreatment program. (See 40 CFR 403.6(a)(4))

4. Does not include introductory material or statements of intent broader than the Illinois program. (See 40 CFR 403.13(b))

5. Specifies what State law is to be applied in pretreatment permits. (See 40 CFR 403.4)

6. Specifies procedures to be followed in situations in which USEPA allows a range of procedures within an approved program. (See 40 CFR 403.6(a)(1))

7. Adopts substantive requirements in situations in which USEPA requires that a rule be adopted, but allows a range of options. (See 40 CFR 403.12(b))

8. Translates general directives into specific State requirements. (See 40 CFR 403.9(g))

9. Specifies procedural steps which must be taken under State law. (See 40 CFR 403.13)

10. Modifies Part 403 to the extent necessary to comport with Illinois constitutional, statutory and administrative law. (See 40 CFR 403.8(e))

11. Rewords provisions for clarity.

The text of Part 310 is drawn from Part 403 as nearly verbatim as possible. The text is in nearly the same order as in Part 403. However, in order to comply with codification requirements, the first level of subdivision of USEPA sections has been promoted to Sections in Part 310. USEPA Sections generally correspond with Subparts in Part 310. The Board has added notes to each Section referencing the Part 403 subsection from which it is drawn.

Section 310.101

This Section has no close USEPA counterpart. It has been added to state the applicability of the Part in a short fashion to aid readers. Commenters objected that the proposed Section seemed to change the scope of the program from the federal. (USEPA and IEPA). The Board has rewritten this Section to address these concerns in two ways. First, the Board has added a statement that this Section is only a general guide to aid the reader. Second, the Board has modified the language to more closely track and cite the operative Sections.

Section 310.102

This Section is drawn from 40 CFR 403.2. Unnecessary USEPA introductory material has been deleted. Some of the provisions have been reworded for clarity.

The Board's objective is to comply with the mandate of Section 13.3 of the Act. The Board has added a statement to that effect.

Section 310.103

The Board received several comments from IEPA and USEPA

concerning interaction with USEPA following program approval. Among the matters mentioned are the following:

1. Are pretreatment programs approved by USEPA prior to approval of the Illinois program valid?

2. Does the proposal extend federal compliance dates?

3. Do the rules prevent USEPA from having access to records?

4. Do the rules prevent USEPA from conducting inspections and sampling after authorization?

As a specific example, USEPA suggests that it be added to the definition of "approval authority," which is discussed below in connection with Section 310.110, to recognize that it will actually approve program submissions until the Illinois program is authorized. This would imply that USEPA would be acting pursuant to Board rules when it approved program submissions prior to authorization of the Illinois program. This would violate two of the general propositions discussed above: the rule would place the Board in the position of regulating USEPA, and would regulate activities prior to the time the Agency is authorized to administer the program. Since nobody objected to the general propositions, which were stated in the Proposed Opinion, the Board will retain them and attempt to reconcile the comments within the general framework.

Another example is federal compliance dates. The Board could attempt to adopt past compliance dates as State law retroactively. These probably would not withstand appeal. It will probably be a more efficient use of enforcement resources to provide for federal enforcement at the outset.[19]

In response to these comments, the Board has added a Section dealing specifically with the relationship to federal law. This appears to be preferable to attempting to restate what may be very complex at several points within the rules.

Section 310.103(a) first states the obvious intent to adopt an identical in substance program meeting the mandate of Section 13.3 of the Act.

Section 310.103(b) provides that the Clean Water Act and USEPA rules continue in effect after authorization. Specifically, USEPA retains the right to inspect and take samples. (IEPA Motion for Reconsideration)

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[19]In R86-46, USEPA indicated that in RCRA similar dates are strictly federally enforceable. (Opinion and Order of July 16, 1987)

These rules will be fully effective as State rules as soon as they are filed with the Secretary of State shortly after adoption of this Final Opinion and Order. However, they will not function to allow IEPA to issue pretreatment permits, review pretreatment program submissions or authorize POTW's to issue authorizations to discharge until the program is delegated to IEPA by USEPA. Section 310.103(b) has been reworded to avoid any misinterpretation on this point. (PC 21)

As is discussed below in connection with removal credits, there is a very real possibility that the program will be authorized without removal credits. That is, USEPA will retain authority to issue removal credits pending completion of its sludge disposal rules and State action modifying these rules to include the sludge rules. The Board has therefore modified Section 310.103(b) to provide that the rules will allow action "when and to the extent USEPA authorizes." (PC 19, 20, 21)

Section 310.103(c) provides that the Board's rules are not to be construed as exempting anybody from compliance with federal law prior to authorization. Specifically, as suggested by USEPA, USEPA's compliance dates will be enforceable as federal law for violations prior to authorization. Also, NPDES and Part 309 pretreatment permit conditions established pursuant to Section 307.105 will continue to be enforceable under existing State law.

As noted above, the Agency presently manages the pretreatment program under contract with USEPA. Section 310.103(d) provides that programs approved by USEPA through this mechanism will automatically become approved Illinois programs, unless the Agency objects within 60 days after Illinois program approval. The Board has also allowed 60 days after USEPA approves a program, to cover the possibility that USEPA will continue to retain some approval authority after authorization, as it does with NPDES permits. This provision will probably never be used, since the Agency works closely with USEPA in approving pretreatment programs.

Section 310.103(e) provides that the memorandum of agreement (MOA) will control USEPA's access to records and information in the possession of the Agency.[20] USEPA will have to agree to abide by the confidentiality requirements associated with such information, which are discussed below in connection with Section 310.105. This rule is not necessary, since the Agency has independent authority under the Act to enter into a memorandum of agreement. However, the Board has included it since it was an issue in USEPA's comments.

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[20]Under the rules USEPA has two methods to get information from POTW's and industrial dischargers: it can inspect or request information directly under Section 310.103(b), or it can ask the Agency to request the information and obtain it through the MOA.

Section 310.104

This Section is drawn from 40 CFR 403.4. The USEPA rule has been applied to the Illinois situation, but is not repeated.

The USEPA rule governs conflicts between State, and local, law and USEPA rules. USEPA allows more stringent State or local law to override its requirements. With respect to State requirements, the Board has identified the more stringent requirements.

Section 5 of the Act requires the Board to "determine, define and implement the environmental control standards applicable in the State." The Board cannot subdelegate this authority to local government. The POTW must apply the Board rules in the issuance of pretreatment permits.[21,22]

As discussed above, there are three types of prohibitions and standards. In Section 307.1101 the Board combined the USEPA general and specific pretreatment requirements with the existing Board general requirements. POTWs and users will be able to refer to this rule without further consideration of stringency, unless there is a local requirement. Sections 307.1102 and 307.1103 contain concentration based standards for mercury and cyanide which will apply to all POTWs. Sections 307.1501 et seq. include the USEPA categorical standards, which are often expressed as mass discharge limits dependent on production rates. The control authority will have to determine which of these two types is more stringent as applied in the permit or authorization.[23]

Section 310.105

This Section is drawn from 40 CFR 403.14. The USEPA rule has been applied, rather than repeated.

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[21]However, as is discussed below in connection with Sections 310.210 and 310.211, the POTW must evaluate its system and develop more stringent standards based on its capacity to treat discharges, from the cumulative effect of actual dischargers, so as to avoid interference or pass through.

[22]The pretreatment program should not be construed as in any way superseding any existing powers of a unit of local government to charge a user fee or to refuse to accept discharges which it does not believe the treatment plant can handle.

[23]Because of the different method of expressing the standards, the POTW will have to apply each set of rules to a given situation to decide which type of standard is more stringent. For example, it may be necessary to determine a production rate, calculate an allowable mass discharge limit and divide by flow to obtain a concentration limit to compare with the Board standards. (Peabody Coal v. IEPA, PCB 78-296, 38 PCB 131, May 1, 1980.)

Section 310.105(a) is drawn from 40 CFR 403.14(b). It provides that "effluent data shall be available to the public without restriction."[24]

Section 310.105(b) provides that, for information in the hands of the Board or Agency, confidentiality is governed by Part 120, if it deals with trade secrets. The Board notes that Sections 120.102 and 120.330 of its trade secrets rules allow for the program anticipated here.[25]

POTWs will need to adopt procedures to protect confidentiality before pretreatment programs are approved. The Agency will review these procedures to assure that they meet the minimum requirements specified by this Section, 40 CFR 403.14 and other State and federal laws governing disclosure. Section 310.105(c) has been modified to make it clear that the Agency itself is subject to the same minimum requirements. (USEPA).[26]

Section 310.107

This Section will include all materials which must be incorporated by reference for use in the later Sections. The Board has incorporated the Standard Industrial Classification Manual in that SIC Codes are requested in a subsequent Section. Also, as is discussed above in connection with Section 307.1003, the Board has consolidated in this Section all of the "odd" references to federal rules and statutes which are found in these regulations, that is all of the references which could not be found by simple comparison with the text of the USEPA rules.

Section 13.3 of the Act exempts this rulemaking from the requirements of the APA concerning incorporations by reference. However, the Board has nonetheless taken an expansive interpretation of what is meant by an "incorporation by reference" under the APA. Some of these materials are probably not true incorporations by reference. However, it is not worth the risk to the program to try to avoid these requirements.

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[24]In the proposed Opinion the Board asked for comment as to what this means in the context of the pretreatment program. The Board received no response, except from IEPA, which said it was important. The Board has left this in, since it doesn't seem to hurt anything. However, if it's effluent data, it is governed by Part 309, rather than 310.

[25]The Agency has asked that the Board reference the Agency's Part 161 rules at this point. The Board declines to do so. For other confidential matters, the Agency should use its confidentiality rules to the extent applicable without a Board rule. (IEPA).

[26]Confidential information will often first come into possession of the POTW from a discharger, subject to the POTW's confidentiality rules, which will have been approved with the program. The Board, Agency and USEPA will protect this information unless there is a final determination that the POTW's decision to protect the information was wrong under applicable State and federal laws, or under the POTW's own rules. (NSSD).

Section 310.110 Definitions

The 40 CFR 401 definitions have been consolidated with the Part 403 definitions for inclusion in Section 310.110. Definitions which seem to apply only to NPDES discharges have been omitted. The Board has added a number of definitions appropriate to the Illinois program.

The definition of "approval authority" has been modified on the assumption that the Agency will administer an approved program in Illinois. Therefore, "approval authority" is equivalent to "Agency". The Board has addressed USEPA's concerns in Section 310.103 above. (USEPA).

"Approved POTW pretreatment program" is drawn from 40 CFR 403.3(d). It has been modified on the assumption that the Agency will be the approval authority.[27,28]

The Board has added a definition of "authorization to discharge" in response to several comments concerning ambiguities created by use of the term "pretreatment permit" to describe the action taken by the POTW to allow a discharge. As is discussed below in connection with the definition of "pretreatment permit," the Board has reserved that term for the document issued to the discharger by the Agency as the control authority, and will use the term "authorization to discharge" to describe the POTW's action. The "authorization to discharge" may consist of a permit, license or ordinance, as specified in the approved pretreatment program. The specific comments will be discussed below where they occur.

The Board has included a formal incorportion by reference of the Clean Water Act in Section 307.107. This will be defined by reference to the incorporations by reference Section. Since "CWA" is so defined, it will not be necessary to repeat the incorporations by reference litany each time it is used.[29]

In the July 16 Opinion the Board suggested that the rules could be made much simpler and clearer if the term "industrial

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[27]The USEPA rule includes a condition that the program meet the criteria for approval, as well as having been approved. This has been omitted as redundant. The Agency cannot approve a program unless it meets the criteria. Once approved, a program will remain "approved" until the Agency takes steps to cancel the approval.

[28]Under Section 310.103, programs which have been approved by USEPA will become "approved" programs unless the Agency objects. (USEPA).

[29]At first sight the term "discharge of pollutants" appears to belong with the pretreatment rules. (40 CFR 401.11(h)) However, on closer examination, it applies only to effluent discharges.

user" were defined globally and used to replace "discharger," "user" and "non-domestic source." The Board suggested using the definition implied by Section 310.401, which was drawn from the Agency's comments. (IEPA) In its motions for reconsideration, the Agency endorsed this change. (IEPA Motion for Reconsideration) [30]

As modified, the definition of industrial user specifically includes certain types of discharger. The specifications are taken from the existing pretreatment permit requirement of 35 Ill. Adm. Code 309.Subpart B. Specifically included are persons who: discharge toxic pollutants; are subject to a categorical standard; discharge more than 15% of the flow or biological loading to the POTW; have caused pass through or interference; or, have presented an imminent endangerment to the health or welfare of persons.

The Board has added a definition of "industrial wastewater." This is a shortened term used in place of "industrial wastes of a liquid nature," which is used in several places in the USEPA rules. This follows the general terminology used in the Board rules, under which "wastewater" is regulated under Subtitle C, while "wastes" are regulated under Subtitle G.

The definition of "interference" is drawn from 40 CFR 403.3(i), which was amended at 52 Fed. Reg. 1586, January 14, 1987. The Board has defined a term "sludge requirements," which is discussed below.

40 CFR 401.11(m) defines "municipality" by reference to the CWA. As is discussed below, the Board has replaced this with the term "unit of local government," an all-inclusive term defined by Art. 7, Sec. 1 of the Illinois Constitution. [31]

The Board has added definitions of "municipal sewage" and "municipal sludge," undefined terms used at several places in the USEPA rules. There is a possibility of confusion in Illinois because of the term "municipal," which could be construed as related to "municipality." "Municipal sludge" has been defined as the sludge produced by a POTW. "Municipal sewage" is the

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[30] In the body of the rules the Board has generally changed "discharger" to "industrial user." The Board has retained "user" as a shortened form where "industrial user" has already been used in the subsection and it is clear from the context that "industrial user" is intended. The Board has retained "non-domestic source" in the definition of "indirect discharge." This is a reference to terminology used in the Clean Water Act, and serves in part to define "industrial user."

[31] As is discussed below, different Illinois statutes govern "municipalities" and "sanitary districts," both of which are "units of local government." (IEPA) Use of the term "municipality" in the rules to mean something other than what is meant in a closely related statute would invite confusion.

sewage received by a POTW, exclusive of its industrial component.

The term "new source" is drawn from 40 CFR 401.11(c). The USEPA definition references the date a proposal for a categorical standard appeared in the Federal Register. As is discussed above, the Board has proposed to specify these dates in Part 307. The comments on this definition are also discussed above. (IEPA and USEPA).

"Permit" has been stricken as an alternative to "NPDES Permit." This could cause confusion with "pretreatment permit." Whenever the rules mean "NPDES permit," they will so state. (IEPA).

The definition of "pass through" is drawn from 40 CFR 403.3(n), which was amended at 52 Fed. Reg. 1586, January 14, 1987.

The definition of "person" is drawn from 40 CFR 401.11(m) and the CWA.[32,33] The Board has used the term "unit of local government" in place of the types mentioned in the USEPA definition.

The definition of "pollutant" is drawn from 40 CFR 401.11(f). That definition specifies discharges into "water", and as such seems to be inapplicable to the pretreatment program. However, in that the term is essential, the Board has modified the definition to include discharges to "sewers."[34]

The Board has added a definition of "pretreatment permit" in response to comments indicating confusion as to whether this encompassed authorizations to discharge issued by a POTW. As

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[32]Section 13(h) of the Act provides that no person shall discharge to a sewer except in compliance with Board rules. Section 13.3 requires the Board to adopt identical in substance rules. The Board construes this to mean that it is to adopt a definition of "person" consistent with the USEPA program, and that that definition will control the the scope of Section 13(h). If the definition of "person" found in the Act were to control Section 13(h), the scope of the pretreatment program might be different than the program mandated by USEPA, violating Section 13.3.

[33]The CWA definition does not include the U.S. Government. However, the definition in 40 CFR 122.2, applicable to the NPDES program, which seems to be based on the same CWA definition, specifically includes the U.S. Government. The Board received no comment in response to its request for comment on this in the Proposed Opinion.

[34]The Board has also omitted the exclusion of injections to facilitate oil production and sewage from vessels. These seem to be relevant only to the surface discharge program. It would not be physically possible to facilitate oil production by injecting water or other material into a sewer. Also, it would seem appropriate to apply the pretreatment rules if sewage from a vessel were somehow discharged to a sewer.

defined, the term will apply only to permits issued by the Agency as the "control authority." Authorizations issued by a POTW will be called "authorizations to discharge," which is defined above.

The definition of "pretreatment standard" is drawn from 40 CFR 403.3(j). The Board has dropped the equivalent term "national pretreatment standard." As these terms are used in the rules, more stringent Board standards would also be "national," which would be confusing. There is no need for terms distinguishing the USEPA standards from the Board standards, since their function does not depend on their origin.

The Board has conditioned this definition on adoption of USEPA standards by the Board. Therefore additional categorical standards will not become "pretreatment standards" until the Board adopts them as State rules.

"Pretreatment standard" also includes local limits which are part of an approved pretreatment program pursuant to Section 310.211. (USEPA, IEPA, MSD).

The definition of "POTW" is drawn from 40 CFR 403.3(o). It has been made more specific so it applies in Illinois. It has been simplified through the addition of definitions for "treatment works" and "unit of local government".

The definition of "schedule of compliance" is referenced in 40 CFR 401.11(m). It has been set out in the rules, with some modification as is discussed below. The rules allow the Agency and POTW to establish compliance schedules in permits within certain bounds.

The Board has modified this definition in response to comment. (NSSD). A "schedule of compliance" can be included either in an "authorization to discharge" issued by a POTW, or in a "pretreatment permit" issued by the Agency. (Section 310.510(a)(4) and 310.432). "Schedules of compliance" to develop a pretreatment program can also be placed in the POTW's NPDES permit. (Section 310.504)

The earlier versions of the proposal included a sentence referencing the sources of schedules of compliance, including the traditional methods of establishing such schedules in Illinois, which have been temporary hardship variances and Board enforcement Orders. However, it appears that, as intended by USEPA in the pretreatment program, schedules of compliance do not protect a POTW or industrial user from enforcement for failure to meet the original compliance date. (PC 21) It is therefore not appropriate to base the schedule of compliance on a Board variance. The Board has therefore deleted this reference from the definition. The Board has also added a statement that schedules of compliance do not protect the POTW or industrial user from enforcement, so as to afford notice to the public.

The Board has added a definition of "SIC Code", a term which is used in the rules.

The Board has added a definition of "sludge requirements" as a part of the modification of these rules to add removal credits, which is discussed in detail below in connection with Section 310.300. The definition was contained in the definition of "interference" in the July 16, 1987 proposal. The Board has made this a global definition to be used both in defining interference and in limiting removal credits. The Board has specified the Part 309 sludge application permits, RCRA permits and Part 807 solid waste permits as those, which if violated, would result in interference. These are the State equivalents of the federal programs listed in the USEPA definition of "interference." In addition, the Board has retained references to the federal TSCA and Marine Protection Acts, which have no State equivalents.[35]

USEPA has asked that the Board also reference the USEPA sludge disposal regulations which it will promulgate in the future. As is discussed below in connection with Section 310.300 et seq., authorization and issuance of removal credits will probably be delayed pending USEPA adoption of these future regulations. This would be a forward incorporation prohibited under the APA. It will be necessary for the Board to update this definition once USEPA completes its rulemaking. (PC 21)

The Board has reviewed the text of Part 310 to identify and replace various phrases which appear to mean the same thing as the defined term "sludge requirements." For example, "applicable requirements for sewage sludge use or disposal" in Section 310.201(b)(2)(B) has been changed to "sludge requirements." Other examples occur in Section 310.210.

The definition of "submission" has been narrowed from that of 40 CFR 403.3(t).[36] As defined, it will include only the request from the POTW to the Agency for approval of a pretreatment program, or for authorization to issue removal credits. The submission from the Agency to USEPA for approval of the State program is not the subject of these rules.

The Board has added a definition for "treatment works", a term that is essential to the applicability of the pretreatment program. The definition is implied by the definition of "POTW," which references Section 212 of the CWA. The Board has defined the term by reference to the CWA, with the first sentence of the

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[35]The Board has omitted the Clean Air Act, since it does have a State equivalent, but the Board is not aware of any Clean Air Act limitations on sludge disposal.

[36]The USEPA rules use "submittal" as a substitute for "submission" in several places. The Board has used the defined term throughout. Also, it should be noted that the USEPA rules actually use "submission" in contexts other than those listed.

CWA definition set out in full for clarity. [37]

The definition of "unit of local government" replaces the definition of "municipality" in 40 CFR 401.11(m), which references the CWA. The definition has been modified to use the term "unit of local government," an all-inclusive term defined by Art. 7, Sec. 1 of the Illinois Constitution.

Section 310.201 General Provisions

This Section includes the general prohibition against introduction of pollutants which pass through or interfere with the operation of the POTW. This Section is drawn from 40 CFR 403.5(a), which was amended at 52 Fed. Reg. 1586, January 14, 1987. Some of the provisions have been reworded for clarity.

One comment suggested substituting "non-residential" for "non-domestic" source, but did not provide a definition. (NSSD) The January 14 amendments use "user," the term which has been adopted here and elsewhere in the proposal.

The Board has revised this and the following Section to utilize the defined term "sludge requirements."

Section 310.202

The "general and specific" prohibitions of 40 CFR 403.5(b) have been combined with the similar existing Board requirements in Section 307.1102. These are part of the "general and specific" pretreatment requirements of Subpart B of Part 307.

Section 310.210

This Section is drawn from 40 CFR 403.5(c), which was amended at 52 Fed. Reg. 1586, January 14, 1987. It has been reworded for clarity. POTW's which are required to develop pretreatment programs have to evaluate their system with respect to the cumulative effect of discharges upon it. They may have to develop and enforce more stringent specific limits based on this evaluation. The Board has modifed the language in Section 310.210(a) to make it clear that this evaluation and the more stringent limits are to be a part of the pretreatment program submission. As such, the limits will be reviewed by the Agency and subject to appeal to the Board.

IEPA and USEPA filed earlier comments which indicated confusion over program approval versus authorization to discharge and over variances versus permit appeals. This is discussed in summary at the beginning of this Opinion. In that these issues

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[37] The rest of the definition in Section 212 seems to be specifying what is or is not eligible for the grants program, and is not particularly appropriate for inclusion.

appear to have been resolved, the Board has dropped the discussion which appeared here in the October 1 Proposed Opinion. Persons are referred to that, and earlier Opinions, for that discussion.

As is discussed above in connection with Section 310.104, only the Board has authority to adopt environmental control standards.[38] The Board has therefore added Section 310.210(d) to the USEPA text. The Board has modified the text in response to comment. (IEPA and USEPA). Specific limits developed by the POTW are to be based on the characteristics and treatability of the wastewater by the POTW, effluent limitations which the POTW must meet, sludge disposal practices, water quality standards in the receiving stream and the Part 307 pretreatment standards.

IEPA has cited as authority for local limits Ill. Rev. Stat. 1985, ch. 24, par. 11-141-7 and ch. 42, par. 317(h).[39] These are consistent with the Board's interpretation that its role is to develop environmental control standards, while the unit of local government is to meet these standards and protect its system.

40 CFR 403.5(c)(2) refers to the POTW developing "specific discharge limits for industrial users, and all other users, ..." However, as defined in 40 CFR 403.3(h), "industrial user" is the equivalent of "user." To avoid the interpretation that there is yet another class of "users," Board has deleted the phrase "and all other users."[40]

Section 310.210(c) is drawn from 40 CFR 403.5(c)(3), which the Board reworded for clarity. As reworded, the Section reads in part:

> Prior to developing or enforcing ... limits, POTW's shall give ... individual notice ...

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[38]There is an important distinction between environmental control standards and standards based on evaluation of a given system. New categorical pretreatment standards would be based on evaluation, or reevaluation, of treatment technology similar to that done by USEPA in adopting the categorical standards. On the other hand, treatment technology would be a secondary consideration for the POTW after evaluation of its system. Also, the Board, and USEPA, have developed effluent standards, water quality standards and effluent guidelines which the POTW must meet to protect the environment beyond its point of discharge. The local limits must be designed to meet these environmental control standards, but should not reevaluate them.

[39]IEPA states that MSD has authority to adopt environmental control standards, but cites no authority. MSD did not comment on this Section.

[40]As defined above, "industrial user" includes persons who have caused pass through or interference, so that the POTW would be able to develop specific limits directed at such industrial users, which is probably what the USEPA rule means.

USEPA wants this changed to "developing and enforcing." However, its reason is that it "is not the intent of §403.5(c) to give interested parties a chance to comment on pending enforcement actions." The suggested change would accomplish precisely that result. The intent of the USEPA Section can most efficiently be stated simply by deleting the phrase "or enforcing." The notice has to be given before the limits are developed. If they are not correctly developed, they are not enforceable.[41]

Section 310.211

This Section is drawn from 40 CFR 403.5(d). The additional pretreatment standards which the POTW develops from the characteristics of the treatment plant and discharges will function the same as categorical pretreatment standards.

The Board reworded Section 310.211 so that it reads:

> If a POTW develops ... limits, such limits shall be deemed pretreatment standards for purposes of this Part.

40 CFR 403.5(d) actually reads, "Where." USEPA suggests that the Board change this to "When." The Board believes that "If" captures the true intent best. As provided in other Sections, some POTW's have to develop local limits, others do not. "If" captures the meaning of a true conditional with no connotation of place or time.[42]

Section 310.212 (Not adopted)

This proposed Section was drawn from 40 CFR 403.5(e). It would have required a 30 day notice before the Agency could assume enforcement responsibility if a POTW failed to take action. The Board has deleted this as inconsistent with the Agency's right to enforce under the Act. (IEPA). The Agency and USEPA will address specific enforcement responsibilities in the MOA. (USEPA).

40 CFR 403.5(f) sets a compliance date for the USEPA rules. This has been omitted, since it is long since past.[43]

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[41] One comment asked for greater specificity as to the method of calculating the limits and giving notice. The Board does not believe it can adopt additional requirements under its identical in substance mandate. The method of giving notice should be tailored to local needs, and reviewed by the Agency in the program submission. (NSSD).

[42] The specific problem with "When" is that it seems to imply that the local limits become pretreatment standards at the moment they are "developed," as opposed to when the Agency approves the program submission.

[43] As noted above in connection with Section 310.103(b), the rules will actually become effective when filed with the Secretary of State shortly after adoption of this Opinion. (Footnote continued)

Section 310.220

This Section is drawn from 40 CFR 403.6. This general, introductory material is unnecessary, but seems to provide a useful cross reference to Part 307. (IEPA). The Board has corrected an erroneous cross-reference. (NSSD).

Section 310.221

This Section is drawn from 40 CFR 403.6(a). A user can request a category determination after a new categorical standard is adopted.

The Board has modified Section 310.221(a)(1) in response to comments to change the deadline for submission of the category determination request. (USEPA) For standards adopted by USEPA prior to Illinois program authorization, category determination requests should be made pursuant to USEPA rules within 60 days after USEPA adoption. After Illinois is authorized, the deadline will be keyed to the Board's adoption of the standard, which will happen a few months after USEPA acts. This will avoid giving another 60-day period for category determination requests with respect to old USEPA standards adopted by the Board at the beginning of the program, but will not ask industrial users to monitor the Federal Register as well as the Illinois Register for future actions.

Section 310.221(a)(3) has been modified to change "submission" to "application," the term used in the next paragraph. (USEPA).

Section 310.221(b)(2) allows either the industrial user or the POTW to request a category determination. No action is necessarily required of the POTW. (NSSD).

Some of the provisions have been reworded for clarity. Paragraph (d)(1) has been edited to allow for the possibility that the Agency might determine that a submission is not complete.

The Board edited this Section on the assumption that the Agency will be delegated the authority to make these category determinations. IEPA and USEPA apparently agree that IEPA will be delegated the basic authority, although USEPA has indicated that it will not waive oversight authority, as is allowed under 40 CFR 403.6(a). (USEPA) The Board has edited to delete this possibility.

USEPA will retain a case-by-case oversight authority on

However, they will not allow issuance of permits, authorizations or program approvals until USEPA delegates the program.

category determinations. If the Agency refuses or fails to make a determination, the action can be appealed to the Board. Agency determinations, however, are subject to review by USEPA. If USEPA accepts the Agency determination, the determination is appealable to the Board for 35 days after notification of the Agency decision to the user.[44] If USEPA modifies the Agency determination, the user must utilise USEPA procedures to challenge USEPA's decision. The user cannot appeal the USEPA action to the Board, or appeal the Agency's action to the Board if modified by USEPA.[45]

Paragraph (d)(2) has been edited so that it does not purport to regulate actions by USEPA, but only actions by the POTW and IEPA prior to the time the Agency forwards its decision to USEPA, and actions taken in the absence of USEPA modification.[46]

Section 310.222

This Section is related to 40 CFR 403.6(b). Compliance dates were discussed above. For the earlier standards, USEPA was silent as to the compliance date. 40 CFR 403.6(b) operated to give three years for existing sources to come into compliance with new standards. For the more recent standards, USEPA has specified the compliance dates with the categorical standards.

Compliance dates at the State level are somewhat more complex. The standards are not enforceable as State law until the Board has adopted them or incorporated them by reference, and until USEPA has approved the Illinois pretreatment program.[47]

The Board cannot adopt the text of the USEPA rule. First, it would not adequately state the situation with respect to compliance dates at the State level. Second, since USEPA now

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[44]To avoid confusion, the Agency should not notify the user of a determination until USEPA review is complete.

[45]40 CFR 403.6(a)(5) refers to a request for hearing "and/or" legal decision. This has been replaced with "or", since "and/or" is now prohibited by the Administrative Code Unit. Similar changes have been made at several points in the Proposal. Generally, "A or B" is to be understood to mean "A or B, or both" in these rules, unless the contrary is clearly stated.

[46]IEPA says this Section "limits USEPA's oversight authority" and "makes the USEPA determination subject to Board authority." USEPA did not comment on this aspect of the Board proposal. Since the Agency's problems are not clear, and the language is acceptable to USEPA, the Board will not modify it.

[47]As noted above in connection with Section 310.103(b), the rules will actually become effective when filed with the Secretary of State shortly after adoption of this Opinion. However, they will not allow issuance of permits, authorizations or program approvals until USEPA delegates the program.

specifies the dates with the standards, there would be a possibility of a conflict between this Section and the date specified by USEPA.[48] For these reasons the Board has drafted a State rule with no close federal counterpart.

There are basically three situations with respect to compliance dates. Where compliance is already required at the federal level, compliance will be required at the State level as soon as USEPA approves the Illinois program. For standards which are adopted after program approval, the Board will adopt or incorporate the USEPA compliance date with the standard. The intermediate case is the most complex: categories for which compliance will be required at the USEPA level during the pendency of program approval. For these sources compliance will be required as of the latest of the following dates: USEPA compliance date;[49] Board adoption or incorporation; and program approval.

As is discussed above, this Section refers only to compliance dates for purposes of enforcement of Board rules. The Board has added Section 310.222(c) to make it clear that these standards are enforceable as federal law prior to authorization of the Illinois program. (USEPA, IEPA, NSSD).[50]

Section 310.230

This Section is drawn from 40 CFR 403.6(c). The Board has dropped introductory language reflecting USEPA's intentions in adopting categorical standards. The Board has also edited "effluent" to "discharge" in the last sentence. (IEPA)

Section 310.232

This Section is drawn from 40 CFR 403.6(d). This contains the anti-dilution rule. The USEPA rule is limited to "categorical" pretreatment standards. The Board proposed to make this applicable to all the pretreatment standards, including the Board's concentration-based standards for mercury and cyanide. The Agency supported applying the anti-dilution rule to these

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[48]40 CFR 403.6(b) is best interpreted as a formula used by USEPA to decide what dates to include with the standards. The Board cannot adopt a rule which purports to regulate USEPA.

[49]This scheme assumes that USEPA will continue to specify the compliance date with the standards, as is its current practice. If USEPA stops doing this, it will be necessary for the Board to determine the date and specify it when it incorporates the standard. In the absence of a specified date, immediate compliance will be required upon adoption or incorporation by the Board.

[50]Also, as discussed above, NPDES and pretreatment permit conditions established pursuant to old Section 307.105 will remain enforceable as State law.

standards, but pointed out that, as worded, the anti-dilution rule would also apply to local limits. The Agency suggested that this was beyond the Board's authority, while MSD specifically endorsed it. (IEPA and MSD)

35 Ill. Adm. Code 304.121(a) prohibits dilution "of the effluent from a treatment works or from any wastewater source." This applies to the Board's existing Part 307 standards. As far as these standards are concerned, there is no change from the existing rules by making this Section apply to all standards.

With respect to local limits, it is possible that dilution might be an acceptable treatment, although this would be highly unusual. The Board has added a sentence allowing the POTW to override the anti-dilution rule. However, the Board will leave it as a general rule which applies if the POTW is silent in its ordinance.

Section 310.233

This Section is drawn from 40 CFR 403.6(e). It specifies the methods for deriving discharge limits where wastewater from more than one source is combined prior to discharge. Most of the changes to this Section involve format.[51,52]

Section 310.233(a) defines "average daily flow" as a "reasonable measure of the average daily flow for a 30-day period." One commenter suggested insertion of "minimum" in front of "30" because USEPA sometimes insists on a five year average. The Board believes that this would change the intent of the rule.[53] (NSSD).

Section 310.233(c) spells out the type of self monitoring required to show compliance with an alternative standard set under the formula. It does not deal with the question of whether

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[51]The symbols in the formulas have been modified to avoid the use of subscripts and superscripts, which inevitably cause problems in the printed version of Board rules. For similar reasons, the sigma sign for summation has been replaced with the "SUM" function, which is defined in the rule. The formula has been written in a one line format, also to avoid proofreading problems. (See 1 Ill. Adm. Code 100.340(i))

[52]40 CFR 403.6(e) includes phrases such as "value(s)." It is doubtful whether this usage is acceptable under the 1987 Administrative Code Style Manual. The Board has replaced these with the plural ("values"), with the understanding that the singular is included in the plural.

[53]Under some circumstances it might take a five year average to get a reasonable measure of average daily flow, while under other circumstances a single day's measurement might be a reasonable measure, depending on the variability. The purpose of the 30-days is to indicate that the average daily flow is to take account of such things as weekends and work cycles over that period.

a program submission should provide for self-monitoring. This is contained in Section 310.510. (NSSD).

40 CFR 403.6(e) contains two large asides in the definitions of the terms used in each of the formulas. It is impossible to meet codification requirements with this format. The asides have been moved to Section 310.233(d) and (e). This also avoids unnecessary repetition of the asides. The asides include references to NRDC v. Costle and to 40 CFR 403, Appendix D, which have been moved to the incorporations by reference Section.

Section 310.233(d) has been modified to remove discretionary language. The control authority will have to make the dilution determination if the user asks for one.[54,55]

Section 310.301 Removal Credits

As was discussed above, the Board received a motion to reconsider from IMA and Steel requesting that the Board add removal credits based on 40 CFR 403.7. Eventually IMA and Steel filed proposed language with the Board, and the Agency concurred as to the desirability of addressing removal credits in this Docket.[56] On September 4, 1987, the Board granted the motion to reconsider, vacated the July 16 Opinion and Order and indicated that it would adopt an Opinion and Order including removal credits.

Removal credits were adopted by USEPA at 46 Fed. Reg. 9439, January 28, 1981. This version can be found in 40 CFR 403.7 (1983). USEPA suspended these rules as a result of litigation. USEPA revised the removal credits rules at 49 Fed. Reg. 31212, August 3, 1984. This resulted in an appeal in the federal courts. NRDC v. USEPA, 790 F. 2d 289 (Third Circuit, 1986) The result is a remand to USEPA with instructions to correct deficiencies in the removal credits provisions.

The pretreatment program is designed in part to prevent toxic pollutants discharged by industry from passing through a POTW to be discharged to "navigable waters," and to prevent

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[54]This does not mean that the control authority has to decide that the wastestream "should be classified as diluted." All it means is that, if asked, the control authority has to say yes or no.

[55]The Agency has commented that the control authority "should be able to require installation of a sampling point prior to mixing with other discharges if it does not desire to collect all of the information required by the formula to determine compliance." (IEPA). This does not appear to have anything to do with the language of this Section.

[56]The Board accepted this approach and the attendant delay only because it was requested by the Agency, which has the responsibility of pursuing the program authorization. (Agency letter of September 3, 1987)

contamination of POTW sludge. A POTW may be able to remove toxic pollutants to a certain extent without contaminating its sludge. If this is so, 40 CFR 403.7 would allow the POTW to apply for authorization to grant "removal credits." If authorized, a POTW could allow dischargers to increase pollutant loadings beyond that allowed by the categorical standards. [57]

The Appeals Court remanded the rules to USEPA based on several flaws. First, the method of measuring the removal efficiency of the POTW had a lower confidence level than that required for USEPA effluent guidelines, violating a specific requirement of the Clean Water Act. Second, the rules ignore the effect of direct discharge of toxic pollutants by way of sewer overflows. Third, the rules allow the approval authority to withdraw from the POTW authorization to grant removal credits only if the POTW's removal rate drops consistently and substantially below the rate claimed in the application. Fourth, USEPA has not yet promulgated sludge disposal rules, a condition precedent to granting removal credits under the Clean Water Act.

The October 1 Proposed Opinion, and PC 19, 20 and 21, included speculation about how USEPA would respond to the remand. This was resolved by USEPA's action on November 5, 1987. (52 Fed. Reg. 42434) USEPA reinstated the 1981 rules at the necessary points. However, USEPA acknowledged that it had to adopt "a more comprehensive set of sludge regulations under Section 405 of the Clean Water Act as a precondition for granting removal credits." USEPA indicated that it will be proposing such.

USEPA's comment was drafted prior to the Federal Register action. However, USEPA believed the Board's October 1 Proposal to be consistent with the rules it then anticipated. (PC 21)

USEPA indicated that it would accept the Illinois pretreatment program authorization application with or without removal credits. However, Illinois would not be authorized to issue removal credits until USEPA adopts comprehensive sludge disposal regulations. (PC 21)

Adoption of removal credits rules at this time is not necessary to obtain program approval. However, as noted above, the Board interprets the "identical in substance" mandate of Section 13.3 of the Act as requiring it to go beyond adoption of a minimally approvable program. The Board attempts to adopt a

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[57] For example, assume a categorical standard allowed a user to discharge up to 20 lbs per day of a pollutant and that the POTW has a 60% removal efficiency for that pollutant. The POTW could allow the user to discharge up to 50 lbs per day of the pollutant pursuant to a removal credit. 50 lbs/day with a 60% removal results in the discharge of 20 lbs/day from the POTW.

regulatory program which has the same substance as the rules applied by USEPA in states without authorization. The Board will therefore adopt the removal credits rules, even though they are inoperative because they are missing an essential component, the sludge regulations.[58,59,60]

The Board's proposal for the most part followed the IMA and Steel proposal (which will be referred to as "the proposal" in the remainder of the discussion of this Subpart).[61]

The Board has added Section 310.301 to the proposal. This is based on 40 CFR 403.7(a), which contains definitions applicable only to removal credits. The proposal suggested making all of the 40 CFR 403.7 definitions global by adding them to Section 310.110. The Board has instead proposed to keep most of them as local definitions, specifically to keep the prohibition on dilution in "removal" from affecting other portions of the rules.

The Board has moved "sludge requirements" to Section 310.110. USEPA uses similar language in its global definition of "interference." The Board believes that USEPA intends the sludge requirements to be the same in both places. The Board wants to consolidate these references in a single place to make certain that its rendering is consistent in both places.

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[58]In the July 16 Opinion and Order the Board intended to immediately adopt the pretreatment rules without removal credits, and to open a second Docket to address removal credits. The Agency would have promptly applied for authorization of the pretreatment program without removal credits. This is basically what has happened now, except that the application has been delayed by five months.

[59]The evil consequences, cited by IMA and Steel, of failure to adopt removal credits at this time would not have happened. The Agency would have requested authorization of the program less the removal credits. USEPA would have retained removal credits authority when delegating program authority to the Agency.

[60]The Board wishes to distinguish its action in this Docket of attempting to anticipate the result of a remand to USEPA in the original adoption of a program from attempting to anticipate such action during the ongoing maintenance of "identical in substance" programs. If the Board, after a successful federal appeal, were to adopt a program which was at odds with the result of the appeal, the Board would be taking an affirmative action which could be challenged on appeal. This is different from inaction on existing State rules pending USEPA action on the the remand. In such a situation, the Board views the federal Court opinion as applying to the derivative Board rule pending Board action in adopting the USEPA revisions resulting from the opinion.

[61]The Board has renumbered the Sections so as to leave space for the inevitable USEPA renumbering. Two of the Sections have been internally renumbered as noted below. This Opinion will generally follow the current numbering of the Order. References to certain numbers "in the proposal" will be understood to refer to the equivalent Sections in the IMA and Steel proposal.

The Board has included State sludge disposal regulations in the definition. This is mandated by the Clean Water Act.[62] However, as noted above, this will not suffice to allow issuance of removal credits until USEPA issues sludge disposal rules. USEPA has indicated that the Board's definition should include a reference to its sludge rules to be proposed in the future. (PC 21) As noted above, the Board cannot make a forward incorporation by reference under the APA. The Board will have to amend this definition after USEPA completes its rulemaking.

The definitions of "consistent removal" and "overflow" are not found in the current version of 40 CFR 403.7. The proposal draws on the 1981 amendments, as mandated by the opinion in NRDC v. USEPA.

40 CFR 403.7 contains frequent references to "industrial user(s)" and "pretreatment standard(s)." This type of unconventional usage has come under attack in the 1987 edition of the Administrative Code Style Manual. The Board has added definitions to make it clear that the singular means the plural, so as to avoid this usage.

Section 310.303

The Board has used the defined term "sludge requirements," instead of attempting a partial redefinition here.

Section 310.310

The Board has rewritten the formula to use percents and so that it all fits on a single line.[63]

Section 310.311

This Section is drawn from 40 CFR 403.7(b), with modifications to meet NRDC v. USEPA, which criticized the method required to establish "consistent removal". The proposal is based on the 1981 rules.[64]

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[62]The Board earlier proposed to modify the definition of "interference" to specify State sludge programs. These modifications were accepted by all participants without comment.

[63]The formula of 40 CFR 403.7(a)(4) requires the removal credit to be expressed as a fraction, which is confusing since it is defined below in the rules, and universally expressed, as a percent. The Board has placed the formula on a single line to avoid editing problems which inevitably arise otherwise.

[64]The Board has restored the USEPA subsection headings indentation levels, which were deleted and modified in the proposal. Although this makes it harder to reference the proposal, it is much easier to compare the Order with the 1981 USEPA rules.

Section 310.311(c)(2)(B), which was Section 310.304(d) of the proposal, allowed the use of historical data "amassed prior to the effective date of this Section" as a substitute for sampling. This was copied from the USEPA rule, which was effective in 1981. Pursuant to the Agency's suggestion, the Board has modified this to allow historical data amassed within three years prior to application by a POTW for removal credit authorization.

Section 310.311(e) includes references to test methods. As is discussed above in connection with Section 307.1003, the Board has modified these to reference Sections 307.1003 and 310.602, in order to avoid scattering odd references about the rules.

Section 310.312

This Section is drawn from 40 CFR 403.7(c). It allows the POTW to grant provisional removal credits to new or modified facilities, subject to a demonstration of consistent removal within 18 months after the discharge commences. The Board has restored the final sentence, which was omitted from the proposal. This requires the Agency to terminate authority to grant removal credits under certain circumstances.

Section 310.320

This Section is drawn from 40 CFR 403.7 (1983), pursuant to NRDC v. USEPA. It requires the POTW to compensate for overflow of untreated wastewater between the user and the POTW. The removal credit either has to be reduced to compensate for overflow events, or the users have to cease discharging in anticipation of overflow events.[64]

The proposal provided that the Section does not apply if users "can demonstrate" that overflow does not occur between the users and the POTW. The Board has changed it to "demonstrates" to make it clear that the Section contemplates an actual prior demonstration by the user.

The proposal would also have allowed the Agency to grant allowances where the POTW "submits to the Agency evidence" that, for example, users have the ability cease discharging to prevent overflows. The Board has modified this to make it clear that the POTW has to "demonstrate" such ability.[65]

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[65]The language of the proposal was subject to the interpretation that the allowance had to be granted if there was any evidence to support it, as opposed to the usual practice of requiring the Agency to weigh the evidence before it. For example, under the proposed language, the Agency would have been required to accept the POTW's word that flow diversion equipment existed, even if its inspection revealed that the equipment did not exist.

The formula of Section 310.320(b)(1) has been modified so it can be written on one line.

Section 310.340

This Section is drawn from 40 CFR 407(e)(1)-(4), which specifies the contents of the application from the POTW to the Agency for authority to grant removal credits.

Section 310.351

This Section is drawn from 40 CFR 403.7(f)(5) (1983), as required by NRDC v. USEPA, instead of 40 CFR 403.7(f)(4) (1986). This governs modification or withdrawal of removal credit authority from the POTW, and credits from users. The Agency can withdraw authority if it determines that the POTW has granted credits in violation of the rules, or if credits granted are causing pass through or interference.

Section 310.400 Pretreatment Permits[66]

The Agency suggested alternative language for this entire Subpart. (IEPA). The Board has made extensive changes in response to comments, mainly from the Agency.

The Board has added a preamble in the form of Section 307.400. This will help avoid the incorrect interpretation that this Subpart applies in the presence of an approved POTW pretreatment program. (NSSD).

The Agency pointed out that many users would be subject to the construction and operating permit requirement of 35 Ill. Adm. Code 309.Subpart B. The Board has added a reference to that Subpart, which has been amended as discussed above. Users who have pretreatment permits will be exempt from the Part 309 operating permit. However, new construction will continue to require a Part 309 construction permit.

The following Sections govern issuance of pretreatment permits by the Agency. These permits will be required of dischargers unless and until the Agency approves a pretreatment program.

Section 310.401

The March 5, 1987 Proposal used the term "non-domestic"

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[66]These rules are based on 40 CFR 403.10(e) and (f). However, they do not follow the text of the USEPA rule, which specifies the contents of the program submission which IEPA will give to USEPA. The Board rules will be a portion of this submission, which will also include things out of the Board's jurisdiction, such as the adequacy of funding for inspections.

source to state the scope of the pretreatment permit requirement. Pursuant to the Agency's comments, the July 16 rules drew on the language of the existing 35 Ill. Adm. Code 309.Subpart B pretreatment permit requirement to state the scope of the new Part 310 requirement. In the July 16 Opinion the Board noted that the rules could be greatly simplified and clarified if the term "industrial user" were defined globally, drawing on the language of existing 35 Ill. Adm. Code 309.Subpart B. As is discussed above in connection with the definitions in Section 310.110, the Board has made this change. As a result of this change much of the proposed language of Section 310.401 is now found in the definition of "industrial user." However, there is no substantive change from the July 16 rules.

There are three categories of "industrial user" which are addressed in Section 310.401.[67]

The first category is for dischargers to a POTW with an approved program. These users will be exempt from the pretreatment permit requirement, and will have to obtain an authorization to discharge from the POTW pursuant to whatever mechanism is approved in the program submission.[68]

The second category are users who meet any of the criteria for an operating permit under Section 309.202(b). Pretreatment permits will be required if the user discharges "toxic pollutants," if the user is subject to a categorical standard or if the user discharges more than 15% of the total hydraulic flow or organic loading to a plant. Rather than reference the Clean Water Act for the definition of "toxic" and for the categorical standards, the Board has referenced the equivalent rules adopted in this Docket in Part 307.

The third category includes users who don't meet the above criteria, but whom the Agency determines have caused pass through or interference, or have presented an imminent endangerment to public health. This category is again drawn from Section 309.202(b), although the Board has used the terminology of the new rules instead of referencing the Clean Water Act. The Board has also added a requirement of notice to the discharger before a permit is required, in order to give the discharger time to apply before being in violation of the permit requirement itself.[69]

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[67]The Agency also suggested a specific exclusion for persons with NPDES permits. This seems to be unnecessary in the context of Part 310. (IEPA)

[68]As discussed in connection with Part 309, these users will still have to get a construction permit from the Agency prior to new construction.

[69]Once the discharger causes pass through or interference, he will have to apply for a pretreatment permit within 30 days, as well as being subject to enforcement for having caused pass through or interference.

Section 310.402

Pursuant to the Agency's comments, the Board has added a Section specifying that applications must be received at least 90 days before a permit is needed, or 90 days before a permit expires. These times coincide with the 90 days the Agency has to review applications under Section 39(a) of the Act. If the user files a timely, complete application, he will be able to continue to discharge pending Agency action (Section 310.422).

Section 310.403

The Board has added this Section to make sure the Agency has authority to address imminent endangerment to public health. Section 34(a) of the Act allows the Agency to declare an emergency and seal facilities "upon a finding that episode or emergency conditions specified in Board regulations exist."[70]

Section 310.410

This Section contains the minimum information requirements to get a pretreatment permit. This is drawn from the Agency's comment. The Agency will be expected to promulgate application forms. The Agency can request additional necessary information either in the forms or through individual requests to applicants.[71]

Section 310.411

As suggested by the Agency, the Board has added a Section requiring that the user obtain from the POTW and owners of any intervening sewers certifications that they have capacity to transport and treat the discharge.

Section 310.412

As suggested by the Agency, the Board has specified the identity of the persons who can sign the application. This is drawn from other signatory requirements, such as 40 CFR 403.12(i).

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[70]Section 34(b) allows the Agency to take similar action "in other cases in which the Agency finds that an emergency condition exists creating an immediate danger to health." Section 34(b) is probably sufficient to allow the Agency to take action in the absence of a Board rule. However, the Board has adopted the "imminent endangerment" language in this Subpart to make it clear that the Agency can act under Section 34(a) under the same standard as USEPA.

[71]The Agency has authority to adopt procedures for pretreatment permit issuance pursuant to Section 39(a) of the Act.

Section 310.413

The Board has added this Section at the Agency's suggestion. If the Agency determines that a site visit is necessary to evaluate the application, it should notify the discharger. If this is done within 30 days after receipt of the application, the failure to allow a site visit results in an incomplete application, which the Agency can deny.

Section 310.414

The Board has added a Section on completeness at the Agency's suggestion. The Board has added a requirement that the Agency notify the applicant of an incomplete application within 30 days after receipt. This is drawn from Section 309.225(a). If the Agency fails to so notify, it cannot reject the application as incomplete, although it can deny it for failure to provide adequate proof.

Section 310.415

The Board has added this Section after reflecting on Section 310.402. This references the 90-day decision period of Section 39(a) of the Act. It also states the result of Section 16(b) of the APA.

Section 39(a) provides that the applicant "may deem the permit issued," but does not say for how long. The Board has construed this consistent with the purposes of the Act and the APA. The decision period is intended to avoid inconvenience to the public from delays by the Agency, but is not intended to provide a reward for Agency errors.[72]

If the application is for renewal of a permit, Section 310.415 provides that the old permit continues in effect pending issuance of the new permit. If the application is for a new permit, the applicant may deem the permit issued for a period of one year, starting at the end of the 90-day period. This should allow adequate time to restart the application process.[73]

Section 310.420

The Board proposed the classical standard for permit issuance, that the applicant prove that the discharge will meet regulatory requirements. At the Agency's suggestion the Board has expanded this to specifically authorize the Agency to issue permits with compliance schedules, and other conditions which

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[72]See R81-18, Opinion and Order of September 4, 1987.

[73]The deemed issued permit does not excuse the discharger from compliance with the pretreatment standards.

will result in compliance, to users who cannot demonstrate present compliance. The Board has retained the classical standard to make it clear that the Agency can deny permits when, for example, it does not have enough information to establish conditions leading to compliance.

Section 310.421

Pursuant to the Agency's comments, the Board has added a Section specifying the form of the Agency's final action. This will either be a written permit or a letter of denial with the reasons as specified in Section 39(a).

Section 310.430

The Board has retained this Section, although the Agency asked that it be shortened to the general statement of conditions the Agency can impose. The Board believes that the Agency should have a list of conditions similar to that which the POTW should have in the program submission.

The Board has added Section 310.430(e) to allow inspections at reasonable times upon presentation of credentials, consistent with existing Section 309.147. (USEPA).

The Board has added references to three additional types of conditions referenced in the Agency's comments. Section 310.430(f), (g) and (h) reference more extensive rules on expiration dates, compliance plans and modification. These are discussed below.

Section 310.431

As suggested by the Agency, the Board has provided that pretreatment permits can be issued for up to five years. The Agency can shorten this to coordinate with future compliance dates. The Agency can also issue short-term permits for experimental processes and to cover emergency situations.

Section 310.432

The Board has added a Section on compliance plans at the Agency's suggestion. This is drawn from 40 CFR 403.8(d), which applies to the POTW's program submission.

The Board earlier proposed to require variances prior to establishment of certain schedules of compliance. As noted above in connection with the definition of "schedule of compliance" in Section 310.110, USEPA intends that schedules of compliance not protect industrial users from enforcement. (PC 21) There is therefore no reason to require variances prior to establishment of these schedules of compliance. The Board has therefore dropped the references to variances, and has replaced these with provisions warning industrial users that schedules of compliance

do not protect them from enforcement.

Section 310.441

The Board has added this Section in response to Agency comments. Pretreatment permits will function only as a defense to the permit requirement. Permit compliance will not excuse a person from complying with the underlying rules.

Section 310.442

The Board has added a Section on modification at the Agency's suggestion. Paragraph (a) makes it clear that modification at the request of the permittee is always allowed. Paragraph (b) allows the Agency to reopen the permit if it obtains new information, or if new rules are adopted. The Agency has to give notice to the permittee that it is reviewing the application, and allow the permittee to file a new application.[74]

Section 310.443

At the Agency's suggestion the Board has added a Section on revocation. This references the Act and Board procedures for enforcement. It includes a list of causes for revocation which is drawn from existing Section 309.182(b) and 309.264.

Section 310.444

The applicant can appeal the denial of a pretreatment permit, or its issuance with conditions.[75]

Section 310.501 Pretreatment Program Development

This Section is drawn from 40 CFR 403.8(a).[76] This Section determines which POTW's are required to develop pretreatment programs: those above 5 mgd which receive from industrial users pollutants which pass through or interfere with the POTW, or

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[74]The Board added a requirement to Section 310.430 that the Agency include a modification condition in each permit to make sure that everybody is aware of this.

[75]The Board solicited comment on whether pretreatment permits were subject to third party appeals. The Board has reviewed the Act in light of the comment and concluded that pretreatment permits are best characterized as Section 39(a) permits required by Section 13.3 of the Act and Board rules necessary to implement Section 13.3, rather than as ancillary to the POTW's NPDES permit. There is no right of third party appeals for such permits. (USEPA and IEPA)

[76]This Section has been reworded from the comparable federal language. The Board solicited comment as to whether the revisions resulted in any changes in meaning. The Board received only positive comment. (USEPA).

which receive discharges from users which are subject to pretreatment standards. The Agency can also require smaller POTW's to develop programs under certain stated circumstances.

The Board has changed Section 310.501(a)(2) to make it clear that it references the categorical standards of 35 Ill. Adm. Code 307.

40 CFR 403.8(a) exempts POTW's if the State assumes direct responsibility for pretreatment permits. The Board questioned whether the Agency wanted to exercise this option. The Agency indicated that it did. (IEPA). The Board has therefore added Section 310.501(c) to allow the Agency to waive the requirement that POTW's develop programs.[77] The waiver has to be written. The Agency will have to allow the POTW time to develop a program if it rescinds a waiver.

Section 310.502

This Section is drawn from 40 CFR 403.8(b). The USEPA rule requires POTW's to develop pretreatment programs no later than July 1, 1983, which has already passed. The Board proposed to substitute July 1, 1988, as the Illinois deadline, and solicited comment. The Board received adverse comment. (IEPA and USEPA). The Board has adopted the Agency's suggestion of keying the deadline for having an approved program to one year after the issuance of an NPDES permit requiring program development.

Section 310.503

This Section is drawn from 40 CFR 403.8(c). The USEPA rule treats modification of the POTW's NPDES permit to incorporate an approved pretreatment program as a "minor modification." As such it is not subject to the detailed procedures for permit issuance of 40 CFR 122. The Agency asked the Board to delete this provision, noting that any future program approvals will come years after the programs should have been in place under 40 CFR 403, and therefore should be treated as major. (IEPA). The Board agrees.

One commenter asked that the Board allow POTW's with multiple treatment works to establish a pretreatment program in the NPDES permit for only one facility. (NSSD). This appears to be contrary to the intent of the federal rules.

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[77]The Board has worded this Section so that POTW's are required to develop programs under objective standards, subject to a discretionary waiver. The language suggested by the Agency made the requirement to develop a program discretionary, inviting confusion between POTW's which didn't need a program because they were small versus POTW's which needed a program, but were in a situation such that the Agency preferred to administer the program.

Section 310.504

This Section is drawn from 40 CFR 403.8(d). If the Agency issues an NPDES permit for a POTW required to establish a pretreatment program, but which has not done so, the Agency is to include a compliance schedule in the permit. The compliance schedule is to lead to an approved program within one year for consistency with Section 310.502. This date is intrinsically keyed to permit reissuance. (IEPA).

As discussed above in connection with the definition of "schedule of compliance" in Section 310.110 and in Section 310.432, USEPA has objected to the presence of Board variances in the pretreatment program. USEPA intends that schedules of compliance established under the pretreatment program not protect POTW's from enforcement. (PC 21) The Board has therefore deleted references to variances as a method by which a POTW establishes a schedule of compliance. The Board has also added a statement that schedules of compliance do not protect from enforcement so as to afford notice of this to POTW's.

Section 310.505

This Section is drawn from 40 CFR 403.8(e). It requires the Agency to modify or reissue permits to incorporate an approved pretreatment program or to place the POTW on a compliance schedule leading to an approved program.

The USEPA rule uses the phrase "revoke and reissue" instead of "reissue" to describe the process by which the Agency replaces an earlier permit with a new permit. The Board has modifed the term to avoid confusion with permit revocation as a penalty for violation of the Act.[78]

The Board has deleted references to coordination with the grants program, since grants are no longer available anyway. (IEPA).

The Board has added a reference to the removal credits program rules of Subpart C. (Section 310.505(e).)

Section 310.510

This Section is drawn from 40 CFR 403.8(f). This Section establishes the requirements for an approvable pretreatment program.

40 CFR 403.8(f)(1) establishes the legal authority which a POTW must have for program approval. Generally the POTW has to

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[78]This modification is consistent with the terminology adopted in the RCRA rules in R86-1 (Opinion and Order of June 20 and July 11, 1986.)

have legal authority to enforce Parts 307 and 310. The Board has specified in Section 310.510(a) only its own rules, without requiring the POTW to have the authority to enforce the USEPA rules or CWA directly.

40 CFR 403.8(f)(1)(v) requires that the POTW have authority to enter any place where records are required to be kept under 40 CFR 403.12(m). The correct reference should be to Section 403.12(1), whose equivalent is Section 310.634.

40 CFR 403.8(f)(1)(vi) requires that POTW's have authority to seek civil or criminal penalties against dischargers which do not comply with pretreatment requirements if the state has laws which allow POTW's to seek such penalties.[79]

Municipalities may pass ordinances with fines and penalties of up to $500 and six months imprisonment. (Ill. Rev. Stat. 1985, ch. 24, Sec. 1-2-1 and 1-2-1.1). Sanitary Districts have similar powers. (Ill. Rev. Stat. 1985, ch. 42, Sec. 305.1, and Section 46(c) of the Act. (IEPA).[80]

The Board has deleted the option of regulating through contracts from the proposal. Units of local government appear to have adequate authority to regulate by ordinance, and this seems to be the clear preference of all commenters. (USEPA, IEPA, NSSD and MSD).

40 CFR 403.8(f)(1)(iii), reflected in Section 310.510(a)(3), requires the POTW to control discharges through "permit, contract, order or similar means." One commenter pointed out that this appears to be inconsistent with control through ordinances. (MSD). The Board has therefore added "ordinances" to the list, and removed "contracts". There are similar problems in several other sentences in this Section.

Section 310.510(a)(4)(B) requires that POTW's have authority to require the development of compliance plans by industrial dischargers. Neither the Board's rules nor the USEPA rules specify the details of the procedures which the POTW must follow to develop such compliance plans. Individual POTW's will propose mechanisms to the Agency for individual approval. The Board assumes this will typically consist of a decision by the POTW's governing body, subject to appeal by way of suing in Circuit Court. However, the Board's rules do not require variances from the categorical standards before the POTW approves a local compliance plan. (PC 21)

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[79]If the state does not allow actual penalties, POTW's have to contract with dischargers specifying penalties. USEPA has proposed to repeal this option at 51 Fed. Reg. 21479, June 12, 1986. (IEPA).

[80]Both are "units of local government" as defined above.

40 CFR 403.8(f)(2) contains several provisions requiring the POTW to share information with USEPA or the State agency. As is discussed above in connection with Section 310.103, USEPA will retain authority to request information pursuant to federal law. Information sharing between IEPA and USEPA will be governed by the MOA. (IEPA and USEPA).

40 CFR 403.8(f)(2)(vii) requires notices to be published in the largest daily newspaper "published" in the unit of local government in which the POTW is located. This is reflected in Section 310.510(b)(7). The Board has modified this to track Section 309.109(a)(2)(C). There are situations in Illinois in which newspapers are "published" in certain municipalities, but are wholly inappropriate for a notice of local importance. (IEPA) The Board has dropped the requirement of publication in a daily newspaper, recognizing that less frequently published papers may actually be the most appropriate place for notice. (IEPA Motion for Reconsideration).

40 CFR 403.8(f)(3), reflected in Section 310.510(c), includes language which allows POTW's to have limited program approval without adequate funding. This has been deleted since further delays are not appropriate at this late date. (IEPA).

Section 310.522

This Section is drawn from 40 CFR 403.9(b). The Board has changed "city attorney or a city official acting in a comparable capacity ... " to "attorney or official acting in a comparable capacity for the unit of local government". (MSD).

Section 310.524

This Section is drawn from 40 CFR 403.9(d). The Board has added this Section to require the POTW to submit the removal credits application. The reference in 40 CFR 403.9(d) to Section 403.7(d) should be corrected to read 403.7(e).

Section 310.531 and 310.532

These Sections are drawn from 40 CFR 403.9(e) and (f). The Board has added references to the removal credits program rules of Subpart C.

Section 310.533

This Section implements 40 CFR 403.9(g). The Section is simple because the Agency is the water quality management agency in Illinois.

Section 310.541

This Section is drawn from 40 CFR 403.11(a).[81] This and the following Sections set up the procedures which the Agency follows

in approving pretreatment programs. As provided above, this results in a modification of the POTW's NPDES permit.

The Board has added references to the removal credits program rules of Subpart C. The references in 40 CFR 403.11(a) to 40 CFR 403.7(d) and 403.9(b) should be corrected to read Sections 403.7(e) and 403.9(d).

Section 310.542

This Section is drawn from 40 CFR 403.11(b). The Board has implemented the USEPA rule by specifying certain agencies which are to receive public notice of the pretreatment program.[82]

The Board has added a reference to the removal credits program rules of Subpart C.

Section 310.544

This Section leads into 40 CFR 403.11(d). The Board has not adopted the USEPA text, since it specifies only procedures to be followed by USEPA.

USEPA has the right to object to a proposed pretreatment program. The program proposal has to be modified to meet this objection. The POTW can contest the objection in accordance with USEPA rules, but cannot appeal the USEPA objection to the Board.

The Board has added a reference to the removal credits program rules of Subpart C. USEPA has the authority to object to each removal credit application from the POTW, as well as to the basic pretreatment program.

Section 310.545

This Section is drawn from 40 CFR 403.11(e). The Board has added a reference to the removal credits program rules of Subpart C. The notice of approval of the pretreatment program has to identify any removal credits authorized.

Section 310.547

POTW pretreatment program approval will be a part of NPDES permit issuance pursuant to Part 309. The program can be

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[81]The Board has adopted no equivalent of 40 CFR 403.10, which governs the IEPA's submission of the State program to USEPA. These rules should be submitted to USEPA as a part of the program submission under this Section.

[82]The Board has specified that regional planning agencies responsible for water quality management plans are to receive notice. This recognizes the interest of the regional planning agencies, such as NIPC, in water quality management plans.

appealed to the Board only as a part of the appeal of a final NPDES permit action. (IEPA).

Section 310.601 Reporting Requirements

This and the following Sections specify reporting requirements. Section 310.601 is drawn from 40 CFR 403.12(a).[83]

As is discussed above, the Board has changed "approval authority" to "Agency" throughout these rules, which will become effective upon program authorization. Until that time USEPA will act as the approval authority pursuant to 40 CFR 403. (USEPA)

Section 310.602

This Section is drawn from 40 CFR 403.12(b). It requires the user to prepare a "baseline report" describing the wastewater and wastewater source.

Section 310.602(e)(1) requires the industrial user to identify the applicable pretreatment standards.[84]

Section 310.602(e)(6) governs sampling and analysis. 40 CFR 403.12(b)(5)(vi) appears to contain a reference to future amendments to 40 CFR 136. The Board believes these are precluded by the APA. Instead, the Board has referenced Section 307.1003, which requires the use of Part 136 methods, and which in turn references Section 310.107, which includes the formal incorporation by reference of Part 136. That Section will be periodically updated as these rules are maintained.

The USEPA rules allow the Administrator to approve alternative sampling and analysis methods. USEPA has indicated that it will retain authority to approve alternative sampling techniques. (IEPA and USEPA) The Board has added a formal incorporation by reference of 40 CFR 403.12(b). This has not been placed with the incorporations by reference Section since it occurs within the equivalent of 40 CFR 403.12(b), and will hence be easy to find during rule maintenance.

The Board has added a reference to the removal credits program rules of Subpart C. (Section 310.602(g)). Industrial user's compliance schedules should to take account of any removal credits.[85]

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[83]Section 403.12(a) contains a definition of "control authority:" the POTW after the pretreatment program has been approved, and the Agency before. The Board has adopted this as a global definition in Section 310.110, since the term is used throughout the Part.

[84]Of course the user may be wrong. This is for the control authority to decide. (NSSD)
(Footnote continued)

Under the federal rule, existing industrial users are required to prepare a "baseline report" within 180 days after adoption of a new pretreatment standard, or within 180 days after a category determination is made.

In Section 310.602(h)[86] the Board has followed the general approach discussed above in connection with compliance dates. Up to the time of program authorization, baseline reports are to be submitted to USEPA pursuant to 40 CFR 403. For standards adopted by USEPA after the Illinois program is authorized, the baseline report due date will be keyed to the time Illinois adopts the standard, which will be a few months after USEPA. In particular, the Board will not require new baseline reports for the standards it adopts with the initial program. (USEPA)

Section 310.605

This Section is drawn from 40 CFR 403.12(e), which allows the control authority to "agree" to alter the requirement of reports in June and December at its discretion, in consideration of such things as budget cycles. It is not clear with whom the agreement is to be made. The Board has simplified and clarified the language, to provide that the control authority "may alter" the due months. The reports will still be due every six months, except for the initial period in which an alternative schedule is established.

Section 310.610

This Section is drawn from 40 CFR 403.12(g). The first sentence of the USEPA rule contains a "therein" which has been rendered as "in the discharge" for clarity. For the reasons noted above, the Section has been edited to reference Sections 307.1003 and 310.602, rather than repeating references to USEPA regulations found in those Sections. (IEPA and USEPA, PC 19)

Section 310.631

This Section is drawn from 40 CFR 403.12(i). The introductory language has been modified to replace "may be" with "is" in the definition of "authorized representative."

Section 310.634

This Section is drawn from 40 CFR 403.12(l). Paragraph (c)

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[85]The Board has changed "and/or" to "or", which appears to convey the correct meaning in this context. "And/or" has come under recent attack from the Administrative Code Unit.

[86]The Board has moved the time provisions to subsection (h) since they are too complex at the State level to be included in the introductory paragraph.

has been modified so that the Agency will control retention of documents by the POTW. As is discussed above, USEPA will retain control pursuant to 40 CFR 403 and will be able instruct the Agency to request longer retention pursuant to the MOA. (IEPA and USEPA)

One commenter suggested that this be amended to allow the POTW to extend the retention period. (MSD). This is clearly not provided under the federal rules. The POTW could provide for this by ordinance.

Section 310.701 Fundamentally Different Factors

This Section is drawn from 40 CFR 403.13(a). This and the following Sections deal with "fundamentally different factors" ("FDF") variances. The Board has modified the rules to avoid describing these as "variances," a term which would be confusing in light of Board variances granted pursuant to Title IX of the Act.[87] (PC 21) The Board has instead used "determination" to describe the fundamentally different factors process.

As is explained in the introductory material to 40 CFR 403.13(b), the need for FDF determinations arises because of the method USEPA chose to establish pretreatment standards. USEPA chose to regulate by industry categories, rather than by pollutant. Industry categories, established by SIC codes, are mainly defined by products, without consideration of pollution potential. This raises the possibility that a discharger may meet the definition for inclusion in an industry category, yet have little in common with the industries which USEPA sampled in establishing the pretreatment standards for the category. USEPA has provided a mechanism by way of the FDF determination for arriving at permit limitations for users which fit into a regulated category, but which have factors fundamentally different than those looked at by USEPA in arriving at the categorical pretreatment standards.

Sections 310.703 et seq. spell out in great detail the factors to be considered by the Agency in making an FDF determination. Section 310.722 allows the requester to appeal a

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[87] Board variances grant temporary relief from a rule when a petitioner demonstrates arbitrary and unreasonable hardship. The petitioner must have a plan for eventual compliance. On the other hand an FDF determination results in a permanent limitation, with no plan for eventual compliance. The variance procedures are clearly inappropriate. There is still a question as to whether the FDF determination is the equivalent of determining an environmental control standard, and hence an action reserved to the Board by Sections 5(c) and 13(a)(2) of the Act, or whether it is implementation of a Board rule as a part of permit issuance, and hence an action reserved to the Agency by Sections 4(g), 4(l) and 39 of the Act. If the decision were reserved to the Board, the appropriate procedure would be the adjusted standards of Section 28.1 of the Act.

denial to the Board. The specified factors appear to be sufficiently detailed to allow the Board to review the Agency's decision in a meaningful way. The Board therefore concludes that the FDF determination is in the nature of a permit review action which is within the Agency's authority.[88,89]

The Agency's comments seek to place the Agency in the position of simply assembling the materials and recommending a decision to USEPA. As adopted, the rules require the Agency to actually make a decision to grant or deny, subject to USEPA approval.[90] USEPA did not object to this aspect of the Board's proposal.

Section 310.702

This Section is drawn from 40 CFR 403.13(b). Much of the basic introductory material, which was referenced above, has been dropped. This relates to the rationale of USEPA in adopting the categorical standards, and is not appropriate in the Board rule, since the Board has merely incorporated the standards by reference.

Section 310.703 and 310.704

USEPA asked that the Board remove references to treatment costs from the FDF factors to comply with recent amendments to the Clean Water Act. (USEPA). These occur in 40 CFR 403.13(c) and (d). Based on the specific request from USEPA, the Board has done this. However, this may cause confusion when USEPA actually amends its rules.

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[88]The question is whether the FDF determination is the equivalent of determining an environmental control standard, and hence an action reserved to the Board by Sections 5(c) and 13(a)(2) of the Act, or whether it is implementation of a Board rule as a part of permit issuance, and hence an action reserved to the Agency by Sections 4(g), 4(l) and 39 of the Act.

[89]The Board retains the authority to issue variances pursuant to the Act for arbitrary or unreasonable hardship. These would have to be consistent with federal law. A variance would have to meet the requirements of a delayed compliance plan, as well as the requirements specified under the Act and Part 104.

[90]The Agency has questioned whether the FDF variance rules need to be adopted at all, since the Board has not adopted an equivalent with respect to the NPDES program. (IEPA). However, the pretreatment program differs from NPDES in an important respect. While Section 39(b) of the Act requires the Agency to apply federal law directly in writing the NPDES permit, Section 13.3 requires the Board to adopt identical in substance regulations. Once the Board takes this step, some sort of sign off is required at the State level before waivers are granted. Moreover, the Board has seen NPDES permit appeals which, at a minimum, would have been simpler if the FDF mechanism had been specifically provided in the Board rules. (Stepan Chemical v. IEPA, PCB 79-161, 39 PCB 130, 416, July 24 and September 4, 1980.)

Section 310.706

This Section is drawn from 40 CFR 403.13(f), which allows more stringent State and local requirements to override FDF determinations. Rather than repeat the directive of the USEPA rule, the Board has implemented it by stating the Illinois law on this. The Agency cannot grant an FDF determination with respect to the more stringent requirements established pursuant to independent Board authority. This presently consists of the cyanide and mercury standards discussed above. Also, the FDF determination could not be used to override any more stringent local limitations based on an evaluation of the system and discharges to it.

Section 310.711

This Section is drawn from 40 CFR 403.13(g), which sets the application deadline for FDF requests. The Board has modified this consistent with the above discussion of compliance deadlines and category request deadlines. Prior to program authorization, FDF requests will be directed to USEPA pursuant to 40 CFR 403. The Board rules will apply only to USEPA standards adopted after program authorization, and times will be keyed to the date of Board adoption. The Board will not allow a new FDF period for the old standards adopted with the program. (USEPA and IEPA).

Section 310.713

This Section is drawn from 40 CFR 403.13(i). It has been reworded for clarity.

Section 310.714

This Section is drawn from 40 CFR 403.13(j). For the reasons noted above, the Board has implemented the USEPA notice requirements with a more specific list of entities to be notified.

Section 310.722

This Section is drawn from 40 CFR 403.13(l). The preceding Section requires the Agency to notify the requester if it denies an FDF determination, or to otherwise forward the request to USEPA with an approval recommendation. Section 310.722(a) references the USEPA procedures for review of FDF determinations, but does not purport to specify them. Section 310.722(b) prohibits the Agency from granting any FDF approval unless USEPA approves.

Section 310.722(c)(1) allows the requester to appeal to the Board any finding of the Agency that FDF do not exist.[91] Section 310.722(c)(2) provides that the requester may contest USEPA decisions only as allowed by USEPA.

Section 310.801

This Section references the USEPA procedures of 40 CFR 403.15 for adjusting categorical standards to reflect the presence of pollutants in intake waters.

Section 310.901 et seq.

These provisions are drawn from 40 CFR 403.16, governing "upsets." An upset is an affirmative defense in the event of an enforcement action. However, to claim an upset, the discharger has to notify the POTW within 24 hours after the upset, and provide certain specified information. If the discharger fails to notify the POTW within 24 hours, the discharger is barred from later claiming that non-compliance resulted from an upset.

Section 310.905 provides that the Agency is to review upset claims, although any determinations are not final actions subject to review. The only review would come in the event of an enforcement action, at which time the Board would decide whether an upset occurred.

JCAR QUESTIONS

The JCAR questions consist of three identical questions for each Part, Parts 307 and 310. These are general questions, and the response is the same for each Part. The Board will therefore answer them in this section of the Opinion.

JCAR first questions how a rule can be adopted more than 180 days after USEPA has adopted it. JCAR asks if Section 5 of the APA applies after 180 days. The Board has held that similar identical insubstance rules are not subject to second notice review by JCAR.[92] In addition, most of the USEPA rules invclved in R86-44 were adopted long before the authorizing statute, P.A. 84-1320. It was impossible for the Board to have met the 180 day requirement during this intitial rulemaking.

The second question concerns the statement of statewide policy objectives in the notices in the Register. Section 13.3 of the Act gives the Board no alternative but to adopt the rules in question. The policies behind the decision to adopt the rules are those of the General Assembly and not the Board. The policy objectives were set forth in Section 11 of the Act, which was referenced in the Notice, as required by the APA.

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[91]The most the Board could do would be to direct the Agency to forward the FDF request to USEPA.

[92]The Board held that Section 5 does not apply in its Opinion and Order of July 16, 1987, in R86-46. (See also R87-3,4; Resolution of June 25, 1987.)

Recognizing that the pretreatment program will have a major impact on units of local government, the Board elaborated on the policy objectives in the notice in the Register.

The third question concerns whether the Board "received" any public comment, and whether it ever considers changing a rule in response to comment. The public comment is detailed above. As is detailed above, the Board has made numerous changes in response to comments.

This Opinion supports the Board's Final Order of this same day. The Board will withhold filing the final rules with the Secretary of State until December 17, 1987, to allow time for final review and motions to reconsider by the agencies involved in the authorization process.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 3rd day of December, 1987, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board