

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 403

[OW-2005-0024; 7980-3]

RIN 2040-AC58

Availability of and Procedures for Removal Credits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Today's Advance Notice of Proposed Rulemaking (ANPRM) seeks comment on two issues concerning the removal credits provisions in the General Pretreatment Regulations. EPA requests comments on whether to amend the list of pollutants for which removal credits are available to add certain pollutants. The pollutants that the Agency would add are those that EPA previously has determined, after an exposure and hazard screening, would not require sewage sludge regulations. EPA is also soliciting comment on options to amend the "consistent removal" provision in the removal credits regulations that would be consistent with a decision of the U.S. Court of Appeals for the Third Circuit.

DATES: Comments must be received on or before December 13, 2005.

ADDRESSES: Submit your comments, identified by Docket ID No. OW-2005-0024 by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

Agency Web site: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

E-mail: OW-Docket@epa.gov. Please specify Docket ID No. OW-2005-0024 in the body of the message.

Mail or Hand Delivery/Courier: Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW-2005-0024. Please include a total of two copies. Hand deliveries/couriers are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OW-2005-0024. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, [regulations.gov](http://www.regulations.gov), or e-mail. The EPA EDOCKET and the federal [regulations.gov](http://www.regulations.gov) websites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or [regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects

or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Section I.B1 of the preamble.

Docket: All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: Jennifer Chan, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; phone number: (202) 564-0995; fax number: (202) 564-6431; e-mail address: chan.jennifer@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this action are governmental entities responsible for implementation of the National Pretreatment Program and industrial facilities subject to Pretreatment Standards and requirements. These entities include:

Category	Examples of regulated entities
Local government	Publicly Owned Treatment Works (POTWs). States and Tribes acting as Pretreatment Program Control Authorities or as Approval Authorities.
State government	
Industry	Industrial Users of POTWs. EPA Regional Offices Acting as Pretreatment Program Control Authorities or as Approval Authorities.
Federal Government	

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by

this action. Other types of entities not listed in the table could also be regulated. To determine whether your organization or facility is regulated by this action, you should carefully examine the applicability criteria in 40

CFR 403.1 and 40 CFR 403.7. If you have questions about the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible.
8. Make sure to submit your comments by the comment period deadline identified.

II. Overview of Removal Credits

A. What are the Existing Rules Relating to Removal Credits?

Section 307(b)(1) of the Clean Water Act (CWA) directs EPA to establish categorical Pretreatment Standards in order to prevent interference with POTW operation and pass through of inadequately treated pollutants. Because, in certain instances, POTWs could provide some or all of the treatment of an Industrial User's wastewater that would otherwise be required pursuant to the Pretreatment Standard, the Act also authorizes a discretionary program for POTWs to grant "removal credits" to their Industrial Users. Removal credits are a regulatory mechanism by which Industrial Users may discharge a pollutant in quantities that exceed what would otherwise be allowed under an applicable categorical Pretreatment Standard because it has been determined that the POTW to which the Industrial User discharges consistently removes the pollutant.

Section 307(b)(1) establishes a three-part test that a POTW must meet in order to obtain removal credit authority for a given pollutant. Removal credits may be authorized only if (1) the POTW "removes all or any part of such toxic pollutant," (2) the POTW's ultimate Discharge would "not violate that

effluent limitation or standard which would be applicable to that toxic pollutant if it were discharged" directly rather than through a POTW, and (3) the POTW's Discharge would "not prevent sludge use and disposal by such [POTW] in accordance with section [405] * * *" (Sec. 307(b)). EPA promulgated removal credit regulation that are codified at 40 CFR 403.7 (See 43 FR 27736, 46 FR 9404, 49 FR 31212, and 52 FR 42434).

Under 40 CFR 403.7, POTWs are authorized to grant removal credits if they meet the conditions outlined in 40 CFR 403.7(a)(3). One condition is POTWs must demonstrate and continue to achieve "consistent removal" of the pollutant. "Consistent removal" is defined at 40 CFR 403.7(b). Another condition is removal credits may only be made available for pollutants that are listed in Appendix G, Table I of Part 403 for the sludge use or disposal practice employed by the POTW, when the requirements in 40 CFR Part 503 are met, or for pollutants listed in Appendix G, Table II of this part when the concentration for a pollutant in the sewage sludge does not exceed the concentration for the pollutant in Appendix G, Table II. In addition, removal credits may be made available for any pollutant in sewage sludge when the POTW disposes all of its sewage sludge in a municipal solid waste landfill unit that meets the criteria in 40 CFR Part 258.

B. Third Circuit Court Decision

The U.S. Court of Appeals for the Third Circuit in *NRDC v. EPA*, 790 F.2d 289 (3rd. Cir. 1986), struck down the 1984 provisions of EPA's General Pretreatment regulations (49 FR 31212) concerning removal credits on the grounds that EPA had not promulgated the comprehensive sewage sludge regulations required by CWA section 405 sludge regulations. In the course of the decision, the court also determined that the definition of "consistent removal" in the regulations failed to implement the requirements of the CWA. The court held that the definition violated a statutory requirement that direct and indirect dischargers be held to the same standards and that EPA's definition of consistent POTW removal, *i.e.* removal that is achieved only 50% of the time, violated section 307(b)(1) of the CWA.

In 1987, the Agency replaced the 1984 "consistent removal" provision with the 1981 provision (46 FR 9404). See 52 FR 42434. On February 19, 1993, EPA promulgated the first round of sewage sludge regulations, 40 CFR Part 503, (58 FR 9248) and included those pollutants

regulated in 40 CFR Part 503 in Appendix G of 40 CFR Part 403, Table I, Regulated Pollutants in Part 503 Eligible for a Removal Credit. Those pollutants not regulated in 40 CFR Part 503 and that the Agency was no longer considering for the sewage sludge regulations were included in Appendix G of 40 CFR Part 403, Table II, Additional Pollutants Eligible for a Removal Credit.

C. What is the Status of EPA's Review of the Existing Part 503 Sewage Sludge Regulations?

The CWA requires EPA to review the sewage sludge regulations every two years to identify additional toxic pollutants in sewage sludge that may warrant regulation under section 405(d). Under a recent biennial review cycle, EPA evaluated publicly available information on the toxicity, persistence, concentration, mobility, and potential for exposure of additional toxic pollutants in sewage sludge. In a late 2003 **Federal Register** notice, EPA outlined a final action plan (68 FR 75531) for reviewing its sewage sludge regulations in response to a 2002 National Research Council (NRC) report that identified a need to update the scientific basis of Part 503. In that notice, EPA also presented the results of its studies to identify additional toxic pollutants that might be candidates for future sewage sludge regulations. EPA identified fifteen pollutants from a list of 803 pollutants for further evaluation and possible regulation. These 15 pollutants, listed below, had a Hazard Quotient (HQ) equal to or greater than one and thus failed the screening. The HQ is the ratio of the magnitude of exposure of the receptor organism (humans, aquatic organism) to the human health or ecological benchmark. EPA will obtain updated concentration data and conduct a refined risk assessment using the data to determine whether to propose amendments to Part 503.

- Acetone
- Anthracene
- Barium
- Beryllium
- Carbon disulfide
- Chloroaniline, 4-; p-Chloroaniline
- Diazinon
- Fluoranthene
- Manganese (from drinking water)
- Methyl ethyl ketone; 2-Butanone
- Nitrate (as Nitrate-nitrogen)
- Nitrite (as Nitrate-nitrogen)
- Phenol
- Pyrene
- Silver

The **Federal Register** notice (68 FR 75531, December 31, 2003) includes

timeframes for taking action on these pollutants. Once this action is taken, Appendix G of the Pretreatment regulation would be modified to add the additional pollutants if warranted. Additional biennial review cycles will occur per section 405(d)(2)(C) of the CWA.

EPA also determined that there was sufficient toxicological and exposure data for 25 pollutants to conclude that these pollutants would not require regulation under Part 503. (With respect to five of these 25 pollutants, EPA has reevaluated its determination because they are undergoing current IRIS (Integrated Risk Information System) or Office of Pesticide Program reassessment.) These 5 pollutants are listed below:

- Benzoic acid
- Butyl benzyl phthalate
- Dichloroethene, 1, 2-trans-
- Dichloromethane; Methylene chloride
- Dioxane, 1,4-

The remaining 20 pollutants, listed in Section III.A., have undergone EPA's rigorous exposure and hazard screening which includes a probabilistic model of 14 potential pathways to humans and ecological endpoints.

III. Solicitation of Comments

This section of the ANPRM describes the two issues EPA is soliciting comments on.

1. Whether EPA should propose to amend the list of pollutants eligible for removal credits to add the 20 pollutants for which the Agency has completed an exposure and hazard screening.

2. Whether there are any options to amend the "consistent removal" provision in the removal credits regulations that would be consistent with the earlier Third Circuit decision.

A. What Action Could EPA Take To Amend the List of Eligible Pollutants

EPA did not propose any changes to the list of pollutants eligible for removal credits or any modifications to the procedures for obtaining removal credits in the 1999 proposed Pretreatment Streamlining Rule (64 FR 39564). (EPA notes that the Agency did propose to change the methodology used for adjusting removal credits to account for system overflows in 40 CFR 403.7(h). See Section III.H. of today's final Pretreatment Streamlining Rule.) A number of commenters asked EPA to consider changes to the regulations to allow greater availability of removal credits for a broader range of pollutants. More specifically, these commenters suggested that EPA further streamline the regulations to make removal credits

available for pollutants EPA is no longer considering for the sewage sludge regulations (40 CFR Part 503). EPA notes that certain pollutants that it evaluated and is no longer considering for the sewage sludge regulations are listed in Appendix G of the 40 CFR Part 403, Table II and are eligible for removal credits. Moreover, as explained above, EPA is at this time evaluating whether to amend the sewage sludge regulations. During any resulting rulemaking, interested parties may submit information and background data to EPA that would support amendments to Appendix G to add additional pollutants for which removal credits will be available.

In addition, a POTW or Industrial User may petition the Agency to establish a Part 503 standard or an amendment to Part 403, Appendix G for a pollutant. The petition must contain documentation consistent with the records of decision underlying current Appendix G listings. Data must be included on the toxicity, fate effects, and environmental transport properties of individual pollutants adequate to allow EPA to construct a Part 503 numerical standard, or to allow EPA to make a finding that the concentration of the pollutant in sewage sludge is not sufficient to create a reasonable probability of negative human health or environmental impact from that pollutant contained in the sewage sludge considering the specific sewage sludge use or disposal practice being employed by the POTW. See the **Federal Register** notice dated December 31, 2003 (68 FR 75531) for the exposure and hazard assessment needed for pollutant to be considered for removal credits.

As discussed in section II.C. of the preamble, there are 20 pollutants that did not fail EPA's exposure and hazard screening. These pollutants, listed below, could potentially qualify for removal credits.

- Acetophenone
- Azinphos methyl
- Biphenyl, 1,1-
- Chlorobenzene; Phenyl chloride
- Chlorobenzilate
- Chlorpyrifos
- Cresol, o-; 2-Methylphenol
- Endrin
- Ethyl p-nitrophenyl phenylphosphorothioate; EPN; Sanox
- Hexachlorocyclohexane, alpha-Hexachlorocyclohexane, beta-
- Isobutyl alcohol
- Methyl isobutyl ketone (MIBK); Methyl-2-pentanone, 4-
- Naled
- N-Nitrosodiphenylamine

- Trichlorofluoromethane
- Trichlorophenoxy propionic acid, 2-2,4,5-; Silvex
- Trichlorophenoxyacetic acid, 2,4,5-; 2,4,5-T
- Trifluralin
- Xylenes (mixture)

EPA could develop upper concentrations for these pollutants and add them to Appendix G of 40 CFR Part 403, Table II through an amendment to the Pretreatment rule. EPA requests comment on whether the addition of any of these 20 pollutants to Appendix G would be helpful to POTWs and IUs in applying for removal credits. Depending on the response, EPA would then consider whether to develop a schedule for proposing an amendment to Appendix G of 40 CFR Part 403, Table II.

B. Consistent Removal Demonstration

EPA did not propose any changes to how a POTW demonstrates "consistent removal" in the 1999 Proposed Pretreatment Streamlining Rule and did not receive comment on this issue. However, in a draft 2004 Report to Congress on the Costs and Benefits of Federal Regulation prepared by the Office of Management and Budget (OMB), OMB requested public nominations of specific regulations, guidance documents and paperwork requirements that, if reformed, could result in lower costs, greater effectiveness, enhanced competitiveness, more regulatory certainty and increased flexibility. These nominations, along with agency responses, were compiled in OMB's March, 2005 report on Regulatory Reform of the U.S. Manufacturing Sector. One of the reform nominations that OMB received suggested that the procedures POTWs must follow to get authority for removal credits are unduly burdensome and thus make removal credits unduly difficult to obtain. The commenter asserted that the required testing procedures do not accurately reflect the actual pollutant removal capability of the POTW and cited as example the requirement under 40 CFR 403.7(b) which requires that the POTW calculate the removal rate based on the average of the lowest half of the removal measurements taken according to listed procedures. The commenter recommended revisions to more accurately reflect the total removal by the POTW, and modifications to facilitate the granting of authority when justified.

With respect to the commenter's concern about "consistent removal", EPA notes that its options are constrained by the Third Circuit's

decision. However, EPA is requesting comment on whether there are any options to amend the consistent removal provision that would simplify or

improve the process for obtaining removal credits that would be consistent with the restrictions previously established by the court.

Dated: September 27, 2005.

Stephen L. Johnson,
Administrator.

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