# Sunshine Act Meetings

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Friday, July 24, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

**DEPARTMENT OF AGRICULTURE**

**AGENCY:** Rural Telephone Bank.

**ACTION:** Regular Meeting of the Board of Directors.

**TIME AND DATE:** 9 a.m., Wednesday, August 5, 1992.

**PLACE:** Salon I, Ballroom Level, The Ritz-Carlton, 401 Ward Parkway, Kansas City, Missouri 64112.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The following matters have been placed on the agenda for the open Board of Directors meeting:

1. Call to Order.
2. Approval of Minutes of the May 19, 1992, Board Meeting.
3. Report on Loans Approved in the Third Quarter of FY 1992.
4. Review of Financial Statements for the Third Quarter of FY 1992.
5. Report on Requests for Waiver of Prepayment Premium.
6. Privatization Committee Report.
7. Prepayment Committee Report.
8. Effect of Federal Credit Reform Act on Interest Rates for Borrowers.
9. Consideration of Resolution to Replace Lost Stock Certificate.
10. Consideration of Resolution to Declare C Stock Dividend.
11. Consideration of Resolution to Adopt Date, Time, and Place for 10th Biennial Stockholders' Meeting.
12. Consideration of Resolution to Adopt Dates for Future Board Meetings.
13. Adjournment.

**CONTACT PERSON FOR MORE INFORMATION:** Matthew P. Link, Assistant Secretary, Rural Telephone Bank (202) 720-0530.

Dated: July 20, 1992.

**James B. Huff, Sr.,**

*Governor.*

[FR Doc. 92-17670 Filed 7-22-92; 2:00 pm]

BILLING CODE 3410-15-F

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**FARM CREDIT ADMINISTRATION**

Farm Credit Administration Board; Regular Meeting

**SUMMARY:** Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), that the October 8, 1992 regular meeting of the Farm Credit Administration Board (Board) will not be held and that a special meeting of the Board is scheduled for Thursday, October 1, 1992. An agenda for this meeting will be published at a later date.

**FOR FURTHER INFORMATION CONTACT:** Curtis M. Anderson, Secretary to the Farm Credit Administration Board, (703) 883-4003, TDD (703) 883-4444.

**ADDRESS:** Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090.

Dated: July 21, 1992.

**Curtis M. Anderson,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 92-17596 Filed 7-22-92; 11:39 am]

BILLING CODE 6705-01-M

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**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

**TIME AND DATE:** 10:00 a.m., Wednesday, July 29, 1992.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

*Summary Agenda*

Because of its routine nature, no substantive discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Proposed amendments to Regulations 2 (Truth in Lending) relating to home equity lines of credit. (Proposed earlier for public comment; Docket No. R-0743)

*Discussion Agenda*

2. Publication for comment of proposed amendments to Regulation C (Home Mortgage Disclosure) to implement section 224 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) regarding setting an exemption standard for nondepository lenders.
3. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452-3684 or by writing to:

Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: July 22, 1992.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 92-17623 Filed 7-22-92; 11:40 am]

BILLING CODE 6210-01-M

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**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM**

**TIME AND DATE:** Approximately 10:30 a.m., Wednesday, July 29, 1992, following a recess at the conclusion of the open meeting.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: July 21, 1992.

**Jennifer J. Johnson,**

*Associate Secretary of the Board.*

[FR Doc. 92-17623 Filed 7-22-92; 11:40 am]

BILLING CODE 6210-01-M

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**DEPARTMENT OF JUSTICE**

**UNITED STATES PAROLE COMMISSION**

Public Announcement

Pursuant To The Government In the Sunshine Act

(Public Law 94-409) [5 U.S.C. Section 552b]

**TIME AND DATE:** 1:00 p.m., Tuesday, July 28, 1992.

**PLACE:** 5550 Friendship Boulevard, Chevy Chase, Maryland, 20815.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Approval of minutes of previous Commission meeting.

2. Reports from the Chairman, Commissioners, Legal, Case Operations, Program Coordinator, and Administrative Sections.
3. Discussion on Enhanced Supervision.
4. Discussion on Voting On Original Jurisdiction Cases.
5. Discussion on Omitted Special Conditions.
6. Discussion of Procedures to be followed when a Release Date is Advanced under 28 C.F.R. Sec. 2.28(e) for Electronic Monitoring or CCC Placement.
7. Discussion on unique issues regarding Military Prisoners.
8. Discussion of Prehearing Disclosure of Codefendant Material.
9. Discussion on Redrafted Procedures for 28 C.F.R. 2.30 Reopenings.
10. Overview of the Policy and Practices of the Community Confinement Program.
11. Discussion on warrants held in abeyance.
12. Modification of Definition of "Value of the Property for Theft and Fraud Offenses."
13. Proposal of a "Limited Contract Parole Program."
14. Discussion on the Commission s AIDS Policy and Special Conditions.
15. Defining the Effect of a Conspiracy Conviction on a Prisoner's Accountability for Crimes Committed By his Co-conspirators.
16. Amendment of 28 C.F.R. Sec. 2.66, Paroling Policy For Prisoners Serving Aggregate U.S. and D.C. Code Sentences.
17. Approval of the Commission's budget for Fiscal Year 1994 prior to submission to the Office of Management and Budget.

**AGENCY CONTACT:** Tom Kowalski, Case Operations, United States Parole Commission, (301) 492-5962.

Dated: July 20, 1992.

**Michael A. Stover,**

*General Counsel, U.S. Parole Commission.*

[FR Doc. 92-17690 Filed 7-22-92; 3:20 pm]

BILLING CODE 4410-01-M

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**DEPARTMENT OF JUSTICE**

**UNITED STATES PAROLE COMMISSION**

*Public Announcement*

Pursuant To The Government In the Sunshine Act
(Public Law 94-409) [5 U.S.C. Section 552b]

**DATE AND TIME:** Tuesday, July 28, 1992, 9:30 a.m., Eastern Daylight Time.

**PLACE:** 5550 Friendship Boulevard, Chevy Chase, Maryland, 20815.

**STATUS:** Closed—Meeting.

**MATTER CONSIDERED:** Appeals to the Commission involving approximately sixteen cases decided by the National Commissioners pursuant to a reference under 28 CFR 2.27. These cases originally heard by an examiner panel wherein inmates of Federal prisons have applied for parole or are contesting revocation of parole or mandatory release.

**AGENCY CONTACT:** Jeffrey Kostbar, Case Analyst, National Appeals Board, United States Parole Commission, (301) 492-5968.

Dated: July 20, 1992.

**Michael A. Stover,**

*General Counsel, U.S. Parole Commission.*

[FR Doc. 92-17691 Filed 7-22-92; 3:20 pm]

BILLING CODE 4410-1-M

Friday
July 24, 1992

# Part II

# Environmental Protection Agency

## 40 CFR Parts 122, 123, and 130

**Surface Water Toxics Control Program, Water Quality Planning and Management Program, and National Pollutant Discharge Elimination System; Rule and Proposed Rule**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 122, 123, and 130**

**[FRL-3979-8]**

**Surface Water Toxics Control Program and Water Quality Planning and Management Program**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** EPA is amending its regulations to respond directly to a court remand of a final rule interpreting section 304(1) of the Clean Water Act (CWA) issued on June 2, 1989 (54 FR 23868). Other amendments finalize regulations proposed on January 12, 1989 (54 FR 1300) to clarify requirements and consolidate reporting required by sections 303(d), 314(a), and 305(b) of the CWA. Another amendment corrects a citation to the CWA.

Section 308(a) of the Water Quality Act of 1987 added section 304(1) to the CWA to accelerate the control of toxic pollutants discharged into surface waters. Section 304(1) required States to identify those waters that are adversely affected by toxic, conventional, and nonconventional pollutants; to identify where additional controls are needed; and to prepare individual control strategies. These actions were to be accomplished according to an ambitious series of deadlines which have now passed (54 FR 23868, June 2, 1989). In today's action EPA is requiring that States identify additional point sources and toxic pollutants being discharged to impaired waters previously identified under section 304(1). However, no new ICSs are required by today's final rule.

As part of EPA's approach to identifying waters in need of additional controls, today's rule also modifies existing EPA regulations that implement section 303(d) of the CWA. Section 303(d) requires the States to identify, establish a priority ranking, and develop total maximum daily loads (TMDLs) for their waters that do not achieve or are not expected to achieve water quality standards. Section 303(d) requires that this list of waters be submitted to EPA "from time to time" for review and approval. In today's action EPA defines "from time to time" for purposes of this listing requirement to mean every two years coincident with submission of the section 305(b) report. Today's actions also clarify the information that is required to be submitted by the States with the section 303(d) list. In addition, EPA is promulgating amendments concerning requirements to report information on the quality of lakes pursuant to section 314(a) of the CWA.

**EFFECTIVE DATE:** This regulation shall be effective at 1 p.m. eastern standard time August 24, 1992. The requirements contained in § 130.7(d)(2) shall apply to State submittals made after the effective date of this regulation.

**ADDRESSES:** The record for this rulemaking is available at: U.S. Environmental Protection Agency, Library M2904 (PM-211-A), 401 M Street SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Bruce Newton, Chief, Watershed Branch, (202) 382-7076.

**SUPPLEMENTARY INFORMATION:**



## I. Authority

This regulation is issued under the authority of the CWA, 33 U.S.C. 1251 et seq.

## II. Background

### *A. Overview of EPA's Water Quality Management Program*

Today's amendments deal with the identification of waterbodies that require the attention of regulatory agencies to ensure that water quality standards are attained and maintained. This is a necessary step of the water quality management process established by the Clean Water Act (CWA). Recently, EPA and the States have undertaken a number of activities to improve the water quality management process to address emerging pollution concerns. These activities include, among other things, adopting new water quality criteria for toxic chemicals and ecological measures (biocriteria), developing nonpoint source management programs, protecting wetlands and other critical habitats, and engaging the public through volunteer monitoring and greater participation in decision making. Sections 304(l) and 303(d) of the Clean Water Act are key elements of the water quality management process. Section 304(l) established a one-time requirement for States to identify waterbodies according to various categories of water quality impairment and to develop individual control strategies. Section 303(d) establishes a continuous process to identify water quality-limited waters, establish priorities, and develop water quality protection plans termed Total Maximum Daily Loads (TMDLs).

Many of the problems affecting the Nation's waters are best addressed through a comprehensive watershed protection process in which all sources and problems are considered cooperatively by multiple agencies with active participation by the affected public and local governments. EPA is encouraging more comprehensive watershed protection. One key initiative is improving the implementation of TMDL requirements contained in section 303(d). EPA has recently issued a guidance document on State and EPA implementation of section 303(d), Guidance for Water Quality-based Decisions: The TMDL Process, April, 1991 (EPA 440/4-91-001). The amendments today are part of this effort to improve the water quality management process.

Although today's actions concern separate statutory requirements, we are addressing them together for the following reasons. Certain of the activities involved in both provisions are similar in that they both require the States to identify and report impaired and threatened waterbodies. Second, to make the reporting less burdensome, many of the State commenters have requested that the various statutory listing requirements under sections 304(l), 303(d), 314(a), and 305(b) be coordinated and eventually consolidated. Finally, EPA wishes to emphasize that the process for TMDL development established under section 303(d) provides an effective means by which the problems identified under the listing provisions of section 304(l) can be addressed. In particular, focused attention of specific waterbodies under section 303(d) will significantly improve the protection and restoration of water quality by encouraging cooperation between agencies, promoting greater public participation, and encouraging all problems in a watershed to be addressed comprehensively instead of in a piecemeal manner.

*B. Section 304(l) of the Clean Water Act (CWA)*

Seciton 308(a) of the Water Quality Act of 1987 (WQA) added section 304(l) to the CWA (hereafter referred to as section 304(l)). EPA adopted rules implementing section 304(l) on January 4, 1989 (54 FR 258) and June 2, 1989 (54 23868).

Section 304(l) of the CWA reinforced the State and EPA activities to identify and control point source discharges of toxic pollutants. Under section 304(l), the States were required to submit to EPA four lists and individual control strategies (ICSs) for review and approval by February 4, 1989. EPA was required to make approval or disapproval decisions on the lists and ICSs by June 4, 1989. EPA's approval or disapproval decisions were then published for public review. The public had 120 days to submit to EPA petitions and comments on the proposed decisions. EPA had until June 4, 1990 to respond to petitions or comments.

Section 304(l) required the States to submit to EPA four lists described as follows:

1. A(i) —A list of those waters in the State that, after the application of technology-based effluent limits, cannot reasonably be anticipated to attain or maintain water quality standards for priority pollutants adopted under section 303(c)(2)(B) of the CWA. This list is referred to as the "mini-list" or "A(i)" list;

2. A(ii) —A list of all waters that after application of technology-based effluent limits, cannot reasonably be anticipated to attain or maintain that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water. This list is referred to as the "long list" or "A(ii)" list;

3. B—A list of those waters that after application of technology-based effluent limits are not expected to achieve applicable water quality standards, due entirely or substantially to point source discharges of priority pollutants. In today's action this list is referred to as the "short list" or "B" list;

4. C—A list of the point sources of the priority pollutants which are believed to be preventing or impairing water quality for waters on the lists and the amount of each priority pollutant discharged by each point source. This list is referred to as the "facility list" or "C" list.

In addition, section 304(l)(1)(D) required that the State prepare and submit to EPA an individual control strategy (ICS) that would achieve water quality standards through the reduction of the discharge of toxic pollutants from point sources to each identified water segment. In the June 2, 1989 final rule, EPA required that ICSs be prepared for each point source identified on the facility list.

The statutory language of section 304(l)(1)(B) required the States to list waters for which water quality standards will not be achieved due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 307(a). The toxic pollutants identified under section 307(a) of the CWA are 65 categories and classes of pollutants that include thousands of compounds. EPA has designated 126 of these pollutants as "priority pollutants" because they are common, widely present chemicals for which toxicological data are available. The regulatory requirements controlling toxic pollutants under section 304(1) of the CWA focus on the 126 priority pollutants.

In the January 4, 1989 rule, EPA interpreted the statute to require that the facilities list ("C" list) identify those facilities that discharge only to waters that do not meet water quality standards due entirely or substantially to point source discharges of priority pollutants (the "short list" of waters). In the June 2, 1989 rule, EPA required that an ICS in the form of an NPDES permit be prepared for each facility identified. Thus, the facilities list was to consist only of facilities discharging toxic pollutants to waters on the short list, or "B" list, and ICSs were required for all facilities on the facilities list.

The Natural Resources Defense Council (NRDC) petitioned for review of EPA's January 4, 1989 regulation interpreting the facility list to include only facilities discharging to waters on the "B" list and interpreting the ICS requirement to apply only to waters on the "B" list. The Ninth Circuit Court of Appeals remanded that portion of the challenged section 304(1) regulation concerning the listing requirements. In *NRDC* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990), the Ninth Circuit held that EPA erroneously interpreted paragraph C as requiring only the listing of point sources discharging toxic pollutants into the waters on the "B" list. The court reasoned that paragraph C unambiguously requires listing of point sources for waters "included on such lists" and the use of the plural "lists" must refer to all three lists. The Court's decision requires EPA to amend its regulations to require the States to identify all point sources discharging any toxic pollutant that is believed to be preventing or impairing the water quality of any stream segment listed to the "A(i)," "A(ii)," and "B" lists, and to indicate the amount of the toxic pollutant discharged by each source. The remand also requires EPA to reconsider its interpretation of ICS requirements under section 304(l)(1)(D). Today's action amends section 304(1) regulations in response to the Ninth Circuit Court's remand. In a proposed rule published elsewhere in this issue, EPA is soliciting comments on which facilities listed pursuant to this final rule will need ICSs.

*C. Section 303(d) of the CWA*

Section 303(d) (established by the 1972 Federal Water Pollution Control Act) requires that each State identify those waters for which existing required pollution controls are not stringent enough to implement State water quality standards. For these waters, States are required to establish total maximum daily loads (TMDLs) according to a priority ranking. The identified waters and loads are required to be submitted to EPA for approval from "time to time".

On January 11, 1985, EPA published a final rule (50 FR 1775) that established 40 CFR part 130 (Water Quality Planning and Management). This rule established certain requirements for State and local government water quality programs, including requirements related to implementation of section 303(d) of the CWA. The regulation did not specify dates for State compliance with the section 303(d) requirements, but reiterated the statutory provision calling for submissions from time to time.

At the same time that regulations implementing the requirements of section 304(l) were proposed on January 12, 1989 (54 FR 1300), new regulatory amendments pertaining to section 303(d) were also proposed. In order to build upon the significant amount of effort expended by the States and EPA to develop the section 304(l) lists, EPA proposed, under the authority of section 303(d), that the States continue identifying, listing, and reporting waters every two years.

Although the intent of the biennial listing proposal was to more effectively implement section 303(d) listing provisions by building on the section 304(l) listing efforts, many commenters were confused about the legal basis for the proposal and objected to it, stating that EPA lacked the authority under section 304(l) to establish the biennial listing requirements. EPA did not finalize the section 303(d) biennial listing proposal with the final section 304(l) rule and instead reopened the public comment period for the section 303(d) proposal on July 24, 1989 (54 FR 30765). The public comment period closed on September 22, 1989.

EPA is today promulgating a simplified version of the proposed section 303(d) listing requirements. The final rule provides States with the option of consolidating section 303(d) listing with the section 305(b) water quality reporting process, thus allowing use of the automated data system for section 305(b) to avoid duplicative reporting.

## III. Scope of This Rule

This section discusses the actions being taken today in two parts. Part A describes EPA's amendments to parts 123 and 130 that respond to the Ninth Circuit's partial remand of EPA's regulation interpreting section 304(l)(1)(C). Part B describes the amendments made to part 130 that relate to the requirements of sections 303(d) and 314(a) and discusses the public comments received in response to the January 12, 1989 proposed rule and the July 24, 1989 reopening of the public comment period.

### *A. New Section 304(l) Listing Requirements*

In the January 1989 final rule, EPA interpreted section 304(l)(1)(C) to require States to identify point sources discharging toxic pollutants only to waters on the short or "B" list. See 40 CFR 130.10(d)(3). States submitted their 304(l)(1)(C) facility lists in accordance with this interpretation.

#### 1. Summary of Court Order

By opinion, on September 28, 1990, the U.S. Court of Appeals for the Ninth Circuit required EPA to amend its regulations at § 130.10(d)(3) to "require the states to identify all point sources discharging any toxic pollutant which is believed to be preventing or impairing the water quality of any stream segment listed under CWA §§ 304(l)(1) (A) and (B) and to indicate the amount of the toxic pollutant discharged by each source." *NRDC* v. *EPA*, 915 F.2d 1314, 1324 (9th Cir. 1990). Today's amendments fulfill this requirement.

#### 2. Response to the Court Order on Section 304(l)

a. *Changes to 40 CFR 130.10(d).* In response to the court order, EPA is amending § 130.10(d)(3), which refers to the "C" list or facility list, by changing the wording from "such list" to "such lists." This amendment means that some point sources and amounts of priority pollutants discharged need to be identified for waters on the "A(i)" (mini) and "A(ii)" (long) lists. Pursuant to the regulations promulgated in 1989, States have already identified facilities discharging to waters on the "B" (short) list. In order to respond to today's action, States should use existing, readily available information to identify waters on their "A(i)" and "A(ii)" lists that are listed because the waters were impaired by priority pollutants. The States should then list any point sources believed to be discharging these priority pollutants to the listed waters. States must also identify the quantity of section 307(a) pollutant(s) being discharged to the listed water bodies from the newly identified point sources.

The requirements of the court order indicate that a point source must be listed if, as stated in § 130.10(d)(3), it is discharging a toxic pollutant "believed to be preventing or impairing" water quality for each segment of water on all lists (not just the "B" list). To comply with this requirement States must use, at a minimum, existing and readily available data to add any facilities to their existing "C" list (facility list) and otherwise follow procedures established in part 130 for the original section 304(l) lists. EPA will follow the procedures for approval or disapproval of the expanded list and ensure an opportunity for public review and comment (at the State or federal level). Because the lists of waters have already been established within the process required by the statute and regulations, the lists of waters need not be altered.

The court order leaves open the question of whether these additional submissions should list facilities discharging as of February 4, 1989; September 28, 1990 when the remand was issued; or the present. Similarly, it is unclear whether only existing and readily available water quality-related data as of February 4, 1989 should be used. Since the intent of section 304(l) is to be protective of water quality, the Agency would prefer identifying all facilities and pollutants contributing to the problem. However, in view of the short timeframe involved, EPA encourages the States to use discretion in the use of existing and available information. It may not be feasible to recreate the State data base to a given time period, especially if States have already revised their lists or water quality data. Therefore, the EPA is recommending that States use data and information that is readily available.

States are expected, as soon as possible, to compile and submit to the Regional Administrator for review and approval or disapproval the additions to the "C" list of point sources and amounts of toxic pollutants discharged. The new "C" lists must be submitted to EPA as soon as possible because the deadline for submission passed while the original regulations were being reviewed by the court. As a matter of policy guidance, EPA is requesting that States submit their lists within sixty days from the date of publication of these amendments. EPA notes that this would normally provide an unreasonably short amount of time for States to respond to these regulatory amendments. However, EPA has already notified the States of the listing requirements resulting from the Court remand and the requested schedule for submission.

A state's new "C" list does not need further documentation unless a State has changed its methodology from the initial listing, because EPA has already reviewed the documentation required in § 130.10(d)(6). However, EPA may request additional documentation of the decisions, under the procedures promulgated June 2, 1989. EPA shall review the new submissions according to the procedures set forth in 40 CFR 130.10(d)(8)–(10), except that the Regional Administrator shall approve or disapprove of the new lists by 60 days after publication of the rule plus 120 days (§ 130.10(d)(8)), January 20, 1993, and, when appropriate, shall implement the listing requirements and respond to public comments and petitions by 180 days after publication of the rule, plus one year § 130.10(d) (9) and (11)), January 20, 1994.

b. *Changes to 40 CFR 123.46(a).* EPA regulations at 40 CFR 123.46(a), which implement section 304(l)(1)(D) of the Clean Water Act, require ICSs for all facilities appearing on State "C" lists. This requirement at § 123.46(a) was based on EPA's interpretation of section 304(l)(1)(C), under which facilities would be listed on State "C" lists only if they were found to be discharging toxic pollutants to waters on State "B" lists. However, as discussed above in *NRDC* v. *EPA*, the Ninth Circuit invalidated EPA's interpretation of section 304(l)(1)(C) and required EPA to amend its regulations at § 130.10(d)(3) to reflect the Court's interpretation that facilities discharging toxic pollutants to waters on State "A" lists should also appear on State "C" lists. In today's rule, EPA is changing the wording of § 123.46(a) in order to maintain the original meaning of those regulations pending reconsideration of the scope of the ICS requirement.

Section 123.46(a) previously required States to submit individual control strategies to EPA for each point source identified by the State pursuant to section 304(l)(1)(C). If that language were to remain as it is, today's change in § 130.10(d)(3) could be read to require, immediately, ICSs for each point source discharging toxic pollutants to waters listed on the "A" or "B" lists. Because the statute is ambiguous, if EPA were to implement such a requirement, it would normally do so only after an opportunity for public comment. Therefore, EPA is amending § 123.46(a) to require States to submit individual control strategies to EPA for each point source identified by the State pursuant to section 304(l)(1)(C) which discharges the toxic pollutant(s) of concern to a water identified by the State pursuant to section 304(l)(1)(B). This change is necessary to maintain the original meaning of the language at § 123.46(a) in light of today's amendment to § 130.10(d)(3). Most of the ICSs required under old and new § 123.46(a) have already been established. Under today's rule no additional ICSs are required.

The Ninth Circuit required EPA to reconsider its interpretation of section 304(l)(1)(D) of CWA. EPA is reconsidering its interpretation of section 304(l)(1)(D) to decide whether additional ICSs will be required, given the court's interpretation of section 304(l)(1)(C), and may find it necessary to amend its regulations at § 123.46(a). EPA intends to solicit public comment on its interpretation of the ICS requirement pursuant to section 304(l)(1)(D) of the CWA. Elsewhere in today's **Federal Register**, EPA is proposing options for interpreting section 304(l)(1)(D) in light of the decision of the U.S. Court of Appeals for the Ninth Circuit. This proposal will directly address the question of whether to amend § 123.46(a) to reflect a requirement to submit additional ICSs.

The purpose of today's amendment to the section 304(l) regulations is to correct EPA's interpretation of the CWA as required by the court. Therefore, the rulemaking is properly classified as an interpretive rule, see *United Technologies Corporation* v. *EPA*, 821 F. 2d 714, 718 (D.C. Cir. 1987), in that it corrects an erroneous interpretation of the statute and does not "create new law, rights or duties," *Citizens to Save Spencer County* v. *EPA*, 600 F. 2d. 844, 876 n. 153 (D.C. Cir. 1979). The Administrative Procedure Act (APA) specifically excludes "interpretive" rules from its notice and comment procedures. 5 U.S.C. 553(b)(A).

### *B. Section 303(d) of the CWA and Amendments to §§ 130.7, 130.8, and 130.10*

#### 1. Introduction: Relationship of Section 303(d) of the CWA and EPA's Water Quality Planning and Management Program

EPA's water quality planning and management regulations are established under the authority of several sections of the CWA, including sections 106, 205(g), 205(j), 208, 303, 304(l), 305 and 501. Part 130 sets out the planning and management activities to be undertaken by States including establishment of water quality standards, water quality monitoring, the development of lists of impaired waters, the development of individual control strategies for certain pollution sources, the establishment of TMDLs and the development of State-level continuing planning processes, water quality management plans, and biennial water quality reports.

Section 303(d) of the CWA requires that each State identify waters for which existing required pollution controls are not stringent enough to achieve State water quality standards. These waters are referred to as "water quality limited." The States are required to rank their water quality-limited segments by priority, and establish TMDLs for them. The list of identified waters, rankings and TMDLs are required to be submitted to EPA for approval.

Section 130.7(d) currently provides that the lists and TMDLs be submitted to EPA by the States "from time to time" for approval. No specific schedule is defined in the current regulation. Once the lists and TMDLs are approved, they are automatically incorporated into the State's current water quality management plans.

#### 2. Today's Final Actions and Response to Comments Received on Section 303(d) Proposed Rule

This section discusses today's actions to amend EPA's Water Quality Planning and Management Regulations at 40 CFR 130.7, 130.8, and 130.10. The first part of this section describes the new requirements for identifying water quality-limited waters and reporting these waters to EPA. These requirements are established today by amending §§ 130.7 and 130.10. The second part of this section describes the amendments to § 130.8 which requires that the assessment of publicly owned lakes be reported by States to EPA in their water quality assessment (section 305(b)) reports.

This section is arranged according to major topics covered by today's actions. Each topic contains a summary of today's actions on that topic, presents the major issues raised by the comments during public notice and discusses substantive changes from proposed regulation.

a. *Amendments to §§ 130.7 and 130.10—*i. *Identification of waters and listing format.* Under the existing regulations, States are required to identify water quality-limited segments, establish a priority ranking for these waters, and develop Total Maximum Daily Loads (TMDLs). Today's amendments do not change these requirements. Today's actions specify that States submit their list of waters, including those waters targeted for TMDL development, to EPA every two years coincident with the section 305(b) report and provide documentation to support the States' determinations.

The amendments proposed on January 12, 1989 differed from today's final actions. The proposed amendments, would have required the States to develop three lists based on the following three separate subcategories of water quality-limited waters, similar in some respects to the format required for lists developed under section 304(l) of the CWA:

(i) List of waters where numeric water quality standards for priority pollutants are not achieved due to either point or nonpoint sources of pollution;

(ii) List of all waters which cannot achieve either numeric or narrative water quality standards for a priority pollutant due entirely or substantially to discharges from point sources; and

(iii) A list of waters still requiring TMDLs that do not fit under category (i) or (ii).

Together, the combination of lists in the three-list format would have included waters listed in the section 304(l) "long list," except for waters meeting the State standards but not meeting the fishable/swimmable goals of the Act. In the preamble to the proposed rule, EPA asked for comments on an alternate two-list format. The two-list format would have included one list of water quality-limited segments due to any discharges of the 307(a) toxic pollutants, ammonia, and chlorine from point or nonpoint sources (called the

"Toxics List"), and the second list would have included waters not achieving water quality standards due to all pollutants from either point or nonpoint sources.

Many commenters stated that the proposed listing requirements were very confusing. They contended that even if the two-list format was adopted, this would not facilitate the identification process. Many commenters indicated that the listing format that grouped together toxics with ammonia and chlorine would be inconsistent with the listing requirements for 304(l). Several commenters indicated that the proposed listing format continued to focus on point source discharges of section 307(a) pollutants whereas, under section 303(d), all water quality-limited waters are required to be identified and should include point and nonpoint source impacted waters.

Given these comments, it was apparent that there continued to be confusion about the relationship between the section 304(l) listing exercise and the identification requirements under section 303(d). The section 303(d) identification process existed prior to the implementation of the section 304(l) requirements. Today's actions clarify the existing requirements under section 303(d). However, the link to section 304(l) remains, in that a basic requirement of the listing processes under both sections 303(d) and 304(l) is to identify water quality-limited waters. While it is not EPA's intent for States to duplicate the section 304(l) listing exercise every two years, EPA recommends that the States use the information developed for the section 304(l) lists to develop the section 303(d) list of waters. Also the section 303(d) listing process will not be used to track the implementation of individual control strategies (ICS) that were required for point sources of toxic discharges under section 304(l). This will be tracked through other EPA mechanisms under the NPDES program.

One commenter suggested that EPA take time to review the results of the section 304(l) listing requirements prior to adopting the new listing format for section 303(d) waters. One commenter suggested a one-list format to identify those waters not meeting water quality standards, with each entry on the list accompanied by an explanation that identifies the cause of the problem for each entry, such as section 307(a) pollutant, point source, nonpoint source, etc.

EPA has reviewed the results of the section 304(l) listing requirements and has considered the objectives for the TMDL program, that is for States to identify water quality-limited waters and establish a priority ranking for TMDL development. With this in mind, today's amendments require the States to identify water quality-limited waters still requiring TMDLs in a single list format.

On January 12, 1989 EPA proposed that States identify waters for which applicable standards will not be achieved due to discharges from point sources of section 307(a) toxic pollutants. Parallel with this requirement was the identification of the point sources responsible for impairment of these waters. These proposed requirements are being dropped today. States and numerous other commenters objected to the use of the section 303(d) listing authority to identify point sources of pollutants. Many states indicted that the inclusion of a point source list in the section 305(b) report, as the proposal would have required, was not appropriate and would be a major departure from past section 305(b) reports which focused on waterbodies. Also, many commenters indicated that these requirements would, in effect, repeat the section 304(l) process every two years. EPA agrees with these comments. While actual sources contributing to water quality standards exceedances must be identified prior to TMDL development or NPDES permitting, EPA does not believe that the identification of individual sources necessarily must take place as part of the biennial listings of problem waterbodies under sections 303(d) and section 305(b). Therefore, EPA is removing the proposed point source listing requirement (paragraphs (b)(2)(ii) and (b)(9) of the January 12, 1989 proposed rule).

While States are not required to list specific point sources, EPA is suggesting that States use the section 305(b) automated data system source categories to characterize waterbodies that need TMDLs. Examples of these source categories are municipal discharges, industrial discharges, agriculture, silviculture, urban runoff, and construction. This information will be cross referenced using the section 305(b) Waterbody Identification Number.

ii. *Priority ranking, including identifying waters targeted for TMDL development.* Section 303(d) of the CWA currently requires that each State rank by priority their water quality-limited waters. Today's actions reaffirm the importance of priority ranking by the States and also adds specificity regarding how a State will meet this existing requirement.

The final amendments require that each State prioritize waters on its 303(d) list and, as part of this prioritization, identify the water quality-limited waters that are targeted through priority ranking for TMDL development over the next two years. The State's water quality planning and management activities should include the development and implementation of TMDLs for their water quality-limited waters, and the State's annual work program should reflect those TMDLs targeted for development and TMDL activities on an ongoing basis. The two-year time frame was selected to be consistent with the section 305(b) biennial reporting process. States should include in their identification of waters targeted for TMDL development both "complex" TMDLs that may cover a large watershed or address particularly challenging pollution problems and routine or "simple" TMDLs that may be developed as part of an NPDES permit reissuance.

Section 303(d) of the CWA currently requires that when setting priorities, States must consider the uses of identified waters and the severity of the pollution. These are the minimum, but not necessarily the only factors a State should consider in developing a priority ranking. EPA did not propose new amendments to describe other factors to consider, but in the July 24, 1989 notice to reopen the proposed amendments for comments, EPA did specifically request input on the issue of priority ranking and factors to consider. The comments received were used in the development of the EPA guidance document entitled "Guidance for Water Quality-based Decisions: The TMDL Process" (EPA 440/4–91–001). This document contains guidance on priority ranking of water quality-limited waters and describes how the ranking process should result in the targeting of waterbodies for TMDL development. Identification and scheduling of targeted waterbodies for the development of TMDLs are critical steps in the implementation of section 303(d) of the CWA.

As stated in the guidance document, targeting of high priority waters for TMDL development should reflect an evaluation of the relative value and benefit of waterbodies within the State and take into consideration the following: Risk to human health and aquatic life; degree of public interest and support; recreational, economic, and aesthetic importance of a particular waterbody; vulnerability or fragility of a particular waterbody as an aquatic habitat; immediate programmatic needs such as wasteload allocations for permits or load allocations for best management practices (BMPs); water pollution problems identified during the development of the section 304(l) "long list;" and national policies and priorities such as those identified in EPA's Annual Operating Guidance.

The proposed amendments would have established a new paragraph (b)(7) requiring that a priority ranking be established for water quality-limited waters. However, as one commenter noted, this requirement also appeared in existing § 130.7(b)(1) which was not proposed to be changed. EPA feels that it would be redundant to include this requirement twice in its regulations, as proposed. Today's action moves the existing reference to priority ranking in paragraph 130.7(b)(1) to new 130.7(b)(4) where the identification of waters targeted for TMDL development in the next two years is discussed.

Although this priority ranking requirement is not new, many commenters indicated that the requirements for it were not clear. One commenter specifically requested a clarification of the existing requirement for submission to EPA of the priority ranking. Therefore, to satisfy the priority ranking requirement of section 303(d), to clarify the submission requirement, and to ensure that States proceed with the development of TMDLs for their water quality-limited waters, EPA, in paragraph (b)(4) of today's action, is requiring a priority ranking of all water quality-limited waters still requiring TMDLs and the identification of those water quality-limited waters that have been targeted through priority ranking to have TMDLs developed in the next two years. The waters targeted for TMDL development should be highlighted within the list of water quality-limited waters to be submitted every two years coincident with the section 305(b) report.

iii. *Identification of pollutants.* The existing regulations at § 130.7(b)(1)(iii) require that States "shall identify the pollutants causing or expected to cause violations of the water quality standards" for water quality-limited segments still requiring TMDLs. Today's amendments do not change this requirement. To identify water quality-limited waters that still require TMDLs, the particular pollutant causing the problem will usually be known. However, pollutants include both individual chemicals and characteristics such as nutrients, BOD, or toxicity. Moreover, many waters do not meet standards due to non-chemical problems, such as siltation. Therefore, EPA recommends the use of the existing cause classification system used in the section 305(b) water quality reporting process to identify pollutants causing water quality standards' exceedances in segments still requiring TMDLs.

EPA recommends that the States use the "cause categories" described in the "Guidelines for the Preparation of the 1992 State Water Quality Assessment (section 305(b)) Report" or the most recent guidelines issued by EPA for the section 305(b) report. The WBS provides for both the identification of specific water bodies as well as fields for identifying causes. While the cause categories in the WBS include both general and specific pollutants such as pesticides, priority organics, metals, ammonia, chlorine, and thermal modification, there is a mechanism for States to develop additional categories for such parameters as chromium, lead, trichloroethylene, specific habitat alterations, contaminated sediments, etc., as desired.

In the January 12, 1989 proposed amendments, a separate paragraph (b)(8) was proposed that duplicated the existing requirement at paragraph (b)(1) of section 130.7 to identify pollutants (which in today's actions has been moved to paragraph (b)(4)). One commenter indicated that this was redundant. EPA agrees. Therefore, in today's actions the proposed paragraph (b)(8) has been deleted.

iv. *Biennial listing.* EPA proposed a requirement for the submission of the section 303(d) list to EPA biennially within the water quality report required by section 305(b) of the CWA. The proposal also would have required the biennial identification of point sources discharging toxic pollutants to those waters where water quality problems are due entirely or substantially to point source discharges of toxic pollutants. Under today's final action the States have a choice to submit the section 303(d) list to EPA as a part of the section 305(b) report or separately with the section 305(b) report. In addition, there is no requirement for the identification and listing of point sources discharging toxic pollutants to those waters where such discharges are entirely or substantially causing the water quality problem.

Many States supported the proposed amendments that would have required States to submit their section 303(d) lists of waters in their biennial section 305(b) reports. Some commenters, however, disagreed with the biennial reporting for the following reasons:

(1) The level of effort would be similar to the level required for the section 304(l) list and therefore would be an excessive amount of work to be done every two years;

(2) Since the section 305(b) report is a vehicle some States use to generate support for and greater awareness of water quality programs, it is an inappropriate vehicle to specifically list point sources; and

(3) The inclusion of point sources would be a major departure from previous section 305(b) reports which focused on overall state water quality.

In response to these comments, EPA has lightened the reporting burden somewhat by eliminating from the final section 303(d) rule the requirement for multiple lists and the listing of point sources of toxic pollutants. In addition, EPA has decided to provide flexibility to those States that may wish to separate their section 303(d) lists from the section 305(d) reports. Under today's rule, States may include the section 303(d) lists in the section 305(b) reports or may submit them at the same time as the section 305(b) reports but under separate cover.

v. *Applicable standard definition.* In the January 1989 proposed rule EPA defined the term "applicable standard" for listing waters impacted by point source discharges of toxic pollutant as a numeric criterion for a toxic pollutant within State water quality standards or, where a State numeric criterion for a toxic pollutant is not established in State water quality standards, the State's narrative water quality standards interpreted by applying the EPA national water quality criteria on a chemical-by-chemical basis. This definition was also proposed for the section 304(l) listing requirement, and a modified version of it was ultimately promulgated under § 130.10(d) for the development of section 304(l) lists.

Forty-seven comments addressed this issue. Several commenters pointed out that this definition of applicable standard is not valid for listing under section 303(d) of the CWA. Section 303(d) requires the States to identify all impaired waters regardless of whether the impairment is due to toxic pollutants, other chemicals, heat, habitat, or other problems. The proposed definition for applicable standards deals only with the toxic pollutants. Generally, the commenters disagreed with the proposed requirement for interpreting narrative criteria, especially by "applying EPA national water quality criteria on a chemical-by-chemical basis." One commenter argued that narrative water quality criteria interpreted on a chemical-by-chemical basis would exclude those waters that are biologically impaired and that this approach would not be consistent with proposed 40 CFR part 122 which provided for derivation of effluent limits to control whole effluent toxicity.

EPA agrees that the proposed definition is too narrowly focused on toxic pollutants to be applicable for identifying all waters pursuant to section 303(d). Therefore in today's final action the term "applicable standard" for the purposes of listing waters under section 303(d) is defined in § 130.7(b)(3) as those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses and antidegradation requirements. In the case of a pollutant for which a numeric criterion has not been developed, a State should interpret its narrative criteria by applying a proposed state numeric criterion, an explicit State policy or regulation (such as applying a translator procedure developed pursuant to section 303(c)(2)(B) to derive numeric criteria for priority toxic pollutants), EPA national water quality criteria guidance developed under section 304(a) of the Act and supplemented with other relevant information, or by otherwise calculating on a case-by-case basis the ambient concentration of the pollutant that corresponds to attainment of the narrative criterion. Today's definition is consistent with EPA's Water Quality Standards regulation at 40 CFR part 131. EPA may disapprove a list that is based on a State interpretation of a narrative criterion that EPA finds unacceptable.

vi. *Thermal waters.* The existing regulations under § 130.7(b)(2) require States to identify waters impacted by thermal discharges to the extent that controls on thermal discharges are not sufficient to protect and allow propagation of a balanced indigenous population of shellfish, fish and wildlife. These waters are also subject to the TMDL process and are required to be identified with the list of water quality-limited waters described under § 130.7(b)(1). The regulations suggest that a second list covering only thermally-impacted waters may be required.

EPA received several comments requesting that the reporting requirements by the States be consolidated. To achieve this, today's final action requires the States to submit to EPA one list of water quality-limited waters requiring TMDLs. This list will include waters impacted by toxic, conventional, non-conventional pollutants and thermally impacted waters. In order to identify waters impacted by thermal discharges, States may use the "cause" categories in the section 305(b) automated data system which contains a field "thermal modification." A discussion of pollutant identification can be found elsewhere in this preamble.

vii. *Documentation factors.* Today's actions specify in § 130.7(b)(5) that the States must use, at a minimum, existing and readily available water quality related data and information to prepare the section 303(d) list of waters. EPA proposed sixteen categories of waters for which all existing and readily available information needed to be considered in preparation of sections 304(l) and 303(d) lists (54 FR 1300). These categories were finalized as documentation factors for the section 304(l) listing requirement (54 FR 23668).

In response to comments discussed below, EPA removed the proposed category, "waters on the section 303(d) list," and revised the remaining categories into four more generalized categories for section 303(d) lists. These four categories are the minimum data and information that a State must "assemble and evaluate" when developing its section 303(d) list. The four broad categories promulgated today are intended to include fifteen of the categories developed for listing under section 304(l) as follows:

(1) Waters identified in a State's most recent section 305(b) report as having impaired or threatened designated uses (130.10(d)(6)(i)–(iv), (viii), (xii), (xiv));

(2) Waters for which dilution calculations or predictive models indicate nonattainment of State water quality standards, either numeric or narrative (130.10(d)(6)(ix–xi));

(3) Waters with water quality problems reported by State, local or Federal agencies, members of the public, or academic institutions (130.10(d)(6)(vi)–(vii), (xiii), (xvi)); and

(4) Waters impaired or threatened by nonpoint sources and identified by States in submissions to EPA under section 319 of the CWA (130.10(d)(6)(xv));

Several commenters indicated that many of the sixteen categories were not appropriate for the section 303(d) list development, including the "fishable/swimmable" category, the category of waters on the section 303(d) list, categories concerning designated use impairment (e.g., closed shellfish waters), and the categories concerning dilution analyses for only point source discharges of toxic pollutants. Commenters requested addition of other categories, some site specific. In addition, many States expressed concern that redoing many of the specific, narrow dilution analyses and effluent toxicity tests every two years would be unnecessarily burdensome.

EPA agrees with commenters who felt that the category of waters that will not support the "fishable/swimmable" goals of the CWA could include waters that meet State water quality standards. Water quality standards consist of designated uses for waters, criteria sufficient to protect such uses, and an antidegradation policy to maintain existing uses and protect high quality waters. Therefore, some waters that are not designated fishable/swimmable can, nonetheless, meet State water quality standards. However, waters that are designated fishable/swimmable, but are not meeting that use, do not meet water quality standards. Waters that are not designated fishable/swimmable and that meet designated uses and applicable criteria should not be listed under section 303(d).

Several commenters expressed concern over the burden of listing and documentation to support the listing decisions. EPA agrees that the States should retain a certain amount of flexibility in developing their section 303(d) list, but at the same time States should be prepared to demonstrate to EPA that all existing and readily available data and information relevant to identifying water quality-limited waters are used to develop section 303(d) lists. Today's final action consolidates 15 of the 16 categories used to list section 304(l) waters into four broad categories to reflect EPA's position on use of existing and readily available information to develop section 303(d) lists.

There are additional reasons for consolidating the categories. Today's rule provides an option for the States to consolidate the section 303(d) listing requirement with the section 305(b) reporting process, since much of the analysis and data evaluation a State performs to develop the section 305(b) report is relevant to identifying water quality-limited waters under section 303(d). A number of categories among the sixteen proposed in January 1989, describe water quality problems that a State considers in developing its section 305(b) report. These categories are consolidated in today's rule under § 130.7(b)(5)(i). A number of the sixteen categories proposed were narrowly focussed on point sources of toxic pollutants as required for the section 304(l) lists. These categories have been broadened to include dilution calculations and predictive modeling that indicate nonpoint source impacts and impacts from pollutants other than the priority pollutants and can be found in today's rule under § 130.7(b)(5)(ii). It is not expected that States will prepare dilution calculations on every point source discharger every two years, but they will need to consider the most recent analyses, often done during permit issuance.

The four categories included in today's regulation are not intended to exclude any information that is relevant to developing section 303(d) lists. States are required to use all existing and readily available data and information. For example, States should consider their section 304(l) lists and also available Toxic Chemical Release Inventory (TRI) data reported under the Emergency Planning and Community Right-to-Know Act.

Today's action specifies the minimum documentation the States must provide when submitting their section 303(d) list of waters. The requirements (described in paragraph (b)(6) under § 130.7) to submit documentation to EPA describing the data, information, and methodology used to develop the list, the rationale to exclude any particular category of information from consideration, and other reasonable information requested by EPA have not changed from the proposed language. Some commenters interpreted this requirement to mean that each water segment listed would have to be accompanied by a specific rationale for listing that particular water segment or water body and that the use of the words "demonstrate good cause" for not listing a waterbody puts the burden of proof on the States to justify exclusion of any waterbody. EPA is not necessarily requiring that listing decisions for each waterbody in the State be specifically documented as an initial matter; rather, today's rule requires documentation for the list as a whole. EPA may request documentation of specific waters during review, to justify how States addressed known water quality concerns in the list.

viii. *Submission of lists and EPA approval.* Section 303(d) and existing § 130.7 currently require each State to submit its list of water quality-limited waters "from time to time." Today's action establishes that, for the purposes of identifying water quality-limited waters still requiring TMDLs, "from time to time" means once every two years. The list of waters still needing TMDLs must also include a priority ranking and must identify the waters targeted for TMDL development during the next two years. Today's regulation makes no changes regarding the timing for TMDL submission. Such submissions should be made from time to time, when they are ready for EPA review.

Today's regulation specifies that the date for submission of the section 303(d) list of waters is the same as for submission of the section 305(b) report. The list may be submitted as part of the section 305(b) report or under separate cover. EPA is taking this action to consolidate the States' reporting requirements and allow the use of the section 305(b) automated data system to lessen the burden to the States.

The April 1991 program guidance suggested a submittal date of April 1, 1992, and most States have made their submissions. Today's rule provides that for the 1992 biennial submission, these lists are due no later than October 22, 1992. EPA believes that it is important for States developing TMDLs within the next two years and thereafter to have a reasonably up-to-date list of waters needing TMDLs. Today's requirement therefore ensures both that all States will have reasonably up-to-date lists within 90 days of publication of this rule and that the lists will be updated every two years thereafter. When a State makes their 1992 submission prior to the effective date of today's rule, or thereafter revises the list at EPA's request after the effective date of today's rule, the State list is not subject to the new requirements contained in these amendments.

Although most States supported consolidating reporting with the section 305(b) process, a few States and commenters argued that EPA does not have the authority to require biennial submissions of section 303(d) lists of waters. Section 303(d) requires States to identify and list the waters within its jurisdiction that do not or are not expected to achieve water quality standards, and to develop TMDLs for these waters. The States must also identify the pollutants preventing the attainment of water quality standards. Section 303(d) also gives EPA the authority to review and approve or disapprove the lists of waters prepared by a State.

Section 305(b) of the CWA requires each State to submit to EPA, biennially, "a description of the water quality of all navigable waters in such State." As part of section 305(b), States already list specific waterbodies that do not meet State water quality standards and the causes and sources of impairment. EPA and most of the State commenters agree that it makes sense to consolidate the sections 305(b) and 303(d) reporting processes. Moreover, EPA has authority under section 501(a) to interpret the statutory phrase "from time to time" to require biennial submission of section 303(d) lists.

In response to several commenters that argued that the section 305(b) report was not an appropriate vehicle for reporting section 303(d) waters and pollutants and that the proposed documentation requirements were also inappropriate as applied to the section 305(b) report, today's amendments allow States to submit the list required under section 303(d) separately from the section 305(b) report. EPA encourages the States to use the section 305(b) format and especially the Waterbody System in order to consolidate their reporting requirements.

Today's action drops the proposed amendment to § 130.8 which would have required the section 303(d) list to be submitted in the section 305(b) report. Today's amendments to § 130.10(b)(2) require submission of the list of section 303(d) waters, pollutants, priority ranking, and targeted waterbodies once every two years.

In addition, today's action specifies that EPA's approval of the list is dependent on whether a State has met the requirements specified in the regulation under § 130.7(b). This section describes how a State identifies and targets by priority ranking its water quality-limited waters that still require TMDLs, the requirements that States use, at a minimum, all existing and readily available water quality-related data and information and that States provide documentation to support their determinations. EPA may, of course, approve any component of a State submission that is deemed adequate, even if some components are lacking or are deemed inadequate.

b. *Amendments to § 130.8.* Today's amendments add paragraph (b)(5) to § 130.8 to require that lake water quality assessments be submitted biennially as part of each State's section 305(b) report. No changes have been made to the proposal. Section 314(a)(2) of the CWA requires that each State submit biennially to EPA an assessment of the water quality of all publicly owned lakes.

The specific elements of the required assessment are outlined in section 314(a)(2) and include a list and description of those publicly owned lakes for which uses are know to be impaired, a description of the status and trends of the water quality of each publicly owned lake, the nature and extent of pollution loadings from point and nonpoint sources and the extent to which the use of each lake is impaired as a result of such pollution. The assessment must also include a description of the methods and procedures needed to control sources of pollution, restore the lake water quality, mitigate the harmful effects of high acidity, and remove toxic metals and other toxic substances mobilized by high acidity.

In order to receive grant assistance from EPA's Clean Lakes Program, States have been reporting their lake water quality assessments for publicly owned lakes in their water quality (section 305(b)) reports since 1988.

3. Summary of Public Notice

EPA opened two public comment periods for the proposed amendments to 40 CFR Part 130 that are related to section 303(d). The first comment period was offered in conjunction with the proposed section 304(l) regulation on January 12, 1989 (54 FR 1300). Comments received during this period indicated that there was confusion between the section 304(l) lists and section 303(d) lists. EPA reopened the comment period on July 24, 1989 in order to provide an opportunity to clarify EPA's intentions and receive additional comments on the section 303(d) requirements. When the comment period closed in September 1989, EPA had received a total of 185 comments related to section 303(d) from 58 commenters.

In the July 24, 1989 (54 FR 30765) notice to reopen the comment period on the proposed amendments implementing section 303(d), EPA specifically solicited comments on the implications of adding new emphasis to the section 303(d) program. Several questions were posed by EPA to make a more complete evaluation of how the new section 303(d) requirements might affect State and EPA programs.

Some of the issues raised by these questions related to the specific requirements that are promulgated with today's actions: the interpretation of narrative criteria, the adequacy and specificity of the documentation requirements, the timing for new requirements, and the reporting format. The major comments relating to these questions and EPA's response can be found within this preamble and in a response to comments document in the administrative record to this rulemaking.

Several questions posed did not relate specifically to today's action but were valuable in assisting EPA in developing a document entitled "Guidance for Water Quality-based Decisions: The TMDL Process" (EPA 440/4-91-001). The questions posed that relate to the development of the "Guidance for Water Quality-based Decisions: The TMDL Process" include: how should States develop a priority ranking for TMDL action; how would improved identification and reporting of water quality-limited segments affect the permitting process and existing nonpoint source control programs; should States consider nonpoint source contributions in the development of TMDLs; should EPA require public participation in the development of lists of water quality-limited segments. These topics are covered in detail in the guidance document and will assist States in meeting the requirements of today's regulations.

Many commenters expressed that the identification and prioritization of problem waters are necessary parts of shifting to a more integrated approach for addressing water quality problems on a watershed basis. Some of these commenters, however, added that administrative burdens detract from the States' ability to address problems and, therefore, should be kept to a minimum. EPA agrees, and these final amendments minimize administrative workloads by consolidating several reporting processes and allowing use of automated data systems.

States that consolidate reporting under sections 305(b), 303(d), and 314(a) will be able to focus on harmonizing the targeting and priority-setting aspects of various pollution control programs. This will promote integration between programs (e.g., point source and nonpoint source programs), agencies (e.g., pollution control and agricultural agencies), and eventually different levels of government to address problems on a comprehensive watershed basis.

The section 303(d) process allows EPA and the States to focus on problem watersheds in priority order. It also provides a process to find the most cost-effective solution to water quality problems in a watershed by allowing trade-offs among sources. Since TMDLs are the sum of allowable loadings of a pollutant from all point and nonpoint sources in a watershed (plus a margin of safety), States have the flexibility to consider the relative costs of point and nonpoint source controls when preparing TMDLs, along with such other factors as reliability, relative effectiveness, and degree of assurance that nonpoint source controls will actually be implemented and maintained. EPA also encourages point/nonpoint source trading and other market-based approaches to water quality improvement. Through trading, regulated point sources may be allowed to avoid upgrades of treatment systems to meet water quality objectives if they arrange for and finance equivalent (or greater) reductions in nonpoint source discharges within their watershed or waterbody. EPA and the States will increasingly use the section 303(d) process to establish priorities, promote integration, and develop necessary loadings reductions that are cost effective and watershed based.

*G. Technical Corrections*

EPA is today making non-substantive clarifying corrections to its regulations in part 130 to amend repeated references to "WLAs/LAs and TMDLs" to read "TMDLs." EPA had clearly stated in its definition of WLAs, LAs and TMDLs, and in the preamble to the 1985 final rule establishing part 130, that WLAs and LAs are part of a TMDL. See 50 FR 1775. Accordingly, the references to WLAs and LAs in these passages are not necessary. Since these changes are not substantive, and serve only to clarify existing requirements, EPA finds that notice and comment proceedings regarding these changes are unnecessary. Furthermore, the changes are in the nature of interpretive amendments to EPA rules, which are exempt from notice and comment requirements.

As part of the rules promulgated on June 2, 1989, EPA provided alternatives that the permitting authority may use to establish effluent limitations to meet narrative water quality criteria in 40 CFR 122.44(d)(1)(vi). Two of the options, §§122.44(d)(1)(vi)(A) and 122.44(d)(1)(vi)(B), involve use of EPA's water quality criteria guidance documents which summarize the scientific knowledge on the effects of pollutants and which contain recommendations regarding levels of pollutants consistent with protection of water quality. These criteria documents are developed as guidance pursuant to section 304(a) of the CWA. However, § 122.44(d)(1)(vi)(B) incorrectly indicates that the criteria are published pursuant to section 307(a) of the CWA. EPA is correcting that error in this rule.

## IV. Regulatory Analysis

*A. Executive Order 12291*

Under section 3(b) of Executive Order 12291 the agency must judge whether a regulation is major and thus subject to the requirements of a Regulatory Impact Analysis. The regulation published today is not major because the rule will not result in an effect on the economy of $100 million or more, will not result in increased costs or prices, will not have significant adverse effects on competition, employment, investment, productivity, and innovation, nor will it significantly disrupt domestic or export markets. Therefore, a Regulatory Impact Analysis has not been developed for this rule.

*B. Paperwork Reduction Act*

The information collection requirements related to section 303(d) of the CWA contained in this rule were previously approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. and assigned OMB Control Number 2040-0071. An addendum to the Information Collection Request to clarify the portion of burden related to 303(d) was made available for public review on February 7, 1992 and approved by OMB on May 14, 1992. OMB has reviewed and approved the information collection requirements related to section 304(l) of the CWA contained in this rule and assigned it OMB control number 2040-0152. The information collection requirements related to section 314 of the CWA contained in this rule were previously approved by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. and assigned OMB Control Number 2030-0020.

Public reporting burden for the collection of information pursuant to section 303(d) of the CWA is estimated to average 395 hours per State, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The burden hours associated with the collection of information pursuant to section 303(d) is part of the burden for collection of information pursuant to section 305(b) of the CWA (which is estimated to average 4,639 hours per State). Public reporting burden for the collection of information pursuant to section 304(l) of the CWA is estimated to average 489 hours per State, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

*C. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), Federal agencies must analyze the impact of regulations on small entities (small businesses, small government jurisdictions and small organizations). However, this analysis is not required if the agency's administrator certifies that the rule will not have a significant economic effect on a substantial number of small entities. EPA has concluded that this rule will not have a significant economic effect on small entities because today's rulemaking imposes no new requirements for the regulated community. Today's regulations merely clarify procedures for implementing section 303(d) of the CWA and respond to the court decision on section 304(l) regulations.

**List of Subjects**

*40 CFR Part 122*

State program requirements, Water pollution control.

*40 CFR Part 123*

State program requirements, Water pollution control.

*40 CFR Part 130*

Water pollution control.

Dated: July 10, 1992.

**William K. Reilly,**

*Administrator.*

For the reasons set out in the preamble title 40 of the Code of Federal Regulations is amended as follows.

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

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

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

2. Section 122.44 is amended by revising paragraph (d)(1)(vi)(B) to read as follows:

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

* * * * *

(d) * * *

(1) * * *

(vi) * * *

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

* * * * *

## PART 123—STATE PROGRAM REQUIREMENTS

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

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

2. Section 123.46 is amended by revising paragraph (a) to read as follows:

**§ 123.46 Individual control strategies.**

(a) Not later than February 4, 1989, each State shall submit to the Regional Administrator for review, approval, and implementation an individual control strategy for each point source identified by the State pursuant to section 304(l)(1)(C) of the Act which discharges to a water identified by the State pursuant to section 304(l)(1)(B) which will produce a reduction in the discharge of toxic pollutants from the point sources identified under section 304(l)(1)(C) through the establishment of effluent limitations under section 402 of the CWA and water quality standards under section 303(c)(2)(B) of the CWA, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than three years after the date of establishment of such strategy.

* * * * *

## PART 130—WATER QUALITY PLANNING AND MANAGEMENT

1. The authority citation for part 130 continues to read as follows:

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

2. Section 130.7 is amended by revising paragraph (b); removing the words "WLAs/LAs and" in paragraphs (c)(1) (three places), (c)(1)(ii), (c)(2), (d) (three places), and (e); revising the first sentence of (d)(1) and adding three sentences immediately following the revised sentence; designating the second paragraph under (d)(1) as (d)(2); and adding a new sentence immediately following the first sentence of the newly designated (d)(2) to read as follows:

**§ 130.7 Total maximum daily loads (TMDL) and individual water quality-based effluent limitations.**

* * * * *

(b) Identification and priority setting for water quality-limited segments still requiring TMDLs.

(1) Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which:

(i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;

(ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty); and

(iii) Other pollution control requirements (e.g., best management practices) required by local, State, or

Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.

(2) Each State shall also identify on the same list developed under paragraph (b)(1) of this section those water quality-limited segments still requiring TMDLs or parts thereof within its boundaries for which controls on thermal discharges under section 301 or State or local requirements are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife.

(3) For the purposes of listing waters under § 130.7(b), the term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.

(4) The list required under §§ 130.7(b)(1) and 130.7(b)(2) of this section shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards. The priority ranking shall specifically include the identification of waters targeted for TMDL development in the next two years.

(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§ 130.7(b)(1) and 130.7(b)(2). At a minimum "all existing and readily available water quality-related data and information" includes but is not limited to all of the existing and readily available data and information about the following categories of waters:

(i) Waters identified by the State in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened";

(ii) Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards;

(iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and

(iv) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

(6) Each State shall provide documentation to the Regional Administrator to support the State's determination to list or not to list its waters as required by §§ 130.7(b)(1) and 130.7(b)(2). This documentation shall be submitted to the Regional Administrator together with the list required by §§ 130.7(b)(1) and 130.7(b)(2) and shall include at a minimum:

(i) A description of the methodology used to develop the list; and

(ii) A description of the data and information used to identify waters, including a description of the data and information used by the State as required by § 130.7(b)(5); and

(iii) A rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in § 130.7(b)(5); and

(iv) Any other reasonable information requested by the Regional Administrator. Upon request by the Regional Administrator, each State must demonstrate good cause for not including a water or waters on the list. Good cause includes, but is not limited to, more recent or accurate data; more sophisticated water quality modeling; flaws in the original analysis that led to the water being listed in the categories in § 130.7(b)(5); or changes in conditions, e.g., new control equipment, or elimination of discharges.

* * * * *

(d) Submission and EPA approval.

(1) Each State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section. For the 1992 biennial submission, these lists are due no later than October 22, 1992. Thereafter, each State shall submit to EPA lists required under paragraph (b) of this section on April 1 of every even-numbered year. The list of waters may be submitted as part of the State's biennial water quality report required by § 130.8 of this part and section 305(b) of the CWA or submitted under separate cover. * * *

(2) * * * The Regional Administrator shall approve a list developed under § 130.7(b) that is submitted after the effective date of this rule only if it meets the requirements of § 130.7(b). * * *

* * * * *

3. Section 130.8 is amended by adding paragraph (b)(5) to read as follows:

**§ 130.8 Water quality report.**

* * * * *

(b) * * *

(5) An assessment of the water quality of all publicly owned lakes, including the status and trends of such water quality as specified in section 314(a)(1) of the Clean Water Act.

* * * * *

4. Section 130.10 is amended by revising paragraphs (b)(2) and (d)(3) to read as follows:

**§ 130.10 State submittals to EPA.**

* * * * *

(b) * * *

(2) Identification of water quality-limited waters still requiring TMDLs (section 303(d)), pollutants, and the priority ranking including waters targeted for TMDL development within the next two years as required under § 130.7(b) in accordance with the schedule set for in § 130.7(d)(1). (Approved by the Office of Management and Budget under control number 2040-0071.)

* * * * *

(d) * * *

(3) For each segment of navigable waters included on such lists, a determination of the specific point source discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source.

(Approved by the Office of Management and Budget under control number 2040-0152)

* * * * *

[FR Doc. 92-17017 Filed 7-23-92; 8:45 am]

BILLING CODE 6560-50-M

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 123**

**[FRL-3979-7]**

## National Pollutant Discharge Elimination System; Surface Water Toxics Control Program

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** Today's action proposes a response to a recent decision of the U.S. Court of Appeals Ninth Circuit in *NRDC v. EPA*, 915 F.2d 1314 (9th Cir. 1990) interpreting section 304(l) of the Clean Water Act (CWA). The Court's decision requires states to identify all facilities discharging toxic pollutants believed to be preventing or impairing water quality of waters on any of the State lists of impaired waters previously identified under section 304(1) and to identify the pollutants discharged. The Ninth Circuit decision also requires EPA to reconsider whether all facilities newly identified under 304(l) are required to have individual control strategies (ICS). The first action is completed elsewhere in the **Federal Register** today as part of final amendments to EPA regulations. The second action is initiated today through this proposal.

Today's action proposes two options. The first option is to continue to require ICSs only for point sources originally subject to such a requirement under EPA's earlier interpretation of section 304(l). The second option is to provide the State the discretion to determine whether, on a case-by-case basis, newly listed facilities will be required to have ICSs. In proposing these options, EPA also considered a third option—a requirement for ICSs for all newly listed point sources. Today's proposal discusses and solicits public comment on all three options. Section III below discusses the three options: no additional ICSs; some new ICSs at the discretion of the Director; and, ICSs for all newly listed point sources. After evaluating public comments and the revised State C lists, EPA may finalize the option requiring no new ICSs or the option authorizing some additional ICSs without seeking further public comment. Due to the lack of information to support the third option described under section III below—ICSs for all newly listed point sources, EPA does not expect to finalize that option without seeking further public comments.

**DATES:** EPA will accept comments from the public on this proposal until September 8, 1992.

**ADDRESSES:** Submit comments to Robert K. Wood, Water Quality and Industrial Permits Branch, Office of Wastewater Enforcement and Compliance, (EN-336), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The public record for this proposal is available at the EPA library, M2904, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Robert K. Wood, Water Quality and Industrial Permits Branch, Office of Wastewater Enforcement and Compliance, (EN-336), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-1955.

**SUPPLEMENTARY INFORMATION:**

### Preamble Outline



### I. Authority

These regulations are issued under the authority of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

### II. Background

#### *A. Clean Water Act Section 304(l)*

In enacting the Water Quality Act of 1987 (WQA) which amended the CWA, Public Law No. 100-4, 101 Stat. 7, Congress placed greater emphasis on attaining State water quality standards. In particular, section 308 of the WQA amendments added several provisions to focus attention on attaining water quality standards for toxic pollutants. The first component was the establishment of the section 304(l) program. The purpose of section 304(l) is to identify and to control "toxic hot spots." 133 Cong. Rec. 1287 (Jan. 14, 1987) (stmt. of Sen. Moynihan).

In order to identify these "toxic hot spots," section 304(l) required each State, within two years after February 4, 1987, to submit to EPA three lists of waters. The first list required an inventory of those waters which are not reasonably expected to attain or maintain the new water quality standards developed under section 303(c)(2)(B) for toxic pollutants. (See section 304(l)(1)(A)(i).) The second list encompasses all waters that are not reasonably anticipated to attain the goals of the Act, *i.e.*, to "assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water." Waters on the second list, while meeting State water quality standards, might not be fully achieving the goals of the Act. (See section 304(l)(1)(A)(ii).) These first two lists are known as the "A lists."

The third list includes those waters that the State "does not expect" to achieve applicable water quality standards, after application of technology-based controls, due to discharges from point sources of section 307(a) toxic pollutants. (See section 304(l)(1)(B).) For a water to be listed on the B list the failure to attain water quality standards had to be entirely or substantially due to the point source discharge of toxic pollutants. This list is commonly referred to as the "B list."

The statute also required the States to submit a list of point sources discharging toxic pollutants "believed to be preventing or impairing" the attainment of applicable water quality. 33 U.S.C. 1314(l)(1)(C). This list is commonly referred to as the "C list."

On January 4, 1989, EPA promulgated a rule interpreting the C list to include only point sources discharging toxic pollutants into waters on the B list. 40 CFR 130.10 (54 FR 258). Under this rule, once the State identified such point sources, they were to prepare ICSs for them. On June 2, 1989, EPA promulgated final regulations implementing section 304(1) of the CWA (54 FR 23868). Under EPA's June 2, 1989 regulations, the linkage between the C list sources and the B list waters which was to result in ICSs for point sources discharging to B list waters, was unique to the B list. EPA's rules did not require identification of point sources discharging to waters listed on the A lists, nor did these rules require development of ICSs for point sources discharging to A list waters.

Upon the State's submittal of the lists and ICSs, EPA was to approve or disapprove the State's submissions of the lists and ICSs by June 4, 1989. In the event of a State's failure to submit the lists or ICSs, or if EPA disapproved a list or ICS, EPA was to work in cooperation with the State in order to develop the lists and ICSs by June 1990.

*B. Definition of Individual Control Strategy (ICS)*

EPA's June 2, 1989, final regulations implementing section 304(1) of the CWA (54 FR 23868) established the criteria and procedures for State listing of waters and facilities under section 304(1) as well as the requirements for ICSs. In these regulations EPA defined the term "individual control strategy" as "* * * a final NPDES permit with supporting documentation showing that the effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that applicable water quality standards will be met not later than three years after the individual control strategy is established. Where a State is unable to issue a final permit on or before February 4, 1989, an individual control strategy may be a draft permit with an attached schedule * * * indicating that the permit will be issued on or before February 4, 1990. * * *." 40 CFR 123.46(c).

*C. The Ninth Circuit Decision and Today's Final Amendments*

A portion of EPA's regulations implementing section 304(l) of the CWA was remanded in *NRDC* v. *EPA*, 915 F.2d 1314 (9th Cir. 1990). The Ninth Circuit invalidated EPA's interpretation of section 304(l)(1)(C) and required EPA to amend its regulations at 40 CFR 130.10(d)(3) to reflect the Court's interpretation that facilities discharging toxic pollutants into waters on the A lists (not just the B lists) should be included on the C lists. In response to the Ninth Circuit decision, elsewhere in today's Federal Register, EPA is amending § 130.10(d)(3) to require States to supplement their C lists to include point sources discharging toxic pollutants to waters on the A lists.

The Ninth Circuit also required EPA to reconsider its interpretation of section 304(l)(1)(D) found at 40 CFR 123.46(a) of EPA regulations. EPA's original interpretation of section 304(1)(1)(D) requires only facilities discharging to waters on the B lists (every facility on the original C list) must have ICSs. When the Ninth Circuit invalidated EPA's interpretation of section 304(1)(1)(C) and thereby required States to expand their C lists to include point sources discharging toxic pollutants to waters on the A lists, the Court also required EPA to reconsider whether all point sources on the expanded C lists shall be required to have ICSs.

In its decision, the Ninth Circuit explicitly left for EPA to consider whether to increase the number of facilities required to have ICSs. The Ninth Circuit's requirement that EPA reconsider its interpretation of which facilities must have ICSs is not a directive to interpret the statute in a certain way. On the contrary, the Court asked EPA to determine the best course of action, i.e., to determine whether all, some, or none of the facilities which will be added to States' C lists should be required to have ICSs. Therefore, today's preamble discusses in some detail three options that EPA has considered for reinterpreting the requirements at § 123.46(a). EPA's principal proposal is to leave the regulations at § 123.46(a) unchanged and thereby not require ICSs for any newly listed facilities. EPA is also proposing, and soliciting public comment on, two other options.

*D. Implementation of Water Quality-based Permits and ICSs*

1. Water Quality-based Permit Requirements—Background

This section provides background regarding some of the water quality requirements that apply to NPDES permits, and explains what distinguishes permits that contain ICSs for other permits. All NPDES permits must include water quality-based effluent limitations where necessary to protect State water quality standards. CWA section 301(b)(1)(C). EPA regulations at 40 CFR 122.44(d) define this requirement and clarify how the permitting authority shall determine when water quality-based effluent limitations are necessary. All NPDES permits being issued should now reflect the requirements of § 122.44(d). In general, § 122.44(d) requires effluent limitations for pollutants and pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 CFR 122.44(d)(1)(i). The fundamental purpose of an ICS is to "achieve the applicable water quality standard" for toxic pollutants "as soon as possible" through limitations imposed in permits. 40 CFR 123.46(a). The end point of attainment of water quality standards is the same for ICSs as for other NPDES permits. Therefore, all NPDES permits that meet the water quality-based permitting requirements at § 122.44(d) will also ultimately meet the requirements of an ICS. Thus, EPA may approve the existing permit as the ICS if the effluent limitations for the pollutant(s) of concern in the existing permit already meet the requirements of section 304(l).

There are some distinct differences between NPDES permits that contain ICSs and NPDES permits that do not. First, the requirements for an approvable ICS are narrowly focused on achieving water quality standards for toxic pollutants. To be approved by EPA, an ICS is required only to contain limitations for CWA section 307(a) toxic pollutants where necessary to protect State water quality standards. In contrast, all NPDES permits are also required to contain necessary limitations for individual section 307(a) toxic pollutants, as well as on all other pollutants or pollutant parameters, including whole effluent toxicity, where necessary to protect State water quality standards. Limitations for non-307(a) pollutants, such as chlorine and ammonia, and limitations for whole effluent toxicity are additional controls designed to protect State numeric and narrative water quality criteria; these are not required before EPA may approve an ICS. Thus, the requirements for water quality-based NPDES permits are broader than the requirements that apply to the ICS portion of an NPDES permit. All permits that are issued in compliance with the CWA will ultimately be at least as protective of water quality standards as, and in some cases more protective of water quality standards than, ICSs issued pursuant to section 304(l).

Another difference pertains to the timing of issuance of and compliance with NPDES permits, as compared to ICS requirements in permits. NPDES permits expire and are reissued every five years. With a few, limited exceptions, NPDES permits are not modified within this five-year cycle. Conversely, ICSs are intended to be implemented on an accelerated basis, i.e., within the five-year permitting cycle. Furthermore, in some circumstances NPDES permits may allow a reasonable time, which can never exceed the five year permit term for compliance with water quality-based limitations, while ICSs must require compliance within three years from establishment of the ICS.[1]

[1] ICSs were established beginning in approximately February 1989 and should have been

Continued

Whether and to what extent there would be an actual difference in the ultimate compliance dates between the normal NPDES permitting process and a new round of ICSs is unclear. EPA does not have precise data regarding either how many additional permits need water quality-based permit limits or when such permits expire. EPA has made increasing efforts over the last few years to ensure that permits contain appropriate water quality-based limitations. On March 9, 1984 EPA published a national "Policy for the Development of Water Quality-based Permit Limitations for Toxic Pollutants" (49 FR 9016). This notice confirmed EPA's policy of requiring that NPDES permit limitations assure compliance with all State water quality criteria for toxics. In 1985, EPA Published the "Technical Support Document for Water Quality-based Toxics Control." EPA-440/4-85-032, September 1985. This guidance document provided specific technical procedures to translate State numeric and narrative water quality criteria for toxics into NPDES permit numerical effluent limitations. Following this policy and guidance, EPA and States began to issue more permits which included effluent limitations for toxics designed to meet State water quality criteria. EPA has continued to expand and emphasize the water quality-based permit program to assure that permits include all necessary limitations. In February 1987, EPA began implementing the far-reaching programs of the Water Quality Act of 1987. In response to one of the new programs created by the 1987 Amendments, EPA promulgated final regulations on June 2, 1989 which strengthened EPA's Surface Water Toxics Control Program under NPDES (54 FR 23868). In March of 1991, after over five years of experience in implementing the surface water toxics control program, EPA published the revised "Technical Support Document for Water Quality-based Toxics Control." EPA/505/2-90-001, PB91-127415, March 1991.

All NPDES permits should have been renewed since EPA issued the 1984 National Policy, and, by 1994, all permits issued before the 1989 regulations should have been renewed. Because most permits contain compliance schedules of three years or fewer, compliance would likely be required no later than 1997 for permits issued as late as 1994. If EPA requires new ICSs, the ICSs will be developed as soon as 1992, depending on when today's proposed regulations become final. ICSs issued in 1992 or 1993 would require compliance as soon as possible, but no later than 1995 or 1996. EPA does not have information regarding how many additional ICSs might be developed under the various options described in this proposal—thus EPA cannot make a dependable estimate of how long development and establishment of the additional ICSs would take. Given the above analysis, there may not be a significant time difference between requiring new ICSs on the one hand and relying on the normal permitting process on the other.

A third difference between NPDES permits and ICS relates to EPA's ability to take over a State's authority to issue a permit. Under current regulations, EPA cannot assume a State's authority to issue the permit on the basis of the State's failure to issue the permit. However, where an ICS is required, EPA may take over a State's authority to issue the permit based on the State's failure to implement the ICS requirements consistent with the requirements of section 304(l). 40 CFR 123.46(f).

2. The Listing Process Conducted From 1988-1990

EPA considers the listing process that States and EPA have already completed under section 304(l) to be credible. Under section 304(l), the States were required to submit to EPA, three lists of waters and a list of facilities for EPA review and approval. EPA was required to make approval or disapproval decisions on the lists. The listing process was based on all available information. EPA and the States spent considerable time and effort to cast a broad net in the listing process to ensure that all waters for which there was sufficient supporting information were listed. In addition there was an opportunity for the public to comment on every State list (the comment process was held either by the State or by EPA, or in some cases by both). Because of the extensive process the States and EPA went through to develop the lists of waters and facilities, EPA has confidence in the quality of the lists.

In preparation for developing the 304(l) lists required by February 4, 1989, EPA advised the States that where a State had information showing that the fishable swimmable goals of the CWA were not being met in a water, but lacked information showing that such impairment was entirely or substantially due to the point source discharge of toxic pollutants, the State should list that water on the A list. The identity of point sources discharging to the water was not required for such waters in 1989. Similarly, EPA reviewed each State's lists to ensure that, where a State had information showing that a water was not meeting water quality standards entirely or substantially due to point source discharges of toxic pollutants, the water was listed on the B list, the responsible point sources were identified, and ICSs were prepared for them.

EPA and the States evaluated all available data, including both water quality related data and discharge data in determining whether an ICS would be required. The public had an opportunity to participate in the listing decisions in each State. EPA and States made every effort to list all point sources preventing or impairing the attainment of applicable water quality standards for toxic pollutants. If a particular point source was not included on a State's final C list, EPA has implicitly found through approval of the lists that an ICS was not needed. The bases for this finding were that the data do not show that the water quality standard is not expected to be attained for toxic pollutants, or that the data do not show that attainment (or substantial progress toward attainment) can be achieved from further controlling point sources of toxic pollutants. Requiring ICSs for such point sources will require permitting authorities to divert fixed resources to immediately evaluate the need for such point source controls. If the extensive listing process already conducted is credible, then this use of resources would be unwise and unnecessary in meeting the statutory goals and requirements.

3. Information About Supplemented State C Lists

The Ninth Circuit decision requires that, in addition to the facilities that the States have already identified pursuant to section 304(l)(1)(C), a point source must be listed if, as stated in 40 CFR 130.10(d)(3), it is discharging a toxic pollutant "believed to be preventing or impairing" water quality for each segment of water on all lists (not just the B list). Under EPA's original interpretation of section 304(l), State facilities lists were tied directly to waters not meeting applicable water quality standards, due entirely or substantially to the point source discharge of toxic pollutants (the B list). The Ninth Circuit has broadened this link between listed waters and facilities. States must now list facilities discharging section 307(a) toxic pollutants to waters where some uses

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established by June, 1990 (although there were ICSs that were not established by then).

are impaired due to any type of source (including nonpoint sources) of such toxic pollutants whether the water quality standard will or will not be achieved.

EPA does not at this time have information from the States about the number of point sources that will be added to State C lists as a result of the Ninth Circuit decision and EPA's amendment to § 130.10(d)(3) implementing that decision. Nor does EPA have information regarding whether those discharges will be to waters where the water quality standards are being achieved or where the point source contribution is minimal.[2] EPA does not anticipate obtaining such information until the States submit it to EPA in 1992. Thus, EPA does not know what the quantity or importance of the newly added point sources will be.

This uncertainty raises the question of whether there will be sufficient environmental benefit from requiring ICSs for newly listed point sources given that the next permits issued to such point sources are required to be as protective as ICSs, and that ICS development can be significantly more resource intensive than, and thereby delay, other permit issuance under the normal five-year cycle. EPA's experience from the first round of ICS issuance was that a large permit workload was created. There were two principal reasons. First, the normal five-year cycle was interrupted and unexpired permits were reopened that would have otherwise not been reopened until the permit expired. Second, a larger number of permits had to be issued in a short period of time. This caused available resources to be directed toward addressing the peak workload and disrupted other State and regional permitting activities. Further, ICSs and their compliance requirements have been challenged in evidentiary hearings much more frequently than other NPDES permits. EPA believes that dischargers have challenged their permits containing ICS conditions more frequently than the norm in part because, as a result of ICS requirements, they are seeing water quality-based limits in their permits for the first time. EPA believes that many of the same dischargers are likely to again challenge their permits when they come up for reissuance to include additional water quality-based limits (e.g., limits for whole effluent toxicity or WET). Thus, a likely result of requiring additional ICSs is an increase in evidentiary hearing requests. This too is a significant drain on limited State and EPA resources.

This diversion of resources has resulted in an increased number of expired permits that have not been reissued ("permit backlog"). EPA annually tracks the number of expired permits which EPA Regions and authorized States have been unable to reissue. The number of backlogged permits in the States has increased from 12% in 1988 to 22% in 1990. This period of time corresponds to the period during which the States were developing ICSs. The result of this increased backlog is that some permits needing new effluent limitations to protect water quality are not being issued. EPA's information, based on a sample of two regions, shows that approximately 35% of facilities that discharge wastewater exhibit WET at levels which have the reasonable potential to cause an excursion above a water quality criterion. EPA does not believe that 307(a) toxic pollutants are the sole cause of WET. In addition, section 304(l) of the CWA does not require ICSs to specifically limit WET. Therefore, diversion of resources away from normal permit reissuance, during which a limit for other than a 307(a) pollutant could be imposed, will allow some facilities to continue to impair water quality.

By adhering to the five-year permitting cycle instead of requiring new ICSs, EPA believes that point source controls protective of water quality standards will be established where necessary in the near-term, and that EPA will at the same time avoid unnecessarily diverting fixed EPA and State resources away from activities that may provide needed environmental protection. Based on these factors, EPA believes that it may be more environmentally beneficial to adhere to the normal five-year permitting cycle when establishing water quality-based effluent limitations to protect applicable water quality standards.

## III. Options

The Ninth Circuit required EPA to reconsider its interpretation of CWA section 304(l)(1)(D). EPA has considered three principal options in deciding whether to require additional ICSs.

### A. Statutory Background

EPA's starting point for today's proposal is the language and purpose of the statute. If the statute provides an unambiguous requirement regarding which waters need ICSs, EPA is bound to implement that requirement. If, on the other hand, the statute is ambiguous, EPA may choose a rational interpretation of the statute in view of its purpose. Section 304(l)(1)(D) provides for "each such segment," an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 402 of this Act and water quality standards under section 303(c)(2)(B) of this Act, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy. When this provision is read as a whole it is ambiguous. The reference to "each such segment" could mean one of several things. First, "each such segment" could refer broadly to all segments identified in section 304(l), meaning that each and every segment identified on any of the lists must have an ICS. Second, "each such segment" could refer specifically to the segments affected by paragraph C, implying that each segment identified as receiving discharges of section 307(a) pollutants from point sources must have an ICS. Third, the provision could require ICSs for water segments for which an ICS will produce a reduction in the discharge of toxic pollutants sufficient to achieve the applicable water quality standard. Last it could mean that the States and/or EPA are to examine the listed segments of water to determine whether an ICS is needed to improve water quality. This last approach could be accomplished on a case-by-case basis, or if data are available, groups of water segments could be included in or excluded from the ICS requirement.

The legislative history does not illuminate the precise meaning of this provision. Clearly, Congress intended the section 304(l) program to be narrowly focused on the "toxic hot spots" rather than to be broadly applied to all waters. See, for example, 133 Cong. Rec. S17-76, 24 (daily ed. Jan. 6, 1987), statement of Senator Moynihan. The only discussion in the Conference Report indicates that the C list would consist of dischargers to the B list

[2] The relative contribution of the point source is only relevant to the question of whether the development of new limitations should be a high priority, not whether there should be limitations at all. EPA regulations at 40 CFR 122.44(d) require NPDES limitations for all dischargers where necessary to protect applicable water quality standards. These regulations to not distinguish "minimal" contributions from contributions of a greater magnitude.

waters and ICSs would be prepared for each discharger on the C list. Because the essence of that discussion (*i.e.*, that the C list would consist of the dischargers to the B list) has already been rejected by the Ninth Circuit, EPA does not believe that the Conference Report alone is determinative. Similarly, section 304(l) did not codify either the House of Representatives or the Senate version of the provision. The House provision would have required ICSs for the B list waters, while the Senate provision would have required an ICS-type control mechanism for at least some of the waters on the A(i) list. Neither the House nor the Senate provision would have required special limitations for waters on a list equivalent to the A(ii) list.

As shown above, the language of the statute and the legislative history do not provide clear guidance for one distinct interpretation. Therefore, EPA will take into account the purposes of section 304(l) and the Clean Water Act generally to determine the scope of the ICS requirements.

*B. No Additional ICSs*

EPA is proposing under this option that new ICSs not be developed for the facilities added to the C list. EPA's reasoning is based on the conclusions that (1) the statute does not require new ICSs; and (2) the purposes of the statute, in particular the requirement that water quality standards be met, will be served without new ICSs.

By proposing this option EPA is adhering to its original view that ICSs should be required for those waters where the solution meshes with the problem. In particular the ICS solution of point source controls for toxic pollutants fits the problem of the waters on the B list. Those waters include all waters that are entirely or substantially contaminated by point source discharges of toxic pollutants. The B list includes a wide spectrum of waters, including some waters with significant nonpoint source pollution and some waters with significant degradation from other pollutants. What is common to all the B list waters is that point sources of toxic pollutants are a significant problem. Thus EPA is proposing that ICSs be required for all point sources on the C list which discharge to waters on the B list.

Even though no ICSs would be required for the point sources added to State C lists as a result of the Ninth Circuit decision, the next permit issued to the facility pursuant to EPA and State NPDES regulations, and specifically 40 CFR 122.44(d), must contain effluent limitations for each of the toxic pollutants for which the facility was identified pursuant to section 304(l)(1)(C), where necessary to meet applicable water quality standards. Therefore, the next permit issued to the facility must, by regulation, be at least as protective as an ICS would.

As described above, there are certain characteristics of an ICS that are lost under this option. First, the timing of issuance of a permit containing an ICS may be different than for a permit not containing an ICS. EPA does not believe that this time difference is substantial. As discussed later in section III.C. of today's proposal, new ICSs would likely not be incorporated into final NPDES permits until 1994 following promulgation of a final rule in 1992, State submittals of new draft ICSs in 1993, and completion of the EPA or State review and public comment period. In contrast, most NPDES permits effective on or before 1994 should already include effluent limitations necessary to achieve water quality standards in order to comply with the June 2, 1989, regulations at 40 CFR 122.44(d)(1). Most authorized States should have been issuing permits to comply with the requirements of 40 CFR 122.44(d)(1) by June 1990 because under 40 CFR 123.62(e) authorized States have up to one year to adopt regulations to reflect promulgation of new federal regulations. States may have up to two years if State law must be amended; however, EPA believes that most States did not need changes to State law to implement the requirements of 40 CFR 122.44(d)(1). Because NPDES permits cannot extend for more than five years, most of the NPDES permits needing water quality-based effluent limits for toxics will have been reissued by 1994. Furthermore, in most States, water quality standards or implementing regulations that expressly authorize compliance schedules allow up to three years as a reasonable compliance schedule; three years is also the maximum time allowed by section 304(l)(1)(D) for compliance with the requirements of an ICS. Therefore, the timeframe for compliance with the requirements of any new ICSs would not be significantly different from the compliance timeframe for final permits that would normally be issued under the five-year cycle of expiration and reissuance.

A second characteristic of an ICS that is lost under this option relates to EPA's authority to take over and issue State permits. Currently, EPA's authority to take over ICS issuance from the State (40 CFR 123.46(f)) does not apply to all NPDES permits—only ICSs. Therefore, under this option where no new ICSs would be required, EPA would forgo the opportunity to take over permit issuance from the State for new C list facilities where the State fails to act on those permits. EPA's authority to object to a State permit and assume authority to issue such a permit would be unchanged under this option.

There is a significant advantage to this option. It would take advantage of the significant work already completed separating out the waters that urgently need point source controls for toxic pollutants, instead of requiring the States and EPA to start over in that evaluation. Because EPA believes that most of the impaired waters for which facilities will be identified on the expanded C lists are dominated by nonpoint sources of toxics, or are already meeting water quality standards for toxics, this option is likely to provide a level of environmental protection similar to what would be achieved under other options. Thus, this option would allow permitting authorities to continue planned reissuance of expired permits that achieve State water quality standards—in many cases for higher priority waters where, for example, nonconventional pollutants are the problem.

This option would require no change to 40 CFR 123.46(a) as amended today by the final action described above. The regulations at § 123.46(a) would maintain their original meaning: ICSs are required for each point source identified pursuant to section 304(l)(1)(C) which discharges to a water identified pursuant to section 304(l)(1)(B).

EPA solicits comment on this proposed option, including under which circumstances this option would be more appropriate than other options described below, on whether this option should be adopted, and on the assumptions upon which this option is based. These assumptions include: that the section 304(l) listing process was credible; that section 304(l) implementation has identified the great majority of waters and facilities in need of ICSs to address point source-related "toxic hot spots;" that water quality-based permits issued in the normal permitting cycle will be at least as protective of water quality as ICSs; that some permits most in need of new water quality-based limitations for non-307(a) toxic pollutants will not be timely reissued as a result of an expanded 304(l) process; and that ICS development is highly resource intentive.

*C. Some New ICSs at the Discretion of the State*

EPA is proposing an alternative to the option described in III.B., above. Under this second option, each State would have the discretion to determine, on a case-by-case basis, whether ICSs should be established for newly listed facilities. The resulting State determinations would be reviewable by EPA and would be made available for public comment. An ICS would not be required for a listed facility where in the judgment of the State, after EPA review and opportunity for public notice and comment, an ICS is not warranted.

EPA realizes that the listing process under section 304(1)(1) (B) and (C) may not have identified all waters and facilities where additional ICSs would be warranted. EPA will rely, in part, on the information submitted by the States in their new C lists to make the final determination of whether to require more ICSs. If the new State C lists identify a significant number of sources on waters exceeding water quality standards for toxic pollutants, EPA will be more likely to select this second option and thereby require at least some new ICSs.

At present, EPA's preferred way of structuring such a requirement would be to require the State to evaluate all newly listed point sources and their receiving waters to determine if developing an ICS would be warranted. EPA is proposing at § 123.46(a)(i), under this option, a set of criteria that the States would use to decide whether to submit an ICS for a particular facility and on which the Regional Administrators would base their reviews of those decisions. The proposed criteria are fundamentally based on the section 304(l) requirement to establish ICSs that will reduce the point source discharge of toxic pollutants, and EPA's regulations at 40 CFR 122.44(d) which require that permits contain water quality-based effluent limitations wherever necessary to protect water quality standards. The basis for these determinations would include the following: whether applicable water quality standards for toxic pollutants for the listed receiving water are currently being met; whether the newly listed point source causes, has the reasonable potential to cause, or contributes to an exceedance of applicable water quality standards for toxic pollutants; and, whether a decrease in discharge from all listed point sources of the toxic pollutants of concern to the listed water would significantly improve water quality.

Under this option, EPA is proposing a process and deadlines for the following actions: State determinations of which facilities need ICSs; State submittal of new ICSs to EPA; EPA review of State ICSs; public review of draft permits containing new ICSs; and EPA public notice of its final approval/disapproval decisions. In proposing an administrative process, EPA is attempting to consolidate actions wherever possible and make the process of implementing this option clear and straightforward. Thus, where possible, EPA proposes relying on the normal permit issuance process for public review of ICSs. In proposing this administrative process, EPA's two main objectives are to establish ICSs quickly where they are necessary, and to ensure that ICS determinations are made accurately. EPA solicits public comment on whether the proposed administrative process will be efficient and accurate. In particular, EPA solicits comment on whether public review of ICS determinations is necessary.

The proposed process is as follows:

—Each State shall determine, based on the following criteria, which facilities on the section 304(l)(1)(C) list that discharge to waters not on the list required by section 304(l)(1)(B), should be required to have ICSs:

(a) Whether applicable water quality standards for toxic pollutants for the listed receiving water are currently being met;

(b) Whether the newly listed point source causes, has the reasonable potential to cause, or contributes to an exceedance of applicable water quality standards for toxic pollutants; and

(c) Whether a decrease in discharge from all listed point sources of the toxic pollutants of concern to the listed water would significantly improve water quality.

—Each State shall submit to EPA, by September 22, 1993, the ICSs for each facility the State has determined should be required to have an ICS. Where a State is authorized to administer the NPDES Program, that State should make draft permits that are ICSs available for public comment prior to submitting the ICSs to EPA.

September 22, 1993, is one year from the date EPA is recommending that States submit their revised lists of facilities under section 304(l)(1)(C). EPA believes that one year is necessary to allow the States sufficient time to develop well-documented ICSs. For the first set of ICSs submitted on or before February 4, 1989, the States had two years to identify which waters needed listing, to identify which facilities needed ICSs and then to develop the ICSs. In the action proposed under this option, the States will already have the waters identified but will need to decide which additional facilities need ICSs and then to develop ICSs. EPA believes that one year provides a reasonable time to complete these activities given that the number of new ICSs is presently undeterminable.

—Within four months of the State submittal of each ICS, the Regional Administrator shall: (a) Approve any ICS EPA believes is adequate if the State has provided public participation and if the Regional Administrator determines that additional public comment is not desirable, (b) propose to approve any ICS EPA believes is adequate and either the State has not provided adequate public participation or the Regional Administrator determines that additional public comment is desirable, (c) propose to disapprove any ICS EPA believes is inadequate, and (d) propose to disapprove any implicit determination not to submit an ICS for a facility if EPA believes, based on the criteria in paragraph (i), an ICS is needed. An ICS is adequate if it conforms to the definition of ICS at 40 CFR 123.46(c); contains limitations for the relevant toxic pollutant(s) as required in § 122.44(d) and it contains a date for compliance that is as soon as possible, but not later than three years from the date of establishment of the ICS. EPA shall make its proposed decisions regarding approval/disapproval of State ICSs available for public comment for a period of 60 days.

EPA believes that four months is a reasonable time for EPA to review the submitted ICSs and decide whether to approve or disapprove them. The four months is the same amount of time that Congress allowed for review of the ICSs which were submitted on or before February 4, 1989. EPA believes that the same amount of time is needed because EPA may be reviewing a large number if ICSs during any four months period, making it impractical to expect that review could be completed in a shorter time.

EPA also believes that a 60-day comment period is sufficient to provide for full public participation in the review of ICSs and EPA's proposed decisions regarding ICSs. In the first round of ICSs, the statute allowed for a 120-day public comment period for review of listing decisions on waters as well as review of ICSs. In the action proposed under this option, the public will already know which waters were listed based on the February 4, 1989, submittals and will only need to review the ICSs and any proposed decisions regarding approval or disapproval of ICSs. ICSs are in content equal to NPDES permits. EPA normally allows for a 30-day comment period for public review of NPDES permits. Therefore, EPA believes that 60 days is sufficient for full public review of the new ICSs and proposed decisions regarding ICSs.

The proposed regulations under this option would not require EPA to take public comment on those ICSs that the Regional Administrator approves and determines that the State provided adequate public participation. EPA Regional Offices may choose to publicly notice such final decisions at the same time they request public comment on proposed approval/disapproval decisions.

Within four months after the close of the 60-day public comment period on EPA's proposed approval/disapproval of State ICSs, EPA shall consider all public comments received, make final approval/disapproval decisions including decisions on whether additional ICSs should be required. EPA shall publicly notice these final decisions. At any point where EPA publicly notices a disapproval of a State ICS, the Administrator in cooperation with such State, and after notice and opportunity for public comment, shall implement the requirements of section 304(l) in such State within one year following the date of the disapproval.

EPA believes that four months is a reasonable time for EPA to review any comments submitted by the public and make final approval/disapproval decisions. The four months is the same time EPA allowed for this activity for the first set of ICSs which were submitted on or before February 4, 1989. EPA believes that the same amount of time is needed because many of these decisions could be complex and of significant interest to the public. EPA believes that four months is the shortest feasible time to adequately evaluate comments on such decisions.

The Chief benefit of this option is that it would support the development of ICSs where they are necessary, i.e., where the State and EPA make the judgment that water quality improvement will result. At the same time this option would enable the States and EPA to forgo developing an ICS where the ICS would not require new controls or where the environmental benefit would, on balance, be insignificant.

This option would not require that ICSs be developed for all facilities added to State C lists; instead, ICSs would be limited to where water quality-based limitations for toxic pollutants are required under 40 CFR 122.44(d) and where the ICS is expected to result in improved water quality. Limiting the ICS requirement to only some dischargers is appropriate because ICSs are limited to controlling point sources of toxic pollutants and some of the waters concerned may not be impaired by either. This option contemplates that there may be some newly listed facilities whose discharges have the reasonable potential to cause or contribute to excursions of the applicable water quality standards even though the waters are not exceeding the water quality standards due entirely or substantially to the point source discharge of toxic pollutants.

Under this option, the State would have to judge whether the contribution of toxic pollutants from such a discharger is either significant or minimal. The question of whether the receiving water is impaired entirely or substantially due to the point source discharge of toxic pollutants, however, has already been answered. If the State and EPA did not list the water on the B list, then they have found that the principal cause of impairment of the water, based on available information, is not the point source discharge of toxic pollutants.

A significant drawback of this option is that States would have to undertake large numbers of evaluations that could be essentially redundant. In deciding whether ICSs are warranted, the States and EPA (in reviewing State decisions) might be essentially revisiting the determinations that were already made when the B lists were developed. This could be true even though the terminology controlling the decisions would be somewhat different—in reality available water quality information is not usually precise enough to make fine distinctions, and the State and EPA must rely in part on their accumulated expertise to make reasonable decisions. Thus, this option could impose a repetitive decision making burden without a corresponding environmental benefit.

EPA is also proposing an additional regulatory amendment under this option to amend the definition of Individual Control Strategy at 40 CFR 123.46(c). The existing regulatory definition of ICS is not clear on the conditions under which a draft permit can be an ICS. EPA intends to continue to approve draft permits as ICSs under this option and is, therefore, proposing to amend the definition of ICS to clarify that ICSs can be draft permits where the final permit will be issued within one year after the State submits the draft permit to EPA. This proposed amendment is needed to ensure that ICSs will be established as soon as possible while taking account of the length of time needed to develop complex permits.

EPA solicits comments on this option, including whether it should be finalized, what different criteria might be appropriate for determining when ICSs are required, what procedures are appropriate for implementing this option, and what deadlines should apply.

### *D. ICSs for All Newly Listed Point Sources*

This option would require ICSs for all newly listed facilities. The obvious result of this option would be that accelerated review of the need for new water quality-based controls, in the form of ICSs, would be required for all point sources on the C list. In the discussions above, EPA has already identified at least two categories of waters for which ICSs would not accomplish the statutory goal of attaining water quality standards: waters that are already expected to achieve applicable standards and waters with minimal point source contributions. Yet, under this option, fixed EPA and State resources would be expended on establishing ICSs even in cases where the information shows that there will be little or no environmental benefit from an ICS. One result of this expenditure of resources, EPA has learned, may be that the permit backlog (permits that have expired and not yet been reissued) would increase. Furthermore, as noted above, EPA has very little information at this time about the number of facilities that States will add to their C lists as a result of the Ninth Circuit decision. If a small number of facilities is added, the resource implications in other parts of the water quality program of this option would be minimal. However, if a large number of facilities is added and if those facilities include a large proportion of facilities that are discharging minimal amounts of toxic pollutants, a significant expenditure could be required to develop ICSs without a concomitant environmental benefit. The essential point is that the listing process itself (listing of point sources discharging toxic pollutants to the A list waters) may not in many cases provide the information necessary to show that ICSs would result in improved water quality for a given facility; yet, under this option, an ICS would always be required for a listed facility, regardless of whether available information shows that an ICS would be environmentally beneficial. It is questionable whether ICSs should automatically be required for newly listed facilities, particularly in light of the virtual absence of information concerning the likely contents of the new C lists.

This option would require an amendment to 40 CFR 123.46(a), as amended elsewhere in this **Federal Register**, to establish the requirement for new ICSs and the administrative process and schedule for developing, reviewing, and implementing the new ICSs. The administrative process under this option would be similar to the process proposed under the second option above except that ICSs would be submitted to EPA and approved or disapproved by EPA for each newly listed point source. Again, the Agency solicits comment on all aspects of this option and, specifically, on the advisability of finalizing this option and on what changes to existing procedural regulations would be necessary to implement this option.

## IV. Today's Proposal

Today, EPA is proposing two options. First, EPA is proposing to not amend § 123.46(a). This proposal is described in detail as the first option in III.B., above. Under this option, the regulations at § 123.46(a) would maintain their original meaning as established on June 2, 1989: ICSs are required for each point source on the C list that discharges to a water on the B list. Even though no ICSs would be required for the point sources added to State C lists as a result of the Ninth Circuit decision, the next permit issued to the facility pursuant to EPA and State NPDES regulations and, specifically 40 CFR 122.44(d), must contain effluent limitations protective of applicable standards for all pollutants where necessary, including each of the toxic pollutants for which the facility was listed. Such permits would also need to meet all other requirements of 40 CFR 122.44(d). Therefore, the next permit issued to the facility would, by regulation, be at least as protective as an ICS would. Under this first option, no regulatory change to § 123.46(a) beyond that made by final rule, elsewhere in today's **Federal Register**, would be necessary. EPA is, therefore, not proposing any additional regulatory language under this option.

EPA is also proposing today an alternative option. This second option is described in detail under section III.C., above. Under this option the regulations at § 123.46(a) would be amended to provide the State the discretion to determine, on a case-by-case basis, whether ICSs are required for newly listed facilities. The State determinations would be subject to EPA and public review. An ICS would not be required for a listed facility where in the judgment of the State, and after EPA and public review, an ICS is not warranted. EPA is, today, proposing under the second option, a set of criteria on which the States would base their ICS determinations and on which EPA would base its reviews of State ICS determinations. The proposed regulation would be an addition to 40 CFR 123.46(a), as set out in the proposed regulations below. Today's proposed regulatory language at § 123.46(a) is for this second option only. No regulatory language is either necessary or proposed under the first option.

EPA believes at this time, that the first proposed option may be the best course of action. In proposing this option EPA is postulating that the original B lists identified the vast majority of waters for which ICSs would provide significant environmental benefit. The first option would avoid the resource-intensive and inherently redundant process of developing limits on toxic pollutants separate from other permit limits. EPA also believes that the benefits of the first option outweigh the possibility that some newly listed point sources that are in need of high-priority attention will not receive new water quality-based controls immediately, but rather will receive water quality-based effluent limitations at the time of the next permit issuance.

If after reviewing the revised State C lists and the public comments on today's proposal, EPA determines that the original B lists did not identify a substantial portion of waters for which ICSs would provide significant environmental benefit, EPA will be more likely to consider finalizing the second, or alternative option, described in III.C., above.

EPA is today soliciting comments from the public on all aspects of this proposal. EPA will carefully consider all public comments on this proposal before making a final decision. EPA also intends to evaluate the revised C lists in making its final determination of the best course of action. After evaluating public comments and the revised State C lists, EPA may finalize either of its proposed options without seeking further public input. Due to the lack of information to support the third option described under III.D. above, and EPA's belief that there will be some newly listed facilities for which an ICS will not improve water quality and therefore should not be required, EPA does not anticipate finalizing that option without seeking further public input. EPA is, therefore, not today proposing any regulatory language that would implement this third option.

## V. Regulatory Analysis

### *A. Executive Order 12291*

Under section 3(b) of Executive Order 12291 the Agency must judge whether a regulation is major and thus subject to the requirements of a Regulatory Impact Analysis. Today's proposal will not result in any additional regulatory requirements. Today's proposal, therefore, is not major; it will not result in an effect on the economy of $100 million or more; it will not result in increased costs or prices; it will not have significant adverse effects on competition, employment, investment, productivity, and innovation; and it will not significantly disrupt domestic or export markets. Therefore, the Agency has not prepared a Regulatory Impact Analysis under the Executive Order. EPA submitted this proposal to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

### *B. Paperwork Reduction Act*

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this proposed rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers 2040–0057 2040–0068, and 2040–0086.

### *C. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act of 1980 (5U.S.C. 601 *et seq.*), Federal agencies must, when developing regulations, analyze their impact on small entities (small businesses, small government jurisdictions, and small organizations). This analysis is unnecessary, however, where the agency's administrator certifies that the rule will not have a significant economic effect on a substantial number of small entities. The Agency has concluded that today's proposal will not have a significant economic effect on a substantial number of small entities because today's action proposes no new requirements for the regulated community. Today's proposal merely affirms a final regulatory amendment also made today and described above and solicits public comment on this proposal as well as possible alternative courses of action.

## List of Subjects in 40 CFR Part 123

State Program Requirements, water pollution control.

Dated: July 10, 1992.
**William K. Reilly,**
*Administrator.*

For the reasons set out in the preamble 40 CFR part 123 is proposed to be amended as follows.

## PART 123—STATE PROGRAM REQUIREMENTS

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

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

2. Section 123.46(a) is amended by adding paragraphs (a)(1), (a)(2), (a)(3) and (a)(4) (and by revising paragraph (c) to read as follows:

### § 123.46 Individual control strategies.

(a) * * *

(1) Each State shall determine, based on the following criteria, which facilities on the section 304(l)(1)(C) list that discharge to waters not on the list required by section 304(1)(1)(B), should be required to have ICSs:

(i) Whether applicable water quality standards for toxic pollutants for the listed receiving water are currently being met;

(ii) Whether the newly listed point source causes, has the reasonable potential to cause, or contributes to an exceedance of applicable water quality standards for toxic pollutants; and

(iii) Whether a decrease in discharge from all listed point sources of the toxic pollutants of concern to the listed water would significantly improve water quality.

(2) Each State shall submit to EPA, by September 22, 1993, the ICS for each facility the State has determined should be required to have an ICS. Where a State is authorized to administer the NPDEs Program, that State should make draft permits that are ICSs available for public comment prior to submitting the ICSs to EPA.

(3) Within four months of the State submittal of each ICS, the Regional Administrator shall: (i) Approve any ICS EPA believes is adequate if the State has provided adequate public participation and if the Regional Administrator determines that additional public comment is not desirable, (ii) propose to approve any ICS EPA believes is adequate, and either the State has not provided adequate public participation or the Regional Administrator determines that additional public comment is desirable, (iii) propose to disapprove any ICS EPA believes is inadequate, and (iv) propose to disapprove any implicit determination not to submit an ICS for a facility if EPA believes, based on the criteria in paragraph (a)(1) of this section an ICS is needed. An ICS is adequate if it conforms to the definition of ICS at 40 CFR 123.46(c); contains limitations for the relevant toxic pollutant(s) as required in § 122.44(d) and it contains a date for compliance that is as soon as possible, but not later than three years from the date of establishment of the ICS. EPA shall make its proposed decisions regarding approval/disapproval of State ICSs available for public comment for a period of 60 days.

(4) Within four months after the close of the 60-day public comment period on EPA's proposed approval/disapproval of State ICSs, EPA shall consider all public comments received, make final approval/disapproval decisions including decisions on whether additional ICSs should be required. EPA shall publicly notice these final decisions. At any point where EPA publicly notices a disapproval of a State ICS, the Administrator in cooperation with such State, and after notice and opportunity for public comment, shall implement the requirements of section 304(l) in such State within one year following the date of the disapproval.

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(c) For the purposes of this section the term individual control strategy as set forth in section 304(1) of the CWA, means a final NPDES permit with supporting documentation showing that effluent limits are consistent with an approved wasteload allocation, or other documentation which shows that the applicable water quality standards will be met not later than three years after the individual control strategy is established. Where a State is unable to issue a final permit within one year after submitting to EPA its revised list of facilities pursuant to section 304(a)(1)(1)(C), an individual control strategy may be a draft permit with an attached schedule indicating that the permit will be issued within one year after the State submitted to EPA the draft permit as the ICS.

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