

## EPA'S PRETREATMENT STREAMLINING RULE AUTHORIZES GREATER LOCAL CONTROL OF THE FEDERAL PRETREATMENT PROGRAM

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The federal Clean Water Act (CWA) is in some respects federal in name only. While the basic programs called for by the CWA are established either by the statute or by U.S. Environmental Protection Agency (EPA) rulemaking, the implementation of those programs often is left to states or localities. One notable example of this is the National Pollutant Discharge Elimination System (NPDES) permitting program, under which numerous states and Indian tribes administer permitting and enforcement functions. An equally important area in which EPA authorizes others to act in its stead is federal Pretreatment Program that controls indirect discharges to publicly-owned treatment works.

As with EPA and the states that administer the NPDES program, EPA has enjoyed a lively and continuing debate with the publicly-owned treatment works (POTW) and indirect discharger communities over the specifics of the federal program that they administer. This debate has been animated by many factors, including the POTWs' desire to manage their responsibilities as cost-effectively as possible and EPA's concern that more efficient programs might create loopholes capable of defeating the larger purposes of the CWA. Following decades of relative stability, EPA's new Pretreatment Streamlining Rule relaxes some historic controls in order to provide the greater efficiency sought by the regulated communities. Whether these relaxations are enough, too much, or just right is a question that will need to be answered over the coming years.

### Background

The pretreatment program is the mechanism by which federal control is exerted over industrial dischargers who discharge through POTWs instead of discharging directly to waters of the United States. It includes the mechanisms to ensure that federally-mandated standards are imposed on indirect dischargers, as well as the monitoring, reporting and enforcement activities that are a part of any discharge control system. This program is operated in large measure by the POTWs themselves, subject to federal

scrutiny of their conformance with federal program regulations dating back to the early days of the CWA.

Over the past decade, POTWs and some members of the indirect discharge community have encountered what they believe are unnecessary frictions in the operation of the pretreatment program. In some cases, these frictions consist of constraints that stand in the way of environmentally and economically valuable improvements in the way affected industries operate. In many others, they manifest themselves as requirements that increase a POTW's cost of administering the program without producing a significant benefit in terms of environmental protection.

EPA, the POTW community and other interested parties have spent considerable time and energy over the last ten years examining each of these points of friction. The 2005 Pretreatment Streamlining Rule is the result of that effort and, as a readjustment of the balance between regulatory certainty and program efficiency, its provisions deserve a close look by all who are interested in the protection of the nation's waters.

### Analysis of the Rule

The Pretreatment Streamlining Rule addressed a large number of program areas identified by EPA, industry and others as opportunities for improvement. While each issue is important to its own constituency, the balance struck in the following four areas deserves our special attention.

### General Oversight of Categorical Industrial Users

Historically, all industrial dischargers to POTWs (industrial users, or IUs) in industries regulated by federal Categorical Pretreatment Standards were required to be made subject to a POTW-issued permit (or other discharge control mechanism), to report on the quality of their discharge at least twice a year, and to be subjected to inspection and sampling by the POTW itself no less often than once per year. While these controls made sense for dischargers that were capable of upsetting a POTW's operation or discharging pollutants that would pass through the POTW

causing a violation of its NDPES permit, the municipal community pointed out that they probably are excessive when applied to small categorical dischargers whose contribution to a POTW are essentially *de minimus*.

In response to this concern, EPA's new streamlining rule eliminates the permit requirement, the self-reporting requirement, and the POTW inspection requirement for certain categorical industrial users that discharge less than 100 gallons-per-day of process wastewater. A so-called "middle tier" of categorical industrial users (those discharging up to 5,000 gallons per day where that represents less than 0.01 percent of the certain key design capacities of the POTW) was also created. While middle tier dischargers will still be required to have a permit or other appropriate control mechanism, they will be allowed to self-report data only once per year and will be subject to mandatory inspection and sampling by the POTW only once every other year.

The question, of course, is whether the decreased levels of control and scrutiny of these smaller dischargers will allow small "categorical industrial users" to operate outside of the federally-prescribed standards. On the one hand, the streamlined provisions seem to establish the thresholds for these reduced levels of attention sufficiently low to ensure that POTWs will not be harmed by taking a more *liaise faire* approach. On the other hand, simple human nature may induce some qualifying dischargers to take advantage of the lack of scrutiny in ways that might result in the discharge of measurably greater quantities of pollutants to a POTW's collection system. Whether this effect is substantial will be seen in the coming years.

### **Substitution of Mass-Based for Existing Concentration-Based Limitations**

Another point of friction addressed by EPA and its partners was the inability, under existing regulations, to substitute mass-based limitations for the concentration-based limits established by the categorical standards promulgated for some industries. Where concentration-based standards were required, industrial dischargers were often dissuaded from installing water-saving process improvements by the fear that reduced water usage would raise the concentrations of pollutants in their discharges and places them in violation. Water reduction technologies have pro-

liferated in recent years, and both industry (for cost reasons) and POTWs (in the interest of freeing up treatment capacity) are anxious to see such measures implemented.

The streamlining rule addressed this concern by allowing POTWs to convert concentration-based categorical standards to mass-based discharge limitations under certain limited circumstances. Those conditions, which include the showing of a substantial reduction of water use by the industry and the requirement that the industry not be subject to large fluctuations in flow, production rates or pollutant loadings, are designed to ensure that the translation from concentration- to mass-based limits does not accept frivolous data that simply memorialize a prior practice of substituting dilution for adequate treatment.

The balance here is evident. If the controls are adequate, industrial dischargers and POTWs will be allowed to take advantage of significant reductions in water usage and reduced discharge volumes. If the controls are inadequate, dischargers who may have been skating by for years on the strength of excessive dilution of their wastestreams will have that practice memorialized and essentially hidden from view for the indefinite future.

### **Elimination of Sampling for Pollutants Not Expected to be Present**

The Pretreatment Streamlining Rule also addresses the longstanding concern of some categorical industrial users concerning the requirement to continue sampling for pollutants that are regulated by a categorical pretreatment standard but are known to be absent from the wastestream. This costly excess has been especially troubling to the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) industry. In that industry, processes vary so greatly from plant to plant that many of the pollutants limited in the pretreatment standard may not be found in the discharge of a given facility. Sampling for these absent substances is extremely costly, time consuming and, ultimately, valueless.

Of course, forgoing sampling of regulated pollutants is a tonic that must be applied judiciously. Industrial processes are notoriously malleable, with only the requirement to self-report changes standing as a bulwark against the renewed discharge of a pollutant that is no longer monitored. Moreover,

the complexity of some facilities, especially in the OCPSF sector, is such that there may be a genuine issue whether POTW personnel are in a position to assess a discharger's assertion that a given pollutant is not generated in the regulated process. While there is no fundamental flaw with the flexibility provided by this change, its successful implementation will require vigilance by the regulated community and by regulators at all levels of government.

### **Revision of "Significant Noncompliance" Criteria**

Finally, the Pretreatment Streamlining Rule addresses the long-standing complaint of both industry and the POTW community that the pretreatment program requires that inconsequential violations be reported and published as instances of "significant noncompliance." The new rule deals with this complaint in a number of ways, including by stating that the significant noncompliance criteria will only apply to "significant industrial users" and to those

industrial users that have in fact caused interference or pass through that has resulted in the POTW ordering that their discharge be halted under its emergency authority. Whether this sensible revision will operate to allow violations of significance to escape serious enforcement and public scrutiny will be a matter for study after the new rule goes into effect.

### **Conclusion and Implications**

The long-awaited streamlining of the federal pretreatment program will allow POTWs and their industrial dischargers to take advantage of many efficiencies that were previously unavailable to them. The changes are designed to yield these new efficiencies without environmental cost. As with any streamlining of a complex regulatory program, however, greater efficiency can beget a loosening of control. The question going forward will be whether these streamlined procedures are as capable of ensuring consistent compliance with federal discharge standards as were the procedures they replace. Of this, only time and a careful look back will tell. (RSD)