

or NSPS. For simplicity, the following discussion refers only to effluent limitations guidelines; however, the discussion also applies to new source standards.

a. Definitions

The limitations for pollutants for the OWS, as presented in today's final rule, are provided as maximum daily discharge limitations. Definitions provided at 40 CFR 122.2 state that the "maximum daily discharge limitation" is the "highest allowable 'daily discharge.'" Daily discharge is defined as the "'discharge of a pollutant' measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling." Section 10 of the TDD describes the data selection and calculations used to develop today's limitations.

b. Percentile Basis for Limits, Not Compliance

EPA promulgates limitations that facilities are capable of complying with at all times by properly operating and maintaining their processes and treatment technologies. EPA established these limitations on the basis of percentiles estimated using data from facilities with well-operated and controlled processes and treatment systems. However, because EPA uses a percentile basis, the issue of exceedances (*i.e.*, values that exceed the limitations) or excursions is often raised in public comments on limitations. For example, comments often suggest that EPA include a provision that allows a facility to be considered in compliance with permit limitations if its discharge exceeds the specified daily maximum limitations one day out of 100. As explained in section 10.4 of the TDD, these limitations were never intended to have the rigid probabilistic interpretation implied by such comments. The following discussion provides a brief overview of EPA's position on this issue.

EPA expects that all facilities subject to the limitations will design and operate their treatment systems to achieve the long-term average performance level on a consistent basis because facilities with well-designed and operated model technologies have demonstrated that this can be done. Facilities that are designed and operated to achieve the long-term average effluent levels used in developing the limitations should be capable of compliance with the limitations at all times, because the limitations incorporate an allowance for variability in effluent levels about the long-term

average. The allowance for variability is based on control of treatment variability demonstrated in normal operations.

EPA recognizes that, as a result of today's rule, some dischargers may need to improve treatment systems, process controls, and/or treatment system operations in order to consistently meet limitations and standards in the final MP&M effluent guidelines. EPA finds that this consequence is consistent with the Clean Water Act statutory framework, which requires that discharge limitations reflect best practicable control technology currently available (BPT).

c. Limitations

EPA did not establish monthly average limitations for O&G (as HEM) and TSS because a monthly average limitation would be based on the assumption that a facility would be required to monitor more frequently than once a month. For the reasons set forth in section VI.F.1, EPA estimates that one monthly monitoring event is sufficient; however, if permitting authorities choose to require more frequent monitoring for O&G (as HEM) and TSS, they may set monthly average limitations and standards based on their BPJ (*see* 40 CFR 430.24(a)(1), footnote b).

d. Requirements of Laboratory Analysis

The permittee is responsible for communicating the requirements of the analysis to the laboratory, including the sensitivity required to meet the regulatory limits associated with each analyte of interest. In turn, the laboratory is responsible for employing the appropriate set of method options and a calibration range in which the concentration of the lowest non-zero standard represents a sample concentration lower than the regulatory limit for each analyte. It is the responsibility of the permittee to convey to the laboratory the required sensitivity to comply with the limitations (*see* *Sierra Club v. Union Oil*, 813 F.2d 1480, page 1492 (9th Cir. 1987)).

B. Upset and Bypass Provisions

A "bypass" is an intentional diversion of the streams from any portion of a treatment facility. An "upset" is an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. EPA's regulations concerning bypasses and upsets for direct dischargers are set forth at 40 CFR 122.41(m) and (n) and for indirect

dischargers at 40 CFR 403.16 and 403.17.

C. Variances and Modifications

The CWA requires application of effluent limitations established pursuant to section 301 to all direct dischargers. However, the statute provides for the modification of these national requirements in a limited number of circumstances. Moreover, the Agency has established administrative mechanisms to provide an opportunity for relief from the application of the national effluent limitations guidelines for categories of existing sources for toxic, conventional, and nonconventional pollutants.

1. Fundamentally Different Factors Variances

EPA will develop effluent limitations or standards different from the otherwise applicable requirements if an individual discharging facility is fundamentally different with respect to factors considered in establishing the limitation of standards applicable to the individual facility. Such a modification is known as a "fundamentally different factors" (FDF) variance.

Early on, EPA, by regulation provided for the FDF modifications from the BPT effluent limitations, BAT limitations for toxic and nonconventional pollutants and BPT limitations for conventional pollutants for direct dischargers. For indirect dischargers, EPA provided for modifications from pretreatment standards. FDF variances for toxic pollutants were challenged judicially and ultimately sustained by the Supreme Court. (*Chemical Manufacturers Assn v. NRDC*, 479 U.S. 116 (1985)).

Subsequently, in the Water Quality Act of 1987, Congress added a new section 301(n) explicitly authorizing modifications of the otherwise applicable BAT effluent limitations or categorical pretreatment standards for existing sources if a facility is fundamentally different with respect to the factors specified at section 304 (other than costs) considered by EPA in establishing the effluent limitations or pretreatment standards. Section 301(n) also defined the conditions under which EPA may establish alternative requirements. Under section 301(n), an application for approval of FDF variance must be based solely on: (1) Information submitted during rulemaking raising the factors that are fundamentally different; or (2) information the applicant did not have an opportunity to submit. The alternate limitation or standard must be no less stringent than justified by the difference and must not result in