

## § 403.16

## 40 CFR Ch. I (7-1-03 Edition)

limits are placed on process water pollutants either at the outfall or elsewhere.

(3) Credit shall be granted only to the extent necessary to meet the applicable categorical Pretreatment Standard(s), up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with Standard(s) adjusted under this section.

(4) Credit shall be granted only if the User demonstrates that the intake water is drawn from the same body of water as that into which the POTW discharges. The Control Authority may waive this requirement if it finds that no environmental degradation will result.

(c) The applicable categorical pretreatment standards contained in 40 CFR subchapter N specifically provide that they shall be applied on a net basis.

[53 FR 40614, Oct. 17, 1988, as amended at 58 FR 18017, Apr. 7, 1993]

### § 403.16 Upset provision.

(a) *Definition.* For the purposes of this section, *Upset* means an exceptional incident in which there is unintentional and temporary noncompliance with categorical Pretreatment Standards because of factors beyond the reasonable control of the Industrial User. An Upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(b) *Effect of an upset.* An Upset shall constitute an affirmative defense to an action brought for noncompliance with categorical Pretreatment Standards if the requirements of paragraph (c) are met.

(c) *Conditions necessary for a demonstration of upset.* An Industrial User who wishes to establish the affirmative defense of Upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An Upset occurred and the Industrial User can identify the cause(s) of the Upset;

(2) The facility was at the time being operated in a prudent and workmanlike manner and in compliance with applicable operation and maintenance procedures;

(3) The Industrial User has submitted the following information to the POTW and Control Authority within 24 hours of becoming aware of the Upset (if this information is provided orally, a written submission must be provided within five days):

(i) A description of the Indirect Discharge and cause of noncompliance;

(ii) The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue;

(iii) Steps being taken and/or planned to reduce, eliminate and prevent recurrence of the noncompliance.

(d) *Burden of proof.* In any enforcement proceeding the Industrial User seeking to establish the occurrence of an Upset shall have the burden of proof.

(e) *Reviewability of agency consideration of claims of upset.* In the usual exercise of prosecutorial discretion, Agency enforcement personnel should review any claims that non-compliance was caused by an Upset. No determinations made in the course of the review constitute final Agency action subject to judicial review. Industrial Users will have the opportunity for a judicial determination on any claim of Upset only in an enforcement action brought for noncompliance with categorical Pretreatment Standards.

(f) *User responsibility in case of upset.* The Industrial User shall control production or all Discharges to the extent necessary to maintain compliance with categorical Pretreatment Standards upon reduction, loss, or failure of its treatment facility until the facility is restored or an alternative method of treatment is provided. This requirement applies in the situation where, among other things, the primary source of power of the treatment facility is reduced, lost or fails.

[46 FR 9439, Jan. 28, 1981, as amended at 53 FR 40615, Oct. 17, 1988]

### § 403.17 Bypass.

(a) *Definitions.* (1) *Bypass* means the intentional diversion of wastestreams