UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 19 1986

OFFICE OF WATER

MEMORANDUM

SUBJECT: Guidance on Advance Concurrence of the Assistant Administrator for Water on Selected Section 301(g) and Fundamentally Different Factors Variance Decisions Under the Clean Water Act

FROM: Lawrence J. Jensen
Assistant Administrator for Water (WH-556)

TO: Regional Administrators, Regions I - X

On April 30, 1986 (51 FR 16028), EPA promulgated a final rule reserving to the Administrator or his delegate the decisionmaking authority for section 301(g) and fundamentally different factors (FDF) variances under the Clean Water Act. The Administrator delegated the authority to grant or deny these variances to the Regional Administrators, but required the advance concurrence of the Assistant Administrator for Water or his delegate in certain cases. The rule and delegation are effective on May 30, 1986.

The delegation provided that the determination of whether a request requires advance concurrence would be established in guidance issued by the Office of Water (OW). The guidance for these determinations is attached. It is my intention to modify this guidance in the future as both the Regions and Headquarters gain more experience in dealing with these variances, so that advance concurrence will eventually be required in fewer instances.

I solicit any comments you may have on the guidance. If you have any questions or comments on this matter, please contact me (FTS 382-5700) or James R. Elder, Director, Office of Water Enforcement and Permits (FTS 475-8488). In addition, your staff may contact Martha G. Prothro, Director, Permits Division (FTS 475-9545) or Gary Hudiburgh of her staff (FTS 475-9531).

Attachment

cc: Water Management Division Directors, Regions I - X
James R. Elder (EN-335)
William A. Whittington (WH-551)
Susan G. Lepow (LE-132W)

Guidance on Advance Concurrence of the Assistant Administrator for Water on Selected Section 301(g) and Fundamentally Different Factors Variance Decisions Under the Clean Water Act

On April 30, 1986 (51 FR 16028), EPA promulgated a final rule reserving to the Administrator or his delegate the decisionmaking authority for section 301(g) and fundamentally different factors (FDF) variances under the Clean Water Act (copy attached). The Administrator delegated the authority to grant or deny these variances to the Regional Administrators, but required the advance concurrence of the Assistant Administrator for Water or his delegate in certain cases (copy attached). The rule and delegation are effective on May 30, 1986.

The delegation provides that the determination of whether a request requires advance concurrence of the Assistant Administrator for Water or his delegate would be established in guidance issued by the Office of Water (OW). The guidance for these determinations follows.

FDF VARIANCE REQUESTS -- NATIONALLY SIGNIFICANT ISSUES

The advance concurrence of the Assistant Administrator for Water or his delegate is required only on FDF variance requests that raise issues of national significance.

I. Issues of National Significance.

It is not possible to establish a static list of nationally significant issues since FDF variances by their nature involve case-by-case determinations based upon the circumstances prevailing at an individual facility. However, based upon OW's previous experience with FDF variances, the following factors (and examples) indicate those which OW may consider nationally significant.

- First decision of significant precedential value in category/subcategory (e.g., the first central waste treatment decision in the iron and steel industry).

- First decision of significant precedential value on specific issue (e.g., cost, the first decision dealing with a specific toxic pollutant).

- Similar or identical applications in more than one State, category/subcategory and/or Region (e.g., the several leather tanning FDFs in Regions I, II and V).

- Issue/guideline involved in litigation/rulemaking (e.g., the variance requests from the Louisiana phosphate fertilizer facilities.)

- Federal legislative issues (e.g., the proposed relief for the Alaska pulp mills).

OW expects that Headquarter's (HQ) concurrence would be required on approximately 15 to 20 percent of all FDF variance requests.

II. Submission of Materials.

The Office of Water Enforcement and Permits (OWEP) will establish a formal docket for all FDFs. The Regions will submit a copy of all FDF variance requests to Permits Division [(EN-336), 401 M Street, S.W., Washington, D.C. 20460] upon receipt from the applicant or the State. It is also necessary for the Regions to submit copies of all pending FDF variance requests at this time. When the Region submits a copy of the FDF variance request to HQ, the Region should also submit a copy of any applicable NPDES permit or pretreatment mechanism and permit application or baseline monitoring report. In addition, the Region may make a recommendation on the issue of national significance. Staff in other involved HQ offices [Offices of Water Regulations and Standards (OWRS) and General Counsel (OGC)] will be notified of the receipt of an application. Tentative and final decisions for NPDES requests and determinations for pretreatment requests (either approval or denial) and supporting documents will also be included in the docket.

III. Timing and Extent of HQ Participation.

OW will have 30 calendar days after receipt of an application to determine if the variance raises issues of national significance. OWEP will consult with other involved HQ offices (OWRS and OGC) before making this determination. I am designating the Director, Permits Division as the authority to notify the Region on whether HQ concurrence is required. If the Region is not notified in writing that HQ believes the variance request raises issues of national significance within this 30 day period, HQ concurrence will be presumed to be waived. If HQ indicates that concurrence will be required but later determines that concurrence is unnecessary, the concurrence can also be waived at a later date.

If the Director, Permits Division indicates that OW concurrence is required, HQ and Regional staff will establish a schedule for deciding the variance request. The concurrence of the Assistant Administrator for Water, or his delegate, will be required before the Regional Administrator issues a tentative or final decision (NPDES) or determination (pretreatment). (At this time, I am not delegating my concurrence authority.) OW intends to concur or nonconcur within 45 days of receipt of a tentative or final decision (NPDES) or determination (pretreatment); however, concurrence will not be presumed if OW does not act within this 45 day period. (In cases where the concurrence action cannot be completed before the 45 day period ends, OW will have agreed with the Region on an alternative timetable.) In all cases, the Region will retain the primary responsibility for processing the FDF and the final decisionmaking authority will remain with the Regional

Administrator. OWEP will be responsible for processing of HQ concurrence, including early identification of issues and follow-up to ensure agreement among OWEP, OWRS and OGC. All three HQ offices will sign the recommendation to the Assistant Administrator for Water or his delegate to concur or nonconcur.

We expect that after this system becomes operational, OW will periodically be able to identify specific types of FDFs that do not raise issues of national significance. In those cases, the Region will not have to submit an application for review; however, copies of the application and decision will still be submitted to HQ for tracking and dissemination of information. At this time, OW has not identified any categories of FDFs that do not raise issues of national significance and will not require HQ concurrence.

Permits Division will provide summaries of all pending and decided FDFs twice yearly along with continuation of the existing quarterly status report.

IV. HQ Technical and Legal Assistance.

HQ staff are available to provide assistance to the Regions in processing FDF variance requests. If OW determines that a variance does not raise issues of national significance, Regional staff will still be provided any consultation or support necessary from staff in OWRS on guidelines issues, including questions on consideration of the factors at issue in guidelines development and access to guidelines records. Regional staff would also be urged to consult with staff in OWEP on policy and precedence issues, and with OGC staff on legal issues. In addition, HQ staff may take the initiative in providing technical and legal assistance to Regional staff even if concurrence is not required.

SECTION 301(g) VARIANCE REQUESTS -- FIRST REQUEST DEALING WITH A SPECIFIC POLLUTANT IN A SPECIFIC INDUSTRY DISCHARGING TO SPECIFIC TYPES OF WATERS

The advance concurrence of the Assistant Administrator for Water or his delegate is required on the first request dealing with a specific pollutant in a specific industry discharging to specific types of waters (inland or freshwater, estuarine, marine).

I. First Request.

As of the date of this guidance, the advance concurrence of the Assistant Administrator or his delegate is required on all section 301(g) requests except for the following for which model decisions have been issued. Model decisions are issued for the first request dealing with the specific pollutant, industry and type of water. It is expected that the Regions will closely follow the model decisions when issuing decisions which do not require HQ concurrence. A model decision has been developed to date for the following situation.

Industry	Waters	Pollutants	Model Decision
Iron/Steel	Inland/Fresh	Ammonia, Phenols (4AAP)	Weirton Steel Weirton, WV

OW will notify the Regions upon the issuance of the model decisions for other specific pollutants, industries and types of waters as they are issued. OWEP has also issued pollutant specific guidance documents for ammonia and phenols (4AAP) that are useful in decisionmaking on section 301(g) requests.

II. Submission of Materials; Timing and Extent of HQ Participation.

The Office of Water Enforcement and Permits (OWEP) will establish a formal docket for all requests. The Regions will submit a copy of a draft tentative and final decision to Permits Division [(EN-336), 401 M Street, S.W., Washington, D.C. 20460] if advance concurrence is required. Previous model decisions and pollutant specific guidance documents should be helpful in drafting these materials. Staff in other involved HQ offices [Offices of Water Regulations and Standards (OWRS) and General Counsel (OGC)] will be notified of the receipt of an application. OWEP will maintain copies of tentative and final decisions on all model decisions and transmit the materials to the Regions when they are issued.

The advance concurrence of the Assistant Administrator for Water or his delegate is required on the first request dealing with a specific pollutant discharging to specific types of waters (inland or freshwater, estuarine, marine) for a specific industry; concurrence is required before the Regional Administrator issues a tentative or final decision. At this time, I am delegating my concurrence authority to the Director of OWEP. OWEP intends to concur or nonconcur within 45 days of receipt of a tentative or final decision; however, concurrence will not be presumed if OWEP does not act within this 45 day period. (In cases where the concurrence action cannot be completed before the 45 day period ends, OWEP will have agreed with the Region on an alternative timetable.) The Region will retain the primary responsibility for processing the section 301(g) requests and the decisionmaking authority will remain with the Regional Administrator. OWEP will be responsible for processing of HQ concurrence, including early identification of issues and follow-up to ensure agreement among OWEP, OWRS and OGC. All three HQ offices (including OWEP staff) would sign the recommendation to the Director of OWEP to concur or nonconcur.

Circumstances may arise when HQ concurrence will still be required for a first request, but may be similar to other model decisions. This situation may occur when a decision has been issued for a specific pollutant to a specific type of water in a similar industry (i.e., the various metals industries).

We expect that after this system becomes operational, OW will be able to further identify specific types of section 301(g) requests that will not require HQ concurrence. In those cases, the Region will not have to submit materials for concurrence. However, copies of all tentative and final decisions should still be submitted to HQ for tracking and dissemination of information.

Permits Division will provide summaries of all pending and decided section 301(g) requests twice yearly along with continuation of the existing quarterly status report.

III. HQ Technical and Legal Assistance.

HQ staff are available to provide assistance to the Regions in processing section 301(g) requests. Even when concurrence is not required, Regional staff are urged to consult with staff in the various HQ offices on issues. Regional staff are urged to consult with staff in OWRS on criteria and standards issues, OWEP on policy and precedence issues, and OGC on legal issues. In addition, HQ staff may take the initiative in providing technical and legal assistance to Regional staff even if concurrence is not required.

IV. Delegation of Stays Under Section 301(j)(2)

On June 28, 1985, the Administrator delegated the authority to grant or deny stays of limitations under section 301(j)(2) to the Regional Administrators (copy attached). HQ consultation is required before the Regional Administrator issues this decision. HQ staff are available to provide assistance to the Regions in drafting and issuing decisions under section 301(j)(2). OWEP staff will maintain a docket of stay decisions.

Attachments

16mm film to videotape (broadcast quality tape format per hour) + raw stock 275.00
Minimum charge for film to videotape transfer + raw stock 140.00

Aerial photographic print processing prices will be determined by the local DoD-operated lab due to limited availability.

35mm film processing for motion pictures is not done in-house by the DoD. Charges for this type of processing will be at prevailing contract rates on a case-by-case basis.

(e) *Construction and Engineering Information.* Copies of aerial photograph maps, specifications, permits, charts, blueprints, and other technical engineering documents.

(1) Searching, per hour or fraction thereof (including overhead costs) $13.25
(2) First print 2.50
(3) Each additional print of same document 0.85

(f) *Copies of Medical Articles and Illustrations.* Standards contained in the basic Instruction will be utilized in computing costs.

(g) *Claims, Litigation.* Copies of documents required for other than official purposes. (Includes court-martial records furnishing information from Report of Claims Investigations; e.g., automobile collision investigations and safety reports.) Requests pertaining to private litigation and to cases in which the United States is a party and where court rules provide for reproduction of records without cost to the Government (if not covered in 2. or 3., above).

(1) Searching and processing (per hour) $13.25
Minimum charge 8.30

Note.—Charges for professional search or research will be made in accordance with 10.b., below.

(2) Office copy reproduction (minimum for six pages or less) $3.50
(3) Each additional image 0.10
(4) Certification and validation with seal, each 5.20

(h) *Publications and Forms.* A search and/or processing fees, as described in 10.a., below, will be made for requests requiring extensive time (one hour or more).

(1) *Shelf Stock.* (Requesters may be furnished more than one copy of publication or form if it does not deplete stock levels below projected planned usage.)

(i) Minimum fee per request (six pages or less) $3.50
Plus:
(A) Form, per copy ..... $.10
(B) Publications, per printed page ..... .02
(C) Microfiche, per fiche ..... .10

(ii) (Examples: Cost of 20 forms, $5.50; cost of a publication with 100 pages, $5.50; cost of microfiche publication consisting of 10 fiches, $4.50)

(2) Office Copy Reproduction (when shelf stock is not available):

(i) Minimum fee per request (six pages or less) $3.50
(ii) Each additional page ..... .10
(iii) Minimum charge first fiche 8.70
(iv) Each additional fiche ..... .20

(i) *Engineering Data (Microfilm)*—(1) *Aperture Cards.*

(i) Silver duplicate negative, per card $0.75
When keypunched and verified, per card ..... .85
(ii) Diazo duplicate negative, per card ..... .65
When keypunched and verified, per card ..... .75
(2) 35mm roll film, per frame 0.50
(3) 16mm roll film, per frame 0.45
(4) Paper prints (engineering drawings), each 1.50
(5) Paper reprints of microfilm indices, each 0.10

(j) *General.* Charges for any additional services not specifically provided above, consistent with the provisions of the basic Instruction, will be made by the respective DoD Components at the following rates:

(1) Clerical search and processing, per hour $13.25
Minimum charge 8.30
(2) Professional search or researching (To be established at actual hourly rate prior to search. A minimum charge will be established at ½-hourly rates.) .....
(3) Minimum charge for office copy reproduction (up to six images) 3.50
(4) Each additional image 0.10
(5) Each typewritten page 3.50
(6) Certification and validation with seal, each 5.20
(7) Hand-drawn plots and sketches, each hour or fraction thereof 12.00

Linda M. Lawson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

April 24, 1986.

[FR Doc. 86-9577 Filed 4-29-86; 8:45 am]

BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124 and 403

[EN-FRL-2956-9]

The National Pollutant Discharge Elimination System and General Pretreatment Regulations; Authority for Deciding Variance Requests Based on Fundamentally Different Factors and on Water Quality Factors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document amends certain portions of the National Pollutant Discharge Elimination System (NPDES) regulations in order to delegate authority to EPA Regional Administrators for deciding variance requests based on section 301(g) of the CWA and based on the presence of fundamentally different factors (FDF). In addition, this document amends the General Pretreatment regulations in order to delegate authority to EPA Regional Administrators for deciding variance requests based on the presence of fundamentally different factors (FDF).

These amendments will change present procedures to require headquarters involvement only where the variance request raise nationally significant or precedent-setting issues.

DATES: For judicial review purposes, in accordance with 40 CFR Part 23 (50 FR 7268) the time and date of the Administrator's action in issuing this rule shall be 1:00 P.M. Eastern Time on May 14, 1986.

These regulations shall become effective on May 30, 1986.

FOR FURTHER INFORMATION CONTACT: Ms. Marilyn Goode, Permits Division (EN-336), U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; (202) 475-9521.

SUPPLEMENTARY INFORMATION:

I. Background

A. Section 301(g) Variances

Section 301(g) of the CWA provides that variances from effluent limitations based on best available technology economically achievable (BAT) may be granted to certain direct dischargers of nonconventional pollutants. In order to obtain a variance under section 301(g), an applicant must demonstrate that his proposed modified effluent limitations (1) will meet water quality standards or best practicable control technology currently available, whichever is applicable; (2) will not result in any additional requirements on other point or nonpoint sources; (3) will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, the protection and propagation of a balanced population of shellfish, fish and wildlife, and recreational activities in and on the water and (4) cannot reasonably be anticipated to pose an unacceptable risk to human health and the environment.

The existing NPDES regulations (§ 124.62) allow the Regional Administrator or NPDES State Director

to deny all requests for section 301(g) variances for direct dischargers (these variances are not available to indirect dischargers). However, only the Deputy Assistant Administrator for Water Enforcement (now the Director of the Office of Water Enforcement and Permits [OWEP]) may approve such variances.

B. FDF Variances

The fundamentally different factors (FDF) variance is an administrative mechanism designed to allow alternative case-specific limitations in lieu of national effluent limitations guidelines and categorical pretreatment standards for existing direct or indirect dischargers of toxic, conventional, or nonconventional pollutants. In order to obtain an FDF variance, an applicant must demonstrate that the factors prevailing at his plant or facility are fundamentally different from the factors considered in establishing the national discharge limitations and standards, as specified in existing regulations (40 CFR 125.30–125.32 and 403.13).

In the case of direct dischargers, the existing NPDES regulations (§ 124.62) allow the Regional Administrator and the NPDES State Director to deny all requests for FDF variances. However, only the Deputy Assistant Administrator for Water Enforcement (now the Director of the Office of Water Enforcement and Permits [OWEP]) may approve such variances. In the case of indirect dischargers, the existing General Pretreatment regulations (§ 403.13) allow the State Director and the EPA Enforcement Division Director (now the Regional Water Management Division Director) to deny all requests for FDF variances. However, only the EPA Enforcement Division Director (now the Regional Water Management Division Director) may approve such requests.

C. Delegation Plan

In the case of section 301(g) and FDF variance requests from direct dischargers, the above procedures have brought about considerable duplication of effort between Headquarters and Regional offices, since they require the Regional Administrator to review and, where approval is recommended, submit the request to EPA Headquarters for further review. These reviews may also be in addition to a review by the State Director. Such multiple review has often made the issuance of timely decisions difficult. This is compounded by the fact that EPA Headquarters receive a relatively large number of these types of variance requests.

In light of the above, EPA has reexamined the need for routine Headquarters involvement in the approval of such variance requests. The Agency has concluded that Headquarters involvement should only be required where the variance request involves nationally significant or precedent-setting issues. Accordingly, EPA has decided to delegate to Regional Administrators the authority to grant as well as deny all requests for section 301(g) or FDF variances, with advance concurrence required from the Assistant Administrator for Water or his delegate only under certain circumstances. Such advance concurrence would be required only for FDF requests that raise nationally significant issues, or for the first 301(g) variance request dealing with a specific pollutant in a particular industry discharging to specific waters. Requests for which advance concurrence is required will be identified in guidance issued to EPA Regions. This delegation will not alter the authority of the State Director to deny such variance requests.

Because of the relatively small number of sections 301(c) and 302(b)(2) variance requests which have been received, the Agency is not currently amending the procedures applicable to variance requests under these provisions. The State Director and Regional Administrator will still retain authority to deny section 301(c) and 302(b)(2) variance requests while final approval authority will remain with the Director of the Office of Water Enforcement and Permits.

As noted above, in the case of FDF variances for indirect dischargers, decisions to grant requests are already made at the Regional level by the Water Management Division Director. However, to avoid confusion and for the sake of program consistency we are providing the Regional Administrator with the same authority to grant as well as deny these requests as for direct dischargers. As with direct discharges, this delegation will not alter the authority of the State Director to deny these variance requests.

EPA believes that the delegation accomplished today will simplify the present cumbersome process, result in speedier resolution of the relevant issues, and provide consistency in the treatment of direct and indirect dischargers.

In order to allow for the delegation discussed above, the Agency is today amending 40 CFR 124.62, 124.63, and 403.13 to provide that the Administrator, or his delegate, may grant or deny section 301(g) and FDF variance requests. Concurrently with this rulemaking, the Administrator is implementing the actual delegation of this authority through the EPA delegations manual. This procedure is more appropriate than delegating authority to the Regional Administrators through the rulemaking process, since the regulations as amended to day will allow the Administrator to redelegate his authority in the future directly through the delegations manual as needed instead of through a new rulemaking procedure. EPA anticipates revising other regulations in the future to specify the Administrator as the decisionmaking authority in order to allow for delegations through the manual.

In the case of appeals from decisions on variance requests from indirect dischargers (see § 403.13(m)) the Agency wishes to point out that the petition for a hearing to reconsider or contest the Regional Administrator's decision would be submitted to the Regional Administrator, even though the Regional Administrator (as the Administrator's delegate) will also be responsible for making the initial decision on the variance.

The Agency is promulgating today's amendments in final form pursuant to section 553(b)(A) of the Administrative Procedure Act (APA). The rule change issued today merely changes the procedures for processing variance requests within the Agency. The substantive standards for review of the requests remain the same. Accordingly, the rule does not "alter the rights or interests of parties." *Batterton* v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1980). As such, it fits squarely within the exemption from notice and comment requirements of the APA.

II. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it affects only internal Agency procedures. The requirements applicable to the regulated public are not affected.

III. Regulatory Flexibility Act

EPA has determined, pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that this regulation will not have a significant economic impact on a substantial number of small entities, since it affects only internal Agency operating procedures.

List of Subjects

40 CFR Part 124

Administrative practice and procedure, air pollution control, hazardous materials, waste treatment and disposal, water pollution control, water supply, Indian lands.

40 CFR Part 403

Confidential business information, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: March 31, 1986.

Lee M. Thomas,

Administrator.

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart D—Specific Procedures Applicable to NPDES Permits

1. The authority citation for Part 124 continues to read as follows:

Authority: Resources Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act 33 U.S.C. 1251 *et seq.*; and Clean Air Act, 42 U.S.C. 1857 *et seq.*

2. Section 124.62 is amended by removing paragraphs (b) (1) and (3), redesignating paragraphs (b) (2) and (4) as paragraphs (b) (1) and (2) respectively, and adding new paragraphs (e) and (f) to read as follows:

§ 124.62 Decision on Variances.

* * * * *

(e) The State Director may deny or forward to the Administrator (or his delegate) with a written concurrence, or submit to the Administrator (or his delegate) without recommendation, a completed request for:

(1) A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based;

(2) A variance based upon certain water quality factors under CWA section 301(g).

(f) The Administrator (or his delegate) may grant or deny a request for a variance listed in paragraph (e) of this section that is forwarded by the State Director, or that is submitted to EPA by the requester where EPA is the permitting authority. If the Administrator (or his delegate) approves the variance, the State Director or Regional Administrator may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under § 124.64.

3. Section 124.63 is amended by revising paragraph (a)(1) to read as follows:

§ 124.63 Procedures for Variances When EPA is the Permitting Authority.

(a) * * *

(1)(i) If, at the time, that a request for a variance based on the presence of fundamentally different factors or on section 301(g) of the CWA is submitted, the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit, but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Administrator (or his delegate) shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

(ii) If, at the time, that a reqeust for a variance under sections 301(c) or 302(b)(2) of the CWA is submitted, the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit, but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Regional Administrator, after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.62, shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

* * * * *

PART 403—GENERAL PRETREATMENT REGULATIONS FOR EXISTING AND NEW SOURCES OF POLLUTION

1. The authority citation for Part 403 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1311; 1314(b), (c), (e), and (g); 1316(b) and (c); 1317; 1318; and 1361.

2. In 403.13, paragraph (g)(1), the introductory text of paragraph (h), paragraph (i), the introductory text of (j), (j)(3), (k)(2), (l)(1), the introductory text of (l)(2), (l)(2)(ii)(B), (l)(2)(ii)(C), (l)(2)(ii)(D), and paragraph (m) are revised to read as follows:

§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

* * * * *

(g) *Application deadline.* (1) Requests for a variance and supporting information must be submitted in writing to the Director or to the Administrator (or his delegate), as appropriate.

* * * * *

(h) *Contents submission.* Written submissions for variance requests, whether made to the Administrator (or his delegate) or the Director, must include:

* * * * *

(i) *Deficient requests.* The Administrator (or his delegate) or the Director will only act on written requests for variances that contain all of the information required. Persons who have made incomplete submissions will be notified by the Administrator (or his delegate) or the Director that their requests are deficient and unless the time period is extended, will be given up to thirty days to remedy the deficiency. If the deficiency is not corrected within the time period allowed by the Administrator (or his delegate) or the Director, the request for a variance shall be denied.

(j) *Public notice.* Upon receipt of a complete request, the Administrator (or his delegate) or the Director will provide notice of receipt, opportunity to review the submission, and opportunity to comment.

* * * * *

(3) Following the comment period, the Administrator (or his delegate) or the Director will make a determination on the request taking into consideration any comments received. Notice of this final decision shall be provided to the requester (and the Industrial User for which the variance is requested if different), the POTW into which the Industrial User discharges and all persons who submitted comments on the request.

(k) * * *

(2) Where the Director finds that fundamentally different factors do exist, he shall forward the request, with a recommendation that the request be approved, to the Administrator (or his delegate).

(l) *Review of requests by EPA.*

(1) Where the Administrator (or his delegate) finds that fundamentally different factors do not exist, he shall deny the request for a variance and send a copy of his determination to the

Director, to the POTW, and to the requester (and to the Industrial User, where they are not the same).

(2) Where the Administrator (or his delegate) finds that fundamentally different factors do exist, and that a partial or full variance is justified, he will approve the variance. In approving the variance, the Administrator (or his delegate) will:

* * * * *

(ii) * * *

(B) The rationale for the adjustment of the Pretreatment Standard (including the reasons for recommending that the variance be granted) and an explanation of how the recommended alternative discharge limits were derived;

(C) The supporting evidence submitted to the Administrator (or his delegate); and

(D) Other information considered by the Administrator (or his delegate) in developing the recommended alternative discharge limits;

* * * * *

(m) *Request for hearing.* (1) Within 30 days following the date of receipt of the notice of the decision of the Administrator's delegate on a variance request, the requester or any other interested person may submit a petition to the Regional Administrator for a hearing to reconsider or contest the decision. If such a request is submitted by a person other than the Industrial User the person shall simultaneously serve a copy of the request on the Industrial User.

(2) If the Regional Administrator declines to hold a hearing and the Regional Administrator affirms the findings of the Administrator's delegate the requester may submit a petition for a hearing to the Administrator within 30 days of the Regional Administrator's decision.

[FR Doc. 86-9522 Filed 4-29-86; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 180

[PP4F2986/R777; FRL-3010-2]

Cypermethrin; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a tolerance for residues of the insecticide cypermethrin in or on the raw agricultural commodity pecans. This regulation to establish a maximum permissible level for residues of the insecticide in or on the commodity was requested pursuant to a petition by ICI Americas, Inc.

EFFECTIVE DATE: Effective on April 30, 1986.

ADDRESS: Written objections, identified by the document control number [PP4F2986/R777], may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: George LaRocca, Product Manager (PM) 15, Registration Division (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 204, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703-557-2400.

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of December 21, 1983 (48 FR 56435), which announced that ICI Americas, Inc., Concord Pike and New Murphy Rd., Wilmington, DE 19897, had submitted a pesticide petition (PP4F2986) to EPA proposing to amend 40 CFR 180.418 by establishing a tolerance for residues of the insecticide cypermethrin [(±)alpha-cyano-(3-phenoxyphenyl)-methyl(±)-*cis,trans*-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropanecarboxylate] and its metabolites *cis,trans*-3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropane carboxylic acid (DCVA) and 3-phenoxybenzoic acid (3-PB Acid) (sum of cypermethrin plus metabolites) in or on the raw agricultrual commodity pecans at 0.05 part per million (ppm).

There were no comments received in response to the notice of filing.

The data submitted in the petition and other relevant material have been evaluated. The toxicological data considered in support of the tolerance as well as the risk of cypermethrin for previously established tolerances are discussed in a document on cypermethrin that appeared in the **Federal Register** of June 15, 1984 (49 FR 24865).

A full review of the data indicates that although cypermethrin increases the frequency of spontaneously occurring tumors in the lungs of female mice at high dose levels, the increased dietary risk would be extremely small from the proposed use of cypermethrin on pecans. The increased dietary risk associated with this tolerance, based on the highly conservative assumption that all units of the commodity would bear residues at the proposed tolerance level, is estimated to be 10^{-9}–10^{-6}. This value was calculated based on the proposed tolerance level.

The acceptable daily intake (ADI) is calculated to be 0.01 mg/kg/day based on a 1-year dog feeding study with a NOEL of 1.0 mg/kg/day and using a 100-fold safety factor. The maximum permissible intake (MPI) is calculated to be 0.60 mg/day for a 60-kg person. Published and pending tolerances result in a theoretical maximum residue contribution (TMRC) of 0.0408 mg/day based on a 1.5-kg diet and utilize 6.80 percent of the ADI. The establishment of this tolerance will add only 0.00002 mg/day (1-5 kg diet) to the TMRC, resulting in a total use of 6.81 percent of the ADI.

There are no regulatory actions pending against the registration of cypermethrin. The metabolism of cypermethrin in plants and animals is adequately understood for the purposes of the tolerances set forth below. An analytical method using electron capture gas-liquid chromatography is available for enforcement purposes.

Because of the long lead time from establishing this tolerance to publication of the enforcement methodology in the Pesticide Analytical Manual II, an interim analytical methods package is being made available to the State pesticide enforcement chemists when requested by mail:

By mail: Information Service Section (TS-757C), Program Management Support Division, Office of Pesticides Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202 (703-557-3262).

Based on the above information, the Agency has determined that establishing the tolerance for residues of the pesticide in or on the commodity will protect the public health. Therefore, as set forth below, the tolerance is established for a period extending to December 31, 1989, to cover residues existing from this conditional registration of cypermethrin, and the tolerance may be made permanent if registration is continued based on information received in 1988 (see **Federal Register** notice on conditional registration of cypermethrin for use on cotton, published January 9, 1985 (50 FR 1112)).

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the

CLEAN WATER ACT

2-25. Section 301(g) Permit Variances

1. AUTHORITY. To approve or deny permit variance requests, pursuant to Section 301(g) of the Clean Water Act, claiming as their bases specified water quality factors.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS. The advance concurrence of the Assistant Administrator for Water or his delegatee is required on the first request dealing with a specific pollutant in a specific industry discharging to specific waters (inland/fresh, estuarine, or marine). The determination of whether a request is a first request will be made according to procedures established in guidance issued by the Office of Water.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

CLEAN WATER ACT

2-26. FDF Permit Variances

1. AUTHORITY. To approve or deny variance requests, pursuant to Sections 301, 304 and 307(b) of the Clean Water Act, claiming as their bases fundamentally different factors (FDF) from those considered in the development of the discharge limits in the effluent limitations guidelines or from pretreatment standards for existing sources.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS. The advance concurrence of the Assistant Administrator for Water or his delegatee is required on requests that raise issues of national significance. The determination of whether a request raises nationally significant issues will be made according to procedures established in guidance issued by the Office of Water.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

CLEAN WATER ACT

2-49. Section 301(j)(2) Stays for National Pollutant Discharge Elimination System (NPDES) Permits

1. AUTHORITY. To grant or deny stays under Section 301(j)(2) of the Clean Water Act (CWA) for certain requirements of NPDES permits. This stay provision is restricted to permit requirements for non-conventional pollutants under Section 301(g) of the Clean Water Act, and, where the requirements of Section 301(j)(2) are met, allows permit issuance to proceed for pollutants not covered by the variance where additional time is needed to act upon the variance request.

2. TO WHOM DELEGATED. Regional Administrators.

3. LIMITATIONS. Regional Administrators must consult with the Director, Office of Water Enforcement and Permits prior to the approval or denial of a stay.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

5. ADDITIONAL REFERENCES. Section 301(g) of the Clean Water Act; 40 CFR Parts 122.21(l), 122.21(n), 122.62(a)(5), and 124.64(c) of the NPDES Regulations.