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

JUN 13 1978

OFFICE OF
GENERAL COUNSEL
n-78-7

MEMORANDUM

TO : Deputy Assistant Administrator for Water Enforcement (EN-329)

FROM : Associate General Counsel
Water and Solid Waste Division (A-131)

SUBJECT: Your Request for Opinions on Variances in Second Round NPDES Permits and Other Issues

In your May 16 memorandum, you asked for OGC's opinions on a number of issues. Your questions, and our responses, follow.

Variances

Question 1

Is a "fundamentally different factors" variance clause, as contained in BPT effluent limitations guidelines, legally required for BAT and BCT effluent limitations?

May one variance provision be established in the NPDES regulations which applies to all BAT, BCT and BPT guidelines rather than inserting the provision in each guideline?

Answer

A "fundamentally different factors" variance clause is not legally required for either BAT or BCT. On the other hand, such a clause is not prohibited by the Clean Water Act. We believe that the inclusion of such a variance for BCT and BAT is reasonable since the combination of the Agency's limited resources and the variety of industrial processes and treatment possibilities suggest the difficulty of covering the peculiarities and uniqueness of specific facilities solely through the use of subcategories in national regulations.

[illegible] these regulations. It is clear that Congress intended these regulations to be absolute prohibitions. The use of the word "standards" implies as much. So does the description of the preferred standard as one "permitting no discharge of pollutants." (Emphasis added). It is "unlawful for any owner or operator of any new source

---

1/ The Court also concluded in a footnote that it would be premature to consider whether EPA's "fundamentally different factors" variance for BPT had the "proper scope." 430 U.S. 129, n. 19.

Answer:

Yes. Since the specific factors specified in 301(c) (the economic capability of the particular facility) and 301(g) (the effect of the specific discharge upon water quality) are not relevant to the determination of BAT pursuant to 402(a)(1), it would be inequitable to deny the discharger the opportunity to request a variance

Such variance clauses will not allow facilities to avoid BAT or BCT but will rather insure that facilities achieve an individualized BAT or BCT when the general regulations are inappropriate.

It is legally permissible to establish one variance provision in the NPDES regulations rather than inserting the provision in each guideline, provided the regulation cites Sections 301 and 304 in the authority statement.

Discussion

The Clean Water Act has no provisions for a "fundamentally different factors" variance from any of the technology-based effluent limitations guidelines -- BPT, BCT, BAT, or NSPS. The FWPCA Amendments of 1972 contained a variance for BAT, under which the owner or operator of a facility could demonstrate that less stringent limitations would "represent the maximum use of technology within [his] economic capability." Section 301(c). The Clean Water Act of 1977 also provides for a variance from BAT when a facility could demonstrate that less stringent limitations would be sufficient to protect water quality. Section 301(g). The 1977 Amendments provided explicitly, however, that neither the 301(c) nor the 301(g) waivers could be utilized for relief from BAT toxics limitations. Section 301(l). In addition, Section 301(g) by its terms is not available for relief from limitations based upon BCT or upon thermal limitations. Similarly, Section 301(c) relief is limited to variances from BAT and is not available for relief from limitations based upon BCT. In addition, the legislative history of the CWA indicates that there are no waivers for toxic or conventional pollutants. (197 Cong. Rec. S19649, Dec. 15, 1977).

Congress has explicitly provided for certain variance procedures applicable to only one of the technology-based limitations of the Act, (BAT) and applicable only to certain pollutants (those that are neither conventional nor toxic). Thus, the question is whether the Administrator has the authority to create additional variance mechanisms other than those specifically authorized by the Act. The Supreme Court has addressed this issue in E. I. du Pont de Numours & Co. v. Train, 430 U.S. 112 (1977), where it ruled that EPA was authorized to set uniform technology-based regulations for both BPT and BAT, but was required to provide a mechanism for variances for individual plants. At the same

time, however, the Court ruled that EPA lacked the authority to provide a variance from the NSPS technology-based requirements of "best available demonstrated control technology." The Court held that:

> the statute authorizes the 1977 limitations as well as the 1983 limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations. [430 U.S. at 128.] 1/

The Court also noted that Congress had explicitly provided for a BAT variance mechanism through Section 301(c). EPA regulations at the time included no additional variance mechanism such as "fundamentally different factors" for BAT. By implication, we believe the Court suggested that the statutory BAT variance was sufficient and that the Agency was not required to provide additional variance mechanisms for BAT.

In its discussion of the NSPS, however, the Court overruled the Fourth Circuit Court of Appeals and held that EPA lacked the authority to provide for variances for new sources:

> The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations. It is clear that Congress intended these regulations to be absolute prohibitions. The use of the word "standards" implies as much. So does the description of the preferred standard as one "permitting no discharge of pollutants." (Emphasis added). It is "unlawful for any owner or operator of any new source

---

1/ The Court also concluded in a footnote that it would be premature to consider whether EPA's "fundamentally different factors" variance for BPT had the "proper scope." 430 U.S. 129, n. 19.

> to operate such source in violation of any standard of performance applicable to such source." Section 306(e). (Emphasis added). In striking contrast to Section 301(c), there is no statutory provision for variances, and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and "maximum feasible control of new sources." Leg. Hist. 1476. du Pont v. Train, supra, 430 U.S. at 128.

In distinguishing between the BPT and BAT technology-based limitations on the one hand, and the new source performance standards on the other, the Court appears to place major reliance upon the difference between "effluent limitations guidelines" and "standards." In addition, less explicitly, the Court appears to differentiate between existing sources and new sources. This appears to be a reasonable distinction in regard to the applicability of variance mechanisms. A new facility can plan its location, its process, and its waste treatment to meet uniform Federal requirements. An existing facility may be limited in any of these regards. For instance, an existing facility located in an urban area may have insufficient land to construct the necessary treatment facilities, while a new source could choose its site to assure sufficient land for the required treatment facility.

Thus we believe there is a rational basis for a determination by the Agency that the "fundamentally different factors" variance which has been provided for BPT should also be provided for BCT and BAT in addition to the statutory BAT variance mechanisms which have been included in the Act, particularly since the statutory 301(c) variance, which the Court relied upon as an adequate variance mechanism for the 1983 requirements, will no longer be available for certain classes of pollutants. We believe that providing such a mechanism will increase the likelihood that the Courts will uphold our BCT and BAT regulations upon a challenge by specific companies or facilities that the regulations are arbitrary and capricious on the basis of inadequate subcategorization, or failure to consider individual problems of all plants in an industry.

It can be argued that Congress explicitly forbade the Administrator from developing a "fundamentally different factors" variance for toxic BAT in Section 301(l). That section provides:

time, however, the Court ruled that EPA lacked the authority to provide a variance from the NSPS technology-based requirements of "best available demonstrated control technology." The Court held that:

> the statute authorizes the 1977 limitations as well as the 1983 limitations to be set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its 1977 limitations. [430 U.S. at 128.] 1/

The Court also noted that Congress had explicitly provided for a BAT variance mechanism through Section 301(c). EPA regulations at the time included no additional variance mechanism such as "fundamentally different factors" for BAT. By implication, we believe the Court suggested that the statutory BAT variance was sufficient and that the Agency was not required to provide additional variance mechanisms for BAT.

In its discussion of the NSPS, however, the Court overruled the Fourth Circuit Court of Appeals and held that EPA lacked the authority to provide for variances for new sources:

> The question, however, is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations. It is clear that Congress intended these regulations to be absolute prohibitions. The use of the word "standards" implies as much. So does the description of the preferred standard as one "permitting no discharge of pollutants." (Emphasis added). It is "unlawful for any owner or operator of any new source

---

1/ The Court also concluded in a footnote that it would be premature to consider whether EPA's "fundamentally different factors" variance for BPT had the "proper scope." 430 U.S. 129, n. 19.

> ing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

Pursuant to this section, the Administrator has developed technology-based effluent limitations for individual permittees in the absence of promulgated effluent limitations guidelines. In developing such limitations, the Administrator has considered not what constituted the technology-based limitation for the specific facility, but rather what constituted the technology-based limitation for the category and class of point sources of which the particular facility was a member. This approach has been judicially upheld in United States Steel Corp. v. Train, 556 F.2d 822, 844, (7th Cir. 1977) and Alabama v. EPA, 557 F.2d 1101, 1110, (5th Cir. 1977).

A similar situation should apply in regard to case-by-case BAT permit limitations. The economic capability of the particular facility should not be considered in determining BAT for the class or category of point source. Similarly, the effect of the specific discharge upon water quality is irrelevant in determining BAT. Thus the permittee should be able to request a 301(c) or a 301(g) variance to the same extent as if his permit were based upon promulgated BAT effluent limitations guidelines.

Section 301(j)(1)(B) requires a discharger to apply for a 301(c) or a 301(g) modification within 270 days of the promulgation of an applicable effluent guideline. When no effluent guideline exists, 301(j)(1)(B) is not applicable. The Agency should specify by regulation the procedures and the deadlines for requesting modifications of 402(a)(1) BAT determinations.

Question 3

Are approved NPDES States authorized to make 301(c) and 301(g) determinations, subject to EPA review?

Answer

No. These determinations are reserved to the Administator. However, the State must concur in any 301(g) determination, and EPA may require States to consider variance requests and recommend to EPA whether variances should be granted.

> The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under Section 307(a)(1) of this Act.

We believe, however, that Congress intended only that toxic pollutants not be subject to the modification provisions of Sections 301(c) and 301(g). These two modification provisions allow a discharger to receive relief from BAT effluent limitations and instead to install a level of treatment less stringent than BAT. On the other hand, a fundamentally different factors variance does not provide relief from meeting BAT. Rather, it provides for the development of an individualized BAT for a particular facility based upon factors which establish that the national uniform effluent limitations guidelines are not applicable to that facility. Thus, a discharger who receives a fundamentally different factors variance from the national guidelines will not be given a modification from meeting BAT, but will rather be given an individualized BAT.

Question 2

Do the provisions of 301(c) and 301(g) apply to permit limits for nonconventional pollutants which are based upon a Section 402(a)(1) BAT determination in the absence of guidelines?

Answer:

Yes. Since the specific factors specified in 301(c) (the economic capability of the particular facility) and 301(g) (the effect of the specific discharge upon water quality) are not relevant to the determination of BAT pursuant to 402(a)(1), it would be inequitable to deny the discharger the opportunity to request a variance from BAT on the basis that no guidelines exist.

Discussion

Section 402(a)(1) provides that all NPDES permits issued by the Administrator shall meet

> either all applicable requirements under Sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implement-

Question 4

If 301(c) and 301(g) do apply to non-guidelines BAT permit limitations for nonconventional pollutants, which of the following methods for incorporating a 301(c) or 301(g) determination into a permit is acceptable if an approved NPDES State is issuing the permit?

1) Establish 402(a)(1) BAT limitations in a draft permit independent of any 301(c) or 301(g) considerations and allow the discharger to request a 301(c) and/or 301(g) variance from these limitations.

2) Establish both 402(a)(1) limitations in the permit and the alternate limitations based on any modification under 301(c) and 301(g). This would require that the applicant request the variance before issuance of the draft permit.

3) In establishing the 402(a)(1) permit limitations, the permit writer would, if the discharger requests a variance under 301(c) and/or 301(g), consider the factors of 301(c) and 301(g) in determining the permit limitations. In other words the draft permit limits would represent BAT or BAT as modified by 301(c) and 301(g) and would be representative of both technological factors and the factors unique to 301(c) and 301(g).

Answer

Modified versions of all three methods can be included in a legally defensible system for permit issuance. We believe that the best approach would be to adhere to the procedural system outlined in forthcoming NPDES proposed procedural regulations, as discussed below.

Question 5

Which of the following is the proper manner for EPA to review the modification of a 402(a)(1) BAT limitation by a State under 301(c) and 301(g):

Discusssion

The 1972 Amendments to the Clean Water Act reflected a pattern of careful consideration by the Congress of what authorities under the law may be exercised by EPA and the States. For example, Section 316(a) provided for thermal waivers to be granted by either EPA or NPDES States. By contrast, Section 302 authorized only the Administrator to set water quality related effluent limitations. The Conference Report specifically called attention to the limitation of 302 authority to the Administrator and the exclusion of States. See Conference Report on S. 2770, Leg. Hist. 305. Section 301(c) similarly provided no authority to the States.

This pattern appears also in the 1977 Amendments. Various waivers and extensions are authorized to be granted by amended Section 301. Section 301(g) authorizes "the Administrator, with the concurrence of the State," to grant variances from BAT effluent limitations for non-toxic, non-conventional pollutants where BAT is unnecessary to meet the required water quality. Likewise, Section 301(h) provides that deep-ocean outfall variances may be granted by "the Administrator, with the concurrence of the State . . .." Section 301(i) secondary treatment time extensions, on the other hand, like 316(a) variances, may be granted by "the Administrator (or if appropriate the State)." Congress clearly intended that only the level of government specifically authorized by the Act would have authority to grant waivers or extensions.

Thus, neither 301(c) nor 301(g) variances may be granted by NPDES States. However, the statute specifically confers on States the authority to veto, by refusing to concur in, the grant of any 301(g) waiver. Moreover, all States have authority, where State law requires it, to set more stringent limitations for a permittee such that a 301(c) or 301(g) waiver would have no practical effect. For these reasons, it would be desirable to issue rules requiring NPDES States to perform at least some of the analysis which would be necessary to support granting or denying requested variances under Sections 301(c) and 301(g). This point is discussed in more detail in our response to Question 5, infra.

waiver, or determine that State law required a more stringent limitation, such that granting the waiver would have no effect.

When the draft permit is transmitted to the Regional Administrator for review, EPA would simultaneously review the permit for compliance with the "guidelines and requirements" of the Act, and grant or deny the 301(c) or 301(g) waiver on the basis of the record developed by the State. Obviously, the Administrator's review would be greatly facilitated if the State includes in the draft permit both the BAT effluent limitations which would be required if EPA denies the variance, and recommended limitations to be incorporated into the permit if the Administrator grants the variance. Currently, NPDES States follow roughly this procedure in granting "fundamentally different factors" variances for BPT. However, because it is not clearly set forth in the regulations that the States must provide a careful analysis and a complete record, States vary widely in providing information. California provides a detailed decision with alternative recommended effluent limitations, and other States provide only a recommendation accompanied by no analysis and no recommended limitations. Careful regulations could ensure efficient permit processing and EPA review. We will be pleased to assist in developing such regulations.

Question 6

Telephone conversations with your staff indicate that the first part of this question may be rephrased as follows:

For a particular discharger, assume that BAT allows no more than 10 pounds per day, that a 301(c) determination would allow 30 pounds; and that a 301(g) determination would allow 20 pounds. If the discharger's 301(c) and 301(g) requests are considered together, can relief even beyond 30 pounds be granted?

Answer

No.

Discussion

In our view, the only natural reading of the two subsections is the one suggested in your discussion of this question. Congress has provided two substantively independent variance mechanisms, and a discharger is

1) Under the veto authority of Section 402(d)(2);

2) Under the discretionary authority of 301(c) and 301(g) as being outside the guidelines and requirements of the Act. Since only the Administrator is authorized to modify effluent limitations under 301(c) and 301(g), the granting of a modification by a State must be reviewed by EPA.

Answer

Properly speaking, EPA does not "review" these modifications at all; it must make the determinations in the first instance. Procedural approaches for the State's role in these determinations are discussed below.

Discussion (questions 4 and 5)

As noted in the answer and discussion for question 3, States have no authority to make determinations under Sections 301(c) and 301(g) of the Act. They may, however, be required to carry out analysis of relevent data and to make a recommendation to EPA if such a requirement is included as part of the guidelines issued under Section 304(i) of the Act.

Obviously, it would be possible under the language of the Act for EPA to make determinations under Section 301(c) and 301(g) independently of State permit issuance. However, such a procedure would be unnecessarily cumbersome, and could delay State permit issuance considerably.

The issuance of waivers under Sections 301(c) and 301(g) can be incorporated into the overall framework for permit issuance which will be set out in the forthcoming proposed NPDES regulations. Under those regulations, all variances not barred by Section 301(j) of the Act must be requested by permit applicants not later than the close of the comment period on the draft permit. At that point the permit issuing State could be required to assess the application and other information submitted by the applicant and to develop a recommendation for the Administrator. Since States must concur in the grant of a 301(g) waiver, the State could deny a 301(g) request, or recommend that it be approved by the Administrator. Since States have no authority under 301(c), they could only recommend grant or denial of the

> owner or operator from reapplying for a modification under Section 301(c) if as a result of regulations under this Act subsequent to the initial request for modification there is a substantial change in the economic circumstances of the applicant which could not have been anticipated at the time of the initial request.

-- In explaining the Conference Bill to the House, Ray Roberts, Chairman of the House Conferees, said:

> If a discharger applies for waivers under both 301(c) and 301(g), he must do so within the same 270-day time period to permit EPA to process both applications in the same period of time and combine the proceedings, as the Agency is indeed encouraged to do. Cong. Rec. H12928, December 15, 1977.

It is clear from the foregoing that Congress intended that Sections 301(c) and 301(g) requests be processed simultaneously to the fullest extent possible. It appears that the only deviation from the Sections 301(g)(2) and (j)(1)(B) time-frames contemplated by Congress is the situation described on page 85 of the Conference Report as quoted above.

There may be less to this deviation, however, than initially appears. First, it applies only where a 301(c) request was initially filed with a 301(g) request and the 301(c) request was denied. Second, it appears to apply only where the change in the applicant's economic circumstances are "as a result of regulations under this Act subsequent to the initial request."

In general, we recommend that the procedures you establish (i) require that (c) and (g) applications be filed and processed simultaneously, and (ii) bar out-of-time filings. 3/

3/ Except, for purposes of §301(c), in the extraordinary case of substantial change in economic circumstances resulting from new EPA regulations.

entitled to the limit derived from the variance which gives him the most relief. To allow relief even beyond the more generous of the two limits derived from (c) and (g), however, simply has no support in the statute or legislative history.

Question 6 - Part 2

If a discharger requests and is granted any relief under Section 301(c) from the requirements of BAT can further relief be subsequently given under Section 301(g) or vice versa?

Answer

Except in highly extraordinary circumstances, no.

Discussion

It is first useful to review the relevant statutory provisions and legislative history:

-- Section 301(j)(1)(B) provides an ascertainable deadline for filing §301(g) requests: the later of (i) September 23, 1978 2/ or (ii) 270 days after promulgation of the applicable §304 BAT guidelines.

-- Section 301(g)(2) provides that if one applies for a §301(g) waiver for a pollutant he may apply for a 301(c) waiver for that pollutant "only during the same time period" allowed for the §301(g) waiver request.

-- The Conference Report for the 1977 Amendments states at page 85:

> If the owner or operator of a point source who requests a modification under Section 301(g) also files for a modification under Section 301(c), within the same time period, and such section 301(c) modification is not granted, nothing in this section shall preclude such

---

2/ 270 days after enactment of the 1977 Amendments.

to include newly effective toxic guidelines and standards. The preamble also states that EPA believes the reopener clause provision does not exceed our legal authority under Section 402(a)(1) to include any conditions necessary to carry out the provisions of the Act. It is reasonable in view of the Act's goals and deadlines to require that when a permit must be reopened and modified in part, it should be brought fully into conformity with the requirements of the Act as they exist at the time of the modification.

While §124.46(a) addresses the elements of a State NPDES program, Section 402(a)(3) of the Clean Water Act requires EPA's permits to be subject to the same terms, conditions, and requirements as apply to a State program. Hence, the legal rationale applies equally to EPA permit administration.

Accordingly, it is only necessary to consider whether the condition sought to be added pursuant to §124.46(a) or a comparable EPA condition is a "requirement of the Act then applicable." It is clear that the specific conditions listed in Question 1 would be requirements of the Act. Effluent limitations for BCT or BAT (both for non-conventional pollutants and for toxics) established under 402(a)(1) or promulgated EPA regulations are express requirements of the Act under Sections 301 and 307. Limitations necessary to meet water quality standards or 208 plans are also requirements of the Act under Sections 301(b)1)(C) and 208(e); by §124.46(a), the permit reopener clause must also require that they be inserted in any reissued or modified permit.

Hence, it is only necessary, to trigger the provisions of a §124.46(a)-type reopener clause, that, after a permit containing such a clause is issued, toxic pollutant standards or limitations applicable to the permittee are issued or approved under Sections 301(b)(2)(C) or (D), 304(b)(2), and 307(a)(2). Once that occurs, the required permit condition states that the permit must be modified or reissued and the modified or reissued permit must include all conditions necessary to reflect any then applicable requirements of the Act.

Second Round Permits

Question 1

When permits in primary industries are reopened and modified following promulgation of effluent guidelines for toxics, may the permit writer also insert other conditions, specifically (a) Section 402(a)(1) judgments of BAT for toxics, where necessary; (b) promulgated BCT effluent limitations guidelines or 402(a)(1) BCT judgments; (c) promulgated BAT effluent guidelines (or 402(a)(1) BAT judgments) for non-conventional pollutants; or (d) limitations necessary to meet water quality standards or 208 plans?

Answer

Yes. Once an applicable BAT effluent guideline for toxic pollutants is promulgated and the permit reopened, all then-applicable requirements of the Act must be included in any modified or reissued permit.

Discussion

The recent revision to the State NPDES program regulations requires that permits issued to dischargers in the Appendix D industrial categories must include a mandatory "reopener clause", effective when an applicable effluent standard or limitation is issued or approved following issuance of the permit. The regulation provides that State issued permits must include a condition which requires that:

> . . . [T]he permit shall be promptly modified or, alternatively, revoked and reissued in accordance with such effluent standard or limitation and any other requirements of the Act then applicable. (Emphasis addd.) §124.46(a), 43 Fed. Reg. 22163, May 23, 1978.

EPA's view of the legal authority supporting promulgation of this section is stated in the preamble to the revision. See id. at 22161. The preamble states EPA's belief that the 1977 CWA Amendments do not override the NRDC v. Train consent decree requiring permits to be revised

Question 2

Subparagraph 301(b)(2)(D) of the Act requires compliance with BAT toxic effluent limitations for pollutants other than those in the NRDC consent decree not later than three years after "the date such limitations are established." Is an effluent limitation established at the time of promulgation of the effluent limitations guidelines pursuant to sections 301 and 304 of the Act, or at the time of the imposition of such effluent limitations in an NPDES permit?

Answer

An effluent limitation is established on the date effluent limitations guidelines become effective. If no guideline has been promulgated, the effluent limitation is established at the time it is included in a permit pursuant to Section 402(a)(1).

Discussion

An effluent limitation is defined as "any restriction established by a State or the Administrator on quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . .." Section 502(11).

Technology-based effluent limitations are established for classes and categories of point sources pursuant to regulations under Sections 301 and 304 of the Act. It is clear from the explicit statutory language of Section 301 that the limitations are established by regulation, independent of the permit program under Section 402. Thus Section 301(e) states that "effluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act." See also §309(a)(3).

However, when effluent limitations have not previously been established pursuant to regulations under 301/304, they can alternatively be established under Section 402(a)(1). Effluent limitations developed in such a manner are established at the time the permit becomes effective.

Question 3

If a statutory deadline calculated under Section 301(b)(2)(D) results in a deadline which is before July 1, 1984, may July 1, 1984 be used as the appropriate deadline?

Answer

No. The statute is explicit in requiring that effluent limitations for toxic pollutants which are added to the list of 65 be achieved no later than three years after such limitations are established. This could result in statutory deadlines which occur earlier than the July 1, 1984 date mandated by Congress for those toxic pollutants which are on the original list of 65. To the extent that this would create administrative difficulties, the regulations could be issued with an effective date of July 1, 1981, thus requiring compliance by July 1, 1984.

Discussion

Your question points up an anomaly which was evidently not considered by Congress in the development of the 1977 Clean Water Act. A BAT guideline for a specific industrial category might be promulgated in March, 1979. The effluent limitations for those pollutants on the list of 65 (301(b)(2)(C)), for BCT (301(b)(2)(E)), and for non-conventional pollutants (301(b)(2)(F)) could be achieved as late as July 1, 1984; but those effluent limitations for pollutants which were added to the 307(a) list would have to be achieved by March, 1982. 4/

In Section 307(a)(2) Congress required that the Administrator establish effluent limitations for all toxic pollutants on the original list of 65 no later than July 1, 1980, thus allowing in all cases a maximum of at least four years rather than three for achieving such effluent limitations.

4/ Of course, there is nothing in the Act to prevent the permit writer from requiring compliance with all the effluent limitations by March, 1982.

Second Round Permits

Question 1

When permits in primary industries are reopened and modified following promulgation of effluent guidelines for toxics, may the permit writer also insert other conditions, specifically (a) Section 402(a)(1) judgments of BAT for toxics, where necessary; (b) promulgated BCT effluent limitations guidelines or 402(a)(1) BCT judgments; (c) promulgated BAT effluent guidelines (or 402(a)(1) BAT judgments) for non-conventional pollutants; or (d) limitations necessary to meet water quality standards or 208 plans?

Answer

Yes. Once an applicable BAT effluent guideline for toxic pollutants is promulgated and the permit reopened, all then-applicable requirements of the Act must be included in any modified or reissued permit.

Discussion

The recent revision to the State NPDES program regulations requires that permits issued to dischargers in the Appendix D industrial categories must include a mandatory "reopener clause" effective when an applicable effluent standard or limitation is issued or approved following issuance of the permit. The regulation provides that State issued permits must include a condition which requires that:

> . . . [T]he permit shall be promptly modified or, alternatively, revoked and reissued in accordance with such effluent standard or limitation and any other requirements of the Act then applicable. (Emphasis addd.) §124.46(a), 43 Fed. Reg. 22163, May 23, 1978.

EPA's view of the legal authority supporting promulgation of this section is stated in the preamble to the revision. See id. at 22161. The preamble states EPA's belief that the 1977 CWA Amendments do not override the NRDC v. Train consent decree requiring permits to be revised

To the extent that this anomaly creates administrative difficulties, the effluent guidelines for pollutants added to the 307(a) list could be promulgated so that they are not "established" until July 1, 1981. Thus a BAT regulation for a particular category or class could be promulgated in March of 1979, but the regulation could state explictly that the effluent limitations for 301(b)(1)(D) pollutants do not become established and effective until July 1, 1981. 6/ BAT permits issued prior to July 1, 1981 could contain effluent limitations based on the 301(b)(1)(D) regulations with the proviso that such limitations do not become part of the permit until July 1, 1981. Similarly, permits could contain pre-guidelines 301(b)(1)(D) limitations with the proviso that such limitations do not become established until July 1, 1981. The discharger would be required to challenge such effluent limitations at the time of final Agency action on the permit, rather than at the time of the July 1, 1981 atuomatic modification. We would be pleased to assist you and the Office of Water Planning and Standards in developing standard language for effluent guidelines and permits to accomplish such results.

Heat

Question 1

Should "heat" (the thermal component of a discharge), be treated as a fourth pollutant category, in addition to the toxic, conventional, and nonconventional categories?

Answer

Heat may not be classified as a "fourth category" so as to render it ineligible for §301(c) variances.

Discussion

On its face, §301(c) applies to any BAT limitation for any point source. The only exception in the statute is

---

6/ Judicial review would of course be available within 90 days after "promulgating". See §509(b). Promulgation would occur on the date of publication in the Federal Register, and the effective date would be the date limitations are "established" under §301(b)(1)(D).

Nonetheless, despite this apparent anomaly, it seems clear that the Agency lacks the authority to extend the three-year deadline. The statutory language is clear on its face, and the legislative history is equally clear:

> For all other toxic pollutants compliance must be achieved no later than 3 years after the limitation is established. (Conference Report at p. 82.)

In his floor statement, Congressman Roberts on behalf of the House Managers stated that:

> With respect to chemicals thus added to the list, the Administrator is required to promulgate regulations as soon as practicable, industry compliance is required within 3 years in the case of BAT effluent guidelines . .. [Cong. Rec. December 15, 1977 at H12927]. 5/

5/ Senator Muskie's floor statement is more ambiguous:

> For all other toxic pollutants, compliance must be achieved no later than 3 years after the limitation is established. For all pollutants other than toxic pollutants or conventional pollutants, compliance with effluent limitations requiring best available technology must be achieved not later than 3 years after the limitation is established or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.
>
> The earliest date for which compliance is required is the same as the date for compliance with the requirements of sections 301(b)(2)(C) and (E); that is, not later than July 1, 1984. [Cong. Rec. Dec. 15, 1977 at S19648].

It is unclear whether the Senator is suggesting that July 1, 1984 is the earliest date for all pollutants, or merely for the unconventional pollutants.

§301(l), which excludes §307 toxics. Especially in light of the specific exclusion of heat from §301(g), there is no support in the statute for excluding it from §301(c).

The legislative history you have cited does not call into question the clear provisions of the statute. The first excerpt states in part that heat is excluded from "the category of non-conventional pollutants." This appears to be nothing more than a recognition that thermal discharges are not eligible for §301(g) variances.

The second quote states that the conferees did not want to provide "additional" waiver opportunities for heat which were not in the 1972 Act. This again appears to be nothing more than a reflection of heat's exclusion from the new §301(g) variance scheme. Heat was eligible for §301(c) under the 1972 Act; continuing to recognize its eligibility now does not provide an "additional" waiver opportunity.

In short, we simply cannot construe legislative history which is at best ambiguous to supply an exclusion from §301(c) which would be totally at odds with the words of the statute.