



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

AUG 18 1977

OFFICE OF ENFORCEMENT

n-77-14

MEMORANDUM

TO: Regional Administrators
Directors of Approved NPDES States

FROM: Deputy Assistant Administrator
for Water Enforcement (EN-335)

SUBJECT: Policy Regarding Procedures for Fundamentally
Different Factors BPT Variances

Introduction

In light of the experience gained from reviewing "fundamentally different factors" (FDF) variance requests during the past year, the Office of Enforcement has developed interim procedures that will be used by our office pending possible promulgation of regulations. This memorandum is to inform you of such procedures and other relevant matters.

Before doing so, I think it is important to discuss our policy regarding approval of variances. We regard the variance as an exceptional device to be approved only when clearly demonstrated by the circumstances. Our adherence to this policy is evidenced by the fact that our office has recommended approval of only two requests out of a total of 11 determinations.

We will be forwarding to you, on a periodic basis, a variance status report which will inform you of the status of all variance requests, the issues involved, and a general overview of the variance program. In addition to the status report we are contemplating the development of regulations concerning the variance program. Accordingly, we would appreciate input from you prior to development of the regulations regarding issues addressed in this memorandum or any other issues which have come to your attention. Indeed, we would welcome your advice on whether you feel that such variance regulations are advisable.

It is important to note that the policy established by this memorandum only applies where the fundamentally different factors variance request asks for or results in the establishment of less stringent effluent limitations. We do not address the situation where more stringent limits are requested, because all requests received have involved less stringent limits and because we anticipate few if any requests asking for or leading to more stringent limits. If such requests should occur, the Regions and the States should seek guidance from us on a case-by-case basis.

Procedures for Regions and States

Only the Administrator has the authority to approve the request for a discharger to receive a FDF variance. This is apparent from the language of the variance clause:

If . . . fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations
(emphasis added)

Although concurrence of the Administrator is required in situations where the Regions or the States approve variance requests, it is not required where the request is denied. In cases where the Regions and the States deny all or part of the variance requests, it is important, as discussed below, that they adequately review and respond to the issues raised.

The procedures that should be followed in seeking the approval of the Administrator or appealing decisions of the Regional Administrators to the Administrator depend on whether the applicant is within the jurisdiction of an

approved NPDES State and whether the request has been denied or approved at the Regional or State level.1/

If the State:

(1) Denies the variance request, no further EPA review is required. Appeals of State determinations must be made within the administrative framework of the State or to the appropriate State court.

(2) Approves the variance request, it shall be forwarded to the Regional Administrator for review; it will not be subject to review by the Administrator unless the RA concurs with the findings of the State.

(3) Determination is a mixed decision, only those aspects of the request which are approved should be forwarded to the RA.

If the Regional Administrator:

(1) Denies the variance request, which may come directly from the applicant or the State, no further review by our office or the Administrator will occur unless the applicant appeals the decision to the Administrator. The RA shall advise the applicant that a petition for the Administrator's review must be made to the Administrator within 10 days of the determination.2/

(2) Approves the variance request, which may come directly from the applicant or the State, it shall be forwarded to the Administrator for review. To facilitate

1/ There are three decision options available to the Regions and the States following review of the variance request. They are:

- (1) Deny the request in its entirety.
- (2) Approve the request in its entirety.
- (3) Deny certain aspects of the request and approve others. (Mixed decision)

2/ This time period is consistent with the time periods established in 40 CFR Section 125.36(b) for requesting an adjudicatory hearing following issuance of a permit and 40 CFR Section 125.35(n) for appeal of initial decisions of the RA.

the expeditious handling of these requests, we urge the Regions to send a copy of the request to the Director, Permits Division.

(3) Determination is a mixed decision, only those aspects of the request which are approved shall be forwarded to the Administrator. If, however, an appeal is made relating to those portions of the request that were denied, the appeal should be consolidated with the review of the approved aspects of the request.

In all cases where the variance request sets forth disputed complex material issues of fact, the RA may decide to conduct a hearing prior to resolution of these issues.

Headquarters Procedures

Because both complex legal and technical issues are involved in a variance request, we have determined that a variance panel consisting of persons with expertise in these areas will review requests received from the Regions to assure adequate consideration of all issues. Ordinarily the panel will be comprised of the Chief of the Industrial Permits Branch, an attorney from General Counsel, a technical member of the Industrial Permits Branch with responsibility for the industry concerned and personnel from other EPA program offices (such as Effluent Guidelines Division) as necessary. Furthermore, if the Regions so desire, members of their staff intimately involved in the variance request will be asked to attend the variance panel meetings.

Ordinarily the following procedures will apply:

(1) The Deputy Assistant Administrator for Water Enforcement issues a Recommended Decision to the Administrator by the Office of Enforcement to deny or approve the request based on the panel's findings. However, if a variance request concerns solely legal issues, the General Counsel may make the Recommended Decision of the Administrator.

(2) The Recommended Decision is transmitted to the Regional Administrator, the State Director (if an approved NPDES State is involved) and the applicant.

(3) A draft public notice of the Recommended Decision is transmitted to the Permits Branch Chief of the Region for publication within the geographical locale of the facility involved.3/

(4) All comments received by the Office of Enforcement (or General Counsel) within 30 days of the date of the notice will be considered prior to issuance of a Final Decision by the Administrator. Interested persons can receive copies of the Recommended Decision from the Permits Division, EPA Headquarters.

(5) The Variance Panel reviews the comments and drafts a Final Decision for the Administrator's signature.

(6) In matters involving issues of great importance and broad potential impact, Recommended Decisions may be noticed in the Federal Register.4/

We encourage the Regions and approved NPDES States (to the extent it is compatible with their administrative procedures) to utilize similar variance panels. We believe that the panel approach provides the type of review required in these complex matters.

The Record

The Office of Enforcement is concerned that application of the variance provision will be subject to judicial scrutiny, particularly with respect to the record developed during the decision-making process. Accordingly, it is

3/ Procedural fairness requires that interested persons and the industry involved have the opportunity to participate in EPA decision-making process prior to a final determination.

4/ For example, see Louisiana Pacific Corp. and Crown Simpson Pulp Co., Recommended Decision of the Administrator 42 Fed. Reg. 28167, June 2, 1977. At issue in the variance request was the relevance of the nature and quality of the receiving water.

important that the record developed during the process substantiate final EPA or State determinations regarding the issues of fundamental difference and the establishment of different effluent limitations. The primary responsibility in this regard will fall on the Regions and the States.

In denying a variance request or recommending the establishment of different effluent limitations, the record compiled by the Region (and/or the State) should make plain the course of inquiry, the reasons for the determination, the facts relied upon and, most importantly, it should substantiate the determination.

The variance clause states in part that:

If such fundamentally different factors are found to exist, the Regional Administrator or the State . . . shall establish . . . effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such . . . factors. (emphasis added)

Therefore in establishing less stringent limitations, the reasons for and the facts relied on must be clearly stated in order that the Administrator may approve or disapprove such limitations. In essence, limits established by the Region or the NPDES State must be justified by the extent of the fundamental difference. Moreover the basis for the recommended limits should be clearly delineated.

If the record as forwarded to us is incomplete, we will either return the variance request to the Region or the NPDES State for supplementation and further consideration or, in rare cases, we may supplement the record ourselves. Such actions will result in lengthy delays. For example, in cases where our office supplements the record, we must afford the permittee the opportunity to rebut such material and in certain cases this may require a hearing. Furthermore, a poorly developed record in the case of Regional or NPDES State denials could lead to adverse court holdings. Therefore I cannot overemphasize the importance of the record from both the standpoint of legal sufficiency and State and Agency resources.

Scope of the Variance

It is an inherent aspect of the variance clause that it applies only to individual dischargers which have been determined to fall within a particular industrial category.

The language of the variance clause clearly contemplates the adjustment of effluent limitations only for plants that fall within a given industry. Logically, an industry not subject to the regulations is not subject to the regulations' exemptions. Therefore, it is not the proper device for raising the issue of whether a facility has been correctly categorized. Such issues should be raised during permit issuance or through an adjudicatory hearing.

Also, several of the Regions and NPDES States have recommended the establishment of different effluent limitations under the variance clause for permit limits based on 402(a)(1) determinations. Clearly the variance provision applies only to effluent limitations established under an applicable guideline. Limitations based on 402(a)(1) are BPCTCA for the plant and are not subject to the variance provisions of the guidelines.

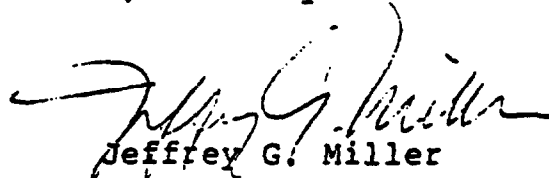
Timely Variance Request

An issue worthy of discussion because of its immediate importance is when should variance requests be considered by EPA Headquarters, the Regions and the NPDES States.

In general, our position is that requests must be submitted during the permit issuing or reissuing process and not be considered at other times. Under certain limited circumstances, however, variance requests can be considered during the life of a permit, such as when the alleged fundamentally different factors arose or were reasonably capable of discovery only after the time when the request would generally be considered timely.

I urge the Regions and NPDES States to notify each industrial applicant by letter with the permit application that variance requests must be submitted prior to issuance or reissuance of the final permit and that requests received after the permit is final are untimely except under the circumstances discussed above.

If you have any questions regarding this memorandum, please contact Tom Tomasello, Attorney Industrial Permits Branch (8/472-3665).


Jeffrey G. Miller

cc: Regional Enforcement Division Directors
Regional Permit Branch Chiefs