

markedly more adverse non-water quality environmental impacts than the national limitation or standard.

EPA regulations at 40 CFR part 125 subpart D, authorizing the Regional Administrators to establish alternative limitations and standards, further detail the substantive criteria used to evaluate FDF variance requests for direct dischargers. Thus, 40 CFR 125.31(d) identifies six factors (*e.g.*, volume of process wastewater, age and size of a discharger's facility) that may be considered in determining if a facility is fundamentally different. The Agency must determine whether, on the basis of one or more of these factors, the facility in question is fundamentally different from the facilities and factors considered by EPA in developing the nationally applicable effluent guidelines. The regulation also lists four other factors (*e.g.*, infeasibility of installation within the time allowed or a discharger's ability to pay) that may not provide a basis for an FDF variance. In addition, under 40 CFR 125.31(b)(3), a request for limitations less stringent than the national limitation may be approved only if compliance with the national limitations would result in either: (a) A removal cost wholly out of proportion to the removal cost considered during development of the national limitations; or (b) a non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits. The conditions for approval of a request to modify applicable pretreatment standards and factors considered are the same as those for direct dischargers.

The legislative history of section 301(n) underscores the necessity for the FDF variance applicant to establish eligibility for the variance. EPA's regulations at 40 CFR 125.32(b)(1) are explicit in imposing this burden upon the applicant. The applicant must show that the factors relating to the discharge controlled by the applicant's permit which are claimed to be fundamentally different are, in fact, fundamentally different from those factors considered by the EPA in establishing the applicable guidelines. The pretreatment regulations incorporate a similar requirement at 40 CFR 403.13(h)(9).

Facilities must submit all FDF variance applications to the appropriate Director (as defined at 40 CFR 122.2) no later than 180 days from the date the limitations or standards are established or revised (*see* CWA § 301(n)(2) and 40 CFR 122.21(m)(1)(i)(B)(2)). EPA regulations clarify that effluent limitations guidelines are "established"

or "revised" on the date those effluent limitations guidelines are published in the **Federal Register** (*see* 40 CFR 122.21(m)(1)(i)(B)(2)). Therefore all facilities requesting FDF variances from the effluent limitations guidelines in today's final rule must submit all FDF variance applications to their Director (as defined at 40 CFR 122.2) no later than November 10, 2003.

An FDF variance is not available to a new source subject to NSPS.

2. Water Quality Variances

Section 301(g) of the CWA authorizes a variance from BAT effluent guidelines for certain non-conventional pollutants due to localized environmental factors so long as the discharge does not violate any water quality-based effluent limitations. These pollutants include ammonia, chlorine, color, iron, and phenols (as measured by the colorimetric 4-aminoantipyrine (4AAP) method). Dischargers subject to new or revised BAT limitations promulgated today for those pollutants may be eligible for a section 301(g) variance. Please note that section 301(g)(4)(c) requires the filing of section 301(g) variance applications pertaining to the new or revised limits not later than February 9, 2004. Existing section 301(g) variances for limitations not being revised today are not affected by today's action. This variance is not applicable to today's final rule as none of these parameters are regulated by today's final rule.

3. Permit Modifications

Even after EPA (or an authorized State) has issued a final permit to a direct discharger, the permit may still be modified under certain conditions. (When a permit modification is under consideration, however, all other permit conditions remain in effect.) A permit modification may be triggered in several circumstances. These could include a regulatory inspection or information submitted by the permittee which reveals the need for modification. Any interested person may request that a permit modification be made. There are two classifications of modifications: Major and minor. From a procedural standpoint, they differ primarily with respect to the public notice requirements. Major modifications require public notice while minor modifications do not. Virtually any modification that results in less stringent conditions is treated as a major modification, with provisions for public notice and comment. Conditions that would necessitate a major modification of a permit are described at 40 CFR part 122.62. Minor

modifications are generally non-substantive changes. The conditions for minor modification are described at 40 CFR part 122.63.

XII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (*see* 58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule merely establishes technology-based discharge limitations and standards.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of