



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

OCT 11 1983

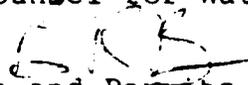
OFFICE OF
WATER

MEMORANDUM

SUBJECT: Review of Memorandum Regarding Draft Procedures for Processing Fundamentally Different Factors Variances for Direct and Indirect Dischargers

TO: Steven Schatzow, Director
Office of Water Regulations and Standards (WH-551)

Colburn T. Cherney
Acting Associate General Counsel for Water (LE-132W)

FROM: Bruce R. Barrett, Director 
Office of Water Enforcement and Permits (EN-335)

Attached is a draft memorandum for Rebecca W. Hanmer's signature to the Regional Administrators regarding proposed procedures for processing fundamentally different factors (FDF) variances for direct and indirect dischargers for review and comment. (We have not deleted the material relating to FDF variances for indirect dischargers as the Third Circuit decision in National Association of Metal Finishers v. EPA did not disallow FDF variance requests for conventional and non-conventional pollutants from pretreatment standards for existing sources.) This draft has been developed by my staff as a result of our meeting with Rebecca on procedures for handling FDF variances for indirect dischargers on July 28, 1983.

I would like your comments on this draft by October 21, 1983. Please call me (755-9187) if you have any questions or comments on this matter.

Attachment

cc: Jeffery D. Denit (WH-552)
Susan G. Lepow (LE-132W)



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DRAFT

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Draft Procedures for Processing Fundamentally
Different Factors Variances for Direct and Indirect
Dischargers

TO: Regional Administrators

FROM: Rebecca W. Hanmer
Acting Assistant Administrator for Water (WH-556)

Due to the increased emphasis on National Pollutant Discharge Elimination System (NPDES) permit issuance and imposition of categorical pretreatment standards on indirect dischargers by the Regions and States, there is an increased interest in the variances and time extensions available under the Clean Water Act. The NPDES and pretreatment regulations contain procedures for processing fundamentally different factors (FDF) variances for direct and indirect dischargers. (Copies of the procedural regulations appear as Attachments A and B.) There is a need to take steps to assure that information is exchanged regularly among Regions and States on precedents being set and that some acceptable degree of consistency in approach is provided. In addition, it is important to integrate EPA's review of variance requests to avoid the duplication of effort that currently occurs with separate Regional and Headquarters review. The procedures detailed in this memorandum are designed to achieve these goals. If you agree that such procedures are workable, we would expect to make the appropriate regulatory changes to reflect this new approach. These procedures focus on FDF variances but if successful, may be used for addressing other variances and time extensions under the Clean Water Act.

All FDF variance requests, in an important sense, involve issues of national significance since they all require interpretation of national effluent guidelines and the supporting technical records for the guidelines. In addition, each FDF decision sets a precedent for other requests to the extent that issues are not strictly case specific. Finally, past EPA practice has resulted in a duplication of the evaluation and decision-making by both the Region and Headquarters on each variance request. For these reasons, there must be an integrated EPA involvement in the resolution of these requests. I propose to establish a Headquarters/Regional Variance Review

Panel (Variance Panel or Panel) to review and recommend responses on each variance request. The Variance Panel would consist of staff from OW (the Permits Division (PD) and Effluent Guidelines Division (EGD)), the Office of General Counsel (OGC), and the affected Region. It is envisioned that PD will provide advice on the procedural aspects, precedents and application of the appropriate regulations. EGD will provide expertise in the guidelines development process, interpretation of the guidelines and review of the guidelines record. OGC will provide legal interpretations and advice. The Regional office will provide knowledge and information on the facts and circumstances for the individual request, as well as participating in the decision-making process. The Headquarters staff from PD, EGD and OGC will be those individuals assigned to the specific industry or pretreatment program for which the FDF variance has been requested. The affected Region would also designate at least one staff member for each FDF variance. Each member of the Variance Panel, in addition to providing expertise on the issues involved in the FDF request, would be responsible for keeping his or her management informed of the progress of the Panel's work and keeping the Panel informed of any issues or directions management has given. The Permits Division will provide coordination services for each Variance Panel, such as distribution of materials, preparation of schedules and briefing materials, etc. Generally, the Panel members would communicate by telephone and correspondence, but in some cases a Panel may need to meet either in the Region or at Headquarters, as appropriate.

The function of the Variance Panel will be to review the submitted FDF variance requests (from the dischargers or State), identify significant issues and develop a proposed EPA position within four weeks of receipt of the materials. A flow chart of the operation of the Variance Panel is contained in Attachment C. Permits Division will be responsible for assuring preparation of the draft decision (this would be either the draft tentative decision or draft final decision for NPDES variances or draft determination for pretreatment variances) and its distribution. The Variance Panel will submit a draft decision to the Regional Water Management Division (WMD) Director, Directors of Office of Water Enforcement and Permits (OWEP) and Office of Water Regulations and Standards (OWRS), and the Associate General Counsel for Water for a two week review period. After this two week review period, these managers will meet with the Variance Panel, if necessary, to discuss the draft decision and resolve any disagreements. (EPA's teleconferencing facilities would be used to avoid unnecessary travel.) The Variance Panel will then prepare a decision (this would be either the tentative decision or final decision for NPDES variances or determination for pretreatment variances) within one week of the receipt of concurrence by affected managers or within one week after the meeting of managers to resolve issues. The decision would then be submitted to the Assistant

Administrator (AA) for Water. Upon completion of the AA's review the decision will be transmitted to the Regional Administrator (RA). If there is disagreement between Headquarters and the Region, the RA and AA will resolve the matter.

Specific Procedures - Requests from Direct Dischargers

Regions would send copies of the request to Headquarters upon receipt from the State or the discharger. The Variance Panel will first develop the tentative decision of the RA. The Regional Office will provide for public notice and opportunity to comment on the tentative decision of the RA. After public comment, the Variance Panel will confer, under the same schedule and procedures as described above, to develop the draft final decision for management review. If the final decision is to approve the FDF variance request, the Director, OWEP will provide concurrence in the final decision as required by 40 CFR §124.62(d). A flow chart of the operation of the Variance Panel for FDF variance requests from direct dischargers is contained in Attachment D.

Specific Procedures - Requests from Indirect Dischargers

Upon receipt from the discharger of FDF variance requests from PSES, the general pretreatment regulations require that a determination of completeness be made and that public notice and comment on the complete variance request be provided by the [State or WMD] Director. If the State has made the determination of completeness and provided for public notice and comment, the request should be submitted to Headquarters after receipt from the State. I believe the Variance Panel and management review should also be implemented before the determination of completeness is made and public notice of receipt of the variance request is given, if the action is the responsibility of the Region. After submission of the request to Headquarters, following the determination of completeness, public notice and the opportunity for comment, the Variance Panel will develop the draft determination of the WMD Director, which will then be subject to management review. The AA for Water will transmit the determination to the RA, who may consult with the WMD Director before the determination is issued. A flow chart of the operation of the Variance Panel for FDF variance requests from indirect dischargers is contained in Attachment E.

We are very interested in your comments on this proposal and would be happy to discuss it with you. I am requesting your written comments by _____. If Regional comments indicate agreement with this integrated approach, we would initiate steps to change the regulations to provide for a single Agency decision to be made by the AA for Water, along with implementation of this approach, in the interim, as outlined in these draft procedures.

DRAFT

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If you or your staff have any questions on the procedures, please feel free to call Bruce Barrett at FTS 755-9187 or Martha Prothro at FTS 755-2545.

Attachments

cc: Regional Water Management Division Directors
Director, NEIC
Colburn T. Cherney (LE-132W)

bcc: Bruce R. Barrett (EN-335)
Steven Schatzow (WH-551)

required by a stay under this section shall be

Attachment A more

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schedules under § 124.60(f)(2) will not automatically be granted for a period equal to the period the stay is in effect for an effluent limitation. For example, if both the Agency and the discharger agree that a certain treatment technology is required by the CWA where guidelines do not apply, but a hearing is granted to consider the effluent limitations which the technology will achieve, requirements regarding installation of the underlying technology will not be stayed during the hearing. Thus, unless the hearing extends beyond the final compliance date in the permit, it will not ordinarily be necessary to extend the compliance schedule. However, when application of an underlying technology is challenged, the stay for installation requirements relating to that technology would extend for the duration of the hearing.

(g) For purposes of judicial review under CWA section 509(b), final agency action on a permit does not occur unless and until a party has exhausted its administrative remedies under Subparts E and F and § 124.91. Any party which neglects or fails to seek review under § 124.91 thereby waives its opportunity to exhaust available agency remedies.

§ 124.61 Final environmental impact statement.

No final NPDES permit for a new source shall be issued until at least 30 days after the date of issuance of a final environmental impact statement if one is required under 40 CFR § 6.805.

§ 124.62 Decision on variances.

(Applicable to State programs, see § 124.25 (NPDES)).

(a) The Director may grant or deny requests for the following variances (subject to EPA objection under § 123.44 for State permits):

(1) Extensions under CWA section 301(i) based on delay in completion of a publicly owned treatment works;

(2) After consultation with the Regional Administrator, extensions under CWA section 301(k) based on the use of innovative technology; or

(3) Variances under CWA section 316(a) for thermal pollution.

(b) The State Director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA 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 on the economic capability of the applicant under CWA section 301(c);

(3) A variance based upon certain water quality factors under CWA section 301(g); or

(4) A variance based on water quality related effluent limitations under CWA section 302(b)(2).

(c) The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in paragraph (b) of this section that is forwarded by the State Director, or that is submitted to the Regional Administrator by the requester where EPA is the permitting authority.

(d) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under paragraph (c) of this section. If the Deputy Assistant Administrator approves the variance, the Director 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 § 124.54.

§ 124.63 Procedures for variances when EPA is the permitting authority.

(a) In States where EPA is the permit issuing authority and a request for a variance is filed as required by § 122.21, the request shall be processed as follows:

(1) If at the time that a request for a variance 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.

(2) If at the time that a request for a variance is filed the Regional Administrator has given notice under § 124.10 of a draft permit covering the discharge in question, but that permit has not yet become final, administrative

proceedings concerning that permit may be stayed and the Regional Administrator shall prepare a new draft permit including a tentative decision on the request, and the fact sheet required by § 124.8. However, if this will significantly delay the processing of the existing draft permit or the Regional Administrator, for other reasons, considers combining the variance request and the existing draft permit inadvisable, the request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the administrative disposition of the existing draft permit shall proceed without delay.

(3) If the permit has become final and no application under § 124.3 concerning it is pending or if the variance request has been separated from a draft permit as described in paragraphs (a) (1) and (2) of this section, the Regional Administrator may prepare a new draft permit and give notice of it under § 124.10. This draft permit shall be accompanied by the fact sheet required by § 124.8 except that the only matters considered shall relate to the requested variance.

§ 124.64 Appeals of variances.

(a) When a State issues a permit on which EPA has made a variance decision, separate appeals of the State permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Variance decisions made by EPA may be appealed under either Subparts E or F, provided the requirements of the applicable Subpart are met. However, whenever the basic permit decision is eligible only for an evidentiary hearing under Subpart E while the variance decision is eligible only for a panel hearing under Subpart F, the issues relating to both the basic permit decision and the variance decision shall be considered in the Subpart E proceeding. No Subpart F hearing may be held if a Subpart E hearing would be held in addition. See § 124.111(b).

(c) Stays for section 301(g) variances. If a request for an evidentiary hearing is granted on a variance requested under CWA section 301(g), or if a petition for review of the denial of a request for the hearing is filed under § 124.91, any otherwise applicable standards and limitations under CWA section 301 shall not be stayed unless:

(1) In the judgment of the Regional Administrator, the stay or the variance sought will not result in the discharge of

(ii) The dates analyses were performed; Attachment B. Within 3 years any records of monitoring activities and results (whether or not such monitoring activities are required by this section) and shall make such records available for inspection and copying by the Director and the Regional Administrator (and POTW in the case of an Industrial User). This period of retention shall be extended during the course of any unresolved litigation regarding the Industrial User or POTW or when requested by the Director or the Regional Administrator.

(3) Any POTW to which reports are submitted by an Industrial User pursuant to paragraphs (b), (d), and (e) of this section shall retain such reports for a minimum of 3 years and shall make such reports available for inspection and copying by the Director and the Regional Administrator. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the Industrial User or the operation of the POTW Pretreatment Program or when requested by the Director or the Regional Administrator.

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

(a) *Definition.* The term "Requester" means an Industrial User or a POTW or other interested person seeking a variance from the limits specified in a categorical Pretreatment Standard.

(b) *Purpose and scope.* In establishing categorical Pretreatment Standards for existing sources, the EPA will take into account all the information it can collect, develop and solicit regarding the factors relevant to pretreatment standards under section 307(b). In some cases, information which may affect these Pretreatment Standards will not be available or, for other reasons, will not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the limits in categorical Pretreatment Standards, making them either more or less stringent, as they apply to a certain Industrial User within an industrial category or subcategory. This will only be done if data specific to that Industrial User indicates it presents factors fundamentally different from those considered by EPA in developing

the limit at issue. Any interested person believing that factors relating to an Industrial User are fundamentally different from the factors considered during development of a categorical Pretreatment Standard applicable to that User and further, that the existence of those factors justifies a different discharge limit from that specified in the applicable categorical Pretreatment Standard, may request a fundamentally different factors variance under this section or such a variance request may be initiated by the EPA.

(c) *Criteria.*—(1) *General criteria.* A request for a variance based upon fundamentally different factors shall be approved only if:

- (i) There is an applicable categorical Pretreatment Standard which specifically controls the pollutant for which alternative limits have been requested; and
- (ii) Factors relating to the discharge controlled by the categorical Pretreatment Standard are fundamentally different from the factors considered by EPA in establishing the Standards; and
- (iii) The request for a variance is made in accordance with the procedural requirements in paragraphs (g) and (h) of this section.

(2) *Criteria applicable to less stringent limits.* A variance request for the establishment of limits less stringent than required by the Standard shall be approved only if:

- (i) The alternative limit requested is no less stringent than justified by the fundamental difference;
- (ii) The alternative limit will not result in a violation of prohibitive discharge standards prescribed by or established under § 403.5;
- (iii) The alternative limit will not result in a non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Pretreatment Standards; and
- (iv) Compliance with the Standards (either by using the technologies upon which the Standards are based or by using other control alternatives) would result in either:

(A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or

(B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.

(3) *Criteria applicable to more stringent limits.* A variance request for the establishment of limits more

stringent than required by the Standards shall be approved only if:

- (i) The alternative limit request is no more stringent than justified by the fundamental difference; and
- (ii) Compliance with the alternative limit would not result in either:
 - (A) A removal cost (adjusted for inflation) wholly out of proportion to the removal cost considered during development of the Standards; or
 - (B) A non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the Standards.
- (d) *Factors considered fundamentally different.* Factors which may be considered fundamentally different are:
 - (1) The nature or quality of pollutants contained in the raw waste load of the User's process wastewater;
 - (2) The volume of the User's process wastewater and effluent discharged;
 - (3) Non-water quality environmental impact of control and treatment of the User's raw waste load;
 - (4) Energy requirements of the application of control and treatment technology;
 - (5) Age, size, land availability, and configuration as they relate to the User's equipment or facilities; processes employed; process changes; and engineering aspects of the application of control technology;
 - (6) Cost of compliance with required control technology.
- (e) *Factors which will not be considered fundamentally different.* A variance request or portion of such a request under this section may not be granted on any of the following grounds:
 - (1) The feasibility of installing the required waste treatment equipment within the time the Act allows;
 - (2) The assertion that the Standards cannot be achieved with the appropriate waste treatment facilities installed, if such assertion is not based on factors listed in paragraph (d) of this section;
 - (3) The User's ability to pay for the required waste treatment; or
 - (4) The impact of a Discharge on the quality of the POTW's receiving waters.
- (f) *State or local law.* Nothing in this section shall be construed to impair the right of any state or locality under section 510 of the Act to impose more stringent limitations than required by Federal law.
- (g) *Application deadline.*
 - (1) Requests for a variance and supporting information must be submitted in writing to the Director or to the Enforcement Division Director, as appropriate.
 - (2) In order to be considered, request for variances must be submitted within

180 days after the effective date of the categorical Pretreatment Standard unless the User has requested a categorical determination pursuant to § 403.6(a).

(3) Where the User has requested a categorical determination pursuant to § 403.6(a), the User may elect to await the results of the category determination before submitting a variance request under this section. Where the User so elects, he or she must submit the variance request within 30 days after a final decision has been made on the categorical determination pursuant to § 403.6(a)(4).

(h) *Contents of submission.* Written Submissions for variance request, whether made to the Enforcement Division Director or to the Director must include:

(1) The name and address of the person making the request;

(2) Identification of the interest of the Requester which is affected by the categorical Pretreatment Standard for which the variance is requested;

(3) Identification of the POTW currently receiving the waste from the Industrial User for which alternative discharge limits are requested;

(4) Identification of the categorical Pretreatment Standards which are applicable to the Industrial User;

(5) A list of each pollutant or pollutant parameter for which an alternative discharge limit is sought;

(6) The alternative discharge limits proposed by the Requester for each pollutant or pollutant parameter identified in item (5) of this paragraph;

(7) A description of the Industrial User's existing water pollution control facilities;

(8) A schematic flow representation of the Industrial User's water system including water supply, process wastewater systems, and points of Discharge; and

(9) A Statement of facts clearly establishing why the variance request should be approved, including detailed support data, documentation, and evidence necessary to fully evaluate the merits of the request, e.g., technical and economic data collected by the EPA and used in developing each pollutant discharge limit in the Pretreatment Standard.

(i) *Deficient requests.* The Enforcement Division Director or 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 Enforcement Division Director or Director that their requests are deficient and unless the time period is extended, will be given up to 30 days

to correct the deficiency. If the deficiency is not corrected within the time period allowed by the Enforcement Division Director or the Director, the request for a variance shall be denied.

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

(1) The public notice shall be circulated in a manner designed to inform interested and potentially interested persons of the request. Procedures for the circulation of public notice shall include mailing notices to:

(i) The POTW into which the Industrial User requesting the variance discharges;

(ii) *Adjoining States whose waters may be affected;* and

(iii) Designated 208 planning agencies, Federal and State fish, shellfish and wildlife resource agencies; and to any other person or group who has requested individual notice, including those on appropriate mailing lists.

(2) The public notice shall provide for a period not less than 30 days following the date of the public notice during which time interested persons may review the request and submit their written views on the request.

(3) Following the comment period, the Director or Enforcement Division Director will make a determination on the request taking into consideration any comments received. Notice of this final decision shall be provided to the requestor (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) *Review of requests by state.* (1) Where the Director finds that fundamentally different factors do not exist, he may deny the request and notify the requester (and Industrial User where they are not the same) and the POTW of the denial.

(2) Where the director finds that fundamentally different factors do exist, he shall forward the request, and a recommendation that the request be approved, to the Enforcement Division Director.

(1) *Review of requests by EPA.* (1) Where the Enforcement Division Director 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 Enforcement Division Director 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 Enforcement Division Director will:

(i) Prepare recommended alternative discharge limits for the Industrial User either more or less stringent than those prescribed by the applicable categorical Pretreatment Standard to the extent warranted by the demonstrated fundamentally different factors;

(ii) Provide the following information in his written determination:

(A) the recommended alternative discharge limits for the Industrial User concerned;

(B) the rationale for the adjustment of the Pretreatment Standard (including the Enforcement Division Director's reasons for recommending that a fundamentally different factor variance be granted) and an explanation, of how the Enforcement Division Director's recommended alternative discharge limits were derived;

(C) the supporting evidence submitted to the Enforcement Division Director; and

(D) other information considered by the Enforcement Division Director in developing the recommended alternative discharge limits;

(iii) *Notify the Director and the POTW* of his or her determination; and

(iv) Send the information described in paragraphs (1)(2) (i) and (ii) above to the Requestor (and to the Industrial User where they are not the same).

(m) *Request for hearing.* (1) Within 30 days following the date of receipt of notice of the Enforcement Division Director's decision 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.

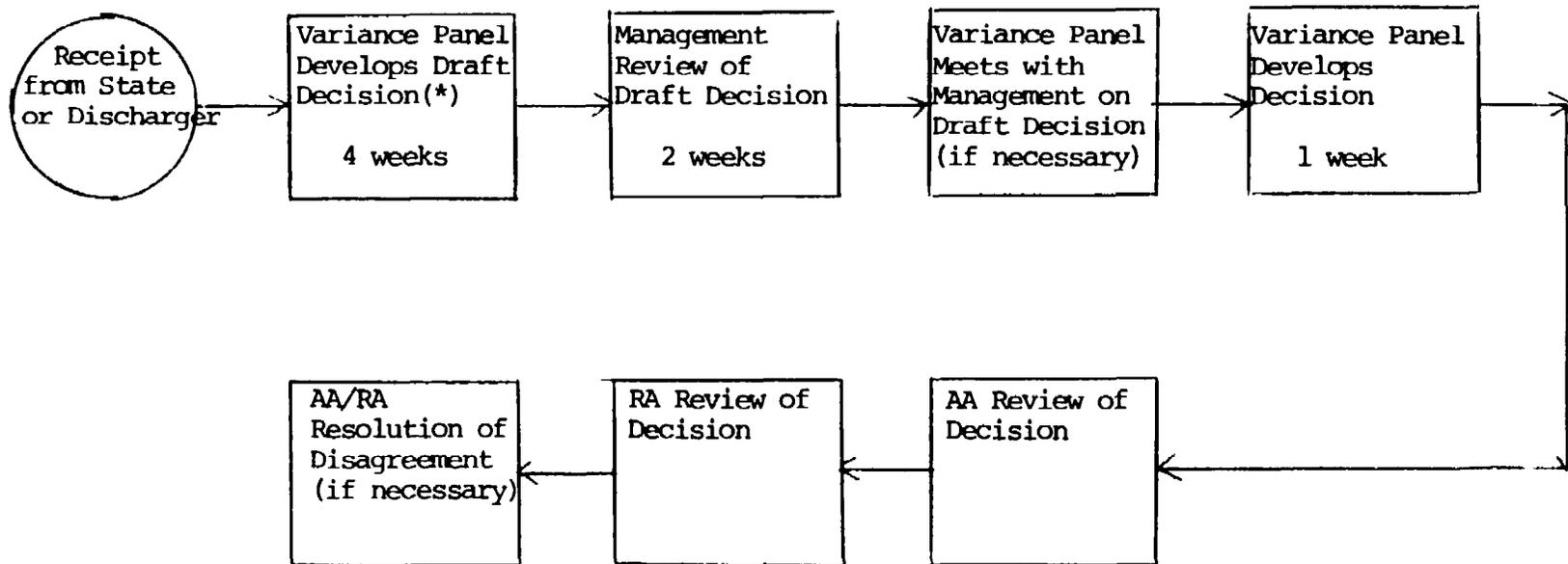
(2) If the Regional Administrator declines to hold a hearing and the Regional Administrator affirms the Enforcement Division Director's findings, the Requester may submit a petition for a hearing to the Administrator within 30 days of the Regional Administrator's decision.

§ 403.14 Confidentiality.

(a) *EPA authorities.* In accordance with 40 CFR Part 2, any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter. Any such

Attachment C

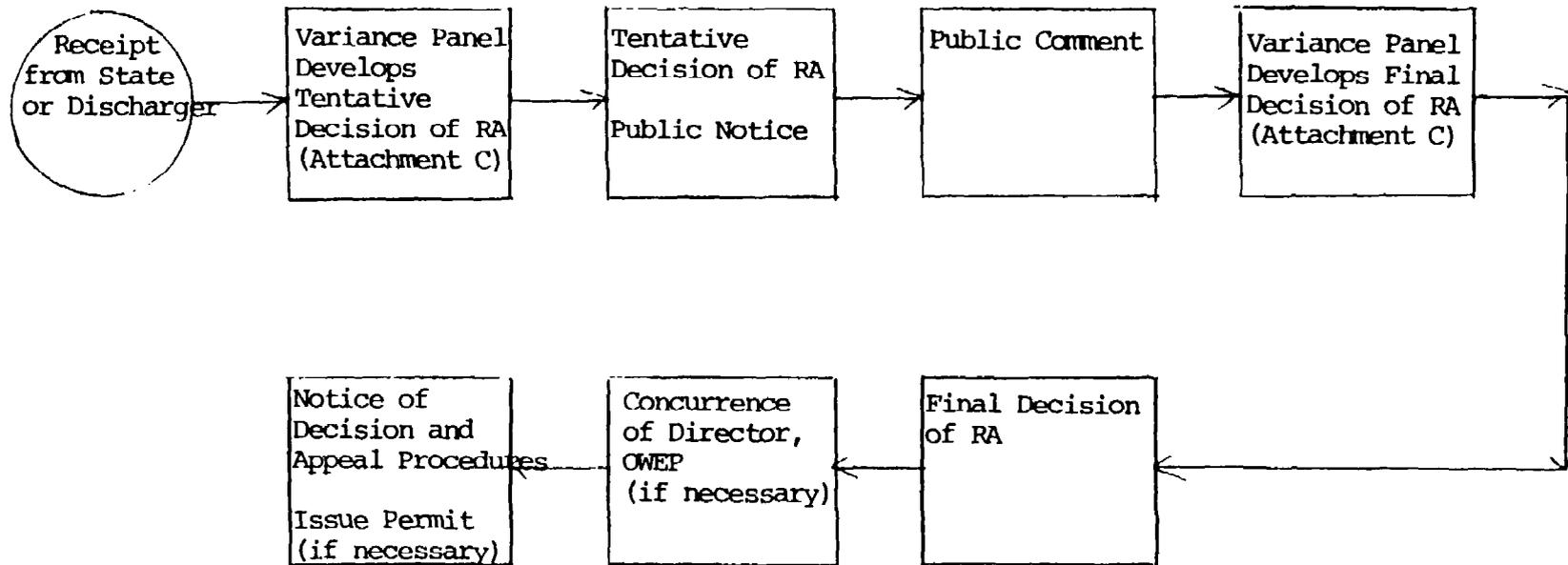
Flow Chart of Operation of Headquarters/Regional Variance Review Panel for FDF Variance Requests



*: Draft tentative decision or draft final decision for NPDES variances
Draft determination for pretreatment variances

Attachment D

Flow Chart of Operation of Variance Panel for FDF Variance Requests
from Direct Dischargers



Attachment E

Flow Chart of Operation of Variance Panel for FDF Variance Requests from Indirect Dischargers

