

the miner's complaint of discrimination, discharge or interference was not frivolously brought and shall be accompanied by an affidavit setting forth the Secretary's reasons supporting his finding, a copy of the miner's complaint, and proof of notice to and service on the person against whom relief is sought by the most expeditious means of notice and delivery reasonably available.

(b) *Request for hearing.* Within 10 days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint is not frivolously brought, he shall issue immediately an order of temporary reinstatement. If a hearing on the application is requested, the hearing shall be held within 10 days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

(c) *Hearing.* The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

(d) *Judge's order on application.* Within 5 days following the close of a hearing on an application for temporary reinstatement the Judge shall issue an order granting or denying the application. The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought. In addition to service of the order granting or denying the application, the Judge shall notify the parties of his determination by the most expeditious means reasonably available.

(e) *Review of order.* Review by the Commission of a Judge's order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition for review with supporting arguments within 5 days following receipt of the Judge's order. The opposing party simultaneously shall be notified and served. The filing of a petition for review shall not stay the effect of the Judge's order unless the Commission directs otherwise. Any response shall be filed within 5 days following receipt of a petition. The Commission's ruling on a petition for review shall be rendered within 10 days following receipt of any response or the expiration of the period for filing such response.

(f) *Dissolution of order.* If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. If the Secretary fails to file a complaint with the Commission within 90 days after an order of reinstatement has been issued, the Judge may issue an order to show cause why the order of reinstatement should not be dissolved. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

Approved: April 23, 1986.

Ford B. Ford,
Chairman, Federal Mine Safety and Health Review Commission.
[FR Doc. 86-9583 Filed 4-29-86; 8:45 am]
BILLING CODE 6735-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 288

[DoD Instruction 7230.7]

User Charges; Fixed Fees

AGENCY: Department of Defense.
ACTION: Final rule.

SUMMARY: The part revises 32 CFR Part 288 to reestablish and update the Schedule of Fees and Rates as requested by DoD Components. It also deletes references to an "administrative surcharge" since it conflicts with principles established by the Supreme Court in connection with the "user charges" statute. In January 1985, DoD Instruction 7230.7 eliminated the fixed

fee schedule and gave Components authority to compute charges. The part reestablishes fixed fees and withdraws this authority.

EFFECTIVE DATE: January 29, 1985.

ADDRESS: The Assistant Secretary of Defense (Comptroller), Department of Defense, The Pentagon, Washington, DC 20301-1155.

FOR FURTHER INFORMATION CONTACT: Thomas P. Mares, telephone 202-697-0536.

List of Subjects in 32 CFR Part 288

Accounting, Armed Forces,
Government property and Services.

Accordingly, 32 CFR Part 288 is revised to read as follows:

PART 288—USER CHARGES

- Sec.
- 288.1 Reissuance and purpose.
 - 288.2 Applicability.
 - 288.3 Definitions.
 - 288.4 Policy.
 - 288.5 Responsibilities.
 - 288.6 Charges and fees.
 - 288.7 Collections.
 - 288.8 Legislative proposals.
 - 288.9 Examples of benefits not to be charged under 288.4(c) of this part.
 - 288.10 Schedule of fees and rates.

Authority: 31 U.S.C. 483a; Title V, Pub. L. 137, 65 Stat. 290

§ 288.1 Reissuance and purpose.

This part reissues 32 CFR Part 288 and implements the DoD program under 31 U.S.C. 9701, and OMB Circular A-25 for establishing appropriate charges for authorized services provided by DoD organizations.

§ 288.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components"). None of the provisions in this part should be construed as providing authority for the sale or lease of property, or the rendering of special services. Actions to convey such special benefits must be authorized by separate authority. The user charge policy is applicable except when other statutes or directives specifically direct other practices or procedures.

§ 288.3 Definitions.

Recipient. One who requests or receives the benefits of the service(s) provided.

§ 288.4 Policy.

(a) *General.* It is DoD policy not to compete with available commercial facilities (see 32 CFR Part 169a) in providing special services or in the sale or lease of property to private parties and agencies outside the Federal Government. However, when a service or sale is made that conveys special benefits to recipients, above and beyond those accruing to the public at large, a reasonable charge shall be made to each identifiable recipient, except as otherwise authorized by the Secretary of Defense. A special benefit will be considered to accrue, and a charge shall be imposed when the service rendered:

(1) Enables the recipient to obtain more immediate or substantial gain or values (which may or may not be measureable in monetary terms) than those which accrue to the general public; or

(2) Is performed at the request of the recipient and is above and beyond the services regularly received by or available without charge to the general public.

(b) *Costing.* (1) A charge shall be imposed to recover the full cost to the Federal Government of rendering a service or the fair market value of such service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be made based on recovery of full costs to the Federal Government.

(2) When federally owned resources or property are leased or sold, a fair market value shall be obtained. Fair market value shall be determined by the application of sound business management principles and, so far as practicable and feasible, in accordance with comparable commercial practices. Charges based on fair market value need not be limited to the recovery of costs; they may produce net revenues to the Government.

(c) *Exclusions and Exceptions.* (1) The provisions of this part do not apply when other statutes or directives require different practices or procedures such as for:

(i) Morale, welfare, and recreation services to military personnel and civilian employees of the Department of Defense and other services provided in accordance with § 288.9.

(ii) Sale or disposal of surplus property under approved programs (See DoD Instruction 7310.1¹).

(iii) Services furnished the general public relating to, or in furtherance of, the U.S. Armed Forces recruiting program.

(iv) Services furnished to representatives of the public information media in the interest of public understanding of the U.S. Armed Forces.

(v) U.S. Armed Forces participation in public events. Charges for such participation are governed by the provisions of 32 CFR Part 238.

(vi) Records made available to the public, under the Freedom of Information Act, pursuant to 32 CFR Part 286. Charges for such record searches and copies of records are governed by § 286.61.

(vii) Services furnished to non-Federal audio-visual media. Charges for such services are governed by the provisions of DoD Instruction 5410.15.²

(viii) Government-developed computer programs released to non-Federal customers. Charges for software packages are governed by DoD Instruction 7930.2.³

(ix) Pricing of performance by industrial fund activities which shall be in accordance with DoD Directive 7410.4.⁴

(2) Charges may be waived or reduced when:

(i) The recipient of the benefits is engaged in nonprofit activity designed for public safety, health, or welfare.

(ii) Payment of the full fee by a state, local government, or nonprofit group would not be in the interest of the program.

(iii) Furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization, or comparable fees are set on a reciprocal basis with a foreign country.

(iv) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

§ 288.5 Responsibilities.

Head of DoD Components, or designees, shall:

(a) Identify each service or activity covered by this part.

(b) Determine the extent of the special benefit provided.

(c) Determine applicable cost and fair market value.

(d) Establish appropriate charges and collect from recipients of special services.

(e) Grant cost waivers or reductions consistent with guidance in this part.

(f) Recommend to the Assistant Secretary of Defense (Comptroller) necessary additions and revisions to § 288.10.

§ 288.6 Charges and Fees.

(a) *General.* (1) All charges and fees shall be based on total cost to the U.S. Government or fair market value, whichever is higher. Total cost shall be based on actual cost or replacement cost when property is to be replaced and expense data accumulated in accordance with DoD 7220.9-M.⁵ Estimates from the best available records may be used if actual cost or expense data is not available.

(2) Cost accounting systems shall not be established solely for the purpose of determining charges, but the results of existing cost accounting systems shall be used. Total cost shall include all direct and indirect costs (see Chapter 71, DoD 7220.9-M).

(3) Charges and fees established in advance must be projected to the midpoint of the future period. Projected amounts shall be reviewed annually or whenever significant changes in cost or value occur.

(4) Internal management controls (see DoD Directive 5010.38⁶) must be established to ensure that charges and fees are developed and adjusted, using current, accurate, and complete data, to provide reimbursement conforming to statutory requirements. Such controls also must ensure compliance with cash management and debt collection policies (see DoD Directive 7045.13⁷).

(b) *Services.*—(1) *Basic Requirements.* The maximum charge for a special service shall be governed by its total cost or fair market value, whichever is higher, and not by the value of the service, to the recipient. The cost computation shall include the direct and indirect costs to the Government of carrying out the activity. Typically, a service may involve the following:

(i) Civilian salaries or wages, including the full cost of benefits, such as leave, retirement, and medical and life insurance.

(ii) The full cost of military personnel services, including retirement, other personnel support, leave, and permanent change of station factors.

(iii) The cost of materials, supplies, travel expenses, communications, utilities, equipment and property rental, and, maintenance of property and equipment.

¹ Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Code 301, 5801 Tabor Avenue, Philadelphia, Pa 19120.

² See footnote 1 to § 288.4(c)(1)(ii).

³ See footnote 1 to § 288.4(c)(1)(ii).

⁴ See footnote 1 to § 288.4(c)(1)(ii).

⁵ See footnote 1 to § 288.4(c)(1)(ii).

⁶ See footnote 1 to § 288.4(c)(1)(ii).

⁷ See footnote 1 to § 288.4(c)(1)(ii).

(iv) Depreciation expense and interest of investment (currently at a 10 percent annual rate) (OMB Circular No. A-94) in DoD-owned, fixed assets.

(v) Other operational, administrative, and accessorial (DoD Instruction 7510.4⁸ costs incurred by the activity while establishing standards and regulations and research in support of the service performed, for example.

(2) *Fees and Rates.* Fees and rates shall be based on actual costs. The charges for services provided by data processing activities shall be determined by using the costs accumulated pursuant to OMB Circular No. A-121 and Federal Government accounting Pamphlet No. 4 requirements. Fees and rates for recurring services shall be established in advance, when feasible. Recurring services include, but are not limited to, copying, certifying, and researching records, except when those services are excluded or exempted from charges under § 228.4(c) or § 228.9.

(3) *DoD-wide Fees and Rates.* Section 228.10 provides a schedule of fees and rates for certain services for use throughout the Department of Defense. Recommendations for additions and revisions to the schedule will be made to the Assistant Secretary of Defense (Comptroller).

(c) *Lease or Sale of Property.* Charges for lease or sale of property shall be based on a determination of fair market value.

(1) In cases involving the lease or rental of military equipment, when there is no commercial counterpart, fair market value will be based on the computation of an annual rent which will be the sum of the annual depreciation plus interest on investment. The amount of interest on investment is determined by applying the interest rate to the net book value; that is, acquisition cost plus additions less depreciation. The current interest rate in OMB Circular No. A-94 shall be used. Support, if furnished, and applicable general administration expenses will be extra. In determining the value, consideration may be given to the responsibility of the lessee to assume the risk of loss or damage to the property and to hold the Government harmless against claims or liabilities by the lessee or third parties.

(2) In cases involving the sale of property when there is no known fair market value, costs shall be based on the total of the standard price of the item carried in inventory, or the reduced price when so authorized for sale within the Department of Defense and the

accessorial and administrative costs computed under DoD Instruction 7510.4.

§ 288.7 Collections.

(a) Collections of charges and fees shall be made in advance of rendering the service, except when preservation of life or property is involved, performance is authorized by law without advance payment, or advance payment is impractical because multiple requests for services are received on a continuing basis from a reliable requester (i.e., consistently prompt payments for services received). When an advance collection exception is approved, an accounts receivable will be established to control collections. The policies in DoD 7220.9-M, DoD Directive 5010.38, and DoD Directive 7045.13 shall be used in accounting, controlling, and managing cash and debt collections.

(1) Collections of fees and charges normally will be deposited to Miscellaneous Receipts of the Treasury unless otherwise authorized by law or regulation.

(2) Collections for utilities and services in connection with the lease of property will be deposited to the appropriation or fund responsible for financing the operations of the equipment or facility.

§ 288.8 Legislative proposals.

In cases where collections of fees and charges for services or property are limited or restricted by provisions of existing law, the DoD Component(s) concerned will submit appropriate remedial legislative proposals under applicable legislative procedures. (See DoD Instruction 5500.4.⁹)

§ 288.9 Examples of Benefits not to be charged under provisions of § 288.4(c)(D) of this Part.

(a) Services requested by members of the U.S. Armed Forces in their capacity as Service members.

(b) Services requested by members of the U.S. Armed Forces who are in a casualty status, or requested by their next of kin or legal representative, or requested by any source, when it relates to a casualty.

(c) The address of record of a member or former member of the U.S. Armed Forces when the address is available readily through a directory (locator) service, and when the address is requested by a member of the U.S. Armed Forces or by a relative or a legal representative of a member of the U.S. Armed Forces or when the address of record is requested by any source for the purpose of paying monies or

forwarding property to a member or former member of the U.S. Armed Forces.

(d) Services requested by or on behalf of a member or former member of the U.S. Armed Forces or, if deceased, his or her next of kin or legal representative that pertain to the following:

(1) Information required to obtain financial benefits regardless of the terms of separation from the Service.

(2) Document showing membership and military record in the Armed Forces if discharge or release was under honorable conditions, except as provided in paragraphs (1) and (2) of this section.

(3) Information relating to a decoration or award or required for memorization purposes.

(4) Review or change in type of discharge or correction of records.

(5) Personal documents, such as birth certificates, when such documents are required to be furnished by the member.

(e) Services that are furnished free in accordance with statutes or executive orders.

(f) Information from or copies of medical and dental records or X-ray films of patients or former patients of military medical or dental facilities, when such information is required and requests for such data are (1) submitted by an accredited medical facility, physician, or dentist; or (2) requested by the patient, his or her next of kin, or legal representative.

(g) Services involving confirmation of employment, disciplinary or other records, and salaries of active or separated civilian or military personnel, when requested by prospective employers or recognized sources of inquiry for credit or financial purposes.

(h) Services requested by and furnished to a Member of Congress for official use.

(i) Services requested by state, territorial, county, or municipal government, or an agency thereof, that is performing a function related to or furthering of a DoD objective.

(j) Services requested by a court, when the service will serve as a substitute for personal court appearance of a military or civilian employee of the Department of Defense.

(k) Services requested by a nonprofit organization that is performing a function related to or furthering an objective of the Federal Government or that is in the interest of public health and welfare, including education.

(l) Services requested by an individual or corporation that is performing a function related to or furthering an objective of the Federal Government.

⁸ See footnote 1 to § 228.4(a).

⁹ See footnote 1 to § 288.4(c)(1)(ii).

when the cost of such services would be chargeable to a Federal Government contract or grant held by the individual or corporation.

(m) Services requested by donors with respect to their gifts.

(n) Requests for occasional and incidental services (including requests from residents of foreign countries), that are not requested often, when it is determined administratively that a fee would be inappropriate for the occasional and incidental services.

(o) Requests from Federal employees for the completion of claims for reimbursement under the Federal Employees Health Benefit Act of 1959.

(p) Administrative services provided by reference or reading rooms to inspect public records, excluding copies of records or documents furnished.

(q) Requests for military locator service by financial organizations that are located on DoD installations.

(r) Requests for military locator service by financial organizations that are engaged in the direct deposit program and that are not located on DoD installations. Requests for an address of record shall include the following:

(1) A statement that the financial organization is listed as a direct deposit recipient in the current U.S. Treasury Bureau of Accounts, "Financial Organizations Directory."

(2) A statement that the individual, whose address is being requested, has his or her pay forwarded as a direct deposit by a DoD disbursing officer.

(3) The individual's financial organization's account number.

(s) Services rendered in response to requests for classification review of DoD classified records, submitted under Executive Order 12065 and implemented by 32 CFR Part 159. Such services consist of the work performed in conducting the classification review or in granting and completing an appeal from a denial of declassification following such review.

(t) Services of a humanitarian nature performed in such emergency situations as life-saving transportation for non-U.S. Armed Forces patients, search and rescue operations, and airlift of personnel and supplies to a disaster site. This does not mean that inter- and intra-Governmental agreements to recover all or part of costs should not be negotiated. Rather, it means the recipient or beneficiary will not be assessed a "user charge."

\$ 288.10 Schedule of Fees and Rates.

This schedule applies to authorized services related to copying, certifying, and searching records rendered to the

public by DoD Components, except when those services are excluded or excepted from charges under subsection D.3. of the basic Instruction, or § 288.9. Except as provided in special cases prescribed below, a minimum fee of \$3.50 will be levied for processing any chargeable case. Normally only one copy of any record or document will be provided.

Requests Involving

(a) *Training and Education (copies of documents required for other than official purposes):*

	Fee
(1) Transcripts:	
First copy.....	\$3.50
Each additional copy (includes requests for transcripts of graduation from military academies and schools).....	.45
(2) Certificates:	
First copy.....	3.50
Each additional copy (includes all requests for certificates, verification of attendance, and course completion from service schools and other facilities).....	.45

(b) *Medical and Dental Records of Patients and Former Patients (when requested for purposes other than further medical treatment).* Covers requests for information from or copies of medical records, including clinical records (inpatient records of military and non-military patients), health records (military outpatient records), outpatient records (non-Military outpatient records), dental records, and loan of x-rays.

(1) Searching and processing (per hour).....	\$13.25
Minimum charge.....	8.30
(2) Each typewritten page.....	3.50
(3) Office copy reproductions (per image).....	0.10
(4) Copy or loan of each x-ray.....	8.50

(c) *Military Membership and Record (Excluding Medical and Dental Records).*

(1) Address of record, each.....	\$3.50
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(2) Copies of releasable military personnel records (e.g., effectiveness reports for officers and enlisted personnel) reproduced for the personal use of active, retired, and former members, next of kin of missing-in-action or deceased members of the Armed Forces.

Minimum charge (up to six reproduced images).....	\$3.50
Each additional image.....	.10
Statement of verification of Service or report of separation for individuals	

with other than honorable discharges..... 5.20

(d) *Photography.* (1) Still pictorial or documentary photographic prints. Unlisted standard sizes of prints may be furnished, if available, at prevailing contract or activity rates.

	Price per print (quantity)			
	1 to 9	10 to 20	21 to 50	50 +
Single weight (RC type) paper:				
8"x10".....	\$4.50	\$3.25	\$2.50	\$1.75
11"x14".....	9.00	7.00	5.00	4.00
16"x20".....	19.00	15.00	12.00	9.50
20"x24".....	30.00	25.00	20.00	15.00
Single weight color paper:				
8"x10".....	11.00	7.50	3.50	3.00
11"x14".....	17.00	9.00	6.50	5.50
16"x20".....	35.00	25.00	14.00	11.50
35mm color transparency slide made from color negative.....	5.00	3.50	3.00	3.00
35mm duplicate from 35mm slide.....	1.00	.60	.50	.45
Print mounted on 16"x20" cardboard + unit price of print.....	8.00			
Print mounted on 20"x24" cardboard + unit price of print.....	12.00			
Color transparencies (first), 16.00 each additional:				
8"x10".....	20.00			
4"x5".....	4.50			
4"x5" B&W negative.....	2.00			
70mm color negative.....	7.50			

Note.—Prices may vary by 20% of these average charges based on local inhouse labor, equipment, and supply (raw stock) costs.

(2) Motion Picture:

	Price per foot contact
Color:	
16mm work print (positive work print from an original negative).....	\$0.20
16mm reversal work print.....	.20
16mm color master ("A" roll).....	.60
16mm duplicate negative (from master positive).....	.60
16mm reversal duplicate negative.....	.85
16mm internegative (from reversal original).....	.70
16mm short rolls (under 100 ft) + basic price.....	.10
16mm tab-to-tab printing + basic price.....	.20
Black and white:	
16mm work print (negative/positive).....	.10
16mm master positive (fine grain).....	.25
16mm duplicate negative.....	.25
16mm short rolls (under 200 ft) + basic price.....	.10
16mm tab-to-tab printing + basic price.....	.10

(3) Miscellaneous:

Magnetic tape—dub from 16mm film + raw stock.....	\$65.00
Searching (per hour or fraction thereof).....	18.00
Minimum charge per film order (including search).....	35.00

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Linda M. Lawson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

April 24, 1986.

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BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 124 and 403

[EN-FRL-2956-9]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

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

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

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

These regulations shall become effective on May 30, 1986.

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

SUPPLEMENTARY INFORMATION:

I. Background

A. Section 301(g) Variances

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

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

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

B. FDF Variances

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

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

C. Delegation Plan

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

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

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

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

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

In order to allow for the delegation discussed above, the Agency is today amending 40 CFR 124.62, 124.63, and 403.13 to provide that the Administrator, or his delegate, may grant or deny section 301(g) and FDF variance

requests. Concurrently with this rulemaking, the Administrator is implementing the actual delegation of this authority through the EPA delegations manual. This procedure is more appropriate than delegating authority to the Regional Administrators through the rulemaking process, since the regulations as amended to day will allow the Administrator to redelegate his authority in the future directly through the delegations manual as needed instead of through a new rulemaking procedure. EPA anticipates revising other regulations in the future to specify the Administrator as the decisionmaking authority in order to allow for delegations through the manual.

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

The Agency is promulgating today's amendments in final form pursuant to section 553(b)(1) of the Administrative Procedure Act (APA). The rule change issued today merely changes the procedures for processing variance requests within the Agency. The substantive standards for review of the requests remain the same. Accordingly, the rule does not "alter the rights or interests of parties." *Batterson v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980). As such, it fits squarely within the exemption from notice and comment requirements of the APA.

II. Executive Order 12291

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

III. Regulatory Flexibility Act

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

List of Subjects**40 CFR Part 124**

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

40 CFR Part 403

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

Dated: March 31, 1986.

Lee M. Thomas,
Administrator.

PART 124—PROCEDURES FOR DECISIONMAKING

Subpart D—Specific Procedures Applicable to NPDES Permits

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

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

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

§ 124.62 Decision on Variances.

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

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

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

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

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

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

(a) * * *

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

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

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

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

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

2. In 403.13, paragraph (g)(1), the introductory text of paragraph (h), paragraph (i), the introductory text of (j), (j)(3), (k)(2), (l)(1), the introductory text of (l)(2), (l)(2)(ii)(B), (l)(2)(ii)(C),

(l)(2)(ii)(D), and paragraph (m) are revised to read as follows:

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

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

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

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

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

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

(k) * * *

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

(l) **Review of requests by EPA.**

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

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

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

(ii) * * *

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

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

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

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

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

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

BILLING CODE 6560-50-M

40 CFR Part 180

[PP4F2986/R777; FRL-3010-2]

Cypermethrin; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a tolerance for residues of the insecticide cypermethrin in or on the raw agricultural commodity pecans. This regulation to establish a maximum permissible level for residues of the insecticide in or on the commodity was

requested pursuant to a petition by ICI Americas, Inc.

EFFECTIVE DATE: Effective on April 30, 1986.

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

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION: EPA

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

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

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

A full review of the data indicates that although cypermethrin increases the frequency of spontaneously occurring tumors in the lungs of female mice at high dose levels, the increased dietary risk would be extremely small from the proposed use of cypermethrin on pecans. The increased dietary risk associated with this tolerance, based on the highly conservative assumption that all units of the commodity would bear residues at the proposed tolerance level, is estimated to be 10^{-9} – 10^{-8} . This value was calculated based on the proposed tolerance level.

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

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

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

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

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

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