



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

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OFFICE OF
WATER

MEMORANDUM

SUBJECT: Draft Guidance for Application and Review
of Section 301(c) Variance Requests

FROM: Martha G. Prothro, Director *Martha G. Prothro*
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and Permits (EN-336)

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TO: Regional Water Management
Division Directors

The Permits Division (OWEP) and the Regulatory Policy Division (OPPE) have developed a draft technical guidance manual to assist with the preparation and review of section 301(c) variance requests. As you know, section 301(c) of the Clean Water Act provides a method whereby a discharger may obtain a modification of the requirements of section 301(b)(2)(A), which requires the application of best available technology economically achievable (BAT). An applicant may be granted a section 301(c) variance for nonconventional pollutants, if the proposed modified requirements:

- (1) will represent the maximum use of technology within its economic capability; and,
- (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

The purpose of the attached draft guidance is to assist applicants in completing requests for 301(c) variances and EPA Regions and States in reviewing the requests. For the purpose of financial evaluation, we have divided applicants into two groups, regulated and unregulated industries. Regulated industries are those whose rates of return are set by public utility commissions. Most firms are unregulated.

Unregulated firms should perform three financial calculations to determine if they are eligible on economic grounds for a section 301(c) variance. Similarly, regulated firms should perform two calculations to determine their economic eligibility. EPA will grant a variance only if the financial tests (or comparable demonstrations by the applicant) indicate that the required pollution control technology is not economically achievable and if the applicant can demonstrate reasonable further progress toward elimination of the discharge of pollutants. We have provided worksheets for performing the various financial calculations. The tests are designed to be understood by those with minimal training in financial management or accounting. If the results are unrepresentative or inconclusive, additional review or assistance is available from financial analysts at OPPE for the benefit of both permit writers and applicants.

We are eager to receive your comments and suggestions on the draft guidance. We also suggest that you provide copies of the guidance to the NPDES States in your Region. We are particularly concerned about your views on ease of use by both applicants and permit writers and on the appropriateness of the financial screening tests which we have developed. Please send your comments and any comments from your States by September 18 to Tom Laverty or Marilyn Goode of the Permits Division. If you have any questions about the draft guidance, please have your staff contact them at FTS 426-7010. Thank you for your help in putting the guidance in final form.

cc: Regional Permits Branch Chiefs

Attachment

Technical Guidance Manual
for Application and Review of Section 301(c)
Variance Requests

I. INTRODUCTION

A. Purpose of this Manual

The purpose of this guidance manual is to outline a simple, expeditious methodology for assessing the economic capability of dischargers applying for section 301(c) variances. The economic tests specified here, those that EPA prefers and recommends for use in reaching a decision on a section 301(c) variance request. However, as this manual provides guidance only and is not binding, applicants are free to submit other evaluations of their financial condition that respond to the section 301(c) requirements. EPA also may perform further evaluation of applicants' financial ability. Variance determinations will be made on a case-by-case basis as part of the permit issuance process. Accordingly, permit writers will explain their reliance on any specific tests in determining economic capability as well as any conclusion reached. The public will have an opportunity to participate in this decision through the NPDES procedures (40 CFR Part 124) and the ultimate decision on the request will be judicially reviewable as part of the NPDES permit.

B. Statutory Background

The Clean Water Act requires achievement of best available technology economically achievable (BAT) effluent limitations for all nonconventional pollutants by July 1, 1984 or not more than three years after EPA establishes the limitations, up to July 1, 1987, whichever is later. Section 301(b)(2)(F).

Section 301(c) of the Clean Water Act (P.L. 95-217) establishes a mechanism whereby a direct discharger may obtain a modification of the requirements of Section 301(b)(2)(A). The discharger can be granted a Section 301(c) variance by showing that the modified requirements:

- (1) will represent the maximum use of technology within the economic capability of the owner or operator; and,
- (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Section 301 (j)(1)(B) imposes an application deadline for Section 301(c). An applicant for a Section 301(c) variance must submit its application not later than 270 days after promulgation of the applicable effluent guideline or 270 days after enactment of the Clean Water Act 1977, whichever is later.*

* See 40 CFR 122.21(1)(2) for specific requirements on the submission of section 301(c) variance requests.

II. APPLICATION AND REVIEW PROCEDURE

A. Summary of Section 301(c) Variance Process

A Section 301(c) variance request must clearly demonstrate that the modified requirements represent the maximum use of technology within the firm's economic capability and that the modified requirements will result in reasonable further progress toward the elimination of nonconventional pollutants. With respect to the latter showing, at a minimum, the applicant must demonstrate compliance with all applicable BPT limitations and pertinent water quality standards. In addition, the proposed alternative must provide for a reasonable degree of improvement in the applicant's discharge. Recommended criteria for demonstrating 'reasonable further progress' are described in Section C below.

The methodologies for determining economic capability for regulated and unregulated industries differ. Regulated industries are those in which Public Utility Commissions (PUCs) set the firm's rate of return, such as the electric utility industry. Most firms are unregulated.

Unregulated firms should calculate three financial tests to determine if they are eligible on economic grounds for a Section 301(c) variance. EPA, generally, will grant a variance only if all three tests indicate that the required pollution control is not economically achievable and the applicant makes the requisite demonstration about reasonable further progress.

Similarly, regulated firms should perform two financial calculations. EPA, generally, will grant a variance only if both tests indicate that the pollution control equipment is not economically achievable and the applicant can demonstrate reasonable further progress.

B. Procedure Governing Section 301(c) Variance Requests

Requests for Section 301(c) variances are governed by provisions in the NPDES permit regulations 40 CFR Parts 122 and 124. These provisions specify when variance requests must be submitted, certain requirements of requests, and the decisionmaking and appeal process. The most important provisions include 122.21(f), 124.62, 124.63, and 124.64. Other pertinent provisions include 122.21(n)(2), 124.51(b), and 124.60.

C. Demonstration of Reasonable Further Progress

There are three criteria for determining whether the modified requirements will "result in reasonable further progress toward the elimination of the discharge of pollutants." The applicant for a Section 301(c) variance will have to meet the following

three criteria to the satisfaction of the Administrator.

First, BPT is an absolute floor--a minimal level of control--for all plants to meet. Any applicant for a Section 301(c) variance must demonstrate current compliance with all applicable BPT limitations and continued compliance under the proposed modified limitations.

Second, the applicant must demonstrate that the proposed modified limitations will assure compliance with the pertinent water quality standards. Section 301(c) provides a variance from the technology-based requirements of BAT, but not from the requirement for compliance with water quality standards.

Finally, to insure that "reasonable further progress" will be made, the applicant should demonstrate to the satisfaction of the Administrator that the applicant has evaluated all combinations of pollution control efforts within its economic capability. Such evaluation shall consider new treatment technologies, upgrading of an existing treatment system, and any process modifications or materials substitutions within its economic capability that will result in a reduction of discharges of the pollutant or pollutants for which the variance is sought.

After conducting its evaluation, the applicant then must propose modified effluent limits based on some combination of treatment and production changes that will involve the maximum use of technology within its economic capability and will result in reasonable further progress toward the elimination of the discharge of pollutants.

In some cases, the availability of technologies only in discrete increments may result in an applicant proposing to use technologies that require an investment that is less than its maximum economic capability. Furthermore, EPA interprets economic capability in terms of the longer-term viability of an applicant. Therefore, the Agency will not require additional controls that may entail a significant risk of exceeding the applicant's longer-term economic capability. However, the Administrator may review the control methods not selected by the applicant in determining if the applicant's selection of control methods satisfies the criteria that proposed modified limits would represent maximum efforts within its economic capability and would ensure reasonable further progress toward the Act's goal of the elimination of pollutant discharges into the Nation's waters. The Administrator's decision will necessarily be made on a case-by-case basis.

Whenever possible, the Agency will determine reasonable progress in such a manner to be compatible with the ultimate goal of compliance with BAT limitations. This will avoid investment in pollution control equipment which could not be later adapted