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OFFICE OF
GENERAL COUNSEL

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MEMORANDUM

TO: Jeffrey G. Miller
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for Water Enforcement (EN-335)

FROM: James A. Rogers
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SUBJECT: Innovative Technology Extensions Under §301(k) of Clean Water Act; Effect of §§301(j) and (l)

This is in response to the two Clean Water Act questions raised in your memorandum of July 14, 1978.

Question #1

Is an innovative technology extension under section 301(k) available for toxic pollutants in view of the language of section 301(l)?

Answer #1

Yes.

Discussion #1

Under section 301(k), a facility may obtain an extension until mid-1987 to meet best available technology ("BAT") limitations if the facility will use an innovative technology which has the potential for industry-wide application. The language of §301(k) does not exclude toxic BAT limitations from consideration. Section 301(l), however, provides that EPA "may not modify any requirement of this section" with respect to toxic pollutants.

The basic question is whether a BAT compliance date extension for a toxic pollutant under §301(k) would constitute a modification of a §301 requirement as prohibited by §301(l). A cursory reading of §§301(k) and (l) provides no easy answer. In our view, however, the language of §301 and the legislative history indicate that the §301(l) prohibition does not apply to §301(k).

Section 301(k) states that EPA may "establish a date for compliance" for a facility "which proposes to comply" with BAT. In contrast, §§301(c) and (g) (economic capability and water quality waivers from BAT) state that EPA may "modify the requirements of [BAT]". Because section 301(l) uses the phrase "modify any requirement," it is reasonable to link it to §§301(c) and (g) but not §301(k).

This makes sense not only semantically, but also practically. Under a §301(k) extension, BAT (or even more stringent limits*) must in all events be met. Under §§301(c) and (g) modifications, facilities may be relieved of BAT limitations altogether.

This construction of the statutory language accommodates two important Congressional concerns. It maximizes the opportunities for innovative technology extensions, but assures that the substantive BAT limits for toxic pollutants will not be relaxed for any facility.

The legislative history tends to confirm our construction of the statutory language. Representative Roberts, Chairman of the House conferees, made the following statements about the Conference Bill:

> [N]ew subsection 301(k) provides that the Administrator . . . may establish an extension of the July 1, 1984 requirements to no later than July 1, 1987 for [BAT] for pollutants identified in subparagraphs (C), (D), and (F) of Section 301 . . . .
>
> 197 Cong. Reg. H12932, December 15, 1977 (emphasis added).

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* Two of the three grounds on which §301(k) extensions may be based require "significantly greater" effluent reduction than normal BAT limits.

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the discharger nor 301(g) waivers based on water quality considerations shall be available.
>
> 197 Cong. Rec. H12927, Dec. 15, 1977.

The first quote clearly indicates that BAT toxic limitations (which are covered under §301(b)(2)(C)) qualify for §301(k) extensions. The second quote indicates that the "waivers" and "modifications" which Congress sought to preclude through §301(l) were the §§301(c) and (g) waivers and modifications, not the §301(k) extension.

Question #2

Must an applicant for an extension for innovative technology under Section 301(k) apply within 270 days from the promulgation of an effluent guideline in accordance with Section 301(j)(1)(B)?

Answer #2

No.

Discussion #2

The 270-day deadline of §301(j)(1)(B) governs modifications of "the provisions of subsection (b)(2)(A) as it applies to pollutants identified in subsection (b)(2)(F)." It should be noted that §301(k) extensions for toxic pollutants, the focus of your first question, are not even potentially subject to the 270-day deadline. This is because §301(j)(1)(B) by its terms applies only to §301(b)(2)(F) pollutants ("grey list" or "non-toxic/non-conventional" pollutants).

The question remains whether §301(k) extensions for "grey list" pollutants are subject to the 270-day deadline. Under a careful reading of the statute, they are not.

The §301(j)(1)(B) deadline covers applications for "modification of the provisions of subsection (b)(2)(A)." An extension under §301(k) is not a modification of the provisions of (b)(2)(A).

This is because (b)(2)(A) does not contain any dates; it only contains the substantive requirements for BAT. Section 301(b)(2)(F) is the provision which set dates for BAT compliance. As pointed out in Discussion #1 above, §301(k) can only extend the date for BAT compliance; it cannot relieve a facility from BAT compliance.

Had §301(j)(1)(B) referred to "a modification of the provisions of subsection (b)(2)(A) and (b)(2)(F)," it would have been possible to apply the 270-day deadline to §301(k) extensions for "grey list" pollutants. As the statute is written, it is not possible to do so.