

# FINAL

## Guidance For Reviewing Extension Requests Under 1412(b)(10) Of The Safe Drinking Water Act

### PURPOSE

This document provides guidance concerning how EPA interprets the authorities and limitations of Section 1412(b)(10) of the Safe Drinking Water Act (SDWA). For the purpose of this document State refers to EPA Regions and States exercising primary enforcement responsibility under the SDWA. Under certain conditions, this provision allows States to provide up to a two year extension of the date by which public water systems must comply with a new or revised National Primary Drinking Water Regulation. It also provides recommendations to State Directors on the procedures they may want to follow in using this authority.

The SDWA provisions and EPA regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States, or the regulated community, and may not apply to a particular situation based upon the circumstances. EPA and State decision makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance where appropriate. Any decisions regarding a particular facility will be made based on the applicable statutes and regulations. Therefore, interested parties are free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA will consider whether or not the recommendations or interpretations in the guidance are appropriate in that situation. EPA may change this guidance in the future.

### BACKGROUND

The SDWA, as amended in 1996, generally requires compliance with national primary drinking water regulations 3 years after promulgation. The Amendments also allow compliance deadlines to be extended for up to an additional 2 years if it is determined that additional time is needed for capital improvement projects to comply with a maximum contaminant level (MCL) or treatment technique (TT). This is specified in Section 1412 (b)(10) of the SDWA:

*“A national primary drinking water regulation promulgated under this section (and any amendment thereto) shall take effect on the date that is 3 years after the date on which the regulation is promulgated unless the Administrator determines that an earlier date is practicable, except that the Administrator, or a State (in the case of an individual system), may allow up to 2 additional years to comply with a maximum contaminant level or treatment technique if the Administrator or State (in the case of an individual system) determines that additional time is necessary for capital improvements.”*

Furthermore, the responsibilities of the States have been further explained in the legislative history<sup>1</sup> for this provision:

- “The Administrator may establish an earlier date for compliance as part of the regulation, if an extended period is not necessary for design and construction. The **Administrator** is also authorized to extend the compliance period for an additional 2 years (up to a total of 5 years) in the promulgated regulation where the additional period is necessary for construction activities that may be necessary to comply.”[bold added]
- “In addition to the Administrator’s authority to extend the period beyond the 3 years by rule, a **State** may extend the compliance period for particular public water systems in that State that need up to an additional 2 years for the design and construction of treatment facilities or alternative water supplies to comply.” [bold added]
- “The **Administrator** is authorized to provide case-by-case extensions for particular systems in States that do not have primary enforcement responsibility under section 1413.”[bold added]

A State may grant extensions to an MCL or TT under 1412(b)(10) on a case-by-case basis only when additional time has not been incorporated into the rule. Under the authority of this provision, compliance with a regulation may not be extended to beyond five years after the rule publication. In other words, a system’s application for an extension would only apply to those rules with a compliance deadline of less than 5 years from promulgation (e.g., Interim Enhanced Surface Water Treatment Rule). Additional extensions may be granted through the exemption provision of Section 1416. States are granted authority to issue extensions by the federal law and do not need a parallel State statute or regulation.

EPA Regions will provide case-by-case extensions for individual systems in States that do not have primacy or interim primacy (a state has interim primacy if they have submitted a complete primacy application package). The extension only applies to a time frame for compliance with an MCL or TT. A system is still obligated to comply with all other provisions of the regulation such as monitoring and reporting.

As new regulations are promulgated, systems will begin to evaluate the adequacy of their treatment processes to determine if they will satisfy compliance requirements for these rules. During the evaluation process some systems will conclude that, despite best efforts to do so, they will not be able to satisfy compliance requirements (i.e., meet an MCL or TT) and submit applications to their State for extensions under 1412(b)(10).

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<sup>1</sup> Report of the Committee on the Environment and Public Works United States Senate on S. 1316, 104<sup>th</sup> Congress - 1<sup>st</sup> Session, pg. 49

#### **HYPOTHETICAL EXAMPLE - ABC SYSTEM**

ABC System is seeking an extension to comply with the new HAA5 MCL set by the Stage 1 Disinfectant/Disinfection Byproducts Rule (Stage 1 DBPR).

ABC System uses surface water as a source and serves 10,000 or more people. Note: For the Stage 1 DBPR, only Subpart H systems (systems using surface water or ground water under the direct influence of surface water) that serve 10,000 or more people may apply for an extension, since all other affected systems have up to five years to comply.

## **GUIDANCE**

Three general areas the State should consider when reviewing requests for extensions are:

- qualification criteria,
- conditions of the extension, and
- interim treatment measures

Before a system may be granted an extension it should satisfy the qualification criteria and agree to the conditions and measures deemed necessary by the State.

## **QUALIFICATION CRITERIA**

To qualify for an extension, a water system should meet the following criteria:

### **Demonstrate a need for an extension.**

- The system should show that without an extension they would not be able to meet a new MCL or TT specified in the regulation.
- The proposed capital improvement should facilitate compliance.
- An additional aspect is to allow systems to be progressive (e.g., forethought to design with future rules in mind).

ABC System performed a study over an 18-month period and found while operating under optimum conditions they could not meet the new standards (0.060 mg/L) for the group of five haloacetic acids (HAA5), on a consistent basis.

**The system should document their “Good Faith” efforts to meet the original compliance date of the regulation.**

- A system should demonstrate that they initiated steps towards compliance in a reasonable period of time after the promulgation date of the rule. A reasonable period can include time for a system to discuss their options with the State prior to initiating any activities. Additionally, when evaluating a system’s “Good Faith” effort toward compliance, the State may wish to consider other factors such as compliance history.
- A system which did not take steps towards compliance, or has only started to do so in the months immediately preceding the compliance date has not demonstrated a “good faith” effort.

In February 1999, shortly after rule publication, ABC System evaluated their plant and determined it would not satisfy new regulations. ABC based the determination on monitoring done after optimization of current processes. Therefore, in January 2000, in good faith ABC initiated renovation and upgrade activities on an expedited time line.

**Demonstrate that the scope and/or complexity of the capital improvements warrant the length of the extension.**

- Extensions should be granted for only the period necessary to complete the required capital improvements. While 1412(b)(10) allows for extensions of up to two years, extensions for the full time should only be granted where the scope of the proposed improvements justifies the length of the time requested.

ABC System initiated construction activities to upgrade their plant to incorporate granular activated carbon (GAC) treatment to reduce HAA5 levels. Although ABC System began construction in January 2000 (two full years prior to the initial compliance deadline for Stage 1 DBPR), construction would not be completed until April 2003. Thus, ABC System requested an extension for compliance with the HAA5 MCL. Through the negotiation with the State, ABC Systems received a 1.5 year

## **EXTENSION CONDITIONS**

Systems will likely propose a plan that includes critical milestones and a time-line with a final compliance date. Often these conditions will be refined through negotiations with the State. The State may wish to consider documenting the conditions of the extension through a memorandum of understanding signed by both parties or by signing-off on the system’s plan once negotiations are completed. The conditions of an extension should, at a minimum, contain:

**Compliance schedules with critical milestones.**

- A system should present a realistic construction schedule to complete their capital improvement efforts. Schedules should be based upon the scope/complexity of the capital improvement.
  - Critical milestones are those which would indicate that significant progress towards construction goals are being realized.
- While developing the compliance schedule, the State and system should discuss and document the implications of missed milestones (e.g. violation of National Primary Drinking Water Regulation) and remedies for the delay.

**Progress reports corresponding to critical milestones.**

- The State should request progress reports as frequently as is necessary to perform oversight of the system. We do not intend to create any undue reporting burden by requesting information that is not critical to determining the system's compliance with the negotiated compliance schedule.

The ABC System proposed the following critical milestone to discuss in their progress reports during the extension period:

- Groundbreaking for the GAC system
- 50% building completion
- GAC installed - to include results of pilot test run
- Building construction complete, and
- Plant operating with GAC system fully operational

**Compliance with interim measures for public health protection as determined by the State.**

- During the extension period the system should make reasonable efforts to meet the intent of the provisions established in the rule. Measures that can be taken within the scope of the system's current operation should be established and complied with to provide a level of public health protection while capital improvements are on ongoing. Interim measures are discussed further in the following section.

**Provide an opportunity for a system's customers to respond/comment to a notice of an extension.**

- It is important that the public which is served by the system is informed of the purpose of the extension and has an opportunity to provide input to the system and the State.
- The system should consider publishing a "Notice of Availability" of a public hearing as an opportunity to explain and receive feedback on the extension.

**Notice of the extension in the annual Consumer Confidence Report (CCR) [note: applies only to community water systems (CWSs)].**

- A CWS should explain to their customers the reason they pursued an extension.
- The notice should explain the issues surrounding the extension and the interim measures the

system will take to ensure that the quality of service will not be compromised.

- The CWS is required to publish their compliance monitoring results in the CCR.

ABC System agreed to notify their customers of the **extension** to the HAA5 compliance date in their annual CCR. Note: The system would not be in violation of the MCL/TT or be required to report under the Public Notification Rule, but they are required to report any compliance monitoring results in the CCR (if they are a CWS).

**The State may wish to have a system issue a Public Notice, or a statement in the CCR if the MCL or TT for which the extension was granted is exceeded.**

- A system is not required to issue a public notice during the extension period for an exceedence of an MCL or TT. The State may wish to encourage the system to notify their customers of any exceedences as part of the system's responsibility to keep the public informed of any issues related to public health and the water supply.

For ABC System, conditions of an extension include submitting quarterly sample data and notifying the public if the annual average for HAA5 exceeds 0.060 mg/L.

## **INTERIM MEASURES**

EPA believes that it is important to consider each system's potential for achieving meaningful overall risk reduction through reasonable interim treatment requirements. Some possibilities the States may wish to consider include the following:

- **Change the treatment process, type of treatment, or point of treatment.**

ABC System will optimize treatment in their plant to improve precursor removal and minimize the formation of disinfection byproducts.

- **Implement a main flushing program in areas with high detention times and/or biofilm problems.**
- **Minimize the use of certain sources.**
- **Provide alternate solutions for sensitive populations (e.g., bottled water, point-of-use, or point-of-entry devices).**

In all cases, EPA believes that it is essential to evaluate all potential interim treatment requirements in terms of their impact on disinfection byproduct formation, microbial protection, corrosion control, and other public

health issues. States should consider the net gain in public health protection when establishing interim treatment requirements.