



## Correspondence

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January 6, 2000 (AR-18J)

Janet McCabe, Assistant Commissioner  
Office of Air Management  
Indiana Department of Environmental Management  
100 North Senate Avenue  
P.O. Box 6015  
Indianapolis, Indiana 46206-6015

Dear Ms. McCabe:

This letter is in regards to your December 8, 1999, letter to Francis X. Lyons, Regional Administrator, concerning the Section 112(I) of the Clean Air Act **delegation** for the State of Indiana. Under the provisions contained in the July 8, 1997, **Federal Register** notice approving Indiana's program for receiving **delegation** of Section 112(I) standards, you have requested **delegation** of implementation and enforcement authority of additional Part 63 Maximum Achievable Control Technology (MACT) standards.

You have requested **delegation** of the standards for gasoline distribution, hazardous organic national emission standard for hazardous air pollutants, off-site waste recovery operations, and primary aluminum reduction, i.e., Part 63 MACT Standard Subpart R, F, G, H, I, DD, and LL respectively. We find that the State of Indiana's rules 326 Indiana Administrative Code (IAC) 20-10, 326 IAC 20-11, 326 IAC 20-12, 326 IAC 20-23, and 326 IAC 20-24 pursuant to Section 112(I) are at least as stringent as the Federal standards. Therefore, the United States Environmental Protection Agency delegates to Indiana the implementation and enforcement authority for the Part 63 Subparts R, F, G, H, I, DD, and LL MACT Standards.

This letter amends the **delegation** of Section 112 standards for Part 70 and non-Part 70 sources already delegated to the State. The existing **delegation**

**William Wagner**  
08/28/02 05:25 PM

To: Bruce Varner/R5/USEPA/US@EPA, Genevieve Damico/R5/USEPA/US@EPA, William Macdowell/R5/USEPA/US@EPA, Robert Miller/R5/USEPA/US@EPA  
cc: Jane Woolums/R5/USEPA/US@EPA, Sandra Lee/R5/USEPA/US@EPA  
Subject: Status of MACT delegations Confidential

DRAFT; ATTORNEY CLIENT PRIVILEGE; CONFIDENTIAL

Bill, Bruce, Genevieve & Bob:

Several issues have arisen regarding the 112 program, its delegation to the states, and our continuing responsibilities. This email discusses changes to the 112(l) program and the corresponding status of the delegation of MACT standards and the general provisions to R5 states.

#### I. Statutory and Regulatory Background.

Congress developed the 112(l) delegation program to address the numerous state air toxics programs that had been developed by the late 1980's. Essentially, the intent of Congress was to provide a procedure whereby a state program could take the place of the federal MACT program. As developed, the 112(l) program has become a three tiered delegation program: a state can take "straight" delegation whereby the MACT standard is "unchanged" from the federal MACT standard; a state can modify the MACT standards; a state can replace the MACT program with its own program.

Interestingly, even where a state takes straight delegation (as is the case with the R5 states), recent amendments to the 112(l) delegation program allow "straight delegation" states to modify certain general provisions. In a September 14, 2000 Final Rule(65 FR 55810; proposed rule at 64 FR 1880 (1/12/99)), EPA amended the 112(l) program to allow states to "ask the appropriate EPA Regional Office to delegate any of the authorities listed as 'Category I'," and the regions to delegate "such authorities at their discretion." These authorities include the approval of minor and intermediate alternatives to monitoring; the approval of adjustments to time periods for submitting reports; the approval of minor alternatives to record keeping and reporting.

Under the amended program, if a regional office delegates certain Category I authorities to a state, that state "must maintain a record of all approved alternatives to all monitoring, testing, record keeping, and reporting requirements and provide this list of alternatives to its EPA Regional Office at least semi-annually, or on a more frequent basis if requested by the Regional Office." The regional office may audit the state-approved alternatives and "disapprove any that it determines are inappropriate . . ." 65 FR at 55840. Further, regional offices are required to provide "firm guidelines for decision making in the process of delegating Part 63 General Provisions." Regional delegation documents, such as an MOA, "can draw on the language of this preamble, the July 10, 1998, memo from John S. Seitz, the February 26, 1993, memorandum from Gilbert H. Wood . . . to ensure consistency in approvals." 65 FR at 55824.

Because existing MACT standards are inconsistent in their reference and delegation of general provisions, EPA proposed amendments to existing MACT standards for the purpose of clarifying the delegable general provisions. 67 FR 2286 (January 16, 2002). To my knowledge, EPA has not published the final notice to this proposal ( I don't know the status of the proposed amendments).

Among other things, the September 14, 2000 Final Rule expands the scope of what constitutes an acceptable state program to accept delegation of the 112 program. Under the September 14th amendments, a state can implement and enforce a delegated 112 program through its Title V, FESOP and PTI permitting programs - the state is not required to incorporate MACT standards by reference or to promulgate the standards into its regs. Significantly, if a state program uses this procedure, the MACT standard is delegated on a source by source basis upon the issuance of the appropriate permit (or it is delegated when all sources in that source category have received their permits). The down-side to this approach is that pre-permitting implementation of the MACT standard cannot be delegated - i.e., the delegation occurs upon issuance of the permit. Further, enforcement can only be made against permitted sources. Although we can assert that the state can implement the standard as our "agent," the potential problem is that we may not have the authority to do so, or that we may - in an "agency" relationship - be precluded from overfiling against a state-approved provision.

## II. Status of State Delegations in R5

### A. Illinois

#### 1. Part 70 Sources

In the proposed interim approval of the Illinois Title V program (59 FR 49882 (9/30/94)), EPA also proposed straight delegation of section 112 standards to Illinois for Part 70 sources. The notice provided that "because the State of Illinois has historically accepted automatic delegation of section 112 standards and requirements, EPA proposes to approve the delegation of section 112 standards and requirements through automatic delegation. . . . Illinois will automatically assume responsibility for collection and receipt of any information required by the standard. . . . The details of this delegation mechanism will be set forth in a MOA . . . ." The provisions in Illinois law that allow for such "automatic delegation" are not discussed, nor is there any reference to the delegation of the general provisions.

In the final interim approval of the Title V program (60 FR 12478 (3/7/95)), EPA also approves the "State's program for receiving delegation of section 112 standards that are unchanged from Federal standards . . . ." The final approval does not reference the mechanism for delegation (other than "automatic"), nor does it reference an MOA, or the delegation of the general provisions.

#### 2. Non-Part 70 Sources

In a direct final rule dated November 22, 1995 (60 FR 57834), EPA approved the straight delegation of the air toxics program to Illinois for non-Part 70 sources. The notice provides that

“upon promulgation of a section 112 standard, the State of Illinois automatically receives the authority and assumes responsibility for the timely implementation and enforcement required by the standard . . .” The program includes the Part 63 general provisions “to the extent that they are not reserved to the EPA and are delegable to the State.” The notice does not refer to any MOA.

### 3. Discussion

I have not reviewed the MOA between EPA and Illinois (could someone please forward a copy?). The MOA (or MOAs) should describe the mechanism of the “automatic” delegation, procedures to track the delegations, and procedures to review the State’s implementation and enforcement of the standards. The MOA should address both Part 70 and Non-part 70 sources. Regarding the general provisions, it is unlikely that the MOA addresses the changes made in the September 2000 Final Rule. Further, the federal register notices for the 112(l) delegation to Illinois for Part 70 sources does not notice the delegation of the general provisions. Has the State assumed that it has delegation of the general provisions, and, if so, has the State modified any general provision for specific sources? In light of the changes to both the scope and procedures for 112(l) delegation, I would expect that EPA will want to amend the MOA with Illinois as well as issue a FRN which clarifies the delegation of the general provisions.

#### B. Indiana

##### 1. Part 70 Sources

In the proposed interim approval of the Indiana Title V program (60 FR 27064 (5/22/95)), EPA also proposed the delegation through “rule adoption” of “section 112(d), (f) or (h) standards” unchanged from the federal standards as they apply to Part 70 sources. The notice states that the mechanism will be set forth in an MOA. There is no reference to the delegation of Part 63 general provisions.

In the final interim approval of the Title V program (60 FR 57188 (11/14/95)), EPA also approved the delegation of “section 112 standards” through rule adoption as they apply to Part 70 sources. The notice states that the details of the delegation will be set forth in an MOA. There is no reference to the delegation of Part 63 general provisions.

##### 2. Non-Part 70 Sources

In a direct final rule dated July 8, 1997 (62 FR 36460), EPA approved the straight delegation of the air toxics program to Indiana for non-Part 70 sources. The notice does not reference an MOA, nor does it include the delegation of the general provisions. However, the notice does describe the following delegation procedure: for existing standards, IDEM submitted a schedule for their adoption into state regulations; for future standards, EPA “will automatically delegate the authority to implement a standard to the State by letter . . .”; upon receipt of the letter, the State will be responsible for implementing the standard; IDEM will notify EPA upon adopting the standard “unchanged” into State regulations; upon receipt of proof of the State regulation, EPA will delegate the enforcement authority to the State by letter.

### 3. Discussion

I have not reviewed the MOA between EPA and Indiana (could someone please forward a copy?). The MOA (or MOAs) should describe the mechanism of the delegation, procedures to track the delegations, and procedures to review the State's implementation and enforcement of the standards. The MOA should address both Part 70 and Non-part 70 sources. Regarding the general provisions, it is unlikely that the MOA addresses the changes made in the September 2000 Final Rule. Further, the federal register notices for the 112(l) delegation to Indiana for both Part 70 and non-Part 70 sources do not notice the delegation of the general provisions. Has the State assumed that it has delegation of the general provisions, and, if so, has the State modified any general provision for specific sources? In light of the changes to both the scope and procedures for 112(l) delegation, I would expect that EPA will want to amend the MOA with Indiana as well as issue a FRN which delegates the general provisions.

#### C. Wisconsin

##### 1. Part 70 Sources

In the proposed interim approval of the Wisconsin Title V program (59 FR 52743 (10/19/94)), EPA also proposed straight delegation of section 112 standards to Wisconsin for Part 70 sources. The proposal refers to "automatic" delegation that will be set forth in an MOA. The notice does not describe a mechanism for the delegation, nor refer to the delegation of the general provisions.

In the final interim approval of the Title V program (60 FR 12128 (3/6/95)), EPA also approved the state's "program for receiving delegation of section 112 standards that are unchanged from federal standards as promulgated." The notice does not reference an MOA, specific delegation procedures, or the general provisions.

##### 2. Non-Part 70 Sources

In a direct final rule dated April 1, 1997 (62 FR 15402), EPA approved the straight delegation of the air toxics program to Wisconsin for non-Part 70 sources. The notice identifies three possible mechanisms to implement the delegation. The summary of the notice states that the mechanism involves "either the delegation of all existing and future section 112 standards as federally promulgated, for promulgation as State standards (or rules), or to incorporate Federal standards into State air pollution control permits, reserving the right to promulgate the standards as a State rule at a later time." To me, this means that Wisconsin will either promulgate the MACT rule in its regulations, or simply put the MACT rule in its permits - I assume there is a FESOP program. The notice later states that for a source category for which "Wisconsin wishes to adopt its own rules, WDNR shall submit for approval to EPA State rules varying from the Federal standard . . . if possible within 18 months of promulgation by EPA. . . . EPA will review such rules for approvability . . ." To me, this means that Wisconsin may seek to modify or replace certain future MACT standards.

The notice states that the mechanism of the delegation will be set forth in an MOA. However,

the notice describes the procedure that will be used for straight delegation: EPA will delegate by letter the authority to implement a standard; Wisconsin will expeditiously adopt the rule into its regulations - if possible, within 18 months of promulgation; WDNR will submit proof of adoption to EPA; EPA will respond with a letter delegating enforcement authority to WDNR. The notice does not refer to the delegation of the general provisions.

### 3. Discussion

I have not reviewed the MOA between EPA and Wisconsin (could someone please forward a copy?). The MOA (or MOAs) should describe the mechanisms (3) for delegation, procedures to track the delegations, and procedures to review the State's implementation and enforcement of the standards. The MOA should address both Part 70 and Non-part 70 sources. Regarding the general provisions, it is unlikely that the MOA addresses the changes made in the September 2000 Final Rule. Further, the federal register notices for the 112(l) delegation to Wisconsin for both Part 70 and non-Part 70 sources do not notice the delegation of the general provisions. Has the State assumed that it has delegation of the general provisions, and, if so, has the State modified any general provision for specific sources? In light of the changes to both the scope and procedures for 112(l) delegation, I would expect that EPA will want to amend the MOA with Wisconsin as well as issue a FRN which delegates the general provisions.

#### D. Michigan

##### 1. Part 70 Sources

In the proposed interim approval of the Michigan Title V program (61 FR 32391 (6/24/96)), EPA also proposed the straight delegation of Section 112 standards because "Michigan has the authority under section 324.5506(6), NREPA, to include any conditions in an operating permit that are necessary to assure compliance with the Act . . . ." The notice does not describe a delegation procedure, but states that the mechanism will be set forth in an MOA. There is no reference to the delegation of Part 63 general provisions.

In the final interim approval of the Title V program (60 FR 57188 (11/14/95)), EPA also approved the "State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated." The notice does not mention an MOA, delegation procedures, the delegation of existing and future standards, nor the delegation of the general provisions.

##### 2. Non-Part 70 Sources

In a direct final rule dated November 23, 1998 (63 FR 64632), EPA approved the straight delegation to Michigan of the federal air toxics program "contained within 40 CFR Parts 61 and 63" for non-Part 70 sources. Interestingly, this is the only 112(l) FRN for the Region that references Part 61. The notice describes the following delegation procedure:

For a future Section 112 standard for which MDEQ intends to accept delegation, EPA will automatically delegate the authority to implement a Section 112 standard to the State