



# How To Review And Issue Clean Air Act

## Applicability Determinations And Alternative Monitoring

### New Source Performance Standards

N S P S

### National Emission Standards for Hazardous Air Pollutants

N E S H A P

**How to Review and Issue  
Clean Air Act  
Applicability Determinations and Alternative Monitoring  
for  
New Source Performance Standards  
National Emission Standards for Hazardous Air Pollutants**

February 1999

Manufacturing, Energy, and Transportation Division  
Office of Compliance  
**Office** of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
40 1 M Street, SW  
Washington, DC 20460

## **DISCLAIMER**

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied on, to create any rights enforceable by any party in litigation with the United States. The U.S. Environmental Protection Agency (EPA) and State **officials** may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on an analysis of specific-site circumstances. This guidance may be **revised** without public notice to reflect changes in EPA's policy.

## Executive Summary

A critical aspect of implementing the New Source Performance Standards (**NSPS**) and National Emission Standards for Hazardous Air Pollutants (NESHAP) under the Clean Air Act (**CAA**) is responding to requests for applicability determinations and monitoring alternatives. The Environmental Protection Agency (EPA, or the Agency) currently issues over 100 memoranda per year pertaining to NSPS and NESHAP applicability and monitoring requirements, and handles countless telephone and electronic mail requests. Given this volume of activity, the reorganizations across the Agency, and the large number of new NESHAP regulations, the challenge to ensure nationally consistent responses is greater than ever.

This guidance on How to Review and Issue CAA Applicability Determinations and Alternative Monitoring clarifies the necessary roles and procedures for issuing nationally consistent responses. It is directed to Agency staff and management involved in responding to NSPS and NESHAP applicability and monitoring questions. This guidance will also be a useful tool for personnel in State and Local Agencies involved in implementing the NSPS and NESHAP.

Today's guidance is the culmination of three Agency initiatives on implementation of the NSPS and NESHAP programs. This guidance addresses recommendations from a review of the Applicability Determination Index (**ADI**) performed by the Manufacturing, Energy, and Transportation Division (**METD**) issued on July **23, 1998**. Today's guidance also responds to a need identified at the 1997 Air **Toxics** Implementation Working Meeting for guidance on how to develop applicability determinations. Third, today's guidance reflects a July 10, 1998 policy **from** the Office of Air Quality Planning and Standards (OAQPS) on which discretionary authorities in the Part 63 NESHAP General Provisions may be delegated to State and Local Agencies.

For purposes of this guidance, applicability determinations under the NSPS (40 CFR Part **60**), NESHAP (40 CFR Parts 61 and **63**), and CAA section 11 I(d) (40 CFR Part 60, subparts B & C) programs are source-specific, written responses to questions on whether certain equipment or activities are subject to the regulations. Applicability determinations are issued by persons holding delegated authority within State or Local Agencies, EPA Regional Offices or EPA Headquarters. State and Local Agencies are the first stop for questions from the public on applicability. EPA Regional Offices have the primary role within EPA for providing

## Executive Summary, continued

applicability determinations when an EPA response is necessary. There are also four divisions in Headquarters' delegated the authority to issue NSPS and NESHAP applicability determinations.

Requests for alternative monitoring also must be approved or disapproved in writing by persons delegated such authority. Within EPA, only the Regional Offices are delegated the authority to issue alternative monitoring for the NSPS and NESHAP. However, Headquarters provides assistance to Regional Offices in their development of responses as necessary. The role of State and Local Agencies in the review and approval of alternative monitoring has generally been limited to reviewing minor changes in monitoring methodology; however, the degree of delegation varies. Pursuant to the July 10, 1998 policy statement by OAQPS and today's guidance, delegations of authority to issue intermediate alternatives to monitoring may also be delegated to State and Local Agencies under certain conditions.

Today's guidance fulfills the following needs for implementation of the NSPS and NESHAP program identified by METD's review of the ADI, and the 1997 Air Toxics Working Meeting:

- **basic terminology is clarified**, such as what constitute applicability determinations, monitoring alternatives, and regulatory interpretations;
- delegated authorities and **lead offices** for issuing applicability determinations and alternative monitoring responses are identified;
- **procedures for handling informal requests**, such as telephone inquiries and electronic mail, are presented;
- **consultation procedures** for use in the development of applicability determinations and alternative monitoring responses are established;
- necessary **steps in issuing applicability determinations** are identified; and,
- **drafting pointers** to improve the clarity of applicability determinations and alternative monitoring responses are provided.

---

'The Manufacturing, Energy and Transportation Division (METD), the Chemical, Commercial Services and Municipal Division (CCSMD), and the Agriculture and Ecosystems Division (**AgED**) in the Office of Compliance (OC), and the Air Enforcement Division (**AED**) in the Office of Regulatory Enforcement (ORE). Both OC and ORE are in the Office of Enforcement and Compliance Assurance (OECA). (See Attachment 5, "Organizational Charts.")

## Executive Summary, continued

Further, today's guidance answers basic questions on how the applicability and monitoring review process will interface with operating permits; discusses Small Business Regulatory Enforcement Fairness Act (SBREFA) requirements as they pertain to informal Agency responses on applicability and monitoring; and provides guidance on responding to applicability inquiries posed after the action in question has already occurred (post hoc situations).

Today's guidance also sets forth new policy in several areas. This guidance:

- allows consistency between the new Part 63 and existing Part 60 and 61 programs in the delegation of authority to State and Local Agencies for applicability determinations and alternative monitoring;
- incorporates new time frames for OECA and OAQPS for reviewing draft applicability determinations and monitoring responses;
- provides consultation procedures for OAQPS in the drafting of regulatory interpretations on NSPS and NESHAP applicability;
- establishes OC sector leads as the focal points and leads within OECA for questions on NSPS and NESHAP applicability;
- sets forth OC's new policy of publishing notification of availability of applicability determinations in the Federal Register.

Implementation of this guidance should improve accuracy and clarity of applicability determinations and alternative monitoring responses. Adherence to the policies and principles presented will ensure national consistency in the implementation of the NSPS and NESHAP programs.

## Contents

<b>Section 1</b>	<b>Background</b> .....	1
<b>Section 2</b>	<b>Description</b> of Terms.....	3
	Overview; Applicability Determinations; Regulatory Interpretations; Alternative Monitoring; Alternative Testing; Informal Discussions; Other Revisions, Waivers and Extensions	
<b>Section 3</b>	<b>Interface with Title V Operating Permits</b> .....	11
	Overview Applicability Determinations and Title V Operating Permits Changes to Monitoring and Title V Operating Permits	
<b>Section 4</b>	<b>Who has Authority,</b> Overview .....	13
4.1	<b>Delegated Authorities within EPA</b> .....	13
	Applicability Determinations; Regulatory Interpretations; Alternative Monitoring; Alternative Testing <b>Table: Delegations of Authority within EPA</b> .....	18
4.2	<b>Delegations to State and Local Agencies</b> .....	19
	Delegable Authorities Nature of State Determinations Delegation Process	
<b>Section 5</b>	<b>Who has the Lead,</b> Overview .....	23
5.1	<b>Lead Offices for Applicability Determinations</b> .....	23
	Whose Lead--State or EPA Region Whose Lead--EPA Regions or Headquarters Lead within Headquarters Requests--Where to Send <b>Diagram: Lead Offices for Applicability Determinations</b> .....	28
	Responses--Type and Where to Send <b>Inset: Responding to Post Hoc Requests</b> .....	30
5.2	<b>Lead Offices for Regulatory Interpretations</b> .....	31
5.3	<b>Lead Offices for Alternative Monitoring</b> .....	32
	Whose Lead--State or EPA Region Whose Lead--EPA Regions or Headquarters <b>Diagram: Sample Lead Offices for Changes in Monitoring</b> .....	33
	Where to Send Requests and Issuance of Responses	

## Contents, continued

<b>Section 6</b>	<b>EPA Consultations</b> .....	<b>35</b>
6.1	<b>Consultation Procedures for OECA</b> .....	<b>36</b>
6.2	<b>Consultation Procedures for OAQPS</b> .....	<b>38</b>
6.3	<b>Consultation Procedures for Regional Offices</b> .....	<b>39</b>
	<b>Inset: Correspondence During Deliberations</b> .....	<b>41</b>
<b>Section 7</b>	<b>Informal Inquiries:</b> .....	<b>43</b>
	Overview	
	Responding to Phone Inquiries	
	Responding to E-mail	
	SBREFA Requirements	
<b>Section 8</b>	<b>Steps in Developing Applicability Determinations</b> .....	<b>47</b>
	Overview; The Eight Steps	
<b>Section 9</b>	<b>Drafting Points for Applicability Determinations and Alternative Monitoring Responses</b> .....	<b>51</b>
	Overview; Drafting Pointers	

## Attachments

- 1 Part 63 Delegable Authority Memorandum. "Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies," from John S. Seitz, Director Office of Air Quality Planning and Standards, July 10, 1998
- 2 Parts 60 and 61 Delegable Authorities Memoranda for NSPS and NESHAP Applicability Determinations and Alternative Monitoring
- 3 Selected EPA Delegations of Authority
- 4 Applicability Determination Index Update Procedures
- 5 OECA and OAQPS Organizational Charts
- 6 NSPS and NESHAP General Contacts



## Section 1

### Background

The Environmental Protection Agency (EPA, or the Agency) currently issues over 100 letters or memoranda per year on Clean Air Act (CAA) applicability or monitoring issues under the New Source Performance Standards (NSPS) and the National Emission Standards for Hazardous Air Pollutants (NESHAP) programs. As a means of promoting national consistency, EPA Headquarters has maintained a compilation of EPA applicability determinations since the first determinations were issued in the early 1970's. Revisions to monitoring and recordkeeping requirements (alternative monitoring) are also part of this compilation. These memoranda are currently available through the Applicability Determination Index (ADI). The ADI is an electronic index on the Internet with over one thousand EPA memoranda pertaining to the applicability, monitoring, recordkeeping and reporting requirements of the NSPS (40 CFR Part 60) and NESHAP (40 CFR Parts 61 and 63). The memoranda may be searched by date, office, subpart, citation or by string word searches.

As part of its charge to oversee the ADI, the Manufacturing, Energy, and Transportation Division (METD) in the Office of Compliance (OC) reviewed the NSPS memoranda posted on the ADI since the 1994 reorganization of the larger Office of Enforcement and Compliance Assurance (OECA). As a result of the review, METD issued a report on July 23, 1998<sup>2</sup> which identified key areas in which the clarity and consistency of applicability determinations and monitoring alternatives could be improved. The report recommended reinforcement of internal consultation procedures and adherence to drafting principles.

The April 1997 Air Toxics Implementation Working Meeting at Brown Summit also identified a need to enhance the clarity and effectiveness of applicability determinations for the Part 63 NESHAP program. That working group recommended the development of guidance clarifying the roles and steps in making applicability determinations, addressing basic issues such as what constitutes an applicability determination, and which office has the lead in issuing determinations.

---

<sup>2</sup>Report entitled, "Review of the Applicability Determination Index; NSPS Memoranda," issued July 23, 1998. by John B. Rasnic, Director, METD, OC.

## **Section 1: Background, continued**

On July 10, 1998, the Office of Air Quality Planning and Standards (OAQPS) issued guidance (Attachment 1) on the extent to which applicability determination and alternative monitoring review and approval authority for the Part 63 NESHAP program may be delegated to State and Local Agencies. That guidance addresses what Part 63 General Provisions discretionary authorities may be delegated to State and Local Agencies through straight delegation of the General Provisions. The Part 63 guidance creates three categories of changes to monitoring and testing: minor, intermediate, and major. The guidance indicates that the authority to issue minor and intermediate changes in monitoring, and applicability determinations may be delegated to State and Local Agencies, given proper notification, oversight, and consideration of State and Local capabilities.

The Part 63 delegable authorities guidance potentially allows State and Local Agencies to be delegated greater authority for applicability determinations and monitoring revisions for the Part 63 program than was allowed under previous guidance for the Parts 60 and 61 programs. EPA Regional Offices will ultimately determine the extent to which authority to issue applicability determinations and alternative monitoring should be delegated to any one particular State or Local Agency.

Today's guidance on How to Review and Issue CAA Applicability Determinations and Alternative Monitoring for NSPS and NESHAP is designed to address the findings of **METD's** review of the **ADI**, and the needs identified by the Air **Toxics** Implementation Working Meeting. It clarifies the roles, consultation, issuance, and drafting procedures for the development of applicability determinations and alternative monitoring responses. It is also reflective of the Part 63 delegable authorities guidance by providing that EPA may delegate applicability determination and alternative monitoring authority to State and Local Agencies for the Parts 60 and 61 programs to the same extent as is allowed under Part 63. Ultimately, today's guidance provides procedures by which the Agency can ensure nationally consistent responses to applicability and monitoring inquiries in the NSPS and NESHAP programs.

## Section 2

### Description of Terms What is an Applicability Determination or Alternative Monitoring Response

#### Overview

This guidance pertains to the drafting of CAA applicability determinations and alternative monitoring responses under the NSPS (40 CFR Part 60), and the NESHAP (40 CFR Parts 61 and 63) programs. The procedures as they relate to CAA section 11 l(d) plans, under 40 CFR Part 60 Subparts B and C, which implement the Emission Guidelines (e.g., for Municipal Waste Combusters (MWCs) and Municipal Landfills) are also addressed.

This section defines the terms “applicability determination” and “alternative monitoring.” These terms are distinguished from similar authorities, also defined in this section, such as regulatory interpretations, alternative testing, and responses to informal inquiries.

#### Applicability Determinations

The term “applicability determination” as used in this guidance refers to decisions issued **in writing** by a recipient of the Administrator’s **delegated authority** as to whether certain activities by a **specific source** would trigger applicability of the regulation in question. Applicability determinations involve evaluation of whether actions taken by the source constitute construction, reconstruction or modification, and often involve a determination of whether the source meets the definition of the regulated entity, i.e., the affected facility for NSPS, the affected source for Part 63, or the designated facility for section 11 l(d) plans.

The term “applicability determination” is being used broadly in this guidance as shorthand for a variety of written documents pertaining to source-specific applicability-related issues, for the purpose of establishing roles and responsibilities within the Agency. Although this guidance

## Section 2: Description of Terms -- Applicability Determinations, continued

restricts use of the term “applicability determination” to documents issued by a recipient of the Administrator’s delegated authority, many of these documents (such as internal EPA memoranda) would not be considered applicability determinations in the legal sense. Precisely speaking, the term “applicability determination” is limited to the Agency’s formal, written decisions, issued to a source in response to a question from that source, regarding source-specific applicability issues. The broader use of the term in this guidance, which includes internal EPA memoranda and responses to inquiries generated within a State or Local Agency, is not intended to create any legal rights.

In some instances, regulations contain procedures that source owners or operators may use to receive a response regarding applicability issues. The General Provisions of the NSPS and Part 61 NESHAP provide at 40 CFR Sections 60.5 and 61.06 that a source owner or operator can request a determination of whether certain actions constitute construction (including reconstruction), modification, or the commencement thereof.

Although the Part 63 NESHAP and section 11 l(d) regulations contain no specific regulatory provision that sources may request applicability **determinations**<sup>3</sup>, EPA does respond to written inquiries regarding applicability for the Part 63 and section 11 l(d) programs. EPA has delegated the authority to respond to such inquiries to the same persons within the Agency who are delegated the authority to issue NSPS and Part 61 NESHAP determinations. Therefore, today’s guidance applies the term applicability determination to the Part 63 and section 11 l(d) programs to mean a written determination provided by a recipient of the Administrator’s delegated authority as to whether a particular activity, facility, or source is subject to the regulations.

Applicability determinations are issued in the form of a letter or memorandum from EPA, or the State or Local Agency to which the program has been delegated, and must be signed by a person to whom the authority has been delegated.

Applicability determinations may be issued either before or after the action in question has occurred. However, the means for responding to inquiries in the post hoc setting requires special consideration given the potential for an enforcement action, and is discussed separately in Section 5.1, “Lead Offices for Applicability Determinations.”

---

<sup>3</sup>The Part 63 General Provisions do use the term applicability determination in sections 63.1 (b)(3) & 63.10(b)(3). However, these sections refer to decisions made *by* the Source that they are not subject to a standard under Part 63. This source-generated decision is distinct from the applicability determinations discussed in this document, which are issued *by the EPA or a delegated State or Local Agency.*

## Section 2: Description of Terms, continued

EPA determinations are posted through quarterly updates to the **Applicability Determination Index (ADI)**, available on the Internet at:

**<http://ttnwww.rtpnc.epa.gov/cfdocs/adiwww/adiwww.html-ssi>**

The ADI is also accessible through METD's home page, **<http://www.epa.gov/oeca/metd>**. A description of the ADI update procedures is provided in Attachment 4. In the future, EPA plans to periodically post summaries of the Agency's applicability determinations in the Federal Register.

State and Local Agency determinations are not posted on the **ADI**, since their programs to implement Parts **60, 61 & 63** may be more expansive or more stringent than the federal regulations. The EPA's Unified Air Toxics **Website** is being expanded to contain links to State or Local Agency bulletin boards for Part 63 determinations. The address for the Unified Air Toxics **Website** is : **<http://www.epa.gov/ttn/uatw>**

## Regulatory Interpretations

In contrast to applicability determinations which are source-specific, EPA receives numerous inquiries about the broad range of regulatory requirements as they pertain to the **whole source category**. These questions may pertain, for example, to the type of testing, monitoring, recordkeeping or reporting that applies to the source category, such as how often sources are required to sample fuel, or what the deadline is for performance testing. EPA's responses to these inquiries can broadly be characterized as regulatory interpretations.

Regulatory interpretations are issued in the form of a letter, memorandum, or guidance. Such interpretations are typically issued by either the division with the lead for implementing the regulation (within OECA or Regional Offices), or the lead Headquarters division responsible for drafting the regulation (within OAQPS). Legal counsel has also issued these interpretations. Regulatory interpretations for the NSPS and NESHAP program are posted on the **ADI**.

It may not always be easy to distinguish a request for a regulatory interpretation pertaining to applicability criteria, from a request for an applicability determination. In such cases it may be useful to request clarification from the source if they are in fact requesting a source-specific applicability determination under sections 60.5 or 61.06, to ensure the response is issued from an office with the proper authority.

## Section 2: Description of Terms, continued

### Alternative Monitoring

The NSPS and NESHAP programs allow sources to seek permission to use monitoring or recordkeeping which is different from the promulgated requirements. These provisions are set forth at 40 CFR 60.13(i), 61.14(g), 63.8(b)(1), 63.8(f) & 63.10(f). Although the language in each of these paragraphs varies somewhat, they all allow alternatives to the monitoring requirements ranging from minor changes in monitoring and recordkeeping, to major changes, including entirely different monitoring systems. **This guidance will use the term “alternative monitoring” to refer to any change in the promulgated monitoring and recordkeeping requirements, regardless of the magnitude of the change.** Bear in mind that changes in reporting requirements may be necessary as a result of alternative monitoring.

Historically in the NSPS and Part 61 NESHAP program, EPA reviews major changes in monitoring, including those changes which have broad application, whereas States and sometimes Local Agencies review source-specific minor changes. However, delegations of authority to State and Local Agencies vary.

The Part 63 delegable authorities guidance issued by OAQPS on July 10, 1998 (Attachment 1) defines and categorizes proposed changes in monitoring as minor, intermediate, and major. These terms are summarized as follows, but please refer to Attachment 1 for a more complete description of the terms.

- **Minor changes** to monitoring are those that have no potential to decrease the stringency of the compliance monitoring measures, have no national significance, and are **source-specific**.
- **Intermediate changes** to monitoring involve a proven technology, and apply on a **site-specific** basis; however, the proposal may have the potential to be less stringent than the existing monitoring. As such, proposed intermediate changes in monitoring must undergo a rigorous review to ensure that any approved changes do not decrease the stringency of the compliance or enforcement measures.
- **Major changes** to monitoring use unproven technology or procedures, or constitute an entirely new method; they may be site-specific or apply broadly. Proposed major changes also have the potential to decrease the stringency of the source's monitoring. These proposals must also undergo rigorous review to ensure that they are of the same or higher stringency as the method or procedure specified in the applicable regulation.

## Section 2: Description of Terms, continued

Pursuant to the Part 63 delegable authorities guidance, both minor and intermediate changes in monitoring may be delegated to State and Local Agencies with appropriate oversight. Today's guidance confirms that Regions may delegate the review and approval of source-specific, minor and intermediate monitoring alternatives for the NSPS and Part 61 NESHAP, consistent with the Part 63 guidance (see Section 4.2, "Delegations to State and Local Agencies"). This constitutes an expansion of authority delegable to States, since intermediate changes in monitoring were not previously delegable to States.

Requests for NSPS and NESHAP alternative monitoring are usually source-specific in nature; however, EPA has given broad approval to some monitoring alternatives for use by any source which meets defined criteria. Alternative monitoring is typically approved or disapproved in a letter or memorandum, signed by a person to whom the authority has been delegated.

EPA has posted numerous responses to requests for alternative monitoring on the **ADI**, and some alternative methods with broad application have been published in the Federal Register. Through today's guidance, EPA is confirming that Regional Offices should continue to post **Agency-**issued alternative monitoring approvals and disapprovals on the **ADI**. Further, OAQPS is requesting that all State-issued intermediate changes in monitoring be sent to the Emission Monitoring and Analysis Division (see Section 5.3 on "Where to Send Requests and Issuance of Responses").

Revisions to State-adopted and EPA-approved section 11 l(d) plans for designated facilities are permissible pursuant to 40 CFR 60.29. Such revisions require EPA approval, as well as notice and opportunity for public comment.

## Section 2: Description of Terms, continued

### Alternative Testing

NSPS and NESHAP provisions on alternative testing are found at 40 CFR 60.8(b), 61.13(h), 63.7(e)(2), & 63.7(f). Testing alternatives may be source-specific, or may apply broadly, but must be signed by a person to whom authority has been delegated. Approvals that have broad application have been published in the Federal Register. Testing alternatives are currently published on the Agency's Technology Transfer Network (TTN) Emission Measurement Center (EMC) web site, under "Methods." The Internet address is: <http://www.epa.gov/ttn/emc>

As with alternative monitoring, the delegations of authority to review and approve alternative test methods depend on the nature of the proposed change, including whether that change is minor or major. The Part 63 delegable authorities guidance (Attachment 1) defines changes in testing based on the new three levels of changes (minor, intermediate, and major). Major revisions to testing and revisions of a broad nature must be reviewed by EPA. State or Local Agency authority to review testing is limited to source-specific minor and intermediate changes.

Different procedures for review and approval apply for testing changes than apply for monitoring changes. For example, intermediate changes to testing must meet EPA Method 301 criteria; whereas, Method 301 is not used to evaluate monitoring changes. Further, major changes to test methods may only be approved by OAQPS; whereas, major changes to monitoring are approved by Regional Offices. The reader is referred to Attachment 1 for a more complete description of the three levels of testing changes.

Since there are different procedures for reviewing alternative testing and alternative monitoring, **it is important to understand whether a proposal involves the test method, or the monitoring method.** Test methods are designated in the standard as the means for determining compliance with the emission standard during a performance test. The regulation may require periodic performance tests, or where Continuous Emission Monitoring Systems (CEMS) are employed, may specify that CEMS are the test method (i.e., a designated means of determining continuing compliance with the emission standard). Proposed changes to these requirements are reviewed under alternative testing authority.



## **Section 2: Description of Terms, continued**

Some Part 63 NESHAP regulations specify that parameter monitoring, in addition to a specific reference test method, is used to determine compliance with the standard. Although these parameter monitoring requirements are means for determining continuing compliance with the standard, revisions to the parameter monitoring requirements would be reviewed under alternative monitoring procedures. The alternative testing procedures would be used to review revisions to the performance test method.

Revisions to State section 111 (d) plans would require EPA approval and notice and opportunity for public hearing.

## Section 2: Description of Terms, continued

### Informal Discussions

States and EPA frequently receive questions over the telephone, and increasingly via electronic mail (e-mail), related to applicability, monitoring and recordkeeping requirements. This type of correspondence is considered an informal discussion, and does not constitute a request for a determination. Any answer provided in that **forum** is not considered an applicability determination or alternative monitoring response. Applicability determinations and alternative monitoring decisions must follow the formal process discussed in this document. Because applicability determinations and alternative monitoring decisions are source-specific and hinge on the details of the specific situation, it is necessary that requests be in writing and not based on hypothetical scenarios. It is equally important that the agency's determination or approval be in writing, in response to a specific fact-based written request, and be signed by a person to whom authority has been delegated.

### Other Revisions, Waivers, and Extensions

The NSPS and NESHAP programs provide flexibility **from** the promulgated requirements in a number of ways, as specified in individual subparts, the General Provisions, and the statute itself. Examples include compliance extensions under section 112(i) of the CAA, innovative technology waivers for NSPS under section 111 **(j)** of the **CAA**, and equivalency determinations for NESHAP under section 112(h) of the CAA. The level of EPA review for these provisions is reflected in EPA's delegations of authority, and the method for application and approval varies as specified in guidance or regulations. Discussion of the many means of adapting the regulations to source-specific conditions is beyond the scope of this guidance.

## Section 3

### Interface with Title V Operating Permits

#### Overview

The CAA title V operating permit program provides for the implementation of all CAA requirements that have been determined to apply to the source. This section briefly addresses the interface between the operating permit program and the NSPS/NESHAP applicability determinations and monitoring review process.

#### Applicability Determinations and Title V Operating Permits

In preparing a title V permit application, a source must **identify** all of the applicable requirements that apply to the source. As such, owners or operators may find it useful to request a NSPS or NESHAP applicability determination. As described in Section 2, NSPS and NESHAP applicability determinations are source-specific, written determinations, signed by persons to whom authority has been delegated, and must specifically address whether a particular activity or process is subject to the regulation in question. The process of seeking an applicability determination under the Parts **60, 61**, or 63 programs is, however, a separate process from the development of the operating permit.

If it is determined that an operating permit does not correctly reflect a source's applicable requirements, EPA has several courses of action that may be taken. These include objecting to or reopening the permit for cause, as appropriate. In general, an operating permit shield regarding Part **60, 61**, or 63 requirements can only be created to the extent that the applicable requirements are included and specifically identified in the permit, or the permit includes a written determination from the permitting authority that specifically identified requirements are not applicable to the source.

Sources should direct any questions pertaining to permitting obligations to their permitting authority. Questions on the applicability of the NSPS or NESHAP should be directed to the agency delegated the authority to issue applicability determinations (the permitting authority

### **Section 3: Interface with Title V, continued**

should be alerted, if not already involved). Usually States are the first stop for applicability issues, as discussed in Section 5, "Who has the Lead"; however, the extent of delegation varies.

Questions of first impression which pertain broadly to implementation of the Part 70 program, should be directed by permitting authorities to the appropriate EPA Regional Office, which in turn should discuss the questions with EPA Headquarters. Given that the title V permitting program is designed to bring applicable regulations together in the operating permit, it may become challenging to distinguish a title V applicability question from a NSPS or NESHAP applicability question.

Given the close tie between the programs, OECA and OAQPS (both the Operating Permits Group in the Information Transfer and Program Integration Division in OAQPS, and the Emission Standards Division in OAQPS) need to closely coordinate all applicability-related inquiries which come to their attention.

### **Changes to Monitoring and Title V Operating Permits**

The NSPS and NESHAP procedures for reviewing monitoring changes continue to be used to evaluate and approve changes in monitoring for sources with operating permits. The operating permit must be revised to incorporate any approved changes in monitoring requirements.

Alternative monitoring requirements reviewed and approved using the **NSPS/NESHAP** alternative monitoring review process (as provided in 40 CFR sections **60.13, 61.14, 63.8 & 63.10**, and discussed in this document) become applicable requirements which must be incorporated into the permit in place of the prior monitoring requirements. For changes in monitoring which are approved consistent with the **NSPS/NESHAP** procedures and delegations, the monitoring terms in the operating permit may generally be revised using the minor permit modification procedures.

## **Section 4**

### **Who has Authority**

#### **Overview**

This section explains who is delegated the Administrator's NSPS and NESHAP authority to issue applicability determinations and approve alternative monitoring. The first subsection (4.1) reflects the current delegations of authority within EPA. The second subsection (4.2) summarizes issues pertaining to delegations to State and Local Agencies. Information on who among those agencies delegated authority has the lead is addressed in Section 5, "Who has the Lead."

#### **4.1. Delegated Authorities within EPA**

The text and table which follow summarize the current delegations of the Administrator's authority within EPA for applicability determinations and alternative monitoring. This subsection also addresses regulatory interpretations and alternative testing, to distinguish these functions from applicability determinations and alternative monitoring. Delegations of the Administrator's authority are compiled in the "EPA Delegations Manual" maintained by the Office of Administration and Resources Management, and are available on the Agency's Intranet at:

**<http://intranet.epa.gov/rmpolicy>**

The relevant delegations of authority are provided in Attachment 3.

## Section 4.1: Delegated Authorities within EPA, continued

### Applicability Determinations

Applicability Determination Delegation 7- 127 pertains to NSPS, section 11 l(d) plans, and Part 61 & Part 63 NESHAP.

Delegation 7- 127 delegates authority from the Administrator to Regional Administrators and the Assistant Administrator for OECA. Applicability determination authority is redelegated within OECA to division directors and branch chiefs via memoranda dated June 6, 1994, and August 31, 1995 (Attachment 3).

Applicability determination authority is delegated to:

**Regional Offices**--delegable to branch chief level or equivalent, conditioned upon quarterly submission of summaries and copies of **applicability** determinations to the ADI.

**OECA/Office of Compliance (OC)**--delegated to division directors and branch chiefs in the Manufacturing, Energy and Transportation Division (METD), the Chemical, Commercial Services, and Municipal Division (CCSMD), and the Agriculture and Ecosystem Division (**AgED**).

**OECA/Office of Regulatory Enforcement (ORE)**--delegated to division director and branch chief in the Air Enforcement Division (**AED**).

## Section 4.1: Delegated Authorities within EPA, continued

### Regulatory Interpretations

The authority to issue regulatory interpretations does not require delegation, per se. It is part of EPA's responsibility in implementing the standards to resolve differing views and establish a definitive position on the issue at hand by issuing a regulatory interpretation.

Regulatory interpretations of the NSPS and NESHAP are most often issued by OAQPS or OC, depending on the nature of the question; however, Regional Offices, **AED** and OGC also issue regulatory interpretations. Early consultation between offices should resolve any concerns about which office would best serve as the lead. Given the broad nature of regulatory interpretations, it is recommended that they be issued from the division director level or higher.

## Section 4.1: Delegated Authorities within EPA, continued

### Alternative Monitoring

Alternative Methods Delegation 7-121 pertains to NSPS, Part 61 & Part 63 NESHAP<sup>4</sup>.

Delegation 7-121, authority 1 .a., delegates authority from the Administrator to Regional Administrators (Attachment 3).

Alternative Monitoring authority is delegated to:

**Regional Offices**, delegable to branch chief level or equivalent.

Unlike previous delegations for alternative monitoring (superseded delegation **7-14**), the current delegation makes no distinction between minor or major revisions to monitoring, and delegates this authority in whole to the Regional **Offices** only.

---

<sup>4</sup>**Revisions** to State section 11 l(d) plans require adoption by the State, notice and opportunity for public hearing, and EPA approval.



## Section 4.1: Delegated Authorities within EPA, continued

### Alternative Testing

Alternative Methods Delegation 7-12 1, and Performance Test Delegation 7- 119 pertain to NSPS, Part 61 & Part 63 NESHAP<sup>4</sup>.

Delegation 7- 12 1, authority 1 .b., delegates authority for alternative testing from the Administrator to the Director of OAQPS. Delegation 7-1 19 delegates authority for minor changes in test methodology and waivers from the Administrator to Regional Administrators' (Attachment 3).

Minor Test Revisions & Performance Test Waiver authority is delegated to:

**Regional Offices**, delegable to the branch chief level or equivalent.

Alternative Test Method authority is delegated to:

**OAQPS**, office director, delegable to the branch chief level or equivalent.

---

<sup>4</sup>Delegation 7- 12 1 will be updated to reflect the three levels of testing changes described in the Part 63 delegable authorities guidance (Attachment 1) so as to delegate authority to issue intermediate changes in testing to Regional Offices. (Intermediate changes would be classified as major changes in the current delegations of authority, which may currently be approved only by OAQPS.)

**Section 4.1: Delegated Authorities within EPA, continued**

**Delegations of Authority within EPA**

<b>Authority</b>	<b>Delegation #</b>	<b>Application</b>	<b>Persons Delegated</b>
<b>Applicability Determinations</b>	EPA 7-127  OECA redelegations 6/94 and 8/95	NSPS  NESHAP (Part 61 & 63)  Section 11 l(d) plans	Regional Offices  OECA/OC: METD CCSMD AgED  OECA/ORE: AED
<b>Regulatory Interpretations</b>	not applicable	all regulations	not applicable,  but usually issued by OECA or OAQPS
<b>Alternative Monitoring</b>	EPA 7-121	NSPS  NESHAP (Part 61 & 63)	Regional Offices
<b>Minor Test Changes &amp; Performance Test Waivers</b>	EPA 7-1 19 <sup>6</sup>	NSPS  NESHAP (Part 61 & 63)	Regional Offices
<b>Alternative Test Methods [Minor &amp; Major Test Changes]</b>	EPA 7-121	NSPS  NESHAP (Part 61 & 63)	OAQPS

---

<sup>6</sup>The authority for minor changes to test methods will be folded into Delegation 7- 12 1, Alternative Methods, and will be expanded to include delegation of intermediate test changes to Regional Offices.

## **Section 4: Who has Authority, continued**

### **Section 4.2. Delegations to States and Local Agencies**

#### **Delegable Authorities**

States, and in some cases Local Agencies, are typically delegated those authorities which do not alter the stringency of the standard, which do not require Federal oversight for national consistency, and which do not require Federal rulemaking. EPA developed guidance in the 1980's (Attachment 2)<sup>7</sup> on the types of authorities which State and Local Agencies should exercise for the NSPS and Part 61 NESHAP programs. That guidance lists specific General Provision authorities which should not be delegated beyond EPA. The Part 63 delegable authorities guidance issued on July 10, 1998 (Attachment 1) indicates which Part 63 General Provision authorities are and are not appropriate to delegate to State or Local Agencies.

The 1998 Part 63 delegable authorities guidance differs slightly from the 1980's guidance on NSPS and Part 61 NESHAP in that it potentially allows the delegation of more authority to State and Local Agencies for applicability determinations and alternative monitoring. The 1980's guidance recommended that State or Local Agencies perform only routine applicability determinations based on an established precedent. The Part 63 guidance contains no such limitation on State or Local authority. The Part 63 guidance does however specifically indicate that EPA Regional Offices should be notified when State or Local Agencies make applicability determinations.

---

<sup>7</sup>The guidance consists of EPA's 1983 Good Practices Manual for Delegation of NSPS and NESHAPS, a memorandum from the Assistant Administrator for Air, Noise and Radiation dated March 24, 1982, and four memoranda from OAQPS dated February 24, 1983, December 17, 1984, September 11, 1986 and November 12, 1986. The memoranda comprise Attachment 2.

The Part 61 NESHAP delegation procedures referenced in the 1983 Good Practices Manual are now superseded by the procedures in Part 63, Subpart E. See discussion on page 22, on the "Delegation Process."

## Section 4.2: Delegations to States, continued

The 1980's guidance on NSPS and NESHAP delegation restricted State and Local authority for alternative monitoring to acting on minor changes in methodology. The Part 63 delegable authorities guidance expands the delegable authority to State and Local Agencies for alternative monitoring to include intermediate changes in monitoring, again with notification to the Regional Office.

**Today's guidance allows conformity between the extent to which applicability determination and alternative monitoring authority may be delegated to State and Local Agencies for Part 60 NSPS, and Parts 61 and 63 NESHAP.**<sup>8</sup> Consistent with the July 10, 1998 Part 63 delegable authorities guidance, applicability determination authority may be delegated to State and Local Agencies for the NSPS and Part 61 NESHAP, without restriction to "routine" determinations. Likewise, authority to issue intermediate changes in monitoring may be delegated to State and Local Agencies for the NSPS and Part 61 NESHAP. However, consistent with the Part 63 guidance, it is recommended that Regional Offices require notification when these decisions are made, and that authority not be delegated for decisions which are likely to be nationally significant or alter the stringency of the underlying standard.

Implementation of the Part 63 delegable authorities guidance involves clarifying with State and Local Agencies which Part 63 General Provision authorities have and have not been delegated. Today's guidance does not envision that Regional Offices necessarily revisit the existing delegations of authority for the NSPS and Part 61 NESHAP programs. EPA Regional Offices will continue to use their discretion when determining which authorities, within the list of delegable authorities, should be delegated to any particular State or Local Agency, and whether to attach any restrictions or formal notification requirements to those delegations.

Note that some regulations specifically list authorities which may only be performed by EPA. For example, NSPS Subpart RRR for SO<sub>2</sub> Reactor Processes specifies in section 60.708 that provisions related to alternative means of control cannot be delegated to States. Subpart E of Part 63 lists CAA section 112 authorities which may not be delegated to State or Local Agencies, such as the authority to add or delete pollutants from the list of hazardous air pollutants. These regulatory provisions in addition to the referenced guidance documents (Attachments 1 & 2) contain the authorities which may not be delegated to State or Local Agencies.

---

<sup>8</sup>The delegation of authority to make revisions to *test methods* for the Parts 60 and 61 programs may also follow the recommendations of the Part 63 delegable authorities guidance. See Attachment 1 for an explanation of the extent to which authority to approve alternative testing may be delegated, and restrictions on implementation of that authority.

## **Section 4.2: Delegations to States, continued**

### **Nature of State Determinations**

Decisions which State and Local Agencies make, such as State applicability determinations, are not binding on the EPA. Delegation of authority to State and Local Agencies is not intended to give those agencies the authority to issue interpretations of Federal law that are subsequently binding on the Federal Government. EPA through its oversight of State and Local Agencies confirms proper use of these delegated authorities. During oversight, if the EPA Regional Office determines that a State or Local Agency made decisions that decreased the stringency of the standard, then corrective actions should be taken, and the source(s) should be notified. Ultimately, only EPA can make a determination as to the applicability of a Federal standard or the appropriateness of a revision to a Federal standard.

Through the title V operating permit program, State or Local Agency determinations would be reflected in the operating permit. However, if it is determined that an operating permit does not correctly reflect a source's applicable requirements, **EPA** has several courses of action, as discussed in Section 3, "Interface with Title V Operating Permits." These actions include objecting during EPA's 45 day review period to an improper determination reflected in the permit. In States where permit shields are provided which cover applicability determinations, EPA may reopen the permit for cause, and require the improper applicability determinations to be changed hence forth in the permit. In States without permit shields, EPA has the authority to enforce violations of the underlying regulations, notwithstanding the State's issuance of a permit reflecting an incorrect determination.

## 4.2: Delegations to States, continued

### Delegation Process

The mechanism which is used to delegate authority to **State** and Local Agencies is separate from the EPA internal delegations discussed in Section 4.1. Typically, the Governor of a State or his or her designee submits a written request for delegation of authority to implement and enforce the NSPS and NESHAP. Upon EPA approval, States may either implement the NSPS and NESHAP regulations directly, adopt the regulations **by reference**, or develop and implement State regulations which are identical to or at least as stringent as the Federal regulations. EPA's approval of the delegation is published in the Federal Register.

Procedures for EPA review and approval of NSPS programs are discussed in Guideline S. 13, "Delegation of Authority to the **States--NSPS** and **NESHAPs**" issued by the Division of Stationary Source Enforcement in the **1970's**, and in the Good Practices Manual. Procedures for delegation of Part 61 and Part 63 NESHAP programs now follow the procedures in Subpart E of Part 63. Prior to the 1990 CAA Amendments, delegation procedures for the Part 61 NESHAP followed Guideline S. 13 and the Good Practices **Manual**.<sup>9</sup>

States (or Local Agencies) implement EPA's Emission **Guidelines** for Designated Facilities through a State plan which is adopted by the State and approved by EPA in accordance with section 111(d) of the Clean Air Act. Each State plan must show that the State has legal authority to carry out the plan (40 CFR 60.26). Revisions to requirements in the plan would necessitate notice and opportunity for public hearing, and EPA review and approval.

---

<sup>9</sup>The original authority on which the Part 61 NESHAP delegations were based (CAA section 112(d)(1)) was removed in the 1990 CAA Amendments and replaced by CAA section 112(l). Part 63 Subpart E now implements CAA section 112(l). Therefore, any revisions to existing Part 61 delegations would follow Part 63 Subpart E.

## Section 5

### Who has the Lead

#### Overview

This section addresses which of the **offices** with delegated authority has the lead in issuing applicability determinations and alternative monitoring responses. Separate subsections are devoted to applicability and monitoring. Both subsections discuss which **office** assumes the lead, and how and where requests and responses are to be sent. Flow diagrams illustrate the course of the lead responsibility. The unique issue of how to respond to applicability issues after the activity in question has occurred, is the subject of an **inset** at the end of subsection 5.1.

#### 5.1. Lead Offices for Applicability Determinations

##### Whose Lead--State or EPA Region

Although the extent to which authority for issuance of applicability determinations has been delegated to State and Local Agencies **varies**, **State or Local Agencies are the first stop for applicability questions**, and generally issue determinations which are routine in nature. Regions may, in their delegations of authority to the State or Local Agency, specify the type of determinations that should be forwarded to the Region for response. Examples of determinations that are typically forwarded to EPA Regional **Offices** for response include those that:

- are unusually controversial or complex
- have bearing on more than one State or district (are multi-Regional)
- appear to create a conflict with previous policy or determinations
- are a legal issue which has not previously **been** considered (a matter of first impression)
- raise new policy questions.

## **Section 5.1: Lead Offices for Applicability Determinations, continued**

In response to the Part 63 delegable authorities guidance, the existing delegations of authority to issue applicability determinations may, within the discretion of the Regional Office, be expanded. Since the type of determination which State or Local Agencies may issue varies, the reader should consult with the appropriate Regional Office for questions on how this process works for a particular State or Local Agency.



## Section 5.1: Lead Offices for Applicability Determinations, continued

### Whose Lead--EPA Region or Headquarters

**Within EPA, the Regional Offices have the primary responsibility and lead role in issuing applicability determinations.** The August 1995 delegations of the Administrator's authority under which the Agency currently operates allow Regions to act on all applicability issues, including those which are nationally significant or multi-Regional in nature. In the course of developing their responses, Regional Offices are encouraged to consult with EPA Headquarters, other Regional Offices, and the State or Local Agency that has jurisdiction for the source (see Section 6, "EPA Consultations").

Communication within EPA, research of the issue, and review of memoranda posted on the ADI, are essential to ensuring national consistency (see Section 8, "Basic Steps in Developing Applicability Determinations"). Improved access to previous determinations through the ADI, and rapid electronic dissemination of drafts for review by Headquarters and other Regional Offices has enabled Regions to take the lead in issuing determinations, and has obviated the need for determinations to be issued from a centralized office in the vast majority of cases.

There are, however, **limited circumstances under which a Regional Office may request a written response from Headquarters** to assist the Region in their response back to the State or source. Headquarters is typically involved in drafting responses where:

- the source challenges a Regional determination which has already been issued;
- the determination is multi-Regional and controversial in nature (it affects a decision being made in another Region and there is some question or conflict as to how the issue should be resolved);
- conflicting policies or determinations are identified;
- the question involves a legal issue which has not been previously considered.

Although it is not necessary that Headquarters take the lead in these cases, Regional Offices may request a written Headquarters response in these cases at the Region's discretion. In such cases, the Region sends a memorandum to the appropriate Headquarters division director, explaining the facts at hand, posing a specific question for response, and expressing the Region's position on the issue.

## Section 5.1: Lead Offices for Applicability Determinations, continued

### Lead within Headquarters

Within Headquarters, the Office of Compliance (OC) in OECA is the focal point for questions concerning NSPS and NESHAP applicability. **OC is the Headquarters lead for issuing applicability determinations, except in those cases where the Regional Office is preparing a civil judicial action for referral to the Department of Justice (DOJ) for the source in question.** The Air Enforcement Division (AED) in the OECA's Office of Regulatory Enforcement (ORE) is the Headquarters lead when a civil judicial referral is being prepared.

This constitutes a change and clarification in the lead role of OC and **ORE/AED** in addressing source-specific applicability issues. Prior to today's guidance, **ORE/AED** was the lead within Headquarters for applicability issues which pertained to an enforcement action. Today's guidance focuses **AED's** lead role on those questions involving a civil judicial referral. For other questions referred to Headquarters, including those where an administrative action is being prepared, and where the Region has not decided in which forum (administrative or judicial) to pursue an enforcement action, OC would have the lead. Likewise, OC will continue to be the Headquarters lead for situations where no enforcement action is warranted.

**OC staff is also responsible for posting notes on the AD1 for any determinations which need clarification** (see also Section 8, Step 5). OC would **also** be the lead within OECA for resolving apparent or actual inconsistencies between determinations.

This policy will simplify the assignment of applicability determinations by eliminating guess work as to which OECA office (ORE versus OC) should be the lead. It will have the benefit of increasing the OC sector leads' active involvement in issues pertaining to their sector, while retaining **AED's** oversight of civil actions.

Within OC, applicability issues are handled by the sector lead for the affected industry, which may reside in either the Manufacturing, Energy and Transportation Division (METD), the Chemical, Commercial Services, and Municipal Division (CCSMD), or the Agriculture and Ecosystem Division (**AgED**). If a Regional Office is unsure of who to contact, they may inquire with the air media lead for OC, residing in METD.

In accordance with 40 CFR sections **60.5(b)** and 61.06, EPA should issue applicability determinations within 30 days of receipt of the request. Therefore, it is recommended that OC and **AED** division directors begin tracking the timeliness of responses sent to Regional Offices, and **urge that staff finalize responses to Regional Office applicability-related inquiries well within one month of receipt of the Region's written request.**

## Section 5.1: Lead Offices for Applicability Determinations, continued

### Requests--Where to Send

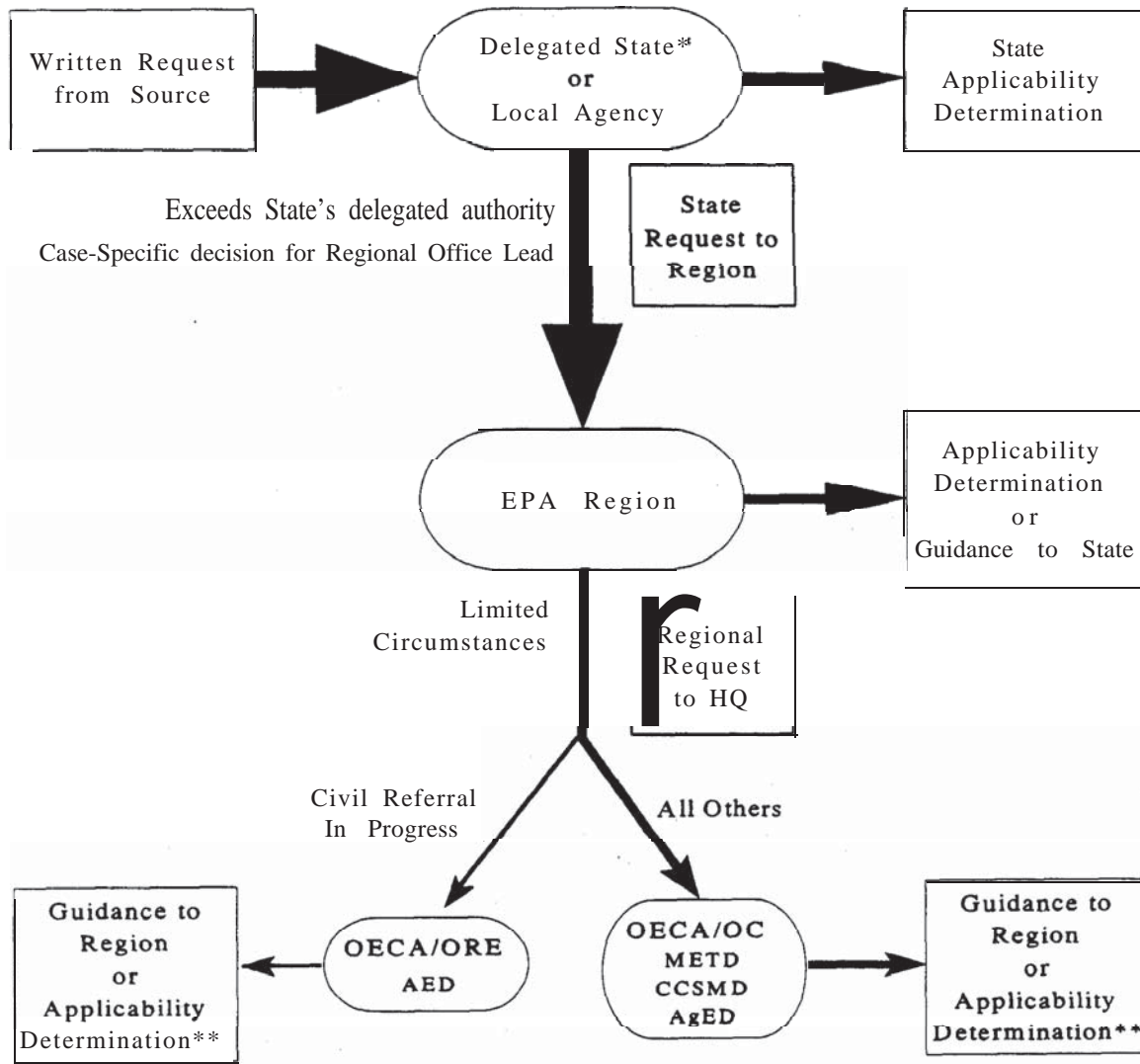
As depicted in following diagram, "Lead Offices for Applicability Determinations," requests for applicability determinations should be sent by the source directly to the State or Local Agency which has been delegated the authority to issue determinations; this is consistent with the primary role of States in implementing the Clean Air Act. In the event that the State or Local Agency has not been delegated authority to issue applicability determinations, the request should be sent directly to the EPA Regional Office. A list of the delegated State and Local Agencies and their addresses is located in 40 CFR sections 60.4 and 61.04. Section 63.13(b) instructs sources to contact the appropriate Regional Office to obtain the mailing address of the State or Local Agency.

Requests sent to the State or Local Agency may be responded to by the State or Local Agency, if the issue is within the scope of the State or Local Agency's delegated authority. Otherwise, the request is forwarded to the EPA Regional Office for response. If the source bypasses this process and sends the request to EPA Headquarters, the request should be immediately forwarded **from** Headquarters to the appropriate Regional Office, so that the Region may decide whether the State or the Region should take the lead in responding.

Sometimes a question regarding a source's applicability originates within a State or Local Agency. To clarify for the State how the regulations should apply, the State should forward a written request to the EPA Regional Office. Again, if EPA Headquarters receives a request which has bypassed the Regional Office, it should generally be forwarded to the appropriate Regional Office for response.

**Section 5.1: Lead Offices for Applicability Determinations, continued**

**Lead Offices for Applicability Determinations**



\* If the State is not delegated the authority to issue applicability determinations, the source should send the written request directly to the EPA Regional Office.

\*\* Headquarters rarely issues determinations directly to the source. Usually the Headquarters response is in the form of a memorandum to the EPA Regional Office.

## Section 5.1: Lead Offices for Applicability Determinations, continued

### Responses--Type and Where to Send

State or Local Agency applicability determinations are issued directly to the source or party which has requested the determination. As discussed previously (Section 4.2, on “Nature of State Determinations”), State and Local Agency determinations are not binding on the EPA.

Regional Offices may issue either an applicability determination or regulatory interpretation depending on whether a source-specific or generic response is appropriate. In cases where the action in question has already occurred, Regions need to consider whether an applicability determination is the most appropriate response, given the pre-enforcement context of the issue (see inset, “Responding to Post Hoc Requests”). Typically, the Regional Office sends its response to the State, where it is used to form the basis of a State determination or response back to the source. The Region may respond directly to the source, but in accordance with the States’ primary role in implementing the Clean Air Act, most responses are sent through the State or Local Agencies.

Headquarters responds in writing to requests pertaining to applicability with a regulatory interpretation or an applicability determination. Based on the Headquarters response, the Region either issues an applicability determination to the source, or forwards the information to the State, who in turn responds to the source. Headquarters may issue an applicability determination directly to a source; however, this is rarely necessary or appropriate given the Regions’ and States’ lead roles in implementing the regulatory programs.

**EPA-issued applicability determinations must be posted on the ADI.** Update procedures for the ADI are provided in Attachment 4.

State-issued Part 63 applicability determinations should be posted by States on their State websites, and linked to the Unified Air Toxics Website (UATW). Questions on UATW links may be directed to the Information Transfer and Program Integration Division in OAQPS (contacts provided in Attachment 6). Links to State websites are located on the Comprehensive Rule Pages on the UATW at: <http://www.epa.gov/ttn/uatw/eparules.html>

## Section 5.1: Lead Offices for Applicability Determinations, continued

### Responding to Post Hoc Requests

For applicability inquiries where the source has already taken the action in question, it is important to consider the alternatives to issuing an applicability determination. There are potential enforcement ramifications for these post hoc requests. In some cases, it may be desirable to proceed directly with an enforcement action.

If the source has sent a written inquiry to the Agency after construction or after the physical or operational change has commenced, consider the following options for a response:

- A letter of acknowledgment to the source of their inquiry, pending further action.
- A preliminary warning letter to the source that puts the source on notice that the action as described may constitute a violation, without finally deciding the issue.
- An applicability determination that finally decides the issue.

For requests sent to OECA from the Regions, another option is an internal memorandum to the Region, marked “enforcement sensitive” and not intended for release to the source.

Consult the Office of Regional Counsel (ORC) or **ORE/AED** enforcement attorneys, as appropriate, for advice on the best option to choose in a particular circumstance, and the best wording of the response letter.

## **Section 5: Who has the Lead, continued**

### **Section 5.2. Lead Offices for Regulatory Interpretations**

Requests for generic regulatory interpretations pertaining to applicability criteria may be difficult to distinguish from requests for applicability determinations. In such cases, the requestor should be asked if their intent is to receive a source-specific applicability determination, pursuant to section 60.5 or 61.06.

Regulatory interpretations posed to EPA which require clarification or simplification of the regulatory requirements should generally be issued by the EPA Regional Offices. However, interpretations which pertain to unforeseen gaps in the regulation should generally be issued from EPA Headquarters. OECA/OC and OAQPS should consult to determine who should take the lead in responding to issues raised to Headquarters. Although OC generally takes the lead in issues pertaining to applicability, there may be circumstances where OAQPS would be better suited to respond. Regardless of which office assumes the lead, the critical component in issuing the interpretation is that both offices concur.

## **Section 5: Lead Offices, continued**

### **Section 5.3. Lead Offices for Alternative Monitoring**

#### **Whose Lead--State or EPA Region**

Minor monitoring alternatives are generally acted on by the State or Local Agency to whom authority has been delegated. Major monitoring alternatives, including entirely new monitoring systems, are generally handled by the EPA Regional Office. The July 10, 1998 Part 63 delegable authorities guidance describes three types of changes in monitoring: minor, intermediate, and major. That guidance indicates that both minor and intermediate monitoring alternatives may be delegated to State or Local Agencies, with appropriate oversight by Regional Offices. Today's guidance enables Regional Offices to apply those same three distinct levels of monitoring changes to State and Local Agency delegations for the Part 60 NSPS and Part 61 NESHAP programs.

The following diagram, "Sample Lead Offices for Changes in Monitoring," depicts the most common division of authorities, whereby minor alternative monitoring requests are acted upon by the State. Sources should check with their State or EPA Regional Office to determine the level of State delegation for monitoring alternatives and where to send requests.

#### **Lead within EPA**

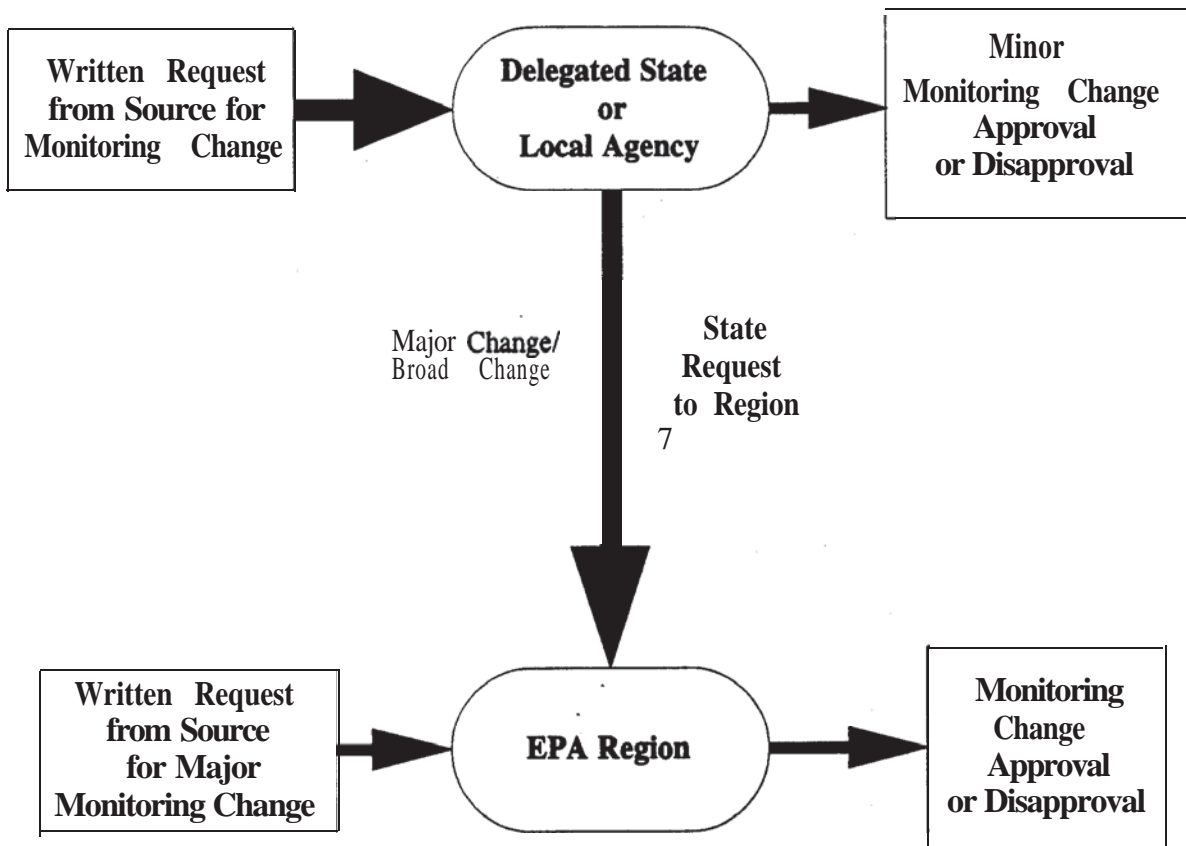
Within EPA, Regional Offices have the lead for reviewing, approving, or disapproving alternative monitoring. Headquarters is no longer delegated the authority to issue alternative monitoring; however, Headquarters provides assistance to Regional Offices upon request.

Regions are encouraged to consult with Headquarters, particularly OAQPS, where additional technical expertise is necessary for evaluating the request. It is also suggested that OAQPS routinely be consulted with to ensure national consistency (see Section 6.3, "Consultation Procedures for Regional Offices"). Regions should always review the ADI to discern the Agency's action on any similar requests.



**Section 5.3: Lead Offices for Alternative Monitoring, continued**

## Sample Lead Offices for Changes in Monitoring



This diagram depicts a common division of authority in the delegated role for reviewing and approving monitoring alternatives. The lead office for any one State may vary depending on State-specific delegated authorities. States may additionally be delegated the authority to issue intermediate changes in monitoring. If a State is not delegated the authority to act on minor changes, written requests should be sent directly to the EPA Regional Office.

## Section 5.3: Lead Offices for Alternative Monitoring, continued

### Where to Send Requests and Issuance of Responses

As with applicability issues, State or Local Agencies are usually the first stop for source inquiries. States typically respond to minor alternative monitoring inquiries, and forward other monitoring issues to the EPA Regional Office according to their State-specific delegations or due to a need for technical or policy assistance. Consistent with the Part 63 delegable authorities guidance, States may also respond to intermediate changes in monitoring where delegated.

The Region may respond directly to the source, or send a response or guidance to the State or Local Agency who in turn responds to the source. The preceding diagram, Sample Lead Offices for Changes in Monitoring, depicts a common division of authorities.

Responses take the form of a letter of approval or disapproval, and should include the Agency's rationale (see Section 9, "Drafting Points"). For disapprovals, the response may spell out or suggest revisions to the proposal which would make the alternative acceptable. Whether to attach or suggest such conditions is at the Agency's discretion, since it is the source's responsibility to propose acceptable alternatives if they do not wish to follow the methods already developed by the Agency.

As discussed previously (see Section 4.2, regarding "Nature of State Determinations"), State and Local Agency decisions on alternative monitoring are not binding on the EPA. However, EPA's response back to the State on a specific monitoring inquiry is a binding EPA decision, within the limitations of the information provided to the EPA.

**EPA-issued alternative monitoring decisions should be posted on the AD1** (see Attachment 4 for information on AD1 update procedures). Intermediate changes to monitoring issued by State or Local Agencies should be sent to the Emission Measurement Center in OAQPS via mail or facsimile. <sup>10</sup>

---

<sup>10</sup>All State-issued intermediate changes to monitoring (as well as intermediate changes to testing issued by States or Regional Offices) should be copied to: Chief, Source Characterization Group A, U.S. EPA (MD-19), Research Triangle Park, NC, 27711; Facsimile Telephone Number 919-541-1039.

## Section 6

### EPA Consultations

#### Overview

When developing applicability determinations or responses to monitoring proposals, the draft response should be discussed with EPA offices that have relevant expertise and interests. Although the current delegations of authority do not *require* concurrence or consultation with other offices, **consultation is imperative to ensuring national consistency.**

In a few cases, there are informal work groups which can be used to accomplish this consultation. The Municipal Waste Combuster and Continuous Emission Monitoring Systems workgroups are examples. Otherwise, the staff lead for developing the response will need to individually contact each affected office.

This section details the recommended consultation procedures for each lead office (OECA, OAQPS, and Regional Offices) for applicability determinations, regulatory interpretations, and alternative monitoring. This section includes regulatory interpretations of applicability and monitoring requirements since these more generic interpretations impact the source-specific applicability and alternative monitoring determinations. Given their far-reaching affect, regulatory interpretations should undergo the same consultations as are recommended for Headquarters applicability determinations.

In situations where staff cannot readily reach agreement on an application-related issue, the issue should be quickly elevated to management for resolution. OAQPS and OECA have established a forum to expedite management-level issue resolution between OAQPS and OECA (see Section 8, Step 5, "Resolve Issues").

Proper treatment of correspondence drafted during deliberations is highlighted in an inset at the end of this section.

## Section 6: EPA Consultations, continued

### Section 6.1. Consultation Procedures for OECA-- Applicability Determinations and Regulatory Interpretations

OECA staff should routinely consult with other offices when developing NSPS or NESHAP applicability determinations or regulatory interpretations. **Consultation should consist of a heads up phone call from the OC sector or AED staff lead to the reviewing office's lead staff, followed by an e-mailed draft of the response.** The purpose of the initial phone call is to obtain preliminary input from other offices, and to let the office know when to expect a draft. The OC sector lead (or AED staff lead, for cases involving a civil referral) is responsible for performing the background research on the assigned question prior to providing a draft response for review (see also Section 8, "Steps in Developing Applicability Determinations").

#### **Staff in the OECA must consult with the following offices/divisions:**

- Office of Air Quality Planning and Standards (OAQPS) -- the **Emission Standards Division (ESD)** in OAQPS has a stake in the accuracy of determinations and regulatory interpretations given their lead role in developing the NSPS and NESHAP. ESD staff should be consulted on all determinations and regulatory interpretations. Informal concurrence (oral or e-mailed) from the ESD staff person should be received prior to issuing the final response. OAQPS has agreed to generally provide input within one calendar week. If no input is received after affirming receipt of the draft by the proper OAQPS staff, OECA may assume OAQPS concurrence.
- Office of General Counsel (OGC) -- given OGC's expertise in interpreting regulations and role in defending applicability determinations in the Courts of Appeals, the OGC lead for NSPS & NESHAP should be consulted on all headquarters applicability determinations and regulatory interpretations.
- Regional Offices -- it is essential that OECA consult with the Region in which the source is located since the Region is responsible for implementing the determination. Other Regions may be consulted on an as-needed basis given Region-specific expertise (for example Region 5 has experience with steel plants, Region 7 with rock crushers). The Lead Region for air enforcement is a useful contact for general Regional feedback (see contacts in Attachment 6). Established working groups may also provide a vehicle for Regional feedback, such as the monthly air toxic telephone conferences.

## Section 6.1: OECA Consultation Procedures, continued

-

- Office of Compliance (OC) -- OC staff may consult with the air media leads within OC on an as-needed basis; however, the air media leads do not routinely review all NSPS and NESHAP determinations. Any determinations or interpretations pertaining to more than one sector should be coordinated with the other affected sector leads.

AED staff must consult with the OC sector leads in all cases. AED staff must also consult with the OC air media lead in cases which include interpretation of the General Provisions.

OC staff should provide their input within one calendar week.

- Office of Regulatory Enforcement (ORE) -- the **Air Enforcement Division** in ORE should be consulted on all OC applicability determinations and regulatory interpretations. **AED should be alerted immediately when the question involves a potential violation, such as when the source has already constructed or modified** (a post hoc determination). **AED staff should provide their input within one calendar week.**

Any disagreements with OECA's draft position can usually be resolved at the staff level. Any remaining substantive differences should be quickly elevated to management for resolution.

-

## Section 6: EPA Consultations, continued

-

### Section 6.2. Consultation Procedures for OAQPS- Regulatory Interpretations

For regulatory interpretations on applicability or monitoring issues for which OAQPS is the lead, it is imperative that OAQPS consult with the following affected offices. Often a regulatory interpretation has bearing on enforcement actions and implementation practices in the Regions which are already underway.

The consultation procedures for regulatory interpretations are analogous to those presented for OECA in Section 6.1, consisting of a heads up phone call and an e-mailed draft of the memorandum. For questions pertaining to Part 63, OAQPS maintains a "MACT Issue Resolution Process" which may be the appropriate means of alerting reviewers to the issue, and obtaining reviewers' position (contact provided in Attachment 6). Differences which cannot be resolved at the staff level should quickly be elevated for resolution by management.

- **OECA/Office of Compliance (OC)** -- sector leads should always be consulted in the development of NSPS and NESHAP regulatory interpretations. The leads for air issues within METD should be contacted on issues pertaining strictly to the General Provisions. **OC staff should provide their input within one week of receiving the inquiry.**  
  
**OC staff are the focal point for coordination of comments within OECA. As such, OC staff are responsible for involving ORE's Air Enforcement Division as appropriate.**
- **Office of General Counsel (OGC)** -- given OGC's expertise in interpreting regulations and defending the Agency's implementation of these regulations, the OGC lead for NSPS & NESHAP should be consulted on all Headquarters regulatory interpretations.
- **Regional Offices** -- it is essential that OAQPS consult with affected Regions since Regions are ultimately responsible for implementing regulatory interpretations, and since Regional Offices would be aware of established practices in interpreting the provision in question. Because regulatory interpretations are broad in nature, it may not be possible to identify only one or two affected Regions. In these cases, OAQPS should rely on the Lead Region for air enforcement. Established working groups may also provide a vehicle for Regional feedback, such as the monthly air toxic telephone conferences.

## Section 6: EPA Consultations, continued

### Section 6.3. Consultation Procedures for Regional Offices— Applicability Determinations and Alternative Monitoring

To ensure nationally consistent responses, Regional Offices are encouraged to consult with OC, OAQPS, and legal counsel on a routine basis. Although Regional Offices need only consult with Headquarters on precedent-setting issues, consultation with all the offices listed results in the best quality responses.” Regulatory interpretations must include consultation with the listed Headquarters offices, given the far-reaching effect of regulatory interpretations. Communication between Regions is also essential to ensuring national consistency.

**To enable routine consultation without delaying responses, OAQPS and OC have committed to a one week review of draft applicability determinations.** If no response is received within one week of providing a draft to the appropriate headquarters contact(s), the Region may move forward with issuing their response. OAQPS has committed to providing consultation within these time frames for alternative monitoring responses as well.

- **OECA/Office of Compliance** -- the Regional Office should consult with sector leads in OC in the development of precedent-setting **applicability determinations**. The leads for air issues within METD should also be contacted on precedent-setting issues pertaining strictly to the General Provisions. **OC staff should provide their input within one week of receiving the inquiry.**

OC staff are the focal point for coordination of comments within OECA. As such, OC staff are responsible for involving ORE’s Air Enforcement Division in applicability questions as appropriate. OC staff are expected to alert **AED** immediately if the question involves a potential violation, such as when the source has already constructed or modified (post hoc determinations).

• **OAQPS** -the Emission Standards Division has technical expertise and interest in applicability and monitoring issues given their lead role in developing the NSPS and NESHAP. OAQPS should be consulted on all precedent-setting issues, and where their

---

<sup>11</sup>The “Review of the Applicability Determination Index; NSPS Memoranda.” issued by METD on July 23, 1998 noted that responses that were clearly coordinated with other offices were among the highest quality.

### Section 6.3: Regional Office Consultation Procedures, continued

technical expertise is needed. Where Regions request routine consultation, OAQPS will provide input within one week of receiving the inquiry.

- Offices of Regional Counsel (ORC) -- Regional staff should routinely consult with their ORC in the development of applicability determinations. If there is a potential violation (i.e., when the source has already proceeded with construction or modification), consultation with ORC should include a discussion of whether issuance of an applicability determination is the best course of action (see inset in Section 5.1, "Responding to Post Hoc Requests").
- Other Regional Offices -- communication between Regions is essential to ensuring national consistency. Although the ADI is the principle means of reviewing EPA's applicability and **monitoring** decisions across the country, there is an inherent time lag of up to three months before memoranda are available on the ADI. Regions may need to consult with the Lead Region for enforcement, or with other Regions to determine whether there has been any recent activity on a related issue. OC staff may be useful in identifying other Regions which have recently **dealt** with similar questions.
- State or Local Agencies -- consultation with the State or Local Agency that has jurisdiction for the source is encouraged, as they may have crucial information bearing on the determination.



## Section 6: EPA Consultations, continued

### Correspondence During Deliberations

Written materials generated during deliberations, i.e.,

- drafts for review
- comments from reviewers
- recommended positions from non-lead offices

should be clearly labeled:

“NOT FOR EXTERNAL DISTRIBUTION”

**and**

“DELIBERATIVE PROCESS” or “PREDECISIONAL” or “DRAFT”

These labels put the public on notice that the discussion within the document is **not** an Agency decision which creates any rights.

The reason such labels should accompany **drafts** is self-evident—they are works in progress that might otherwise be mistaken as an Agency position,

It is equally important that **written correspondence from reviewing offices** contain these labels. Comments provided by reviewers are not formal Agency positions. Reviewers must label the position of their office as “**predecisional**” or “deliberative process” since only the office with delegated authority may issue the formal Agency determination.

**Regulatory interpretations** pertaining to **applicability** should not be issued while the Agency is developing an applicability determination on a related subject. Proper consultation **in the** development of regulatory interpretations will **identify** any related source-specific inquiries under review by the Agency.

Page 42 intentionally left blank.

## Section 7

### Informal Inquiries

#### Overview

EPA receives many telephone inquiries from sources, their consultants and counsel. E-mail is used increasingly for soliciting ideas and input. It is important to distinguish these informal discussions from formal, signed applicability determinations and alternative monitoring responses.

Requests for applicability determinations or alternative monitoring must be sent to the delegated agency in writing, and responses must be signed by a person to whom authority has been delegated. Responses provided over the phone or through or e-mail discussions are considered ; informal guidance.

This section covers points to consider when responding to telephone and e-mail inquiries, and how informal inquiries are addressed by SBREFA.

#### Responding to Phone Inquiries

It is a useful and necessary public service to provide information about the regulations to the public over the phone. It is equally important that the caller understand that the Agency cannot provide determinations or approve alternatives over the phone. Agency staff responding to phone calls should provide whatever general information is on point, but inform the caller that a written inquiry is **necessary** if the caller wishes to pursue an applicability determination or alternative **monitoring**. Callers should be referred to the State or Regional Office with the primary responsibility for implementing the NSPS and NESHAP.

## Section 7: Informal Inquiries, continued

Bear the following points in mind when responding to telephone inquiries:

- Avoid the discussion of hypothetical scenarios that lack enough specific details to give an accurate response.
- Refer the caller to the Applicability Determination Index and other background documents that may be useful to them. Give the caller basic information on how to use and search for documents on the **ADI**.

The Internet address for the ADI is:

**<http://ttnwww.rtpnc.epa.gov/cfdocs/adiwww/adiwww.html-ssi>**

The ADI can also be accessed through **METD's** home page at:

**<http://www.epa.gov/oeca/metd>**

- Respond in general to the question by helping the caller understand determinations or guidance that have already been issued on topics related to the inquiry.
- Remind the caller that a request for a determination of applicability, or a request for alternative monitoring, needs to be submitted in writing to the Agency.
- Determine the location of the facility, and refer the caller to the appropriate Regional **Office** or State or Local Agency.

The staff person should follow up with a call to the State or Regional Office. This allows the State or Region to be better prepared to handle the question. It is also useful for the Regional Office and State to know who the source has consulted.

## Section 7: Informal Inquiries, continued

-

### Responding to E-mail

E-mail is a useful way for staff to consult with each other on NSPS and NESHAP questions, and is an efficient means for inter-office review of draft determinations and monitoring responses.

E-mail inquiries from Regional Offices on NSPS and NESHAP applicability issues should be directed to the OC sector lead. OC staff need to be responsive to these requests to help ensure national consistency, and need to involve **ORE/AED** immediately if the applicability issue involves an action which the source has already taken. OC staff should provide their response to informal applicability-related inquiries from the Regional Offices within one week (see Section 6, "EPA Consultations").

When communicating via e-mail, label the response:

**"NOT FOR EXTERNAL DISTRIBUTION"** and  
**"DELIBERATIVE PROCESS" or "PREDECISIONAL."**

These cautionary statements will prevent confusion in the event that the message is viewed outside of the Agency.

In general, EPA staff should not respond to sources through e-mail, since the message could be mistaken for a formal written determination. Also, Headquarters should not respond directly to State or Local Agencies via e-mail without involving or copying the Regional Office which has oversight responsibility for that State or Local Agency.

- -'

## Section 7: Informal Inquiries, continued

### Small Business Regulatory Enforcement Fairness Act (SBREFA) Requirements for Informal Inquiries

Under SBREFA section 213, EPA has designated the **Informal** Guidance Program to respond to fact-specific, compliance-related inquiries from small entities. This **Informal** Guidance Program draws on the resources of Small Business Ombudsman, Regional small business liaisons, technical and program staff, and the related hotlines and clearinghouses. EPA designed this program to ensure accessibility of the informal guidance to the small entity community, and to avoid duplication with existing activities.

The procedures discussed in this section form an important part of the Informal Guidance Program. OC sector leads and Regional **Office** technical and program staff provide informal guidance when responding to phone inquiries from the regulated community. However, written requests for applicability determinations, monitoring alternatives, and regulatory interpretations are not considered informal, and must be handled through the formal written procedures addressed elsewhere in this document. It is important to remind the public of the distinction between the formal applicability determinations/alternative monitoring and informal guidance.

-

## Section 8

### Steps in Developing Applicability Determinations

#### Overview

There are eight basic steps in developing an accurate applicability determination. These are:

1. Clarify the request
2. Research (regulations, preambles, **ADI**, background information documents)
3. Consult
4. Prepare Draft (either before or after consultation)
5. Resolve Issues
6. Issue Determination from Delegated Authority (carbon copy reviewers)
7. Post Determination on **ADI**
8. Publish Notice of Availability in the Federal Register

Implicit in this discussion is an understanding that the Agency has decided that issuing an applicability determination is the best course of action for the particular case. When an applicability question pertains to an action which the source has already taken (a post hoc situation) there are obvious enforcement implications which may cause the Agency to proceed with a different type of response. See the inset in Section 5.1 for how to respond to applicability inquiries in post hoc situations.

- -

## Section 8: Steps in Developing Applicability Determinations, continued

### The Eight Steps

#### 1. Clarify the Request

The first step in preparing an applicability determination is to make sure the question is clearly understood. This may require contact with the person who sent the inquiry. For Headquarters, this typically means discussing the inquiry with the Regional Office; for Regions it is usually the State or source.

#### 2. Research

The next step is to research the topic. The obvious place to start is to **carefully read the regulation**, paying particular attention to the “applicability” and “definitions” sections. Based on reading the regulation alone, the staff person should be able to formulate a tentative position.

The staff person should then **check the AD1** to search for information on related topics--the word search function is particularly useful for **this** purpose. The **preamble for both the proposed and promulgated rulemaking** should be read to determine if EPA has clarified its intent with respect to the provision in question. The Background Information Document (BID) should also be reviewed to see how EPA characterized the affected facility or source. Sometimes there are inspection manuals or enabling documents for the subpart which may also be relevant.

This background information (preamble, BIDs, etc.) may help clarify the Agency’s intent where the regulatory language does not directly address the question. However, it is the regulatory language by which sources must abide.

#### 3. Consult

After completing the basic research, the staff person is ready to formulate a draft position and consult with the appropriate EPA offices and management. It is important that the research be completed before the consultations so as to make the best use of the other office’s time, and to allow the staff person to learn the regulations first hand. Consultations are best done orally initially to alert the reviewer to the issue and necessary time frame, and then via a draft memo.



## **Section 8: Steps in Developing Applicability Determinations, continued**

### **4. Prepare the Draft**

After receiving preliminary input from other offices, the staff person should draft the memorandum or letter, clearly laying out the question, the answer, and the rationale (see Section 9, "Drafting Points"). The draft must be circulated for review, continuing the consultations. Drafts should be clearly labeled as such, with a header or footer stating,

"NOT FOR EXTERNAL DISTRIBUTION" and  
"DRAFT" or "DRAFT POSITION FOR EPA REVIEW".

### **5. Resolve Issues**

If a potential inconsistency or differing of opinions in EPA's implementation or interpretation of a provision is identified, that issue should be flagged for management and reviewers. For applicability questions where management has differing opinions, OAQPS and OECA have established an issue resolution forum to expedite the decision-making process (contacts provided in Attachment 6). Any seemingly inconsistent determinations that have already been issued should be raised to OECA/OC for clarification and resolution. OC staff may need to post a note in the comment field of the ADI to explain any apparent or actual discrepancy presented by a determination. Any such notes should undergo review by **AED**, the air lead in OC, and the affected Regional Office.

### **6. Issue Determination**

After incorporating comments and resolving with management how to proceed if conflicting positions are presented, the determination should be issued and signed by a person to whom the authority has been delegated. Signature by the person to whom the authority has been delegated becomes critical should the Agency be challenged on the substance and validity of a determination. Carbon copies should be sent to all reviewers.

### **7. Post on ADI**

**The EPA staff contact for the determination is responsible for posting the memorandum on the ADI.** This entails summarizing the determination, and electronically sending the abstract, the determination, and a header (listing the name of the person who signed the memo, the date issued, the subject, the affected subpart, and any relevant regulatory citations) to the EPA

## Section 8: Steps in Developing Applicability Determinations, continued

contractor for posting on the **ADI**. Headers, abstracts, and determinations should be converted to three separate ASCII files, and named according to the procedures in Attachment 4, "ADI Update Procedures." The ADI is updated quarterly; however, memoranda with their headers and abstracts should be sent as soon as possible to the contractor, to ensure timely posting of determinations. The current address for submitting headers, abstracts, and memoranda is: **pqa@pqa.com**

The ADI is an invaluable tool for ensuring national consistency, used widely by regulatory agencies and the public. It is the responsibility of all staff involved in drafting determinations to ensure that the ADI is complete and current. Questions regarding the ADI can be directed to the Manufacturing, Energy, and Transportation Division in OC (see contact in Attachment 6).

### 8. Publication in the Federal Register

Starting in 1999, OC plans to publish notice of the availability of applicability determinations in the Federal Register (FR). Publication in the FR provides fair notice to other companies of the Agency's interpretation, and sets in motion a 60-day period for judicial review.

OC will be performing this function for all EPA Regional Office and Headquarters-issued applicability determinations, provided the determinations are submitted to the **ADI**. Current plans are to publish the ADI headers and abstracts for applicability determinations in the FR, and to batch publication quarterly. As such, OC will rely on the Regional Offices to perform timely updates to the **ADI**. Publication would be limited to applicability determinations as described in this document, *i.e.*, case-specific determinations that apply previously promulgated regulations to a particular set of facts at a particular source.

## Section 9

# Drafting Points for Applicability Determinations and Alternative Monitoring Responses

### Overview

Applicability determinations and alternative monitoring responses must include enough information that **the question, the answer, and the rationale** are all clear **from** reading the response alone. The following pointers are provided to help avoid the most common drafting pitfalls; this is not intended to be a comprehensive list of issues to address.

For applicability questions involving a source where a violation may have occurred, there needs to be some decision as to whether issuance of an applicability determination is the best course of action. For example, a source may inquire whether an action they have already taken constituted construction or modification. If the source is subject to the regulations and has not been meeting the regulatory requirements, there are obvious enforcement implications. Section 5.1 addresses how to respond to applicability inquiries in post hoc situations.

### Drafting Pointers

- **Restate the question.** Remember that only EPA's response will be posted on the AD1 and not the incoming question. To make determinations and decisions useful for **future** guidance, it is necessary that the question be accurately restated or summarized.
- **State the applicable subpart.** Reiterate in the response the NSPS or NESHAP subpart to **which the** source is potentially subject. This helps people find the memo on the **ADI**, and provides basic clarity. There is a tendency in testing and monitoring responses to answer the specific technical question at hand, without indicating which subpart applies.

## Section 9: Drafting Pointers, continued

- **Specify what is being approved.** It is essential to clearly state what are the new requirements. The reader may not have the same interpretation of the proposed or approved monitoring as does the author. For example, if the monitoring frequency or method is changing, reiterate in the approval what is the new frequency or the name of the method. If the protocol is very lengthy and is being approved in its entirety, attach or specifically cite the new method.
- **Say why.** State the rationale for the determination, approval, or disapproval, and be more specific than “based on your submission” or “it is acceptable upon review.” Usually the submission is not attached to the final response, and even if it is, the reader does not know what arguments in the submission were persuasive or in error. In approving alternate span values, for example, state why the quality of data is not compromised.
- **Build the record to support the determination or decision.** Cite and summarize documents which support the determination. If basing the determination on “information provided by OAQPS,” state what information specifically, *e.g.*, a Background Information Document, or a specific economic analysis. If concurring with a Region’s recommended interpretation, be specific as to what information within their argument is particularly compelling.

Cite the appropriate statutory and regulatory provisions, guidance documents, policy statements, determinations, and interpretations. When referring to a previous determination, cite at a minimum the date, author, and origin (office) of the determination. Where preamble language exists that is on point, identify, quote or paraphrase the Federal Register notice.

Leaving out this background information forces future readers of the determination to redo the background research, and weakens the determination. If a previous determination seems to contradict our current determination, explain how the current case is different; such issues should be brought to the attention of OC.

- **Read the draft memo and try to find the question, the answer, and the rationale.** After drafting the response, re-read the response and see if these three basic questions can be answered, without relying on the incoming materials.

## **Attachments**

**1** Part 63 Delegable Authority Memorandum

“Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies,” from John S. Seitz, Director, Office of Air Quality Planning and Standards, July 10, 1998.

**2** Parts 60 and 61 Delegable Authorities Memoranda for NSPS and NESHAP Applicability Determinations and Alternative Monitoring

**3** Selected EPA Delegations of Authority

**4** Applicability Determination Index Update Procedures

**5** OECA and OAQPS Organizational Charts

**6** NSPS and NESHAP General Contacts

## **Attachment 1**

### Part 63 Delegable Authority Memorandum

“Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies,” **from** John S. Seitz, Director, **Office** of Air Quality Planning and Standards, July 10, 1998.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

JUL 10 1998

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

## **MEMORANDUM**

**SUBJECT:** Delegation of 40 CFR Part 63 General Provisions Authorities to State and Local Air Pollution Control Agencies

**FROM:** John S. Seitz, Director  
Office of Air Quality Planning and Standards (MD-10)

**TO:** See Addressees

This memorandum is to provide guidance to the EPA Regional Offices on delegation of discretionary authorities relating to air toxics in 40 CFR part 63, subpart A (the General Provisions) to State and Local Air Pollution Control (S/L) agencies through 40 CFR part 63, subpart E (Approval of State Programs). Under the General Provisions, the EPA Administrator has the authority to approve certain changes to, or make decisions under, specific General Provisions requirements. Questions have been raised by the Regions about whether S/L agencies may make the same discretionary decisions when they are delegated the General Provisions.

In explaining the straight delegation process for delegating air toxics provisions to S/L agencies under 40 CFR part 63, subpart E, we did not clarify what discretionary authorities are delegated to S/L agencies when they seek straight delegation of the General Provisions. Although this is briefly discussed in the proposed General Provisions' preamble (**Federal Register**, August 11, 1993, page 42775-42777), the forthcoming proposed subpart E revisions will fill that gap by clarifying which discretionary authorities may be delegated to S/L agencies through straight delegation of the General Provisions. At your discretion, the Regional Offices must then specify in delegation agreements or documents which of the subpart A authorities are being delegated to each State. We recommend that you begin implementing these changes as soon as possible. Therefore, this memorandum is intended to explain the changes and provide guidance for you to begin implementing the changes now. Neither this memorandum nor the subpart E rulemaking changes any source-specific decisions that have already been made under the General Provisions, but the guidance in this memorandum should be used as guidance for all future decisions regarding the General Provisions' authorities.

To implement these changes, you will need to clarify with your S/L agencies which General Provisions' authorities have and have not been delegated. In cases where you may have delegated authorities in the past that should no longer be delegated, you will need to inform your S/L agencies that delegation of these authorities will be revoked.

At this time, we are also providing clarification of section 63.6(i)(1), "Extension of Compliance with Emission **Standards**," General Provisions authority. This section states "(u)ntil an extension of compliance has been granted by the Administrator (or a State with an approved permit program) under this paragraph, the owner or operator of an **affected** source subject to the requirements of this section shall comply with all applicable requirements of this part." It is our **interpretation** that this authority does not require delegation through subpart **E** and, **instead**, is automatically granted to States as part of their part 70 operating permits program approval regardless of **whether** the operating permits **program** approval is **interim** or **final**. Additionally, it is our interpretation that the State would not **need** to have **been** delegated a particular source category or have **issued** a part 70 **operating** permit for a particular source to grant that source a compliance **extension**.

We are also providing clarification of section 63.5(e) and (f), "Approval and Disapproval of Construction and Reconstruction," **General** Provisions authority. The Clean Air Act as **amended** (1990 Amendments), sections 112(i)(1) and (3) state that the "Administrator (or a State with a permit program approved under title **V**)" can **determine whether** a source will comply with the standard if constructed properly. It is our **interpretation** that this authority does not require delegation through subpart **E** and, **instead**, is automatically granted to States as part of **their** part 70 operating permits program approval.

-Link to section 112(l): This guidance only addresses the case where the General Provisions are delegated to an S/L agency through straight delegation under section 112(l) provisions which **were** promulgated in 40 CFR part 63, subpart E. **Therefore**, the guidance **addresses** S/L agencies' authority to make source-specific decisions only, **not source-category** wide decisions. Any **S/L** agency wishing to make **discretionary** decisions on a source-category wide basis **under** the General Provisions or any **other** part 63 **requirement** would need to use the section **112(l) delegation** process under 40 CFR part 63, subsections **63.92, 63.93**, or 63.94 to substitute its own rule or program. When subpart **E** revisions are promulgated, section 63.97 will be added to the **above list as a delegation** option.

**Consistency with Previous Policies:** This **guidance** is intended to be consistent with previous policies developed for new source performance **standards (NSPS)** under 40 CFR **part 60**, national **emission standards** for hazardous air pollutants (**NESHAP**) under 40 CFR

---

*See, for example, February 24, 1983 Memorandum on **Delegation of New Source Performance Standards Authority** to States, from Jack Farmer, Acting Director, Emission Standards and Engineering Division, OAQPS, to Allyn Davis, Director, Air and Waste Management Division, Region VI; and March 24, 1982 Memorandum on **Delegation of Authority to States: NESHAPS**, from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation to Regional Administrators, Regions I-X.*



part 61, and for changes to State **implementation** plans (SIP's)? Past guidance issued for NSPS changes has **permitted** delegation to S/L agencies of all the Administrator's authorities except those that require **Federal rulemaking**, or **those** for which Federal oversight is critical to ensuring national **consistency** in the application of **standards**. Additionally, such delegations were **not** intended to give S/L agencies the authority to issue interpretations of Federal law that are subsequently binding on the Federal Government. Current SIP policy, as reflected in *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program*,<sup>2</sup> permits S/L agencies to alter SIP requirements so long as the alternative requirements are shown to be equally stringent and are within a pre-approved protocol (and **so long** as public review is provided and EPA approval is obtained). The **S/L** agencies can show equivalent stringency by providing substantive criteria in **SIPs** governing **the implementation** of alternative requirements.

We recognize that Regions have the prerogative to approve delegation of specific authorities to some S/L agencies and not to others. Therefore, we encourage Regions to provide as clearly as possible an explanation of the criteria they have used to approve or disapprove delegation of a specific authority, and to apply those criteria consistently across their S/L agencies. Such criteria could include a **determination** of whether the S/L agency has **sufficient** expertise to make such decisions, or a **determination** that the working relationship between the Region and the S/L agencies is such that individual decisions could or could not be determined through consultation on an **"as needed"** basis. For example, you may want to work more closely with your **S/L** agencies on their first **decision-making** for some authorities, thus gaining assurance that the S/L agencies can and will make appropriate decisions. We also recommend that Regions obtain copies of all S/L agencies' alternative **determinations** for their records; especially where new issues are addressed.

### **Delegation of Specific Authorities**

The part 63 General Provisions lists **15 specific** types of authorities for which the Administrator may make **discretionary decisions** on a **source-specific** basis. When the **General** Provisions are delegated to an S/L agency, such **discretion** may **be** appropriately delegated, provided the stringency of the underlying **standard** would not be compromised.

We recognize **that**, in order for Regional Offices to have the authority to delegate some of the **authorities** out&d in this memorandum (**such** as intermediate changes to test methods), delegation 7-121 must first be revised to delegate these authorities to the Regions. We intend to make this revision, i.e., to delegation **7-121**, as soon as possible. Additionally, the Emission

---

<sup>2</sup>**However**, we are expanding our interpretation of previous policy for the applicability **determinations'** discretionary authority.

<sup>3</sup> Memorandum **from** Lydia **Wegman**, Deputy Director, OAQPS, to Regional Air Division **Directors**, March 1996.

Measurement **Center-of** the Emissions Monitoring and Analysis Division must receive copies of any approved intermediate changes to test methods or monitoring. Please note that intermediate changes to test methods must be demonstrated as equivalent through the procedures set out in EPA method 301 (see Attachment 1). This information will be used to compile a database of decisions that will be accessible to the **S/L** agencies and Regions for reference in making future decisions. Regions are asked to ensure that initial intermediate changes to testing and monitoring made in each Region are evaluated. All intermediate test changes and State-issued intermediate changes to monitoring should be provided via mail or facsimile to:

Chief, Source Characterization **Group A**  
U.S. EPA (MD-19)  
Research Triangle Park, NC 27711  
Facsimile Telephone Number: (9 19) 54 1-1 039

Changes in monitoring issued by Regional Offices should continue to be posted on the Applicability Determination Index (**ADI**). For electronic file transfer procedures for **ADI** updates, please contact **Belinda** Breidenbach in the Office of Compliance at 202-564-7022.

We have divided the General Provisions discretionary authorities into two categories, based upon the relative significance of each discretionary type of decision: they are those authorities which can be delegated and those authorities which cannot be delegated. These categories are delineated below:

### **Category I. General Provisions That May Be Delegated**

In general, we believe that, where possible, authority to make decisions which are not likely to be nationally significant or to alter the stringency of the underlying standard should be delegated to S/L agencies. While we understand the need for Federal oversight of S/L agency decision-making which will ensure that the delegated authorities are being adequately implemented and enforced, we do not want to impede S/L agencies in running the part 70 operating permit and Federal air **toxics** programs with oversight that is cumbersome. We recommend that Regions rely on their existing mechanisms and resources for oversight. During oversight, if the Region determines that the **S/L** agency had made decisions that decreased the stringency of the **standard**, then corrective actions should be taken and the source(s) should be notified. Withdrawal of the program should be initiated if the corrective actions taken are insufficient.

The authorities listed in Table 1 may be delegated to S/L agencies, so long as the S/L agencies have the capability to carry out the Administrator's responsibilities and any decisions made do not decrease the stringency of the standards. Since you are ultimately responsible for all

General **Provisions authorities'** decision-making made in your Region, I am comfortable with trusting your judgement about which of the Administrator's discretionary authorities listed here should be delegated to the **S/L** agencies in your Region. When the Region delegates any category I authority to the S/L agency, it could be accomplished either when the General Provisions are delegated or at the time that each relevant maximum achievable control technology (**MACT**) standard is delegated, with the exception of approval of construction and reconstruction (40 CFR part 63, section **63.5**), which should be delegated when the General Provisions are delegated.

There are some category I authorities, such as approval of intermediate alternatives to test methods, for which you should be notified when decisions are made by your S/L agencies. Also, you may want to monitor the progress of S/L agencies' decision-making, in addition to updating your files for compliance and enforcement matters. We have indicated these authorities in Table 1 with an asterisk. We encourage you to document, in delegation agreements or delegation rulemaking, the request for notification when decisions are made regarding the indicated category I authorities.

#### **Category .II. General Provisions That May Not Be Delegated**

Authorities listed in this section are those decisions which could result in a change to the, stringency of the underlying standard, which are likely to be nationally significant, or which may require a rulemaking and subsequent **Federal Register** notice. Therefore, these authorities must be retained by the EPA Regional Office or EPA Headquarters. As a result, the following authorities in Table 2 may not be delegated to **S/L** agencies (all references are to sections of 40 CFR part 63, subpart A):

If you have any questions, or would like to discuss this matter further, please contact me at (919) 541-5608, or Tom Driscoll of my staff at (919) 541-5135.

**Table 1. General Provisions' Authorities that may be Delegated**

<b>Section</b>	<b>Authorities</b>
Section 63.1 .	Applicability Determinations
Section 63.6(e)	Operation and Maintenance Requirements - Responsibility for Determining Compliance
Section <b>63.6(f)</b>	<b>Compliance</b> with Non-Opacity Standards - Responsibility for Determining Compliance
Section 63.6(h)	Compliance with Opacity and Visible Emissions Standards - Responsibility for <b>Determining</b> Compliance
Sections <b>63.7(c)(2)(i)</b> and (d)	Approval of Site-Specific Test Plans
Section <b>63.7(e)(2)(i)</b> '	Approval of Minor Alternatives to Test Methods (see Attachment 1)
Sections <b>63.7(e)(2)(ii)</b> and <b>(f)</b> '	Approval of Intermediate Alternatives to Test Methods (see Attachment 1)
Section <b>63.7(e)(2)(iii)</b>	Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors
Sections <b>63.7(e)(2)(iv)</b> and (h)(2), (3)	Waiver of Performance Testing
Sections 63.8(c)(1) and (e)(1)	Approval of Site-Specific Performance Evaluation (monitoring) Test Plans
Section <b>63.8(f)</b> '	Approval of Minor Alternatives to Monitoring (see Attachment 1)
Section <b>63.8(f)</b> '	Approval of Intermediate Alternatives to Monitoring (see Attachment 1)
Sections 63.9 and 63.10	Approval of Adjustments to Time Periods for Submitting Reports'

---

'Regions should be notified when these decisions are made by S/L agencies who have been delegated authority to make these kinds of decisions.

'Adjustments to the timing that reports are due can be delegated, as mentioned in sections 63.9(i) and **63.10(d)** and (e), but not the contents of the reports. For title V sources, semiannual and annual reports are required by part 70 and nothing herein **changes** that requirement.

**Table 2. Authorities That May Not Be Delegated**

Section	Authority
Section 63.6(g)	Approval of Alternative Non-Opacity Emission Standards
Section 63.6(h)(9)	Approval of Alternative Opacity Standard
Sections 63.7(e)(2)(ii) and (f)	Approval of Major Alternatives to Test Methods (see Attachment 1)
Section 63.8(f)	Approval of Major Alternatives to Monitoring (see Attachment 1)
Section 63.100-1	Waiver of <b>Recordkeeping</b> -- all

## ATTACHMENT 1

*Intermediate change to monitoring* is a modification to federally required monitoring involving “proven technology” (generally accepted by the scientific community as equivalent or better) that is applied on a site-specific basis and that may have the potential to decrease the stringency of the compliance and enforcement measures for the relevant standard. Though **site-specific**, an intermediate decrease may set a national precedent for a source category and may ultimately result in a revision to the federally required monitoring. Examples of intermediate changes to monitoring include, but are not limited to: (1) use of a continuous emission monitoring system (CEMS) in lieu of a parameter monitoring approach; (2) changes to quality control requirements for parameter monitoring; and (3) use of an electronic data reduction system in lieu of manual data reduction.

*Intermediate change to a test method* is a within-method modification to a federally enforceable test method involving “proven technology” (generally accepted by the scientific community as equivalent or better) that is applied on a site-specific basis and that may have the potential to decrease the stringency of the associated emission limitation or standard. Intermediate changes are not approvable if they decrease the stringency of the standard. Though site-specific, an intermediate change may set a national precedent for a source category and may, ultimately result in a revision to the federally enforceable test method. In order to be approved, an intermediate change must be validated according to EPA method 301 (part 63, appendix A) to demonstrate that it provides equal or improved accuracy and precision. Examples of intermediate changes to a test method include, but are not limited to: (1) modifications to a test method’s sampling procedure including substitution of sampling equipment that has been demonstrated for a particular sample matrix and the use of a different impinger absorbing solution; (2) changes in sample recovery procedures and analytical techniques, such as changes to sample holding times and use of a different analytical finish with proven capability for the analyte of interest; and (3) “combining\*” a federally-required method with another proven method for application to processes emitting multiple pollutants. As an example, Region IX and the CARB have developed a testing protocol to determine whether California chromium **electroplaters** needed to “retest\*” for the Chromium Electroplating NESHAP. This testing protocol has been attached (Attachment 2) for your information should you choose to use it. **Again**, these examples should only be approved if they do not decrease the stringency of the monitoring requirement.

*Major change to monitoring* is a modification to federally required monitoring that uses unproven technology or procedures or is an entirely new method (sometimes necessary when the required monitoring is unsuitable). A major change to a test method may be site-specific or may apply to one or more source categories and will usually set a national precedent. Examples of major changes to a test method include, but are not limited to: (1) use of a new monitoring approach developed to apply to a control technology not contemplated in the applicable regulation; (2) use of a predictive emission monitoring system (**PEMS**) in place of a required

## Attachment 1 Continued

continuous emission-monitoring system (CEMS); (3) use of alternative calibration procedures that do not involve calibration gases or test cells; (4) use of an analytical technology that differs **from** that specified by a **performance** specification; and (5) use of alternative averaging times for reporting purposes.

*Major change to a **test** method* is a modification to a federally enforceable test method that uses unproven technology or procedures or is an entirely new method (sometimes necessary when the required test method is unsuitable). A major change to a test method may be **site-specific** or may apply to one or more source categories and will usually set a national precedent. In order to be approved, a major change must be validated according to EPA method 301 (part 63, appendix A). Examples of major changes to a test method include, but are not limited to: (1) use of an unproven analytical finish, (2) use of a method developed to fill a test method gap; (3) use of a new test method developed to apply to a control technology not contemplated in the applicable regulation; and (4) “combining” two or more sampling/analytical methods (at least one unproven) into one for application to processes

*Minor change to monitoring* is a modification to federally required monitoring that (a) does not decrease the stringency of the compliance and enforcement measures for the relevant standard; (b) has no national significance (e.g., does not **affect** implementation of the applicable regulation for other affected sources, does not set a national precedent, and individually does not result in a revision to the monitoring requirements); **and** (c) is site-specific, made to reflect or accommodate the operational characteristics, physical constraints, or safety concerns of an affected source. Examples of minor changes to monitoring include, but are not limited to: (1) modifications to a sampling procedure, such as use of an improved sample conditioning system to reduce maintenance requirements; (2) increased monitoring frequency; and (3) modification of the environmental shelter to moderate temperature fluctuation and thus protect the analytical instrumentation.

*Minor change to a test method* is a modification to a **federally** enforceable test method that (a) does not decrease the stringency of the emission limitation or **standard**; (b) has no national significance (e.g., does not affect implementation of the applicable regulation for other affected sources, does not set a national precedent, and individually does not result in a revision to the test method); **and** (c) is site-specific, made to reflect or accommodate the operational characteristics, physical constraints, or safety concerns of an affected source. Examples of minor changes to a test procedure, such as a modified sampling traverse or location to avoid interference **from** an obstruction in the stack, increasing the sampling time or volume, use of additional impingers for a high moisture situation, accepting particulate emission results for a test run that was conducted with a lower than specified temperature, substitution of a material in the sampling train that has been demonstrated to be more inert for the sample matrix, and changes in recovery and analytical techniques such as a change in quality control/quality assurance requirements needed to adjust for analysis of a certain sample matrix.

NOTE: The authority to approve decreases in **sampling** times and **volumes** when necessitated by process variables has typically been delegated **in** conjunction with the *minor changes to test methods*, but these types of changes are not **included within** the scope of *minor changes*.



## **Attachment 2**

### **Parts 60 and 61 Delegable Authorities Memoranda for NSPS and NESHAP Applicability Determinations and Alternative Monitoring**

“Delegation of Authority to States: NESHAPS” from Kathleen M. Bennett,  
Assistant Administrator for Air, Noise and Radiation, March 24, 1982.

“Delegation of New Source Performance Standards Authority to States” from Jack R. Farmer,  
Acting Director, Emission Standards and Engineering Division, February 24, 1983.

“Delegation of NESHAP Authority to State /Local Agencies” from Jack R. Farmer,  
Director, Emission Standards and Engineering Division, December 17, 1984.

“Delegation of NSPS and NESHAP Authority to State/Local Agencies” from Jack R. Farmer,  
Director, Emission Standards and Engineering Division, September 11, 1986.

“New Section for all NSPS and NESHAP Regulations: Delegation of Authority”  
from Jack R. Farmer, Director, Emission Standards and Engineering Division,  
November 12, 1986.



PN 112-82-03-24-002  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 24 1982

OFFICE OF  
AIR, NOISE AND RADIATION

MEMORANDUM

**SUBJECT:** Delegation of Authority to States: NESHAPS  
**FROM:** Kathleen M. Bennett  
Assistant Administrator for Air, Noise and Radiation  
**TO:** Regional Administrators, Regions I - X

Several Regional offices have requested guidance on issuing an "automatic" delegation to States of the authority to implement the NESHAP program. There has also been a request for guidance on delegation of the authority to grant waivers of compliance with NESHAPS.

As discussed in my guidance document of December 29, 1991, for the Administrator's Accountability System,

the Agency should be as flexible as possible in the determination of when a State program is adequate and delegation should be made. The appropriate attitude toward State and local agencies is to presume both capability and proper intention, if at all possible.

In order to promote the delegation of the NESHAP program (as well as the NSPS program), an "automatic" delegation to the States should be pursued. Automatic delegation would not only provide States with the implementing authority for current standards under the NESHAP program, but would also provide the authority for future standards as they are published in the Federal Register. Again citing the guidance document,

regional offices should foster this approach by consulting with appropriate State officials and attempt to resolve any legal issues which may inhibit this approach in some States.

With regard to delegating the authority to grant waivers of compliance with NESHAPS, the Agency has now concluded that this authority could be incorporated into the "automatic" delegation of the NESHAP program. Originally the Agency had retained the authority to grant waivers to insure consistent application of the standards while the States were familiarizing themselves with this program. Because there was never any legal restriction preventing

the delegation of this authority, the Agency has now determined that the States ~~will~~ ~~be~~ ~~able~~ ~~to~~ ~~assume~~ ~~the~~ ~~responsibility~~ ~~for~~ ~~the~~ ~~program~~ and that they can ~~assume~~ this additional responsibility. Therefore, the current policy with respect to delegation of ~~the~~ ~~function~~ ~~of~~ ~~granting~~ ~~waivers~~ ~~of~~ ~~compliance~~ is to include this function in the ~~delegation~~ of the NESMAP program.

As a clarification, it should be noted that ~~no~~ sources are currently eligible for waivers of compliance and would not be caught in the interim during my transfer of authority to States to grant waivers. The waiver period of two years from the effective date of any present NESMAP standard has already expired. Therefore, the need to issue waivers to existing sources will not arise until new standards are promulgated under the NESMAP program.

If you have any questions concerning the delegation of authority to States for the NESMAP or NSPS programs, you should contact ~~Bern~~ Steigerwald at the Office of Air Quality, Planning, and Standards (OAQPS). OAQPS is ~~the~~ ~~programmatic~~ ~~role~~ ~~for~~ ~~delegation~~ ~~of~~ ~~authority~~. Mr. Steigerwald may be contacted at FTS 629-5555.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

February 24, 1983

MEMORANDUM

SUBJECT: Delegation of New Source Performance Standards Authority to States

FROM: Jack R. Farmer, Acting Director   
Emission Standards and Engineering Division (MD-13)

TO: Allyn M. Davis, Director  
Air and Waste Management Division, Region VI

Your November 23, 1982, memorandum to Mr. Don R. Goodwin (copy attached) requested guidance on which of the Administrator's discretionary authorities under 40 CFR Part 60 can be delegated to the States. You identified 57 specific paragraphs which contain provisions that require the Administrator's approval. We have developed guidance on the authorities you identified plus several other authorities not specifically mentioned in your request.

Our guidance permits delegation to a State of all the Administrator's authorities under Part 60 except for any which require rulemaking in the Federal Register to implement or where Federal overview is the only way to ensure national consistency in the application of standards. The division of State/EPA authority should be based on the principle of respecting the technical judgment of the State with EPA's role being primarily one of monitoring and evaluating overall program performance and providing assistance when necessary. Implementation decisions generally should be made by the State, while the Agency should make only those decisions that have the potential to alter the meaning of the standard or result in divergent application in different areas.

The authorities that should not be delegated to the States are listed below. All other authorities may be delegated. Of course, the decision of whether or not to delegate authority under any particular section rests with the Regional Office based on an assessment of the State's intentions and its legal and programmatic capability to implement the program. This guidance establishes those sections which from a legal and policy perspective are able to be delegated.

The decision-making authority that this guidance allows to be delegated to the States pertains to minor modifications to testing and monitoring methods. These authorizations appear in the regulations where the potential for advancements in test procedures, equipment, reagents, or analytical procedures was anticipated. The regulations, consequently, were structured to allow changes in sampling and measurement technology to be incorporated in an efficient and reasonable manner. The decision to make a minor change can generally be made by competent testing and laboratory personnel. Approval by an enforcement agency is needed to confirm that the change is minor in nature and provide a mechanism to prevent inexperienced testing and laboratory personnel from inadvertently making major changes to the method. Subsequent approval by the Administrator is not needed, because the minor changes do not affect the precision or accuracy of the method and, therefore, are not of national significance. The delegation, however, should require adequate documentation of any changes to testing or monitoring methods so that periodic auditing by EPA can confirm that this discretionary authority is not being abused.

#### Authorities-Which May Not Be Delegated to States Under Section 111

1. Paragraph 60.8(b)(2) and 60.8(b)(3). In order to ensure uniformity 7 and technical quality in the test methods used for enforcement of national standards, the Agency will retain the authority to approve alternative and equivalent methods which effectively replace a reference method. This restriction on delegation does not apply to 60.8(b)(1), which allows for approval of minor modifications to reference methods on a case-by-case basis. This authority allows, for example, a field engineer to approve deviations to methods that are necessary because of site-specific problems or circumstances. Requests for approval should be submitted to the Director, Emission Standards and Engineering Division. A technical review will be performed and any approved methods or changes to methods will be proposed and subsequently promulgated in the Federal Register. At such time, the alternative or equivalent methods become a part of 40 CFR Part 60 and are available for general use.

Some subparts include general references to the authority in 60.8(b) to approve alternative or equivalent standards. Examples include, but are not necessarily limited to, paragraphs 60.11(b), 60.274(d), 60.396(a)(1), 60.396(a)(2), and 393(c)(1)(i). These references are reminders of the provisions of paragraph 60.8 and are not separate authorities which can be delegated.

2. General Provisions 60.11(e). The granting of an alternative opacity standard requires a site-specific opacity limit to be adopted under 40 CFR Part 60. The Administrator may not delegate the authority for rulemaking.

3. Subpart S, 60.195(b). Development of alternative compliance testing schedules for primary aluminum plants is done by adopting site-specific amendments to Subpart S. This authority must be retained by the Administrator.

4. Subpart Da, 60.45a. Commercial demonstration permits allow an alternative emission standard for a limited number of utility steam generators. Delegation to the States is expressly prohibited in the subpart.

5. Subpart GG, 60.332(a)(3) and 60.335(a)(ii). These sections pertain to approval of customized factors (fuel nitrogen content and ambient air conditions, respectively) for use by gas turbine manufacturers in assembly-line compliance testing. Since each approval potentially could affect emissions from equipment installed in a number of States, the decision-making must be maintained at the Federal level to ensure national consistency. Notices of approval must be published in the Federal Register.

6. Equivalency Determinations, Section 111(h)(3) of Clean Air Act. Approval of alternatives to any design, equipment, work practice, or operational standard [e.g., 60.114(a) and 60.302(d)(3)] is accomplished through the rulemaking process and is adopted as a change to the individual subpart. This authority may not be delegated to the States.

7. Innovative Technology Waivers, Section 111(j) of the Clean Air Act. Innovative technology waivers must be adopted as site-specific amendments to the individual subpart. The authority to grant waivers may not be delegated. Any applications or questions pertaining to such waivers should be sent to the Director, Emission Standards and Engineering Division. [Note that responsibility for 111(j) has been transferred from the Stationary Source Compliance Division (SSCD) to the Emission Standards and Engineering Division (ESED).] States may be delegated the authority to enforce waiver provisions if the State has been delegated the authority to enforce NSPS.

a. Applicability Determinations. The majority of applicability determinations are expected to be routine in that there would be an established precedent to follow. Delegations should be conditioned to ensure that all interpretations of 40 CFR Part 60 (including Section 60.5) are consistent with those made by the EPA in the past. A compendium of all historical decisions is prepared by SSCD and distributed to the Regional Offices annually with updates made quarterly. These summaries should be sent routinely to each State or local agency that has been

delegated NSPS authority along with an explanation that these decisions represent NSPS policy. Any situations not clearly governed by precedent should be referred to the Regional Office for decision. As in the past, requests for applicability decisions should be forwarded to the Director, Stationary Source Compliance Division.

#### Attachment

cc: Air Waste and Management Division Directors,  
Regions I-V and VII-X  
R. Campbell (MD-10)  
C. Elkins (ANR-443)  
~~S. Meyers (ANR-443)~~  
✓ E. Reich (EN-3411)  
F. Renner (MD-10)  
E. Salo (A-133)  
R. Shigehara (MD-19)  
B. Steigerwald (MD-10)  
G. Walsh (MD-131)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

DEC 17 1984

MEMORANDUM

SUBJECT: Delegation of NSHAP Authority to State/Local Agencies

FROM: Jack P. Farmer, Director  
Emission Standards and Engineering Division (MD-13)

TO: David P. Howekamp, Director  
Air Management Division, Region IX

This is in response to your memorandum requesting guidance on which of the Administrator's discretionary authorities under 40 CFR Part 61 can be delegated to State and local agencies (hereafter referred to as "States"). You identified 121 specific paragraphs which contain provisions that require the Administrator's approval.

Our guidance permits delegation to a State of all the Administrator's authorities under Part 61, except for any which require rulemaking in the Federal Register to implement, or where Federal oversight is the only way to ensure national consistency in the application of standards. The division of State/EPA authority should be based on the principle of respecting the technical judgment of the State with EPA's role being primarily one of monitoring and evaluating overall program performance and providing assistance when necessary. Implementation decisions generally should be made by the State, while the Agency should make only those decisions that have the potential to alter the meaning of the standard or result in divergent application in different areas.

This guidance permits the delegation of discretionary authority in the Asbestos standard pertaining to substitutions for certain control requirements [61.153(a)(4), 61.153(b)(3), 61.154(b)(1), 61.156(b)(3), 61.156(c)(2)]. These authorities were included in the regulation where the need for flexibility in determining control requirements was anticipated, recognizing that these decisions are most efficiently and reasonably made by the implementing agency. These decisions may be made outside the authority of Section 112(e) and do not necessarily require notice and opportunity for public comment. Approval by the Administrator is not required because the decisions are not of national significance. The delegation, however, should require adequate documentation of any decisions made under these paragraphs so that periodic auditing by EPA can confirm these discretionary authorities are not being abused.



The guidance also permits delegation of authority to approve minor modifications to testing and monitoring methods. Minor modifications pertain to contingencies that arise in the field and to authorizations that appear in the regulations where the potential for advancements in test procedures, equipment, reagents, or analytical procedures was anticipated. The regulations, consequently, were structured to allow changes in sampling and measurement technology to be incorporated in an efficient and reasonable manner. The decision to make a minor change can generally be made by competent testing and laboratory personnel. Approval by an enforcement agency is needed to confirm that the change is minor in nature and provide a mechanism to prevent inexperienced testing and laboratory personnel from inadvertently making major changes to the method. Subsequent approval by the Administrator is not needed, because the minor changes do not affect the precision or accuracy of the method and, therefore, are not of national significance. The delegation, however, should require adequate documentation of any changes to testing or monitoring methods so that periodic auditing by EPA can confirm that this discretionary authority is not being abused.

Part 61 stipulates that if reasonable grounds exist to dispute the results obtained by an equivalent or alternative source test method, the use of the reference method may be required, and the results of the reference method prevail [61.67(g), 61.70(c), 61.14(c)]. This authority may be delegated since the implementing agency is in the best position to make judgments about the reasonableness of test results obtained by alternative methods on a specific source. However, as specified in the guidance below, the approval or withdrawal of an equivalent or alternative test method is done by rulemaking and cannot be delegated.

Paragraphs 61.11 and 61.13, which deal with waivers for compliance dates and compliance testing, can be delegated if the State's enforcement and implementation procedures are adequate. Granting of waivers should be in writing and the States should provide copies of each written waiver to the Regional Office. Review of waivers should be part of the annual audit process.

Paragraphs 61.08(e)(2), 61.11(e), and 61.13(c) are basically statements clarifying the Administrator's authority and the relationship of certain provisions. States may want these same statements in their laws, but it should be made clear that we are not relinquishing our enforcement responsibilities through the delegation process. In the final analysis, the Administrator retains concurrent responsibility for the enforcement of the Act and any subsequent regulation developed under the Act.

The authorities that may not be delegated to the State are listed below. All other authorities may be delegated. Of course, the decision of whether or not to delegate authority under any particular section rests with the Regional Office based on an assessment of the State's intentions and its

legal and programmatic capability to implement the program. This guidance establishes those sections which from a legal and policy perspective are able to be delegated.

#### Authorities Which May Not Be Delegated To States Under Section 112

1. Paragraph 61.06. The majority of applicability determinations are expected to follow established precedents. Delegations should be conditioned to ensure that all interpretations of 40 CFR Part 61 are consistent with those made by the EPA in the past. A compendium of all historical decisions has been prepared by SSCD and distributed to the Regional Offices. These summaries should be sent to each State or local agency that has been delegated NESHAP authority along with an explanation that these decisions represent NESHAP policy. Any situations not clearly governed by precedent should be referred to the Regional Office for decision.

2. Paragraph 61.15. This paragraph is simply a statement about EPA's procedure for handling of Freedom of Information Act requests and confidential business information. Section 4.7, page 8, of the Good Practices Manual for Delegation of NSPS and NESHAP, February 1983, explains the options that are available to the Regions and the States for handling this question.

3. Paragraph 61.14. In order to ensure uniformity and technical quality in the test methods used for enforcement of national standards, the Agency will retain the authority to approve alternative and equivalent methods. Requests for approval should be submitted to the Director, Emission Standards and Engineering Division. A technical review will be performed and any approved methods or changes to methods will be proposed and subsequently promulgated in the Federal Register. At such time, the alternative or equivalent methods become a part of 40 CFR Part 61 and are available for general use. This restriction on delegation does not apply to case-by-case approval of minor modifications to sampling procedures or equipment that affect a single source.

4. Paragraph 61.53(c)(4). The list of approved design, maintenance, and housekeeping practices affect the meaning and intent of the standard. To ensure uniform application, the list is available only from EPA.

5. Equivalency Determinations, Section 112(e)(3) of the Clean Air Act. Approval of an alternative means of emission limitation to any design, equipment, work practice, or operational standard is accomplished through the rulemaking process and is adopted as a change to the individual subpart. This authority may not be delegated to the States. Certain paragraphs in Parts 61 refer to potential alternative standards or procedures for evaluating proposed alternatives. These paragraphs merely reiterate the point that alternative means of emission limitations can be considered and are not authorities that may be delegated. Examples of such paragraphs include 61.66, 61.112(c), 61.151(c)(2), 61.152(b)(3), 61.153(c), 61.154(b)(2), 61.156(d), 61.242-1(c)(2), 61.244.

On June 6, 1984, revisions were proposed to the General Provisions of Part 61 (49 FR 23498). The proposed revisions included some section number changes, and some sections were expanded. If you have questions or need additional guidance, please contact John Crenshaw (629-5571 FTS).

cc: Director, Air and Waste Management Division, Regions I-VIII,x  
R. Biondi, SSCD (EN-3411)  
R. Campbell, OAQPS (MD-10)  
G. Emison, GAQPS (MD-10)  
E. Reich, SSCD (EN-3411)  
F. Renner, OAQPS (MD-10)  
E. Salo, OGC (LE-132A)  
R. Shigehara, OAQPS/ESED (MD-191)  
B. Steigerwald, OAQPS (MD-10)  
D. Tyler, OAQPS/CPDD (MD-15)  
G. Walsh, OAQPS/ESED (MD-13)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

11 SEP 1986

MEMORANDUM

SUBJECT: Delegation of New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants Authority to State/Local Agencies (NESHP)

FROM: Jack R. Farmer, Director of Emission Standards and Engineering Division (MD-13)

TO: David P. Howekamp, Director  
Air Management Division, Region IX

This guidance is in response to your memorandum requesting direction, on which of the Administrator's discretionary authorities under 40 CFR Parts 60 and 61 can be delegated to State and local agencies (hereafter referred to as "States"). As you pointed out, we issued delegation guidance on NSPS on February 24, 1983 and on NESHP on December 17, 1984 (both memos attached). The subparts about which you asked are those that have been promulgated since those two previous memoranda. In addition, we are including guidance on the revised Part 61 General Provisions that were published on November 7, 1985, and on five standards that have been promulgated since we received your request (three arsenic NESHP and revisions to kraft pulp mill NSPS and asphalt concrete NSPS).

We are unable to provide guidance on NESHP Subparts B, H, I, and K, since we do not have responsibility for radionuclides and radon-222. Please direct any questions to Sheldon Meyers, Director, Office of Radiation Programs (ANR-458c), U.S. Environmental Protection Agency, 401 M Street, N.W., Washington, D.C. 20460.

The authorities that may not be delegated to the States are listed below. All other authorities may be delegated. The criteria for determining which of the authorities can be delegated to States has not changed since our previous guidance and so are not reiterated here. If you have any questions about this guidance, please refer to the attached memos or contact John Crenshaw, FTS 629-5571.

<u>NSPS Subpart</u>	<u>Authorities Which May Not be Delegated to States</u>
<b>vv -- SOCFI Equipment Leaks</b>	<b>60.482-1(c)(2)</b> 60.484
<b>ww -- Beverage Can Coating</b>	60.496(a)(1) <b>60.493(b)(2)(i)(A)</b>
<b>GGG -- Petroleum Refinery Equipment Leaks</b>	<b>60.592(c)</b>
<b>JJJ -- Petroleum Dry Cleaning</b>	60.623

No restrictions in delegation  
of the following NSPS subparts:

I (revised 1/24/86)  
N (revised 1/2/86)  
Na  
AAa  
BB (revised 5/20/86)  
LL  
RR  
xx  
FFF  
HHH  
LLL  
000  
PPP

<u>NE-SHAP Subpart</u>	<u>Authorities Which May Not be Delegated to States</u>
<b>A -- General Provisions</b>	61.04(b) <b>61.12(d)(1)</b> 61.13(h)(1) (ii)
<b>J -- Benzene Equipment Leaks</b>	61.112(c)
<b>N -- Arsenic, Glass Manufacturing</b>	61.164(a)(2) 61.164(a)(3)
<b>O -- Arsenic, Low Arsenic Feedstock Copper Smelters</b>	<b>61.172(b)(2)(ii)(B)</b> <b>61.172(b)(2)(ii)(C)</b> 61.174(a)(2) 61.174(a)(3)
<b>P -- Arsenic, High Arsenic Feedstock Copper Smelters</b>	No restrictions
<b>V -- Equipment Leaks</b>	<b>61.242-1(c)(2)</b> <b>61.244</b>

Your suggestion to provide delegation guidance along with each final rule is a good one. In the future, we will add a paragraph entitled "Delegation of Authority" to each NSPS and NESHAP regulation. That paragraph will indicate any authorities that may not be delegated to States or local agencies.

If I can be of further assistance, please do not hesitate to contact me.

## 2 Attachments

cc: Director, Air and Waste Management Division, Regions I-VIII,X  
 Rich Biondi, SSCD (EN-341)  
 Ron Campbell, DAQPS (MD-10)  
 Gerald Emison, OAQPS (MD-10)  
 Ed Reich, SSCD (EN-341)  
 Fred Renner, OAQPS (MD-10)  
 Charlie Carter, OGC (LE-132A)  
 Earl Salo, OGC (LE-132A)  
 B. J. Steigerwald, OAQPS (MD-10)  
 Darryl Tyler, OAQPS/CPDD (MD-15)  
 George Walsh, OAQPS/ESED (MD-13)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Office of Air Quality Planning and Standards  
Research Triangle Park, North Carolina 27711

NOV 12 1986

MEMORANDUM

**SUBJECT:** New Section for all NSPS and NESHAP Regulations: Delegation of Authority

**FROM:** Jack R. Farmer, Director *Jack*  
Emission Standards and Engineering Division (MD-13)

**TO:** Robert L. Ajax, Chief, Standards Development Branch, ESED  
James U. Crowder, Chief, Industrial Studies Branch, ESED  
George W. Walsh, Chief, Emission Measurement Branch, ESED  
Susan R. Wyatt, Chief, Chemicals and Petroleum Branch, ESED

Effective immediately, all NSPS and NESHAP regulations will have a new section entitled, "Delegation of Authority." The new section will designate which of the Administrator's discretionary authorities may be delegated to the States and which shall be retained by EPA. The new section should be added to all regulations now under development or review. At this time, we do not intend to revise the existing regulations to add the new section. However, as existing regulations are reviewed or revised, the section should be added then. The new section shall appear as the last numbered section in the regulation. The format is contained in Attachment A.

Background

Section 111(c) and 112(d) of the Clean Air Act prescribe that EPA may delegate to any State the authority to implement and enforce NSPS and NESHAP. Delegations are negotiated on a case-by-case basis between EPA Regional Offices and the individual States (sometimes local agencies also). The transfer of NSPS and NESHAP authority to a State in no way precludes EPA from enforcing a standard in Federal court should the State fail to effectively do so. Regional Offices periodically review the performance of States through program audits.

The policy of EPA has been to encourage delegation of programs to States to the maximum extent practicable. Most States have accepted delegation for most of the NSPS and NESHAP. About one-third of the States

have provisions for automatic delegation of new standards as they are promulgated; but, with the rest, some form of delegation procedure takes place with each new standard. In either case, the Regional Offices must specify to the States which of the Administrator's discretionary authorities contained within a regulation can be handled by the State and which shall be retained by EPA. Generally, the authorities for which delegation is in question are those parts of a regulation that state "the Administrator may. . ." or "the Administrator shall. . ." In situations like these, it is unclear whether or not the regulation is addressing a decision that truly must be made by EPA.

Regional Offices have repeatedly asked ESED to provide guidance on what authorities they can delegate. The problem with this guidance is that it is provided periodically; covers batches of standards; and, therefore, is often unavailable at the time of the initial delegation negotiations. Also, since the guidance is in memo form, it can be misplaced or forgotten easily. For reasons of efficiency and program effectiveness, we have decided to provide delegation guidance as a part of the standard itself.

#### Guidance

Attached are the three guidance memos on delegation that have been sent to the Regional Offices. The memos cover all NSPS and NESHAP that have been promulgated through September 11, 1986, and the General Provisions to both NSPS and NESHAP. You should refer to these memos for general guidance on delegation issues and for past decisions on specific standards. Please follow these precedents, unless there are overriding factors on a case-specific basis.

<u>ESED Guidance Memos</u>	<u>Topics</u>
February 24, 1983	NSPS and Part 60 General Provisions
December 17, 1984	NESHAP and Part 61 General Provisions
September 11, 1986	NSPS (promulgated after 2/24/86), NESHAP (promulgated after 12/17/84), and Part 61 General Provisions (revised)

The OAQPS policy, as reflected in these memos, permits delegation to a State of all the Administrator's authorities except for any which require rulemaking in the Federal Register to implement or where Federal overview is the only way to ensure national consistency in the application of standards. The division of State/EPA authority should be based on the principle of respecting the technical judgment of the State. Implementation decisions generally should be made by the State, while the Agency should



make only those' decisions that have the potential to alter the meaning of the standard or result in divergent application in different regions of the country.

Historically, most of the NSPS and NESHAP authorities have been delegated, as evidenced by the three guidance memos. Authorities that have been withheld are those that meet one of the conditions listed-below. These are not the only conditions under which delegation can be withheld. Unique circumstances may warrant withholding delegation of certain decisions and can be considered on a per case basis.

Authorities Which May Not Be Delegated to States Under Sections 111 and 112

1. Equivalency Determinations.

Approval of alternatives to any design, equipment, work practice, or operational standard is accomplished through rulemaking and is adopted as a change to the individual subpart. Rulemaking authority may not be delegated.

2. Alternative Test Methods.

In order to ensure uniformity and technical quality in the test methods used for enforcement of national standards, the Agency will retain the authority to approve alternative methods which effectively replace a reference method. Approved methods or changes to methods will be proposed and subsequently promulgated in the Federal Register. At such time, the alternative or equivalent methods become a part of 40 CFR Part 60 and are available for general use.

3. Decisions Where Federal Oversight is Needed to Ensure National Consistency.

° One example is the Gas Turbine NSPS: The approval of customized factors for use by manufacturers in assembly-line compliance testing. Since compliance is determined by the manufacturer rather than the user, the decision can affect emissions in a number of States and, therefore, has national significance.

° Another example is the Beverage Can NSPS: Approval of alternative procedures for computing spray booth transfer efficiency (TE). The science of measuring TE is not well-developed, understood, or documented. Expertise on TE generally is not available to the States.

4. Any Decision That Requires Rulemaking to Implement.

One example is the Primary Aluminum NSPS: Alternative compliance testing schedules are adopted by site-specific amendments to the NSPS and, therefore, may not be delegated.

**Coordination**

John Crenshaw is responsible for delegation issues within ESED. If you have any questions about this guidance or about delegation of any specific authority, please contact John.

**4 Attachments**

cc: R. Biondi, SSCD  
R. Campbell, OAQPS  
C. Carter, OGC  
J. Emison, OAQPS  
F. Renner, OAQPS  
E. Salo, OGC  
B. Steigerwald, OAQPS  
D. Tyler, CPDD

New Section for All NSPS and NESHAP Regulations

60 or 61.xxx\* Delegation of Authority.

(a) In delegating implementation and enforcement authority to a State under section 111(c)\*\* of the Act, the authorities contained in paragraph (b) of this section shall be retained by the Administrator and not transferred to a State.

(b) Authorities which will not be delegated to States:

60.aaa(c)(2)\*\*\*

60.aab(b)(1)(a)

- 
- 
- 

etc.

---

\*Last numbered paragraph of the regulation.

\*\*Section 112(d) if NESHAP.

\*\*\*If there are no authorities that must be withheld, enter "No restrictions" here.

## **Attachment 3**

### **Selected EPA Delegations of Authority**

Delegation 7-127. "Applicability Determinations," dated August 7, 1995,  
EPA Delegations Manual.

Delegation 7-121. "Alternative Methods" dated August 7, 1995, EPA Delegations Manual. .

Delegation 7- 119. "Performance Test" dated August 7, 1995, EPA Delegations Manual.

"Redelegation of CAA Part 63 MACT General Provisions," from Steven A. Herman,  
Assistant Administrator, Office of Enforcement and Compliance Assurance,  
August 31, 1995.

8/7/95

**CLEAN AIR ACT AMENDMENTS OF 1990**7-127. **Applicability Determinations**

1. **AUTHORITY.** To issue determinations pertaining to applicability of a source to 40 **CFR** Parts 60, 61, and 63 and pursuant to Section **111(b)**, **111(d)**, **111(f)**, **111(h)**, 112(d), 112(f) and **112(h)** of the Clean Air Act.

2. **TO WHOM DELEGATED.** Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance.

3. **LIMITATIONS.** Regional Administrators or their redelegates **must** provide summaries and copies of the applicability determinations on a quarterly basis to the applicability determination index.

4. **REDELEGATION AUTHORITY.** Authority may be redelegated to the Branch Chief level or **equivalent.**

5. **ADDITIONAL REFERENCES.**

a. Sections 111 of the Clean Air Act.

b. Sections 112 of the Clean Air Act.

c. 40 **CFR** 60.5 and 61.06.

d. This delegation, **Applicability Determinations** supersedes Delegation 7-15.

CLEAN AIR ACT AMENDMENTS OF 19907-121. Alternative Methods1. AUTHORITY.

a. To approve or disapprove alternatives to any monitoring **methods** required under 40 CFR Part ~~50~~, 61, or 63 pursuant to Section **111(f)**, **111(h)**, 112(d), **112(f)** and 112(h) **of** the Clean Air Act.

b. To approve or disapprove alternative test methods, equivalent methods, alternative standards, or procedures required under 40 CFR Part 60, 61, or 63 pursuant to Section **111(f)**, **111(h)**, 112(d), 112(f) and **112(h)** of the Clean Air Act.

2. TO WHOM DELEGATED.

a. Authority la. is delegated to Regional Administrators.

b. Authority lb. is delegated to the Assistant Administrator of the Office **of** Air and Radiation.

3. REDELEGATION AUTHORITY.

a. This authority may be redelegated to the Branch Chief **level or** equivalent.

b. This authority is redelegated to the Director of the Office of Air Quality Planning and Standards, and may be redelegated to the Branch Chief level or equivalent.

4. ADDITIONAL REFERENCES.

a. 40 **CFR** 60.8(b) (2) and 40 **CFR** **60.8(b) (3)**

b. 40 **CFR** **61.13(h) (1) (ii)**

c. ~~40 CFR 63.6(g)~~, 40 **CFR** 63.7(e) **(2) (ii)**, 40 **CFR** **63.7(f)**, and ~~40 CFR 63.8(f)~~.

d. Section 111 of the Clean Air Act.

e. Section 112 of the Clean Air Act.

f. This delegation, Alternative Methods, h e delegation titled Performance Test supersede delegation 7-14

CLEAN AIR ACT AMENDMENTS OF 19907-119. Performance Test

1. AUTHORITY. To approve the use of a reference method with minor changes in test methodology, to approve shorter sampling times and smaller sampling volumes when necessitated by process variables, to waive the requirement for a performance test pursuant to Section **111(f)**, **111(h)**, 112(d), 112(f) and **112(h)** of the Clean Air Act if the owner or operator of an affected source has demonstrated by other means that the affected source is in compliance.
2. TO WHOM DELEGATED. Regional Administrators.
3. REDELEGATION AUTHORITY. This authority may be redelegated to the Branch Chief level or equivalent.
4. ADDITIONAL REFERENCES.
  - a. 40 **CFR** 63.7(e) (2) **(i)**, 40 **CFR** 63.7(e) **(2)** (iii), 40 **CFR** **63.7(e)** (2) (iv), and **63.7(h)**.
  - b. 40 **CFR** 61.13(h) (1) **(i)** and, 40 **CFR** **61.13(h) (1)** (iii).
  - c. 40 **CFR** **60.8(b) (1)**, 40 **CFR** 60.8(b) **(4)**, and 40 **CFR** **60.8(b)** (5).
  - d. Section 111 of the Clean Air Act.
  - e. Section 112 of the Clean Air Act.
  - f. This delegation, Performance Test, and the delegation titled Alternative Methods supersede delegation 7-14.



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

AUG 31 1995

OFFICE of  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: **Redelegation of CAA Part 63 MACT** General Provisions  
FROM: **Steven A. Herman, Assistant Administrator**  
4 **Office of Enforcement and Compliance Assurance**  
TO: **Addressees**

I hereby redelegate the authority delegated to me in delegations;

7-116 Compliance Extensions  
7-118 Construction and Reconstruction,  
7-127 Applicability Determinations, and  
7-128 Establishment of Monitoring Parameters to Demonstrate Compliance

to the Division Directors of the Manufacturing, Energy, and Transportation Division; Chemical, Commercial Services and Municipal Division; Agriculture and Ecosystems Division; and the Air Enforcement Division. These authorities are further redelegated to the branch Chiefs of the Manufacturing Branch, Energy and Transportation Branch, Chemical Industry Branch, Commercial Services and Municipal Branch, Agriculture Branch, Air Toxics, New Source Review and **Permits** Branch, and **SIPs**, NSPS, Acid Rain, and Stratospheric Protection Branch.

Addressees : John B. Rasnic, Director  
Manufacturing, Energy, and Transportation Division  
Elliott **Gilberg**, Acting Director  
Chemical, Commercial Services and Municipal Division  
Rick Colbert, Director  
Agriculture and Ecosystems Division  
**Kathie** Stein Director  
Air **Enforcement** Division  
Mamie R. Miller, Chief  
Manufacturing Branch



## **Attachment 4**

### Applicability Determination Index Update Procedures

“Format for Submitted Determinations to ADI,”  
Manufacturing, Energy, and Transportation Division, January, 1998.

## Format for Submitting Determinations to ADI

---

For each determination, there will be three files: a header information file, an abstract file, and a file containing the determination letter itself. These files are submitted electronically for updating of the ADI. This guidance describes the file types, file nomenclature, descriptions of the file types, examples, and information for file transfer.

These three files need to be ASCII Text files. The files can be converted to this format within the word processing software where they are created. For example, in Word Perfect for Windows, each file can be converted by selecting "Save As" from the File menu and then selecting "ASCII (DOS) Text", within the box labeled "save File as Type:"

### File Names

The management of the large amount of data that is being submitted to ADI is made easier by requiring that each office use the following scheme for naming the three files associated with each determination. Each file name has four parts:

- (1) Identify Region or Office with a single character

<u>Use:</u>	<u>For:</u>
I	Region I-likewise for 2-9
0	Region 10
E	EMAD
S	ESD
C	CCMD
M	METD
D	DOE
G	OGC
P	OPPTS

- (2) Identify recipient-use 6 characters or fewer from name of individual or corporation

- (3) identify file type with a single character

<u>Use:</u>	<u>For:</u>
H	Header

A            Abstract  
L            Letter

(4) Identify category-use a period followed by the three letter abbreviation

<b>Use:</b>	Ear.:
.NSP	NSPS (Part 60)
.NES	NESHAP (Part 61)
.MAC	MACT (Part 63, New NESHAPs)
.CFC	CFC regulations
.ASB	Asbestos regulations

### Header Files

Header Information should include the following items. For any determination where certain information is unavailable or irrelevant, that category should be left blank. Please have the items in this order:

Date  
Region (within Headquarters, use specific office such as METD)  
Title (a very brief description of subject of the determination)  
Author (EPA official whose name is typed on the signature line)  
Recipient  
Comments (if the name and number of a contact person is given at the end of the letter, that information can be included here)  
Subpart  
Legal Citations

### Abstract Files

The Abstract should begin with a question that briefly identifies the type of facility, device, process, etc. to which the determination pertains, and summarizes the question the source is asking. The answer should give a clear answer with a brief explanation of the reason behind the Agency's response. For complex determinations that cover several distinct issues, it is helpful to use one question and one answer for each issue. Note that it is not necessary to indent or tab within the Abstract; each line can be flush with the left margin.

### Letter Files

The Letter file consists of the actual determination that was sent, and should

include ~~any~~ attachments that were included where the information in the attachments is not widely available or is not well explained within the determination letter itself. For example, it would not be necessary to include a copy of a regulation that was enclosed, but it is important to include a copy of a previous memo or letter on which the current determination relies without explaining its contents.

### Examples

Examples of Header and Abstract Files with their filenames are given on the following pages. Please follow the style of the examples such as giving the Author's last name followed by a comma and the first name, or using the numerical format for the date. It is not necessary for the file to begin with a line that gives the filename or a title such as "Header Information" or "Abstract."

### File Transfer

The easiest method of transmitting the determination files is to include all of the ASCII files into a ZIP file using PKZIP. Then attach the ZIP file to an E-mail message. Send the E-mail directly to the contractor at **pqa@pqa.com**. If you have questions or wish to use another file transfer method please call Perrin Quarles Associates at **(804) 979-3700**.

**5INTPAPH. MAC**

Date: 02/09/1 995  
Region: Region 5  
Title: Int. Paper-Batch Vapor Coating Extractor  
Author: Varner, Bruce  
Recipient: Jayne, Thomas  
Comments: contact Bruce Varner 312-886-6763  
Subpart: T  
Legal citations: 63.461

**5INTPAPA. MAC**

Q: A batch vapor coating extractor separates polyethylene from paper using, trichloro-ethylene. Is this extractor subject to subpart T?

A: No. Section 63.461 says a solvent cleaning machine is one that removes" soils from surfaces. The described activity is not a cleaning operation.

---

**5BASSERH.NES**

Date: 04/02/1 991  
Region: Region 5  
Title: Benzene transfer-exemptions  
Author: Kee, David  
Recipient: Basser, Shari  
Comments: contact Spiros Bourgikos 312-886-6862  
Subpart: BB  
Legal citations: 61.300, 61.302, 61.305(i)

**5BASSERA.NES**

Q: Is a terminal that handles benzene-laden liquid from a coke by-product recovery plant exempt from subpart BB?

A: Individual loading racks that handle only exempt liquids, like coke by-product recovery plant liquid, are exempt. However, if the rack also handles a non-exempt liquid, the source must keep records and report. In addition, if

the rack handles more than 1.3 million liters a year of non-exempt liquid, the emission standards apply. The exemption does not cover other racks at the terminal.

### **2HMMH.NSP**

Date:

Region: Region 2

Title: custom fuel monitoring schedule

Author: Muszynski, William

Recipient: Lipka, George

Comments: contact Kenneth Eng 212-264-9627

Subpart: GG

Legal citations: 60.332, 60.333, 60.335

### **2HMMA.NSP**

**Q:** Does Subpart GG allow the use of methods of fuel gas sulfur analysis other than reference methods?

**A:** Yes, other methods of documented accuracy are acceptable.

**Q:** Does using one sample taken each day after all truck deliveries have been completed satisfy the oil testing requirements of Subpart GG?

**A:** No, a sample must be taken for each delivery unless the facility obtains approval for a custom schedule.

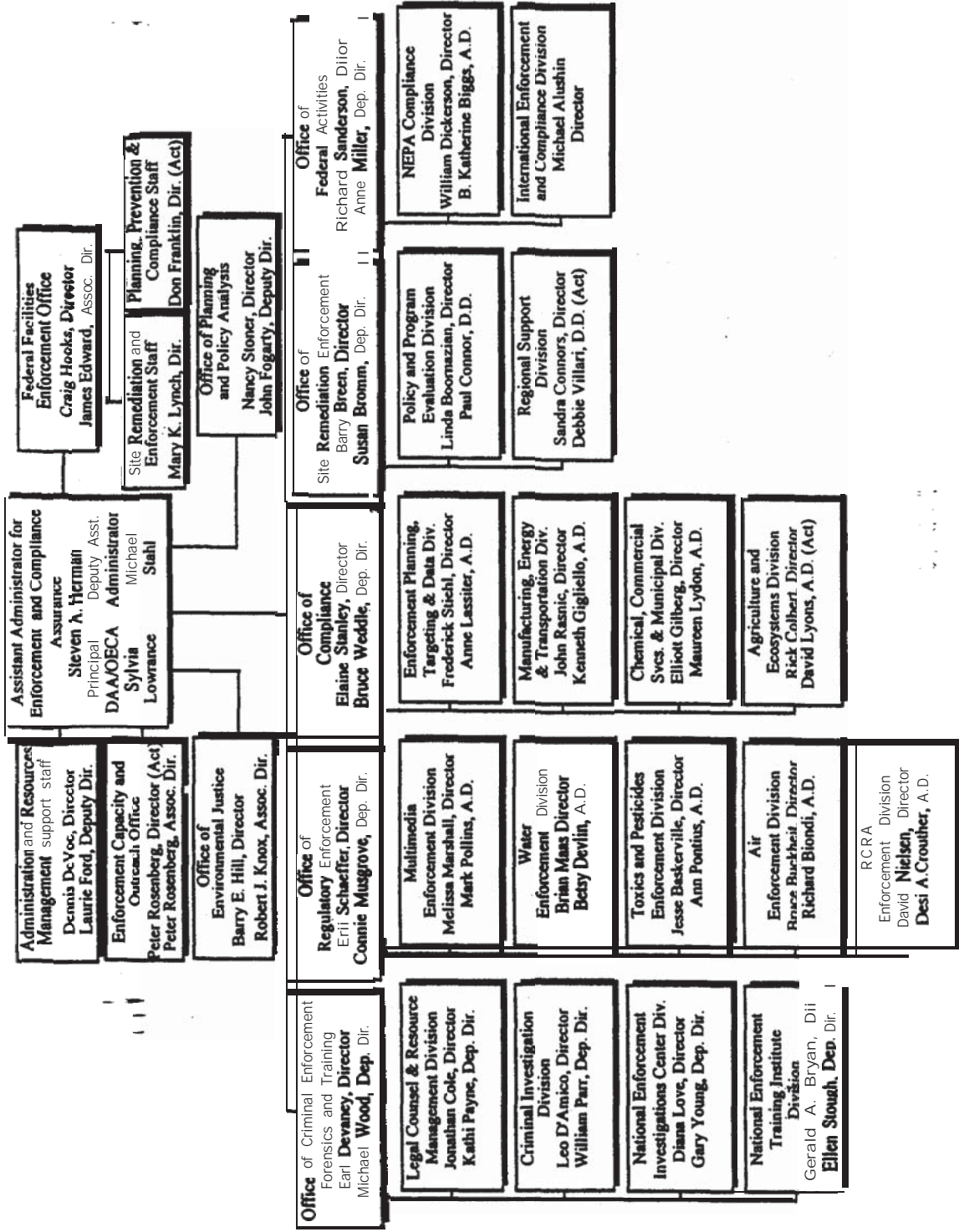
**Q:** Will **EPA** approve alternate fuel sampling schedules for two gas turbine engines? ☐

**A:** Yes, the specified custom schedules are approved.

**Attachment 5**

OECA and OAQPS Organizational Charts

# Office of Enforcement and Compliance Assurance







**OAQPS**  
Office of Air Quality Planning and Standards  
U.S. Environmental Protection Agency

# Current



## IMMEDIATE OFFICE

John Seitz, Director MD-10  
Sandy Trippe, Secretary 641-5616  
Lydia Wegman, Deputy Director  
Sherry Russell, Secretary 541-5504

Henry Thomas Assoc. Dir. - Program Oper.  
John Bachmann Associate Director  
Science/Policy & New Programs

WASHINGTON OPERATIONS STAFF Mail 6301  
Anna Duncan, Director 260-5575

POLICY ANALYSIS AND COMMUNICATIONS STAFF  
Jeff Clark, Director 541-5557 MD-10

PLANNING, RESOURCES & REGIONAL MANAGEMENT STAFF  
Ieva Sporns, Director 541-0882 MD-11

## Addresses/Phones:

North Carolina (919) 541-5616  
OAQPS (MD-10)  
Research Triangle Park, NC 27711  
Washington (202) 2604575  
OAQPS (6301), 401 M<sup>th</sup> Street, SW  
Washington, DC 20460

<b>EMISSIONS, MONITORING, AND ANALYSIS DIVISION</b> Bill Hunt, Director David Mobley, Associate Director Denise Warren, Secretary 541-5536 MD-14	
<b>Air Quality Trends Analysis Group</b>	David Guinnup 541-5558
<b>Monitoring &amp; Quality Assurance Group</b>	Rich Scheffe 541-5651
<b>Air Quality Modeling Group</b>	Joe Tikvart 541-5561
<b>Emission Inventory &amp; Factors Group</b>	David Misenheimer * 541-0875
<b>Source Characterization Group A</b>	MD-19 Bill Lamason 541-5582
<b>Source Characterization Group B</b>	MD-19 Connie Oldham 541-5545

<b>EMISSION STANDARDS DIVISION</b> Bruce Jordan, Director Jack Edmondson, Associate Dir. Terl Porterfield, Secretary 541-5572 MD-13	
<b>Metals Group</b>	Al Vervaert 541-5601
<b>Minerals &amp; Inorganic Chemicals Group</b>	Jim Crowder 541-5422
<b>Combustion Group</b>	Doug Bell 541-5578
<b>Coatings &amp; Consumer Products Group</b>	Linda Herring 541-7946
<b>Organic Chemicals Group</b>	Susan Wyatt 541-5873
<b>Waste &amp; Chemical Processes Group</b>	K.C. Hustvedt 541-5671
<b>Policy, Planning &amp; Standards Group</b>	Fred Dimmick 541-5627

<b>AIR QUALITY STRATEGIES &amp; STANDARDS DIVISION</b> Sally Shaver, Director Bill Harriet, Associate Director Carolyn Pate, Secretary 541-5551 MD-15	
<b>Integrated Policy &amp; Strategies Group</b>	Joe Paisie 541-5628
<b>Ozone Policy &amp; Strategies Group</b>	Tom Helms 541-5526
<b>Health Effects &amp; Standards Group</b>	Karen Martin 541-5688
<b>Risk &amp; Exposure Assessment Group</b>	Dianne Byrne 541-5648
<b>Visibility &amp; Ecosystem Protection Group</b>	Eric Ginsburg 541-5531
<b>Innovative Strategies &amp; Economics Group</b>	Ron Evans IV 541-5543

<b>INFORMATION TRANSFER &amp; PROGRAM INTEGRATION DIVISION</b> Tom Curran, Director Bob Keilam, Associate Director Connie MacGill, Secretary 541-5504 MD-12	
<b>Operating Permits Group</b>	Steve Hitte 541-5281
<b>Integrated Implementation Group</b>	Karen Blanchard 541-5319
<b>Information Management Group</b>	Ed Lillis 541-5586
<b>Information Transfer Group</b>	Chet Wayland 541-5547
<b>Education &amp; Outreach Group</b>	MD-7 Howard Wright 541-5455
<b>Program Review Group</b>	Racqueline Shelton 541-5590

## **Attachment 6**

NSPS and NESHAP General Contacts

—  
—  
—

## General Contacts for Parts 60, 61 & 63 Applicability Determinations

### Air Media Contact for OECA/Office of Compliance:

OECA/OC/METD	Sally Mitoff	202-564-7012
	<b>Belinda</b> Breidenbach	202-564-7022

### OECA/Office of Regulatory Enforcement/Air Enforcement Division:

NSPS:	James Jackson	202-564-2002
	<b>Zofia</b> Kosim	202-564-8733
NESHAP:	Charlie Garlow	<del>202-564-</del> 1088
	Ginny Phillips	202-564-6 139

### Office of General Counsel:

NSPS:	Diane <b>McConkey</b>	202-260-923 1
	Jocelyn <b>deGrandpre</b>	202-260-0330
NESHAP:	Patricia Embrey	202-260-7625
	(will provide appropriate <b>staff</b> contact)	

### Lead Region for Enforcement:

Region 3	Bernie Turlinski	215-814-2110
----------	------------------	--------------

### Applicability Determination Index:

OECA/OC/METD	<b>Belinda</b> Breidenbach	202-564-7022
--------------	----------------------------	--------------

### Monitoring Contact for NSPS & NESHAP (technical questions)

OAQPS/EMAD	Peter Westlin	919-541-1058
------------	---------------	--------------

MACT Issue Resolution Process ( <b>IRP</b> )	Larry Brockman	919-541-5398
--	----------------	--------------

### OAQPS-OECA MACT Implementation Forum

OAQPS/ITPID/PIRG	Gil Wood	919-541-5272
OECA/OC	Sally Mitoff	202-564-70 12

### Unified Air Toxics Website Contact:

OAQPS/ITPID	Nancy Pate	919-54 1-5347
-------------	------------	---------------

### OAQPS/Emission Standards Division:

Coatings & Consumer Products (CCPG)	919-541-7946
Combustion Group (CG)	919-541-5578
Organic Chemicals Group (OCG)	919-541-5673
Policy, Planning & Standards Group ( <b>PPSG</b> )	919-541-5627
Metals Group ( <b>MG</b> )	919-541-5601
Mineral & Inorganic Chemicals Group ( <b>MICG</b> )	919-541-5422
Waste & Chemical Processes Group ( <b>WCPG</b> )	<b>919-541-5671</b>