

US EPA ARCHIVE DOCUMENT

Office of Solid Waste (5305W)

**Hazardous Waste Combustion (HWC) National
Emission Standards for Hazardous Air Pollutants
(NESHAP) Fact Sheet:**



**CLEAN AIR ACT (CAA) DELEGATION FOR
THE HWC NESHAP**

EPA promulgated the Phase 1 Maximum Achievable Control Technology (MACT) standards, also called the National Emission Standards for Hazardous Air Pollutants (NESHAP), for hazardous waste burning incinerators, cement kilns, and lightweight aggregate kilns on September 30, 1999 (64 FR 52828). These standards were promulgated under the joint authority of the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA). Since 1999, we have issued several technical corrections and amendments to the Phase 1 HWC NESHAP to improve its implementation. In addition, we have also revised specific sections in response to vacatur orders by the Court of Appeals for the District of Columbia Circuit. Most notably, we promulgated negotiated interim emission standards that temporarily replace the 1999-promulgated standards, and we extended the compliance date by one year. This fact sheet summarizes, for the convenience of all interested stakeholders, regulators, and industry, the delegation process under section 112(l) of the CAA (40 CFR Part 63, Subpart E) and relates this process specifically to the HWC NESHAP.

How Will the HWC NESHAP¹ Be Implemented and Enforced?

Authority to Implement and Enforce

State, Local, and Tribal Air Pollution Control Agencies (S/L/T) can implement and enforce the HWC NESHAP by accepting delegation under section 112(l) of the Clean Air Act (promulgated into regulation as 40 CFR Part 63, subpart E) and/or by having an approved Title 5 operating permit program. Section 112(l) allows for EPA to approve S/L/T programs to implement and enforce emission standards for pollutants subject to section 112 regulations, such as the HWC NESHAP. If the S/L/T chooses not to receive formal delegation under section 112(l), then it cannot be the primary enforcement authority for the HWC NESHAP. Also, where a S/L/T has not received delegation, a source must then report all compliance monitoring, recordkeeping,

¹ 64 FR 52991, September 30, 1999.

and reporting requirements to both the S/L/T and the EPA Regional Office.² This includes applicable general provisions requirements and any additional requirements specific to a NESHAP. Furthermore, S/L/Ts that do not receive delegation cannot exercise delegable provisions' authorities. For instance, the authority to approve minor changes to the monitoring requirements of 63.1209 (g) or to approve comprehensive performance test plans are not granted to you (the S/L/T) if you do not accept delegation through section 112(l) (this does not prevent you from reviewing documents and providing comments, but does not allow for you to approve documents). For a complete list of delegable authorities, see 40 CFR 63.91(g). In addition, we have recently proposed a rule that provides clarifications to the delegable provisions' authorities in each NESHAP, including the HWC NESHAP. The purpose of the clarifications to each NESHAP's delegation provisions is to plainly state which authorities can be delegated to S/L/Ts and which authorities must be retained by EPA. In some cases, there were no delegation provisions, incorrect delegations in existing NESHAP, or there were inconsistencies of the delegable authorities among the NESHAP. Thus, this rulemaking adds delegation provisions' sections where needed, corrects delegation provisions where needed, and makes the delegation provisions consistent among the NESHAP.

A S/L/T's Title 5 permitting authority is independent of its delegation status for any NESHAP under section 112(l). All State and Local Air Pollution Control Agencies (S/L) and some Tribes have either interim approval or approved Title 5 operating permit programs in which they have committed to implement and enforce all NESHAP. In these approvals, the S/L/Ts have also demonstrated that they have the legal authority, resources, and expertise to implement and enforce all NESHAP. Therefore, regardless of whether the S/L/Ts have received formal delegation of the HWC NESHAP under section 112(l), they must incorporate this (and all other NESHAP) into Title 5 permits and be able to implement and enforce them. However, receiving delegation under section 112(l) for the HWC NESHAP by S/L/Ts, in addition to having an approved Title 5 program, has advantages. It will ensure clear and consistent requirements for owners, operators, affected sources, potential regulators, and the public, and will indicate who is the primary implementation and enforcement authority. As mentioned previously, it also allows S/L/Ts to exercise any delegable provisions' authorities and therefore, avoids duplicative reviews and reporting requirements.

Incorporation of HWC NESHAP into Title 5 Permits

Under 40 CFR §70.4(a) and section 502(d) of the CAA, S/L/Ts were required to submit to the Administrator, a 40 CFR Part 70 (Title 5) permitting program by November 15, 1993. As mentioned earlier, all S/Ls and some Tribes currently have interim approval or approved Title 5 permitting programs. Thus, S/L and those Tribes have the authority to administer the HWC NESHAP by incorporating the subpart EEE requirements into Title 5 permits as permit terms and conditions for operation.

The Phase 1 HWC NESHAP was promulgated on September 30, 1999. Since September 1999, there have been several technical corrections, technical amendments, and more recently, two

² In certain cases, EPA can waive the dual reporting requirements in the S/L/T delegation agreement. See 40 CFR §63.12(c) for specifics.

final rules that affect the Phase 1 HWC NESHAP. As a result of the one year extension to the compliance date, affected sources are required to achieve compliance with the standards by September 30, 2003. Sources subject to Title 5 permitting requirements for the first time as a result of the HWC NESHAP, were required to submit an application for a permit within 12 months of promulgation. Since Title 5 permits must be renewed every five years, sources that had an existing Title 5 permit at the time of promulgation should have revised their permit to include HWC NESHAP terms and conditions if they had three or more years remaining until renewal. To modify the permit, sources should have submitted a significant Title 5 permit modification to their permitting authorities within 18 months of promulgation. If there were less than three years remaining until renewal, the source should have submitted a significant permit modification upon renewal. The above time frames are also applicable for inclusion of the February 13, 2002 negotiated interim standards, since some of the 1999-promulgated HWC NESHAP standards have been revised. However, in cases where a source's Title V permit only references "subpart EEE", there would be no need to modify the permit. Sources should contact their permitting authority regarding whether a minor, a significant, or no permit modification is needed.

Even though EPA may delegate authority to implement and enforce the HWC NESHAP to S/L/Ts who have received delegation under section 112(l) and/or have approved Title 5 permit programs, EPA ultimately retains the authority to enforce this or any other NESHAP.

Current Subpart E Delegation Options

On November 26, 1993, we (EPA) published guidance in a final rule (40 CFR Part 63, Subpart E) addressing approval of S/L/T programs and delegation of Federal authorities, and subsequently amended these provisions on September 14, 2000 at 65 FR 55810. These rulemakings established guidance for EPA approval and delegation of section 112 requirements as they are promulgated (straight delegation), and by rule adjustment, substitution of requirements, state program approval process, equivalency by permit process, and partial approval. The latter five are considered alternative approval options and are for S/L/Ts that have, or want to develop, applicable rules or requirements pursuant to 112 authority.

The Subpart E approval process is initiated when you (S/L/T), apply for delegation of section 112 rules without changes or for delegation under any of the other five alternative approval options. Under each of these delegation approval options, with the exception of straight delegation, you must demonstrate that each of your rules, standards, or requirements (unless using equivalency by permit) are no less stringent than the Federal rule, emission standard, or requirement that would otherwise apply to that same affected source. The final amendment rule (see 65 FR 55811) provides a variety of enforcement mechanisms that may be used according to the delegation option you choose.

As previously mentioned and explained in more detail below, there are various approaches S/L/Ts can take when applying for delegation. It can be beneficial for a source to know whether its S/L/T has received delegation of an individual NESHAP, since this will indicate who reviews and approves compliance reports and alternative requirements. To find out the delegation status for this NESHAP or any other standards, you should contact your appropriate delegation or 112 standards representative. If you are not aware of a contact for your S/L/T, you can begin your search by visiting the EPA 112(l) website at: [http://www.epa.gov/ttnatw01/112\(l\)/112-lpg.html](http://www.epa.gov/ttnatw01/112(l)/112-lpg.html).

Straight Delegation

The option for approving and delegating unchanged Federal rules or requirements is known as Straight Delegation. Under this process, you may receive delegation for Federal standards and requirements so long as you implement and enforce the Federal MACT standards as they have been written in the promulgated requirements. You may also receive delegation of authority for unchanged rules and standards that we will promulgate in the future. In many cases, S/Ls have already established delegation agreements to receive automatic delegation of all new (unchanged) NESHAP. Also, S/L/Ts may incorporate by reference, individual NESHAP on a periodic basis in conjunction with their internal rulemaking process. With respect to the following five (alternative) options, straight delegation is the more commonly used option. These provisions are addressed in 40 CFR §63.91 and in various guidance memoranda and documents, including the “Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E”.

Rule Adjustment

The Rule Adjustment option is defined as delegation to implement a Federal standard through approval of a S/L/T’s rule(s) that makes only minor adjustments such that it is structurally very similar to a Federal rule. Minor adjustments that may be approved, such as substituting an emission limitation which is more stringent than the Federal standard (e.g., 98% HAP control out of the stack as opposed to 95% control in the NESHAP standard), are listed in 40 CFR §63.92. Each of your adjustments must be clearly no less stringent (i.e., must not be ambiguous regarding the stringency of any proposed adjustment) than the corresponding requirement in the Federal standards. The criteria that we use to determine whether a State’s rule is equivalent to a Federal rule are found in 40 CFR §63.92.

Substitution of Requirements

The Substitution of Requirements Option, also referred to as rule substitution, is defined as delegation to implement and enforce a Federal standard through approval of a S/L/T’s rules and/or requirements that replaces a Federal rule more or less wholesale and usually in a significant way. This means that your rule is structurally different than the Federal rule. This option may also be used when your rule does not meet the criteria of the rule adjustment option because it is not “unambiguously no less stringent” than the Federal rule. An example of this would be if your rule achieves equivalent emission reductions, but through a combination of

levels of control and compliance and enforcement measures not addressed by the Federal Rule. Most importantly, your rules and requirements must be equivalent to, or no less stringent than the Federal standard. These provisions are found in 40 CFR §63.93.

State Program Approval Process (SPA)

The SPA Process option is defined as delegation to implement and enforce some or all NESHAP alternative requirements through development of terms and conditions in Title 5 operating permits, rather than through approval of each individual substantive rule. This is more an approval for your air toxics program through the Title 5 operating permit program. It is intended to eliminate the redundant review of generic requirements that apply to multiple source categories each time we review your alternative requirements for a new source category. In other words, it allows for S/L/Ts to bundle regulations or requirements for multiple source categories and submit them as a group for more efficient processing.

The SPA process consists of two steps. The first is an “up-front” approval where you submit your upfront program and we approve it based upon your commitment to develop appropriate alternative requirements. In the second step, you submit your alternative requirements and we review them to ensure that they are indeed no less stringent than the Federal rules and requirements. The alternative requirements may be in the form of rules, permits, or other enforceable mechanisms. Finally, the alternative requirements must be written into the operating permit in the form of the Federal standard and once verified, approval can be granted to you to implement and enforce your program in place of the section 112 emissions standards. These provisions are in 40 CFR §63.97.

Equivalency by Permit Process (EBP)

The EBP Process is similar in structure to the SPA option. However, the difference between the two processes is that the EBP option does not require that the alternative requirements be written in the form of the Federal standard in order to demonstrate equivalency. The EBP process allows you to substitute alternative requirements and authorities that take the form of permit terms and conditions instead of source category regulations. This means that you can obtain delegation without having to go through a rulemaking at the S/L/T level to establish source category-specific regulations.

There are three steps in the EBP process. The first is up-front approval of your EBP program. Approval is contingent upon your including terms and conditions that are no less stringent than the Federal standard in the Title 5 permit. The second step is the review and approval of your alternative section 112 requirements in the form of pre-draft Title 5 permit terms and conditions. The purpose of the “pre-draft” is for us to identify potential issues with the equivalency determination so that the operating permit issuance process is not lengthened (due to additional consideration needed since your alternative requirements do not need to be written in the Federal standard form). In the third step, the approved pre-draft terms and conditions are incorporated into specific Title 5 permits and the permit issuance process. You receive delegation to implement the alternative requirements only when the Title 5 permit (containing those requirements) has been issued. The overall benefit of the EBP option is that it provides

delegation authority that does not require you to go through the rulemaking process to establish source category specific regulations when only a small number of sources exist in your jurisdiction. See 40 CFR §63.94 for these provisions.

Partial Approval

For any S/L/T who cannot or chooses not to take full delegation of an entire standard (although it is encouraged to take full delegation whenever possible), the Partial Approval option is available. There are two major types of partial delegation: you can accept the authority to implement and enforce only some of the requirements in a section 112 regulation; or you can accept the authority to implement and enforce all the requirements of a section 112 or S/L/T rule, but only for a defined universe of sources.

An example of the latter would be to accept authority for all requirements for major sources, but not for area sources. There are two ways to obtain partial delegation: you can request partial delegation; or you can request full delegation, but you may only be granted partial delegation when a portion of your alternative requirements or enforcement authority is found unapprovable.

Guidance on partial approval is available in “Technical Assistance for the Submission of State/Local/Tribal Requests for Delegation and Approval of Alternatives to section 112 Rules, Programs, or Requirements” (40 CFR 63, Subpart E).

What Do the Alternative Approval Options Mean for S/L/Ts?

These alternative approval options can be helpful for those of you that have existing rules and requirements, both air and RCRA, that regulate air emissions from HWCs. If you have such rules and requirements, you may want to consider working with your EPA Regional Office to get your rules and requirements for HWCs approved, through Subpart E, as equivalent to the HWC NESHAP. For instance, if your rules and requirements are approved as a substitute to the HWC NESHAP, subject sources will continue to comply with your rules and requirements which they are familiar with, rather than complying with both your rules and requirements and the Federal requirements.

General Approval Criteria for Delegations Under Subpart E

To obtain delegation under any of these approval processes, you must demonstrate that you have met certain basic approval criteria that are listed in 40 CFR §63.91, as well as any additional process specific approval criteria that are included in the sections addressing the substitution delegation mechanisms. In general, Title 5 program approval, whether interim or final, is sufficient to demonstrate that you have satisfied the Subpart E general approval criteria in 40 CFR §63.91, at least for sources permitted under your Title 5 program. Otherwise, you can obtain delegation for your rule or program by meeting the following criteria in 40 CFR §63.91(d)(3)(i)-(v):

- you must demonstrate to us that you have adequate legal authority and resources to implement and enforce your rule or program upon approval, in addition to assuring that all sources within your jurisdiction will comply with each applicable section 112 rule;
- you must submit a copy of each of your statutes, regulations, and other requirements that contain the appropriate provisions granting authority to implement and enforce your rule or program upon approval;
- you must provide an expeditious implementation schedule for the rule or program upon approval; and
- you must submit a plan that assures expeditious compliance by all sources subject to the rule or program.

Specific approval criteria and administrative process requirements for delegation under Subpart E are summarized at 64 FR 1884 and 65 FR 55837, and in various guidance memoranda and documents, including “Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E” (EPA-453/R-93-040, November 1993). For the latest rulemaking information and a complete listing of guidance and policy documents related to section 112(l), please visit the 112(l) website at: [http://www.epa.gov/ttnatw01/112\(l\)/112-lpg.html](http://www.epa.gov/ttnatw01/112(l)/112-lpg.html).

In the following flow diagrams, Figure 1 depicts the general administrative procedure for obtaining delegation, while Figures 2 through 6 depict the administrative procedures for the delegation approval options discussed in this fact sheet (with the exception of Partial Approval).

FIGURE 1. ADMINISTRATIVE PROCEDURES FOR DELEGATION UNDER SUBPART E

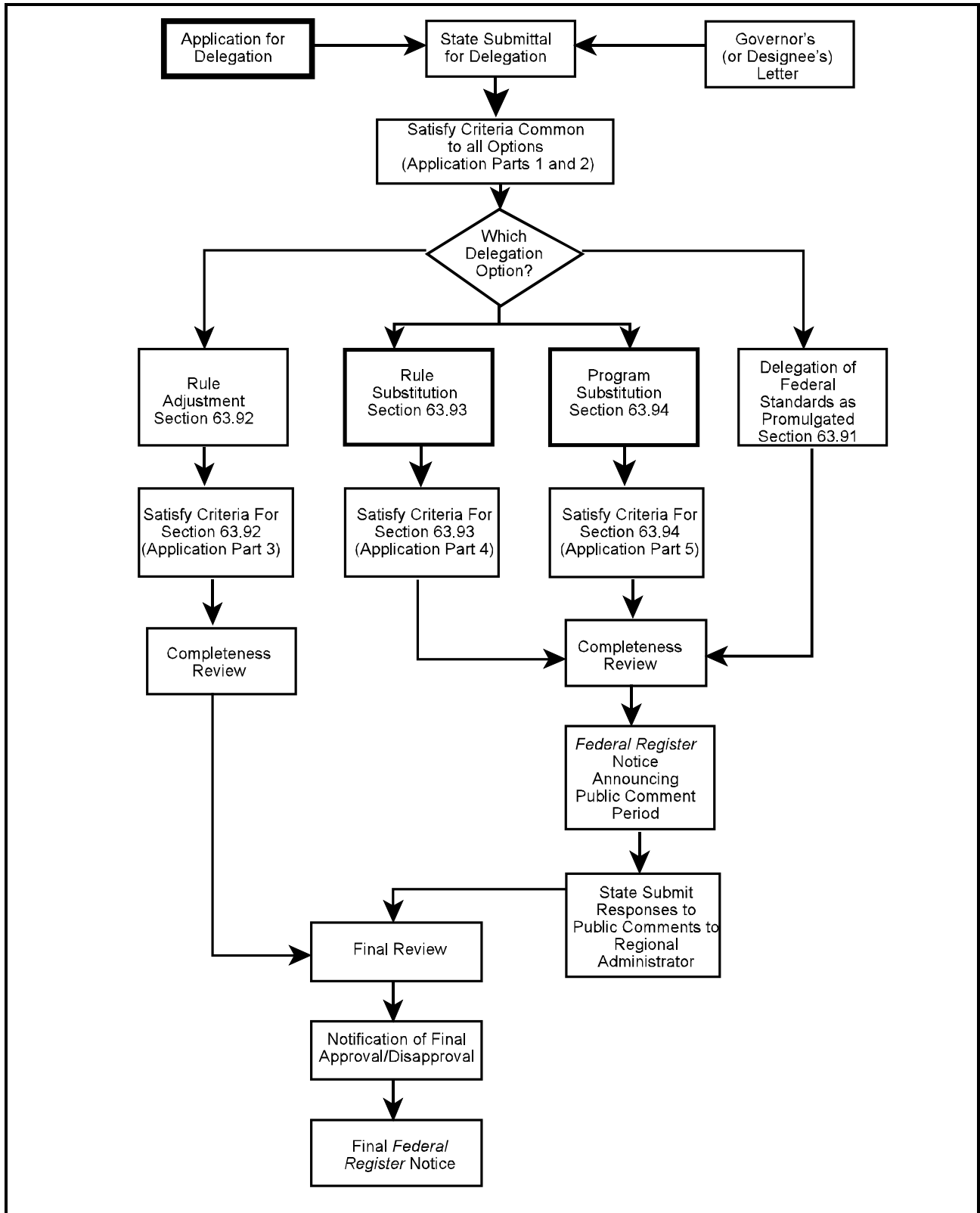


FIGURE 2. §63.91: STRAIGHT DELEGATION

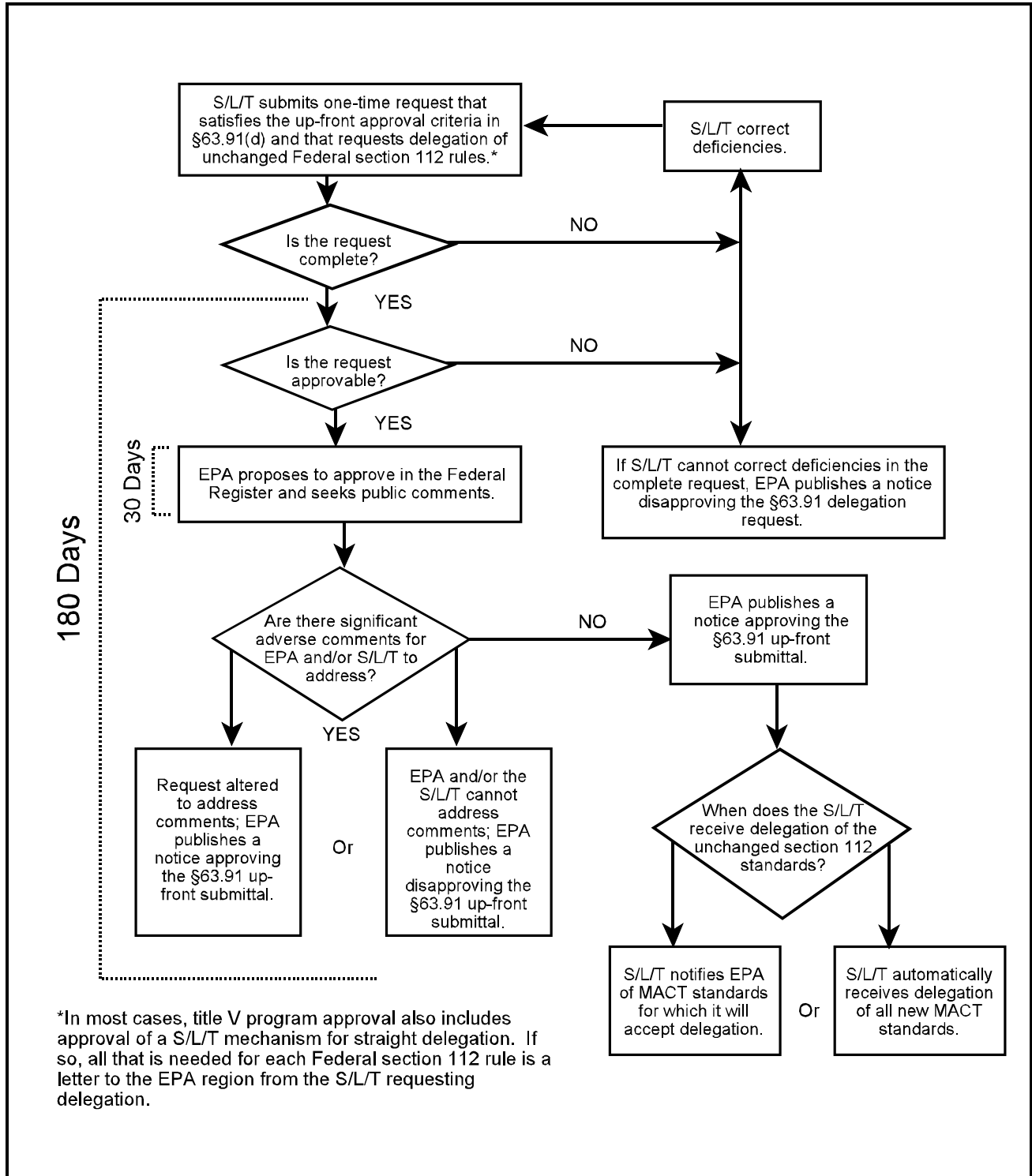


FIGURE 3. §63.92: RULE ADJUSTMENT

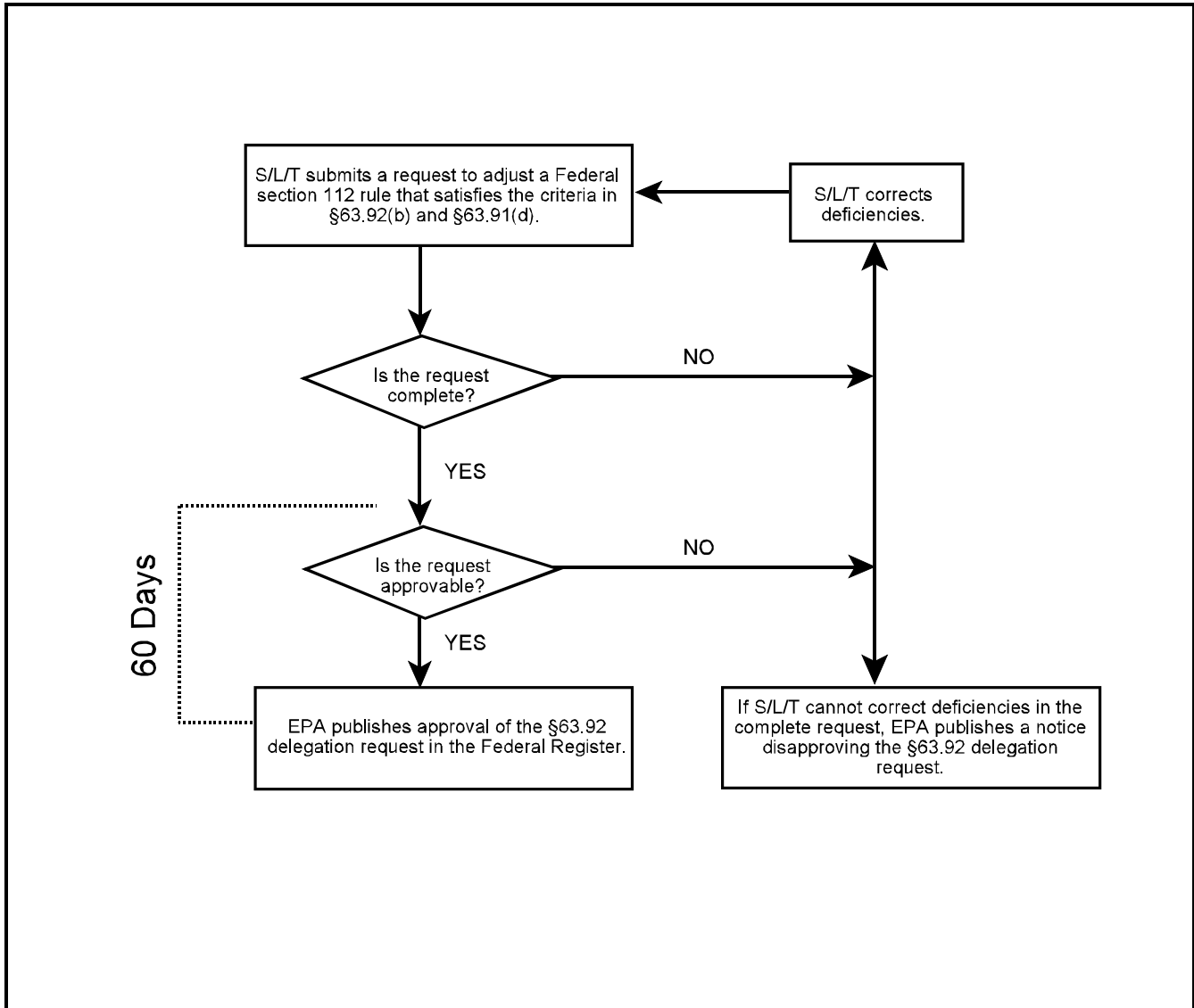


FIGURE 4. §63.93: SUBSTITUTION OF REQUIREMENTS

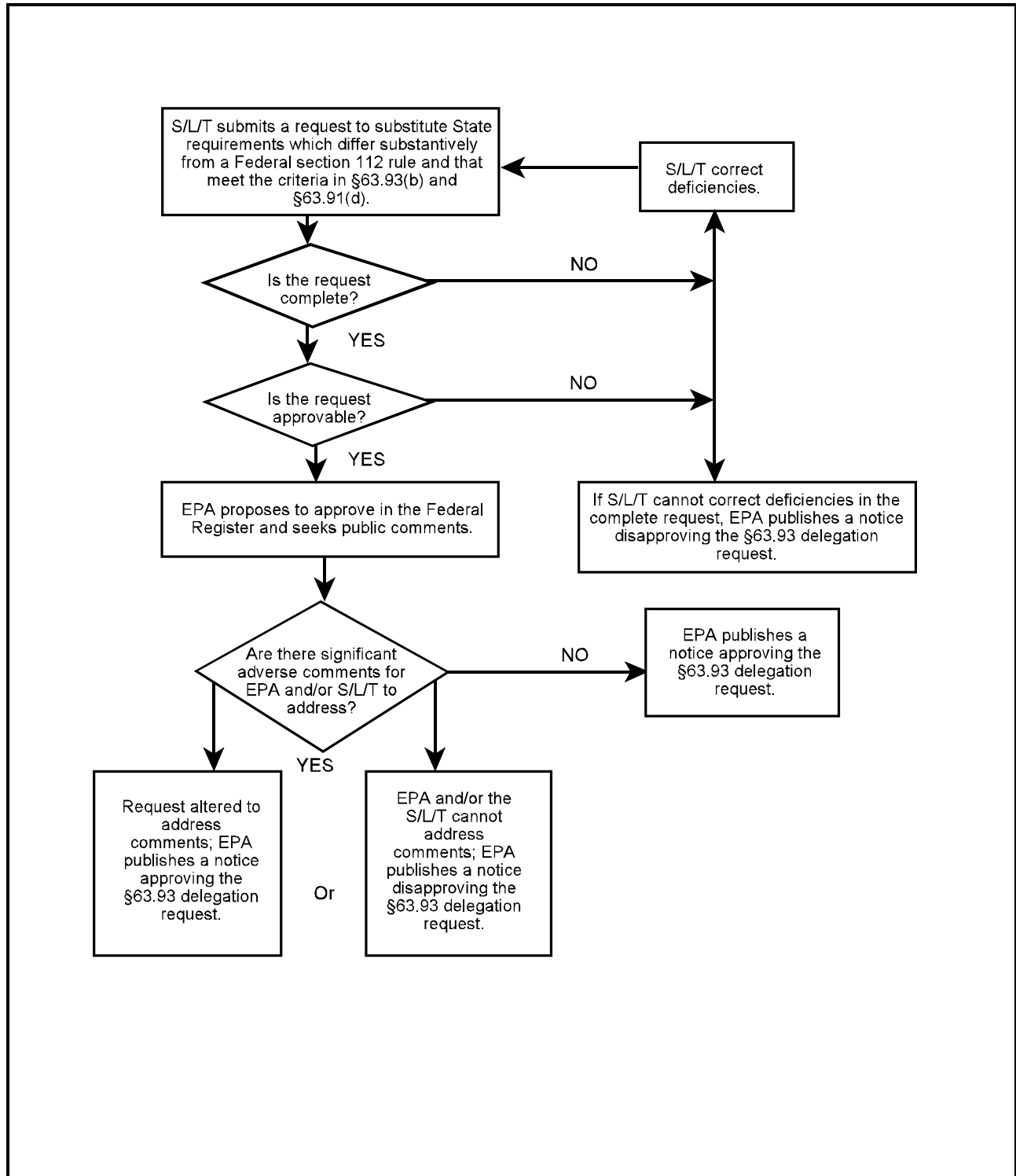


FIGURE 5a. §63.94: EQUIVALENCY BY PERMIT UP-FRONT APPROVAL*

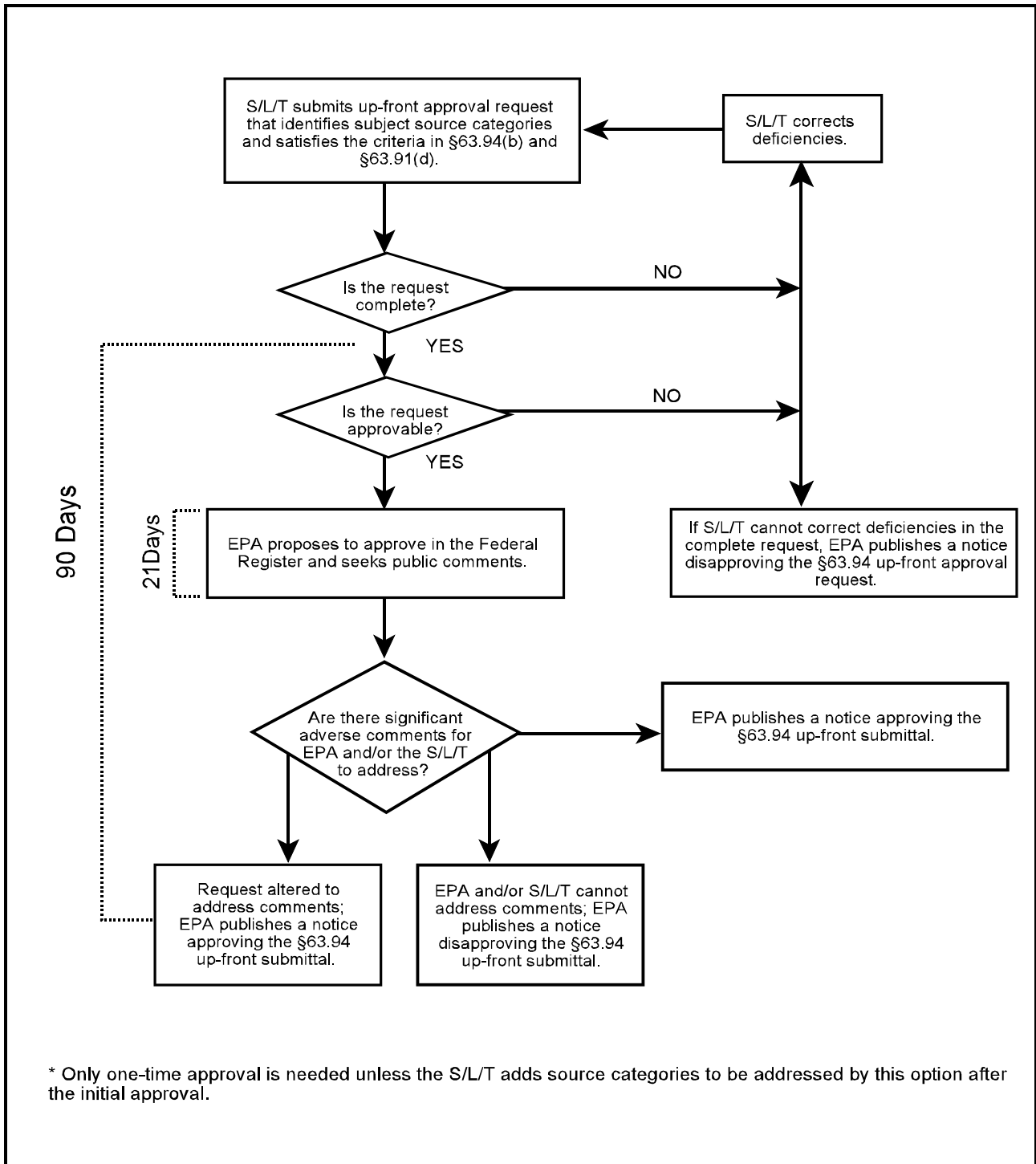


FIGURE 5b. §63.94: EQUIVALENCY BY PERMIT APPROVAL OF ALTERNATIVE REQUIREMENTS*

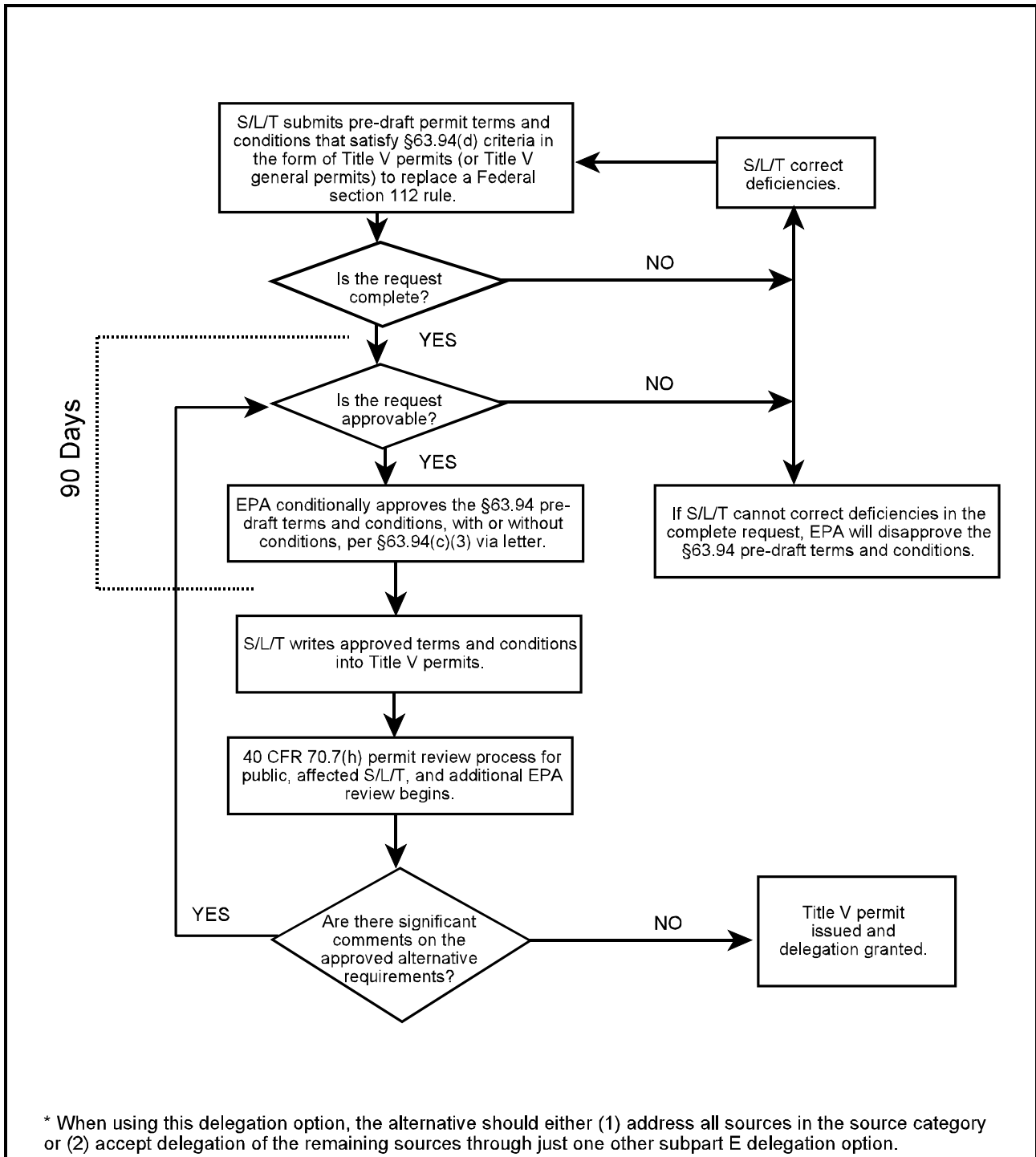


FIGURE 6a. §63.97: STATE PROGRAM APPROVAL UP-FRONT APPROVAL*

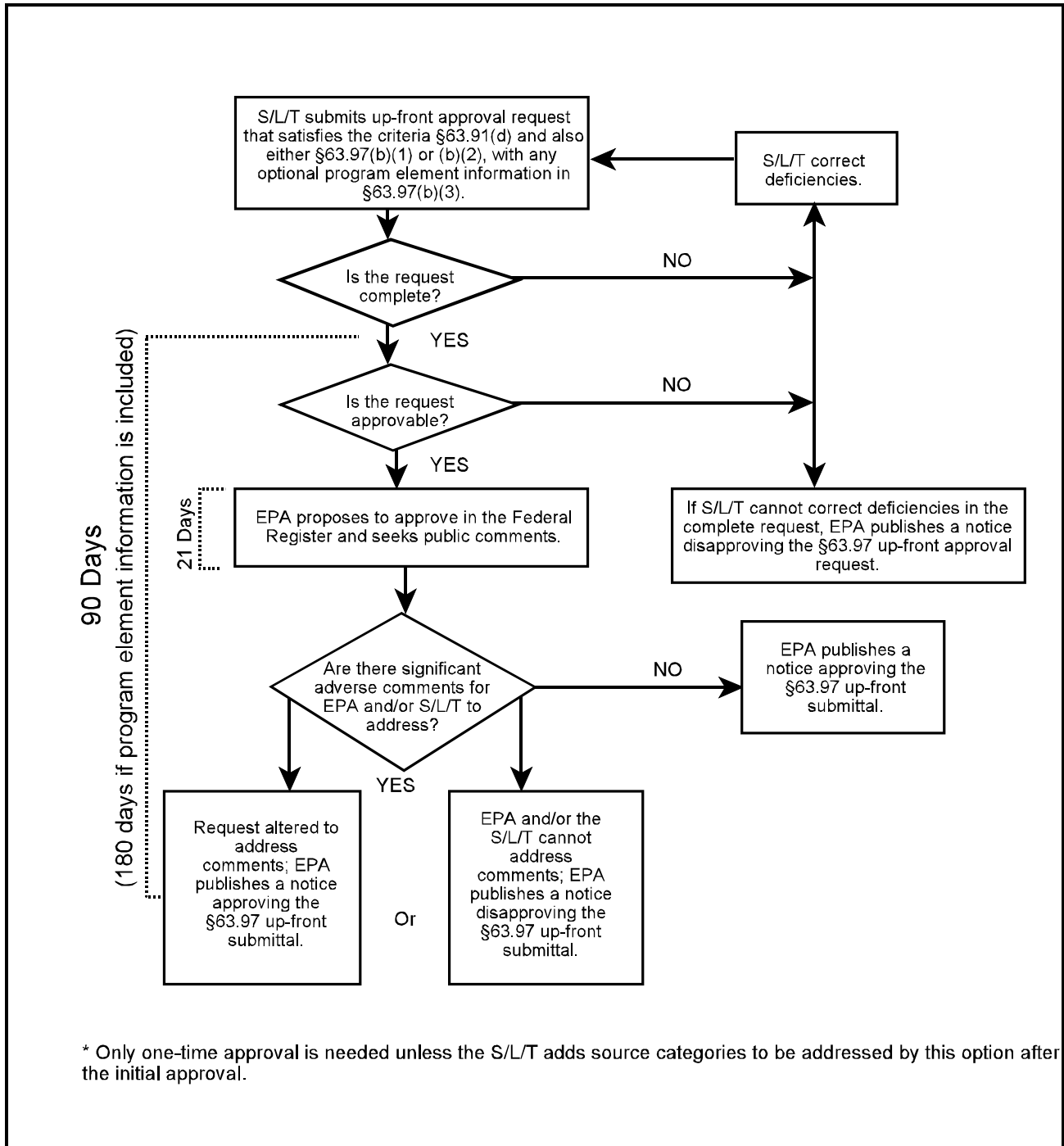
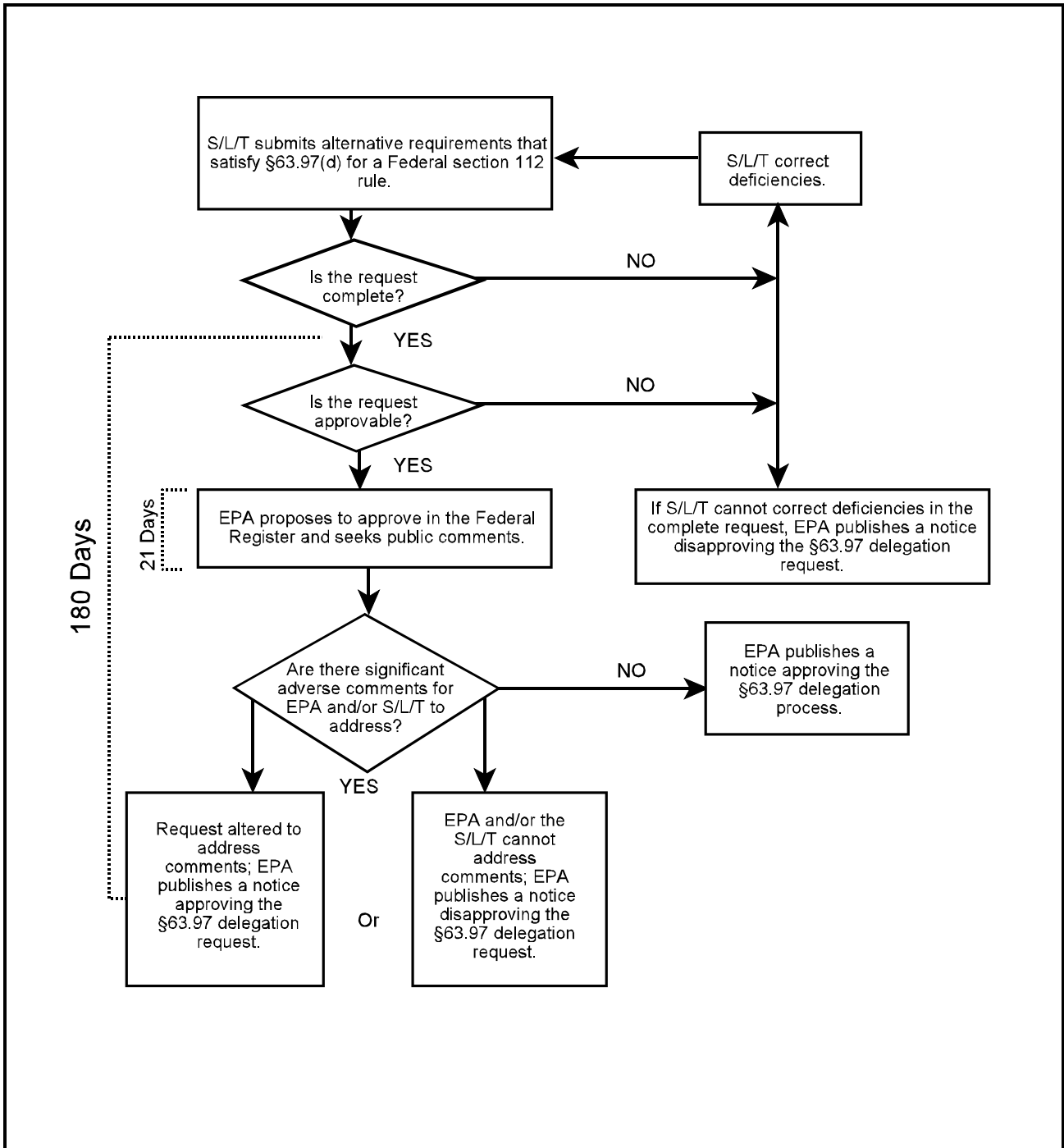


FIGURE 6b. §63.97: STATE PROGRAM APPROVAL ALTERNATIVE REQUIREMENTS



For More Information

HWC NESHAP Interim Standards Rule – *Interim Standards for Hazardous Air Pollutants for Hazardous Waste Combustors* (67 FR 6792, February 13, 2002). See Part Four, section II., *How Is This Rule Delegated Under the CAA?* for delegation of revisions to the 1999 promulgated standards.

Internet Address: <http://www.epa.gov/epaoswer/hazwaste/combust/comb-02.htm>.

HWC NESHAP Final Rule - *Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors* (64 FR 52828, September 30, 1999). See 52991 specifically for discussion of state delegation for the HWC NESHAP rule.

Internet Address: <http://www.epa.gov/hwcmact/preamble.htm>.

CAA Delegation 112 (I) Regulations - *Hazardous Air Pollutants: Amendments to the Approval of State Programs and Delegation of Federal Authorities; Final Rule* (65 FR 55810, September 14, 2000).

Internet Address: [http://www.epa.gov/ttnatw01/112\(I\)/112-lpg.html](http://www.epa.gov/ttnatw01/112(I)/112-lpg.html).

Contact: Tom Driscoll at driscoll.tom@epa.gov or (919) 541-5135; Kathy Kaufman at kaufman.kathy@epa.gov or (919) 541-0102.

CAA Delegation Authorities - *Memorandum: Delegation of 40 CFR Part 63 General Provisions Authorities to State Air Pollution Control Agencies* (July 10, 1998).

Internet Address: <http://www.epa.gov/ttn/uatw/genprov/delauth9.txt>.

Contact: Tom Driscoll at driscoll.tom@epa.gov or (919) 541-5135; Kathy Kaufman at kaufman.kathy@epa.gov or (919) 541-0102.