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(AR-18J)

Ainars Z. Silas, Supervisor  
North/South Major Facilities  
Air Quality Division  
Minnesota Pollution Control Agency  
520 Lafayette Road  
St. Paul, Minnesota 55155

Dear Mr. Silas:

The purpose of this letter is to give the U. S. Environmental Protection Agency's (EPA) recommendation on whether Section 112(g) of the Clean Air Act applies to a proposed modification for New Flyer USA in St. Cloud, Minnesota. We received a letter from your office, along with other correspondence, relating to an application from New Flyer USA requesting approval to modify its existing manufacturing lines and increase its emissions of hazardous air pollutants (HAPs). According to this correspondence, it is the Minnesota Pollution Control Agency's (MPCA) position that the proposed increase would subject New Flyer USA to 112(g) and the requirements for a case-by-case maximum achievable control technology (MACT) determination under 40 C.F.R. §§ 63.40 to 63.44. This application also raises concerns of possible intentional circumvention of the applicable requirements under 112(g).

Section 112(g) calls for a permitting agency to determine MACT emission limitations on a case-by-case basis for the construction, reconstruction, or modification of any major source of HAPs, where a MACT standard has not yet been promulgated. To avoid the requirement to apply a MACT to new construction, the owner or operator of a source may limit the source's potential emissions below the major source thresholds for HAPs through a federally-enforceable mechanism, such as in a synthetic minor construction permit. The major source thresholds for HAPs are 10 tons per year for any single HAP and 25 tons per year of any combination of HAPs. Sources that wish to avoid being subject to the MACT requirements and choose to limit their HAP emissions in this way must do so before beginning construction of the new major source or major modification. In acting upon an application for a new synthetic minor permit or a change to an existing synthetic minor permit, the permitting authority must

consider the possibility that a source is trying to circumvent 112(g).

Circumvention is prohibited by 40 C.F.R. § 63.4(b), which states:

No owner or operator subject to the provisions of this part shall build, erect, install, or use any article, machine, equipment, or process to conceal an emission that would otherwise constitute noncompliance with a relevant standard. Such concealment includes, but is not limited to-- (1) The use of diluents to achieve compliance with a relevant standard based on the concentration of a pollutant in the effluent discharged to the atmosphere; (2) The use of gaseous diluents to achieve compliance with a relevant standard for visible emissions; and (3) The fragmentation of an operation such that the operation avoids regulation by a relevant standard. (Emphasis added)

In determining whether circumvention has occurred under 112(g), EPA considers factors similar to those it would use in determining whether circumvention has occurred in New Source Review (NSR) construction permitting. For instance, we consider the length of time between a single source's applications for synthetic minor permits to avoid NSR applicability, and the functional relationships among projects constructed under different synthetic minor permits. EPA looks closely at applications to relax synthetic minor limitations less than a year after operation of the new construction or modification begins. If a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation on the capacity of the source, such as relaxation of a synthetic minor emissions cap, then the applicable NSR requirements apply to the source or modification as though construction had not yet commenced on the source or modification.

Similarly, for the purposes of reviewing possible cases of circumvention of 112(g) review, EPA reviews synthetic minor permits issued to a single source within a period of up to 5 years. In cases in which we determine that the source intended to circumvent the Section 112 requirements, EPA will consider the initial project and any subsequent projects together to determine whether construction, reconstruction or modification of a major source has occurred.

New Flyer USA originally submitted an application requesting synthetic minor limits for its proposed new source on

July 9, 1998. New Flyer USA sought in its application authority to construct and operate two separate manufacturing lines. MPCA issued a permit October 27, 1998, which allowed the source to take limits of 9.0 tons per year for any single HAP and 24.0 tons per year for any combination of HAPs to avoid classification of the facility as a major source under Section 112 of the Act. New Flyer constructed the facility at a "greenfield site" as defined under 40 C.F.R. § 63.41, and the construction occurred after June 29, 1998, which is the effective date for Section 112(g)(2)(B) in Minnesota.

New Flyer USA submitted a new application to the MPCA on July 24, 2000, requesting a relaxation of the limitations in its initial 112(g) permit, thereby allowing additional emissions of 9.9 tons per year for any single HAP and 24.9 tons per year for any combination of HAPs at its existing manufacturing lines. Thus, it requested a relaxation of the existing requirements limiting the source to a synthetic minor. The permit application also requested modifications to the existing lines so that they can be used to construct a new type of bus, but it did not request approval to construct any new manufacturing lines at the facility. The EPA views any new construction, any proposal for new construction, or any relaxation of synthetic minor limits within 5 years of the initial permit as evidence of a potential phased construction for a source. Based on our positions and the facts stated above, EPA agrees with MPCA's determination that a case-by-case MACT emission limitation determination would be required under 112(g) for the proposed emission increases for HAPs at New Flyer USA and that the requirements of 40 C.F.R. §§ 63.40 through 63.44 apply.

If you have any questions regarding this letter, please contact Shaheerah Fateen, Environmental Engineer, at (312) 353-4779.

Sincerely yours,

/s/

Robert B. Miller, Chief  
Permits and Grants Section