

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JAN 5 2011

John Benedict, Director
Division of Air Quality
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

Dear Mr. Benedict:

The U.S. Environmental Protection Agency (EPA) has previously delegated to the State of West Virginia (West Virginia) the authority to implement and enforce various federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS), which are found at 40 C.F.R. Parts 60, 61 and 63.¹ In those actions, EPA also delegated to West Virginia the authority to implement and enforce any future federal NESHAP or NSPS on the condition that West Virginia legally adopt the future standards, make only allowed wording changes, and provide specified notice to EPA.

In a letter dated April 6, 2010, West Virginia informed EPA that West Virginia had updated its incorporation by reference of federal NESHAP and NSPS to include many such standards, to the extent referenced in 40 C.F.R. Parts 60, 61, and 63, effective June 1, 2009. West Virginia noted that it understood that it was automatically delegated the authority to implement these standards. West Virginia committed to enforcing the standards in conformance with the terms of EPA's previous delegations of authority. West Virginia made only allowed wording changes.

West Virginia provided copies of the revised West Virginia Legislative Rules which specify the NESHAP and NSPS which West Virginia has adopted by reference. These revised Legislative Rules are entitled 45 CSR 34 – "Emission Standards for Hazardous Air Pollutants," and 45 CSR 16 – "Standards of Performance for New Stationary Sources." These revised Rules have an effective date of June 1, 2010.

Accordingly, EPA acknowledges that West Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which West Virginia has adopted by reference in West Virginia's revised Legislative Rules 45 CSR 34 and 45 CSR 16, both effective on June 1, 2010.

Please note that on December 19, 2008, in *Sierra Club v. EPA*,² the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions from the General Provisions of 40 C.F.R. Part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued the mandate vacating these SSM exemption provisions which are found at 40 C.F.R. § 63.6(f)(1) and (h)(1).

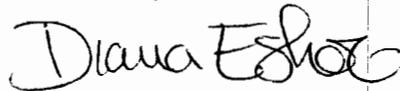
¹ EPA has posted copies of these actions at : <http://www.epa.gov/reg3artd/airregulations/delegate/wvdelegation.htm>.

² *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)

Accordingly, EPA no longer allows sources the SSM exemption as provided for in the vacated provisions at 40 C.F.R. § 63.6(f)(1) and (h)(1), even though EPA has not yet formally removed the SSM exemption provisions from the General Provisions of 40 C.F.R. Part 63. Because West Virginia has incorporated 40 C.F.R. Part 63 by reference, West Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 C.F.R. Part 63 due to the Court's ruling in *Sierra Club v. EPA*.

EPA appreciates West Virginia's continuing NESHAP and NSPS enforcement efforts and also West Virginia's decision to take automatic delegation of additional and more recent NESHAP and NSPS by adopting them by reference.

Sincerely,



Diana Esher, Director
Air Protection Division

