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

APR 16 2012

Mr. George S. Aburn, Jr.
Director, Air and Radiation
Management Administration
Maryland Department of the
Environment
1800 Washington Boulevard
Baltimore, Maryland 21230

Dear Mr. Aburn:

Thank you for your letter of March 7, 2012 informing the United States Environmental Protection Agency (EPA) that the State of Maryland (Maryland) has acted to obtain updates of its existing delegations of authority to implement and enforce federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS).

As you know, EPA's previous delegations to Maryland of the authority to implement and enforce various NESHAP found at 40 CFR parts 61 and 63 and of various NSPS found at 40 CFR part 60 provide that Maryland may obtain automatic delegation of authority to implement and enforce updated or additional NESHAP and NSPS.[1] For Maryland to obtain automatic delegation of additional standards, the primary requirement is that Maryland must have included the updated or additional standards by reference into Maryland's regulations. In some cases Maryland must also have provided notice to EPA and/or committed to enforcing the standards in accordance with the provisions of the applicable previous EPA delegation(s) of authority to Maryland.

In your letter you notify EPA that Maryland has "acted to obtain updates to its delegations of authority to implement and enforce NESHAP and NSPS to include all current and future:

- NESHAP under 40 CFR Part 63; and
- NSPS under 40 CFR Part 60."

You note that the Code of Maryland Regulations (COMAR) specifies Maryland's requirements pertaining to control of NESHAP and NSPS sources. You state that "[i]n accordance with COMAR 26.11.15.02, NESHAP sources in Maryland may not be constructed, modified, or operated in any way which will result in violation of any provisions of 40 CFR Part

[1] EPA has posted copies of these delegation actions at:
http://www.epa.gov/reg3artd/airregulations/delegate/mddelegation.htm.

63." You also note that "[i]n accordance with COMAR 26.11.06.12, NSPS sources in Maryland may not be constructed, modified, or operated in any way which will result in violation of any provisions of 40 CFR Part 60."

You explain that Maryland has updated the COMAR to specify that Maryland has adopted all current and future NESHAP found at 40 CFR part 63 and NSPS found at 40 CFR part 60 by reference. You further explain that Maryland accomplished this by updating its definitions of a NESHAP source, found at COMAR 26.11.01.01B(21), and its definition of a NSPS source, found at COMAR 26.11.01.01B(23). You state that Maryland intends to implement all delegated current and future NESHAP found at 40 CFR part 63 and NSPS found at 40 CFR part 60 in conformance with the terms of the applicable previous EPA delegations of authority to Maryland.

You provided EPA with copies of notices Maryland published in the Maryland Register proposing and finalizing the revised COMAR definitions of a NESHAP source and of a NSPS source.

EPA notes that the final action notice which Maryland provided, dated February 24, 2012, confirms Maryland's revision of Title 26, Department of the Environment, Subtitle 11, Air Quality to adopt the revised definitions. The notice states that:

"On February 9, 2012, the Secretary of the Environment adopted amendments to:

(1) Regulation .01 under COMAR 26.11.01 General Administrative Provisions; and

(2) Regulation .12 under COMAR 26.11.06 General Emission Standards, Prohibitions, and Restrictions.

This action, which was proposed for adoption in 38:25 Md. R. 1647---1648 (December 2, 2011) has been adopted as proposed.

Effective Date: March 5, 2012."

EPA further notes that the proposed action notice which Maryland provided, dated December 2, 2011, specifies Maryland's proposed updates to the NESHAP source and NSPS source definitions.

Maryland states in the proposed action notice that it is proposing to revise Regulation .01 under COMAR 26.11.01 - General Administrative Provisions, as follows:

".01 Definitions

A. (text unchanged)
B. Terms Defined
(1) --- (20-1) (text unchanged)

(21) --- 'National Emission Standards for Hazardous Air Pollutants source (NESHAP source)' means any:

(a) Source of asbestos, beryllium, mercury, vinyl chloride, benzene, or inorganic arsenic which is subject to the provisions of 40 CFR Part 61 (excluding Subparts B, H, I, K, Q, R, T, and W), as amended; or

(b) [One of the sources listed in §D of this regulation] [2]

Source which is subject to the provisions of 40 CFR Part 63, as amended.

(22) Reserved

(23) 'New Source Performance Standard source (NSPS source)' [(see §C of this regulation)] *means any source which is subject to 40 CFR Part 60, as amended.*

(24) --- (53) (text unchanged)

[C.] --- [D.] (proposed for repeal)"

The notice also proposes a change to a reference in COMAR to the NSPS definition. That reference is found at Regulation .12 under COMAR 26.11.06 - General Emission Standards, Prohibitions, and Restrictions. Maryland proposed this change in the citation because Maryland had also proposed to change the COMAR identification of the NSPS source definition to identify it as definition number 23.

In response to your submittal, EPA acknowledges that Maryland now has the delegated authority to implement and enforce the current and future NESHAP as found in 40 CFR part 63, and the current and future NSPS found in 40 CFR part 60, except for those standards which EPA explicitly excluded from its delegations to Maryland in EPA's initial delegation actions, as discussed below. EPA also acknowledges that Maryland has the delegated authority to implement and enforce any future amendments to delegated standards. EPA would also like to note that Maryland continues to be delegated the authority to implement and enforce the NESHAP standards at 40 CFR part 61, in accordance with EPA's previous delegation action related to these standards, except for those subparts in 40 CFR part 61 which Maryland has not adopted by reference as Maryland indicates by its exclusion of them in its definition of NESHAP source.

Please note that when EPA initially delegated to Maryland the authority to implement and enforce various NESHAP and NSPS, EPA specified various standards or provisions that it was specifically excluding from its designation, including any standards under 40 CFR part 63 that control radionuclides, or any provisions pertaining to an accidental release prevention program. These exclusions remain in effect. EPA also specified various requirements, limitations and restrictions. All of these remain in effect.

Please also note that on December 19, 2008, in *Sierra Club v. EPA*,[3] the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR Part 63 relating to exemptions for startup, shutdown, and malfunction

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[2] Maryland uses brackets to indicated text to be deleted.

[3] *Sierra Club* v. EPA, 551 F.3rd 1019 (D.C. Cir. 2008).

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(SSM). On October 16, 2009, the Court issued a mandate vacating these SSM exemption provisions, which are found at 40 CFR § 63.6(f)(1) and (h)(1).

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

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

Sincerely,

Diana Esher

Diana Esher, Director
Air Protection Division

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