



BUREAU OF ENVIRONMENT
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Nitro, WV 25143-2506

CECIL H. UNDERWOOD
GOVERNOR

MICHAEL P. MIANO
COMMISSIONER

December 18, 1998

Ms. Judy Cooper
Director
Administrative Law Division
Capitol Complex
Charleston, WV 25305

RE: 45CSR34 - "Emission Standards for Hazardous Air Pollutants
Pursuant to 40 CFR Part 63"

Dear Ms. Cooper:

This is to advise that I am giving approval to file the above-referenced legislative rule with your Office and the Legislative Rule-Making Review Committee as Notice of Rule Modification of a Proposed Rule.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Carrie Chambers in my office at 759-0515.

Sincerely yours,


Michael P. Miano
Commissioner

MPM:cc

Attachment

cc: John Johnston
Karen Watson
Carrie Chambers

FILED

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TITLE 45
LEGISLATIVE RULE
DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF AIR QUALITY

OFFICE OF THE SECRETARY OF STATE

SERIES 34
EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS
PURSUANT TO 40 CAR PART 63

§45-34-1. General.

1.1. Scope. - This rule establishes general provisions for national emission standards for hazardous air pollutants (NESHAPS) and other regulatory requirements pursuant to section 112 of the federal Clean Air Act as amended in 1990 (CAA). This rule codifies general procedures and criteria to implement emission standards for stationary sources that emit (or have the potential to emit) one or more of the substances listed as hazardous air pollutants (HAP) in or pursuant to section 112(b) of the CAA. It is the intent of the Director to adopt these standards by reference. It is also the intent of the Director to adopt associated reference methods, performance specifications and other test methods which are appended to these standards.

1.2. Authority. - W.Va. Code §§22-5-1 et seq.

1.3. Filing Date. - ~~May 1, 1998~~

1.4. Effective Date. - ~~May 1, 1998~~

1.5. Incorporation by Reference - Federal Counterpart Regulation. The Director has determined that a federal counterpart regulation exists, and in accordance with the Director's recommendation, with limited exception, this rule incorporates by reference, 40 CFR Part 63, effective July 1, 1997, as amended by the Federal Register through June 1, 1997.

§45-34-2. Requirements.

2.1. After the effective date of the state permit program under Title V of the CAA, no person may modify a major source of hazardous air pollutants, unless the Director determines that the maximum achievable control technology emission limitation under this rule for existing sources will be met.

2.2. After the effective date of the state permit program under Title V of the CAA, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Director

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determines that the maximum achievable control technology emission limitation under this rule for new sources will be met.

2.3. After the effective date of the state permit program under Title V of the CAA, the Director shall determine and apply case-by-case maximum achievable control technology standards to existing sources categorized by the Administrator pursuant to Section 112(c)(1) of the CAA for which the Administrator has not promulgated emission standards in accordance with Section 112(d) and 112(e) of the CAA.

2.4. Prior to constructing, reconstructing or modifying any facility subject to this rule, the owner or operator shall obtain a permit in accordance with the applicable requirements of 45CSR13, 45CSR14, 45CSR30 and this rule.

§45-34-3. Definitions.

3.1. "Administrator" means the Administrator of the United States Environmental Protection Agency or his or her designated representative.

3.2. "Director" means the Director of the West Virginia Division of Environmental Protection or such other person to whom the Director has delegated authority or duties pursuant to W. Va. Code §22-1-6 or §22-1-8.

3.3. "Hazardous air pollutant" means any air pollutant listed pursuant to §112(b) of the CAA as of June 1, 19978.

§45-34-4. Adoption of Standards.

4.1. The Director hereby adopts and incorporates by reference the provisions of 40 CFR Part 63 including any reference methods, performance specifications and other test methods which are appended to such standards and contained in 40 CFR Part 63 ~~as in effect on~~ effective July 1, 1997, as amended by the Federal Register through June 1, 19978, for the purposes of implementing a program for national emission standards for hazardous air pollutants for source categories, except as follows:

4.1.a. Section 63.15 is amended to provide that information shall be available to the public in accordance with W.Va. Code §§22-5-1 et seq., §§29B-1-1 et seq., and 45CSR31.

4.1.b. Any provision related to section 112(r) of the CAA, notwithstanding any requirements of 45CSR30.

§45-34-5. Director.

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5.1. Any and all references in 40 CFR Part 63 to the "Administrator" are amended to be the "Director" except as follows:

5.1.a. where the federal regulations specifically provide that the Administrator shall retain authority and not transfer such authority to the State;

5.1.b. where provisions occur which refer to:

5.1.b.1. alternate means of emission limitations;

5.1.b.2. alternate control technologies;

5.1.b.3. innovative technology waivers;

5.1.b.4. alternate test methods;

5.1.b.5. alternate monitoring methods;

5.1.b.6. waivers/adjustments to recordkeeping and reporting;

5.1.b.7. emissions averaging; or

5.1.b.8. applicability determinations; or

5.1.c. where the context of the regulation clearly requires otherwise.

§45-34-6. Permits.

6.1. Nothing contained in this rule shall be construed or inferred to mean that permit requirements in accordance with applicable rules shall in any way be limited or inapplicable.

§45-34-7. Inconsistency Between Rules.

7.1. In the event of any inconsistency between this rule and any other existing rule of the West Virginia Division of Environmental Protection, such inconsistency shall be resolved by the determination of the Director and such determination shall be based upon the application of the more stringent provision, term, condition, method, rule or regulation.

ANALYSIS OF PROPOSED LEGISLATIVE RULE

Agency: Office of Air Quality
Subject: Emissions Standards for Hazardous Air Pollutants
Pursuant to 40 CFR Part 63
CSR Cite: 45CSR34
Counsel: JAA

PERTINENT DATES

Filed for public comment: June 16, 1998
Public comment period ended: July 21, 1998
Filed following public comment period: July 31, 1998
Filed LRMRC: July 31, 1998
Filed as emergency: n/a

OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

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Fiscal Impact: None.

ABSTRACT

The current rule incorporates federal emission standards for stationary sources which emit hazardous air pollutants. The proposed modification inserts a new incorporation date for the Code of Federal Regulations of June 1, 1998.

The Office of Air Quality has also asked that a change to the rule be made based on comments of the Environmental Protection Advisory Council, which were received after the rule was filed. The proposed amendment contained in Section 4.1.b. and underlined below, would read as follows:

"Any provision related to section 112(r) of the CAA, notwithstanding any requirements of 45CSR30."

45CSR30 is the Office of Air Quality's rule regulating Title V Operating Permits.

AUTHORITY

Statutory authority: W.Va. Code, §22-5-4 provides:

(a) The director is authorized...

(4) To promulgate legislative rules in accordance with the provisions of chapter twenty-nine-a of this code not inconsistent with the provisions of this article, relating to the control of air pollution: Provided, That no rule of the director shall specify a particular manufacturer of equipment nor a single specific type of construction nor a particular method of compliance except as specifically required by the "Federal Clean Air Act," as amended, nor shall any such rule apply to any aspect of an employer-employee relationship: Provided, however, That no legislative rule or program of the director hereafter adopted shall be any more stringent than any federal rule or program except to the limited extent that the director first makes a specific written finding for any such departure that there exists scientifically supportable evidence for such rule or program reflecting factors unique to West Virginia or some area thereof....

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

No. WVC §29A-3-5 provides the following:

"After the public hearing or the close of the public comment period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider, any attempted ex parte communications directed to it in the form of additional comment, prior to the submission of its final agency-approved rule to the legislative rule-making review committee pursuant to the provisions of section eleven of this article."

The committee has received a proposed modification that the agency has submitted to the committee based on comments received from the "Division of Environmental Protection Advisory Council." The Council is made up of citizens and state officials not within the offices of the agency. Since the proposed changes suggested by the Council were received after the close of public comment regarding this rule, the agency violated the requirements of WVC §29A-3-5, which says the agency shall not permit the receipt of, nor consider, any additional comment. The agency has proposed a modification to the rule based on the Council's comments.

Counsel recommends that in the future the Environmental Protection Advisory Council schedule meetings regarding agency rules during the public comment period for all DEP rules so that the agency can properly consider the Council's comments and recommendations.

VIII. OTHER.



FILED

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WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Senator Mike Ross, Co-Chairman
Delegate Mark Hunt, Co-Chairman
Debra A. Graham, Counsel

December 15, 1998

Joseph A. Altizer, Associate Counsel
Rita Pauley, Associate Counsel
Teri Anderson, Administrative Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

TO: Ken Hechler, Secretary of State, State Register

TO: John H. Johnston
Office of Air Quality
1558 Washington St., East
Charleston, WV 25311

FROM: Legislative Rule-Making Review Committee

Proposed Rule: **Emissions Standards for Hazardous Air Pollutants Pursuant to 40CFR Part 63, 45CSR34**

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
(a) as originally filed
(b) as modified by the agency
2. Authorize the agency to promulgate part of the Legislative rule;
a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule with
certain amendments; amendments and a statement of reasons
for such recommendation is attached.
4. Authorize the agency to promulgate the Legislative rule as
modified with certain amendments; amendments and a
statement of reasons for such recommendation is attached.

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