

Reduction Act of 1995 (44 U.S.C. 3501–3520).

### Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

### Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

### Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

### Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### Environment

We have analyzed this rule under Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). A final “Environmental Analysis Check List” and a final “Categorical Exclusion Determination” will be available in the docket where indicated under ADDRESSES.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

■ For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR

1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. From June 12, 2004 to November 30, 2005, add temporary § 165.T17–010 to read as follows:

#### § 165.T17–010 Safety Zone; Bering Sea, Aleutian Islands, Unalaska Island, AK.

(a) *Description.* This safety zone is defined by a point at the western tip of Cape Kovrizhka, Unalaska Island, located at 53°51.0′ N, 167°9.5′ W, then west 10 nautical miles to a point located at 53°51.0′ N, 167°26′ W, then south to the northern tip of Wedge Point, Unalaska Island, located at 53°27′ N, 167°24′ W. All coordinates reference Datum: NAD 1983.

(b) *Enforcement period.* The safety zone in this section will be enforced from June 12, 2005 through November 30, 2005.

(c) *Regulations.* (1) The Captain of the Port and the Duty Officer at Marine Safety Office, Anchorage, Alaska can be contacted at telephone number (907) 271–6700.

(2) The Captain of the Port may authorize and designate any Coast Guard commissioned, warrant, or petty officer to act on his behalf in enforcing the safety zone.

(3) The general regulations governing safety zones contained in § 165.23 apply. No person or vessel may enter or remain in this safety zone, with the exception of attending vessels, without first obtaining permission from the Captain of the Port or his on-scene representative.

Dated: May 3, 2005.

**R.J. Morris,**

*Captain, U.S. Coast Guard, Captain of the Port, Western Alaska.*

[FR Doc. 05–9925 Filed 5–17–05; 8:45 am]

**BILLING CODE 4910–15–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[R04–OAR–2004–KY–0002–200511; FRL–7914–5]

### Approval and Promulgation of Implementation Plans for Kentucky: Inspection and Maintenance Program Removal for Jefferson County, Kentucky; Source-Specific Nitrogen Oxides Emission Rate for Kosmos Cement Kiln

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a revision to the Jefferson County, Kentucky, portion of the Kentucky State Implementation Plan (SIP) requesting removal of three regulations from the regulatory portion of the Kentucky SIP related to the Jefferson County inspection and maintenance (I/M) program. EPA is approving Kentucky's September 22, 2003, SIP revision to move these I/M regulations to the contingency measures section of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. EPA is also approving a source-specific SIP revision amending the nitrogen oxides (NO<sub>x</sub>) emission rate for Kosmos Cement Company's cement kiln. This final rule addresses comments made on EPA's proposed rulemaking previously published for this action.

**DATES:** This rule will be effective June 17, 2005.

**ADDRESSES:** EPA has established a docket for this action under Regional Material in EDocket (RME) ID No. R04-OAR-2004-KY-0002. All documents in the docket are listed in the RME index at <http://docket.epa.gov/rmepub/>, once in the system, select "quick search," then key in the appropriate RME Docket identification number. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Ms. Notarianni can be reached via telephone number at (404) 562-9031 or electronic mail at [notarianni.michele@epa.gov](mailto:notarianni.michele@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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#### I. Today's Action

EPA is approving revisions to the Jefferson County, Kentucky, portion of the Kentucky SIP related to the Jefferson County I/M program, also known as the Jefferson County Vehicle Emissions Testing (VET) Program. Through this final action, EPA is approving the movement of three regulations which comprise the Jefferson County VET Program from the regulatory portion of the Kentucky SIP to the contingency measures section of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan, which is part of the Kentucky SIP. The three Jefferson County VET Program regulations which are subject to today's action are: Regulation 8.01, "Mobile Source Emissions Control Requirements," Regulation 8.02, "Vehicle Emissions Testing Procedure," and Regulation 8.03, "Commuter Vehicle Testing Requirements." Also in this final action EPA is approving a source-specific SIP revision for changes reflected in the May 3, 2004, Board Order for the Kosmos Cement Company's cement kiln. EPA is approving the revisions to the Board Order which lower the kiln's NO<sub>x</sub> emission rate to 4.755 pounds per ton of clinker produced (pptcp) by the kiln, based upon a rolling 30-day average. In addition, EPA is responding to the adverse comments received on the January 3, 2005, rulemaking proposing to approve the aforementioned revisions (70 FR 53).

#### II. Background

On January 3, 2005, EPA proposed approval of Kentucky's September 22, 2003, SIP revision request to move the three, SIP-approved Jefferson County VET Program regulations to the contingency measures section of the Kentucky SIP, and to lower the NO<sub>x</sub> emission rate for the Kosmos Cement Company's cement kiln (70 FR 53). The emissions reductions from the Kosmos Cement Company provide compensating, equivalent emissions reductions for the Jefferson County VET Program. (See the proposed rule published January 3, 2005, at 70 FR 53 for further background and a detailed analysis of the complete September 22, 2003, SIP revision.) EPA received adverse comments on the proposed rule. In today's action, EPA is responding to the adverse comments received.

#### III. Response to Comments

*Comment 1:* The commenter writes that the SIP revision is unapprovable because Jefferson County is violating both the 8-hour ozone and fine particulate matter (PM<sub>2.5</sub>) NAAQS, to which the VET Program contributed emissions reductions. A plain reading of Section 110(l) of the Clean Air Act (CAA) requires that the Louisville Metro Air Pollution Control District (LMAPCD) first determine whether the I/M program will be necessary for achievement of the 8-hour ozone (and PM<sub>2.5</sub>) standards prior to approval of removal of the measure from the current SIP. Another commenter also questions what is the justification for terminating the VET Program.

*Response 1:* Jefferson County, Kentucky is designated nonattainment for the 8-hour ozone and PM<sub>2.5</sub> NAAQS. Control strategy SIP revisions showing how the area will attain these NAAQS are due June 15, 2007, for the 8-hour ozone standard and April 5, 2008, for the PM<sub>2.5</sub> standard, unless the area attains the standards prior to these due dates. These control strategy SIPs will identify the control measures that will be used to help the area attain the NAAQS. The control measures will be selected by the Commonwealth of Kentucky after public notice and comment.

In a May 11, 2004, letter from EPA to Louisville's Assistant County Attorney, EPA provided its interpretation of section 110(l) of the Clean Air Act as guidance in relation to an area such as Jefferson County that does not yet have an attainment demonstration for the 8-hour ozone nor for the PM<sub>2.5</sub> NAAQS. Prior to the time when the control strategy SIP revisions are due, to demonstrate no interference with any applicable NAAQS or requirement of the Clean Air Act under section 110(l), EPA has interpreted this section such that States can substitute equivalent (or greater) emissions reductions to compensate for the control measure being moved from the regulatory portion of the SIP to the contingency provisions. As long as actual emissions in the air are not increased, EPA believes that equivalent (or greater) emissions reductions will be acceptable to demonstrate non-interference. EPA does not believe that areas must wait to produce a complete attainment demonstration to make any revisions to the SIP, provided the status quo air quality is preserved. EPA believes this will not interfere with an area's ability to develop a timely attainment demonstration. As an acceptable means to demonstrate no interference in order

to satisfy section 110(l) of the CAA, the submittal provides for equivalent emissions reductions from the Kosmos Cement Company to replace the NO<sub>x</sub> and volatile organic compound (VOC) emissions reductions previously gained from the VET Program to ensure actual emissions in the air are not increased pending development of a complete attainment demonstration for the new 8-hour ozone and PM<sub>2.5</sub> standards. Even if the area ultimately determines that an I/M program should again be instituted as part of those future attainment demonstrations, since air quality has not been adversely affected in the interim, EPA believes that 110(l) will be satisfied.

As for the 1-hour ozone and carbon monoxide (CO) NAAQS, Kentucky has demonstrated through air quality analyses that the VET Program is not needed for the Kentucky portion of the Louisville area in order to continue to maintain those NAAQS. VOC and NO<sub>x</sub> emissions remain below 1999 attainment year levels to support movement of the program to a contingency measure in the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. Finally, since mobile source winter CO emission levels continuously decline from 1999 through 2020, EPA concludes that no potential interference with the CO standard will result from this action. (For the complete analysis, see pages 56–57 of proposed rule, 70 FR 53, published January 3, 2005.)

The commenter also questions whether a demonstration of non-interference is needed for air toxics, also known as hazardous air pollutants (HAPs). An I/M program is not designed to reduce HAPs, however, the program does reduce emissions of VOCs, several of which are HAPs. Since there are no ambient air quality standards established for HAPs, the area must demonstrate that the SIP revision will not interfere with any applicable air toxics rules. There are no air toxics rules that apply to motor vehicles, thus removal of the VET Program does not interfere with any Federal standards that might apply. Furthermore, a change to requirements that apply to mobile sources in the area does not interfere with implementation of Federal air toxics rules i.e., maximum achievable control technology (MACT) standards, that apply to stationary sources in the area. The EPA thus concludes that non-interference relative to air toxics has been demonstrated.

*Comment 2:* The commenter states that, “EPA has issued policy interpretations that sweep the non-interference obligation under the

regulatory rug and which clearly undercut 110(l) through a substantive agency interpretation, not properly promulgated as a regulation under 5 U.S.C. 553 despite an obvious and dramatic effect of altering the applicability of law, and which proffers an interpretation of 110(l) that flunks the first step of *Chevron*.” The commenter believes the “strict” interpretation of Section 110(l) which EPA describes in its May 11, 2004, letter to the District is the only interpretation consistent with the plain language and intent of the Act, and that removal of an approved and implemented control measure controlling both precursors of ozone and particulates, at a time when it is not known what additional reductions will be needed to attain the 8-hour ozone and fine particulates standard in the Jefferson County airshed, is of questionable legality. Until EPA completes the guidance on what constitutes “interference,” EPA defense of an ad-hoc finding of “non-interference” appears unsubstantiated.

*Response 2:* EPA is authorized by Congress to issue interpretations of ambiguous provisions of the Clean Air Act without promulgating a regulation. Through the January 3, 2005, proposed rule (70 FR 53), EPA sought public comment on its current interpretation of 110(l) of the Act. EPA has evaluated the comments and believes its interpretation to be reasonable. EPA is taking final action on this interpretation in this rulemaking action, which has undergone appropriate notice-and-comment procedures, and EPA is here responding to all comments submitted on this issue. EPA concludes that the language in section 110(l) is not clear on its face with respect to the demonstrations necessary to show non-interference in the absence of an approved attainment demonstration. Rather, EPA believes section 110(l) is ambiguous with respect to the appropriate test for these areas, and consequently EPA has the discretion to interpret section 110(l) for these areas consistent with the Act as a whole. EPA believes that so long as substitute reductions are achieved such that ambient air quality levels in the area are not adversely affected in the interim, SIP revisions will not interfere with an area’s obligations to develop timely demonstrations of attainment and reasonable further progress. Consequently, since substitute reductions have been submitted in this case, EPA concludes that the Agency is authorized to approve this SIP revision consistent with section 110(l).

*Comment 3:* The commenter states that the NO<sub>x</sub> reductions achieved by

Kosmos occurred prior to the 2003 ozone season, yet the community had numerous incidents of exceedances of ozone standards even with the Kosmos emissions reductions and the VET Program. Substituting already-achieved emissions reductions that were insufficient to prevent violations during the previous ozone season do not provide any new reductions to offset those lost. The District must provide new actual reductions, not ones that have already been achieved.

*Response 3:* EPA clarifies that the Louisville area has had no 1-hour ozone NAAQS exceedances since the area was redesignated to attainment for that standard in a final action published October 23, 2001, 66 FR 53665. Regarding exceedances of the 8-hour ozone NAAQS during the 2003 ozone season, Kentucky has provided substitute, equivalent emissions reductions that meet the criteria set forth in EPA’s proposed rulemaking published January 3, 2005 (70 FR 53) to demonstrate no interference with the 8-hour ozone and PM<sub>2.5</sub> NAAQS. (See Response #1.) EPA believes that this equivalent substitution of emissions to ensure no net emissions change into the air is allowable regardless of whether the area is meeting the 8-hour ozone or PM<sub>2.5</sub> NAAQS. Enacting the equivalent reductions at Kosmos prior to (rather than after) the cessation of the VET Program provides additional assurance that there is no net emissions increase to the air for any period of time. The control strategy SIP for the area will ultimately demonstrate how the Louisville area will meet the 8-hour ozone and PM<sub>2.5</sub> NAAQS as noted in Response #1.

The NO<sub>x</sub> emissions reductions at Kosmos, as reflected in the emission rate reduction to 4.755 pptcp of NO<sub>x</sub>, are new or “surplus” for two reasons. The reduction is not from a Federal Control Measure that would occur without any state or local action and the emission rate reduction is below what is already required in the Jefferson County portion of the Kentucky SIP. (For additional details, refer to the proposed rulemaking published January 3, 2005, at 70 FR 53.) Although the NO<sub>x</sub> emissions reductions at Kosmos occurred eight months prior to the closing of the VET Program, these reductions are considered new reductions based on EPA’s policy of supporting early implementation of control measures to achieve early emissions reductions. This policy is commonly applied, for example, to enact contingency measures prior to the occurrence of a NAAQS violation in an area. This policy of allowing early

emissions reductions was upheld in the September 8, 2004, 5th Circuit decision (*Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004)).

*Comment 4:* Is there a guidance document EPA uses to determine whether proposed substitutions of emissions reductions are acceptable?

*Response 4:* Yes, the Agency is using several guidance documents to assess the legality of accepting compensating emissions reductions. These guidance documents are listed below, and further described in the January 3, 2005, proposed rule (70 FR 53) with information on how to obtain copies.

The EPA guidance memorandum from John Calcagni, Director, Air Quality Management Division, to the Air Directors in EPA Regions 1–10, “Procedures for Processing Requests to Redesignate Areas to Attainment,” September 4, 1992, is currently being used. On pages 10 and 13, the guidance allows areas redesignated to attainment for the NAAQS to move control measures from the regulatory portion of the SIP to the contingency plan if they are not needed to maintain the NAAQS and if compensating equivalent emissions reductions are provided. The guidance notes that a demonstration that measures are equivalent would have to include appropriate modeling or an adequate justification. This 1992 memorandum pertains to the NAAQS in existence at the time, which include the 1-hour ozone and CO NAAQS. EPA is currently drafting guidance that specifically addresses section 110(l).

Guidance EPA is using as precedence to determine the acceptability of substituting NO<sub>x</sub> for VOC emissions reductions in the Louisville case is the August 5, 1994, EPA memorandum, “Clarification of Policy for Nitrogen Oxides (NO<sub>x</sub>) Substitution,” from John Seitz, Director, Office of Air Quality Planning and Standards. This memorandum pertains to EPA’s “NO<sub>x</sub> Substitution Guidance” (December 1993). The guidance acknowledges that controlling only VOCs may not be the most effective approach in all areas for attaining the ozone standard and allows for substitution of NO<sub>x</sub> emissions reductions for VOC emissions reductions as appropriate, contingent upon approval by EPA.

Two items of correspondence from EPA that serve as guidance are also described in the January 3, 2005, proposed rule (70 FR 53). The Agency is using the May 12, 2004, EPA Memorandum from Tom Helms, Group Leader, Ozone Policy and Strategies Group, Office of Air Quality Planning and Standards, and Leila H. Cook,

Group Leader, State Measures and Conformity Group, Office of Transportation and Air Quality, to the Air Program Managers, the subject of which is “1-Hour Ozone Maintenance Plans Containing Basic I/M Programs.” The May 12, 2004, memorandum addresses the application of 8-hour ozone anti-backsliding provisions to basic I/M programs in 1-hour ozone maintenance areas. In addition, EPA is using a May 11, 2004, letter from the Agency to Louisville’s Assistant County Attorney to provide the Agency’s current interpretation of section 110(l) of the Clean Air Act as guidance in relation to an area such as Jefferson County that does not yet have an attainment demonstration for the new 8-hour ozone and PM<sub>2.5</sub> NAAQS.

*Comment 5:* The commenter states that it has not been demonstrated, through appropriate modeling and analysis, that reductions of NO<sub>x</sub> from tall stack emissions controls would yield the same or better air quality benefit in ozone formation reduction as from ground-level exhaust emissions of both VOCs and NO<sub>x</sub> from continued implementation of the I/M program.

*Response 5:* The May 26, 2004, supplement to the September 22, 2003, SIP submittal provides information to address the equivalency of NO<sub>x</sub> emissions reductions from Kosmos Cement Company, a point source, to replace low-level, area reductions of NO<sub>x</sub> and VOC gained by the VET Program. This information is discussed under the third response of the LMAPCD Comment and Response document. In summary, the LMAPCD document provides existing modeling for the area that shows NO<sub>x</sub> emissions reductions are beneficial to the Louisville area and that NO<sub>x</sub> emissions reduction scenarios in all cases in the Louisville area resulted in a greater reduction of ozone concentrations than the VOC reduction scenarios. Modeling to demonstrate the air quality impacts from this specific scenario was not developed. Modeling was not needed to support this equivalency demonstration because it is unlikely that the small emission changes involved in the removal of the VET Program and additional reductions from the Kosmos cement kiln would be noticeable in the modeling or have any noticeable effects on ozone formation in the modeling. The photochemical models are more suited to assessing the aggregate effects of the many control measures used in an attainment strategy for an urban area. However, sensitivity modeling of emissions reductions on source categories can be used to provide directional information on the

effectiveness of precursor reductions. Such information was provided through the sensitivity modeling developed for the 1-hour ozone NAAQS for the Louisville area. This modeling demonstrates that areawide ozone coverages for concentrations greater than the ozone standard are more effectively reduced with NO<sub>x</sub> emissions reductions than with VOC reductions. The Louisville modeling does show that VOC emissions reductions are beneficial, but on a more localized level, whereas NO<sub>x</sub> emissions reductions are beneficial over a larger area. In conclusion, EPA finds the analysis detailed in the Comment and Response document adequate to demonstrate that point source NO<sub>x</sub> reductions will yield the same or better air quality benefit in reducing ozone formation as low-level, areawide emissions reductions of VOC and NO<sub>x</sub>.

*Comment 6:* The commenter states that the emissions reductions at Kosmos are clearly not contemporaneous since they occurred in March 2003, nearly two years ago. The use of the November 2003 date to measure the contemporaneousness of the emissions reductions would reward Louisville for having terminated the program unlawfully, and is inappropriate given that the termination of the program has not yet been lawfully approved and it remains a component of the SIP. The time frame in which the reductions must be viewed as “contemporaneous” for purposes of substituting other measures in a maintenance plan, must be the date of lawful cessation of the I/M Program on approval by EPA.

*Response 6:* While “contemporaneous” is not explicitly defined in the Clean Air Act, EPA believes a reasonable interpretation is to enact the compensating, equivalent emissions reductions within a maximum of one year (prior to or following) the cessation of the substituted control measure. The actual dates of occurrence of the start and end of substituted control measures, rather than the effective date of EPA action on a SIP revision, are used to ensure that the status quo level of emissions in the air is maintained. EPA acknowledges that Louisville inappropriately terminated the program before obtaining EPA approval of a SIP revision, however EPA does not believe this is relevant to determining the contemporaneousness of substitute reductions. Since the concept of contemporaneous reductions is to address ambient air quality levels, EPA believes it should be measured with respect to actual program implementation. Kosmos’ March 2003 emissions reductions occurred well

within a year of the end of the actual termination of the VET Program, which occurred as of November 1, 2003. EPA agrees that the VET Program remains an enforceable component of the SIP, and will not become a contingency measure until the effective date of this final action. (See also Response #7 regarding legal consequences of terminating the VET Program without EPA approval.)

*Comment 7:* Unless the EPA approves an amendment to the Kentucky SIP to remove the VET Program, the approved SIP, including the VET Program, must continue to be maintained and enforced as a matter of federal law. The commenter expresses that the illegal termination of the VET Program has gone without sanction by the EPA.

*Response 7:* EPA exercises its discretion whether to issue a finding of failure to implement the SIP for the discontinuation of the VET Program. EPA recognized that the LMAPCD was actively working with the Agency to develop an approvable SIP revision to provide compensating emissions reductions as expeditiously as possible. EPA also notes that in a Memorandum Opinion dated January 29, 2004, the U.S. District Court concluded that the District violated the Clean Air Act by terminating the VET Program, an approved element of the Kentucky SIP, without EPA's prior approval. (Memorandum Opinion, P.20, Case Number 3:03CV-712-H) In a court order issued June 10, 2004, the Court ordered the LMAPCD, the agency responsible for implementation of the Jefferson County, Kentucky portion of the state SIP, to pay a fine of \$100,000 in connection with this termination of the program. The Court subsequently distributed these funds to the Kentucky Resources Council for use in the Council's environmental projects as specified by the Court. The Court did not order the District to restart the VET Program due to the status of the pending SIP revision at that time and the likely timing and potential substance of an EPA response. (Memorandum and Order, Case Number 3:03CV-712-H, June 10, 2004) Upon the effective date of this final action, the issue of not implementing and enforcing a control measure in the SIP is resolved.

*Comment 8:* The commenter writes that the Kosmos reductions are not enforceable and equivalent to the lost VET Program reductions, because the new Kosmos proposed limits are a rolling 30-day average rather than a maximum instantaneous cap. The commenter notes there may be times (including days where ozone levels are otherwise elevated) in which the emissions will exceed the proposed average and will not offset what would

have been captured on a continuous basis by the operation of the VET Program. The commenter also expressed that the modifications resulting in NO<sub>x</sub> reductions were undertaken to avoid NO<sub>x</sub> spikes that were in excess of permit limits and that as such, those reductions would not appear to be surplus since they were undertaken to achieve compliance with permit requirements that would have occurred regardless of the termination of the VET Program.

*Response 8:* The May 3, 2004, amended Board Order for the Kosmos cement kiln requires that NO<sub>x</sub> emissions (expressed as NO<sub>2</sub>) from the cement kiln shall not exceed 4.755 pptcp by the kiln, based upon a rolling 30-day average. In this final action, EPA is approving the proposed revisions in the May 3, 2004, Board Order, including this lowered NO<sub>x</sub> emission rate, into the Kentucky SIP. To comply with this lower emission rate and the SIP, the average of daily NO<sub>x</sub> emissions from Kosmos' cement kiln over 30 consecutive days must be below the rate approved into the SIP. Any daily fluctuations above the emission rate are compliant with the SIP as long as this 30-day rolling average condition is met. For this reason, the emissions reductions, as reflected in the lowered NO<sub>x</sub> emission rate for Kosmos, are surplus and are not a violation of SIP requirements.

Through this final action, the 30-day rolling average condition for Kosmos becomes federally enforceable. Kosmos is required to maintain and operate a continuous emission monitoring system (CEMS) to measure daily NO<sub>x</sub> emissions into the atmosphere from the cement kiln (Appendix A of Kosmos' NO<sub>x</sub> Reasonably Available Control Technology (RACT) Plan). This requirement to record and submit CEMS data allows for monitoring of the lowered NO<sub>x</sub> emission rate at Kosmos on a daily basis which will assure compliance with the new limit on a 30 day basis. The VET Program was designed with the presumption that the vehicle would maintain compliance for the year.

Regarding concerns expressed on high ozone days, an emission rate based upon a rolling 30-day average is set to accommodate normal fluctuations in operating conditions while remaining protective of public health. EPA notes that other programs use a 30-day rolling average and have been effective in controlling emissions, including NO<sub>x</sub> RACT (see page 55625 of 57 FR 55620, November 25, 1992) and New Source Performance Standards for boilers (see page 49444 of 63 FR 49442, September

16, 1998). Furthermore, EPA believes even longer term compliance averaging periods have demonstrated their effectiveness, e.g., EPA's NO<sub>x</sub> SIP Call trading program's ozone season averaging time period ("NO<sub>x</sub> Budget Trading Program," August 2004, EPA-430-R-04-010). Should the rolling 30-day average NO<sub>x</sub> emission rate ever exceed the established NO<sub>x</sub> emissions standard, Section II.A.4. of Appendix A of Kosmos' NO<sub>x</sub> RACT Plan contains specific reporting and recordkeeping requirements for Kosmos to submit excess emissions reports that document the amount, dates, and timeframes of the excess emissions and corrective actions taken or preventive measures adopted.

*Comment 9:* The commenter writes that the emissions reductions at Kosmos from the installation of controls preclude emission at levels contained in the former permit even under full operating conditions, and that the elimination of the increment of allowable emissions from the former permit limits to the actual potential emissions is a "phantom paper reduction" rather than a real emissions reduction.

*Response 9:* EPA first clarifies that Kosmos made changes to its operating procedures, not installed controls, to achieve the equivalent emissions reductions achieved in March 2003. As described in LMAPCD's Comment and Response Document on page 5, by requiring all kiln operators to operate the kiln in the same manner, the cement kiln ran more efficiently and thus used less fuel and emitted less pollutants. The resulting NO<sub>x</sub> emissions reductions at Kosmos were verified using CEMS, which is a monitoring system for continuously measuring and recording the emissions of a pollutant. The Agency's evaluation of the SIP submittal supports that Kosmos will have achieved the predicted 8,672 pounds per summer day (ppsd) of NO<sub>x</sub> emissions reductions in 2004. It is EPA's practice to approve control measures into the SIP using projected emissions reduction data as long as the baseline data and emission projection methodology are based on sound science. In the proposed approval, EPA's analysis is based on the change in the allowable emission rate (6.6 to 4.755 pptcp NO<sub>x</sub>) at a constant production rate (4700 tons of clinker/day). The procedure EPA used in the proposal assumes: (1) Kosmos emitted at its maximum allowable rate of 6.6 pptcp NO<sub>x</sub>, on average in 2002, under the previous Board Order approved into the Kentucky SIP and (2) Kosmos will emit no more than 4.755 pptcp NO<sub>x</sub>, on

average, under the new Board Order dated May 3, 2004 (see 70 FR 58, January 3, 2005). Kosmos was emitting at 2.1–4.1 pptcp NO<sub>x</sub> in 2003 under the 6.6 limit due to the operational changes made in March 2003. To prevent Kosmos from changing the cement kiln's operation and increasing emissions in 2004 or later up to 6.6, a revised Board Order with the lower emission rate of 4.755 pptcp NO<sub>x</sub> was adopted by the Board on May 3, 2004, and will become part of the federally enforceable Kentucky SIP as of the effective date of this final action. Kosmos' cement kiln cannot emit up to 6.6 pptcp NO<sub>x</sub> without violating the new SIP limit for Kosmos of 4.755 pptcp NO<sub>x</sub>, and therefore, the proposed calculation procedure remains valid.

*Comment 10:* The commenter expressed that eliminating the VET Program may increase cost of a program restart should the area's control strategy be required to use an I/M program if Louisville is classified as a moderate 8-hour ozone nonattainment area.

*Response 10:* EPA acknowledges that there would be additional costs to restart the VET Program since it has been terminated. The Louisville area is designated nonattainment under subpart 1, "Nonattainment Areas in General," of Title I Part D of the Clean Air Act for the 8-hour ozone NAAQS. An I/M program is not required for these subpart 1 nonattainment areas. The statutory authority to implement an I/M program remains intact in Kentucky Revised Statute (KRS) 77.320, "Elimination of vehicle emissions testing program in county containing consolidated local government—Determination of need for program," and in KRS 77.180, "Orders, rules and regulations." KRS 77.180 is the cited statute in the VET Program regulations now located in the contingency portion of the Louisville 1-Hour Ozone Maintenance Plan as of the effective date of this action. Thus, should the area become classified moderate and need to implement I/M, it would already have the statutory authority to do so. (To access KRS 77.320 and KRS 77.180 within Chapter 77, "Air Pollution Control," access the following Web site: <http://lrc.ky.gov/KRS/077-00/CHAPTER.HTM>.)

*Comment 11:* The commenter states that the law that repealed the VET Program, KRS 77.320, should be repealed. The commenter suggests that the VET Program was the only effective means of air management in the metropolitan area and should be reinstated.

*Response 11:* The LMAPCD adopted several regulatory programs that helped

the area to attain the 1-hour ozone NAAQS. The Louisville area has had no 1-hour ozone NAAQS exceedances since the area was redesignated to attainment in a final action published October 23, 2001 (66 FR 53665). Louisville was able to demonstrate continued maintenance of the 1-hour ozone NAAQS without the I/M program. In addition, the provision of substitute reductions from the Kosmos cement kiln will prevent increases in ambient air levels pending development of 8-hour and PM<sub>2.5</sub> attainment demonstrations. The 8-hour ozone and PM<sub>2.5</sub> control strategy SIP revisions for the area due in 2007 and 2008, respectively, will identify control strategies to help the area meet these NAAQS as expeditiously as practicable. These SIP revisions will include a demonstration that the selected control measures will timely achieve the relevant NAAQS.

*Comment 12:* The commenter states that in addition to businesses, each individual who drives should be responsible for cleaner, healthier air. The commenter suggests that the VET Program could be required only every other year and exclude cars less than five years old to reduce the burden.

*Response 12:* Under Jefferson County's present 8-hour ozone and PM<sub>2.5</sub> nonattainment classifications, and 1-hour ozone maintenance status, Kentucky has discretion which control measures to apply to help the County attain and maintain these NAAQS. So long as the area meets all applicable CAA requirements, EPA cannot dictate that each individual residing in the area must personally contribute to required emissions reductions.

*Comment 13:* Mobile source emissions comprise a significant component of the emissions profile for the county, and the VET program has been responsible for moderating the effects of the increase in vehicle miles traveled in this region, and in reducing the contribution of ozone precursors from the mobile sector. For this reason, the proposed repeal of the VET Program is troubling.

*Response 13:* The Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan provides emissions data and emissions projections covering the year 2005 for this maintenance area. The Kentucky portion of the Louisville 1-Hour Ozone Maintenance Area is comprised of Jefferson County, and portions of Bullitt and Oldham Counties in Kentucky. EPA acknowledges that projected 2005 emissions from mobile sources contribute almost one-third of the VOC emissions and nearly one-half of the NO<sub>x</sub> emissions in the Kentucky portion of the Louisville area. The

equivalent emissions reductions from Kosmos that are replacing those previously gained from the VET Program, in addition to meeting all other applicable requirements for the area, help to ensure that the current air quality is maintained. The 8-hour ozone and PM<sub>2.5</sub> attainment demonstrations due in 2007 and 2008, respectively, will address, as appropriate, any needed mobile source controls for the designated nonattainment areas under these standards. See also Response #1.

*Comment 14:* When will the public review and formal comment period begin on the January 3, 2005, proposed rule (70 FR 53)?

*Response 14:* The public comment period on the proposed rulemaking was from January 3, 2005 to February 2, 2005, as stated in the proposed rulemaking published January 3, 2005, at 70 FR 53.

*Comment 15:* The commenter notes that the problems that come with global warming and pollution are not going to go away anytime soon, and that these issues will only get worse until action is taken.

*Response 15:* This comment is not relevant nor specific to issues contained in the January 3, 2005, proposed rule (70 FR 53).

*Comment 16:* The commenter notes that the United States of America needs to do much more to clean up the air and atmosphere to protect the ozone layer from getting worse. The commenter also states that the country's per capita output of air pollutants and many other environmentally damaging pollutants is "shamefully high."

*Response 16:* This comment is not relevant nor specific to issues contained in the January 3, 2005, proposed rule (70 FR 53).

*Comment 17:* The commenter states that with respect to Louisville Gas & Electric (LG&E), it is inappropriate to claim credit for reductions achieved by the company as a result of its compliance strategy with the NO<sub>x</sub> SIP call, since those reductions were made in response to existing legal obligation and would have been achieved irrespective of any District action to execute an "Agreement." The commenter also notes that substituting LG&E emissions of NO<sub>x</sub> for lost VOC and NO<sub>x</sub> emissions from motor vehicles is not equivalent because LG&E has presented modeling in the past demonstrating that NO<sub>x</sub> emissions from the LG&E stacks did not contribute appreciably to the local ozone problem in the Louisville area.

*Response 17:* The comments received regarding emissions reductions from LG&E are not relevant nor specific to

issues contained in the January 3, 2005, proposed rule (70 FR 53).

#### IV. Final Action

EPA is approving a revision to the Jefferson County, Kentucky portion of the Kentucky SIP which moves Regulations 8.01, 8.02, and 8.03 from the regulatory portion of the Jefferson County part of the Kentucky SIP to the contingency measures section of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. EPA is also approving a source-specific SIP revision amending the NO<sub>x</sub> emission rate for Kosmos Cement Company's cement kiln.

#### V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have

substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 18, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 11, 2005.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

■ Part 52 of chapter I, title 40, Code of Federal Regulations, is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart S—Kentucky

■ 2. Section 52.920 is amended as follows:

■ a. in paragraph (c) by removing from Table 2, Regulation 8.01 titled, "Mobile Source Emissions Control Requirements," Regulation 8.02 titled, "Vehicle Emissions Testing Procedure," and Regulation 8.03 titled, "Commuter Vehicle Testing Requirements,"

■ b. in paragraph (d) by revising the entry for "Board Order Kosmos Cement Company," and

■ c. in paragraph (e) by revising the entry for "Louisville 1-hour Ozone Maintenance Plan" to read as follows:

#### § 52.920 Identification of plan.

\* \* \* \* \*

(d) \* \* \*

EPA-APPROVED KENTUCKY SOURCE—SPECIFIC REQUIREMENTS

Name of source	Permit number	State effective date	EPA approval date	Explanation
* Board Order Kosmos Ce- ment Company.	* NO <sub>x</sub> RACT Plan 05/03/04 .....	* 05/03/04	* 05/18/05 [Insert first page number of publi- cation]	*
* .....	* .....	* .....	* .....	*

(e) \* \* \*

EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
* Louisville 1-Hour Ozone Maintenance Plan.	* Jefferson County and portions of Bullitt and Oldham Counties .....	* 11/1/03	* 05/18/05 [Insert first page number of publi- cation]	*
* .....	* .....	* .....	* .....	*

[FR Doc. 05-9905 Filed 5-17-05; 8:45 am]  
BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 80**

[OPP-2005-0109; FRL-7711-4]

**Dimethyl Ether; Exemption from the Requirement of a Tolerance**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of dimethyl ether or methane, oxybis- as an inert ingredient (propellant) in pesticide formulations applied to growing crops or to raw agricultural commodities (RAC) after harvest. The DuPont Company, DuPont Fluoroproducts submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This

regulation eliminates the need to establish a maximum permissible level for residues of dimethyl ether.

**DATES:** This regulation is effective May 18, 2005. Objections and requests for hearings must be received on or before July 18, 2005.

**ADDRESSES:** To submit a written objection or hearing request follow the detailed instructions as provided in Unit XIV. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket identification (ID) number OPP-2005-0109. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is

open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305-5805.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Boyle, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-6304; e-mail address: [boyle.kathryn@epa.gov](mailto:boyle.kathryn@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

*A. Does this Action apply to Me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 28522)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of