

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[R05–OAR–2004–OH–0003; FRL–7923–2]

**Approval and Promulgation of State Implementation Plans; Ohio; Revised Oxides of Nitrogen (NO<sub>x</sub>) Regulation and Revised NO<sub>x</sub> Trading Rule****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** On June 28, 2004, Ohio submitted an oxides of nitrogen (NO<sub>x</sub>) State Implementation Plan (SIP) revision request to EPA which included amended rules in Ohio Administrative Code (OAC). The purpose of the SIP revision is to exclude from the NO<sub>x</sub> trading program carbon monoxide boilers associated with fluidized catalytic cracking units (FCCU). The revision also allocates additional NO<sub>x</sub> allowances to the overall budget and to the trading budget to correct a typographical error made in the original rule. Removal of the FCCU boilers from the NO<sub>x</sub> trading program is an option Ohio has elected to incorporate in its NO<sub>x</sub> SIP. The Ohio SIP revision addresses some minor corrections in the rules and also incorporates by reference specific elements of the NO<sub>x</sub> SIP Call. EPA is approving the Ohio request because the changes conform to EPA policy under the Clean Air Act. The collective emissions from these sources are small and the administrative burden, to the states and regulated entities, of controlling such sources is likely to be considerable. Inclusion of these small NO<sub>x</sub> sources in the NO<sub>x</sub> SIP Call control program would not be cost effective. EPA proposed approval of this SIP revision and published a direct final approval on January 19, 2005. We received adverse comments on the proposed rulemaking, and therefore withdrew the direct final rulemaking on March 14, 2005.

**DATES:** This rule is effective on July 27, 2005.**ADDRESSES:** EPA has established an electronic docket at Regional Material in eDocket (RME) Docket ID No. R05–OAR–2004–OH–0003. 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., Confidential Business Information (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 Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. We recommend that you telephone John Paskevicz, Engineer, at (312) 886–6084, before visiting the Region 5 office. This EPA office is open from 8:30 AM to 4:30 PM, Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** John Paskevicz, Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6084. [Paskevicz.john@epa.gov](mailto:Paskevicz.john@epa.gov).**SUPPLEMENTARY INFORMATION:****Table of Contents**

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**I. General Information**

On August 5, 2002, at 67 FR 50600, EPA published a completeness determination that the Ohio NO<sub>x</sub> SIP submittal contained all of the elements of a NO<sub>x</sub> plan required for review. On January 16, 2003, at 68 FR 2211, we published a direct final rule approving Ohio’s submittal. This rule was withdrawn on March 17, 2003, at 68 FR 12590, before it became effective because EPA received an adverse comment on the flow control issue. On August 5, 2003, at 68 FR 46089, having resolved the flow control issue, EPA approved Ohio’s NO<sub>x</sub> State Implementation Plan (SIP), designed to reduce NO<sub>x</sub> emissions from major fuel burning sources during the ozone season. The Ohio NO<sub>x</sub> SIP specifically addressed emissions from sources named in Ohio Administrative Code (OAC) rules 3745–14 appendices A and B. These 2 appendices identify sources by location and plant identification

number, and list NO<sub>x</sub> allocations for each plant. Appendix B lists NO<sub>x</sub> allowance allocations for the ozone season for regulated non-electrical generating units (non-EGUs).

Following the August 5, 2003 approval, EPA issued an NO<sub>x</sub> SIP Call applicability statement which clarifies inclusion of a specific NO<sub>x</sub> source category (carbon monoxide (CO) boilers) and gives States the option to include or exclude this source category of boilers in the trading program. These CO boilers are associated with fluidized catalytic cracking units (FCCU) found in oil refineries and used to combust, and thereby control, CO emissions and to produce steam for use at the refinery. NO<sub>x</sub> is produced by a refinery’s FCCU and CO boiler and these emissions vent through the boiler stack. As fuel burning sources, these units could be included in the NO<sub>x</sub> trading program if the State so desired. The EPA applicability statement gives this option to the States.

The Ohio NO<sub>x</sub> SIP Call inventory for non-EGUs includes some, but not all, FCCU–CO boilers. Two boilers were regulated at one refinery but not regulated at two similar FCCU–CO units at two other refineries. These inventory inconsistencies existed as well at other state inventories in NO<sub>x</sub> SIP Call states. Because of these inconsistencies from state to state, EPA developed its applicability statement to allow each state with one or more FCCU–CO boiler the option of determining whether all of its large FCCU–CO boilers are covered, or all of its large FCCU–CO boilers are not covered by the NO<sub>x</sub> SIP trading program. However, in this option, EPA does not intend to allow states to split this category of sources by including some, but not all, large FCCU–CO boilers in the trading program. To prevent splitting the category, EPA needed to provide an explanation as to how allowances would be addressed for states like Ohio, with some but not all FCCU–CO sources in the rule.

**II. Background***A. What Is the Intent of Today’s Final Rule?*

Today’s final rule resolves the issue of applicability of Ohio’s rule to certain fuel burning units. It is intended to give affected sources in Ohio a clear indication that CO boilers associated with fluidized catalytic cracking units (FCCU) at oil refineries are not subject to Ohio’s NO<sub>x</sub> budget trading rule. This action excludes selected units from the NO<sub>x</sub> budget trading program and the monitoring requirements of the State rule, and clears up for owners of these sources the questions of whether or not

monitoring, record-keeping and reporting requirements are required for these sources.

*B. Who Is Affected by Today's Rule?*

This rule revision affects all refineries in Ohio which have carbon monoxide boilers associated with fluidized catalytic cracking units. There are three

refineries in Ohio which are affected by this rule change. However, since the beginning of the NO<sub>x</sub> trading program, all three refineries have been granted an exemption from the monitoring, recordkeeping and reporting requirements of the Ohio NO<sub>x</sub> budget rule and the requirements of the NO<sub>x</sub> SIP Call. The exemption was granted in

writing by EPA and applied to specific units classified by the State as small units.

*C. What Changes Did Ohio Make to Its NO<sub>x</sub> SIP?*

Ohio made a number of changes to the NO<sub>x</sub> rules as noted in Table I, below.

TABLE I

Reference	Description of change
3745-14-01(B)(2)(h) .....	Changed the definition of "boiler" to exclude CO boilers associated with combusting CO from fluidized catalytic crackers at petroleum refineries.
3745-14-01(D)(2)(c) .....	Made minor corrections to references within this section of the rule.
3745-14-01(G) .....	This chapter was amended to add significant amounts of State EPA and Federal EPA materials through incorporation by reference (IBR). The text of the incorporated material is not included but the specific materials incorporated as they exist on the effective date of the State rule are made part of the regulations and are listed in detail in the revised rule. Items included as part of the IBR are: the Clean Air Act and specific sections of Title IV; specific elements of part 51, part 52, part 60, part 72, and part 75 of the Code of Federal Regulations (CFR), and the Ohio EPA Weekly Review.
3745-14-03(B)(3)(a) .....	Made a minor correction to reference within this section of the rule.
3745-14-05(A) .....	This is the section of the Ohio rule which identifies the total number of allowances in the State's trading budget. The exclusion of FCCU-CO boilers from the requirements of the NO <sub>x</sub> program changes both the total number of allowances and the number of allowances for regulated non-electric generating units listed in appendix B of the State's plan. Details regarding this change are found in the State's revised budget demonstration. The revised total trading program budget includes 49,460 NO <sub>x</sub> allowances. The revised number of NO <sub>x</sub> allowances, for non-electric generating units, is 4,030.
3745-14 Appendix B .....	Appendix B is the list of regulated non-electric generating units subject to the 3745-14 NO <sub>x</sub> budget program. This revised appendix reflects the exclusion of FCCU-CO boilers from the trading program. And it also incorporates the 16 NO <sub>x</sub> allowances for Premcor's unit B026, a unit covered by the Ohio rule.

The Ohio NO<sub>x</sub> plan revision was reviewed based on the elements set forth in Appendix V, 40 CFR part 51.

The State's submittal included: a formal letter requesting approval of the rule revision; evidence of legal authority; evidence that the rules were adopted in the Ohio Code; a copy of the rule; evidence that Ohio followed the requirements of the State's administrative procedures act; copy of the public notice; evidence that a public hearing was held; and copy of public comments.

The submittal included a revised budget demonstration, describing the changes to the Ohio NO<sub>x</sub> emission budget and the NO<sub>x</sub> trading budget. Following original EPA approval of the Ohio NO<sub>x</sub> plan, the State discovered that an existing unit at the Premcor Refinery in Lima, Ohio should have been included in the rules as a regulated unit but was not. It is included because the unit is classified by Ohio as a large unit subject to the Ohio rule. OEPA also discovered that the rules regulated two CO boilers associated with FCCU boilers at the Sunoco Refinery in Ohio and did not regulate two similar FCCU-CO boilers, one belonging to Premcor Refinery and one at BP Toledo Refinery. These corrections are made in the Ohio

rule revision. Ohio also learned that EPA had given other States the option of regulating or not regulating similar FCCU-CO boilers, and moved to make these changes to its rules. On the basis of this information, Ohio initiated a change to its trading rules which were made effective on May 5, 2004.

*D. How Does This Change Affect NO<sub>x</sub> Sources?*

CO boilers associated with fluidized catalytic cracking units at oil refineries are classified as small units and, therefore, not required to be part of the NO<sub>x</sub> trading program. This has significant effect on annual operating costs for monitoring and reporting for owners of these boilers. Allowances, made available in Ohio's original rule, are no longer available for these units, and potential income from the sale of emission reduction credits no longer exists. More importantly for the owners of the sources, because these units are not part of the trading program, there is no longer a requirement for these sources to monitor, record and report emissions of NO<sub>x</sub> for these units under 40 CFR part 75. This relieves the owners of these sources from the substantial burden and expenses associated with

the monitoring requirements of the Ohio trading rule.

*E. What Opportunities Were Provided by Ohio for Public Input Into This Rule Change?*

The Clean Air Act (Act) requires States to allow the public an opportunity to review and comment on any State's plan to implement provisions of the Act. Section 110(a)(1) of the Act states, "Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator \* \* \* a plan \* \* \*". Ohio provided reasonable notice and public input.

Ohio's Revised Administrative Code states that the Director of the Ohio Environmental Protection Agency "may conduct public hearings on any plan for the prevention, control, and abatement of air pollution that the director is required to submit to the Federal government." (Ohio Revised Code Chapter 3704.03, Powers of the director of environmental protection.) On October 21, 2003, Ohio advised the affected community of a proposed rulemaking and public hearing concerning Rules 3745-14-01, 3745-14-03, and 3745-14-05 of the Ohio Administrative Code. Notice was made available to the public and affected

industries via Ohio EPA's Web site and by direct electronic mail to the State's list of interested parties. This notice announced a thirty-day comment period beginning October 21, 2003. Comments were received and the rule was revised in response to the comments and again made available on the State's Web site. A public hearing was held in Columbus on March 11, 2004, at which no comments were made, and no comments were received via either U.S. Mail or electronic mail.

Ohio published a notice of adoption of amended rules, and in the notice offered its citizens, and affected industry, an opportunity to appeal the Ohio EPA Director's findings and orders, and again sent an announcement of this opportunity to the list of interested parties. No appeals were made. The revision was approved by the Director and became effective on May 5, 2004.

#### *F. Why Is EPA Approving This Revision?*

EPA is approving this revision because it conforms with the intent of EPA's applicability statement regarding boilers associated with fluidized catalytic cracking units located at oil refineries. This applicability statement or policy is available from the EPA Clean Air Markets Division (CAMD). A copy of this policy is available at the following web link: <http://www.epa.gov/airmarkets/fednox/boilerpolicy.pdf>. The intent of the policy has been articulated in letters to all three sources in Ohio which are affected by the Ohio NO<sub>x</sub> rule.<sup>1</sup> In anticipation of the pending changes to the Ohio trading rule, these sources petitioned EPA and Ohio to exempt specific units from the requirements of OAC 3745-14-01, the monitoring, recordkeeping and reporting requirement of the Ohio NO<sub>x</sub> trading rule.

Prior to the May 31, 2004 start of the trading program, EPA had already exempted these small sources from the monitoring requirements. The exemptions were based on requests from the sources, and were made with the understanding that Ohio, with guidance from EPA, would amend its rules to exempt these sources from monitoring, and submit the rules to EPA to formalize the revision to the Ohio NO<sub>x</sub> plan. EPA agreed with the exemptions because the

units at these sources are considered small emitters and were not factored into the cost-effectiveness determination in the development of the original EPA rule. 63 FR 57356, October 27, 1998. Also, many of these units which are classified as CO emission control equipment in some state inventories are not significant emitters of NO<sub>x</sub>. EPA did not intend these units to be included in the NO<sub>x</sub> trading program because the emissions from this category were relatively small (less than 1 ton per day) 63 FR 57356, October 27, 1998. Ohio corrected this applicability issue by revising the State rule to exempt these units from the requirements of the NO<sub>x</sub> program. EPA agrees with the State's revision.

#### **III. What Public Comments Were Received and What Is EPA's Response?**

EPA received two documents commenting on the direct final rule pertaining to the Ohio NO<sub>x</sub> SIP Call revision published in the **Federal Register** on January 19, 2005, at 70 FR 2954 EPA noted in the proposed rule also published on January 19, 2005, at 70 FR 2992, that if EPA received written comments, the direct final rule will be withdrawn and all written public comments received during the comment period will be addressed in a subsequent final rule based on the proposed rule. EPA, in the proposed rule, invited any party interested in commenting on the action to do so within the time-frame noted in the proposed rule.

Whenever EPA receives adverse comments on the rule, it is required to published a withdrawal of the direct final rule within 30-days from the date of the close of the comment period. In this instance the withdrawal of the direct final approval of the Ohio revised NO<sub>x</sub> rule was published on March 14, 2005, at 70 FR 12416, within the time period required by EPA procedures.

In addition to the two written comments on this action, EPA received several telephone inquires regarding the revision to the Ohio NO<sub>x</sub> trading rule. However, these phone calls were not intended by the callers to comment on the rule changes, but conveyed questions regarding EPA procedures and timing of the subsequent final rule or action. EPA did not receive any written comments resulting from these phone calls, and therefore, the details of the content of these telephone inquires will not be addressed in this final rule.

Two written comments were submitted addressing the direct final rule. One comment came from an anonymous citizen via the Federal eRulemaking Portal through the

Regional Materials in eDocket (RME) identification number R05-OAR-2004-OH-0003, and one comment was received from Ohio Environmental Protection Agency (OEPA) via the U.S. Postal Service. Both of these comments are available for viewing by the public in the RME using the above noted identification number.

The citizen comment notes that the commenter's daughter has asthma and expresses concern that the Social Security Administration terminated disability payments. The comment does not address EPA's proposed action on Ohio's NO<sub>x</sub> rules. Thus the comment provides no reason for EPA's final action to differ from its proposed action.

The OEPA submitted a comment suggesting corrections to errors in the text of the approval in the direct final rule. We incorrectly included in the direct final rule a number of changes to the State's rule which had not yet been given public notice and comment in the State's rulemaking procedure. These errors are corrected in this final rule. The direct final rule also refers to a unit in the Ohio inventory which was misidentified by the State in its original submittal. These changes are reflected in the revised text and appear as requested by Ohio EPA in its comments on the direct final rule. The intent of this final rule remains the same as the previously published direct final rule. EPA agrees with Ohio and is approving the revision which exempts FCCU-CO boilers from requirements of the trading program.

#### **IV. Final Action**

We are approving Ohio's revision to the State's NO<sub>x</sub> plan because it continues to meet the requirements of the EPA NO<sub>x</sub> trading program. The State's revision makes a minor adjustment in the overall trading budget which EPA had confirmed was approvable. EPA agreed with Ohio prior to the start of the 2004 ozone season that this change would be approved and that affected FCCU-CO boilers would not be required to implement NO<sub>x</sub> rule requirements as long as Ohio continued to make progress to change the rules. The rule changes affecting the definition of boiler and adjusting the budget became effective in the State on May 5, 2004. This adjustment in the budget was recognized by EPA as a necessary change to accommodate Ohio's change in the definition of "boiler" in the State rule. EPA is publishing this action as a final rule because it serves to implement the intent of the NO<sub>x</sub> SIP Call and EPA policy and improves operation of Ohio's NO<sub>x</sub> plan.

<sup>1</sup> For example, letter dated June 28, 2004, from Sam Napolitano, Director, Clean Air Markets Division, EPA to Mr. Allen R. Ellet, Air Quality Team Leader, BP Oil Company, Toledo Refinery, Toledo, Ohio. In this letter, EPA approves an extension to the deadline for compliance by the CO boiler with the monitoring, recordkeeping and reporting requirements of the Ohio NO<sub>x</sub> budget trading program.

## V. Statutory and Executive Order Reviews

### *Executive Order 12866; Regulatory Planning and Review*

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.

### *Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

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).

### *Regulatory Flexibility Act*

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.*).

### *Unfunded Mandates Reform Act*

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).

### *Executive Order 13175 Consultation and Coordination with Indian Tribal Governments*

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).

### *Executive Order 13132 Federalism*

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.

### *Executive Order 13045 Protection of Children from Environmental Health and Safety Risks*

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.

### *National Technology Transfer Advancement Act*

In reviewing plan 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 plan 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.

### *Paperwork Reduction Act*

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.*).

### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. section 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 August 26, 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, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Reporting and recordkeeping requirements.

Dated: May 19, 2005.

**Richard C Karl,**

*Acting Regional Administrator, Region 5.*

■ For the reasons stated in the preamble, part 52, Chapter I, title 40 of the 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 KK—Ohio

■ 2. Section 52.1870 is amended by adding paragraph (c)(132) to read as follows:

#### § 52.1870 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(132) On June 28, 2004, the Ohio Environmental Protection Agency submitted revisions to OAC rule 3745–14–01. These revisions change the definition of “boiler” by excluding from the trading program carbon monoxide (CO) boilers associated with combusting CO from fluidized catalytic cracking units at petroleum refineries. The submittal also includes revisions to OAC rule 3745–14–03 (A housekeeping correction to reference OAC Chapter 3745–77 concerning Title V operating permit) and 3745–14–05 (Revising the number of trading program budget allowances and source identification for the ozone seasons 2004 through 2007).

(i) Incorporation by reference.

(A) Ohio Administrative Code rules 3745–14–01, 3745–14–03, and 3745–14–05, effective May 25, 2004.

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