

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

[OAR-2002-0054; FRL-7997-9]

RIN 2060-AM94

**National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing: Reconsideration**

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

**ACTION:** Notice of final action on reconsideration.

**SUMMARY:** On May 16, 2003, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) for new and existing sources at brick and structural clay products (BSCP) manufacturing facilities (the final rule). Subsequently, the Administrator received a petition for reconsideration of the final rule. On April 22, 2005, EPA announced its reconsideration of one issue arising from the final rule. Specifically, we (EPA) requested public comment on our decision to base the maximum achievable control technology (MACT) requirements for certain tunnel kilns on dry limestone adsorption technology. As a result of this reconsideration process, we have concluded that the MACT floors and standards determined at promulgation are correct, and no changes to the final rule are warranted. We, therefore, are taking no amendatory action with respect to these requirements.

**DATES:** This final action is effective on November 17, 2005.

**ADDRESSES:** *Docket.* EPA has established an official public docket for the NESHAP for brick and structural clay products manufacturing including both Docket ID No. OAR-2002-0054 and Legacy Docket ID No. A-90-30. The official public docket consists of the

documents specifically referenced in this action, any public comments received, and other information related to the BSCP rulemaking and the reconsideration action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they are aware of all materials relevant to the BSCP rulemaking and this action. Although listed in the index, some information is not publicly available, *i.e.*, confidential business information 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 Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mary Johnson, Combustion Group, Emission Standards Division (MC-C439-01), EPA, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5025; fax number: (919) 541-5450; e-mail address: [johnson.mary@epa.gov](mailto:johnson.mary@epa.gov).

**SUPPLEMENTARY INFORMATION:** The information presented in this preamble is organized as follows:

- I. General Information
  - A. What is the source of authority for the reconsideration action?
  - B. What entities are potentially affected by the reconsideration action?
  - C. How do I obtain a copy of this action?
- II. Background
  - A. History
  - B. Overview of Decisions at Promulgation

- III. Today's Action
  - A. Final Action
  - B. Comments Received on Reconsideration Issue
- IV. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
  - H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act

**I. General Information**

*A. What is the source of authority for the reconsideration action?*

EPA is reconsidering one aspect of its final BSCP rule under sections 112 and 307(d)(7)(B) of the Clean Air Act (CAA) as amended (42 U.S.C. 7412 and 7607(d)(7)(B)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

*B. What entities are potentially affected by the reconsideration action?*

Entities potentially affected are those industrial facilities that manufacture BSCP. Brick and structural clay products manufacturing is classified under Standard Industrial Classification (SIC) codes 3251, Brick and Structural Clay Tile; 3253, Ceramic Wall and Floor Tile; and 3259, Other Structural Clay Products. The North American Industry Classification System (NAICS) codes for BSCP manufacturing are 327121, Brick and Structural Clay Tile; 327122, Ceramic Wall and Floor Tile Manufacturing; and 327123, Other Structural Clay Products. The categories and entities that include potentially affected sources are shown below:

Category	SIC	NAICS	Examples of potentially regulated entities
Industrial .....	3251	327121	Brick and structural clay tile manufacturing facilities.
Industrial .....	3253	327122	Extruded tile manufacturing facilities.
Industrial .....	3259	327123	Other structural clay products manufacturing facilities.

The reconsideration action does not concern the NESHAP for clay ceramics manufacturing facilities (40 CFR part 63, subpart KKKKK), which were published with the final BSCP rule (40 CFR part 63, subpart JJJJJ).

This table is not intended to be exhaustive, but rather provides a guide

for readers regarding entities likely to be affected by the reconsideration action. To determine whether your facility may be affected by the reconsideration action, you should examine the applicability criteria in 40 CFR 63.8385 of the final BSCP rule. If you have any questions regarding the applicability of

the final rule to a particular entity or the implications of the reconsideration action, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

### C. How do I obtain a copy of this action?

In addition to being available in the dockets, an electronic copy of today's action also will be available on the Worldwide Web (WWW). Following the Administrator's signature, a copy of this action will be posted at <http://www.epa.gov/ttn/oarpg> on EPA's Technology Transfer Network (TTN) policy and guidance page. The TTN provides information and technology exchange in various areas of air pollution control.

## II. Background

### A. History

Section 112 of the CAA requires that we establish NESHAP for the control of hazardous air pollutants (HAP) from both new and existing major sources. Major sources of HAP are those stationary sources or groups of stationary sources that are located within a contiguous area and under common control that emit or have the potential to emit considering controls, in the aggregate, 9.07 megagrams per year (Mg/yr) (10 tons per year (tpy)) or more of any one HAP or 22.68 Mg/yr (25 tpy) or more of any combination of HAP. The CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable. This level of control is commonly referred to as MACT.

The MACT floor is the minimum control level allowed for NESHAP and is defined under section 112(d)(3) of the CAA. In essence, the MACT floor is the level of control already achieved by the better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor is the level of emission control that is achieved in practice by the best-controlled similar source. The MACT floor for existing sources is the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory for which the Administrator has emissions information (where there are 30 or more sources in a category or subcategory, as in the case of each BSCP subcategory).

In developing MACT standards, we also consider control options capable of achieving a level of emission control more stringent than the floor. We establish more stringent standards where we find greater reductions are achievable, taking into consideration the cost of achieving the emissions reductions, any health and environmental impacts, and energy requirements.

We proposed NESHAP for major sources manufacturing BSCP on July 22,

2002 (67 FR 47894), and we published the final BSCP rule on May 16, 2003 (68 FR 26690). Following promulgation, the Administrator received a petition for reconsideration (dated July 15, 2003) filed by Earthjustice on behalf of Sierra Club pursuant to section 307(d)(7)(B) of the CAA. The petition requested reconsideration of three aspects of the final rule. We also received a letter (dated October 10, 2003) from counsel for the Brick Industry Association (BIA), commenting on the Sierra Club's petition for reconsideration. On April 19, 2004, EPA issued a letter to the Sierra Club's counsel granting its petition for reconsideration with respect to one issue. On April 22, 2005, we announced our reconsideration of and requested public comment on that issue, specifically our decision to base the MACT requirements for certain tunnel kilns on DLA technology.

In addition to the petition for reconsideration, three petitions for judicial review of the final NESHAP for BSCP manufacturing and clay ceramics manufacturing (40 CFR part 63, subparts JJJJJ and KKKKK, published together on May 16, 2003) were filed with the U.S. Court of Appeals for the District of Columbia Circuit by the Sierra Club, BIA, and two clay ceramics manufacturers (Monarch Ceramic Tile, Incorporated and American Marazzi Tile, Incorporated).<sup>1</sup> The litigation has been stayed to enable EPA to act on Sierra Club's petition for reconsideration prior to briefing. On May 10, 2005, the Court issued its most recent order, holding the case in abeyance until November 10, 2005.

### B. Overview of Decisions at Promulgation

In the proposed rule, the MACT floors for the kiln exhaust from certain tunnel kilns were based on the use of dry lime injection fabric filters (DIFF), dry lime scrubber fabric filters (DLS/FF), or wet scrubbers (WS). Dry limestone adsorber (DLA) technology, which is the most prevalent type of air pollution control device (APCD) used to control emissions from existing brick kilns, was not proposed as a MACT floor technology because we had questions and concerns about DLA based on the information we had at the time. In response to the proposed rule, however, we received numerous comments from industry representatives, kiln manufacturers, and APCD vendors on issues related to the application and

performance of the APCD discussed in the preamble. Many commenters reported technical obstacles to the use of DIFF, DLS/FF, and WS technologies, particularly for retrofitting BSCP kilns, as well as other disadvantages of those technologies, and provided information to address our questions and concerns about DLA technology.

As a result of these public comments, we realized that there was more information on DLA technology to be considered and that we did not fully understand the limitations of applying the other technologies that were the focus of our MACT floors analysis at proposal. After reviewing all of the available information, we determined that MACT for some new tunnel kilns should be based on DIFF, DLS/FF, and WS technologies, but that for existing tunnel kilns retrofitting with DIFF, DLS/FF, or WS is not feasible or practical in many cases. We concluded that retrofitting existing BSCP tunnel kilns with certain APCD would likely alter brick quality and color for many kilns, resulting in changes to the product that are central to its character and value. We also determined that our principal concerns with DLA at proposal (*i.e.*, generation or no control of particulate matter (PM) emissions and consistency of performance) had been allayed by the information we received in response to the proposal.

In light of the public comments received regarding technical features and limitations of DIFF, DLS/FF, WS, and DLA technologies, we came to new conclusions regarding the effective application of these technologies. We concluded that DLA are the only currently available technology that can be used to retrofit existing tunnel kilns without potentially significant impacts on aspects of the production process that affect the character of the product itself. In the final BSCP rule, we thus allowed existing large tunnel kilns to use the DLA technology.

In addition, we concluded that, because of retrofit concerns, it is not technologically or economically feasible for an existing small tunnel kiln that would otherwise meet the criteria for reconstruction and whose design capacity is increased such that it becomes a large tunnel kiln to meet the relevant standards (*i.e.*, new source MACT) by retrofitting with a DIFF, DLS/FF, or WS. We also similarly concluded that it is not technologically and economically feasible for an existing large DLA-controlled tunnel kiln that would otherwise meet the criteria for reconstruction to meet the relevant standards (*i.e.*, new source MACT) by retrofitting with a DIFF, DLS/FF, or WS.

<sup>1</sup> The cases, which have been consolidated, are: *Brick Industry Association v. EPA*, No. 03-1142 (D.C. Cir.); *Sierra Club v. EPA*, No. 03-1202 (D.C. Cir.); and *Monarch Ceramic Tile, Inc. v. EPA*, No. 03-1203 (D.C. Cir.).

However, we determined that it is technologically and economically feasible for these types of kilns, whether existing or reconstructed, to retrofit or continue operating with a DLA, and the final rule required that such kilns meet the emissions limits that correspond to the level of control provided by a DLA.

In the final rule, we concluded that DIFF, DLS/FF, and WS are appropriate technologies for new large tunnel kilns and for reconstructed large tunnel kilns that were equipped with DIFF, DLS/FF, or WS prior to construction. For small tunnel kilns, however, we concluded that DLA are the only APCD that have been adequately demonstrated, and, therefore, we based the final requirements for new and reconstructed small tunnel kilns on DLA control.

### III. Today's Action

#### A. Final Action

At this time, we are announcing our final action regarding the one issue in the Sierra Club's petition for reconsideration that we agreed to reconsider. The petition sought reconsideration of three issues relating to EPA's promulgation of final MACT floor standards based on DLA technology. One of the concerns was whether EPA had adequately complied with public notice and comment requirements. Noting that EPA had proposed MACT floor standards based on three different technologies, DIFF, DLS/FF and WS, the Sierra Club argued that EPA had provided no opportunity to comment on either the final DLA-based floors or the final floor approach. Pursuant to section 307(d)(7)(B) of the CAA,<sup>2</sup> we granted the Sierra Club's petition for reconsideration only with respect to that one issue "namely, the Sierra Club's claim that the MACT floors (and MACT standards based on the floors) at promulgation were set using a different control technology than those proposed and that EPA did not provide adequate opportunity for public comment on the revised MACT floors."<sup>3</sup>

<sup>2</sup> Section 307(d)(7)(B) of the CAA provides that if a person raising an objection to a rule during judicial review "can demonstrate to the Administrator that \* \* \* the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. 7607(d)(7)(B).

<sup>3</sup> In its petition for reconsideration, the Sierra Club also raised two issues relating to our overall MACT approach, which was the same at proposal and promulgation. Specifically, the Sierra Club

As stated in the April 22, 2005, notice announcing reconsideration of one aspect of the final rule, the arguments Sierra Club presented in the petition for reconsideration did not persuade us that our MACT floor determination for the final BSCP rule was erroneous or inappropriate. However, because we changed the technological basis of the MACT floors and standards between proposal and promulgation in response to comments received on the proposed rule, we decided to grant reconsideration on this issue and provide an opportunity for public comment on the DLA-based floors and standards reflected in the final rule.

In our notice of reconsideration, we requested comment on the DLA-based floors and standards, including technical issues related to the performance of DLA as compared to DIFF, DLS/FF, and WS; the ability to retrofit existing kilns with DLA, DIFF, DLS/FF, and WS; and whether this should be a consideration when selecting MACT control options. We also specifically requested (1) additional information regarding whether there have been technical difficulties associated with DIFF, DLS/FF, WS, and DLA; (2) additional information on how these control devices have performed at plants operating these technologies; and (3) additional information on the successful application of these technologies to existing kilns. We received 15 responses to our request for public comment. These comment letters are available in the official public docket (Docket ID No. OAR-2002-0054).

The comments we received provided limited new information related to APCD technology performance, including retrofitting issues, technical difficulties, overall performance, or successful application of the control technologies. Instead, the commenters generally referred to comments they had previously submitted on the proposed rule. Overall, the reconsideration notice did not bring to light additional technical information for EPA to weigh in revisiting its original MACT floor and standard-setting decisions. While one

argued that "in setting floors, EPA unlawfully considered more kilns than the best performing twelve percent of sources for which it had emissions information"; and that "EPA's floors do not reflect the average emission level achieved by the best performing twelve percent of kilns for which the Administrator has emissions information." We addressed these issues in the response to Earthjustice's comments on the proposal (See p. 2-44, EDOCKET document no. OAR-2002-0054-0005). Therefore, they do not meet the criteria for reconsideration under CAA section 307(d)(7)(B), and they are not discussed in this action.

commenter argued that the CAA does not permit EPA to consider the feasibility of retrofitting existing kilns with APCD when determining the MACT floor, we disagree with the commenter's legal analysis for the reasons discussed below. Since the reconsideration comments did not provide a basis for us to conclude that our prior analysis was incorrect or flawed, we reaffirm the validity of the determinations we made at promulgation and are making no changes to the final rule. A summary of major comments received on the reconsideration issue and EPA's responses to those comments are provided below.

#### B. Comments Received on Reconsideration Issue

We received both comments in support of and comments objecting to the DLA-based MACT floors and standards in the final rule. Multiple industry commenters supported our decision to include DLA as a retrofit technology in the MACT floor analyses for BSCP manufacturing. They also agreed with our statement in the April 22, 2005, notice that the petitioners did not provide sufficient information in their petition for reconsideration to warrant any changes to the final rule; indeed, they argued that the final rule should not even be subject to reconsideration. These commenters stated that the comments EPA received on the proposed rule specifically addressed the use of DLA, and thus, inclusion of DLA could have been anticipated by anyone following the public record. The commenters also asserted that the ability to retrofit certain APCD to an existing kiln has not been demonstrated to be achievable. They considered unreasonable the petitioner's assertion that the ability to retrofit a control is irrelevant to the determination of MACT and is equivalent to considering costs. The commenters stated that EPA cannot set a standard that has not been demonstrated as achievable. According to the commenters, under MACT, when the existing sources included in the top 12 percent have controls in place but these controls have not been demonstrated as a "retrofitable" device (*i.e.*, they were installed when designing and building the kiln rather than after it was built), then they are not a retrofit control device for that process. In addition, the commenters argued that if the same products cannot be produced after the installation of the control device, then it is not the same process. The commenters could think of no MACT standard where EPA added

controls that changed the targeted industry's products.

Industry commenters highlighted major points made regarding DLA in previous comments on the proposed rule, including: (1) DLA are viable controls and have been demonstrated as a retrofit technology; (2) DLA are the most prevalent control in the industry because DLA achieve essentially the same reductions in emissions (*e.g.*, of hydrogen fluoride (HF)), but do not present the same retrofit issues, as the other controls; (3) contrary to previous concerns raised by EPA, DLA have the potential to reduce PM emissions; (4) the small amount of PM that comes from these units has not been shown to contain any significant HAP emissions, and is likely significantly smaller than the already low amount in kiln exhaust; and (5) DLA have been demonstrated as a control that does not interfere with the operation of the kiln (*i.e.*, airflow within the kiln). This last point is particularly important to the brick industry, which raised concerns with the other control devices that were considered by EPA. Industry commenters noted that among the controls considered for retrofit purposes, only DLA do not impact the types of products that can be produced, and not impacting the products is critical to the ongoing viability of a brick plant.

Multiple industry commenters agreed with key EPA statements made in the promulgation preamble, specifically where EPA: (1) Concluded that "retrofitting existing kilns with DIFF or DLS/FF systems is not feasible in many cases;" (2) acknowledged that "retrofitting existing BSCP kilns with certain APCD (particularly those that affect kiln airflow) can alter time-honored recipes for brick color, thereby changing the product;" (3) concluded that "DLA are the only currently available technology that can be used to retrofit existing kilns without potentially significant impacts on the production process;" (4) concluded that "it is not technologically and economically feasible for an existing large DLA-controlled kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2 \* \* \* to meet the relevant (*i.e.*, new source MACT) standards by retrofitting with a DIFF, DLS/FF, or WS;" and (5) concluded that "DIFF and DLS/FF systems, if attempted on smaller kilns, would experience more difficulties with respect to airflow than systems on larger kilns because as the design airflow decreases, the acceptable operating range also would be expected to decrease." According to the commenters, the petitioners have

provided no arguments or technical information that would change these conclusions.

In response, we agree that our decisions at promulgation were a natural progression based on the comments received after proposal regarding the control technologies used in the industry. The comments and additional technical information not available to EPA prior to proposal provided a more complete explanation of the application of DLA and other control technologies to existing kilns in the BSCP source category. The previous comments submitted and referenced by these commenters are included in the official public docket (Docket ID No. OAR-2002-0054). We also agree that there is no new technical information relevant to the MACT floor analysis in the final rule.

Some industry commenters also argued that if EPA does reconsider the DLA-based MACT for the BSCP industry, then decisions at promulgation that stemmed from the DLA-based MACT must also be reviewed. Specifically, EPA must: (1) Reevaluate the use of risk-based alternatives for this rule, and (2) revisit the issue of removing existing DLA from revised MACT determinations. In addition, they stated that EPA must repropose the rule if the Agency concludes that MACT must be based on anything other than DLA. According to the commenters, numerous facilities have begun to comply with the promulgated rule by installing or committing to install DLA. The commenters stated that the large costs that would be incurred by ripping out a DLA and replacing it with a DIFF, DLS/FF or WS would be unreasonable, unwarranted, and not justified by the minimal benefits that would accrue, assuming the other APCD could be made to work. According to the commenters, those facilities most impacted and penalized would be the environmentally proactive facilities that have installed DLA to reduce emissions even before required by MACT, because they would be ripping out controls less than 2 years old.

As explained further below, based on our evaluation of the reconsideration comments received, EPA is not making any changes to the MACT floors and standards. We acknowledge that changes to the promulgated MACT floor and standards based on DLA control technology could necessitate reevaluation of related decisions; however, since EPA is not making any changes, these comments are not relevant to this action.

Earthjustice, in its comments on behalf of Sierra Club, reiterated its objection, originally stated at proposal, that EPA's decision to base MACT floors on the alleged performance of a control technology is unlawful, arbitrary and capricious. The commenter resubmitted its comments on the proposed rule and its Petition to Reconsider letter. The commenter argued that EPA's decision to base MACT floors on the alleged performance of DLA-equipped kilns contravenes the CAA MACT floor mandate because DLA-equipped kilns are not the best-performing kilns for which EPA has information. The commenter referenced EPA's own data, which indicated that (1) kilns equipped with other control technologies are achieving better emission levels than DLA-equipped kilns, (2) DLA have low hydrogen chloride (HCl) removal efficiencies, (3) DLA do not provide a mechanism for PM removal, and (4) DLA may actually create PM in some instances.

This commenter argued that EPA's statement that "DLA are the only currently available technology that can be used to retrofit existing large kilns without potentially significant impacts on the production process" is statutorily irrelevant. According to the commenter, the CAA requires EPA to set MACT floors regardless of what control equipment the best-performing kilns are using, and EPA cannot choose to ignore that mandate based on its policy preference for setting floors that allegedly reflect what is achievable through using DLA. The commenter stated that EPA's argument that DLA is the only available technology depends largely on arguments irrelevant to MACT floor calculations, *e.g.*, that retrofitting kilns with other technologies (1) would create solid waste or wastewater that is difficult or expensive to dispose of, and (2) could require kilns to change their recipes or incur downtime or reduction in capacity. The commenter argued that the possibility that other technologies may cost more or require sources to overcome technological difficulties does not support EPA's refusal to consider the performance of kilns equipped with those technologies. The commenter further argued that the record does not support or explain EPA's claim that those technologies may have technical difficulties, *e.g.*, that they need a different airflow, which might affect brick color. The commenter noted that many existing kilns already are using those other technologies, which shows that it is possible to maintain the airflows and still produce bricks in the

colors the manufacturers choose. According to the commenter, EPA's suggestion that changes in airflow might affect brick color is only speculation, based on unsubstantiated and self-serving assertions by industry.

Previous comments submitted at proposal related to DLA control technology and referenced by this commenter are in the official public docket (Docket ID No. OAR-2002-0054). The commenter's Petition to Reconsider letter is part of the docket at OAR-2002-0054-0010. As mentioned previously, one issue from that letter is the focus of this reconsideration action.

In response to these comments, we reviewed our MACT floor analysis and its factual and statutory basis. Contrary to the commenter's claims, there is ample support in the rulemaking record for the concerns expressed by the brick industry about the feasibility of retrofitting existing kilns with DIFF, DLS/FF or WS (unless the existing kiln had been designed and built with that technology). As explained in more detail below, the attempts that have been made to retrofit using DIFF or DLS/FF have not met with success, and we do not have a basis for concluding that the technological obstacles that have been encountered to date can be overcome in the 3 years that existing sources have to comply with the NESHAP.<sup>4</sup> While sources subject to NESHAP typically face challenges in meeting the applicable requirements, here the concern is whether existing BSCP kilns can retrofit APCD without changing the very products they make. As for WS, we continue to believe that retrofits using that technology are only feasible for kilns having access to a sewer system for wastewater disposal. Indeed, a WS system that includes the type of wastewater treatment that would be required in the absence of sewer system access has never been built or demonstrated in the BSCP industry. Based on our review of the rulemaking record, we again conclude that DLA are the only currently available technology that can be used to retrofit existing tunnel kilns without potentially significant impacts on the production process and the resulting product of many kilns.

We also believe that the MACT floor analysis upon which we based the promulgated standards for existing tunnel kilns in the BSCP industry properly took into account the technical obstacles to retrofitting those kilns with

available APCD. We disagree that the ability to retrofit a technology to an existing source is irrelevant to the MACT floor. Under CAA section 112(d)(2), EPA is required to set NESHAP that reflect the "maximum degree of reduction in emissions" of the relevant HAP that the Agency, considering various factors, "determines is *achievable*" (emphasis added). In surveying existing tunnel kilns, we found that DIFF, DLS/FF and WS were used almost exclusively by kilns that had been designed and built to work with those technologies. Kilns which had been retrofitted with ACPD primarily used DLA because, among other things, that technology, unlike DIFF and DLS/FF, does not affect airflow crucial to product quality and color, and, unlike WS, does not generate large quantities of wastewater. As described in detail below, the kilns that had been retrofitted with DIFF or DLS/FF experienced serious and so far insurmountable problems.

While kilns using DIFF, DLS/FF or WS technologies achieve lower emission rates than kilns using DLA, the CAA does not require that we turn a blind eye to compelling evidence that kilns not already equipped with DIFF, DLS/FF or WS cannot be reliably retrofitted with those technologies without significantly affecting the kiln's production process and its product. On its face, CAA section 112(d) repeatedly calls for "achievable" standards. BSCP facilities that are otherwise similar in terms of kiln type and size are demonstrably dissimilar in their ability to be retrofitted with the various APCD. EPA may appropriately account for technological differences that affect whether a control technology can be feasibly applied to all existing sources that will require additional controls to lower their HAP emissions.

Recognizing these technological issues, we clearly laid out in the final rule preamble the four basic steps taken in determining the MACT floor control level:

(1) We reviewed available data on pollution prevention techniques (including substitution of raw materials and/or fuels) and the performance of add-on control devices to determine the techniques that were viable for and effective at reducing HAP emissions;

(2) For each subcategory, we ranked the kilns from the best performing to the worst performing based on the emission reduction technique used on the kilns;

(3) For each subcategory, we then identified the 94th percentile kiln and the emission reduction technique that represented the MACT floor technology; and

(4) For each subcategory, we then selected production-based or percent-reduction emission limits that correspond to the 94th percentile kiln and emission reduction technique, and we based our selections on the available data while considering variability in the performance of a given emission reduction technique.

A full explanation of the MACT floor and MACT determination is provided in the promulgation preamble (see 68 FR 26698, May 16, 2003).

Key points and information provided by the commenters after proposal included the following: (1) DIFF, DLS/FF, and WS are not demonstrated technologies for retrofitting BSCP kilns; kilns that have used those technologies for a retrofit have experienced significant problems, as explained further below; (2) different products require different airflows to produce distinctive characteristics of the product; (3) DIFF, DLS/FF, and WS require minimum airflow rates to operate properly; (4) DIFF, DLS/FF, and WS affect the product line when process/kiln airflow rates must be changed to accommodate control device operation; (5) DIFF, DLS/FF, and WS result in kiln downtime and reductions in kiln production capabilities; (6) during kiln slowdowns, DIFF, DLS/FF, and WS APCD may not be able to operate at all; (7) DIFF, DLS/FF, and WS produce large amounts of solid waste and wastewater that pose environmental issues of their own; (8) most BSCP facilities are located in areas that do not have available sewer access for WS wastewater; (9) few DIFF, DLS/FF, and WS systems have been developed specifically for brick kilns; (10) DLA do not require minimum airflow rates; (11) lower airflow rates increase the control efficiency of DLA; (12) DLA do not impact kiln operation, airflow, and production level; (13) DLA do not generate PM emissions; (14) DLA do perform over the life of the sorbent; (15) DLA limestone is continually replaced and HF and HCl control efficiencies are maintained; and (16) DLA control technology is applied to brick kilns all over the world, and vendors are experienced in applying the technology to the BSCP industry.

Commenters noted that most of the DIFF, DLS/FF, and WS in place in the BSCP industry have been installed on new kilns, and those that were installed on existing kilns have created problems with kiln operation. Commenters pointed out that all injection and wet control devices need a certain airflow to operate, and because the airflow rate within a brick kiln can vary by 50 percent or more, depending primarily

<sup>4</sup> Consistent with CAA section 112(i), EPA's final rule provided existing covered sources with the maximum allowable lead time of 3 years to comply with the BSCP NESHAP.

on the size of the product, control systems with any type of injection are problematic. Each product has a given set of kiln operating parameters, and the airflow varies from product to product. Balancing airflow in the kiln is critical to the operation of the kiln. Any changes to the firing characteristics and/or airflow rate that result from the use of DIFF, DLS/FF, and WS controls have an impact on the quality and aesthetic value of the product. If these control devices are used, then the control devices will dictate how the kiln is operated.

Commenters shared their actual experience with DIFF, DLS/FF and WS technologies in retrofit applications. In the case of WS, they noted that short-term pilot tests of WS had encountered significant problems and that full-scale WS had never been used on BSCP kilns (with the exception of one facility, discussed below, that operates two WS). Multiple commenters stated that, rather than being reduced, PM was generated by WS during pilot tests. One commenter stated that, during the 3-month pilot test, the longest time of continuous operation of the WS was 6 days. Following the pilot tests, the facilities chose not to install a full scale WS due to the insurmountable issues. The one facility operating WS has a permit to discharge untreated wastewater to the local sewer system, thus making wet scrubbing a feasible option for that facility. According to a letter submitted by the company, one of the WS at this facility has ongoing problems with fouling of scrubber packing.

With respect to DIFF, commenters explained that the only commercially available retrofit DIFF installation was problematic and still not operating correctly more than 2 years after installation. This system had problems with the dampers and reagent feeding systems. Commenters noted that the original cost for this DIFF was \$1 million; however, the facility spent over \$2 million without achieving successful operation. Furthermore, another retrofit DIFF installation changed the kiln draft enough to result in kiln capacity reduction from 13.5 to 12.2 cars/day; this was a loss in revenue of \$1 million per year. According to commenters, the vendor who installed this DIFF system is no longer in business.

Commenters indicated that the only DLS/FF retrofit that has been attempted is also problematic and led to product quality problems and kiln downtime. This system was a prototype and so had no operational, troubleshooting, or maintenance history, leaving the facility to diagnose operational problems. The

vendor who installed this DLS/FF is no longer providing systems to the BSCP industry according to the commenters.

In sum, the commenters provided information showing that few injection (*i.e.*, DIFF and DLS/FF) or WS systems have been developed specifically for brick kiln operations, and retrofit experience shows that vendors have been unable to successfully design these systems for retrofit applications in the BSCP industry. Commenters charged that EPA did not account for retrofitting problems associated with installing DIFF, DLS/FF, and WS on older kilns and the costs associated with these problems. Commenters described how attempts at retrofitting kilns with these APCD have resulted in significant kiln downtime and permanent reductions in kiln production capacities. Commenters stated that DIFF and DLS/FF systems produce large amounts of solid waste that is difficult and expensive to dispose of, and use of WS is not practical for most facilities because the facilities have no viable options for wastewater disposal. Commenters also pointed out that there are high costs and marginal additional emissions reductions associated with replacing an existing DLA with a DIFF system.

Based on the many comments received following proposal regarding retrofit concerns with DIFF, DLS/FF, and WS and our own review of all the available information, we concluded that retrofitting existing kilns with these technologies is not feasible in most cases. We note that in addition to comments received from brick manufacturers, we received comments from a kiln vendor and APCD vendors explaining the importance of airflow to kiln operation, product quality and color, and for proper APCD operation; these comments further substantiated many of the claims submitted by industry representatives. We find it particularly compelling that: (1) Attempts to retrofit older kilns with injection systems (*i.e.*, DIFF and DLS/FF) have been unsuccessful due to interference with the kiln airflow, such that product quality cannot be maintained, and (2) injection system retrofits have experienced operational problems (*i.e.*, settling of lime sorbent in the ductwork and subsequent APCD malfunction, early and unanticipated fabric filter bags failure) during the airflow variations that are necessary for various products. We also find quite compelling the argument that WS are not an option for most BSCP facilities because of limited or no sewer access. Although we also received many comments after proposal regarding the cost of control technologies, our MACT

floor decisions are based on what is technically achievable and demonstrated as opposed to cost as section 112(d)(3) of the CAA does not allow consideration of cost when determining MACT floors.

As described above, in the reconsideration proposal notice we asked for additional comments and information on technical issues related to the performance of control technologies, including DLA, DIFF, DLS/FF, and WS. We also requested information on the successful retrofit of DIFF, DLS/FF, and WS on existing tunnel kilns. We received no additional information that would lead us to different conclusions today regarding the MACT floor for existing large tunnel kilns. Therefore, we continue to believe that DLA are the only currently available technology that can be used to retrofit existing large tunnel kilns without potentially significant impacts on the production process.

One commenter also took issue with EPA's decisions on reconstructed sources. Specifically, the commenter rejected as irrelevant EPA's arguments that it would not be technologically and economically feasible for the following reconstructed sources to meet the relevant (*i.e.*, new source MACT) standards by retrofitting with a DIFF, DLS/FF, or WS: (1) An existing small tunnel kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2, and whose design capacity is increased such that it becomes a large tunnel kiln; and (2) an existing large DLA-controlled tunnel kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2. The commenter argued that EPA is not relieved of its statutory obligation to set new source floors reflecting the performance of the best-performing source based on the possibility that some sources may incur costs or have to overcome technological obstacles to match the performance of the relevant best source. According to the commenter, such a possibility also does not allow EPA to simply declare that certain reconstructed BSCP are not subject to these requirements, which the commenter argued would contravene the CAA's definition of "new source" and statutory mandate requiring reconstructed sources to meet new source MACT. The commenter argued that this decision is nothing more than an attempt by EPA to substitute its own views for the plainly expressed intent of Congress. The commenter also argued that EPA missed the point in basing the MACT floor for new small tunnel kilns on the alleged performance of DLA (with EPA concluding that "DLA are the

only APCD that have been demonstrated on small tunnel kilns”) because the floor must reflect the actual performance of the single best kiln, not what EPA thinks is achievable through the use of DLA.

Based on the retrofit comments discussed above, the same technological retrofit concerns for existing sources are also relevant to (1) existing small tunnel kilns that are rebuilt such that they become large kilns and (2) existing large DLA-controlled tunnel kilns that are rebuilt. Retrofitting these types of existing kilns with DIFF, DLS/FF, or WS is not feasible. The only currently available technology that can be used to retrofit these reconstructed kilns without potentially significant impacts on the production process is DLA. Additionally, DIFF, DLS/FF, and WS have not been demonstrated for small kilns. Smaller kilns have even smaller airflow rates than larger kilns, and any fluctuations in airflow rates have significant impact on the ability of the DIFF, DLS/FF, or WS to operate correctly. DLA are the only APCD that have been demonstrated on small tunnel kilns, and, therefore, the requirements for new and reconstructed small tunnel kilns were based on the level of control that can be achieved by DLA.

With respect to the commenter’s argument that EPA must meet the statutory mandate requiring reconstructed sources to meet new source MACT, we point out that the definition of “Reconstruction” at 40 CFR 63.2 includes the text “\* \* \* to such an extent that \* \* \* it is *technologically and economically feasible* for the reconstructed source to meet the relevant standard(s) established by the Administrator (or a State) pursuant to section 112 of the Act.” (emphasis added) This regulatory definition, which was promulgated on March 16, 1997 (59 FR 12430) and amended on April 5, 2002 (67 FR 16595), reflects EPA’s view that the statutory requirements for reconstructed sources allow for the consideration of both technological and economical issues. In view of the regulatory definition, we believe we correctly identified the MACT floors and standards for reconstructed sources and for new small tunnel kilns.

Multiple commenters expressed concern about EPA’s statement in the reconsideration notice that no change in the compliance date is warranted. The commenters argued that the reconsideration process has been slow, and EPA reopened the rule because it did not follow its own proper procedures, neither of which is due to any fault or action by industry.

According to these commenters, EPA will have used more than two-thirds of the compliance period for existing sources just to process this reconsideration petition. With the compliance date less than 1 year away, the commenters stated that it may not be possible for the limited number of vendors worldwide to supply every company that needs an APCD in time. One commenter argued that the 1-year case-by-case extension offered by the General Provisions is not a reasonable solution to a systemic problem and creates another burden for industry to apply for and obtain this extension. The commenters argued that EPA should not rely on past precedents for not providing compliance extensions when litigation occurs on a rule, because this is not litigation but reconsideration and because EPA has determined that its rulemaking process has deficiencies that must be corrected. Commenters noted that their industry is composed primarily of small businesses, where a single financial decision, such as which control to install, can have profound impacts on the facility’s viability. In light of these concerns, multiple commenters argued that EPA should set a compliance date 3 years from the date that EPA publishes its conclusions on the reconsideration, while other commenters suggested 1-year or 2-year extensions of the compliance date. One commenter indicated that neither EPA nor environmental groups would be affected by an extension.

As mentioned above, section 112(i)(3) of the CAA specifies that NESHAP for existing sources can have compliance deadlines of no more than 3 years. For the BSCP NESHAP, EPA provided the maximum 3 years for covered sources to comply with the new standards. It is not at all unusual for promulgation of CAA standards to be followed by litigation or petitions for reconsideration. CAA section 307(b)(1) specifically provides that the filing of a petition for reconsideration of a rule does not postpone the effectiveness of the rule. The final BSCP rule was effective as of the date of its promulgation and it has remained in effect during the reconsideration period. Sources covered by the final rule have thus remained subject to its requirement for compliance to be achieved by May 16, 2006.

EPA made it clear in its reconsideration notice that the Agency did not believe a change in the compliance date was warranted. We noted that Sierra Club, in its petition for reconsideration, “has not provided information which persuades us that our decision to base the MACT floors on

DLA technology is erroneous or inappropriate.” (See 70 FR 21094, April 22, 2005.) We explained that “[i]f we decide to amend the final rule as a result of the reconsideration process, we will reevaluate the compliance date as early as possible.” Covered sources were thus on notice that we were unlikely to change the compliance deadline unless we determined that the final rule should be amended based on new information, and that the petition for reconsideration had not provided any new information.

To date, EPA has not, during the pendency of a reconsideration request, extended the compliance deadlines for promulgated MACT standards to provide compliance periods in excess of the statutory 3 year maximum. In contrast, only where the Agency has amended a MACT standard in a significant way have we found it appropriate to set a new compliance date for the rule that takes into account new requirements not contained in the original rule. In this case, we decided that no amendments to the standards are warranted, so the final rule and its compliance deadline remain unchanged.

EPA acknowledges that the time to complete the reconsideration has been lengthy, and has comprised approximately 2.5 years of the 3-year compliance period. To the extent any covered source finds it cannot comply with the BSCP NESHAP in the 3 years of lead time provided, it may seek an extension in accordance with 40 CFR 63.6(i)(3). We understand that the majority of the affected businesses are small businesses for which installation of the requisite emission controls entails a significant investment in time and money. The process to install equipment involves the evaluation and selection of a control device and a control device vendor, the application and issuance of a permit from the regulatory authority, the installation of the controls and the potentially lengthy process of insuring that the installed control can meet the MACT limits while still maintaining product quality. Given the small number of controls that have been installed in this industry prior to the standards, and the relatively small number of vendors with an understanding of this industry, some individual facilities may require an extension to come into compliance. We encourage States to make appropriate use of the extension authority granted to them under 40 CFR 63.6(i)(3).

Although commenters acknowledged that we stated in the April 22, 2005, reconsideration notice that we would only address comments on our decision to base MACT for certain tunnel kilns

on DLA, they offered comments on other issues as well. These issues are outside the scope of this reconsideration, but we would like to offer a few thoughts on two of the issues raised: The requirement for a daily visual limestone check and the start-up definitions.

Regarding the first of these issues, commenters specifically requested that EPA change the requirement for the daily visual check of the limestone level in the DLA, and cited significant safety hazards and the generation of minimal information associated with climbing to the top of the limestone hopper each day, especially on days with wet, freezing, or windy weather. According to the commenters, better, safer approaches are available to confirm the adequacy of limestone present (e.g., monitoring the amount of limestone added and removed from the system, installing numerous level indicators throughout the storage bins to ensure that limestone is flowing, monitoring pressure drop on the scrubber on a daily basis, and monitoring flow as an alternative in systems with recycle). They argued that requesting an alternative monitoring plan under the General Provisions was an avoidable financial burden for each facility when EPA could easily add compliance alternatives to the rule.

Commenters also requested clarification on the start-up definition with respect to the timing of the requirement to vent through a DLA. The commenters disagreed with the dual definition of start-up in the final rule, which depended on the type of control device used, because a facility may not know which control will ultimately be needed for its system. At a minimum, the commenters believed the DLA-based definition should be clarified because there is the potential for confusion. While the kiln may be considered to have reached "initial start-up" at 260 °C (500 °F), there are no known HAP emissions from bricks at this temperature. However, there is still moisture in the exhaust when the kiln first reaches this temperature, and venting through the control device at this temperature could create devastating clogging of the limestone. According to the commenters, bricks are not a source of HAP emissions until they reach a temperature at which dehydroxylation occurs (500–600 °C (932–1112 °F)). At a minimum, the commenters believed EPA should clarify that, while the kiln may be considered "started," this does not mean that the exhaust must be vented through the control device.

We would like to address these issues at least to some extent in this action since they pertain to compliance with the promulgated MACT standards. The compliance requirement to verify that the limestone hopper and storage bin contain adequate limestone by performing a daily visual check is not limited to being met only by climbing to the top of the limestone hopper each day. Other methods of visually confirming that the hopper and storage bin contain adequate limestone could include some type of visual access point (e.g., a window) on the side of the hopper, installing a camera in the hopper that provides continuous feed to a video monitor in the control room (a common practice in other mineral products industries), or confirming that load level indicators in the hopper are not indicating the need for additional limestone. With respect to the start-up definitions, the final rule's definitions of start-up are based on public comments regarding DIFF-, DLS/FF-, and WS-controlled kilns and information from an owner of DLA-controlled kilns. If in the future it is determined that revisions to the compliance requirements or start-up definitions in the final rule are warranted, they will be addressed at that time in a rule amendment.

#### IV. Statutory and Executive Order Reviews

On May 16, 2003, we published the final NESHAP for BSCP manufacturing pursuant to section 112 of the CAA. With today's action, we are promulgating no changes to the final rule. Accordingly, we believe that the rationale provided with the final BSCP rule is still applicable and sufficient.

##### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and, therefore, subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that today's action does not constitute a "significant regulatory action" because it does not meet any of the above criteria. Consequently, this action was not submitted to OMB for review under Executive Order 12866.

##### B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not promulgating any new paperwork (e.g., monitoring, reporting, recordkeeping) as part of today's final action. The OMB has previously approved the information collection requirements contained in the final rule (40 CFR part 63, subpart JJJJJ) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0508 (EPA ICR number 2022.02) for the BSCP rule. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the reconsideration of one issue arising from the final rule, since the reconsideration did not result in a proposed change to final rule.

### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA's regulatory proposals with significant Federal intergovernmental mandates, and

informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that today's action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. At promulgation of the BSCP rule, we estimated a total annual cost of \$24 million for any 1 year. Because today's action results in no changes to the final rule, the estimated total annual cost for the final BSCP rule remains the same, and today's action will not increase regulatory burden to the extent of requiring expenditures of \$100 million or more by State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. Thus, today's action is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, the EPA has determined that today's action contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no regulatory requirements that apply to such governments or impose obligations upon them. Therefore, today's action is not subject to the requirements of section 203 of the UMRA.

### E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that 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." Under Executive Order 13132, the EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless EPA consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and EPA's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, it must include a certification from EPA's Federalism Official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

Today's action does not have federalism implications. 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. Because we are not promulgating any changes to the final rule, today's action will not increase regulatory burden to the extent that it would result in substantial direct effects on the States. Thus, the requirements of Executive Order 13132 do not apply to today's action.

### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 6, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" are defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

Today's action does not have tribal implications. The final BSCP rule, which today's action does not change, will not have substantial direct effects on tribal governments, 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 in Executive Order 13175. No

tribal governments are known to own or operate BSCP manufacturing facilities. Thus, Executive Order 13175 does not apply to the final rule or today's action.

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns the environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the rule. Today's action is not subject to Executive Order 13045 because the final BSCP rule, which today's action does not change, is based on technology performance and not on health or safety risks.

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

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action."

Today's action is not subject to Executive Order 13211 because it is not a significant regulatory action under

Executive Order 12866 nor is it likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104-113; 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

Today's action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

**List of Subjects for 40 CFR Part 63**

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 10, 2005.

**Stephen L. Johnson,**  
Administrator.

[FR Doc. 05-22805 Filed 11-16-05; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 87**

[OAR-2002-0030; FRL-7997-3]

RIN 2060-AK01

**Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures**

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

**ACTION:** Final rule.

**SUMMARY:** In this action, we are amending the existing United States regulations governing the exhaust emissions from new commercial aircraft gas turbine engines. Under the authority of section 231 of the Clean Air Act (CAA), 42 U.S.C. 7571, the Environmental Protection Agency (EPA)

is establishing new emission standards for oxides of nitrogen (NO<sub>x</sub>) for newly certified commercial aircraft gas turbine engines with rated thrust greater than 26.7 kilonewtons (kN). This action adopts standards equivalent to the NO<sub>x</sub> standards of the United Nations International Civil Aviation Organization (ICAO), and thereby brings the United States emission standards into alignment with the internationally adopted standards (ICAO standards for newly certified engines were effective beginning in 2004). In addition, today's action amends the test procedures for gaseous exhaust emissions to correspond to recent amendments to the ICAO test procedures for these emissions.

On December 19, 2005, the new NO<sub>x</sub> standards will apply to newly certified gas turbine engines—those engines designed and certified after the effective date of the regulations (for purposes of this action, the date of manufacture of the first individual production model means the date of type certification). Newly manufactured engines of already certified models (i.e., those individual engines that are part of an already certified engine model, but are built after the effective date of the regulations for such engines and have never been in service) will not have to meet these standards.

Today's amendments to the emission test procedures are those recommended by ICAO and are widely used by the aircraft engine industry. Thus, today's action will help establish consistency between U.S. and international standards, requirements, and test procedures. Since aircraft and aircraft engines are international commodities, there is commercial benefit to consistency between U.S. and international emission standards and control program requirements. In addition, today's action ensures that domestic commercial aircraft meet the current international standards, and thus, the public can be assured they are receiving the air quality benefits of the international standards.

**DATES:** This final rule is effective December 19, 2005.

The incorporation by reference of certain publications listed in this regulation is approved by the Director of the Federal Register as of December 19, 2005.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OAR-2002-0030. 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,