

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2004-KY-0004-200603; FRL-8031-2]

#### Approval and Promulgation of Implementation Plans; Kentucky Prevention of Significant Deterioration and Nonattainment New Source Review

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the Kentucky State Implementation Plan (SIP) submitted by the Commonwealth of Kentucky on September 2, 2004. The proposed revisions modify Kentucky's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) regulations in the SIP to address changes to the federal NSR regulations, which were promulgated by EPA on December 31, 2002 (67 FR 80186) and reconsidered with minor changes on November 7, 2003 (68 FR 63021) (collectively, these two final actions are called the "2002 NSR Reform Rules"). Together, the PSD and NNSR programs are commonly referred to as the "NSR programs." EPA's 2002 NSR Reform Rules, proposed for inclusion in the Kentucky SIP, include provisions for baseline emissions calculations, an actual-to-projected-actual methodology for calculating emissions changes, options for plantwide applicability limits, recordkeeping and reporting requirements, and a significance threshold for ozone depleting substances.

**DATES:** Comments must be received on or before March 13, 2006.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2004-KY-0004, by one of the following methods:

1. <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

2. E-mail: [fortin.kelly@epa.gov](mailto:fortin.kelly@epa.gov).

3. Fax: 404-562-9019.

4. Mail: (Docket ID No. EPA-R04-OAR-2004-KY-004), Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

5. Hand Delivery: Deliver your comments to: Ms. Kelly Fortin, Air Planning Branch, Air, Pesticides and Toxics Management Division, 12th floor, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**Instructions:** Direct your comments to Docket ID No. EPA-R04-OAR-2004-KY-0004. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official business hours are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the Kentucky State Implementation Plan, contact Mr. Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960.

Telephone number: (404) 562-9043; e-mail address: [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov). For information regarding New Source Review, contact Ms. Kelly Fortin, Air Permits Section, at the same address above. Telephone number: (404) 562-9117; e-mail address: [fortin.kelly@epa.gov](mailto:fortin.kelly@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, references to "EPA," "we," "us," or "our," are intended to mean the Environmental Protection Agency. The supplementary information is arranged as follows:

- I. What Action Is EPA Proposing to Take?
- II. What is the Background for this Action?
- III. What is EPA's Analysis of Kentucky's NSR Rule Revisions?
  - a. Definitions for Chapter 51; 401 KAR 51:001

- B. Prevention of Significant Deterioration of Air Quality; 401 KAR 51:017  
 C. Review of New Sources in or Impacting Upon Nonattainment Areas; 401 KAR 51:052  
 IV. What Action is EPA Taking Today?  
 V. Statutory and Executive Order Reviews.

### I. What Action Is EPA Proposing To Take?

On September 2, 2004, the Commonwealth of Kentucky, through the Kentucky Department of Environmental Protection (KDEP), submitted revisions to the Kentucky State Implementation Plan (SIP). The submittal consists of revisions to three regulations that are already part of the Kentucky SIP. The affected regulations are: 401 Kentucky Administrative Regulations (KAR) 51:001, "Definitions for 401 KAR Chapter 51;" 401 KAR 51:017, "Prevention of Significant Deterioration of Air Quality;" and 401 KAR 51:052, "Review of New Sources in or Impacting upon Nonattainment Areas." The revisions were made to update the Kentucky NSR programs to make them consistent with changes to the Federal NSR regulations published on December 31, 2002 (67 FR 80186) and November 7, 2003 (68 FR 63021). These two EPA rulemakings are commonly referred to as the "2002 NSR Reform Rules."

In a letter to EPA dated August 23, 2005, Kentucky requested to amend the September 2, 2004, SIP submittal in light of the decision issued by the U.S. Circuit Court of Appeals for the District of Columbia (DC Circuit Court) on June 24, 2005. The June 24, 2005, decision is discussed in further detail below. Kentucky requested that the portion of the Kentucky SIP revision related to the EPA rules that were vacated by the DC Circuit Court not be approved into the SIP, namely Sections 20, 21, and 22 of 401 KAR 51:017, Sections 11, 12, and 13 of 401 KAR 51:052, and definitions (38) and (188) in Section 1 of 401 KAR 51:001. EPA is therefore now proposing to approve the SIP submitted by KDEP on September 2, 2004, as amended on August 23, 2005.

### II. What Is the Background for This Action?

On December 31, 2002, EPA published final rule changes to 40 Code of Federal Regulations (CFR) parts 51 and 52, regarding the Clean Air Act's PSD and Nonattainment New Source Review (NNSR) programs. 67 FR 80186. On November 7, 2003, EPA published a notice of final action on the reconsideration of the December 31, 2002 final rule changes. 68 FR 63021. In that November 7th final action, EPA added the definition of "replacement

unit," and clarified an issue regarding plantwide applicability limitations (PALs). The December 31, 2002 and the November 7, 2003, final actions, are collectively referred to as the "2002 NSR Reform Rules." The purpose of today's action is to propose approval of the SIP submittal from the Commonwealth of Kentucky, which includes EPA's 2002 NSR Reform Rules.

The 2002 NSR Reform Rules are part of EPA's implementation of Parts C and D of title I of the Clean Air Act (CAA or Act), 42 U.S.C. 7470–7515. Part C of title I of the CAA, 42 U.S.C. 7470–7492, is the PSD program, which applies in areas that meet the National Ambient Air Quality Standards (NAAQS)—"attainment" areas—as well as in areas for which there is insufficient information to determine whether the area meets the NAAQS—"unclassifiable" areas. Part D of title I of the CAA, 42 U.S.C. 7501–7515, is the NNSR program, which applies in areas that are not in attainment of the NAAQS—"nonattainment areas." Collectively, the PSD and NNSR programs are referred to as the "New Source Review" or NSR programs. EPA regulations implementing these programs are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S.

The CAA's NSR programs are preconstruction review and permitting programs applicable to new and modified stationary sources of air pollutants regulated under the CAA. The NSR programs of the CAA include a combination of air quality planning and air pollution control technology program requirements. Briefly, section 109 of the CAA, 42 U.S.C. 7409, requires EPA to promulgate primary NAAQS to protect public health and secondary NAAQS to protect public welfare. Once EPA sets those standards, states must develop, adopt, and submit to EPA for approval, a State Implementation Plan (SIP) that contains emissions limitations and other control measures to attain and maintain the NAAQS. Each SIP is required to contain a preconstruction review program for the construction and modification of any stationary source of air pollution to assure that the NAAQS are achieved and maintained; to protect areas of clean air; to protect air quality related values (such as visibility) in national parks and other areas; to assure that appropriate emissions controls are applied; to maximize opportunities for economic development consistent with the preservation of clean air resources; and to ensure that any decision to increase air pollution is made only after full public consideration of the consequences of the decision.

The 2002 NSR Reform Rules made changes to five areas of the NSR programs. In summary, the 2002 Rules: (1) Provide a new method for determining baseline actual emissions; (2) adopt an actual-to-projected-actual methodology for determining whether a major modification has occurred; (3) allow major stationary sources to comply with plant-wide applicability limits to avoid having a significant emissions increase that triggers the requirements of the major NSR program; (4) provide a new applicability provision for emissions units that are designated clean units; and (5) exclude pollution control projects (PCPs) from the definition of "physical change or change in the method of operation." On November 7, 2003, EPA published a notice of final action on its reconsideration of the 2002 NSR Reform Rules (68 FR 63021), which added a definition for "replacement unit" and clarified an issue regarding PALs. For additional information on the 2002 NSR Reform Rules, see 67 FR 80186 (December 31, 2002), and <http://www.epa.gov/nsr>.

After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), various petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA's 1980 NSR Rules (45 FR 5276, August 7, 1980). On June 24, 2005, the DC Circuit Court issued a decision on the challenges to the 2002 NSR Reform Rules. *New York v. United States*, 413 F.3d 3 (DC Cir. 2005). In summary, the DC Circuit Court vacated portions of the Rules pertaining to clean units and pollution control projects, remanded a portion of the Rules regarding recordkeeping, e.g., 40 CFR 52.21(r)(6) and 40 CFR 51.166(r)(6), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. EPA has not yet responded to the Court's remand regarding the recordkeeping provisions. Today's action is consistent with the decision of the DC Circuit Court because Kentucky's submittal does not include any portions of the 2002 NSR Reform Rules that were vacated as part of the June 2005, decision.

The 2002 NSR Reform Rules require that state agencies adopt and submit revisions to their SIP permitting programs implementing the minimum program elements of the 2002 NSR Reform Rules no later than January 2, 2006. (Consistent with changes to 40 CFR 51.166(a)(6)(i), state agencies are now required to adopt and submit SIP revisions within three years after new amendments are published in the **Federal Register**.) State agencies may

meet the requirements of 40 CFR part 51, and the 2002 NSR Reform Rules, with different but equivalent regulations. However, if a state decides not to implement any of the new applicability provisions, that state is required to demonstrate that its existing program is at least as stringent as the federal program.

On September 2, 2004, the Commonwealth of Kentucky submitted a SIP revision for the purpose of revising the Commonwealth's NSR permitting provisions. These changes were made primarily to adopt EPA's 2002 NSR Reform Rules. As discussed in further detail below, EPA believes the revisions contained in the Kentucky submittal are approvable for inclusion into the Kentucky SIP.

### III. What Is EPA's Analysis of Kentucky's NSR Rule Revisions?

Kentucky currently has an approved NSR program for new and modified sources. Today, EPA is proposing to approve revisions to Kentucky's existing NSR program in the SIP. These proposed revisions became state-effective on July 14, 2004, and were submitted to EPA on September 2, 2004. Copies of the revised rules, as well as the State's Technical Support Document (TSD), can be obtained from the Docket, as discussed in the "Docket" section above. A discussion of the specific changes to Kentucky's rule, proposed for inclusion in the SIP, follows.

#### A. Definitions for 401 KAR Chapter 51; 401 KAR 51:001

Regulation 401 KAR 51:001 defines the terms used in Chapter 51 of the Kentucky Administrative Regulations. The amendments to section 51:001 provide the definitions of terms used in 401 KAR 51:017 and 401 KAR 51:052, which were changed to include the 2002 NSR Reform Rules, as discussed above. Specifically, the revisions include new or revised definitions for terms such as "actual emissions," "actual PALs," "allowable emissions," "baseline actual emissions," and "major modification." The Kentucky definitions correspond with the federal definitions. Furthermore, the introductory paragraph of Chapter 51:001 states that the definitions "are not more stringent or otherwise different than the corresponding federal definitions."

Kentucky's revisions to Chapter 51:017 contain a minor provision that is different from the existing federal rule found in 40 CFR 51.166(b)(23), which defines significance levels for various pollutants. Kentucky's definition of "significance" (definition 221), includes a significance threshold for ozone

depleting substances (ODS) of 100 tons per year (tpy). This definition, as applied by 401 KAR 51:017, has the effect of requiring that facilities with emissions or net emissions increases greater than or equal to 100 tpy of ODS obtain a major source permit. The current Federal rule (51.166(b)(23)(ii)) does not contain a specific threshold for ODS. In 1996, however, EPA proposed a 100 tpy threshold for ODS. See 61 FR 38250, July 23, 1996. Based on the rationale provided in the 1996 proposal, EPA believes that it is reasonable for Kentucky to adopt this threshold. If EPA issues a final rule that establishes a threshold for ODS that is different from the one proposed in 1996, Kentucky will have the obligation to amend its rule. Additional information regarding significance threshold levels for ODS can be found in the Docket for this action. General information about ODS is available on the EPA Web site at: <http://www.epa.gov/ozone/index.html>.

EPA performed a line by line review of the Kentucky definitions and found them to be consistent with the 2002 NSR Reform Rules and other federal requirements set forth in 40 CFR 51 subpart I. Per Kentucky's request, as discussed above, EPA is not proposing to approve the definition of "clean unit" or the definition of "pollution control project" into the Kentucky SIP.

#### B. Prevention of Significant Deterioration of Air Quality; 401 KAR 51:017

Kentucky regulation 401 KAR 51:017 contains the preconstruction review program that provides for the prevention of significant deterioration of ambient air quality as required under Part C of title I of the Clean Air Act. The program applies to major stationary sources or modifications constructing in areas that are designated as attainment or unclassifiable with respect to the NAAQS. Kentucky's PSD program was originally approved into the SIP by EPA on November 6, 1989, and has been revised several times.

The current revisions to 401 KAR 51:017, which EPA is proposing to approve into the SIP, were provided to update the existing provisions to be consistent with the current Federal PSD rules, including the 2002 NSR Reform Rules. These revisions address baseline actual emissions, actual-to-projected actual applicability tests, and PALs. Definitions previously contained in this section were moved to 401 KAR 51:001, "Definitions for 401 KAR Chapter 51." 401 KAR 51:017 does not incorporate the portions of the Federal rules that were recently vacated by the DC Circuit Court, including the clean unit

provisions, the pollution control projects exclusion, and equipment replacement provision which was promulgated shortly after the 2002 NSR Reform Rules. As noted earlier, EPA has not yet responded to the DC Circuit Court's remand of the recordkeeping provisions of EPA's 2002 NSR Reform Rules. Kentucky's rule contains recordkeeping requirements that are substantially the same as the remanded Federal rule. While final action by EPA with regard to the remand may require EPA to take further action on this portion of Kentucky's rules, at this time, the rules are the same as existing Federal law.

The requirements included in Kentucky's PSD program are substantively the same as the corresponding federal provisions. The Kentucky rules have been formatted to conform to Kentucky rule drafting standards (Kentucky Revised Standards Chapter 13A), but in substantive content the rules are the same as the Federal rules. As part of its review of the Kentucky SIP submittal, EPA performed a line-by-line review of the proposed revisions and has determined that they are consistent with the program requirements for the preparation, adoption and submittal of implementation plans for the Prevention of Significant Deterioration of Air Quality, set forth at 40 CFR 51.166.

#### C. Review of New Resources in or Impacting Upon Nonattainment Areas; 401 KAR 51:052

Kentucky's permitting requirements for major sources in or impacting upon non-attainment areas are set forth at 401 KAR 51:052 (NNSR program). The Kentucky NNSR program was originally approved into the Kentucky SIP on January 25, 1980 (with subsequent amendments) and applies to the construction and modification of any major stationary source of air pollution in a nonattainment area, as required by Part D of title I of the CAA. To receive approval to construct, a source that is subject to this regulation must show that it will not cause a net increase in pollution, will not create a delay in meeting the NAAQS, and that the source will install and use control technology that achieves the lowest achievable emissions rate.

The revisions to this regulation, which EPA is proposing to approve into the SIP, update the existing provisions to be consistent with the current Federal nonattainment rule, including the 2002 NSR Reform Rules. These revisions address baseline actual emissions, actual-to-projected-actual applicability tests, and PALs. Definitions previously

contained in this section were moved to 401 KAR 51:001, "Definitions for 401 KAR Chapter 51." The rule does not incorporate the portions of the Federal rules that were recently vacated by the DC Circuit Court, including the clean unit provisions, the pollution control projects exclusion, and the equipment replacement provision, which was promulgated shortly after the 2002 NSR Reform Rules.

The revisions included in Kentucky's NNSR program are substantively the same as the 2002 NSR Reform Rules. The Kentucky Rules have been formatted to conform to Kentucky rule drafting standards (KRS Chapter 13A), but in substantive content the rules are the same as the Federal rules. As part of its review of the Kentucky submittal, EPA performed a line-by-line review of the proposed revisions and has determined that they are consistent with the program requirements for the preparation, adoption and submittal of implementation plans for New Source Review, set forth at 40 CFR 51.165.

#### IV. What Action Is EPA Proposing To Take?

EPA is proposing to approve revisions to the Kentucky SIP (Kentucky regulations, 401 KAR 51:01, 401 KAR 51:017, and 401 KAR 51:052) submitted by the Commonwealth of Kentucky on September 2, 2004, and amended on August 23, 2005. EPA proposed to take no action on the following provisions of the Kentucky regulations, which include portions of the 2002 NSR Reform Rules that were vacated by the D.C. Circuit Court: Sections 20, 21, and 22 of 401 KAR 51:017, Sections 11, 12, and 13 of 401 KAR 51:052, and definitions (38) and (188) in Section 1 of 401 KAR 51:001.

#### VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5

U.S.C. 601 *et seq.*). Because this rule proposes to approve 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 (Pub. L. 104-4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

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

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

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead,

Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: February 3, 2006.

**J.I. Palmer Jr.,**

*Regional Administrator, Region 4.*

[FR Doc. 06-1318 Filed 2-9-06; 8:45 am]

**BILLING CODE 6560-50-M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Part 413

[CMS-1126-RCN]

RIN 0938-AK02

#### Medicare Program; Provider Bad Debt Payment; Extension of Timeline for Publication of Final Rule

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Extension of timeline.

**SUMMARY:** Section 1871(a)(3)(A) of the Social Security Act (the Act) requires us to publish a Medicare final rule no later than 3 years after the publication date of the proposed rule. This notice announces an extension of the timeline for publication of a Medicare final rule in accordance with section 1871(a)(3)(B) of the Act, which allows us to extend the timeline for publication of the "Medicare Program; Provider Bad Debt Payment" final rule under exceptional circumstances.

**DATES:** *Effective Date:* This notice is effective on February 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jill Keplinger, (410) 786-4550.

**SUPPLEMENTARY INFORMATION:** On February 10, 2003 (68 FR 6682), we published a proposed rule that would revise existing regulations governing reimbursement for bad debts for all providers or entities, other than hospitals, currently eligible for bad debt reimbursement under the Medicare program. These proposed revisions were intended to provide for a consistent bad debt reimbursement policy for all providers currently eligible to receive payments from Medicare for bad debt. The proposed revisions also would remove a cap on End Stage Renal Disease (ESRD) bad debt reimbursement, which limits payment of allowable bad debts to the facility's unrecovered costs. In addition, the