

with Indian Tribal Governments, because it does not have a substantial and direct effect on one or more Indian tribes, on the relationship between the Federal Governments and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

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

### Environment

We considered the environmental impact of this rule and concluded that, under figure 2-1, paragraphs (34)(h) and (35)(a) of Commandant Instruction M16475.1D, this rule is categorically excluded from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit for an event not located in, proximate to, or above an area designated as environmentally sensitive by an environmental agency of the Federal, state, or local government, are specifically excluded from further analysis and documentation under those sections. A "Categorical Exclusion Determination" is available in the docket where indicated under ADDRESSES.

### List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233 through 1236; 49 CFR 1.46; 33 CFR 100.35.

2. Add a temporary section, § 100.35T-05-012 to read as follows:

#### § 100.35T-05-012, Lawson's Creek and Trent River, New Bern, NC.

(a) *Definitions:*

(1) *Coast Guard Patrol Commander.* The Coast Guard Patrol Commander is a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Fort Macon.

(2) *Official Patrol.* The Official Patrol is any vessel assigned or approved by Commander, Coast Guard Group Fort Macon with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant.* Includes all vessels participating in the Lawson's Creek Hydroplane Race under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Group Fort Macon.

(4) *Regulated Area.* Includes all waters of Lawson's Creek and the Trent River, shoreline to shoreline, bounded to the east by the Route 17-B bridge and bounded to the southwest by the Route 70 bridge.

(b) *Special Local Regulations:*

(1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall:

(i) Stop the vessel immediately when directed to do so by any official patrol.

(ii) Proceed as directed by any official patrol.

(iii) Unless otherwise directed by the official patrol, operate at a minimum wake speed not to exceed six (6) knots.

(c) *Effective Dates:* This section is in effect from 7 a.m. to 5 p.m. EDT on May 17, May 18, and May 19, 2002.

Dated: April 2, 2002.

**Thad W. Allen,**

*Vice Admiral, Coast Guard, Commander, Fifth Coast Guard District.*

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### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[KY-123; KY-123-1; KY 137-200218(a); FRL-7169-7]

#### Approval and Promulgation of Implementation Plans: Kentucky: Nitrogen Oxides Budget and Allowance Trading Program

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

**ACTION:** Direct final rule.

**SUMMARY:** EPA is approving the State Implementation Plan (SIP) revision that was submitted by the Commonwealth of Kentucky (Kentucky) on January 31, 2002. This revision responds to EPA's regulation entitled, "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," otherwise known as the "NO<sub>x</sub> SIP Call." This revision establishes and requires nitrogen oxides (NO<sub>x</sub>) reduction requirements and an allowance trading program for large electric generating and industrial units, beginning in 2004. It also establishes and requires NO<sub>x</sub> reduction requirements for cement kilns beginning in 2004. The revision includes a budget demonstration and initial source allocations that clearly demonstrate that Kentucky will achieve the required NO<sub>x</sub> emission reductions in accordance with the timelines set forth in EPA's NO<sub>x</sub> SIP Call. The intended effect of this SIP revision is to reduce emissions of NO<sub>x</sub> in order to help attain the national ambient air quality standard for ozone. EPA is approving Kentucky's NO<sub>x</sub> Reduction and Trading Program because it meets the requirements of the Phase I NO<sub>x</sub> SIP Call that will significantly reduce ozone transport in the eastern United States. As of May 31, 2004, Kentucky's plan will also provide reductions at units currently required to make reductions under the EPA's Clean Air Act (CAA) Section 126 rulemaking. EPA is approving this plan as a SIP revision fulfilling the NO<sub>x</sub> SIP Call "Phase I" requirements. On December 26, 2000, EPA determined that Commonwealth of Kentucky had failed to submit a SIP in response to the NO<sub>x</sub> SIP Call, thus starting a 18 month clock for the mandatory imposition of sanctions and the obligation for EPA to promulgate a Federal Implementation Plan (FIP) within 24 months. On January 31, 2002, Kentucky submitted a NO<sub>x</sub> SIP and EPA found that SIP submission complete on March 6, 2002, stopping the sanctions clock. Through this **Federal Register** Notice, both the sanctions clock and EPA's FIP obligation are terminated.

EPA is also approving several revisions to existing regulation 401 KAR 51:001 (Definitions for 401 KAR Chapter 51) that do not to address NO<sub>x</sub> SIP Call requirements, but fulfill other Kentucky statutory requirements.

**DATES:** This direct final rule is effective June 10, 2002 without further notice, unless EPA receives adverse comment by May 13, 2002. If adverse comment is

received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** All comments should be addressed to: 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. Copies of Kentucky's submittals and other information relevant to this action are available for inspection during normal business hours at the following addresses: Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.

Commonwealth of Kentucky, Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky, 40601-1403.

The interested persons wanting to examine these documents should make an appointment at least 24 hours before the visiting day and reference files KY-123, KY-123-1 and KY-137.

**FOR FURTHER INFORMATION CONTACT:**

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. Mr. Lakeman can also be reached by phone at (404) 562-9043 or by electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

**SUPPLEMENTARY INFORMATION:** On February 20, 2001, Kentucky's Natural Resources and Environmental Protection Cabinet (Cabinet) submitted draft regulations in response to the federal NO<sub>x</sub> SIP Call to EPA for pre-adoption review, and requested parallel processing to the development and adoption of these regulations by Kentucky, since the rules were not adopted or state-effective at the time of submittal. On October 10, 2001, the Cabinet supplemented the February 20, 2001 submittal with a draft budget demonstration and initial source allocation for pre-adoption review. Parallel processing of this documentation to support Kentucky's NO<sub>x</sub> SIP Call regulations was also requested, as it was not adopted by the Cabinet at the time of submittal. The supplemental submittal also contained copies of Kentucky's final NO<sub>x</sub> SIP Call regulations, including evidence that these regulations were adopted by Kentucky and became effective on August 15, 2001. However, the regulations were not formally submitted for approval into the Kentucky SIP. On January 31, 2002, Kentucky submitted

final revisions to its SIP to meet the requirements of the Phase I NO<sub>x</sub> SIP Call. The revisions comply with the requirements of the Phase I NO<sub>x</sub> SIP Call. Included in the document are revisions to 401 KAR 51:001 "Definitions for 401 KAR Chapter 51", 401 KAR 51:160 "NO<sub>x</sub> Requirements for Large Utility and Industrial Boilers", 401 KAR 51:170 "NO<sub>x</sub> Requirements for Cement Kilns", 401 KAR 51:180 NO<sub>x</sub> Credits for Early Reduction and Emergency", 401 KAR 51:190 Banking and Trading NO<sub>x</sub> Allowances", and 401 KAR 51:195 NO<sub>x</sub> opt-in Provisions". EPA has deemed the submittal is administratively and technically complete, and a letter of completeness was sent to the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet on March 6, 2002. The information in this notice is organized as follows:

**I. EPA's Action**

- A. What actions are being approved today?
- B. Why is EPA approving these actions?
- C. What are the NO<sub>x</sub> SIP Call general requirements?
- D. What is EPA's NO<sub>x</sub> budget and allowance trading program?
- E. What guidance did EPA use to evaluate Kentucky's submittal?
- F. What is the result of EPA's evaluation of Kentucky's program?

**II. Kentucky's Control of NO<sub>x</sub> Emissions**

- A. When did Kentucky submit the SIP revision to EPA in response to the NO<sub>x</sub> SIP Call?
- B. What is the Kentucky NO<sub>x</sub> Budget Trading Program?
- C. What is the Compliance Supplement Pool?
- D. What is the New Source Set-Aside program?
- E. Today's Rulemaking and Section 126 Rulemaking

**III. What other revisions to the Kentucky SIP is EPA approving?**

**IV. Final Action**

**V. Administrative Requirements**

**I. EPA's Action**

**A. What Actions Are Being Approved Today?**

EPA is approving revisions to Kentucky's SIP concerning the adoption of its NO<sub>x</sub> Reduction and Trading Program and cement kiln rule, submitted on January 31, 2002. EPA is also approving several revisions to existing regulation 401 KAR 51:001 (Definitions for 401 KAR Chapter 51) that do not address NO<sub>x</sub> SIP Call requirements, but fulfill other Kentucky statutory requirements.

**B. Why Is EPA Approving These Actions?**

EPA is approving these actions because Kentucky's NO<sub>x</sub> Reduction and Trading Program and cement kiln

regulations meet the requirements of the Phase I NO<sub>x</sub> SIP Call. Therefore, EPA is approving Kentucky's NO<sub>x</sub> Reduction and Trading Program.

To address all NO<sub>x</sub> SIP Call requirements Kentucky revised existing regulation 401 KAR 51:001 (Definitions for 401 KAR Chapter 51) and added several new regulations to 401 KAR 51. Under Kentucky statute, any regulation that is reopened for revision must be completely updated at the time of reopening. Since 401 KAR 51 also contains regulations that address new source review requirements for attainment and nonattainment areas, an update of 401 KAR 51:001 required revision of several definitions associated with these regulatory programs. Several other revisions were made to improve the overall clarity and readability of this regulation.

**C. What Are the NO<sub>x</sub> SIP Call General Requirements?**

The NO<sub>x</sub> SIP Call requires 22 States and the District of Columbia to meet statewide NO<sub>x</sub> emission budgets during the five month period from May 1 to September 30, called the ozone season (or control period), in order to reduce the amount of ground level ozone that is transported across the eastern United States. The D.C. Circuit decision on March 3, 2000, concerning the NO<sub>x</sub> SIP Call (*Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)) reduced the number of States from 22 to 19 and defined the ozone season in 2004 as May 31 through September 30.

EPA identified NO<sub>x</sub> emission reductions by source category that could be achieved by using cost-effective controls. The source categories included were electric generating units (EGUs) and non-electric generating units (non-EGUs), internal combustion engines, and cement kilns. EPA determined statewide NO<sub>x</sub> emission budgets based on the implementation of these cost effective controls for each affected jurisdiction to be met by the year 2007. Internal combustion engines are not addressed by Kentucky in this response to Phase I, but will be in Phase II. In the NO<sub>x</sub> SIP Call, EPA suggested that imposing statewide NO<sub>x</sub> emissions caps on large fossil-fuel fired industrial boilers and EGUs would provide a highly cost effective means for states to meet their NO<sub>x</sub> budgets. In fact, the state-specific budgets were set assuming an emission rate of 0.15 lbs NO<sub>x</sub>/mmBtu at EGUs, multiplied by the projected heat input (mmBtu/hr). The NO<sub>x</sub> SIP Call state budgets also assumed on average a 30 percent NO<sub>x</sub> reduction from cement kilns, and a 60 percent reduction from industrial boilers. The

non-EGU control assumptions were applied at units where the heat input capacities were greater than 250 mmBtu per hour, or in cases where heat input data were not available or appropriate, at units with actual emissions greater than one ton per day. However, the NO<sub>x</sub> SIP Call allowed states the flexibility to decide which source categories to regulate in order to meet the statewide budgets.

To assist the states in their efforts to meet the SIP Call, the NO<sub>x</sub> SIP Call final rule included a model NO<sub>x</sub> allowance trading regulation, called "NO<sub>x</sub> Budget Trading Program for State Implementation Plans" (40 CFR part 96) that could be used by states to develop their regulations. The NO<sub>x</sub> SIP Call rule explained that if states developed an allowance trading regulation consistent with the EPA model rule, they could participate in a regional allowance trading program that would be administered by the EPA (63 FR 57458–57459, October 27, 1998)).

There were several periods during which EPA received comments on various aspects of the NO<sub>x</sub> SIP Call emissions inventories. On March 2, 2000 (65 FR 11222), EPA published additional technical amendments to the NO<sub>x</sub> SIP Call. On March 3, 2000, the D.C. Circuit issued a decision on the NO<sub>x</sub> SIP Call that largely upheld EPA's position (*Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)). The DC Circuit Court denied petitioners' requests for rehearing or rehearing en banc on July 22, 2000. However, the Circuit Court remanded four specific elements to EPA for further action: the definition of electric generating unit, the level of control for stationary internal combustion engines, the geographic extent of the NO<sub>x</sub> SIP Call for Georgia and Missouri, and the inclusion of Wisconsin. On March 5, 2001, the U.S. Supreme Court declined to hear an appeal by various utilities, industry groups, and a number of upwind states from the D.C. Circuit's ruling on EPA's NO<sub>x</sub> SIP Call rule.

EPA published a proposal that addresses the remanded portion of the NO<sub>x</sub> SIP Call on February 22, 2002 (67 FR 8395). Any additional emissions reductions required as a result of a final rulemaking on that proposal will be reflected in the second phase portion (Phase II) of the Commonwealth's emission budget. On April 11, 2000, in response to the Court's decision, EPA notified Kentucky of the maximum amount of NO<sub>x</sub> emissions allowed for the Commonwealth during the ozone season. This budget adjusted Kentucky's NO<sub>x</sub> emission budget to reflect the Court's decision regarding internal

combustion engines and cogeneration facilities. Although the Court did not order EPA to modify Kentucky's budget, EPA believes these adjustments are consistent with the Court's decision.

#### *D. What Is EPA's NO<sub>x</sub> Budget and Allowance Trading Program?*

EPA's model NO<sub>x</sub> budget and allowance trading rule, 40 CFR part 96, sets forth a NO<sub>x</sub> emissions trading program for large EGUs and non-EGUs. A state can voluntarily choose to adopt EPA's model rule in order to allow sources within its borders to participate in regional allowance trading. The NO<sub>x</sub> SIP Call (63 FR 57514–57538, October 27, 1998) and 40 CFR part 96 contain a full description of EPA's model NO<sub>x</sub> budget trading program.

Emissions trading, in general, uses market forces to reduce the overall cost of compliance for pollution sources, such as power plants, while maintaining emission reductions and environmental benefits. One type of market-based program is an emissions budget and allowance trading program, commonly referred to as a "cap and trade" program.

In a cap and trade program, the state (or EPA) sets a regulatory limit, or emissions budget, in mass emissions (emissions budget) from a specific group of sources. The budget limits the total number of allowances for each source covered by the program during a particular control period. When the budget is set at a level lower than the current emissions, the effect is to reduce the total amount of emissions during the control period. After setting the budget, the state (or EPA) then assigns, or allocates, allowances to the participating entities up to the level of the budget. Each allowance authorizes the emission of a quantity of pollutant, e.g., one ton of airborne NO<sub>x</sub>.

At the end of the control period, each source must demonstrate that its actual emissions during the control period were less than or equal to the number of available allowances it holds. Sources that reduce their emissions below their allocated allowance level may sell their extra allowances. Sources that emit more than the amount of their allocated allowance level may buy allowances from the sources with extra reductions. In this way, the budget is met in the most cost-effective manner.

#### *E. What Guidance Did EPA Use To Evaluate Kentucky's Submittal?*

The NO<sub>x</sub> SIP Call included a model NO<sub>x</sub> budget trading program regulation (see 40 CFR part 96). EPA used the model rule and 40 CFR 51.121–51.122 to evaluate Kentucky's NO<sub>x</sub> reduction

and trading program and 40 CFR part 98 subpart B (proposed model rule for cement kilns) to evaluate Kentucky's cement kiln rule SIP submittal.

#### *F. What Is the Result of EPA's Evaluation of Kentucky's Program?*

EPA has evaluated Kentucky's January 31, 2002, SIP submittal and finds it approvable. The Kentucky NO<sub>x</sub> reduction and trading program and cement kiln rule are consistent with EPA's guidance and meet the requirements of the Phase I NO<sub>x</sub> SIP Call. EPA finds the NO<sub>x</sub> control measures in Kentucky's NO<sub>x</sub> reduction and trading program approvable. Also, EPA finds that the submittal contained the information necessary to demonstrate that Kentucky has the legal authority to implement and enforce the control measures, and to demonstrate their appropriate distribution of the compliance supplement pool. Furthermore, EPA finds that the submittal demonstrates that the compliance dates and schedules, and the monitoring, recordkeeping and emission reporting requirements will be met.

## **II. Kentucky's Control of NO<sub>x</sub> Emissions.**

#### *A. When Did Kentucky Submit the SIP Revision to EPA in Response to the NO<sub>x</sub> SIP Call?*

On February 20, 2001, the Cabinet submitted a draft NO<sub>x</sub> emission control rule to the EPA for pre-adoption review, requesting parallel processing to the development of the rule at the Commonwealth level. On October 10, 2001, the Cabinet supplemented the February 20, 2001, submittal with a draft budget demonstration and initial source allocation for pre-adoption review, and requested parallel processing of this supplement. On January 31, 2002, Kentucky submitted a final revision to its SIP to meet the requirements of the Phase I NO<sub>x</sub> SIP Call.

#### *B. What Is Kentucky's NO<sub>x</sub> Budget Trading Program?*

Kentucky proposes, as in the model rule, to allow the large EGUs, boilers and turbines to participate in the multi-state cap and trade program. Cement kilns are not included in the trading program, but will be required to install low NO<sub>x</sub> burners, mid-kiln firing systems or technology that achieves the same emission reductions, which achieve overall 30 percent reduction from sources in this category. Kentucky's SIP revision to meet the requirements of the NO<sub>x</sub> SIP Call

consists of revised rule 401 KAR 51:001 Definitions for 401 KAR Chapter 51; and new rules 401 KAR 51:160 NO<sub>x</sub> requirements for large utility and industrial boilers, 401 KAR 51:170 NO<sub>x</sub> requirements for cement kilns, 401 KAR 51:180 NO<sub>x</sub> credits for early reduction and emergency, 401 KAR 51:190 Banking and Trading NO<sub>x</sub> allowances, and 401 KAR 51:195 NO<sub>x</sub> opt-in provisions.

All of the above-cited regulations, with the exception of 401 KAR 51:170 NO<sub>x</sub> requirements for cement kilns, contain elements of Kentucky's NO<sub>x</sub> Budget Trading Program. These regulations establish and require a NO<sub>x</sub> cap and allowance trading program for large EGUs and non-EGUs, for the ozone control seasons beginning May 31, 2004, and commencing May 1 in years thereafter.

Kentucky voluntarily chose to follow EPA's model NO<sub>x</sub> budget and allowance trading rule, 40 CFR part 96, that sets forth a NO<sub>x</sub> emissions trading program for large EGUs and non-EGUs. Since Kentucky's NO<sub>x</sub> Budget Trading Program is based upon EPA's model rule, Kentucky sources are allowed to participate in the interstate NO<sub>x</sub> allowance trading program that EPA will administer for the participating states.

Kentucky has adopted regulations that are substantively identical to 40 CFR part 96, with the exception of some provisions related to sources procuring and using early reduction credits (ERCs) (see 401 KAR 51:180 NO<sub>x</sub> credits for early reduction and emergency). Kentucky's rule allows ERCs to be earned for reductions in NO<sub>x</sub> emissions during the 2001, 2002, and 2003 control periods that may be deducted for compliance with NO<sub>x</sub> emission standards only during the 2004 and 2005 control periods. ERCs will be granted for each ton of NO<sub>x</sub> emission reduction achieved below 0.45 pounds per million British thermal units (lbs/MMBTU) or the average NO<sub>x</sub> emission rate (in lbs/MMBTU) from the baseline control period in 2000, whichever is less. ERCs will not be earned for emission reductions made to satisfy requirements under the CAA. Under 401 KAR 51:160, Kentucky allocates NO<sub>x</sub> allowances to the EGU and non-EGU units that are affected by these requirements. The NO<sub>x</sub> trading program applies to all fossil fuel-fired EGUs with a nameplate capacity equal to or greater than 25 MW that sell any amount of electricity to the grid as well as any non-EGUs that have a heat input capacity equal to or greater than 250 mmBtu per hour. Each NO<sub>x</sub> allowance permits a source to emit one ton of NO<sub>x</sub> during

the ozone season. NO<sub>x</sub> allowances may be bought or sold. Unused NO<sub>x</sub> allowances may also be banked for future use, with certain limitations. Kentucky's NO<sub>x</sub> allocations do not exceed the values allowed to meet the Commonwealth cap. Therefore, pursuant to 40 CFR 51.121(p)(1), EPA is proposing approval of Kentucky's SIP revision as satisfying the Commonwealth's NO<sub>x</sub> emission reduction obligations.

It should be noted that 401 KAR 51:160 section 2(1)(a)6 defines how Kentucky intends to account for the exempt units, as provided in Kentucky's January 4, 2002, response to EPA. These units are only exempt from the requirements of 401 KAR 51:160, Sections 3 through 8. These units remain NO<sub>x</sub> budget units, as provided in 401 KAR 51:160, Section 1 and Section 2(1). As such, they remain subject to 401 KAR 51:190, which incorporates by reference the federal trading program; and thus provides that all NO<sub>x</sub> budget units must have an authorized account representative and establish appropriate accounts. Section 2(1)(a)6a clearly states that the units must, among other things, "secure and transfer to an account designated by EPA, NO<sub>x</sub> allowances for each control period in an amount equal to the NO<sub>x</sub> emission limitation \* \* \* upon which the unit's exemption is based." This is Kentucky's method for accounting for these units in the Commonwealth budget. Kentucky has agreed that this language should be more clearly written and intends to clarify this language during the next amendment to the regulation.

Source owners will monitor their NO<sub>x</sub> emissions by using systems that meet the requirements of 40 CFR part 75, subpart H, and report resulting data to EPA electronically. Each budget source complies with the program by demonstrating at the end of each control period that actual emissions do not exceed the amount of allowances held for that period. However, regardless of the number of allowances a source holds, it cannot emit at levels that would violate other federal or Commonwealth limits, for example, reasonably available control technology (RACT), new source performance standards, or Title IV (the Federal Acid Rain program).

In 401 KAR 51:160, Section 2(1)(a)6, Kentucky used the term "owner or operator" incorrectly. However, the federal trading program, which is incorporated by reference in 401 KAR 51:190, provides that all NO<sub>x</sub> budget units must have an authorized account representative and establish appropriate

accounts. Therefore there is no real impact on implementation of the program. Kentucky has committed to propose language to revise the appropriate terms when the regulations are next amended.

401 KAR 51:160 NO<sub>x</sub> Requirements for large utility and industrial boilers, addresses several aspects of Kentucky's NO<sub>x</sub> Budget Trading Program for individual subject units (EGUs, boilers or turbines used in power plants and other industrial applications). Sections 1 and 2 establish applicability requirements and requirements for unit exemptions based on permit limitations and retired unit status, consistent with part 96 Subpart A—NO<sub>x</sub> Budget Trading Program General Provisions. Section 2(1)(b) states that an exempted unit that does not comply with its permit limitations shall lose its exempt status and shall become subject to all provisions of 401 KAR 51:160. It is Kentucky's intent that a unit, which loses its exemption by not complying with the applicable permit limits, shall become subject retroactively to the full requirements of the NO<sub>x</sub> SIP Call. Kentucky has committed to propose further clarifying language when the regulation is next amended. Sections 3 and 7 require subject units to monitor and report NO<sub>x</sub> emissions in accordance with 40 CFR part 96 Subpart H—Monitoring and Reporting, and meet the compliance requirements specified in 401 KAR 51:190. Sections 4 and 5 establish methodologies and procedures for allocating NO<sub>x</sub> allowances, including the establishment of a three-year allocation period, that are consistent with part 96 Subpart E—NO<sub>x</sub> Allowance Allocations. Section 6 establishes requirements for applying for a NO<sub>x</sub> budget permit that are consistent with part 96 Subpart C—Permit Requirements.

401 KAR 51:190 Banking and trading of NO<sub>x</sub> allowances, incorporates by reference several portions of 40 CFR part 96 in their entirety: Subpart B—Authorized Representative for NO<sub>x</sub> Budget Sources (40 CFR parts 96.10–96.14), Subpart D—Compliance Certification (40 CFR parts 96.30–96.31), and Subpart G—NO<sub>x</sub> Allowance Transfers (40 CFR parts 96.60–96.62). 401 KAR 51:190 also incorporates by reference all of 40 CFR part 96 Subpart F—NO<sub>x</sub> Allowance Tracking System (40 CFR parts 96.50–96.57), with the exception of 40 CFR part 96.55(c) (provisions for requesting and allocating early reduction credits (ERCs)). 401 KAR 51:180 NO<sub>x</sub> credits for early reduction and emergency, addresses the requirements of 40 CFR part 96.55(c), as described in Section IIC. of this final

rulemaking. 401 KAR 51:195 NO<sub>x</sub> opt-in provisions, incorporates by reference 40 CFR part 96 Subpart I—Individual Unit Opt-ins. It should be noted that in 401 KAR 51:001 section 1(2) the definition “Affected Facility” (as applied to the opt-in program) appears to broaden the regulation, however, in 401 KAR 51:195 section 2 the definition is narrowed and is consistent with the NO<sub>x</sub> SIP Call.

401 KAR 51:170 NO<sub>x</sub> requirements for cement kilns, establishes requirements for cement manufacturing facilities. These sources are subject to NO<sub>x</sub> reduction requirements but do not participate in the NO<sub>x</sub> trading program. They are required to install low NO<sub>x</sub> burners, mid-kiln firing systems or technology that achieves the same emission reductions. The NO<sub>x</sub> SIP Call state budgets assumed on average a 30 percent NO<sub>x</sub> reduction from cement kilns. Kentucky has one existing cement

kiln. Kentucky’s regulation establishes an emissions limit of 6.6 pounds NO<sub>x</sub> per ton of clinker averaged over a 30 day rolling period. This emission limit, which the facility will meet to address NO<sub>x</sub> RACT requirements, reduces NO<sub>x</sub> emissions from this facility by more than 30 percent from projected 2007 baseline emissions. The cement kiln rule is consistent with EPA’s guidance and meets the requirements of the Phase I NO<sub>x</sub> SIP Call. Kentucky’s submittal does not rely on any additional reductions beyond the anticipated federal measures in the mobile and area source categories.

Kentucky’s budget demonstration shows how Kentucky intends to meet the Phase I NO<sub>x</sub> emission budgets established by EPA. Kentucky’s 2007 NO<sub>x</sub> budget emissions for area, non-road and highway sources are identical to EPA’s 2007 budget emissions for these source categories, as identified in

the March 2, 2000, final rule (65 FR 11231). Kentucky’s 2007 NO<sub>x</sub> budget emissions for EGUs and non-EGUs revise EPA’s 2007 budget emissions for these two source categories. Kentucky’s submittal provides documentation demonstrating that EPA’s 2007 budget emissions incorrectly omitted one EGU unit, misidentified one non-EGU unit as small (not subject to control), misidentified several non-EGU units as large (subject to control) and added non-EGU large internal combustion engines (3,083 tons) which are not part of the trading program. EPA has reviewed Kentucky’s corrections and concurs with Kentucky’s revised list of EGUs, large non-EGUs and small non-EGUs, as well as Kentucky’s resultant 2007 NO<sub>x</sub> budget emissions for the EGU and non-EGU source categories. EPA therefore is approving Kentucky’s final NO<sub>x</sub> emission budgets to meet Phase I of the NO<sub>x</sub> SIP Call as shown below:

Source category	EPA 2007 NO <sub>x</sub> budget emissions (tons/season)	Kentucky 2007 NO <sub>x</sub> budget emissions (tons/season)
EGUs .....	36,503	36,504
Non-EGUs .....	25,669	28,750
Area Sources .....	31,807	31,807
Non-road Sources .....	15,025	15,025
Highway Sources .....	53,268	53,268
Total .....	162,272	165,354

### C. What Is the Compliance Supplement Pool?

To provide additional flexibility for complying with emission control requirements associated with the NO<sub>x</sub> SIP Call, the final NO<sub>x</sub> SIP Call rule provided each affected state with a “compliance supplement pool.” The compliance supplement pool is a quantity of NO<sub>x</sub> allowances that may be used to cover excess emissions from sources that are unable to meet control requirements during the 2004 and 2005 ozone season. Allowances from the compliance supplement pool will not be valid for compliance past the 2005 ozone season. The NO<sub>x</sub> SIP Call included these voluntary provisions in order to address commenters’ concerns about the possible adverse effect that the control requirements might have on the reliability of the electricity supply or on other industries required to install controls as the result of a state’s response to the NO<sub>x</sub> SIP Call.

A state may issue some or all of the compliance supplement pool via two mechanisms. First, a state may issue some or all of the pool to sources with credits from implementing NO<sub>x</sub> reductions in an ozone season beyond

any applicable requirements of the CAA after September 30, 1999, and before May 31, 2004, (i.e., early reductions credits, or ERCs). This allows sources that cannot install controls prior to May 31, 2004, to purchase other sources’ ERCs in order to comply. Second, a state may issue some or all of the pool to sources that demonstrate a need for an extension of the May 31, 2004, compliance deadline due to undue risk to the electricity supply or other industrial sectors, and where early reductions are not available. See 40 CFR 51.121(e)(3).

Kentucky’s rule, 401 KAR 51:180 NO<sub>x</sub> credits for early reduction and emergency, establishes requirements for monitoring, calculating, allocating and tracking ERCs that are generally consistent with the general requirements of 40 CFR part 96.55(c). 401 KAR 51:180 also establishes alternative requirements for Kentucky’s sources to follow in procuring and using ERCs. First, Kentucky allows an ERC to be granted “for each ton of NO<sub>x</sub> emission reduction achieved below 0.45 lbs NO<sub>x</sub>/mmBtu [the federally-required limit for most units under Title IV of the CAA] or the average NO<sub>x</sub> emission rate

(in lbs/mmBtu) from the baseline control period in 2000, whichever is less.” In contrast, 40 CFR part 96.55(c) allows the owner or operator to request ERCs for a NO<sub>x</sub> budget unit only if its NO<sub>x</sub> emission rate is reduced to less than both 0.25 lbs NO<sub>x</sub>/mmBtu and 80 percent of the unit’s NO<sub>x</sub> emission rate in the 2000 control period for EGUs, and for non-EGUs, to less than 95 percent of the unit’s NO<sub>x</sub> emission rate in the 2000, 2001, or 2002 control period. However, Kentucky’s rule is acceptable within the flexibility allowed by the model rule. Kentucky’s regulation also divides the compliance supplement pool into separate pools for EGUs and non-EGUs. It further divides the pool for EGUs into separate annual allocations, with 20 percent of the pool to be allocated for NO<sub>x</sub> reductions achieved in 2001, 30 percent of the pool to be allocated for NO<sub>x</sub> reductions achieved in 2002, and 50 percent of the pool to be allocated for NO<sub>x</sub> reductions achieved in 2003.

### D. What Is the New Source Set-Aside Program?

Kentucky’s SIP provides for new source set-asides. The new source set

aside comprises a set percent of the EGU and non-EGU budgets taken off the top and reserved for new units. The allocation period that begins in 2004 for EGUs that commence commercial operation after May 1, 2001, and before May 1, 2006, is 5 percent of the tons of NO<sub>x</sub> emissions in the Commonwealth trading program budget apportioned to EGUs under section 96.40. For allocation periods beginning in 2007 or later, the allocation for new EGU units is 2 percent of the tons of NO<sub>x</sub> emissions in the Commonwealth trading program budget apportioned to EGUs under 96.40 for the given allocation period. For non-EGUs, for all allocation periods, the allocation for new units is 2 percent of the NO<sub>x</sub> allowances in the Commonwealth trading budget apportioned to non-EGUs under 96.40 for the given allocation period. This approach to allocations for new units is acceptable because it falls within the flexibility of the NO<sub>x</sub> SIP Call requirements for a state's allocation to new sources.

#### *E. Today's Rulemaking and Section 126 Rulemaking*

Today's direct final rulemaking does not have any direct bearing on the applicability of the Section 126 rulemaking. We are not amending the Section 126 rule at this time. However, based upon coordination with EPA, Kentucky made changes to its NO<sub>x</sub> SIP rule so that the rule could potentially supplant the Section 126 rule as of May 31, 2004. In order to make a transition of this sort, EPA would need to complete a future rulemaking to amend the Section 126 rule. It is EPA's intention to propose and finalize rulemaking to supplant the Section 126 requirements in Kentucky prior to May 31, 2004.

#### **III. What Other Revisions to the Kentucky SIP Is EPA Proposing To Approve?**

To address all NO<sub>x</sub> SIP Call requirements Kentucky revised existing regulation 401 KAR 51:001 (Definitions for 401 KAR Chapter 51). Under Kentucky statute, any regulation that is reopened for revision must be completely updated at the time of reopening. Since 401 KAR 51 also contains regulations that address new source review requirements for attainment and nonattainment areas, complete update of 401 KAR 51:001 required revision of some definitions associated with these regulatory programs. Several other text changes were made to improve the overall readability and clarity of this regulation. This submittal adds definitions to 401

KAR 51:001 for the following terms that do not address NO<sub>x</sub> SIP Call requirements: Acid Rain emissions limitation and Enforceable as a practical matter. This submittal also revises existing definitions contained in 401 KAR 51:001 for the following terms that do not address NO<sub>x</sub> SIP Call requirements: Alternative Method, Capital expenditure, Extreme nonattainment county or Extreme nonattainment area, Malfunction, Marginal nonattainment county or Marginal nonattainment area, Moderate nonattainment county or Moderate nonattainment area, Modification, New Source, PM<sub>10</sub>, Potential to emit or PTE, Reconstruction, Reference method, Run, Secondary emissions, Serious nonattainment county or Serious nonattainment area, Severe nonattainment county or Severe nonattainment area, Source, Standard, Total suspended particulates or TSP and Volatile organic compound or VOC.

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

EPA is approving the Kentucky's SIP revision consisting of its NO<sub>x</sub> Reduction and Trading Program and cement kiln rule, which was submitted on January 31, 2002. EPA finds that Kentucky's submittal will be fully approvable because it meets the requirements of the Phase I NO<sub>x</sub> SIP Call.

EPA is also approving several revisions to existing regulation 401 KAR 51:001 (Definitions for 401 KAR Chapter 51) that do not address NO<sub>x</sub> SIP Call requirements, but fulfill other Kentucky statutory requirements.

The EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective June 10, 2002 without further notice unless the Agency receives adverse comments by May 13, 2002.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on June 10, 2002 and no further action will be taken

on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

#### **V. Administrative Requirements**

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

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

because it is not economically significant.

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

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a

rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 10, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

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

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: April 1, 2002.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

Chapter I, title 40, Code of Federal Regulations, is amended as follows:

#### PART 52—[AMENDED]

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

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

#### Subpart S—Kentucky

2. In § 52.920 the table in paragraph (c) is amended by revising entry "401 KAR 51:001" and adding 5 new entries "51:160," "51:170," "51:180," "51:190," and "51:195" in numerical order at the end of Chapter No. 51 New Source Requirements; Non-Attainment Areas to read as follows:

#### § 52.920 Identification of plan.

\* \* \* \* \*

(c) EPA-approved regulations.

#### EPA-APPROVED KENTUCKY REGULATIONS FOR KENTUCKY

Reg	Title/subject	State effective date	EPA approval date	Federal Register Notice
*	*	*	*	*
<b>Chapter 51 New Source Requirements; Non-Attainment Areas</b>				
401 KAR 51:001 .....	Definitions .....	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
*	*	*	*	*
401 KAR 51:160 .....	NO <sub>x</sub> Requirements for Large Utility and Industrial Boilers.	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
401 KAR 51:170 .....	NO <sub>x</sub> Requirements for Cement Kilns.	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
401 KAR 51:180 .....	NO <sub>x</sub> Credit for Early Reduction and Emergency.	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
401 KAR 51:190 .....	Banking and Trading Allowances.	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
401 KAR 51:195 .....	NO <sub>x</sub> Opt-in Provisions .....	08/15/01	April 11, 2002 .....	[Insert Federal Register cite for this publication].
*	*	*	*	*



**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 180**

[OPP-301212; FRL-6821-4]

RIN 2070-AB78

**Lysophosphatidylethanolamine (LPE); Exemption from the Requirement of a Tolerance****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of the biological pesticide lysophosphatidylethanolamine (LPE) on all food commodities when applied/used in accordance with good agricultural practices. Nutra-Park, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act, as amended by the Food Quality Protection Act of 1996, requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of LPE.

**DATES:** This regulation is effective April 11, 2002. Objections and requests for hearings, identified by docket control number OPP-301212, must be received by EPA, on or before June 10, 2002.

**ADDRESSES:** Written objections and hearing requests may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit IX. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, your objections and hearing requests must identify docket control number OPP-301212 in the subject line on the first page of your response.

**FOR FURTHER INFORMATION CONTACT:** By mail: Carol E. Frazer, c/o Product Manager (PM) 90, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308-8810; and e-mail address: frazer.carol@epa.gov.

**SUPPLEMENTARY INFORMATION:****I. General Information***A. Does this Action Apply to Me?*

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

Categories	NAICS codes	Examples of potentially affected entities
Industry	111	Crop production Animal production Food manufacturing Pesticide manufacturing
	112	
	311	
	32532	

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?*

1. *Electronically.* You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select "Laws and Regulations," "Regulations and Proposed Rules," and then look up the entry for this document under the "Federal Register—Environmental Documents." You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>. A frequently updated electronic version of 40 CFR part 180 is available at [http://www.access.gpo.gov/nara/cfr/cfrhtml\\_00/Title\\_40/40cfr180\\_00.html](http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr180_00.html), a beta site currently under development. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at <http://www.epa.gov/opptsfrs/home/guidelin.htm>.

2. *In person.* The Agency has established an official record for this action under docket control number OPP-301212. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record

does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305-5805.

**II. Background and Statutory Findings**

In the **Federal Register** of January 3, 2002 (67 FR 323) (FRL-6773-6), EPA issued a notice pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(e), as amended by the Food Quality Protection Act (FQPA) (Public Law 104-170) announcing the filing of a pesticide tolerance petition (PP 1F6244) by JP BioRegulators, now called Nutra-Park Inc., 8383 Greenway Blvd., Suite 520, Middleton, WI 53562. This notice included a summary of the petition prepared by the petitioner Nutra-Park, Inc. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR 180.1199 be amended by establishing a permanent exemption from the requirement of a tolerance for residues of lysophosphatidylethanolamine (LPE).

**III. Risk Assessment**

New section 408(c)(2)(A)(i) of the FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(c)(2)(A)(ii) defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ." Additionally, section