

Dated: October 6, 2006.  
**A. Stanley Meiburg,**  
*Acting Regional Administrator, Region 4.*

■ 40 CFR part 52, 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 RR—Tennessee**

■ 2. Section 52.2220(e) is amended by adding a new entry at the end of the

table for “Carbon Monoxide Second 10–Year Maintenance Plan for the Memphis/Shelby County Area” to read as follows:

**§ 52.2220 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

**EPA-APPROVED TENNESSEE NON-REGULATORY PROVISIONS**

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State effective date	EPA approval date	Explanation
Carbon Monoxide Second 10-Year Maintenance Plan for the Memphis/Shelby County Area.	Memphis/Shelby .....	5/10/2006	10/25/2006 [Insert first page of publication].	

[FR Doc. E6–17854 Filed 10–24–06; 8:45 am]  
**BILLING CODE 6560–50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 63**

[EPA–HQ–OAR–2004–0022; FRL–8233–9]

**RIN 2050–AG33**

**NESHAP: National Emission Standards for Hazardous Air Pollutants: Standards for Hazardous Waste Combustors (Amendment)**

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

**ACTION:** Final rule.

**SUMMARY:** The EPA is amending the effective date of the standard for particulate matter for new cement kilns that burn hazardous waste. EPA promulgated this standard as part of the national emission standards for hazardous air pollutants (NESHAP) for hazardous waste combustors that were issued on October 12, 2005, under section 112 of the Clean Air Act. EPA agreed to reconsider the standard and proposed to change it on March 23, 2006 (71 FR 14665). This amendment suspends the obligation of new cement

kilns to comply with the particulate matter standard until EPA takes final action on this proposal. This amendment does not affect other standards applicable to new or existing hazardous waste burning cement kilns.

**DATES:** The final rule is effective on October 25, 2006.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0022. All documents in the docket are listed on <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information the disclosure of which 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 <http://www.regulations.gov> or in hard copy at the HQ EPA Docket Center, Docket ID No. EPA–HQ–OAR–2004–0022, EPA West Building, Room B–102, 1301 Constitution Ave., NW., Washington, DC 20004 (See note below). This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The HQ EPA Docket

Center telephone number is (202) 566–1742. 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. A reasonable fee may be charged for copying docket materials.

**Note:** The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to visit the Public Reading Room to view documents. Consult EPA’s **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at <http://www.epa.gov/epahome/dockets.htm> for current information on docket status, locations and telephone numbers.

**FOR FURTHER INFORMATION CONTACT:** For more information on this rulemaking, contact Frank Behan at (703) 308–8476, or [behan.frank@epa.gov](mailto:behan.frank@epa.gov), Office of Solid Waste (MC: 5302P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC. 20460.

**SUPPLEMENTARY INFORMATION:** *Regulated Entities.* The regulated categories and entities affected by the NESHAP include:

Category	NAICS code	SIC code	Examples of regulated entities
Industry .....	327310	3241	Cement manufacturing, clinker production.
Federal government .....	.....	.....	Not affected.
State/local/tribal government .....	.....	.....	Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be impacted by this action. This table lists examples of the types of entities EPA is now aware could potentially be

regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is affected by this action, you should examine the applicability criteria in 40

CFR 63.1200. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Worldwide Web (www).* In addition to being available in the docket, an electronic copy of today's final rule will also be available on the www at <http://www.epa.gov/hwcmact>.

**Judicial Review.** Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of today's amendment to the NESHAP for hazardous waste combustors is available only on the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this final rule. Under section 307(b)(2) of the CAA, the requirements that are subject to today's notice may not be challenged later in civil or criminal proceedings brought by the EPA to enforce these requirements.

**Organization of This Document.** The information presented in this preamble is organized as follows:

- I. Summary of Final Rule
- II. Background
- III. Basis for Amended Effective Date
- IV. Good Cause Findings
- V. 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 of 1995
  - 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 Risks and Safety Risks
  - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act
  - J. Congressional Review

## I. Summary of Final Rule

EPA is issuing a final rule to amend the effective date of the standard for particulate matter for new cement kilns that burn hazardous waste. The effect of this action is to suspend the obligation of new cement kilns to comply with the particulate matter standard that was issued on October 12, 2005 (70 FR 59402), under section 112 of the CAA, and set forth in § 63.1220(b)(7)(i). EPA is codifying this amendment by amending §§ 63.1206(a)(1)(ii)(B) and 63.1220(b)(7)(i).

Under this amended rule, cement kilns that were constructed or reconstructed after April 20, 2004, are temporarily relieved of the obligation to comply with the replacement particulate matter standard of 0.0023 gr/dscf, corrected to 7 percent oxygen,

under § 63.1220(b)(7)(i).<sup>1</sup> However, such sources instead must comply with a particulate matter standard of 0.15 kg/Mg dry feed, which was the standard applicable to new cement kilns prior to the promulgation of the replacement standard (*i.e.*, the standard set forth in § 63.1220(b)(7)(i) as promulgated in the October, 2005 rule). This action does not affect any other standards applicable to new (or existing) cement kilns. It also does not affect the standards for other hazardous waste combustor source categories.

This amendment of the effective date shall take effect immediately upon publication in the **Federal Register**, and will remain in effect until EPA takes final action on the proposal to revise the particulate matter standard under § 63.1220(b)(7)(i). After EPA takes final action on the particulate matter standard, a cement kiln constructed or reconstructed after April 20, 2004, will be subject to the particulate matter standard set forth in § 63.1220(b)(7)(i).

## II. Background

The final maximum achievable control technology (MACT) standards for hazardous waste combustors, implementing section 112(d) of the Clean Air Act, were published on October 12, 2005 (70 FR 59402). They are codified at 40 CFR part 63, subpart EEE. These standards include limits for particulate matter, which is a surrogate for certain hazardous air pollutant (HAP) metals. The particulate matter standard for new hazardous waste burning cement kilns is 0.0023 gr/dscf.<sup>2</sup>

Following promulgation of the hazardous waste combustor final rule, the Administrator received petitions for reconsideration of this standard pursuant to section 307(d)(7)(B) of the CAA from Ash Grove Cement Company (AGCC) and the Cement Kiln Recycling Coalition (CKRC).<sup>3</sup> Under this section of the CAA, the Administrator shall initiate reconsideration proceedings if the petitioner can show that it was impracticable to raise an objection to a rule within the public comment period or that the grounds for the objection arose after the public comment period.

<sup>1</sup> In this notice all concentration-based standards with units of gr/dscf are corrected to 7% oxygen.

<sup>2</sup> The particulate matter standard is used as a surrogate to control five HAP metals including antimony, cobalt, manganese, nickel, and selenium. In addition, the particulate matter standard is a surrogate control for all non-mercury HAP metals in the raw materials and auxiliary fuels. 69 FR at 21221.

<sup>3</sup> AGCC's petition for reconsideration is docket item EPA-HQ-OAR-2004-0022-0516 and the petition of CKRC is docket item EPA-HQ-OAR-2004-0022-0520.

Petitioners AGCC and CKRC requested that EPA reconsider the particulate matter standard for new cement kilns. They stated that the final standard of 0.0023 gr/dscf was not properly noticed and was derived using unrepresentative test data from the Ash Grove Cement Chanute (AGCC Chanute) plant, resulting in an unachievable standard. To support their position, the petitioners provided additional performance data from the AGCC Chanute plant, the cement kiln whose performance was the basis for the standard. On March 23, 2006, we published a proposed rule granting reconsideration of the particulate matter standard for new cement kilns and proposed a revised standard. See 71 FR 14665. In the proposal we agreed that there was legitimate confusion regarding whether we would base the new source standard on emissions data from the Ash Grove Cement Chanute plant, and that also, there was no practical opportunity for commenters to address this issue during the public comment period. We also stated that "it appears that the promulgated new source standard for particulate matter for cement kilns is overly stringent in that it does not fully reflect the variability of the best performing source over time (the "emission control that is achieved in practice," using the language of section 112(d)(3))." 71 FR at 14668. Therefore, we proposed a revised particulate matter standard for new cement kilns of 0.0069 gr/dscf. Eleven public comment letters were submitted in response to the proposal, including a request to extend the comment period by two weeks that was granted in a subsequent notice on April 13, 2006 (71 FR 19155).

Pursuant to section 307(d)(7)(B) of the CAA, EPA also issued an administrative stay of the 0.0023 gr/dscf standard on March 23, 2006 (71 FR 14655). The administrative stay was in effect for three months, the maximum allowable under this section of the CAA, from March 23, 2006 to June 23, 2006. The administrative stay was based on our initial determination that the petitions for reconsideration (for the particulate matter standard for new cement kilns) appear to have merit and that there is a potential environmental detriment associated with requiring immediate compliance with the current standard of 0.0023 gr/dscf (71 FR at 14655).

## III. Basis for Amended Effective Date

Although we proposed to revise the particulate matter standard for new cement kilns to 0.0069 gr/dscf from 0.0023 gr/dscf in response to the petitions for reconsideration, the

October 12, 2005 final rule provides that the promulgated particulate matter standard of 0.0023 gr/dscf takes effect upon publication. Without today's amendment of this provision, all cement kilns that were constructed or reconstructed after April 20, 2004, would have been required to comply immediately with the 0.0023 gr/dscf emission standard. While there are no cement kilns operating that were constructed or reconstructed after April 20, 2004 (and thus already complying with the 0.0023 gr/dscf standard) currently, there are a number of cement plants that are in various stages of constructing new, lower emitting and more energy-efficient kilns to replace older cement kilns. Comments submitted by these cement companies affirm that the promulgated particulate matter standard of 0.0023 gr/dscf, if left in effect during the reconsideration proceedings, could adversely affect the construction of these new kilns. As discussed in Section IV below, we have found that such delays, if they were to occur, would result in adverse environmental and energy impacts (e.g., increased emissions of particulate matter and increased consumption of fossil fuels such as coal). Therefore, we conclude it is appropriate to amend the effective date of the particulate matter standard for new cement kilns until we conclude the reconsideration proceedings.

We are mindful that there would be no need to amend the effective date of the new source particulate matter standard for cement kilns if it seemed likely that we would affirm the promulgated standard of 0.0023 gr/dscf at the conclusion of the reconsideration process. Based on a preliminary, non-cursory evaluation of public comments submitted in response to the proposed rule to revise the particulate matter standard, we continue to believe that a MACT floor level of 0.0023 gr/dscf is not representative of the performance of any single best performing cement kiln source in our emissions data base, properly taking normal operating variability into account. Therefore, while not a final determination, our preliminary review of public comments provided during the reconsideration proceedings has not persuaded us that a revision of the particulate matter standard for new cement kilns is unnecessary. We will, of course, consider objectively all information submitted during the reconsideration process and make a final determination in the near future as to the need to revise this standard.

Our preliminary view is that an emissions standard of 0.0023 gr/dscf for

particulate matter is not an appropriate standard for new cement kilns either as a MACT floor or as a beyond-the-floor standard.<sup>4</sup> First, a level of 0.0023 gr/dscf does not appear to be an achievable MACT floor level based on available particulate matter emissions data from the AGCC Chanute plant, the cement kiln on whose performance that standard was based. Available performance data for AGCC Chanute include emissions data from 2001–2002 (the basis of the promulgated MACT floor of 0.0023 gr/dscf) and additional emissions data from 2003–2005 submitted by petitioner AGCC during reconsideration proceedings (the basis for identifying another cement plant as the single best performing source in the reconsideration proposed rule that led EPA to propose a MACT floor of 0.0069 gr/dscf). As discussed below, it is our view that these emissions data show that the AGCC Chanute source does not routinely achieve a standard of 0.0023 gr/dscf. In fact, our review of the AGCC Chanute data led us to identify another cement plant as the single best performing source in the March 23, 2006 reconsideration proposed rule.

One commenter to the March 23, 2006 proposed rule stated that the emissions data of AGCC Chanute from 2003–2005 reflect unnecessary bag leakage and ineffective maintenance, and, therefore, the test data submitted during reconsideration proceedings for AGCC Chanute should not be accepted as representative of routine performance. The commenter also states that a standard of 0.0023 gr/dscf would be readily achievable by AGCC Chanute (and other cement kilns) through, among other things, an effective preventative maintenance program that includes the use of bag leak detection systems to identify and correct bag leaks when they first occur.<sup>5</sup> However, the commenter provides no evidence that an ineffective preventative maintenance program is responsible for the

<sup>4</sup> See the notice of proposed rulemaking for a discussion of how we selected representative data for each source so that the single best performing source could be identified and how we calculated the MACT floor levels for particulate matter. 69 FR at 21223–233 (April 20, 2004). The proposed rule also describes how emissions variability was accounted for, including the use of a “universal variability factor” that was used only for the particulate matter standard to address long-term variability in particulate matter emissions of sources using fabric filters. See also 70 FR at 59436–450. In developing MACT standards, we must also consider beyond-the-floor control options that are more stringent than the floor level taking into consideration not only emission performance but also the cost of achieving the emission reductions, any health and environmental impacts, and energy requirements. CAA section 112(d)(2).

<sup>5</sup> See docket item EPA–HQ–OAR–2004–0022–0542.01, page 2.

variability seen in the additional emissions data from 2003–2005 as compared to the 2001–2002 data. Without a basis to exclude the data, we tentatively believe these additional data must not be excluded from the MACT floor analysis because they reflect the normal variability of the source over time. As discussed in the reconsideration proposed rule, if these data are considered, then AGCC Chanute's performance clearly shows that an emission level of 0.0023 gr/dscf is not an appropriate MACT floor for new cement kilns because it does not fully reflect the source's emission variability (71 FR at 14669). We also tentatively reject the commenter's argument that AGCC Chanute could routinely achieve a MACT floor of 0.0023 gr/dscf if its baghouse (fabric filter) were better maintained by monitoring emissions with a bag leak detection system. The argument suggests that AGCC Chanute could have maintained the performance achieved in 2001–2002 through improved monitoring and a better preventative maintenance program. We disagree that the commenter's argument is even relevant when identifying a MACT floor because whether AGCC Chanute could operate better (achieve lower emissions over time) with different equipment, such as a bag leak detection system, is a beyond-the-floor issue. As the commenter acknowledges, AGCC Chanute is not equipped with a bag leak detection system. For purposes of a MACT floor, we must identify the single best performing source and identify an emission level that reflects “the emission control that is achieved in practice by the best controlled source.” Section 112(d)(3). Therefore, a MACT floor of 0.0023 gr/dscf for particulate matter would not be justifiable based on theoretical performance of a differently-equipped AGCC Chanute plant.

Second, a level of 0.0023 gr/dscf does not appear to be an achievable MACT floor level based on available particulate matter emissions data from any other cement kiln source in our emissions data base. As presented in the support document to the reconsideration proposed rule, we are not in possession of any emissions data from a cement kiln achieving this level, accounting for normal performance variability.<sup>6</sup>

Finally, an emissions standard of 0.0023 gr/dscf for particulate matter is not likely an appropriate beyond-the-floor standard for new cement kilns. In

<sup>6</sup> USEPA, “Draft Technical Support Document for HWC MACT Standards, Reconsideration of the New Source Particulate Matter Standards for Cement Kilns,” March 2006, Table 4.

the reconsideration proposal, we evaluated a beyond-the-floor standard of 0.0035 gr/dscf and proposed that such a standard would not be justified.<sup>7</sup> This analysis was based on improved baghouse performance that evaluates improved bag material and a lower gas to cloth ratio. We also reached that conclusion in the final rule whereby we rejected adopting a beyond-the-floor standard of 0.0012 gr/dscf.<sup>8</sup> While we are not able to quantify the costs here (because the MACT floor level has yet to be determined), the previous analyses indicate that a beyond-the-floor standard of 0.0023 gr/dscf is not likely to be warranted. We will, of course, make a final determination as to the appropriateness of a beyond-the-floor standard for new cement kilns during the reconsideration process in the near future.

#### IV. Good Cause Findings

Section 553(b) of the Administrative Procedure Act (APA) (which applies to this action pursuant to the final sentence of CAA section 307(d)(1)) provides that, when any agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. Similarly, under section 553(d) of the APA, an agency may find that there is good cause to make the rule effective upon publication in the **Federal Register**.

We have determined that there is good cause for making today's amendment final without prior proposal and opportunity for public comment for several reasons. First, this amendment removes potential impediments to significant environmental and energy savings by allowing continued construction of new cement kilns that burn hazardous waste. As noted in the petitions for reconsideration of AGCC and CKRC, at least three companies are in various stages of constructing new, lower emitting and more energy-efficient kilns to replace older cement kilns.<sup>9</sup> Declarations made by

representatives of these companies are that the companies could choose not to burn hazardous waste at these kilns and instead comply with the more lenient standards for particulate matter applicable to non-waste burning kilns, should the current particulate matter standard of 0.0023 gr/dscf be included in a permit.<sup>10</sup> Using the AGCC's Foreman plant as an example, we estimate that emissions of particulate matter would increase by approximately 77 tons per year at the Foreman plant should AGCC decide to abandon plans to burn hazardous waste at the new preheater/precalciner kiln.<sup>11</sup> Continental Cement Company and Keystone Cement Company also are planning to construct new cement kilns. If all three companies abandoned plans to build the new lower-emitting cement kilns, then particulate matter emissions would potentially increase by over 200 tons per year.

There also may be environmental detriment if the amendment is not issued because the companies building new cement kilns could experience construction and permitting delays. This detriment would result because the existing higher-emitting and less efficient cement kilns would (assuming delay) continue to operate for a longer period of time (i.e., operation of the new cement kilns replacing the older kilns would be postponed). We estimate that emissions of particulate matter would increase by approximately 60 tons at the Foreman plant should AGCC experience a 1-year delay in initiating operation of their new preheater/precalciner kiln.<sup>12</sup> Delays at Continental Cement Company and Keystone Cement Company would result in annual increases in particulate

item EPA-HQ-OAR-2004-0022-0521, Appendices F and G, respectively.

<sup>10</sup> Declarations made by representatives of AGCC, Continental Cement Company, and Keystone Cement Company are available in the docket. See docket item EPA-HQ-OAR-2004-0022-0521, Appendices F, G, and H.

<sup>11</sup> For purposes of this estimate, it was assumed that the new preheater/precalciner kiln would be designed to 0.0034 gr/dscf, which is the design level for the standard that we proposed for new hazardous waste burning cement kilns on March 23, 2006 (71 FR 14665). The particulate matter standard for new cement kilns that do not burn hazardous waste is 0.15 kg/Mg dry feed, which equates to approximately 0.04 gr/dscf, corrected to 7% oxygen, for a preheater/precalciner kiln. Section 63.1343(b)(1).

<sup>12</sup> We estimate emissions of particulate matter from Ash Grove Cement's three wet process kilns at 85 tons per year. See USEPA, "Technical Support Document for HWC MACT Replacement Standards, Volume V: Emissions Estimates and Engineering Costs," September 2005, Appendix C. For purposes of this estimation, we assumed that the new preheater/precalciner kiln would be designed to 0.0034 gr/dscf, which is the design level for the standard that we proposed for new hazardous waste burning cement kilns on March 23, 2006.

matter emissions of 27 tons and 30 tons, respectively. Thus, if all three companies experienced a one-year delay in building the new lower-emitting cement kilns, then particulate matter emissions would increase by approximately 117 tons.

We also find that amending the rule's effective date yields substantial energy savings. A typical wet process cement kiln requires approximately 5–6 million Btu of energy to make one ton of clinker product, while the more thermally-efficient preheater/precalciner kilns require 3 million Btu of energy. One wet process cement kiln annually producing 500,000 tons of clinker would consume approximately 105,000 tons of coal (assumes that all energy is derived from coal). However, a more thermally-efficient preheater/precalciner kiln would require 57,000 tons of coal per year, which equates to an annual energy savings of nearly 50,000 tons of coal per kiln as compared to a wet process kiln. Thus, a delay in the start-up of the new kilns or outright abandonment of its construction would result in the increased use of several hundred thousand tons of coal per year.

It is also important to note that while this amendment temporarily relieves newly constructed or reconstructed cement kilns of the obligation to comply with the replacement standard of 0.0023 gr/dscf, there are no cement kilns currently in operation that are subject to the replacement standard. That is, there are no new cement kilns that are currently complying with the replacement standard of 0.0023 gr/dscf for particulate matter, and thus no kilns that will actually emit particulate matter at higher levels. Thus, although the less stringent particulate matter standard that was applicable to new cement kilns prior to the promulgation of the replacement standards will be in effect as a result of today's amendment, this will not lead to an actual increase in particulate matter emissions.

We also note that the issue of the rule's effective date has essentially already been subject to robust public comment through the grant of reconsideration and proposal to amend the rule. Thus, this is not a situation where the public is presented with a final rule without having opportunity to address the issues involved in the action.

Finally, we note that we expect this amendment to be in effect for only a short time. We estimate that the amendment will remain in effect for less than 1-year while the rulemaking to revise the particulate matter standard for new cement kilns is concluded. We intend to take final action on

<sup>7</sup> USEPA, "Draft Technical Support Document for HWC MACT Standards, Reconsideration of the New Source Particulate Matter Standards for Cement Kilns," March 2006, Section 4.1.2.

<sup>8</sup> USEPA, "Technical Support Document for HWC MACT Standards, Volume III: Selection of MACT Standards," September 2005, Section 11.3.4.

<sup>9</sup> For example, AGCC is replacing its three older wet process cement kilns at its Foreman, Arkansas plant with a new preheater/precalciner kiln. See docket item EPA-HQ-OAR-2004-0022-0523, page 3. Information related to plans of Continental Cement Company and Keystone Cement Company to build new cement kilns can be found in docket

reconsideration of the particulate matter standard for new cement kilns as expeditiously as possible. When that work is completed, the kilns currently under construction will be responsible for meeting the standard in the revised rule prior to commencing operation. We do not anticipate that any of those new kilns will ever operate subject to the previous replacement standard.

Given the possibility of environmental detriment, the lack of environmental prejudice, the previous opportunity for public comment on the issues involved, and the likely short duration of this amendment, we find that there is good cause to amend the rule's effective date under 5 U.S.C. 553(b)(B) without prior notice or opportunity to comment. We also find, for the same reasons, that good cause exists under APA section 553(d)(3) to make this amendment effective upon publication in the **Federal Register** rather than 30 days later.

## V. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO. Consequently, this action was not submitted to the Office of Management and Budget for review under EO 12866.

### B. Paperwork Reduction Act

The information collection requirements in the final rule (70 FR 59402, October 12, 2005) were submitted to and approved by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*, and assigned OMB control number 2050-0171. An Information Collection Request (ICR) document was prepared by EPA (ICR No. 1773.08) and a copy may be obtained from Susan Auby by mail at Office of Environmental Information Collection Strategies Division (ME-2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at [auby.susan@epa.gov](mailto:auby.susan@epa.gov), or by calling (202) 566-1672. A copy may also be downloaded from the Internet at <http://www.epa.gov/icr>.

Today's action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Because there is no additional burden on the industry as a result of the final rule amendments, the ICR has not been revised.

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 in 40 CFR are listed in 40 CFR part 9.

### 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.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) A small business that is primarily engaged in cement manufacturing as defined by NAIC code 327310 with less than 750 employees (for the entire corporation); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in the field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any new, more stringent requirements on new source, small cement manufacturing entities.

### D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 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, 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 to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one 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 regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that the final rule amendments do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, or tribal governments, in the aggregate, or to the private sector in any one year. Furthermore, section 202 does not apply to rules for which EPA invokes an exemption under section 553(b)(1)(B) of the Administrative Procedure Act, as is being done in this action. Thus, today's action is not subject to sections 202 and 205 of the UMRA. EPA has also determined that the final rule amendments contain no regulatory requirements that might significantly or uniquely affect small governments. Thus, the final rule amendments are not

subject to the requirements of section 203 of the UMR A no new enforceable duty on any State, local or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled "Federalism" (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" is 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."

This final rule does not have federalism implications. It will 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. Thus, Executive Order 13132 does not apply to this rule.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 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." This final rule does not have tribal implications, as specified in Executive Order 13175. This action contains no requirements that are more stringent than in the October 2005 final rule. Thus, Executive Order 13175 does not apply to this rule.

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

"Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an 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 Agency 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 the Agency.

Today's final rule is not subject to E.O. 13045 because it does not meet either of these criteria. The rule simply amends the effective date of a standard while EPA takes final action on the proposed rule (71 FR 14665 (March 23, 2006)).

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

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not an economically significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

As noted in the proposed rule (69 FR 21198), Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub. L. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory 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, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Congressional Review*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public

interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As discussed in Section IV above, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of October 25, 2006. 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**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subject in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: October 19, 2006.

**Stephen L. Johnson,**  
*Administrator.*

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

**PART 63—NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES**

■ 1. The authority citation for part 63 continues to read as follows:

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

■ 2. Section 63.1206 is amended by revising paragraph (a)(1)(ii)(B)(1) and adding new paragraph (a)(1)(ii)(B)(3) to read as follows:

**§ 63.1206 When and how must you comply with the standards and operating requirements?**

- (a) \* \* \*
- (1) \* \* \*
- (ii) \* \* \*
- (B) \* \* \* (1) If you commenced

construction or reconstruction of your hazardous waste combustor after April 20, 2004, you must comply with the new source emission standards under §§ 63.1219, 63.1220, and 63.1221 and the other requirements of this subpart by the later of October 12, 2005 or the date the source starts operations, except as provided by paragraphs (a)(1)(ii)(B)(2) and (a)(1)(ii)(B)(3) of this section. The costs of retrofitting and replacement of equipment that is installed specifically to comply with this subpart, between April 20, 2004, and a source's compliance date, are not considered to be reconstruction costs.

\* \* \* \* \*

(3) *Temporary particulate matter standard under § 63.1220 for new*

*cement kilns.* You are not required to comply with the particulate matter standard specified under § 63.1220(b)(7)(i) until EPA takes final action with regard to the particulate matter standard pursuant to reconsideration proceedings. If you start up a new or reconstructed hazardous waste burning cement kiln as defined by this subpart, you must not emit particulate matter in excess of 0.15 kg/Mg dry feed, as determined according to the requirements under § 63.1204(b)(7)(i) through (iii).

\* \* \* \* \*

■ 3. Section 63.1220 is amended by revising paragraph (b)(7)(i) to read as follows:

**§ 63.1220 What are the replacement standards for hazardous waste burning cement kilns?**

\* \* \* \* \*

(b) \* \* \*  
(7) \* \* \*

(i) Except as provided by § 63.1206(a)(1)(ii)(B)(3) and paragraph (b)(7)(iii) of this section, particulate matter emissions in excess of 0.0023 gr/dscf corrected to 7 percent oxygen.

\* \* \* \* \*

[FR Doc. E6-17897 Filed 10-24-06; 8:45 am]

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**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**49 CFR Part 29**

[Docket No. OST-2005-22602]

RIN 2105-AD46

**Debarment and Suspension (Nonprocurement) Requirements**

**AGENCY:** Office of the Secretary (OST), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Department of Transportation's regulations implementing the governmentwide nonprocurement debarment and suspension requirements. Specifically, this rule adopts the optional lower tier coverage prohibiting excluded persons from participating in subcontracts at tiers lower than the first tier below a covered nonprocurement transaction.

**DATES:** *Effective Date:* This final rule is in effect November 24, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ellen Shields, Office of the Senior Procurement Executive, Office of Administration (M-61), (202) 366-4268,

400 Seventh Street, SW., Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

You may retrieve previously filed comments online through the Document Management System (DMS) at <http://dmses.dot.gov>. The DMS is available 24 hours each day, 365 days each year. Electronic retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

**Background**

On November 26, 2003, the Department of Transportation (DOT), along with twenty-nine other agencies, published its final rule implementing changes to the governmentwide debarment and suspension common rule (68 FR 66533). These regulations were intended to resolve unnecessary technical differences between the procurement and nonprocurement systems, revise the existing governmentwide debarment and suspension regulations in a plain language style and format, and make other improvements consistent with the purpose of the debarment and suspension system. One of the changes made to the regulations included limiting the mandatory down-tier application of an exclusion to only the first procurement level. Under the previous governmentwide regulations, all executive agencies applied suspensions and debarments to all procurement levels. However, in the revised governmentwide regulations, each agency was given the option of applying an exclusion to levels below the first procurement level. This final rule adopts the optional lower tier coverage to make the debarment and suspension regulations applicable to levels below the first procurement level. Many of the DOT programs involve billions of dollars in grants that are obligated to construction projects by States, localities and other recipients. For instance, on August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for

Users (SAFETEA-LU), Public Law 109-59. This Act authorizes funding for highways, highway safety, and public transportation totaling \$244.1 billion over five years (2005-2009) and is the largest surface transportation investment in our Nation's history. Of this \$244.1 billion, a substantial portion of these funds will be used by States and other grantees to procure construction contracts. These construction contracts could involve multiple subcontracts that would be vulnerable to misconduct and poor performance if suspended or debarred contractors are allowed to participate in these transactions.

**Discussion of Comments**

On October 5, 2005, the Office of the Secretary (OST) in the DOT published a notice of proposed rulemaking (NRPM) and requested comment on whether the DOT should adopt the lower tier coverage. In response to the NPRM, OST received two comments. These comments were submitted by the American Road and Transportation Builders Association (ARTBA) and the Wisconsin Department of Transportation (WisDOT).

ARTBA commented that the transportation construction industry has a well-deserved reputation of being comprised of highly ethical firms. However, despite this reputation, some firms betray the integrity of the whole. In these situations, ARTBA acknowledged that suspension or debarment may be appropriate. Additionally, ARTBA commented on the importance of maintaining the contractor's due process rights. ARTBA stated that the basis of due process is that everyone is deemed innocent until proven guilty and that due process is not served if contractors are suspended or debarred before being afforded an opportunity to be heard. ARTBA noted that debarment and suspension cannot be taken lightly because of the interruption in the firm's ability to work and, as such, the DOT needs to ensure that the debarment and suspension process is fair.

The DOT agrees with ARTBA that the transportation construction industry does indeed have a well-deserved reputation of being comprised of highly ethical firms. However, as ARTBA acknowledges, there are some firms within the industry that betray this reputation. The participation of these irresponsible firms and individuals in the transportation program could result in millions of dollars being wasted due to fraud. These are funds that could be used on construct more transportation projects. Also, the DOT agrees with