

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 63**

[Docket No. OAR-2002-0054; FRL-7902-5]

RIN 2060-AM94

National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing: Reconsideration**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of reconsideration of final rule; request for public comment; notice of public hearing.

SUMMARY: On May 16, 2003, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) for new and existing sources at brick and structural clay products (BSCP) manufacturing facilities (the final rule). Subsequently, the Administrator received a petition for reconsideration of the final rule. The EPA is announcing our reconsideration of and requesting public comment on one issue arising from the final rule. Specifically, we are requesting comment on our decision to base the maximum achievable control technology (MACT) requirements for certain tunnel kilns on dry limestone adsorption technology. We plan to issue a final decision on this issue as expeditiously as possible. We are seeking comment only on this issue. We will not respond to any comments addressing any other issue or any other provisions of the final rule or any other rule.

DATES: *Comments.* Comments must be received on or before June 21, 2005.

Public Hearing. If anyone contacts the EPA requesting to speak at a public hearing by May 9, 2005, a public hearing will be held on May 23, 2005. For additional information on the public hearing and requesting to speak, see the **SUPPLEMENTARY INFORMATION** section of this preamble.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR-2002-0054 (Legacy Docket ID No. A-99-30), by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- Agency Web site: <http://www.epa.gov/edocket>. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov.
- Fax: (202) 566-1741.

- Mail: Air Docket, EPA, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

- Hand Delivery: Air Docket, EPA, Room B108, 1301 Constitution Avenue, NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR-2002-0054 (Legacy Docket ID No. A-99-30). The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.epa.gov/edocket>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov websites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. We request that interested parties who would like information they previously submitted to EPA to be considered as part of this reconsideration action identify the relevant information by docket entry numbers and page numbers.

Docket: The EPA has established an official public docket for the NESHAP for brick and structural clay products manufacturing including both Docket ID No. OAR-2002-0054 and Docket ID No. A-90-30. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to the BSCP

rulemaking and the reconsideration action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they have received all materials relevant to the BSCP rulemaking and this action. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

Public Hearing. If a public hearing is held, it will be held on May 23, 2005 at the EPA facility, Research Triangle Park, North Carolina, or at an alternate site nearby.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Johnson, Combustion Group, Emission Standards Division (MC-C439-01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-5025; fax number: (919) 541-5450; e-mail address:

johnson.mary@epa.gov. For questions about the public hearing, contact Ms. Eloise Shepherd, Combustion Group, Emission Standards Division (MC-C439-01), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5578, or electronic mail at shepherd.eloise@epa.gov.

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

- I. General Information
 - A. What is the source of authority for the reconsideration action?
 - B. What entities are potentially affected by the reconsideration action?
 - C. How do I submit CBI?
 - D. How do I obtain a copy of this action?
- II. Background
- III. Today's Action
- IV. Discussion of the Issue
- 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
 - E. Executive Order 13132: Federalism

- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act

I. General Information

A. What Is the Source of Authority for the Reconsideration Action?

The statutory authority for this action is provided by sections 112 and 307(d)(7)(B) of the Clean Air Act (CAA) as amended (42 U.S.C. 7412 and 7607(d)(7)(B)). This action is also subject to section 307(d) of the CAA (42 U.S.C. 7607(d)).

B. What Entities Are Potentially Affected by the Reconsideration Action?

Entities potentially affected are those industrial facilities that manufacture

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

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

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

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the reconsideration action. To determine whether your facility may be affected by the reconsideration action, you should examine the applicability criteria in 40 CFR 63.8385 of the final BSCP rule. If you have any questions regarding the applicability of the final rule to a particular entity or the implications of the reconsideration action, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

C. How Do I Submit CBI?

Do not submit this information to EPA through EDOCKET, regulations.gov, or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

D. How Do I Obtain a Copy of This Action? Worldwide Web (WWW)

In addition to being available in the dockets, an electronic copy of today's action also will be available on the WWW. Following the Administrator's signature, a copy of this action will be posted at www.epa.gov/ttn/oarpg on EPA's Technology Transfer Network (TTN) policy and guidance page. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541-5384.

II. Background

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

The MACT floor is the minimum control level allowed for NESHAP and is defined under section 112(d)(3) of the CAA. In essence, the MACT floor ensures that the standards are set at a level that assures that all major sources achieve the level of control at least as stringent as that already achieved by the

better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory for which the Administrator has emissions information (where there are 30 or more sources in a category or subcategory, as in the case of each BSCP subcategory).

In developing MACT standards, we also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of cost of achieving the emissions reductions, any health and environmental impacts, and energy requirements.

We proposed NESHAP for major sources manufacturing BSCP on July 22, 2002 (67 FR 47894), and we published the final BSCP rule on May 16, 2003 (68 FR 26690). The preamble for the proposed rule described the rationale for the proposed rule, solicited public comments, and offered an opportunity for a public hearing. A public hearing regarding the proposed BSCP rule was held on August 21, 2002, during which 21 presentations were made. Following the public hearing, we met with representatives of industry and environmental groups. We received a total of 80 public comment letters on the proposed BSCP rule. Comments were

submitted by industry trade associations, BSCP manufacturing companies, State regulatory agencies and their representatives, and environmental groups. We summarized the major public comments on the proposed rule and our responses to those comments in the preamble to the final rule and in a separate, supporting "response to comments" document.

Following promulgation of the BSCP rule, the Administrator received a petition for reconsideration (dated July 15, 2003) filed by EarthJustice on behalf of Sierra Club pursuant to section 307(d)(7)(B) of the CAA. The petition requested reconsideration of three aspects of the final rule. We also received a letter (dated October 10, 2003) from counsel for the Brick Industry Association (BIA), commenting on the Sierra Club's petition for reconsideration. On April 19, 2004, EPA issued a letter to the Sierra Club's counsel granting its petition for reconsideration with respect to one issue and indicating that the Agency would conduct rulemaking to respond to the petition. Today's action initiates the rulemaking by requesting comment on one issue raised in the Sierra Club's petition for reconsideration.

In addition to the petition for reconsideration, three petitions for judicial review of the final NESHAP for BSCP manufacturing and clay ceramics manufacturing (40 CFR part 63, subparts JJJJJ and KKKKK, published together on May 16, 2003) were filed with the U.S. Court of Appeals for the District of Columbia Circuit by the Sierra Club, BIA, and two clay ceramics manufacturers (Monarch Ceramic Tile, Incorporated and American Marazzi Tile, Incorporated).¹ On September 29, 2003, EPA filed a motion with the Court asking the Court to stay proceedings in the litigation and defer establishing a briefing schedule to enable EPA to act on Sierra Club's petition for reconsideration prior to briefing. In an order dated January 21, 2004, the Court granted EPA's motion, holding the case in abeyance for 90 days without prejudice to a later motion to extend the abeyance period. In a motion filed on April 20, 2004, EPA indicated its intent to reconsider one issue arising from the final BSCP rule and asked the Court to extend the abeyance period pending EPA's completion of its reconsideration proceeding. The EPA explained that it is in the interest of all of the parties to the litigation and of the Court for EPA to

complete its reconsideration proceeding prior to briefing, because issues raised by Sierra Club and BIA relating to BSCP sources will either be moot following completion of the reconsideration proceeding, or will be subject to judicial review on a new record based on EPA's action at the conclusion of the reconsideration proceeding.² On July 29, 2004, the Court issued an order holding the case in abeyance for nine months from the date of the order without prejudice to a later motion to extend the abeyance period.

III. Today's Action

The Sierra Club's petition for reconsideration sought reconsideration of three issues relating to EPA's promulgation of final MACT floor standards based on dry limestone adsorber (DLA) technology. Noting that EPA had proposed MACT floor standards based on three different technologies, dry lime injection fabric filters (DIFF), dry lime scrubber fabric filters (DLS/FF) and wet scrubbers (WS), the Sierra Club argued that EPA had provided no opportunity to comment on either the final DLA-based floors or the final floor approach. Pursuant to section 307(d)(7)(B) of the CAA³, we granted the Sierra Club's petition for reconsideration with respect to one issue—namely, the Sierra Club's claim that "EPA's decision to consider only DLA-controlled kilns was unlawful and arbitrary and capricious."⁴

² Sierra Club and BIA opposed an indefinite stay. On May 10, 2004, EPA again asked the Court to grant its request for an indefinite stay, but in the alternative, EPA asked the Court to hold the case in abeyance for nine months from the date of the Court's order granting EPA's motion, with leave for EPA to file a motion requesting a further extension of the abeyance period or to govern further proceedings before the nine-month period expires.

³ Section 307(d)(7)(B) of the CAA provides that if a person raising an objection to a rule during judicial review "can demonstrate to the Administrator that * * * the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." 42 U.S.C. 7607(d)(7)(B).

⁴ In its petition for reconsideration, the Sierra Club also raised two issues relating to our overall MACT approach, which was the same at proposal and promulgation. Specifically, the Sierra Club argued: That "in setting floors, EPA unlawfully considered more kilns than the best performing twelve percent of sources for which it had emissions information"; and that "EPA's floors do not reflect the average emission level achieved by the best performing twelve percent of kilns for which the Administrator has emissions information." We addressed these issues in the response to Earthjustice's comments on the proposal (See p. 2–44, EDOCKET document no. OAR–2002–0054–0005). Therefore, they do not

This narrow reconsideration issue involves the Sierra Club's claim that the MACT floors (and MACT standards based on the floors) at promulgation were set using a different control technology than those proposed and that EPA did not provide adequate opportunity for public comment on the revised MACT floors. Because we changed the proposed MACT floors and standards in response to comments received on the proposed rule, we are now providing an opportunity for public comment on the DLA-based floors and standards reflected in the final rule. Without prejudging the information that will be provided in response to this action, we note that to date, the Sierra Club has not provided information which persuades us that our decision to base the MACT floors on DLA technology is erroneous or inappropriate. However, in order to ensure a full opportunity for comment, we have decided to grant reconsideration on this issue. Stakeholders who would like for us to reconsider comments they submitted to us previously on this issue should identify the relevant docket entry numbers and page numbers of their comments to facilitate expeditious review during the reconsideration process. We plan to take final action on the issue for which we have decided to grant reconsideration as expeditiously as possible.

The compliance date for the final BSCP rule has not changed as of today's action. If we decide to amend the final rule as a result of the reconsideration process, we will reevaluate the compliance date as early as possible.

IV. Discussion of the Issue

Brick and structural clay products are fired in either tunnel (continuous) kilns or periodic (batch) kilns. Kilns are predominantly fired with natural gas, although other fuels, including sawdust, are also used. Most of the sawdust-fired kilns duct some or all of the kiln exhaust to rotary sawdust dryers prior to release to the atmosphere. Consequently, some sawdust-fired kilns have two process streams, including a process stream that exhausts directly to the atmosphere or to an air pollution control device (APCD), and a process stream in which the kiln exhaust is ducted to a sawdust dryer where it is used to dry sawdust before being emitted to the atmosphere.

The proposed rule focused on those process streams from existing large

meet the criteria for reconsideration under CAA section 307(d)(7)(B), and they are not discussed in this action.

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

tunnel kilns that exhausted directly to the atmosphere or to an APCD. Any process stream from existing large tunnel kilns that was ducted to a sawdust dryer prior to July 22, 2002 was not subject to the requirements of the proposed rule. Large tunnel kilns are those with a design capacity that is equal to or greater than 9.07 Mg/hr (10 tons per hour (tph)) of fired product.

The MACT floors for the kiln exhaust from those certain tunnel kilns in the proposed rule were based on the use of DIFF, DLS/FF, or WS. Another technology, DLA, which is the most prevalent APCD used to control emissions from existing brick kilns, was not proposed as a MACT floor technology because at the time of the proposal, we had concerns about the ability to effectively monitor DLA performance and questions about the effectiveness of DLA, particularly with respect to particulate matter (PM) control. In the preamble to the proposed rule, we stated: “* * * We have several concerns about the long-term effectiveness of the DLA control technology and the degree to which we can assure continuous compliance for DLA-controlled kilns. First, long-term test data that demonstrate performance over the life of the sorbent are not available. This is important for these systems because the sorbent (limestone) is not continuously replaced with new sorbent, and we expect the performance of the systems to decrease as the sorbent is re-used and the ability of the sorbent to adsorb HF and HCl decreases. Second, representatives of DLA manufacturers and facilities that operate DLA have stated that not all limestone can effectively be used as a sorbent in a DLA. Because of these two issues, we have been unable to identify any type of parameter monitoring that could be used to assure continuous compliance. If parameter monitoring cannot be used, some type of CEMS would be required to assure continuous compliance with HF and HCl emission limits if DLA were considered as MACT control. The only potential option that we have identified for assuring continuous compliance is the installation and continuous operation of Fourier transform infrared spectroscopy (FTIR) monitoring systems. The costs associated with FTIR systems are considerable. Finally, DLA do not provide a mechanism for PM (and, therefore, metal HAP) removal and may actually create PM in some instances. For all of these reasons, we believe that DLA or equivalent controls would not represent an appropriate level of MACT control for BSCP kilns

* * *.” (67 FR 47894, 47908, July 22, 2002)

In response to the proposed rule, we received numerous comments from industry representatives (including the BIA), kiln manufacturers, and air pollution control device vendors on issues related to the application and performance of the APCD discussed in the preamble. As discussed in this preamble, and in the preamble to the final rule, many commenters reported technical obstacles and disadvantages of the DIFF, DLS/FF, and WS technologies for BSCP kilns and provided information to address our concerns about DLA technology.

Several commenters argued that DIFF, DLS/FF, and WS technologies are not proven or commercially available for BSCP kilns. Commenters pointed out that, with the exception of one facility, full-scale WS have never been used on BSCP kilns, although some short-term pilot tests of WS have been conducted. The commenters pointed out that injection systems (such as DIFF and DLS/FF) and wet control devices need a certain minimum airflow to operate properly, and different products may require different airflows, some of which could be outside of the range within which the APCD operates properly. In addition, commenters pointed out that during kiln slowdowns, the APCD may not be able to operate at all because of reduced kiln airflow.

Several commenters expressed concerns about waste disposal. Commenters stated that DIFF and DLS/FF systems produce large amounts of solid waste that are difficult and expensive to dispose of. Commenters stated that WS would not be viable options for many BSCP plants because of wastewater treatment issues (e.g., limited or no sewer access, wastewater treatment costs).

Commenters also raised concerns about retrofitting existing BSCP kilns with DIFF, DLS/FF, and WS technologies. Commenters pointed out that brick color, the primary factor in brick sales, is affected by kiln airflow. Thus, retrofitting with an APCD that changes the kiln airflow would change the color of the brick produced using a particular recipe in an individual tunnel kiln. The colors produced by the unique firing characteristics of the kiln may not be able to be reproduced.

The commenters also charged that we did not account for other retrofitting problems associated with installing DIFF, DLS/FF, or WS on older kilns, and the costs associated with these problems. Commenters also described how attempts at retrofitting kilns with these APCD resulted in significant

amounts of kiln downtime and permanent reductions in kiln production capacities. As stated by the commenters, none of the retrofits have been entirely successful in terms of reducing emissions while not disrupting the production process, and several have had dramatic negative impacts on the production process (68 FR 26695, May 16, 2003).

Numerous commenters recommended that EPA allow use of DLA. The commenters described the operating benefits of DLA, including ease of operation, low operating cost, little down time, and the ability to handle kiln fluctuations with changing throughputs. Most importantly, the commenters asserted, DLA do not impact kiln operation. The commenters pointed out that DLA do not require a minimum airflow like DIFF, DLS/FF, or WS technologies. One commenter pointed out that once a DLA is designed for maximum airflow, any fluctuations below this maximum only create more contact time between the kiln exhaust gases and the limestone, which would likely increase the effectiveness of the DLA and would not impact the operation of the kiln. Commenters also disagreed with our statements at proposal that: DLA generate PM emissions; long-term test data that demonstrate DLA performance over the life of the sorbent are not available; DLA limestone is not continuously replaced; and the performance of DLA decreases as the sorbent is re-used because the ability of the sorbent to adsorb hydrogen fluoride (HF) and hydrogen chloride (HCl) decreases.

As a result of these public comments, we realized that we had limited information on the DLA technology at proposal and that we did not fully understand the limitations of applying the technologies (DIFF, DLS/FF, and WS) that were the focus of our MACT floors analysis at proposal. In our response to these comments at promulgation, we disagreed with commenters that the use of DIFF was not proven in the brick industry. The DIFF and DLS/FF systems are a proven control technology for new kilns with a given minimum airflow rate. However, we noted that retrofitting existing kilns with DIFF or DLS/FF systems is not feasible in many cases. We recognized that WS may not be practical or low-cost for most facilities, but maintained that they could be a legitimate option for some facilities (e.g., facilities with sewer access). We acknowledged that retrofitting existing BSCP kilns with certain APCD (particularly those that affect kiln airflow) could alter time-honored recipes for brick color, thereby

changing the product. With respect to the effectiveness of DLA as PM controls, we acknowledged the ability of DLA to provide some control of PM emissions, although test data that quantify a PM control efficiency are not available. We also acknowledged, with respect to our concerns at proposal regarding DLA sorbent replacement and the associated long-term effectiveness of DLA, that spent limestone is replaced or regenerated in such a manner that performance would not be adversely impacted, and, therefore, DLA performance would remain consistent over time.

In light of the public comments received regarding the technical features and limitations of DIFF, DLS/FF, WS, and DLA technologies, we came to new conclusions regarding the effective application of these devices. As we stated in the preamble to the final rule, section 112(d)(3) of the CAA does not allow us to consider cost in determining MACT floors. However, we concluded that DLA are the only currently available technology that can be used to retrofit existing tunnel kilns without potentially significant impacts on the production process. Consequently, the final BSCP rule allows existing large tunnel kilns (and existing large tunnel kilns first exhausting to a sawdust dryer after July 22, 2002) to use the DLA technology.

In addition, we concluded that, because of the retrofit concerns, it is not technologically and economically feasible for an existing small tunnel kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2 and whose design capacity is increased such that it becomes a large tunnel kiln to meet the relevant standards (*i.e.*, new source MACT) by retrofitting with a DIFF, DLS/FF, or WS. We also concluded that it is not technologically and economically feasible for an existing large DLA-controlled tunnel kiln that would otherwise meet the criteria for reconstruction in 40 CFR 63.2 to meet the relevant (*i.e.*, new source MACT) standards by retrofitting with a DIFF, DLS/FF, or WS. Accordingly, we added regulatory language in 40 CFR 63.8390(i) to provide that an existing small tunnel kiln that is rebuilt such that it becomes a large kiln and an existing large DLA-controlled tunnel kiln that is rebuilt do not meet the definition of reconstruction in 40 CFR 63.2 and are not subject to the same requirements as new and reconstructed large tunnel kilns. However, we noted that it is technologically and economically feasible for both types of kilns described in 40 CFR 63.8390(i) to retrofit with a

DLA (or to continue operating an existing DLA) and the final rule requires that such kilns meet emission limits that correspond to the level of control provided by a DLA.

For the final rule, we maintained that DIFF, DLS/FF, and WS are appropriate technologies for new large tunnel kilns and for reconstructed large tunnel kilns that were equipped with DIFF, DLS/FF, or WS prior to reconstruction. However, we concluded that DLA are the only APCD that have been demonstrated on small tunnel kilns (which have smaller airflows than large tunnel kilns), and, therefore, we based the final requirements for new and reconstructed small tunnel kilns on the level of control that can be achieved by a DLA. Our floor approach at promulgation is described at 69 FR 26690, 26699–26701 (May 16, 2003).

The Sierra Club contends that EPA's decision to consider only DLA control technology for the MACT floors at promulgation was "unlawful and arbitrary and capricious" given the statutory requirement that MACT floors for existing sources reflect the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory for which the Administrator has emissions information. The Sierra Club argues that DLA-equipped kilns are not the best performers because kilns equipped with other control technologies achieve better emission levels. The Sierra Club asserts that EPA's argument that DLA are the only currently available technology that can be used to retrofit existing large kilns without potentially significant impacts on the production process is not relevant under the statute. The Sierra Club believes that the CAA requires us to base floors on the emission level achieved by the best performing large kilns for which we have emissions information, regardless of what control equipment these best performing kilns are using. The Sierra Club further claims EPA's argument that DLA are the only available technology that can reliably be used to retrofit existing large kilns "depends largely on claims about the cost of using other technologies," and the Sierra Club states that we may not consider cost to exclude technologies from our MACT floor determinations. Finally, the Sierra Club contends that our arguments regarding the technical difficulties associated with DIFF, DLS/FF, and WS are refuted and unsupported by the rulemaking record and have not been explained, given that some brick producers are currently using these technologies, and, therefore, must have found a way to overcome

technical problems such as minimum airflow requirements or changes in brick colors.

The arguments presented in the petition for reconsideration have not persuaded us that our MACT floor determination for the final BSCP rule was erroneous or inappropriate. We believe we correctly identified the MACT floors and set reasonable MACT standards in the final rule. Nevertheless, given that we changed the floor determination between proposal and promulgation in response to comments received on the proposal, and that the Sierra Club has raised concerns about the final BSCP rule's floors and the lack of opportunity to comment on the final rule's floors, in today's notice of reconsideration we are requesting public comments on our decision to base the MACT floors on the use of DLA for the final BSCP rule. We acknowledged in the preamble for the final rule that we are not allowed under CAA section 112 to consider cost when determining MACT floors, and we disagree with the Sierra Club's suggestion that claims about retrofitting kilns are tantamount to claims about the cost of various air pollution control technologies. However, we are seeking additional comments on technical issues related to the performance of DLA as compared to DIFF, DLS/FF, and WS. We request comments on the ability to retrofit existing kilns with DLA, DIFF, DLS/FF, and WS, and whether this should be a consideration when selecting MACT control options. Furthermore, we would like to receive additional information regarding whether there have been technical difficulties associated with DIFF, DLS/FF, WS, and DLA and additional information on how DIFF, DLS/FF, WS, and DLA have performed at plants operating these technologies (*e.g.*, information on airflow limitations, product quality and consistency, typical downtime of the APCD, and whether there have been operating problems or unforeseen problems during retrofit). Finally, we would also like to receive additional information on the successful application of DIFF, DLS/FF, WS, and DLA to existing kilns.

V. Statutory and Executive Order Reviews

On May 16, 2003, we published final NESHAP for BSCP manufacturing pursuant to section 112 of the CAA. In today's action, we are proposing no changes to the final rule, but are seeking additional comments on one aspect of the rule finalized in the May 16, 2003 **Federal Register** action (68 FR 26690). We believe the rationale provided with

the final BSCP rule is still applicable and sufficient, but we are open to comments received in response to today's action.

A. Executive Order 12866: Regulatory Planning and Review

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

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

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

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

B. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not proposing any new paperwork (e.g., monitoring, reporting, recordkeeping) as part of today's action. With this action, we are seeking additional comments on one aspect of the final BSCP rule (68 FR 26690, May 16, 2003). However, OMB has previously approved the information collection requirements contained in the final rule (40 CFR part 63, subpart JJJJJ) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060-0508 (EPA ICR number 2022.02) for the BSCP rule. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566-1672.

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

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

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this action. This action seeks comment on one aspect of the final BSCP rule without proposing any changes to the rule. Therefore, the EPA has determined that this action will not have a significant economic impact on a substantial number of small entities in the BSCP manufacturing source category.

For purposes of assessing the impact of today's action on small entities, small entities are defined as: (1) A small business according to Small Business Administration (SBA) size standards; (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 its field.

Small Business Administration size standards for BSCP manufacturing, by

NAICS code, are shown in Table 1 of this preamble.

TABLE 1.—SMALL BUSINESS SIZE STANDARDS FOR BSCP MANUFACTURING

NAICS code	Size standard, number of employees
327121	500
327122	500
327123	500
327125	750
327993	750

A discussion of the small business economic impacts associated with the final rule can be found at 69 FR 26718, 26719, May 16, 2003.

D. Unfunded Mandates Reform Act

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

small governments on compliance with the regulatory requirements.

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

E. Executive Order 13132: Federalism

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

If EPA complies by consulting, Executive Order 13132 requires EPA to

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

Today's action does not have federalism implications. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Because we are proposing no changes to the final rule, today's action will not increase regulatory burden to the extent that it would result in substantial direct effects on the States. Thus, the requirements of Executive Order 13132 do not apply to today's action.

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

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

Today's action does not have tribal implications. The final BSCP rule, which today's action does not change, will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. No tribal governments are known to own or operate BSCP manufacturing facilities.

Thus, Executive Order 13175 does not apply to the final rule or today's action.

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

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the rule. Today's action is not subject to Executive Order 13045 because it is not economically significant as defined by Executive Order 12866, and the final BSCP rule, which today's action does not change, is based on technology performance and not on health or safety risks.

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

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action." Today's action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Public Law 104–113; 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus

standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

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

List of Subjects in 40 CFR Part 63

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

Dated: April 18, 2005.

Stephen L. Johnson,

Acting Administrator.

[FR Doc. 05–8125 Filed 4–21–05; 8:45 am]

BILLING CODE 6560–50–P