

KENTUCKY—OZONE (1-HOUR STANDARD)

Designated area	Designation		Classification	
	Date ¹	Type	Date ¹	Type
* * *	*	*	*	*
Louisville Area:				
Bullitt County	10/23/01	Attainment		
Jefferson County	10/23/01	Attainment		
Oldham County	10/23/01	Attainment		
* * *	*	*	*	*

¹ This date is November 15, 1990 unless otherwise noted.

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[FR Doc. 01-25894 Filed 10-22-01; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY-75-1; KY-97-1-200109, FRL-7082-8]

Approval and Promulgation of Implementation Plans Kentucky: Approval of Revisions to Kentucky State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On September 13, 1999, EPA published a direct final rule approving and an accompanying notice of proposed rulemaking proposing to approve the 15 percent Rate-of-Progress Plan (15 percent plan) for the Louisville moderate 1-hour ozone nonattainment area which was submitted on November 12, 1993, and amended on April 5, 1994, and June 30, 1997. As stated in the **Federal Register** document, if adverse or critical comments were received by October 13, 1999, the effective date would be delayed and timely notice would be published in the **Federal Register**. Due to receipt of adverse comments within the comment period, EPA withdrew the direct final rule on November 3, 1999, in order to address all public comments received.

This action addresses the adverse comments related to the approvability of the emission reduction measures and grants final approval to the rule revisions and the 1990 Base Line Emissions Inventory. No comments were received relating to the 1990 Base Line Emissions inventory.

EFFECTIVE DATE: This rule will be effective November 23, 2001.

ADDRESSES: Copies of the State submittal(s) are available at the

following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.

Department for Environmental Protection, Natural Resources and Environmental Protection Cabinet, Division of Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601. Air Pollution Control District of Jefferson County, 850 Barrett Avenue, Suite 205, Louisville, Kentucky 40204.

FOR FURTHER INFORMATION CONTACT:

Scott Martin of the EPA Region 4 staff at (404) 562-9036. martin.scott@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 13, 1999, EPA published a direct final rule (64 FR 49404) approving and an accompanying notice of proposed rulemaking (64 FR 49425) proposing to approve the 15 percent plan for the Louisville moderate 1-hour ozone nonattainment area which was submitted on November 12, 1993, and amended on April 5, 1994, and June 30, 1997. This submittal was required by Section 182(b)(1)(A) of the Clean Air Act, as amended in 1990 (CAA) in order to demonstrate reasonable further progress (RFP) in attaining the National Ambient Air Quality Standard (NAAQS) for ozone. As stated in the **Federal Register** document, if adverse or critical comments were received by October 13, 1999, the effective date would be delayed and timely notice would be published in the **Federal Register**. Due to receipt of adverse comments within the comment period, EPA withdrew the direct final rule on November 3, 1999, (64 FR 59644) in order to address all public comments received in a subsequent final rule.

In a separate action, EPA is finalizing its proposal (66 FR 27483) to determine that the Louisville moderate ozone

nonattainment area has attained the public health-based 1-hour ozone NAAQS. The Louisville area includes the Kentucky Counties of Jefferson, Bullitt and Oldham and the Indiana Counties of Clark and Floyd. This determination is based on three years of complete, quality-assured, ambient air monitoring data for the 1998 to 2000 ozone seasons that demonstrate that the area has attained the ozone NAAQS. On the basis of this determination, EPA is also determining that State implementation plan (SIP) submissions for certain RFP and attainment demonstration requirements, along with certain other related requirements, of part D of title 1 of the CAA are no longer required for the Louisville area. All previously approved SIP revisions must continue to be implemented and enforced and are not affected by this action.

EPA's final action on the determination of attainment eliminates the need for approval of the 15 percent plan and therefore no further action will be taken on the demonstration that this reduction was achieved. However, the control measures contained in the 15 percent plan have been implemented prior to attainment of the 1-hour ozone NAAQS. This action addresses comments related to the approvability of the control measures and grants final approval to the rule revisions and the 1990 Base Line Emissions Inventory, although no action is taken on the 15 percent demonstration itself since it is no longer required.

II. Analysis of State's Submittal

The comment and response is summarized below:

Comment 1

Regulation 1.18: Rule Effectiveness

Jefferson County is claiming 6.37 tons per day in volatile organic compound (VOC) reductions from its "Rule Effectiveness" program. This program requires sources to develop and

implement a "rule effectiveness improvement plan." There is no minimum level of effort or improvement required under the rule, no standard for judging whether a particular plan is adequate or inadequate, and no requirement that the County actually review and approve or disapprove the plan. Nor does the County explain how it developed the 6.37 ton per day estimate of VOC reductions from this program. Further, although the rule requires plans to be implemented by November 15, 1996, there is no evidence in the record that this in fact occurred.

Under these circumstances, the County's Rule Effectiveness program is neither approvable nor creditable. Because the rule does not require any specified level of emission reduction, and the content of each rule effectiveness plan is determined solely by the source, there is no assurance of any emission reductions at all. The Clean Air Act (the Act) and EPA guidance do not allow approval or crediting of undefined, hypothetical SIP measures. EPA can approve and credit only clearly defined, real, permanent, and enforceable measures. 57 FR 13498, 13509 (1992). In fact, EPA guidance explicitly requires that any benefits claimed from rule effectiveness improvement must be documented at a minimum by conducting a post-implementation source specific emissions study. EPA, *Guidance for Growth Factors, Projections, and Control Strategies for the 15 Percent Rate-of-Progress Plans*, at 45 (EPA-452/R-93-002, March 1993) (hereinafter, "15 percent guidance"). Only where such studies have documented additional emission reductions due to rule effectiveness measures can EPA grant credit for such measures toward the required 15 percent rate of progress. For all the foregoing reasons, the County's rule effectiveness program cannot be credited with any emission reductions.

Response

Regulation 1.18, Rule Effectiveness, states that all sources subject to this regulation shall complete and return, by the date specified, a questionnaire supplied by the District that will determine the current procedures that impact rule effectiveness evaluation, including but not limited to: employee training, maintenance procedures, monitoring procedures, and record keeping methods. Sources were required to submit a detailed rule effectiveness implementation plan to the District. These plans were implemented as expeditiously as practicable but no later than November 15, 1996, as required by

the District's rule. The District has submitted the rule effectiveness plans to EPA, and they are available for inspection at the Region 4 offices.

The above referenced EPA guidance states that rule effectiveness improvements must reflect real emissions reductions resulting from specific implementation program improvements. However, the guidance does not require a specified level of emission reductions be established in rule effectiveness improvement plans. Additionally, as stated above, the final action on the determination of attainment for the Louisville area eliminates the need for the approval of the 15 percent plan and the specific level of emission reduction credits. Therefore, EPA is granting approval to Regulation 1.18.

Comment 2

Regulation 6.43: VOC Emission Reduction Requirements

The County claims 3.56 tons per day in reductions from regulation 6.43. During the County's process for adopting this rule, the Commonwealth raised questions about the legality of adopting source specific emission limits by rule. The County responded by offering assurances that it would obtain written commitments from each source not to challenge the legality of the rule on this basis. The record does not indicate whether these written commitments were ever obtained from all affected sources. Given the legal doubts raised by the Commonwealth, EPA cannot credit emission reductions from any source that has not signed such a commitment.

Response

According to the December 13, 1996, Air Pollution Control District Comment and Response Document relating to Regulation 6.43, the following comment was made by Mr. John Hornback, Director, Kentucky Division for Air Quality: "The regulation, as proposed, specifically identifies each company by name and sets the required emission, equipment, and operational requirements for that company. The regulation states that the listed companies have voluntarily agreed to the requirements of the regulation. This regulation, as written, would probably constitute special legislation in violation of Sections 59 and 60 of the Commonwealth's Constitution. The Division recommends that the regulation be rewritten and promulgated without the specific listing of company names and their individual emission reduction limits." The following

response was given: "The District disagrees. The District does not believe that this regulation constitutes special legislation. The category of stationary sources to which this regulation applies is all of the stationary sources who volunteered to be regulated pursuant to this regulation. Each stationary source is treated equally in that each is required to meet the requirements for which they have voluntarily agreed. The District will ask the Air Pollution Control Board (Board) to adopt the proposed changes."

The revisions were adopted by the Board on December 18, 1996. Based on responses from the District, and the Board's action, EPA believes that the District has the authority to adopt and implement these regulations without need for additional commitments from regulated entities and that the regulations are therefore creditable as SIP measures. Additionally, as stated above, the final action on the determination of attainment for the Louisville area will eliminate the need for the approval of the 15 percent plan and the specific level of emission reduction credits. Therefore, EPA is granting approval to Regulation 6.43.

Comment 3

Regulation 6.43: VOC Emission Reduction Requirements

Because the emission limits set by rule 6.43 can be met by emissions trading, the reductions claimed from the rule 6.43 are dependent on the adequacy of the County's emissions trading program. Accordingly, we question how EPA can propose to credit all of the claimed reductions from the rule when the County's trading program has not been approved by EPA, and when the Agency has specifically stated that the program does not meet EPA guidance 64 FR 49406.

Response

The June 30, 1997, SIP submittal contains three different versions of Regulation 6.43 adopted September 21, 1994, December 18, 1996, and May 21, 1997. The September 1994 and December 1996 versions contained section 5: Compliance Plan and Schedule. This section did allow the affected sources to meet the emission reduction requirements by utilizing the emissions trading program in Regulation 2.12: Emission Trading. However, the May 1997 version deletes section 5: Compliance Plan and Schedule. Therefore, sources cannot meet the emission reduction requirements through an emissions trading program. Thus, EPA concludes that this regulation is approvable.

*Comment 4***Audit Privilege and Immunity Law**

EPA seeks to discount the impact of Kentucky's audit privilege and immunity (API) law by asserting that it does not impact on federal enforcement. In order to be approvable, however, the plan must be enforceable by the state as well as the federal government. 42 U.S.C. 7410(a)(2)(A), (C), (E). Among other things, the state must adopt enforceable emission limits, adopt a program for enforcement of the plan, and provide assurances that it will have adequate authority to carry out the plan (and is not prohibited by any provision of state law from doing so). An API law that hampers state and local enforcement is flatly contrary to these requirements of the Act. EPA has previously identified Kentucky's law as an impediment to approval of state programs under the CAA, and must address this matter squarely prior to final approval of the submitted plan. Further, EPA cannot credit any emission reductions claimed under the plan for sources that can evade enforcement action via the state API law.

Response

On December 6, 2000, EPA issued a notice of deficiency (NOD) to Kentucky (65 FR 76230). This NOD was based upon EPA's finding that the Commonwealth's audit privilege and

immunity law, KRS 224.01–040, unduly restricted Kentucky's ability to adequately administer and enforce the criminal enforcement, civil penalty and public access provisions of its title V program, which was previously granted interim approval status. In response, the Kentucky General Assembly amended KRS 224.01–040 to address these deficiencies. This amendment was signed by the Governor on March 19, 2001 and became effective on June 16, 2001. EPA reviewed the amendments and concluded that, as of the effective date, all issues identified in the NOD were resolved.

Approval of Supporting Regulations

EPA is granting final approval to the following regulations:

Regulation 1.18 Rule Effectiveness, adopted September 21, 1994.

Regulation 6.40 Standards of Performance for Gasoline Transfer to Motor Vehicles (Stage II Vapor Recovery and Control), amended August 9, 1993.

Regulation 6.43 Volatile Organic Compound Reduction Requirements, adopted May 21, 1997.

Regulation 6.44 Standards of Performance for Existing Commercial Motor Vehicles and Mobile Equipment Refinishing Operations, adopted February 2, 1994.

Regulation 6.45 Standards of Performance for Existing Solid Waste Landfills, adopted February 2, 1994.

Regulation 7.79 Standards of Performance for New Commercial Motor Vehicle and Mobile Equipment Refinishing Operations, adopted February 2, 1994.

Regulation 8.03 Commuter Vehicle Testing Requirements, amended September 15, 1993.

Please see the **Federal Register** document published on September 13, 1999, (64 FR 49404) for further discussion of the rule revisions.

Withdrawn Regulations

Regulation 1.16 Standards for Volatile Organic Compound Content of Architectural and Industrial Maintenance Coatings and Modification of Alternate Fuels Vehicle Conversion Program was withdrawn on February 25, 2000.

Regulation 2.12 Emissions Trading (including Banking and Bubble Rules) was withdrawn on May 10, 2001.

1990 Base Line Emissions Inventory

In this action, the EPA is approving the 1990 base line emissions inventory for the Louisville area. Detailed information on the emissions calculations can be obtained at the Region 4 office. The following table is a summary of the base line emissions inventory.

LOUISVILLE 1990 BASE LINE EMISSIONS INVENTORY

[tons/day]

Source type	VOC	NO _x	CO
Point	83.75	147.87	10.14
Area	38.69	4.5	28.04
Mobile	92.81	40.49	541.22
Nonroad	12.68	16.58	54.61
Biogenic	20.9	N/A	N/A
Total	248.83	209.44	634.01

The EPA is approving this inventory as satisfying the requirements of section 182(a)(1) of the CAA.

III. Final Action

EPA is granting final approval of the Louisville 1990 Base Line Emissions Inventory and the aforementioned rule revisions because they are consistent with the requirements of the CAA and EPA policy.

Also included in this submittal were revisions to Regulation 1.02 Definitions; Regulation 1.04 Performance Tests; Regulation 1.06 Source Self Monitoring and Reporting; Regulation 1.07 Emissions During Shutdowns, Malfunctions, and Emergencies;

Regulation 1.08 Administrative Procedures; Regulation 2.02 Air Pollution Regulation; Regulation 2.03 Permit Requirements—Non-Title V Operating Permits and Construction/Demolition Permits; Regulation 2.07 Public Notification; Regulation 2.08 Emission Fees, Permit Fees, and Permit Renewal Procedures; Regulation 5.14 Hazardous Air Pollutants; and Regulation 6.42 VOC and nitrogen oxide reasonably available control technology (NO_x RACT). Action on these regulations will be taken in a separate notice.

IV. Administrative Requirements

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

will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4).

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

In reviewing SIP submissions, EPA's role is to approve state choices,

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

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 24,

2001. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: October 3, 2001.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

Part 52 of chapter I, title 40, *Code of Federal Regulations*, is amended as follows:

PART 52—[AMENDED]

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

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

Subpart S—Kentucky

2. Section 52.920 is amended by revising the entry for 8.03 and by adding new entries in numerical order to the last table in paragraph (c) to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date
Reg 1 General Administrative Procedures				
1.18	Rule Effectiveness	11/23/01	66 FR 53689	9/21/94
Reg 6 Standards of Performance for Existing Affected Facilities				
6.43	Volatile Organic Compound Reduction Requirements	11/23/01	66 FR 53689	5/21/97
6.45	Standards of Performance for Existing Solid Waste Landfills	11/23/01	66 FR 53689	2/2/94

EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date
	*	*	*	*
Reg 7 Standards of Performance for New Affected Facilities				
7.79	Standards of Performance for New Commercial Motor Vehicles and Mobile Equipment Refinishing Operations.	11/23/01	66 FR 53690	2/2/94
	*	*	*	*
Reg 8 Mobile Source Emission Control				
Requirements 8.03.	Commuter Vehicle Testing	11/23/01	66 FR 53690	2/2/94
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[FR Doc. 01-25895 Filed 10-22-01; 8:45 am]

BILLING CODE 6560-50-P