

after the affected source begins firing BSCP, whichever is earlier. Although some commenters suggested that initial startup for DIFF-, DLS/FF-, and WS-controlled kilns be defined in terms of airflow, we defined initial startup in terms of production rate for DIFF-, DLS/FF-, and WS-controlled kilns because the final rule requires owners and operators of affected sources to monitor production rate, whereas flowrate monitoring is not required under today's final rule. We included the stipulation for DIFF-, DLS/FF-, and WS-controlled kilns that initial startup occurs no later than 12 months after the new kiln begins firing BSCP to prevent facilities from operating an affected new or reconstructed kiln at just less than 75 percent of the kiln design capacity long term to circumvent the final rule. A similar stipulation is not necessary for DLA-controlled kilns because the kiln temperature requirement is such that the kiln cannot produce BSCP until well after the temperature is reached.

By defining initial startup in today's final rule, we also have clarified the compliance date for new and reconstructed sources, which is specified in terms of the initial startup. Thus, new and reconstructed DIFF-, DLS/FF-, and WS-controlled tunnel kilns beginning operation after the promulgation date will be allowed to reach 75 percent of the kiln design capacity before initial startup is triggered and the APCD must come online. New and reconstructed DLA-controlled tunnel kilns, and tunnel kilns that would be considered reconstructed but for 40 CFR 63.8390(i)(1) or 40 CFR 63.8390(i)(2), beginning operation after the promulgation date will trigger initial startup when the temperature in the kiln first reaches 260°C (500°F) and the kiln contains product. Performance testing is required 180 days following the compliance date (*i.e.*, 180 days following initial startup). Facilities wishing to conduct performance testing to determine the level of air pollution control necessary may conduct such testing prior to achieving initial startup.

3. Startup

Two commenters expressed concern with how startup is defined with respect to the proposed rule. The commenters stated that, under the proposed rule, a kiln could be considered to be operating if only one burner was operating. However, a kiln could have as many as 100 burners or more. To clarify what constitutes kiln startup we added to today's final rule a definition of "startup" that incorporates "starting the production process."

4. Deviations

One commenter felt that the requirement of reporting emissions as deviations during startup, shutdown, or malfunction (SSM) is inappropriate because facilities are not required to be in compliance with the emission limitations during SSM. Another commenter requested that EPA make it clear the deviations are not necessarily an indication of noncompliance or excess emissions.

The term deviation applies to events during which an affected source fails to meet an emission limitation or comply with another requirement of the final rule. Deviations are not synonymous with violations; depending on the circumstances, a deviation may or may not be a violation of an applicable requirement. We agree with the commenter that an affected source need not be in compliance with emission limits during periods of SSM. Although we consider non-compliance with emission limits during startup, shutdown, and malfunction to be deviations from the emission limits, we do not consider these deviations to be violations of the emission limits. 40 CFR 63.7(e)(1) specifies that, "Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test, nor shall emissions in excess of the level of the relevant standard during periods of startup, shutdown, and malfunction be considered a violation of the relevant standard unless otherwise specified in the relevant standard or a determination of noncompliance is made under 40 CFR 63.6(e)." As indicated in Table 7 of the final rule, this language of the general provisions to part 63 does apply to subpart JJJJJ. The definition of deviation included in today's final rule is consistent with how deviation is defined in other NESHAP, and has not been changed since proposal.

I. Risk-Based Approaches

The preamble to the proposed BSCP rule requested comment on whether there might be further ways to structure the BSCP rule to focus on the facilities which pose significant risks and avoid the imposition of high costs on facilities that pose little risk to public health and the environment. Specifically, we requested comment on the technical and legal viability of two risk-based approaches: (1) An applicability cutoff for threshold pollutants under the authority of CAA section 112(d)(4); and (2) subcategorization and delisting under the authority of CAA sections

112(c)(1) and 112(c)(9).³ We indicated that we would evaluate all comments before determining whether either approach would be included in the final BSCP rule. Numerous commenters submitted detailed comments on these risk-based approaches. These comments are summarized in the BSCP Response-to-Comments document (see **SUPPLEMENTARY INFORMATION** section).

Based on our consideration of the comments received and other factors, we have decided not to include the risk-based approaches in today's final BSCP rule. The risk-based approaches described in the proposed BSCP rule and addressed in the comments we received raise a number of complex issues. In addition, we are under time pressure to complete the BSCP rule, because the statutory deadline for promulgation has passed and a deadline suit has been filed against EPA. (See *Sierra Club v. Whitman*, Civil Action No. 1:01CV01537 (D.D.C.).) Given the range of issues raised by the risk-based approaches and the need to promulgate a final rule expeditiously, we believe that it is appropriate not to include any risk-based approaches in today's final BSCP rule. Nonetheless, we expect to continue to consider risk-based approaches in connection with other proposed NESHAP where we have described and solicited comment on such approaches. Finally, while we are not including risk-based approaches in today's final BSCP rule, we have included a number of other measures that we expect will reduce the costs and burdens on the affected sources.

III. Summary of the Final Brick and Structural Clay Products Manufacturing NESHAP

A. What Source Category Is Regulated by the Final Rule?

Today's final rule for BSCP manufacturing applies to BSCP manufacturing facilities that are, are located at, or are part of, a major source of HAP emissions. The BSCP manufacturing source category includes those facilities that manufacture brick (including, but not limited to, face brick, structural brick, and brick pavers); clay pipe; roof tile; extruded floor and wall tile; and/or other extruded, dimensional clay products. Brick and structural clay products primarily are produced from common clay and shale. Production of BSCP typically consists of processing and handling the raw materials, forming

³ See 68 FR 1276 (January 9, 2003) (Plywood and Composite Wood Products Proposed NESHAP) and docket number A-98-44, Item No. II-D-525 (White papers submitted to EPA outlining the risk-based approaches).