

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 65

[EPA-HQ-OAR-2007-0429; FRL-8459-5]

RIN 2060-A045

Revisions to Consolidated Federal Air Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct Final Rule.

SUMMARY: The EPA is taking direct final action on the General Provisions for Consolidated Federal Air Rule to allow extensions to the deadline imposed for source owners and operators to conduct required performance tests in certain specified force majeure circumstances. On May 16, 2007, we published a final rule that revised the General Provisions for Standards of Performance for New Stationary Sources, for National Emission Standards for Hazardous Air Pollutants, and for National Emission Standards for Hazardous Air Pollutants for Source Categories to allow extensions to the deadline imposed for source owners and operators to conduct required performance tests in certain specified force majeure circumstances. We recently realized that we should have also revised the Consolidated Federal Air Rule to allow for similar extensions.

DATES: This rule is effective on [insert date 90 days from date of publication in the Federal Register] without further notice, unless EPA receives adverse comment by [insert date 30 days from date of publication in the Federal Register]. If we receive adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that some or all of the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified under Docket ID No. EPA-HQ-OAR-2007-0429 by one of the following methods:

- www.regulations.gov. Follow the on-line instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov
- Fax: (202) 566-9744
- Mail: Revisions to Consolidated Federal Air Rule, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Please include a total of two copies.
- Hand Delivery: EPA Docket Center, 1301 Constitution Avenue, NW, EPA Headquarters Library, Room 3334, EPA West Building, 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. EPA-HQ-OAR-2007-0429. 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 www.regulations.gov, 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 www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, 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 www.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. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Revisions to Consolidated Federal Air Rule Docket, EPA/DC, EPA West Building, EPA Headquarters Library, Room 3334, 1301 Constitution Ave., 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.

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I. Why is EPA Using a Direct Final Rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. The proposed changes mirror those recently promulgated in the May 16, 2007 final rule revising the General Provisions for Standards of Performance for New Stationary Sources, for National Emission Standards for Hazardous Air Pollutants, and for National Emission Standards for Hazardous Air Pollutants for Source Categories ("Force Majeure Rule") which allowed extensions to the deadline imposed for source owners and operators to conduct required performance tests in certain specified force majeure circumstances. Nonetheless, in the "Proposed Rules" section of this Federal Register, we are publishing a separate document that will serve as the proposed rule if relevant adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting, must do so at this time. For further information about commenting on this rule, see the

ADDRESSES section of this document. If EPA receives adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Does This Action Apply to Me?

This action applies to any owner or operator of a source required to conduct performance testing to demonstrate compliance with applicable standards under the General Provisions for Consolidated Federal Air Rule.

III. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this direct final rule is available by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Only those objections to this final rule that were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2) of the CAA, the requirements that are the subject of this direct final rule may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

IV. This Action

The direct final rule allows source owners or operators, in the event of a force majeure, to petition the Administrator for an extension of the deadline(s) by which they are required to conduct an initial or subsequent performance test required by the Consolidated Federal Air Rule. Performance tests required as a result of enforcement orders or enforcement actions are not covered by this rule because enforcement agreements contain their own force majeure provisions. A "force majeure" is defined as an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents the owner or operator from complying with the regulatory requirement to conduct performance tests within the specified timeframe despite the affected facility's best efforts to fulfill the obligation. Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility.

If an affected owner or operator intends to assert a claim that a force majeure is about to occur, occurs, or has occurred, the owner or operator must notify the Administrator, in writing, as soon as practicable following

the date the owner or operator first knew, or through due diligence should have known, that the event may cause or caused a delay in testing beyond the regulatory deadline. The owner or operator must provide a written description of the event and a rationale for attributing the delay in testing beyond the regulatory deadline to the force majeure; describe the measures taken or to be taken to minimize the delay; and identify a date by which the owner or operator proposes to conduct the performance test. The test must be conducted as soon as practicable after the force majeure occurs.

The decision as to whether or not to grant an extension to the performance test deadline is solely within the discretion of the Administrator. The Administrator will notify the owner or operator in writing of approval or disapproval of the request for an extension as soon as practicable. If an owner or operator misses its performance test deadline due to a force majeure event, and the request for an extension is subsequently approved, the owner or operator will not be held in violation for failure to conduct the performance test within the prescribed regulatory timeframe.

We recognize that there may be circumstances beyond a source owner's or operator's control constituting a force

majeure event that could cause an owner or operator to be unable to conduct performance tests before the regulatory deadline. We developed this rule to provide a mechanism for consideration of these force majeure events and granting of extensions where warranted. Under current rules, a source owner or operator who is unable to comply with performance testing requirements within the allotted timeframe due to a force majeure is regarded as being in violation and subject to enforcement action. As a matter of policy, EPA often exercises enforcement discretion regarding such violations. However, where circumstances beyond the control of the source owner or operator constituting a force majeure prevent the performance of timely performance tests, we believe that it is appropriate to provide an opportunity to such owners and operators to make good faith demonstrations and obtain extensions of the performance testing deadline where approved by the Administrator in appropriate circumstances.

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 12866 (58 FR 51735 October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The information collection requirements are not enforceable until OMB approves them.

The final rule requires a written notification only if a plant owner or operator needs an extension of a performance test deadline due to certain rare events, such as acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility. Since EPA believes such events will be rare, the projected cost and hour burden will be minimal.

The increased annual average reporting burden for this collection (averaged over the first 3 years of the ICR) is estimated to total 6 labor hours per year at a cost of \$377.52. This includes one response per year from six respondents for an average of 1 hour per response. No capital/startup costs or operation and maintenance costs are associated with the final reporting requirements. 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. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the Federal Register to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act 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 as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a 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.

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. Extensions to deadlines for conducting performance tests will provide flexibility to small entities and reduce the burden on them by providing them an opportunity for additional time to comply with performance test deadlines during force majeure events. We expect force majeure events to be rare since these events include circumstances such as, acts of nature, acts of war or

terrorism, and equipment failure or safety hazard beyond the control of the affected facility.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.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 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 one year. The maximum total annual cost of this final rule for any year has been estimated to be less than \$435.00. Thus, today's final rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

EPA has determined that the final rule contains no regulatory requirements that might significantly or uniquely affect small governments. The final rule requires source owners and operators to provide a written notification to the Agency only if an extension to a

performance test deadline is necessary due to rare force majeure events. Therefore, the final rule is not subject to the requirements of section 203 of the UMRA.

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. The final rule requirements will not supercede State regulations that are more stringent. In addition, the final rule requires a written notification only if a plant owner or operator

needs an extension of a performance test deadline due to certain rare events, such as acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility. Since EPA believes such events will be rare, the projected cost and hour burden will be minimal. 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 direct final rule does not have tribal implications as specified in Executive Order 13175. This final rule 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. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 F.R. 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 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.

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866 and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This rule does not affect the underlying control requirements established by the applicable standards but only the timeframe associated with performance testing in limited circumstances.

H. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this direct final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This direct final rule does not relax the control requirements on affected sources. It merely allows an extension to the deadline for conducting performance tests in rare force majeure circumstances.

I. Executive Order 13211: Actions 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 a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 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. New test methods are not being proposed in this rulemaking, but EPA is allowing for extensions of the regulatory deadlines by which owners or operators are required to conduct performance tests when a force majeure is about to occur, occurs, or has occurred which prevents

owners or operators from testing within the regulatory deadline. Therefore, NTTAA does not apply.

K. Congressional Review Act

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. 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. 804(2). This rule will be effective on [Insert date 90 days after date of publication in the Federal Register].

List of Subjects in 40 CFR Part 65

Air pollution control, Environmental protection,
Intergovernmental relations, Reporting and Recordkeeping
Requirements.

Dated: August 17, 2007.

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, part 65 of the Code of Federal Regulations are amended as follows:

PART 65—[AMENDED]

1. The authority citation for part 65 continues to read as follows:

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

Subpart A—[Amended]

2. Section 65.2 is amended by adding, in alphabetical order, a definition for "Force majeure" to read as follows:

§ 65.2 Definitions.

* * * * *

Force majeure means, for purposes of §65.157, an event that will be or has been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevents the owner or operator from complying with the regulatory requirement to conduct performance tests within the specified timeframe despite the affected facility's best efforts to fulfill the obligation. Examples of such events are acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility.

* * * * *

3. Section 65.157 is amended as follows:

- a. By revising paragraph (c) introductory text.
- b. By adding paragraphs (c) (1) (viii) through (c) (1) (xi).

§ 65.157 Performance test and flare compliance determinations.

* * * * *

(c) Except as specified in paragraphs (c) (1) (viii), (c) (1) (ix), (c) (1) (x), and (c) (1) (xi) of this section, unless a waiver of performance testing or flare compliance determination is obtained under this section or the conditions of another subpart of this part, the owner or operator shall perform such tests specified in the following:

(1) * * *

(viii) If a force majeure is about to occur, occurs, or has occurred for which the affected owner or operator intends to assert a claim of force majeure, the owner or operator shall notify the Administrator, in writing as soon as practicable following the date the owner or operator first knew, or through due diligence should have known that the event may cause or caused a delay in testing beyond the regulatory deadline, but the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification shall occur as soon as practicable.

(ix) The owner or operator shall provide to the Administrator a written description of the force majeure event

and a rationale for attributing the delay in testing beyond the regulatory deadline to the force majeure; describe the measures taken or to be taken to minimize the delay; and identify a date by which the owner or operator proposes to conduct the performance test. The performance test shall be conducted as soon as practicable after the force majeure occurs.

(x) The decision as to whether or not to grant an extension to the performance test deadline is solely within the discretion of the Administrator. The Administrator will notify the owner or operator in writing of approval or disapproval of the request for an extension as soon as practicable.

(xi) Until an extension of the performance test deadline has been approved by the Administrator under paragraphs (c) (1) (viii), (c) (1) (ix), and (c) (1) (x) of this section, the owner or operator of the affected facility remains strictly subject to the requirements of this part.

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