

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 61, and 63

[EPA-HQ-OAR-2006-0085; FRL-8315-2]

RIN 2060-AN84

**Revisions to Standards of Performance for New
Stationary Sources, National Emission Standards for
Hazardous Air Pollutants, and National Emission
Standards for Hazardous Air Pollutants for Source
Categories**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates revisions to 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 for extensions to the deadline imposed for source owners and operators to conduct an initial or subsequent performance test required by applicable regulations. The General Provisions do not currently provide for extensions of the deadlines for conducting performance tests.

DATES: This final rule is effective on [Insert date of publication in the FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2006-0085.

All documents in the docket are listed on the www.regulations.gov web site. 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 is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Revisions to Standards of Performance for New Stationary Sources, National Emission Standards for Hazardous Air Pollutants, and National Emission Standards for Hazardous Air Pollutants for Source Categories Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 202-566-1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: Ms. Lula Melton, Air Quality Assessment Division, Office of Air Quality Planning and Standards, (C304-02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541-2910; fax number: (919) 541-4511; e-mail address: melton.lula@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action applies to any source whose owner or operator is required to conduct performance testing to demonstrate compliance with applicable standards under 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.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the final amendments will be placed on the TTN's policy and guidance page for newly proposed or promulgated

rules at <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control.

C. Public Comments on Proposed Rule

The EPA received 15 sets of public comments on the proposed amendments to 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 during the 90-day comment period. These comments were submitted to the rulemaking docket. The EPA has carefully considered these comments in developing the final amendments. Summaries of the comments and EPA's responses are contained in this preamble.

D. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this 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 60 DAYS FROM DATE OF PUBLICATION]. 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 final rule may not

be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides a mechanism for us to convene a proceeding for reconsideration, “[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if 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.” Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding FOR FURTHER INFORMATION CONTACT section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW, Washington, DC 20460.

E. How is this document organized?

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II. Summary of Final Action and Rationale

A. What are the requirements?

The 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 applicable regulations. 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.

B. Why did we amend the requirements for performance tests in the General Provisions?

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.

III. Responses to Comments

A. Clarification of Approving Authority

Comment: Five commenters requested that we clarify or define the approving authority.

Response: We inadvertently used two terms (Administrator and delegated agency) in the proposed rule. In 40 CFR Part 60 of the proposed rule, we stated that the owner or operator shall notify the Administrator of force majeure events, and in 40 CFR Parts 61 and 63 of the proposed rule, we stated that the owner or operator shall notify the delegated agency.

We have replaced the term delegated agency with the term Administrator in 40 CFR Parts 61 and 63 of the final rule to be consistent with (1) the term (Administrator) used in 40 CFR Part 60 and (2) the term (Administrator) used in Parts 61 and 63 of the General Provisions that this final rule amends. Nonetheless, we believe that it may be appropriate for the Administrator to assign the responsibility of evaluating and approving or denying requests for extensions to performance test deadlines due to force majeure events to a duly delegated agency according to applicable procedures.

B. Force Majeure Concept

Comment: Six commenters stated that they thought the scope of the rule was too narrow and that circumstances beyond what they believed were covered by the definition of "force majeure" warranted similar extensions (e.g., pandemics, facility shutdowns, and process constraints that result in non-representative testing conditions).

Response: The proposed rule is not as narrow as indicated by commenters. 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." Although we provide examples of events that could meet this definition (i.e., acts of nature, acts of war or terrorism, and equipment failure or safety hazards beyond the control of the affected facility), this list is not exhaustive. The focus of the rule and this definition is an event beyond the control of the affected facility. Similarly, two definitions of "force majeure" in dictionaries are "an unexpected or uncontrollable event" (The American Heritage Dictionary) and "an event or effect that cannot be reasonably anticipated or controlled" (Merriam-Webster's Online Dictionary). Thus, any event beyond the control of the affected facility may qualify for the extension. We can neither provide an exhaustive list of all of the possible events that may qualify as "force majeure" under this rule, nor determine whether the generic additional examples provided in the public comments would or would not qualify under all circumstances. The Administrator will exercise his or her discretion when considering requests for extensions to performance test deadlines due to "force majeure" events.

Comment: Six commenters requested that we expand the scope of the rule to allow the force majeure concept to justify extensions for additional regulatory requirements,

such as monitoring, recordkeeping, reporting, maintenance, and inspections.

Response: The purpose of this rulemaking is to address requests for extensions to performance test deadlines.

Expanding the force majeure concept to include additional regulatory requirements is beyond the scope of the proposed rule. Therefore, the final rule covers petitions for extensions to performance test deadlines only.

C. Notifications

Comment: Four commenters requested that we allow simplified notifications. One of these commenters requested that we allow a simplified notification initially followed by the timeline for completing the performance test later. In addition, one of these commenters requested that we allow initial notification to the Administrator in non-written formats followed by written communication later since during force majeure events means of communication may be disrupted. Two of these commenters stated that the Administrator should not require listing of every applicable test and rule for an entire facility.

Response: We agree that phased notification may be appropriate in certain circumstances. For example, if a source owner or operator is unable to determine a date by which the performance test will be conducted at the time of

the force majeure event, verbal notification to the Administrator that the original performance test deadline will be missed followed by written communication describing the details required by the rule may be appropriate. Also, if a force majeure event results in widespread power outages and no US Postal mail service, an initial oral notification followed by written notification may be necessary. The written notification required by this rule does not include a listing of every applicable test and rule for an entire facility. The rule requires the source owner or operator to provide to the permitting authority a written description of the force majeure event, a rationale for attributing the delay in testing beyond the regulatory deadline to the force majeure event, a written description of the measures taken or to be taken to minimize the delay, and a date (as soon as practicable following the force majeure event) by which the owner or operator proposes to conduct the performance test.

Comment: Two commenters requested that we clarify that written notification includes letters, faxes, e-mails, web-based submittals, etc.

Response: We agree that written notification regarding force majeure events can be provided to the Administrator in such written formats as those listed above.

Comment: Three commenters expressed the concern that a legitimate request for an extension may be denied based on the timing of the request. For example, source owners and operators may not be aware of an anticipated hurricane until one day prior to the event. Another commenter suggested that we require source owners and operators to notify the Administrator verbally within five days of the force majeure event and in writing within twenty-one days of the event.

Response: We proposed that the owner or operator would notify the Administrator, in writing, as soon as practicable following the date the owner or operator first knew, or should have known that the event may cause or caused a delay in testing beyond the regulatory deadline. We do not believe that it is appropriate to establish specific timelines in the rule. The existence of a force majeure event typically necessitates flexibility. Thus, the final rule states that 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.

D. Approvals

Comment: Four commenters suggested that we add a provision that allows requests for extensions to be automatically granted if the Administrator does not respond within a specific timeframe. Three of the four commenters suggested that the Administrator be given thirty days to respond. Two commenters are concerned that owners and operators will be subject to enforcement actions until their requests for extensions are approved.

Response: We disagree with allowing automatic approvals and with requiring the Administrator to respond within 30 days. We do not believe that it is appropriate to place this burden on the Administrator since the Administrator may also have been affected by the force majeure event. We believe that it is appropriate to require the Administrator to notify the owner or operator of approval or disapproval of the request for an extension as soon as practicable.

Furthermore, 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.

Comment: Two commenters stated that circumstances, such as during acts of war, mandatory evacuations, or energy and supply restrictions, applying for an extension to a performance test deadline should be self-implementing.

Response: We believe that the Administrator should have the discretion to determine if a request for an extension warrants approval and that self-implementation is not appropriate. During any situation that a source owner or operator believes qualifies as a force majeure event, the owner or operator must submit a request to the Administrator that includes the required information, such as a written description of the force majeure event, a rationale for attributing the delay in testing beyond the regulatory deadline to the force majeure event, a description of the measures taken to minimize the delay, and a date (as soon as practicable) by which the performance test is expected to occur. The Administrator will notify the owner or operator of approval or disapproval of the request for an extension as soon as practicable. Furthermore, 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.

Comment: One commenter requested that we add the following statement to the rule (i.e., "the Administrator shall approve a reasonable request for extension of the performance test deadline.")

Response: We do not believe that it is necessary to add this statement to the rule. 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 as soon as practicable.

Comment: Two commenters requested that EPA affirm that we already have the authority to approve requests for extensions to performance tests.

Response: We do not have this authority except through enforcement discretion. Therefore, we developed this rule to grant this authority.

Comment: Three commenters believe that the Administrator should have the authority to issue blanket approvals for a designated area in advance of a force majeure event.

Response: We do not believe that blanket approvals are necessary since approvals for requests to extend performance

test deadlines can be granted after the force majeure event occurs. Furthermore, we believe that requests to extend performance test deadlines should be reviewed and considered on a case-by-case basis because situations and circumstances may vary among facilities affected by the same force majeure event.

E. Title V Deviations

Comment: Four commenters requested that we specify that extensions granted under this rule are not Title V deviations.

Response: We agree that extensions granted under this rule are not Title V deviations since the original performance test deadline will not be applicable once a request for an extension has been approved. However, where the Administrator has not yet issued a decision on a request for an extension under today's rule, the failure to conduct the performance test within the originally prescribed timeframe is a deviation and should be reported as such.

F. Other Comments

Comment: One commenter requested that we expand the concept of force majeure to cover regulations for other environmental media, such as water regulations.

Response: We proposed that this rule address air regulations only and are maintaining that approach in the final rule.

Comment: One commenter requested that denials for extensions be administratively appealable.

Response: The commenter did not explain why this recommendation is appropriate or how it could be implemented. Therefore, we are not adopting this recommendation.

Comment: One commenter requested that we delete the word "strictly" from the statement "Until an extension of the performance test deadline has been approved under ..., the owner or operator of the affected facility remains strictly subject to the requirements of this part."

Response: We disagree with the request to remove the word "strictly" because it is intended to emphasize that this rule is one of strict liability.

IV. 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

not-for-profit enterprises, 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 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 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 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.

I. National Technology Transfer and Advancement Act

As noted in the proposed rule, 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.

J. 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 [Insert date of publication in the Federal Register].

List of Subjects in 40 CFR Parts 60, 61, and 63

Environmental protection, Air pollution control,
Intergovernmental relations, Reporting and recordkeeping
requirements.

Dated: May 10, 2007

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, title 40, chapter I, parts 60, 61, and 63 of the Code of Federal Regulations are amended as follows:

PART 60-- [AMENDED]

1. The authority citation for part 60 continues to read as follows:

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

Subpart A-- [Amended]

2. Section 60.2 is amended by adding, in alphabetical order, a definition for "Force majeure" to read as follows:

§ 60.2 Definitions.

* * * * *

Force majeure means, for purposes of §60.8, 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 60.8 is amended by revising paragraph (a) to

read as follows:

§ 60.8 Performance tests.

(a) Except as specified in paragraphs (a) (1), (a) (2), (a) (3), and (a) (4) of this section, within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility, or at such other times specified by this part, and at such other times as may be required by the Administrator under section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such performance test(s).

(1) 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.

(2) 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.

(3) 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.

(4) Until an extension of the performance test deadline has been approved by the Administrator under paragraphs (a) (1), (2), and (3) of this section, the owner or operator of the affected facility remains strictly subject to the requirements of this part.

* * * * *

PART 61 - [AMENDED]

4. The authority citation for part 61 continues to read as follows:

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

Subpart A - [Amended]

5. Section 61.02 is amended by adding, in alphabetical order, a definition for "Force majeure" to read as follows:

§ 61.02 Definitions.

* * * * *

Force majeure means, for purposes of §61.13, 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.

* * * * *

6. Section 61.13 is amended as follows:

- a. By removing "; or" at the end of paragraph (a)(1) and adding in its place a period.
- b. By revising paragraph (a) introductory text.
- c. By adding paragraphs (a)(3) through (a)(4).

§ 61.13 Emission tests and waiver of emission tests.

(a) Except as provided in paragraphs (a) (3), (a) (4), (a) (5), and (a) (6) of this section, if required to do emission testing by an applicable subpart and unless a waiver of emission testing is obtained under this section, the owner or operator shall test emissions from the source:

* * * * *

(3) 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 specified in paragraphs (a) (1) or (a) (2) of this section or beyond a deadline established pursuant to the requirements under paragraph (b) of this section, 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.

(4) 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.

(5) 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.

(6) Until an extension of the performance test deadline has been approved by the Administrator under paragraphs (a) (3), (a) (4), and (a) (5) of this section, the owner or operator of the affected facility remains strictly subject to the requirements of this part.

* * * * *

PART 63--[AMENDED]

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

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

Subpart A--[Amended]

8. Section 63.2 is amended by adding, in alphabetical order, a definition for "Force majeure" to read as follows:

§ 63.2 Definitions.

* * * * *

Force majeure means, for purposes of §63.7, 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.

* * * * *

9. Section 63.7 is amended by revising paragraphs (a) (2) introductory text and (a) (2) (ix) and by adding paragraph (a) (4) to read as follows:

§ 63.7 Performance testing requirements.

(a) * * *

(2) Except as provided in paragraph (a) (4) of this section, if required to do performance testing by a relevant standard, and unless a waiver of performance testing is obtained under this section or the conditions of paragraph (c) (3) (ii) (B) of this section apply, the owner or operator of the affected source must perform such tests within 180 days of the

compliance date for such source.

* * * * *

(ix) Except as provided in paragraph (a)(4) of this section, when an emission standard promulgated under this part is more stringent than the standard proposed (see §63.6(b)(3)), the owner or operator of a new or reconstructed source subject to that standard for which construction or reconstruction is commenced between the proposal and promulgation dates of the standard shall comply with performance testing requirements within 180 days after the standard's effective date, or within 180 days after startup of the source, whichever is later. If the promulgated standard is more stringent than the proposed standard, the owner or operator may choose to demonstrate compliance with either the proposed or the promulgated standard. If the owner or operator chooses to comply with the proposed standard initially, the owner or operator shall conduct a second performance test within 3 years and 180 days after the effective date of the standard, or after startup of the source, whichever is later, to demonstrate compliance with the promulgated standard.

* * * * *

(4) 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:

(i) 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 specified in paragraph (a) (2) or (a) (3) of this section, or elsewhere in this part, 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.

(ii) 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.

(iii) 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.

(iv) Until an extension of the performance test deadline has been approved by the Administrator under paragraphs (a) (4) (i), (a) (4) (ii), and (a) (4) (iii) of this section, the owner or operator of the affected facility remains strictly subject to the requirements of this part.

* * * * *

10. Section 63.91 is amended by adding paragraph (g) (1) (i) (O) to read as follows:

§ 63.91 Criteria for straight delegation and criteria common to all approval options.

* * * * *

(g) * * *

(1) * * *

(i) * * *

(O) Section 63.7(a) (4), Extension of Performance Test Deadline

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