

EO 12866 Interagency Comments: Continuous Emission Monitoring; Quality-Assurance Requirements During National Emergencies (RIN 2060-AU85)

- EPA seeks comment on whether the temporary measures in this interim final rule in “national emergency” situations should be made permanent and suggests that this interim final rule may be treated as a proposed rule to that effect. The interim final rule does not provide any justification or explanation for why this temporary exemption should be made permanent. If EPA were to decide to make these measures permanent in a subsequent final rule, absent additional procedures, the final rule would be vulnerable to challenge for lack of notice as EPA would not have articulated a rationale for making the measures permanent.

EPA response: We have revised the amendments to apply more specifically to the COVID-19 emergency and are no longer seeking comment on whether to make the amendments permanent. See § 75.68(a)(1); see also preamble at 1-2, 35.

- EPA has not adequately explained why these temporary measures will extend for 180 days as opposed to, for example, until the end of the national emergency that triggered their application. Under many presently-discussed scenarios it is easy to foresee that the protective measures currently in place to respond to COVID-19 will no longer be applied in a matter of months. EPA should address that potential as part of its explanation for why 180 days is necessary.

EPA response: The period of eligibility to use the temporary measures is expressly limited to the shorter of (1) the duration of the national emergency plus a 60-day grace period for completion of delayed tests or (2) the 180-day duration of the interim rule. See § 75.68(a)(1). In addition, each unit is required to complete delayed tests as soon as practicable following the end of restrictions impairing the ability to complete testing for that unit, if earlier. See § 75.68(a)(6)(i). These provisions are described in the preamble at 1-2 and 20-21.

- The interim final rule does not address why the exceptions for essential activities in State stay-at-home or shelter-in-place orders do not already adequately accommodate the need to maintain monitoring and reporting functions at covered facilities. While we have not conducted an exhaustive review, we are aware that many such orders exempt maintenance of critical infrastructure, like power plants. It is thus unclear that the premise of the rule is correct—i.e., that essential personnel could not undertake required testing. It seems that such personnel are naturally limited in number and these functions are relevantly infrequent, such that other protective measures (sanitizing, social distancing, use of protective equipment) could be deployed. EPA should address those considerations.

EPA response: The temporary measures do not suspend activities typically carried out by plant staff, such as requirements to perform continuous emissions monitoring and reporting functions or routine plant maintenance. The only types of tests addressed by the temporary measures are periodic or event-driven tests that typically require either outside

contractor personnel (e.g., stack testers), supplies from outside facilities (e.g., calibration gases), or services from outside laboratories (e.g., fuel analyses). These testing activities are distinct from the activities typically performed by on-site plant personnel, and designation of the on-site plant personnel as essential cannot ensure that the testing can be performed as originally scheduled. The temporary measures are designed to accommodate travel, plant access, or safety restrictions that if implemented as designed would limit interactions between plant personnel and outside contractors for public health reasons, as well as restrictions that may prevent plants from obtaining supplies or services needed for certain tests, such as when an outside calibration gas supply facility or an outside laboratory is closed because of the COVID-19 emergency. These considerations are discussed in section II.A of the preamble.

- The draft interim final rule often says that these measures apply when an operator “may be unable to meet test deadlines for reasons related to a declared national emergency.” That suggested threshold is vague and it suggests a wide, and easily satisfied, array of circumstances that trigger the measures in the draft interim final rule. EPA should consider more definitive language for circumstances that render compliance “impossible,” “impracticable,” or “unreasonable” due to the unnecessary risk of exposure to the coronavirus. The substance of the draft indicates a higher threshold for applicability in practice, but phrases in the draft such as the above could be used to argue that the rule is too permissive.

EPA response: The rule text has been strengthened by removing the words “related to” before “travel, plant access, and other safety restrictions.” See § 75.68(a)(3)(ii), (4)(ii), (5)(ii). The preamble has also been revised in multiple places to clarify that the temporary measures are available only when a test is not completed by the otherwise applicable deadline because of “travel, plant access, and other safety restrictions” implemented to address the COVID-19 emergency.

- EPA has not clearly articulated the characteristics of a “national emergency” that would underpin the application of the measures in the interim final rule. This shortcoming would be especially problematic if EPA were to finalize a rule making these measures permanent. Even in lay terms, a national emergency can take many forms, including many situations that would not be expected to have any impact on environmental monitoring or reporting. Relatedly, and considering the lack of concrete definition, the draft interim final rule should not rely as heavily as it does on the broad concept of “national emergency.”

EPA response: We have revised the amendments to apply more specifically to the COVID-19 emergency and are no longer seeking comment on whether to make the amendments permanent. See the definition of “emergency period” at § 75.68(a)(1). The more precisely targeted applicability is also described in the preamble at 1-2 and 20-21.

- Related to the prior comment, EPA should provide more information and technical detail about the impending deadlines during the COVID emergency and the immediacy of the impact of the COVID emergency on operators to justify the good cause exemption. The

draft's reference to, and reliance on, general concerns expressed to EPA by some operators is not a persuasive justification in the absence of specific facts and evidence that could be included in the administrative record. As drafted, there is no indication that such facts support EPA's action here.

EPA response: EPA has presented a discussion in section II.A of the preamble concerning the part 75 testing requirements that typically require outside contractor personnel, the automatic penalties incurred when part 75 test deadlines are missed, the approximately 1000 units with RATAs due between April and June 2020, the travel and plant access restrictions currently in place to address the COVID-19 emergency, the likelihood of extended delays in rescheduling any missed tests, and the need for plant operators to make immediate decisions about near-term test schedules in light of the vital considerations for the health of their staff and the public. EPA believes this discussion provides a persuasive justification of the urgent need for the targeted, temporary amendments in this rule sufficient to justify the use of the good cause exception for issuance of the rule without prior notice and opportunity for comment.

- It is unclear when facilities would need to perform validation, such that EPA could not give any notice. Could EPA provide a table of applicable dates so that it is easy to see what deadlines would occur during the emergency?

EPA response: EPA explains in section II.A of the preamble that hundreds of RATA tests will have deadlines in April and May 2020, before a rule could be finalized using the most expedited possible notice-and-comment procedures. The test dates are not susceptible to a precise calendar presentation, which is why they are described in section II.A in terms of frequency and the number of tests expected in the near term after issuance of this rule. It is not possible for all units with stack tests due in a given quarter to have the tests performed in the last week of the quarter or even the last month of the quarter, which is why several hundred of the approximately 1000 units EPA expects to perform RATAs between April and June of 2020 would have to perform the tests in April or May and, absent the temporary amendments in this rule, would be penalized for missing their test deadlines.

- EPA does not explain why it could not give a notice period shorter than the typical 45-day notice period referenced in the interim final rule. EPA has provided shorter notice periods in the past, and the preamble should address why a shorter notice period could not be provided.

EPA response: EPA has revised the discussion at page 40 of the preamble that previously referenced the likely need for "a 45-day comment period." The revised text explains that if EPA were not invoking the APA section 553(b)(B) good cause exception, the rulemaking requirements of CAA section 307(d) would apply to this rule, and that under those procedures, EPA would have to provide an opportunity for a public hearing (with prior notice of the hearing) and the public comment period would have to extend for 30 days after the hearing.

- EPA does not explain why it does not anticipate that the interim final rule would adversely affect emissions. Such an assumption is likely to be challenged in litigation. Moreover, if that were the case, why must the data be validated in the first place?

EPA response: The rule explains that no change in emissions behavior is expected because the rule does not alter any existing emissions limitation under any program and does not suspend any existing requirements for any affected unit to report emissions for any hour of operations. See preamble at 25-26. This conclusion does not undermine the need for data validation through quality-assurance testing, which serves the important but distinct purpose of ensuring the high quality of the reported emissions data. See preamble at 12-13.

- There is not an adequate explanation as to why EPA could not use its case-by-case exemption authority here. Is EPA saying that it is not permissible to grant exemptions to multiple units or is it that granting exemptions on a case-by-case basis is administratively burdensome and EPA is trying to minimize resource burdens when the COVID emergency calls for people to stay home?

EPA response: EPA has provided additional explanation concerning why reliance on the possibility of relief at some point in the future under the case-by-case petition process cannot provide operators with the timely assurance they need that they will not be penalized for urgent decisions they must make, in far less time than it would take for a petition to be submitted and answered, regarding whether to delay near-term scheduled tests in light of the current COVID-19 emergency. See preamble at 20-21.