

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 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.
- 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.
- 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 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.”

- 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.
- 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 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 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?
- 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?