

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 75**

[EPA-HQ-OAR-2008-0800; FRL-8737-5]

RIN 2060-AP39

**Stay of the Effectiveness of Requirements for Air Emission Testing Bodies**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to stay the effectiveness of requirements for air emission testing bodies.

On January 24, 2008, final amendments to regulations on competency requirements for air emission testing bodies (AETBs) were published in the **Federal Register**. The AETB provision generally requires stack testers and stack testing companies to meet certain minimum competency requirements described in ASTM D 7036 by January 1, 2009.

On March 25, 2008, the Utility Air Regulatory Group (UARG) filed a Petition for Review primarily claiming that EPA could not by the AETB requirement hold utilities responsible for something they cannot control.

While EPA is considering revisions to the requirements to address UARG's concerns, it cannot propose and complete any such revision through notice and comment rulemaking before the compliance date contained in the existing rule, thus necessitating this action. EPA needs to complete this action staying effectiveness of the AETB requirements in order to secure an extension of an Order Granting Abeyance of Further Proceedings which expires on October 29, 2008, when the Agency must file Motions to Govern Further Proceedings.

**DATES:** Effective on November 4, 2008, in Appendix A to 40 CFR Part 75, the effectiveness of Section 6.1.2(a) through (c) is stayed indefinitely.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2008-0800. All documents in the docket are listed in the Federal Docket Management System index at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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 and Radiation Docket is (202) 566-1742.

**FOR FURTHER INFORMATION CONTACT:** John Schakenbach, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343-9158, e-mail at [schakenbach.john@epa.gov](mailto:schakenbach.john@epa.gov). Electronic copies of this document can be accessed through the EPA Web site at: <http://epa.gov/airmarkets>.

**SUPPLEMENTARY INFORMATION:**

*Regulated Entities.* Entities regulated by this action primarily are fossil fuel-fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

Category	NAICS code	Examples of potentially regulated industries
Industry .....	221112 and others .....	Electric service providers.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine the applicability provisions in §§ 72.6, 72.7, and 72.8 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*Judicial Review.* Under CAA section 307(b)(1), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit on or before January 5, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the

purposes of judicial review, does not extend the time within which a petition for judicial review may be filed, and does not postpone the effectiveness of this rule. Under CAA section 307(b)(2), the requirements established by this rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

*Outline.* The following outline is provided to aid in locating information in this preamble.

- I. Overview
- II. Administrative Procedures Used in This Action
- III. Staying the Effectiveness of Requirements for Air Emission Testing Bodies
  - A. Rule revision staying the effectiveness of requirements for air emission testing bodies
- IV. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism

- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Congressional Review Act

**I. Overview**

On January 24, 2008, final amendments to 40 CFR part 75 on competency requirements for air emission testing bodies (AETBs) were published in the **Federal Register** (See 73 FR 4365, 4367, and 4372). The AETB provision generally requires stack testers and stack testing companies to meet certain minimum competency requirements described in ASTM D 7036 by January 1, 2009.

On March 25, 2008, the Utility Air Regulatory Group (UARG) filed a Petition for Review primarily claiming that EPA could not by the AETB requirement hold utilities responsible for something they cannot control. While EPA is considering revisions to the requirements to address UARG's concerns, it cannot propose and complete any such revision through notice and comment rulemaking before the compliance date contained in the existing rule, thus necessitating this action. EPA needs to complete this action staying effectiveness of the AETB requirements in order to secure an extension of an Order Granting Abeyance of Further Proceedings which expires on October 29, 2008, when the Agency must file Motions to Govern Further Proceedings.

EPA believes that this rulemaking qualifies for the "good cause" exemption under section 553(b)(3)(B) of the APA. EPA has determined that prior proposal and opportunity for comment are unnecessary because the public is not likely to be particularly interested, and notice and opportunity for comment were previously provided for the AETB provision (*see*, proposed rule 71 FR 49300, August 22, 2006).

EPA believes that this rulemaking qualifies for the "good cause" exemption to make the rule effective immediately under section 553(d) of the APA because it is a relaxation of a restriction by staying the effectiveness of requirements for air emission testing bodies.

## II. Administrative Procedures Used in This Action

Under CAA section 307(d)(1)(S), this action revising the Acid Rain Program rules is subject to the requirements of CAA section 307(d). Section 307(d)(3) provides that a notice of proposed rulemaking, providing an opportunity for a public hearing and comment, must be published in the **Federal Register**, except under certain circumstances, as provided in the Administrative Procedure Act (5 U.S.C. 553(b)). Two examples of where the requirement for such a notice does not apply are: (1) The public is not likely to be particularly interested; and (2) notice and opportunity for comment were previously provided (See 5 U.S.C. 553(b)(B)).

EPA finds, for the following reasons, that notice and opportunity for public hearing and comment concerning the stay of effectiveness of requirements for air emission testing bodies is not required because (1) the public is not likely to be particularly interested because of the relatively minor nature of

this rulemaking action; and (2) notice and opportunity for comment were previously provided for the AETB provision (*see*, proposed rule 71 FR 49300, August 22, 2006). As discussed above, this rule revision was finalized—after notice and opportunity for comment—on January 24, 2008.

In addition, EPA also finds that there is good cause under 5 U.S.C. 553(d) to make this final rule—staying the effectiveness of requirements for air emission testing bodies—immediately effective upon publication in the **Federal Register**. As explained above, the final rule provides a relaxation of a requirement by staying the effectiveness of requirements for air emission testing bodies.

## III. Staying the Effectiveness of Requirements for Air Emission Testing Bodies

In this final rule, EPA is staying the effectiveness of requirements for air emission testing bodies.

## 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 (Oct. 4, 1993)) and is therefore not subject to review under the Executive Order. In this action, EPA is simply staying the effectiveness of requirements for air emission testing bodies that were previously issued and would have become effective on January 1, 2009.

### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action does not impose any new information collection burden because it is simply staying the effectiveness of requirements for AETBs.

### C. Regulatory Flexibility Act

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute, because although the rule is subject to the APA, the Agency has

invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirement.

### D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector [The term "enforceable duty" does not include duties and conditions in voluntary Federal contracts for goods and services.] Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule simply stays the effectiveness of requirements for air emission testing bodies and therefore does not result in any additional expenditures to State, local, and tribal governments or to the private sector. For the same reasons, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments.

### E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255 (Aug. 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 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. This rule simply stays the effectiveness of requirements for air emission testing bodies that would have become effective on January 1, 2009. Thus, Executive Order 13132 does not apply to this rule.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule simply stays the effectiveness of requirements for air emission testing bodies that would have become effective on January 1, 2009. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, entitled “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 Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 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. This rule simply stays the effectiveness of requirements for air emission testing bodies that would have become effective on January 1, 2009. Moreover, when first promulgated, the AETB provision required the use of ASTM D 7036–04, an applicable voluntary consensus standard.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (59 FR 7629 (Feb. 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 rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not change the level of protection provided to human health or the environment, but simply stays the effectiveness of requirements for air emission testing bodies that would have become effective on January 1, 2009. Moreover, when first promulgated, the AETB provision did not change the level of protection provided to human health or the environment.

*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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established that the effective date shall be upon publication in the **Federal Register**. 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**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 75**

Environmental protection, Acid rain, Administrative practice and procedure, Air pollution control, Electric utilities, Carbon dioxide, Continuous emission monitoring, Intergovernmental relations, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur oxides, Reference test methods.

Dated: October 29, 2008.

**Stephen L. Johnson**,  
Administrator.

■ 40 CFR part 75 is amended as follows:

**PART 75—CONTINUOUS EMISSION MONITORING**

■ 1. The authority citation for part 75 continues to read as follows:

**Authority:** 42 U.S.C. 7401–7671q.

**Appendix A to Part 75—[Amended]**

■ 2. In Appendix A to Part 75, the effectiveness of Section 6.1.2(a) through (c) is stayed indefinitely.

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 147**

[EPA–R09–OW–2007–0248; FRL–8734–5]

**Navajo Nation; Underground Injection Control (UIC) Program; Primacy Approval**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving an application from the Navajo Nation (“Tribe”) under Section 1425 of the Safe Drinking Water Act (SDWA) for primary enforcement responsibility (or “primacy”) for the underground injection control (UIC) program for Class II (oil and gas-related) injection wells located within the exterior boundaries of the formal Navajo Reservation, including the three satellite reservations (Alamo, Canoncito and Ramah), but excluding the former Bennett Freeze Area, the Four Corners Power Plant and the Navajo Generating Station; and on Navajo Nation tribal trust lands and trust allotments outside the exterior boundaries of the formal Navajo Reservation. (These areas are collectively referred to hereinafter as “areas covered by the Tribe’s Primacy Application.”)

**DATES:** This approval is effective December 4, 2008. The incorporation by