



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

April 15, 2016

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance on Vacatur of RICE NESHAP and NSPS Provisions for Emergency Engines

FROM: Peter Tsirigotis
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TO: EPA Regional Air Enforcement Managers
EPA Regional Air Directors

The U.S. Environmental Protection Agency is issuing this guidance to explain how the EPA intends to implement certain regulatory requirements after the U.S. Court of Appeals for the District of Columbia Circuit issues the mandate effectuating the vacatur in *Delaware v. EPA*.¹ The statutory provisions and EPA regulations, as impacted by the impending issuance by the court of its mandate and described in this document, are themselves legally binding requirements. This document does not substitute for those provisions or regulations or modify them, nor is it a regulation itself. As such, this document does not impose legally binding requirements on the EPA, states, or the regulated community and may not apply to a particular situation based upon the circumstances. In appropriate circumstances, individual EPA decision makers may adopt approaches that differ from this guidance.

Background

On May 1, 2015, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision² granting in part and denying in part petitions for review of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Stationary Reciprocating Internal Combustion Engines (RICE), 40 CFR part 63 subpart ZZZZ, and the New Source Performance Standards (NSPS) for Stationary Compression Ignition and Spark Ignition Internal Combustion Engines, 40 CFR part 60 subparts IIII and JJJJ. The court decision, as modified on rehearing, vacated paragraphs 40 CFR 60.4211(f)(2)(ii)-(iii), 60.4243(d)(2)(ii)-(iii), and 63.6640(f)(2)(ii)-(iii). The vacated paragraphs specified that emergency engines may operate for a limited number of hours per year in two situations: (1) emergency demand response when the Reliability Coordinator has declared an Energy Emergency Alert Level 2, and (2) when there is a deviation of voltage or frequency of five percent or greater below standard voltage or frequency.³

¹ *Delaware v. EPA*, 785 F.3d 1 (D.C. Cir. 2015).

² *Ibid.*

³ In a different case (*Conservation Law Foundation, et. al. v. EPA*, No. 13-1233 (DC. Cir.)), the EPA requested and received a voluntary remand without vacatur of the provisions in 40 CFR 60.4211(f)(3)(i), 60.4243(d)(3)(i), and 63.6640(f)(4)(ii), which allow emergency engines to operate for up to 50 hours per year if certain conditions are met. Those provisions are not affected by the vacatur in *Delaware v. EPA* and engines can continue to operate for the purpose specified in those paragraphs.

The EPA requested and received a stay of the court's mandate effectuating the vacatur until May 1, 2016. May 1, 2016, falls on a Sunday, so we expect the court to issue the mandate on Monday, May 2, 2016.

Impact of the Vacatur

Upon issuance of the court's mandate vacating 40 CFR 60.4211(f)(2)(ii)-(iii), 60.4243(d)(2)(ii)-(iii), and 63.6640(f)(2)(ii)-(iii), these provisions will cease to have any legal effect. It is the EPA's view that this change will mean that an engine may not operate in circumstances described in the vacated provisions for any number of hours per year unless it is in compliance with the emission standards and other applicable requirements for a non-emergency engine.⁴ After issuance of the mandate, operation of emergency engines will be limited to emergency situations as specified in 40 CFR 60.4211(f)(1), 60.4243(d)(1), and 63.6640(f)(1); maintenance checks and readiness testing for a limited number of hours per year as specified in 40 CFR 60.4211(f)(2)(i), 60.4243(d)(2)(i), and 63.6640(f)(2)(i); and certain non-emergency situations for a limited number of hours per year as specified in 40 CFR 60.4211(f)(3), 60.4243(d)(3), and 63.6640(f)(3)-(4).⁵

For an emergency engine that was operating for the purposes specified in paragraphs 40 CFR 60.4211(f)(2)(ii)-(iii), 60.4243(d)(2)(ii)-(iii), and 63.6640(f)(2)(ii)-(iii) before the vacatur mandate that becomes a non-emergency engine after the vacatur mandate solely as a result of the operation for those purposes after the vacatur mandate, regulatory requirements including numerical emission limits or work practice standards, notifications, and performance testing may apply. The applicability of regulatory requirements to a particular engine depends on criteria including the engine's type, horsepower, and age, and not every such engine will become subject to notification and testing requirements. The EPA's Regulation Navigation tools for the RICE NESHAP and NSPS can assist engine owners/operators in determining the applicable criteria and requirements for a specific engine. The tools can be found at <https://www3.epa.gov/ttn/atw/icengines/imp.html#regnav>.

Engines that are subject to initial performance testing requirements should conduct the initial performance test within 180 days of the date of the mandate (or by October 29, 2016, assuming the court issues the mandate on May 2, 2016). If an initial notification is required for the engine per 40 CFR 63.6645, notifications should be submitted no later than 120 days after the date of the mandate. If an initial notification is required for the engine according to 40 CFR 60.4214(a) or 60.4245(c), then such notification should be submitted no later than 30 days after the date of the mandate.⁶ The timelines for performance testing and initial notifications are specified in 40 CFR 60.7(a)(1), 60.8(a), 60.4214(a), 60.4245(c), 63.9(b), 63.6610, 63.6611, 63.6612, and 63.6645.

while the EPA addresses the *Conservation Law Foundation, et. al. v. EPA* remand. This guidance does not further address those remanded provisions.

⁴ In the EPA's motion asking the D.C. Circuit Court to stay the mandate, the EPA explained its understanding that the court's vacatur did not reinstate the provisions within the prior 2010 regulation that had previously allowed up to 15 hours per year of emergency demand response or mean that engines may operate for unlimited periods for emergency demand response and still qualify as emergency engines. See footnote 2 of the EPA's "Motion for Stay of the Mandate" in *Delaware v. EPA* which can be found at <https://www3.epa.gov/ttn/atw/icengines/tech.html>.

⁵ See footnote 3 regarding the voluntary remand without vacatur of the provisions in 40 CFR 60.4211(f)(3)(i), 60.4243(d)(3)(i), and 63.6640(f)(4)(ii).

⁶ This guidance with respect to notice and performance testing obligations only applies to the limited universe of engines that operate for the purposes specified in paragraphs 40 CFR 60.4211(f)(2)(ii)-(iii), 60.4243(d)(2)(ii)-(iii), and 63.6640(f)(2)(ii)-(iii) before and after the issuance of the vacatur mandate and for which the issuance of the vacatur mandate is the sole reason for the engine's change in status from an emergency engine to a non-emergency engine.

Reporting for Emergency Engines

Paragraph 40 CFR 63.6650(h) specifies that owners/operators of emergency engines that are used or contractually obligated to be available for the purposes specified in 40 CFR 63.6640(f)(2)(ii)-(iii), which are the paragraphs that were vacated, must submit an annual report that includes the hours the engine operated for those purposes. These reporting regulations provide that the first report must cover operation during 2015 and must be submitted no later than March 31, 2016. The deadline for this report occurred before the court is scheduled to issue the mandate, and owners/operators were required to submit this report by March 31, 2016. The NSPS regulations also contain similar reporting requirements in 40 CFR 60.4214(d) and 60.4245(e), and owners/operators were also required to submit the reports required by the NSPS regulations by March 31, 2016. Owners and operators will not be required to submit a report by March 31, 2017, for any such operations in 2016.

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