

**ORAL ARGUMENT HELD SEPTEMBER 26, 2014
PANEL DECISION ISSUED MAY 1, 2015**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CONSOLIDATED DOCKET NOS. 13-1093, 13-1102, 13-1104

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL, ET AL.,

PETITIONERS,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

ON PETITION FOR REVIEW OF A FINAL RULE PROMULGATED BY
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT'S UNOPPOSED PETITION FOR PANEL REHEARING

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JULY 15, 2015

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**DELAWARE DEPARTMENT OF)
NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
ET AL.,)
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PETITIONERS,)
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v.)
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UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
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RESPONDENT.)
_____)**

**Nos. 13-1093, 13-1102, 13-1104
(CONSOLIDATED)**

RESPONDENT’S CERTIFICATE OF COUNSEL

Pursuant to Circuit Rules 35(c) and 28(a)(1), counsel for Respondent United States Environmental Protection Agency submits this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

i. Parties, Intervenors, and Amici Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

ii. Parties to These Cases

All parties and intervenors appearing in this Court are listed in the Initial Opening Brief for Petitioners.

(B) Rulings Under Review

The action under review is *National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines*, 78 Fed. Reg. 6674 (Jan. 30, 2013).

(C) Related Cases

The case on review has not been previously before this Court or any other court. On August 2, 2013, this Court severed certain issues from these consolidated petitions for review and assigned them a separate docket number, No. 13-1233. Following a period of abeyance to allow for administrative reconsideration proceedings, Petitioners filed their opening briefs in Case No. 13-1233 (consolidated with 14-1199) on March 19, 2015. On June 30, 2015, prior to filing its brief, Respondent filed in those consolidated cases an opposed Motion for Voluntary Remand Without Vacatur and an opposed Motion for a Stay of the Briefing Schedule. On July 1, 2015, the Court suspended the briefing schedule pending further order of the Court.

Respectfully submitted,

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DATED: July 15, 2015

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INTRODUCTION

Pursuant to Fed. R. App. P. 40, and unopposed by any party, Respondent United States Environmental Protection Agency (“EPA”) seeks rehearing on one aspect of the Court’s vacatur and remand of a final rule promulgated by EPA under Sections 111 and 112 of the Clean Air Act, 42 U.S.C. §§ 7411, 7412, revising new source performance standards and national emissions standards for hazardous air pollutants emitted by certain classes of stationary reciprocating internal combustion engines, 78 Fed. Reg. 6674 (Jan. 30, 2013) (“2013 Rule”). *See Delaware Dep’t of Natural Resources & Env’tl. Control v. EPA* (“*Delaware*”), 785 F.3d 1 (D.C. Cir. 2015) (Attach. 1). The Court held that it was arbitrary and capricious for EPA to “allow backup generators to operate without emissions controls for up to 100 hours per year *as part of an emergency demand-response program*,” *id.* at 5 (emphasis added), and reversed and remanded “the challenged rules that contain the 100-hour exemption for emergency engines under the National Emissions Standards, 40 C.F.R. § 63.6640(f)(2), and the Performance Standards, 40 C.F.R. §§ 60.4211(f)(2), 60.4243(d)(2),” *id.* at 18. The remainder of the 2013 Rule was to “remain[] in effect.”

Panel rehearing is warranted under Fed. R. App. P. 40(a)(2) because in vacating the above-listed portions of the 2013 Rule, the Court appears to have misapprehended the scope of Petitioners’ arguments and the appropriate scope of

vacatur. While the challenged allowances for operation of emergency engines for purposes of emergency demand response appear only in subparagraphs (ii) and (iii) of the listed provisions,¹ the Court has also vacated other, unchallenged uses of emergency engines within the 100-hour annual allowance. As set forth in detail below, EPA respectfully requests that the Court amend its Opinion and Judgment to vacate only those portions of the regulations addressed to emergency demand response, and to leave in effect the provisions that allow emergency engines to operate for maintenance checks and readiness testing.

BACKGROUND

These consolidated petitions for review challenge portions of an EPA rule entitled, “National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards

¹ Subparagraph (iii) allows operation of emergency engines within the 100-hour annual limit during periods where there is a deviation of voltage or frequency of five percent or greater below standard. EPA intended this provision to allow for use of emergency engines (particularly those operated by small municipalities or in geographically isolated areas) to stabilize the grid in the event of voltage or frequency drops. *See* Joint Appendix 1929 (Kansas Power Pool Comments) at 1931–32 (explaining that in remote locations across Kansas, backup engines are the sole resources available to respond to voltage or frequency drops, since “there is no redundancy” in the form of larger or more efficient power plants); Joint Appendix 1453 (American Public Power Association Comments) at 1474–77 (“[a]t the distribution system level, a utility is acting to prevent equipment damage when it responds to low voltage conditions”). However, EPA is not seeking rehearing on this issue because the provision may also allow operation for demand response in some areas of the country.

for Stationary Internal Combustion Engines,” which was promulgated on January 30, 2013. 78 Fed. Reg. 6674. Relevant here, the 2013 Rule revises requirements applicable to certain classes of stationary reciprocating internal combustion engines, including revising the scope of subcategories of “emergency engines” to include reciprocating internal combustion engines that operate for up to 100 hours per year under certain circumstances.² Specifically, the revised regulations allowed engines to operate “for any combination” of the following three purposes, up to a cumulative total of 100 hours per year, and still be classified as emergency engines: (1) “maintenance checks and readiness testing”; (2) emergency demand response during periods when a reliability coordinator has declared an “Energy Emergency Alert Level 2” as defined by standards promulgated by the North American Electric Reliability Corporation; and (3) when there is a “deviation of voltage or frequency of 5 percent or greater below standard.” *See, e.g.*, 40 C.F.R. § 63.6640(f)(2)(i)–(iii).

On May 1, 2015, the Court issued a decision in this case concluding that “the challenged rules that contain the 100-hour exemption for emergency engines” were arbitrary and capricious. *See Delaware*, 785 F.3d at 18. The Court vacated certain regulations – 40 C.F.R. §§ 63.6640(f)(2), 60.4211(f)(2), & 60.4243(d)(2) –

² In general, the subcategories of “emergency engines” are subject to less stringent emission standards than non-emergency engines.

and remanded the matter to EPA for further action. *See id.* The Court left in place the remainder of the 2013 Rule, but indicated that if vacatur of the above-listed portions of the 2013 Rule would cause “administrative or other difficulties,” EPA or other parties to this proceeding could “file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards.” *Id.* 18–19 (quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)); *see also* Docket Entry 1550128 (Judgment). The Court stayed issuance of the mandate until 7 days after disposition of any timely petition for rehearing or rehearing en banc. Docket Entry 1550130. On May 22, the Court granted EPA’s motion for an extension of time until July 15, 2015, to file any petition for rehearing or motion to stay the mandate. Docket Entry 1553910. EPA by separate motion filed on this date is seeking stay of the mandate until May 1, 2016.

ARGUMENT

I. THE COURT MISAPPREHENDED THE APPROPRIATE SCOPE OF VACATUR, AND ERRONEOUSLY VACATED PROVISIONS THAT WERE NOT AT ISSUE IN THIS CASE ALLOWING FOR MAINTENANCE AND TESTING OF EMERGENCY ENGINES.

The Court held that “EPA acted arbitrarily and capriciously when it modified [its regulations] to allow backup generators to operate without emissions controls for up to 100 hours per year *as part of any emergency demand response program.*” *Delaware*, 785 F.3d at 4–5 (emphasis added). Although the Court’s

holding and analysis are clearly addressed only to the 100-hour annual allowance for emergency demand response (consistent with Petitioners' challenge to only those aspects of the Rule), the Court vacated provisions that allow emergency engines to be used for purposes other than emergency demand response (but within the same overall 100-hour per year limit). Specifically, the Court vacated "the challenged rules that contain the 100-hour exemption," including the entirety of the following three regulatory subsections: 40 C.F.R. §§ 63.6640(f)(2), 60.4211(f)(2), and 60.4243(d)(2) (*see* Addendum attached hereto). 785 F.3d at 18; Docket Entry 1550128 (Judgment). Vacatur of these entire subsections, which include provisions allowing for routine maintenance and testing of engines, is not warranted. Instead, vacatur should have been limited to the specific emergency demand response provisions that were challenged by Petitioners and addressed by the Court. Accordingly, EPA seeks (and no party to these proceedings opposes) an amended Opinion and Judgment clarifying that the Court is vacating only the portions of the regulations allowing emergency engines to operate for purposes of emergency demand response (codified at subparagraphs (ii) and (iii) of the above-cited provisions), and leaving in place the allowances (codified at (i) of the above-cited provisions) for up to 100 hours per year for maintenance checks and readiness testing.

In regulations implementing both the New Source Performance Standards (Clean Air Act Section 111, 42 U.S.C. § 7411) and the National Emissions Standards for Hazardous Air Pollutants (Clean Air Act Section 112, 42 U.S.C. § 7412), EPA has long defined the subcategory of emergency engines to encompass engines that operate for up to 100 hours per year for maintenance checks and readiness testing purposes. *See* 71 Fed. Reg. 39,154, 39,161 (July 11, 2006) (New Source Performance Standards for certain compression ignition engines); 73 Fed. Reg. 3568, 3583 (Jan. 18, 2008) (New Source Performance Standards for certain spark ignition engines and National Emissions Standards for Hazardous Air Pollutants for certain new and reconstructed engines) (explaining that maintenance and readiness testing of emergency engines is “crucial” to ensure that the engine “will respond as expected in the event of an emergency”). No Petitioner challenged EPA’s decision in the 2013 Rule to retain this allowance. *See* 40 C.F.R. § 63.6640(f)(2)(i) (providing that under certain circumstances, emergency engines “may be operated for maintenance checks and readiness testing” for up to 100 hours per year). Nor did the Court address the maintenance and testing provisions in its decision. Accordingly, the Court should not have vacated these provisions.

Maintenance and testing of emergency engines is critical to ensure that the engines function properly and reliably when needed. Following the Court’s May

1, 2015 decision, EPA received correspondence from various entities not parties to this litigation explaining the critical role of engine maintenance and testing. *See* Attach. 2 (May 18, 2015 Letter from Portland General Electric) at 2 (“[a]n emergency engine owner must be assured that the engine will properly perform in the event of an emergency”); *see also* Attach. 3 (June 9, 2015 Letter from Counsel for “Class of ’85 Regulatory Response Group”) at 2 (“. . . [t]he ability to conduct these types of tests is necessary for safe and appropriate operation of an emergency engine. Owners of emergency generators must be able to ensure that their machines will work properly in the event of an actual emergency.”). Indeed, one party stated that some owners and operators of emergency engines “are required to comply with strict maintenance and readiness testing requirements promulgated by regulatory agencies other than EPA,” such as the U.S. Nuclear Regulatory Commission. Attach. 3 at 2.

No party to these proceedings objects to a clarification by the Court that the maintenance and testing provisions are not vacated. Petitioners challenged only the provisions in EPA’s 2013 Rule that permit emergency engines to operate upon a grid operator-declared “Energy Emergency Alert Level 2,” and the provisions allowing operation during periods when voltage or frequency drops below five percent of standard. *See* Docket Entry 1492292 (Joint Brief of Industry Petitioners and Conservation Law Foundation) at 32 (seeking vacatur of “the 2013 Rule’s

100-hour allowance for emergency demand-response operation,” citing only 40 C.F.R. § 63.6640(f) and (f)(2)(ii)); Docket Entry 1491648 (Opening Brief of Delaware) at 29 (seeking vacatur of “the 100 hour allowance for demand response,” among other provisions not relevant here). Petitioners’ briefs do not challenge the need for or otherwise address the allowance for maintenance or readiness testing. Nor are the Court’s stated grounds for reversal relevant to such operation. *See Delaware*, 785 F.3d at 13 (describing four capacity market-related issues as grounds for reversal). Accordingly, EPA seeks clarification from the Court that the following provisions allowing operation for maintenance checks and readiness testing are not vacated, and remain in effect: 40 C.F.R. §§ 63.6640(f)(2)(i), 60.4211(f)(2)(i), and 60.4243(d)(2)(i). The relevant sentence of the Court’s Opinion, *see Delaware*, 785 F.3d at 18, would read as follows with the requested revision (new text in bold):

We reverse the challenged rules that contain the 100-hour exemption for **operation of emergency engines for purposes of emergency demand response** under the National Emissions Standards, 40 C.F.R. § 63.6640(f)(2)(**ii**)-(biii), and the Performance Standards, 40 C.F.R. §§ 60.4211(f)(2)(**ii**)-(biii), 60.4243(d)(2)(**ii**)-(biii).

The revised sentence of the Court's Judgment, Docket Entry 1550128, would read as follows with the requested revision (new text in red):

The challenged rules that contain the 100-hour exemption for **operation of** emergency engines **for purposes of emergency demand response** under the National Emissions Standards, 40 C.F.R. § 63.6640(f)(2)(**ii**)-(b>iii), and the Performance Standards, 40 C.F.R. §§ 60.4211(f)(2)(**ii**)-(b>iii), 60.4243(d)(2)(**ii**)-(b>iii), be reversed and remanded to EPA for further action.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court grant rehearing on the scope of its vacatur order, and issue an amended Opinion and Judgment to clarify that the Court is not vacating the provisions that allow for maintenance and testing of emergency engines.

Respectfully submitted,

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DATED: July 15, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 15, 2015, a true and correct copy of the foregoing Respondent's Unopposed Petition for Panel Rehearing was served electronically through the ECF system on all registered counsel.

/s/ Austin D. Saylor
AUSTIN D. SAYLOR

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REGULATORY ADDENDUM TO RESPONDENT'S PETITION FOR PANEL REHEARING

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JULY 15, 2015

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40 C.F.R. § 63.6640ADD1

40 C.F.R § 60.4211ADD5

40 C.F.R. § 60.4243ADD11

§63.6640 How do I demonstrate continuous compliance with the emission limitations, operating limitations, and other requirements?

(a) You must demonstrate continuous compliance with each emission limitation, operating limitation, and other requirements in Tables 1a and 1b, Tables 2a and 2b, Table 2c, and Table 2d to this subpart that apply to you according to methods specified in Table 6 to this subpart.

(b) You must report each instance in which you did not meet each emission limitation or operating limitation in Tables 1a and 1b, Tables 2a and 2b, Table 2c, and Table 2d to this subpart that apply to you. These instances are deviations from the emission and operating limitations in this subpart. These deviations must be reported according to the requirements in §63.6650. If you change your catalyst, you must reestablish the values of the operating parameters measured during the initial performance test. When you reestablish the values of your operating parameters, you must also conduct a performance test to demonstrate that you are meeting the required emission limitation applicable to your stationary RICE.

(c) The annual compliance demonstration required for existing non-emergency 4SLB and 4SRB stationary RICE with a site rating of more than 500 HP located at an area source of HAP that are not remote stationary RICE and that are operated more than 24 hours per calendar year must be conducted according to the following requirements:

(1) The compliance demonstration must consist of at least one test run.

(2) Each test run must be of at least 15 minute duration, except that each test conducted using the method in appendix A to this subpart must consist of at least one measurement cycle and include at least 2 minutes of test data phase measurement.

(3) If you are demonstrating compliance with the CO concentration or CO percent reduction requirement, you must measure CO emissions using one of the CO measurement methods specified in Table 4 of this subpart, or using appendix A to this subpart.

(4) If you are demonstrating compliance with the THC percent reduction requirement, you must measure THC emissions using Method 25A, reported as propane, of 40 CFR part 60, appendix A.

(5) You must measure O₂ using one of the O₂ measurement methods specified in Table 4 of this subpart. Measurements to determine O₂ concentration must be made at the same time as the measurements for CO or THC concentration.

(6) If you are demonstrating compliance with the CO or THC percent reduction requirement, you must measure CO or THC emissions and O₂ emissions simultaneously at the inlet and outlet of the control device.

(7) If the results of the annual compliance demonstration show that the emissions exceed the levels specified in Table 6 of this subpart, the stationary RICE must be shut down as soon as safely possible, and appropriate corrective action must be taken (e.g., repairs, catalyst cleaning, catalyst replacement). The stationary RICE must be retested within 7 days of being restarted and the emissions must meet the levels specified in Table 6 of this subpart. If the retest shows that the emissions continue to exceed the specified levels, the stationary RICE must again be shut down as soon as safely possible, and the stationary RICE may not operate, except for purposes of startup and testing, until the owner/operator demonstrates through testing that the emissions do not exceed the levels specified in Table 6 of this subpart.

(d) For new, reconstructed, and rebuilt stationary RICE, deviations from the emission or operating limitations that occur during the first 200 hours of operation from engine startup (engine burn-in period) are not violations. Rebuilt stationary RICE means a stationary RICE that has been rebuilt as that term is defined in 40 CFR 94.11(a).

(e) You must also report each instance in which you did not meet the requirements in Table 8 to this subpart that apply to you. If you own or operate a new or reconstructed stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions (except new or reconstructed 4SLB engines greater than or equal to 250 and less than or equal to 500 brake HP), a new or reconstructed stationary RICE located at an area source of HAP emissions, or any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you do not need to comply with the requirements in Table 8 to this subpart: An existing 2SLB stationary RICE, an existing 4SLB stationary RICE, an existing emergency stationary RICE, an existing limited use stationary RICE, or an existing stationary RICE which fires landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis. If you own or operate any of the following RICE with a site rating of more than 500 brake HP located at a major source of HAP emissions, you

do not need to comply with the requirements in Table 8 to this subpart, except for the initial notification requirements: a new or reconstructed stationary RICE that combusts landfill gas or digester gas equivalent to 10 percent or more of the gross heat input on an annual basis, a new or reconstructed emergency stationary RICE, or a new or reconstructed limited use stationary RICE.

(f) If you own or operate an emergency stationary RICE, you must operate the emergency stationary RICE according to the requirements in paragraphs (f)(1) through (4) of this section. In order for the engine to be considered an emergency stationary RICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (f)(1) through (4) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (f)(1) through (4) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary RICE in emergency situations.

(2) You may operate your emergency stationary RICE for any combination of the purposes specified in paragraphs (f)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraphs (f)(3) and (4) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (f)(2).

(i) Emergency stationary RICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency RICE beyond 100 hours per calendar year.

(ii) Emergency stationary RICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP-002-3, Capacity and Energy Emergencies (incorporated by reference, see §63.14), or other authorized

entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP-002-3.

(iii) Emergency stationary RICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary RICE located at major sources of HAP may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. The 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to supply power to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(4) Emergency stationary RICE located at area sources of HAP may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. Except as provided in paragraphs (f)(4)(i) and (ii) of this section, the 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) Prior to May 3, 2014, the 50 hours per year for non-emergency situations can be used for peak shaving or non-emergency demand response to generate income for a facility, or to otherwise supply power as part of a financial arrangement with another entity if the engine is operated as part of a peak shaving (load management program) with the local distribution system operator and the power is provided only to the facility itself or to support the local distribution system.

(ii) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator.

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

§60.4211 What are my compliance requirements if I am an owner or operator of a stationary CI internal combustion engine?

(a) If you are an owner or operator and must comply with the emission standards specified in this subpart, you must do all of the following, except as permitted under paragraph (g) of this section:

(1) Operate and maintain the stationary CI internal combustion engine and control device according to the manufacturer's emission-related written instructions;

(2) Change only those emission-related settings that are permitted by the manufacturer; and

(3) Meet the requirements of 40 CFR parts 89, 94 and/or 1068, as they apply to you.

(b) If you are an owner or operator of a pre-2007 model year stationary CI internal combustion engine and must comply with the emission standards specified in §§60.4204(a) or 60.4205(a), or if you are an owner or operator of a CI fire pump engine that is manufactured prior to the model years in table 3 to this subpart and

must comply with the emission standards specified in §60.4205(c), you must demonstrate compliance according to one of the methods specified in paragraphs (b)(1) through (5) of this section.

(1) Purchasing an engine certified according to 40 CFR part 89 or 40 CFR part 94, as applicable, for the same model year and maximum engine power. The engine must be installed and configured according to the manufacturer's specifications.

(2) Keeping records of performance test results for each pollutant for a test conducted on a similar engine. The test must have been conducted using the same methods specified in this subpart and these methods must have been followed correctly.

(3) Keeping records of engine manufacturer data indicating compliance with the standards.

(4) Keeping records of control device vendor data indicating compliance with the standards.

(5) Conducting an initial performance test to demonstrate compliance with the emission standards according to the requirements specified in §60.4212, as applicable.

(c) If you are an owner or operator of a 2007 model year and later stationary CI internal combustion engine and must comply with the emission standards specified in §60.4204(b) or §60.4205(b), or if you are an owner or operator of a CI fire pump engine that is manufactured during or after the model year that applies to your fire pump engine power rating in table 3 to this subpart and must comply with the emission standards specified in §60.4205(c), you must comply by purchasing an engine certified to the emission standards in §60.4204(b), or §60.4205(b) or (c), as applicable, for the same model year and maximum (or in the case of fire pumps, NFPA nameplate) engine power. The engine must be installed and configured according to the manufacturer's emission-related specifications, except as permitted in paragraph (g) of this section.

(d) If you are an owner or operator and must comply with the emission standards specified in §60.4204(c) or §60.4205(d), you must demonstrate compliance according to the requirements specified in paragraphs (d)(1) through (3) of this section.

(1) Conducting an initial performance test to demonstrate initial compliance with the emission standards as specified in §60.4213.

(2) Establishing operating parameters to be monitored continuously to ensure the stationary internal combustion engine continues to meet the emission standards. The owner or operator must petition the Administrator for approval of operating parameters to be monitored continuously. The petition must include the information described in paragraphs (d)(2)(i) through (v) of this section.

(i) Identification of the specific parameters you propose to monitor continuously;

(ii) A discussion of the relationship between these parameters and NOX and PM emissions, identifying how the emissions of these pollutants change with changes in these parameters, and how limitations on these parameters will serve to limit NOX and PM emissions;

(iii) A discussion of how you will establish the upper and/or lower values for these parameters which will establish the limits on these parameters in the operating limitations;

(iv) A discussion identifying the methods and the instruments you will use to monitor these parameters, as well as the relative accuracy and precision of these methods and instruments; and

(v) A discussion identifying the frequency and methods for recalibrating the instruments you will use for monitoring these parameters.

(3) For non-emergency engines with a displacement of greater than or equal to 30 liters per cylinder, conducting annual performance tests to demonstrate continuous compliance with the emission standards as specified in §60.4213.

(e) If you are an owner or operator of a modified or reconstructed stationary CI internal combustion engine and must comply with the emission standards specified in §60.4204(e) or §60.4205(f), you must demonstrate compliance according to one of the methods specified in paragraphs (e)(1) or (2) of this section.

(1) Purchasing, or otherwise owning or operating, an engine certified to the emission standards in §60.4204(e) or §60.4205(f), as applicable.

(2) Conducting a performance test to demonstrate initial compliance with the emission standards according to the requirements specified in §60.4212 or §60.4213, as appropriate. The test must be conducted within 60 days after the engine commences operation after the modification or reconstruction.

(f) If you own or operate an emergency stationary ICE, you must operate the emergency stationary ICE according to the requirements in paragraphs (f)(1) through (3) of this section. In order for the engine to be considered an emergency stationary ICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (f)(1) through (3) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (f)(1) through (3) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary ICE in emergency situations.

(2) You may operate your emergency stationary ICE for any combination of the purposes specified in paragraphs (f)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraph (f)(3) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (f)(2).

(i) Emergency stationary ICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator maintains records indicating that federal, state, or local standards require maintenance and testing of emergency ICE beyond 100 hours per calendar year.

(ii) Emergency stationary ICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP-002-3, Capacity and Energy Emergencies (incorporated by reference, see §60.17), or other authorized

entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP-002-3.

(iii) Emergency stationary ICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary ICE may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section. Except as provided in paragraph (f)(3)(i) of this section, the 50 hours per calendar year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator;

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

(ii) [Reserved]

(g) If you do not install, configure, operate, and maintain your engine and control device according to the manufacturer's emission-related written instructions, or you change emission-related settings in a way that is not permitted by the manufacturer, you must demonstrate compliance as follows:

(1) If you are an owner or operator of a stationary CI internal combustion engine with maximum engine power less than 100 HP, you must keep a maintenance plan and records of conducted maintenance to demonstrate compliance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, if you do not install and configure the engine and control device according to the manufacturer's emission-related written instructions, or you change the emission-related settings in a way that is not permitted by the manufacturer, you must conduct an initial performance test to demonstrate compliance with the applicable emission standards within 1 year of such action.

(2) If you are an owner or operator of a stationary CI internal combustion engine greater than or equal to 100 HP and less than or equal to 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test to demonstrate compliance with the applicable emission standards within 1 year of startup, or within 1 year after an engine and control device is no longer installed, configured, operated, and maintained in accordance with the manufacturer's emission-related written instructions, or within 1 year after you change emission-related settings in a way that is not permitted by the manufacturer.

(3) If you are an owner or operator of a stationary CI internal combustion engine greater than 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test to demonstrate compliance with the applicable emission standards within 1 year of startup, or within 1 year after an engine and control device is no longer installed, configured, operated, and maintained in accordance with the manufacturer's emission-related written instructions, or within 1 year after you change emission-related settings in a

way that is not permitted by the manufacturer. You must conduct subsequent performance testing every 8,760 hours of engine operation or 3 years, whichever comes first, thereafter to demonstrate compliance with the applicable emission standards.

§60.4243 What are my compliance requirements if I am an owner or operator of a stationary SI internal combustion engine?

(a) If you are an owner or operator of a stationary SI internal combustion engine that is manufactured after July 1, 2008, and must comply with the emission standards specified in §60.4233(a) through (c), you must comply by purchasing an engine certified to the emission standards in §60.4231(a) through (c), as applicable, for the same engine class and maximum engine power. In addition, you must meet one of the requirements specified in (a)(1) and (2) of this section.

(1) If you operate and maintain the certified stationary SI internal combustion engine and control device according to the manufacturer's emission-related written instructions, you must keep records of conducted maintenance to demonstrate compliance, but no performance testing is required if you are an owner or operator. You must also meet the requirements as specified in 40 CFR part 1068, subparts A through D, as they apply to you. If you adjust engine settings according to and consistent with the manufacturer's instructions, your stationary SI internal combustion engine will not be considered out of compliance.

(2) If you do not operate and maintain the certified stationary SI internal combustion engine and control device according to the manufacturer's emission-related written instructions, your engine will be considered a non-certified engine, and you must demonstrate compliance according to (a)(2)(i) through (iii) of this section, as appropriate.

(i) If you are an owner or operator of a stationary SI internal combustion engine less than 100 HP, you must keep a maintenance plan and records of conducted maintenance to demonstrate compliance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions, but no performance testing is required if you are an owner or operator.

(ii) If you are an owner or operator of a stationary SI internal combustion engine greater than or equal to 100 HP and less than or equal to 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test within 1 year of engine startup to demonstrate compliance.

(iii) If you are an owner or operator of a stationary SI internal combustion engine greater than 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test within 1 year of engine startup and conduct subsequent performance testing every 8,760 hours or 3 years, whichever comes first, thereafter to demonstrate compliance.

(b) If you are an owner or operator of a stationary SI internal combustion engine and must comply with the emission standards specified in §60.4233(d) or (e), you must demonstrate compliance according to one of the methods specified in paragraphs (b)(1) and (2) of this section.

(1) Purchasing an engine certified according to procedures specified in this subpart, for the same model year and demonstrating compliance according to one of the methods specified in paragraph (a) of this section.

(2) Purchasing a non-certified engine and demonstrating compliance with the emission standards specified in §60.4233(d) or (e) and according to the requirements specified in §60.4244, as applicable, and according to paragraphs (b)(2)(i) and (ii) of this section.

(i) If you are an owner or operator of a stationary SI internal combustion engine greater than 25 HP and less than or equal to 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test to demonstrate compliance.

(ii) If you are an owner or operator of a stationary SI internal combustion engine greater than 500 HP, you must keep a maintenance plan and records of conducted maintenance and must, to the extent practicable, maintain and operate the engine in

a manner consistent with good air pollution control practice for minimizing emissions. In addition, you must conduct an initial performance test and conduct subsequent performance testing every 8,760 hours or 3 years, whichever comes first, thereafter to demonstrate compliance.

(c) If you are an owner or operator of a stationary SI internal combustion engine that must comply with the emission standards specified in §60.4233(f), you must demonstrate compliance according paragraph (b)(2)(i) or (ii) of this section, except that if you comply according to paragraph (b)(2)(i) of this section, you demonstrate that your non-certified engine complies with the emission standards specified in §60.4233(f).

(d) If you own or operate an emergency stationary ICE, you must operate the emergency stationary ICE according to the requirements in paragraphs (d)(1) through (3) of this section. In order for the engine to be considered an emergency stationary ICE under this subpart, any operation other than emergency operation, maintenance and testing, emergency demand response, and operation in non-emergency situations for 50 hours per year, as described in paragraphs (d)(1) through (3) of this section, is prohibited. If you do not operate the engine according to the requirements in paragraphs (d)(1) through (3) of this section, the engine will not be considered an emergency engine under this subpart and must meet all requirements for non-emergency engines.

(1) There is no time limit on the use of emergency stationary ICE in emergency situations.

(2) You may operate your emergency stationary ICE for any combination of the purposes specified in paragraphs (d)(2)(i) through (iii) of this section for a maximum of 100 hours per calendar year. Any operation for non-emergency situations as allowed by paragraph (d)(3) of this section counts as part of the 100 hours per calendar year allowed by this paragraph (d)(2).

(i) Emergency stationary ICE may be operated for maintenance checks and readiness testing, provided that the tests are recommended by federal, state or local government, the manufacturer, the vendor, the regional transmission organization or equivalent balancing authority and transmission operator, or the insurance company associated with the engine. The owner or operator may petition the Administrator for approval of additional hours to be used for maintenance checks and readiness testing, but a petition is not required if the owner or operator

maintains records indicating that federal, state, or local standards require maintenance and testing of emergency ICE beyond 100 hours per calendar year.

(ii) Emergency stationary ICE may be operated for emergency demand response for periods in which the Reliability Coordinator under the North American Electric Reliability Corporation (NERC) Reliability Standard EOP-002-3, Capacity and Energy Emergencies (incorporated by reference, see §60.17), or other authorized entity as determined by the Reliability Coordinator, has declared an Energy Emergency Alert Level 2 as defined in the NERC Reliability Standard EOP-002-3.

(iii) Emergency stationary ICE may be operated for periods where there is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency.

(3) Emergency stationary ICE may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (d)(2) of this section. Except as provided in paragraph (d)(3)(i) of this section, the 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to generate income for a facility to an electric grid or otherwise supply power as part of a financial arrangement with another entity.

(i) The 50 hours per year for non-emergency situations can be used to supply power as part of a financial arrangement with another entity if all of the following conditions are met:

(A) The engine is dispatched by the local balancing authority or local transmission and distribution system operator;

(B) The dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.

(C) The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines.

(D) The power is provided only to the facility itself or to support the local transmission and distribution system.

(E) The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine. The local balancing authority or local transmission and distribution system operator may keep these records on behalf of the engine owner or operator.

(ii) [Reserved]

(e) Owners and operators of stationary SI natural gas fired engines may operate their engines using propane for a maximum of 100 hours per year as an alternative fuel solely during emergency operations, but must keep records of such use. If propane is used for more than 100 hours per year in an engine that is not certified to the emission standards when using propane, the owners and operators are required to conduct a performance test to demonstrate compliance with the emission standards of §60.4233.

(f) If you are an owner or operator of a stationary SI internal combustion engine that is less than or equal to 500 HP and you purchase a non-certified engine or you do not operate and maintain your certified stationary SI internal combustion engine and control device according to the manufacturer's written emission-related instructions, you are required to perform initial performance testing as indicated in this section, but you are not required to conduct subsequent performance testing unless the stationary engine is rebuilt or undergoes major repair or maintenance. A rebuilt stationary SI ICE means an engine that has been rebuilt as that term is defined in 40 CFR 94.11(a).

(g) It is expected that air-to-fuel ratio controllers will be used with the operation of three-way catalyts/non-selective catalytic reduction. The AFR controller must be maintained and operated appropriately in order to ensure proper operation of the engine and control device to minimize emissions at all times.

(h) If you are an owner/operator of an stationary SI internal combustion engine with maximum engine power greater than or equal to 500 HP that is manufactured after July 1, 2007 and before July 1, 2008, and must comply with the emission standards specified in sections 60.4233(b) or (c), you must comply by one of the methods specified in paragraphs (h)(1) through (h)(4) of this section.

(1) Purchasing an engine certified according to 40 CFR part 1048. The engine must be installed and configured according to the manufacturer's specifications.

(2) Keeping records of performance test results for each pollutant for a test conducted on a similar engine. The test must have been conducted using the same methods specified in this subpart and these methods must have been followed correctly.

(3) Keeping records of engine manufacturer data indicating compliance with the standards.

(4) Keeping records of control device vendor data indicating compliance with the standards.

(i) If you are an owner or operator of a modified or reconstructed stationary SI internal combustion engine and must comply with the emission standards specified in §60.4233(f), you must demonstrate compliance according to one of the methods specified in paragraphs (i)(1) or (2) of this section.

(1) Purchasing, or otherwise owning or operating, an engine certified to the emission standards in §60.4233(f), as applicable.

(2) Conducting a performance test to demonstrate initial compliance with the emission standards according to the requirements specified in §60.4244. The test must be conducted within 60 days after the engine commences operation after the modification or reconstruction.