

this part by testing locomotives (or auditing for remanufactured locomotives) selected from normal production runs of that engine family. When both of these requirements are met, we will re-issue the certificate or issue a new certificate. If this subsequent testing (or auditing) reveals failing data the revocation remains in effect.

(j) At any time subsequent to an initial suspension of a certificate of conformity for a test or audit locomotive pursuant to paragraph (a) of this section, but not later than 30 days (or such other period as may we allow) after the notification our decision to suspend or revoke a certificate of conformity in whole or in part pursuant to this section, you may request a hearing as to whether the tests or audits have been properly conducted or any sampling methods have been properly applied. (See § 1033.920.)

(k) Any suspension of a certificate of conformity under paragraphs (a) through (d) of this section will be made only after you have been offered an opportunity for a hearing conducted in accordance with § 1033.920. It will not apply to locomotives no longer in your possession.

(l) If we suspend, revoke, or void a certificate of conformity, and you believe that our decision was based on erroneous information, you may ask us to reconsider our decision before requesting a hearing. If you demonstrate to our satisfaction that our decision was based on erroneous information, we will reinstate the certificate.

(m) We may conditionally reinstate the certificate for that family so that you do not have to store non-test locomotives while conducting subsequent testing or auditing of the noncomplying family subject to the following condition: you must commit to recall all locomotives of that family produced from the time the certificate is conditionally reinstated if the family fails subsequent testing, or auditing if applicable, and must commit to remedy any nonconformity at no expense to the owner.

## Subpart E—In-use Testing

### § 1033.401 Applicability.

The requirements of this subpart are applicable to certificate holders for locomotives subject to the provisions of this part. These requirements may also be applied to other manufacturers/re-manufacturers as specified in § 1033.1(d).

### § 1033.405 General provisions.

(a) Each year, we will identify engine families and configurations within families that you must test according to the requirements of this section.

(1) We may require you to test one engine family each year for which you have received a certificate of conformity. If you are a manufacturer that holds certificates of conformity for both freshly manufactured and remanufactured locomotive engine families, we may require you to test one freshly manufactured engine family and one remanufactured engine family. We may require you to test additional engine families if we have reason to believe that locomotives in such families do not comply with emission standards in use.

(2) For engine families of less than 10 locomotives per year, no in-use testing will be required, unless we have reason to believe that those engine families are not complying with the applicable emission standards in use.

(b) Test a sample of in-use locomotives from an engine family, as specified in § 1033.415. We will use these data, and any other data available to us, to determine the compliance status of classes of locomotives, including for purposes of recall under 40 CFR part 1068, and whether remedial action is appropriate.

### § 1033.410 In-use test procedure.

(a) You must test the complete locomotives; you may not test engines that are not installed in locomotives at the time of testing.

(b) Test the locomotive according to the test procedures outlined in subpart F of this part, except as provided in this section.

(c) Use the same test procedures for in-use testing as were used for certification, except for cases in which certification testing was not conducted with a locomotive, but with a development engine or other engine. In such cases, we will specify deviations from the certification test procedures as appropriate. We may allow or require other alternate procedures, with advance approval.

(d) Set all adjustable locomotive or engine parameters to values or positions that are within the range specified in the certificate of conformity. We may require you to set these parameters to specific values.

(e) We may waive a portion of the applicable test procedure that is not necessary to determine in-use compliance.

**§ 1033.415 General testing requirements.**

(a) *Number of locomotives to be tested.* Determine the number of locomotives to be tested by the following method:

(1) Test a minimum of 2 locomotives per engine family, except as provided in paragraph (a)(2) of this section. You must test additional locomotives if any locomotives fail to meet any standard. Test 2 more locomotives for each failing locomotive, but stop testing if the total number of locomotives tested equals 10.

(2) If an engine family has been certified using carryover emission data from a family that has been previously tested under paragraph (a)(1) of this section (and we have not ordered or begun to negotiate remedial action of that family), you need to test only one locomotive per engine family. If that locomotive fails to meet applicable standards for any pollutant, testing for that engine family must be conducted as outlined under paragraph (a)(1) of this section.

(3) You may ask us to allow you to test more locomotives than the minimum number described above or you may concede failure before testing 10 locomotives.

(b) *Compliance criteria.* We will consider failure rates, average emission levels and the existence of any defects among other factors in determining whether to pursue remedial action. We may order a recall pursuant to 40 CFR

part 1068 before testing reaches the tenth locomotive.

(c) *Collection of in-use locomotives.* Procure in-use locomotives that have been operated for 50 to 75 percent of the locomotive's useful life for testing under this subpart. Complete testing required by this section for any engine family before useful life of the locomotives in the engine family passes. (NOTE: § 1033.820 specifies that railroads must make reasonable efforts to enable you to perform this testing.)

**§ 1033.420 Maintenance, procurement and testing of in-use locomotives.**

(a) A test locomotive must have a maintenance history that is representative of actual in-use conditions, and identical or equivalent to your recommended emission-related maintenance requirements.

(1) When procuring locomotives for in-use testing, ask the end users about the accumulated usage, maintenance, operating conditions, and storage of the test locomotives.

(2) Your selection of test locomotives is subject to our approval. Maintain the information you used to procure locomotives for in-use testing in the same manner as is required in § 1033.250.

(b) You may perform minimal set-to-spec maintenance on a test locomotive before conducting in-use testing. Maintenance may include only that which is listed in the owner's instructions for locomotives with the amount of service and age of the acquired test locomotive. Maintain documentation of all maintenance and adjustments.

(c) If the locomotive selected for testing is equipped with emission diagnostics meeting the requirements in § 1033.110 and the MIL is illuminated, you may read the code and repair the malfunction according to your emission-related maintenance instructions, but only to the degree that an owner/operator would be required to repair the malfunction under § 1033.815.

(d) Results of at least one valid set of emission tests using the test procedure described in subpart F of this part is required for each in-use locomotive.

(e) If in-use testing results show that an in-use locomotive fails to comply with any applicable emission standards, you must determine the reason