



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

December 16, 2011

MEMORANDUM

SUBJECT: The Environmental Protection Agency's Enforcement Response Policy For Use Of Clean Air Act Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury and Air Toxics Standard

FROM: Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance *Cynthia Giles*

TO: Regional Administrators (EPA Regions I-X)
Regional Counsel (EPA Regions I-X)
Regional Enforcement Division Directors (EPA Regions I-X)
Air Division Directors (EPA Headquarters and Regions I-X)

I. STATEMENT OF POLICY

It is the EPA's obligation to ensure compliance with environmental laws designed to protect public health and welfare. Where there is a conflict between timely compliance with a particular requirement and electric reliability, the EPA intends to carefully exercise its authorities to ensure compliance with environmental standards while addressing genuine risks to reliability in a manner that protects public health and welfare.

Pursuant to Section 112 of the Clean Air Act ("CAA"), the EPA finalized national emission standards for hazardous air pollutants ("NESHAP") from electric generating units ("EGUs") in December 2011. These standards, commonly known as the "Mercury and Air Toxics Standards" ("MATS"), adopt emission limits on mercury, acid gases and other toxic pollutants for affected coal and oil-fired EGUs. Many existing sources will comply with the MATS by controlling their emissions, while others (typically older, smaller, less efficient units) may choose to cease operations rather than install control technologies.

The EPA believes that all affected sources will be able to comply with the MATS within the compliance period specified by Section 112(i)(3) of the CAA (including, as applicable, any

extensions permitted under Section 112(i)(3)(B)) (the “MATS Compliance Date”). The EPA’s analysis projects only a modest level of retirements, and the Agency does not anticipate that such retirements will lead to resource constraints that would adversely affect electric reliability.

Nonetheless, the EPA acknowledges that there may be isolated instances in which the deactivation or retirement of a unit or a delay in installation of controls due to factors beyond the owner’s/operator’s control could have an adverse, localized impact on electric reliability that cannot be predicted or planned for with specificity at the present time. In such instances, sources could find themselves in the position of either operating in noncompliance with the MATS or halting operations and thereby potentially impacting electric reliability.

The EPA is issuing this policy memorandum to describe its intended approach regarding the use of Section 113(a) administrative orders (“AOs”) with respect to sources that must operate in noncompliance with the MATS for up to a year to address a specific and documented reliability concern. This enforcement policy is limited in application to units that are critical for reliability purposes. Some sources will be able obtain a broadly available one-year extension pursuant to Section 112(i)(3)(B). A source that qualifies for a one year extension from its permitting authority may also qualify for an AO at the end of its extension, provided that it falls within the terms of this policy. The EPA believes that there are likely to be few, if any, cases in which it is not possible to mitigate a reliability issue within four years, and that there are likely to be fewer, if any, cases in which it is not possible to mitigate a reliability issue within the further year contemplated under this policy.

This policy does not address situations where a reliability critical unit needs more than one year to come into compliance after the MATS Compliance Date. The policy also does not address delays in installations of controls and/or other instances of noncompliance with the MATS for units that are not reliability critical. The EPA intends to handle such scenarios as it has in the past, by assessing each situation on a case-by-case basis, at the appropriate time, to determine the appropriate enforcement response and resolution.

As set forth below, in light of the complexity of the electric system and the local nature of many reliability issues, the EPA will, for purposes of using its Section 113(a) AO authority in this context, rely for identification and/or analysis of reliability risks upon the advice and counsel of reliability experts, including, but not limited to, the Federal Energy Regulatory Commission (“FERC”), Regional Transmission Operators (“RTOs”), Independent System Operators (“ISOs”) and other Planning Authorities as identified herein, the North American Electric Reliability Corporation (“NERC”) and affiliated regional entities, and state public service commissions (“PSCs”) and public utility commissions (“PUCs”). The EPA will work with these and other organizations, as appropriate, to ensure that any claims of reliability risks are properly characterized and evaluated.

The EPA is committed to achieving compliance with the MATS while ensuring electric reliability.

The policies established in this document supplement other applicable policies, and are intended to assist government personnel in determining the appropriate response to noncompliance. These policies and procedures are not intended to, nor do they, constitute a rulemaking by the EPA. These policies and procedures do not create a right or a benefit, substantive or procedural, that is enforceable at law or in equity by any person. The EPA reserves the right to act at variance with these policies and to change them at any time without public notice. Further, nothing in this document should be construed to affect the EPA's analysis of, or reaction to, an imminent and substantial endangerment to human health.

II. SUMMARY OF LEGAL REQUIREMENTS AND AUTHORITIES

Section 112 of the CAA establishes compliance deadlines for existing sources to meet standards promulgated under that provision, such as those included in the MATS rule.¹ Specifically, Section 112(i)(3)(A) provides:

After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard.

See, also 40 CFR 63.9984.

The CAA and its implementing regulations provide specific conditions under which extensions may be granted to this three year compliance period and under which other compliance time periods may apply. *See, e.g.*, Section 112(i)(3)(B), (4)-(6). In particular, Section 112(i)(3)(B) provides:

The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls.

Section 113 of the CAA authorizes the Administrator to bring enforcement actions against sources in violation of CAA requirements, seeking injunctive relief, civil penalties and, in certain circumstances, other appropriate relief. The EPA also has the discretion to agree to negotiated

¹ Except as otherwise provided under Section 112(i)(3)(B), the MATS requires compliance within three years of the effective date, the statutory maximum.

resolutions including, for example, expeditious compliance schedules with enforceable compliance milestones.

III. THE EPA'S ENFORCEMENT RESPONSE TO BRING RELIABILITY-CRITICAL UNITS INTO COMPLIANCE

The EPA generally does not speak publicly to the intended scope of its enforcement efforts, particularly years in advance of the date when a violation may occur. The Agency is doing so now with respect to the MATS to provide confidence with respect to electric reliability. EGUs may be needed to operate to maintain the reliability of the electric grid when they would prefer, or could be required, to halt operations temporarily (until controls can be installed) or indefinitely (through deactivation of a unit). This policy describes the EPA's intended enforcement response in such instances. The policy is informed, as are our enforcement actions in general, by the need to find an appropriate balance between critical public interests, bearing in mind the resources and process time required for any enforcement response.

Some sources may take all steps necessary to comply with the MATS, but may nevertheless be needed to operate in noncompliance with the MATS to address concerns with electric reliability. In the event that such sources are interested in receiving a schedule to come into compliance while operating, the EPA intends, where necessary to avoid a serious risk to electric reliability, and provided the criteria set forth herein are met, to issue an expeditious case-specific AO to bring a source into compliance within one year. *See* Section 113(a). Any such AOs would be issued on or after (not before) the MATS Compliance Date and would be limited to units that are required to run for reliability purposes that (A) would otherwise be deactivated, or (B) due to factors beyond the control of the owner/operator, have a delay in installation of controls or need to operate because another unit has had such a delay.²

The Agency is cognizant that early planning will play a key role in allowing for the identification, and timely mitigation, of any potential reliability issues. The EPA expects that owners/operators will begin compliance planning early, and will provide early notice of their compliance plans to the appropriate reliability entities. We further expect that entities with responsibility for reliability planning and coordination will develop and maintain system-wide reliability plans for the units within their purview, and that this regional reliability planning will provide early identification of units that are critical for reliability purposes. Early notice and planning can discourage delays in coming into compliance, encourage timely action to avoid or mitigate reliability concerns, and minimize the need for issuance of AOs of the type described herein.

² The EPA does not intend to seek civil penalties for violations of the MATS that occur as a result of operation for up to one year in conformity with an AO issued in connection with this policy, unless there are misrepresentations in the materials submitted in a request for an AO.

The EPA also recognizes the need for advance planning with regard to the future availability of any reliability critical EGUs to operate as needed to maintain electric reliability. Accordingly, although an AO cannot be issued under Section 113(a) prior to the MATS Compliance Date, the EPA intends – where the owner/operator has timely submitted a complete request and has provided appropriate cooperation – to give the owner/operator as much advance written notice as practicable of the Agency’s plans with regard to such an AO.

To qualify for an AO in connection with this policy, an owner/operator should, at a minimum, take the following steps.^{3,4}

- A. Provide early notice of compliance plans. Within one year after the effective date of the MATS, an owner/operator should provide written notice of its compliance plans, with regard to each EGU it owns or operates, that identifies (a) the units it plans to deactivate and the anticipated dates of deactivation and (b) the units for which it intends to install pollution control equipment or otherwise retrofit and the anticipated schedule for completion of that work, to the Planning Authority for the area in which the relevant EGU or EGUs are located.⁵
- B. Timely request an AO for a unit that may affect reliability due to deactivation. In addition to the elements identified in III(A) above, for a unit that is required to run for reliability purposes that would otherwise be deactivated:
 1. An owner/operator should, no less than 180 days prior to the MATS Compliance Date, submit electronically to (a) the Director of the Air Enforcement Division in the EPA’s Office of Enforcement and Compliance Assurance, and (b) the Regional Administrator of the EPA Region in which the EGU is located, with a copy to FERC, at an office of its designation, (collectively, “AO Request Recipients”) a written request for an enforceable compliance schedule in an AO for the unit, which includes information responsive to each of the elements specified in III(D) below.
 2. At the same time the unit owner/operator submits its request for an AO, an owner/operator should also provide notice that it is seeking such an AO to (a) the Planning Authority, (b) any state PUCs/PSCs with regulatory jurisdiction with

³ The EPA will evaluate each request for an AO for a unit that is required to run for reliability purposes on a case-by-case basis.

⁴ Any notice, request or other submission discussed in this memorandum should conform to the standard business practice of the receiving entity for the submission of information, including any requirements governing submission of Confidential Business Information and/or other confidential information.

⁵ Planning Authority is the entity defined as such in the “Glossary of Terms Used in NERC Reliability Standards,” available at:

http://www.nerc.com/docs/standards/rs/Reliability_Standards_Complete_Set.pdf, or any successor term thereto approved by FERC, and includes, in relevant jurisdictions, RTOs and ISOs.

regard to the relevant EGU,⁶ (c) any state, tribal or local environmental agency with permitting authority under Titles I and V of the CAA, and any tribal environmental agency that does not have such authority, with jurisdiction over the area in which the EGU is located (collectively, “AO Notice Recipients”).

- C. Timely request an AO for a unit that may affect reliability due to delays related to the installation of controls. In addition to the elements identified in III(A) above, for a unit that is required to run for reliability purposes that, due to factors beyond the control of the owner/operator, has a delay in installation of controls or needs to operate because another unit has had such a delay:
1. An owner/operator should, within a reasonable time of learning of a delay that it believes may result in a unit being unable to comply by the MATS Compliance Date, provide to the Planning Authority for the area in which the relevant EGU or EGUs are located, written notice of the units impacted by the delay, the cause of the delay, an estimate of the length of time of the delay, and the timeframe during which it contemplates operation in noncompliance with the MATS.
 2. An owner/operator should, within a reasonable time of learning that it is critical to reliability to operate a unit described in the preceding paragraph in noncompliance with the MATS after the MATS Compliance Date, submit electronically to the AO Request Recipients a written request for an enforceable compliance schedule in an AO for the unit, which includes information responsive to as many of the elements specified in III(D) below as it is possible to provide at that time.
 3. At the same time the unit owner/operator submits its request for an AO, an owner/operator should also provide notice that it is seeking such an AO to the AO Notice Recipients.
- D. Submit a complete request for an AO. The following elements should be included in a request for an AO in connection with this policy:⁷
1. Copies of the early notice provided to the Planning Authority pursuant to III(A) or an explanation of why it was not practicable to have provided such notice and a demonstration that such notice was provided as soon as it was practicable.

⁶ PUCs/PSCs may also wish to obtain the information identified in III(A), either by requesting that an owner/operator over which the PUC/PSC has jurisdiction provide such information directly, or by requesting such information from the relevant Planning Authority.

⁷ The EPA may request additional information from the unit owner/operator. The speed with which the EPA evaluates a request and its ultimate response will be related to the timeliness, completeness, and quality of the submittal.

2. Written analysis of the reliability risk if the unit were not in operation, which demonstrates that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would: (a) result in the violation of at least one of the reliability criteria required to be filed with FERC, and, in the case of the Electric Reliability Council of Texas (“ERCOT”), with the Texas PUC,⁸ or (b) cause reserves to fall below the required system reserve margin.
3. Written concurrence with the analysis in III(D)(2) by, or a separate and equivalent analysis by, the Planning Authority for the area in which the relevant EGU or EGUs are located, or, in the alternative, a written explanation of why such concurrence or separate and equivalent analysis cannot be provided, and, where practicable, any related system wide analysis by such entity.
4. Copies of any written comments from third parties directed to, and received by, the owner/operator in favor of, or opposed to, operation of the unit after the MATS Compliance Date.
5. A plan to achieve compliance with the MATS no later than one year after the MATS Compliance Date, and, where practicable, a written demonstration of the plan to resolve the underlying reliability problem and the steps and timeframe for implementing it, which demonstrates that such resolution cannot be effected on or before the MATS Compliance Date.
6. An identification of the level of operation of the unit that is required to avoid the documented reliability risk in III(D)(2) and, consistent with that level, a proposal for operational limits and/or work practices to minimize or mitigate any HAP emissions to the extent practicable during any operation not in full compliance with the MATS.

In evaluating a request for an AO submitted in contemplation of this policy, although the EPA’s issuance of an AO is not conditioned upon the approval or concurrence of any entity, the EPA intends to consult, as necessary or appropriate on a case-by-case basis, with FERC and/or other entities with relevant reliability expertise.

⁸ Because ERCOT oversees intrastate transmission of electricity solely within Texas and does not provide for interstate transmission, ERCOT files reliability criteria with the Texas PUC.