

**Staff White Paper on  
the Commission's Role Regarding  
Environmental Protection Agency's  
Mercury and Air Toxics Standards  
January 30, 2012**

**I. Introduction**

This White Paper explains staff's position on how the Commission should advise the Environmental Protection Agency (EPA) on requests for extension of time to comply with EPA's Mercury and Air Toxics Standards (MATS).<sup>1</sup> Staff seeks comments on this process.

On December 21, 2011, the EPA released the MATS final rule pursuant to its authority under Section 112 of the Clean Air Act (CAA).<sup>2</sup> The MATS final rule limits mercury, acid gases and other toxic emissions from power plants. Pursuant to Section 112(i)(3)(A) of the CAA, affected sources are required to comply within three years of the MATS effective date. Pursuant to CAA Section 112(i)(3)(B), some affected sources are eligible for a one-year extension (i.e. for a total of four years).<sup>3</sup>

The EPA's Office of Enforcement and Compliance Assurance released a policy memorandum (EPA Policy Memorandum) dated December 16, 2011 describing its intended approach regarding the use of CAA 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 (i.e. for a total of five years).<sup>4</sup>

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<sup>1</sup> National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, <http://www.epa.gov/mats/pdfs/20111216MATSfinal.pdf>.

<sup>2</sup> 42 U.S.C. § 7412(i)(3)(A) (2006).

<sup>3</sup> *See id.* § 7412(i)(3)(B).

<sup>4</sup> 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 (Dec. 16, 2011), <http://www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf>.

## II. Background

### A. Compliance with EPA's Mercury and Air Toxics Standards

Under Section 112(i)(3) of the CAA, affected sources must be compliant with MATS within three years, with an extension of up to one year available in certain cases.<sup>5</sup> In addition to the up to four-year compliance period contemplated in Section 112(i)(3), the EPA Policy Memorandum describes a process by which certain affected sources can obtain an additional one-year extension through an administrative order pursuant to Section 113(a) of the CAA. Specifically, the EPA Policy Memorandum contemplates AO requests: (1) for electric generating units (EGUs) that may affect reliability due to deactivation; and (2) for EGUs that may affect reliability due to delays related to the installation of controls.<sup>6</sup>

The EPA Policy Memorandum states that an AO cannot be issued under Section 113(a) prior to the MATS Compliance Date in Section 112(i)(3).<sup>7</sup> However, provided an owner/operator has timely submitted a complete request and provided appropriate cooperation, the EPA expects to give an owner/operator "as much advance written notice as practicable of the [EPA's] plans with regard to such an AO."<sup>8</sup>

The EPA Policy Memorandum states that in evaluating a request for an AO it will seek advice, on a case-by-case basis, from the Commission and/or other entities with relevant reliability expertise.<sup>9</sup> However, the EPA's issuance of an AO is not conditioned upon the approval or concurrence of the Commission or any other entity.

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<sup>5</sup> The EPA Policy Memorandum refers to the date by which affected sources must comply under Section 112(i)(3) of the CAA (which includes the possible one-year extension under Section 112(i)(3)(B)) as the "MATS Compliance Date."

<sup>6</sup> EPA Policy Memorandum at 4.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> In the EPA Policy Memorandum, it states that "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

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## **1. General Requirements for AO Requests**

The EPA Policy Memorandum provides that within one year after the MATS effective date, an owner/operator should submit written notice of its compliance plans (Notice of Compliance Plans) with regard to each EGU it owns or operates. The Notice of Compliance Plans should be sent to the planning authority for the area in which the relevant EGU(s) are located and should identify: (1) the units the owner/operator plans to deactivate and the anticipated dates of deactivation; and (2) the units for which it intends to install pollution control equipment or otherwise retrofit and the anticipated schedule for completion of that work.

The EPA Policy Memorandum states that an owner/operator should submit the following information for all AO requests:

- (1) copies of the Notice of Compliance Plans provided to the planning authority or an explanation why it was not practicable to have provided such notice and a demonstration that such notice was provided as soon as it was practicable;
- (2) written analysis of the reliability risk if the EGU 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 the Commission, and, in the case of the Electric Reliability Council of Texas, with the Texas Public Utility Commission; or (b) cause reserves to fall below the required system reserve margin;
- (3) written concurrence with the reliability risk analysis, or a separate and equivalent analysis, by the planning authority for the area in which the relevant EGU(s) 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;

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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.” EPA Policy Memorandum at 2.

(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; and

(6) identification of the level of operation of the EGU that is required to avoid the documented reliability risk and, consistent with that level, a proposal for operational limits and/or work practices to minimize or mitigate any hazardous air pollutant emissions to the extent practicable during any operation not in full compliance with the MATS.<sup>10</sup>

## **2. Specific Requirements for AO Requests**

To request an AO for EGU(s) that may affect reliability due to deactivation, the EPA Policy Memorandum states that the an owner/operator, no less than 180 days prior to the MATS Compliance Date, must submit electronically to: (1) the Director of the Air Enforcement Division in the EPA's Office of Enforcement and Compliance Assurance, and (2) the Regional Administrator of the EPA Region in which the EGU is located, with a copy to the Commission at an office of its designation (collectively, "AO Request Recipients"), a written request for an enforceable compliance schedule in an AO for the EGU(s), which includes information responsive to each of the general requirements discussed above. At the same time, an owner/operator should provide notice that it is seeking an AO to: (1) the planning authority, (2) any state public utility commissions or public service commissions with regulatory jurisdiction with regard to the relevant EGU, and (3) 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").

To request an AO for EGU(s) that are required to run for reliability purposes that, due to factors beyond the control of the owner/operator, have delays in installation of controls or need to operate because another EGU has had such a delay, the EPA Policy Memorandum states that an owner/operator should: (1) within a reasonable time of learning of a delay that it believes may result in an EGU being unable to comply by the MATS Compliance Date, provide to the planning authority for the area in which the relevant EGU(s) are located, written notice of the EGU(s) 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 non-compliance with the MATS; (2) within a reasonable time of learning that it is critical to reliability to operate the identified EGU(s)

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<sup>10</sup> *Id.* at 6-7.

in non-compliance 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 EGU(s), which includes information responsive to as many of the general requirements discussed above as it is possible to provide at that time; and (3) at the same time the owner/operator submits its request for an AO, provide notice that it is seeking such an AO to the AO Notice Recipients.

### **B. Energy Policy Act of 2005 and Mandatory Reliability Standards**

Section 215 of the Federal Power Act (FPA) requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which provide for the reliable operation of the Bulk-Power System, subject to Commission review and approval.<sup>11</sup> Section 215(d)(2) of the FPA states that the Commission may approve, by rule or order, a proposed Reliability Standard or modification to a Reliability Standard if it determines that the Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.<sup>12</sup>

On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of section 215 of the FPA governing electric reliability.<sup>13</sup> In July 2006, the Commission certified the North American Electric Reliability Corporation as the ERO.<sup>14</sup>

### **III. Commission Advice to the EPA Under the EPA's Policy Memorandum**

The EPA Policy Memorandum indicates that the EPA intends to seek advice, as necessary and on a case-by-case basis from, among others, the Commission as the EPA decides whether it will grant an AO to an owner/operator. The EPA Policy

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<sup>11</sup> 16 U.S.C. § 824o(d)(2) (2006).

<sup>12</sup> *See id.* § 824o(e)(3).

<sup>13</sup> *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>14</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

Memorandum makes clear that the decision as to whether to grant an AO to an owner/operator is solely the decision of the EPA and that the concurrence or approval of any entity is not a condition for approval or denial of an AO request.<sup>15</sup>

This White Paper explains staff's position on how the Commission should advise the EPA regarding AO requests.<sup>16</sup> Staff seeks comments on this process.

**A. Process for Advising the EPA Under the EPA's Policy Memorandum**

The EPA Policy Memorandum explains that when an owner/operator submits an AO request: (1) for EGUs that may affect reliability due to deactivation; and (2) for EGUs that may affect reliability due to delays related to the installation of controls, the owner/operator must provide a copy of the request to the Commission. This AO request must include an owner/operator's "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 . . . result in the violation of at least one of the reliability criteria required to be filed with [the Commission] . . ."<sup>17</sup> In addition, the Commission will receive the planning authority's written concurrence with the owner/operator's analysis, or a written explanation of why the planning authority's concurrence cannot be provided.

Staff believes that each AO request should be filed with the Commission Secretary. The Commission should treat any AO request to the EPA that is filed with the Commission Secretary as an informational filing. The Commission should assign each informational filing a separate Administrative Docket (AD) number. An informational filing provided to the Commission should include the same information that the owner/operator submitted to the EPA pursuant to the EPA Policy Memorandum.<sup>18</sup>

The Commission's Office of Electric Reliability should be designated as the lead office tasked with processing an owner/operator's informational filing. EPA states that the analysis provided should demonstrate "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

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<sup>15</sup> EPA Policy Memorandum at 7.

<sup>16</sup> Nothing in this White Paper modifies the process that the EPA announced it will follow in the EPA Policy Memorandum in deciding whether it will grant AOs.

<sup>17</sup> EPA Policy Memorandum at 7.

<sup>18</sup> The Commission may request additional information from the applicant but generally expects to rely on the information submitted to EPA.

to be filed with the Commission, and, in the case of the Electric Reliability Council of Texas, with the Texas Public Utility Commission; or (b) cause reserves to fall below the required system reserve margin.” Staff believes that the Commission’s review of an informational filing should be whether, based on the circumstances presented, there might be a violation of a Commission-approved Reliability Standard.<sup>19</sup> However, staff seeks comments on the other elements outlined in the EPA Policy Memorandum and whether and how the Commission should review issues arising outside of a potential violation of a Reliability Standard under FPA section 215. This review will be conducted pursuant to section 307(a) of the FPA, the Commission’s general investigative authority. Staff has not determined if the Commission’s review should be conducted de novo (a new analysis, conducted as if the planning authority’s original analysis had not taken place) or should accord some level of deference (possibly similar to appellate review) to the planning authority’s analysis. Comments on this issue are requested.

Staff anticipates that the Commission would then advise the EPA as contemplated by the EPA Policy Memorandum by submitting written Commission comments to the EPA.<sup>20</sup> Staff believes that the Commission comments should concern whether, based on the circumstances presented, there might be a violation of a Reliability Standard approved under section 215 of the FPA, but as noted seeks comment on this scope.

## **B. Intervention and Other Procedures**

Staff believes that the Commission should not permit entities to intervene in the preparation of the Commission comments to the EPA. However, the EPA Policy Memorandum requires an owner/operator requesting an AO to submit “[c]opies 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.”<sup>21</sup> These

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<sup>19</sup> Commission comments to the EPA indicating that there “might be a violation of a Reliability Standard” under the circumstances presented do not constitute a final determination under section 215 of the FPA that a Reliability Standard has or will be violated. That is, the Commission comments will reflect its preliminary view based on the information presented, not a final agency action triggering civil penalties or other enforcement actions.

<sup>20</sup> The Commission will vote on the Commission comments before submission to the EPA. Commission comments submitted to the EPA will be publicly posted on the Commission’s eLibrary system under the applicable AD docket number. Differing views by any Commissioner will also be submitted to the EPA in writing and will be publicly posted on the Commission’s eLibrary system.

<sup>21</sup> EPA Policy Memorandum at 7. While staff does not propose that the Commission should seek comments on these informational filings, if comments are  
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materials would also be provided as part of the informational filing an owner/operator submits to the Commission under the requirements in the EPA Policy Memorandum.<sup>22</sup> When appropriate, the Commission may consider the comments submitted as part of the informational filing in developing its written comments to the EPA, but in doing so those commenters will not be treated as interveners. Moreover, as noted previously, the Commission comments would not constitute a final agency action. A decision determining an entity's legal rights and obligations would be made by EPA, not by the Commission comments to EPA. Thus, judicial review of the Commission comments will not lie. Similarly, requests for rehearing will not be allowed.

#### **IV. Conclusion**

This White Paper provides staff's position on how the Commission should advise the EPA under the EPA's Policy Memorandum. As stated in the EPA Policy Memorandum, whether or to what extent the EPA considers or relies on the Commission's comments, and whether to grant an AO to an owner/operator, will rest entirely with the EPA. This white paper outlines a proposal that would provide a fair, timely, and transparent process for the Commission to advise the EPA on requests for extension of time to comply with EPA's MATS rule applying the Commission's expertise on reliability issues as appropriate in this context. We seek comments on this process.

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received by the Commission, they would be placed in the associated AD docket. Because these would be informational dockets, staff does not anticipate that the Commission would be required to address comments received.

<sup>22</sup> *Id.* at 5, 6.



Document Content(s)

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