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ENVIRONMENTAL

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CLIENT ALERT: UPCOMING EPA COMPLIANCE DEADLINES AND PROCEDURES FOR REQUESTING EXTENSIONS

The Environmental Protection Agency has issued various regulations or proposed regulations affecting consumer-owned power systems, with the majority designed to curb air emissions from fossil-fuel-fired generation. Though some of these rules are subject to reconsideration or judicial review, compliance deadlines are approaching, and your utility should be in the process of implementing a compliance plan.

Currently, two rules – the Reciprocating Internal Combustion Engines (RICE) National Air Emission Standard for Hazardous Air Pollutants (NESHAP)[1] and the Mercury Air Toxics Standard (MATS)[2] – have established compliance deadlines of May 3, 2013 and April 16, 2015, respectively.

Obviously, the preferred plan is to bring units into compliance in a timely fashion, unless you intend to retire the units as not cost-effective. However, sometimes compliance schedules raise their own issues. Vendors may be overextended, parts may be backordered, or shutdown of the unit, either permanently or for the duration of a retrofit may threaten reliability in the area. If there is a chance your utility will be unable to meet the MATS or RICE deadlines, you should consider a backup plan. This memorandum discusses compliance extensions with reference to the MATS and RICE rules. It is important to note that an extension is not easy to obtain and requires you to document your efforts to meet the deadline in good faith. Furthermore, compliance extensions typically *will not exempt* a unit from regulation, nor do they insulate your utility from certain enforcement actions or from citizen lawsuits. An extension is a limited solution that may not fully protect you, but it can allow what otherwise would be a non-compliant unit additional time to run before EPA will assess penalties.

[1] 75 Fed. Reg. 9648.

[2] 77 Fed. Reg. 9304.

An extension may be available if reliability would be affected by taking your unit out of service for retrofitting. If you plan to shut down a unit rather than retrofit it, any reliability implications of that decision may also result in an extension. In certain cases, you will be required to file with FERC in support of an application for a reliability extension filed with EPA or your local permitting authority.

1. The MATS and RICE Rules and Their Compliance Deadlines

Both the MATS and RICE rules mandate the installation of pollution control devices and/or monitoring and reporting activities for certain types of existing units.

MATS requires affected coal- and oil-fired steam electric generating units ("EGU")[3] to comply with (1) emission limits on mercury, non-mercury metals and acid gases, (2) work practice standards for organic hazardous air pollutant ("HAP") emissions, and (3) all applicable reporting requirements. **The MATS compliance deadline for existing units is April 16, 2015**.[4] Although pending litigation could result in the D.C. Circuit remanding MATS back to the EPA for changes, such an outcome cannot be guaranteed. Accordingly, affected utilities should already be making compliance plans. These steps include investigating pollution control technologies (e.g. fabric filters, wet and dry flue gas desulfurization systems, dry sorbent injection systems, and activated carbon injection systems), assessing which units may be retrofitted and which may be retired, and discussing compliance plans or potential retirements with the relevant regional energy planning entity.

The ***RICE rule*** impacts three categories of existing small emergency and non-emergency generators with stationary compression ignition (CI) RICE:

- engines with a site rating of less than or equal to 500 brake horsepower (HP) located at a major source[5] of hazardous air pollutant (HAP) emissions;
- engines with a site rating greater than 500 Hp located at major sources of HAP; and
- engines of any power rating located at area sources.[6]

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[3] Affected units are coal- or oil-fired combustion units of more than 25 MW (nameplate capacity) serving a generator that produces electricity for sale and cogeneration units that supply more than 1/3 of their potential electrical output capacity and more than 25 MW electrical output to any utility distribution system for sale. *See* 40 CFR § 63.10042.

[4] 40 C.F.R. § 63.9984(b). New sources, i.e. on which construction commenced after May 3, 2011, must be in compliance with the standards as of April 16, 2012 or at startup, whichever is later. 40 C.F.R. § 63.9984(a). In conjunction with MATS, the EPA also published new-source performance standards (NSPS) for coal-, oil- and natural gas-fired units that begin construction, modification, or reconstruction after May 3, 2011. The NSPS require affected units to comply with emission limits on SO_2, NO_x, and Particulate Matter.

[5] A major source is a stationary engine that emits or has the potential to emit any single HAP at a rate of 10 tons or more per year or any combination of HAP at a rate of 25 tons or more per year.

[6] An area source is a unit that is not a major source.

Under the RICE rule, non-emergency generating units in each category must meet start-up requirements and carbon monoxide emission limits and for many units, this may require retrofits. Certain units greater than 300 HP must also meet fuel requirements. Additionally, all three categories of units as well as units less than 100 HP must meet certain management practice standards and reporting requirements.

All units must comply with the RICE rule by May 3, 2013. EPA has proposed limited amendments to certain parts of the RICE rule, but for units not affected by those amendments, EPA has not adjusted any compliance deadlines. There is also no guarantee EPA will change the deadline for units affected by the amendments.

2. Possible Requests for Extensions

If it appears impossible to bring your units into compliance by the initial compliance dates for the MATS or RICE rules, you should think about a backup plan. Under the MATS and RICE rules, regulated entities may apply for extensions of up to one year when "necessary for the installation of controls" (pursuant to Clean Air Act Section 112(i)(3)(B)). Additionally, under MATS, a second one-year extension is available through Clean Air Act Section 113(a) for "reliability critical units."[7] There is a third extension process by which the President may exempt a stationary source from compliance for up to two years.[8] However, a Presidential Exemption is unlikely to be granted because the stringent requirements include that "the technology to implement such standard is not available and that it is in the national security interests of the United States."

a. One-Year Extension under CAA Section 112(i)(3)(B)

A Section 112(i)(3)(B) compliance extension requires a written request to the Clean Air Act permitting authority where the unit is located explaining why the extension is "necessary for the installation of controls." Potential reasons for a Section 112(i)(3)(B) extension include:[9]

- emission controls are being installed but not yet completed (so long as the owner/operator can show progress towards installation, such as obtaining building permits or hiring a contractor), or
- generation is needed to maintain reliability while replacement power is constructed, other units install emission controls, or transmission upgrades are completed.

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[7] Reliability issues associated with plant retirements over EPA rules began to attract national attention during the MATS rulemaking, so the concept of a reliability critical plant was developed. Although other EPA rules may not incorporate this concept we believe a reliability case could be attempted for any unit important for reliability that might be retired as a result of any EPA program.

[8] Clean Air Act § 112(i)(4); 40 C.F.R. § 63.6(j).

[9] 40 C.F.R. § 63.6(i); *see also* 77 Fed. Reg. at 9410.

You must submit your request for an extension no later than 120 days prior to the compliance date (January 3, 2013 for units affected by the RICE rule and December 17, 2014 for units affected by MATS). Between the 120 day application deadline and the compliance deadline, you may still submit an extension request but must show that the need arose after the 120-day deadline date and is due to circumstances beyond your reasonable control.

Each request must include the following:

- a description of the controls to be installed to comply with the standard;
- a compliance schedule with dates by which each step toward compliance will be reached including dates for the initiation of on-site construction, process change or installation of emission control equipment, and final compliance.

As long as a Section 112(i)(3)(B) request is non-frivolous, the EPA will stay the applicability of the rule to that unit until a decision is made. If EPA denies the request after the compliance deadline, however, the rule will be immediately effective. Consequently, affected entities should continue to work towards compliance while their request is pending.

b. One-Year Additional Extension to MATS under Section 113(a)

To obtain a second year-long extension to the MATS compliance date, you must apply for a Clean Air Act Section 113(a) Administrative Order ("AO") to have your unit designated as a "reliability critical unit."[10] A reliability critical unit is a unit that must be run to maintain the reliability of the grid even though it does not comply with MATS because you have planned to deactivate it or, due to factors beyond your control, there will be a delay in the installation of pollution control equipment.[11] The application process requirements include:

- **By April 16, 2013**, provide the relevant planning authority (as defined by NERC reliability standards) notice ("Early Notice") of which unit(s) you (a) plan to deactivate and the anticipated date of deactivation, or (b) plan to retrofit and the anticipated date of completion.
- **For planned retrofit units, within a reasonable time of learning a delay in installation controls may affect reliability,** provide the relevant planning authority with written notice of the delay, an estimate of the length of the delay,

[10] EPA has published a policy memorandum describing the process it will use to grant a Section 113(a) extension. The policy is available here.

[11] EPA has not yet addressed situations where it may take a reliability critical unit longer than 5 years to come into compliance or where a unit that is not reliability-critical will need longer to come into compliance. For now, the EPA states that those cases will be handled on an individual basis.

and the timeframe in which the unit would be in noncompliance with MATS if operated.

- **By October 18, 2014** for planned deactivated units, and within a reasonable time of learning that there is a delay for planned retrofit units, submit an electronic written request for an AO extension to (a) the Director of EPA's Air Enforcement Division, (b) EPA's Regional Administrator in the region in which the EGU is located and (c) FERC. Submit notice of the written request to (a) the relevant planning authority, (b) any state PUC/PSC with regulatory jurisdiction, (c) any state, tribal, or local environmental agency with Title I and IV Clean Air Act permitting authority, and (d) if applicable, any tribal environmental agency that has jurisdiction over the area in which the EGU is located even if it does not have Clean Air Act permitting Authority.

The written request must include:

- a copy of the Early Notice;
- the owner/operator's analysis of the reliability risk;
- a written concurrence of the owner/operator's analysis or an independent reliability analysis by the planning authority;
- a copy of any third party comments on the extension (e.g. those received by the owner/operator or that are submitted to NERC, the state PUC, etc.);
- a plan to achieve compliance during the year extension; and
- an identification of the level of operation needed to avoid the documented reliability risk and a proposal to minimize or mitigate HAP emissions during the period the unit is in non-compliance.

The reliability risk analysis must demonstrate that a failure to operate the unit would either cause reserves to fall below the required system reserve margin or result in the violation of at least one of the reliability criteria required to be filed with FERC (e.g. Federal Power Act Section 215 Reliability Standards) or, for ERCOT entities, with the Texas PUC. Although EPA has provided no additional guidance on the contents of the risk analysis, FERC has suggested that applications include systems planning and operations studies, system restoration studies or plans, operating procedures, and mitigation plans required by the Reliability Standards. [12] Remember that other units in your area will be going through the same process. Even if an outage at your unit does not normally cause a reliability issue, your local planning authority will have the best picture of whether your retirement or retrofit outage, considered in the context of other planned retirements or retrofit outages, might cause

[12] FERC's policy statement on its guidance role can be found here.

reliability issues that would not ordinarily arise. Early coordination with your reliability coordinator is very important.

EPA alone makes the decision whether a unit is granted a reliability risk extension. However, FERC, along with the other "noticed" entities, may provide guidance to the EPA. Consequently, FERC's MATS policy states that entities seeking a reliability risk extension should file their written requests at FERC as informational filings. FERC's Office of Electric Reliability will then process the informational filings to determine "whether, based in the circumstances presented, there might be a violation of a Commission-approved Reliability Standard."

While both the MATS and RICE rules remain in flux, their compliance horizons are approaching, and affected utilities must assess their compliance plans and reliability status now. If you would like to discuss compliance plans for your generating units, please contact any Spiegel attorney you regularly work with or a member of our environmental practice listed below.

FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE FOLLOWING SPIEGEL ATTORNEYS:

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