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Federal Energy Regulatory Commission
888 First Street, NE
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Submitted via: <http://www.ferc.gov>

RE: **Comments on FERC White Paper on MATS compliance extension requests
(Docket No. AD12-1-000)**

The American Clean Skies Foundation (ACSF) is a non-profit organization founded in 2007 to advance U.S. energy security and a cleaner environment through the expanded use of natural gas, renewable energy, and energy efficiency. ACSF appreciates the opportunity to submit comments on FERC's *Staff White Paper on the Commission's Role Regarding Environmental Protection Agency's Mercury and Air Toxics Standards (MATS)* issued on January 30, 2012 (hereafter referred to as the "FERC Response").¹

The MATS requires that power plants be equipped with modern pollution controls to control hazardous air pollutants. These pollution controls are required within 3 years of the effective date of the MATS, subject to certain extensions, including 1-year extensions typically within the jurisdiction of state permitting authorities and *additional* 1-year extensions granted by EPA through "Administrative Orders" (AOs).² The FERC Response addresses FERC's role regarding these AO extensions, which if granted would allow a full five years for compliance.

The AO review process suffers from three principal defects: an *optional* planning requirement, a lack of transparency and ability for state regulators and the public to clearly access information and provide meaningful comments and solutions, and *timing*. Fortunately, with adjustments to EPA's and FERC's proposed MATS extension procedures, unnecessary reliability problems can be avoided.

¹ This FERC white paper is available at <http://www.ferc.gov/media/news-releases/2012/2012-1/01-30-12-white-paper.pdf>.

² EPA's MATS was published in the Federal Register on February 16, 2012 (77 Fed. Reg. 9304). The MATS "effective date" is 60 days following publication in the Federal Register, although as noted retrofits would not be required for at least 3 years after the effective date.

To that end, ACSF suggests that over the next year FERC issue one or more orders to:

- ***Mandate that generators publicly docket their plans for compliance with MATS within 18 months after the new rules take effect. This is critical to avoiding unnecessary electric system reliability problems.***
- ***Provide for adequate transparency and a meaningful, timely opportunity for state regulators and the public to comment on, and provide solutions to any reliability issues raised by the public compliance plans which are docketed.*** Currently, the process whereby the owner/operators of coal-fired units submit MATS “compliance plans” is: (1) only optional; (2) lacks transparency and the ability of state regulators (or the public) to meaningfully review compliance plans and submit comments on, and provide solutions to, reliability issues; and (3) involves too long a time lag between the submittal of compliance plans and third-party scrutiny, thus increasing rather than reducing the risk of a reliability issue.

The MATS has been over 20 years in the making, with the underlying statutory authority stated in the 1990 Clean Air Act amendments. Despite the long gestation of the MATS and its likely consequences for generators, some utilities and utility Planning Authorities (e.g., some RTOs/ISOs in organized markets) have raised concerns regarding the effect that power plant retirements may have on electric power system reliability. Although EPA “believes that all affected sources will be able to comply with the MATS” within the statutorily-provided time frames, out of caution it provided a Policy Memorandum to deal with extension requests if unplanned contingencies arise.³

ACSF applauds EPA and FERC for issuing guidance on how the agencies will process MATS compliance date extension requests. Unfortunately, EPA’s approach--and FERC’s involvement with MATS extension issues--has *significant gaps* that could increase rather than reduce reliability problems and hinder state regulators or market participants from offering alternative solutions early in the process. FERC should close these gaps along the lines proposed above, as FERC is the federal entity with primary jurisdiction over electric reliability.

The recent joint forum on power sector environmental rules involving FERC and the National Association of Regulatory Utility Commissioners (NARUC) shows the need for coordination between FERC and state regulators with respect to reliability issues.⁴ As noted by NARUC’s President Commissioner David Wright of South Carolina “job number one” of a State

³ See EPA, *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* (December 16, 2011), at pp. 1-2. EPA’s policy memorandum is available at <http://www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf>.

⁴ See e.g., <http://www.ferc.gov/media/news-releases/2012/2012-1/01-04-12.asp>.

utility regulator is “to assure reliable electricity service is provided at a reasonable price.” Furthermore, as NARUC officer Commissioner David Ziegner of Indiana has noted, “Bringing FERC commissioners and State regulators together, in an open forum, is absolutely essential.” The same openness and early transparency is needed regarding MATS compliance plans.

There is no apparent reason why reliability concerns cannot be harmonized with the federal health and safety laws like the MATS. And the best way for FERC to do this is simple: adopt an order (or orders) to require early, open and transparent planning that meaningfully involves state regulators and informed stakeholders.

I. Overview of the Policy Memorandum and FERC’s response.

EPA essentially outlines a two-step process for owner/operators who wish to receive a MATS compliance extension. In the first step, EPA’s guidance states that:

“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 [electric generating unit] 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....”

(Policy Memorandum, p. 5, emphasis added)

EPA’s second step does not occur until several years from now and just before an AO is actually desired. Then, an owner/operator can file an AO request with EPA just 180 days before MATS compliance is due. As part of this AO request, an owner/operator is expected to file copies “of any written comments from third parties” that it has received in favor of, or opposed to, operation of the electric generating unit at issue after the MATS compliance deadline. (Policy Memorandum, p. 7) It is only then, when a crisis has arisen, that FERC receives a copy of relevant documentation. And it is only at this late stage that third-party comments that *may* have been received by the owner/operator are provided to EPA and FERC. But there is no clarification on how these comments are actually collected in the first place, or for providing any information when these compliance plans are prepared to state regulators or other stakeholders on which to base such comments. Worse still, these comments are only collected by FERC and EPA when it is *too late* to consider any meaningful options but a MATS deadline extension.

The proposed role for FERC in the AO review process is one step, and not much of a step at that. Essentially, FERC’s Proposed Response is “hands-off.” FERC proposes to review the 11th hour information that is submitted to it from EPA as part of an AO request and then provide comments to EPA. But FERC proposes to allow no state PUC or public review of its role. FERC’s statement in its conclusion is telling, when it states that “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.” (FERC Response, p. 8). FERC here abdicates responsibility for electric reliability issues over which it is the federal entity with primary

jurisdiction. Fortunately, with adjustments to EPA's and FERC's proposed MATS extension procedures, unnecessary reliability problems can be avoided.

FERC should encourage an early, open and transparent planning process so that solutions to electric reliability issues can be solved before problems arise. And, if a request for a compliance extension is submitted due to reliability concerns, FERC should take a "hard look" at whether those reliability issues merit delaying health-based emission reductions.

In particular, the current AO review process as established in the Policy Memorandum and FERC Response suffers from several main defects:

1. The owner/operator submittal of compliance plans is *optional*, a fact that both FERC and EPA gloss over.

As noted above, EPA's Policy Memorandum only says that compliance plans *should* be submitted. Furthermore, if several years from now a problem arises and a utility decides it wants a compliance extension, EPA allows the utility to provide "an explanation of why it was not practicable" to have provided such a compliance plan in the first place. (Policy Memorandum, p. 6) Clearly, such a process is ripe for abuse, allowing utilities to avoid submitting compliance plans and then offer an explanation after-the-fact. And at a minimum it creates a situation where compliance plans may be considered "later rather than sooner"—the exact *opposite* of what should be done.⁵

ASCF understands that not every detail of a compliance plan may be available one year following the effective date of the MATS. But the MATS have been over two *decades* in development, and utilities should be able to provide a significant amount of meaningful information one year from now on how they intend to comply with the MATS rule, including unit-specific plans.

2. The AO request process suffers from a significant lack of *transparency* and the ability of state regulators and the public to meaningfully review compliance plans and submit comments on, and provide solutions to, reliability issues.

In particular, EPA suggests that these compliance plans should go to the relevant Planning Authorities. But there is no stated requirement that Planning Authorities make these documents available for review by the public or state regulators such as state environmental and public utility regulators or market participants. Both EPA's Policy Memorandum and FERC's white paper gloss over this point.

⁵ For instance, under the National Environmental Policy Act (NEPA), environmental requirements are integrated "with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." See 40 CFR Section 1501.2.

The FERC Response says that EPA's Policy Memorandum requires an owner/operator requesting an AO to submit "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." (FERC Response, p. 7) As noted above, it is unclear through what process state regulators or the public would have to provide such comments. Worse still, these comments would only be considered several years down the road—when an AO request is docketed and it is *too late* for reasonable measures to be taken to avoid what might have otherwise been an avoidable reliability problem.

3. The *timing* of the scrutiny of utility plans is back-loaded when it should be front-loaded.

In short, there is no requirement for a utility to disclose its plans until it is too late for anyone (the EPA, the FERC, state regulators, the owner/operator itself, other power suppliers and stakeholders, etc.) to review, and identify and implement solutions to, potential issues. Providing enough time on the front end allows state regulators and market participants to find solutions other than the granting of an AO compliance deadline extension.

II. FERC should issue an order that remedies these defects in the MATS compliance deadline extension review process.

As noted above, the AO review process suffers from three principal defects: an *optional* planning requirement, a lack of transparency and ability for state regulators and the public to clearly access information and provide meaningful comments and solutions, and *timing*. Fortunately, with adjustments to EPA's and FERC's proposed MATS extension procedures, unnecessary reliability problems can be avoided.

In particular, FERC should issue an order that does two things. First, FERC should require all owners/operators of power plants that may need to make a significant change to their facilities to comply with the MATS to submit a compliance plan to the relevant Planning Authority *and* relevant state regulators within 18 months of the MATS effective date.⁶ Second,

⁶ FERC could issue such an order pursuant to its authority to regulate reliability issues under Section 215 of the Federal Power Act. Other FERC statutory authority may also apply, and numerous federal reliability standards already require analogous actions. FERC could issue such order requiring the submittal of compliance plans directly, or instruct NERC to establish such a requirement as a reliability standard. If FERC declines to issue an order requiring the submittal of compliance plans, then it should at a minimum coordinate with state regulators so that *they* require such compliance plans be submitted within one year (or 18 months). However, a patchwork of state action on requiring compliance plans may increase rather than minimize reliability risks.

FERC should require Planning Authorities to promptly make critical information from these compliance plans publicly available for a comment period of at least 90 days.⁷

Regarding the owner/operator submission of compliance plans, FERC's order would only be requiring what EPA leaves as optional. Furthermore, an owner/operator submitting such a plan should not be unduly burdensome, as it should be expected that almost all owner/operators subject to the MATS have done some form of contingency planning, given the long gestation of these pollution control requirements.

Comments received on this planning information, along with any other relevant comments that the owner/operator receives, would then be submitted with any request for an AO as already outlined in the Policy Memorandum.

Finally, FERC should make its own review and recommendations on an AO request available for public comment on an expedited fashion (e.g., a 15-day comment period). Thus, FERC should take a different response than outlined in section III.B of the FERC Response, whereby FERC has refused to allow public review of its comments to EPA on AO requests.

Notably, FERC's order could allow owner/operators of impacted power plants to opt out of the need to submit compliance plans if: (1) they don't have any units that are subject to the MATS standards, or (2) their units already have MATS-level controls.

III. Past experience shows just how critical transparency and the ability for public comment is.

The power generation industry has undergone significant transformation over the last 20 years. With deregulation and the rise of merchant power generators, distributed generation and other developments, many different stakeholders may be able to identify potential reliability solutions other than just the owner/operator of a coal plant that is slated to be shut down.

1. The role of state regulators and other stakeholders.

State regulators are involved with many aspects of power generation in their states, and yet it is not clear under EPA's Policy Memorandum how they are provided with key information such as the compliance plans. Both state environmental regulators (who often perform on-site inspections of power plants), and state public utility commissions with oversight over power

⁷ Ideally the information that Planning Authorities make publicly available should include plant-level compliance plans—in other words, Planning Authorities would simply make available the compliance plans that they receive from owners/operators. However, if such information is subject to legitimate claims of business confidentiality or other requirements for protection from disclosure, then the Planning Authorities should release information in an aggregated form, but broken out in the most specific fashion possible (e.g., information on plans for retirements and retrofits broken out by the smallest “LMP”-zones or most specific, targeted sub-regions in a given area).

generation issues, should receive copies of compliance plans when they are initially prepared. The recent joint forum on power sector environmental rules involving FERC and the National Association of Regulatory Utility Commissioners (NARUC) shows the need for coordination between FERC and state regulators.⁸

Moreover, with the rise of merchant generators, renewable energy, energy efficiency, demand side management, the smart grid, cogeneration and other distributed generation, and myriad other possible energy solutions available to address reliability, a substantial number of stakeholders have expertise and may be able to assist utilities, Planning Authorities, FERC and EPA in identifying solutions to reliability issues that may arise. But stakeholders can't assist in the review of compliance plans they don't see, and can't provide solutions to reliability issues that they aren't informed of in a timely fashion.

2. Often overlooked solutions: natural gas and the role of generation located closer to load.

In contrast to coal-fueled power plants, natural gas-fueled power plants emit no mercury and negligible amounts of the other hazardous air pollutants targeted for reductions by the MATS. Accordingly, switching from coal-fueled power generating electricity to generation from natural gas can achieve substantial reductions in toxic air emissions. Moreover, numerous modern, low-emitting, high-efficiency natural gas combined cycle plants are available today, with significant unused capacity, to replace existing coal-fired generation.⁹ And modern, high-efficiency power natural gas power plants can be readily permitted and constructed, often at the same location where coal plants have been retired, making use of existing transmission. Furthermore, dramatically expanded U.S. natural gas reserves and infrastructure have reduced gas price volatility and provide the opportunity to cost effectively expand the use of natural gas in the United States, including for power generation.¹⁰

Unfortunately, the role that natural gas can play in eliminating reliability concerns is often given insufficient attention. To help to rectify this problem, ACSF provided detailed comments to EPA on the proposed MATS, noting that the standards “should not be weakened for

⁸ See e.g., <http://www.ferc.gov/media/news-releases/2012/2012-1/01-04-12.asp>, discussed *supra*.

⁹ See e.g., Congressional Research Service, *Displacing Coal with Generation from Existing Natural Gas-Fired Power Plants* (2010), available at http://assets.opencrs.com/rpts/R41027_20100119.pdf. See also, Massachusetts Institute of Technology Energy Initiative, *The Future of Natural Gas* (June 2011) at page 2, a report for which funding was contributed, in part, by ACSF and available at <http://www.cleanskies.org>.

¹⁰ See e.g., the American Clean Skies Foundation and Bipartisan Policy Center, *Task Force on Ensuring Stable Natural Gas Markets* (2011), executive summary at pp. 7-13, available at <http://www.cleanskies.org/>.

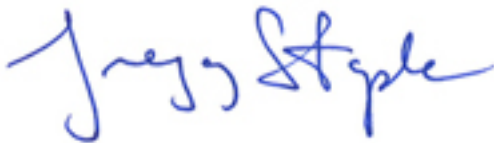
fear that retiring aging coal power plants will cause reliability concerns, because readily-available, cleaner natural gas generation can provide replacement power.”¹¹ ACSF addressed the issue of compliance extensions in these comments, noting that “various analysts have found that switching more generation to underutilized natural gas plants in place of higher emitting coal-fired facilities can enable utilities to provide reliable power while reducing pollution”; and this can be done without an extension of the MATS regulatory time frame.

Just last month ACSF also submitted comments regarding the Department of Energy’s analysis of electric transmission congestion issues. There, ACSF noted that “Given the low emissions profile and relatively small footprint of natural gas electric generating units, these units are uniquely well-suited for siting closer to sources of electricity demand” and therefore can reduce transmission congestion. This has obvious implications for electric system reliability as well: natural gas power plants (either existing or new) can be readily deployed to provide power and therefore solve reliability issues. But these solutions cannot be readily identified if the compliance plans of owner/operators of units to be shuttered are not made readily available.

IV. Conclusion.

To ensure FERC meets its obligations for safeguarding the reliability of the interstate power system, FERC should issue an order (or orders) to require (1) early planning by owner/operators of units impacted by the MATS, (2) the timely sharing of information with state regulators and the public, and (3) a meaningful opportunity for states and the public to provide comments so that reliability crises can be avoided. Most of the information that is needed is discussed in EPA’s Policy Memorandum; however, the process needs to be revamped to require timelier planning and transparency so that solutions can be better identified and implemented.

Sincerely,



Gregory C. Staple
Chief Executive Officer, ACSF

¹¹ See http://www.cleanskies.org/wp-content/uploads/2011/08/EPA-8_4_2011-filing-re-MACT.pdf, where additional supporting information is provided.