October 28, 2011

APPA Position on Extending MACT Compliance Deadlines

Summary of APPA Comments

- Seeks 77 months (over 6 years) to comply, primarily for the installation of controls (about 20% plan to use FGDs, 20% SCRs and one-half to use new fabric filters).
- Agrees with EEI's basic arguments for more time and also argues that public power faces unique challenges with timely implementation.
- Asks for 1-year extension and also asks EPA to consider presidential authority to issue longer exemptions (the latter is merely mentioned and not developed).
- Specifically, asks for a "categorical extension" in the final rule for publicly-owned or governmental facilities "based on time-constrained feasibility" due to issues unique to public power: local and state law hurdles re: city council and board of directors approval, bidding procedures, inability to compete with larger utilities for access to vendors and contractors. Ties argument to Executive Order No. 13563 (EPA should have looked to regulatory options to consider flexible, lower-cost approaches to implement rules) and the unfunded mandates law to support its position.
- APPA agrees with EEI that use of EPA's section 113 enforcement procedures is inappropriate and too uncertain.
- APPA's specific mechanism for granting the 77 months, in addition to the 1-year categorical exemption for public power, is for EPA to use existing procedures in the title V operating permit program to modify permits to allow more time. APPA argues that "streamlined compliance schedules should be provided to public power (and other entities) that can demonstrate need for additional time" in units' title V operating permits. CAA title V requires state permitting authorities to put in one place all CAA requirements applicable to a single source and allows permitting authorities to make "minor modifications" to permits without requiring wholesale revision of the permit, in certain circumstances.
- APPA asks EPA in the final rule to allow modification of MACT compliance schedules through "minor permit modifications" as per the procedures included in the title V federal operating permits' implementing regulations. APPA believes EPA can do this if it deems all extensions to be "minor permit modifications" in the final rule. Units would then submit an application for any needed modification/extension to the compliance deadline on a case-by-case basis.

Issues Raised by APPA's Approach

- APPA assumes a permitting agency exercising authority under title V can extend the statutory deadlines in the MACT portion of the CAA without relying upon the specific criteria and timelines in that provision. However, EPA's regulations implementing title V clearly state that "minor permit modifications may be used only for those permit modifications that (1) Do not violate any applicable requirement." 40 C.F.R. § 70.7(e)(2).

The title V permitting extension APPA proposes would exceed the MACT statutory deadlines, rendering the "minor permit modification" process inapplicable.

- More importantly, even if title V permits extended compliance deadlines, this approach is not likely to shield units from enforcement under CAA section 113 or citizen suits under section 304 because units would still be exceeding the MACT deadlines.
    - In promulgating the title V implementing regulations in 1990, EPA explicitly noted that "compliance schedules" provided in title V operating permits cannot cure violations or protect against enforcement: "It should be noted that adoption of compliance plans and the ensuing schedules of compliance do not protect a source from enforcement action or penalty assessment for existing or previous violations of the applicable requirements." 56 *Fed. Reg*. at 21,734 (May 10, 1991).
- Extensive case law holds that where Congress explicitly enumerates certain exemptions to a specific statutory requirement, additional exemptions are not to be implied in the absence of contrary legislative intent. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19 (2001). The CAA explicitly provides a deadline for MACT compliance and created two tools to extend this deadline where needed. Title V is not one of these tools.