

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AIR ENFORCEMENT DIVISION, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE
BEFORE THE ADMINISTRATOR

In the Matter of:

Board of Public Utilities of the Unified
Government of Wyandotte County/Kansas City,
Kansas,

Respondent.

Administrative Compliance Order on Consent
AED-CAA-113(a)-2016-0001

ADMINISTRATIVE COMPLIANCE ORDER

A. PRELIMINARY STATEMENT

1. This Administrative Compliance Order (“Order”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 113(a) of the Clean Air Act (“CAA” or the “Act”), 42 U.S.C. § 7413(a)(3) and (4).
2. On the EPA’s behalf, Phillip A. Brooks, Division Director of the Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, is delegated the authority to issue this Order under Section 113(a) of the Act.
3. Respondent is the Kansas City Board of Public Utilities Unified Government of Wyandotte County/Kansas City, Kansas, an administrative agency of the Unified Government of Wyandotte County/Kansas City, Kansas (“BPU”). Respondent is a “person” as defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e). Respondent owns and/or operates Nearman Creek Power Station (hereafter, the “Facility”), located in the state of Kansas.
4. Respondent signs this Order on consent.

B. STATUTORY AND REGULATORY BACKGROUND

5. Section 112 of the CAA, 42 U.S.C. § 7412, authorizes the Administrator of EPA to regulate hazardous air pollutants (“HAPs”) which may have an adverse effect on health or the environment.
6. Pursuant to Section 112 of the CAA, the EPA finalized National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Subpart UUUUU on December 16, 2011, 77 FR 9304 (Feb. 16, 2012) (40 C.F.R. Part 63 Subpart UUUUU), commonly known as the “Mercury and Air Toxics Standards.” *Id.* (hereafter, “MATS”). The MATS adopt emission limits on mercury, acid gases and other toxic pollutants for affected coal and oil-fired electric utility generating units (“EGUs”).
7. Pursuant to 40 C.F.R. § 63.9981, the MATS applies to owners or operators of coal-fired EGUs or oil-fired EGUs as defined in 40 C.F.R. § 63.10042.
8. Pursuant to 40 C.F.R. § 63.2, “owner or operator” is defined as “any person who owns, leases, operates, controls, or supervises a stationary source.”
9. Section 111(a)(3) of the Act, 42 U.S.C. § 7411(a)(3), and 40 C.F.R. § 63.2 defines a “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant.”
10. Pursuant to 40 C.F.R. § 63.2, “affected source” is defined as “the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a Section 112(c) source category or subcategory for which a Section 112(d) standard or other relevant standard is established pursuant to Section 112 of the Act.”
11. Pursuant to 40 C.F.R. § 63.9982, the affected source to which the provisions of the MATS, 40 C.F.R. Part 63, Subpart UUUUU, applies is the “collection of all existing coal- or oil-fired EGUs, as

defined in 40 C.F.R. § 63.10042, within a subcategory, [and] ... each new or reconstructed coal- or oil-fired EGU, as defined in 40 C.F.R. § 63.10042.”

12. On December 16, 2011, in parallel with finalizing the MATS, the Office of Enforcement and Compliance Assurance issued a policy memorandum describing its intended approach regarding issuance of Section 113(a) administrative orders (“Orders”) to sources that are unable to comply with the MATS but that may need to operate for up to a year to address a specific and documented reliability concern. *See* 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 (hereafter, “2011 MATS Enforcement Policy”). The 2011 MATS Enforcement Policy is limited in application to units that are critical for reliability purposes.
13. In issuing the 2011 MATS Enforcement Policy, the EPA believed that there would be few, if any, cases in which affected sources would not 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)), which has proven to be the case. Nonetheless, the EPA acknowledged 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 could not be timely predicted or planned for with specificity. 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. Thus, although the EPA generally does not speak publicly to the intended scope of its enforcement efforts in advance of the date when a violation may occur, the Agency issued the 2011 MATS Enforcement Policy to describe the EPA’s intended enforcement response in such instances and to provide confidence

with respect to electric reliability. The policy is informed, as are EPA's 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.

14. The 2011 MATS Enforcement Policy specifies that to qualify for an Order in connection with it, an owner/operator must, in summary, provide early written notice of its compliance plans to the Planning Authority¹ for the area in which the source is located, timely request an Order and provide notice of such request to the EPA, FERC, its Planning Authority, any state public utility or service commission, and any state, tribal or local environmental agencies, with jurisdiction over the area in which the EGU is located, and submit a complete request for an Order.
15. A complete request pursuant to the 2011 MATS Enforcement Policy must include the following elements: copies of the early notice provided to the Planning Authority; written analysis of the reliability risk, which demonstrates that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability; written concurrence with the reliability analysis by the relevant Planning Authority (or a written explanation of why such concurrence cannot be provided); copies of any written comments received from third parties in favor of, or opposed to, operation of the unit after the MATS Compliance Date; a plan to achieve compliance with the MATS no later than one year after the MATS Compliance Date; and identification of the level of operation required to avoid the reliability risk and proposed operational limits and/or work practices to minimize or mitigate emissions to the extent practicable during non-compliant operation.

¹ Planning Authorities are the entities tasked, under NERC reliability standards, with addressing electric reliability through grid planning. In the 2011 MATS Enforcement Policy, Planning Authority was defined as "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."

16. With respect to the demonstration of reliability risk, the 2011 MATS Enforcement Policy states that the analysis provided in an Order request 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 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.
17. Although the EPA's issuance of an Order is not conditioned upon the approval or concurrence of any entity, in light of the complexity of the electric system and the local nature of many reliability issues, for purposes of using its Section 113(a) Order authority in connection with the 2011 MATS Enforcement Policy, the EPA has sought advice in the identification and/or analysis of reliability risks, as necessary and on a case-by-case basis from reliability experts, including, but not limited to, the Federal Energy Regulatory Commission ("FERC"), Regional Transmission Operators ("RTOs"), Independent System Operators and other Planning Authorities, as EPA indicated it would do in the 2011 MATS Enforcement Policy.
18. The 2011 MATS Enforcement Policy specifically stated that an owner/operator interested in receiving a Section 113(a) administrative order pursuant to the policy should provide FERC with a copy of its complete and timely written request to the EPA.
19. On May 17, 2012, FERC issued a policy statement explaining how it intended to provide advice to the EPA on requests for an administrative order pursuant to the 2011 MATS Enforcement Policy. *See* Policy Statement of the Commission's Role Regarding the Environmental Protection Agency's Mercury and Air Toxics Standards, 139 FERC ¶ 61,131 (2012) ("FERC Policy Statement"). The FERC Policy Statement provided that the Commission will advise the EPA by submitting written Commission comments to the EPA based on the Commission's review of the

information provided in an informational filing containing the copy of the request for the administrative order provided to the Commission in an AD docket. *Id.* at Paragraph 21. Further, the FERC Policy Statement indicated that the Commission's comments would provide advice to the EPA on whether, based on the Commission's review of the informational filing, there might be a violation of a Commission-approved Reliability Standard, and may also identify issues within its jurisdiction other than a potential violation of a Commission-approved Reliability Standard. *Id.*

C. FINDINGS

20. Respondent owns and/or operates an existing coal-fired electric utility steam generating unit, as defined in 40 C.F.R. § 63.10042.
21. Respondent's operation at the Facility is subject to the MATS.
22. On November 27, 2012 Respondent received a one year extension pursuant to 40 C.F.R. 63.6(i)(4)(i)(A) from its permitting authority, the Kansas Department of Health and Environment, extending the date by which it must comply with the MATS to April 16, 2016. *See* November 27, 2012 Letter from John W. Mitchell, Kansas Department of Health and Environment to Kansas City Board of Public Utilities.
23. On August 19, 2014, Respondent submitted a timely and complete request for an Order pursuant to the 2011 MATS Enforcement Policy to the EPA, with a copy to FERC. That request can be found in the FERC AD docket, AD14-16-000 (hereafter "Order Request").
24. Pursuant to the Order Request, Respondent seeks an Order from April 16, 2016 to October 15, 2016, on grounds that it will not be able to comply with the MATS at Nearman 1 (Source ID No.: 2090008) of the Facility without potentially operating in noncompliance with the MATS or halting operations and thereby potentially impacting electric reliability because it has been delayed in installing the following air quality controls at Nearman 1: a powdered activated

carbon system for controlling mercury, a circulating dry scrubber system for controlling acid gasses/sulfur dioxide, a fabric filter for controlling particulate matter, and a selective catalytic reduction system for controlling nitrogen oxide (although the latter technology is not required to meet the MATS compliance, it is being installed simultaneously with the other technologies and does not affect the overall schedule). *See id.*

25. More specifically, the Order Request states that the loss of Nearman 1 in 2016 will result in BPU not having sufficient capacity to meet SPP's reserve requirements. *Id.* at 8.
26. In its Order Request, Respondent notes that while "SPP has not found any system-wide reliability risk under the NERC criteria standards should Nearman 1 not operate during the 2016 summer peak season," *id.* at 7, "SPP does project, however, that without Nearman in 2016, [Respondent] will not have sufficient capacity to meet reserve capacity requirements," *id.* at 8 n. 4.
27. FERC reviewed the reliability risk presented in the request in accordance with the FERC Policy Statement and on November 20, 2014 found that "the loss of the Nearman 1 unit would result in BPU falling below the 12 percent capacity reserve requirement stipulated in SPP Criteria 2.1.9 unless BPU is able to procure replacement energy for the unit," and "[a]bsent a significant change in future circumstances, [FERC's] view is that the Nearman 1 unit is needed as requested by BPU to maintain electric reliability." *See Commission Comments On Kansas City Board Of Public Utilities' Request For EPA Administrative Order (November 20, 2014) at Paragraph 7, Docket No. AD14-16-000.* "In fact, calculations indicate that BPU's resources in 2016 without Nearman 1 will be below its projected load, let alone its reserve margin." *Id.* at n. 8. Additionally, FERC notes that "the reliability of the Bulk-Power System depends in part on whether utilities meet an appropriate planning reserve margin." *Id.*
28. Respondent proposes to minimize emissions by limiting the operation of Nearman 1 to one-

third its total annual electric output for the six month period from April 16, 2016 through October 15, 2016. See Order Request at 1-2 and 5 and at Attachment B, Paragraph 6. During this time period, Respondent will pursue a construction schedule at Nearman 1 to tie in the needed controls for MATS compliance prior to resuming normal generation at the unit. *Id.* at Attachment B, Paragraph 6.

D. ORDER

29. Respondent is ordered to take the actions described in this section of this Order.
30. Between April 16, 2016 and October 15, 2016, Respondent shall limit the operation of Nearman 1 to a total of 623 GWH, which is equal to one-third of its potential annual electric output, and pursue a construction schedule at Nearman 1 to construct and tie in the needed air pollution controls for MATS compliance prior to resuming normal generation at the unit, except that if a grid or system emergency condition is declared during which Southwest Power Pool requires Nearman 1 to run, then electricity generated during such a period would not count toward the aforementioned 623 GWH.
31. By 11:59 pm October 15, 2016, Respondent shall achieve full compliance with the MATS at Nearman 1 at the Facility. In accordance with 40 C.F.R. § 63.9984(f), Respondent shall demonstrate that compliance has been achieved by conducting the required performance tests and other activities required under the MATS no later than 180 days after October 15, 2016.
32. Within 30 days of completion of the performance tests, achieving full compliance with the MATS at the Facility, Respondent shall provide written notice to the EPA indicating that the compliance tests have been performed, pursuant to the process specified in paragraph 39 of this Order.

D. OTHER TERMS AND CONDITIONS

33. Respondent admits the jurisdictional allegations contained in Sections A (Preliminary Statement) and B (Statutory and Regulatory Background) of this Order.
34. Respondent neither admits nor denies the findings in Section C (Findings) of this Order.

E. GENERAL PROVISIONS

35. Any violation of this Order may result in a civil administrative or judicial action for an injunction or civil penalties of up to \$37,500 per day per violation, or both, as provided in Sections 113(b)(2) and 113(d)(1) of the Act, 42 U.S.C. §§ 7413(b)(2) and 7413(d)(1), as well as criminal sanctions as provided in Section 113(c) of the Act, 42 U.S.C. § 7413(c). The EPA may use any information submitted under this Order in an administrative, civil judicial, or criminal action.
36. Nothing in this Order shall relieve Respondent of the duty of achieving and maintaining compliance with all applicable provisions of the Act or other federal, state or local laws or statutes, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
37. Nothing herein shall be construed to limit the power of the EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.
38. The provisions of this Order shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns. From the Effective Date of this Order until the Termination Date as set out in paragraph 44 below, Respondent must give written notice and a copy of this Order to any successors in interest prior to any transfer of ownership or control of any portion of or interest in the Facility. Simultaneously with such notice, Respondent shall provide written notice of such transfer,

assignment, or delegation to the EPA. In the event of any such transfer, assignment, or delegation, Respondent shall not be released from the obligations or liabilities of this Order unless the EPA has provided written approval of the release of said obligations or liabilities.

39. Unless this Order states otherwise, whenever, under the terms of this Order, written notice or other documentation is required to be given, it shall be directed to the individuals specified at the addresses below unless those individuals or their successors give notice of a change of address to the other party in writing:

Phillip A. Brooks
Division Director of the Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, US Environmental Protection Agency
Mail Code 2242A, Room 1119
1200 Pennsylvania Ave, NW
Washington, DC 20460 mail or 20004 courier (note Room 1119 on courier packages)

Ward A. Burns, P.E.
Air Permitting and Compliance Branch
EPA Region 7
11201 Renner Boulevard
Lenexa KS 66219
Phone: (913) 551-7960
burns.ward@epa.gov

Parthenia B. Evans
Stinson Leonard Street
1201 Walnut, Ste. 2900
Kansas City, MO 64106
Phone: (816) 691-3127
Parthy.Evans@stinson.com

Don L. Gray
General Manager
Kansas City Board of Public Utilities
540 Minnesota Avenue
Kansas City, Kansas 66101
DGray@bpu.com

All notices and submissions shall be considered effective upon receipt.

40. To the extent this Order requires Respondent to submit any information to the EPA, Respondent may assert a business confidentiality claim covering part or all of that information, but only to

the extent and only in the manner described in 40 C.F.R. Part 2, Subpart B. The EPA will disclose information submitted under a confidentiality claim only as provided in 40 C.F.R. Part 2, Subpart B. If Respondent does not assert a confidentiality claim, the EPA may make the submitted information available to the public without further notice to Respondent.

41. Each undersigned representative of the Parties certifies that he or she is authorized to enter into the terms and conditions of this Order to execute and bind legally the Parties to this document.

F. EFFECTIVE DATE AND OPPORTUNITY FOR A CONFERENCE

42. Pursuant to Section 113(a)(4) of the Act, an Order does not take effect until the person to whom it has been issued has had an opportunity to confer with the EPA concerning the alleged violations. By signing this Order, Respondent acknowledges and agrees that it has been provided an opportunity to confer with the EPA prior to issuance of this Order. Accordingly, this Order will take effect immediately upon signature by the latter of Respondent or the EPA.

G. JUDICIAL REVIEW

43. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including any right of judicial review under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

H. TERMINATION

44. This Order shall terminate on the earlier of the following (the "Termination Date") at which point Respondent shall operate in compliance with the Act:
- a. By 11:59 pm October 15, 2016;
 - b. The effective date of any determination by the EPA that Respondent has achieved compliance with all terms of this Order; or

- c. Immediately upon receipt by Respondent of notice from the EPA finding that an imminent and substantial endangerment to public health, welfare, or the environment has occurred.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AIR ENFORCEMENT DIVISION, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE
BEFORE THE ADMINISTRATOR

In the Matter of:

Board of Public Utilities of the Unified
Government of Wyandotte County/Kansas City,
Kansas,

Respondent.

Administrative Compliance Order on Consent
AED-CAA-113(a)-2016-0001

For United States Environmental Protection Agency, Air Enforcement Division, Office of Enforcement and Compliance Assurance:

4/16/2016

Date


Phillip A. Brooks
Division Director of the Air Enforcement Division, Office of Civil
Enforcement, Office of Enforcement and Compliance Assurance,
US Environmental Protection Agency
Mail Code 2242A, Room 1119
1200 Pennsylvania Ave, NW
Washington, DC 20460 mail or 20004 courier (note Room 1119
on courier packages)

For Board of Public Utilities of the Unified Government of Wyandotte County/Kansas City, Kansas:


Signature

4-6-16
Date

Printed Name: Don L. Gray
Title: General Manager
Address: Kansas City Board of Public Utilities
540 Minnesota Avenue
Kansas City, Kansas 66101
DGray@bpu.com

CERTIFICATE OF SERVICE

I certify that the foregoing "Administrative Compliance Order" in the Matter of Board of Public Utilities of the Unified Government of Wyandotte County/Kansas City, Kansas, Order AED-CAA-113(a)-2016-0001, was filed and copies of the same were mailed to the parties as indicated below.

Certified Mail

Parthenia B. Evans
Stinson Leonard Street
1201 Walnut, Ste. 2900
Kansas City, MO 64106
Phone: (816) 691-3127
Parthy.Evans@stinson.com

Don L. Gray
General Manager
Kansas City Board of Public Utilities
540 Minnesota Avenue
Kansas City, Kansas 66101
DGray@bpu.com

Mr. John Mitchell
Director, Division of Environment, Kansas Department of Health and Environment
1000 SW Jackson, Suite 400
Topeka, KS 66612-1367

4/18/16
Date

A large black rectangular redaction box covers the signature area of Tawanna Cathey.

Tawanna Cathey

A handwritten signature in black ink, appearing to be "Tawanna Cathey", is written over the redacted area.