



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R09-OAR-2013-0489; FRL-9901-58-Region 9]

Source Specific Federal Implementation Plan for Implementing Best Available Retrofit Technology for Four Corners Power Plant; Navajo Nation; Extension of Notification Deadline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On August 24, 2012, EPA promulgated a Federal Implementation Plan (FIP) to implement the Best Available Retrofit Technology (BART) requirement of the Regional Haze Rule for the Four Corners Power Plant (FCPP), which is located on the Navajo Nation Indian Reservation. Included in the FIP was a requirement that by July 1, 2013, Arizona Public Service (APS), co-owner and operator of FCPP must notify EPA of its selected BART compliance strategy. On June 19, 2013, APS requested that EPA extend the notification date from July 1 to December 31, 2013, due to new uncertainties related to the potential deregulation of the retail electricity market in Arizona that complicate its decision for selecting a BART compliance option. In response to this request, on July 11, 2013, EPA proposed to extend the notification date, from July 1, 2013 to December 31, 2013. EPA did not receive any comments during the 30-day public

comment period for the proposed action. EPA received one comment that was emailed to EPA on August 13, 2013, one day after the close of the comment period. We are providing a response to the late comment, however the information in the late comment did not change the basis or justification for our proposal to extend the notification date. Therefore, EPA is taking final action to extend the notification date in the FIP from July 1, 2013 to December 31, 2013.

DATES: This rule is effective on [*insert date 30 days from publication in the Federal Register*].

ADDRESSES: EPA established a docket for this action at EPA-R09-OAR-2013-0489. Generally, documents in the docket are available electronically at www.regulations.gov or in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While documents in the docket are listed in the index, some information may be publicly available only at EPA Region 9 (e.g., maps, voluminous reports, copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact person listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Anita Lee, EPA Region 9, (415) 972-3958, r9_airplanning@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, "we", "us", and "our" refer to EPA.

Table of Contents

I. Background

II. Summary of EPA Action and Response to Late Comment

III. Statutory and Executive Order Reviews

I. Background

FCPP is a privately owned and operated coal-fired power plant located on the Navajo Nation Indian Reservation near Farmington, New Mexico. Based on lease agreements signed in 1960, FCPP was constructed and has been operating on real property held in trust by the Federal government for the Navajo Nation. The facility consists of five coal-fired electric utility steam generating units with a total capacity of 2060 megawatts (MW). Units 1, 2, and 3 at FCPP are owned entirely by APS, which serves as the facility operator, and are rated to 170 MW (Units 1 and 2) and 220 MW (Unit 3). Units 4 and 5 are each rated to a capacity of 750 MW, and are co-owned by six entities: Southern California Edison (48 percent), APS (15 percent), Public Service Company of New Mexico (13 percent), Salt River Project (10 percent), El Paso Electric Company (7 percent), and Tucson Electric Power (7 percent).

On August 24, 2012, EPA promulgated a FIP that established limits for emissions of oxides of nitrogen (NO_x) from FCPP under the BART provision of the Regional Haze Rule (77 FR 51620). The final FIP required the owners of FCPP to implement one of two strategies for BART compliance: (1) compliance with a facility-wide BART emission limit for NO_x of 0.11 pounds per million British Thermal Units of heat input (lb/MMBtu) by October 23, 2017, or (2) retirement of Units 1, 2, and 3 by January 1, 2014, and compliance with a BART emission limit for NO_x of 0.098 lb/MMBtu on Units 4 and 5 by July 1, 2018. The second BART compliance strategy, involving retirement of Units 1, 2, and 3, was based on a broader plan put forth by APS that also called for APS to purchase Southern California Edison's 48 percent ownership interest in Units 4 and 5 at FCPP. This compliance strategy was proposed and finalized in the FIP as an alternative emission control strategy that achieved greater reasonable progress than BART. For additional information regarding EPA's analyses regarding BART and the alternative emission control strategy, see EPA's BART proposal (75 FR 64221, October 29, 2010), supplemental proposal (76 FR 10530, February 25, 2011) and final rule (77 FR 51620, August 24, 2012).

As discussed in our supplemental proposal published on February 25, 2011, APS' choice to retire Units 1, 2, and 3, and comply with BART emission limits on Units 4 and 5 was contingent

on the resolution of several issues. These issues included a renewed site lease with the Navajo Nation, a renewed coal contract, and regulatory approvals from the Arizona Corporation Commission (ACC), California Public Utilities Commission (CPUC), and Federal Energy Regulatory Commission (FERC) for APS to purchase the 48 percent interest of Units 4 and 5 currently owned by Southern California Edison (SCE). Because the regulatory approvals, renewed site lease, and renewed coal contract were expected to require significant time and effort by APS, other owners, and the Navajo Nation, EPA's final FIP included requirements for APS to (1) update EPA by January 1, 2013, on the status of lease negotiations and regulatory approvals, and (2) notify EPA, by July 1, 2013, of the BART strategy APS would elect to implement, including a plan and schedule for compliance with its chosen strategy.¹

On December 31, 2012, APS provided an update to EPA regarding the status of the approvals required for implementing the alternative emission control strategy.² APS stated that on March 7, 2011, APS and the Navajo Nation executed an agreement to extend the lease for FCPP to July 6, 2041. The lease renewal must be reviewed and approved by the U.S. Bureau of Indian

¹ See 40 CFR 49.5512(i)(4).

² See Letter from Susan Kidd, Director Environmental Policies and Programs, Arizona Public Service, to Jared Blumenfeld, Regional Administrator, EPA Region 9, dated December 31, 2012.

Affairs, which triggers review under the National Environmental Policy Act (NEPA), and other related reviews, including under Section 7 of the Endangered Species Act. NEPA review is underway and is expected to conclude in time to allow for a Record of Decision by January 2015. EPA is a cooperating agency in the NEPA process. In its December 31, 2012 update letter, APS also stated that it is in ongoing negotiation for a new coal supply agreement with its coal supplier. Finally, APS confirmed that it had obtained regulatory approvals to purchase SCE's 48 percent interest of Units 4 and 5.³

However, in a letter dated June 19, 2013, APS requested that EPA extend the date by which APS must provide notification of its BART implementation strategy for FCPP.⁴ APS explained that it had previously expected to meet the July 1, 2013 notification date because it had completed the processes to obtain regulatory approvals to purchase SCE's shares of Units 4 and 5, and renewal of the lease and coal contract were underway. Then, unexpectedly, in May 2013, the ACC voted to re-examine

³ APS received approval from the ACC on April 24, 2012; from FERC on November 27, 2012; and from the Department of Justice / Federal Trade Commission on July 2, 2012. As discussed in our final rulemaking dated August 24, 2012, EPA already understood that the CPUC approved the sale of SCE's shares of Units 4 and 5 at FCPP to APS on March 22, 2012.

⁴ See letter from Ann Becker, Vice President, Environmental and Chief Sustainability Officer, Arizona Public Service, to Jared Blumenfeld, Regional Administrator, EPA Region 9, dated June 19, 2013.

deregulation of the retail electric market in Arizona.⁵ In its June 19, 2013 letter, APS explains that, depending on its structure and reach, a deregulated retail electric market could significantly change the BART compliance strategy for FCPP. Thus, APS stated that it would no longer be able to make an informed decision regarding the BART option by July 1, 2013. APS stated that its decision concerning a selected compliance strategy requires more certainty regarding the likelihood of deregulation in Arizona. APS also filed a Form 8-K with the United States Securities and Exchange Commission disclosing the uncertainty caused by the ACC decision to examine deregulation.⁶

APS has requested that EPA extend the notification date for its selection of the BART compliance strategy to December 31, 2013. APS noted that the potential for deregulation of the retail electric market in Arizona was not foreseen at the time of our final rulemaking in 2012. APS also noted that extending the notification date by six months will not affect public health or the environment because the BART compliance dates, in 2017 or 2018, depending on the compliance strategy selected, are not linked to the notification date and remain unchanged.

⁵ <http://www.azcc.gov/Divisions/Administration/About/Letters/5-23-13%20Retail%20Competition%2013-0135.pdf>

⁶ Form 8-K was appended to the June 19, 2013 letter from Ann Becker to Jared Blumenfeld.

On July 11, 2013, EPA proposed to revise the notification date provision in the existing source-specific federal implementation plan for FCPP, codified at 40 CFR 49.5512(i)(4), to extend the date by which the owner or operator of FCPP must notify EPA of its selected BART compliance strategy from July 1, 2013 to December 31, 2013 (78 FR 41731). EPA's proposal included a proposed determination that an extended notification date was necessary to provide APS with the needed flexibility in determining whether to implement BART or the alternative emission control strategy to reduce FCPP's NO_x emissions by 80 - 87 percent. Additionally the proposed extension would not interfere with attainment, reasonable further progress, or any other requirement of the CAA because the proposed notification date extension does not change the compliance dates associated with BART or the alternative emission control strategy. The public comment period for the proposed action closed on August 12, 2013. EPA did not receive any comments on the proposed action during the public comment period. On August 13, 2013, a comment letter dated August 12, 2013, was sent to EPA via electronic mail. Although our proposal stated that comments "must be postmarked no later than August 12, 2013," EPA is responding to the late comment in this final rulemaking. Because the comment does not change our basis or justification for our

proposal to extend the notification date, EPA is finalizing our proposed action.

II. Summary of EPA Action and Response to Late Comment

EPA is taking final action to extend the date by which the owner or operator of FCPP must notify EPA of its selected BART compliance strategy, from July 1, 2013 to December 31, 2013. This final action revises one provision in the existing source-specific FIP for FCPP, codified at 40 CFR 49.5512(i)(4). The notification date was not a substantive requirement of our BART determination, nor was it a requirement related to the emission limit constituting BART or the timeframe for BART compliance, as defined in the CAA or the Regional Haze Rule. EPA notes that the FIP continues to require FCPP to meet the emission limits required under BART or the alternative emission control strategy by the compliance dates specified in our final rulemaking, codified at 40 CFR 49.5512(i)(2) and (3), regardless of the extension of the notification date in (i)(4).

On August 13, 2013, EPA received one late comment via electronic mail on our proposed notification date extension. The comment was submitted by the Law Office of John M. Barth on behalf of the San Juan Citizens Alliance (SJCA). SJCA provided four reasons for contending that the request for an extension of the notification date was "not reasonable."

First, SJCA contends that APS's request for an extension is not reasonable because APS "knew or should have known" the ACC might consider deregulation in the future, but failed to identify it as a factor that could influence its choice between BART and the alternative to BART. It appears that SJCA is arguing that APS cannot base its request for a notification date extension on the potential for deregulation because APS should have foreseen, but did not identify, deregulation as an important factor in its decision. EPA disagrees. In our final action in August 2012 that, among other things, established the notification date, EPA had determined that APS had adequately justified its requested notification date of July 1, 2013 based on when it anticipated receiving approvals, from the ACC, the California Public Utilities Commission, and the Federal Energy Regulatory Commissions, to purchase SCE's share of Units 4 and 5 at FCPP, a key prerequisite for implementing the Alternative to BART. SJCA submitted comments on the proposed action and did not raise the ACC's potential consideration of deregulation as a basis for not finalizing the July 1, 2013 notification date. SJCA has not provided any reason that APS may not raise the ACC's consideration of deregulation now as a justification for the notification date extension. The mere fact that deregulation may have arisen in the future, but was not identified as a potential issue, does not stop APS from relying on this event as

a reasonable basis to request an extension of the notification date now. In any event, SJCA has not provided any explanation for how it or the public will be harmed if EPA extends the notification date. APS is still required to comply with BART or the alternative emission control strategy by the dates in our August 2012 final rule.

Second, SJCA asserts that APS's request for the extension, by letter dated June 19, 2013, was untimely because the ACC discussed potential deregulation on May 9, 2013 and advised APS of this action on May 23, 2013. SJCA does not provide any explanation about how this brief delay in requesting an extension of the compliance date makes APS's request unreasonable. As noted above, APS has not requested, and EPA has not proposed, to extend the actual compliance dates for BART or the Alternative to BART. SJCA has not claimed that extension of the notification date to December 31, 2013, results in any harm to its members or the public. In any event, the brief time that elapsed before APS submitted a request to EPA for an extension of the notification date was not unreasonable.

Third, SJCA argues that the ACC is only conducting an information gathering proceeding concerning deregulation and such a proceeding is not adequate to justify extending the notification date. Again, EPA disagrees with the commenter. APS requested a modest extension of the notification date based on

the current uncertainty regarding the ACC's consideration of deregulation and the potential for a deregulated electric market to influence APS's decisions related to FCPP. None of the information SJCA submitted is sufficient to allow EPA to determine that the ACC's proceeding to receive and consider comments on deregulation is not a reasonable justification for extending the notification date. SJCA has not provided any facts showing that the potential for deregulation would not affect APS's decisions related to FCPP or that it or any other member of the public is harmed by the notification date extension. As noted above, EPA is not extending the dates on which APS must demonstrate FCPP is in compliance with the BART emissions limit or the alternative emission control strategy.

Finally, SJCA states that it is unreasonable to extend the notification date to December 31, 2013 and that October 31, 2013 should be sufficient. EPA disagrees. SJCA has not demonstrated that a six-month extension for APS to provide notification is not reasonable. In fact, Exhibit 2 to the SJCA comment letter highlights the uncertainty of the timing of the ACC's examination of deregulation. Exhibit 2 shows that, as of July 1, 2013, the ACC's timeline for examining deregulation was "tentative," and the understanding of Commissioner Robert L. Burns was "that the goal is to address the issue at a September

or October Open Meeting.”⁷ Thus, Exhibit 2 does not provide enough certainty in the timing of ACC’s review and consideration of comments on deregulation to indicate that a notification date of October 31, 2013 would be sufficient or more reasonable than December 31, 2013. SJCA has also failed to provide any reason that it or any other member of the public will be harmed from the extension of the notification date. APS is required to continue to comply with the dates it will come into compliance with BART or the alternative.

In summary, the four points raised by SJCA in its late comment do not provide sufficient information for EPA to change its proposal to extend APS’s BART notification date from July 1, 2013 to December 31, 2013. EPA is finalizing its proposal, and APS is required to notify EPA on December 31, 2013, whether FCPP will install and operate emissions controls to meet the BART limitation for Units 1 - 5 in 2017, or implement the alternative emissions control strategy by closing Units 1, 2 and 3 in January 2014 and installing controls to meet a NO_x emission limit of 0.098 lb/MMBtu on Units 4 and 5 in July 2018.

⁷ Exhibit 2 to the SJCA Comment Letter was a letter dated July 1, 2013 from Robert L. Burns, Arizona Corporation Commission, to President Ben Shelly and Speaker Johnny Naize, Navajo Nation, in response to a letter from President Shelly and Speaker Naize, dated June 24, 2013, expressing concern related to the decision of the ACC to reexamine deregulation in Arizona.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563

This action extends the date for a single source to notify EPA regarding its decision to implement BART or an alternative emission control strategy. This type of action for a single source is exempt from review under Executive Orders (EO) 12866 (58 FR 51735, October 4, 1993) and EO 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). Because the action merely extends a notification date, it does not impose an information collection burden and the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final action on small entities, I certify that this final action will not have a significant economic impact on a substantial number of small entities. The owners of FCPP are not small entities, and the extended notification date was requested by the operator and co-owner of FCPP. See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

D. Unfunded Mandates Reform Act (UMRA)

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to

provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This final rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule merely extends a notification date in an existing federal implementation plan for FCPP by six months. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This final rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule does not impose regulatory requirements on any government entity.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or in the distribution of power and responsibilities among the

various levels of government, as specified in Executive Order 13132. This action extends a notification date by six months. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this final rule may have tribal implications because FCPP is located on the Navajo Nation Indian Reservation. However, the rule will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

EPA consulted with tribal officials early in the process of developing the BART regulations that were finalized on August 24, 2012, for FCPP to permit them to have meaningful and timely input into its development. During the comment period for prior EPA actions related to the EPA's BART FIP for FCPP, the Navajo

Nation raised concerns to EPA about the potential economic impacts of our BART determination on the Navajo Nation. EPA consulted the Navajo Nation regarding those concerns. Additional details of our consultation with the Navajo Nation are provided in sections III.H and IV.F of our final rulemaking published on August 24, 2012 (77 FR 51620). EPA notified the Navajo Nation Environmental Protection Agency regarding the request from APS to extend the notification date on June 25, 2013. EPA did not receive a request from the Navajo Nation to consult on this six-month extension of the notification date for FCPP.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This action addresses a notification date required for regional haze and visibility protection.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is exempt under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub L. No. 104-113, 12 (10) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by the VCS bodies. The NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when the Agency decides not to use available and applicable VCS.

This final rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental

justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final rule does not change any applicable emission limit for FCPP nor does it extend the compliance deadline under BART or the Alternative to BART. This final rule merely extends the date, by six months, by which the operator of FCPP must notify EPA of its elected compliance strategy.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules (1) rules of particular applicability; (2) rules relating to agency

management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's final action under section 801 because this is a rule of particular applicability and only applies to one facility, the Four Corner Power Plant.

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by ***[insert date 60 days from the effective date of this final rule]***. Filing a petition for reconsideration by the administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 49

Environmental protection, Air pollution control, Indians, Intergovernmental relations, Nitrogen Dioxide.

(i) (2) of this section or whether it will comply with paragraph (i) (3) of this section and shall submit a plan and time table for compliance with either paragraph (i) (2) or (3) of this section. The owner or operator shall amend and submit this amended plan to the Regional Administrator as changes occur.

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