

## MEMORANDUM

**DATE:** Sept. 15, 2008

**TO:** MWAQC

**FROM:** Joan Rohlf, Chief, Air Quality Planning

**SUBJECT:** CAIR Vacatur on Washington Region's Ozone and PM2.5 SIPs : Effect on SIPs and Proposed Action

### Background

In July the D.C. Circuit Court vacated EPA's Clean Air Interstate Rule (CAIR), a rule that contributed to 28 states and the District's ability to meet the PM2.5 standard by the 2009 deadline. The CAIR rule which was adopted by many states, including Virginia and the District, established regional caps on NOx and SO<sub>2</sub> emissions from power plants by 2009 and 2010, and allowed trading of emissions credits.

EPA officials have not publically discussed their response or whether they plan to appeal the vacatur. On August 15 the court granted EPA an extension of the time to file an appeal. The new deadline for appeal is September 24, 2008.

Since July the state air agencies have been working together to resolve the complex issues raised by the CAIR vacatur. The states in three affected regional air quality planning organizations, Ozone Transport Commission (OTC), LADCO and VISTAs, are meeting to explore solutions to the issues presented here.

This memo reviews (A) the effect of the CAIR vacatur on the Washington region SIPs, (B) status of the ozone SIPs and possible MWAQC/state action, and (C) status of the PM2.5 SIP and possible MWAQC/state options for addressing the lack of CAIR. Staff continues to track developments in Congress, seek guidance from EPA and follow developments in the Ozone Transport Commission and other regional organizations.

### A. Ruling's Impact on Washington Region SIPs

The regions' 8-hour ozone SIP, submitted in May 2007, and the PM2.5 SIP, submitted in April 2008, take credit for emissions reductions due to CAIR. The CAIR vacatur affects these SIPs for the following reasons:

- Virginia and the District use emissions reductions from CAIR in both SIPs<sup>1</sup> to achieve state reductions to meet the standard in 2009

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<sup>1</sup> Maryland's Healthy Air Act does not refer to CAIR, but Maryland relies on CAIR to reduce transported emissions from MD sources and from sources into MD from outside the state.

- The attainment modeling demonstration for both SIPs is based on a multi-state inventory that includes NOx reductions from CAIR to reduce transport;
- Without CAIR there is no way for the Maryland, Virginia or the District to reduce transported pollution from out-of-state sources affecting the Washington region's nonattainment areas ability to attain. Without CAIR or similar state regulatory emission limits, there is no way for Maryland, Virginia or the District to reduce transported emissions from in-state sources affecting other states.

#### **B. 8-Hour Ozone SIP: Status and Effect on Conformity**

The states submitted the 8-hour ozone SIPs in June 2007. The SIPs were found complete by operation of law six months later in December 2007. By December 2008, twelve months later, EPA is required to act on the ozone SIPs.<sup>2</sup> If EPA approves the RFP plan and base year inventory, the RFP mobile budgets for 2008 could be found adequate for use in conformity by this December.

If EPA fails to act on the Washington region's ozone SIPs by December, EPA could be sued for failing to take action. In a worst case scenario, if EPA disapproved the SIPs in mid-2009, a conformity freeze would occur immediately after a disapproval without a protective finding.<sup>3</sup> Highway sanctions would apply 24 months later in 2011. The conformity freeze means that only projects in the first three years of the transportation plan can proceed. Exempt projects are those that improve traffic safety or projects that would improve air quality by reducing single occupancy vehicles or reducing congestion.

#### ***Option: Revise the Ozone SIP***

To revise the 8-hour ozone SIP attainment demonstration, the states need to find measures to substitute for CAIR that achieve the same NOx reductions in 2009. To address transported emissions from major sources, the states need to reinstate the NOx SIP call which would establish NOx caps on utilities.

#### **C. PM<sub>2.5</sub> SIP : Status**

The region submitted PM<sub>2.5</sub> SIPs in early April 2008, despite a three- year history of PM<sub>2.5</sub> data in the region that demonstrates compliance with the 1997 PM<sub>2.5</sub> standards.<sup>4</sup> Under the Clean Air Act, these SIPs will be found complete by operation of law six months later, as early as October 5, 2008. EPA is required to act on the SIPs by October 2009, twelve months later.

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<sup>2</sup> CAAA, ∞110, (k)(1)(B)Completeness finding.

<sup>3</sup> Transportation Conformity Rule Amendments, 40 CFR Part 93, Federal Register, Vol.69, No. 126, July 1, 2004, 40048.

<sup>4</sup> Maryland and the District opposed requesting redesignation for the region because those states are joined in litigation over the 2007 standard, arguing that the annual standard, unchanged from 15 µg/m<sup>3</sup>, is not sufficiently protective of human health.

If EPA determines the SIPs incomplete, an 18-month sanction clock would begin for the 2-1 offset provision for new sources, and a 24-month clock would begin for highway sanctions. The sanctions could be turned off by submitting a complete plan.

#### *PM<sub>2.5</sub> Clean Data Determination Proposed*

In August EPA Region 3 staff unofficially proposed to the states in the Metropolitan Washington region that EPA would make a Clean Data determination for the region's PM<sub>2.5</sub> monitors. EPA's Clean Data Policy applies to areas where the monitors have complied with the federal standard for the past three years. The Washington region's air quality monitors have data in compliance with the standard from 2005-2008. The Clean Data Policy would remove the region's requirement as a nonattainment area to submit a SIP or Maintenance Plan by April 5, 2008.

EPA's Clean Data Policy memo states that areas with clean data "may be exempt from making submissions for RPF, attainment demonstrations and contingency measures – *as long as those areas continue to meet the standard.*"<sup>5</sup> If the area violates the standards before being redesignated to attainment, then all the requirements would apply. Regarding redesignation, the memo says "EPA encourages States to take action to redesignate areas that are attaining the standard as expeditiously as practicable."

#### ***Options to Address PM<sub>2.5</sub> SIP***

- ***Redesignation Request***

MWAQC and the states could request that EPA redesignate the region to attainment of the PM<sub>2.5</sub> SIP. The region's redesignation request would require a maintenance plan for 10 years from the date that the area is redesignated. Creating a maintenance plan for the Washington region will require EPA advice regarding the inventories to be developed for the interim and outyears for NO<sub>x</sub>, SO<sub>2</sub>, and PM direct.

An advantage of a maintenance plan is that it would provide mobile emissions budgets for PM<sub>2.5</sub>. The maintenance plan would establish mobile budgets for an interim year and an outyear, at least ten years after the region is redesignated.

- ***Clean Data Request***

MWAQC and the States could request EPA to issue a Clean Data Determination based on the previous 3 years' of monitor data showing compliance with the 1997 PM<sub>2.5</sub> NAAQS. The Determination would appear in the Federal Register and there would be a public comment period. The Determination would remove the requirement to submit a SIP or Maintenance Plan by April 5, 2008.

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<sup>5</sup> "Clean Data Policy for Fine Particle National Ambient Air Quality Standards, EPA Memo from Stephen Page, Director, Office of Air Quality Planning and Standards, December 14, 2004. (italics added)

EPA would encourage the states to submit a request for redesignation, but there would be no clock or deadline for submittal, according to the Clean Data Policy. MWAQC and the states would lack mobile budgets for fine particles until EPA did an adequacy determination on the new mobile budgets. Interim budgets are being used until a PM<sub>2.5</sub> SIP or maintenance plan establishes PM<sub>2.5</sub> mobile budgets.

- **SIP Revision**

Several sections of the PM<sub>2.5</sub> SIP would need to be revised once the states enact measures that provide reductions comparable to CAIR reductions. It is uncertain how long it will take the states to enact substitute measures for CAIR. Throughout the northeast and Midwest, states are reviewing the options available to them to guarantee emissions reductions that were promised by CAIR.

In the Washington region, Maryland's Healthy Air Act does not refer to CAIR, so the emissions reductions from HAA in the SIP are still valid. Virginia and the District need to find other measures to substitute for CAIR that achieve similar reductions. All three states in the region still have the NO<sub>x</sub> SIP call and need to define NO<sub>x</sub> allowances under that rule. The states may use individual permits to cap SO<sub>2</sub> levels or find other measures to achieve the necessary SO<sub>2</sub> reductions.

EPA developed CAIR to eliminate the significant contribution from upwind states. Without CAIR, Maryland, the District and Virginia have no measure to control transport, a requirement of the Clean Air Act. Available options to control pollution from sources across states include filing 126 petitions or urging Congress to enact CAIR legislation. Section 126 of the Clean Air Act allows states to petition EPA for a finding that major sources outside of the state contribute significant levels of pollution affecting the states' ability to meet the federal standard. At the federal level, EPA could address the deficiencies in CAIR or Congress could adopt legislation to do so.

#### **D. Recommended Next Steps**

The states are working hard to examine solutions to the CAIR vacatur problem. For the Washington region 8-hour ozone SIP, the states are looking for comparable reductions to CAIR. When the new measures are identified, MWAQC and the states should revise the ozone SIP and submit it to EPA.

Regarding the PM<sub>2.5</sub> SIP, staff recommends that MWAQC ask EPA to issue a Clean Data determination for the region. Because the Clean Data policy memo does not set a deadline for further action, a Clean Data determination would give the states, EPA and Congress time to find solutions to the CAIR vacatur and would remove the possibility of SIP-related sanctions for the PM<sub>2.5</sub> SIP. A Clean Data determination would give MWAQC and the states more time to review whether or not to request redesignation or to revise the PM<sub>2.5</sub> SIP.

In the meantime, the region's air quality continues to improve. MWAQC, the states and local governments are implementing the programs and measures included in the region's SIPs. MWAQC, the states and local governments are actively considering new measures to reduce air pollution and improve air quality in the region.

**Options for PM<sub>2.5</sub> SIP after CAIR Vacatur**

	<b>Clean Data</b>	<b>Revised PM<sub>2.5</sub> SIP</b>	<b>Redesignation Request and Maintenance Plan</b>
<b>Description</b>	MWAQC/States request EPA make Clean Data determination, that areas' monitors have complied with the standard for the past 3 yrs; published in FR.	MWAQC/States revise PM2.5 SIP to replace references to CAIR with references to NOx SIP call and other programs to guarantee NOx reductions will take place by 2009; Need measure to reduce transport.	MWAQC/States request that EPA redesignate the region to Attainment and submit maintenance plan.
<b>Timing</b>	September/October, After determination, no deadline	Timing is uncertain.	Request and Maintenance Plan should be submitted as soon as possible.
<b>Advantages</b>	<ol style="list-style-type: none"> <li>1. no deadline for submitting redesignation request or revised attainment plan;</li> <li>2. Recognizes progress in cleaning air;</li> <li>3. buys time.</li> </ol>	<ol style="list-style-type: none"> <li>1. Complies with EPA deadline;</li> <li>2. Mobile budget adequacy determination possible.</li> </ol>	<ol style="list-style-type: none"> <li>1. Complies with EPA deadline</li> <li>2. Establishes new mobile budgets (2012, 2015, 2025,2030?)</li> <li>3) opportunity for pro-active measures to control other sources</li> </ol>
<b>Disadvantage</b>	No PM <sub>2.5</sub> mobile budgets; continued use of interim test.	<ol style="list-style-type: none"> <li>1. Process could take months because revised inventories are needed. And</li> <li>2. Attainment modeling needs to be rerun.</li> </ol>	<ol style="list-style-type: none"> <li>1.MDE and DC are suing EPA re annual PM<sub>2.5</sub> NAAQS; don't support redesignation because PM<sub>2.5</sub> NAAQS is not protective of health.</li> <li>2. Significant implementation issues exist</li> <li>3. EPA guidance for PM<sub>2.5</sub> maintenance plans is needed</li> </ol>