

Summary of CAIR Vacature

U.S. Court of Appeals, DC Circuit

Argued March 25, 2008

Decided July 11, 2008

Background on Clean Air Interstate Rule (CAIR)

The Clean Air Interstate Rule is an EPA regulation that requires reductions in emissions of NO_x and SO₂ from large fossil fuel-fired electric generating units (i.e., power plants). EPA published CAIR in the Federal Register on May 12, 2005. A reconsideration of the Rule was published April 28, 2006. The rule is set up in several phases with the first phase of NO_x reductions to come by 2009 and the first phase of SO₂ reductions by 2010. The rule sets up both an annual emissions budget and an ozone season emissions budget for each state. States allocate emissions allowances to power plants. Power plants can control emissions to stay within their allowance allocations, or can purchase additional allowances from other sources within the CAIR region (i.e., emissions trading). CAIR builds upon previous EPA regulations controlling NO_x and SO₂ from power plants, including the NO_x SIP call and the Acid Rain Program.

CAIR's Day in Court: Court Sides with Plaintiffs in Most Instances

Petitions for judicial review of EPA's Clean Air Interstate Rule were received within 60 days of the CAIR rule's publication. Petitioners included: North Carolina; Several Electric Utility Companies (SO₂ Petitioners); Entergy and Florida Power and Light; Electric Utilities in Texas, Minnesota, and Florida; and Florida Association of Electric Utilities.

Several different issues were raised by petitioners and reviewed by the court. The court sided with the plaintiffs on the majority of issues raised.¹ The most significant court decisions include the following:

- The emissions trading program doesn't prevent significant contribution to nonattainment or interference with maintenance in downwind states. Further, the allocation of allowances was arbitrary and was not related to upwind state's contribution to pollution in a downwind state.
- The SO₂ allowance allocations were based on the older Acid Rain program and don't directly relate to actual contribution to downwind air pollution by a particular state.
- The NO_x allowance allocation adjustments based on the type of fuel (oil/natural gas vs coal) is unlawful. The court writes: "Because the fuel adjustment factors

¹ EPA denied the following petitions: that EPA arbitrarily and without explanation changed the definition of "will" in the context of will contribute to downwind nonattainment; EPA's method of truncating the measurement precision for PM_{2.5} from 0.15 to 0.2 µg/m³ is inappropriate; Texas and Florida should not be included as CAIR states; and acceleration of the NO_x compliance deadline from January 1, 2010 to January 1, 2009 is unlawful.

shifted the burden of emission reductions solely in pursuit of equity among upwind states—an improper reason—the resulting state budgets were arbitrary and capricious."

- The CAIR Phase II compliance date of 2015 is unlawful because it is inconsistent with the compliance deadlines in the Clean Air Act. EPA must decide what date, whether 2015 or earlier, is as expeditious as practicable for states to eliminate their significant contributions to downwind nonattainment

Final Court Decision: CAIR is Fatally Flawed and is No Longer in Force

The court writes "Because we find more than several fatal flaws in the rule and the Environmental Protection Agency ("EPA") adopted the rule as one, integral action, we vacate the rule in its entirety and remand to EPA to promulgate a rule that is consistent with this opinion."

Why CAIR is Important to the Metropolitan Washington Region: Power Plant Regulations and the Region's SIPs

Both the 8-hour ozone and the PM_{2.5} SIPs include references to CAIR as a control measure. CAIR also was included as a control program that provided emission reductions in upwind regions; such reductions were included in the region's attainment modeling runs. Therefore, if the vacature stands, inclusion of CAIR in the region's SIPs could pose an issue for EPA approval of the SIPs.

Referencing CAIR: State Regulations

States took different approaches in handling regulations on power plants in the context of federal CAIR mandates.

- Maryland passed the Healthy Air Act (HAA) which establishes a state program to cap emissions from power plants that does not rely on CAIR authority.
- Virginia adopted a state regulation requiring reductions in emissions from power plants based on the CAIR regulation. Virginia no longer has NO_x SIP call emission allowance allocation authority for 2009, so must promulgate an expedited regulation to establish emissions budgets for 2009.
- DC has not yet adopted its CAIR rule but retains its NO_x SIP call authority.

Are the Region's SIP Emission Reductions at Risk?

More information is needed to determine if local emission reductions in the region's 8-hour ozone and PM_{2.5} attainment SIPs for 2009 are on solid ground. Maryland's Healthy Air Act, the NO_x SIP call, and facility shutdowns/conversions are certainly key programs credited with the major point source reductions occurring in 2009 in the 8-hour ozone and PM_{2.5} SIPs. However, some of the point source reductions in Virginia may rely on CAIR authority.

Is the Region's Attainment Modeling Demonstration At Risk?

The attainment modeling results in both the 8-hour ozone and PM_{2.5} SIPs included emission reductions in the region and across a larger modeling domain that may include reductions attributable to CAIR.

Is the Region's Contingency Plan at Risk?

- *8-hour Ozone SIP.* The contingency plan for the 8-hour ozone SIP did not rely on reductions attributable to CAIR.
- *PM_{2.5} SIP.* The contingency plan for the PM_{2.5} SIP did include emission reductions in Virginia that are attributable to CAIR. SO₂ reductions included in the PM_{2.5} SIP contingency plan for Maryland in 2010 are a result of Healthy Air Act implementation. The Contingency Plan 2010 emission reduction requirements could be met with the SO₂ reductions from Maryland only if the Virginia reductions were removed.

Summary of CAIR Vacature and Impacts on the Region

- An important federal regulation providing for significant reduction in emissions of NO_x and SO₂ is no longer in force. The fall back position for the states is to rely on the existing NO_x SIP call and Acid Rain programs, as well as existing state legislation/regulation, to control emissions from large point sources.
- States have an obligation to prohibit contribution from sources within the state to downwind pollution in other states. States have the option of filing Section 126 positions to seek relief from EPA for controlling upwind sources of air pollution.
- EPA has an obligation to quantitatively determine the extent of contribution of states to downwind pollution in other states when allocating allowances and establishing emission allowance trading programs. Unrestricted trading of allowances enables significant contributors to purchase allowances instead of controlling emissions.

Next Steps

What happens next is uncertain. There are several possibilities at the federal level:

- EPA may ask for a rehearing en banc (the full court of Appeals) or can appeal the ruling to the Supreme Court. Given the court finding was unanimous, a successful rehearing is questionable.
- EPA may start the process of developing a revised rule to respond to the court decision.
- Congress could act to provide a legislative solution.
- EPA may disapprove the region's currently submitted attainment SIPs for 8-hour ozone and PM_{2.5} because the SIPs reference CAIR and the attainment modeling results include CAIR reductions in upwind states.

Glossary of Terms

Section 126 Petitions. Under Section 126 of the Clean Air Act, "downwind states" may petition EPA to take action against "upwind states" to force the control of sources that contribute significantly to nonattainment or interfere with maintenance in the downwind state.

NOx SIP Call. In late 1998, the U.S. EPA adopted a rule called the "NOx SIP Call" to reduce ozone transport in the Eastern United States. This regional NOx reduction program required 22 states, including Maryland and Virginia, and the District of Columbia, to further reduce large point source NOx emissions to EPA identified state emission budget levels by 2007. The majority of the 22 SIP call states had these regulations in place by 2003/2004.

Virginia CAIR

Virginia has adopted state regulations codifying the requirements of the Clean Air Interstate Rule. Virginia's rules create an emissions cap based on the allowances allocated to the facility. The rule does not allow trading as a method of complying with the emissions cap.

Maryland Healthy Air Act

In April of 2006 the Maryland General Assembly and Governor Ehrlich adopted the Healthy Air Act (HAA), a law that requires reductions in NOx, SO₂, and Mercury emissions from Maryland's largest and oldest coal fired power plants. Maryland implements the HAA through regulation. The regulation requires reductions in NOx emissions from coal-fired electric generating units (excluding fluidized bed combustion units) starting in 2009. By 2009 Maryland expects an approximate 70 percent reduction in NOx emissions from these regulations when compared to 2002 emissions. To meet the requirements of Maryland's regulations a company's "system" (covered units owned by the same company) must meet a system-wide cap by 2009. Compliance cannot be achieved through the purchase of allowances under the HAA.

District of Columbia CAIR

The District of Columbia is currently drafting its Clean Air Interstate Rule (CAIR).

Acid Rain Program. Title IV of the Clean Air Act set a goal of reducing annual SO₂ emissions by 10 million tons below 1980 levels. To achieve these reductions, the law required a two-phase tightening of the restrictions placed on fossil fuel-fired power plants. Phase I began in 1995. Phase II began in the year 2000. The Acid Rain Program introduced an allowance trading system whereby affected utility units are allocated allowances based on their historic fuel consumption and a specific emissions rate. Each allowance permits a unit to emit 1 ton of SO₂ during or after a specified year. For each ton of SO₂ emitted in a given year, one allowance is retired, that is, it can no longer be used.