

US EPA ARCHIVE DOCUMENT

**ORAL ARGUMENT HELD March 25, 2008
PANEL DECISION ISSUED July 11, 2008**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 05-1244 and consolidated cases

STATE OF NORTH CAROLINA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**On Petition for Review of Final Action of the
United States Environmental Protection Agency**

**REPLY IN SUPPORT OF
PETITION FOR REHEARING
OR REHEARING EN BANC**

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November 17, 2008

In accordance with the Court's Order of October 21, 2008, respondent United States Environmental Protection Agency ("EPA") submits this reply in support of its Petition for Rehearing or Rehearing *En Banc* to address "whether a stay of the Court's mandate in lieu of immediate vacatur would suffice." A stay of the mandate as a bridge to a new rule is preferable to immediate vacatur, and would address some of the harms from vacatur if it provided enough time for a replacement rule to be implemented.^{1/} However, a stay of the mandate alone would be insufficient to address all the harms from vacatur that were identified in our Petition, *i.e.*, public health impacts resulting from the loss or delay of expected emission reductions, economic losses resulting from the collapse of the allowance market, and disruption of State and federal efforts to achieve Clean Air Act requirements, Petition at 10-12. These harms can only be completely avoided if the Court grants the rehearing petition in full, *i.e.*, if the Court remands CAIR to EPA to justify and/or modify the rule while leaving it in place and the Court reverses its holding that EPA is precluded from terminating or limiting Title IV allowances through the CAIR program.^{2/} If the Petition is not granted in full, the effectiveness of any Court-ordered relief in addressing the harms identified in the Petition will depend not only on the type of relief selected, but also on

^{1/} Relief from vacatur is supported by a wide range of affected entities, including environmental groups, States, and even some of those entities subject to regulation under the rule. *See* Petition for Rehearing of Environmental Intervenors; Response of State of North Carolina; Motion for Leave to Participate as Amicus of State of New York, et al.; Motion for Leave to Participate as Amicus of State of Ohio; and Response of Duke Energy, et al. While some industry petitioners oppose a stay, the severe harms resulting from vacatur justify either remanding without vacatur or staying the Court's mandate until a new regulatory program is in place.

^{2/} EPA's Petition seeks rehearing of the bases for the Panel's decision to vacate the Clean Air Interstate Rule ("CAIR"): (1) its conclusion that the CAIR trading program and budgets were not consistent with 42 U.S.C. 7410(a)(2)(D) and thus could not be addressed by EPA on remand through further explanation or minor changes; and (2) its determination that vacatur was warranted despite significant economic, environmental and public health consequences, for which neither the NO_x SIP Call nor CAA section 126 provides an adequate interim remedy. EPA also seeks rehearing of the Panel's holding that EPA lacks statutory authority to terminate or limit allowances issued under Title IV of the Clean Air Act through the CAIR program. EPA continues to believe that rehearing or rehearing *en banc* is warranted on these issues.

what, if any changes the Court makes in its Opinion, and on the length of any stay of the mandate. Further, if the rule becomes void *ab initio* when the stay ends, it could be difficult for EPA to effectively enforce the rule during the stay.

The impact of a stay of the Court's mandate must be analyzed separately for NO_x and SO₂. Reductions in SO₂ provide the bulk of the public health and environmental benefits expected from CAIR. However, because future expectations of allowance value directly influence the incentives for sources to reduce emissions, and because there is a substantial existing bank of SO₂ allowances that sources can use to comply with the CAIR SO₂ trading program, a stay alone would be less successful in addressing harms caused by vacatur of the SO₂ program. For NO_x, where a large allowance bank does not exist, a stay would be more successful in addressing the health and environmental problems attributable to NO_x during the stay.

Benefits from a Stay of the Court's Mandate With Regard to SO₂

Allowances awarded under the Title IV program have no expiration date; they may be used in the year in which they are issued or in any subsequent year. If sources expect their value to rise, allowances can be "banked" for future use or sale; 6.9 million allowances are currently banked. Due to economic incentives from the promulgation of CAIR some utilities reduced emissions prior to the effective date of the CAIR requirements. This allowed them to "bank" allowances to assist in meeting future requirements in the CAIR trading program, where Title IV allowances were anticipated to be more valuable. Due in part to such early reductions, SO₂ emissions are now below the Title IV cap. Whether through CAIR or a replacement program, limits on SO₂ emissions more stringent than those required by Title IV will be required for States to attain the ambient air quality standards for fine particles (PM_{2.5}). Thus, the Court's opinion

regarding the scope of EPA's authority to terminate or limit Title IV allowances through CAIR, unless altered, will send a clear signal to the market that these allowances will soon lose most, if not all, of their value creating an incentive for sources holding banked allowances to get some value from them by using them before a new program goes into force, thereby increasing SO₂ emissions between now and then. Analyses performed by EPA project that much of the substantial reductions in SO₂ emissions over the next several years that were expected from CAIR will be lost, and there will be significant harmful effects on public health, if utilities believe that they will not be able to use banked Title IV allowances to meet future SO₂ emission requirements. See Brian McLean, CAIR Update (Sept. 18, 2008) at 6-7 (Att. 1).

Because the size of the projected SO₂ emissions increase is dependent on future expectations regarding allowance value, it is also dependent on the length of time that CAIR remains in place. Id. EPA's modeling demonstrates that if the market receives signals that banked Title IV allowances will become worthless quickly, as it would if the Court adopted the July 2009 deadline proposed by North Carolina, SO₂ emissions could rise. Similarly, allowing CAIR to remain in place for a short time (e.g., 2 years), with no change in the holding on Title IV issues, would result in a large number of banked allowances being used, and thus the loss of most of the near-term public health benefits expected from the SO₂ requirements of CAIR. See USEPA, Analysis of Potential Quick-Fix Legislative Changes to Address Court Decision (Aug. 28, 2008) at 11, <http://www.epa.gov/airmarkets/progsregs/cair/quickfix.ppt> (Attachment 2). In contrast, allowing CAIR to remain until replaced by a rule on remand that is at least as stringent would preserve more of the projected early SO₂ benefits of CAIR, including saving thousands of lives, that were expected to be obtained in anticipation of the rule's stringent Phase II requirements, even without a change in the holding.

Benefits from a Stay of the Court's Mandate With Regard to NOx

The benefits of a stay of the Court's mandate are clearer for NOx but also depends on its length. For NOx, a stay could address the health and environmental harms associated with vacatur of the CAIR NOx programs. Because there is no existing bank of annual NOx allowances, allowing CAIR to remain in place while EPA promulgates and implements an alternative regulatory program would achieve the NOx reductions that were anticipated from CAIR, with the associated public health benefits resulting from reductions in ozone and PM_{2.5} concentrations. Moreover, a stay of the mandate would eliminate a regulatory gap that could result from the fact that some state regulations implementing the NOx SIP Call trading program were eliminated in anticipation of the beginning of the CAIR ozone-season NOx programs in May 2009.

Length of Stay Required to Achieve Benefits

To achieve the desired public health benefits, a stay must remain in effect until the reduction requirements from a newly promulgated regulation go into effect. EPA's modeling demonstrates that the longer the stay, the greater the health benefits that will occur. As several petitioners acknowledge, to avoid a regulatory gap and provide regulatory certainty, the stay would need to provide time not only for EPA to promulgate a new rule, but also for States and sources to implement its requirements. See, e.g., Duke Response at 6-7. A stay only until July 2009, such as that requested by North Carolina, would be insufficient to avoid a regulatory gap.

EPA is acutely aware of the public health consequences associated with the vacatur of CAIR and is moving expeditiously to promulgate a new rule. The complexity and amount of modeling and analysis required depends in part on whether any aspect of the Panel opinion is revised. Given that vacatur of CAIR (as opposed to the remand requested by the Petition) would

eliminate the basis for the current regulation, EPA believes the rulemaking required to promulgate a replacement would take about two years from the Court's resolution of the Petition and that it would take sources and States several more years to make the transition to the new regulatory regime. EPA could provide periodic status reports to the Court while a stay is in effect.^{3/} In addition, to be effective in addressing the harms created by vacatur of CAIR, a stay should make clear that CAIR will not have been void *ab initio* once the stay expires. Otherwise, EPA may have difficulty enforcing the CAIR requirements that would apply during the stay.

In short, EPA continues to believe that the relief requested in the rehearing petition is appropriate and provides the best avenue to address the harms that would result from vacatur. A stay of the Court's mandate would alleviate most of those harms if the Court also grants EPA's Petition as to the Title IV allowance issues and if the stay remains in place until EPA promulgates new regulations and States and sources have time to transition to the new regulatory regime. If the Court does not grant rehearing on the Title IV issue, a stay would eliminate some of the anticipated harms, but only if it were of sufficient duration to allow implementation of a replacement regulatory regime.

Respectfully submitted,

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^{3/} EPA intends to act expeditiously to address the problem of interstate pollutant transport; however, given the extensive revisions necessitated by the Court's opinion, the stay period proposed by North Carolina is unreasonably short.



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2008, I caused a true and correct copy of the foregoing Reply in Support of Petition for Rehearing or Rehearing En Banc to be served by first class mail, postage-prepaid, on the following:

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A handwritten signature in black ink, appearing to read "Norman L. Rave, Jr.", written over a horizontal line.

Norman L. Rave, Jr.