

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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THE ADMINISTRATOR

Mr. Bart E. Cassidy  
Meredith DuBarry Huston  
Manko, Gold, Katcher & Fox LLP  
401 City Avenue, Suite 500  
Bala Cynwyd, Pennsylvania 19004

Dear Mr. Cassidy:

The U.S. Environmental Protection Agency has reviewed the June 26, 2006, petition you submitted on behalf of ARIPPA. This petition asks EPA to reconsider the Clean Air Interstate Rule Federal Implementation Plan (CAIR FIP) Rule to address the economic impact of the rule on waste coal-fired units operated by Independent Power Producers (IPPs). After careful consideration and for the reasons explained below, EPA denies the ARIPPA petition for reconsideration.

The CAIR FIP Rule was published in the *Federal Register* on April 28, 2006. See 71 Fed. Reg. 25328 (Apr. 28, 2006) (Air Pollution Control – Transport of Emissions of Nitrogen Oxides (NO<sub>x</sub>) and Sulfur Dioxide (SO<sub>2</sub>): Final Rule). The rule promulgated Federal Implementation Plans (FIPs) for states covered by the Clean Air Interstate Rule (CAIR) as a backstop to implement the requirements of CAIR until states have approved full State Implementation Plan revisions to replace the FIPs. The FIPs implement the CAIR model trading rules with minor changes to account for federal rather than state implementation. The applicability provisions of the FIPs are identical to the applicability provisions of the CAIR model rules and were not reconsidered when the CAIR FIP Rule was promulgated. Both the CAIR and the CAIR FIP Rule were developed through processes that involved extensive public participation.

ARIPPA separately submitted comments to EPA regarding the CAIR, the CAIR reconsideration, and the CAIR FIP Rule. In all three sets of comments, ARIPPA argued that waste coal-fired units operated by IPPs should not be included in the CAIR SO<sub>2</sub> trading programs because it would be infeasible or too costly for these units to further reduce emissions of SO<sub>2</sub>. ARIPPA's comments on the CAIR FIP Rule specifically claimed, among other things, that waste coal-fired units operated by IPPs should be exempt from the rule because the allowance holding requirements would result in their facilities being "economically unviable." EPA responded to ARIPPA's comments on the CAIR FIP Rule in the preamble, the response to comments document, and a specific technical support document titled "Waste Coal-Fired Units in the CAIR and CAIR FIP." All three of these documents are in the docket for the CAIR FIP.

EPA's responses demonstrated that the limited information submitted by ARIPPA to support its claims failed to demonstrate that these units, as a category, would be rendered "economically unviable" if they were included in the CAIR trading programs. As part of this response, EPA showed that ARIPPA's "cost to revenue" ratio calculations – an economic measure chosen by ARIPPA in its comments – were inaccurate and the actual values were much lower. Also in response to ARIPPA's comments, EPA conducted a bottom-up analysis to illustrate that waste coal units would likely continue to be profitable even with the cost of complying with the CAIR SO<sub>2</sub> program. Additionally, EPA's response explained existing options that might allow waste coal-fired units to obtain Clean Air Act Title IV SO<sub>2</sub> allowances.

ARIPPA has now submitted this petition for reconsideration, which asks EPA to reconsider the economic burden of the CAIR FIP Rule on waste coal-fired units owned by IPPs. The petition argues that the economic analysis presented by EPA in response to ARIPPA's comments was "inaccurate" and based on "incomplete information." The petition asks EPA to gather additional information and conduct additional analysis regarding the economic impact of the CAIR FIPs on these sources. The petition also asserts that EPA did not provide adequate responses to comments on its determination that the rule would not have a significant impact on small entities. EPA disagrees with the assertions and denies the petition because ARIPPA has failed to show that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act.

Section 307(d)(7)(B) of the Clean Air Act provides for reconsideration of a final rule if two criteria are met: 1) a person raising the objection must demonstrate either that it was impracticable to raise the objection during the public comment period or that the grounds for the objection arose after the period for public comment (but within the time specified for judicial review); and 2) the petitioner must show that the objection is of central relevance to the outcome of the rule.

EPA has determined that the ARIPPA petition does not meet the 307(d)(7)(B) standard. ARIPPA has neither shown that its objection to EPA's response to its comments is of central relevance to the rule, nor that the objection could not have been raised during the public comment period. The petition contends that the standard is met because ARIPPA did not have adequate opportunity to comment on EPA's analysis of the economic impact of the CAIR FIPs on waste coal-fired units operated by IPPs. However, as noted above, ARIPPA did submit comments that addressed the potential economic impact of the CAIR FIP Rule on waste coal-fired units operated by IPPs. In its comments on the CAIR FIP Rule, ARIPPA presented data and analysis to EPA regarding its projections of the cost of compliance with the CAIR FIPs. ARIPPA's comments also asked EPA to create a special exemption from the CAIR FIPs (and from the CAIR model trading rules) for these units. EPA carefully considered these comments and examined the data submitted. EPA declined to create the exemption requested for the reasons stated in the final rule and responded fully to the submitted comments, noting errors in the analysis presented by ARIPPA. Any additional analysis that EPA conducted was done in

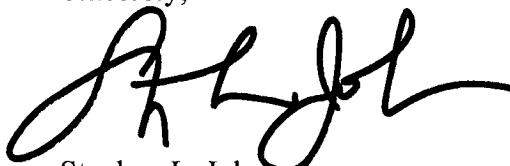
response to the comments submitted by ARIPPA, in an attempt to respond to those comments. EPA also concluded that ARIPPA had not substantiated its claim.

ARIPPA now, by its petition, asks EPA to reconsider the CAIR FIP Rule to give it an additional opportunity to review and comment on EPA's response to ARIPPA's original comments. It argues that reconsideration is warranted because it could not have raised objections to EPA's responses during the public comment period and that these objections are of central relevance to the rule. EPA disagrees. ARIPPA had ample opportunity to provide, and did provide, comments on the economic impact of the CAIR FIP Rule on ARIPPA units. EPA's response, explaining why it decided not to add the exemption requested by ARIPPA, does not itself provide a basis for a petition for reconsideration of the status of waste coal facilities. Further, the purpose of EPA's analysis was to examine the validity of ARIPPA's claims. This analysis confirmed EPA's prior conclusion that it was not appropriate to create an exemption for this category of units, a conclusion on which all parties had ample opportunity to submit comments.

The petition also contends that reconsideration is warranted because EPA did not provide a meaningful response to ARIPPA's comments regarding EPA's determination, under the Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act (SBREFA), that the CAIR FIP Rule would not have a significant impact on small entities. The petition, however, fails to demonstrate that this objection meets the standard in Clean Air Act section 307(d)(7)(B). The petition does not explain how the objection to EPA's response to comments is of central relevance to the outcome of the rule. Further, ARIPPA has not shown that it could not have raised its objections during the public comment period or that the grounds for the objection arose after the period for public comment (but within the time specified for judicial review). ARIPPA had adequate opportunity to comment and, indeed, did comment on EPA's evaluation of the impact of the CAIR FIP Rule on small entities as it relates to ARIPPA members. EPA responded to ARIPPA's comments on this issue and explained, among other things, that no ARIPPA members qualify as small entities because all are owned by parent companies too large to qualify for consideration under SBREFA. Thus, the analysis conducted by EPA under the RFA/SBREFA and EPA's certification that the CAIR FIP Rule will not have a significant economic impact on a substantial number of small entities were accurate and are not relevant to ARIPPA's request for an exemption from the CAIR FIPs.

Thank you for your interest in the CAIR FIP Rule. If you have any questions concerning our decision, please contact Sonja Rodman in the Office of General Counsel at (202) 564-4079.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. L. Johnson', written in a cursive style.

Stephen L. Johnson