

US EPA ARCHIVE DOCUMENT



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

FEB 27 2007

THE ADMINISTRATOR

Ms. Lisa M. Jaeger
Bracewill & Giuliani LLP
2000 K Street, N.W.
Suite 500
Washington, D.C. 20006

Dear Ms. Jaeger:

The U.S. Environmental Protection Agency has reviewed the June 27, 2006, petition you submitted on behalf of the Colver Power Project. This petition asks EPA to reconsider specific issues relating to the regulation of waste coal-fired units under the Clean Air Interstate Rule Federal Implementation Plan (CAIR FIP) Rule. After careful consideration and for the reasons explained below, EPA denies the Colver Power Project 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_x) and Sulfur Dioxide (SO₂): 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.

EPA received numerous comments on the CAIR FIP Rule, including comments from ARIPPA – an association of Independent Power Producers (IPPs), of which Colver Power Project is a member. 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 SO₂ trading programs because it would be infeasible or too costly for these units to further reduce emissions of SO₂. 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 Rule. EPA’s responses demonstrated that the limited information that ARIPPA submitted 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 that 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 SO₂ program. Additionally, EPA’s response explained existing options that might allow waste coal-fired units to obtain Clean Air Act Title IV SO₂ allowances.

Colver Power Project has now submitted this petition for reconsideration which asks EPA to reconsider issues in the CAIR FIP Rule. Colver Power argues that EPA did not sufficiently analyze certain data regarding waste coal-fired facilities and that EPA did not analyze sufficient data generally. It also argues that technical support documents prepared by EPA in responding to comments on the CAIR FIP Rule were flawed. Finally, Colver Power argues that EPA should have modified the definition of Electric Generating Unit (EGU) to exclude certain waste coal-fired units when it modified the definition to exclude certain solid waste incinerators. EPA disagrees with the assertions in the petition and denies the petition because it fails 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 rule if two criteria are met: 1) a person raising an 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.

The Colver Power petition states reconsideration is warranted and argues that the grounds for its objection arose after the public comment period or could not be raised due to impracticability. Colver Power, however, does not substantiate the assertions for any of its objections. It neither identifies when the grounds for the objections arose, nor explains why it asserts that it was impractical to raise the objections during the public comment period. Further, Colver Power does not explain how the objections would be of central relevance to the outcome of the rule.

Colver Power had ample opportunity to share with EPA its views regarding the treatment of waste coal-fired units in the CAIR FIP Rule. ARIPPA – an association of which Colver Power is a member – did submit comments during the comment period for the CAIR FIP Rule that asked EPA to exempt certain waste coal-fired units from the requirements of the rule.

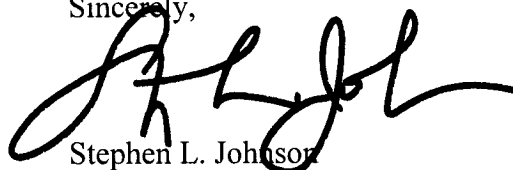
ARIPPA submitted detailed comments that addressed the potential economic impact of the CAIR FIP Rule on waste coal-fired units operated by IPPs. In its comments on the rule, ARIPPA presented data and analysis to EPA regarding its projections of the cost of compliance with the CAIR FIPs. ARIPPA's comments 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 and responded fully to the submitted comments, noting errors in the analysis presented by ARIPPA. EPA also concluded that ARIPPA had not substantiated its claim.

Colver Power Project, by its petition, now appears to be asking EPA to reconsider the CAIR FIP Rule only to give it an additional opportunity to review and comment on EPA's response to previously submitted comments that asked that certain waste coal-fired units be exempted from the requirements of the CAIR FIPs. Colver Power also incorrectly states that EPA eliminated an exemption for waste coal-fired units in the final CAIR FIP Rule. This is not accurate. The exemption for waste coal-fired sources that Colver Power supports did not exist in either the CAIR model trading rules or the proposed CAIR FIP Rule. ARIPPA had requested that EPA add an exemption that did not exist in the proposed CAIR FIP Rule, and EPA declined to do so for the reasons stated in the final rule. Any additional analysis by EPA of the impact of a potential exemption was done only in response to commenters' request that an exemption be added and not to support the alleged elimination of an exemption from the proposed rule, which never contained such an exemption. Further, Colver Power incorrectly asserts that EPA developed a new "threshold rule" when deciding to revise the definition of EGU to exclude certain solid waste incinerators. EPA's revision of the definition of EGU was done through a reconsideration process that provided ample opportunity for public comment. EPA's responses to comments regarding the revised definition, among other things, explained that the primary purpose of solid waste incinerators is to burn waste and did not create a new "threshold rule." EPA's responses to these comments do not provide a basis for reconsideration of the status of waste coal facilities.

In sum, Colver Power Project had ample opportunity to provide, and an association of which it is a member did provide, comments on the economic impact of the CAIR FIP Rule on waste coal units, including Colver Power. EPA's responses to comments – including its explanation as to why it decided not to add the exemption requested by ARIPPA, its analysis confirming its prior conclusion that it was not appropriate to create an exemption for this category of units, and its response to comments regarding the revisions to the definition of EGU – do not provide a basis for a petition for reconsideration.

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 over the printed name.

Stephen L. Johnson