

US EPA ARCHIVE DOCUMENT



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

MAR 15 2006

THE ADMINISTRATOR

Mr. William H. Lewis, Jr., Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mr. Lewis:

The Environmental Protection Agency has received the August 2005 petition you filed on behalf of Minnesota Power (Petitioner) for reconsideration and stay of the Clean Air Interstate Rule (CAIR). This petition asks EPA to reconsider specific aspects of the CAIR and to stay implementation of CAIR in the State of Minnesota. As you are aware, EPA has already responded to parts of this petition. By letter dated November 21, 2005, we indicated our intent to grant reconsideration of at least one issue in your petition. Subsequently, on December 2, 2005, we published a Federal Register notice initiating a reconsideration process on four issues, including two raised by Petitioner. After careful consideration and for the reasons explained below, EPA denies the remaining requests in your petition.

The CAIR, published in the Federal Register on May 12, 2005 (70 FR 25162), is a powerful component of the Bush Administration's plan to help over 450 counties in the Eastern United States meet air quality standards for ozone and fine particles. EPA determined that reductions in upwind precursor emissions will assist downwind areas in meeting the national ambient air quality standards (NAAQS) for ozone and fine particles. EPA also determined that attainment will be achieved in a more equitable, cost-effective manner than if each nonattainment area attempted to achieve attainment with the ozone and fine particles NAAQS by implementing local emissions reductions alone. The CAIR was developed through a process that involved extensive public participation. We received and responded to thousands of comments and held public hearings in February and June 2005. The robust public dialogue was an important part of the rulemaking process.

EPA recognizes the continuing significant public interest in the CAIR. Following publication of the rule, EPA received twelve separate petitions for reconsideration, including the one you submitted. In response, EPA granted reconsideration on and reopened for public comment the following six issues:

- (1) the definition of "Electric Generating Unit (EGU)" as it relates to solid waste incinerators (70 FR 49708, 49738);

- (2) claims that inequities result from the sulfur dioxide (SO₂) allocation methodology to be used by States participating in the EPA-administered trading program (70 FR 72268, 72272);
- (3) EPA's use of fuel adjustment factors (1.0 for coal, 0.6 for oil, and 0.4 for gas) in establishing State nitrogen oxides (NO_x) budgets (70 FR 72268, 72276);
- (4) certain inputs to the fine particle (PM_{2.5}) modeling used to determine whether Minnesota should be included in the CAIR region for PM_{2.5} (70 FR 72268, 72279);
- (5) EPA's determination that Florida should be included in the CAIR ozone region (70 FR 72268, 72280); and,
- (6) the impact of New York v. EPA on certain analyses prepared for the final CAIR (70 FR 77101).

EPA published Federal Register notices announcing the reconsideration processes and requested public comment on the issues under reconsideration. EPA is taking final action on reconsideration of these issues in a separate rulemaking signed today.

Two of the issues EPA decided to reconsider, relating to the SO₂ allocation methodology and the inputs for EPA's PM_{2.5} modeling for Minnesota, were raised by Petitioner. These issues are addressed in the final action on reconsideration signed today. It is important to note that EPA granted Minnesota's request for reconsideration regarding PM_{2.5} modeling only on the issue of the inputs for the PM_{2.5} modeling for Minnesota. To the extent that the Petition can be interpreted as requesting reconsideration of broader modeling issues, EPA denies the request. EPA provided numerous opportunities for parties to comment on the modeling platform used for the CAIR modeling. On August 6, 2004, EPA published a Federal Register notice (69 FR 47828) announcing that it was making available for public comment additional information relevant to the CAIR, including a new modeling platform that EPA was proposing to use to support the rule. Among other things, this notice pointed readers to a document entitled "Configuration of CMAQ for CAIR Annual Simulations." This document, in the CAIR docket (EPA-HQ-OAR-2003-0053-1719) explained that EPA planned to use CMAQv.4.3 for the final CAIR modeling. The public had ample opportunity to comment both on the details of the modeling platform itself and on the decision to use the CMAQv.4.3 model to support the CAIR. Petitioner thus has not shown that reconsideration of this issue would be warranted under section 307(d)(7)(B) of the Clean Air Act and EPA sees no reason to reconsider its decision to use CMAQv.4.3 as the modeling platform for CAIR. This issue is discussed further in EPA's response to Minnesota Power's comments on the reconsideration notice.

Further, Petitioner briefly suggests that if the entire State of Minnesota is not excluded from the CAIR PM_{2.5} region, some undefined portion of the State should be excluded. Throughout the CAIR rulemaking, EPA consistently explained and defended its decision to determine significant contribution on a State-wide basis. Petitioner has not presented any evidence sufficient to convince EPA that it was impractical for it to raise these concerns during the public comment period or that the issue arose after the close of that period. Further, Petitioner has not presented any evidence to demonstrate that it would be proper to exclude a

portion of the State of Minnesota. For these reasons, EPA declines to reconsider this issue.

Your petition raises two additional issues. First, you ask EPA to reconsider the $0.2\mu\text{g}/\text{m}^3$ threshold used to determine whether a State's emissions significantly contribute to nonattainment or interfere with maintenance in downwind States. Second, you ask EPA to stay the CAIR in the State of Minnesota. We address each of these issues below.

PM2.5 Threshold for Determining Significant Contribution

Petitioner asks EPA to reconsider the $0.2\mu\text{g}/\text{m}^3$ significance threshold for PM2.5 that was used in EPA's air quality modeling analyses to determine whether a State's emissions contribute significantly to PM2.5 nonattainment or maintenance problems in a downwind State. As grounds for reconsideration, Petitioner contends that EPA did not provide adequate opportunity to comment on the threshold and did not provide an adequate rationale for why the threshold should be set at approximately one percent of the PM2.5 NAAQS.

In the January 2004 CAIR proposal (69 FR 4566), EPA proposed a $0.15\mu\text{g}/\text{m}^3$ PM2.5 threshold, representing 1 percent of the annual PM2.5 NAAQS. EPA also provided analyses based on an alternative $0.10\mu\text{g}/\text{m}^3$ threshold and called for comment on the use of higher or lower thresholds (69 FR 4584). In the proposal, EPA explained the key factors it considered in selecting the threshold. It explained, for example, that there are significant public health impacts associated with ambient PM2.5 even at relatively low levels, and that EPA's modeling indicates that some nonattainment areas will find it difficult or impossible to attain the standard without reductions in upwind emissions. EPA further discussed how its modeling analyses indicate that generally PM2.5 nonattainment problems result from the combined impact of relatively small contributions from many upwind States, along with contributions from in-State sources, and in some cases, substantially larger contributions from a subset of States. This is in part due to the annual nature of the PM2.5 transport problem, which means that throughout the entire year and across a range of wind patterns, emissions from many upwind States affect the downwind nonattainment area. Together, these factors suggest a relatively low value for the PM2.5 threshold is appropriate. EPA also explained that this general approach was used for the NOx SIP Call rulemaking and that the significance value for PM2.5 should be smaller than for ozone, which is a seasonal pollutant and more likely to affect areas by a prevailing wind direction.

In addition, EPA received numerous comments during the comment period on EPA's rationale for the proposed threshold. Commenters recommended the use of alternative thresholds, both higher and lower. EPA believes that adequate opportunity for public comment was provided on the PM2.5 threshold. In fact, the extensive public involvement was an important part of the decision making process. Ultimately, in response to public comments on the CAIR proposal that the precision of the threshold should not exceed that of PM2.5 NAAQS, EPA rounded the proposed $0.15\mu\text{g}/\text{m}^3$ threshold to $0.2\mu\text{g}/\text{m}^3$ in accordance with well-established rounding conventions, whereby numbers ending in 5 are rounded up, resulting in the $0.2\mu\text{g}/\text{m}^3$ threshold. Petitioner has failed to show either that it was impractical to raise their objection during the public comment period or that the grounds for the objection arose after the public comment period had closed. Petitioner has not shown that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act, and EPA therefore denies Petitioner's request to

reconsider this issue. Consequently, EPA is not required to respond to Petitioner's substantive arguments. Nonetheless, EPA also briefly discusses Petitioner's concerns below.

EPA disagrees with Petitioner's contention that the final $0.2 \mu\text{g}/\text{m}^3$ threshold is too low. As noted above the threshold in the proposed rulemaking of $0.15 \mu\text{g}/\text{m}^3$ was rounded up to $0.2 \mu\text{g}/\text{m}^3$ in the final CAIR. Nonetheless, Petitioner argues that the revised threshold remains too low and recommends that EPA choose a significance level between 3 percent and 7 percent of the NAAQS. Petitioner suggests a higher significant threshold is justified because Minnesota utilities already have low emissions rates and thus should not be forced to purchase allowances from higher emitting facilities in other States. This argument is not relevant to the issue of whether Minnesota's contribution to downwind States is significant. Petitioner also argues that a higher significance threshold is justified because variability exists in PM_{2.5} monitoring readings and it argues EPA's air quality model may have a systematic bias. EPA disagrees. EPA uses the model outputs in a relative, rather than an absolute, sense, so that any modeling bias is constrained by real world results. As described in CAIR, EPA conducts a relative comparison of the results of a base case and a control case to estimate the percentage change in ambient PM_{2.5} from the current year base case, holding constant the meteorology, other source emissions, and other factors contributing to uncertainty. With this technique, any absolute modeling bias is canceled out. For these reasons, Petitioner has not submitted information to convince EPA that the PM_{2.5} threshold should be revised.

Request to Stay CAIR in Minnesota

Petitioner also requests that EPA stay the effectiveness of the CAIR in Minnesota pending reconsideration of the final rule. Petitioner requests that EPA stay the effectiveness of the final rule, or at a minimum its applicability in Minnesota, for at least three months, and that the compliance dates in the final rule be extended while the Agency addresses the issues raised in the petition. As explained above, EPA granted reconsideration on two issues raised in Minnesota Power's petition and now declines to grant reconsideration on any other issues raised in the Petition. The Petitioner further did not convince EPA that a stay of the CAIR in Minnesota was appropriate at any time during this reconsideration process.

The EPA's authority under section 307(d)(7)(B) of the Clean Air Act only permits the Administrator to stay the effect of a rule during reconsideration for a period not to exceed three months. In determining whether to stay the effectiveness of a rule, EPA and courts evaluate the following factors:

- (1) the likelihood that the party seeking the stay will prevail on the merits;
- (2) the likelihood that the party seeking the stay will be irreparably harmed absent a stay;
- (3) whether a stay would substantially harm other parties interested in the proceedings;
and,
- (4) the public interest in granting a stay.

Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Cooper v. Town of East Hampton, 83 F.3d 31, 36 (2nd Cir. 1996); Serono Lab., Inc. V. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); In re Public Service Co. Of New Hampshire et al. (Seabrook Station Units 1 and 2) NPDES Appeal No. 76-7, 1 EAD 389 (Aug. 12, 1977).

Because Petitioner has not persuaded us that they would prevail on any of these factors, EPA denies Petitioner's request to stay the CAIR in Minnesota.

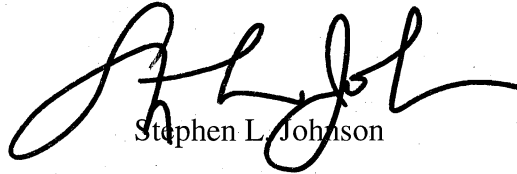
Petitioner requests the stay "since EPA's reconsideration pursuant to [its] petition should result in Minnesota not being subject to CAIR." However, Petitioner has not submitted information to EPA sufficient to convince the Agency that Minnesota should not be subject to the CAIR. Petitioner has not provided information sufficient to convince EPA that any of their three challenges is likely to succeed on the merits. As explained in the December 2, 2005 Federal Register notice, EPA initiated a reconsideration process on two issues raised by Petitioner – the modeling inputs for PM_{2.5} modeling for Minnesota and challenges to the SO₂ allocation methodology. EPA has now received and responded to numerous comments on that proposal, and in the final action on reconsideration signed today, EPA finalizes its determination that Minnesota is properly included in the CAIR region for PM_{2.5} and its decision to use the SO₂ allocation methodology in the final CAIR was appropriate. As discussed in the final notice on reconsideration, EPA carefully considered Petitioner's arguments regarding these issues and concluded that the challenges did not have merit. In addition, as discussed above, Petitioner has not shown that reconsideration of the PM_{2.5} threshold is warranted and EPA does not believe the challenges to the threshold selected would prevail on the merits. The EPA is confident that Minnesota is properly included in the CAIR region for PM_{2.5}.

EPA also does not believe there is a basis to conclude that Petitioner will suffer irreparable harm from the denial of its request to stay implementation of CAIR in Minnesota pending the outcome of this petition. The only potential harms to Petitioner identified in the petition are unspecified efforts to identify options and develop plans for complying with CAIR. Petitioner identifies no specific expenses or commitments of resources it will be required to make in the immediate future. Further, the first compliance deadline in the CAIR is January 2009. Sources will have until that date to determine and implement their compliance strategies. EPA also does not believe the petition raises significant uncertainty regarding the applicability of the CAIR requirements. For these reasons, EPA does not believe Petitioner will suffer irreparable harm from the denial of its request for a stay.

For these reasons, EPA concludes that there is no justification to stay implementation of the CAIR in Minnesota during the remainder of the reconsideration process. EPA generally does not stay its rules pending judicial or administrative review, and nothing in this petition has demonstrated that justice requires the extraordinary remedy of a stay.

Thank you for your interest in the final CAIR. EPA looks forward to working with you as implementation of the rule proceeds. If you have any questions about this letter, 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