

MASSACHUSETTS SIP STEERING COMMITTEE

Meeting Summary

August 7, 2008

In Attendance:

Rich Rothstein, Km Chng Environmental
Richard Burkhart, EPA Region 1
Anne Arnold, EPA Region 1
Alison Simcox, EPA Region 1
Paula Hamel, Dominion
Shawn Konary, Mirant
Pete Romano, IOMA
Bob Machaver, RJ Associates
John LeFebvre, GenPower
Sue Reid, Conservation Law Foundation
Don DiCristofaro, Blue Sky Environmental
Wig Zamore
Keith Beasley, Massport

Jim Cope, EOT
Howard Bernstein, DOER
Rob Sydney, DOER

Mass DEP Staff:

Eileen Hiney
William Space
Richard Blanchet
Azin Kavian
Richard Fields
Patricio Silva
Kenneth Santlal
Aimee Powelka

Please note that all materials distributed or presented at the August 7, 2008 meeting are available at:
<http://www.mass.gov/dep/public/committee/daqcpu11.htm>

CAIR Vacatur (Eileen Hiney – handouts)

EPA's 2005 Clean Air Interstate Rule (CAIR) cap-and-trade program set annual caps for NO_x and SO₂ for states contributing to non-attainment of the PM_{2.5} NAAQS and ozone-season caps for NO_x for states contributing to ozone nonattainment. Phase 1 reductions were required to start in 2009 for NO_x and 2010 for SO₂; Phase 2 reductions of both pollutants were required in 2015. On July 11, 2008 the Court of Appeals for the D.C. Circuit vacated the Clean Air Interstate Rule (CAIR) in its entirety. Key elements of the court decision include: CAIR's cap and trade allocations did not address emissions from within one state contributing to nonattainment in another state, did not implement the CAIR budget by attainment deadlines, did not address independently transport's ability to interfere with maintenance, illegally justified the cap on SO₂ budgets based on cost of controls, invalidly used fuel factors to allocate NO_x allowances, and EPA had no authority to alter the Title IV (Acid Rain) SO₂ allowance trading program. States and the Ozone Transport Commission have urged the EPA to reinstate the NO_x SIP Call Trading Program as soon as possible. States are also considering filing Section 126 petitions to address significant contributions by upwind sources to nonattainment in downwind areas.

The CAIR vacatur has significant implications on public health, NAAQS attainment (particularly for PM_{2.5}; less impacts for ozone), continuity of NO_x trading programs, and adequacy of various SIPs. MassDEP added sunset provisions to its NO_x Budget Program (310 CMR 7.28) when it adopted MassCAIR (310 CMR 7.32) in 2007, and EPA said it would cease administering the NO_x Budget Trading Program upon implementation of CAIR. EPA must now address whether and how it intends to continue administration of the ozone-season NO_x trading program. Massachusetts must examine whether to re-instate the NO_x Budget Program regulation and, if so, under what cap. Massachusetts SIPs that relied on modeling that incorporated CAIR include the Ozone Attainment Demonstration and Transport SIPs and the Regional Haze SIP. Whether EPA will be able to approve these SIPs remains to be seen.

2008 Ozone and PM2.5 Season (Rich Fields – slides)

Current ozone season exceedance data showed that, as of this date, Massachusetts monitors recorded exceedances of the new ozone standard of .075 ppm on 17 days. He did note that, had the old standard still been in place (0.084 ppm), only 9 days of exceedances would have occurred. There have been 11 exceedances over 7 days of the new PM2.5 standard (35 ug/m3) since January 1, 2008.

To explain how important global scale circulations are to local ozone severity and why this summer has been so rainy and relatively clean, he presented upper air (500 millibar – approximately 17,000 feet) meteorological charts for this summer and compared them with those of 2002, a bad ozone summer. Where the 2002 maps showed the predominance of a warm ridge, typical of hot sunny weather over the eastern U.S., the 2008 maps revealed an unusually strong trough, known for inducing wet weather.

Regional Haze SIP (Aimee Powelka – slides)

The Massachusetts draft regional haze SIP is in internal review. Once approved, it will be sent to Federal Land Managers and to EPA for a 60 day review period. After receipt of FLM and EPA comments, it will be issued for public hearing. The SIP contains information documenting the contribution of emissions from Massachusetts sources to regional haze at Class I areas in Vermont, New Hampshire, and Maine. The Mid-Atlantic/Northeast Visibility Union (MANE-VU) agreed upon a regional strategy to reduce SO₂ emissions with the following elements: 1) timely implementation of Best Available Retrofit Technology (BART), 2) a low sulfur fuel oil strategy, 3) 90% reduction in SO₂ emissions from specific EGU stacks (the “167” list), and 4) continued evaluation of other control measures (particularly smoke management). Most MANE-VU states, including Massachusetts, plan to submit their Regional Haze SIPs in 2009 despite the use of CAIR in modeling for reasonable progress.

Green Communities Act (Robert Sydney, DOER – slides)

The Department of Energy Resources has been reorganized to contain 3 divisions, which reflect the priorities of the recently-enacted Massachusetts Green Communities Act: the Division of Energy Efficiency, the Division of Renewable and Alternative Energy Development, and the Division of Green Communities. The Act provides technical and financial assistance to municipalities to implement energy efficiency and renewable energy with funding from the auction of RGGI allowances and other sources. The Act also requires gas and electric supply needs to compete with cost-effective energy efficiency and demand response measures, establishes long-term contracts for renewable energy sources, encourages small solar and wind by allowing net metering, expands the Renewable Energy Portfolio Standard, and creates an Alternative Energy Portfolio Standard. Green building efforts are supported by requiring the state building code to adopt updates of the International Energy Conservation Code and by mandating state building construction to use energy efficiency, water conservation, or renewable energy.

(The Act is available at <http://www.mass.gov/legis/laws/seslaw08/sl080169.htm>)

Climate Change Update (William Space)

The first allowance auction under the Regional Greenhouse Gas Initiative is scheduled for September 25, and bidder applications are currently being accepted and reviewed by the participating states. Sources regulated under RGGI are required to own allowances to cover CO2 emissions that occur after January 1, 2009.

Governor Patrick recently signed the Clean Energy Biofuels Act. (The Act is available at <http://www.mass.gov/legis/laws/seslaw08/s1080206.htm>). The Act exempts fuels consisting of eligible cellulosic biofuels from the gasoline tax, and requires blending of advanced biofuels with distillate fuels such as diesel fuel and home heating oil beginning in 2010. Cellulosic biofuels are derived from cellulosic feedstocks such as wood and corn stalks, and advanced biofuels are defined as fuels that achieve a 50% reduction in life-cycle greenhouse gas emissions relative to the fuel that they displace. The Act also authorizes the governor to work with other states to implement a regional low carbon fuel standard to reduce the average per-unit life-cycle emissions from fuels by 10%.

Governor Patrick is expected to sign the Global Warming Solutions Act this week. The Act requires the Secretary of Energy and Environmental Affairs to implement a plan to reduce greenhouse gases emissions from Massachusetts by 10 – 25% by 2020 and at least 80% by 2050. Consideration of a broad range of strategies, including market-based mechanisms, is required. The Act also requires mandatory reporting of greenhouse gas emissions from many sources beginning in 2009.

Next SIP SC Meeting: Thursday, December 4, 2008 at 10:00 a.m.

Memorandum

Date: July 11, 2008
To: NESCAUM Directors
From: Paul Miller
Re: Short summary of DC Circuit decision vacating CAIR

The Court of Appeals for the D.C. Circuit (DC Circuit) vacated the Clean Air Interstate Rule (CAIR) in its entirety on July 11, 2008. Below is a short summary of some of the court's rationales for vacating different parts of CAIR. The court ultimately decided that the many flaws of CAIR and EPA's adoption of it as "one, integral action" required it to vacate the rule in its entirety.

These notes are based on my own reading of the decision, and do not reflect nor are they intended to reflect the views and legal opinions of the NESCAUM member states.

Petitioners

Petitioners challenged CAIR on several fronts. North Carolina challenged EPA's trading programs, its interpretation of "interfere with maintenance," and its 2015 compliance deadline. Different utilities challenged different parts of CAIR. Key challenges raised were to EPA's use of cost considerations to determine SO₂ reduction requirements, the use of "fuel factors" as a basis for NO_x budgets, and the authority of EPA to reduce Title IV SO₂ allowances.

This short summary does not include all issues raised by petitioners, such as inclusion of "border states" and the 2009 Phase I NO_x compliance deadline. With the exception of remanding back to EPA for reconsideration of the inclusion of Minnesota in CAIR, the court rejected or did not consider these additional challenges.

Key Elements of DC Circuit Decision

1. Pollution Trading Programs

In response to North Carolina's petition, the court ruled that CAIR's cap and trade approach violated Clean Air Act (CAA) §110(a)(2)(D)(i)(I). The court held that under the CAA, EPA must address significant contributions through emission reductions "*within the State*" (emphasis in original). CAIR was regional, so would not necessarily result in reducing all emissions within a particular state found to significantly contribute to another state.¹

In distinguishing this holding from the DC Circuit's previous decision upholding the NO_x SIP Call (*Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)), the court said it never passed on the lawfulness of the NO_x trading program there because no one challenged its adoption.²

2. "Interfere with Maintenance"

North Carolina argued that even though all its counties were projected to be in ozone attainment by 2010, several counties remained at risk of returning to nonattainment. The DC Circuit said it did not

¹ This appears to undermine EPA's ability to use interstate (as opposed to intrastate) emissions trading to address pollution transport under CAA §110.

² The DC Circuit did state towards the end of its opinion that the NO_x SIP Call currently in effect should "mitigate any disruption" from vacating CAIR in regard to NO_x, so it's clear the court accepts the NO_x SIP Call's continued existence.

previously rule on EPA's interpretation of "interfere with maintenance" during the NO_x SIP Call litigation in *Michigan*, so EPA's reliance on its interpretation in that context did not support using the same interpretation under CAIR. The court ruled here that EPA's interpretation of "interfere with maintenance" gave it no independent significance from EPA's interpretation of "contribute[d] significantly to nonattainment." As a result, EPA's identical interpretation unlawfully nullifies the statutory provision of "interfere with maintenance" as a separate and independent provision.³ The court held that this applies both to ozone and PM_{2.5} maintenance.⁴

3. 2015 Compliance Deadline

North Carolina challenged the CAIR 2015 Phase Two NO_x deadline on grounds that it failed to address the 2010 attainment deadline for ozone in North Carolina. The court ruled that CAA Title I attainment deadlines required substantive, not procedural, measures. Therefore, it struck down the CAIR 2015 deadline as inconsistent with a substantive requirement to address significant contributions by upwind sources to downwind areas by attainment deadlines.

4. SO₂ Budgets

Several utilities challenged EPA's rationale for setting the SO₂ budget according to what could be achieved with "highly cost effective controls" rather than on grounds of what EPA determined significantly contributed to downwind nonattainment. The court held that EPA illegally justified the cap on an analysis based on cost of controls instead of on an analysis of what amount of pollution significantly contributed to downwind nonattainment. It also held that EPA's use of the Title IV acid rain SO₂ allowance budget as the starting point for determining CAIR caps was arbitrary because the Title IV cap was set for a different purpose (acid rain) than the CAIR cap (PM_{2.5}).

5. NO_x Budgets

The court ruled that EPA's use of "fuel factors" to allocate NO_x allowances "for the sake of sharing the burden of emissions reductions fairly" was invalid. The court stated that reductions had to be based on what is required to eliminate significant contributions from within a state to downwind nonattainment, and notions of fairness as applied by EPA are not relevant. It held that EPA's NO_x allocation scheme to distribute more allowances to coal-fired power plants inappropriately shifted the cost of reductions from upwind states with a higher concentration of coal-fired power plants to those with mainly oil- and gas-fired power plants.

6. Title IV Allowances

The court ruled that even if EPA has authority to establish an SO₂ trading program for purposes of CAA §110, it has no authority to remove Title IV allowances distributed under the acid rain program. The court held that SIPs can prohibit emissions that significantly contribute to downwind nonattainment under §110, but the goal of §110 is different from the acid rain goals of Title IV. Therefore, EPA cannot compel states to require retirement of SO₂ allowances distributed under Title IV in order to meet §110 goals.

Parting thoughts

If this ruling stands, EPA appears to be prohibited from using interstate trading programs under CAA §110 to eliminate emissions from within states that significantly contribute to downwind nonattainment. EPA must address significant contributions on an individual state basis, and cannot allow a state to meet its reduction requirements by obtaining allowances for emission reductions occurring outside the state. The reasoning is that the CAA statutory language prohibits emissions *within a state* from significantly

³ This may have significance for the current challenge to EPA's secondary ozone NAAQS in that EPA has not given the secondary NAAQS an independent meaning from the primary NAAQS.

⁴ This has implications for downwind states or areas that attain current air quality standards, but might want to consider §126 petitions for maintenance purposes.

contributing to downwind nonattainment, and an interstate trading program to address this contravenes the statutory language by inappropriately allowing continued emissions within a state through the use of emission allowances generated out-of-state.

The court observed that “downwind states retain their statutory right to petition for *immediate relief* from unlawful pollution under section 126” [emphasis added]. This leaves the door open for upwind emission reductions initiated through state §126 petitions.