

**CAIR Replacement Rule
Discussions between NACAA and EPA
April 2, 2009**

I. Introduction

On Thursday, April 2, 2009, EPA held a meeting and call with the National Association of Clean Air Agencies (NACAA) to discuss the CAIR replacement rule. The brief summary that follows covers the key issues discussed. More detailed notes, including a list of all participants in the call, are being prepared.

II. EPA Opening Comments

Sam Napolitano, CAMD, began with a short introduction, explaining that EPA was beginning the process of creating a replacement rule for CAIR. The Agency is reviewing all options, setting up analyses, and preparing technical models. The goal is to finalize a replacement rule within two years.

The primary objectives are to help states comply with the NAAQS and to reduce interstate transport. Therefore, EPA has decided that it would be best to start working with state and local air agencies immediately. EPA would like to hear from the state and local air agencies about what type of replacement rule would most help them meet air quality requirements. Sam stressed that this is the beginning of a dialogue process, and that EPA intends to continue these types of discussions throughout the rule development process.

This is a chance for the state and local air agencies to talk to the key EPA staff that will actually develop and write the rules, as well as the OGC attorneys assigned to the rule development. Sam stressed that EPA is interested in hearing NACAA's thoughts and concerns. Everything is on the table as EPA puts together ideas for the new Assistant Administrator for Air and Radiation, who should arrive within the next couple of weeks.

III. NACAA Opening Comments

Bill Becker, NACAA, thanked EPA for the opportunity to meet and share ideas. He noted that NACAA had five years ago highlighted deficiencies with the CAIR program that were never addressed. He expressed a sincere hope that EPA could address those deficiencies during this rulemaking. He explained NACAA's three main concerns with the original CAIR as: (1) reductions were not tough enough; (2) the breadth of sources covered was not expansive enough; specifically EPA should consider cement kilns and industrial boilers; and (3) the deadlines in CAIR did not match up with the attainment deadlines that the states are required to meet.

Bill indicated that states face serious consequences if they fail to meet the attainment deadlines, and that in the original CAIR there was a disconnect between what EPA was doing and what the states were required to do by law. He asked that EPA keep the states' needs in mind when developing a rule and creating a schedule, specifically regarding attainment deadlines.

IV. Core Issues Outlined by EPA

Sam Napolitano said that EPA would lay out the issues, but that he would be unable to indicate how EPA would eventually proceed, as the Agency is uncertain at present as to how to respond to the issues raised by the CAIR court decision. The purpose of this meeting is to gather different ideas and thoughts to present to the new Assistant Administrator for Air, whose responsibility it will be to decide how to address the ramifications of the court decision.

Sam invited Bill Harnett, OAQPS, to talk about the key issues EPA is considering in the CAIR replacement rule. He asked that speakers identify themselves as notes of the meeting were being prepared and would be shared with all participants on the call.

Bill Harnett outlined the following major issues:

1. Baseline

What is the starting point? What is the baseline? When the original CAIR rule was developed there were many questions about how to set up a baseline and what to take into account when creating the baseline. The situation has continued to change, and EPA would like to know how states believe the baseline should be created, and what factors should be considered in the baseline.

2. Quantifying significant contribution

Jim Ketcham-Colwill, OAR, explained that significant contribution is one of the key issues from the court decision. The court held that CAIR failed to quantify adequately each state's significant contribution. There are many smaller issues that come up under this general rubric, but the key questions pivot on how significant contribution is quantified.

3. Remedy

What remedy should be applied to the quantified significant contribution? What types of approaches should be considered? Is the trading option practical?

Tad Aburn, asked whether EPA had considered bifurcating the process – getting CAIR out as quickly as possible so reductions from EGUs can happen as quickly as possible, and then separately addressing how to satisfy section 110(a)(2)(D), which the new CAIR rule would be part of. Sonja Rodman, OGC, noted that the idea of bifurcating the replacement plan had been suggested during EPA's call with OTC. She added that from a legal perspective bifurcation might be possible, but that it would require significant work. EPA is required to address the section 110(a)(2)(D) findings of failure to submit, and using that authority would be the fastest and easiest way to create a rule to address transport.

Tad Aburn, MDE, noted that the primary concern for the states was getting reductions as fast as possible. He suggested that EPA consider solving transport through multiple programs, and that the Agency rely on its section 110 authority for all of them. Each rule could solve a piece of the transport problem. As long as the problems persist, further rules will be required.

EPA outlined some of the ideas brought up by the environmental NGOs, which have asked EPA to take a holistic approach to the rulemaking. Specifically, they have asked that EPA provide clear guidance as to what regulations the Agency would be promulgating and the long term control targets they envisioned for power plants. Such guidance would allow utilities to make comprehensive control plans that might include shutting down or re-powering small, very dirty plants.

NACAA members expressed interest in a holistic approach but were concerned that it might slow down the process or increase the legal risks. The members noted that the primary concern for states is to get reductions as fast as possible so they can meet the NAAQS.

4. Affected Area/NAAQS

Which states or regions should be covered by the rule? What should the timing of the rule look like? Should EPA start with the existing NAAQS? Or, should it try to integrate the newer standards into a replacement rule? Timing becomes a key element when considering which standards to target.

Bill Harnett noted that other states had asked EPA to look at industrial boilers and cement kilns, which the Agency was already considering. He also explained that some states had mentioned the possibility of controls on products and other manufacturing processes that contribute VOCs. Dealing with products or VOCs would most likely have to wait for a later rule, but he wanted NACAA to know that other states had raised the issue and that EPA was aware of the concern.

V. NACAA Response to Core Issues

1. Baseline

Sheila Holman, NC DENR, suggested that EPA consider using 2012 as the year against which to model the baseline because the 1997 ozone NAAQS will be in effect and it will be one year before the attainment deadline for daily PM_{2.5}.

2. Significant contribution

Tad Aburn said he was unclear as to why significant contribution had become such a big concern under section 110(a)(2)(D). He said his understanding is that EPA must determine if a SIP contains adequate measures to control transport. Sonja Rodman replied that EPA had never received a SIP that addressed section 110 in a context that did not rely on a federal program. Tad recommended linking section 110 to attainment in all areas. That would allow the Agency to develop a plan for attainment in all areas, which would, by definition, satisfy section 110 requirements.

EPA agreed that SIPs containing controls sufficient to bring all areas into attainment could be approved satisfying 110(a)(2)(D). However, EPA could not require states to over control. Among other things, the D.C. Circuit Court decision clearly instructed EPA not to

overstep its legal authority. EPA wants to create a strong rule, but the Agency also recognizes the likelihood of legal challenges.

Bill Becker noted that the Clean Air Act (CAA) does not require the NAAQS to be met in two or five years, but rather as expeditiously as practicable. He suggested that EPA could use the pressing need to meet the NAAQS as a basis for authority to over-control. Bill Harnett replied that the CAA requires states to move as expeditiously as practicable, but only grants EPA authority when the states are unable to meet the NAAQS.

John Paul, Dayton Regional Air Pollution Agency, suggested that modeling might take into account a “birthday clause.” He suggested doing modeling runs with all utilities at the best level of control to see if it would even be possible to go too far in terms of controls.

3. Remedy

Bill Becker said his understanding of the CAIR court decision was that trading could not be used as an option and he asked whether EPA had a different understanding. Sonja Rodman replied that EPA believes trading is still a possibility, though some additional assurances may be needed. She suggested that in many ways the court decision was like a legal minefield because the court was very clear that the way EPA had done the CAIR rule was unacceptable. However, the court was far less clear on what would be acceptable. Trading is one of several areas in which EPA believes the court did not provide clear direction.

Tim Smith, OAQPS, noted that trading provides economic incentives to reduce more and can often help states meet attainment deadlines faster. Tad Aburn agreed and said that he supported trading. However, he is unsure if trading helps in making a section 110 demonstration.

Bill Becker also agreed that trading could be a powerful control option and noted that most NACAA members also support trading. However, the members are concerned that allowing trading in a replacement rule could make the rule legally vulnerable. He cautioned that trading should be used to get the best results, not the mediocre results under the original CAIR. He urged EPA to make sure that any future program used trading to achieve the types of performance standards that should have been achieved last time.

Amy Royden-Bloom, NACAA, suggested that if EPA designed a rule that got everyone into attainment even with trading, then trading is OK because section 110(a)(2)(D) has been satisfied and no one is over-controlled because each state is integral to the success of the trading program. If one state pulls out, whole program could fall apart.

NACAA members suggested putting BACT controls on EGUs, large industrial boilers, and cement kilns because they believe that with that level of control the states would be able to achieve attainment. John Paul pointed out that putting BACT controls on all large facilities was still cheaper per ton than putting RACT controls on the smaller sources. OGC would have to figure out the legal justifications and how to deal with concerns about over control. Sam said it would be helpful to obtain from state and local air agencies the cost/ton of RACT for smaller sources, to compare with the cost of controls on EGUs.

4. Affected Area/NAAQS

Bill Becker asked if EPA could outline how the Agency saw the replacement CAIR rule development and implementation schedule fitting into the states' attainment deadlines.

Bill Harnett replied that the first five year date had nearly passed; by summer of 2009, controls must be in place to meet the 1997 NAAQS for compliance in 2010. The next compliance date is 2013, which means controls must be in place by 2012. EPA anticipates that 2012 would be the earliest that any benefits could be realized from a replacement CAIR program.

Bill Harnett said EPA was going as fast as the Agency believes possible, and realizes that states will have difficulty with the earlier compliance dates. However, it takes time to get a good rule done and additional time to get controls on once the rule is finalized. EPA will do everything it can to finish the rule quickly. However, the top priority is to develop a good rule that is legally defensible.

Bill Becker said NACAA would support EPA using the newer standards, or at least building in a method to ratchet down the requirements as the new standards came into play. Tad Aburn said that he agreed and he noted that on current red and orange ozone days, the amount of emissions in Maryland from transport alone is over the newer standards.

Bill Becker also said NACAA would support considering cement kilns and industrial boilers, and noted that NACAA had asked EPA to consider those very sources five years ago during the original CAIR rulemaking process.

VI. Conclusion

Sam Napolitano concluded the call by saying that this is the first of a series of teleconferences with state and local air agencies and other stakeholders, including OTC, LADCO, CenSARA, industry representatives, and environmental groups. When this series has concluded, EPA will meet with state and local air agencies again to report what EPA has heard from all of the groups. This will allow them to react and respond, and to continue the general dialogue.

Bill Becker thanked Sam for the opportunity to share ideas. Given that EPA intends to move very quickly with the rulemaking process, he asked that open communication remain a priority. Specifically, he asked that EPA not close down options by limiting the scope of a proposed plan. He recommended that EPA propose a rule with multiple options, allowing the Agency to choose which ones to make final based on comments and further study.