CAIR Replacement Rule
Discussions between OTC and EPA
March 18, 2009

I. Introduction

On Wednesday, March 18, 2009, EPA held a call with the Ozone Transport Commission (OTC) to discuss the CAIR replacement rule. See Appendix A for a list of the participants in the call. The notes that follow are a detailed summary of the call.

II. EPA Opening Comments

Sam Napolitano, CAMD, opened the call by thanking the OTC directors and staff. He said that EPA sees this call as the beginning of a dialogue with the states, regional groups, and other key stakeholders. EPA had a very productive conversation with LADCO on Monday (March 16) and heard a number of good suggestions about how to move forward. The Agency sees this call as the start of a similar dialogue with OTC about the different elements that should be included in a replacement CAIR rule. As part of the dialogue effort, EPA has pulled together the staff who will actually write the rule, develop technical analyses, and perform modeling. The Agency hopes to complete the rule in the next couple of years. CAIR will remain in effect as a new rule is being developed.

EPA has a topic guide to work from that is aimed at helping to organize the discussion. The purpose of this call is to gather different ideas and thoughts to present to the new Assistant Administrator for Air (AA). This first series of teleconferences will include calls with states and other stakeholders, including LADCO, NACAA, the southern states, Texas, industry representatives, and environmental groups. When this series has concluded, EPA will meet with states to report what EPA has heard from all of the groups. This will provide a way for the states to react, and to continue the general dialogue. The Agency hopes to get back to the states around April 20th.

EPA is still waiting for the new AA, but staff have heard positive things about the likely AA and expect her to arrive soon. The staff will discuss the input from these conversations with the AA to give her a sense of the analytical and technical work that has been completed.

The upcoming meeting in June might be a good time for interaction between state and EPA personnel. Also, the staff might have a better sense at that time of how the AA wants to move on a replacement CAIR rule. During the process, EPA will be sure to include states on any key issues that arise.

At the moment EPA has many options to present to the new AA for direction. The political management structure is not yet fully in place. Thus, the Agency has not decided on how to address many of the difficult issues. However, this does afford an opportunity for the Agency to listen to all stakeholder viewpoints and consider new approaches to meeting air quality standards. There are many current programs and requirements, such as MACT, BART,

and regional haze that will affect the replacement rule. However, it is unclear at this time whether changes in those programs will have an effect on the replacement CAIR program.

EPA is interested in including industrial boilers, and will be discussing ICI boilers with CIBO. Although their inclusion is not certain, these boilers are definitely on the table for consideration.

EPA has received OTC's letter and understands the detailed work OTC is doing. The Agency looks forward to the results of that work being presented through the State Collaborative in the near future.

III. OTC Opening Comments

Anna Garcia, Executive Director of the OTC, said that OTC was very interested in many of the issues on EPA's topic list. It should not surprise EPA that baseline, significant contribution, timing, trading, and coverage are all issues the Commission and its member states have been discussing. By May or June, OTC hopes to be able to share with EPA some of the technical work the Commission has completed.

OTC shared the letter it and LADCO sent to EPA outlining the emission limits that the Commission thought would be required. The letter has been made public and was also shared with industry. OTC expects to hear reactions soon, and it has cost information and a preliminary technical support document, both of which will be shared with EPA once they are finalized.

OTC is updating its information on electric utility controls and emissions. The Commission hopes to perform detailed analysis in an effort to see the full range of reductions that would be possible, and at what price.

Trading remains an issue of concern to OTC members, who are interested in how EPA will approach the policy and the court decision. OTC has seen cost benefits in most of its analyses, but there are concerns about whether allowing trading will really solve transport issues.

IV. OTC Discussion

1. Timing

Tad Aburn, MDE, noted that states are particularly concerned with whether the CAIR replacement rule process would line up with the process that states have to go through to meet attainment deadlines. It is important to get the reductions by the attainment dates, if not three years beforehand, because states have to work within those dates. The big challenge is to make sure a replacement program happens quickly.

Sam Napolitano, asked what years the states were considering. Tad replied that states were looking to have controls in place for 2013, 2014, and 2015 because they are anticipating that they will have to meet attainment in 2016.

Bill O'Sullivan, NJ DEP, suggested that performance standards would need to be considered in order to adequately address the court's concerns with the current CAIR rule. Because it will probably take longer than that timeframe to fully implement the performance standards, trading should be used as a way to encourage earlier deeper reductions from units that can reduce cheaply and quickly. He suggested that the phases of a replacement plan should coincide with attainment dates. It is important to pick performance standards that are not too high or too low, and to then allow trading to encourage reductions beyond the standard.

2. Performance Standards

Sam Napolitano asked Bill O'Sullivan to define what performance standards he foresaw by pollutant and program. Bill replied that EPA would have to look at the different state programs, but that there should be performance standards for all three pollutants, and even tighter trading schemes for SO_2 and NO_x.

Sam asked Bill what he would base the standards on. Bill replied that he would use RACT, which, while taking cost into account, does not require that controls are at the cheapest cost available. He suggested that the original CAIR had paid too much attention to cost, and that EPA should look at what the Agency had used for RACT and retrofit BACT.

Ali Mirzakhalili, DNREC, suggested that EPA should look at anything above 25 MW for these performance standards, with 24-hour average limits set at around 0.26 pounds per mmBtu for SO_2 and 0.125 pounds per mmBtu for NO_x. He thought those limits could be met with retrofit and hybrid controls. He also noted that because small units were able to meet those requirements, large units should have an even easier time.

Ali also agreed that timing is critical. He noted that plenty of work has been done, much of the groundwork has been laid, and he suggested that EPA could move faster than the two-year time frame to develop and promulgate a rule. If the Agency cannot move faster, he urged it to stick to the timeline and put the rule development in high gear.

Sam acknowledged that EPA understood the states' concerns, but that two years is a very fast schedule for EPA. How to define "significant contribution" certainly is one factor that will lengthen the rule development process because EPA is still trying to figure out exactly what significant contribution is and how it compares to a base year. EPA also is working hard to get the inventories set up so they can perform the modeling that is needed to fully understand and demonstrate the elimination of significant contribution as required by section 110(a)(2)(D). The Agency would welcome any state help with either inventories or modeling.

Tad Aburn suggested that one option for a CAIR replacement would be to disconnect it as a complete solution for section 110(a)(2)(D). EPA could classify the new rule as another national rule that helps solve transport, but disconnect it from the section 110(a)(2)(D) demonstration. He has never believed that section 110(a)(2)(D) could be solved by looking at a single sector.

Tim Smith, OAQPS, replied that under the section 110 findings of failure, EPA was now under FIP obligations to address section 110(a)(2)(D) transport issues. Therefore, the Agency is concerned about whether it has the flexibility to solve the section 110 findings of failure through another program. At the same time, the Agency is very sensitive to timing because it is already late, which means that EPA potentially could be sued and put on a schedule for rule completion.

Tad pointed out that if EPA could disconnect the replacement rule from the obligation o f fully satisfying section 110(a)(2)(D), the Agency might face fewer legal challenges, which would clearly make the whole process easier and possibly faster. Section 110(a)(2)(D) is not simply satisfied by passing a CAIR-type rule, and he would like to continue exploring the idea of disconnecting the replacement rule from the 110 finding. EPA noted that it welcomes ideas for fresh thinking and would like to hear more from the states about this issue.

3. Baseline

Susan Wierman, MARAMA, said that she does not understand how EPA could use future year emission projections, which may or may not happen, as the baseline for determining a significant contribution. Based on the meeting agenda distributed before the call, it appears that EPA is still considering this approach, but she indicated that she does not think it makes sense as a concept. If EPA projects forward, the Agency cannot know where the emissions will come from in the future because new sources are created and old ones shut down. Also, the Agency cannot predict where emissions will occur under a trading program as allowances can move between states. She concluded that she thought EPA would have to look at existing emissions that everyone knows have occurred.

Sam Napolitano replied that using the 2010 baseline was one of the few concepts EPA won in the court case. The Agency chose to use a future year baseline because it wanted to be able to take into account future reductions from settlement agreements and mobile source controls, as well as from other programs such as RACT. EPA is considering approaching the CAIR replacement rule baseline in a similar manner because an accurate projection of future emissions would require taking into account rules that EPA knows will have a quantifiable impact on emissions. Furthermore, inventories are works in progress; thus, some level of uncertainty is unavoidable. He added, however, that EPA would still welcome other ideas on this subject.

In response, other participants noted that EPA also won on the issue of what year the rule would take effect, as well as on some aspects of significant contribution. Tim Smith explained that for EPA the big issue in the July 11, 2008 court decision was the determination that EPA had not come up with a rule that guaranteed to eliminate the significant contribution from each state. The court held that EPA had neither adequately quantified each state's significant contribution nor provided a remedy to eliminate the significant contribution which had been identified. The court did accept EPA's thresholds for consideration of geographical areas and its choice of a baseline year.

Susan suggested that in order to understand significant contribution EPA would be required to use current year emissions data rather than projecting what the Agency thinks

emissions will be at some point in the future and using those data to create the baseline for the programs. In response to Sam asking for further explanation of her rationale, Susan replied that states would have to comment on which specific years should be used, but as a general principle she thought using a year that is known would be better than a technique that not everyone understands.

Rob Sliwinski, NYSDEC, agreed with Susan, noting that the emissions causing the attainment problems are current emissions. Thus, it makes the most sense to use actual data for the baseline rather than something based on conjecture and future forecasts. EPA should focus on eliminating the emissions that people know are actually causing or contributing to non-attainment. Susan added that she thought it might make sense to take into account future controls for mobile sources. However, because EPA knows what the emissions from EGUs are, it should rely on current year quality-assured data.

Tim Smith said that EPA is considering what baseline to use, and he thanked everyone for their input. Potential legal challenges may impact any final decision, and it will be important to look also at the criticism that might be leveled at the Agency if data from a current year were used for the baseline. Tim noted two areas of concern. The first concern is that there are definitive settlements in place which EPA knows will have a quantifiable effect on emissions. The second concern involves the SO_2 bank, which could play a large role depending on the overall direction of a replacement rule and where allowance prices end up. A no-CAIR-baseline would have to take into account the possibility of an increase in emissions due to banked allowances. These are two major issues for EPA when considering what year to use for the baseline.

Sam then asked Susan whether the 2008 inventories were ready to be used for creating a baseline. Susan replied that 2008 was not yet completed. Sam responded that even with the current year's data forecasting would be required. Susan replied that there was a one-year lag; thus, 2007 data are available and quality-assured. However, she added, even with 2007 data there are issues with some of the modeling inventory data. Another participant noted that states just received a request from EPA to see what controls are in place on EGUs and that there are some issues with the inventories that were submitted. States are currently trying to correct the data in the inventory that was circulated.

Susan suggested that EPA use the 2007 data to generate the baseline because those are the data states are using for the next round of modeling. States would be willing to work with EPA to fix any issues with the data so as to ensure the Agency and the states agree on the baseline. There will be concerns in any year about future settlements and other programs that are coming on line. Those programs and settlements could be considered in the remedy rather than the baseline.

Susan then noted that industry had raised the bank issue in recent meetings with the states, noting that if CAIR were in place for only a short period of time most sources would use up some of the banked allowances rather than put on further controls. Sam agreed this was a likely scenario and noted that EPA was left by the Court with the shortened version of CAIR

from the options EPA had analyzed last fall. The decision allowed CAIR to stay in place, but only while EPA develops a replacement rule.

Chris Salmi, NJ DEP, urged EPA to use the available information and move forward quickly. It is critical not to wait longer for more data because states have people breathing bad air, suffering health effects, and even dying. He stressed the importance of moving swiftly and decisively.

Bill O'Sullivan strongly agreed with Chris. He also agreed with Susan that banking was something to be addressed in the remedy not the baseline. The baseline should be built on data that have been monitored and quality-assured rather than on future year projections. The same applies to concerns about future year settlements, which should be addressed in the remedy. The baseline should account for the situation as it exists in the most current data.

Tim replied that EPA will consider all the comments about the baseline and will move as quickly as possible. However, one of the biggest concerns remains legal risk. The Agency wants to be sure that any replacement rule will fully satisfy the courts because no matter how the rule is constructed, litigation is expected.

4. Scope of the Replacement Rule

Ali Mirzakhalili suggested that EPA not try to do too much with the replacement rule. He thought one of the weaknesses with the last CAIR rule was that it tried to address contribution through a cap and trade program married to the Acid Rain Program. EPA would not have to deal with the bank if the Agency did not allow trading. Also, if EPA were to leave out provisions claiming that the rule fixes contribution then it would not be required to demonstrate the elimination of significant contribution.

Anne Gobin, CT DEP, thought that EPA should bifurcate the rule process and get the deepest and quickest reductions possible because people have unhealthy air, and states have to meet these attainment levels. The rule does not have to be perfect and does not have to fix everything in one step. She agreed with Ali that taking on too much with a replacement rule would open it to a high level of litigation risk.

Sam Napolitano acknowledged that EPA understood and heard the states' desire to move quickly. Two years is a very fast time frame for EPA, and the Agency intends to move with all deliberate speed. However, as others have pointed out, one of the primary concerns is making sure the rule is legally defensible.

Tim Smith said one of the core issues EPA needs to resolve is determining the purpose of the CAIR replacement rule. What is the rule trying to accomplish?

Tad Aburn said that he believes the key to a new rule would be separating out section 110(a)(2)(D). Although EPA tried to make section 110(a)(2)(D) only about EGUs in the original CAIR, he believes it covers cars and other sources. Clearly, section 110(a)(2)(D) is something EPA needs to deal with, but disconnecting it from a CAIR replacement rule might be best. It

appears that EPA is mostly concerned with section 110(a)(2)(D), while states are mostly concerned with getting controls in place as fast as possible.

Sara Schneeberg, OGC, replied that it might be possible legally to replace CAIR with a rule that does not rely on section 110(a)(2)(D) and to deal with the section 110 requirements through a FIP, but that would require significant work. State participants generally agreed but said they believed that EPA might be able to move faster by disconnecting from section 110(a)(2)(D).

One state participant asked how EPA thought section 110(a)(2)(D) would be addressed by looking only at the power sector, suggesting that the Agency would have to look at other sectors. EPA replied that it does not have an answer as to whether section 110(a)(2)(D) requirements can be met by controlling the power sector only, and that the Agency is open to looking at additional sectors. The state participant then suggested that it depends on how significant contribution is defined and what categories EPA defines as contributing. All source categories should be considered, and reasonable screening criteria are needed to determine which sources are actually playing a role in significant contribution. Section 110(a)(2)(D) is not solved by just going after EGUs. Furthermore, seasonal or annual programs do not necessarily solve the transport issue.

Sam mentioned that detaching the replacement program from the section 110(a)(2)(D) finding might bring up authority issues. The court clearly instructed EPA to be sure the Agency based the replacement rule on clear legislative authority. EPA is uncertain where that authority would come from, except from section 110(a)(2)(D). The Agency is interested in the idea of bifurcation, but it is concerned about the legal foundation.

Andy Bodnarik, NH DES, said that one thing the court made clear is that EPA must quantify each state's contribution, as well as each state's contribution to other states. Quantifying those contributions is not something that can be addressed without taking all sectors into account, along with all the state-specific requirements for those sectors. He also suggested that intrastate trading might provide flexibility.

A participant from NJ DEP raised concerns about getting out of the significant contribution classification once a state had been determined to contribute to another state. For instance, one way to determine if a significant contribution has been addressed would be to look at the contributing state's rules and determine if the receiving state had at least as stringent controls as the contributing state. If both states have equally stringent rules, then the contribution might be considered satisfied, for example.

5. Trading

Sam Napolitano noted that trading had not appeared to be a legal issue for most states, and that only North Carolina had brought up legal concerns with trading. Other states had concerns about stringency and how many allowances were given out, but most states did not oppose the concept of trading. However, one of the most significant choices EPA must make in a replacement rule is between direct control and trading. EPA is considering direct control, but

"significant contribution" issues remain even if EPA were to choose a direct control (e.g., performance standard) approach. Direct control still leaves the same problem of trying to identify what parts of contribution are significant and then demonstrating that the remedy eliminates that quantified significant contribution.

Susan Wierman indicated that the idea that only North Carolina had an issue with trading might be too narrow. Other states, such as New Jersey, Maryland, and Delaware, adopted state-specific rules that limited trading by requiring EGUs to put on controls and by curtailing their ability to buy or sell allowances. Although states did not argue against trading on legal grounds in CAIR litigation, they clearly had policy concerns. Sam agreed that some states had added local controls which the CAIR program allowed. In those states direct control exists with the ability for facilities also to trade. Originally, when he said that only North Carolina had a problem with trading he was speaking in the legal context regarding states that made a legal challenge.

Susan noted that some states were concerned that transport issues could not be solved by trading. She suggested that if an area in a state were contributing to non-attainment in another state, that area should itself be considered in non-attainment. There are clearly political ramifications to such a determination. This concept has been discussed by OTC but has not necessarily been supported by other states. However, she did think there was legal authority to move forward with something other than CAIR.

Tim Smith raised concerns about how a strictly performance-based system can have a lowest common denominator effect. With command and control, sources control only down to the required level, even if they might easily and cheaply control more emissions. Trading adds an economic incentive to reduce immediately and beyond the required level so sources can sell or bank allowances. One idea EPA is considering is to establish minimum standards and allow any source that reduces below those to participate in trading.

Ali Mirzakhalili agreed that trading should be used to encourage additional reductions beyond the standard. He supports using a performance standard and allowing trading to help eliminate the lowest common denominator problem.

Another state participant pointed out that regardless of trading, the key point of the North Carolina case was that EPA needs to eliminate significant contribution.

6. Sectors to Include

Barbara Kwetz, Massachusetts DEP, said that she believed a replacement program would have to look at more than just utilities. Massachusetts gets the most response in modeling from the on-road sector. She was unsure if EPA had the authority to look at on-road through significant contribution, but that the on-road sector plays a large role in their modeling.

Barbara also said that she believed EPA needed to build efficiency factors into the consideration of EGUs. States were concerned with how the allowances were distributed between the states last time. She thought the new AA would support considering efficiency.

Sam Napolitano replied that it seemed that Barbara was suggesting that EPA needed to look at more than EGUs. Was she considering cars? Or more broadly, what other sectors do the states think EPA should look at? Barbara replied that she was just reporting on what the modeling was demonstrating. She supports bifurcating and dealing with significant contribution in a separate rulemaking because far more than just utilities are involved in transport.

Jeff Crawford, ME DEP, suggested that it is important timing-wise and depth-wise to consider other programs that will affect mobile emissions. He thinks it might be better not to tie mobile sources directly into a CAIR replacement rule, but he also said that mobile sources should not be taken out of consideration. He also thinks that the new rule would need to include more than EGUs, most likely large stationary sources. Large stationary sources were originally considered under CAIR, but in the end were not included because there was not enough information. Jeff believes the data have progressed to a point where EPA could justify including the large stationary sources. When asked if he was referring to new information on ICI boilers, he replied yes, in part, and that there was other new information that also supported inclusion of large stationary sources.

Andy Bodnarik reiterated the idea of bifurcation, suggesting that EPA create one program to deal with transportation and another that addresses CAIR-like programs that use a combination of performance standards and trading. Mobile sources should be included as one of many sectors in the rule addressing transportation.

Chris Salmi also believes that EPA should separate out section 110(a)(2)(D) and develop a comprehensive plan to address transportation. Such a plan could involve multiple smaller rules that combine to control transportation across numerous sectors, allowing EPA to achieve the objective in a timely fashion that the states believe is important. Sam thanked Chris for the suggestion and said that EPA would consider it.

7. 1997 versus 2006 NAAQS

Bill Harnett noted that the 2007 deadline had passed for the FIP required by the section 110(a)(2)(D) finding made in 2005 for the 1997 standards. He also noted that the group had not even begun to talk about the 2006 standards for PM and ozone and wondered how the states foresaw these standards being addressed.

The 2006 standards must be met in September 2009, so this is an immediate issue for the states. Would the states rather have EPA wait and see if the states can meet the standards, or should EPA proceed with creating the FIP? Basically, should EPA consider the newer standards?

States replied that it would depend on what type of FIP EPA intended to create. It was also noted that timing is difficult because the dates are upcoming but not yet arrived. It is hard to address a standard that states are not yet officially failing, especially when standards exist that are supposed to have been met, but were not in fact met. However, it is also true that the compliance date for the 2006 standards is fast approaching.

One participant noted that the EPA Administrator has acknowledged in publications that EPA had not fulfilled the section 110(a)(2)(D) requirements over the past eight years and would have to do better. Thus, it seems as though EPA should admit that the approach to section 110(a)(2)(D) did not work, lay out a new plan for how to address transport, and provide an indication of the role a CAIR replacement rule will play in helping reduce future transport.

V. EPA Discussion

Sam Napolitano noted that the group had addressed each of the three topic areas on the agenda in a largely unstructured fashion, and asked whether there were any more discussion on the baseline.

1. Baseline

Andy Bodnarik raised the legal problem that EPA must confront in trying to create a new rule. The more assumptions EPA tacks onto the rule, the harder it is to get the rule promulgated. Last time there were assumptions regarding BART, MACT, and RACT which he felt might endanger the rule in the future.

EPA asked if he meant that the new rule should satisfy the BART, MACT, and RACT requirements. Andy responded that he did not mean this, but that if the future rule attempted to satisfy all those requirements it would face potential legal challenges because those requirements are moving targets.

EPA acknowledged this point and said that in terms of the baseline question the Agency is trying to understand what consideration, if any, it should give to the reductions those programs will achieve when creating the new baseline.

The states responded that in general they were in favor of using actual emissions data to generate the baseline rather than using projected reductions. The states believe 2007 is the best year meteorologically and the one for which states have good data. Furthermore, 2007 is the year the states are using to create their inventories for the next round of SIPs. States would like to work with EPA on these data to be sure everyone has a complete inventory that is based on real, monitored data.

2. Significant Contribution

Sam Napolitano then moved the discussion to significant contribution. Clearly the states understand that significant contribution is a big issue that EPA must be sure to adequately address. EPA heard the states' suggestion for disconnecting from section 110(a)(2)(D), which is a good idea and will be considered. Do the states have any further comments or suggestions about how to deal with significant contribution?

One participant replied that she had read the rules and the methodologies and was still confused about how EPA arrived at the significant contribution levels used in the original CAIR.

She said that she understands the levels, but not the methodology used to determine them. She asked if EPA would be reviewing these methodologies, and wondered what universe of factors EPA generally considered when determining significant contribution or performing related modeling.

Sam explained that there were two elements involved in a significant contribution determination. The first was a numeric metric used to define which geographical areas should be in CAIR. The court agreed with EPA's process in terms of identifying the areas that should be included. The second element was the remedy; here sources were required to put on highly cost-effective controls. If cost-effective controls were put in place, the unit was determined to have met its CAIR obligations. By definition, complying with CAIR also meant the unit was in compliance with section 110(a)(2)(D) requirements.

States noted that the second section was what the court struck down. Cost can be considered as part of the control strategy, but EPA said that if the cost were reasonable then the controls met the requirements. It was suggested that the court thought EPA had put the priorities in the wrong order. EPA agreed that clearly the court had found the old method unacceptable, but the Agency was less certain about what the court would find acceptable, which is part of what is driving the solicitation of new ideas.

Barbara Kwetz suggested that significant contribution was a scientific test which requires EPA to figure out and define the linkage between one state's emissions and exactly what part of those emissions are significantly contributing to non-attainment in a different state. Cost-effectiveness arises when looking at a remedy. Sam agreed that this was one way to approach significant contribution.

Barbara agreed that the court upheld the geographic metrics, but thought that in order to meet the standards the metrics might have to be lowered to include more areas. However, once that significant contribution is identified it must be removed; cost-effectiveness only comes into consideration when choosing between the different strategies that will eliminate significant contribution. Cost-effectiveness alone does not eliminate significant contribution.

Tim Smith noted that EPA needed to develop some method of measuring the actual amount of significant contribution, not just whether an area did indeed significantly contribute. The court specifically held that under section 110(a)(2)(D) EPA needed to identify the significant contribution, and then eliminate what was identified. In the original CAIR, the court found that EPA had neither identified nor eliminated the significant contribution.

Ali Mirzakhalili added that the geographic threshold of 0.2 that the court agreed EPA had done correctly was based on a standard which is up for review and will mostly like be revised. However, another participant noted that the court had sent only the annual standard back to EPA for review. It is impossible to prejudge what will happen during the review because the court asked EPA to justify only the level at which the annual standard was set. Therefore, it is not certain that the standard will change. Ali agreed with this but noted that the ozone NAAQS had already been lowered from 80 ppb to 75 ppb. He suggested that because the standard is more stringent, the thresholds for significant contribution should be tightened as well.

Some states noted that section 110(a)(2)(D) requires SIPs to contain adequate measures to deal with transport. They suggested that the difference between individual states' controls should be taken into account when determining significant contribution. This would level the playing field and ensure that those states which already have significant levels of control are given credit for those reductions.

As a participant from NJ DEP had noted earlier, as part of the review it would be important to determine whether the receiving state has rules at least as stringent as those of the contributing state.

The states have always been slightly confused about the way EPA makes significant contribution determinations. It was suggested that if an upwind state does not have a SIP measure that provides a non-zero benefit to the downwind area, the downwind area already has those types of controls in the SIP, and the downwind state's controls are cost-effective, then no matter how small the contribution is from the upwind state, it should be considered significant. The suggestion was that EPA might look at using the SIP measures as the driver for section 110(a)(2)(D).

Sam explained that EPA has always been concerned about industry litigation risk. The Agency has always tried to select levels that industry would have difficulty arguing were not significant. Furthermore, requiring a 0.2 microgram reduction through a SIP requires significant effort. The entire CAIR program on average removed 1 microgram.

Tim asked the larger question of whether in determining what different states need to do to meet section 110(a)(2)(D) requirements EPA should look at significant contribution strictly through a level playing field paradigm, or should it also weigh which states contribute more?

One state participant replied that the assumption is that states that contribute more would have to control more. Susan Wierman raised the fact that states, specifically those in the Northeast, are smaller, and that non-attainment areas overlap state boundaries. For instance, the District of Columbia non-attainment area includes three to four states. It would seem that if there is an approvable SIP for that non-attainment area then the SIP itself is a demonstration that each of the states have done what is required to address transport to the states in that non-attainment area. Using the SIPs as a significant contribution metric would allow EPA to move away from a metric based on standards which change over time.

Leah Weiss, NESCAUM, noted that all of the modeling numbers are based on an average summer day. However, many areas are affected by peak emissions, which need to be considered because those emissions often overwhelm an area and cause ozone non-attainment. Tim asked whether the states believe that the peak issue is linked to transport. Jeff Crawford responded that Maine has experienced high ozone levels between 2 a.m. and 3 a.m., which clearly points to a transport problem.

EPA noted that its modeling has historically been aimed at a peak. The Agency would take an episode period, work through it, and think about significant contribution relative to the

peak. EPA then asked if the peak emission issue involved peaker plants coming on line during high demand days, as those plants are often smaller and dirtier than usual. One participant suggested that EPA had not looked at the issue in that light before. Leah noted generally that the manner in which modeling is performed may contribute to some difficulties in this area.

Tad Aburn asked if the section 110(a)(2)(D) demonstration was the responsibility of the upwind area. EPA said that it is the states' responsibility to demonstrate compliance through the SIPs with section 110(a)(2)(D), and that the finding of failure to demonstrate section 110 compliance is what triggered this whole process.

Tad asked if EPA might be able to provide more guidance to the states on how to meet the section 110(a)(2)(D) requirements and what that demonstration would require. Bill Harnett agreed that guidance might be useful. Especially as the section 110 transport requirements will continue to be an issue in the eastern U.S. In any demonstration there would have to be both a modeling and a control component. EPA expressed an interest in knowing which elements of the demonstration, such as state and regional modeling, have already been developed through the RPO process.

OTC asked about EPA's review process for determining section 110(a)(2)(D) compliance. OTC said it also would be interested in additional guidance from EPA on how to meet those requirements. EPA responded that most states do not submit anything on this issue. This means, of course, that the state automatically falls under the FIP. There was some discussion about the complexity of the demonstrations, and it was suggested that in many ways the technical aspects of a demonstration might be beyond the resources of states and that the SIP process might not really be appropriate. However, EPA understands the concerns and will look into issuing more guidance.

David Wackter, CT DEP, indicated that he thought that addressing significant contribution would require sector-by-sector modeling. This would allow EPA to define what part of the significant contribution comes from EGUs and create a rule to deal with that specific part of the significant contribution. EPA would also be able to see what portion of significant contribution came from mobile sources, point sources, and area sources. He added that he believes the modeling would show that sources other than EGUs are playing a large role in contribution, which would mean that reductions might be required from those other sources. He reiterated support for bifurcating the process.

Sam acknowledged the suggestions and said that EPA would consider the bifurcation ideas. He then asked if the states had any more thoughts on the remedy.

3. Remedy

Chris Salmi suggested that there are a number of area source categories where national rules make more sense. For instance, paint products, ICI boilers, and many others. Another participant noted that OTC was re-examining area source rules and going back to the VOC rules concerning consumer products. The Commission is very interested in working with EPA on new

national rules controlling emissions from sources other than EGUs, and would be happy to share with EPA the work done so far.

Bill Harnett noted that there appeared to be two different remedies to address transport that states would like to see implemented. The first would be to look at area sources for contribution and set a level of control that sources would be required to achieve for area sources per state. EPA could recommend to the state how to achieve those control levels and what types of controls EPA believed would be cost-effective. However, it would be up to the state to meet the requirements. A second remedy would deal with national rules covering other sources, such as future consumer products.

One participant suggested EPA use thresholds for other sources and allow the states to decide how to meet the thresholds.

EPA indicated that it understands that the states are very interested in getting a program in place as quickly as possible. The Agency understands that states want EPA to do whatever is possible with EGUs and large stationary sources under the revised CAIR, and then to consider separate programs to control other types of sources.

Andy Bodnarik noted that some states already have area rules that cover manufacturing and deal with more than just paints and coatings. Therefore, he believes states might support national standards that fit into pre-existing rules. For example, California dealt with some area sources, such as water heaters, by adopting a manufacturing standard. There are clearly products other than VOC emitters that are contributing to the overall emissions in large amounts.

Sam Napolitano asked if Andy was referring to building codes. Andy replied that he was thinking more along the lines of how EPA controlled wood stoves. Sam asked if he thought this would be regulated under NSPS. Andy said it could operate in a similar manner, depending on the source. For example, under the wood stove program, EPA set up a test lab, and manufacturers either passed or failed. Andy suggested EPA could do with other sources the same as California did with water heaters.

Bill Harnett agreed that using an approach similar to wood stoves for other area sources would be one option. However, Peter Tsirigotis, OAQPS, might raise concerns with resources as his division can barely keep up with current programs and litigation on MACT and residual risk. Standards have to be reviewed, and the group is reviewing about 80 rules every two years. In addition, the sheer volume of court-ordered work at this time makes it difficult to look ahead. Although it strains EPA's resources, the Agency is required to comply with court orders. Bill said he would raise the issue with Peter, but wanted the states to bear the resource situation in mind.

4. Coverage and Timing

Sam Napolitano moved the discussion to coverage and timing, stating that EPA understands that the states believe the program is late and that they are pushing for fast action.

From this conversation he understands that the states would like EPA to deal with the 2006 and 2008 revised NAAQS for ozone and particulates, as well as the 1997 standards.

The states confirmed that a CAIR replacement rule on EGUs should consider all three standards. Using the 2006 and 2008 standards means that EPA will have to define transport within the framework of these newer, more stringent standards. However, put simply, the states are interested in the deepest and fastest emission reductions EPA can achieve. If combining source categories is necessary and will delay the rule, states understand why EPA may have to take that path, but the states encouraged the Agency to determine how to get some immediate reductions.

Sam replied that EPA would be best able to look at utilities and possibly large industrial boilers because other source categories have not been focused on in recent years. EPA will have to build up data and research policy options concerning area and other sources. EPA believes utilities and large industrial boilers will be the easiest to get quick reductions from because so much work has already been done with these sources.

VI. Conclusion

Sam Napolitano noted that the 2005–2008 data indicate that even with the shortened CAIR and the court challenges, the current programs have brought SO_2 down by 2.4 million tons in the CAIR region. Emissions are still under the cap, and the bank did get bigger, but some progress was made. Additionally, the same data show that there was an annual NO_x reduction of over 0.5 million tons in the CAIR region. The 2008 data are not finalized, but it appears as though emissions will be under the summer cap.

Clearly, everyone would like to achieve greater reductions. However, EPA does believe these results will be helpful in trying to meet attainment requirements. While the SO_2 bank is clearly an issue, EPA believes the NO_x reductions are very real and binding. Sam noted that while most people were satisfied with the reductions under Phase I, OTC had wanted further reductions, and EPA looks forward to making sure reductions continue to occur. Finally, it is important to note that there are many control equipment projects under construction that will bring even more reductions.

States and OTC said that they were pleased to hear about the reductions. However, they are concerned because preliminary work (which has not yet been made public) based on the last round of modeling indicates that another 500,000 tons of NO_x reductions will be required in the region. They cautioned that all the data had not been finalized, but noted that a large reduction would be required just from the Northeast region. That does not even take into account reductions that will be required from other regions such as the Midwest and South. In response to further questions from EPA, they explained that the predicted 500,000 ton reduction requirement applied not just to EGUs but to all sectors. In the power sector, it appears that a reduction of a few hundred thousand tons might be required. Sam then announced that Maryland was the big reducer for NO_x, and he congratulated Tad Aburn.

Ali Mirzakhalili thanked EPA for the renewed efforts at dialogue and mentioned that he hoped the dialogue would continue. In the past, starting with the Clear Skies initiative, the states' message has been that the federal reductions are too little and too late. The federal response to the states' concerns was usually that EPA was doing the best it possibly could and that the reductions offered were the best the states were going to get. He hopes that the state comments were clear that this time EPA needs to do better and develop more stringent number and caps. States need reductions immediately to help meet attainment dates.

Sam acknowledged that EPA had heard the states and suggested that the new AA would be a good listener. Bill Harnett agreed with Sam and thought the new AA would want to engage with states to make sure EPA understands the issues states are facing and the support they need from the Agency. Both Sam and Bill indicated that they understand that the states would like to have been more involved in the development of CAIR, and they reiterated EPA's interest and commitment to a strong dialogue with the states.

Anna Garcia expressed OTC's approval of the renewed commitment to dialogue. OTC and the states then asked EPA how it thought regular communication between states and EPA could be structured. They suggested that EPA staff discuss the issue once the political leadership was settled.

Bill Harnett indicated that he thought that arranging a phone call similar to this one would be one way EPA could keep the lines of communication open. For now, EPA will stay in touch with OTC and let OTC decide at what point another discussion would be useful. As noted at the beginning of this call, at some point after April 20th, EPA will present a summary of this series of preliminary calls with states and other stakeholders. The semi-annual meeting was also mentioned as a good place for some direct contact, though the states noted that it is difficult at this time to get travel approval.

Ali offered to develop a draft model rule to share with EPA. EPA agreed to consider it and suggested that he email it to Bill or Sam, either of whom would then circulate the draft to the whole team.

Anna Garcia concluded by thanking EPA, noting that OTC would be speaking with LADCO the next day during the collaborative call, and she said that if there is anything OTC can do to help EPA, the Agency should not hesitate to call. The states and OTC do understand that there is lot of work facing the Agency.

Sam thanked OTC and reiterated that EPA understands the states want a rule back in place as soon as possible. He concluded by noting that if the states had concerns about specific details they should not hesitate to call or email EPA.

Appendix A:
Participants

OTC and Other Groups:

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Doug Austin (OTC)
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Amy Royden-Bloom (NACAA)
Leah Weiss (NESCAUM)
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Ali Mirzakhalili (Delaware)
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Diane Nelson (Maryland)
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Barbara Kwetz (Massachusetts)
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Jeff Underhill (New Hampshire)
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