

CAIR Replacement Rule
Discussions between Texas Commission on Environmental Quality (TCEQ) and EPA
April 28, 2009

I. Introduction

On Tuesday, April 28, 2009, EPA held a call with the Texas Commission on Environmental Quality (TCEQ) to discuss the CAIR replacement rule. The summary that follows covers the key issues discussed during the call.

II. EPA Opening Comments

Sam Napolitano, CAMD, noted that illness had prevented Bill Harnett, OAQPS, from joining the call, but that some of his key staff were on the call. Sam then briefly outlined the current situation, 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 states and stakeholders immediately. EPA has already held a number of meetings with state groups and stakeholders and would like to hear from Texas about what type of replacement rule would be most practical while also achieving the required emission reductions. 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 stakeholders 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 the stakeholders' 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. TCEQ Opening Discussion

Kim Herndon, TCEQ, thanked Sam and EPA for the opportunity to share ideas and to discuss the replacement CAIR rule. She indicated that for the most part TCEQ had questions for EPA, and she began by asking how the CAIR replacement rule would mesh with CAIR as it is currently in effect.

Sam explained that the current CAIR rule was in effect and that EPA credits the rule with 2.4 million tons of reductions and the largest SO₂ reductions in 15 years. EPA has distributed allowances for all sources through 2010, and some sources were given allowances for 2011-2013. In general, the Agency is waiting for the new Assistant Administrator for Air and Radiation before distributing later year allowances. EPA has informed the designated representatives (DRs) at the affected facilities that the original CAIR will be in effect through 2010, after which it is unclear what will happen. The Agency has cautioned DRs to be careful about trading or buying later year allowances given the regulatory uncertainty.

Kim noted that Texas was under the FIP for Phase II of the original CAIR. TCEQ has been instructed by the state legislature to revise the SIP for approval so that the state is not under the FIP for Phase II. She asked what TCEQ should do, given that the replacement CAIR rule is supposed to be promulgated before Phase II. Sam replied that a specific discussion about Texas' SIP would be better coordinated through EPA Region 6. EPA would be very interested in helping work through any SIP issues, but that process has to go through the Regions.

TCEQ posed several questions about details of the new CAIR replacement rule, at which point Sonja Rodman, OGC, intervened to provide context to the discussion. She explained that EPA was at the very beginning of the rulemaking process and had not made any decisions about specifics of a replacement rule. She noted that the D.C. Circuit Court had remanded the rule after finding substantial flaws in how EPA had addressed significant contribution. The court ruled that EPA had failed to quantify each state's individual contribution and found that the remedy did not adequately remove each state's significant contribution. EPA now confronts fundamental questions about how to address significant contribution and create a remedy that satisfies the court's decision.

The purpose of this meeting is to get a sense of what the states need from EPA. The Agency is not in a position to discuss the details of the replacement rule because fundamental decisions about how the new rule will work still need to be made by incoming management. This is an opportunity for Texas to talk to EPA about how the state believes the Agency should address the fundamental issues raised by the court.

Susana Hildebrand, TCEQ, explained that Texas was primarily concerned with not penalizing sources in the state that had already made significant NO_x reductions as a result of state legislative requirements set years ago. Texas does not want to require further reductions from those sources because, on average, other states have not made similar reductions.

The group then turned to discuss the agenda EPA had provided and distributed before the call.

III. Discussion of Agenda

1. Baseline

Sam Napolitano noted that a number of issues arose during consideration of which year to use as a baseline. Some states have expressed concerns about using a future year because of the many extrapolations required. Other concerns center on the fact that MACT requirements, and other known settlements that will require controls to be installed, could not be taken into account using current year data. Because EPA knows that the emission situation will have changed by the time the replacement rule is promulgated, some have argued that the Agency should try to forecast a future year baseline.

Susana Hildebrand expressed concern that units that have already installed scrubbers might be unable to make further significant reductions. She suggested that EPA should use some

type of emissions factor or other mechanism to credit facilities that have already made reductions and reward the early investment. EPA should not require a flat percentage reduction.

Tim Smith, OAQPS, explained that EPA is wrestling with how to consider cost when looking at significant contribution and a remedy that satisfies the court decision. In Texas' situation, where the sources are already well-controlled, further reductions would clearly have a much higher cost. Susana agreed with Tim's characterization of her comment as expressing a preference that EPA consider cost.

David Schanbacher, TCEQ, provided additional background on the reduction percentages that Texas has achieved. He noted that Texas implemented a cap and trade program in the 1990s for grandfathered facilities that had not gone through the permitting process. Through this program Texas was able to achieve 50% reductions on average statewide. Given this success, the SIP group created a similar program for permitted facilities, which gave Texas about a 50% reduction across the board. The state has also achieved significant reductions under SIP plans implemented for Houston and Dallas, where they have realized nearly 90% reductions. Texas has also been working to replace some of the older natural gas fired peaker units that have been responsible for significant NO_x emissions.

David noted that fear of being penalized is one of the primary concerns of facility owners, and one of the reasons they resist putting on controls proactively. TCEQ believes that large reductions have been achieved in Texas under the plans that have been implemented, and it does not want federal regulations to penalize owners who put on controls either proactively or in response to state regulations.

Sam said he understood TCEQ's concerns. EPA has attempted in the past to consider, in an even-handed manner, the significant contribution that upwind states make to downwind states and to set a limit where all states over the limit for ozone or fine particles would, in an equitable way, be part of addressing the transport problem for downwind states. He asked if TCEQ was concerned with EPA continuing to address transport in that manner.

Susana Hildebrand explained that one of the key concerns is Texas's size and the geographic location of all its plants. Western plants have no significant transport issues in most cases, but they get drawn into the program because eastern plants are affecting neighboring states. Texas is large enough that multiple states could fit within its borders. Perhaps one way EPA could address this geographic challenge is to divide the state into quarters.

David then noted that Texas is the one state with a self-contained grid, which means it does not generate energy within its borders to export to other states. For the most part, what is generated in Texas is also consumed here.

2. Quantifying Significant Contribution

Sonja Rodman said that significant contribution was a big area to address, with many options for the replacement rule. For CAIR, EPA established significant contribution through a two step process. EPA first conducted air quality modeling to determine which states should be included in the region and then looked at the cost-effectiveness of controls to determine significant contribution. EPA established regional caps and developed the state budgets for each pollutant involved. The D.C. Circuit Court ruled that EPA had failed to quantify individual state significant contributions and thus also did not require the specific state to eliminate its significant contribution. As EPA develops the new rule it is considering alternate ways to define significant contribution. The Agency welcomes suggestions, especially on what role modeling and cost-effectiveness should play in quantifying and remedying significant contribution.

TCEQ replied that it had not formed an opinion regarding significant contribution or cost analysis. TCEQ strongly criticized the idea that west Texas was contributing to Illinois and east St. Louis.

Sonja indicated that EPA would accept comments on dividing Texas for the purpose of the CAIR replacement rule. However, the issue has already been litigated and is partially addressed in the recent court decision. Kim Herndon offered to assemble more formal comments on the issue. Sonja noted that one issue to address is whether any suggested dividing lines are specifically related to interstate transport. Kim responded that the only differences between one state and another are government boundaries. Therefore, Texas should be able to create boundaries within the state.

Sonja noted that the Agency is willing to consider all options. However, from a defensibility standpoint lines unrelated to interstate transport seem more difficult to defend in court. Accepting a boundary drawn by Texas is very different than working with state boundaries.

3. Remedy

Tim Smith outlined the issue of remedy: What remedy should be applied to the quantified significant contribution? What types of approaches should be considered? Is the trading option practical? Tim noted that EPA had heard suggestions ranging from a strict command-and-control program to a trading program, as well as various combinations of the two. Some states expressed interest in combining looser standards with a trading program in an effort to leverage the increased reductions that can be gained by allowing trading.

TCEQ indicated that it generally supports the cap and trade philosophy and believes there is value in allocating allowances in a manner that gives credit to facilities already operating at low emission rates. TCEQ raised concerns that in the past rules have been developed that did not take into consideration trading programs other than the NO_x SIP Call. Texas has a cap and trade program separate from the NO_x SIP Call. Assumptions about the NO_x SIP Call do not apply to all states with trading programs. It is frustrating when comments from EPA Headquarters do not seem to recognize the existence of other trading programs.

Sam acknowledged TCEQ's concern and indicated that he had heard about the program before during a presentation by Susana Hildebrand at MIT. Per Sam's request, Susana agreed to send him materials about Texas' cap and trade program.

Tim asked for examples of the types of comments TCEQ thought overlooked their program. Kim noted that she did not have any specific comment in front of her, but that responses concerning state trading programs would often start with such phrases as "If you are a NO_x SIP Call state this applies, otherwise this does not apply to you". In general, the responses seemed to imply that the NO_x SIP Call is the only program of its kind, which is not true because there are states with different cap and trade programs.

Sam noted that nothing said at this point would be taken as an official position. These calls are a chance for states to think aloud and offer ideas.

Susana suggested that EPA consider trading zones so that states can count on certain reductions during ozone planning. It is hard for states to incorporate CAIR reductions into modeling for their SIPs. A trading zone would guarantee states that there would be certain amounts of reduction within a trading zone. States could then incorporate those known reductions into SIP planning. Under the original CAIR it was not clear where the reductions would take place, which made it harder to try and incorporate those reductions in the planning process.

Sam said that EPA considered trading zones during the NO_x SIP Call, but that it ultimately decided not to include the zones. He asked whether TCEQ had thoughts about major air sheds or about how EPA should set up the zones. Susana replied that TCEQ did not have any specific recommendations to make. It would like to see improvements in the Gulf cost region that might help the Houston and Beaumont areas. Specifically, there are concerns about transport from Louisiana, and Louisiana has similar concerns about transport from Texas. A trading zone in which both states could quantify the reductions would be helpful.

4. Affected Area/National Ambient Air Quality Standards (NAAQS)

Which states or regions should be covered by the rule? Sam Napolitano noted that some stakeholders had recommended expanding CAIR to include western states. What should the timing of the rule look like? Should EPA start with existing NAAQS? Or, should it try to integrate the newer NAAQS into a replacement rule? Timing becomes a key element when considering which NAAQS to target.

Kim Herndon suggested that it would be helpful if the reductions from the CAIR replacement rule lined up with the attainment dates. For example, the initial NO_x part of the current CAIR will be implemented in 2010 and Texas needs the reductions in 2009. Sam noted that the CAIR annual NO_x program began on January 1, 2009.

Tim Smith then asked whether EPA should address the 2008 NAAQS. Susana Hildebrand said EPA should address the 2008 NAAQS and by-pass the 2006 NAAQS because by achieving the 2008 levels states would have met the 2006 requirements. She then inquired whether EPA thought the replacement rule would continue with an annual and summer program.

Sam responded that the summer program was largely to reassure the eastern states that the NO_x Budget program reductions were achieved.

Susana suggested that the ozone season become an annual program because if other states are contributing to Texas' ozone problem, those states should have the same year-round controls Texas requires. With the lowering of the NAAQS and possible inclusion of the entire state, it is even more important that other contributing states have annual controls.

Sam noted that EPA had transitioned away from the NO_x Budget program and into CAIR. What happens between now and when the final revised CAIR is published is unclear, but EPA does feel that the program has been extremely helpful in reducing ozone problems in the east.

IV. Concluding Points

Sam Napolitano thanked TCEQ members and said EPA would take all of their suggestions under consideration. He mentioned that meeting notes would be sent out to all the participants and suggested that they include additional comments as addenda to the notes. This will help continue the dialogue process.

TCEQ thanked EPA for providing an opportunity to begin the dialogue process. Staff will continue discussing the issues EPA has raised and will try to add comments or further thoughts to the meeting notes.