

**ORAL ARGUMENT HELD March 25, 2008  
PANEL DECISION ISSUED July 11, 2008**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 05-1244 and consolidated cases**

---

**STATE OF NORTH CAROLINA, et al.,**

**Petitioners,**

**v.**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,**

**Respondent.**

---

**On Petition for Review of Final Action of the  
United States Environmental Protection Agency**

---

**REPLY IN SUPPORT OF  
PETITION FOR REHEARING  
OR REHEARING EN BANC**

---

**MICHAEL J. GUZMAN  
Principal Deputy Assistant Attorney General  
JOHN C. CRUDEN  
Deputy Assistant Attorney General**

**Of Counsel:  
SONJA RODMAN  
STEVEN SILVERMAN  
GEOFFREY WILCOX  
Office of General Counsel  
United States Environmental  
Protection Agency  
Washington, D.C.**

**NORMAN L. RAVE, JR.  
ANGELINE PURDY  
Environmental Defense Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 616-7568**

**November 17, 2008**

In accordance with the Court's Order of October 21, 2008, respondent United States Environmental Protection Agency ("EPA") submits this reply in support of its Petition for Rehearing or Rehearing *En Banc* to address "whether a stay of the Court's mandate in lieu of immediate vacatur would suffice." A stay of the mandate as a bridge to a new rule is preferable to immediate vacatur, and would address some of the harms from vacatur if it provided enough time for a replacement rule to be implemented.<sup>1/</sup> However, a stay of the mandate alone would be insufficient to address all the harms from vacatur that were identified in our Petition, *i.e.*, public health impacts resulting from the loss or delay of expected emission reductions, economic losses resulting from the collapse of the allowance market, and disruption of State and federal efforts to achieve Clean Air Act requirements, Petition at 10-12. These harms can only be completely avoided if the Court grants the rehearing petition in full, *i.e.*, if the Court remands CAIR to EPA to justify and/or modify the rule while leaving it in place and the Court reverses its holding that EPA is precluded from terminating or limiting Title IV allowances through the CAIR program.<sup>2/</sup> If the Petition is not granted in full, the effectiveness of any Court-ordered relief in addressing the harms identified in the Petition will depend not only on the type of relief selected, but also on

---

<sup>1/</sup> Relief from vacatur is supported by a wide range of affected entities, including environmental groups, States, and even some of those entities subject to regulation under the rule. *See* Petition for Rehearing of Environmental Intervenors; Response of State of North Carolina; Motion for Leave to Participate as Amicus of State of New York, et al.; Motion for Leave to Participate as Amicus of State of Ohio; and Response of Duke Energy, et al. While some industry petitioners oppose a stay, the severe harms resulting from vacatur justify either remanding without vacatur or staying the Court's mandate until a new regulatory program is in place.

<sup>2/</sup> EPA's Petition seeks rehearing of the bases for the Panel's decision to vacate the Clean Air Interstate Rule ("CAIR"): (1) its conclusion that the CAIR trading program and budgets were not consistent with 42 U.S.C. 7410(a)(2)(D) and thus could not be addressed by EPA on remand through further explanation or minor changes; and (2) its determination that vacatur was warranted despite significant economic, environmental and public health consequences, for which neither the NOx SIP Call nor CAA section 126 provides an adequate interim remedy. EPA also seeks rehearing of the Panel's holding that EPA lacks statutory authority to terminate or limit allowances issued under Title IV of the Clean Air Act through the CAIR program. EPA continues to believe that rehearing or rehearing *en banc* is warranted on these issues.

what, if any changes the Court makes in its Opinion, and on the length of any stay of the mandate. Further, if the rule becomes void *ab initio* when the stay ends, it could be difficult for EPA to effectively enforce the rule during the stay.

The impact of a stay of the Court's mandate must be analyzed separately for NO<sub>x</sub> and SO<sub>2</sub>. Reductions in SO<sub>2</sub> provide the bulk of the public health and environmental benefits expected from CAIR. However, because future expectations of allowance value directly influence the incentives for sources to reduce emissions, and because there is a substantial existing bank of SO<sub>2</sub> allowances that sources can use to comply with the CAIR SO<sub>2</sub> trading program, a stay alone would be less successful in addressing harms caused by vacatur of the SO<sub>2</sub> program. For NO<sub>x</sub>, where a large allowance bank does not exist, a stay would be more successful in addressing the health and environmental problems attributable to NO<sub>x</sub> during the stay.

#### **Benefits from a Stay of the Court's Mandate With Regard to SO<sub>2</sub>**

Allowances awarded under the Title IV program have no expiration date; they may be used in the year in which they are issued or in any subsequent year. If sources expect their value to rise, allowances can be "banked" for future use or sale; 6.9 million allowances are currently banked. Due to economic incentives from the promulgation of CAIR some utilities reduced emissions prior to the effective date of the CAIR requirements. This allowed them to "bank" allowances to assist in meeting future requirements in the CAIR trading program, where Title IV allowances were anticipated to be more valuable. Due in part to such early reductions, SO<sub>2</sub> emissions are now below the Title IV cap. Whether through CAIR or a replacement program, limits on SO<sub>2</sub> emissions more stringent than those required by Title IV will be required for States to attain the ambient air quality standards for fine particles (PM<sub>2.5</sub>). Thus, the Court's opinion

regarding the scope of EPA's authority to terminate or limit Title IV allowances through CAIR, unless altered, will send a clear signal to the market that these allowances will soon lose most, if not all, of their value creating an incentive for sources holding banked allowances to get some value from them by using them before a new program goes into force, thereby increasing SO<sub>2</sub> emissions between now and then. Analyses performed by EPA project that much of the substantial reductions in SO<sub>2</sub> emissions over the next several years that were expected from CAIR will be lost, and there will be significant harmful effects on public health, if utilities believe that they will not be able to use banked Title IV allowances to meet future SO<sub>2</sub> emission requirements. See Brian McLean, CAIR Update (Sept. 18, 2008) at 6-7 (Att. 1).

Because the size of the projected SO<sub>2</sub> emissions increase is dependent on future expectations regarding allowance value, it is also dependent on the length of time that CAIR remains in place. Id. EPA's modeling demonstrates that if the market receives signals that banked Title IV allowances will become worthless quickly, as it would if the Court adopted the July 2009 deadline proposed by North Carolina, SO<sub>2</sub> emissions could rise. Similarly, allowing CAIR to remain in place for a short time (e.g., 2 years), with no change in the holding on Title IV issues, would result in a large number of banked allowances being used, and thus the loss of most of the near-term public health benefits expected from the SO<sub>2</sub> requirements of CAIR. See USEPA, Analysis of Potential Quick-Fix Legislative Changes to Address Court Decision (Aug. 28, 2008) at 11, <http://www.epa.gov/airmarkets/progsregs/cair/quickfix.ppt> (Attachment 2). In contrast, allowing CAIR to remain until replaced by a rule on remand that is at least as stringent would preserve more of the projected early SO<sub>2</sub> benefits of CAIR, including saving thousands of lives, that were expected to be obtained in anticipation of the rule's stringent Phase II requirements, even without a change in the holding.

### **Benefits from a Stay of the Court's Mandate With Regard to NOx**

The benefits of a stay of the Court's mandate are clearer for NOx but also depends on its length. For NOx, a stay could address the health and environmental harms associated with vacatur of the CAIR NOx programs. Because there is no existing bank of annual NOx allowances, allowing CAIR to remain in place while EPA promulgates and implements an alternative regulatory program would achieve the NOx reductions that were anticipated from CAIR, with the associated public health benefits resulting from reductions in ozone and PM<sub>2.5</sub> concentrations. Moreover, a stay of the mandate would eliminate a regulatory gap that could result from the fact that some state regulations implementing the NOx SIP Call trading program were eliminated in anticipation of the beginning of the CAIR ozone-season NOx programs in May 2009.

### **Length of Stay Required to Achieve Benefits**

To achieve the desired public health benefits, a stay must remain in effect until the reduction requirements from a newly promulgated regulation go into effect. EPA's modeling demonstrates that the longer the stay, the greater the health benefits that will occur. As several petitioners acknowledge, to avoid a regulatory gap and provide regulatory certainty, the stay would need to provide time not only for EPA to promulgate a new rule, but also for States and sources to implement its requirements. See, e.g., Duke Response at 6-7. A stay only until July 2009, such as that requested by North Carolina, would be insufficient to avoid a regulatory gap.

EPA is acutely aware of the public health consequences associated with the vacatur of CAIR and is moving expeditiously to promulgate a new rule. The complexity and amount of modeling and analysis required depends in part on whether any aspect of the Panel opinion is revised. Given that vacatur of CAIR (as opposed to the remand requested by the Petition) would

eliminate the basis for the current regulation, EPA believes the rulemaking required to promulgate a replacement would take about two years from the Court's resolution of the Petition and that it would take sources and States several more years to make the transition to the new regulatory regime. EPA could provide periodic status reports to the Court while a stay is in effect.<sup>3/</sup> In addition, to be effective in addressing the harms created by vacatur of CAIR, a stay should make clear that CAIR will not have been void *ab initio* once the stay expires. Otherwise, EPA may have difficulty enforcing the CAIR requirements that would apply during the stay.

In short, EPA continues to believe that the relief requested in the rehearing petition is appropriate and provides the best avenue to address the harms that would result from vacatur. A stay of the Court's mandate would alleviate most of those harms if the Court also grants EPA's Petition as to the Title IV allowance issues and if the stay remains in place until EPA promulgates new regulations and States and sources have time to transition to the new regulatory regime. If the Court does not grant rehearing on the Title IV issue, a stay would eliminate some of the anticipated harms, but only if it were of sufficient duration to allow implementation of a replacement regulatory regime.

Respectfully submitted,

MICHAEL J. GUZMAN  
Principal Deputy Assistant Attorney General  
JOHN C. CRUDEN  
Deputy Assistant Attorney General

---

<sup>3/</sup> EPA intends to act expeditiously to address the problem of interstate pollutant transport; however, given the extensive revisions necessitated by the Court's opinion, the stay period proposed by North Carolina is unreasonably short.



NORMAN L. RAVE, JR.  
ANGELINE PURDY  
Environmental Defense Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
(202) 616-7568  
Counsel for Respondents

Of Counsel:

SONJA RODMAN  
STEVEN SILVERMAN  
GEOFFREY WILCOX  
Office of General Counsel  
U. S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

November 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2008, I caused a true and correct copy of the foregoing Reply in Support of Petition for Rehearing or Rehearing En Banc to be served by first class mail, postage-prepaid, on the following:

James C. Gulick, SDAG  
J. Allen Jernigan, SDAG  
Marc Bernstein, AAG  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602-0629

Joshua Bradford Frank  
Baker & Botts  
1299 Pennsylvania Ave., N.W.  
The Warner, Ste 1300 West  
Washington, D.C. 20004-2400

David A. Savage  
Baker Botts  
98 San Jacinto Boulevard, Ste. 1500  
Austin, TX 78701-4039

William H. Lewis, Jr.  
Michael W. Steinberg  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004

Bart E. Cassidy  
Carol A. Fitzpatrick  
Manko, Gold, Katcher & Fox  
401 City Avenue, Ste. 500  
Bala Cynwyd, PA 19004

Brian J. McManus  
Robin L. Juni  
Jones Day  
51 Louisiana Ave., N.W.  
Washington, D.C. 20001-2113

Randolph R. Mahan  
Director, Corporate Environmental Services  
SCANA Services, Inc.  
1426 Main Street  
Columbia, SC 29218

James S. Alves  
Robert A. Manning  
Winston K. Borkowski  
Hopping Green & Sams, P.A.  
123 South Calhoun Street  
Tallahassee, Fl. 32301

Alvin B. Davis, P.A.  
John T. Butler  
Steel Hector & Davis LLP  
200 South Biscayne Blvd., Ste. 4000  
Miami, Fl 33131-2398

Sheldon A. Zabel  
Schiff Hardin LLP  
233 South Wacker Drive  
6600 Sears Tower  
Chicago, IL 60606

Sam Kalen  
Van Ness Feldman  
1050 Thomas Jefferson St, NW, 7<sup>th</sup> floor  
Washington, D.C. 20007

Steven Shimberg  
Deborah Jennings  
DLA Piper Rudnick Gray Cary US, LLP  
1200 19<sup>th</sup> Street, NW  
Washington, DC 20036



William M. Bumpers  
Baker Botts L.L.P.  
1299 Pennsylvania Ave. NW  
Washington, DC 20004

David W. Marshall  
Clean Air Task Force  
7 Liberty Hill Road  
Building 2, Suite 205  
P.O. Box 950  
Henniker, NH 03242

Jeffery A. Knight  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128

Michael Robert Barr  
Pillsbury Winthrop Shaw Pittman LLP  
1600 Tysons Boulevard  
McLean, VA 22102

Matthew Levine  
Assistant Attorney General  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120

Norman W. Fichthorn  
Hunton & Williams LLP  
1900 K Street, NW  
Washington, DC 20006

Lisa M. Jaeger  
Bracewell & Giuliani LLP  
2000 K Street, N.W., Suite 500  
Washington, D.C. 20006

Sean H. Donohue  
Environmental Defense  
2000 L Street, NW Ste 808  
Washington, DC 20036

John D. Walke  
Natural Resources Defense Council, Inc.  
1200 New York Ave, N.W. Ste. 400  
Washington, DC 20005

Harriett Andrea Cooper  
Frank Hilton Lancaster  
Tennessee Valley Authority  
400 West Summit Hill Drive  
Knoxville, TN 37902

Vickie Patton  
Environmental Defense  
2334 N. Broadway  
Boulder, CO 80304

Claudia M. O'Brien  
Latham & Watkins  
555 Eleventh Street, N.W.  
Suite 1000  
Washington, DC 20004-1304

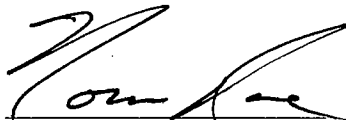
J. Jared Snyder  
Robert M. Rosenthal  
Assistant Attorneys General  
The Capitol  
Albany, NY 12224

Jean Reilly  
Ruth Carter  
Deputy Attorneys General  
Richard J. Hughes Justice Complex  
25 Market Street, P.O. Box 093  
Trenton, NJ 08625-4503

Peter Glaser  
Troutman Sanders LLP  
401 9th Street, NW, Suite 1000  
Washington, DC 20004-2134

Richard P. Mather, Sr.  
Kristen M. Campfield  
Dept. of Environmental Protection  
RCSOB, 9th Floor  
P.O. Box 8464  
Harrisburg, PA 17105-8464

C. Grady Moore, III  
Balch & Bingham  
1901 6th Avenue North, Suite 2600  
Birmingham, AL 35203-2628

A handwritten signature in black ink, appearing to read "Norman L. Rave, Jr.", written in a cursive style.

Norman L. Rave, Jr.