

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

**PETITION FOR RECONSIDERATION
OF THE CROSS STATE AIR POLLUTION RULE: "FEDERAL IMPLEMENTATION
PLANS: INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND
OZONE AND CORRECTION OF SIP APPROVALS"
76 FED. REG. 48208 (AUGUST 8, 2011)**

Docket EPA-HQ-OAR-2009-0491

Submitted On Behalf of the City of Ames, Iowa By:

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October 7, 2011

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Via Electronic Mail and Docket

EPA-HQ-OAR-2009-0491

The Honorable Lisa Jackson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Petition For Reconsideration and Stay of The Cross State Air Pollution Rule: "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals;" 76 Fed. Reg. 48208 (August 8, 2011)

Dear Administrator Jackson:

On behalf of the City of Ames, Iowa and its residents, and pursuant to Clean Air Act Section 307(d)(7)(B), 42 U.S.C. §7607(d)(7)(B), and section 705(b) of the Administrative Procedures Act (APA), 5 U.S.C. § 705b), the City of Ames, Iowa petitions you to reconsider the allocation of allowances for Nitrogen Oxides (NO_x) for the City of Ames, Iowa's public power plant set forth "Federal Implementation Plans: Interstate Transport Of Fine Particulate Matter And Ozone And Correction Of SIP Approvals;" 76 Fed. Reg. 48208 (August 8, 2011). The City of Ames also requests that you stay the final Cross State Air Pollution Rule pending revisions of the allocations and other aspects of the rule.

The final rule presents new information on which the City and the public have had no opportunity to comment.¹ The NO_x allocations in the final rule for the City of Ames are insufficient to operate the City's electric power plant, and are drastically reduced from the proposed allocation of NO_x allowances. There is no explanation in the rule for why the City's allowances were so drastically reduced. Further, the time line for compliance with the Cross State Air Pollution Rule provides no opportunity to design, much less implement the public bidding process to install new NO_x controls. Moreover, there do not appear to be available allocations for other utilities to operate as they have historically, thus providing no avenues for acquiring additional allowances. Finally, the City of Ames does not have infrastructure or access to adequate supplies of alternative fuels like natural gas or other sources of electric power with existing transmission lines to provide alternative compliance strategies to meet the rule's January 1, 2012 applicability date.

By this letter, the City of Ames also is notifying you that it has filed a judicial Petition for Review of the Cross State Air Pollution Rule in the U.S. Court of Appeals for the District of

¹ The City of Ames submitted comments on the proposed revisions to the Clean Air Interstate Rule. EPA-HQ-OAR-2009-0491-2769

Columbia. Case No. 11-1378 (D.C. Cir. 2011). In brief, this judicial filing is predicated on both procedural and substantive grounds. The City of Ames will assert among other things that EPA violated the Clean Air Act and APA by failing to provide notice and an opportunity for public comment on the final state and city allocations of NO_x allowances; that the modeling on which the rule is based is arbitrary and capricious; and that the Agency has finalized an unreasonable rule that could prevent the City from providing reliable electric power to its citizens. See *Northeast Maryland Waste Disposal Auth. v. EPA*, 358 aF.3d 936 (D.C. Cir. 2004); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534-35 (D.C. Cir. 1983)).

Introduction and Background

The City of Ames is a municipal corporation established under the laws and Constitution of Iowa to determine local affairs and government. The City operates a steam electric plant consisting of two generating units at 200 East 5th Street and a peaking plant with two combustion turbines located at 2200 Pullman Street, Ames, Iowa. The City provides electricity to its residential, commercial and industrial communities including Iowa State University and the U.S. Department of Agriculture's National Animal Disease Center. The City has historically provided steam to the City's hospital (regional medical center), and it burns in its power plant processed refuse-derived fuel (RDF). Utilizing RDF is especially important because the City and Story County in which the City resides have no landfill.² The City and its residents and businesses and activities are immediately impacted by EPA's final rule because the Agency has provided only about half of the allocation of NO_x that are needed to meet historical levels of operation of the City's power plant by the dates for compliance with the final rule.

By failing to provide any notice of its revised allocations for the City or of the revised methodology, assumptions and other considerations on which the final Cross State Air Pollution Rule is based, Ames had no ability to react to attempt to obtain NO_x reductions at the plant through installation of pollution controls or to investigate alternative compliance strategies. Moreover, the City submits that EPA's rule is premised improperly on the assumption that all communities have sufficient transmission infrastructure to obtain electricity from other parts of the nation's electric grid, and that they also have access to natural gas as an alternative to installing controls necessary to meet the January 1, 2012 compliance date for the Cross State Air Pollution Rule. The City of Ames has neither, as we pointed out in our comments in the proposed rulemaking.³

The final Cross State Air Pollution Rule does not provide sufficient allowances to operate the city-operated power plant but the rule is at cross purposes with the City's "Duty to Serve" the residents of the City of Ames. The City, therefore, respectfully submits that EPA's rule should be reconsidered and stayed while affected parties have the opportunity they did not receive to examine and comment on EPA's data-base, new modeling scenarios, modeling, and related assumptions that formed the basis for the final Cross State Air Pollution Rule published on August 8, 2011. The City also requests that pending the Agency's Reconsideration of the

² Comments submitted by T. McCullough, City of Ames, Iowa, EPA-HQ-OAR-2009--0491

³ *Supra* at FN1.

CSAPR, the Agency refrain from removing NO_x CAIR allowances for vintage years 2012 and greater from the existing CAIR allowance account for the City of Ames.

Background: On August 2, 2010, EPA proposed revisions of the “Air Transport Rule,” 75 Fed. Reg. 45210, following a federal court’s rejection of the prior transport rule, called the Clean Air Interstate Rule (CAIR), which was voided by the court on the basis that CAIR violated the plain language of the Clean Air Act. *North Carolina v. EPA*, 531 F.3d 896, (D.C. Cir. 2008) (amended 550 F.3d 896 (D.C. Cir. July 2008) allowing EPA to implement Phase I of the CAIR rule pending further rulemaking). The proposed replacement rule was intended to “identify and limit the interstate transport of emissions of nitrogen oxides (NO_x) and sulfur dioxide (SO₂)” from electric generating units in 32 states and to assist downwind states in attaining and maintaining compliance with the 1997 National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter and the 2006 Ozone NAAQS. Iowa was identified in the proposed rule as a State whose emissions affected downwind states. *Id.* at 45215-45216.

The City of Ames submitted comments on the proposed rule that stated that the “allowances allocated under this proposed rule are inadequate to allow the electric utility for the City of Ames to supply the electricity to meet the demand of the city, especially considering the city's load growth that will increase the utilization of the existing generation infrastructure.”⁴ Ames also suggested that the Agency’s methodology for arriving at the proposed allowances was flawed, particularly with regard to the assumptions and analysis that the agency used to calculate power sector variability and native load. The City also identified mistakes in the heat input allocation and other mistakes in the technical support documents for Ames electric and steam unit. The City also commented that it received no allocation of NO_x allowances for either of its oil-fired combustion turbines used for peaking and the Agency failed to allocate any ozone season NO_x allowances for the City of Ames in the proposed rule.⁵ While EPA has since proposed ozone season NO_x allocations (which are deficient) on July 11, 2011, 76 Fed. Reg. 40662, that rulemaking has not been finalized. EPA did not respond to the City’s other comments in the final Cross State Air Pollution Rule.

GROUND FOR RECONSIDERATION AND STAY OF THE CROSS STATE AIR POLLUTION RULE

A. EPA Revised Its Allowance Methodology Without Allowing for Comment by Affected Parties Like the City of Ames, Iowa, Which Resulted in Insufficient Allowances for the City to Provide Electricity and Steam to Its Residents, Schools and Businesses.

In the proposed Cross State Air Pollution Rule, EPA allocated to the City of Ames (Iowa) municipal electric utility coal-fired Units 7 & 8 (the only boilers that the City operates) a total of 1154 tons of annual nitrogen oxide (NO_x) allowances.⁶ These allowances as proposed were adequate to operate the City’s power plant at recent historical levels. When the final CSAPR

⁴ EPA-HQ-OAR-2009-0491-2769 at 1-2.

⁵ *Ibid.*

⁶ <http://www.epa.gov/crossstaterule/pdfs/AllocationTable.pdf>

rule was published on August 8, 2011 in the *Federal Register*, EPA's allocation of annual NO_x allowances for the City of Ames Units 7 & 8 was reduced to a total of 602 tons for 2012, and 588 tons for 2014.⁷ This is a 48% reduction in NO_x allowances for year 2012 and 49% for year 2014. It should be emphasized that the annual NO_x emissions from Units 7 & 8 over the past five years (for the period 2006-2010) have averaged 1107 tons, which means that the final allocations of annual NO_x allowances from EPA would represent a shortfall of 46% for 2012 and a shortfall of 47% for 2014 and beyond. Because the proposed allocation was marginally achievable, the City had no reason to investigate or invest in additional pollution controls when the proposal was issued. With the rule finalized and published in the *Federal Register* on August 8, 2011 and with a compliance deadline of January 1, 2012, there was no opportunity for the City of Ames to obtain legal authorizations required by state and municipal law to bid and install pollution controls for timely compliance. These laws require lengthy periods for competitive bidding of design and engineering, pollution control equipment purchases, and contracts for installation.⁸ Moreover, the City's initial investigation and review of allowances allocated to other Iowa utilities makes it likely that no excess allowances can be bought within the State, because NO_x allowances were reduced statewide by approximately 20% below proposed levels.

The City lacked any notice that such drastic measures would even be required to continue to comply with the Cross State Air Pollution Rule!

In practical terms, therefore, the City of Ames may have to operate its only two boilers (Units 7 & 8) at 46% less than our recent historical average rate to be in compliance with CSAPR's annual NO_x allocations this coming year. The City of Ames has a similar allocation shortfall for ozone season nitrogen oxide (OS-NO_x) allowances. When the final rule was published, EPA's allocation of allowances for OS-NO_x for the City of Ames Units 7 & 8 totaled 270 tons for 2012 and 264 tons for 2014. The 2006-2010 historical average of OS-NO_x emissions from Units 7 & 8 totals 462 tons. This means that if the City of Ames operates Units 7 & 8 at recent historical levels, the City will be short OS-NO_x allowances by 42% for 2012 and by 43% for 2014.

Also, features of the final rule that EPA touts as flexibility for compliance are not available to the City of Ames. First, Ames cannot reliably import power into the city to make up the shortfall of allowances because it has limited transmission capability. To wit, since 2005, the City has worked to bolster its ability to reliably import power, seeking approval for a franchise from the Iowa Utilities Board to build a new 161 kV transmission line interconnection without success. Thus, if the City's two units (7 & 8) cannot operate for lack of allowances, the City (including Iowa State University) seriously risks going "black" (without power) if the remaining single transmission line connecting the City of Ames to the grid should trip (open). Second, the City lacks access to a natural gas pipeline large enough to supply its two coal-fired boilers, which would have to be retrofitted to accept alternative fuels (with necessary and lengthy permitting). Thirdly, as we already discussed, intrastate sources of NO_x allowances for sale

⁷ <http://www.epa.gov/crossstaterule/pdfs/UnitLevelAlloc.pdf>

⁸ As the City of Ames commented in this rulemaking, statutorily-required public improvement bidding and contracting procedures and permitting processes can take a year or more before the City can construct or installation pollution control devices. *Supra* at FN 1.

appear to be limited or non-existent, and interstate sources of NOx allowances appear to be similarly limited based upon preliminary analysis.

(EPA also greatly curtailed interstate trading options that would have been available in the proposed rule.)

B. The Clean Air Act Provides that EPA Must Commence a Proceeding to Reconsider the Final Rule if It Was Impractical For Ames to Raise Its Objections During the Comment Period or that the Grounds for such Objections Arose after the Period for Public Comment had Expired.

Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. §7607(d)(7)(B) provides, in part:

If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time [period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed.

Since the final budgets in the promulgated Cross State Air Pollution Rule are dramatically less than the allocations in the proposed rule, the City of Ames had no opportunity to object to them or to even comment on how those allocations were derived. It would be outlandish for EPA to assert that the City would *not* have objected to these level of allocations had the Agency proposed any allowance scheme such as the one that is imposed on the City by the final Cross State Air Pollution Rule, because the City would have known that the plant could not provide power to its residents and businesses in 2012 under such a proposed allocation. The fact is that EPA did publish several Notices of Data Availability, but they did not publish for public comment runs of the IWP model used to determine allowances for public comment. The Clean Air Act, and basic fairness, requires that an affected party have the opportunity to comment on materials that is of central relevance to the outcome of a rulemaking. 42 U.S. C. §7507(d)(7)(B).

Moreover, not only did EPA's methodology change from that which was employed in issuing the proposed rule, but the fundamental factual data that underlies the final rule are materially different than the data underlying the proposed rule. In addition, policy and legal determinations seem to have changed as well. These elements all must be contained within the proposed rulemaking for the regulation to be upheld. *See 42 U.S.C. §7507(d)(3)*. Failure to provide such information is a violation of the Clean Air Act, which provides that a notice of proposed rulemaking must contain a statement of its basis and purpose that includes a summary of the factual data on which the proposal is based; the methodology used in obtaining the data and in analyzing the data; and the major legal interpretations and policy considerations

underlying the proposed rule. All this information must be included in the docket on the date of the publication of the proposed rule.

The City of Ames therefore submits that “reconsideration of the rule” is merited because Ames and other affected parties will experience immediate, irreparable harm should the rule take effect before completion of the reconsideration proceeding and/or judicial review of the regulation. To provide an opportunity for comment and to rectify the procedural shortcomings of EPA’s CSAPR rulemaking, the Agency should also stay the final Cross State Air Pollution Rule and reconsider it after providing the technical basis for its decision in an intelligible format that is not obscured by thousands of pages of numeric codes and computer files that are virtually unintelligible to most readers.

C. The City of Ames Can Find No Basis for EPA To Assert that The Final Allowances Are the Logical Outgrowth of the CAIR Rulemaking.

The City of Ames submits to the Agency that no such basis exists in the proposed rule from which the resulting allowance allocations in the final rule could be determined to be a logical outgrowth. While it is clear that the law allows an agency to issue a final rule that is different from the one it has proposed for public comment, that final rule must represent a logical outgrowth of the proposal and requests for comment. *See Appalachian Power v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1997) (*finding that a rule is a logical outgrowth only if commenters “clearly understood” that a matter was under consideration*). *See also International Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F. 3d 125, 1259 (D.C. Cir. 2005) (*final rule is deemed a logical outgrowth if interested parties should have anticipated from the proposed rule that the final determinations in the rule were a possibility and reasonably should therefore have commented on that possibility*).

In order to comment on the possibility of the final allowance allocations, the City of Ames would have needed at least some indication that EPA intended to radically change how the state emission budgets would be distributed. Instead, the City commented on other flaws in the proposed Air Transport Rule.⁹ On its face, the proposed rule did not suggest that EPA intended to entirely remodel and reallocate allowances. In this regard, the City of Ames submits that it is significant that the Office of Management and Budget also pointed out during its interagency review of the final CASPR rule required by Executive Order 12866 that the final rule was “significantly different . . . than originally proposed,” and its analysis emphasized the “sheer magnitude of change to the budgets of all of the states.” *Summary of the Interagency Working Comments on Draft Language under EO 12866 Interagency Review*; Docket EPA-HQ-OAR-2009-0491-4122 at 11.

D. The Final Rule Does Not Provide Any Justification For The Drastic Reduction Of Allowances Allocated To The City Of Ames.

⁹ *Supra* at FN 1.

Engineers for the City of Ames have closely examined EPA's final regulation and the myriad and complicated technical support documents detailing in thousands of pages of numeric code the elaborate modeling analysis that apparently yielded the final allowance budgets. Not only was this information not available to us at the time of the proposed rule, but it does not provide in our view, a clear explanation for how EPA rendered its final allocation decisions on allowances for Iowa or utilities within the state of Iowa. Courts have held that an Agency may be upheld in making changes when it promulgates a final rule, but they have also insisted that such changes must be accompanied with an adequate explanation for such changes. *Natural Resources Defense Council v. Thomas*, 805 F. 2d 410 (D.C. Cir. 1986). For instance, the Agency should explain how the base case assumption for emission budgets and new modeling scenarios were designed. Because no such explanation is provided in the final rule package and the modeling files are virtually impenetrable, the City of Ames submits that EPA should reconsider this rule and provide an opportunity for affected parties to understand the assumptions and methodology which yielded allowances that are so low that the City fears it cannot provide electricity and other services to its residents and local businesses.

E. EPA Should Also Reconsider the Cross State Air Pollution Control Rule Because Important New Information Has Become Available Regarding Localized Transmission Constraints and Impacts of the Rule on Electricity Reliability.

EPA has available to it new information regarding limitations and restriction on localized transmission and reliability from the regional transport organizations and the Department of Energy. Both issues, transmission and reliability, greatly affect the City of Ames. In addition, new information has become available on constraints involving the existing infrastructure for delivering natural gas to areas of the country, including the City of Ames. EPA also failed to consult with the organizations such as the regional energy reliability councils and the public utility commissions in the States who have developed analysis that suggests that regional shortfalls in electricity will occur as a result of the final rule and related EPA utility rulemakings. Moreover, it appears based on recent attainment of many Midwestern air quality control regions with the ozone standard, that drastic NO_x reductions are no longer necessary to achieve the ozone standard in downwind areas. *See also, Alpine Geophysics Report dated Sept. 28, 2010, (attached to Midwest Ozone Group (MOG) Comments on the Transport Rule Modeling Analysis).*¹⁰ The City therefore respectfully points out that these sources of information are critical to consider in terms of the legal and policy ramifications of the final rule, thus meriting its reconsideration.

F. If EPA Grants Reconsideration of the Cross State Air Pollution Rule, the City of Ames Requests That The Agency Stay the Rule During the Pendency of the Reconsideration and Refrain From Removing Allowances from Existing CAIR Accounts.

Pursuant to Section 307(d)(7) of the Clean Air Act and the general provisions of the Administrative Procedures Act, the Agency can stay the rule to undertake further rulemaking and for good cause. To avoid imminent harm to the City of Ames and its residents, the Agency

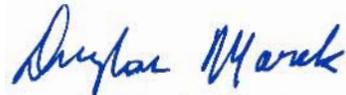
¹⁰ EPA-HQ-OAR-2009-049102809. These comments suggested that EPA's Transport Rule emissions reductions were not necessary to achieve the NAAQS by 2014.

should provide a stay of the Cross State Air Pollution Rule pending the rule's reconsideration. If the Agency does not stay and reconsider rule, the City requests that the Agency refrain from removing NO_x CAIR allowances for vintage years 2012 and greater from the existing CAIR allowance account for the City of Ames pending reconsideration and/or judicial review of the rule.

CONCLUSION

Reconsideration of the Cross State Air Pollution Rule is warranted because EPA materially changed the fundamental requirements of the rule between its original proposal and its final promulgation without providing the public with adequate opportunity to comment on the data, assumptions, methodology or policy considerations on which the rule is based. These changes in turn, fundamentally, will affect the City of Ames' ability to provide electricity and waste disposal service to its residents.

Respectfully submitted on behalf of the
City of Ames, Iowa



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