

January 12, 2012

VIA E-MAIL & OVERNIGHT DELIVERY

The Honorable Lisa P. Jackson  
Administrator, U.S. Environmental Protection Agency  
Room 3000, Ariel Rios Building  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460  
(jackson.lisa@epa.gov)

Re: Request for Administrative Stay of EPA's Final Rule: "Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone" (EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson:

As you are aware, on December 30, 2011 the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit Court") issued an order staying the U.S. Environmental Protection Agency's ("EPA's") recently promulgated Cross State Air Pollution Rule (the "CSAPR"). 76 Fed. Reg. 48,208 (Aug. 8, 2011); *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011) (order granting stay). The D.C. Circuit Court stayed the CSAPR in its entirety while it reviews the merits of various legal challenges to the rule. *Id.* Until the stay is lifted, the Clean Air Interstate Rule ("CAIR") remains in place and the CSAPR has no legal effect. *Id.*; see also *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *Nken v. Holder*, 556 U.S. 418, ---, 129 S. Ct. 1749, 1758 (2009). Consistent with the D.C. Circuit Court's ruling, EPA stated yesterday that it would "not be taking action to implement the [CSAPR]," including allocating allowances, while the stay is in effect. *E-mail from Robert Miller, EPA, to Designated Representatives and Agents, Updates to CAMD Business System Due to CSAPR Stay* (Jan. 11, 2012).

Due to the stay of the CSAPR, the State of Oklahoma and the undersigned owners and operators of electric generating units in Oklahoma (collectively the "Oklahoma Utility Group") respectfully request that EPA grant an immediate administrative stay of the effective date of the supplemental CSAPR rule entitled "Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone" (the "Supplemental CSAPR") and the compliance dates set forth therein.<sup>1</sup> EPA

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<sup>1</sup> The Oklahoma Utility Group is a voluntary ad hoc coalition of electric generating companies doing business in Oklahoma and established for the purpose of evaluating and commenting on issues common to the group.

published the Supplemental CSAPR, which applies to Iowa, Michigan, Missouri, Oklahoma, Wisconsin and Kansas, in the Federal Register on December 27, 2011. 76 Fed. Reg. 80,759 (Dec. 27, 2011). As it now stands, the Supplemental CSAPR becomes effective on January 26, 2012. *Id.* at 80,761, 773. EPA has the authority to grant the requested relief pursuant to 5 U.S.C. § 705 *et. seq.*

The requested stay is necessary because the Supplemental CSAPR is dependent upon the underlying CSAPR and cannot stand on its own. The CSAPR, which was finalized on July 6, 2011, sets forth requirements to address the interstate transport of fine particulate matter and ozone precursors in twenty seven states, not including Oklahoma. On December 16, 2011, EPA finalized the Supplemental CSAPR, which “*implement[s]*” the CSAPR program to limit emissions of nitrogen oxide (“NO<sub>x</sub>”) during the ozone season as the federal implementation plan (“FIP”) for Oklahoma. 76 Fed. Reg. at 80,761 (emphasis added). This program will require significant ozone season NO<sub>x</sub> reductions from Oklahoma sources beginning in 2012. EPA seeks to effectuate these reductions by amending the stayed CSAPR regulations to include, *inter alia*, Oklahoma. 76 Fed. Reg. at 80,775-77. EPA, however, cannot amend a rule that has no legal effect.

In addition, EPA applies the CSAPR’s ozone season NO<sub>x</sub> program to Oklahoma in the Supplemental CSAPR based on a finding under Clean Air Act § 110(a)(2)(D)(i)(I) that Oklahoma significantly contributes to nonattainment or interferes with maintenance of the 1997 National Ambient Air Quality Standards (“NAAQS”) for eight-hour ozone in Allegan County, Michigan. EPA’s “significant contribution” finding hinges upon a single air quality receptor that was identified during the air quality modeling contained in the stayed CSAPR. 76 Fed. Reg. at 80,761-62. As EPA states in the Supplemental Rule:

Five states (Iowa, Kansas, Michigan, Oklahoma, and Wisconsin), which EPA identified as interfering with maintenance problems at the Allegan County and/or Harford County receptors, based on modeling for the [CSAPR], uniquely contribute to these receptors, *i.e.*, absent these receptors the states would not be covered by the [CSAPR] ozone-season program . . .

*Id.* Because it was developed and utilized in connection with the CSAPR, EPA even refused to accept comments on various aspects of its air quality modeling (including with respect to the methodology used to identify receptors, the use of the CAMx air quality model, and use of emissions inventory data) in connection with the Supplemental CSAPR. *Id.* at 80,764.

EPA similarly relies exclusively on the methodologies set forth in the CSAPR to establish the NO<sub>x</sub> emission budgets, variability limits and assurance levels for Oklahoma in the Supplemental CSAPR. 76 Fed. Reg. at 80,775-77. For example, EPA states in the Supplemental

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The companies that comprise the Oklahoma Utility Group own and operate electrical generating units that are subject to the Supplemental CSAPR.

CSAPR that the Agency “is finalizing for the five states the ozone season new unit set-asides for allowance allocations to new units, determined in the same manner as for the other states covered in the [CSAPR] ozone season NO<sub>x</sub> program.” *Id.* at 80,769. EPA likewise finalizes “the unit-level allocations of [the CSAPR] NO<sub>x</sub> ozone season allowances under the FIP to existing covered units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin” based on the “methodology and procedures used for allocations to existing units covered by the [CSAPR] ozone season NO<sub>x</sub> program [as] specified in . . . the preamble to the final [CSAPR].” *Id.* at 80,770.

The validity of EPA’s air quality modeling and the methodologies used in the CSAPR to establish emission budgets, variability limits and assurance levels, however, are the subject of several of the petitions for stay that were granted by the D.C. Circuit Court in the pending CSAPR litigation. *See, e.g., EME Homer City Generation, L.P. v. EPA*, (order granting stay); *Petitioner’s Motion for Stay, Ohio v. EPA*, No. 11-1392 (D.C. Cir. Nov. 15, 2011); *Petitioner’s Motion for Partial Stay, Entergy Corp. v. EPA*, No. 11-1360 (D.C. Cir. Oct. 26, 2011); *Petitioner’s Motion for Partial Stay, Dairyland Power Coop. v. EPA*, No. 11-1394 (D.C. Cir. Oct. 24, 2011); *Petitioner’s Motion for Stay, Wisconsin v. EPA*, No. 11-1393 (D.C. Cir. Oct. 24, 2011); *Petitioner’s Motion for Stay, Env’tl. Comm. of the Fla. Elec. Power Coordinating Grp., Inc. v. EPA*, No. 11-1373 (D.C. Cir. Oct. 14, 2011); *Petitioner’s Motion for Stay, Louisiana v. EPA*, No. 11-1364 (D.C. Cir. Oct. 11, 2011); *Petitioner’s Motion for Partial Stay, Southwestern Pub. Service Co. v. EPA*, No. 11-1375 (D.C. Cir. Oct. 7, 2011); *Petitioner’s Motion for Stay, Kansas v. EPA*, No. 11-1329 (D.C. Cir. Oct. 5, 2011). As such, EPA cannot rely on them as the basis for the Supplemental CSAPR.

Even if the Supplemental CSAPR could legally be implemented without significant revisions (which both the State of Oklahoma and the Oklahoma Utility Group deny), the people of the State of Oklahoma would suffer substantial and irreparable harm if EPA were to do so. Oklahoma utilities (and ultimately ratepayers) would be forced to begin incurring significant costs to achieve timely compliance with the Supplemental CSAPR while the underlying CSAPR remains in limbo.<sup>2</sup> The CSAPR and the Supplemental CSAPR are so intertwined that any decision of the D.C. Circuit Court in the pending CSAPR litigation will undoubtedly have significant implications on the Supplemental CSAPR.

Furthermore, it would be unreasonable for EPA to implement CSAPR with respect to the five states covered by the Supplemental CSAPR and to implement CAIR with respect to the majority of affected states. Not only would this create two conflicting (and ineffective) trading programs, but it would also lead to untenable situations where a single state would be required to comply with both CAIR and CSAPR. Granting the requested stay of the Supplemental CSAPR, on the other hand, would avoid these pitfalls and allow EPA to take coordinated action in response to any decision issued by the D.C. Circuit Court in the pending CSAPR litigation.

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<sup>2</sup> As noted in comments to the proposal for the Supplemental CSAPR filed by certain members of the Oklahoma Utility Group, the Supplemental CSAPR already does not provide sufficient time Oklahoma utilities to achieve the required emission reductions.

For all of the foregoing reasons, the above request for an immediate administrative stay of the Supplemental CSAPR and its compliance deadlines should be granted.

Sincerely,

The State of Oklahoma

By:                     /s/ E. Scott Pruitt                    

E. Scott Pruitt

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