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October 5, 2011

Administrator Lisa P. Jackson
U.S. Environmental Protection Agency
Room 3000, Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Assistant Administrator Gina McCarthy
U.S. Environmental Protection Agency
Office of Air and Radiation
Ariel Rios Building, Mail Code: 6101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Petition for Reconsideration and Stay of *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals* (76 Fed. Reg. 48208)

Dear Administrator Jackson and Assistant Administrator McCarthy:

Enclosed please the State of Ohio's Petition for Reconsideration and Stay of the final issuance of the Cross-State Air Pollution Rule, as published in the Federal Register on August 8, 2011. The State of Ohio, by and through its Attorney General, and on behalf of the Director of Environmental Protection and the Public Utilities Commission of Ohio, hereby petitions for reconsideration and stay of the rule, pursuant to 5 U.S.C. § 705 and 42 U.S.C. § 7607(d)(7)(B), that U.S. EPA may consider Ohio's objections and concerns, as fully described in the enclosed petition.

Very truly yours,

Gary L. Pasheilich
Assistant Attorney General

Enclosures

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:	:	
	:	**EPA Docket No.**
Federal Implementation Plans:	:	
Interstate Transport of Fine Particulate	:	**EPA-HQ-OAR-2009-0491**
Matter and Ozone and Correction	:	
of SIP Approvals (76 Fed. Reg. 48208)	:	

PETITION FOR RECONSIDERATION AND STAY

Pursuant to 5 U.S.C. § 705 and 42 U.S.C. § 7607(d)(7)(B), the State of Ohio, by and through its Attorney General, and on behalf of the Director of Environmental Protection and the Public Utilities Commission of Ohio, hereby petitions the Administrator to reconsider and stay the final rule of the United States Environmental Protection Agency entitled, *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals.* 76 Fed. Reg. 48208 (August 8, 2011) ("Final Rule").

Introduction

On July 6, 2010, U.S. EPA issued its proposed rule, entitled *Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone,* 75 Fed. Reg. 45210 (August 2, 2010) ("Proposed Rule"), to address the interstate transport of emissions of nitrogen oxides ("NOx") and sulfur dioxide ("SO_2") that contribute to harmful levels of fine particulate matter ("PM2.5") and ozone in downwind states. The Proposed Rule established significant NOx and SO_2 reductions for Ohio, as well as an extremely aggressive timeline for implementation. The Proposed Rule required that public comments be received by October 1, 2010. Accordingly, Ohio EPA

and the Public Utilities Commission of Ohio separately submitted comments and concerns to the Administrator on October 1, 2010.

The primary concern of both agencies focused on the extremely tight implementation schedule and significant reductions called for under the rule. U.S. EPA's inflexible schedule arbitrarily adhered to the 2014 attainment schedule under the *Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO[X] SIP Call,* 70 FR 25162 (May 12, 2005) ("CAIR"), despite no judicial mandate for as stringent a timeline as specified in the Final Rule. U.S. EPA also failed to adequately consider the overwhelming burdens placed upon a state like Ohio. In general, the "one size fits all" approach being proposed by U.S. EPA lacked adequate technical support, failed to effectively communicate to the states its basis for many of the core assumptions, and ignored the practical reality of what Ohio and the industries residing in Ohio would face in attempting to meet U.S. EPA's unreasonable implementation schedule. Given the brief timeline and U.S. EPA's lack of clarity as to its methodology, it was unclear to Ohio EPA what portion of the called-for reductions were realistic and achievable for the Ohio plants regulated by the Proposed Rule, and Ohio EPA was not provided adequate time to properly analyze these questions.

As difficult as circumstances were under the Proposed Rule, the situation is now exacerbated by the issuance of the Final Rule on August 8, 2011. U.S. EPA magnified Ohio's burden by requiring additional and unanticipated SO_2 reductions beyond the Proposed Rule by approximately 33% for 2012, despite Ohio's serious and well-

supported concerns in meeting the requirements of the Proposed Rule.[1] U.S. EPA exponentially compounded these issues under the Final Rule by failing to articulate the basis for how it concluded that these additional reductions would be achievable and by adhering to the original CAIR deadlines set in 2005. Inexplicably, determinations that U.S. EPA claimed to be sound under the Proposed Rule were directly contradicted and superseded in the Final Rule. Ohio EPA does not believe these drastic reductions are achievable under the Final Rule based upon its current analysis.

Of equally great concern to Ohio, U.S. EPA has issued the Final Rule with its 33% additional reductions outside of the public comment period, stripping Ohio of its ability to formally engage in a dialogue with U.S. EPA about its concerns or U.S. EPA's reasons for the dramatic increased reductions beyond those of the Proposed Rule.[2]

Accordingly, Ohio requests that the Administrator convene a reconsideration proceeding and grant an immediate stay of the Final Rule so that Ohio is provided an adequate opportunity to comment on the Final Rule. Because the Final Rule fails to acknowledge the concerns that Ohio raised in its October 1, 2010 public comments, Ohio incorporates by reference those comments to the extent they remain unaddressed by the Final Rule. The requests for reconsideration and an immediate stay will focus on the implications raised by U.S. EPA's changes to the Proposed Rule.

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1 The Office of Management and Budget's ("OMB") report on interagency review observed that U.S. EPA has produced a "significantly different rule than originally proposed" given the additional changes, threatening the ability of regulated sources to meet the strict deadlines in the rule: "It is unclear if states and affected facilities will be prepared for a January1, 2012 start date, especially given other changes that EPA is making in the draft final rule. For instance, modeling results used in the final rule are substantially different than those in the original August 2, 2010 Proposed Rule and subsequent notices. Six (6) States are being dropped from the proposed rule; Texas is being added; 3 States have their SO2 Group status change; and the sheer magnitude of change to the budgets of all of the states results in a significantly different rule than originally proposed." *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review* ("OMB Summary of Interagency Working Comments"), Document EPAHQ-OAR-2009-0491-4133 at 11 (posted July 11, 2011).

2 Ohio EPA reserves the right to provide additional analysis pending its further review of the Final Rule.

Petition for Reconsideration and Stay

U.S. EPA is statutorily required by both the Administrative Procedures Act and the Clean Air Act to provide interested parties adequate notice of the rule and its underlying support. 5 U.S.C. § 553(b)(3); 42 U.S.C. § 7607(d)(3). These notice requirements are designed: (1) to ensure that agency regulations are tested via exposure to diverse public comment; (2) to ensure fairness to affected parties; and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 227 U.S. App. D.C. 201, 705, F.2d 506, 547 (D.C. Cir. 1983)).

The Clean Air Act provides a remedy for U.S. EPA's failure to provide adequate notice to interested parties. 42 U.S.C. § 7607(d)(7)(B) requires the Administrator to convene a proceeding for reconsideration with full procedural rights if: (1) it was impracticable to raise the relevant objection during the comment period, or the grounds for such objection arose after the period for public comment; and (2) if the objection is of central relevance to the outcome of the rule.

Each of the above elements is satisfied in this petition for reconsideration. With regard to the first element, U.S. EPA's revisions to the Proposed Rule, including the 33% additional NOx and SO_2 reductions, were incorporated into the Final Rule after the comment periods had closed for the Proposed Rule and its Notices of Data Availability. Accordingly, Ohio was not afforded the opportunity to comment on U.S. EPA's significant revisions presented for the first time in U.S. EPA's Final Rule.

A final rule may differ from the proposed rule, but "only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); see also *Int' Union*. A final rule is a "logical outgrowth" of a proposed rule only if interested parties "'should have anticipated' the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'" *Int'l Union* at 1259-60 (internal citations omitted). "A reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration. *Envtl. Integrity Project* at 998.

Ohio's objections also satisfy the central relevance element of 42 U.S.C. § 7607(d)(7)(B). EPA's failure to provide Ohio with a meaningful opportunity to comment on its NOx and SO_2 allocation reductions not only prevented Ohio from submitting comments on that issue, but prevented EPA from considering these objections in the Final Rule. The Clean Air Act provides for reversal of EPA's actions from the court of appeals when there are such failures to comply with the procedures required by the law. 42 U.S.C. § 7607(d)(9). Additionally, EPA's failure to provide adequate notice violated the procedural requirements of the Administrative Procedures Act in 5 U.S.C. § 553(b)(3). "At a minimum, failure to observe the basic APA procedures, if reversible error under the APA, is reversible under the Clean Air Act as well." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 523 (D.C. Cir. 1983). Generally, "petitioners must show that they would have submitted new arguments to invalidate rules in the case of certain procedural default," however, they are not required to do so "where the agency has entirely failed to comply with notice-and-comment requirements, and the agency has offered no persuasive evidence that possible objections to its final rules have

been given sufficient consideration." *Shell Oil Co. v. EPA*, 950 F.2d 741, 752 (D.C. Cir. 1991) (internal citations omitted). While Ohio needs not show specific prejudice, the procedural defaults in this case precluded Ohio from offering objections and comments on the issue of emissions allocations that should have been considered by EPA.

Ohio's objections squarely address the primary purpose of the Final Rule of establishing a schedule to achieve significant reductions in NOx and SO_2 emissions, i.e., objections to the amount of the proposed reductions, the methodology and assumptions U.S. EPA used to determine that these reductions are achievable, the determination of any expected impacts, and the timetable for implementation.

Ohio requests that the Administrator immediately issue a three-month stay the Final Rule, as provided in 42 U.S.C. § 7607(d)(7)(B), so that consideration can be given to Ohio's objections. A stay in these provisions is warranted to prevent irreparable harm to Ohio's industries and to provide U.S. EPA adequate opportunity to consider Ohio's objections. In the interim, while granting the stay, U.S. EPA should continue the CAIR budgets and allocations until a final, workable version of the Final Rule can be issued.

OBJECTIONS

U.S. EPA Mandates an Additional 33% Emissions Reduction with No Rational Basis

Under the Proposed Rule, Ohio was provided a budget of 464,964 tons of SO_2 emissions in 2012/2013 and 178,307 tons of SO_2 emissions in 2014. Under the Final Rule, these amounts were significantly reduced to a budget of 310,230 tons of SO_2 emissions in 2012/2013 and 137,077 tons of SO_2 emissions in 2014. This represents a reduction of over 33% in the Proposed Rule's 2012/2013 budget and 23% in the 2014

budget. However, Ohio was not provided an opportunity to review and comment on any changes to what was already considered a significantly tight budget for SO_2 emissions.

Budgets are developed in a four-step process that essentially determines each state's "significant contribution" or "interference with maintenance" to neighboring states. EPA's analysis relies on accounting for both cost and air quality improvements. The four-step analysis involves: (1) the identification of each state's emission reductions available at ascending costs per ton as appropriate; (2) the assessment of those upwind emission reductions on downwind air quality impacts; (3) the identification of upwind ''cost thresholds'' delivering effective emission reductions and downwind air quality improvement; and (4) the enshrinement of the upwind emission reductions available at those cost thresholds in state budgets. Vital details of how U.S. EPA determined Ohio's budget remain a mystery, including whether U.S. EPA properly followed the four-step process

The rationale provided in the Final Rule indicates that several changes were made that would affect aspects of the above four steps. However, U.S. EPA fails to articulate in critical areas any rational basis for why those changes were made or how those changes impacted the final budgets. Specifically, these changes include:

- Using an updated version of the Integrated Planning Model—V4.10 FTransport rather than V3.02 EISA. This updated model ostensibly reflects changes to state rules and consent decrees through December 1, 2010 and incorporates public comments on existing controls submitted during the comment process. Other changes to the model include fuel-related and pollution control-related updates, and revised assumptions on

the heat rate and dispatching of cogeneration units along with additional planned retirements.

- In the Proposed Rule, the cost curves were analyzed separately for each pollutant. In the Final Rule, U.S. EPA inexplicably identified upwind emission reductions available as costs imposed on both SO_2 and NOx simultaneously.
- There was an unspecified "refinement" of the air quality assessment tool ("AQAT") used to estimate the impact that reductions under the different cost thresholds would have on air quality. It is unknown what the refinement was or how any refinement of the tool may have affected the final budget and/or contributed to the extensive revised reductions contemplated in the Final Rule.
- Under the Proposed Rule, U.S. EPA selected a cost curve of $2,000/ton for 2014 SO_2 emission reductions that could be achieved. But under the Final Rule analysis, EPA completely ignored the $2,000/ton cost curve, and instead analyzed $1,600/ton and $2,300/ton cost curves, among a few other outlying levels. The Final Rule selected a cost curve of $2,300/ton for 2014 SO_2 emission reductions that could be achieved, directly contradicting the basis provided in the Proposed Rule.

The D.C. Circuit in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), cautioned U.S. EPA against arbitrary allowance calculations by U.S. EPA. Id. at 916-18. But U.S. EPA's voluminous Final Rule and accompanying documentation head down the same path the D.C. Circuit cautioned against by precluding timely and meaningful in-

depth review. U.S. EPA's conclusory explanations remain exceedingly vague without detailed support. In short, it was impossible to verify that U.S. EPA was correct, accurate, or rational in its decision-making. U.S. EPA has not adequately demonstrated how the above changes could result in a drastic 33% reduction in the SO_2 budget when the SO_2 cost curve remained the same as the Proposed Rule.

Additional Reductions under the Implementation Schedule Ignores the Practical Reality of Industries' Ability to Meet the Mandate

As with the Proposed Rule, the Final Rule claims the 2012 SO_2 budget can be met without the need to install post-combustion controls. In the Final Rule, U.S. EPA postulates the 2012 SO_2 budget can be achieved through other methods, such as operating existing controls year-round, fuel switching, increasing the dispatch of lower-emitting generation, or acquiring allocations through trading. These conclusions are unsupported.

Ohio does not believe there will be sufficient allocations on the market for trading and questions whether suppliers of lower sulfur coal will even be able to meet the demand for such fuels by the 2012 compliance date. This is particularly true because contracts for the purchase of coal for 2012 already exist. Ohio's comments on the Proposed Rule voiced extreme concern that this budget was not achievable considering the stringency of the 2012 SO_2 budget.

The same considerations U.S. EPA gave to time constraints under CAIR should apply here as well. In response to comments under CAIR, captioned *Relationship of Reductions to Attainment Dates,* U.S EPA stated that it "views the pace of reductions as being determined by the time within which they may feasibly be achieved." CAIR at 25178. CAIR was published in 2005 and the "feasibility" time standard at the time was based upon a phased-in approach starting in 2010 and 2015 respectively. CAIR at

25167 ("Due to feasibility constraints, EPA is requiring emissions reductions be implemented in two phases.").

How can U.S. EPA apply a "feasibility" standard in one 2005 proposal and in the latest stroke of a pen—uninfluenced by the passage of time or public comment—allegedly claim "feasibility" six years later in 2011 while also ratcheting down the SO_2 budget to levels never anticipated by any of the commentators? Clearly, the Final Rule's additional 33% reduction in the 2012 SO_2 budget aggravates the problem to the point where legitimate concerns are now elevated to flat-out exasperation.

In the Final Rule, "EPA clarifies that while trading of allowances (*i.e.,* buying, selling, and banking) is allowed without restriction, it is specifically the surrender of SO_2 allowances for compliance that is limited." Final Rule at 48263-264. That limitation on SO_2 budgets when combined with the unrealistically compressed time constraints impose an impossible burden on Ohio that will throw many utilities into an automatic civil penalty mode. Final Rule at 46296-46298. While Ohio endorses the objectives of reductions in air pollutants and aggressively pursues violators, these limitations seem excessive.

Ohio is mindful of attainment dates under 42 U.S.C. §§ 7502 and 7511 and that the D.C. Circuit in *North Carolina* allowed CAIR to remain in effect on remand. *North Carolina v. EPA,* 55 F 3d 1176 (D.C. Circuit 2008) (pet. for rehrg. granted in part).In its per curiam opinion, the D.C. Circuit, while not granting an indefinite stay, specifically declined "to impose a definitive deadline by which EPA must correct CAIR's flaws." Id. at 1178. However, U.S. EPA misreads the Court's instructions to the detriment of regulators, as well as regulated community. In the Final Rule, U.S. EPA states, "Given

the Court's emphasis on remedying CAIR's flaws expeditiously, EPA does not believe it would be appropriate to establish a lengthy transition period to the rule which is to replace CAIR." Final Rule at 48220. CAIR, as noted above, purposely did account for a "feasible" transition period. U.S. EPA should do no less now on reconsideration. Unfortunately, the Final Rule does not.

The Final Rule states that many owners should have already anticipated its arrival. However, few could foresee a Final Rule that had been so drastically changed from its published proposed version. The unrealistic and unexpected reductions imposed by U.S. EPA provided no opportunity for entities to establish plans for achieving the mandated reductions. Indeed, any plans crafted under the Proposed Rule would have to be completely reevaluated, given the Final Rule's immense additional reduction increases. Simply put, no one could have expected such an aggressive SO_2 budget would be the result of this process.

Maintaining the CAIR Timeframe with the Reduced SO_2 Budget Threatens to Destabilize Reliability of Ohio's Power Grid

These unexpected reductions in the Final Rule have produced a situation in which Ohio's electrical generating industry is forced to choose drastic methods of meeting the mandate without the ability to assess whether more moderate options are available. The consequences for Ohio will be significant. Nationally, Ohio is sixth in electric generation and coal fuels about 85% of that generation. As industries struggle to assess compliance with the rule, they now face the drastic measure of early decommissioning of coal-fired generating plants in Ohio forced by the Final Rule. Over 150 units within the PJM Interconnection ("PJM") are at risk of being decommissioned by 2015. A projected minimum of 24 gigawatts of generation will be retired in PJM and a conservative

estimate of seven gigawatts specifically within Ohio. Further, AEP recently stated that it intends to shut-down nearly six gigawatts of capacity due to environmental regulations. These expected retirements in Ohio will create uncertainty as to the reliability of services. Up to four electrical-generating units ("EGUs") could be shutdown within a 50-square mile area. As these EGUs are retired, older, smaller, and/or less efficient plants will become "must run" EGUs to address demand. As a result, the cost of generation will rise dramatically.

Moreover, the issuance of the Final Rule, at a time when other recently proposed and finalized rules have been imposed upon Ohio's electric generating industry, is highly likely to drive the need for significant new infrastructure investment. Given the inability of industry to effectively assess the impact of the rule due to timing considerations, it is unclear how many EGUs will be able to construct new facilities to meet the Final Rule's stringent requirements. There are many power plants for which decommissioning, rather than installing additional control equipment, will be a more cost-effective option. There will likely be significant variation in decision-making from utility to utility, which may further destabilize the market and lead to an inadequate planning reserve margin.

CONCLUSION

For the reasons stated above, Ohio requests the Administrator to immediately stay the Final Rule and begin reconsideration proceedings at the earliest opportunity. In the interim, U.S. EPA should continue the CAIR budgets and allocations until a final, workable version of the Final Rule can be issued.

Respectfully submitted,

MICHAEL DEWINE
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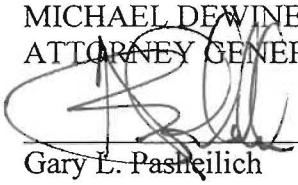

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