UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 19, 2012

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule

FROM: Gina McCarthy
Assistant Administrator

TO: Air Division Directors, Regions 1 – 10

The purpose of this memorandum is to communicate to Environmental Protection Agency (EPA) Regional Offices about our intent with regard to a range of actions potentially affected by the August 21, 2012, decision by the U.S. Court of Appeals to vacate the 2011 Cross-State Air Pollution Rule (CSAPR). (EME Homer City Generation, L.P. v. EPA, No. 11-1302. (D.C. Cir. 2012)). As you know, we have filed a petition for rehearing of the Court's decision. Until a decision is made, CSAPR is stayed and the 2005 Clean Air Interstate Rule (CAIR) remains in effect. In the meantime, we have work to do. Statutory deadlines and other circumstances will require us to take various actions during this period and it is important that we all understand how best to take into account the Court's decision.

Certain state submittals awaiting approval by the EPA, such as pending redesignation requests for the 1997 ozone National Ambient Air Quality Standards (NAAQS) and the 1997 and 2006 $PM_{2.5}$ NAAQS, and pending submittals of certain ozone, $PM_{2.5}$, and regional haze State Implementation Plans (SIPs), may be partly dependent on the assurance of ongoing regional NO_x and SO_2 emission reductions. In many cases, state and local air agencies made these submittals with the expectation that CSAPR, which was designed to limit emissions of NO_x and SO_2 from power plants, would be fully implemented, thus ensuring such reductions would take place.

At the time of the Court's decision, the EPA was considering whether to approve a number of attainment SIPs, redesignation requests, and associated maintenance SIPs that relied on CSAPR in part to provide the necessary regional emission reductions for attaining the ozone and $PM_{2.5}$ NAAQS and maintaining the standards for the relevant future time period. With the Court's

Internet Address (URL) • http://www.epa.gov
Recycled/Recyclable • Printed with Vegetable Oil Based Inks on 100% Postconsumer, Process Chlorine Free Recycled Paper

August 2012 decision to vacate CSAPR, the ability of states to ensure that the necessary reductions would be achieved and maintained was brought into question. However, on page 60 of its August 2012 decision, the Court also ordered the EPA to "continue administering CAIR pending the promulgation of a valid replacement." While we have filed a petition for rehearing of the Court's decision on CSAPR, based on this direction from the Court, we believe that it will be appropriate to rely on CAIR emission reductions as permanent and enforceable for certain actions in certain circumstances. Specifically, we believe it will be appropriate to rely on those reductions either until that petition and any further proceedings in the CSAPR case are resolved or, if the decision vacating CSAPR is not changed, until a valid replacement rule is developed and implementation plans complying with any new rule are submitted by the states and acted upon by the EPA. Thus, action on those pending requests and SIPs may go forward.

With respect to regional haze, there is one pending action that has yet to be finalized for a state plan that relies on the use of CAIR to satisfy the requirements of the regional haze program for its electric generating units. Given the need to act on this plan, we believe that it will be appropriate to approve the submitted state plan that relies on CAIR emission reductions, for the reasons explained above. You may also receive questions about two other categories of regional haze actions taken prior to the CSAPR decision: (1) determinations that certain haze plans did not meet the requirements of the Clean Air Act because of the plans' reliance on CAIR, and (2) actions relying on the CSAPR trading programs to satisfy Best Available Retrofit Technology (BART) for power plants. For these actions, we believe it is the best use of our own, the states', and the courts' resources to await the decision on our petition for rehearing before deciding whether we need to revisit these final actions.

I have directed OAR staff to work closely with EPA Regional Offices to identify, prioritize, and act promptly on any pending redesignation requests and SIP submittals that involve CSAPR reductions. While noting that each EPA action on a pending state request will need to address the specifics of the state's submittal, it is my expectation that Regional Offices, working with national program staff, can move forward to draft and process these notices expeditiously.

I would also like to note that the recent CSAPR decision made certain holdings regarding the requirement for states to submit SIPs addressing the provisions of Clean Air Act section 110(a)(2)(D)(i)(I), the good neighbor provision that addresses upwind emissions linked to NAAQS attainment problems in downwind states. The decision states that a SIP cannot be deemed deficient for failing to meet the good neighbor obligation before the EPA quantifies that obligation. Although we have filed a petition for rehearing of the Court's decision, including this element of the decision, and although the mandate for that decision has not yet been issued, we intend to act in accordance with the decision during the pendency of the appeal. Therefore, at this time the EPA does not intend to make findings that states failed to submit SIPs to comply with section 110(a)(2)(D)(i)(I). To the extent states may inquire about their obligations to submit SIPs

addressing this provision, we believe it would be appropriate to convey that at this time we do not intend to make such findings with respect to section 110(a)(2)(D)(i)(I).

I trust that this information will be helpful to you in responding to questions about pending state actions, and I encourage you to distribute this memo to state and local air agencies in your Region. We will continue to assist Regional Offices on an individual basis to ensure that pending and new actions are being processed as expeditiously as possible in accordance with the recent CSAPR court decision.