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A REMEDY EVEN THE PLAINTIFFS DON'T LIKE. THE D.C. CIRCUIT'S VACATUR OF THE CLEAN AIR INTERSTATE RULE

*North Carolina v. E.P.A.*¹

I. INTRODUCTION

The Clean Air Interstate Rule (CAIR) was a cap-and-trade program designed to control the regional emissions of SO₂ and NO_x. It functionally merged two separate rules, The Acid Rain Trading Program, and the NO_x SIP Call into one. While the two previous rules had passed judicial muster, CAIR did not, and was vacated by the U.S. Court of Appeals for the D.C. Circuit. This decision not only surprised all parties involved, but is believed by all parties to be incorrect because it was inconsistent with a previous holding. It has created many problems that will be difficult to fix without new legislation from Congress.

II. FACTS AND HOLDING

The Environmental Protection Agency (EPA) promulgated the Clean Air Interstate Rule (CAIR) for the purpose of reducing or eliminating the impact of upwind sources of fine particulate matter and smog on out-of-state downwind locations.² The EPA is required by Title I of the Clean Air Act to “issue national ambient air quality standards (“NAAQS”) for each pollutant that “cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare...”³

To comply with Title I of the Clean Air Act, the EPA requires each state to create a state implementation plan (“SIP”) to meet the NAAQS requirements for air quality.⁴ If a state fails to implement an approved

¹ 531 F.3d 896 (D.C. Cir. 2008)

² *Id.* at 903.

³ *Id.* at 901.

⁴ *Id.* at 901-02.

SIP, the EPA must promulgate a federal implementation plan (FIP) for the state to follow.⁵

One provision of Title I requires SIPs to prohibit the emission of any air pollutant from a state in an amount which will “contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]...”⁶ In order to implement this provision, the EPA instituted NOx SIP Call to impose a duty on certain upwind sources to reduce their nitrogen oxides (NOx) to acceptable levels.⁷ This program also created an optional cap-and-trade program for nitrogen oxides.⁸

CAIR was challenged by separate bodies on a wide range of issues.⁹ North Carolina objected to “EPA’s trading programs, EPA’s interpretation of the “interfere with maintenance” language in section 110(a)(2)(D)(i)(I), Phase Two’s 2015 compliance date, the NOx Compliance Supplement Pool, EPA’s interpretation of “will” in “will contribute significantly,” and the air quality threshold for PM2.5.”¹⁰ Several electric utility companies challenged “the EPA’s authority under Title I and Title IV to limit the number of Title IV allowances, and to require units exempt from Title IV to acquire Title IV allowances.”¹¹ A third group referred to as “Entergy” by the court, contested EPA’s authority to “base state NOx budgets on the number of coal-, oil-, and gas-fired facilities a state has compared to other states in the CAIR region.”¹² Also, several electric utilities argued against their inclusion in CAIR, as well as the 2009 start date for Phase One of the NOx restrictions.¹³

The court dealt with each issue individually, finding that CAIR was fatally flawed in five out of the nine issues.¹⁴ Ultimately the court held that because the EPA adopted CAIR as one integral action, the only

⁵ *Id.* at 902.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 905.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See generally *N.C. v. E.P.A.*, 531 F.3d 896 (2008).

proper remedy was to vacate CAIR completely, and its associated federal implementation plan (FIP), and remand to the EPA.¹⁵ If the EPA promulgates a new rule it must be consistent with this decision.¹⁶

III. LEGAL BACKGROUND

In 1970, Congress passed Title I of the Clean Air Act (CAA) in order to protect and enhance the quality of the Nation's air resources.¹⁷ The CAA accomplished this goal by first requiring the EPA to issue national ambient air quality standards (NAAQS).¹⁸ In order to achieve the desired standards, each state was required to create a state implementation plan (SIP).¹⁹ If a state failed to create a SIP according to Title I rules, the EPA was required to create a federal implementation plan (FIP) for that state to follow.²⁰

In 1977 Congress amended the CAA by adding provisions that required the designation of areas as attainment, nonattainment, or unclassifiable.²¹ The 1977 amendments also contained changes to section 110(a)(2)(D) and added section 126, two provisions on the interstate transport of air pollutants.²² Section 110(a)(2)(D) later became the basis of the NOx SIP Call, while section 126 gave states the right to petition the EPA to take action against non-compliant upwind states.

In 1990 Congress again amended the CAA in order to address the continued nonattainment of 1-hour ozone NAAQS. Also part of the 1990 amendments was the Title IV acid rain program.²³ The goal of the

¹⁵ N.C. v. E.P.A., 531 F.3d 896, 901 (2008).

¹⁶ *Id.*

¹⁷ Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended 42 U.S.C §§ 7401-7700 (2006)).

¹⁸ Clean Air Act, 42 U.S.C § 7409(a)(1)(A) (2006).

¹⁹ *Id.* § 7410(a)(1).

²⁰ *Id.* § 7410(c)(1)(A),(B).

²¹ Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 687-88 (amending § 107(d)(I)) (codified as amended at 42 U.S.C. § 7407(d)(1)).

²² Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 687-88 (amending § 110(a)(2)(D)) (codified as amended at 42 U.S.C. § 7410(a)(2)(D)).

²³ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)).

program was to reduce the acidic content of the air by reducing annual emissions of sulfur dioxide.²⁴ The central means by which Title IV was to achieve its goal was by instituting a cap-and-trade program for sulfur dioxide (SO₂).²⁵ The program granted allowances of sulfur dioxide emissions to individual units, and made these allowances transferable.²⁶ In 1998, the EPA instituted a regional cap-and-trade program known as the NO_x SIP Call.²⁷

A. NO_x SIP Call

In accordance with the Clean Air Act the EPA enacted its final rule known as the NO_x SIP Call on October 27, 1998.²⁸ The EPA stated that under CAA section 110(a)(1) and 110(k)(5), new SIPs must be created in order to meet the requirements of section 110(a)(2)(D)(i)(I).²⁹ The rule required 22 states to submit revised SIPs that would effectively prohibit NO_x gas, a precursor of ozone (smog) pollution, for the purpose of reducing the transport of these gases across state boundaries in the eastern United States.³⁰ This reduction was meant to have the dual benefit of improving public health and preventing upwind states from significantly contributing to or interfering with the maintenance of downwind state's

²⁴ 42 U.S.C. § 7651(b) (2000).

²⁵ *Id.*

²⁶ *Id.*

²⁷ 40 C.F.R. §§ 51, 71, 75, 96 (2008) (originally published in 63 Fed. Reg. 57,356-01 (Oct. 27, 1998)).

²⁸ *Id.* The official name of the final rule is "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," but within the rule itself is referred to as the NO_x SIP Call by the EPA and in general by all who reference it. *Id.*

²⁹ *Id.* Section 110(k)(5) gives the EPA the right to call for revisions of state SIPs if it deems them inadequate to meet the NAAQS. 42 U.S.C. § 7410(k)(5) (2000).

³⁰ 40 C.F.R. §§ 51.10, 51.121 (2008) (originally published in 63 Fed. Reg. 57,356-01 (Oct. 27, 1998)). The rule also included the District of Columbia. The 22 states were Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. *Id.*

attainment of 1-hour and 8-hour ozone NAAQS.³¹ The EPA considered the NOx SIP Call to be a significant step towards reducing ozone in the eastern half of the country.³² The EPA gave each state 12 months to revise their SIPs, and determined that the new SIP calls must be implemented by May 1, 2003.³³ The EPA also required each state to submit a special onetime statewide NOx emissions inventory report in 2007.³⁴ The final rule required only ozone-season (summer) emissions reporting.³⁵

The EPA determined that ozone was a regional scale problem that required a collective contribution approach to achieve regional scale reductions.³⁶ In accordance with this regional approach, the EPA determined the phrase “contribute significantly” in section 110(a)(2)(D)(i)(I) to include both upwind emissions and their downwind impact, as well as cost factors relating to the costs of the upwind emissions reductions.³⁷ In order to determine what emissions contributed significantly to downwind nonattainment the EPA provided a multi-factor test of four prongs, three dealing with air quality, while the fourth considered the “availability of highly cost effective control measures for upwind emissions.”³⁸ The EPA determined a reduction of emissions was highly cost effective if it could be affected at a rate of \$2,000 per ton of ozone season NOx.³⁹

As part of the program the EPA gave each state an emissions budget which constituted the amount of pollution they were allowed to emit.⁴⁰ In order to assist states in achieving their budget limits, the EPA

³¹ 40 C.F.R. §§ 51.10, 51.121 (2008) (originally published in 63 Fed. Reg. 57,356-01 (Oct. 27, 1998)). The EPA 1-hour standard ceased to apply to several areas after the NOx SIP final rule, but remained in effect for most urban areas in the eastern United States. *Id.*

³² Nox SIP Call, 63 Fed. Reg. 57,356, 57,359 (Oct. 27, 1998).

³³ *Id.* at 57,447-57,366.

³⁴ *Id.* at 57,455.

³⁵ *Id.* at 57,366.

³⁶ *Id.* at 57,375-76.

³⁷ *Id.* at 57, 376.

³⁸ *Id.*

³⁹ *Id.* at 57,399.

⁴⁰ *Id.* at 57,405.

developed a multi-state NO_x trading program.⁴¹ The purpose of the program was to maintain appropriate levels of emissions reductions through the use of a region-wide cap, but allow the use of a market-based system to make it as cost effective as possible.⁴² The system was developed in consultation with and support of many states, industry members, and environmental groups and was optional provision of the NO_x SIP Call.⁴³ The trading program allowed states in nonattainment to buy allowances from states with excess reductions in order to come into compliance with the rule.⁴⁴ The program also allowed banking of allowances, or the ability of a state in attainment to save its excess reductions for a later time.⁴⁵

B. Michigan

Various aspects of the NO_x SIP Call provision were challenged in *Michigan v. EPA*.⁴⁶ The court in *Michigan* decided eight separate claims made against the NO_x SIP Call, but only one becomes critical to the later decision regarding CAIR.⁴⁷ The key part of the courts analysis in *Michigan* was its analysis of the term “significant” in section 7410(a)(2)(D)(i)(I).⁴⁸ Four challenges were made against the EPA’s interpretation of the term as used in the NO_x SIP Call.⁴⁹

First, petitioners argued that the EPA acted contrary to precedent in its interpretation of the phrase.⁵⁰ The court said that there is nothing in

⁴¹ *Id.* at 57,456.

⁴² *Id.*

⁴³ *Id.* at 57,457. States which chose not to adopt the model rule had the option to either incorporate the rule by reference into its state regulations, or adopt state regulations that mirrored the rule with some minor variations the rule allowed for. *Id.* at 57,458.

⁴⁴ *Id.* at 57,457-72.

⁴⁵ *Id.* at 57,473.

⁴⁶ *Mich. v. E.P.A.*, 213 F.3d 663 (D.C. Cir. 2000).

⁴⁷ *Id.* at 663.

⁴⁸ *See id.* at 674-81.

⁴⁹ *Id.* at 674.

⁵⁰ *Id.* Prior to the 1990 amendments to the Clean Air Act, section 7410(a)(2)(D)(i)(I) said states needed only to stop sources from emitting pollution that would *prevent attainment* or maintenance by a downwind state. *Id.* This was a lesser standard than the post-

the section or any other part of the statute that specifies how to define significant, and neither had the EPA bound itself to any.⁵¹ The court held that the states failed to show any instance of the EPA having created a binding concept of what the term meant, and denied the claim.⁵²

Second, the petitioners argued that the EPA was not permitted to consider the cost of reducing ozone when determining what constituted significant.⁵³ The Court first stated that it had no quarrel with the EPA's method of determining which states were significant contributors.⁵⁴ The Court acknowledged that the method of reducing emissions by the use of highly cost effective controls was only mandated after a state had been deemed a significant contributor.⁵⁵ They said that "naturally, the ultimate line of 'significance,'...would vary from state to state depending on variations in cutback costs."⁵⁶ Petitioners cited *Natural Resources Defense Council v. EPA* as precedent for their contention that costs cannot be the primary consideration of the EPA in effectuating a statute to protect the public health.⁵⁷

The Court stated that the program seemed to have no rationale other than cost reduction, and that under petitioner's proposed reading of section 7410(a)(2)(D)(i)(I) it would be invalid.⁵⁸ The Court also says it only assumes the existence of the allowance trading program because no one has challenged its adoption.⁵⁹ The Court went on to state that due to the inconsistent nature of the petitioners' claims "it would be at very least ironic for us to say there is 'clear congressional intent to preclude

amendment language of contribute significantly. *Id.* The states argued that previous case law based on the pre-1990 terminology meant the two phrases should be equally. *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 675. The EPA determined the 23 jurisdictions to be significant contributors by measuring the NOx parts per billion that were transmitted to downwind states. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 676 (citing *Natural Res. Def. Council v. E.P.A.*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc)).

⁵⁸ *Id.*

⁵⁹ *Id.*

consideration of cost.”⁶⁰ The Court found three separate reasons to reject the petitioners claim against the use of cost in determining significance.

First, “significant” is an ambiguous term, does not in itself convey a one dimensional definition, and in fact in previous case law actually requires the implication of cost.⁶¹ Second, a health-only definition of the word significant contains fatal flaws because it leaves no way to determine a baseline of emission levels, since any amount of ozone has adverse health effects.⁶² Third, and what the Court says is the most formidable obstacle for petitioners, is the settled law of the court that consideration of cost can only be precluded upon clear congressional intent, which the Court did not find.⁶³ Ultimately the Court holds that there was nothing in the “text, structure, or history” of the section, that precluded the EPA from using a cost-effective approach to the regulation of emissions.⁶⁴

The third primary argument made by petitioners against the EPA’s interpretation of the term significant in section 7410(a)(2)(D)(i)(I) is that it constitutes a uniform control strategy and is irrational.⁶⁵ They argue that it causes states making small contributions to downwind nonattainment must make just as much of a reduction as states which make large ones.⁶⁶ The court said that this is a logical result of their upholding of the use of cost differentials, and therefore must be upheld.⁶⁷ Petitioners also argued that it was irrational because upwind states that were further in distance contributed less than states closer to nonattainment areas.⁶⁸ The court held that since there was no clear benefit to an exposure-based trading system as opposed to a cost-based one, they had no basis to upset the EPA’s decision.⁶⁹ The fourth and final argument against the EPA’s interpretation of significant is one of nondelegation.⁷⁰ Basing their

⁶⁰ *Id.* at 677 (citing *Natural Res. Def. Council*, 824 F.2d at 1163).

⁶¹ *Id.* at 677-78.

⁶² *Id.* at 678-79.

⁶³ *Id.*

⁶⁴ *Id.* at 679.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 680.

⁷⁰ *Id.*

argument on *American Trucking Ass'ns, Inc. v. EPA*, petitioners essential argument is the EPA's cost-effectiveness standard is so vague that it has no perceivable boundary.⁷¹ Several ancillary issues were remanded for further consideration, but the court dismissed the majority of the other claims raised against the NO_x SIP Call, including the key issue of the interpretation of the word "significant."⁷² Judge Sentelle gives a notable dissent, arguing that the majority makes a mistake in allowing the use of a cost effectiveness approach.⁷³ He believed Congress clearly stated that it was the amount of the pollution that determined the significant contribution, and that the cost effectiveness approach did not meet this standard.⁷⁴

Following the decision in *Michigan*, aspects of the NO_x SIP Call were again challenged in *Appalachian Power Co. v. EPA*.⁷⁵ The Court in *Appalachian*, like the one in *Michigan*, also stated the rule did not violate the Clean Air Act's commitment to cooperative federalism.⁷⁶ The Court also upheld the *Michigan* standard of determining "significant contribution" based on a regional cost-effectiveness model as opposed to a test that required sources within each state to independently meet the EPA's threshold for downwind nonattainment.⁷⁷

C. CAIR

Following the successful implementation of both the 1990 Acid Rain Program and the 1998 NO_x SIP Call, the EPA issued the Clean Air Interstate Rule (CAIR) in 2005.⁷⁸ CAIR included revisions of cap-and-trade programs outlined in the Acid Rain Program and replaced those in the NO_x SIP Call.⁷⁹ The EPA promulgated the Clean Air Interstate Rule

⁷¹ *Id.* (citing *Am. Trucking Ass'ns, Inc. v. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999), reh'g granted in part, denied in part).

⁷² *Id.* at 695.

⁷³ *Id.* at 695-97.

⁷⁴ *Id.* at 696.

⁷⁵ *Appalachian Power Co. v. E.P.A.*, 249 F.3d 1032 (D.C. Cir. 2001).

⁷⁶ *Id.* at 1046-48.

⁷⁷ *Id.* at 1049.

⁷⁸ Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005).

⁷⁹ *Id.*

(CAIR) for the purpose of reducing or eliminating the impact of upwind sources of fine particulate matter and smog on out-of-state downwind locations.⁸⁰ The EPA established CAIR based on the authority of The Clean Air Act section 110(a)(2).⁸¹ The EPA was required by Title I of the Clean Air Act to issue national ambient air quality standards (NAAQS) for each pollutant that contributes or causes air pollution which could reasonably be anticipated to endanger public health or welfare.⁸²

To comply with Title I of the Clean Air Act, the EPA required each state to create a SIP to meet the NAAQS requirements for air quality.⁸³ If a state failed to implement an approved SIP, the EPA must promulgate a FIP for the state to follow.⁸⁴ A total of 28 eastern states and the District of Columbia were required to reduce SO₂ and/or NO_x emissions under CAIR.⁸⁵ The emissions reductions were to be implemented in two phases. The two phases of NO_x were 2009 and 2014 respectively, while the SO₂ phases were 2010 and 2015.⁸⁶

The EPA believed CAIR was necessary for two main reasons.⁸⁷ First, it felt that CAIR would address serious health concerns, including premature mortality and aggravated respiratory disease, which were caused by the fine particles caused by NO_x and SO₂ emissions.⁸⁸ Second, it would help prevent downwind states from incurring unfair costs of pollution reduction due to their air quality being diminished by upwind states.⁸⁹ The EPA called this second provision the “good neighbor” requirement of section 110(a)(2)(D) of the Clean Air Act.⁹⁰

⁸⁰ *Id.*

⁸¹ *Id.* at 25,166.

⁸² *N.C. v. E.P.A.*, 531 F.3d 896, 901 (D.C. Cir. 2008).

⁸³ *Id.* at 902.

⁸⁴ *Id.*

⁸⁵ Clean Air Interstate Rule, 70 Fed. Reg. 25,167 (May 12, 2005).

⁸⁶ *Id.*

⁸⁷ *Id.* at 25,168.

⁸⁸ *Id.* The EPA estimated by 2015 the annual benefits of the program would include 17,000 fewer premature fatalities, 8,700 fewer cases of chronic bronchitis, 22,000 fewer non-fatal heart attacks, 10,500 fewer hospitalization admissions, and over one million fewer work loss days. *Id.* at 25,166.

⁸⁹ *Id.*

⁹⁰ *Id.* at 25,170.

The good neighbor provision required SIPs to prohibit the emission of any air pollutant from a state in an amount which would either contribute significantly to nonattainment of another state, or interfere with that state's maintenance of NAAQS.⁹¹ Prior to CAIR, the EPA had already instituted the NO_x SIP Call in 1998 to impose a duty on certain upwind sources to reduce their nitrogen oxides (NO_x) to acceptable levels in accordance with section 110(a)(2)(D).⁹² This program also created an optional cap-and-trade program for nitrogen oxides.⁹³ CAIR was designed in part to replace the less extensive NO_x SIP Call.⁹⁴ The EPA felt it was necessary to do this for two reasons.⁹⁵ First, EPA believed that because some years had passed since the passage of the NO_x SIP Call, it would be better to use updated air quality and emissions data for a new rule.⁹⁶ Second, even with the NO_x SIP Call in place, several states were still having difficulty meeting the air quality standards, and the EPA felt it should go beyond the previous modeling done in the NO_x SIP Call in order to ensure continued progress towards attainment.⁹⁷ The EPA stated several times that it relied heavily on the NO_x SIP Call in creating the CAIR rule.⁹⁸ As the NO_x SIP Call was only a seasonal (summer) regulation, and CAIR was an annual one, the EPA decided to implement two separate NO_x trading programs in CAIR to avoid complications.⁹⁹ CAIR outlined three separate cap and trade programs, annual NO_x and SO₂ programs, as well as a seasonal NO_x program.¹⁰⁰ These programs were designed by the EPA to mirror the structure of the NO_x SIP Call and to coordinate with the Acid Rain Program.¹⁰¹ The CAIR ozone-season NO_x cap and trade rules were distinct from those of the NO_x SIP Call in

⁹¹ *N.C. v. E.P.A.*, 531 F.3d 896, 901, 902 (D.C. Cir. 2008).

⁹² *Id.*; Nox SIP Call, 63 Fed. Reg. 57,356 (Oct. 27, 1998).

⁹³ *N.C.*, 531 F.3d at 902.

⁹⁴ Clean Air Interstate Rule, 70 Fed. Reg. 25,166 (May 12, 2005).

⁹⁵ *Id.* at 25,168.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 25,171.

⁹⁹ *Id.* at 25,289-90.

¹⁰⁰ *Id.* at 25,273.

¹⁰¹ *Id.*

that they allowed for unrestricted banking of allowances and for facility level compliance.¹⁰²

With this legal background, the District of Columbia Circuit Court addressed the issues in the instant case.

IV. INSTANT DECISION

In *North Carolina*, the Court held that because there were several fatal flaws in CAIR, and because the EPA had adopted it as one, integral action, the rule in its entirety must be vacated and remanded to the EPA.¹⁰³ The first flaw found by the court was in CAIR's trading programs for SO₂ and NO_x, which the court said failed to meet the goals of section 110(a)(2)(D)(i)(I).¹⁰⁴ The EPA's trading program essentially amounted to a "regionwide approach" which failed to prohibit sources "*within the State from contribut[ing] significantly to nonattainment in...any other State...*" because sources could purchase enough NO_x and SO₂ allowances to cover current emissions, resulting in no change.¹⁰⁵

North Carolina also challenged the EPA's interpretation of the "interfere with maintenance" provision of section 110(a)(2)(D)(i)(I), stating it should include states, such as Georgia, that are projected to barely meet attainment levels of NAAQS in 2010.¹⁰⁶ Analyzing this question for the first time, the court found that the EPA's failure to use the "interfere with maintenance" provision separately from the "significant contribution" provision of section 110(a)(2)(D)(i)(I) amounted to "reading a substantive issue out of a statute."¹⁰⁷ Thus the court held the EPA unlawfully nullified the statute and provided no protection for downwind areas that, despite EPA's predictions, still found themselves struggling to meet NAAQS due to upwind interference in 2010.¹⁰⁸

¹⁰² *Id.* at 25,288.

¹⁰³ *N.C. v. E.P.A.*, 531 F.3d 896, 901 (D.C. Cir. 2008).

¹⁰⁴ *Id.* at 907.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 908.

¹⁰⁷ *Id.* at 909-10.

¹⁰⁸ *Id.* at 910-11.

The court next addressed North Carolina's argument that the 2015 deadline for upwind states to eliminate their "significant contribution" to downwind nonattainment failed to meet the statutory requirement of achieve attainment "as expeditiously as practicable."¹⁰⁹ The court held that the EPA is required to consider all provisions in Title I, including the provisions mandating compliance deadlines for downwind states by 2010.¹¹⁰ The fourth flaw the court found in the CAIR rule was the challenge by Entergy that the budgets and regionwide cap set by the rule were "arbitrary, capricious, ...or otherwise not in accordance with law."¹¹¹ The EPA failed to meet the requirements of section 110(a)(2)(D)(i)(I) because it based its choice of SO₂ emissions caps on Title IV allowances.¹¹²

Entergy also challenged the EPA's use of "fuel factors" to adjust the regional NOx cap among CAIR states.¹¹³ The court held that the EPA's program must fail because it makes one state's significant contribution depend on another state's cost of eliminating emissions.¹¹⁴ Despite the laudatory motives behind the program, the EPA had no authority to use the fuel-adjustment factors to shift the burden of emission reduction from one state to another.¹¹⁵

The court also held that the EPA had no statutory authority to terminate or limit Title IV allowances, either through a trading program or by requiring that SIPs have allowance retirement provisions.¹¹⁶ The EPA was created by statute itself, and if there is no statute conferring it authority on an issue, it has none.¹¹⁷ In addition the court held that the inclusion of Texas and Florida in CAIR was not prejudicial, but that the inclusion of Minnesota in the program should be remanded for further consideration.¹¹⁸

¹⁰⁹ *Id.* at 911.

¹¹⁰ *Id.* at 912.

¹¹¹ *Id.* at 916.

¹¹² *Id.* at 918.

¹¹³ *Id.* at 918-19.

¹¹⁴ *Id.* at 919-20.

¹¹⁵ *Id.* at 921.

¹¹⁶ *Id.* at 922.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 923-28.

The court found they could not edit CAIR to correct the flaws of the rule, because it would leave substantial doubt that the EPA would have adopted the edited version on their own.¹¹⁹ The court ruled that because all of CAIR's components must stand or fall together, the EPA must redo its analysis from the ground up.¹²⁰ Thus, CAIR and its associated FIP programs were vacated and remanded to the EPA.¹²¹

V. COMMENT

CAIR is the third of three major cap-and-trade programs promulgated by the EPA, but the first to be struck down by the court. Both the Acid Rain Program and the NOx SIP Call not only survived previous challenges, but continued in full effect even after the ruling in *North Carolina*.¹²² The EPA's ability to promulgate any new Title I cap-and-trade program, should it choose to do so, as well as State and other emission sources' ability to challenge it, are contingent on the understanding of why this distinction was made. The question that thus presents itself is what distinguished CAIR from the Acid Rain Program and the NOx SIP Call in such a way that would cause the court to vacate only that program, while allowing the other similar rules to remain in effect?

Although the court found five fatal flaws in CAIR, on five very different issues, all of them but one are united by a common theme: the violation of section 110(a)(2)(D)(i)(I).¹²³ Of the five fatal flaws the court found in the CAIR rule, three were unique issues of the rule itself, while two of the flaws found were very close to similar measures in the Acid Rain Program and the NOx SIP Call that were previously found to be acceptable by the court.¹²⁴ The regional cost-effective approach for cap-and-trade emissions reduction, as well as the budget levels the EPA chose

¹¹⁹ *Id.* at 929.

¹²⁰ *Id.*

¹²¹ *Id.* at 930.

¹²² *Id.* at 922, 930.

¹²³ *See supra* Part IV.

¹²⁴ *See supra* Part IV.

to set for those emissions, were both found to be acceptable in the two prior rules, but both were rejected by the court in *North Carolina*.¹²⁵

Why did the court reject CAIR's regional cost-effective cap-and-trade program while acknowledging it had recently accepted a substantially similar program in *Michigan* under the NOx SIP Call?¹²⁶ The court admitted that in *Michigan* it deferred to the EPA's judgment and granted approval of "emissions controls that do not correlate directly with each state's relative contribution to a specific downwind nonattainment area."¹²⁷ The Court in *North Carolina*, stated that *Michigan*, despite having analyzed and ruled on the issues of consideration of cost, uniform controls, and the NOx SIP Call's interpretation of "significant" contribution in section 110(a)(2)(D)(i)(I), never ruled on the legality of NOx SIP Call's trading program.¹²⁸ However, while the lawfulness of the entire rule may not have been challenged, the regional cost-effective approach to emission reduction, the issue at hand, certainly was, as the court itself stated.¹²⁹

In distinguishing their decisions in *Michigan* and the instant case, the court seems to give some weight to their conclusion that CAIR was designed to be a complete remedy to section 110(a)(2)(D)(i)(I).¹³⁰ On the page in the federal regulations cited by the Court is an introduction to the emission reduction requirements of the CAIR FIP.¹³¹ The language seems fairly general, not distinct in any substantial way from the NOx SIP Call language, and never uses the phrase "complete remedy." While it is certain that it could be argued that the EPA considered CAIR a "complete remedy" to SO₂ and NOx emissions, it seems a similar argument could be made for both the Acid Rain Program and the NOx SIP Call, as any clear distinction in language from the EPA is unclear in the rules.

¹²⁵ *N.C.*, 531 F.3d at 916-20.

¹²⁶ *Id.* at 908.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Mich. v. E.P.A.*, 213 F.3d 663, 679 (D.C. Cir. 2000).

¹³⁰ *N.C.*, 531 F.3d at 908 (citing Revisions to the Acid Rain Program, 71 Fed. Reg. 25,340).

¹³¹ Revisions to the Acid Rain Program, 71 Fed. Reg. 25,340).

The court gave two reasons why their decision in *North Carolina* and *Michigan* were not at odds with each other. First, the issue of lawful adoption of the rule was never addressed, and second, CAIR is different in that it was designed to be a complete remedy to section 110(a)(2)(D)(i)(I). It could possibly be argued that these reasons are fairly weak justifications for the overturning of a fundamental part of a rule which had previously withstood the Courts scrutiny, and that while the court attempts to show a harmony in its decision here and in *Michigan*, they are in effect overruling their previous holding on the issue.¹³² As shown in the legal background section of this case note, there were *substantial* challenges made in *Michigan* against the highly cost effective approach towards regulation used in the NOx SIP Call. The approach used in CAIR is virtually the same, because as previously noted, CAIR was designed almost completely around the already existing NOx SIP Call. The court in *North Carolina* took the viewpoint of the dissent in *Michigan*, and effectively overturned that ruling. Despite the Courts best efforts there seems to be no way to harmonize the two decisions.

One pair of writers believes that section 110(a)(2)(A) specifically calls for the use of cost control measures.¹³³ The section calls for SIPs to include control measures that include economic incentives, marketable permits, and auctions of allowances. They believe if the EPA would have based its program on this section as opposed to section 110(a)(2)(D)(i).¹³⁴ While this is an interesting thought, it would not have altered CAIR's fundamental lack of state specific regulation, and if the Court felt strongly enough about the issue to overturn *Michigan* this likely would not have changed its mind.

A. Effects of the Decision

¹³² One different judge on the panel might have affected decision, or a judge could have had a change of heart.

¹³³ Peter H. Wyckoff & Michael R. Barr, *District of Columbia Circuit Strikes Down U.S. EPA's CAIR Cap-and-Trade Program*, ENV'T, LAND USE & NAT. RESOURCES (Pillsbury Winthrop Shaw Pittman LLP, New York, N.Y.) July 17, 2008, available at <http://www.pillsburylaw.com> (search for "CAIR Cap-and-Trade Program"; then follow "Client Alert—District of Columbia Circuit Strikes Down U.S. EPA's CAIR Cap-and-Trade Program" hyperlink; then click "View PDF" button).

¹³⁴ *Id.* at 3.

Fallout from the Court's decision could be substantial. One top EPA official stated at a Senate hearing that "it's kind of like dropping a bomb in the middle of the air program."¹³⁵ The Court's decision was unexpected by all parties and left many "stunned."¹³⁶ Some members of Congress have called the decision a "setback," and are worried it will affect other similar programs.¹³⁷ Ironically many of the same parties that challenged CAIR are now pushing for its reinstatement, because they never expected it to be vacated.¹³⁸ A representative from Duke Energy told CBS News that they never intended for CAIR to be overturned, and that the Court had thrown out the baby with the bathwater."¹³⁹ An official from one environmental group said "there is panic of enormous proportion."¹⁴⁰

One of the first consequences of the decision was a significant reduction in the value of emissions credits that power companies had already purchased in order to comply with the CAIR rule.¹⁴¹ This could potentially result in significant losses for many companies.¹⁴² One report said that SO₂ credits dropped from \$300 to as low as \$102.¹⁴³ Not only that, but many companies purchased allowances in preparation for CAIR

¹³⁵ *Key Democrats Resist GOP Plan for Narrow Bill to Fix CAIR Vacatur*, CLEAN AIR REPORT, Aug. 7, 2008.

¹³⁶ Victor Fiatt, *Taking Environmental Laws Seriously: North Carolina v. EPA*, UNIVERSITY OF HOUSTON LAW CENTER FACULTY BLOG, Aug. 6, 2008, <http://www.uhlawblog.com/2008/08/articles/issues-of-the-day/taking-environmental-laws-seriously-north-carolina-v-epa>.

¹³⁷ *Potential Legislative Fix on the Horizon for Clean Air Interstate Rule Vacated by Appeals Court*, INFORMATION ALERT, (National Conference of State Legislatures), Sep. 3, 2008, available at <http://www.ncsl.org/print/standcomm/scenvir/CAIRInfoAlert.pdf>.

¹³⁸ *Senators Say CAIR Fix Unlikely Until Next Year*, ENERGY TRADER, July 30, 2008.

¹³⁹ *Bush's Clean Air Plan Shutdown*, CBS NEWS, July 12, 2008, <http://www.cbsnews.com/stories/2008/07/12/health/main4255752.shtml>.

¹⁴⁰ Cathy Cash & Christine Cordner, *Senators Ask Utilities to Operate Emission Controls Despite Absence of CAIR Program*, ELECTRIC UTILITY WEEK, Aug. 18, 2008.

¹⁴¹ *CAIR Ruling Forces Industry Financial Losses Over Emissions Credits*, CLEAN AIR REPORT, July 24, 2008.

¹⁴² *Id.*

¹⁴³ *Id.*

and with the decision to vacate it those allowances are no longer needed.¹⁴⁴

The Court's decision has also created serious problems for companies who must now comply with NOx SIP Call regulations in 2009.¹⁴⁵ The loss of CAIR's benefits will hurt electric generating units' ability to compete, and these costs will likely be passed on to the consumer.¹⁴⁶ One industry official told the Senate subcommittee that the loss of CAIR created a huge regulatory hole.¹⁴⁷ The Court stated that the companies could go back to using the NOx SIP Call allowances and trading program, but they didn't seem to realize that these allowances will not exist, as the NOx SIP Call was to end with CAIR.¹⁴⁸ Another problem is that states have already implemented their own legislation based on the assumption that CAIR would be in place, and repealed their own NOx seasonal trading programs.¹⁴⁹

B. The Future of CAIR

There are three likely ways a new CAIR can be implemented, and it seems likely that one or more will occur by at least the end of 2009; Congress may pass new legislation which would legalize the cost effectiveness approach to the cap-and-trade system taken by CAIR, the E.P.A. may sufficiently revise CAIR, or the EPA might appeal the decision to the Supreme Court, and then settle with the parties involved, to effectively nullify the D.C. Circuit's decision.

The first possible resolution, which involved new Congressional legislation began to be pushed almost as soon as the decision came down. The Senate Environment and Public Works Committee's Clean Air and Nuclear Safety Subcommittee held a hearing on July 29 to review the

¹⁴⁴ *Id.*

¹⁴⁵ *Senators Say CAIR Fix Unlikely Until Next Year*, ENERGY TRADER, July 30, 2008.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Amena Saiyid, CAIR's Demise Raises Seasonal NOx Dilemma*, COAL TRADER, Aug. 5, 2008.

¹⁴⁹ *Id.*

decision's implications.¹⁵⁰ Lawmakers on the subcommittee seemed to prefer a legislative fix to the problem in order to avoid any more challenges from the court.¹⁵¹ Despite the consensus of a need to move forward, political posturing made it immediately apparent that there would likely be no new legislation until 2009 after a new administration was in place.¹⁵² Democratic Senator Tom Carper the chairman of the Senate Clean Air and Nuclear Safety Subcommittee has authored a bill called the Clean Air Planning Act which would create a national emissions trading market for NOx and SO2, but does not believe he has the votes to pass it.¹⁵³

Besides a new act, some groups are pushing for the codification of the first phase of CAIR, to provide a two year interim resolution until more legislation could be passed.¹⁵⁴ There are reservations from various industry and environmental groups to this move as well, and it is also unlikely to occur.¹⁵⁵ Democrats were in favor of such a move, while Republicans also wanted to codify phase II of the act, which many believed did not provide enough regulation.¹⁵⁶ Republicans blamed Democrats for the failure of the Clean Skies legislation of 2003, which they believed led to the vacature of CAIR.¹⁵⁷ Ultimately the White House's refusal to sign legislation that did not also codify phase II, along with Democratic insistence that only phase I be codified, led to a stalemate

¹⁵⁰ *Potential Legislative Fix on the Horizon for Clean Air Interstate Rule Vacated by Appeals Court*, INFORMATION ALERT, (National Conference of State Legislatures), Sep. 3, 2008, available at <http://www.ncsl.org/print/standcomm/scenvir/CAIRInfoAlert.pdf>.

¹⁵¹ *Id.*

¹⁵² *Senators Say CAIR Fix Unlikely Until Next Year*, ENERGY TRADER, July 30, 2008.

¹⁵³ *Id.*

¹⁵⁴ *Key Democrats Resist GOP Plan for Narrow Bill to Fix CAIR Vacatur*, CLEAN AIR REPORT, Aug. 7, 2008.

¹⁵⁵ *Id.*

¹⁵⁶ *Hill Effort to Pass CAIR Fix Collapses Amid Continued Disagreements*, INSIDE THE EPA, Sep. 19, 2008.

¹⁵⁷ *Key Democrats Resist GOP Plan for Narrow Bill to Fix CAIR Vacatur*, CLEAN AIR REPORT, Aug. 7, 2008; The Clear Skies Act of 2003 sought to do much the same things that CAIR did, but was never able to make it out of committee due to Democratic opposition. See generally Energy Information Administration, Analysis of Clear Skies, Clean Air Planning and Clean Air Power Acts of 2003, <http://www.eia.doe.gov/oiaf/service/rpt/csa> (providing a complete analysis).

that will likely not be resolved until the Obama administration takes office.¹⁵⁸

The second option for saving CAIR follows a rehearing of the ruling by the D.C. Court. The EPA filed a petition for rehearing with the Court on September 24, 2008.¹⁵⁹ Environmental groups and Industry members also filed petitions for a rehearing.¹⁶⁰ Some say a rehearing is unlikely because the decision was unanimous.¹⁶¹ All three groups of petitioners said the Court's finding is inconsistent with its 2000 *Michigan* ruling.¹⁶² Despite the many substantive issues raised by the petitioners, if only two additional judges are able to rule on the rehearing, one of the previous three judges would have to change his mind in order to get a reversal.¹⁶³

Following the reaction to its ruling, and in response to the petition by the EPA, the D.C. court granted a rehearing. The court asked the parties if they were in fact seeking a vacatur of CAIR, and whether the court should stay its mandate until the EPA is able to promulgate a new rule.¹⁶⁴ The court decided to remand the case without vacatur in order to allow the EPA time to formulate an appropriate rule.¹⁶⁵ The court acknowledged that its previous ruling would have created greater environmental problems by removing CAIR without having a rule to replace it with.¹⁶⁶ The court did not place a deadline on when the new rule

¹⁵⁸ Cathy Cash, *White House Backs Call for Enacting Partial CAIR Law, to Give Some Certainty to Air Rules*, ELECTRIC UTILITY WEEKLY, Sep. 22, 2008.

¹⁵⁹ Petition for Rehearing or Rehearing En Banc, *N.C. v. E.P.A.*, 531 F.3d 896 (2008) (No. 05-1244 and consolidated cases), available at http://www.epa.gov/airmarkets/progsregs/cair/docs/CAIR_Rehearing_Petition_as_Filed.pdf.

¹⁶⁰ *Requests for CAIR Rehearing Face an Uphill Battle Despite 'Flawed' Ruling*, INSIDE THE EPA, Oct. 3, 2008.

¹⁶¹ Amena Saiyid, *US EPA Trying to Save Seasonal NOx Trading Program Post-CAIR*, PLATTS COAL OUTLOOK, Aug. 11, 2008.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *North Carolina v. E.P.A.* 550 F.3d 1176, 1177 (2008).

¹⁶⁵ *Id.* at 1178.

¹⁶⁶ *Id.*

had to be in place, but stated it was not an indefinite stay on the court's decision.¹⁶⁷

A third option which does not seem to have gained much traction is for the EPA to appeal the case to the Supreme Court of the United States, and then settle with petitioners, effectively nullifying the judgment. Some believe this to be "reasonably likely," but it does not seem to be the direction the EPA, petitioners or Congress is going.¹⁶⁸

VI. CONCLUSION

The Court in *North Carolina* decided that the Clean Air Interstate rule was fatally flawed in five different ways and decided it was necessary to vacate the entire rule. In doing so they claimed to be making a decision that could be harmonized with their previous ruling in *Michigan*. In fact they were overturning *Michigan*, much to the dismay of every party involved. Instead of bringing remedy to any of the myriad of issues brought by petitioners against the EPA, the court created a large amount of confusion, disarray, and many additional problems. It seems very likely that some form of CAIR will return in 2009, with the most probable being a new act passed by the recently increased Democratic majority Congress and White House. Some version of Tom Carper's Clean Air Planning Act will likely be what ultimately resolves this issue, and nullifies the decision of the D.C. Circuit.

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¹⁶⁷ *Id.*

¹⁶⁸ Peter Spinney, *CAIR's Rejection Ups the Stakes for NOx Reduction*, THE OPTIMIZATION BLOG, July 28, 2008, <http://www.theoptimizationblog.com/blog/default.cfm?blogid=58>.

