

U.S. Court of Appeals for D.C. Circuit Vacates Regulatory Program Adopted Under Clean Air Act

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On July 11, the U.S. Court of Appeals for the District of Columbia Circuit vacated a regulatory program adopted under the Clean Air Act that had been the basis for significant investments in air pollution control technology and emission allowances, thereby casting doubt on the value of those investments. The circuit court, in *North Carolina v. Environmental Protection Agency*, considered challenges brought by several states and electric utility companies to provisions of the Clean Air Interstate Rule (CAIR).

The U.S. Environmental Protection Agency (USEPA) had adopted CAIR in 2005 pursuant to the Clean Air Act. The purpose of CAIR was to reduce or eliminate the impact of upwind sources on downwind states' nonattainment of ambient air quality standards for fine particulate matter (PM 2.5) and eight-hour ozone concentrations. Concentrations of PM 2.5 are associated with respiratory and cardiovascular problems; excessive eight-hour ozone concentrations cause smog. Under the Clean Air Act, the states are required to demonstrate their compliance with air quality standards established by USEPA for certain air contaminants. CAIR was a reflection of USEPA's recognition that the ability of some states to achieve or maintain attainment with certain air quality standards was adversely impacted by emissions from sources in upwind states. In seeking to address this issue, USEPA, through CAIR, identified 28 states and the District of Columbia as contributors to the nonattainment of air quality standards for PM 2.5 or eight-hour ozone concentrations in downwind states. CAIR then used an emissions allowance cap and trade program for sulfur dioxide (SO₂) and nitrogen oxides (NO_x) that the 28 states and District of Columbia could adopt to address this issue. SO₂ and NO_x emissions are components of PM 2.5, and NO_x is a precursor to ozone.

Under the CAIR cap-and-trade programs, fossil fuel-fired electric generators operating within a CAIR state would need to acquire allowances for emissions of NO_x and SO₂, with each allowance authorizing the emission of one ton of the air contaminant. With respect to SO₂, CAIR reduced the number of allowances available under the existing SO₂ allowance-trading program adopted under the Clean Air Act for the control of acid rain. With respect to NO_x, CAIR created allowance-trading programs for NO_x emissions during the ozone season to address the eight-hour ozone standard, and during the nonozone season to address PM 2.5. The use of these allowances and corresponding reduction in emissions were to begin in 2009 and 2010 for NO_x and SO₂, respectively, with a further reduction in allowable emissions for both air contaminants by 2015. Given the pending regulatory requirements, significant investments were made by the electric generation industry and others in emissions allowances to comply with CAIR and pollution control technology to meet CAIR's more stringent emissions limitations and allow for the sale of excess SO₂ and NO_x allowances.

