



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

SEP 29 2005

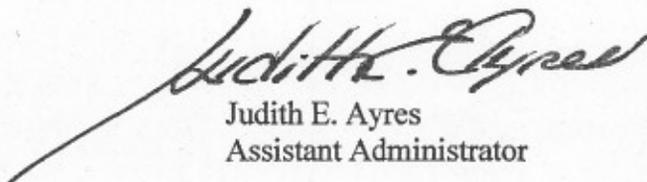
OFFICE OF
INTERNATIONAL AFFAIRS

Mr. William V. Kennedy
Executive Director of the Secretariat
Commission for Environmental Cooperation
393 rue St-Jacques Ouest, Bureau 200
Montreal (Quebec)
Canada H2Y 1N9

Dear Mr. Kennedy:

Please find enclosed a supplemental response from the Government of the United States of America regarding the Submission on Enforcement Matters 04-005. The supplemental response is provided to update the Secretariat on the status of pending judicial and administrative proceedings relevant to the subject matter of the submission.

Sincerely,



Judith E. Ayres
Assistant Administrator

Enclosure

In addition to the above pending judicial proceedings, EPA has received petitions for administrative reconsideration of each of the three rules pursuant to section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). EPA received two petitions for reconsideration of the Section 112 rule, filed by States and environmental groups, and four petitions for reconsideration of CAMR, filed by States, industry, and environmental groups. EPA has also received eleven petitions for administrative reconsideration of CAIR, filed by States and industry groups. EPA is in the process of reviewing and evaluating the pending petitions for administrative reconsideration. The petitions for reconsideration of the Section 112 Rule alone consist of over 200 pages of double-spaced text and more than 40 separate attachments. The petitions on CAIR and CAMR, taken together, are similarly voluminous.

To date, EPA has responded to those States and other groups that filed petitions for reconsideration of CAMR and the Section 112 Rule. Specifically, by letters dated June 24 and August 19, 2005, EPA notified the petitioners that it would be initiating an administrative reconsideration process pursuant to section 307(d)(7)(B) of the Clean Air Act. See June 24 and August 19, 2005 letters attached at Tabs A-B. EPA explained in the letters that the particular issues the Agency plans to reconsider will be announced in forthcoming notices in the *Federal Register*. In the letters, EPA declined to stay the CAMR and Section 112 rules pending completion of the administrative reconsideration process, as certain groups had requested. After receiving EPA's June 24, 2005 letter, several of the environmental groups that petitioned for administrative reconsideration of the Section 112 Rule filed an emergency motion in the United States Court of Appeals for the District of Columbia Circuit, seeking to stay the effectiveness of the rule pending completion of the litigation. That motion was denied on August 4, 2005. See *State of New Jersey v. EPA*, Case No. 05-1097 (Order filed Aug. 4, 2005) (attached at Tab C).²

EPA has moved to consolidate the litigation concerning CAMR and the Section 112 Rule and to hold all proceedings in that consolidated case in abeyance pending completion of the administrative reconsideration process. EPA's motion is fully briefed and pending before the Court. EPA indicated in its motion that it anticipates completing the administrative reconsideration process on CAMR and the Section 112 Rule by May 31, 2006. The Clean Air

² EPA is still in the process of reviewing the petitions for reconsideration on CAIR. To date, EPA has initiated reconsideration on only one issue identified in the petitions. See Letter to Stephen Fotis dated August 1, 2005 & Letter to Robert Golledge dated August 1, 2005 (attached at Tabs D-E); 70 Fed. Reg. 49708, 49738 (Aug. 24, 2005). The Agency is, however, continuing to review the other issues raised in the CAIR petitions for reconsideration, and has indicated in a recent court filing that it intends to grant reconsideration on at least one additional issue. In another letter dated August 1, 2005, EPA declined to stay implementation of CAIR in the State of Florida. See Letter to Robert Manning dated August 1, 2005 (attached at Tab F). Certain industry groups recently filed motions asking the Court to stay the effectiveness of the rule during the pendency of the litigation. The parties have proposed a briefing schedule for these motions under which the industry groups' supplemental briefs would be due by November 1, 2005, and EPA's opposition would be due 21 days later.

**SUPPLEMENTAL RESPONSE OF THE UNITED STATES OF AMERICA
TO SUBMISSION ON ENFORCEMENT MATTERS 04-005
(COAL-FIRED POWER PLANTS)**

**MADE UNDER ARTICLE 14 OF
THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION**

SEPTEMBER 29, 2005

The United States hereby supplements its response to the Submission on Enforcement Matters 04-005 (Coal-fired Power Plants), dated April 25, 2005 (U.S. Response, or the Response), in order to inform the Secretariat of recent developments pertinent to the existence of pending judicial or administrative proceedings and private remedies. See NAAEC Art. 14.3(a), (b)(ii); U.S. Response at 65-72.

As explained in the U.S. Response, the United States Environmental Protection Agency (EPA) issued three final rules under the Clean Air Act in March 2005, each of which affects domestic coal-fired power plants and the Submitters' core concerns related to mercury air emissions from such plants. Those rules include: the Clean Air Mercury Rule (CAMR), the Clean Air Interstate Rule (CAIR), and the Section 112 Rule.¹ (For descriptions of these three rules, see U.S. Response at 17-18.)

In its Response, the U.S. indicated that the Section 112 rule was the subject of pending litigation, and that the U.S. anticipated either judicial challenges to, or requests for administrative reconsideration of, the CAIR and CAMR rules. See, e.g., *id.* at 20-21, 65-67. For those reasons, the U.S. urged that the Submission should be dismissed pursuant to NAAEC Article 14.3(a), which directs the Secretariat to proceed no further on matters that are "the subject of pending judicial or administrative proceedings." *Id.* at 65-72.

The purpose of this supplemental response is to inform the Secretariat that, as anticipated in the U.S. Response, various groups, including several States, have now filed petitions for judicial review of CAMR and CAIR. See State of New Jersey v. EPA, Case No. 05-1162 (and consolidated cases) (D.C. Cir. filed May 18, 2005) (challenges to CAMR); State of North Carolina v. EPA, Case No. 05-1244 (and consolidated cases) (D.C. Cir. filed July 8, 2005) (challenges to CAIR). These judicial challenges are in addition to the challenges filed in late March 2005 and thereafter concerning the final Section 112 Rule. See State of New Jersey v. EPA, Case No. 05-1097 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2005) (challenges to Section 112 Rule). All of the judicial challenges are currently pending in the United States Court of Appeals for the District of Columbia Circuit. Submitters Sierra Club and Waterkeeper Alliance are Petitioners in both the CAMR and Section 112 Rule litigation.

¹ See 70 Fed. Reg. 28,606 (May 18, 2005) (CAMR); 70 Fed. Reg. 25,162 (May 12, 2005) (CAIR), and 70 Fed. Reg. 15,994 (Mar. 29, 2005) (the Section 112 Rule).

Act requires EPA to complete several steps before it reaches a final decision on reconsideration, including: (1) identifying the specific issues on which the Agency is granting reconsideration; (2) providing a reasonable period for public comment, see 42 U.S.C. § 7607(d)(7)(B) and (h); (3) holding a public hearing, if requested, see 42 U.S.C. § 7607(d)(5); (4) analyzing the comments received and considering any new scientific or technical data; (5) preparing responses to significant comments; and (6) drafting and issuing a final decision on reconsideration for publication in the *Federal Register*.

The United States submits that the above-described judicial and administrative proceedings further underscore the arguments presented in the U.S. Response, that the Coal-fired Power Plants' Submission should be dismissed due to the presence of ongoing judicial and administrative proceedings and the availability of private remedies. See U.S. Response at 65-72. Accordingly, pursuant to NAAEC Art. 14.3, the Secretariat's review of this matter should proceed no further.