

News: Legal Updates

[Back to News](#)

12/23/2008

[E-mail This Item](#)

Reversal of Fortune: DC Circuit Vacates CAIR Vacatur

MORE INFORMATION

David L. Rieser
312.849.8249
drieser@mcguirewoods.com

Patricia F. Sharkey
312.750.8601
psharkey@mcguirewoods.com

Gordon R. Alphonso
404.443.5716
galphonso@mcguirewoods.com

Neal J. Cabral
202.857.1727
ncabral@mcguirewoods.com

In a not completely shocking decision, the D.C. Circuit Court of Appeals today granted the EPA's request to modify its remand of the CAIR rules so that it no longer vacates the existing rules. *North Carolina v. EPA* (05-1244 December 23, 2008, slip op.). In the original decision, *North Carolina v. EPA*, 531 F. 3d 896 (D.C. Cir. 2008), the Court deemed the CAIR regulations so fatally flawed, that it determined not only to send the rules back to the EPA for a complete rewrite, but to vacate the rules in their entirety. This decision opened an abyss of uncertainty and confusion. CAIR had been in place since 2005 and many states had adopted NOx and SO2 cap and trade programs to comply with CAIR requirements. Individual generating companies organized their long term planning both around the existence of the cap and trade programs and the financial landscape created by these new markets. The Court's vacatur invalidated most of these regulations and all but crashed the market in NOx and SO2 credits. The decision also frustrated long term planning for electric power, already stressed by the tottering financial markets and now left with no real basis for evaluating future control strategies.

None of the parties had asked the Court to completely vacate the rules and all them individually moved to ask the Court to reconsider its decision. Industry, environmentalists and states had separate issues with portions of the regulations but the overall regulations represented a difficult compromise among those interests and the prospect of having no regulations at all was far worse than the issues raised in each of the appeals.

As a result of the motions to reconsider, the Court today agreed to excise the vacatur from its remand. It noted that vacating the rules would not serve the larger environmental interest and that the EPA's eventual revisior would better serve environmental values presented in the Clean Air Act. The Court refused to set a deadline for the EPA to issue revised rules but noted the parties could file a mandamus action if the EPA took too long.

At this point it's not clear what will be involved in re-establishing the CAIR rules five months after they were vacated. While the state regulatory structure generally remains in place, many of the deadlines were premised on the dates when the rules were issued. Similarly, re-establishing a market in emissions credits may be dependant on when these issues are sorted out. The court's decision will obviate the need for legislation aimed at reinstating CAIR, but will switch to the EPA the push to tighten Phase Two 2015 CAIR limits. In the end, it will be one more thorny Clean Air Act rulemaking for the new administration.

If you would like to receive our legal news updates by e-mail, please use our online sign-up form.

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.