

## **CAMR is on Spring Break (Permanently)**

By R. Bruce Barze, Jr. and Alexia B. Borden

On February 8, 2008, the D.C. Circuit Court of Appeals vacated the Clean Air Mercury Rule (CAMR). *See New Jersey v. EPA*, No. 05-1097. The text of the opinion can be found at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200802/05-1097a.pdf>. The Environmental Protection Agency (EPA) finalized CAMR on May 18, 2005, which established “standards of performance” that limit mercury emissions from new and existing utilities and makes the United States the first country in the world to regulate mercury emissions from coal-fired power plants. 70 Fed. Reg. 28606 (May 18, 2005). The first phase of CAMR was supposed to begin in 2010 and emissions were to be reduced by taking advantage of “co-benefit” reductions—that is, mercury reductions achieved by reducing SO<sub>2</sub> and NO<sub>x</sub> emissions under the Clean Air Interstate Rule. *Id.* In other words, although the program established a trading scheme, EPA set the Phase I CAMR limits specifically to reflect the installation of SCR and scrubbers on hundreds of units. *See id.* at 28619. When fully implemented, these rules would have reduced utility emissions of mercury from 48 tons a year to 15 tons, a reduction of nearly 70 percent. *Id.*

Despite EPA’s best efforts, the D.C. Circuit held two actions by EPA unlawful. First, the Court held that EPA’s delisting of coal- and oil-fired electric generating units (EGU) from the list of sources whose emissions are regulated under section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412, was unlawful. *See* 70 Fed. Reg. 15,994 (Mar. 29, 2005) (“Delisting Rule”). Second, the Court found that CAMR, which was developed pursuant to section 111, 42 U.S.C. § 7411, for coal-fired EGUs was also unlawful. The Court did not weigh in on the legitimacy of the cap-and-trade program, but rather focused on EPA’s lack of abidance by the procedural aspects of section 112 to delist EGUs from that section of the CAA.

New Jersey, fourteen additional States and various environmental organizations contended, and the Court agreed, that the Delisting Rule was contrary to the plain text and structure of section 112. Section 112 requires EPA to regulate emissions of hazardous air pollutants (HAPs) and more specifically, section 112(n) requires EPA to regulate EGUs under section 112 when it concludes that doing so is “appropriate and necessary.” In December 2000, EPA concluded it was “appropriate and necessary” to regulate mercury emissions from coal- and oil-fired power plants under section 112 and listed these EGUs as sources of HAPs regulated under that section. However, in 2005, EPA reconsidered its previous determination and removed these EGUs from the section 112 list. Thereafter it promulgated CAMR under section 111. The Court held that EPA’s removal of these EGUs from section 112 list violates the CAA because section 112(c)(9) requires EPA to make specific findings before removing a source listed under section 112 and EPA conceded it never made such findings. Therefore, because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, effectively invalidating CAMR’s regulatory approach. EPA must now proceed to regulate the HAPs from EGUs under the maximum available control technology (MACT) standards of section 112(d).

Despite the Court’s vacation on February 8, CAMR and EPA’s Delisting Rule remained in effect until the Court issued its mandate. Generally, the mandate is generally not issued until seven (7) calendar days after the time to file a rehearing expires; however, in this case the Court issued its mandate earlier than normal. On February 25, 2008, the Environmental and Tribal Petitioners and Environmental Healthcare intervenors filed a motion for an expedited issuance of the mandate. The D.C. Circuit Rules, specifically Circuit Rule 41, expressly provide the D.C. Circuit to issue a mandate whenever it so chooses and they allow a party to move for an

expedited issuance of the mandate if good cause is shown. On March 6, EPA filed an opposition to the motion for an expedited hearing. The D.C. Circuit agreed with the Environmental and Tribal Petitioners and Environmental Healthcare intervenors and on March 14, 2008, the court granted the motion for the expedited issuance of the mandate, which was issued later that day.

Those seeking to challenge the Court's decisions have two possible avenues: (1) seek a rehearing from the D.C. Circuit or (2) file a petition for writ of certiorari with the U.S. Supreme Court. A petition for rehearing must be filed within 45 days of the date of the order. A petition for writ of certiorari to the U.S. Supreme Court on the other hand must be filed within 90 days of the issuance of the decision. Note that if a petition for rehearing is timely filed, then the 90-day period for seeking a writ of certiorari begins to run from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment. Since the D.C. Circuit granted the motion for the expedited issuance of the mandate, the likelihood of the D.C. Circuit granting a motion for rehearing is slim.

The practical implications of the vacation of this rule are tremendous. The following are some examples of potential problems with this decision. First, there is a question as to the validity of the state implementation plans for the states that have adopted CAMR? Second, should companies continue with projects to comply with the mercury limits of CAMR knowing that the likelihood of these projects will not be sufficient to address the other HAPs that will be potentially regulated now under section 112? Third, what are companies and agencies going to do in the interim while waiting on an appeal and mandate? For example, CAMR requires mercury monitors to be installed by January 1, 2009. The likelihood of an appeal is great; therefore, it is possible that the decision of the D.C. Circuit could be overturned or that the

issuance of the vacatur would not occur for some time. Therefore, companies are faced with a decision as to whether to proceed with the installation of mercury monitors.

Congress is already starting to act due to the D.C. Circuit's vacation of CAMR. On February 14, Senator Thomas Carper (D-Del.) introduced the "Mercury Emissions Control Act" (MECA), specifically in response to the D.C. Circuit's vacation, to require coal-fired power plants to reduce mercury emissions by 90 percent. The legislation also requires EPA to propose a regulation to implement these reductions by October 1, 2008.

As evidenced above, the uncertainty surrounding this decision is great and it will be interesting to see how this all plays out.