The Clean Air Interstate Rule

The Misapplication and Inequities of the Current Rule to Florida
And the Need for Full and Fair Reconsideration

Background

On March 10, 2005, the Environmental Protection Agency (EPA) issued its Clean Air Interstate Rule (CAIR). The rule is intended to bring designated non-attainment areas – typically counties – of the eastern United States that do not meet National Ambient Air Quality Standards (NAAQS) into compliance for fine particulates (PM2.5) and ozone – through the reduction of nitrogen oxide (NOx) and sulfur dioxide (SO_2). Specifically, CAIR imposes emissions reductions on states which EPA computer modeling shows are making a "significant contribution" to non-attainment in at least one downwind area for PM2.5 – 0.2 micrograms per cubic meter – and/or ozone – greater than one percent – regardless of whether the upwind state itself meets NAAQS for particulates and ozone. To meet the rule's emissions requirements, generating facilities in the upwind states must either reduce emissions or purchase allowances equal to their required reduction.

The allocation of allowances to each affected state is determined by the EPA within CAIR. To determine state NOx budgets, and thus to allocate the allowances available within the program, CAIR employs a fuel adjustment factor (FAF) – a system that gives weight to particular fuel sources (i.e., coal gets 1 allowance per unit, oil gets .6 allowance per unit, and gas gets .4 allowance per unit). States can then determine their allocation methodology within the confines of the EPA's allocation budget. Thus, allowance prices are determined by an open market trading system or an auction, and are quantified in units that represent tons of a specific pollutant.

The Misapplication of CAIR to Florida

EPA has determined that the entire state of Florida is within the scope of CAIR as a "significant contributor" of emissions of PM2.5 and ozone to downwind non-attainment areas, specifically in or around Atlanta, Georgia and certain other isolated areas in Georgia and Alabama. There are four specific problems with such a determination:

- Florida is only one of three states within the CAIR purview in attainment for *all* ambient air quality standards;
- EPA's own modeling shows that the entire state of Florida's negligible contribution (0.81%) to the downwind non-attainment areas in Georgia is below the threshold established by CAIR for inclusion in its ozone compliance program;
- Central and southern Florida's emissions of PM2.5 are below EPA's significance threshold for inclusion in the fine particulates compliance requirements of the rule and,
- EPA's modeling indicates that Fulton County, Georgia will come into ozone attainment in the near future without including Florida in CAIR, suggesting that there is little substantiation to indicate that Florida's emissions contribute significantly to air degradation in North Georgia.

Put simply, CAIR should not apply to Florida. At the very least, a significant part of the State should not be included in the rule. In fact, it can easily be argued that EPA capriciously and erroneously manipulated data to include Florida in CAIR. For example, the Preamble to CAIR states that an upwind state does not contribute significantly to ozone non-attainment in a downwind area if the upwind state's maximum contribution to the area is less than 1.0% of total non-attainment in the downwind area. EPA's own modeling shows that Florida's ozone contribution to the downwind areas at issue is 0.81%, which is indisputably "less than 1.0%." EPA, however, overrode this proper exclusion by employing a protocol that "rounded" Florida's 0.81% contribution to 1.0% to bring the State within the rule. Such rounding is inconsistent with EPA's past practice, in which the Agency has used the opposite approach (*i.e.,* truncation) for evaluating upwind state's PM2.5 contributions.

Moreover, the agency did not disclose the rounding protocol during the CAIR rulemaking process itself. In fact, the agency revealed this new protocol 8 months after it issued the final rule, in November 2005, in response to a comment submitted on the final rule.

The Gross Misapplication of CAIR to Central and Southern Florida

Even accepting EPA's flawed rounding protocol, "fine-grid" modeling data clearly demonstrate that a substantial portion of central and southern Florida (*i.e.,* below 28.67 degrees north latitude for ozone and 29.24 degrees north latitude for PM2.5) should have never been included in CAIR. To capture all of Florida, despite the obvious injustice in doing so, EPA refused to utilize or accept such precise modeling.

- *Fine Grid Modeling*: Data from commonly-utilized fine grid modeling clearly demonstrate that specific parts of central and southern Florida do not significantly contribute to downwind non-attainment. In spite of several comments during the CAIR rulemaking requesting this analysis, however, EPA refused to utilize such modeling and instead focused on Florida as a whole. Utilizing EPA's own data, such modeling was completed – and is part of EPA's record for reconsideration – verifying that emissions sources in central and southern Florida, taken together, contribute ozone emissions of 0.25%, substantially below the 1.0% threshold, and PM2.5 emissions of 0.09-0.15 micrograms per cubic meter, well below EPA's 0.2 micrograms per cubic meter significance threshold.
- *Counter to Court Precedent and Clean Air Act*: EPA's refusal to utilize fine grid modeling in its analysis of Florida is counter to the D.C. Circuit's landmark decision in *Michigan v. EPA* [213 F.3d (DC Cir. 2000)], which directed EPA to look at sub-regions of states where it has a reasonable basis to do so pursuant to the data on the record. Moreover, the "good neighbor" provision of the Clean Air Act, which contains the "significant contribution" requirement – and, is EPA's primary authority for CAIR – does not address applying that prohibition on a state-wide basis.

Economic Impact

Central and southern Florida rely almost exclusively on electric power generated from low-emitting feedstocks such as oil and natural gas, and non-emitting sources such as nuclear. This region has taken early and effective action to address air emissions, and the costs associated with these fuel and facility choices is already reflected in south and central Florida's electricity rates. In other words, these ratepayers have already paid – and continue to pay – their fair share to clean Florida's air. Application of CAIR to this region will unfairly result in customers paying hundreds of millions of dollars *more* for pollution control equipment and emissions allowances that are entirely unnecessary to address local, state or interstate transport emissions.

On the other hand, other regions have not made the same efforts to clean up their generation sources. As a result, these areas enjoy electric generation costs and rates that are commensurately lower. There is absolutely no logic available to rationalize the idea that Florida's ratepayers, who have already paid to clean up their own generation, should be forced to bear the burden of cleaning up other areas of the country, especially if there is absolutely no evidence of Florida's complicity.

The fuel adjustment factor also adversely affects Florida, particularly the central and southern part of the State. Obviously, by giving a greater value to coal and a lesser value to oil and natural gas, the CAIR rule arbitrarily punishes certain fuels. As a result, states such as Florida that have a higher proportion of non-coal electric generating units than other states will have fewer allowances allocated to them. Thus, in a perverse twist, the use of the fuel adjustment factor actually shifts allowances, that in a fuel-neutral scheme would be allocated to low emitting states like Florida, to *higher* emitting states.

The use of FAFs is premised upon the incorrect assumption that oil- and gas-fired electric generating facilities will receive a surplus of NOx allowances under CAIR, with or without an adjustment. In fact, the opposite is true. If CAIR is implemented in its current form, oil- and gas-fired facilities would be required to acquire millions of dollars in allowances even if FAFs were not used to allocate allowances. If allowances are allocated using FAFs, as CAIR mandates, even more allowances will have to be acquired or expensive controls will have to be installed for oil- and gas-fired facilities.

EPA defends the use of FAFs by arguing that coal-fired electric power plants need to be subsidized to offset the greater burden on them of complying with CAIR's emission reductions. As such, the FAFs effectively tax oil and gas units and transfer the proceeds to coal units to help them pay the higher costs of pollution control – a transfer of wealth from one state to another. This is an economic subsidy that coal-fired plants do not need or deserve, particularly since their fuel costs are much lower than for oil and gas plants. The ironic consequence of such a subsidy is that it actually inhibits coal-fired facilities from procuring cost-effective pollution controls, contrary to the stated purpose of CAIR and the Clean Air Act.

Challenge and Reconsideration

Florida Power & Light (FPL) and the Florida Association of Electric Utilities (FAEU) have challenged the Clean Air Interstate Rule at the EPA and in the United States Court of Appeals for the District of Columbia Circuit. The Florida parties are arguing that all or a significant part of Florida should be excluded from application of the rule and that the so-called fuel adjustment factors utilized in CAIR to set state emission reduction "budgets" for nitrogen oxide (NOx) are inequitable.

The Florida parties have petitioned EPA to reconsider: 1) whether CAIR should exclude all of Florida, or, in the alternative, the central and southern parts of the State; and 2) EPA's use of the fuel adjustment factor in determining allowance allocations. EPA has granted the reconsideration petition in part for FAFs and ozone compliance for the entire state, but has declined, to date, to reconsider splitting Florida for purposes of applying CAIR to PM2.5 or ozone. A decision on the reconsideration petition is expected by March 15, 2006, well prior to the conclusion of any court proceedings.

Conclusions

Based on the above factors, EPA should revise CAIR to:

- Exclude the entire state of Florida from CAIR for ozone compliance;
- Absent excluding the entire State, exclude from CAIR's ozone compliance the portion of Florida below 28.67 degrees north latitude;
- Exclude the portion of Florida below 29.24 degrees north latitude from CAIR compliance for PM2.5; and/or,
- Suspend the use of fuel adjustment factors for establishing state NOx budgets.

Inclusion of facilities in Florida in the CAIR regime will result in significant additional costs to Florida ratepayers, with no meaningful benefit in local, state or interstate air emissions, and, will, unfortunately and in fact, have a negligible benefit on the non-attainment areas of north Georgia. Consequently, EPA should use the current reconsideration process for the final rule to address the flawed rounding methodology utilized in the final rule, thus correctly removing the entire State from the ozone portion of the program. At the very least, EPA should employ a refined model that would clearly demonstrate that central and southern Florida are not contributing to the air emissions problems CAIR is designed to address. In either case, the EPA must be accountable for the capricious inclusion of Florida in CAIR.