

US EPA ARCHIVE DOCUMENT



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

MAR 15 2006

THE ADMINISTRATOR

Mr. John T. Butler  
Steel Hector & Davis, LLP  
200 South Biscayne Boulevard  
Suite 4000  
Miami, Florida 33131-2398

Dear Mr. Butler:

The Environmental Protection Agency has considered the requests in the July 2005 petition for reconsideration of the Clean Air Interstate Rule (CAIR) that you filed on behalf of FPL Group, Inc. (Petitioner). This petition asks EPA to reconsider specific aspects of the CAIR. As you are aware, EPA has already responded to parts of this petition. By letter dated November 21, 2005, we indicated our intent to grant reconsideration of at least one issue in your petition. Subsequently, on December 2, 2005, we published a Federal Register notice initiating a reconsideration process on four issues, including two raised by Petitioner. After careful consideration and for the reasons explained below, EPA denies the remaining request in your petition for reconsideration.

The CAIR, published in the Federal Register on May 12, 2005 (70 FR 25162), is a powerful component of the Bush Administration's plan to help over 450 counties in the eastern United States meet air quality standards for ozone and fine particles. EPA determined that reductions in upwind precursor emissions will assist downwind areas in meeting the national ambient air quality standards (NAAQS) for ozone and fine particles. EPA also determined that attainment will be achieved in a more equitable, cost-effective manner than if each nonattainment area attempted to achieve attainment with the ozone and fine particle NAAQS by implementing local emissions reductions alone. The CAIR was developed through a process that involved extensive public participation. We received and responded to thousands of comments and held public hearings in February and June 2005. The robust public dialogue was an important part of the rulemaking process.

EPA recognizes the continuing significant public interest in the CAIR. Following publication of the rule, EPA received twelve separate petitions for reconsideration, including the one you submitted. In response, EPA granted reconsideration on and reopened for public comment the following six issues:

- (1) the definition of "EGU" as it relates to solid waste incinerators (70 FR 49708, 49738);

- (2) claims that inequities result from the sulfur dioxide (SO<sub>2</sub>) allocation methodology to be used by States participating in the EPA-administered trading program (70 FR 72268, 72272);
- (3) EPA's use of fuel adjustment factors (1.0 for coal, 0.6 for oil, and 0.4 for gas) in establishing State nitrogen oxides (NO<sub>x</sub>) budgets (70 FR 72268, 72276);
- (4) certain inputs to the fine particle (PM<sub>2.5</sub>) modeling used to determine whether Minnesota should be included in the CAIR region for PM<sub>2.5</sub> (70 FR 72268, 72279);
- (5) EPA's determination that Florida should be included in the CAIR ozone region (70 FR 72268, 72280); and,
- (6) the impact of New York v. EPA on certain analyses prepared for the final CAIR (70 FR 77101).

EPA published Federal Register notices announcing the reconsideration processes and requesting public comment on the issues under reconsideration. EPA is taking final action on reconsideration of these issues in a separate rulemaking signed today. Two of the issues EPA decided to reconsider, relating to EPA's use of fuel adjustment factors in establishing NO<sub>x</sub> budgets and the inclusion of Florida in CAIR for ozone, were raised by Petitioner. These issues are addressed in the final action on reconsideration.

Your July 2005 petition raises one additional issue. Petitioner asks EPA to reconsider its decision to include the entire State of Florida in the CAIR region for PM<sub>2.5</sub>. Petitioner argues that the southern portion of Florida should be excluded from the CAIR. EPA has carefully considered the information submitted by Petitioner. However, Petitioner neither submitted information to EPA sufficient to show that reconsideration of this issue is warranted under section 307(d)(7)(B) of the Clean Air Act (CAA), nor submitted information sufficient to convince EPA that a change to its "whole-State modeling" approach for Florida is warranted. EPA thus denies Petitioner's request to reconsider this issue for the reasons explained below.

As grounds for reconsideration, Petitioner argues that it was impracticable for FPL, during the available comment periods, to submit comments and document its objection to EPA's determination that Florida should be included in the CAIR for PM<sub>2.5</sub>. This conclusion is based on the argument that there was insufficient time for FPL to secure data and perform detailed modeling during any of the available comment periods. Petitioner notes that it did comment on EPA's decision to determine significant contribution on a state-wide basis and EPA's failure to conduct "partial-State" modeling. Petitioner also notes that it requested that EPA perform the modeling that it deems necessary to show that southern Florida does not significantly contribute to downwind nonattainment.

EPA does not agree that Petitioner has met the standard for reconsideration because Petitioner has not shown it was impracticable for it to comment during the comment period on EPA's decision to determine significant contribution on a state-wide basis or on EPA's decision that the State of Florida would be included in the CAIR region for PM<sub>2.5</sub>. EPA proposed to include Florida in CAIR for PM<sub>2.5</sub> in its January 2004 initial CAIR proposal and again in the Agency's June 2004 supplemental proposal (69 FR 4566, 4570; Jan 30, 2004; 69 FR 32, 684, 32, 688-89; June 10, 2004). EPA also provided an additional opportunity to comment on the modeling platform to be used for the final CAIR through a notice of data availability published on August 6, 2004 (69 FR 47, 828).

As Petitioner notes, it did comment and ask EPA to conduct additional modeling to identify a portion of the State that, when considered independently, would not significantly contribute to downwind nonattainment. In response, EPA explained why it is reasonable to determine significant contribution on a State-wide basis. (Corrected Response to Significant Public Comments pp. 229-31). EPA thus declined to perform the additional modeling requested. EPA also disagrees with Petitioner's contention that it was impractical for it to comment on the modeling because it had not, by the end of the comment period, replicated EPA's modeling results. Without addressing whether Petitioner could have replicated EPA's modeling results during the requisite timeframes,<sup>1</sup> EPA disagrees with Petitioner's premise that it was not practical for them to submit comments on the issues in question without first replicating EPA's final CAIR modeling results. Petitioner did submit, several months after this petition was submitted, modeling to show where a line could be drawn to separate the northern portion of Florida from the southern portion of the State such that the northern part exceeds EPA's threshold and the southern part does not. The fundamental issue Petitioner asks EPA to reconsider, however, is EPA's decision to determine significant contribution for Florida on a State-wide basis. In sum, the issue of evaluating significant contribution for the PM<sub>2.5</sub> NAAQS on a State-wide basis was raised by EPA and commented on by Petitioner (albeit without any quantified demonstration that some areas in Florida do not contribute significantly). EPA responded to those comments. Petitioner thus had ample opportunity to comment on this issue. EPA, therefore, denies Petitioner's request to reconsider this issue since Petitioner has failed to show that reconsideration is warranted under section 307(d)(7)(B) of the CAA. Consequently,

---

<sup>1</sup> The modeling used for the CAIR proposals and the final CAIR is extremely complex and relies on data compiled from numerous sources. EPA provided notice and an opportunity to comment on its decision to use the model CMAQ4.3 for the final CAIR in a notice of data availability published on August 6, 2004 (69 FR 47, 828). EPA recognizes the difficulties inherent in duplicating complex modeling operations and is willing to work with stakeholders seeking additional information about its modeling platforms and inputs. EPA notes that Petitioner's first request for assistance in duplicating EPA's modeling results was received after the final CAIR was published.

EPA is not required to respond to Petitioner's substantive arguments. Nonetheless, EPA also discusses briefly the issue of concern to Petitioner below.

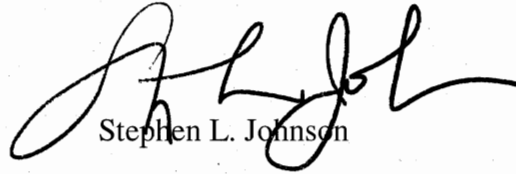
Petitioner has not presented evidence sufficient to convince EPA that its "whole-State modeling" approach for Florida was improper, arbitrary or capricious. The Agency has already presented its initial response to Petitioner's arguments on this issue in its response to a motion by FPL Group, Inc. and the Florida Association of Electric Utilities to stay CAIR. As explained in greater detail in those pleadings (which are part of the administrative record for this proceeding), EPA believes it properly determined that the entire State of Florida contributes significantly to downwind PM<sub>2.5</sub> nonattainment. Petitioner argues that EPA should have included only the northern part of the State in the CAIR region for PM<sub>2.5</sub>. This argument is based on modeling, submitted after the petition was filed, that purports to show that it is possible to divide Florida into two regions, one with emissions just above EPA's significance threshold and one with emissions just below. These arguments do not demonstrate to EPA that its decision to model the effects of the entire State's emissions was arbitrary or capricious.

Petitioner bases its argument on the court's decision in State of Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). In this case, the Court held that EPA could make determinations of significant contribution on a State-wide basis, and that to include a portion of a State, EPA must demonstrate that the portion in question makes a "measurable contribution" to downwind nonattainment, 213 F.3d at 683-84. Even the modeling submitted by Florida demonstrates that the portion of the State they seek to exclude makes a contribution to downwind nonattainment that is only marginally less than the contribution made by the portion they admit does make a significant contribution. Moreover, Petitioner presents no principled basis for dividing Florida in the manner they request. The only apparent rationale for the line they ask EPA to draw is that it is the place where one portion of the State meets the significance criteria and one purportedly does not. This entirely fails to satisfy the burden of demonstrating that EPA's modeling is "without rational relationship to the reality it purport[ed] to represent." Appalachian Power v. EPA, 249 F. 3d 1032, 1050 (D.C. Cir. 2001) (quoting Sierra Club v. EPA, 167 F. 3d 658, 662 (D.C. Cir. 1999)).

In both State of Michigan, 213 F.3d at 684, and Appalachian Power Co. v. EPA, 249 F.3d at 1050, this Court held that EPA can regulate the sources in an entire State on the basis of collective contribution. EPA has applied that principle to Florida, and the modeling presented by Petitioner confirms, rather than rebuts, EPA's determination that sources throughout Florida significantly contribute to downwind nonattainment. As explained above, Petitioner has neither demonstrated to EPA that reconsideration of its PM<sub>2.5</sub> modeling for Florida is warranted nor demonstrated that EPA's decision in the final CAIR was in error. For these reasons, EPA declines to reconsider this issue.

Thank you for your interest in the final CAIR. EPA looks forward to working with you as implementation of the rule proceeds. If you have any questions about this letter, please contact Sonja Rodman in the Office of General Counsel at 202-564-4079.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. L. Johnson', written in a cursive style.

Stephen L. Johnson