Clean Air Act Forum:
State, Local, and Federal Cooperation under the Clean Air Act
Responses to Participant Questions
Florida Department of Environmental Protection

1. In your agency's experience implementing the Clean Air Act (CAA), what is working well? What is not working well?

In Florida's experience, the CAA's permitting programs generally work well. Florida administers an EPA-approved "Title V" major source operating permitting program as well as various other pre-construction and minor source operating permitting programs approved under its State Implementation Plan. This provides Florida's industries with a clear regulatory framework and allows Florida to issue permits within its unique 90-day statutory timeline, which is substantially faster than federal permitting timeframes. It also makes use of the prompt and uniform adjudicatory procedures under Florida's Administrative Procedures Act. It is Florida's experience that EPA Region IV's review of Florida-issued permits is timely, thoughtful, and appropriately deferential to the State. This system provides for adequate regulatory certainty among industry and substantial protection of air resources. This is evidenced by Florida's 75 percent decrease in annual emissions of key industrial pollutants since 1992—even as industrial production and power generation have increased.

The CAA could use clarification, however, with respect to the pollutants intended to be regulated under the pre-construction, Prevention of Significant Deterioration (PSD) permitting program. The PSD program is intended to "prevent significant deterioration" of air quality in areas throughout the country that are attaining ambient air quality standards for pollutants. Originally, the CAA mandated regulation of only particulate matter and sulfur dioxide. EPA was later directed to review hydrocarbons, carbon monoxide, ozone, and nitrogen oxides, and over time, these pollutants became regulated under the PSD program. Today, the pollutants regulated under the PSD program go well beyond those for which EPA has established ambient air quality standards. Moreover, they include pollutants that are regulated under the CAA for entirely different reasons than to "prevent significant deterioration" of air quality standards. Many argue this was not the original intent of Congress.

While permitting under the CAA generally works well, federal oversight of state compliance and enforcement efforts does not work as well due to fundamental differences in the Florida and federal approaches to achieve the mutual goal of compliance. Florida dedicates substantial resources to upfront compliance assistance, and through education and training, Florida seeks to prevent environmental harm before it occurs. Florida's compliance assistance strategy does not detract from its federal compliance inspection obligations, as Florida has consistently exceeded those requirements.

Additionally, Florida allows for the use of pollution prevention projects and in-kind penalties to resolve enforcement actions rather than inflexibly imposing strict monetary penalties that have no direct benefit to the environment. Examples of pollution prevention projects are a facility's use of new technology to reduce source pollution, the minimization of created waste, and the implementation of on-site recycling processes. In Florida, an in-kind penalty must be 1.5 times the amount of the original penalty and can include educating the public on environmental issues, providing environmental restoration projects, and donating environmentally sensitive land to the state. These resolutions serve a greater purpose than a monetary penalty by providing added environmental benefits.

Florida's emphasis on devoting its resources to front-end compliance assistance and its use of pollution prevention projects and in-kind penalty resolution at the back-end does not coincide with the way EPA measures the success of a state's compliance and enforcement program. This tension between compliance and enforcement strategies was exacerbated by an EPA Office of Inspector General (OIG) report entitled "EPA Must Improve Oversight of State Enforcement," dated December 9, 2011. That report specifically judged state performance on the percent of inspections identifying noncompliance and the percent of enforcement actions that included a monetary penalty. It is Florida's opinion that a state that exceeds federal inspection requirements and finds compliance in excess of 98 percent (such as Florida) maximizes environmental protection, while a state that waits until noncompliance has occurred to pursue enforcement and collect penalties has unnecessarily placed its citizens and environment at risk.

2. Do state and local governments have sufficient autonomy and flexibility to address local conditions and needs?

As indicated above, Florida appreciates the authority to implement its federally-approved air permitting programs. This enables the regulated community to rely on the State to process permits with both speed and quality. On the other hand, Florida does not believe that states are given sufficient autonomy and flexibility to implement unique compliance and enforcement programs in a manner serving the best interests of the environment and its citizens. Presumably in an effort to achieve nationwide consistency, EPA has placed too much of a priority on the imposition of monetary penalties and has not given states enough credit for compliance assistance efforts. Since the above-referenced OIG Report was issued, EPA has questioned Florida's compliance and enforcement efforts.

3. Does the current system balance federal, state, and tribal roles to provide timely, accurate permitting for business activities, balancing environment protection and economic growth?

As previously noted, Florida is pleased with its authority to administer the various permitting programs required under the CAA. Florida has an excellent relationship with EPA Region IV permitting staff and is appreciative of the Region's permitting assistance. The regulated community in Florida consistently expresses a preference to obtain federally-required air permits from the State as opposed to the federal government.

4. Does the CAA support a reasonable and effective mechanism for federal, state, tribal and local cooperation through State Implementation Plans? How could the mechanism be improved?

In Florida's experience, the State Implementation Plan (SIP) is a reasonable and effective mechanism to facilitate federal and state cooperation in the regulation of air quality. Florida accepts that its SIP must be periodically revised to account for changes to federal ambient air quality standards. Florida is committed to investing the time and resources associated with SIP revisions, which can sometimes entail the promulgation of state rules under Florida's Administrative Procedures Act.

One way in which the SIP mechanism could be improved, however, would be to not automatically require a SIP revision to remedy nonattainment of an air quality standard where nonattainment can be

attributed to a single or small number of emission sources. In such a case, the state often is able to work with the source or sources to quickly institute a solution (e.g., by making operational changes or adding pollution control devices) without the need to engage in a resource-intensive SIP revision process. For example, in 2010, EPA designated a portion of Hillsborough County, Florida, as nonattainment for lead due to emissions from a secondary lead smelter. At the time of EPA's designation, the smelter was already in the process of being demolished and rebuilt. Florida had already addressed the problem in 2009 by issuing a state permit to construct a new state-of-the-art facility that will completely address the non-attainment. Nonetheless, the CAA required that Florida develop a SIP revision, which it submitted to EPA in June 2012.

In addition, the SIP mechanism works better when both EPA and states respect the timeframes for review as set forth in the CAA. Under the CAA, EPA has one year to 18 months from a state's submittal of a SIP revision to approve, conditionally approve, or disapprove the state's submittal. In the event EPA identifies a deficiency in the SIP revision and elects not to wholly approve the submittal, EPA may conditionally approve the SIP revision based on a commitment by the state to remedy the deficiency within one year. Or, alternatively, EPA can disapprove the SIP revision and give the state two years to re-submit before it imposes a Federal Implementation Plan (FIP).

In some cases, EPA has elected not to take any of these actions, which unnecessarily subjects itself to lawsuits brought by special interest groups for its failure to timely act. These suits are settled behind closed doors without input from affected states. Indeed, affected states generally are provided no notice of these negotiations until a settlement is reached. Problems arise when these settlements require EPA to impose a FIP in a timeframe that does not allow affected states to remedy alleged deficiencies in pending SIP submittals.[1] As such, many of these settlement agreements effectively undermine the role of federalism under the CAA and do not best serve the public.

5. Are cross-state air pollution issues coordinated well under the existing framework?

While Florida recognizes the important federal role in addressing national pollutant transport problems, EPA did not effectively coordinate the recent Cross-State Air Pollution Rule due to the haste to promulgate the rule under a court order. EPA relied on highly complex modeling to establish the rule but did not adequately inform states on how this modeling was performed. This lack of transparency is especially troubling because, to Florida's knowledge, EPA's modeling has never been duplicated by any state or private entity. Consequently, there is little confidence among states and regulated businesses in the results. Further adding to the confusion, the air modeling was completely revised between the proposed and final rules, with very different results. For example, Florida was included in the proposed rule for fine particles, but was not included in the final rule. This exclusion created an unexpected problem with the state's previously submitted regional haze SIP. In addition, the number of nitrogen oxides allowances allocated to Florida was drastically reduced between the

[1] For example, Florida submitted an approvable SIP to address regional haze in 2010 that relied on the federal interstate transport rule, as encouraged by EPA and allowed under federal law. While Florida's regional haze SIP awaited EPA's approval, however, EPA revised its interstate transport rule pursuant to court order, and Florida could not rely on the new interstate rule to the same extent for regional haze purposes. Thus, through no fault of Florida, its regional haze SIP was suddenly in need of revision. Notwithstanding Florida's cooperation with EPA over the years and Florida's unique surprise that it would no longer be able to rely on the transport rule, EPA and special interest groups settled a citizen suit in December 2011 with an agreement that imposed an unreasonable timeframe for Florida to revise its regional haze SIP. Florida's first opportunity to comment on the lawsuit and settlement was in response to publication of the proposed settlement in the Federal Register. While Florida is committed to doing what it takes to revise its SIP, and is currently doing so in an effort to avoid a FIP, it is doing so under an unreasonable time frame set by the "sue and settle" tactic at the expense of Florida's taxpayers and regulated industries.

proposed and final rules, creating an unexpected planning problem for the state's electric utilities. Despite these problems, and similar issues involving other states, EPA elected not to re-propose or delay finalization of the rule, prompting Florida's Attorney General to join a multi-state legal challenge to the rule.

6. Are there other issues, ideas or concerns relating to the role of federalism under the CAA that you would like to discuss?

The CAA should not be implemented in a silo. Environmental regulators often operate independent of other programs when implementing the Act. At the federal level, the resulting tunnel vision can lead to rulemaking that results in cross-media shifting of pollution. For example, the use of technologically-feasible air emission limits allows for reduced air emissions, but may at the same time increase pollution in other media such as water and solid waste. This makes the reconciliation of competing environmental interests and obligations at the state level increasingly difficult. This problem is magnified as new air regulation frequently occurs within a zone of diminishing returns, leading to the diversion of scarce public and private resources from more environmentally protective or beneficial uses. If not expressly required of all federal environmental rulemaking, principals of federalism should allow states greater flexibility to balance the environmental interests of other media when pursuing technologically-feasible air emissions.