Conservation Law Foundation

COMMENTS OF THE CONSERVATION LAW FOUNDATION REGARDING THE MARCH 14, 2007 REPORT ON EMISSIONS LEAKAGE

The Conservation Law Foundation is pleased to offer these comments regarding the Initial Report of the RGGI Emissions Leakage Multi-State Staff Working Group (the "Report"). Our goal in these comments is to put the question of emissions leakage into context, emphasizing the fact that very real multi-billion dollar electric transmission projects are in development that could greatly exacerbate this problem. We also believe that the changing legal landscape suggests that the climate has improved for taking action to address this issue, and strongly urge the states engaged in the RGGI enterprise to immediately start work on fashioning a coordinated utility commission-administered program for addressing it.

We compliment the Staff Working Group for their work on the Report and urge the states to focus on the ideas presented in it regarding methods for actually controlling emissions associated with imported power by regulating power sold in participating states – ensuring that emissions associated with in-state and out-of-state generation are regulated through a modified version of a load-based cap.

The Report correctly notes that implementing such a mechanism, which would inevitably be a variation on the load-based cap discussed in the Report, would require that existing implementation obstacles be overcome. This means addressing the key questions of coordinating emissions attribute "tagging" and power plant dispatch and avoiding "gaming" and "contract shuffling," as discussed in the Report. However, it is essential that this challenge be met in order to ensure that the RGGI program has the credibility and integrity that it needs as well as to set a solid precedent for other states, or even for a national program, which would need to be concerned about potential emissions leakage from Canada and Mexico.

The Changing Context: New "West to East" transmission, action by other States and the changing legal landscape

It is difficult to overstate the importance of this enterprise in terms of maintaining the legitimacy of the RGGI effort and in setting an important precedent.

In state after state, as RGGI has been discussed in legislative and administrative forums, one theme emphasized by critics and skeptics is the possibility that the program will not actually produce a net reduction in CO2 emissions from the electricity generation sector writ large due to increased imports of power from dirty sources outside the region. The need to ensure that the ratepayers and citizens of the states participating in the region are actually receiving the environmental benefit of the program is one of the few unifying messages of all stakeholders speaking publicly about the program.

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West to East Transmission: An Emissions Leakage Highway?

Concern about Emissions Leakage is only heightened by the forward movement of multi-billion dollar projects to build electric transmission infrastructure that will potentially allow electricity generated by high emission coal fired power plants to travel eastward towards, and into, the region covered by RGGI. The largest and most significant of these projects is the AEP Interstate Project which would put in place a mammoth 765 kV transmission line stretching from West Virginia to New Jersey. That project, however, is only the largest and best-known of a variety of projects that would increase capacity along the East-West corridors leading into the RGGI region. The Trans-Allegheny Interstate Line (TrAIL) Project, being undertaken by Allegheny Power to enhance transmission capability from western Pennsylvania to Maryland and Virginia, and the companion Meadow Brook – Loudon 500 kV line proposed by Dominion Resources to carry that power into the Washington D.C. metropolitan area, are other prime examples of projects in motion.[1]

The Report correctly notes that controlling emissions leakage will create "an indirect market signal to generators that low-emitting generation is a valuable commodity" (p. ES-11). It is important to extend this principle to transmission as well – recognizing that the economics of such projects will be shaped by the relative value of, and market for, the power that will travel on particular transmission lines. To be blunt, a strong and effective emissions leakage effort will send a resounding signal that transmission infrastructure that facilitates delivery of power generated by high emissions pulverized coal plants is not a good investment and should not be built.

The Increasing Importance of Precedent

As the Report notes, California is moving ahead with an investigation of a load-based cap (p. 39 & footnote 59). This builds upon the earlier decision by California (discussed at length in the Report) to implement an Emissions Performance Standard for power provided by regulated load serving entities.

What is truly notable, and a change since the Report was prepared, is the pace of activity around the nation to move in this same direction. While it may not be surprising that Washington State would follow California down this path[2] the enactment of legislation in Montana earlier this week preventing regulated utilities in that state from investing in coal fired power plants that do not capture and sequester at least 50% of their CO2 emissions[3] demonstrates the breadth and depth of interest in taking on this issue across the nation.

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[1] For more information on these projects, supplied by the project proponents themselves and compiled by the Edison Electric Institute, see http://www.eei.org/industry_issues/energy_infrastructure/transmission/Trans_Project_A-D.pdf at pp. 1 and 18.

[2] See, http://www.eere.energy.gov/states/news_detail.cfm/news_id=10776, http://www.governor.wa.gov/news/news-view.asp?pressRelease=569&newsType=1 , and full text at http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Amendments/Senate/6001-S%20AMS%20PRID%20S2716.2.pdf .

[3] See Montana Code Annotated sec. 69-8-421(8) as added by Section 15 of HB 25 (Reg. Session 2007). Available at http://data.opi.mt.gov/bills/2007/billpdf/HB0025.pdf .

The RGGI states have a unique and critical opportunity to define and shape policies, mechanisms and methods that can address the question of emissions leakage. This work can be shaped by, and help shape, efforts by Western states seeking to ensure that their efforts to reduce CO2 emissions from the power sector also have integrity and directly induce a net reduction in CO2 emissions. This is an opportunity and challenge that can not be neglected and must be addressed.

The Changing Legal Landscape

The last critical piece of changing context comes from the courts, specifically the United States Supreme Court. Less than a month after deciding the landmark case of Massachusetts v. EPA, 127 S.Ct. 1438 (April 2, 2007) (Finding that US EPA has the power to regulate CO2 under the Clean Air Act) the Supreme Court addressed the legal doctrine known as the "dormant Commerce Clause." This is a doctrine often invoked in the debate about the ability and authority of states to address the question of emissions leakage in a manner that strongly suggests that states (and groups of states) may well have greater freedom to act in this area than previously thought.

In United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority,127 S.Ct. 1786 (April 30, 2007) the Supreme Court determined that a local "flow control" ordinance that required that waste from a particular area go solely to one waste handling facility was valid. To many, this was an unexpected result as the Supreme Court had previously invalidated a nearly identical ordinance in 1994 in C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S.Ct. 1677 (1994). The sole difference between the two cases is that in United Haulers the waste handling facility in question was publicly owned, unlike the privately owned facility in Carbone.

Four of the six Supreme Court Justices who comprised the majority in the United Haulers case clearly based their decision, at least in part, on a belief that regulations that are not motivated by economic discrimination (protecting local businesses) should be viewed with favor even if they have some effect on interstate commerce. Two Justices (Scalia and Thomas) go further and favor scrapping the entire doctrine entirely. This case strongly suggests that the law is rapidly moving in the direction of giving states greater leeway in putting in place legitimate and socially beneficial regulations even when they may have an impact or effect on businesses outside of their state. Indeed, the three dissenting Justices in United Haulers complain that just such a change in the law is occurring, stating that they see no substantive difference between the facts in Carbone and United Haulers.

At the very least, the United Haulers case strongly suggests that past skepticism about the ability of the RGGI states to shape a solution to the problem of emissions leakage that would pass constitutional muster should be reexamined and that states should proceed looking squarely at this new precedent for guidance on how to craft such a solution. Moreover, both schools of thought counsel in favor of taking action to craft an emissions leakage solution immediately, demonstrating that the clear and sole purpose of such an effort is environmental protection as part of the larger RGGI initiative

Conclusion: Work to craft an emissions leakage solution through a form of load-based cap to bring imports into the RGGI program should begin immediately

The context described above is both depressing and heartening. Multi-billion dollar projects are moving forward to put in place infrastructure that could help to undermine the integrity of the RGGI program by piping electricity from high-carbon coal plants into the region. But legal doctrine is

evolving in a manner that will make it easier for the RGGI states to confront this challenge. And across the country more and more states are rising to the challenge of reducing greenhouse gas emissions from power plants and will need tools to stem imports of dirty power from undermining their efforts.

All of this leads to one plain conclusion – the time to act is now. The utility regulatory commissions and energy policy offices in the RGGI states need to step forward, working with environmental protection agencies and a broad range of stakeholders, to craft solutions building upon the Report.

We therefore urge the Governors, Commissioners, Secretaries and Commission Chairs of the states in the RGGI region to set in motion a process, with a clear and ambitious timetable for completion, for crafting a new model rule that will incorporate a load-based cap that will fully incorporate imported power into the RGGI system in an effective and even-handed way.

We are open to any questions or responses regarding these comments and urge that such communications be directed to the Director of CLF's Clean Energy and Climate Change Program Seth Kaplan at 617-850-1721 or by email to skaplan@clf.org.