

2010

**Federal Regulatory
Actions on Climate
Change - Untangled**

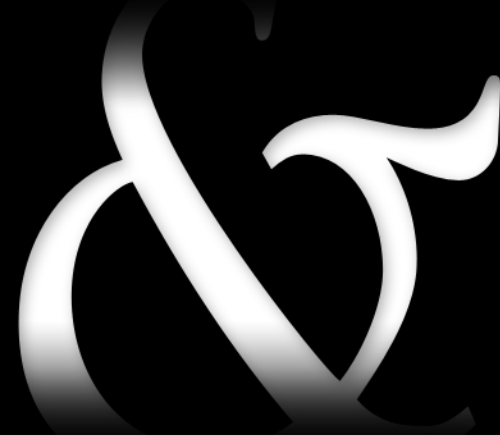
Renewable Energy Markets 2010

Portland

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GHG Regulatory Activities

- Overview of the Clean Air Act
- New Motor Vehicle Emissions Standards
- GHG Reporting Rule
- Endangerment Finding
- Tailoring Rule
- PSD/Title V Permitting Programs
- NSPS and NAAQS
- Options for Regulatory Cap-and-Trade



Clean Air Act Basics

- Passed by U.S. Congress in 1970
- Amended in 1990 to include the Acid Rain Program, which adopted emissions trading for SO₂ and NO_x
 - Title I – Stationary Sources
 - Title II – Mobile Sources
 - Title III – General
 - Title IV – Acid Rain Program
 - Title V – Operating Permits
 - Title VI – Stratospheric Ozone
 - *New Title VII? – Greenhouse Gases?*
- U.S. Environmental Protection Agency (EPA) creates rules under the authority of the CAA



In absence of legislation...

- EPA is pursuing regulatory approach under the Clean Air Act to address GHG emissions from stationary sources
- Suboptimal path for all stakeholders
- Big question:
 - command-and-control?
 - market-based?
 - both?



Review of *Massachusetts v. EPA*

- April 2007 U.S. Supreme Court decision (549 U.S. 497 (2007))
- GHGs are air pollutants susceptible to regulation under the Clean Air Act
- EPA may regulate GHGs if it “forms a ‘judgment’ that such emissions contribute to climate change” and “makes a finding of endangerment”
- Facially dealt only with motor vehicles



Endangerment Finding

- Final finding under § 202(a)(1) related to motor vehicles (Dec. 15, 2009) (74 *Fed. Reg.* 66,496)
 - 6 GHGs constitute air pollution that endanger public health and welfare in the United States
 - Emissions of four of those GHGs (CO₂, CH₄, N₂O, HFCs) from new motor vehicles contribute to that endangering pollution



Light Duty Vehicle Rule

- Section 202(a)(1) of the Clean Air Act
- May 2009 agreement (EPA, DOT, CA, unions, automakers, environmental groups)
- Final GHG emission limits for MY2012-16 light duty vehicles promulgated May 7, 2010 (75 *Fed. Reg.* 25,324)
 - MY2016 vehicles to have AFE of 35.5 mpg
 - Prior standard was 35 mpg by 2020
 - Because MY2012 vehicles can be sold as early as Jan. 2, 2011, EPA has determined GHGs become “subject to regulation” under the Clean Air Act on that date



Pending Mobile Source Regulation

- MY2017-2025 light duty standards (47 to 62 mpg by 2025), and MY2014 and later heavy duty vehicle standards coming soon
- Petitions to regulate virtually all other onroad and nonroad engines and vehicles
 - Ocean-going vessels, aircraft, nonroad vehicles and engines



Mandatory GHG Reporting Rule

- Final rule effective Jan. 1, 2010 (74 *Fed. Reg.* 56,260 (Oct. 30, 2009))
- Requires sources with 25,000+ tpy CO₂e to report starting in 2011
- Compatible with either cap-and-trade or command-and-control system
- Status of litigation and motion for stay



Stationary Source GHG Regulations

- Once mobile source rule finalized, stationary source provisions in the CAA are triggered
- May need to make endangerment finding for stationary sources too



Once CO₂ becomes “subject to regulation”

- Stationary sources required to obtain GHG emission permits
- When?
 - Johnson Memorandum adopted by Obama EPA on April 2, 2010 stating that permitting requirements apply when “a regulatory requirement to control emissions of that pollutant ‘takes effect’” (75 *Fed. Reg.* 17,006)
 - January 2, 2011 (date motor vehicle regulations “take effect”)
- Who?
 - CAA statutory thresholds are 100/250 tons per year
 - Applied to CO₂ would result in 41,000 PSD permits (vs. 300 per year now) and 6.1 million Title V permits (vs. 14,000 now)



Tailoring Rule

- “Absurd results” and “administrative necessity”
- Solution: “PSD/Title V Tailoring Rule” to raise that threshold to 75,000/100,000 tpy – promulgated June 3, 2010 (75 *Fed. Reg.* 31,514)
- Tailors the Clean Air Act and its permitting programs to greenhouse gases
- Creates three-step schedule for permitting stationary sources of GHG emission
- Smaller sources will be phased in beginning July 1, 2013



PSD and Title V Permitting Programs

- Prevention of Significant Deterioration (PSD) preconstruction permits for major new and modified sources require use of Best Available Control Technology (BACT)
 - Can be either an emissions limitation or process or method of operating
 - Determined on a case-by-case basis depending on energy, environmental and economic impacts
 - Guidance to be issued by end of year
 - Permits open for public review and comment
- Title V operating permit does not impose additional emissions limitations



State Action on Permitting

- Most states implement the CAA permitting programs through “state implementation plans” (SIPs)
- EPA is requiring states to revise their SIPs by January 2, 2011 to accommodate these new permitting requirements, or to face a moratorium on issuance of PSD permits, or revert permitting back to EPA
- Challenges and motions for stay



Potential EPA GHG Rulemakings

- Section 111 – New Source Performance Standards
 - Cover new and modified and, in some cases existing, sources
 - May include both technology specifications and operation and measurement requirements
 - Focus on particular types/sectors of emitters
 - EPA considering NSPS for petroleum refineries, electric generating unit boilers



Potential EPA GHG Rulemakings (cont.)

- Sections 108-110 – National Ambient Air Quality Standards
 - Petition received to set a NAAQS for CO₂ at 350 ppm
 - Unlikely to be favorably entertained



Regulatory Cap-and-Trade?

- Could EPA create a cap-and-trade program for GHGs under the CAA?
- Main Options
 - NAAQS
 - NSPS



Command-and-Control Elements First

- Why? Let Congress act first, establish framework, develop legal arguments
- Two previous attempts at creating cap-and-trade under the CAA have been struck down by the courts
 - Clean Air Interstate Rule (NO_x and SO₂)
 - Clean Air Mercury Rule



NAAQS Approach – Section 110

- National Ambient Air Quality Standards (NAAQS)
- Potential (least optimal) route to cap-and-trade
- EPA has discounted this approach
- Waxman-Markey would preempt this approach



NSPS Approach – Section 111

- New Source Performance Standards (NSPS) is essentially a technology-based approach
- Much more likely than NAAQS as an avenue for cap-and-trade
- Sector-based, not geographic
- Basis for CAIR and CAMR



Conclusions on CAA Regulation

- CAA path toward cap-and-trade is fraught with difficulty and uncertainty, but not impossible
- Many years of litigation certain and likely to delay implementation of either C&C or C&T under the CAA



Judicial Challenges to EPA's GHG Rules

- Endangerment Rule – 17 petitions
- Subject to Regulation Rule – 18 petitions
- Light Duty Vehicle Rule – 17 petitions
- Tailoring Rule – 26 petitions
- Current status: preliminary filings and due dates for procedural and substantive motions all upcoming



Implications for Renewable Energy and Carbon Markets

- In the short term . . . look to the states, voluntary markets
- In the medium term . . . EPA action, once effective, may motivate Congress to create comprehensive legislative program

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