

EPA REGULATION OF GHGs UNDER THE CLEAN AIR ACT: EPA'S ANPR

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What We Will Cover



- Overview of ANPR
- Discussion of strategic considerations and approaches on how to respond to ANPR in a reasonable way in light of *Massachusetts v. EPA*– without undermining federal legislative efforts

Overview Of ANPR



- Discusses the following:
 - Basis for and implications of an endangerment finding
 - Provisions of the CAA that might form a basis for regulating GHG's
 - Potential regulatory approaches and technologies
 - Requests comment on petitions to regulate GHGs under various provisions of the CAA

Overview Of ANPR (cont'd)



- Includes preliminary adverse comments from other federal agencies:
 - Office of Management and Budget
 - Department of Agriculture
 - Department of Commerce
 - Department of Energy
 - Department of Transportation
 - Council of Economic Advisors
 - Office of Science and Technology Policy
 - Council on Environmental Quality
 - Small Business Administration

Key Criticisms Of Other Agencies



- CAA is an unsuitable vehicle for reducing GHG emissions in a cost-effective way
- Rule would harm US competitiveness and move industry – and emissions – offshore
- EPA’s suggested “flexibility” mechanisms are untested legally
- EPA makes unsupported assumptions about the availability and costs of GHG-reducing technologies
- CAA regulation would duplicate new laws and initiatives (e.g. EISA)

Endangerment Finding



- Similar “endangerment” language found in:
 - §108 (NAAQS)
 - §111 (NSPS)
 - §1112 (HAPs)
 - §115 (Transboundary pollution)
 - §202 (new on road motor vehicles)
 - §211 (motor vehicle fuels)
 - §213 (non-road engines & vehicles)
 - §231 (aircraft)
- Does an endangerment finding under §202 trigger endangerment findings under other provisions?

Endangerment Discussion



“Scientific records show there is compelling and robust evidence that observed climate change can be attributed to the heating effect caused by global anthropogenic GHG emissions.”

Endangerment Discussion

- Sea level rise
- Changes in precipitation patterns
- Ecosystem changes
- Water scarcity
- Ocean acidification
- Extreme hot and cold days

Climate change “poses a number of serious risks to the U.S. even if the exact nature of the risks is difficult to quantify with confidence.”



“Cause Or Contribute”



- Do emissions from mobile sources (or other sources) “cause or contribute” to climate change (“the air pollution at issue”)
 - EPA precedent suggests < 1% of inventory “contributes”
 - Mobile sources, power generation, industrial sources presumably could meet this threshold

Prevention Of Significant Deterioration



- PSD applies to each “air pollutant” (other than a HAP) that is “subject to regulation under the Act.”
- *Could* be triggered by an endangerment finding
*Note: Some argue that it already applies
- Statutory PSD thresholds (100 tpy/250tpy) applied to GHGs could trigger regulation of very small sources (e.g. hospitals, apartment buildings, commercial buildings)
- Potentially highly burdensome for EPA, States, business community

PSD (cont.)

- Options to reduce burden of PSD/NNSR
 - Interpret “potential to emit” to reduce number of affected sources
 - Increase major source thresholds and significance levels
 - Phase in applicability of PSD for GHGs
 - Develop streamlined approaches to BACT/LAER
 - Use general permits

ANPR OPTIONS FOR REGULATING GHGs UNDER THE CLEAN AIR ACT



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Mobile Sources



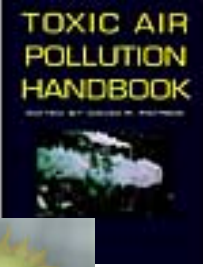
- Averaging, banking and trading?
 - Within sub-sectors?
 - Among all mobile sources?
- Cap and trade?
 - Within sub-sectors?
 - Among all mobile sources?
- Fuel Regulation?
- Command and control?
 - e.g., air conditioner leaks

Mobile Sources (cont'd)



- Avoid duplication of, inconsistency with, NHTSA CAFE regulation
- How to predict long-term technological advancements?
- Emissions leakage (e.g. plug in hybrids)
- Implications of a cap on potential industry sales
- Authority to allow trading between mobile and non-mobile source sectors

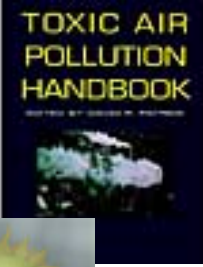
National Ambient Air Quality Standard For GHGs



- **Does an endangerment finding mandate setting a NAAQS?**

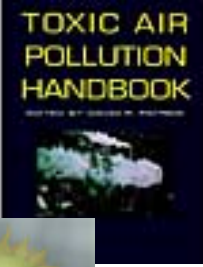
“EPA shall list each air pollutant: (A) emissions of which, in [the Administrator’s] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; (B) the presence of which in ambient air results from numerous or diverse mobile or stationary sources; and (C) for which air quality criteria has not been issued before the date of enactment of Clean Air Act Amendments of 1970, but for which [the Administrator] plans to issue air quality criteria under this section.”

NAAQS (cont'd)



- Primary NAAQS or secondary only?
- What level is requisite to protect public health with an adequate margin of safety?
- Entire nation in nonattainment?
 - RACM/RACT
 - Reasonable Further Progress (RFP)
 - Nonattainment NSR
 - Contingency measures
 - General conformity/transportation conformity
- More stringent offsets/highway funding restrictions if (primary) standard not attained in 10 years
- Use of Section 179B (international contribution to nonattainment)?

NAAQS (cont'd)



- Entire nation in attainment?
 - Fewer mandatory requirements
 - SIPs provide for maintenance using nationwide cap-and-trade program?
- Does NAAQS provide sufficient flexibility?
- Leakage

New Source Performance Standards

- Who could be covered?
 - If GHG NAAQS, NSPS for new and modified sources only
 - If no GHG NAAQS, NSPS for new, modified and existing sources
- Technology-based standards, but
 - Flexibility to sub-categorize types and sizes of sources
 - Allows consideration of costs in standard setting
 - Discretion to list, prioritize source categories
- Could be done without an endangerment finding for already listed source categories?
- Trading allowed?

Hazardous Air Pollutant Listing

- Lower major source threshold
- Must regulate all categories of major sources that emit the HAP
- Stringent level of control mandated (“MACT”)
- Limited ability to consider costs
- Dramatically greater number of sources would be regulated than under other mechanisms
- Standards must be issued within 2 years of source category listing

Strategic Considerations

Multiple Objectives

- Not just GHG tonnage reduction, but technology (and CCS) advancement; energy and transportation security, reliability and affordability; economic competitiveness and jobs

Jurisdiction

- National versus state/regional (and even local) regulation

Administration

- EPA versus DOE, DOT, Others

Program Design

- Economy-wide versus sector-specific
- Allowance-based versus intensity-based
- Command-and-control versus market approach
- New source program?
- Role of local impacts and co-benefits

Default

- EPA likely to make endangerment finding
- EPA likely to regulate
- States likely to regulate

What is the best going forward strategy given the above?

Q&A

Please submit questions via e-mail to megahm.morris@lw.com.

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