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Can Greenhouse Gases Be Regulated Effectively Under Existing Law?

President Obama has touted quick action against climate change as a major goal of his administration. Perhaps recognizing that a new law will take time (and motivation), the administration is now showing signs of pursuing its goal through the existing Clean Air Act (the "Act"). 42 U.S.C. §§ 7401 *et seq*. Administrator-designate of the U.S. Environmental Protection Agency ("EPA") Lisa Jackson told senators at a hearing on January 14, 2009, to expect "an extraordinary burst of activity" on climate change and other problems. When asked specifically about her willingness to regulate new problems under existing laws, Jackson responded that those laws "were meant to address not only the issues of today, but the issues of tomorrow."[1]

Using the Act to address climate change would require an unprecedented amount of legislative license on the part of EPA. The Bush-era EPA began to formally explore this issue in July 2008, when it published an Advanced Notice of Proposed Rulemaking ("ANPR") on regulating greenhouse gases ("GHGs") under the Act. 73 Fed. Reg. 44354 (July 30, 2008). This article reviews some of the general issues raised by the ANPR with respect to stationary sources. For source types subject to potential regulation, the ANPR should serve as a blueprint for predicting, and preparing for, EPA's next move. For the Obama administration, it should serve as a warning against using the Act as anything other than a prod to Congress for new legislation.

Apart from the potential lack of any market mechanism, there are other drawbacks to regulating GHGs under the NAAQS and NSPS programs. Neither program was designed to address a pollutant that is distributed equally throughout the global atmosphere and emitted by such a wide range of sources.

BACKGROUND

The United States Supreme Court set the stage for the current debate on regulating climate change with its landmark decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court in that case overturned EPA's denial of a petition for rulemaking under section 202 of the Act. The petition sought to have EPA regulate GHG emissions from new motor vehicles. In the holding, the Court ruled that EPA has the authority to regulate GHG emissions under section 202 if it finds that such emissions endanger public health or welfare. The Court reversed the court of appeals' ruling and remanded with instructions for EPA to determine whether GHG emissions from new motor vehicles endanger public health or welfare, or to explain why scientific uncertainty prevents a reasoned judgment on the matter.

The July 2008 ANPR discussed EPA's work as of that date in response to the Supreme Court's decision. Rather than focusing on the issue of endangerment, however, the ANPR reviewed several Clean Air Act programs and requested comment on whether those programs could be used to effectively address GHG emissions from different source types.

Two programs in the Act are plausible options for addressing GHG emissions from stationary sources: the National Ambient Air Quality Standards ("NAAQS") of sections 108–110 and the New Source Performance Standards ("NSPS") of section 111.[2] As discussed below, neither program provides clear authority for a market mechanism, and both will entail complicated and costly rulemakings followed by protracted litigation.

PROBLEM 1: FINDING AUTHORITY FOR A CAP-AND-TRADE PROGRAM

The need for a market mechanism may present the most fundamental obstacle to effective regulation of GHG emissions from stationary sources under the Act. The President favors a cap-and-trade approach, as do most supporters of climate change regulation.[3] EPA, too, has found that "[m]arket-oriented approaches are relatively well-suited to controlling GHG emissions." 73 Fed. Reg. at 44410. If GHGs are to be regulated under the Act, a trading program may be the most widely accepted approach.

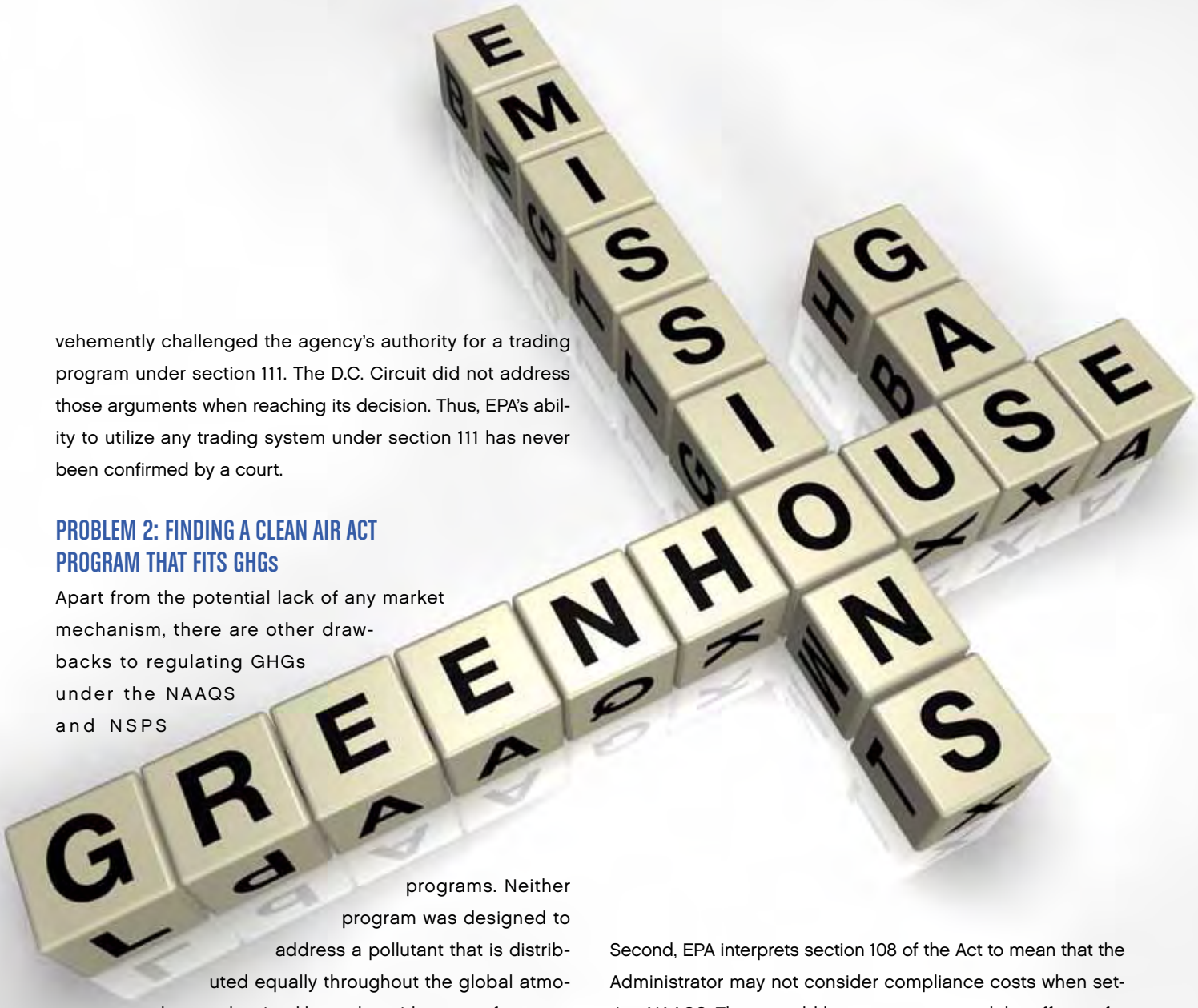
For purposes of the NAAQS, however, a recent decision of the U.S. Court of Appeals for the D.C. Circuit may preclude the use of a cap-and-trade program. The ANPR in July 2008 pointed to the Clean Air Interstate Rule for the trading of sulfur dioxide and nitrogen oxide emissions as evidence of EPA's cap-and-trade authority under the NAAQS. After the ANPR was issued, a three-judge panel of the D.C. Circuit ruled that any trading scheme that allows facilities in upwind states to maintain or increase emissions to the detriment of downwind states is inconsistent with the Act, even if it ultimately results in a regional emission reduction. *State of North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008). The court relied on section 110(a)(2)(d) of the Act, which prohibits one state from contributing significantly to nonattainment in another state or interfering with another state's maintenance of NAAQS. The decision may prohibit the use of any trading program under the NAAQS.

A trading program under the NSPS also would face legal uncertainty. In the July 2008 ANPR, EPA mentioned the Clean Air Mercury Rule ("CAMR") as precedent for the agency's cap-and-trade authority under section 111. 73 Fed. Reg. 44490, n. 247. The D.C. Circuit vacated CAMR on February 8, 2008, albeit for reasons unrelated to EPA's cap-and-trade authority. *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). EPA acknowledged the vacatur in the ANPR but failed to mention that environmental parties in the case

vehemently challenged the agency's authority for a trading program under section 111. The D.C. Circuit did not address those arguments when reaching its decision. Thus, EPA's ability to utilize any trading system under section 111 has never been confirmed by a court.

PROBLEM 2: FINDING A CLEAN AIR ACT PROGRAM THAT FITS GHGs

Apart from the potential lack of any market mechanism, there are other drawbacks to regulating GHGs under the NAAQS and NSPS programs. Neither program was designed to address a pollutant that is distributed equally throughout the global atmosphere and emitted by such a wide range of sources.



NAAQS. The NAAQS framework presents at least three major problems for GHG regulation. First, because GHGs disperse equally throughout the atmosphere, the entire U.S. would have the same attainment or nonattainment status for GHGs, depending on the level of the NAAQS. This is a problem because states bear primary responsibility for ensuring their own attainment or maintenance of the NAAQS. In the case of GHGs, no single state could ensure its own progress toward attainment or maintenance of any standard. Worse yet, no action by the United States alone could ensure attainment or maintenance of the standard without international cooperation.

Second, EPA interprets section 108 of the Act to mean that the Administrator may not consider compliance costs when setting NAAQS. There would be no way to control the effects of a GHG standard on the nation's already unstable economy.

Last, but not least, the time frames for NAAQS regulation could prove infeasible for the orderly regulation of GHGs. Preparation of air quality criteria under normal circumstances can take several years. The process would be particularly burdensome for GHGs, because climate change research is uniquely complex. Nevertheless, if EPA were to list GHGs as a criteria pollutant, an assessment of air quality criteria and a NAAQS proposal would be due 12 months after listing. Clean Air Act § 108(a)(2); 42 U.S.C. § 7408(a)(2). EPA would have another 90 days after that to promulgate final NAAQS. *Id*. at § 109(a); 42 U.S.C. § 7409(a). Because EPA's only discretion lies

in the timing of the original listing decision, the agency would need to delay issuance of the decision until it was able to develop air quality criteria in a scientifically sound manner. By that time, better avenues for addressing climate change could be available through new legislation.

NSPS. In the ANPR, EPA seemed to embrace the NSPS as the most promising method of regulating GHGs under the Act, in large part because section 111 "provides for consideration of cost, and allows substantial discretion regarding the types and sizes of sources to be regulated." 73 Fed. Reg. 44486. Notwithstanding small allowances for flexibility, there are serious drawbacks to regulating GHGs through the NSPS.

One drawback is that EPA would have to develop hundreds of subcategories to fairly regulate all, or even a substantial portion of, GHG emitters. Each subcategory would require its own standard. The result would be a highly complicated regulatory regime that could quickly overwhelm EPA, as well as the states primarily responsible for implementing the standards.

An even more serious problem arises from the fact that GHG controls are emerging technologies. EPA would have a hard time acquiring information to support a standard based on those technologies. Under section 111, EPA must set NSPS at a level that reflects the degree of emission limitation achievable through application of the Best Demonstrated Technology ("BDT"), meaning the best system of emission reduction that has been achieved in practice.

It is far from clear that any GHG control technology could satisfy the BDT standard. In the ANPR, EPA suggested that it might use future-year standards for GHGs based on technology that is not actually in use. 73 Fed. Reg. at 44490. Given that EPA has authority for periodic review of NSPS, any attempt to establish a standard based on what technology might be used in the future makes little sense and is likely to be challenged.

THE FINAL STRAW: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V PERMITTING

Even if EPA could find a way to make the NAAQS or NSPS program work for GHG regulation, there is another problem: regulation of GHG emissions under any section of the Act could have tremendous effects on Prevention of Significant Deterioration ("PSD") and Title V requirements that would quickly overwhelm permitting authorities and sources alike.

PSD Permitting. A PSD permit is required for the construction or modification of any source that emits or has the potential to emit a certain amount of a regulated pollutant in an area that is in attainment with the NAAQS. Emission limits in PSD permits must reflect the level of emission control achievable through use of the Best Available Control Technology ("BACT").[4] BACT limits are required for any air pollutant that is "subject to regulation" under the Act. Clean Air Act § 165(a)(4); 42 U.S.C. § 7475(a)(4); *see also* 40 C.F.R. § 52.21(b)(5).[5]

The role of GHGs in PSD permitting is already a contentious issue. Environmental groups have relied on GHG monitoring and reporting provisions in the Act for certain sources to argue that GHGs are "subject to regulation," and therefore PSD permits must reflect BACT for GHGs. *See*, *e.g.*, *In re Deseret Pwr. Electric Coop.*, EPA Environmental Appeals Board, PSD Appeal No. 07-03. In a recent memorandum, the EPA Administrator disagreed and interpreted the phrase "subject to regulation" as excluding pollutants for which regulations require only monitoring or reporting. 73 Fed. Reg. 80300 (Dec. 31, 2008). Environmental groups recently filed a legal challenge to the Administrator's interpretation. *Sierra Club v. EPA*, D.C. Circuit, No. 09-1018 (Jan. 15, 2009).

Whatever the merits of current arguments to require BACT limits for GHGs, it seems clear that regulation through NAAQS, NSPS, or even section 202 for mobile sources would require their inclusion in PSD permitting. The thresholds for PSD applicability normally restrict PSD requirements to a relatively small number of large stationary sources. In the case of GHGs, however, those same thresholds would dramatically expand the number of PSD-regulated sources. EPA estimates that the number of PSD permits issued annually would increase by a factor of more than 10 if carbon dioxide were to become "subject to regulation" under the Act. 73 Fed. Reg. at 44499.

Title V Permitting. Title V permits must include conditions necessary to ensure compliance with all "applicable requirements" of the Act. 40 C.F.R. § 70.3(c). Regulation of GHGs

under any provision of the Act (including the PSD program) could create "applicable requirements" for sources that emit a relatively small quantity of any GHG—just 100 tons per year. According to EPA, if carbon dioxide were to become an "applicable requirement," the number of sources requiring a Title V permit "would easily number in the millions absent a means to limit potential to emit." 73 Fed. Reg. at 44511.

EPA's Alternative Schemes. In the ANPR, EPA presented various alternative schemes to mitigate the impact of GHG regulation on PSD and Title V requirements for small sources. For PSD, the agency suggested limiting a source's "potential to emit" and increasing major source thresholds and PSD significance levels for GHGs. For both PSD and Title V, EPA suggested using general permits and phasing in requirements by starting with the largest sources of GHGs.

EPA's alternative schemes are of questionable legality. For example, the use of general PSD permits arguably conflicts with the statutory definition of "BACT" as being a case-by-case determination. Clean Air Act §§ 165(a)(4), 169(3); 42 U.S.C. §§ 7475(a)(4), 7479(3). Also, thresholds for PSD and Title V applicability are created by statute and cannot be modified through agency regulation. At the very least, if EPA were to propose a regulation that triggers PSD and Title V requirements for GHGs, it is unclear whether the agency could use any of the alternative schemes set forth in the ANPR.

CONCLUSIONS AND RECOMMENDATIONS

At its core, the ANPR illustrates that the Clean Air Act is not designed to address a problem like global climate change. The new administration has vowed to act quickly, however, and seems willing to do so under existing law, if for no other reason than to guard against legislative deadlock. As a result, the climate change debate is likely to proceed more quickly on both the legislative and regulatory fronts during the next several months and years.

The regulated community should stand ready to reaffirm the need for new legislation in lieu of any EPA proposal to regulate GHGs under the Act. The agency's path forward technically may depend on the outcome of its endangerment analysis under each section of the Act, but that analysis inevitably will be influenced by a more practical concern for whether the NAAQS or NSPS program is capable of effectively addressing the problem. Vulnerable source types should position themselves to explain why those programs will not work. At the same time, companies should analyze their existing carbon footprints and develop strategies for achieving reductions in compliance with either future legislation or regulation under existing law. ■

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[1] A webcast of the hearing is available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing__ID=ae2c3342-802a-23ad-4788-d1962403eb76#files. (Web sites last visited June 1, 2009.)

[2] The NAAQS program operates within a highly regimented framework. Based on certain prerequisites, EPA identifies air pollutants that endanger public health or welfare due to their presence in the U.S. ambient air. EPA must develop air quality criteria encompassing all identifiable effects of those pollutants and establish NAAQS for each. Once NAAQS are set, states bear the primary responsibility for ensuring their own attainment or maintenance of the standards. All of these measures must be completed according to specific time frames.

The NSPS program consists of federal performance standards for new and modified stationary sources that cause or contribute significantly to air pollution that may endanger public health or welfare. Generally, states implement the NSPS by developing plans with standards for sources within the NSPS categories.

[3] The Obama-Biden Plan for Energy and Environment is available at http://change.gov/agenda/energy __and__environment__agenda.

[4] BACT reflects the maximum achievable degree of emission control, taking into consideration energy, environmental, and economic impacts. BACT can involve the addition of control equipment or the modification of production processes or methods. If imposition of an emission standard is not feasible, BACT may be a design, equipment, work practice, or operational standard.

[5] More stringent requirements, called the "Lowest Achievable Emissions Rate," apply in areas that are not in attainment with the NAAQS. Although it is not yet clear whether the U.S. would be in attainment with any future NAAQS for GHGs, the July 2008 ANPR focused primarily on PSD.