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EPA CLIMATE CHANGE ANPR: WHAT IT MEANS FOR STATIONARY SOURCES

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ANPR

- Roadmap for regulation of every sector of the economy
- All facets of manufacturing would be affected, not just “big” manufacturing
- Based on existing Clear Air Act authority – no new legislation needed – could duplicate any program Congress does enact

PROBLEMS WITH EPA REGULATION

- Clean Air Act is an antiquated, inefficient, cost-ineffective statute
- Will not allow EPA to do what it says it wants to do: flexible, market-based programs
- Will force EPA to do what it says it doesn't want to do: impose rigid command and control standards without consideration of equity, efficiency, flexibility, or international competitiveness

STATIONARY SOURCE PROGRAMS

- National Ambient Air Quality Standards (NAAQS)
- New Source Performance Standards (NSPS)
- Prevention of Significant Deterioration Permitting (PSD)
- Title V
- Hazardous Air Pollutants (HAPs)

NAAQS

- NAAQS cannot rationally be used to regulate GHGs
- NAAQS system is based on identifying “safe” levels of pollutants in ambient air; designating attainment and nonattainment areas; and then requiring states to develop plans to cure nonattainment or maintain attainment
- But since GHGs circulate globally, there is nothing any state (or all states) can do to affect GHGs in ambient air

NAAQS EFFECT ON STATIONARY SOURCES

- Nonattainment: buildings and facilities subject to lowest achievable emissions rate (LAER), including offsets for new construction or modifications
- Attainment: PSD permitting, including best available control technology (BACT) for new construction or modifications

NAAQS TOPIC #1

Must EPA establish a NAAQS for CO2 if it makes an endangerment finding?

- 1978 *NRDC v. Train* case holds that setting NAAQS is non-discretionary for pollutants that endanger public health and welfare and that are emitted by “numerous or diverse mobile or stationary sources”
- Are EPA efforts to avoid *Train* convincing? Are we headed for a train wreck?

NAAQS TOPIC #2

Can EPA establish a secondary welfare-based NAAQS only?

- Secondary NAAQS must be attained “as expeditiously as practicable” – does that justify having standard that can never be attained?
- What standards would guide EPA in determining amount of reductions?
- Can EPA avoid setting a primary health-based NAAQS? Must be attained within date certain.

NAAQS TOPIC #3

Can EPA establish a cap and trade program and how would it work?

- All sector? Some sectors? Auctions/allocations?
- If reductions don't reduce ambient concentrations, on what basis are caps set?
- D.C. Circuit just vacated EPA NAAQS cap and trade program in *North Carolina v. EPA*: CAA provides little flexibility for creative or equitable approaches like market-based cap and trade

New Source Performance Standards

- Applies to categories of sources which, in EPA judgment, contribute “significantly” to air pollution endangering health or welfare
- Best Demonstrated Technology
- New and modified sources
- Existing sources if no NAAQS

New Source Performance Standards

- Historically, very contentious process to establish NSPS
- Consider economic and environmental factors on a broad scale
- Functional equivalent of environmental impact statement

NSPS TOPIC #1

- Can EPA do a cap and trade program as an NSPS?
- ANPR doesn't mention that EPA cap and trade authority under NSPS challenged in *New Jersey v. EPA*
- Same issues as NAAQS cap and trade: all sector/some sectors; allocations versus auctions; standards governing establishment of cap; limited authority to address equitable issues

NSPS Topic #2

- *Can EPA prioritize establishment of NSPS – big sources first?*
- ANPR assumes broad authority to proceed against big sources first
- Statute suggests EPA may not have this flexibility, particularly in the face of lawsuits demanding broader action

NSPS Topic #3

- *Can EPA establish NSPS based on technology which is not available today but which is demonstrated today to be available in future?*
- So, for instance, EPA can establish declining caps over time?
- Ratchets up level of contentiousness

PSD

- Permitting program for new or modified sources where no NAAQS or where NAAQS attainment
- Applies to sources emitting more than 100 tpy in 28 defined source categories and all other sources emitting more than 250 tpy
- Must obtain permit for new construction or for modification of existing sources that increases emissions
- Best available control technology

PSD CONUNDRUM: 250 TPY OF CO2 IS ALMOST NOTHING

- Chamber study: more than 1.2 million sources emit above this level, many simply because they utilize natural gas or oil for heating - many office and apartment buildings; hotels; enclosed malls; large retail stores and warehouses; college buildings, hospitals and large assisted living facilities; large houses of worship; food processing facilities; large heated agricultural facilities; indoor sports arenas and other large public assembly buildings; restaurants; and many others
- Huge expansion of permitting program – permitting gridlock

PSD TOPIC #1

Can 250 tpy be transformed into a larger number?

- EPA aware of problem – suggests various ways it might establish higher threshold
- But 100/250 tpy thresholds are statutory – unlikely EPA can change

PSD TOPIC #2

- *Can EPA create streamlined permit requirements?*
- EPA hypothesizes various ways to streamline permits
- All uncertain and all are largely make-work

BAD DREAM SCENARIO: TITLE V

- Title V requires operating permits for all sources emitting above 100 tpy
- Does not impose new regulatory requirements, but collects all otherwise applicable requirements
- Will Title V be interpreted to require permits for all sources emitting above 100 tpy of CO₂, even if they are not subject to other applicable requirements?

NIGHTMARE SCENARIO: HAPs

- Section 112 regulates sources emitting HAPs, defined to include pollutants having an “adverse environmental effect”
- 10 tpy threshold (!)
- Stringent Maximum Achievable Control Technology (MACT) standards for new and existing sources

CONCLUSION

- Comments due 11/28 - broad-based comments needed
- Purpose:
 - influence how quickly and aggressively next Administration acts
 - preemption of CAA regulation in any climate change bill Congress enacts
- Let's regulate GHGs rationally, not through CAA

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