

BIDEN CLIMATE AGENDA: REGULATORY OPTIONS

Professor Karl S. Coplan



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CLIMATE CHANGE!



NEXT 100 YEARS

CLIMATE CRISIS!



HAPPENING NOW

PRESIDENT BIDEN'S CLIMATE GOALS

- PRESIDENT BIDEN'S DECLARED GREENHOUSE GAS EMISSIONS GOALS
 - ZERO GHG GRID BY 2035
 - NET ZERO GHG ECONOMY BY 2050
- US UPDATED PARIS PLEDGE (INDC) ANNOUNCED APRIL 2021
 - 50% REDUCTION FROM 2005 EMISSIONS BY 2030
 - COMPARE TO 26-28% REDUCTION BY 2025 IN ORIGINAL US PARIS AGREEMENT PLEDGE



REGULATORY OPTIONS UNDER EXISTING CLEAN AIR ACT AUTHORITY

- CLEAN AIR ACT SECTION 111(d) INDUSTRY SECTOR BASED REGULATIONS
- CLEAN AIR ACT TITLE I NATIONAL AMBIENT AIR QUALITY STANDARDS
- CLEAN AIR ACT SECTION 172 AND 165 NEW SOURCE STANDARDS
- CLEAN AIR ACT SECTION 115 – INTERNATIONAL AIR POLLUTION
- CLEAN AIR ACT SECTION 202 MOTOR VEHICLE EMISSIONS STANDARDS
- CLEAN AIR ACT SECTION 211 MOTOR VEHICLE FUEL REGULATION



HISTORY OF OBAMA ADMINISTRATION REGULATION AND TRUMP ADMINISTRATION DEREGULATION OF GHGS

- *Massachusetts v. EPA* (2007) –GHGs ARE “AIR POLLUTANTS” UNDER CAA
- SECTION 202 ENDANGERMENT FINDING – DECEMBER, 2009
- TAILPIPE RULE (MILEAGE STANDARDS) (2010, 2012) – 54.5 MPG BY 2025
 - WEAKEND BY TRUMP ADMINISTRATION RULE IN APRIL 2020 – 40.5 MPG BY 2030
- NEW SOURCE TAILORING RULE (2010) – STRUCK DOWN BY S CT IN 2015
- NEW SOURCE PERFORMANCE STANDARDS (2015)
 - Proposed repeal by Trump administration not finalized
- CLEAN POWER PLAN (BSER)(2015) –
 - Stayed by S Ct in 2016
 - Repealed by Trump administration in 2019
 - Repeal vacated in January, 2021



CLEAN AIR ACT § 111(d)

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.



CLEAN AIR ACT § 111

(a)(1) The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.



SECTION 111(d) DOWNSIDES

- REGULATION MUST PROCEED SECTOR BY SECTOR – EXTREMELY TIME CONSUMING
- EPA MUST TAKE COST INTO ACCOUNT IN SETTING BSER LIMITS
- SECTION 111(d) (PROBABLY) NOT AVAILABLE TO REGULATE COAL EGUs ALREADY REGULATED UNDER SECTION 112
- BSER LIMITS SUBJECT TO ROLLBACK BY SUBSEQUENT ADMINISTRATIONS



CLEAN AIR ACT NAAQS PROGRAM

CLEAN AIR ACT SECTION 108:

- (a) AIR POLLUTANT LIST; PUBLICATION AND REVISION BY ADMINISTRATOR; ISSUANCE OF AIR QUALITY CRITERIA FOR AIR POLLUTANTS****(1)** For the purpose of establishing national primary and secondary ambient air quality standards, the [Administrator](#) shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each [air pollutant](#)—**(A)** emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;
- (B)** the presence of which in the ambient air results from numerous or diverse mobile or [stationary sources](#); and
- (C)** for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.



NAAQS PROCESS

- DESIGNATE CRITERIA POLLUTANTS (§ 108)
- ESTABLISH PRIMARY AND SECONDARY NAAQS (§ 109)
 - PROPOSE WITHIN 1 YEAR
 - ADOPT 90 DAYS LATER
- STATES MUST REVISE STATE IMPLEMENTATION PLAN (CAA (§ 172))
 - SHOW ADEQUATE PLAN TO CONTROL ALL SOURCES WITHIN STATE
 - SHOW ACHIEVEMENT OF PRIMARY NAAQS WITHIN TEN YEARS
 - SHOW ACHIEVEMENT OF SECONDARY STANDARDS AS EXPEDITIOUSLY AS PRACTICABLE
- CONSEQUENCES OF INADEQUATE STATE IMPLEMENTATION PLAN
 - FEDERAL IMPLEMENTATION PLAN IN STATE
 - LOSS OF FEDERAL HIGHWAY FUNDING



DOWNSIDERS OF NAAQS REGULATION OF GHGs

- ALL STATES IN NONATTAINMENT, NO STATE CAN MEET NAAQS
- FEDERAL CONTROL AND HIGHWAY FUNDING SANCTIONS TOO HEAVY HANDED
- DESIGNATION OF GHGs AS CRITERIA POLLUTANTS TRIGGERS NEW SOURCE REVIEW AND TITLE V PERMITTING REJECTED BY S CT IN UARG



RESPONSES TO DOWNSIDES OF NAAQS REGULATION OF GHGs

- ALL STATES IN NONATTAINMENT, NO STATE CAN MEET NAAQS
 - SET SECONDARY NAAQS ONLY, DOES NOT HAVE ATTAINMENT DEADLINE
 - CAA § 179a – RELIEF FOR NONATTAINMENT CAUSED BY INTERNATIONAL AIR POLLUTION
 - ADVANTAGES TO FEDERAL IMPLEMENTATION PLAN: UNIFORM NATIONAL STANDARDS
- FEDERAL CONTROL AND HIGHWAY FUNDING SANCTIONS TOO HEAVY HANDED
 - FEDERAL HIGHWAY FUNDING IS THE CAUSE OF THE CRISIS
- DESIGNATION OF GHGs AS CRITERIA POLLUTANTS TRIGGERS NEW SOURCE REVIEW AND TITLE V PERMITTING REJECTED BY S CT IN UARG
 - CLEAR TEXTUAL AUTHORIZATION IN SECTION 108 AND *MASS v EPA*
 - NSR: BAN ON NEW OIL BURNERS IS NECESSARY ANYWAY
 - TITLE V PERMITS: GENERAL PERMITS REQUIRING BUILDING EFFICIENCY MEASURES WOULD BE ADMINISTRATIVELY EFFICIENT AND CLIMATE EFFECTIVE



ADVANTAGES TO NAAQS REGULATION OF GHGs

- CLEAR TEXTUAL AUTHORIZATION UNDER CLEAN AIR ACT – PLAIN MEANING
- MUCH HARDER TO BE UNDONE BY SUBSEQUENT ADMINISTRATION
- COSTS NOT CONSIDERED IN SETTING AND ACHIEVING NAAQS
 - SETTING NAAQS – *AMERICAN TRUCKING v WHITMAN*
 - IMPLEMENTATION PLAN – *UNION ELECTRIC v EPA*
- THE ONLY WAY TO ACHIEVE BIDEN ADMINISTRATION CLIMATE GOALS WITHOUT NEW STATUTORY AUTHORITY



CLEAN AIR ACT § 115 – INTERNATIONAL AIR POLLUTION

(a) Endangerment of public health or welfare in foreign countries from pollution emitted in United States

Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

(b) Prevention or elimination of endangerment

The notice of the Administrator shall be deemed to be a finding under section 7410(a)(2)(H)(ii) of this title which requires a plan revision with respect to so much of the applicable implementation plan as is inadequate to prevent or eliminate the endangerment referred to in subsection (a). Any foreign country so affected by such emission of pollutant or pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable implementation plan.

(c) Reciprocity

This section shall apply only to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.



CLEAN AIR ACT § 211 – MOTOR VEHICLE FUELS

(c) Offending fuels and fuel additives; control; prohibition

(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle if, in the judgment of the Administrator, any fuel or fuel additive or any emission product of such fuel or fuel additive causes, or contributes, to air pollution or water pollution (including any degradation in the quality of groundwater) that may reasonably be anticipated to endanger the public health or welfare, or (B) [2] if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

