STATE IMPLEMENTATION PLANS AND REGULATORY FLEXIBILITY UNDER SECTION 111(d)

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Background

- Massachusetts v. EPA, 549 U.S. 497 (2007); GHGs fall within definition of “air pollutants”

- Endangerment finding (December, 2009)

- Initial regulations:
  - automobile emissions (Tailpipe Rule – May 2010)
  - prevention of significant deterioration for stationary sources (Tailoring Rule – June 2010)

- Legislation to revoke EPA authority failed clearing the path for further rulemaking

President's Plan

- President Obama's June 25, 2013, memorandum to EPA calls for the agency to propose NSPS rules under CAA §111(b) by September 2013 and existing source rules for the power generation sector by June 2014.

- Calls for the use of "market-based instruments" for existing sources

- EPA's authority to regulate CO_2 emissions from existing sources is required by CAA §111(d) to be through state "guidelines."

New vs. Existing Sources

111(b) - new / modified sources

- EPA determines “standards of performance”

111(d) - existing sources

- EPA issues guidelines
- States determine “standards of performance”
- EPA cannot address existing sources unless it first addresses new sources

New Sources – 111(b)

- September 20, 2013 proposal; comment period thru March 10, 2014
- Did not specifically address existing power plants
- Applies only to new electric utility generating units (EGUs) that sell 1/3 or more of the power to the grid
- Applies only to new EGUs larger than 25 MW
- BSER:
  - Natural gas-fired standards: no need for add-on controls
  - Coal-fired boiler and IGCC standards: require partial CO_2 capture but not sequestration

NSPS Issues

- Energy Policy Act of 2005 – prohibits consideration of technologies that receive Clean Coal Power Initiative funding or Section 48 tax credits (3 of 4 CCS facilities did)

- EPA published NODA on February 5, 2014 explaining why it can consider these 3 projects; comments due March 10, 2014

- No operational commercial scale power plants anywhere in the world that use CCS

- EGU's can rely on EOR only if EOR operator agrees to report GHGs – those EOR operators may not elect to do so

Existing Sources – 111(d)

- "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 non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 111(a)(1).

- "An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way. An achievable standard is one which is within the realm of an adequately demonstrated system's efficiency and which, while not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption." Essex Chem. V. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973).

Section 111(d) Exemptions

- Exemptions: criteria pollutants and implications of coverage under §112

- Both provisions adopted in 1990 Amendments

- Legislative history discussed by EPA in CAMR

- EPA regulatory definition (40 CFR §60.21(a)):
  - emissions subject to NSPS
  - not a criteria pollutant
  - not listed under 108(a) or 112(b)(1)(A)

- Competing views:

  1. EPA is precluded from regulatory CO_2 from EGUs under 11(d)
  2. EPA may regulate CO_2 from EGUs under 111(d)

Conflicting Exemption Provisions

House version (U.S. Code):

(d)(1) … State shall submit … 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 108(a)] of this title or emitted from a source category which is regulated under [section 112] but (ii) to which a standard of performance under this section would apply is such existing source were a new source …

Senate version (statutes at Large):

(d)(1) … State shall submit … 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 108(a) or 112(b) but (ii) to which a standard of performance under this section would apply if such existing source were a new source …

Likely to be litigated

§111(d) Basics

- EPA does not directly establish standards. 40 Fed. Reg. 53,343.
- EPA first issues a guidance document (including emission guidelines that reflect BSER). 40 CFR 60.22.
- Mandatory duty to subcategorize to account for costs, physical limitations, geographic location, etc. 40 CFR 60.22(b)(5)
- States submit (9 months) plans to EPA for approval using a SIP-like process. 40 CFR 60.23(a)(1)
- States have significant flexibility to design plans, but must meet EPA minimum guidelines. 40 CFR 60.24

§111(d) Basics (cont).

- These state plans must be approved by EPA and must include emission standards (allowance system or emission rates) and compliance schedules that are no less stringent than emission guidelines." 40 CFR 60.24(c)
- A state may be less stringent if
  - unreasonable cost:
  - physical impossibility of installing equipment; or
  - "other factors" to make more reasonable

  40 CFR 60.24(f)
- States may also take into consideration "among other factors" the remaining useful life of the existing source. 111(d)(1).
- EPA: "[i]n most, if not all cases, the result is likely to be substantial variation in the degree of control required for particular sources, rather than identical standards for all sources" 40 Fed. Reg. 53,343 (1975)

§111(d) Basics (cont).

- State may adopt more stringent controls. 40 CFR 60.24(g)
- EPA shall impose a FIP if a state's plan is inadequate. 111(d)(2).
- Because EPA's 111(d) implementing regulations allow emissions standards to be based on an "allowance system", that standard may be either rate-based or mass-based. 40 CFR 60.21(f), 60.24(b)(1).
- General SIP case law recognizes states' broad authority to develop a plan to NAAQS, and EPA will obviously not be able to deem a plan that does so unacceptable. Va. v. EPA, 108 F.3d 1397 (D.C. Cir. 1997)

Conclusions

- Threshold issues under 111(d) include resolution of whether EPA is correct in its stated bases for NSPS and whether coverage of EGUs under 112 exempts them from 111(d)

- Should EPA develop emission guidelines under Section 111(d), states will need to be closely involved in that process

- EPA will certainly face a challenge to any proposal to apply a “system-based” approach to set BSER compared with defining BSER for the affected facilities themselves

Conclusions (cont.)

- States must be allowed to alter EPA's emission target
  - remaining useful life
  - unreasonable control costs
  - physical impossibility
  - other factors

- EPA's emissions guidelines must however recognize maximum flexibility for states to achieve whatever target is set

- All quantifiable and enforceable reductions must be recognized, including, but not limited to, early reductions, power plant retirements, intra-company, intrastate or interstate trading, energy efficiency programs and other programs being implemented by a state to reduce GHG emissions

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