

ARNOLD & PORTER LLP

**Federal and State Regulation of Climate Change:
The Current State of Play**

**Air & Waste Management Association
South Atlantic States**



**Allison B. Rumsey
November 20, 2008**

ARNOLD & PORTER LLP

COMMITMENT | EXCELLENCE | INNOVATION

Summary

- **Federal Actions**
 - Overview of *Mass. v. EPA*, EPA Activity and ANRPM
 - Boucher/Dingell Discussion Draft Bill
- **Regional Efforts/State/Local Initiatives**
 - RGGI
 - California AB 32
 - Western Climate Initiative/ Other States
- **The Obama Administration**
 - Predictions

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Massachusetts v. EPA (April 2, 2007)

- Subject of Case
 - EPA denial of petition to regulate GHGs from motor vehicles
 - EPA Administrator obligated to set standards for “any air pollutant” from new motor vehicles which, “in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”
- Holdings
 - States have standing to challenge EPA denial of petition for rulemaking.
 - Greenhouse gases (GHGs) are “air pollutants” under the Clean Air Act, so EPA has authority to regulate.
 - EPA required to decide whether to regulate based on ***endangerment*** to public health or welfare.

2

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Mass. v. EPA **Remand and Status of EPA Endangerment Finding**

- EPA’s Initial Plan
 - To propose rule by end of 2007 with final rule by end of 2008
 - With EISA EPA “took a step back”
- Advance Notice of Proposed Rulemaking (ANPRM) (July 2008)
- EPA inviting comments for 120 days (punting until end of current Administration)

3

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Massachusetts v. EPA Consequences

- Since EPA v. Mass EPA received a number of additional petitions to regulate GHG emissions from:
 - Fuels and a wide array of mobile sources
 - Other types of non-road engines and equipment
 - Aircraft
 - Rebuilt heavy-duty highway engines
- Deseret Power – PSD permit challenge – CO₂ air pollutant
 - Remanded to agency to decide if CO₂ “subject to regulation”
 - Nationwide consequences if “yes”.

4

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Coal-Fired Power Plants

- Recent rejections and Cancellations
 - February 2007 TXU Deal (Cancel 8 of 11 coal plants)
 - October 2007 Kansas denial for 700 MW Sunflower Electric plant
 - July 2007 Florida PUC rejection of FPL 1,960 MW plant
 - Sept. 2007 Oklahoma rejection of AEP 950 MW plant
 - Tampa Electric December 2007 canceled 630 MW IGCC plant
 - Wiscasset, Maine – November 2007 rejection of 700 MW IGCC plant
 - Idaho Power recent decision not to pursue coal plant
 - North Carolina’s recent rejection of Duke Energy 800 MW plant
- Technology and fuel disputes
 - January 2008 Letter – attorneys general of 7 states ask South Carolina not to issue permit for proposed (state-owned) Santee Cooper plant unless it is designed to minimize CO₂
 - March 2008 – West Virginia officials rejected proposed requirements for carbon sequestration technology at American Electric Power plant
- Concerns about satisfying load demands
 - Coal currently supplies ~50% of U.S. electricity
 - EEI projection of 40% increase in electricity demand by 2030

5

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

PSD/NSR

- BACT Requirement Under Section 165(a)(4)
 - Best Available Control Technology (“BACT”) “for each pollutant subject to regulation under” the Clean Air Act emitted from the facility.
- Is CO₂ “Subject to Regulation” Under the CAA?
- Implications
 - Threshold for major source subject to PSD review is 100/250 tons/year.
 - Would apply to very many very small sources for CO₂

6

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Overview Comments on ANRPM

- Discussion of Climate Change and GHGs
 - Helpful collection of information and general regulatory themes
 - Emphasis on:
 - Analytic challenges of long-term nature of problem
 - Benefits of market-based approaches (but note EPA's anticipated unresponsiveness in transportation sector)
 - Need to spur technology development
 - Option to integrate life-cycle (LC) analysis
 - Leakage challenge
- Discussion of CAA Provisions and Interconnections
 - Observations generally not new
 - Air pollution as 6 GHGs in aggregate or independent for each?

7

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Draft ANRPM, NAAQS

- Overall: NAAQS Goal-Oriented (Rather than Cost, Feasibility, Technology)
- Section 108: Listing
 - Effect of endangerment finding under Sec. 202
 - All six GHGs together? (If so, how to measure ambient levels?)
 - Control techniques?
- Section 109: Ambient Standard Setting
 - Primary NAAQS margin of safety; secondary NAAQS to protect welfare
 - Discretion to decline if current ambient level ok
 - Level, scientific uncertainty, and can't consider cost
 - Consideration of international impacts of GHGs
- Section 107: Designations of Attainment/Nonattainment Areas
 - Entire country in attainment or nonattainment?

8

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Boucher/Dingell Discussion Draft Climate Bill

Overview:

- Economy-wide cap on GHG covers 88% emissions
 - covered sources: 25 tons/yr power plants; producers and importers of petroleum; large industrial facilities
 - <25k tons/yr – EPA would establish industry-specific limits
 - new coal-fired power plants – CCS % of emissions
- Emissions 6% below 2005 by 2020
- Emissions 44% below 2005 by 2020
- Emissions 80% below 2005 by 2050
- Offsets – 5% of compliance for 1st 5 year; 35% by 2024 (too much?)

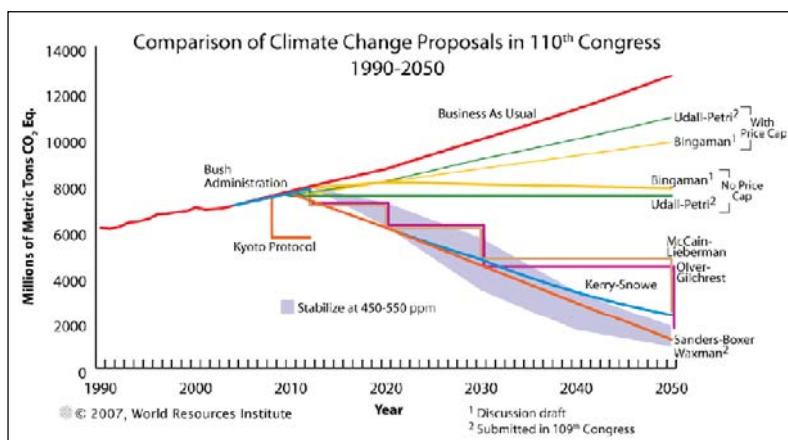
9

Boucher/Dingell Discussion Draft

4 Options for Allocating Emissions Allowances

- Allocate without charge – minimize compliance costs for regulated entities.
 - Unlikely in next administration.
- Provide fewer allowances to covered entities and more allowances to complementary programs that reduce GHG.
- Allowances to adaptation programs.
- Majority of allowances for a rebate to consumers
 - all include support to energy efficiency; low-income protection; allowances auctioned from 2026.

10



Note: Difference
If Chair Dingell v. Waxman

11

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Regional Greenhouse Gas Initiative (RGGI) Overview

- Mandatory, Market-based CO₂ emission reduction
- RGGI (Model rule 2006)
 - CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT
 - CO₂ only for electric generators > 25 MW
 - Implementation in January 2009
 - 10% reductions by 2019 (2009-2014 emission remain as now)
- 25% allocation consumer/strategic; 75% for states to allocate

12

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

RGGI Offsets

- 2009-2014 CO₂ offset - max. 3.3% of power plants total compliance
- 2014-2018 – offsets may be expanded to 5%-10% if certain price thresholds reached
- Offset Options: landfill methane capture; reduction in sulfur hexafluoride in electric power; afforestation; energy efficiency in building sector; agricultural manure management

13

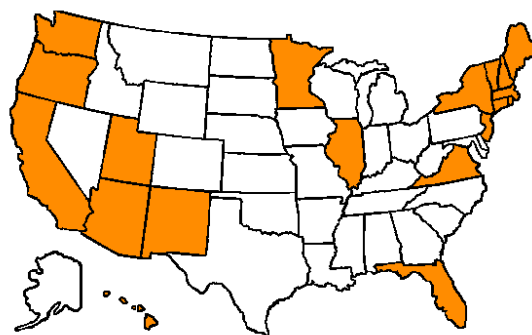
RGGI Sept 2008 Auction

- Sold 12.6 million CO₂ emission allowances
- \$3.07 per allowance. Floor set at \$1.86
- CT, ME, MD, MA, RI, VT (NY, NJ, NH, DE – not ready).
 - This was 55% of allowances to be traded.
- Buyers: 80% electricity generators
- Next auction – Dec. 17, 2008
- Proceeds to fund consumer benefit programs (e.g. promotion of energy efficiency, reduce electricity rate payer impacts, invest in non-carbon tech.)
- Compare: € 16.92/ton (11/17/08)

14

State Developments

Greenhouse Gas Emissions Targets



A greenhouse gas emissions target refers to the emission reduction levels that states set out to achieve by a specified time. For example, a state may set a target of reducing emissions to 1990 levels by 2020, and to 50 percent below 1990 levels by 2050.

Updated: June 20th, 2008

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

State Law: Cap-and-Trade Programs

- California
 - AB 32 (Global Warming Solutions Act 2006)
 - 1990 levels by 2020
 - Reporting of all stationary source emissions greater than 25K/tons CO₂
 - “Maximum technologically feasible and cost-effective GHG reductions.”
 - Scoping plan for achieving limit to be issued January 2009 (maybe higher energy efficiency standards; market-based compliance measures; mix of command and control and trading).
 - Mary Nichols, Chair of California Resources Board – EPA?

16

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

State law: Cap-and-Trade Programs

- Western Climate Initiative
 - Launched February 2007
 - Proposed cap & trade that includes some western states and Canadian provinces.
- New Jersey Global Warming Response Act (2007)
 - Enacted in 2007
 - 1990 levels by 2020
 - 80% reductions (from 2006) by 2050
 - NJDEP to implement
- In absence of federal program, no consensus on how to manage GHG emissions

17

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Obama Administration

What might we expect?

- Cap & Trade on Carbon: GHG to 1990 levels by 2020; 80% below 1990 by 2050
 - 100% credits auctioned
 - funds reinvested in clean energy and energy efficiency
- \$150B/10 years to fund clean tech. e.g. biofuels, renewable energy
- \$1B to fund “clean coal” technology
- Auto standards: boost CAFE to 43/mi gallon
- Nuclear Power, Wind, Solar
- Econ Stimulus package: \$15B/yr --5 million new “green jobs”₁₈

ARNOLD & PORTER LLP COMMITMENT | EXCELLENCE | INNOVATION

Obama Administration

- ANPRM
 - New administration could pursue a CAA strategy (broad or narrow in 2009 -2010).
 - Potential for broad regulatory program – or will act under CAA.
- Rumored – Obama administration will grant California and other states authority to regulate greenhouse gas emissions from automobiles.
 - California and 16 other states currently suing to overturn the Bush administration’s rejection of the waiver.
 - California program would apply to CO₂ N₂O, HFCs in MY 2009, and phase-in by 2016
 - CARB claims 44 mpg. By 2020

19

Predictions 2009

2009 - EPA will begin to regulate under CAA.

Comprehensive Climate Regulation 2009-2010

Cap & Trade – 100 percent allocation; Some command and control.

Mary Nichols, Head of EPA – so look to what California has done.