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NAAQS for GHGs?

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Greenhouse Gas (GHG) Advanced Notice of Proposed Rulemaking (ANPR)

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NICHOLAS INSTITUTE FOR ENVIRONMENTAL POLICY SOLUTIONS
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Avoiding the Glorious Mess:

A Sensible Approach to Climate Change and the Clean Air Act

WORKING PAPER

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Arguments for a GHG NAAQS

- Parallel endangerment language as Sec. 202
- Science-based starting point
 - Cost is not a threshold consideration, as it is w/ Sec. 111
- Allows multi-sector approaches
- Secondary NAAQS allows flexibility and lists “climate” as a public welfare consideration
- Precedent for interstate trading programs

How Could It Work?

- Set primary NAAQS based on Paris Agreement goals, with averaging time potentially spanning decades
- Set secondary NAAQS that would not be attainable for decades
 - Rely on *UARG* precedent to allow EPA to rely on secondary NAAQS even if primary NAAQS is struck down (The *UARG* Court allowed EPA to apply BACT to GHGs if the source is already covered as a major source, thus avoiding absurd results)
- SIPs
 - Establish national carbon budget then apportion state responsibility
 - Good Neighbor Provision
 - Section 179B allows EPA to approve SIP where obstacle to attainment is “emissions emanating from outside the United States”

Legal Risks

- Major Questions Doctrine
- Limitations on *Chevron* deference
- Specific requirements for primary NAAQS/attainment
- Setting standards/allocating to states
- Could prohibit 111(d) regulations

Table 2. Comparison of the key provisions of the Clean Power Plan and the NAAQS Program

	Clean Power Plan	NAAQS Program
Federal/state roles	EPA determines if BSER has been adequately demonstrated, creates model rules, can create/implement federal plans States create/implement state plans	EPA sets NAAQS standards, creates model rules; can create/implement FIPs States create/implement SIPs
Trading	Allows trading among certain fossil fuel-fired power plants Permits intrastate and interstate trading through trading-ready pathways and multistate agreements Model trading rules available	Can apply to multiple sectors, new sources and allow trading among those sectors Can include intrastate and interstate trading Can create trading-ready pathways Model trading rules available
Implementation plan flexibility	Gives states options, including mass- or rate-based standards, trading-ready pathways, and state allowance allocation schemes	Can provide Clean Power Plan options and states or EPA may propose other measures Can encourage more limited options to encourage uniformity and capture efficiencies
Planning timeline	Up to three years	Up to three years plus possible extensions
Endangerment finding	EPA relied on the Section 202 finding ^a	EPA may rely on the Section 202 finding May require an independent demonstration that (1) the pollutant comes from multiple and diverse sources and (2) the EPA plans to issue air quality criteria for the pollutant
Permit requirements	Not applicable	Preconstruction and operating permits for certain major sources Nonattainment NSR permits require offsets
Standard	Applies to source emissions within a specific source category Requires EPA to consider costs when analyzing the BSER Likely reviewed at least every eight years	Applies to ambient air concentration economy wide EPA may not consider costs when setting NAAQS standards Costs are considered for implementation Reviewed at least every 5 years

Source: Reichert, *et al.*, *Revisiting the NAAQS Program for Regulating Greenhouse Gas Emissions under the Clean Air Act*

Comparing NAAQS and 111(d)



NAAQS

- Focus on concentration of pollutant
- Multiple sources/categories
- Pollution limits based on scientific determination
- Cost not considered when setting standard
- Precedent for trading
- Legal risks
 - Major Questions
 - Limited scope of *Chevron* deference?
 - Primary NAAQS/attainment requirements
 - Setting the pollution limit/allocating state requirements

NSPS/111(d)

- Focus on sources of pollution
- Specific source categories
- Pollution limits depends upon definition of “best system”
- Must consider cost and available technology when determining BSER
- No precedent for trading
- Legal risks
 - Major Questions
 - Limited scope of *Chevron* deference?
 - “Beyond the fenceline” challenges
 - Combine multiple categories?
 - Uncertainty about the reg. process