



# Emissions Trading under the Clean Air Act

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# Putting Things in Context

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- n Three trains are leaving the station . . .
  - § Federal legislation
  - § EPA regulation under the Clean Air Act
  - § State and regional programs
- n Our focus is on EPA legal authority to—
  - § Establish cap-and-trade program for GHG emissions
  - § Allow use of emissions offsets for meeting Clean Air Act control requirements
- n **Bottom-line conclusion: “Door is not totally shut”**

# First Wave of EPA Rulemakings

Rulemaking	Status
Reporting Rule	Final rule issued on October 30, 2009
Endangerment Finding	Final rule issued on December 15, 2009
Mobile Source Regulation	Final rule signed on April 1, 2010
EPA policy on <u>WHEN</u> permitting requirements apply	Final rule signed on March 29, 2010
Tailoring Rule on <u>WHICH</u> sources are subject to permit requirements	Proposal pending. Final rule expected in Spring, 2010
New Source Performance Standards for some large source categories	Proposed rules expected in 2010-2011

# Federal Clean Air Act

## Key Elements

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### n Stationary Source Regulation

§ State Implementation Plans for protecting air quality

§ National Ambient Air Quality Standards, PSD Increments

§ Class I impacts

§ Local and regional transport of air pollution

§ NSR permits for construction (new or modified)

§ Performance standards (new and existing)

§ Title V permits for operation

### n Mobile Source Regulation

### n GHG Reporting

# State Implementation Plans

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## n Pros

- § Statute authorizes States to use *“economic incentives, such as fees, marketable permits, and auction of emissions rights”* in developing SIP control measures
- § EPA has same authority in developing control strategies and measures for Federal Implementation Plans

## n Cons

- § Core purpose of SIP/FIP is to attain NAAQS
- § Uncertain as to whether a NAAQS for GHGs must be established before States/EPA may rely on “marketable permits” authority
- § “Marketable permits” authority may be limited by requirements of NSR and NSPS programs

# NSPS

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## n Pros

- § Statute does not expressly prohibit the use of offsets to comply with NSPS limitations
- § Statute prohibits NSPS from requiring a “source to install and operate any particular technological system of continuous reduction”
- § States/EPA could try to rely on “marketable permits” authority given that NSPS is a control measure in a SIP/FIP

## n Cons

- § Definition of “standard of performance” refers to “quantity, rate, or concentration” limits, including “any requirement relating to the operation or maintenance of a *source*”
- § May be inconsistent with the intent of Congress and purpose of NSPS program
- § Inconsistent with how NSPS requirements been implemented, except for NSPS for mercury emissions from power plants and emissions from municipal waste combustors

# New Source Review

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- n Major stationary source must obtain NSR permit before commencement of construction (new and modified)
- n Two potential opportunities for offsets
  - § Emissions standards for GHG emissions based on Best Available Control Technology (BACT)
  - § Requirement to obtain offsets in nonattainment areas

# BACT

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## n Pros

- § Statute does not expressly prohibit use of offsets to comply with BACT standards
- § BACT is defined as an “emissions limitation,” and not as the installation of specific pollution control technology
- § States/EPA could try to rely on “marketable permits” authority given NSR is one measure for achieving NAAQS in SIP/FIP

## n Cons

- § Definition of “emissions limitation” refers to “quantity, rate, or concentration” limits, including “any requirement relating to the operation or maintenance of a *source*”
- § May not be consistent with the intent of Congress and purpose of NSR program
- § Inconsistent with how EPA and states have historically implemented the BACT requirement

# Nonattainment-NSR Offsets

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## n Pros

- § Use of offsets is expressly authorized by statute
- § Rules for generating and banking “creditable” offsets for NSR compliance are well established

## n Cons

- § NSR offset requirement only applies to—
  - § “criteria” pollutants (*i.e.*, those subject to a NAAQS)
  - § Only those sources located in nonattainment areas for such criteria pollutants
- § EPA would have to establish a NAAQS for GHGs at levels below current GHG concentration levels

# Summary

Air Program	Pros	Cons
<b>SIPs/FIPs</b>	<ul style="list-style-type: none"> <li>- Authorizes use of marketable permits and trading mechanisms</li> </ul>	<ul style="list-style-type: none"> <li>- May require EPA to promulgate a NAAQS for GHGs</li> </ul>
<b>NSPS</b>	<ul style="list-style-type: none"> <li>- Expressly prohibits any requirement to install specific control technology</li> <li>- More flexibility for existing sources than new sources through SIP "marketable permit language"</li> </ul>	<ul style="list-style-type: none"> <li>- May be inconsistent with program's purpose and long-standing practice</li> <li>- Statute could be interpreted to require the limits to be applied to source</li> </ul>
<b>NSR - BACT</b>	<ul style="list-style-type: none"> <li>- Not expressly prohibited by statute</li> <li>- Emissions limitation, not requirement to install specific technology</li> </ul>	<ul style="list-style-type: none"> <li>- May be inconsistent with program's purpose and long-standing practice</li> <li>- Statute could be interpreted to require the limits to be applied to source</li> </ul>
<b>NSR - Offsets</b>	<ul style="list-style-type: none"> <li>- Requires sources to offset emissions in nonattainment areas</li> </ul>	<ul style="list-style-type: none"> <li>- Applies only to criteria pollutants</li> <li>- Must establish NAAQS for GHGs</li> </ul>

For more information

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