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An Overview of Rapid Changes in U.S. Climate Policies and Legislation

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Principal sources of change

- Federal Courts
- New Environmental Protection Agency (EPA) regulations under the Clean Air Act (CAA)
- Congressional climate change legislation
- Environmental activist groups
- The White House

Best understood by a chronology with conceptual points interwoven

April 2, 2007

- In Massachusetts v. EPA, the U.S. Supreme Court ruled that greenhouse gases (GHG) from new motor vehicles or motor vehicle engines are a “pollutant” under the Clean Air Act (CAA) and therefore the Environmental Protection Agency (EPA) is required to regulate GHG emissions in the event that it forms a judgment that those emissions may reasonably be anticipated to endanger public health or welfare by contributing to global warming.
- If EPA makes such a finding, then greenhouse gases become a “regulated pollutant” and the Prevention of Significant Deterioration (PSD) and Title V requirements automatically apply.

March 12, 2008

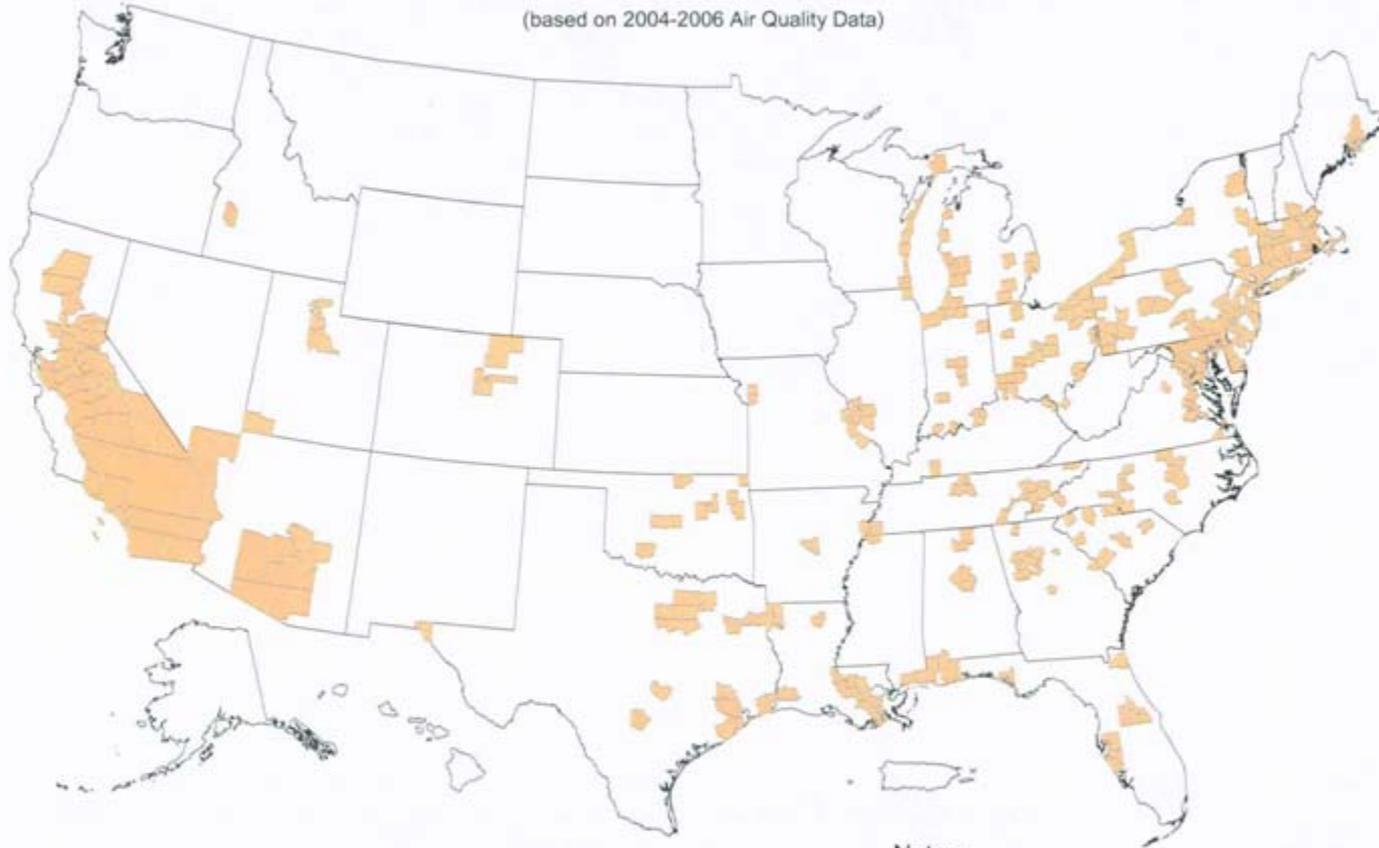
- EPA tightened national ambient air quality standards (NAAQS) for ozone from effectively 0.084 parts per million (ppm) to 0.075 ppm, potentially putting 345 counties into nonattainment status. Final determinations as to status were expected to be made by March 2010. States were to adopt more stringent state implementation plans (SIPs) to achieve the more stringent limits no later than 2013.

March 12, 2008 (continued)

- Ozone is caused by the combination of VOCs and NO_x in the presence of sunlight.
- Because of the need to control VOCs and NO_x , a wide range of small and mid-sized manufacturers and printers that use solvents, paints, and inks will be affected. Users of large industrial boilers and other combustion sources will also be affected because NO_x is a by-product of combustion.

Counties with Monitors Violating the 2008 8-Hour Ozone Standard of 0.075 parts per million (ppm)

(based on 2004-2006 Air Quality Data)



Notes:

¹ 345 monitored counties violate the 2008 8-hour ozone standard of 0.075 parts per million (ppm).

² Monitored air quality data can be obtained from the AQS system at <http://www.epa.gov/ttn/airsaqs/>

February 17, 2009

- In partial response to Massachusetts v. EPA, EPA announced that it would reconsider the circumstances under which GHG emissions are treated as subject to regulation under the CAA and that it expected to promulgate a rule to regulate GHGs from mobile sources by the end of March 2010.

April 24, 2009

- Answering directly the questions posed by the Supreme Court, EPA proposed to determine that greenhouse gases endanger the public health and welfare with respect to six gases:

Carbon dioxide

Methane

Nitrous oxide

Hydrofluorocarbons

Perfluorocarbons

Sulfur hexafluoride

April 24, 2009 (continued)

- EPA also proposed to find that emissions of these substances from new motor vehicles and their engines are contributing to air pollution which is endangering public health and welfare.
- That action would trigger both PSD and Title V applicability because GHGs would be a regulated pollutant.

June 26, 2009

- U.S. House of Representatives passes the Waxman-Markey climate bill.
- Bill contains provisions for clean energy and energy efficiency, as well as establishes a cap-and-trade system.
- A wide range of heavy industry would be required to hold allowances for their GHG emissions.
- Goal is to reduce greenhouse gas emissions by 83% from 2005 to 2050.
- Bill exempts new sources of GHG emissions from EPA New Source Review and Title V permitting under the Clean Air Act.

July 15, 2009

- The Sierra Club announced that as a result of lawsuits and grassroots pressures, 100 coal-fired electric power plants have been defeated or abandoned since its program to oppose coal-fired electric power plants was begun.
- More recently, the Sierra Club's website claimed victory over 107 power plants.

September 11, 2009

- EPA indicated to the Army Corps of Engineers that it may object to all 79 pending permits for strip mining and mountaintop coal removal due to concerns about possible contamination of rivers and streams.

September 15, 2009

- EPA announced a plan to tighten standards for wastewater discharges from coal-fired power plants to reduce pollution in the nation's waterways.
- Chemical discharges from those plants are expected to increase as new air pollution scrubbers are installed to control air pollution.

September 16, 2009

- EPA announced that it will reconsider the national ambient air quality standards (NAAQS) for ozone that were tightened in March 2008 with the potential for further tightening of those standards.
- The new standards for ozone will be proposed in December 2009
- Designation of nonattainment counties will slip until August 2011 (from March 2010), but more stringent SIPs will still be due by the end of 2013.

September 21, 2009

- The United States Court of Appeals for the 2nd Circuit ruled in Connecticut v. American Electric Power that GHG emissions from major utilities may constitute a federal common law “public nuisance,” thereby subjecting the utilities to potential suits for injunctions and/or damages (even though they are operating in accordance with all federal, state, and local statutes, rules, and regulations).
- A common law public nuisance is generally defined to mean an unreasonable interference with a right common to the general public, but as to which the complainant has suffered some harm particular to him or her.

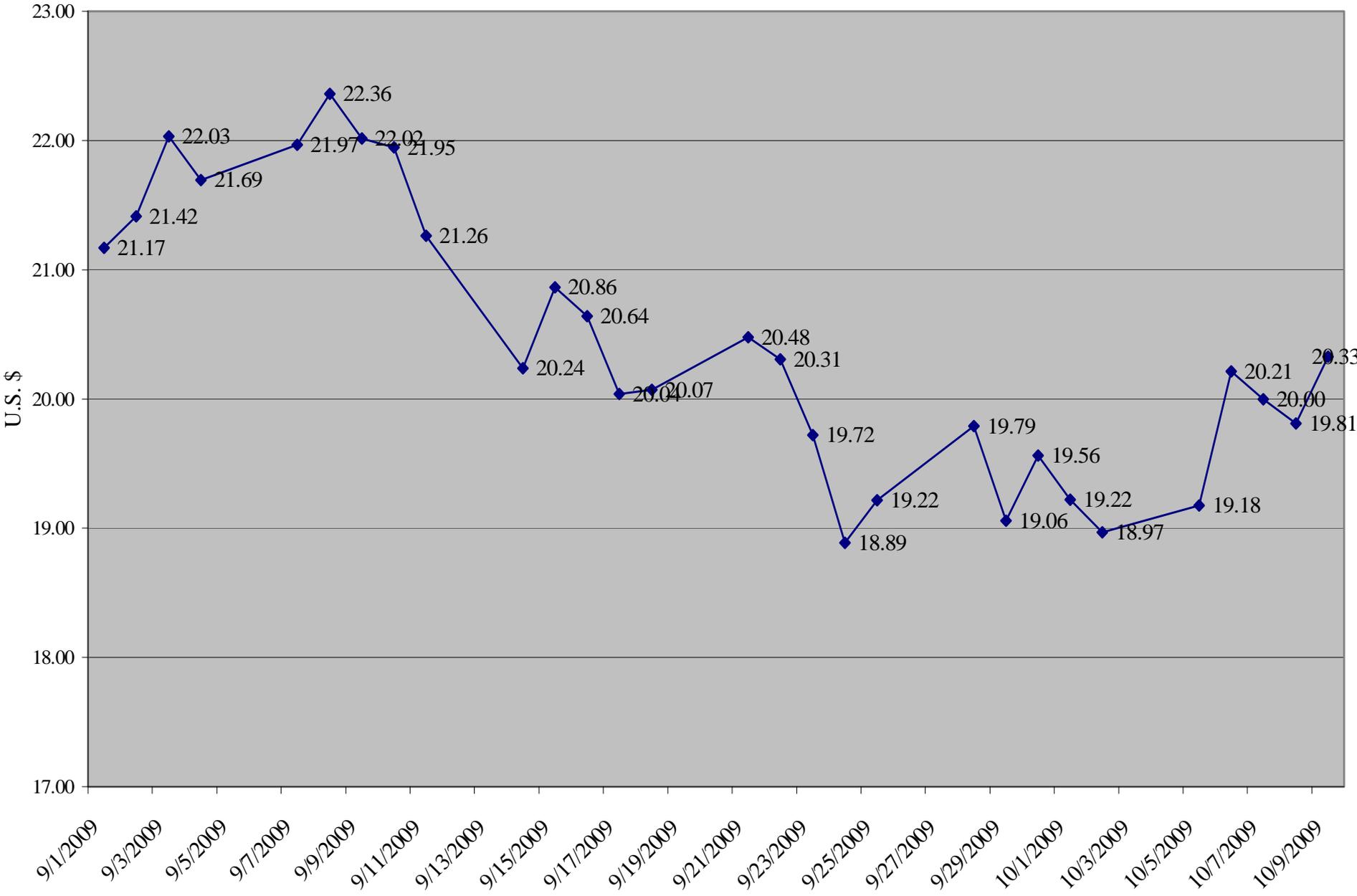
September 22, 2009

- EPA finalized a rule that requires facilities that emit more than 25,000 metric tons per year of CO₂ equivalent as well as certain other facilities to begin collecting data on GHG emissions starting January 1, 2010. The first full year of reports will be due on March 31, 2011.

September 23, 2009

- The European Court of First Instance, the second highest tribunal in the EU, ruled that the European Commission had failed to prove that Poland and Estonia had been too generous in issuing allowances and that the European Commission had “very restricted” power to review national allocation plans (NAPs). (The Commission wanted Poland to cut its allowances by nearly 27% and Estonia by nearly 48%.)
- The decision should not be relevant after Phase III begins in 2013 (when the European Commission has the right to decide on the allocation of carbon allowances for each industry sector across the EU).

Carbon Prices on European Climate Exchange - Sept. 1, 2009 to Oct. 9, 2009



September 30, 2009

- EPA announced a new proposed rule to require major sources to use best available control technology (BACT) to limit GHGs when constructing a new source or modifying an existing source.
- For PSD purposes, the Clean Air Act defines a major stationary source as one that has the potential to emit 250 tons (or for some purposes 100 tons) per year of any regulated pollutant. EPA's proposal would instead use an initial threshold of 25,000 tons of GHG per year on the basis that using the CAA standards would produce "absurd results" and out of "administrative necessity."

September 30, 2009

A draft of the Kerry-Boxer climate bill was introduced in the U.S. Senate and referred to the Committee on Environment and Public Works.

- Bill has same long-term goal of an 83% reduction in greenhouse gas emissions by 2050.
- Bill does not specify how emission allowances will be distributed among industries.
- Bill does not exempt new sources of greenhouse gases from EPA New Source Review under the CAA.

September 30, 2009 (continued)

- Kerry-Boxer bill cuts allowable portion of international offset credits to $\frac{1}{4}$ of total credits (from $\frac{1}{2}$ in the House bill)
- Bill does not outline any details for border tariff provisions
- Unlike the House bill, the Senate bill does not grant the Dept. of Agriculture the authority to oversee offset credits from agricultural and forestry sources – this falls under EPA
- Market Stability Reserve (Strategic Reserve) has minimum auction price after 2017 that is a 7% increase from the previous year, plus inflation

October 5, 2009

- EPA announced that it plans to propose new, more stringent NAAQS for fine particles by July 2010, with a final rule by April 2011.
- Executive Order issued by Pres. Obama requiring:
 - By 2015, 50% recycling by federal agencies
 - By 2020, a 20% decrease in petroleum use by federal vehicles
 - By 2030, federal buildings to have no net energy use that causes GHG emissions

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Norman W. Bernstein has advised on a wide range of regulatory matters under U.S. environmental laws and argued numerous environmental cases in federal appellate and district courts. He has assisted venture capital firms in establishing legal structures to minimize the risks of financing environmentally sensitive deals, advised on environmental disclosure issues and acquisition structuring, extracted a large pigment manufacturing plant from enforcement proceedings, made presentations on behalf of a client before OSHA and the National Toxicology Program regarding the alleged risks posed by silica and on the alleged carcinogenicity of rock wool and slag wool. He has filed comments with EPA on a wide range of rule makings and has negotiated successful settlements in Clean Air Act enforcement cases. He is also a Trustee at two Superfund sites; one is on EPA's National Priority List. His Primer on the Global Carbon Markets 2009 will be available at the breakfast meeting. Mr. Bernstein is scheduled to be one of the lead speakers at the 4th Annual Carbon Trading Summit in New York in January 2010.

Of Counsel



Donald Warner is Of Counsel to N.W. Bernstein & Associates, LLC.

Donald Warner has advised on a wide range of power generation and distribution matters and related financings, and environmental and real estate issues, including project review and feasibility analysis, due diligence review for investors, drafting and negotiating of venture capital and financing agreements, preparing steam and electric power contracts, and assisting in structuring and evaluating of purchase power bidding programs and community outreach for project development. His work has included assisting a major solar project developer in identifying and gaining site control over land needed for photovoltaic power generation, acting as consultant to major wind-development company, being retained by subsidiary of utility holding company to assist in obtaining site approval and permitting for one 300MW and two 79.9MW plants, and as local issues consultant for a proposed 500 MW gas fired plant in New England.

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