



Nicholas Institute for Environmental Policy Solutions
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Legal Limitations on Leakage Control

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Underlining the Importance of Today's Discussion

RGGI is an extremely important initiative on the world stage

- U.S. is the lynchpin of efforts to address climate change, post-2012
- RGGI, along with other less mature state efforts, are being watched as the first true movement within the United States
- Success is vital

Leakage control will be a large part of that success or failure

- If RGGI does not reduce global GHG emissions, or if it is seen as harmful to the states' economic interests, it will be cited as a negative precedent.
- Invitation in the MOU to address this issue up front should be accepted.





Leakage Control: A Challenge that Must be Addressed

- Rich Cowart's math yesterday was cowing – a 1.8% increase in imports could swamp the program's benefits.
 - The NE ISO numbers, and numbers from other analysis, seem even greater than 1.8%.
- Of the policies outlined yesterday, only one actually controlled leakage – the cap on LSE's
 - Portfolio standards might have a positive effect on emissions, but do not guarantee success
- If you go with the LSE approach, some serious legal issues should be taken on squarely in the process





Central Themes for Dormant Commerce Clause

- Purpose, purpose, purpose
- Do it all as one program
- Why is there no less discriminatory alternative?
- Don't hang your hat on long shot arguments





Purpose, Purpose, Purpose

This is a very difficult area of jurisprudence, described as “a tangled underbrush” and “virtually unworkable in practice.”

- Perception of the program’s purpose appears to influence a court’s skepticism of the arguments presented.
- Need to counter threat that this will be perceived as defensive, protectionist program – the good news is that it does not appear to be.
- Need to develop the grounds for acting that we have heard over the past day that justify the program on the interests of the RGGI states:
 - Need to reduce global GHG emissions to protect states’ physical security and natural resources
 - Minimization of RGGI’s environmental footprint
 - Sending of price signal to RGGI consumers





Facial Discrimination may be the entire analysis

Potentially dispositive inquiry is whether regulation is facially discriminatory

- Key question is whether economic burden is placed equally
- Need to persuade court to take the larger view – regulations impose identical burdens on the electricity market, but simply in two different places
 - Fighting courts’ tendency to see things by “transaction”
 - Courts have accepted laws that, “[w]hen the account is made up, the stranger from afar is subject to no greater burdens . . . then the dweller within the gates.”
 - Need to ensure the burdens are in fact, equal
- To maximize chance that the program will be seen as one, greater whole, all components of the program should be imposed at one time





If facially discriminatory:

- If you are found to be facially discriminatory against imports, your regulation begins as “virtually *per se* invalid”
- Analysis will focus on whether states have true interest in global problems, and whether less discriminatory alternative exists
 - Must establish nonprotectionist purposes that justify choice of generator cap rather than allocation to load.
- “Compensatory tax” doctrine would constitute a long shot
 - Courts are loathe to extend it past sales and use taxes
 - Complexity of calculation of emissions from imports would make it very difficult for a court to compare incidence of burden





If not facially discriminatory:

- Good chance of survival
- Legitimate government purpose should be accepted
 - Impacts assessment, global nature of GHG's effect, should be put on record
- Burden likely not excessive if perceived as nondiscriminatory
- Less restrictive alternative might still create problem
 - Courts have never struck down a law under intermediate scrutiny on this prong – much more focused on balancing of purpose and burden
 - Must establish nonprotectionist purposes that justify choice of generator cap





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Thank you.

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