

Creating a Regulatory Cap-and-Trade

The best and most important way for EPA to avoid a collision with Congress is to use its discretionary powers under the Clean Air Act to create a regulatory cap-and-trade system similar to the regimes currently being discussed before Congress.

A Smooth Transition

If EPA moves forward with a cap-and-trade system and Congress later adopts legislation, then the regulatory program can be smoothly transitioned into a new program under the cap-and-trade statute. In addition, compliance costs that were undertaken to conform to the regulatory cap-and-trade will not be wasted, and will help firms comply with the statutory program. The difficulty for EPA will be ensuring that such a regulatory approach is designed in accordance with the language of the Clean Air Act—otherwise it will be open to attack in the courts.

Fuel Trading Program

A cap-and-trade system may not be feasible for mobile source *emissions*. However, EPA can

institute a cap-and-trade system on the sale and manufacture of vehicle fuels (other than jet fuel). Not only is the statutory language broad and able to incorporate a cap-and-trade system, but a cap on fuel is preferable as an upstream point of regulation offering the greatest administrative simplicity and relatively accurate measure of actual emissions. A cap-and-trade system for fuels would be able to achieve substantial and comprehensive GHG emission reductions in the transportation sector.

Economy-Wide Cap

In addition to the authority to create a cap-and-trade for vehicle fuels, EPA has a number of options to create an economy-wide cap and trade program. Authority to control stratospheric pollution, set air quality standards, or require performance standards can all potentially be used to either create a comprehensive economy-wide cap-and-trade, or create a cap-and-trade for stationary sources that could work in tandem with a fuel-trading program. These sources of authority give EPA a great deal of flexibility to create a workable program, although some mandatory duties under the statute, as well as limitations on how the cap-and-trade program must be designed, mean that any regulatory program is likely to be second-best to a legislative approach.

Auction

Auctioning allowances under a cap-and-trade avoids windfall profits that would result from the free distribution of allowances to current emitters. Under a regulatory cap-and-trade, EPA would have the power to auction greenhouse gas allowances under a regulatory cap-and-trade program. While only Congress has the power to impose taxes on the population, an auction of allowances by the EPA does not run afoul of the constitutional designation of the taxation power because an auction of allowances is not a tax—its purpose is not to raise revenue, but instead to affect behavior. Under existing constitutional doctrine, EPA would not be overstepping its authority to auction greenhouse gas allowances, and would not be forced to give those allowances away for free to existing emitters.

International

Because emissions of greenhouse gases are a global problem, for any domestic cap-and-trade system to be ultimately successful in significantly mitigating climate change, it must be supplemented by an international regime that covers all major emitting nations. While the ratification of a treaty by a 2/3 vote of the Senate is one mechanism to conclude an international agreement, it is far more common for either the

President on his own authority, or acting according to the legislative authority, to create a binding international agreement. Under either "sole-executive" authority, or pursuant to provisions of the Clean Air Act, the President has the power to enter into an international climate regime—the participation of the United States in an international climate agreement need not wait for approval of Congress.