



**BREAZEALE, SACHSE & WILSON, L.L.P.**  
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# The Clean Air Act and the Basis for Regulation of Greenhouse Gases

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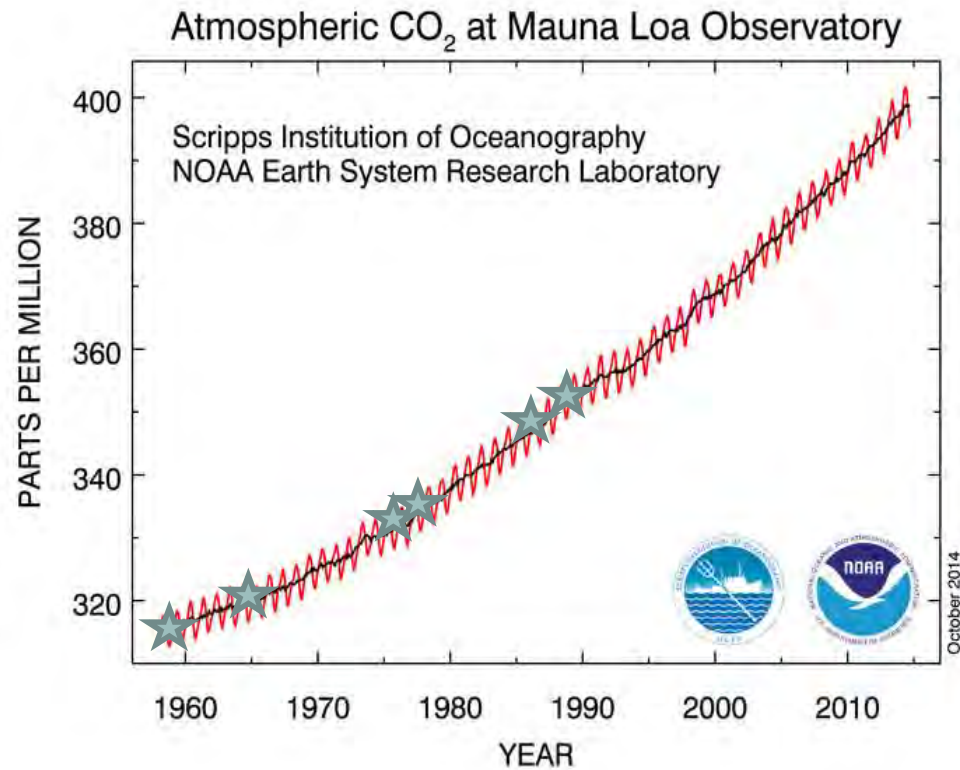
John B. King

# Outline

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- Clean Air Act
- *Massachusetts v. EPA*
- Rulemaking after *Massachusetts*
- *Utility Air Regulatory Group v. EPA*
- Other Rulemakings

# Clean Air Act – CO<sub>2</sub> rise and congressional action



- 1990 - CAA Amendments
- 1987 - Global Climate Protection Act
- 1978 - National Climate Program Act
- 1977 - CAA Amendments
- 1965 - CAA Amendments
- 1959 - CO<sub>2</sub> tracked at Mauna Loa

# Clean Air Act – Overview

Title I applies to emissions from stationary sources

- establishes NAAQS for criteria pollutants
- determines attainment or non-attainment
- PSD is preconstruction program
- emissions above 100/250 TPY Threshold
- BACT is required

Title II applies to emissions from mobile sources

- includes Section 202

Title V establishes requirement for operating permit

- 100 TPY Threshold

## Clean Air Act – Section 202

**“shall by regulation prescribe** (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

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# *Massachusetts v. EPA*

- Petition to EPA by 19 NGOs to regulate GHG under Section 202
  - 1998 warmest year on record
  - IPCC 1995: CO<sub>2</sub> is causing warming
  - EPA GCs - GHG can be regulated under Section 202
- EPA denied petition, saying it “cannot and should not regulate” GHG
  - Cannot because GHG are not an air pollutant
    - Nothing in CAA specifically allows regulation
    - 1990 CAAA required further study
    - Even if an air pollutant, DOT is required to regulate fuels
  - Should not because no conclusive link between CO<sub>2</sub> and warming
  - Would disrupt President’s comprehensive plan

# *Massachusetts v. EPA*

## Questions before Supreme Court

- Does EPA have statutory authority to regulate GHG from motor vehicles?
- Are EPA's reasons for refusing to do so consistent with the statute?

## EPA has authority because GHG are an 'air pollutant'

- Definition - any air pollution agent or combination of such agents including any substance or matter which is emitted into or otherwise enters the ambient air
- The statutory definition "is unambiguous" and "capacious"
- On its face, definition embraces 'all airborne compounds of any stripe'

## EPA was wrong to refuse

- All of EPA's reasons not to regulate were divorced from the statutory text
- Statute requires a 'judgment' within bounds of statute

## Result

- Section 202 authorizes EPA to regulate GHG from new motor vehicles "in the event it forms a 'judgment' that such emissions contribute to climate change"

# Rulemaking after *Massachusetts*

- Advanced Notice of Proposed Rulemaking
- Endangerment Finding
- Cause or Contribute Finding
- Light-Duty Vehicle Rule
- Timing Rule
- Tailoring Rule

# Rulemaking after *Massachusetts*

## Section 202

In EPA's judgment...

- Can air pollution reasonably be anticipated to endanger public health or welfare?
- Do emissions of any air pollutant from motor vehicles cause or contribute to that air pollution?

If an affirmative judgment is made, then...

- EPA shall by regulation prescribe standards applicable to the emissions of any such air pollutant

# Rulemaking after *Massachusetts*

## Endangerment Finding

**Can air pollution reasonably be anticipated to endanger public health or welfare?**

air pollution

- the six well-mixed GHG

reasonably be anticipated to endanger

- encompasses current and future risks
- EPA not required to react to harm or act only when certainty is achieved
- something less than actual harm
- Section 202 is intended to be preventative in nature

public health or welfare?

- quite broad and includes effects on weather and climate

# Rulemaking after *Massachusetts*

## Cause or Contribute Finding

**Do emissions of any air pollutant from motor vehicles cause or contribute to that air pollution?**

air pollutant

- same six GHG

from motor vehicles

- studies document emissions of CO<sub>2</sub>

cause or contribute

- allows one or the other
- not the sole or even major cause
- contribution does not have to be significant

to that air pollution

- air pollution - the total, cumulative stock in the atmosphere
- air pollutant - the flow that changes the size of the total stock



# Rulemaking after *Massachusetts*

## Light-Duty Vehicle Rule

**Once an affirmative judgment is made, then EPA shall by regulation prescribe standards applicable to the emissions of any such air pollutant.**

EPA initially prescribed emission standards for new passenger cars, light-duty trucks, and medium-duty passenger vehicles

Applied to Model Year 2012

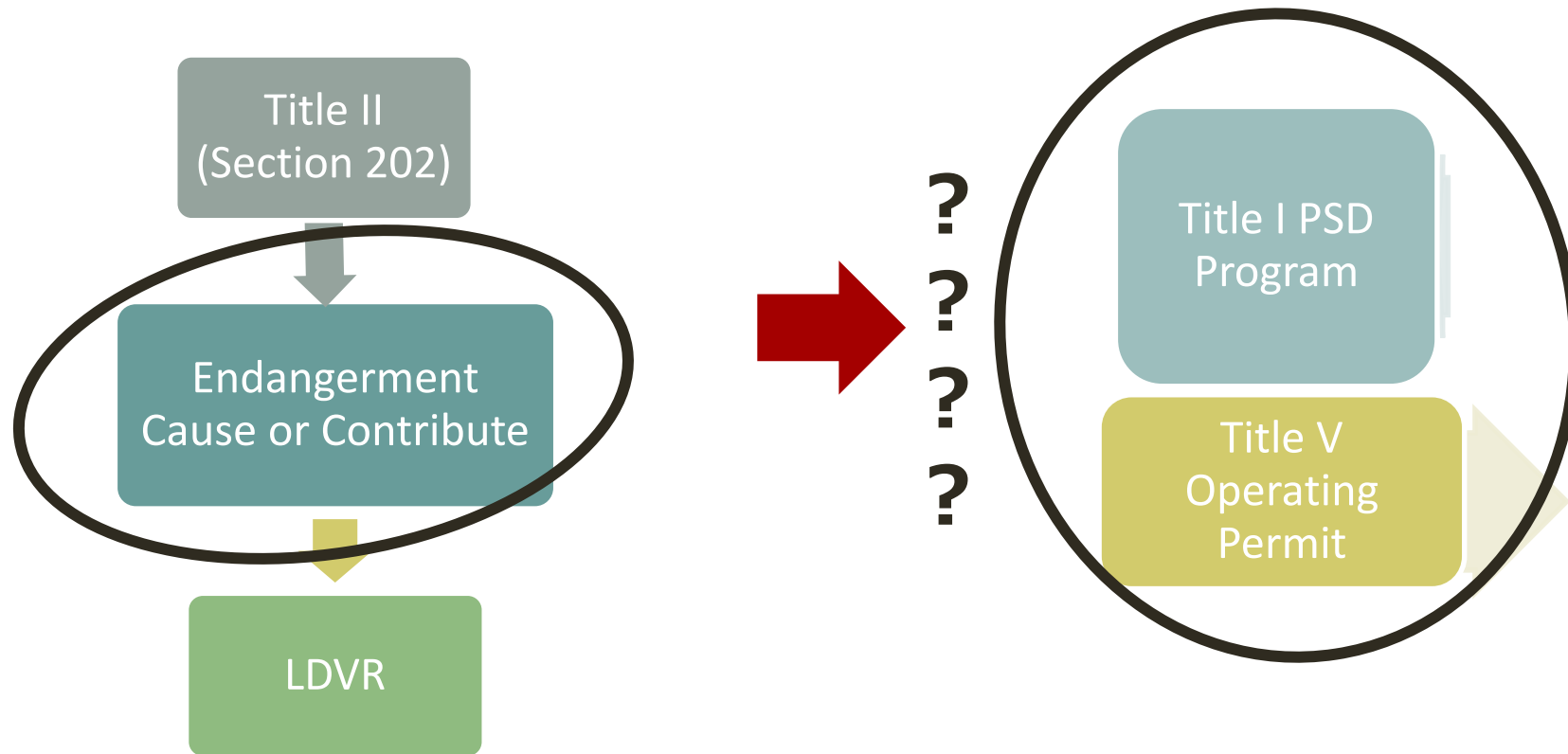
January 2, 2011

First day MY 2012 vehicles could be introduced in commerce

Later prescribed emission standards for heavy-duty vehicles

# Rulemaking after *Massachusetts*

## Timing and Tailoring Rule



# Rulemaking after *Massachusetts*

## Timing Rule

### Regulation of air pollutant under PSD?

- Major emitting facility – source of air pollutants over 100/250 Threshold
- Regulated pollutant includes a pollutant ‘subject to regulation’ under CAA
- BACT for each pollutant ‘subject to regulation’ under this chapter (ie, the CAA)

### EPA’s ‘long-standing interpretation’ of ‘subject to regulation’

- When CAA or regulation requires ‘actual control’ of emissions of that pollutant
- As opposed to only monitoring or reporting requirements
- Date is when the controls on a pollutant first ‘take effect’

### When are GHG ‘subject to regulation’ and thus a ‘regulated pollutant’?

- January 2, 2011 – the date actual controls took effect
- First day vehicles to which the LDVR applied could be introduced in commerce

# Rulemaking after *Massachusetts*

## Tailoring Rule

### Permit thresholds applied to GHG?

- 100/250 TPY in PSD; 100 TPY in Title V
- Millions of sources would be STR and need permit
- Creates enormous burden on applicants and regulatory agencies

### Justification for departure from statutory permit thresholds?

- Absurd results
  - Literal application beyond what Congress could have intended
- Administrative necessity
  - Permitting authorities would be overwhelmed
- One-step-at-a-time
  - Acceptable if on track to achieve full statutory compliance

# Rulemaking after *Massachusetts*

## Tailoring Rule

### **EPA phased in permit requirement in three steps**

#### Step 1

- Anyway sources (already subject to PSD/Title V due to non-GHG)
- PSD: Subject to PSD anyway for non-GHGs and emit > 75K of GHG
- Title V: Only sources required to have Title V permit for non-GHG

#### Step 2

- Step 1 Sources, and regardless of non-GHG ...
- PSD:
  - New sources with 100,000 TPY GHG
  - Changes at major sources greater than 75,000 TPY GHG
- Title V:
  - Sources with 100,000 TPY GHG

#### Step 3

- Established enforceable commitment for final rule by July 1, 2013

# *Utility Air Regulatory Group v. EPA*

Petitions for Review of the rules were filed

- Consolidated for judicial action
- Upheld Endangerment, Cause or Contribute, LDVR
- No standing for Timing and Tailoring Rules

Supreme Court review limited to one issue

- Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases

Decision

- Rejected the Timing Rule
- Invalidated the Tailoring Rule
- EPA has authority to impose BACT on 'anyway' sources

# *Utility Air Regulatory Group v. EPA*

**Source not subject to the PSD/Title V on the sole basis of emissions of GHGs**

Sweeping definition of air pollutants does not compel regulation

- Been given narrow meaning by EPA in other contexts
- Definition describes universe of what may be regulated
- Can still exclude from regulation if inconsistent with CAA

Must operate within the bounds of reasonable interpretations

- EPA acknowledged application would overthrow CAA's design
- PSD/Title V designed to handle only larger sources

Cannot re-write statute

- 100/250 TPY Threshold is clear
- EPA has no authority to rewrite unambiguous statutory terms

# *Utility Air Regulatory Group v. EPA*

**‘Anyway’ source can be required to employ the BACT for GHGs**

Required ‘for each pollutant subject to regulation under this chapter’

- The ‘chapter’ is the entire CAA

GHG subject to regulation under Section 202

- So, BACT is required

Limited holding

- EPA not prohibited from applying BACT to GHG at ‘anyway’ sources
- Does not mean they have to, though
- Suggested a *de minimis* threshold



# Other Rulemakings

## GHG Reporting Rule

## Oil and Gas - Reduced Environmental Completions

- Requires capture of methane during flowback period

## New Power Plants (proposed)

- Relying on Section 111(b)
- New fossil fuel-fired units is 1,100 lb CO<sub>2</sub>/MWh
  - BSER is partial implementation of carbon capture and storage
- New natural gas units is 1,000 lb CO<sub>2</sub>/MWh (large)/1,100 lb CO<sub>2</sub>/MWh (small)
  - BSER is modern, efficient natural gas combined cycle technology

## Existing Power Plants (proposed)

- Relying on Section 111(d)
- Seeks a 30% reduction in GHGs 2005 levels by 2030
- Sets reduction goals for each state to meet
- States are free to figure out how to meet the goals



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## Questions?

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