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**RALPH CHILD**

**DAVID O'CONNOR**

**COLIN VAN DYKE**

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## **Why RGGI Should Die and State GHG Regulation Should Thrive**

**By Ralph Child, David O'Connor and Colin Van Dyke<sup>1</sup>**

Leading states and environmental advocates justly trumpet the northeastern states' Regional Greenhouse Gas Initiative (RGGI) and parallel regional efforts such as the Western Climate Initiative. These programs indicate that a cap and trade system can limit carbon emissions without unacceptable cost or disruption to the U.S. economy. The proceeds from RGGI auctions of CO<sub>2</sub> allowances also provide major funding for energy efficiency and clean generation projects. See [http://www.rggi.org/states/program\\_investments](http://www.rggi.org/states/program_investments)

Yet both of the major congressional proposals to tackle global warming—Waxman-Markey and Kerry-Lieberman—include explicit pre-emption of state cap and trade programs in favor of a federalized program. This article:

- 1) Summarizes why federal pre-emption of states' environmental requirement runs counter to a long history of environmental legislation;
- 2) Explains why limited pre-emption is needed in this case and is consistent with a broad preservation of the states' other tools to limit carbon emissions; and
- 3) Discusses the consequences of pre-empting state cap and trade programs.

At this writing, enactment of federal cap and trade during 2010 appears doubtful, although a program might emerge that is limited to the power generation sector (like RGGI!). Still, assuming that some federal cap and trade program does emerge, pre-emption and its consequences will need resolution.

### **Federalism and State Environmental Requirements**

Pre-empting states' environmental requirements runs counter to long-established principles of federal legislative policy. The Clean Water Act, the Clean Air Act, and the other foundational enactments of federal environmental protection all provide a set of federal requirement, but generally preserve a state's authority to impose more stringent local requirements.

Bedrock principles of federalism underlie that history. The states are seen as more able to discern local needs and tailor the federal programs to local conditions, and as providing "laboratories" for developing best practices. Indeed, RGGI and similar programs are prime examples of the virtues of leaving broad scope for states to go beyond federal minima.

Yet there are instructive examples of federal environmental laws that do prohibit more stringent state requirements. Most prominently, the Clean Air Act forbids states from regulating mobile sources—automobile and truck emissions—beyond what EPA requires, albeit with the major nuance that California is allowed to set its own standards—subject to EPA's waiver of federal pre-emption—and other states may adopt California's rules. This protected automobile manufacturers from needing to meet a plethora of standards for the

obvious reasons of overall efficiency in manufacturing, marketing, and maintenance of fleets of vehicles. At the same time, the nuance provided room for California and other states to assert their needs.

### **RGGI Should Be Pre-empted by a Federal Cap and Trade Program**

The reasons are straightforward. An effective national trading system requires a consistent set of standards; it would be inefficient and unfair to expect businesses to meet multiple standards as to what counts as a tradable allowance. While a 50-state mechanism to reconcile differences is conceivable, there is no good reason to undertake such a complicated task that, among other obstacles, likely would require 50-state legislation. Avoiding such inefficient complexity is one great benefit of a national government.

Unlike a facility's water discharges and SO<sub>2</sub> or NO<sub>x</sub> emissions, moreover, local CO<sub>2</sub> emissions do not have specifically local impacts. So the reasons for fostering state level standards just do not pertain to a national cap and trade system.

This support for pre-emption of RGGI and similar programs assumes, of course, that an eventual federal cap and trade program will be at least nearly as stringent as RGGI. But even a weaker set of requirements, if national, probably will cause greater reductions in GHG emissions than a set of regional programs.

### **The Pending Legislation Establishes a Federal Currency for Allowance Trading While Still Preserving States' Authority to Require GHG Reductions**

Section 335 of the Waxman-Markey bill, as passed by the House, accordingly would prohibit any state from implementing a cap and trade program for the years 2012 through 2017. The Kerry-Lieberman bill goes further and permanently pre-empts state cap and trade programs in sections 2305 and 2501.

At the same time, both bills use substantially similar language to preserve broad state autonomy to compel greenhouse gas reductions by means *other* than establishing cap and trade systems. They each specifically would allow a state to require its sources to surrender some of the allowances granted under the federal law. The bills do not say so, but a state could then retire those allowances or could resell them to raise revenue for the sorts of programs currently funded with RGGI proceeds.

The bill also would allow a state to set its own direct limits on a source's GHG emissions, and to require a source to use federal allowances as a way of demonstrating compliance with such state or municipal standards. These broad limits on the scope of pre-emption substantially preserve the states' ability to impose more stringent standards, as long as states do not do so via their own cap and trade systems. Indeed, by requiring surrender of federal allowances or by forcing lower emissions, states could substantially influence the costs of GHG allowances in the overall market.

In a real sense, the bills would simply establish a currency—the federal allowances—and then cap the amount of that currency that is available for the covered sectors. Any competing state currencies would be retired, but still a state could influence the costs for emitting GHGs and could also require direct GHG reductions.

## **Consequences**

Perhaps the most interesting consequences are unknowable until a federal cap and trade system is established and states then respond. How many states will choose to saddle their CO<sub>2</sub> sources with requirements to surrender federal allowances or to meet more stringent emission standards? It has been sensible for states to impose more stringent environmental standards for pollutants with mainly local impacts, but that reasoning does not readily apply to CO<sub>2</sub>. As a spur to national progress and local development of alternative energy, RGGI has been a success. But if a federal system is established, it will be interesting to see whether the RGGI states continue to impose more stringent requirements.

Similarly, the real consequences of any state requirements to surrender allowances are unknowable. But a substantial reduction in the total number of allowances actually available for compliance across the country would reduce total emissions below the federal requirements and would increase the cost of allowances and the overall cost of compliance.

One certain consequence is that the RGGI states' existing revenues from auctioning RGGI allowances would disappear. So would the programs those revenues have financed unless replacement dollars are found. Kerry-Lieberman nods to that loss by allocating 2/3 of 1% of the federal allowances to those states with pre-existing cap and trade programs, but only for the first three years.

Still, the state programs financed with RGGI allowance proceeds are but a small portion of the efforts at the federal and state levels to transform the energy sector. Even now, Department of Energy subsidies of multiple kinds, state RPS programs, and state-mandated utility efficiency and smart grid programs collectively dwarf the RGGI-financed efforts. Enactment of any broad federal energy or climate legislation will only enhance those non-RGGI efforts.

## **Conclusion**

It is too dramatic to claim that RGGI must die so that federal cap and trade may live. Still, RGGI must die for federal cap and trade to operate sensibly. As long as federal pre-emption of state cap and trade programs preserves states' abilities to foster greenhouse reductions in other ways, both RGGI and its demise should be celebrated.

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<sup>1</sup>Ralph is a member and Colin Van Dyke is an associate of the Environmental Section at Mintz Levin. David is a Senior VP of ML Strategies. From 1995 to 2007, David was the Commissioner of Energy Resources in Massachusetts and was directly involved in the establishment of RGGI.