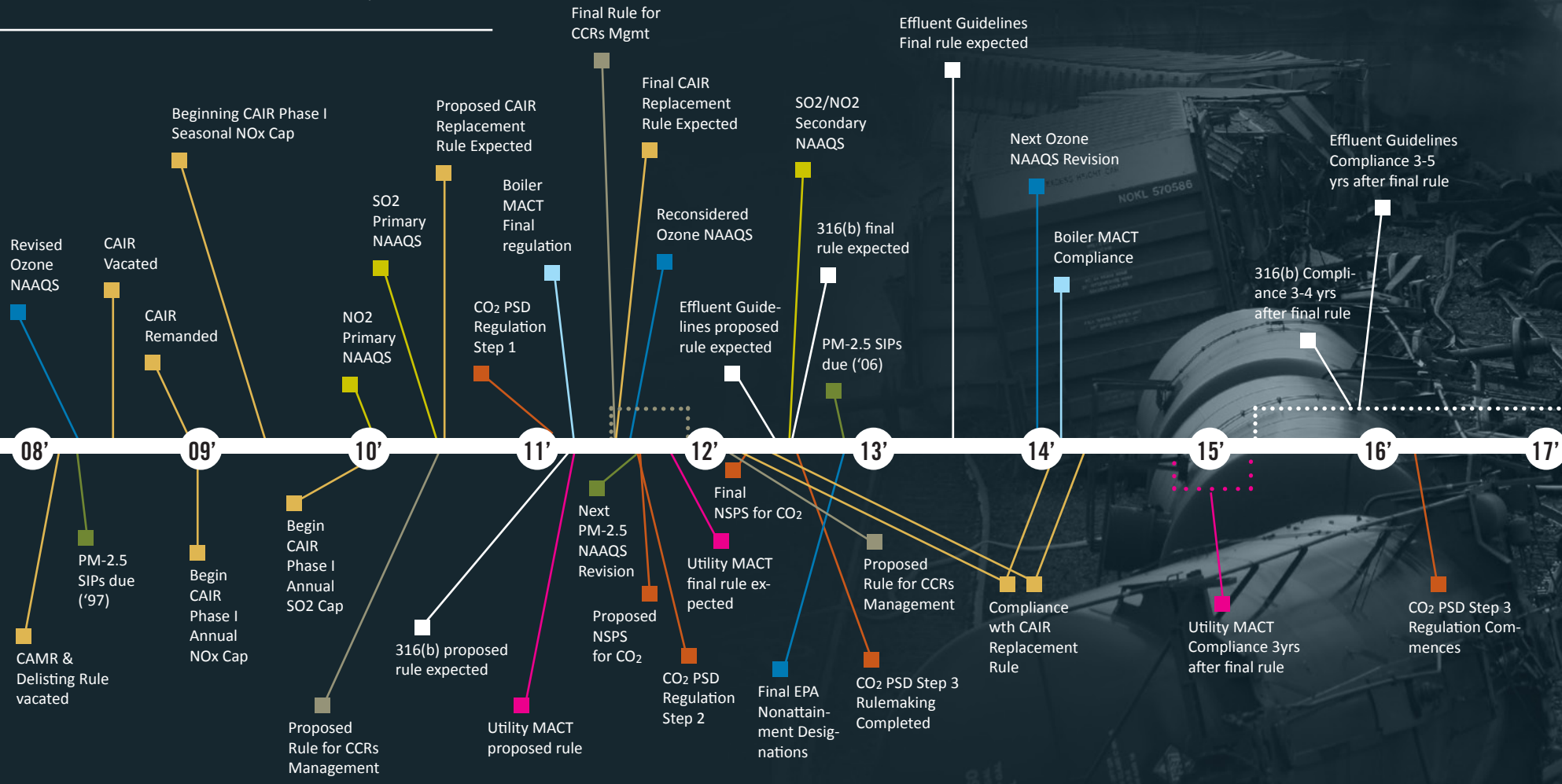


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**EPA'S  
REGULATORY TRAIN WRECK**  
STRATEGIES FOR STATE LEGISLATORS

# EPA's Regulatory Train Wreck

Currently Estimated Regulatory Timeline for Coal-Fueled Power Plants and Commercial Industrial Boilers (as of January 2011)





## EXECUTIVE SUMMARY

### Introduction

The Environmental Protection Agency turned 40 years old in December 2010. To celebrate the occasion, the Agency undertook one of the most breathtaking and hostile regulatory assaults on energy affordability and electric reliability in our nation's history. While pending regulation of greenhouse gas emissions under the Clean Air Act (despite Congressional rejection of cap-and-trade) has received the lion's share of the attention, EPA has also begun promulgating and will continue promulgating over the next several years a slew of overreaching and inefficient air and water rules that will dramatically increase energy costs, cause enormous negative impacts to jobs and the economy, irreparably damage the competitiveness of American business, and trample on the rights of states in the process.

Despite the resounding expression of disapproval for the Administration's big government market interventions by voters last November, the Agency has pushed ahead in its regulatory onslaught without regard to economic realities or democratic accountability. This report highlights one small subsection of this emerging regime—EPA's assault on the use of fossil fuels, and particularly coal, for electric generation and other commercial and manufacturing processes—to illustrate the broader issues resulting from EPA's regulatory train wreck.

### Cap-and-Trade Through the Back Door

EPA's hostility to fossil fuels is a telling example of what the Agency has in mind for the American economy. Eighty-five percent of American energy is produced from fossil fuels; about 50 percent of American electricity comes from coal. America is the Saudi Arabia of coal; it is by far our most abundant domestic source of energy. The fact that the nation uses so much coal reflects its low cost, ready availability, and proven effectiveness as a stable and reliable fuel.

Yet despite the fact that emissions from the use of coal have sharply declined over the last several decades and will continue to decline with the introduction of new clean and green-

coal technologies, EPA wants to remove coal completely from the equation. Instead, EPA wants to force the nation into a "green revolution" by implementing the rejected cap-and-trade agenda through regulation. In the words of President Obama in an interview with *Rolling Stone* last Fall following defeat of cap-and-trade in Congress: "One of my top priorities next year is to have an energy policy that begins to address all facets of our over-reliance on fossil fuels. We may end up having to do it in chunks, as opposed to some sort of comprehensive omnibus legislation."

Or as the President reiterated in his first press conference after the 2010 elections: "Cap-and-trade was just one way of skinning the cat; it was not the only way."

But the voters rejected the Administration's revolutionary approach to environmental policy in the November elections. The market will supply the energy innovations the country needs; government's role is to reduce the regulatory burden, encourage innovation, and otherwise get out of the way.

### The Regulatory Train Wreck

Reflecting its government-knows-best attitude, EPA is developing and finalizing nearly 30 major regulations and more than 170 major policy rules. By late November of 2010, these changes had already surpassed the Agency's regulatory output in the entire first term of Bill Clinton, which the *Wall Street Journal* notes was a period in which "the EPA had just been handed broad new powers under the 1990 revamp of air pollution laws."

EPA's pipeline in the near term just for the use of coal for electric generation and for commercial and industrial purposes includes:

- Regulation of GHG emissions from industrial, manufacturing and electric generation facilities under the enormously inefficient New Source Review program;
- Regulation of essentially the same emissions from the same facilities under the inflexible, top-down, command-and-control New Source Performance Standards program;
- Regulation of cooling water intake structures at fossil fuel (and nuclear) electric generating stations under the Clean Water Act without adequate justification;
- Regulation of mercury, acid gases, and other hazardous air pollutants from power plants as well as from commercial and industrial boilers (despite the lack of evidence that emissions in these miniscule quantities cause health or welfare impacts) using the inflexible, stringent, command-and-control mechanisms set forth in the National Emissions Standards for Hazardous Air Pollutants section of the Clean Air Act;

- Regulation of sulfur dioxide and nitrogen oxides under the Clean Air Transport Rule, a rule that utilities must comply with starting on January 1, 2012, even though EPA is still formulating the rule and doesn't expect to finalize it until this Summer at best;
- Regulation of coal combustion residuals under the Resource Conservation and Recovery Act, with the potential for designating this material for the first time ever as a hazardous waste, a designation which could seriously damage the use of coal for electric generation;
- Promulgation of stringent ozone and particulate matter standards under the National Ambient Air Quality Standards (NAAQS) program, with EPA revising standards recently adopted during the Bush Administration that environmental groups objected to;
- Restrictions on mining permits in Appalachia in an effort that will gut the coal industry and kill jobs in that region.

The images contained in the EPA Train Wreck chart illustrate that there is nothing orderly or reasonable about this approach; this regulatory assault entails overlapping mandates, unattainable deadlines, and uncertainties that combine to threaten economic recovery, state sovereignty, and the very basis of our market-based affordable energy system. As anyone familiar with the implementation of the Clean Air Act over the last forty years will tell you, the low-hanging environmental fruit have been picked, and these additional pollution rules are likely to exponentially increase costs with minimal clean air and water benefits.

## No Cost Too Much

What will all of this regulation cost? EPA doesn't know and evidently doesn't care to find out. Despite pleas from a broad cross-section of business, EPA has refused to undertake a study of the effect of its greenhouse gas regulatory initiatives on jobs, the economy and the business competitiveness. It has similarly failed to conduct a study of the overall, cumulative cost of all of its regulations together. Others have been forced to weigh in on what that cost will be; as discussed in the report, that cost is enormous.

It is not, though, simply a matter of the scope of these regulations that constitutes a train wreck. As Kathleen Hartnett White and Mario Loyola of the Texas Public Policy Foundation (hailing from a state that has felt the brunt of EPA's revised approach to cooperative federalism) note: "The new heavy-handed EPA... operates far more like an activist for whom no standard is too high, no impact too onerous, no risk too low and no science too speculative."

*"It makes sense for state and local air pollution agencies to take the lead in carrying out the Clean Air Act. They are able to develop solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors... The states must involve the public and industries through hearings and opportunities to comment on the development of each state plan."*

- United States EPA, "The Plain English Guide to the Clean Air Act," 2007

## Cramming Down Greenhouse Gas Regulation

Nowhere is EPA's regulatory overreach more apparent than in its misguided effort to regulate greenhouse gases under the Clean Air Act, a statute that was never intended for that purpose. EPA was determined to have greenhouse gas regulation in place by the beginning of this year in order to create a fait accompli for the incoming Congress. As a result, the end of 2010 saw an unprecedented flurry of last-minute rulemaking. EPA promulgated no less than 11 greenhouse gas regulations in 2010, 7 of them in December, and 6 of them totaling more than 500 pages were issued on the eve of the Christmas holiday and did not get published in the Federal Register until the last two business days of 2010.

And what EPA did to states to get this program implemented by the beginning of 2011 is nothing short of unconscionable. Because states in most cases administer the "PSD" and "Title V" permit programs under which EPA chose to regulate greenhouse gases, the Agency ordered states to change their state laws and regulations under which these programs operate in order to conform to EPA's new greenhouse gas requirements. But the Agency gave states only a few months to make the needed law changes. With time running out in 2010, EPA actually threatened states with a construction ban for large industrial and manufacturing sources if the states did not make the necessary law and regulatory changes on EPA's incredibly expedited schedule. And so the final months of 2010 witnessed a large majority of states galloping through rulemakings, some

of them having to invoke emergency authority to meet EPA's schedule, in order to avoid the construction ban. Some states did not make it; as of January 2, 2011, EPA imposed a federal implementation plan on 8 states that did not act quickly enough.

And then EPA had the nerve to announce in a press release that the Agency and the states had "worked closely" to implement the GHG program. That is simply not the case. Appended to the report is a paper entitled "What States are Really Saying about EPA GHG Regulation." It contains excerpts from a dozen state environmental agencies expressing displeasure with the heavy-handed EPA approach.

EPA's intrusion on states' rights in implementing its greenhouse gas program is only one example of the Agency's disregard for the interests of states. The report details a number of others.

## More and More Regulation

While this report focuses on EPA rulemakings that primarily target the use of coal as a particular case study, it is worth noting that this regulatory onslaught is also underfoot in a variety of other fields. For example, having finalized greenhouse gas emission restrictions under the Clean Air Act for 2012 through 2016 model-year passenger vehicles and light trucks in April 2010, the Agency has already proposed the first-ever GHG standards for medium- and heavy-duty vehicles and is also in the process of developing additional light-duty vehicle standards for model-years 2017 to 2025. EPA also has under consideration greenhouse gas rules covering almost every sector of the economy, from cars and trucks to ships, boats and airplanes, to mining and agriculture, to all types of manufacturing and industrial facilities, to movable equipment of every kind (from fork lifts to lawnmowers), and to residential and commercial buildings.

Beyond greenhouse gases, EPA has considered or is in the process of taking up additional regulation of numerous products, emissions, and activities, including: hydraulic fracturing; the widely-used herbicide atrazine; formaldehyde emissions from pressed wood products; lead wheel weights; water nutrients in Florida; lead bullets and tackle; pesticide spray drift; dust; Portland cement; and Bisphenol A.

## What Can State Legislators Do?

Given all of this EPA regulatory activity, now is an essential time for concerned state legislators to stand athwart a train wreck, and yell Stop. The first half and indeed the first few months of

2011 could prove decisive, as EPA moves to implement as much of its regulatory agenda as possible before it can be stopped. In the first part of 2011, Congress appears set to consider, both through more extensive EPA oversight and legislative vehicles like the Congressional Review Act, ways to limit EPA authority.

What then can state legislators do to stop the train wreck? The report outlines some of the comprehensive and issue-specific legislative tools at your disposal, including expressing strong opposition to EPA's regulatory train wreck via resolutions, enhanced regulatory review, bills to assert state sovereignty, and tips for getting your state on the right side of the ongoing legal and public relations struggles. As unemployment hovers around nine percent, it is the duty of states to weigh in against the effects of these job-crushing regulations.

*In particular, as the highest-priority near-term action item, we urge you to give close consideration to the resolution highlighted in Chapter 5 calling on Congress to stop the train wreck.* The resolution has been introduced in a number of states, and has, as of early February, passed out of state houses in Indiana and Wyoming. Our allies in Congress need to hear your support immediately; the Administration needs to understand your determination.

Finally, while the report offers a glimpse into this train wreck as it stands in early 2011, the regulatory environment is obviously dynamic. To provide ongoing updates to this material (including news on additional rulemakings, innovative tools, and links to new studies), an accompanying website is hosted at [www.regulatorytrainwreck.com](http://www.regulatorytrainwreck.com). This website also contains video from an ALEC workshop held at the 2010 States and Nation Policy Summit on "EPA's Regulatory Assault: Higher Prices, Fewer Jobs, and Less Energy," with indispensable analysis from Peter Glaser of Troutman Sanders LLP law firm, and Harry Alford of the National Black Chamber of Commerce. We will keep you up-to-speed on the progress of the Stop the Train Wreck resolution in legislatures across the country. We encourage you to check this site often. If you have any additional questions or requests for model legislation, please contact ALEC's Energy, Environment and Agriculture Task Force Director, Clint Woods, at [cwoods@alec.org](mailto:cwoods@alec.org) or 202.742.8542.

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