

I've been reading the Waxman-Markey energy and climate [discussion draft](#) released earlier in the week (and blogged about by Rick [here](#)). One thing I'm puzzling over is the draft's treatment of state cap and trade regulations. As many have noted, the question of which state climate efforts are saved and which are preempted is an important one—several of the Legal Planet crew heard Mary Nichols & others talk about its importance and about the need for “new models of cooperative federalism” at this [conference](#) on the topic in February.

Here are some of the important related questions, it seems to me: (1) will states be able to require capped entities within their borders to reduce emissions by more than the federal cap alone requires? (i.e., will the federal cap be a floor, not a ceiling?) (2) if so, will states also be given the ability to ‘retire’ those additional reductions, so that they don't simply free up allowances that permit industries in other states to pollute more, cancelling out gains? (3) what role, if any, will states be asked or empowered to play in implementing/enforcing the federal cap? (4) will the answers to these questions vary by state or by emissions sector?

I'm not sure the discussion draft answers any of these questions clearly, but here's what I've found so far (the bill is 648 pages long). Sec. 861 provides that

no State or political subdivision thereof shall implement or enforce a cap that covers any capped emissions emitted during the years 2012 through 2017. For purposes of this section, the term ‘cap’ means an absolute tonnage limit on the amount of greenhouse gases that can be emitted by a group of sources over a specified time period, and that does not vary with any other factor, including the number of sources covered, the amount of time the sources operate, and the production of the sources. For purposes of this section, the term ‘cap’ does not include, among other things, fleet-wide motor vehicle emission requirements that allow greater emissions with increased vehicle production, or requirements that fuels, or other products, meet an average pollution emission rate or lifecycle greenhouse gas standard.

This would seem to prohibit (for six years) state cap-and-trade programs, but to allow for additional state emissions regulations aimed more narrowly at particular sources even if those sources are covered by the federal cap. It also seems to leave ample room for state

emissions requirements based on performance standards (like best available technology stds), efficiency measures, and other metrics aside from a static cap—even if those requirements apply to groups of sources or to whole sectors under the federal cap too. Needless to say, the last sentence appears aimed squarely at saving the [Pavley clean-car regs](#) and state efforts like California’s proposed [Low Carbon Fuel Standard](#).

Open questions include whether states would be permitted to ‘retire’ allowances and what states’ roles might be in implementation and enforcement of the federal cap.

All of this is just the starting point for fierce battles, I’m sure. But anyone else find provisions of relevance to state CAT or have thoughts on where this leaves states’ efforts?