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ARGUS Q&A

Timothy Profeta

Timothy Profeta is director of the Nicholas Institute for Environmental Policy Solutions at Duke University. Before becoming the Nicholas Institute's first director in 2005, he served as counsel for the environment to US senator Joe Lieberman of Connecticut. In this interview, edited for length and clarity, Profeta talks about President Barack Obama's 25 June speech in which he called for greenhouse gas (GHG) regulations for existing power plants.

Argus: The president directed the Environmental Protection Agency (EPA) to issue a proposed standard by 1 June 2014 and a final rule a year later, with states' plans due to EPA by 30 June 2016. Were you surprised by the timing?

Profeta: It did not surprise me at all. The mercury trading program under the Clean Air Mercury Rule (CAMR), which the Bush administration put forward in 2005 under the same section of the Clean Air Act, was finalized about 14 months after the proposal, and this is a 12-month schedule. Given this past experience, it seems like it is a priority schedule they could keep.

Argus: Was CAMR finalized so quickly because of the commercial availability of mercury-control technologies like activated carbon? There are not as many commercially available technologies in the US for controlling GHGs, right?

Profeta: I think it is important to clarify how technology is considered in this type of rulemaking process. I do not think what technology is available will affect the timing of the rulemaking process. Under section 111(d) of the Clean Air Act, the EPA will have to create a guideline ... for states that basically sets an emission target as to how much GHG reduction the EPA determines is generally achievable. The level and stringency of the target depends upon what is the "best system of emissions reduction." How the states and power plants meet the emission target (including any technology-based strategies)

will depend not so much on the administrative process for developing the rule, but on the form and stringency of the target once the rule is finalized.

Argus: Will EPA be able to fit in a stakeholder feedback session with states in the two-year window?

Profeta: Right now, a year to propose and a year to finalize the guidelines from EPA is an aggressive but doable schedule. The EPA needs to stick to that schedule if the Obama administration is going to evaluate the plans before leaving office, because regulations will require EPA to evaluate state plans within four months of the submission deadline. If the deadline is 30 June 2016, four months later is 30 October 2016, and that is the end of the clock for the Obama administration.

The states will have 13 months to take the stakeholder feedback into the creation of their plans, and I think many of the states will be able to move along on that schedule.

Argus: With other criteria pollutants like SO₂ and NO_x, states have traditionally had up to three years to adopt a state implementation plan (SIP), and sources have to attain the standard within a maximum five years from when non-attainment designations are effective. What does the implementation timeline look like for the existing source GHG standard?

Profeta: According to what the president put forward, the "SIP-like plans" of 111(d) will be approved by fall 2016. The precise compliance date for utilities is not determined at this point, but it will depend on timing requirements outlined in the EPA's emission guidelines and state implementation plans.

Argus: Do you think EPA's GHG standards will spur additional legislation from Congress?

Profeta: In the short term, I am skeptical that Congress will create its own GHG regulatory program. Instead, I think there will be an aggressive fight over EPA's authority using the

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Congressional Review Act and appropriation bills. But I do not see momentum behind a carbon regulatory program in Congress now. Over the medium term, this program – if implemented well – could help stimulate federal legislative efforts.

Argus: What do you mean by “stimulate federal legislative efforts?”

Profeta: Because section 111(d) of the Clean Air Act ... challenges states to come up with plans with GHG reductions, states might innovate and find flexible regulatory mechanisms that achieve reductions more cost-effectively than some thought possible. That could inspire a broader federal program. If [states] can demonstrate cost-effective mechanisms to achieve emission reductions, then that could take away some of the fear surrounding the economic impact of a program that is preventing federal policymakers from legislating.

Argus: One of the proposed flexibilities in an existing standard is the ability to average emissions. How do you feel averaging could work?

Profeta: There is going to be a lot of uncertainty as to what will be permissible in state plans under this program. There is a strong school of thought that the compliance will not be source by source but could be achieved across the state’s fleet of sources, through allowing techniques such as averaging, which would allow a utility to meet its emissions target on average across its fleet rather than needing to meet it at every particular source. Approaches such as this would allow more flexibility than requiring action at each individual unit.

Argus: Carbon trading is happening in California and in the Regional Greenhouse Gas Initiative (RGGI). Do you think a national trading program under section 111(d) could face legal challenges like those that brought down the Cross-State Air Pollution Rule?

Profeta: First of all, I think the ruling on trading [for the cross-state rule] was very much focused on the Clean Air Act provisions of interstate pollution that involved reductions from neighboring states. None of [those provisions] apply to GHGs, which are a global stock pollutant, and had no direct precedent of being regulated under section 111. I also do not think that a top-down national trading program is anticipated or planned under section 111, as the provision anticipates state leadership and the administration has been clear that it is looking to use its discretion to create a more state-based approach.

States may well consider new regional approaches, whether they be market-based or otherwise, as they create

their plans under 111. In particular, I can foresee that states will realize that the actions of their interconnected neighbors will have a great deal of impact on their own plans, and their own economies, so there will be a motivation to coordinate regionally in some way

But with all of these questions, the problem with section 111 is that there is so little of a track record in its application that it is hard to find a precedent on which we can lean. At the same time, the opportunity of section 111 is that, because there is so little track record, there is a great deal of malleability in the language.

Argus: Can you give more specific examples of how there are opportunities and challenges under section 111?

Profeta: In California, the state will have a carbon market that crosses not just the utility sector. As a result, it will have to be assessed as to whether it is equivalent to the guidelines produced by the EPA. RGGI is a multi-state trading market. The EPA will have to look at the Clean Air Act to see whether there is a way to allow a multi-state program to be compliant with section 111. Both these programs, if permitted, will ensure that EPA’s guidelines will consider flexibilities for all 50 states, not just California and RGGI.

Argus: Do you know what EPA’s guidance will look like?

Profeta: I do not know. For the guidance EPA issued under CAMR, there was a mercury cap-and-trade program, and the guidance encouraged states to adopt the model rule that would allow them to participate in that program. Based on what the president has said [for an existing-source GHG standard], I believe that EPA is more likely to produce a guidance document allowing states to devise their own programs ... and not follow one model rule.

Argus: Have you heard any discussion from states yet?

Profeta: There has already been at least three years of discussions among states and other stakeholders on how to tackle GHG emissions. Based on those discussions, I think many of the states will push to use the most cost-effective, most flexible mechanisms, whether it is through energy efficiency programs, through pre-existing carbon market programs or through renewable portfolios that create emission reductions across the grid.

Due to the lack of precedent, there is no clear legal picture on how far states can push in that direction. We will find out in the end, probably through the courts, as they evaluate some state programs that were on the aggressive end of the spectrum.