

OF ELEPHANTS AND MOUSEHOLES

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SPPI REPRINT SERIES



February 17, 2011

WORKING PAPER

October 2010
No. 1010

Published by:

AMERICANS FOR PROSPERITY®

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How EPA Could Revive Cap-and-Trade

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Summary: The Obama administration is rapidly promulgating greenhouse gas regulations under the Clean Air Act, something it was arguably never designed to do. This series of regulations is fraught with difficulties as the Environmental Protection Agency is trying to redefine several provisions of the Act in order to apply them to greenhouse gases. This Working Paper examines the possibilities that the EPA could resurrect cap-and-trade as either best available control technology for prevention of significant deterioration permits or as the standard of performance under the new source performance standard program. In order to use either of these provisions to enact a greenhouse gas cap-and-trade program, EPA will have to find “an elephant in a mousehole.” The Paper also includes a discussion of how cap-and-trade would help EPA accomplish emission reduction goals that cannot be effectively pursued under a traditional application of the Clean Air Act.

With the prospects of a legislative greenhouse gas reduction program fading into the midterm election sun, the Obama administration is relying on a regulatory scheme to implement the program. The Environmental Protection Agency (EPA) has been preparing a spate of greenhouse gas (GHG) regulations under the Clean Air Act (CAA) ever since the agency issued an endangerment finding in December 2009. Part of this series of regulations will include compliance guidelines for states and regulated entities, which could include cap-and-trade. However, in order to employ cap-and-trade as a compliance vehicle under existing CAA authority EPA will have to claim that Congress intended EPA to have this authority all along. EPA’s assertion will have to be that in spite of the years of debate on Capitol Hill, twenty years ago Congress hid a massive GHG cap-and-trade program in a few small CAA phrases. Or as Justice Scalia termed it, EPA is going to claim Congress hid an “elephant in a mousehole.”²

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² *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001), reminding, “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions -- it does not, one might say, hide elephants in mouseholes,” citing *MCI Telcoms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).

I. The Environmental Protection Agency on Safari

The CAA requires EPA to advise states and covered sources on how they must comply with the regulations EPA issues. There are two plausible compliance vehicles that EPA could contort to discover a GHG cap-and-trade program. The first is best available control technology for the prevention of significant deterioration permitting program. The second, and more likely outlet, are new source performance standards.

A. Best Available Control Technology

The first mousehole EPA could claim houses cap-and-trade authority is called “best available control technology” (BACT), which covers regulated entities applying for “prevention of significant deterioration” (PSD) permits. Under the CAA, BACT is defined as “an emission limitation based on the maximum degree of reduction” possible.³ The Act authorizes the use of “production processes and available methods, systems, and techniques”⁴ as viable BACT options; clearly a broad and permissive definition. Historically, this has lead to scrubbers or baghouses for traditional pollutants like particulate matter or carbon monoxide.

However, GHGs are obviously very different from anything currently regulated under the CAA and there is currently no viable BACT under a traditional definition. Former EPA attorney Jason Burnett argues, “Right now we don’t have any precedent for what constitutes BACT for [GHGs] . . . There will be people arguing that [carbon capture and sequestrating] is not commercially available and therefore can’t constitute BACT . . . BACT is supposed to be a case-by-case review, where you’re looking at the best technology at that point in time.”⁵ The key is that EPA currently has no GHG BACT listed in its clearinghouse, which is the starting point for regulated sources trying to comply with regulations.⁶

There are four important limitations that will constrain EPA during the GHG BACT determination, two of which will likely preclude the Agency from uncovering a viable cap-and-trade program in the BACT mousehole. First, BACT decisions must be made on a case-by-case basis during each PSD permitting process.⁷ This complicates the prospects of a blanket declaration that GHG BACT will be cap-and-trade. However, it is plausible EPA could limit the BACT choices in its clearinghouse and thus essentially lead each horse to water one-by-one. This would be time consuming process that would conflict with EPA’s intent to sweep the nation into GHG regulations quickly.⁸ Second, PSD permits only apply to new major sources or sources that undergo major modification.⁹ This stipulation will also serve to slow the nation’s adoption of a cap-and-trade program.

³ Clean Air Act, § 169(3).

⁴ *Id.*

⁵ Interview with Jason Burnett, conducted by David Roberts, GRIST.ORG, Sept. 15, 2009. <http://www.grist.org/article/2009-09-15-an-interview-with-jason-burnett-who-worked-on-epa-greenhouse-gas/>.

⁶ ENVTL. PROTECTION AGENCY, RACT/BACT/LAER Clearinghouse. <http://cfpub.epa.gov/RBLC/>.

⁷ Clean Air Act, § 169(3).

⁸ Letter from EPA Admin. Lisa Jackson to Senator Jay Rockefeller, stating that EPA intends to begin requiring GHG permitting for large stationary sources in 2011. Feb. 22, 2010. <http://media.washington-post.com/wp-srv/special/climate-change/documents/post-carbon/022210adm-letter.pdf>.

⁹ Clean Air Act, § 165(a).

Third, EPA cannot require a fundamental redesign of the regulated entity.¹⁰ This limitation will likely eliminate processes such as integrated gasification combined cycle (IGCC) from becoming BACT. In 2005 EPA found “applying the IGCC technology would fundamentally change the scope of the project and redefine the basic design of the proposed source.”¹¹ Finally, EPA is required to select BACT that is both “achievable” and commercially “available” on a large scale.¹² This stipulation will likely disqualify carbon capture and sequestration (CCS). Although CCS is a rapidly improving technology, it still faces numerous obstacles and will certainly not be ready on a commercially viable scale in time to meet EPA’s accelerated implementation timetable for GHG permitting.

These limitations combine to create a very troubling statutory environment that would seem to neither legally support a cap-and-trade BACT nor serve regulators’ desires to implement the regulations on an accelerated timetable.

B. New Source Performance Standards

A second, and more plausible, mousehole for EPA’s cap-and-trade safari are “new source performance standards” (NSPS), which cover both new sources and existing sources emitting criteria pollutants.¹³ NSPS’ ability to cover the entire sector of GHG emitters without having to wait for new construction or major modification is a significant advantage over employing cap-and-trade as GHG BACT.

The CAA defines NSPS as “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.”¹⁴ The D.C. Circuit Court of Appeals interpreted this language as:

An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way. An achievable standard is one which is within the realm of the adequately demonstrated system’s efficiency and which, while not at a level that is purely theoretical or experimental, need not necessarily be routinely achieved within the industry prior to its adoption.¹⁵

The reasonability language in the *Essex* opinion provides significant room for EPA to argue that cap-and-trade will accomplish its emission reduction goals while still claiming they can control the system’s costs by adjusting the number of permits issued each year. This reasonability standard cuts to the very heart of agency overreach.

¹⁰ “As noted in prior EPA decisions and guidance, EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives.” EPA Guidance Letter from Stephen Page, Director, Off. of Air Quality, Plan. and Standards. *Best Available Control Technology Requirements for Proposed Coal-Fired Power Plant Projects*. Page 2. Dec. 13, 2005. <http://www.epa.gov/region7/air/nsr/nsrmemos/igccbact.pdf>.

¹¹ *Id.*

¹² Clean Air Act, § 169(3).

¹³ *Id.*, § 111(d).

¹⁴ *Id.*, § 111(a).

¹⁵ *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433-34 (D.C. Cir. 1973).

The “demonstrated system” prong is bolstered by EPA’s existing management of the acid rain cap-and-trade system. Furthermore, there are several existing GHG cap-and-trade programs that EPA could point to as evidence that while the system is not “routinely achieved within the industry,” it is also not “purely theoretical or experimental.”¹⁶

The CAA also requires that NSPS achieve a “continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.”¹⁷ Cap-and-trade could satisfy the “continuous emission reduction” requirement on a national scale, as EPA could lower the number of emission allowances granted each year, yielding an ever-falling cap. However, each individual source would not necessarily be on a consistent downward trajectory. The ability of covered sources to bank, borrow or trade excess permits as needed is a flexibility that attracts cap-and-trade supporters. This flexibility would result in years where a covered source did not continuously reduce its emissions, and quite the contrary could increase its emissions.

This analysis is further complicated because NSPS does not require a uniform national standard. Instead, the CAA empowers EPA to “distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing” NSPS.¹⁸ It seems difficult to see how EPA could achieve both a “continuous emission reduction” and provide cap-and-trade flexibility for individual sources by foregoing a national standard.¹⁹

EPA has given some indication that it is attracted to the NSPS option. In March, 2010, Senior EPA Policy Analyst Anna Marie Wood spoke at an American Bar Association meeting and stated the CAA “could enable us to include emissions trading” as a compliance vehicle for GHGs.²⁰ Wood was likely referring to a cap-and-trade program under NSPS, as EPA’s FY 2011 budget request—released only a month before Wood’s comments—included \$7.5 million “to assess and potentially develop NSPS regulations for major industrial sectors and seek, where possible, market-oriented mechanisms and flexibilities to provide lowest cost compliance options.”²¹

The NSPS program appears to be the most promising mousehole for EPA to discover a cap-and-trade behemoth. The ability to treat different sources differently is a priority for cap-and-trade designers. Furthermore, the NSPS reasonability standard elucidated in *Essex* provides the greatest flexibility for regulatory design.²²

¹⁶ *Essex*, 486 F.2d at 433-34, *see also*, EPA Admin. Lisa Jackson’s involvement establishing the Regional Greenhouse Gas Initiative, http://www.rggi.org/Lisa_Jackson.

¹⁷ Clean Air Act, § 302(l).

¹⁸ *Id.*, § 111(b)(2), *see also*, *Sierra Club v. Costle*, 657 F.2d 298, 318 (D.C. Cir. 1981), holding “EPA is expressly authorized by section 111 to ‘distinguish among classes, types and sizes within categories of new sources for the purpose of establishing ... standards.’ Thus, the statute provides on its face that EPA does not have to set a uniform percentage reduction requirement for an entire category of emission sources.”

¹⁹ *Costle*, 657 F.2d at 339, citing as example “all new coal-fired sources are subject to the same emissions ceiling and all must apply some level of continuous emission reduction technology to control sulfur dioxide emissions.”

²⁰ Simon Lomax, *EPA Studying Own Carbon-Trading System, Official Says* (Update2), BLOOMBERG.COM, March 15, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ammjHfzRpc9I>.

²¹ ENVTL. PROTECTION AGENCY, *FY 2011 EPA Budget in Brief*, Page 21.

²² *Essex*, 486 F.2d 427 (1973).

II. Implementing a CAA Cap-and-Trade Program

Under either BACT or NSPS, EPA's CAA authority for a cap-and-trade program is arguably housed in the implementation plan structure. The CAA requires states to submit state implementation plans (SIPs) that delineate how they will reduce emissions for multiple pollutants to federally mandated levels. EPA then reviews and approves the plans, requires revisions, or federalizes the program using a federal implementation plan (FIP) if EPA finds the state lacking.

EPA could list cap-and-trade as the NSPS technique for GHGs, then turn to the states and “recommend” that the states codify the standard in their SIPs. The Act allows SIPs to feature, among other things, “enforceable emission limitations ... including economic incentives such as fees, *marketable permits*, and *auctions of emissions rights*” (emphasis added).²³ If the state balks at EPA's mandate—as Texas has already pledged to do—EPA can seize the state's permitting program.²⁴ The CAA gives EPA the “authority to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan.”²⁵ EPA's statutory authority to design FIPs contains similar language as the SIPs program, authorizing “enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as *marketable permits or auctions of emissions allowances*)” (emphasis added).²⁶

If EPA can show that there is no better way for covered entities to reduce GHG emissions, these two implementation plan provisions would seem to give EPA authority to either force states to put their industries in a cap-and-trade program or take the program away from the states and do it themselves.

III. History of Cap-and-Trade under the Clean Air Act

EPA has a short and unsuccessful history trying to use cap-and-trade outside of the explicit Title IV language that authorizes the scheme for sulfur dioxide (SO_x) and nitrogen oxide (NO_x).²⁷ In 2005, the Bush administration's EPA proposed the Clean Air Mercury Rule (CAMR), which would have created a cap-and-trade program for mercury emissions from large stationary sources, specifically electric utility steam generating units.²⁸ In 2008, the DC Circuit Court of Appeals struck down CAMR on the basis that the complementary Delisting Rule—which removed mercury's preexisting hazardous pollutant designation under § 112 and was required before EPA could introduce the cap-and-trade program under § 111's NSPS—could result in an increase in mercury emissions.²⁹

²³ Clean Air Act, § 110(a).

²⁴ “On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions.” Letter from Texas Att’y Gen. Greg Abbott and Chairman of the Texas Commission on Env’tl. Quality Bryan Shaw to EPA Admin. Lisa Jackson and Regional EPA Admin. Alfredo Armentariz. August 2, 2010. <http://www.openmarket.org/wp-content/uploads/2010/08/texas-rejects-tailoring-rule.pdf>.

²⁵ Clean Air Act, § 111(d).

²⁶ *Id.*, § 302(y).

²⁷ *Id.*, §§ 401-416.

²⁸ *Revision of December 2000 Regulatory Finding (Delisting Rule)*, 70 Fed. Reg. 15,994 (Mar. 29, 2005) and *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units (CAMR)*, 70 Fed. Reg. 28,606 (May 18, 2005).

²⁹ *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

The court found EPA had not included the proper scientific basis for delisting mercury. The court did not reach the merits of whether the proposed cap-and-trade scheme was a suitable new source performance standard.³⁰

One argument against the CAMR trading program was that it could result in hotspots where concentrations of mercury would reach unacceptable levels. This of course is not true of GHGs, which disperse evenly across the globe regardless of where they are emitted or reduced.

Additionally, EPA designed the Clean Air Interstate Rule (CAIR) around a voluntary cap-and-trade program pursuant to Title I's National Ambient Air Quality Standards (NAAQS) and Title IV's existing NO_x and SO_x programs.³¹ By 2008, the DC Circuit Court of Appeals had struck down CAIR as well.³² The court found CAIR lacking because its "regionwide caps [had] no state-specific quantitative contribution determinations or emission requirements ... [and] the trading program [was] unlawful, because it [did] not connect states' emissions reductions to any measure of their own significant contributions."³³ The specificity the court faulted EPA for neglecting could be included in a newly crafted GHG cap-and-trade program and it is possible EPA could sidestep the specificity landmine this time around.

Both CAMR and CAIR were EPA attempts to create cap-and-trade programs for pollutants that were already regulated under the CAA. However, EPA is in the process of regulating GHGs for the first time and cap-and-trade advocates have been urging EPA to employ the program somehow under the CAA.

In October, 2010, the Nicholas Institute for Environmental Policy Solutions at Duke University released a working paper aimed at avoiding the glorious mess that would ensue if EPA tried to use the CAA for GHGs.³⁴ The paper's authors urged that § 111 provided authority for an NSPS cap-and-trade program that would be "a cost effective program that delivers meaningful emissions reductions, is consistent with both the statutory language of the [CAA] and legal precedent, and is politically viable."³⁵

In July, 2009, the Institute for Policy Integrity at New York University School of Law petitioned EPA for a GHG endangerment rulemaking for automobile and aircraft fuels and for EPA to create a cap-and-trade program under §§ 211 and 231.³⁶

³⁰ *New Jersey*, 517 F.3d at 583-84.

³¹ *Clean Air Interstate Rule - Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (CAIR)*, 70 Fed. Reg. 25,162 (May 12, 2005), *see also*, *Finding of Significant Contribution and Rule-making for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone*, 63 Fed. Reg. 57,356, 57,358-59 (Oct. 27, 1998).

³² *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

³³ *Id.* at 929-30.

³⁴ *Avoiding the Glorious Mess: A Sensible Approach to Climate Change and the Clean Air Act*, Nicholas Inst. for Env'tl. Pol'y Solutions, DUKE UNIVERSITY, Oct. 2010. <http://nicholasinstitute.duke.edu/climate/policydesign/avoiding-the-glorious-mess> (accessed Oct. 20, 2010), *see also*, "We are looking at the possibility of a glorious mess being visited upon this country," U.S. Rep. John Dingell as spoken to the U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON ENERGY AND AIR QUALITY: *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities*, April 9, 2008.

³⁵ *Id.* at 2.

³⁶ Letter to EPA Admin. Lisa Jackson, *Re: Petition for Rulemaking Under Sections 211 and 231 of the Clean Air Act to Institute a Cap-and-Trade System for Greenhouse Gas Emissions from Vehicle Fuels*, Inst. for Pol'y Integrity, NEW YORK UNIVERSITY SCHOOL OF LAW, July 29, 2009. <http://policyintegrity.org/documents/7.29.09IPIPetitiontoEPA.pdf/projects/documents/7.29.09IPIPetitiontoEPA.pdf> (accessed Oct. 17, 2010).

The Institute argued the § 211(c)(1) language “control or prohibit” allows EPA to institute some sort of upstream cap-and-trade program for the nation’s fuel supply.³⁷ This is obviously a much weaker assertion than the explicit implementation plan language in §§ 110 and 302.

While EPA did finalize an endangerment finding for GHGs in December 2009, it appears they have rejected the Institute’s call for a vehicle and aircraft fuel cap-and-trade program. Instead, EPA has issued a series of escalating CAFE standards for the country’s vehicle fleet as a means to control GHGs. The most recent joint EPA-NHTSA proposal seeks to hike CAFE to an extremely challenging 62 mpg by 2025.³⁸ The timing of this latest intent to regulate is conspicuous given that it will take two years from issuance to implementation and President Obama is up for reelection in 2012. If Obama were to lose that race this proposed CAFE hike would be his last bite at the apple.

IV. Why the Obsession with Cap-and-Trade?

It is important to understand why cap-and-trade advocates are so insistent on finding a way to use the CAA to implement the program, instead of the CAA’s traditional options. A cap-and-trade scheme is crucial to their plans for three important reasons: integration with existing carbon markets, increased number of regulated sources and funding for politically favored energy projects. All three of these were legislative goals for a cap-and-trade program but none of these desires can be fulfilled using a traditional NSPS or BACT structure.

Primarily, there are number of existing carbon markets that cap-and-trade advocates had planned to link to a national legislative cap-and-trade structure.³⁹ The idea was to reward early actors in voluntary markets like the Chicago Climate Exchange, subsume regional programs like the Regional Greenhouse Gas Initiative and demonstrate America’s international cooperation with the Kyoto Protocol’s Clean Development Mechanism. Creating specific statutory provisions that link existing programs and a long-sought national cap-and-trade program would accomplish all of these goals. It is unlikely that EPA machinations could achieve the same depth of integration though a CAA cap-and-trade program.

Secondly, EPA has finalized the Tailoring Rule in an attempt to demonstrate that EPA is only interested in curtailing the largest GHG emitters.⁴⁰ The rule unilaterally and perhaps illegally rewrites the CAA’s applicability thresholds for PSD and Title V GHG permitting requirements.⁴¹

³⁷ Letter to EPA Admin. Lisa Jackson, *Re: Petition for Rulemaking* at 21.

³⁸ *Notice of Upcoming Joint Rulemaking to Establish 2017 and Later Model Year Light Duty Vehicle GHG Emissions and CAFE Standards*. ENVTL. PROTECTION AGENCY and NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. on behalf of the DEP’T OF TRANSP., Sept. 30, 2010. Page 25. http://www.nhtsa.gov/staticfiles/rule-making/pdf/cafe/2017+CAFE_and_GHG_Notice_of_Intent.pdf.

³⁹ H.R. 2454 (Waxman-Markey), 111th Cong., 1st Sess. § 790 (2009), *see also*, *American Power Act* (Kerry-Lieberman) 111th Cong., 2d Sess. § 786 (2010).

⁴⁰ *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule* (Tailoring Rule), 75 Fed. Reg. 31,514 (June 3, 2010).

⁴¹ Marlo Lewis, *EPA’s Tailoring Rule: Temporary, Dubious, Incomplete Antidote To Massachusetts v. EPA’s Legacy of Absurd Results (Part I)*, MASTERRESOURCE.ORG, Jan. 7, 2009. <http://www.master-resource.org/2010/01/epas-tailoring-rule-temporary-dubious-incomplete-antidote-to-massachusetts-v-epas-legacy-of-absurd-results/>.

However, a cap-and-trade NSPS would greatly expand the program's reach. Because cap-and-trade programs often rely on offsets as an alternative means of compliance, covered entities have the opportunity to reach into non-covered areas of the economy to demonstrate emissions reductions.⁴² In this way, the covered sources are boosting EPA's reach by bringing in sources outside the tailored range. Without a cap-and-trade NSPS, EPA would be unable to reach these emitters without lowering the tailoring threshold and thus revealing just how far they really want the GHG regulations to reach.

Finally, a cap-and-trade NSPS would provide much-needed funding for politically favored but uneconomical forms of energy production. Offsets not only increase the NSPS coverage but they also create funding for upstart projects. As long as the price of the offsets is lower than the price of the emissions allowances, covered entities will face an economic incentive to plow capital into non-covered emissions projects, often including wind, solar, hydro and biomass energy. Funding for these types of energy sources has long been a source of contention. Political favoritism has carried them quite far and Capitol Hill is still contemplating a renewable electricity standard that would mandate a certain portion of the nation's energy supply come from these sources.⁴³ A cap-and-trade NSPS with offset potential would encourage regulated entities to fund these projects in a way that traditional CAA regulations could not do.

V. Conclusion

The idea of turning to the agency state to accomplish the same goals that the People's congressional representatives refused to make law runs afoul of the nation's democratic principles. Unfortunately, it appears that cap-and-trade advocates are less concerned with preserving these institutional checks-and-balances than they are with pushing hard to get the scheme enacted.

The fact that Congress spent an entire title in the CAA designing a cap-and-trade program for NO_x and SO_x but did not do so for GHGs certainly points to a lack of congressional intent that EPA regulate them in that fashion. EPA has twice—in both CAMR and CAIR—tried to discover cap-and-trade in a statutory mousehole; and twice the proposal has been vacated. Despite rejection from both Congress and the courts, EPA is still hunting for elephants.

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⁴² For examples of legislative desire to encourage offsets in GHG cap-and-trade programs, see, H.R. 2454, §§ 731-43, see also, *American Power Act*, §§ 731-42, 751-63.

⁴³ Darren Goode, *Brownback says handful or more Republicans in play on RES*, E² WIRE: THE HILL'S ENERGY AND ENV'T BLOG, Sept. 23, 2010, <http://thehill.com/blogs/e2-wire/677-e2-wire/120649-brownback-says-handful-or-more-republicans-in-play-on-res>.

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