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The EPA's Carbon Footprint

Federal regulation of greenhouse gas emissions will impose new controls on millions of Americans.

Jonathan Adler from the March 2010 issue

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On December 7, as delegates from around the world gathered in Copenhagen for the United Nations climate conference, Environmental Protection Agency Administrator Lisa Jackson announced that her bureaucracy would begin to regulate the emission of carbon dioxide and other gases deemed to be warming the planet. "Today, I'm proud to announce that EPA has finalized its endangerment finding on greenhouse gas pollution," Jackson proclaimed. As a consequence, the agency "is now authorized and obligated to take reasonable efforts to reduce greenhouse pollutants under the Clean Air Act."



"Reasonable" here is in the eye of the beholder. The 1990 Clean Air Act was designed for conventional air pollutants such as particulates and ozone smog, not for carbon dioxide. Applying those rules to CO2 will mean imposing costly regulations not just on cars and factories but on commercial buildings, churches, and even residences. All told, more than 1 million entities could become subject to new federal controls on greenhouse emissions.

The EPA power grab was no surprise; indeed, it was inevitable. The regulatory train was set in motion in 2007, when the Supreme Court ruled by a 5-4 vote in *Massachusetts v. EPA* that the Clean Air Act applied to greenhouse gases. The EPA probably would have made the same move had John McCain been president, by court order if not voluntarily. Now that the train is picking up speed, it will be almost impossible to stop and difficult to control. If you think federal environmental regulation is costly and inefficient, you ain't seen nothing yet.

Orders From the Court

The push to extend the Clean Air Act began late in the Clinton administration. In 1998, during a House Appropriations Committee hearing, EPA Administrator Carol Browner told Congress that existing law provided enough authority for the agency to begin regulating the greenhouse gases that environmentalists fear are warming the planet past the point of no return. An EPA legal memorandum on this point soon followed. Environmental groups then tried to force the agency's hand by filing a petition demanding regulation, but the Clinton White House, still smarting over a failed 1993 attempt to impose a nation-wide energy tax, was in no rush to adopt such far-reaching regulations.

By the time the Bush administration took over, the greens were tired of waiting for an answer. In 2002, the petitioners sued the EPA for failing to act. The Bush EPA formally denied the petition in 2003, on grounds that it lacked the authority to regulate greenhouse gases because the Clean Air Act

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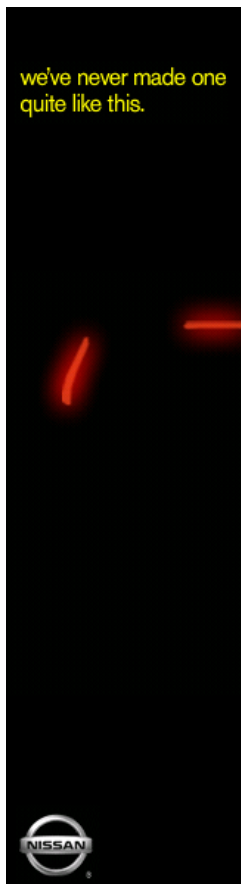
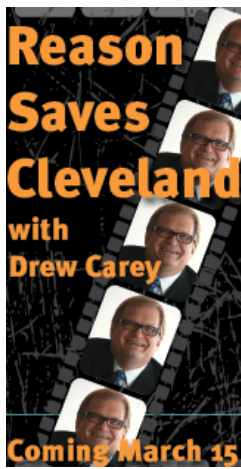
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was written to address localized air pollutants, not globally dispersed emissions such as carbon dioxide. If Washington wanted to fight climate change, the administration argued, coordinated international efforts made more sense than haphazard regulation via a law written in a different time for a different purpose.

The petitioners, now joined by several northeastern states and others, promptly sued. They prevailed in 2007, when the Supreme Court's narrow majority concluded that the EPA had power to regulate greenhouse gas emissions and had acted arbitrarily in declining to exercise the Clean Air Act's underlying authority.

Under the original law, the EPA is required to regulate any emissions that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." According to the five-justice majority, the six greenhouse gases cited by the petitioners—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride—"fit well within the Clean Air Act's capacious definition of 'air pollutant,' " as they contribute to the accumulation of greenhouse gases in the atmosphere, which in turn contribute to a gradual warming that could "threaten the public health and welfare of current and future generations." Writing for the majority, Justice John Paul Stevens brushed aside concerns that a complex regulatory statute designed to combat local pollution problems was a poor fit for global climate control. EPA regulation of greenhouse gases "would lead to no...extreme measures," he wrote.

The Supreme Court stopped short of ordering the EPA to regulate greenhouse gases, but the writing was on the wall. If the EPA concluded that, per the Clean Air Act, greenhouse gas emissions "may reasonably be anticipated to endanger public health or welfare," the agency would now be legally obligated to regulate. Since even the Bush EPA had repeatedly warned that global warming was a problem the nation "must address," greenhouse gas regulation became a question of "when," not "if."

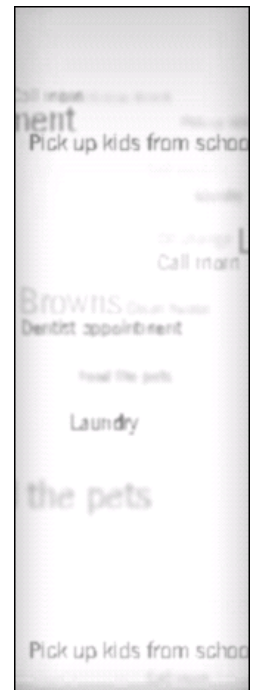
Not Just Cars and Trucks

The immediate consequence of the sweeping new EPA authority will be more stringent regulation of automobiles. Section 202 of the Clean Air Act requires the EPA to adopt emission controls once an "endangerment" finding is made. In September, anticipating that finding, the EPA and the National Highway Transportation Safety Administration proposed new regulations that would effectively require automakers to produce cars and light trucks with an average fuel efficiency rating of 35.5 miles per gallon by 2016. According to the EPA's own estimates, the regulations could cost automakers more than \$50 billion and increase new vehicle prices by an average of \$1,000. The rules could also reduce auto safety by encouraging production of lighter, smaller cars. With the endangerment finding on the books, a final rule should follow shortly.

That won't be the only new regulation set in motion. While the EPA made its endangerment finding under Section 202, other provisions of the act have virtually identical language. For example, Section 111, which governs emissions for newly built or modified industrial facilities, likewise requires the agency to set standards for stationary sources of emissions that cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare." If the EPA must regulate automotive emissions under Section 202, it will also have to set standards for newly constructed industrial facilities under Section 111.

And that just scratches the surface of the EPA's potential greenhouse impact. Under Section 165 of the Clean Air Act, when companies construct or modify any facility that qualifies as a "major" stationary source of air pollution, they are required to adopt the "best available control technology" for all emissions subject to regulation by any part of the act. The law defines a "major" source as a facility that has the potential to emit 250 tons per year of a regulated pollutant (or, for some specified facilities, 100 tons per year). For traditional air pollutants, such as sulfur dioxide or nitrogen oxides, these thresholds mean that only the biggest and dirtiest facilities, amounting to several thousand nationwide, are subject to federal controls.

Carbon dioxide, however, is a ubiquitous by-product of modern industrial society. (Indeed, some efforts to control traditional pollutants increase carbon dioxide emissions by design, as a by-product of more complete combustion.) Plenty of industrial facilities emit more than 250 tons of carbon dioxide per year. So do many commercial and residential buildings. The EPA itself estimates that a strict application of Section 165 would increase the number of required air pollution permits "more than 140-fold." A study commissioned by the U.S. Chamber of Commerce goes even further,





estimating that the 250-ton threshold would encompass nearly 200,000 manufacturing facilities, approximately 20,000 farms, and at least 1 million commercial buildings, including a substantial percentage of hospitals, hotels, large restaurants, and even some churches. On average, the Chamber of Commerce study reported, “a building with over 40,000 square feet uses enough hydrocarbons to become a regulated source.” And since the act applies to all facilities with the mere *potential* to emit 250 tons in a year, the regulatory net could be spread even wider.

Just one EPA permit for a new or modified source can cost hundreds of thousands of dollars for the applicant and require more than 300 person-hours for a regulatory agency. Adding hundreds of thousands of new permit seekers would likely overwhelm the state agencies that typically implement EPA rules, causing extensive delays and cost increases. It would be a substantial new burden on an already struggling economy.

‘Absurd Results’

The EPA is well aware of the potential regulatory nightmare—and political backlash—that enforcement of Section 165 could create, so the agency has offered to modify its carbon rules. In September, shortly after proposing the new regulations for cars and trucks, the EPA proposed a dramatically higher new threshold of 25,000 tons per year before the new greenhouse gas requirements are imposed, even though the statute expressly sets a limit of 250. The EPA estimates that the new threshold, if adopted, would force fewer than 15,000 facilities to obtain carbon permits, and most of those are already subject to other environmental regulations. “This is a common-sense rule that is carefully tailored to apply to only the largest sources,” the EPA’s Jackson explained.

However sensible it may be, the proposal directly conflicts with the act’s explicit text. Section 165 applies to “*any*...source with the potential to emit two hundred and fifty tons per year or more of *any* pollutant” (emphasis added). The EPA justified its elastic reading of the law on grounds that a lower threshold is “not feasible” for greenhouse gases. Without any statutory text to support this decision, the EPA relied on the doctrines of “administrative necessity” and avoiding “absurd results.”

According to the EPA, applying the Clean Air Act as written to greenhouse gas emissions would “extensively disrupt” existing regulatory programs and perhaps make them “impossible” to administer. Yet such administrative concerns did not persuade a majority of the Supreme Court in *Massachusetts v. EPA*. Nor did they convince the attorneys who sued the EPA to force greenhouse gas regulation in the first place, some of whom now work for the EPA. Environmentalists were happy to push inflexible readings of statutory provisions that expand the EPA’s regulatory power. Now that their friends are in charge, some want regulators to have discretion over how this authority is exercised. The EPA says it won’t regulate smaller facilities now, but it’s also pledging to revisit the 25,000 ton threshold within five years.

The EPA’s regulatory benevolence could be even more short-lived, as the agency’s creative reading of the Clean Air Act is unlikely to survive judicial review. During the Bush years, federal courts repeatedly chastised the agency for taking liberties with the Clean Air Act. “Read the statute!” the U.S. Court of Appeals for the D.C. Circuit exclaimed in one case. In another, the court declared that the EPA’s interpretation of the act could make sense “only in a Humpty Dumpty world.” One can imagine its response to the EPA’s effort to turn 250 into 25,000. If the text of the Clean Air Act applies to greenhouse gases, it requires more stringent regulation than even this administration wants.

Pollute Globally, Regulate Locally

Section 165 is not the only potentially massive regulatory consequence of the EPA’s carbon announcement. In all likelihood the finding will force the agency to set National Ambient Air Quality Standards for carbon dioxide and other greenhouse gases as well. This could end up making Section 165 look like a walk in the park.

Sections 108 and 109 of the Clean Air Act require the EPA to set standards for all emissions which, in the judgment of the administrator, “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” and “the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.” We’ve seen this first requirement before; it’s the basis of the endangerment finding, so it has already been met. Emitted from countless mobile and stationary sources, greenhouse gases easily satisfy the second criterion as well.

Air quality standards must be set at the level “requisite to protect the public health” with “an



adequate margin of safety” and “requisite to protect the public welfare from any known or anticipated adverse effects.” States then must develop implementation plans detailing how they will ensure that local air quality meets the standard before a deadline. These plans must include more stringent facility permitting requirements and whatever other measures are necessary to ensure the target is met, including regulation of automobile use. States that fail to comply risk sanctions, including loss of highway funds and direct imposition of even stricter rules.

The problem: It makes no sense to set ambient air quality standards for greenhouse gases. There is simply no way for state and local regulators to ensure that individual cities, or even larger regions, meet an air quality standard for a globally dispersed atmospheric pollutant. Local emissions could be reduced to zero, and a given area would still violate the standards if global emissions did not decline. It would be a pointless regulatory exercise.

Nonetheless, some people feel the exercise is necessary. On December 2, the Center for Biological Diversity filed a petition with the EPA demanding that it adopt National Ambient Air Quality Standards for greenhouse gases. It was a petition of just this sort that set the greenhouse regulatory train in motion in the first place. The Center for Biological Diversity is more than ready to file suit if the EPA does not comply, and the Clean Air Act is on their side.

A Done Deal

Barring congressional action to amend the Clean Air Act, most of this mischief is a done deal. Anti-regulatory groups have already announced their intention to challenge the EPA's endangerment finding in court, but they are unlikely to get very far. All the EPA must show is that it could reasonably anticipate that global warming could threaten public health or “welfare,” an expansive term the act explicitly defines to include effects on climate, “economic values,” and “personal comfort and well-being.” Reviewing courts will not substitute their reading of the relevant scientific evidence for that of the EPA, so it's no use arguing the agency placed too much weight on one study while discounting another.

Although EPA head Jackson would later claim the timing was coincidental, when she announced her decision to regulate carbon she said it would allow U.S. negotiators to “arrive at the climate talks in Copenhagen with a clear demonstration of our commitment to facing this global challenge.” Lacking climate change legislation with binding targets, the White House concluded that an announcement of EPA regulation was the next best thing. The greenhouse regulatory train set in motion by *Massachusetts v. EPA* will continue to steam ahead unless Congress intervenes. All aboard.

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