

The EPA's Power Grab



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Washington (The Weekly Standard) Vol. 015, Issue 15 - 12/28/2009 – The climate campaign, built step-by-step over the last 20 years, has reached its Waterloo. The Copenhagen conference that ended Friday was an exercise in political theater. It not only failed to produce a binding agreement, but the potential emissions curbs it endorsed fall far below what climate orthodoxy demands, while the proposed wealth transfer from rich nations to poor nations is a political nonstarter. Back home, cap and trade legislation remains on life support, even though it has been significantly watered down so as to postpone real costs to consumers for a decade or more. In the midst of this gloom, the climate campaign has played its trump card in the United States: The Environmental Protection Agency formally announced on December 7 its intention to regulate greenhouse gases through the Clean Air Act.

That trump card, however, may turn out to be a joker.

The Clean Air Act (CAA), enacted in 1970 and last updated in 1990, is an abysmal policy mechanism for controlling greenhouse gases, and was never intended for this kind of problem. But the EPA's gambit is not about policy--it is all about politics. The EPA's grasp for dominion over greenhouse gases has been a long time in coming, starting as an effort to bring pressure on the Bush administration to relent in its opposition to a U.N.-led international climate treaty, and continuing under Obama as a means of pressuring Congress and the business community to support cap and trade.

The key antecedent to this gambit was a botched Supreme Court decision in 2007, *Massachusetts v. EPA*, in which a 5-4 majority (Justice Anthony Kennedy sided with the Court's four liberals) ruled that greenhouse gases like carbon dioxide were indeed "pollutants" under the capacious definitions of the Clean Air Act, thereby giving the EPA jurisdiction to regulate them without any legislative mandate from Congress.

Environmental groups had petitioned the EPA to regulate greenhouse gases under the Clean Air Act and had encouraged several states to ask for federal authority to impose their own regulations on automobile emissions. The Bush EPA took the position that it did not have the authority to regulate greenhouse gases, and would decline to regulate them even if it did have the legal authority. Once the Supreme Court ruled, however, the slippery slope logic of environmental law took over, making it inevitable that the EPA would eventually move to regulate greenhouse gases. In a nutshell, environmental statutes and case law have evolved so as to make federal judges into the sock puppets of environmentalists, and greens have become highly skilled in bringing lawsuits to compel federal agencies to do their bidding. (This explains, for example, the Bush administration's decision to list the polar bear as an endangered species.)

The EPA gambit has business groups in an uproar, but is this a case of crying wolf, in a mirror image of

environmental alarms? Industry protested every version of the Clean Air Act (a Ford executive named Lee Iacocca predicted in 1970 that the CAA would shut down the entire American auto industry), and although the cost of reducing air pollution was not trivial (over \$500 billion according to the EPA's likely underestimate), it has not decimated the American economy. In fact, on the surface the Clean Air Act appears to be the largest public policy success story of the last generation: The dramatic reduction in air pollution is greater in magnitude than the reduction in the crime rate in the 1990s or the fall in welfare rolls since welfare reform. You'd never know this from the media or the greens, who hate good environmental news as much as vampires hate garlic.

It is important to understand why the Clean Air Act worked on conventional air pollution so as to appreciate why it is an inappropriate policy tool for greenhouse gases--akin to wearing thick mittens to peel an onion. Greenhouse gases are not comparable to traditional forms of air pollution such as carbon monoxide, sulfur dioxide, lead, and ozone. Reducing conventional sources of air pollution was mostly a technological problem--such as removing lead from gasoline, improving combustion efficiency (a lot of air pollution came from evaporating or incompletely burned fuel), and capturing pollutants, as was done with "scrubbers" on coal-fired power plants to reduce sulfur dioxide. The EPA regulations might be excessively costly, but they imposed no constraint on the use of fuel or energy. To the contrary, the use of coal in the United States has doubled since the 1970s, while sulfur dioxide emissions from coal have been cut by about two-thirds. Likewise we have more than doubled our gasoline and diesel fuel consumption since 1970, but reduced auto and truck emissions more than two-thirds through reformulated fuel, catalytic converters, and better engine combustion technology. Emissions trading (cap and trade) has been one of the tools used to reduce sulfur dioxide emissions efficiently, but it is simpleminded in the extreme to suppose that just because sulfur dioxide and carbon dioxide both end in "dioxide," cap and trade will work exactly the same way for CO₂.

Carbon dioxide emissions are an energy use problem pure and simple, and not a byproduct problem like other forms of air pollution. As Ted Nordhaus and Michael Shellenberger, dissidents in the environmental movement, have written: "Global warming is as different from smog in Los Angeles as nuclear war is from gang violence." The only way to reduce CO₂ emissions is to burn a lot less fossil fuel--ultimately almost none if the ambitious target of climate orthodoxy is to be met (an 80 percent reduction by the year 2050). With the partial exception of still unproven and hugely expensive carbon sequestration for coal, there are no add-on technologies to remove carbon dioxide from fossil fuel combustion, and there is no such thing as "low-carbon" coal, gasoline, or natural gas (comparable to low-sulfur coal and diesel). The EPA can only reduce CO₂ by regulating fuel inputs in the economy--something it never did in regulating conventional air pollutants. In other words, this step promises to turn the EPA into an energy regulatory agency.

But differences between carbon dioxide and conventional air pollutants are only the beginning of the story. It is the peculiar way the Clean Air Act regulations operate that has business groups in an uproar now. There are several steps to the Clean Air Act process. Once a pollutant has been identified as harmful to human health, the next step is to determine its "safe," "health-based" maximum level. This will be a fascinating process to watch with CO₂. The current ambient level of CO₂ is about 390 parts per million

(ppm). Climate orthodoxy per the Kyoto-Copenhagen process aims for CO₂ to reach no higher than 450 ppm. If the EPA adopted 450 ppm as the U.S. ambient standard, then no part of the country would be in violation, which would greatly complicate the task of justifying regulation. The EPA could still propose regulations for CO₂ under another feature of the Clean Air Act--"prevention of significant deterioration." More likely the EPA will arbitrarily designate an ambient CO₂ level below the current level of 390 ppm; lately the most vocal climate campaigners, such as former vice president Al Gore, have been claiming that 350 ppm is the safe level we must somehow return to.

The next step in the process is to designate specific "non-attainment" areas around the nation--that is, areas where ambient levels of pollution are higher than the health-based standard. Most major metropolitan areas were at one time designated a "non-attainment" area for one or more pollutants over the last 30 years. This is important because regulatory measures are then tailored to match local differences in sources of pollution. Texas and Louisiana, for example, have pollution profiles different from the rest of the country because of the heavy presence of petrochemical refining, while the Northeast has a pollution problem from coal-fired power plants in the Ohio valley, and California suffers mostly from car and truck emissions. But large parts of the nation--rural areas and sparsely populated states such as Wyoming and Montana--are with a few exceptions not subject to Clean Air Act regulation and permitting requirements. But in the case of CO₂, the EPA is likely to designate the entire country as a non-attainment area.

The Clean Air Act also includes an element of federalism that will either be swept away or made incoherent by CO₂ regulation. Under the act, each state is charged with developing its own State Implementation Plan (SIP), subject to EPA supervision and approval, for reducing air pollution, tailored to local conditions. Some states--California in particular--have extensive experience at this, while other states (Wyoming and Idaho, for example) have done little of this, and may now have to create new bureaucracies to comply. On the other hand, with the entire country designated as a CO₂ non-attainment zone, the EPA may decide to regulate directly and skip over the SIP process. But this will require a vast expansion of the EPA (not that the agency itself will be complaining).

Next, because there are so many more sources of CO₂ emissions than there are of conventional air pollution, the EPA's regulatory reach is certain to be much greater. There is already some funny business going on. The Clean Air Act authorizes the EPA to regulate stationary sources (buildings, factories, power plants, etc.) that generate as little as 250 tons of pollution per year. Two hundred and fifty tons is a lot if we are talking about emissions that cause ozone, but it is a tiny amount for carbon dioxide. A 70,000 square foot office building (the size of most small office buildings in Washington, D.C., for example) will meet that threshold, as will most fast-food restaurants and virtually all manufacturing facilities. Is such micromanagement of the U.S. economy by the EPA farfetched? Twenty years ago regulators in Los Angeles, facing the nation's worst ozone problem and looking to squeeze every possible emissions source no matter how small, considered a rule banning construction of drive-through windows at fast-food outlets on the theory that cars idling at the pickup windows emitted high amounts of ozone-forming chemicals. Improved auto technology made this rule unnecessary. The L.A. air district also considered banning barbecue lighter fluid, but manufacturers reformulated it to make it less volatile. These are the kinds of

measures we can expect to make their appearance nationwide under an EPA regulatory regime for greenhouse gases; worse, it is easy to imagine the EPA mandating lighting fixtures, insulation retrofits, and thermostat controls on most buildings and small businesses.

The EPA is hip to this problem, and has announced that it would impose its new regulatory regime at a threshold of 25,000 tons of greenhouse emissions per year. This restraint will not survive the first lawsuit from the Sierra Club, since the Clean Air Act statute specifies the 250-ton threshold; eventually a federal judge will compel the EPA to enforce the law to the maximum extent allowed. But this raises another irony in this whole mess--the very litigation machine that has so far been the bread-and-butter of environmentalists could now throw lots of sand into the EPA's gears.

The Clean Air Act has always been a very slow-moving administrative process. Each step in this process--from the choice of the ambient air standard for CO₂, to each state's SIP, to the individual regulations the EPA promulgates--will be susceptible to legal challenge by industry (for being too harsh) or environmentalists (for being too lenient), followed by inevitable appeals by the losing side. For example, the Clinton EPA's proposal to make the ambient air standard for ozone and particle pollution much stricter in the late 1990s was held up in litigation for nearly a decade. Today's first graders may well be reading about the Copenhagen conference in the third edition of high school climate-history textbooks by the time EPA greenhouse gas regulations begin to take effect. But by then the "climate crisis," in the orthodox view, will be so far advanced that it will be too late.

At this point the transparent insincerity of the climate campaign becomes more obvious. The Waxman-Markey version of cap and trade includes a provision that would strip the EPA of authority to regulate greenhouse gases by means of the Clean Air Act--an obvious sop to the business community. Seldom do the greens give up a grant of power such as they were handed by the Supreme Court's *Massachusetts v. EPA* decision (it's the green version of the Brezhnev Doctrine). The Obama administration keeps insisting it doesn't want to regulate greenhouse gases through the cumbersome Clean Air Act, in hopes this will push cap and trade over the finish line as the "market-friendly" alternative. Business groups ought to take a "please don't throw me into that briar patch" attitude, however. The Clean Air Act method of regulating greenhouse gases has the political potential to turn every congressman into John Dingell--the fierce guardian of the auto industry against the EPA for the last 40 years. It is also possible that the EPA gambit may backfire in Congress in the short term. Many senators and House members may decide that it is preferable to let the EPA do the climate campaigners' dirty work, rather than cast another tough vote for cap and trade. This will be especially tempting, since many voters may not cotton on to the fact that Congress can easily remove the EPA's jurisdiction over greenhouse gases by amending the Clean Air Act--as that provision in the cap and trade bill shows. Indeed, House Republicans have already signaled their intention to turn up the heat on Democrats by introducing a "resolution of disapproval" of the endangerment finding, though they should go further and propose stripping the EPA entirely of its authority to regulate greenhouse gases under the Clean Air Act, perhaps saying that is the one part of the Waxman-Markey bill that merits support.

The greatest irony of the EPA's entry into the fray is that it may reopen the supposedly "settled" question

of climate science itself, which has new salience because of the firestorm over the "climategate" scandal involving the leaked emails from the University of East Anglia. There is in addition a separate tale of leaked emails from the EPA itself that has received surprisingly little attention.

Designating carbon dioxide as a Clean Air Act "pollutant" involves a finding that CO₂ is a hazard to human health. Common sense suggests this is a stretch. Unlike ozone, which burns lung tissue and harms plant growth, or airborne lead, which harms brain development in children, human beings exhale carbon dioxide--800 pounds per person per year according to the EPA--and CO₂ is the primary nutrient for plant life on earth. Since the EPA can't make the case that CO₂ is toxic like other air pollution, it based its endangerment finding entirely on indirect or secondary effects, specifically the possibility of more deaths from heat waves, higher ozone levels (ozone tends to rise with temperature), more insect-borne diseases and allergies, and higher vulnerability to extreme weather events such as hurricanes and tornadoes. Each of these claims rests on dubious or contested scientific findings. In general, human health in the United States keeps improving. Deaths from heat waves in this country have been steadily declining. The EPA's own models project falling ozone levels for the next generation. Vector-borne disease rates (think malaria) correlate much more closely with wealth and poverty than with temperature, and recent research casts doubt on the super-hurricane scenarios.

Numerous critics pointed out these and other defects in the EPA's first draft of its endangerment finding released last spring, most notably the Cato Institute's Pat Michaels, who filed a 186-page critique with the EPA during the public comment period. The EPA brushed most of these comments aside in its 11-volume response with a self-assured, not to say royal, "We disagree." But perhaps the most potentially damaging critique of the EPA's science came from within the EPA itself, in the form of an 81-page analysis from career EPA employees Alan Carlin and John Davidson. Carlin and Davidson work for the EPA's in-house research unit known as the National Center for Environmental Economics (NCEE). They argued straightforwardly that "the EPA and many other agencies and countries have paid too little attention to the science of global warming," and went on to cite peer-reviewed studies pointing out the deficiencies and anomalies of the conventional climate-catastrophe narrative.

The EPA didn't condescend to discuss the substance of its outside critics' comments. To insiders Carlin and Davidson, the response amounted to, "Shut up, if you know what's good for you." Carlin and Davidson wanted to submit their analysis as part of the EPA's public comment process in March. Their boss, Al McGartland, head of the NCEE, said no, telling Carlin and Davidson by email "please do not have any direct communication with anyone outside NCEE on endangerment. There should be no meetings, emails, written statements, phone calls, etc." A few days later McGartland told Carlin that he would not submit Carlin's analysis to the EPA public comment process: "The time for such discussion of fundamental issues has passed for this round. The administrator and the administration has decided to move forward on endangerment, and your comments do not help the legal or policy case for this decision. . . . I can only see one impact of your comments given where we are in the process, and that would be a very negative impact on our office."

This is a deeply disingenuous response. The EPA never did engage in a fundamental internal discussion

of fundamental issues. Ordinarily the EPA conducts its own scientific investigation to establish its endangerment findings, but in this case the EPA simply borrowed from the U.N.'s Intergovernmental Panel on Climate Change and the U.S. government's own Climate Change Science Program. Eight minutes after McGartland told Carlin that his analysis would have a "negative impact," he sent a followup email instructing Carlin, "I don't want you to spend any additional EPA time on climate change. No papers, no research etc., at least until we see what EPA is going to do with climate." McGartland then reminded Carlin that the budget for the NCEE had just been cut by 66 percent. There has been talk of eliminating the office altogether on account of the inconvenient economic truths it periodically generates from within the EPA citadel.

The Carlin/Davidson document and the emails were leaked to the Competitive Enterprise Institute in June, but attracted only scant media attention. In light of the scandal surrounding the East Anglia emails, however, the newly urgent demand for transparency in the climate science and policy process may shine unwelcome new light into the dark corners of EPA's politically driven agenda. There will certainly be new fodder for litigation challenging the EPA's endangerment finding, which will involve reopening basic questions of climate science to judicial review. What was "settled" is about to become unsettled. In other words, in hoping to use the EPA's Clean Air Act club to bully Congress into passing cap and trade, the - climate campaign may have made its biggest blunder yet.

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