

THE
Environmental
Forum[®]

Volume 26, Number 2 • March/April 2009

Advancing Environmental
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**Are Current Rules Adequate to
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Water's Worth

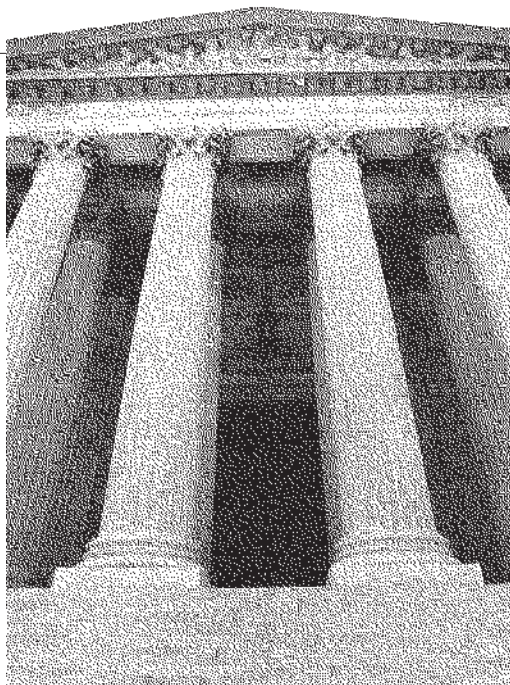
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*Should Obama Wait
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THE FORUM

How Long Should Obama Wait for Congress to Act on Climate Change?

This debate occurs in the context of the Supreme Court's decision in *Massachusetts v. EPA*, which held that the Environmental Protection Agency has the authority under the Clean Air Act to regulate greenhouse gas emissions, a power the Bush administration chose not to exercise in the two years since.

Meanwhile, pressure has been building for Congress to pass a climate bill. During the campaign, Obama adviser Jason Grumet said the new president might wait 18 months for Congress to enact new cap-and-trade legislation but would use existing authority if it didn't pass a bill by then.

But some would like to see Obama act much sooner. Recent news accounts portray Obama's advisers as split on whether to delay action on climate change because of the economic crisis. In the mean time, EPA has been seeking comments on how the CAA might be used to tackle climate change via an Advance Notice of Proposed Rulemaking issued last summer.

Should President Obama wait for Congress, or should he act on the Court's assertion of authority and promulgate a rule using the existing CAA? If he does use the act's regulatory powers, what shape would a climate change program look like?



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President

CONSTITUTION ACCOUNTABILITY CENTER



“The Clean Air Act is at best a blunt instrument for controlling greenhouse gas emissions.”

Robert R. Nordhaus

Member

VAN NESS FELDMAN, P.C.



“Five executive branch actions are essential to comply with the Supreme Court’s decision.”

Vickie Patton

Deputy General Counsel

ENVIRONMENTAL DEFENSE FUND

Let's Get On With It as Soon as Possible

E. DONALD ELLIOTT

Obama's EPA should use parts of the existing Clean Air Act to address greenhouse gas pollutants as soon as possible. New legislation creating a cap-and-trade program designed for GHGs should be better than one cobbled together through strained interpretations of existing authority. EPA faces significant legal risks if it creates a trading program without specific legislative authority, as shown by the recent court decisions invalidating but not vacating the Clean Air Interstate Rule, and the prior regional haze decision. I tried unsuccessfully to fix that in 1990 when as EPA general counsel I attempted to persuade Congress to give EPA explicit stand-by authority for trading programs for pollutants other than sulfur dioxide, but it has not done so.

Even after Congress enacts cap-and-trade (or a regulatory tax), the issue of how to regulate GHGs under the existing CAA will persist. Regulating the temperature of the planet by adjusting the mix of gases in our atmosphere is the most ambitious undertaking yet attempted by human beings. Cap-and-trade is only a down payment. We will also need targeted "policies and measures," or PAMs, for the largest contributors — transportation, power generation, and buildings. Some PAMs can be implemented under the CAA. Consequently, the proposed bills leave most of the CAA undisturbed.

President Obama has pledged to grant the California waiver allowing its GHG standards for new motor vehicles to go into effect. Thirteen other states have opted in. It makes

sense for EPA to set national GHG emissions standards for new vehicles under the CAA that extend or, if feasible, go beyond California's, rather than tolerate a patchwork.

For the power sector, renewables are important but so is coal. Cap-and-trade creates only about 10 percent of the economic incentive needed for new coal-fired power plants that capture and store GHGs. Both China and the U.S. desperately need to get clean coal technologies off the drawing boards into use. The CAA, as well as new subsidies for carbon sequestration, can jump-start deployment.

Action is also needed to nudge engineers to construct energy-efficient structures. More than a third of GHGs are due to buildings. By raising the cost of wasting energy, cap-and-trade should, at least in theory, cause tenants to demand more energy-efficient buildings. But in practice, weak demand by U.S. consumers for energy-efficient appliances and vehicles has proven there is also a role for minimum design-standards for new buildings, like California's and DC's.

Congress is not likely to enact a national building code and localities are notoriously slow to revise theirs. But EPA can regulate the design of new buildings now under CAA Section 165 (the so-called Prevention of Significant Deterioration or New Source Review program) if they are projected to emit over 100 tons annually of any regulated GHG. Rather than exempt buildings, as the Chamber of Commerce has asked, the Obama EPA should get on with the task of regulating GHGs from new buildings in a sensible, practical way through general permits and performance-based standards, as EPA has done elsewhere if smaller sources collectively make large contributions to pollution.

The CAA is not going away. The sooner we act, the greater effect we have to slow increasing concentrations of GHGs. We also surface

problems to fix as legislation moves through Congress, and enhance political pressure to enact, not just talk about, strong new legislation. A bill won't pass quickly, however, and we as a nation will have zero credibility going into the next worldwide Conference of the Parties in Copenhagen in December to negotiate the post-Kyoto regime beginning in 2012 if there is still a perception a year after Obama's election that the United States has done little to regulate GHGs.

So act now!

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Avoiding a Regulatory Nightmare

PETER GLASER

The president should wait for Congress to go first. Proponents of regulating greenhouse gases under existing Clean Air Act programs believe that regulation can be narrowly tailored to capture only the automobile industry and large industrial and other sources. That's just not true. Any regulation of GHGs under the CAA will likely trigger rigid, hugely expensive command-and-control regulation of small emission sources of all types throughout the nation, undermining the president's efforts to restore the country's economic well-being, while yielding no meaningful environmental benefit.

In the first place, CAA regulation

of GHGs from automobiles and large stationary sources will likely automatically lead to GHG regulation of a huge number of small stationary sources under the CAA's Prevention of Significant Deterioration pre-construction permit program. EPA's recent Advance Notice of Proposed Rulemaking recognizes the very large number of small sources that may require PSD permits if GHGs are regulated under the act, because a fuel-burning heating system for even a moderately sized building emits more than 250 tons per year of carbon dioxide, the threshold for PSD permitting.

One study estimated that 1.2 million sources never regulated before under the CAA emit more carbon dioxide than the statutory threshold, including office, hotel and apartment buildings as well as malls, big box stores, sports arenas, large houses of worship, and many other categories. The ANPR discusses the gridlock that could result from this vast expansion of permitting authority; I believe EPA underestimated the problem and that recovery of the construction industry in this country could be seriously impeded by PSD permit delays.

Even worse, regulation of GHGs could trigger a requirement for establishment of National Ambient Air Quality Standards under the CAA. Given the view of environmental organizations that anthropogenic GHG emissions are presently damaging both the public health and welfare, we face the truly frightening prospect that the entire country will be declared to be a carbon dioxide nonattainment area. In that event, buildings that emit as little as 100 tons per year of carbon dioxide will be subject not to PSD, but to rigid nonattainment New Source Review requirements, including installation of the most stringent control technologies without regard to cost and an obligation to obtain GHG emission offsets for any new carbon dioxide emitted. It is difficult

to comprehend how there could be meaningful economic growth in such a regulatory environment.

When I raise these concerns, I am often dismissed by proponents of GHG regulation under the CAA as a "fear-monger." No one wants GHG NAAQS, I am told, and so we will never have them, and EPA can easily find ways around the PSD thresholds so that PSD will apply only to the largest sources. Yet the ANPR comments of at least three environmental organizations took the position that EPA should establish GHG NAAQS, with two of them calling for the establishment of NAAQS at levels that would make the entire country a nonattainment area. Similarly, at least two environmental groups took the position that the statutory PSD thresholds are mandatory and must apply to small sources. I agree. Some of the mechanisms and theories discussed in the ANPR for avoiding PSD applicability to small sources sound more like wishful thinking to me than serious regulatory proposals.

In any event, I am greatly concerned that the pressure for immediate GHG regulation under the CAA has caused proponents to imprudently discount the cascading effects such regulation will have. In our rush to do something to reduce GHG emissions, we should avoid a regulatory policy of "ready, shoot, aim."

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Yes, But Congress Might Want a More Tailored Fit

DOUG KENDALL

Previously, we've spelled out specific steps President Barack Obama can take to encourage Congress to pass legislation establishing a strong cap-and-trade program. Yet there has been speculation as to whether the president already has the authority, under the Clean Air Act, to establish a cap-and-trade program without waiting for Congress to act.

There is no straightforward answer to this question. For one thing, EPA has never successfully implemented a cap-and-trade program for any pollutant without congressional approval. The Bush administration tried twice, once with the Clean Air Mercury Rule and again with the Clean Air Interstate Rule, and both programs were ultimately struck down by the D.C. Circuit for reasons that should not be dispositive for a CO₂ cap-and-trade program.

The only time cap-and-trade has been permitted to go forward is when it was explicitly approved in CAA provisions, as was the case with EPA's famous Acid Rain Program. Georgetown Law professor Lisa Heinzerling noted in testimony before the House Committee on Energy and Commerce that this by itself might be grounds for prohibiting cap-and-trade for CO₂ under other sections of the act, "because [the acid rain] provisions explicitly permit emissions trading, it might be argued that the provisions that do not mention trading do not allow it."

Precedent thus provides little insight as to whether a full-fledged cap-and-trade program for CO₂ emissions under the existing CAA would withstand a court challenge.

Alternatively, in a widely-circulated article published in October, environmentalists Michael Northrop and David Sassoon discussed using the CAA to link up state and regional cap-and-trade programs, thereby circumventing the question of whether the EPA has the authority to establish its own national program.

All this raises the bigger question of whether President Obama should introduce cap-and-trade under the existing CAA, even if he could legally find a way. While the CAA has the obvious advantage of being readily available, attempting to establish a rushed or half-hearted cap-and-trade program under its ungainly provisions could slow down parallel congressional efforts to pass cap-and-trade, and well-tailored legislation would almost certainly provide a preferable framework for greenhouse gas mitigation. As Heinzerling put it to legislators last April, “the Clean Air Act is an excellent off-the-rack garment for greenhouse gas regulation, but it may be that Congress wants a more tailored fit.”

A wiser strategy, then, might be for President Obama to use the CAA to prod Congress on climate change, rather than do its work for it. By using more established federal tools such as CAFE standards and CAA Section 111 new and existing source performance standards, granting the waiver that will allow California and over a dozen other states to start enforcing stricter auto emission standards, and encouraging local, state, and regional experimentation with stronger environmental regulations, the Obama EPA can make it increasingly untenable for Congress not to act.

As the history of environmental regulation has taught us, if such actions occur, influential industries like automakers and electric utilities—already subject to federal and state regulation—will then demand that Congress provide a more organized, comprehensive approach to climate policy.

In this sense, President Obama already has the tools to make industry rally behind, rather than against, a strong cap-and-trade bill—and therefore doesn't need to try to force his sleek, modern cap-and-trade plan into the 1970s leisure suit that is the existing Clean Air Act.

Doug Kendall is President of the Constitutional Accountability Center. This article was adapted from an article that appeared in *grist.com*.

Today's CAA a Blunt Instrument for GHG Control

ROBERT R. NORDHAUS

Should EPA regulate greenhouse gases under the Clean Air Act? EPA's Advance Notice of Proposed Rulemaking issued last July devoted 166 Federal Register pages to that question, in a bizarre face-off between EPA and eight other executive branch agencies. Thousands of pages of public comment followed. What can be added at this juncture? Three key points:

First, there appears to be little dispute that the Clean Air Act is, at best, a blunt instrument for GHG control. There appears to be no viable legal theory under which an economy-wide cap-and-trade program can be established under the CAA (and there is serious question as to whether such a program could be set up even on a more limited basis for large stationary sources). For that reason, an explicit, economy-wide price signal for carbon would appear out of reach under existing law.

Second, in contrast to an “upstream” cap-and-trade program which controls emissions from small sources by regulating their fuel suppliers, the CAA's tools for controlling emissions from vehicles and small

stationary sources are limited. Emissions standards for new vehicles and engines under Section 202 would regulate only CO₂ emissions per mile. They would not constrain vehicle miles traveled, and cannot control the overall level of transportation sector emissions. Moreover, while performance standards under Section 111 and permits under Section 165 and Title V of the CAA can feasibly reach large stationary sources, the overwhelming majority of small sources—a hundred million-plus houses, farms, and small businesses—are beyond the practical reach of these provisions, either because they are below the CAA's permit thresholds or (if above the thresholds) are too numerous to feasibly permit.

Third, even if the agency tried to narrow the focus of its efforts under the CAA to large stationary sources and motor vehicles, the seemingly inflexible permitting requirements under the Prevention of Significant Deterioration program and Title V would require EPA, by its own estimate, to issue permits to an additional half million mostly small stationary sources. EPA's ANPR offers various legal theories to avoid this administrative burden, but no clear path forward is evident.

Thus, it is fair to conclude that any attempt to fashion a GHG regulatory program under the existing CAA that sends an explicit price signal on carbon emissions; has economy-wide reach; and is workable administratively would entail substantial legal risk. One needs only to view the wreckage of the Bush administration's Clean Air Interstate Rule, Clean Air Mercury Rule, and New Source Review rule to recognize the damage that ignoring such risks has done to the credibility and effectiveness of EPA's regulatory program. U.S. climate policy cannot afford false starts—a GHG control program to be credible and effective in the long term must have an unassailable legal foundation.

Congress needs to address cli-

mate policy through a statute that is designed for that purpose. If that legislative effort falters, EPA would be ill-advised to actually go forward with GHG regulation under existing law without seeking a set of technical amendments to the Clean Air Act designed to make the effort more workable and cost-effective. These amendments should include at a minimum explicit authorization of a cap-and-trade program for large stationary sources under Section 111 and authority for EPA to exempt smaller sources from permitting requirements under the act. These changes, if Congress enacts them, would permit EPA to go forward with a limited program of a cap-and-trade and performance standards for large stationary sources, and, if necessary, emission standards for new motor vehicles, without triggering a permitting tsunami for smaller sources.

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Regulation and The Race Against Time

VICKIE PATTON

The new administration is confronted with a climate crisis, in addition to other profound challenges. Global warming will spiral beyond the reach of corrective action unless Congress establishes an enforceable, science-based cap on pollution and our nation works with other countries to carry out similar protections. Leadership is urgent, as the U.S. carbon burden has grown by more than 50 billion tons during the last eight years. Five decisive Executive Branch actions are essential to comply with

the Supreme Court's decision in *Massachusetts v. EPA* and to put the nation back on track in the race against time. These policies complement immediate legislative action.

Mandatory reporting as of January 1, 2010. Congress instructed EPA to finalize mandatory reporting requirements for greenhouse gas emissions by June. The new administration must act expeditiously to meet the statutory deadline. Most importantly, EPA must ensure the nation begins collecting comprehensive data beginning on January 1, 2010. And it must harness 21st century information technologies in making the reported data accessible to the public.

Restore a partnership with the states, beginning with their bipartisan clean cars program. California and 13 states adopted greenhouse gas emission standards for motor vehicles only to have EPA stand in the way. On January 26, President Obama asked EPA Administrator Lisa Jackson to reconsider the decision. EPA must act swiftly to reverse the flawed decision and regain lost time.

Issue national standards to harmonize new investments with carbon minimizing solutions, beginning with cleaner cars, trucks, and power plants. A top priority is acknowledging that greenhouse gases endanger human health and welfare while ensuring that today's new energy investments are consistent with the science-based imperative to cut global warming pollution. Applying nationwide low carbon emission standards — today — to new power plants, new cars, and new trucks will advance technologies, create jobs, and cut costs over the long term by integrating instead of retrofitting carbon-minimizing solutions. EPA prepared a science-based endangerment finding as well as national greenhouse gas emission standards for motor vehicles and transportation fuels to carry out its obligations under *Massachusetts v. EPA* but the Bush administration prevented their release.

Cutting pollution cost-effectively from the nation's large industrial emit-

ters. EPA must immediately begin cutting pollution from large industrial sources to make steady progress toward the reduction levels necessary to achieve climate security. A coalition of major manufacturing firms, power companies, and businesses together with Environmental Defense Fund recently called for policy innovation in moving forward: "We believe programs that both ensure significant progress in reducing greenhouse gas emissions from existing [stationary] sources with the greatest flexibility practicable and encourage investment in new clean technologies are most promising."

Incorporating the societal benefits of carbon mitigation in federal policymaking. By failing to account for the benefits of greenhouse gas reductions in designing major national policies, federal agencies are missing important, cost-effective opportunities today to help protect human health and the environment from global warming. The executive orders governing the coordination and review of federal regulations have long called for maximizing societal benefits. But all too often major societal benefits such as carbon mitigation have been ignored. Environmental Defense Fund's recent report "Carbon Counts" examines three federal agencies' failure to consider the societal benefits of carbon mitigation in important policy initiatives impacting greenhouse gas emissions. The Executive Branch can help ensure new regulatory policies are well designed to mitigate greenhouse gases and thereby maximize important societal benefits.

Every day that we delay passing comprehensive climate change legislation our carbon burden becomes larger and our challenge more difficult. Every day that we delay getting started under existing law, we forego a fleeting opportunity to stave off the grim effects of a changing climate.

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