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EPA Should Avoid Regulating Carbon Dioxide Emissions

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Critics of big government focus most of their attention on soaring federal budgets and the endless stream of new legislation that would further increase spending and taxes. Often overlooked is the trillion-dollar annual cost of compliance with federal regulations. Like the federal budget, this regulatory burden continues to increase and usually accelerates during the final year of an Administration.

The most worrisome regulation now under consideration is a declaration by the Environmental Protection Agency (EPA) that carbon dioxide emissions from motor vehicles endanger public health. The so-called endangerment finding would spark many costly measures with the potential to harm the U.S. economy and intrude on citizens' daily activities. The EPA should refrain from initiating any regulation that would jump ahead of Congress on global warming.

Background. In April 2007, the Supreme Court ruled in a 5-to-4 decision against the EPA over its refusal to regulate emissions of carbon dioxide, a greenhouse gas, from motor vehicles. However, *Massachusetts v. EPA* did not require the agency to change its position; it required only that the agency demonstrate that whatever it chooses to do complies with the requirements of the Clean Air Act. In the Court's words, "[w]e need not and do not reach the question whether on remand EPA must make an endangerment finding," and "[w]e hold only that EPA must ground its reasons for action or inaction in the statute."

Nonetheless, it appears that some people in the Administration and the EPA want to read this case as a mandate to begin cracking down on carbon dioxide. But doing so is not required under the law.[1]

A Cautious Federal Approach Thus Far. Carbon dioxide is a naturally occurring component of air that is created by breathing and other natural processes. It is also the ubiquitous and unavoidable byproduct of fossil fuel combustion, which currently provides 85 percent of America's energy. Thus, any effort to substantially curtail such emissions would have extremely costly and disruptive effects on the economy and on living standards. That may change over the long term: The Bush Administration is supporting research into carbon-friendly energy technologies as well as means to capture and store carbon emissions underground rather than releasing them into the air. But these efforts will likely take at least 20 years to reach fruition. There are no cost-effective solutions in the interim.

For these reasons, the federal government has been extremely cautious about requiring mandatory carbon reductions over short timeframes. In 1997, the Senate unanimously resolved to reject any climate change treaty that unduly burdened the U.S. economy or that failed to engage all major emitting nations, such as China and India. Although the U.S.

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signed the Kyoto Protocol later that year, neither President Clinton nor President Bush submitted the treaty to the Senate to be ratified.

Legislatively, Congress has rejected every attempt to control carbon dioxide emissions, including provisions proposed for the 1990 Clean Air Act Amendments and the 2005 energy bill. Even the current Congress, with its stated zeal to regulate carbon, has done little since taking power in January 2007. One climate change bill, S. 2191, has been voted out of committee, but it must overcome a number of hurdles before it stands a realistic chance before the full Senate. The House has done nothing beyond introducing several bills and holding hearings.

Beyond the economic costs, there are also questions about whether these measures would accomplish anything environmentally. Even assuming the worst-case scenarios of man-made global warming, the impact from these bills would be so small as to be difficult to detect.

Overall, Congress has recognized the potential pitfalls of ill-advised climate measures and has acted with the appropriate caution.

A Regulatory Pandora's Box. It is with this justified caution that the Administration should approach its response to *Massachusetts v. EPA*. The Clean Air Act has many shortcomings as an instrument for rationally regulating carbon dioxide emissions—something the statute was not set up to do.

The Clean Air Act is a model of redundancy. Virtually every type of pollutant is regulated by not one but several overlapping provisions. Terms of art like "air pollutant" and "public health" appear throughout the statute, as do a number of non-discretionary duties for EPA. Any finding that carbon dioxide from motor vehicles is a pollutant that endangers public health or welfare would unleash costly regulations for activities throughout the economy.

Under the Clean Air Act, once carbon dioxide emissions are regulated from motor vehicles, they must also be controlled from stationary sources under the New Source Review (NSR) program, which applies to all pollutants subject to regulation anywhere in the statute. Also, given that the threshold for regulation—250 tons per year and in some cases as little as 100 tons per year—is easily met in the case of carbon dioxide emissions, the agency could impose new and onerous NSR requirements heretofore limited to major industrial facilities.

Most emissions regulated under the Clean Air Act are trace compounds measured in parts per billion, so these threshold levels make sense to distinguish *de minimis* contributors from serious ones. But carbon dioxide occurs at far higher levels (background levels alone account for 275 parts per million), and even relatively small usage of fossil fuels could meet these thresholds. A restaurant kitchen, the heating system in an apartment building, the activities associated with running a farm, and potentially a million other entities could face substantial and unprecedented requirements whenever they are built or modified.

The bottom line is this: If the EPA declares an endangerment finding, the kind of industrial-strength red tape that routinely costs hundreds of thousands if not millions of dollars (and can take more than a year to comply with) could now be imposed for the first time on many commercial buildings, farms, and all but the smallest of businesses. The paperwork would also hamper federal and state environmental regulators, drawing resources away from more useful endeavors.

Even if the EPA attempts to limit the impact to motor vehicles, it will be hit with a number of lawsuits from environmental organizations trying to force an expansion of its carbon dioxide restrictions. In addition to NSR, the language used to regulate carbon dioxide from motor vehicles could also qualify it as a National Ambient Air Quality Standard (NAAQS), and a lawsuit seeking to do so would be inevitable. If carbon dioxide becomes an NAAQS, it would trigger requirements that could be met only by severely curtailing economic activity. Other Clean Air Act regulations could also be unleashed—none of which would require congressional approval.

1. Edwin Meese III *et al.*, "Possible EPA Regulation of Carbon Dioxide Emissions," Heritage Foundation *Memorandum*, December 13, 2007, pp. 3–4.

In effect, an endangerment finding for carbon dioxide would lead to a regulatory scheme far more extensive than those Congress has wisely rejected. The economic impacts, unintended consequences, and public backlash could be unprecedented. It would leave a highly unfortunate legacy for this Administration. Indeed, the cost of this *de facto* tax increase on businesses and consumers would more than undo the benefits of the Bush tax cuts and other pro-growth policies.

Conclusion. An endangerment finding is a regulatory Rubicon that the Administration is not required to cross. Given that the Supreme Court declined to set any deadline for the EPA, there is no reason for the Administration to take final action in 2008. This is particularly true given the complexity of the issue, made more so by provisions in last year's energy bill that made substantial changes in both motor vehicles and fuels regulations. Gathering more information would be the best course of action at this time. In any event, the EPA should not take precipitous action on global warming, especially without guidance from Congress.

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