

WebMemo



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EPA Should Not Ignore Congress on Global Warming Restrictions

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Today, the Environmental Protection Agency (EPA) issued an Advance Notice of Proposed Rule-making (ANPR) detailing potentially devastating regulation of the economy in the name of fighting global warming. But several weeks ago, the Senate considered and wisely rejected global warming legislation that, as with EPA's proposal, would have done far more economic harm than environmental good. Apparently, the EPA bureaucracy is trying to circumvent Congress and regulate carbon dioxide and other greenhouse gas emissions under the Clean Air Act. Fortunately, while allowing the ANPR to be released for comment, the Bush Administration expressed in clear terms its objections to it. EPA Administrator Steve Johnson noted that the Clean Air Act was originally intended to regulate regional pollutants that caused health problems and is not the way to reduce greenhouse gases.

The regulatory roadmap laid out in the ANPR would result in a vast expansion of the EPA's power, giving the organization unprecedented regulatory oversight into all sectors of the economy, including restaurants, hospitals, apartments, schools, shipping, trucks, and farming. There is now a 120-day comment period for interested parties to explain why this proposal needs to be stopped.

Background. In April 2007, the Supreme Court ruled that the EPA could regulate emissions of carbon dioxide from motor vehicles. *Massachusetts v. EPA* did not require the agency to change its position and find that such emissions contribute to global warming enough to endanger public health or

welfare. Rather, it required the agency only to demonstrate that its responses comply with the Clean Air Act. The Court stated that “[w]e need not and do not reach the question whether on remand EPA must make an endangerment finding” and that “[w]e hold only that EPA must ground its reasons for action or inaction in the statute.”

Nonetheless, some at the EPA read the decision as a mandate to crack down on carbon dioxide, and not only for motor vehicles. Toward the end of 2007, this was the rumored direction the agency was taking.¹

Fortunately, the EPA announced last March that it would not begin regulating carbon dioxide but would release an ANPR later in the spring,² providing an opportunity to gather information about the consequences of various options before the agency commits to any subsequent measures. Johnson said that “[r]ather than rushing to judgment on a single issue, this approach allows us to examine all the potential effects of a decision with the benefit of the public's insight” and that the ANPR would request comment “relevant to making an endangerment finding and the implications of this finding with regard to the regulation of both mobile and stationary sources.”³

This paper, in its entirety, can be found at:
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Instead, with its recently released ANPR (a draft of which had been leaked a few weeks ago by agency bureaucrats), the agency all but conceded the endangerment argument and set out a detailed roadmap for heavy-handed agency regulation. By shifting the debate from *if* such regulation should be promulgated to a detailed discussion on *how* to go about it, the EPA appears to reach conclusions, which defeats the entire purpose of the ANPR called for in the March announcement. And rather than paying heed to the Senate's expressed caution when it defeated its climate bill last month, the unelected bureaucrats at the EPA who drafted this nearly 1,000-page monstrosity seem intent on circumventing it.

A Regulatory Pandora's Box. The federal government's caution is justified given the costs of proposals to limit carbon dioxide emissions—something the statute was not intended to do. The statute was created to deal with pollutants like smog and soot, not the very different challenge of global warming.

The Clean Air Act has a number of overlapping provisions that would unleash multiple regulatory regimes for CO₂. Thus, once carbon dioxide emissions are regulated from mobile sources like motor vehicles, they must also be controlled from stationary sources under the New Source Review (NSR) program. And given that the threshold for regulation—250 tons per year, and in some cases as little as 100 tons per year—is easily reached in the case of carbon dioxide emissions, the agency could impose new and onerous NSR requirements on smaller buildings 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 users of fossil fuels

could reach these thresholds. Thus, even the kitchen in a restaurant, the heating system in an apartment building, or the activities associated with running a farm could cause these and other entities—potentially a million or more—to face substantial and unprecedented requirements whenever they are built or modified.

The kind of industrial-strength EPA red tape that routinely imposes hundreds of thousands, if not millions, of dollars in compliance costs could now be imposed for the first time on many commercial buildings, farms, and all but the smallest of businesses. Not only would the costs and delays hamper the private sector, but the paperwork could paralyze 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. In addition to NSR, the language used to regulate carbon dioxide from motor vehicles could also qualify it as a criteria pollutant subject to National Ambient Air Quality Standards (NAAQS). If carbon dioxide comes under NAAQS, it would trigger requirements with even more severe economic implications.

The Opposite of What It Should Be. The White House was put in an awkward position by the leaked ANPR draft, which went against the thrust of the agency's March announcement and set a course for both making an endangerment finding and aggressively regulating under it. Nonetheless, the administration did the right thing by including its strong objections to the agency's approach, as well as critical comments from four cabinet-level secretaries and others. The stage is now set for a 120-day comment period. The White House has ensured that the ANPR process is back on the correct course as an information-gathering step on the need for—and perils of—regulating carbon dioxide under the Clean Air Act.

1. Edwin Meese III *et al.*, "Possible EPA Regulation of Carbon Dioxide Emissions," Heritage Memorandum, December 13, 2007.
2. EPA Letter to Chairman Waxman and Ranking Member Davis of the House Committee on Oversight and Government Reform, March 27, 2008, at <http://oversight.house.gov/documents/20080327170233.pdf> (July 10, 2008).
3. *Ibid.*, p. 2.

Heavy Costs, Questionable Gains. Regulating carbon dioxide under the Clean Air Act is a misguided approach to reducing emissions with heavy economic costs but questionable gains. The nation should consider and discuss the impact of this massive regulatory blueprint issued by EPA, an agency

that seems intent on taking steps harsher than the ones Congress has rightly rejected.

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