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The Price of Counting Carbon

With no greenhouse gas cap-and-trade, what happens now?

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Last month, the Democratic leadership in the U.S. Senate announced it would no longer try to bring a comprehensive climate change bill to the floor before the midterm elections in November.

When the announcement was made, the Senate Democrats intended to focus on crafting a more limited vehicle to promote energy efficiency and reduce emissions of greenhouse gases, but that effort seems stalled as well. No "cap-and-trade" program seems likely to emerge from this Congress, nor does a "carbon tax" or any other means to "put a price on carbon" seem possible.

So where does that leave us legally?

If you ignore the existing state of the law, no action on a statutory program to regulate comprehensively greenhouse gas emissions would be a good thing — or a bad thing, depending on whether you think we should devote resources to controlling those emissions.

Alas, the world is not that simple. There is an existing state of the law.

We do have a set of statutory programs — the federal Clean Air Act and the Pennsylvania Air Pollution Control Act — that will comprehensively regulate greenhouse gas emissions unless the courts rule otherwise. Neither legislature had climate change in mind when they drafted or amended those statutes, and as tools for the task of controlling greenhouse gas emissions, they do not establish a statutory scheme that anyone would choose as a first choice. In a pinch, you can drive a nail with a baseball bat, but a hammer works better.

Southern Legal Foundation v. Environmental Protection Agency, a U.S. District of Columbia Circuit Court of Appeals case in which Pennsylvania has recently sought to intervene, offers one convenient indication that the Clean Air Act and the Air Pollution Control Act regulate greenhouse gas emissions awkwardly.

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In that case, the EPA sought to relieve much of the economy from greenhouse gas regulation, at least for a time, by issuing the "tailoring rule."

Opponents of any regulation petitioned for review of the tailoring rule, because, if the Clean Air Act does not permit the deregulation, the whole scheme probably collapses of its own weight. Environmental advocacy groups and several states have sought to intervene to defend the deregulation — that is to argue that states and the EPA should not have to regulate all greenhouse gas emissions — in an effort to save the statutory scheme from itself.

Six kinds of gas — carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, and perfluorocarbons — increase the rate at which the atmosphere traps heat, the "greenhouse effect." If the atmosphere did not trap heat at all, the earth would be a cold place at night. But if the rate at which the atmosphere traps heat changes, the climate will change. While the other gases have a much stronger "greenhouse effect," most of the human contribution to the greenhouse gas problem comes from emissions of carbon dioxide.

As you will recall from high school, carbon dioxide results from burning anything composed primarily of carbon and hydrogen, like coal, oil, natural gas, ethanol, wood or old copies of this newspaper. Water is the other large product of burning.

Our economy largely runs on combustion for energy. Cars, trucks, trains and ships run primarily on gasoline or diesel fuel. Most electric power plants run on coal, oil or natural gas, although some run on uranium, wind or solar power.

The carbon dioxide and water produced by burning most fuels will weigh more than the original fuel because, as you will remember again from high school, burning combines the fuel with oxygen from the air and reshuffles the atoms into different molecules. Indeed, the carbon dioxide from burning most fuels will weigh somewhat more than the weight of the original fuel. The EPA has adopted a table of default values for this calculation that you can find in its mandatory greenhouse gas reporting rule.

So, if you burn a ton of coal or gasoline, you will emit more than a ton of carbon dioxide. To put that in perspective, burning 15 gallons in your car every week at six pounds per gallon is more than two tons of gasoline each year.

The Clean Air Act calls for every "major" stationary source of air pollutants — that is a facility that is not a vehicle — to have a permit under Title V. New or modified sources of sufficient size must obtain permits for their construction, modification, and operation, and those permits must call for the source to meet technology-based standards for control of any air pollutants "subject to regulation" under the Clean Air Act.

Different thresholds apply for the classification of sources under the major source permitting requirements of the statute. Congress set those thresholds with different pollutants, like soot or sulfur dioxide, in mind, pollutants that only a large air pollution source emits in hundreds or thousands of tons annually. The lowest threshold is 40 tons per year of a pollutant and the highest is 250 tons per year.

For purposes of this column, the details of which thresholds apply to which emissions do not matter; as applied to emissions of carbon dioxide they are all

very low.

Scientists have contended for decades that carbon dioxide concentrations in the atmosphere contribute to climate change. However, the EPA had taken the position that carbon dioxide did not constitute a "pollutant" for purposes of the Clean Air Act.

In 2007, the U.S. Supreme Court decided *Massachusetts v. EPA*, holding that the EPA had not properly justified its decision not to regulate carbon dioxide emissions from mobile sources. That called upon EPA to determine whether emissions of carbon dioxide from cars and trucks "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare" under section 202 of the statute.

Last December, the EPA published an "endangerment assessment" and found that carbon dioxide and other greenhouse gas emissions, in fact, do cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. The endangerment assessment imposes a duty on the EPA to develop greenhouse gas emission standards for vehicles. In addition, because some provisions of the Clean Air Act applicable to stationary sources use almost identical language as section 202, the endangerment assessment pretty much makes stationary source regulation mandatory.

At the same time, the EPA had been directed by the Consolidated Appropriations Act for 2008 to draft a mandatory greenhouse gas reporting rule. It adopted that rule last year.

Given these developments, the EPA could not take the position that carbon dioxide was not a "pollutant subject to regulation under" the Clean Air Act. And given the relatively low thresholds for the permit requirements under the statute, an enormously large number of facilities that burn coal, oil, or natural gas in even modest furnaces or boilers seem to require permits beginning in 2011.

They not only require permits when they are new, they require permits for every change to the facility that would cause a significant change to the emissions of carbon dioxide, and the statutory threshold for "significance" is very low.

The EPA responded by adopting the tailoring rule, which would phase in the requirement for Title V permits and for permits for new construction or modification through 2013.

Initially, only sources independently subject to review under the programs for review of new or modified sources because of emissions of another pollutant would require greenhouse gas permits. They would only have to meet technology-based standards for control of greenhouse gases if their new emissions would exceed 75,000 tons per year of carbon dioxide equivalent. Over the ensuing two years, new sources whose emissions of carbon dioxide equivalent would exceed 100,000 tons per year or modifications to existing sources that would cause an increase in carbon dioxide equivalent emissions of more than 75,000 tons per year would require permits.

On Aug. 12, the EPA proposed certain additional actions — a "SIP call" and a "federal implementation plan" — to assure that either the EPA or the state would

be in a position to issue these permits when the time comes.

In this way, the EPA hoped to limit the number of new permits — and each one is technically very complicated — that would have to be written. Under the Clean Air Act, the states write the permits. In Pennsylvania, the Department of Environmental Protection has recently experienced a more than 25 percent budget cut, even with the addition of several scores of new employees to regulate Marcellus Shale natural gas well development. Just this month, Gov. Edward G. Rendell has announced that state agencies will have to cut an additional 2 percent in order to address a federal funding shortfall of more than a quarter billion dollars.

And, thus, to Southeastern Legal Foundation, one of what are more than two-dozen cases prompted by the tailoring rule.

Opponents to greenhouse gas regulation have attacked the tailoring rule. Their theory is that the regulatory thresholds are established by Congress, and the EPA does not have discretion to ignore them. Either Congress did not intend to regulate greenhouse gases, or it intended to regulate them precisely the way the statute sets out. If the latter, then the regulatory program will collapse of its own weight.

Proponents of greenhouse gas regulation, including Pennsylvania, have rushed in to defend the deregulation of the tailoring rule in order to preserve the imposition of requirements on the largest, and most important, sources of carbon dioxide.

Pennsylvania has an even more difficult regulatory structure.

Section 6.1(a) of the Air Pollution Control Act, mirrored in section 127.11 of the DEP's regulations, requires a permit, known as a "plan approval," to construct a new source of "air contamination," to modify a source, or to install any air pollution control equipment. Routine repair, replacement, and maintenance are exempted, as are sources included on a guidance memorandum prepared by the DEP under section 127.14 of its rules. This requirement generally does away with the numerical thresholds of the federal Clean Air Act for purposes of state permits, and imposes a state requirement subject only to the section 127.14 exceptions. The DEP addresses regulatory burden with what amount to permits by rule, known as "general permits." None of this is set up readily to exempt small sources of greenhouse gases without an extended process.

Against this backdrop, one must count as a failure Congress' inability to enact a statute crafted with greenhouse gas emissions in mind to replace the Clean Air Act's regulatory structure. Whether you think a "price on carbon" is necessary or disastrous, you have to agree that the requirements about to be imposed by the Clean Air Act will turn out to be awkward, uncertain, expensive, and poorly fitted to the problem. Perhaps after this election we can trade our baseball bats for hammers. •

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