

EPA Staff’s Attempt to Regulate Greenhouse Gases under the Clean Air Act¹

“An unprecedented expansion of EPA authority.” – EPA Administrator Johnson

Explaining the ANPR

The Environmental Protection Agency has announced that is it well on its way to regulating at least 85 percent of the energy used in America in the name of global warming (nevermind the fact that global temperatures have inexplicably not increased since at least 2001).² Because energy is an indispensable part of economic activity, if EPA’s plans go forward they will exercise some regulatory control over most of the American economy.

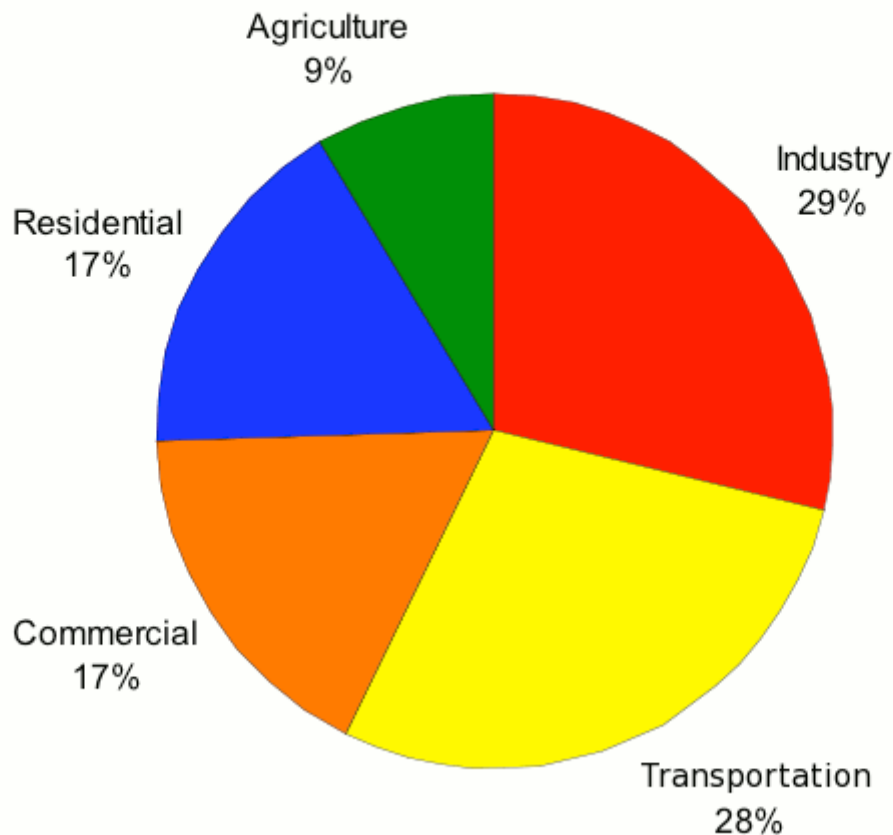
The problems created by regulating greenhouse gases under the Clean Air Act are legion. Nothing says it better than the following statement by the EPA Administrator himself:

If EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: the potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.³

Administrator Johnson is correct. Eighty five percent of the energy used in America comes from fossil fuels.⁴ Carbon dioxide emissions are an unavoidable byproduct of the combustion of fossil fuels. EPA staff is seeking to regulate the most widespread sources of energy in the United States.

To understand the scope of EPA’s potential regulations, below is a diagram of the sources of greenhouse gas emissions in the United States.⁵ To reduce greenhouse gas emissions, EPA’s regulations will affect all of these sectors, industry, transportation, commercial, residential, and agriculture. It will raise the price of energy and thereby increase the cost of doing business.

Table ES-8: U.S Greenhouse Gas Emissions by Economic Sector with Electricity-Related Emissions Distributed (Tg CO₂ Eq.)



How did we get here?

Since at least the late 1990s, environmental activists have tried to get EPA to regulate greenhouse gases.⁶ In 1998, EPA General Counsel, Jonathan Cannon, wrote a legal opinion stating that EPA had the authority to regulate greenhouse gases under the Clean Air Act.⁷ Despite this opinion, EPA declined to regulate greenhouse gases. One reason EPA did not attempt to regulate greenhouse gases at the time is because Congress attached riders to appropriations bills forbidding EPA from spending any money on greenhouse gas regulations.

To force EPA to take action, in 1999, a coalition of environmental activists used Mr. Cannon's opinion to sue EPA in an attempt to force EPA to regulate greenhouse gas emission from mobile sources.⁸ These environmental activists realized that if a court would find that EPA had the authority to regulate greenhouse gases under §202 of the Clean Air Act (the section that regulates emissions from vehicles), then EPA would be forced to regulate greenhouse gases under the rest of the Clean Air Act and apply regulations to all fossil fuel use in the United States.

The Supreme Court Weighs in—Massachusetts v. EPA

A group of attorneys general, led by the Attorney General of Massachusetts, also sued EPA in an attempt to bolster the case against EPA. This case became *Massachusetts v. EPA*.⁹ On April 2, 2007, in a 5-4 decision, the Supreme Court agreed with the environmental activists that EPA had the authority to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act because they found that greenhouse gases are an “air pollutant.” Because greenhouse gases, in the Court’s opinion, are air pollutants under the Clean Air Act, the act then **requires** EPA to regulate greenhouse gases. The Supreme Court held that EPA had to regulate greenhouse gases or for EPA to justify its decision not to regulate greenhouse gases.

The Supreme Court’s Tortured Logic

To reach this result the Supreme Court had to use some tortured logic. Section 202 of the Clean Air Act requires EPA to regulate “any air pollutant” . . . “which may reasonably be anticipated to endanger public health or welfare.”¹⁰ The question is, what is the definition of an “air pollutant” under the Clean Air Act? The majority decided that an air pollutant was **any** “airborne compound of whatever stripe.”¹¹ They even went so far to say that the CAA was unambiguous on this point.¹² Sadly they are unambiguously wrong.

The Clean Air Act defines a pollutant as, “any air pollution agent or combination of such agents, including any physical, chemical, ... substance or matter which is emitted into or otherwise enters the ambient air.”¹³ For something to be a pollutant, therefore, it must be an “air pollution agent,” not merely anything in the air.

Carbon dioxide sure doesn’t sound like an “air pollution agent.” It is inert, colorless, odorless, and it isn’t toxic to human at 20 times ambient levels. Justice Scalia in dissent explained how flawed the majority’s misconstruction of this term was. He wrote from the majority’s opinion “it follows that *everything airborne*, from Frisbees to flatulence, qualifies as an ‘air pollutant.’ This reading of the statute defies common sense.”¹⁴ Regardless of *Massachusetts v. EPA* defying common sense, it is the law.

EPA’s Renewed Efforts to Regulate Greenhouse Gases

After *Massachusetts v. EPA*, EPA had a few options: 1) promulgate a new rule regulating greenhouse gases from vehicles; 2) attempt to extend their authority in the Clean Air Act to the fullest extent and try to regulate all U.S. greenhouse gas emissions; or 3) provide a “reasonable explanation” of why they weren’t going to regulate greenhouse gas emissions.¹⁵

The problem with declining to regulate greenhouse gases is that EPA has in the past essentially stated that greenhouse gases are harmful to human health and welfare. The Supreme Court also made it somewhat difficult for EPA not to regulate greenhouse gas emissions. For example, the Court wrote:

Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.¹⁶

The real question is not if greenhouse gases contribute to climate change (greenhouse gases obviously contribute to the greenhouse effect), but whether greenhouse gases “endanger public health and welfare” as defined by the Clean Air Act. For EPA to avoid taking further regulatory action, they would need to rebut the Supreme Court’s claims of alleged harms from global warming and EPA’s past claims of harms from greenhouse gas emissions.

The Advance Notice of Proposed Rulemaking

Instead of taking the difficult path of explaining the latest climate science and data and refusing to regulate greenhouse gases, EPA instead is attempting to expand their regulatory reach. In late 2007, EPA unofficially announced that it was going to find that greenhouse gases endangered public health and welfare and should therefore be regulated under the Clean Air Act. Before this rule came out, however, other Administration officials questioned the wisdom of such a move. Because of the complexity of potentially regulating 85 percent of all energy use in America, EPA decided to ask the American public for comments on how to proceed. To do this, they put out an “Advance Notice of Proposed Rulemaking” (ANPR).¹⁷

In many cases, an ANPR is a short document that asks the public for comment without revealing an agency’s policy preferences. But instead of a small request for comment, EPA released an enormous 588 page ANPR explaining some of the possible ways to regulate greenhouse gases using the Clean Air Act. The worst part of the ANPR is that EPA staff has essentially predetermined their course of action—regulating greenhouse gases.

What will the ANPR Lead To?

The ANPR envisions massive amounts of regulation on all forms of greenhouse gas emissions and the activities that lead to greenhouse gas emissions. *Massachusetts v. EPA* dealt with the regulation of mobile sources and EPA will likely start by regulating anything that has an engine such as automobiles, light-duty trucks, heavy-duty trucks, motorcycles, planes, ships, boats, recreational vehicles, farm tractors, construction equipment, garden equipment, and even lawnmowers just to name a few.

And what will these potential regulations look like? EPA is proposing to require a 10 percent reduction in the output of America’s energy-intensive industries, lowering the speed limit back to 55 mph, and requiring ocean-going vehicles to take 10 percent longer to deliver their cargo.

EPA’s regulation will not be limited to mobile sources. By starting to regulate greenhouse gases under one section of the Clean Air Act, EPA would be forced to regulate it under other sections, including a program called Prevention of Significant

Deterioration. This program regulates sources that emit 100 tons or more of emissions a year.¹⁸ This may sound like a lot, but a 100,000 square foot building (more or less 10 stories) would emit that much in a year. This means that EPA would regulate the energy use of all large buildings, and any buildings, such as computer data centers, which use large amounts of energy. There are likely one million new sources that EPA would have to regulate¹⁹ and require the buildings to use “Best Available Control Technology”—whatever EPA decides that is for the buildings.²⁰

These regulations could extend to the heating sources of large single-family homes, as well as stores, church, hospitals, and police stations.

EPA would also likely regulate all large beef or dairy operations in the country because cows emit (to put it delicately) large amounts of the potent greenhouse gas methane. Who knows how EPA will propose to control these emissions.

EPA Regulation of Greenhouse Gases Will Lead to Higher Energy Prices

Reducing the greenhouse gas emissions from 85 percent of the energy used in the United States would require tremendous amounts of regulation. The form of these regulations is unclear, but what is clear is that the regulations would dramatically increase energy prices and the price of everything that uses energy, including computers, cars, trucks, washing machines, lawnmowers, and air conditioning units. The economy is already suffering from high energy prices and EPA's plan will just make that worse.

EPA Regulation of Greenhouse Gases Will Not Affect the Climate

Maybe the most amazing thing about the EPA plan is that it won't affect the global temperature unless the developing world reduces their greenhouse gas emissions. Because of high energy prices, America's greenhouse gas emissions have actually fallen recently. World emissions continue to increase, however, because the developing world is more concerned about the health and welfare of their citizens than greenhouse gas emissions. For example, India recently released its National Climate Action Plan on Climate Change. In the plan they stated, “It is obvious that India needs to substantially increase its per capita energy consumption to provide a minimally acceptable level of well-being to its people.”²¹

India and other developing nations are not going to limit their energy consumption to pacify EPA. Because they won't, EPA's regulation of energy use will only drive up energy prices in America without having any affect on global temperatures.

¹ This document is available online at: <http://www.instituteforenergyresearch.org/2008/07/11/epa-staffs-attempt-to-regulate-greenhouse-gases-under-the-clean-air-act/>

² The Intergovernmental Panel on Climate Change (IPCC) projected that temperature should increase about 2 degrees Celsius per century because of greenhouse gas concentrations and temperatures should increase linearly. So far this century global temperatures have not increased. *See* <http://rankexploits.com/musings/2008/result-of-hypothesis-tests-very-low-confidence-2ccentury-correct/> The lack of warming is especially evident in the satellite temperature record. The satellite temperature data from the University of Alabama at Huntsville is available here: http://vortex.nsstc.uah.edu/public/msu/t2lt/tiltghmam_5.2 and the satellite temperature data from Remote Sensing Systems is here:

ftp://ftp.ssmi.com/msu/monthly_time_series/rss_monthly_msu_amsu_channel_tlt_anomalies_land_and_ocean_v03_1.txt.

³ Environmental Protection Agency, *Regulating Greenhouse Gas Emissions under the Clean Air Act*, p. 5.

⁴ Energy Information Administration, *Greenhouse Gases, Climate Change, and Energy*, <http://www.eia.doe.gov/bookshelf/brochures/greenhouse/Chapter1.htm>.

⁵ Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006*, p. ES-16, http://www.epa.gov/climatechange/emissions/downloads/08_CR.pdf.

⁶ One of the first attempts was the International Center for Technology Assessment’s petition for EPA to regulate greenhouse gases in 1999. See <http://www.icta.org/doc/Chronology%20Short%208-31-06.pdf>.

⁷ Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, May 21, 2007, <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/05/21/cannon>.

⁸ The groups which sued are: Alliance for Sustainable Communities, Applied Power Technologies, BioFuels America, California Solar Energy Industries, Clements Environmental Corporation, Environmental Advocates, Environmental and Energy Study Institutes, International Center for Technology Assessment, Friends of the Earth, Full Circle Energy Project, Inc., Green Party Rhode Island, Greenpeace U.S.A., Network for Environmental and Economic Responsibility of the United Church of Christ, New Jersey Environmental Watch, New Mexico Solar Energy Association, Oregon Environmental Council, Public Citizen, Solar Energy Industries Association, and the SUN DAY Campaign.

⁹ www.supremecourt.us/opinions/06pdf/05-1120.pdf.

¹⁰ 42 U.S.C. § 7521(a)(1).

¹¹ *Mass. v. EPA*, 127 S.Ct. at 1460.

¹² *Id.*

¹³ 42 U.S.C. § 7602(g).

¹⁴ *Mass. v. EPA*, 127 S.Ct. at 1476.

¹⁵ *Id.* at 1462.

¹⁶ *Id.* at 1462.

¹⁷ Environmental Protection Agency, *Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act*, <http://www.epa.gov/climatechange/anpr.html>

¹⁸ Specifically this is defined as a source that emits at least 100 tons per year of an air pollutant of any other source with the potential to emit 20 tons per year of an air pollutant.

¹⁹ Portia M.E. Mills & Mark P. Mills, *A Regulatory Burden: The Compliance Dimension of Regulating CO₂ as a Pollutant*, http://www.uschamber.com/assets/env/regulatory_burden0809.pdf.

²⁰ For a more complete explanation of the issue with Prevention of Significant Deterioration see William Kovacs’ testimony before the United States Committee on Environment and Public Works: http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9cc4d7e4-f066-4534-9337-9bf53154b0e1 and Marlo Lewis’ testimony before the same committee: http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=38ed7b76-2817-4f03-9e51-537515c9ffd2.

²¹ Government of India, *National Action Plan on Climate Change*, <http://pmindia.nic.in/Pg01-52.pdf>