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The EPA's Prudent Response to *Massachusetts v. EPA*

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The Environmental Protection Agency (EPA) and Administrator Stephen Johnson deserve praise following the announcement that the agency will respond to the Supreme Court's *Massachusetts v. EPA* decision by issuing an Advance Notice of Proposed Rulemaking (ANPR) on the question of regulating carbon dioxide emissions from motor vehicles under the Clean Air Act. Taking irreversible steps toward regulating emissions would lead to the imposition of unnecessary costs on the economy, which would be all the more damaging in the current economic climate. An ANPR, which will allow for public comment without committing the agency to a specific outcome, is the best course of action.

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. Notwithstanding assertions to the contrary, *Massachusetts v. EPA* did not require the agency to change its position; it only required the agency to demonstrate that whatever it chooses to do complies with the requirements of 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 people in the environmental activist community, Congress, and the EPA wanted to read the decision as a mandate to begin cracking down on carbon dioxide. But doing so is not required under the law.[1]

A Cautious Federal Approach to Regulating Carbon Dioxide—Thus Far. Carbon dioxide is a naturally occurring component of the air and 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 impacts on the economy and on living standards.

However, 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 this reason, the federal government has been extremely cautious about embarking on mandatory carbon reductions over shorter time frames. In 1997, the Senate unanimously resolved to reject any climate change treaty that unduly burdened the U.S. economy or failed to engage all major emitting nations such as China and India. Although the Kyoto Protocol was signed by the U.S. later that

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year, neither President Bill Clinton nor President George W. Bush ever submitted the treaty to the Senate for the required ratification.

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

Beyond costs, there are questions about whether these measures would accomplish anything environmentally. Even assuming the worst-case scenarios of man-made warming, these bills would likely reduce it by an amount so small as to be difficult to detect.

Overall, Congress has, quite rightly, recognized the potential pitfalls of ill-advised climate measures and is acting with appropriate caution.

The Clean Air Act: A Regulatory Pandora's Box. It is with this justified caution that the Administration should approach its response to *Massachusetts v. EPA*. This is especially so given the many shortcomings of the Clean Air Act 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 the EPA. Thus, any finding that carbon dioxide from motor vehicles is a pollutant that endangers public health or welfare would not only lead to regulations for cars and trucks, but also unleash many additional measures with impacts 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. And 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. 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 bottom line: The kind of industrial-strength EPA red tape that routinely imposes hundreds of thousands, if not millions, of dollars in compliance costs in a process that can drag on for a year or more 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 would do the same to 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 a NAAQS, it would trigger requirements

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

that could be met only by severely curtailing economic activity. Other Clean Air Act regulations could also be unleashed—and all of this without congressional approval.

In effect, initiating carbon dioxide restrictions for motor vehicles would lead to a regulatory scheme far more extensive than those Congress has wisely rejected. The economic impacts, unintended consequences, and public anger 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 undo the benefits of the Bush tax cuts and then some.

Conclusion. A wave of costly new regulations is the last thing the economy needs. An ANPR is the best option at this time. It will allow for comment on the economic implications of various options open to the EPA for regulating motor vehicles and on other critical issues, such as the impact of the recently passed Energy Independence and Security Act.

EPA's announcement is entirely consistent with the Supreme Court's decision, which neither set a deadline for the agency to act nor required it to undertake a particular course of action. The EPA is to be applauded for taking the most sensible course of action.

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