

Comment on *Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors*

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Addressing global climate change through the regulation of greenhouse gas emissions is an issue of broad national and international concern, touching on many facets of this country's environmental and economic well-being. Crafting a workable solution will require a coordinated and comprehensive approach, for only such an approach will maximize the environmental benefits of regulation while not imposing undue costs on already strained American businesses and consumers. *Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors* by Peterson, McKinstry, and Dernbach highlights two threshold questions that policymakers face in addressing greenhouse gas regulation.¹ First, given that federal action to address greenhouse gas emissions is a virtual certainty, what role should be left for states and localities to play? Second, in crafting a federal response, do the existing authorities under the Clean Air Act² provide a workable framework for greenhouse gas regulation, or is a new regulatory regime required?

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1. Thomas D. Peterson et al., *Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors*, 39 ELR (ENVTL L. & POL'Y ANN. REV.) 10711 (Aug. 2009) (a longer version of this Article was originally published at 26 VA. ENVTL. L.J. 227 (2008)).
2. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

On the first question, Peterson et al. suggest that states will continue to play a significant role in shaping climate change regulation in conjunction with federal action. The authors' conclusion, however, begs the threshold question of which level of government—the state governments or the federal government—is best suited to enact requirements addressing climate change that balance the various competing interests and reach the optimal level of stringency.

The proper allocation of regulatory responsibility between the state and federal governments has been described by one commenter as the pursuit of the best “jurisdictional match.”³ Often this match is not made, thus resulting in a “jurisdictional mismatch”—that is, “[t]he federal government regulates in many areas where there is no clear analytical basis for federal regulation,” while “[a]t the same time, the federal government is relatively absent where a stronger federal presence could be justified.”⁴ This commenter concludes, correctly in our opinion, that “[g]lobal climate change policy is a prime example of increasing state activity where federal action would provide for a greater jurisdictional match.”⁵

There are many reasons why the federal government is best suited to regulate greenhouse gas emissions. Deciding the optimum level of regulation entails an analysis of the relative costs and benefits of more stringent regulations; in other words, regulations will be set at the level where the benefits of additional stringency is outweighed by the additional costs to society. In the case of greenhouse gas emissions, often neither the costs nor the benefits of a state regulation are fully internalized within the regulating state, thus making that state

3. Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 175 (2005).
4. *Id.* at 132.
5. *Id.* at 175.

the suboptimal body to weigh the costs and benefits of regulation. This is especially true for mobile sources like cars and trucks, as exemplified by California's motor vehicle emissions program,⁶ which Peterson et al. reference in their article. For these sources, the "consumer states," such as California and New York, which seek to impose limits on the level of greenhouse gases emitted from vehicles sold in those states,⁷ are different from the "producer states," such as Michigan and Tennessee. Thus, the costs of motor vehicle emissions regulations are borne disproportionately by states other than the ones setting the regulations.

This result might be justifiable where the regulating state internalizes the benefit of its regulatory program. For example, California has traditionally regulated the emissions of pollutants that cause localized smog, such as hydrocarbons and oxides of nitrogen. Such regulations have provided the citizens of California (and the other states that have adopted the California program) with significant tangible benefits in the form of improvements in the quality of their air. Those states therefore have been able to fully internalize the benefits of their regulations. However, greenhouse gases like carbon dioxide do not stay localized, but rather disperse evenly throughout the atmosphere. Accordingly, carbon dioxide emissions in California have no greater impact on the climate in California than they do elsewhere in the world.⁸ For this reason, California has recognized that its proposed motor vehicle greenhouse gas regulations will not by themselves have any meaningful impact on ambient temperature or on the climate in that state.⁹ In such a circumstance, where both the costs and the benefits of regulation will be realized across the nation as a whole, the federal government is best positioned to chart the appropriate course, taking into account

all of the relevant considerations—such as the anticipated environmental benefits, the costs borne by consumers, and the regulatory burdens imposed on industry.

The second question identified is how the federal government should structure its regulatory response to climate change. Peterson et al. are correct that, in light of the Supreme Court's decision in *Massachusetts v. EPA*,¹⁰ federal action seems inevitable and that the Clean Air Act is the most likely avenue for such action. However, we fear that the authors overstate the extent to which the Clean Air Act provides a workable framework for regulating greenhouse gases like carbon dioxide. As former EPA Administrator Stephen L. Johnson stated in the Agency's Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act (ANPR),¹¹ "the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill suited for the task of regulating global greenhouse gases."¹² This sentiment was echoed by the heads of the Departments of Agriculture, Commerce, Transportation, and Energy, who, in a very unusual move, published their opposition to regulating carbon dioxide under the Clean Air Act in the *Federal Register* along with the ANPR.¹³ From the other side of the political spectrum, Congressman John Dingell, then-Chairman of the House Energy and Commerce Committee, put it best when he said that the likely result of regulating carbon dioxide under the Clean Air Act would be a "glorious mess."¹⁴

As Peterson et al. point out, there are other sections of the Clean Air Act that contain "endangerment" language that is very similar to that construed by the Supreme Court in *Massachusetts*. Once EPA determines that carbon dioxide triggers an endangerment when emitted from a tailpipe, it is very difficult to understand why it does not trigger a similar finding when emitted from other regulated sources. However, applying these other provisions to carbon dioxide would be unworkable and demonstrates that the Act is not well-suited to regulating carbon dioxide.¹⁵

For example, one such section identified by Peterson et al. is §108, which governs the creation and attainment of national ambient air quality standards (NAAQS).¹⁶ These standards, or more stringent standards adopted by the states, are implemented through federally approved state implementation plans (SIPs). State and regional compliance with

6. Section 209(a) of the Clean Air Act preempts states from adopting or enforcing motor vehicle greenhouse gas regulations. 42 U.S.C. §7543(a), ELR STAT. CAA §209(a). However, §209(b) allows the state of California to receive a waiver of Clean Air Act preemption if the conditions of that statute are met. *Id.* §7543(b). Other states may then adopt the California program under §177 of the Act. *Id.* §7507.

7. California's motor vehicle greenhouse gas regulations are set forth at CAL. CODE REGS. tit. 13, §1961.1 (2009). On March 6, 2008, then-EPA Administrator Stephen Johnson denied California's request for a Clean Air Act waiver for these regulations. See California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156 (Mar. 6, 2008). That decision is being reconsidered by the new EPA Administrator.

8. The National Academy of Sciences asserts that:
"[G]reenhouse gases released anywhere in the world disperse rapidly in the global atmosphere. Neither the location of release nor the activity resulting in a release makes much difference. A molecule of CO₂ from a cooking fire in Yellowstone or India is subject to the same laws of chemistry and physics in the atmosphere as a molecule from the exhaust pipe of a high-performance auto in Indiana or Europe."

COMM. ON SCI., ENG'G, & PUB. POLICY, NAT'L ACAD. OF SCI., POLICY IMPLICATIONS OF GREENHOUSE WARMING: MITIGATION, ADAPTION, AND THE SCIENCE BASE 5 (1992).

9. See CAL. ENVTL. PROT. AGENCY, AIR RES. BD., REGULATIONS TO CONTROL GREENHOUSE GAS EMISSIONS FROM MOTOR VEHICLES, FINAL STATEMENT OF REASONS 229, 231–34 (2005), available at <http://www.arb.ca.gov/regact/grnhsas/fsor.pdf> (last visited May 30, 2009).

10. 127 S. Ct. 1438, 37 ELR 20075 (2007).

11. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354 (July 30, 2008).

12. *Id.* at 44355.

13. *Id.* at 44356-78.

14. *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (2008) (statement of Rep. John D. Dingell, Chairman, House Comm. on Energy and Commerce).

15. *Id.* (statement of Raymond B. Ludwizewski, partner, Gibson, Dunn & Crutcher LLP).

16. Peterson et al., *supra* note 1, at 10717.

NAAQS requirements is judged from the perspective of pollutant concentration in the ambient air. For traditional criteria pollutants, compliance with NAAQS depends in large part on local conditions such as local emissions, prevailing air flow conditions, and topography. If an area is a nonattainment area, it may be required to implement strict limits on emissions of the nonattainment pollutants in an effort to meet NAAQS concentrations.

This regulatory construct makes little sense in the context of greenhouse gas emissions. Because greenhouse gases disperse globally, it would be impossible for EPA to distinguish attainment from nonattainment areas for any greenhouse gas NAAQS. If NAAQS for greenhouse gases is set at a level below the current global atmospheric concentration, then EPA would be required to list all states as nonattainment areas. Under this scenario, a state could never achieve attainment status with its own efforts; rather, the ability of states to reach attainment would depend on the willingness not only of other states, but also of nations around the globe, to reduce their greenhouse gas emissions. Alternatively, if EPA set the greenhouse gas NAAQS at the current atmospheric concentrations, states would have to offset all new emissions—both from within their own borders, as well as far away venues like India and China—in their SIPs. Neither of these scenarios makes much sense.

Regulating greenhouse gases under the Clean Air Act would also trigger the new source review (NSR) program, which requires preconstruction review and permitting for major emitting facilities.¹⁷ The term “major emitting facility” is defined in the statute as a source that has the potential to emit at least 250 tons per year of a regulated pollutant or, if included on EPA’s select list of source categories, at least 100 tons per year of a regulated pollutant.¹⁸ Although the 100 to 250 tons per year levels of traditional pollutants is a threshold that generally limits permit requirements to large stationary sources, like electric utilities, chemical plants, and refineries, that threshold is not set high enough to capture only major stationary sources of the carbon dioxide. Rather, the 250 tons per year threshold will dramatically expand the number of facilities that would be forced to undergo the arduous preconstruction permitting process. Office and apartment buildings, hotels, enclosed shopping malls, large retail stores, warehouses, college buildings, and hospitals could become subject to the Clean Air Act permitting process for the first time. For example, the average office building in New York City emits 20 pounds of carbon dioxide per square foot. This average would indicate that any building over 25,000 square feet would be a major stationary source. Applying this threshold, EPA estimates that the number of sources subject to the NSR requirements would increase by

10 fold, and that the agency would have to process 2,000 to 3,000 permits per year.¹⁹ The notion that a landowner would have to engage climate scientists and emissions experts and develop air emissions studies and models in order to satisfy the requirements of NSR permitting program before being able to build a small office building or medical facility illustrates the inappropriateness of existing Clean Air Act programs to regulate greenhouse gases.

Both the current Administration and the new Congress have set climate change as their top environmental priority. Congressional leaders have signaled that they hope to have draft legislation out of committee by Labor Day, while the new EPA is working on complying with the mandate from *Massachusetts v. EPA*. As these initiatives move forward, it is incumbent that all sectors of the federal government work together on a coordinated national approach to climate change that properly balances all of the costs against all of the benefits. Doing so will require either new legislation or amendments to the Clean Air Act that specifically address greenhouse gases and that vest primary regulatory responsibility with the federal government. Any other approach threatens to impose unnecessary costs on businesses and consumers at a time when the economy can ill-afford it.

17. 42 U.S.C. §7475, ELR STAT. CAA §165.

18. 42 U.S.C. §7479(1), ELR STAT. CAA §169(1).

19. Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. at 44499.