

The EPA Runs Amuck

The Bureaucracy Usurps Congress on Climate and Energy Policy

By Marlo Lewis

Summary: *On June 26, 2009, the U.S. House of Representatives passed the Waxman-Markey cap-and-trade bill by a vote of 219-212. However, strong grassroots opposition to cap-and-trade contributed to Democratic Party losses in 2010 and, in a stunning turnaround, the Senate rejected a cap-and-trade bill last year. But keep a hand on your wallet. As Barack Obama said the day after Election Day 2010, “Cap-and-trade was just one way of skinning the cat; it was not the only way. It was a means, not an end. And I’m going to be looking for other means to address this problem.” What was Obama’s “end”? In a moment of candor, presidential candidate Obama said in Jan. 2008 that his cap-and-trade plan would cause electricity prices to “necessarily skyrocket” and “bankrupt” coal. What are those other means? Although many in number, other ways of skinning the cat fall into three basic categories: market-rigging mandates, new regulatory burdens on power plants and other industrial facilities, and bureaucratic restrictions on access to natural resources.*



President Barack Obama calls for a radical transformation of America’s energy sector

In his January 25, 2011 State of the Union speech, President Obama asked Congress to establish a clean energy standard (CES) for the U.S. electric power sector:

“I challenge you join me in setting a new goal: By 2035, 80% of America’s electricity will come from clean energy sources. (Applause)

Some folks want wind and solar. Others want nuclear, clean coal and natural gas. To meet this goal, we will need them all — and I urge Democrats and Republicans

to work together to make it happen.” (Applause)

Since “clean coal” qualifies as “clean energy,” you might think Obama no longer wants to kill the coal industry. Alas no. “Clean coal” refers to coal power plants equipped with carbon capture and

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storage (CCS) technology. It's anybody's guess when, if ever, CCS will become commercially viable.

"Currently available CCS technologies are expensive and very energy-intensive due to the large quantity of energy required to capture, compress, transport, and store CO2 into geologic formations," says a December 2010 report by the Department of Energy and National Energy Technology Laboratory. With current CCS technologies, the cost of avoiding CO2 emissions ranges from \$60 to \$114 per metric ton. That's two to three times more costly than the estimated price of emission permits under the Waxman-Markey cap-and-trade program that failed to pass Congress.

"Clean" in Obama's vocabulary actually means "anything but economical coal." Instead of pricing the carbon emissions from coal, as a cap-and-trade program does, Obama's plan would simply prohibit "conventional coal" (the affordable kind) from competing with other energy sources in 80% of the nation's electricity market. Here's the kicker. Obama's target is

virtually identical to the mix of electricity fuels that would develop under Waxman-Markey. Under Obama's proposal, 80% of U.S. electricity would come from nuclear, natural gas, CCS, and renewable energy by 2035. Under Waxman-Markey, an estimated 81% would come from the same sources by 2030, according to the U.S. Energy Information Administration (EIA). In his State of the Union speech, Obama essentially restated the Waxman-Markey bill's targets for reducing greenhouse gases in the utility-sector—but he neglected to tell Congress and the public that he was doing so.

The Heritage Foundation estimates that Obama's proposal would have the following impacts:

- Raise electricity prices 36% for households and 60% for industry;
- Cut national income (GDP) by \$5.2 trillion between 2012 and 2035;
- Cut national income by \$2,400 per year for a family of four;
- Reduce employment by more than 1,000,000 jobs; and
- Add more than \$10,000 to a family of four's share of the national debt by 2035.

If Obama were a straight shooter, he would have said something like this:

I challenge you to join me in setting a new goal: By 2035, 80% of America's electricity will come from clean energy sources. This will restructure the electric power sector

the same way Waxman-Markey would have if Congress had passed it. My plan will cause electric rates to necessarily skyrocket and bankrupt coal. As I've said before, there's more than one way to skin a cat.

Such candor would not have won applause. More than five months later, no Member of Congress has introduced CCS legislation, although Senate Energy and Natural Resources Chairman Jeff Bingaman (D-N.M.) may do so. Even if a CCS bill were to pass in the Democrat-controlled Senate, it would have virtually no chance of passing in the House.

EPA Uses the Clean Air Act to Regulate Greenhouse Gases

A more serious threat to affordable energy is the surge of new regulations emanating from Obama's Environmental Protection Agency (EPA).

What Team Obama tried and failed to achieve through the legislative process, it now seeks to accomplish through bureaucratic fiat. Under the guise of implementing the 1970 Clean Air Act—passed years before global warming was even a gleam in Al Gore's eye—EPA is effectively legislating climate policy for the nation.

According to Administration policy, a firm that seeks to build or modify a coal power plant, industrial boiler, petroleum refinery, cement production facility, steel mill, or pulp and paper factory must now demonstrate that its project incorporates

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“best available control technology” (BACT) for reducing greenhouse gases (also called GHGs in climate science lingo) before EPA or its state counterparts will grant the necessary pre-construction permit. EPA is also developing performance standards for various industrial sources of GHGs, beginning with coal power plants and petroleum refineries. Over time, EPA intends to extend BACT and performance standard regulations to smaller emitters and source categories. GHG emissions will be controlled throughout the industrial sector – just as if Congress had enacted rather than rejected cap-and-trade!

That may just be the tip of the regulatory iceberg. EPA cites its December 2009 Endangerment Rule as the authority for all its GHG regulations. This rule declares that the “elevated concentration” of GHG emissions in the atmosphere “endangers public health and welfare.”

Having made that formal finding, EPA obligates itself to establish another set of regulations for GHGs: national ambient air quality standards (NAAQS).

NAAQS are emission concentration standards that, in EPA’s judgment, are how much emission concentrations must be lowered in order to “protect public health” and “protect public welfare” (i.e., avoid pollution-related damages to agriculture, buildings, and wildlife). The Clean Air Act requires that states achieve these standards by using EPA-approved emission-control strategies known as State Implementation Plans (SIPs). States must attain “primary” emission standards (i.e., those pertaining

to public health) within five years or face sanctions such as their loss of federal highway funds.

How serious is Obama about imposing emission concentration standards on greenhouse gases? It’s unclear. He has said nothing about it on the record. However, in a brief submitted to the Supreme Court in a recent global warming case, *American Electric Power v. Connecticut*, Obama’s Justice Department cites Section 108 of the Clean Air Act – which triggers NAAQS rulemaking – as one of the authorities that EPA can use to regulate greenhouse gases:

“Section 108 of the CAA [Clean Air Act] also provides EPA with a mechanism for listing pollutants that “endanger public health or welfare” and meet certain other criteria. When an air pollutant is listed, the Act requires States to regulate emissions to prevent pollution from exceeding EPA standards.”

That’s a troubling statement to include in a Supreme Court brief, because the extremist Center for Biological Diversity, and scores of other eco-litigation groups, have petitioned EPA to set NAAQS for carbon dioxide far below the current concentration. (The proposal of 350 parts per million (ppm) is about 40 ppm below the current concentration of 390 ppm). Not even a worldwide economic depression that cut greenhouse gas emissions to, say, 1970 levels would stop CO2 concentrations from rising. If the Obama Administration really were to impose the EPA’s Endangerment Rule on the nation, then the Clean Air Act could be transformed into a law that requires the United States to de-industrialize itself.

EPA claims it is simply implementing the Clean Air Act, as interpreted by the Supreme Court’s 2007 decision in *Massachusetts v. EPA*. In that case, the Court did classify CO2, the basic building block of the planetary food chain, as an “air pollutant” within the meaning of the Clean Air Act. But to do so, the Court had to torture the text of the Act’s Section 302(g). The Court re-imagined “air pollutant” to mean anything emitted into or entering the air, whether or not the substance emitted or entering the air actually causes air pollution. Under this absurd content-free definition, even completely clean, pollution-free air could be called an “air pollutant” the moment it moves or circulates.

Let’s be clear: the Clean Air Act is not a mandate for regulatory climate policy. It contains no title, section, or sub-section on global climate change. It does not even include the key terms “greenhouse gas” and “greenhouse effect.” In fact, in Sections 103(g) and 602(e) – added in 1990 and the only provisions where Congress even obliquely addressed the issue of global climate change – the Act admonishes EPA not to infer authority for “pollution control requirements” regarding CO2 or “additional regulation” based on the “global warming potential” of emitted substances.

Even apart from what the law says, it’s easy to show that EPA is exercising power way beyond any plausible mandate from Congress.

Suppose that Representatives Waxman and Markey had written a different bill, one that

authorized EPA to do what it is doing today: regulate greenhouse gases by reinterpreting the Clean Air Act. How many Members of Congress would vote for an EPA-do-your-own-thing bill?

I'll bet far fewer than those who voted for the Waxman-Markey bill that died in the Senate without a vote. Bear in mind that cap-and-trade died despite a 15-year, billion-dollar PR campaign by the U.N., the environmental movement, major media outlets, regulatory agencies, rent-seeking corporations, and celebrity spokespersons. So what are the odds that Congress, when it enacted the Clean Air Act in 1970, before global warming was even an issue, intended to authorize EPA to implement regulatory measures that are even less popular than cap-and-trade? Exactly zero.

A Giant Regulatory Train Wreck

Even as EPA promulgates greenhouse gas regulations, it's developing and issuing additional regulations on air, water and waste disposal covering many of the same facilities. What the American Legislative Exchange Council rightly calls a "regulatory train wreck" will result if the electric power sector is forced into compliance. Let's examine five of the potentially most onerous rules.

1. Ozone Standards

In January, EPA proposed tightening air quality standards to lower the concentration of ozone (O₃), the main ingredient of photo-chemical smog from 75 parts per billion (ppb) to between 60 and 70 ppb.

EPA claims the rule is necessary to combat childhood asthma. But O₃ is at most a minor contributor to asthma. As Joel Schwartz and Steven Hayward of the American Enterprise Institute document in *Air Quality in America*, asthma rates have risen even as O₃ levels have declined, and hospital visits for asthma are lowest in July and August, when air temperatures and O₃ levels are highest.

Ozone is a product of other chemical compounds, and lowering the ozone concentration in a sun-exposed atmosphere requires achieving ever-larger reductions of these other chemicals in the environment, a technological process which is very difficult and very expensive. Like cap-and-trade, the new ozone standard is likely to force industry to cut back on its use of fossil fuels. A September 2010 study by the Manufacturers Alliance/MAPI estimates that setting a new standard at 60 ppb would:

- Impose annual compliance costs of \$1.013 trillion between 2020 and 2030 (equivalent to 5.4% of projected GDP in 2020).
- Reduce GDP by \$687 billion in 2020.
- Reduce employment by 7.3 million in 2020, about 4.3% of the projected 2020 labor force.

2. Utility MACT Rule

This March, EPA also proposed a rule to reduce "toxic air emissions" from electric generating units (EGUs). This rule would establish Maximum Available Control Technology (MACT) standards for power

plant emissions of mercury, acid gases, arsenic, chromium, and nickel. The rule will require 277 to 753 coal power plants to install new pollution controls by 2015, estimates the North American Electric Reliability Corporation (NERC).

EPA claims the utility MACT rule will eliminate 91% of mercury emissions from coal power plants and prevent 17,000 premature deaths plus hundreds of thousands of illnesses each year. Compliance with the rule will cost \$10.9 billion, but will yield up to \$130 billion in net benefits, EPA claims.

What's not to like? Plenty. For starters, though mercury is certainly "toxic" at high levels of exposure, but there is no solid evidence that mercury emissions from U.S. power plants have harmed anyone. For example, Joel Schwartz and Steven Hayward in *Air Quality in America* provide ample evidence that "mercury in fish is not harmful even at doses many times higher than Americans are ever exposed to."

Moreover, the Electric Power Research Institute (EPRI) estimates that "for most of the U.S., over 60% of the mercury measured at monitoring stations, and thus deposited on land or water, originates outside the country." So eliminating all mercury emissions from U.S. power plants would make little difference to public health even if methyl mercury in freshwater fish were a serious problem.

EPA's fall-back argument is that the primary health benefits from mercury emissions reduction comes from reducing what's

called “fine particulate matter”—i.e. soot and smoke—from the environment. But these byproducts are at historically-low levels in modern industrial economies, and the cost of further reducing them is ever-harder to justify.

EPA claims its mercury MACT rule will save 17,000 lives and avoid hundreds of thousands of illnesses annually. But its claims rest on statistical studies that are easily biased by sampling errors, not double-blind clinical trials. One study by the American Cancer Society “revealed biologically implausible anomalies, suggesting that the study is turning up chance correlations rather than real causal connections,” Schwartz and Hayward note. “For example, PM2.5 [fine particulate matter] appeared to kill men but not women; those with no more than a high school education but not those with some college; and the moderately active but not very active or sedentary.”

3. Cross State Air Pollution Rule

EPA imputes even larger health benefits to its Cross State Air Pollution Rule (CSAPR), which took effect on July 6 of this year.

The rule is supposed to reduce the long-range transport of pollutants, and by 2014, 27 Midwest, Gulf Coast, and Eastern states are required to reduce power-plant emissions of sulfur dioxide (SO₂) 73% and NO_x emissions 54% below 2005 levels. The North American Electric Reliability Corporation (NERC) estimates that up to 576 coal plants will have to install new controls by 2015.

EPA claims the rule will avoid up to 34,000 premature deaths and billions of dollars in health benefits. Again, the agency relies on unreliable epidemiologic (i.e. statistical) studies.

Coal Combustion Residuals Rule

Coal-fired power plants produce about 130 million tons of ash and other coal combustion residuals (CCR) each year. Since 1993, EPA has said CCRs are a “non-hazardous waste” and that power plants may dispose of it in landfills and “wet surface impoundments” (i.e. ponds). Power plants may also sell CCRs as building materials. Coal ash is a common ingredient in cement, concrete, and asphalt roads. Gypsum, a byproduct of SO₂ scrubbers, is used to make drywall and bowling balls. Upwards of 40% of CCRs are recycled with the remainder stored or disposed in landfills and impoundments.

However, industrial accidents in which coal ash has spilled into waterways, requiring the evacuation of nearby residents, has enflamed a longstanding environmentalist campaign to regulate CCRs as hazardous waste.

EPA’s proposed Coal Combustion Residuals (CCR) Rule outlines two options for changing how CCRs are regulated in the future. One option simply establishes national standards for safe disposal of CCRs in landfills and impoundments. But the EPA appears to favor the second option, which would regulate CCRs as hazardous waste and put in jeopardy the “beneficial use exemption” for CCRs recycled for

construction materials. The Association of General Contractors (AGC) warns:

“ . . . the beneficial use exemption could disappear upon demolition of the exempted use (e.g., when a road built using fly ash is dug up), or at the end of the useful life cycle of the exempted use (e.g., when certain types of wall board are removed from a building). This would adversely impact the beneficial use of CCRs, creating a stigma against their use.”

Bureaucratic Restrictions on Natural Resource

Before fossil fuels can be turned into useful energy, they must first be dug or drilled out of the Earth. Accordingly, a longstanding goal of the environmental movement has been to restrict drilling and mining. For example, green groups oppose coal mining in Appalachia, oil development in the Alaska National Wildlife Refuge (ANWR) and even in the Alaska National Petroleum Reserve (NPR), and hydraulic fracturing (“fracking”), the technological marvel that is making natural gas ever more abundant and affordable.

Some hardcore greens use environmental concerns as pretexts to keep wealth locked away under the ground. It’s hard to think of a more unreasonable agenda. As Alaska Sen. Lisa Murkowski noted in a June 2011 hearing on the National Petroleum Reserve Alaska Access Act (H.R. 2150): “We in Congress have to ask ourselves, if we can’t get petroleum from the National Petroleum Reserve, where can we get it from?”

President Obama and environmental groups are fond of saying that “we can’t drill our way out of the problem” of high gasoline prices, because the USA has only 3% of the world’s “proven” petroleum reserves but consumes 25% of the world’s oil. They also point out that it can take ten years before exploration projects begun today start to produce appreciable amounts of oil.

The numbers are correct, but the argument is false. Oil prices are determined by supply and demand, not by U.S. reserves as a share of global reserves. “Proven” reserves are not a fixed quantity but expand with increases in oil prices and advances in extraction technology. Proven reserves also tend to expand where energy companies are actually allowed to explore for oil.

If President Clinton had not vetoed legislation in 1995 allowing oil and gas development in the Alaska coastal plain, ANWR would already be producing hundreds of thousands of barrels of oil per day. Placing oil off limits because future supplies won’t reduce today’s gas prices ensures that prices will be even higher in the future. Moreover, an anti-drilling policy increases dependence on fewer suppliers, making oil prices more volatile. In contrast, a pro-drilling policy alleviates the fear factor in oil markets, contributing to price stability.

Tragically, Obama’s Department of Interior continues to suppress oil production in the Gulf of Mexico, destroying more jobs during 2010 than did the disastrous BP oil spill.

Mountain Mining Veto

In January 2011 EPA took the extraordinary step of revoking a lawfully authorized coal mining permit. It overturned a Clean Water Act (CWA) permit for the 2,278-acre Spruce No. 1 Mine, in Logan County, West Virginia. Spruce No. 1 was one of the largest mountaintop coal mining projects ever proposed in Appalachia. The Army Corps of Engineers had granted the permit in 2007 after extensive environmental review. This was the first time since Congress enacted the CWA in 1972 that EPA used its authority to revoke a coal mining permit.

EPA’s action blocked the creation of 250 well-paying jobs. Even worse, overturning a valid, previously-approved permit cast a shadow of regulatory uncertainty on all potential investments in coal mining operations.

EPA based its decision on a novel water quality standard that could impede coal mining generally in Appalachia. The agency argues that the Spruce Mine project will increase salinity levels in local streams. Indeed it would. It is impossible to remove large amounts of rock without increasing stream salinity levels once the rubble (known as “fill”) is washed by the rain or mixes with the streams.

EPA further contends that higher salinity levels will extirpate local populations of certain insects, especially Mayfly. That’s

also correct. But the Mayfly is not an endangered species, and its ecological niche as fish food is easily filled by other insects.

The problem, explains my colleague William Yeatman, is that EPA “set the [salinity] bar so low that you couldn’t wash a parking lot without violating the Clean Water Act.” Thanks to the salinity standard, EPA now has a ready-made pretext to block almost any mining project.

The West Virginia Legislature had previously affirmed by a unanimous vote that water quality in streams is adequate when there are enough insects (of any kind) to support fish populations. As a consequence, EPA had to claim in its veto of the Spruce Mine permit that the project would have “unacceptable impacts” on non-insect wildlife. As Yeatman documents, however, EPA’s assessment is riddled with errors. For example, EPA claims the project would bury “6.6 miles of high-quality stream.” In fact, 99.6% of the streams are intermittent or seasonal and score “below average” as wildlife habitat. EPA also claims the project would bury five kinds of fish, but “no fish were found at the site.”

Every member of the West Virginia delegation in the House and Senate opposes EPA’s decision, as do the State’s Governor and Legislature. In June, House Transportation and Infrastructure Committee approved the Clean Water Cooperative Federalism Act (H.R.

2018). The bill would prohibit EPA from overturning state water quality standards, certifications, and discharge permits.

Conclusion

Team Obama is implementing an anti-energy agenda that would be dead on arrival if submitted to Congress. Instead of asking for authority from Congress, the President is letting the bureaucracy of EPA and the Interior Department do the legislating.

The good news is that Congress is fighting back. Rep. James Inhofe (R-Okla.) in the Senate and Rep. Fred Upton (R-Mich.) in the House introduced the Energy Tax Prevention Act (S. 482, H.R. 910). The bill would overturn EPA's Endangerment Rule and all other Clean Air Act climate regulations (except for current and pending motor vehicle greenhouse gas emission standards, which automakers and truck manufacturers have already spent millions of dollars to comply with).

Although the Senate version of the bill garnered only 50 votes, 10 shy of the 60 required for passage, the House version passed by 255-172. GOP leaders are expected to press for additional votes on the bill in the Senate.

Of course, the Senate may reject what the House passes. But House passage of pro-energy bills would help define the issues of the 2012 presidential and congressional elections. The most important issue to be decided in the elections, however,

is constitutional. Who shall make climate and energy policy, Congress or politically-unaccountable bureaucrats? The Constitution permits only one answer. When debating energy, members of Congress would be well-advised to campaign as constitutionalists.

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GreenNotes

Who knew going green could cost so much green? According to a new report prosaically titled **The World Economic and Social Survey 2011: The Great Green Technological Transformation**, published by the **United Nations Department of Economic and Social Affairs** (UN-DESA), it will cost us \$76 trillion over the next 40 years to transition to a sufficiently eco-friendly economy. A UN press release summarized: “Over the next 40 years, \$1.9 trillion per year will be needed for incremental investments in green technologies. At least one-half, or \$1.1 trillion per year, of the required investments will need to be made in developing countries to meet their rapidly increasing food and energy demands through the application of green technologies.” It seems to have escaped the UN busybodies that “clean energy” is an indulgence of wealthy Westerners who can afford such neuroses and who haven’t the daily worries of the “developing” world – like you know, finding food.

Global warming? Not, apparently, in Montana, where a 100-mile ultra-marathon foot race through the **Flathead National Forest** scheduled for July 29th was canceled – because of snow. *The Associated Press* reports that race director **Brad Lamson** was worried that “portions of the course for the **Swan Crest 100** have deep snow that is concealing signs that mark trail intersections,” that would, “...would make the course too dangerous for runners and likely prevent anyone from finishing within the required 36-hour limit.”

The earth may not be warming, but **Dr. James Hansen** is finding himself in hot water these days. Hansen, who arguably started the modern climate change hysteria with his June 1988 testimony to Congress on the dangers of global warming, is facing charges by the **American Tradition Institute** that, as *FOXNews.com* reports, “...NASA is withholding documents that show James Hansen failed to comply with ethics rules and financial disclosures regarding substantial compensation he earned outside his \$180,000 taxpayer-paid position as director of the **Goddard Institute for Space Studies**,” and that Hansen, “privately profited from his public job in violation of federal ethics rules, and NASA allowed him to do it because of his influence in the media and celebrity status among environmental groups, which rewarded him handsomely the last four years.” Who knew advocating green could make so much green?

Another front has opened up in the **Sierra Club’s** war on America’s power supply. This time it’s the **Potomac River Generating Station** in Alexandria, Virginia in the environmental group’s crosshairs. *The Washington Examiner* reports the Sierra Club is pressing D.C. Mayor **Vince Gray** to “...to file a special petition with the **Environmental Protection Agency** to force the plant to clean up or shut down.” The Sierra Club is not shy about admitting its preference for the latter: Sierra representative **Irv Sheffey** bluntly states, “We quite frankly would like to see [the plant] shut down,” due to concerns over sulfur dioxide emissions. But **Genon**, owner of the plant, claims it has “reduced sulfur dioxide emissions by 80 percent since 2000.” And Mayor Gray’s office – wisely, in the view of *Green Notes* – has said it was “still evaluating how shutting down the plant would hurt the District’s power supply, and said there are no immediate plan to petition the EPA.”

New York Governor **Andrew Cuomo** has begun to take a harder stance on the **Indian Point** nuclear power plant. In June a top advisor met with the **Entergy** and declared their direct intentions to close the plant. While the permits for the Nuclear Plant are set to expire in 2013 and 2015, Governor Cuomo and his administration are exploring other ways to force the plant to shut down sooner. With power lines coming from upstate New York already at capacity, what is unknown to everyone is how the Governor intends to replace the output with the Nuclear Plant produces, as it supplies 25 percent of New York City and Westchester’s energy.