

Regulating “greenhouse gases”

Canada should beware harmonization
with the United States

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The Harper government has made plain its intention to “harmonize” Canada’s global warming regulations with those promulgated in the United States (Woods, 2010, Feb. 1). From a scientific standpoint, there is a powerful case to be made that such regulations are wholly unnecessary (McKittrick, 2007). From a practical standpoint, Canada should steer clear of the legal and legislative chaos into which US policy has descended.¹

The prime minister and his advisors contend that a regulatory alignment is necessary to protect cross-border trade and the competitiveness of Canadian products. Indeed, organized labour in the US will likely demand higher tariffs or other “border adjustments”² in the event that additional regulatory costs related to global warming place domestic products at a competitive disadvantage.

As the following chronicle reveals, the US is in no position to negotiate regulatory harmony; at present, policy discord reigns in Washington. Convolution though it may be, the status of global warming regulation in the United States demands scrutiny so that Canada can protect itself against forging an agreement that could easily collapse under political pressure or be dissolved by judicial decree.

In the wake of the Copenhagen Conference held in December 2009, both Canada and the United States pledged to reduce greenhouse gas (GHG)³ emissions by 17% below 2005 levels by 2020 (*Environment News Service*, 2010, Feb. 8). No binding accord was actually adopted by the conferees, but developed countries agreed to submit voluntary emissions reduction targets to the United Nations (UNFCCC, 2010).

Just how the reductions will come about remains unresolved. As previously noted, Ottawa plans to harmonize

its regulations with the United States. But it is unlikely that the US Congress will impose regulatory controls on fossil fuel emissions any time soon. Legislation authorizing a “cap-and-trade” scheme was approved by the US House of Representatives, but has stalled in the Senate. With mid-term elections looming—and growing public opposition to yet another costly, job-killing government program (Rasmussen Reports, 2010)—most observers believe the measure will not move forward.

Congress’ inaction cedes the regulatory hammer to officials of the US Environmental Protection Agency (EPA), who display no apparent regard for the dire economic consequences of their regulatory actions. Indeed, a review of the EPA’s global warming-related exploits reveals improper rule-making and abuses of power⁴ (US Chamber of Commerce, 2010). Thus, it would be irresponsible for Canada to base its regulatory regime on EPA actions that now face substantial legal challenges.

Regulations under the Clean Air Act

The basis for the EPA’s proposed emissions regulations⁵ is the agency’s “finding” that carbon dioxide (CO₂) and five other “greenhouse gases” are “air pollutants” actionable under the Clean Air Act (CAA) (US EPA, 2008).

The CAA was designed to control substances that are emitted in trace amounts but which, under certain circumstances, accumulate in high concentrations on local or regional scales. It was never the intent of Congress to regulate CO₂ or any greenhouse gas under the CAA (US EPA, 2003). The term “greenhouse gas” does not even

appear in the statute, and CO₂ is mentioned only once in a non-regulatory context.⁶

In the past, the CAA has been used to regulate air pollutants that have *direct* human health or ecological effects documented in clinical and toxicological studies. In the case of greenhouse gases, however, the EPA is acting on the *supposed* effects of emissions on climate.

Previous administrations have declined to regulate greenhouse gases under the CAA. In 1999, for example, a coalition of 19 environmental organizations⁷ petitioned the EPA to set greenhouse gas emissions standards for new motor vehicles under Section 202 of the CAA. After a notice and comment period, however, the agency resolved that the CAA did not apply to the regulation of CO₂ (US EPA, 2003). The EPA officials concluded that Congress would have been far more specific if it had wanted the agency to undertake regulations of such enormous economic and political consequences (US EPA, 2003).

Shortly thereafter, the International Center for Technology Assessment, 12 other groups, the State of Massachusetts, 11 other states, and four other governmental entities⁸ petitioned the US Court of Appeals for the District of Columbia to review the EPA's petition denial. In a 2-to-1 decision, the Appeals Court held for the agency, finding that the EPA administrator had discretion to consider both scientific evidence and policy judgments in deciding whether to promulgate regulations under the Clean Air Act (US EPA, 2008). The court did not address whether the CAA could actually authorize greenhouse gas regulation.

Massachusetts and the other claimants appealed to the US Supreme Court. On April 2, 2007, in a 5-to-4 decision, the court ruled that the EPA did have the authority under the Clean Air Act to determine whether CO₂ emissions constitute a danger to public health and, if so, to regulate greenhouse gases as "air pollutants" (see *Massachusetts v. EPA*). The court instructed the agency either to determine whether greenhouse gas emissions from new vehicles cause or contribute to the "endangerment" of public health or welfare,⁹ or to justify why the EPA could not determine this.¹⁰ Contrary to the claims of some environmental alarmists (Jackson, 2010), the ruling does not force the EPA to regulate fossil fuel emissions.

In July 2008, the Bush administration solicited public comments on how the EPA should respond to the Supreme Court ruling in *Massachusetts v. EPA*, and the potential ramifications of regulating CO₂ under the Clean Air Act (US EPA 2008). However, the solicitation for comments was prefaced by a statement of opposition

from then-EPA Administrator Stephen Johnson, who noted that "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."

His remarks were echoed by a number of other federal agencies that were also highly critical of using the Clean Air Act to regulate CO₂. Officials with the US Department of Energy, for example, characterized such an approach as "an enormously elaborate, complex, burdensome and expensive regulatory regime that would not be assured of significantly mitigating global atmospheric GHG concentrations and global climate change" (US EPA, 2008).

After the July 2008 solicitation of comments, no further regulatory action was taken by Washington until Barack Obama took office and appointed a new EPA administrator, who subsequently declared greenhouse gases to be a danger to public health and welfare (US EPA, 2009). Despite the enormous consequences CO₂ regulation would unleash, the EPA did not hold formal hearings on the proposed regulations, as required under the federal Administrative Procedures Act (US Chamber of Commerce, 2010).

By proceeding with regulations under the Clean Air Act, the EPA is legally obligated to select between two emissions thresholds prescribed in the statute at which permit requirements would be imposed—either 100 tons/year or 250 tons/year. Either of those statutory thresholds would corral millions of facilities into the permitting process,¹¹ including offices and apartment buildings, shopping malls, restaurants, hotels, hospitals, schools, houses of worship, theatres, and sports arenas (Lewis, 2008). In an effort to soften political outrage over such sweeping regulations, EPA Administrator Lisa Jackson has proposed setting a higher threshold—100,000 tons/year—at which the regulation of stationary sources of emissions would apply. However, only Congress has the power to modify a federal statute; thus, Jackson's proposed change would be a clear violation of law.

Officials with the US Department of Agriculture have expressed concern that the EPA regulations, if enacted, may drive up the cost of food and reduce the supply (US EPA, 2008). For example, should the EPA opt for a 100 tons of CO₂ emissions/year regulatory threshold, even very small farm operations would need operating permits. But, as federal agriculture officials have stated, smaller farm operations are "ill-equipped to bear the

EPA regulations would affect small farms, restaurants, hotels, hospitals, schools, houses of worship, and small businesses.

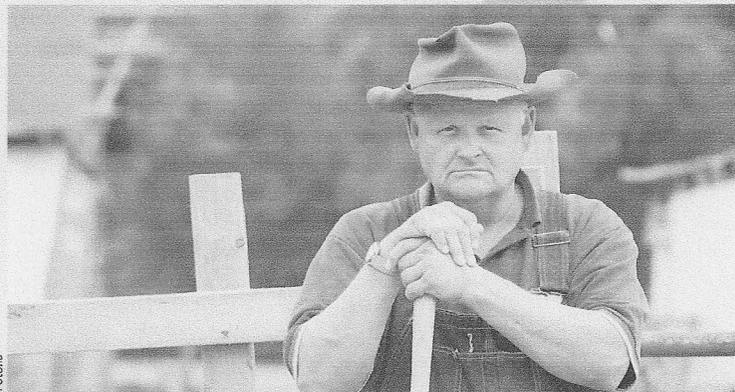
costly burdens of compliance, and many would likely cease farming altogether" (US EPA, 2008).

In addition to creating onerous permit costs for businesses, critics of the EPA warn that costly regulations would likely drive domestic businesses abroad to countries with less stringent requirements. The ensuing shift in the manufacturing base, they argue, would result in no net reduction in global emissions of greenhouse gases. Indeed, economist Stephen Moore characterizes North American regulations of greenhouse gas emissions as the "China and India Full Employment Act" (Moore, 2009).

Absent proof of a link between human-made emissions from fossil fuels and global warming, the most rational policy course is to ignore the alarmists and focus instead on actual threats to human health and the environment. This course of action is all the more justified given recent revelations of scientific deceit among the research institutions tasked with guiding the international response to global warming (see Katz, 2010). Unfortunately, Stephen Harper and his advisors have concluded that green politics demand action. But while regulatory harmonization with the United States is preferable to discord, the government should insulate Canada from America's legal and legislative confusion.

Notes

1 The US Chamber of Commerce, the Competitive Enterprise Institute, the State of Texas, and many other organizations and political entities have filed lawsuits challenging the legality of the EPA's regulatory actions. Meanwhile, Alaskan Republican Senator Lisa Murkowski has proposed a resolution to prohibit the agency from taking regulatory action by overturning its finding that greenhouse gases endanger public health and welfare.



2 Congress has considered imposing "border adjustments" that would require foreign companies to purchase "allowances" representing the excess carbon emissions related to the manufacture of imports from countries with less stringent global warming regulations.

3 The term "greenhouse gas" is a misnomer. It implies that greenhouse gases trap heat like a glass greenhouse, but that is erroneous. In a greenhouse, sunlight warms the interior surfaces of the building. That heat is then transferred to the trapped air by conduction. In the atmosphere, the sun heats the Earth's surface, which transfers heat (energy) to surface air via conduction. But the heat is also distributed throughout the atmosphere by convection, evaporation, and condensation.

4 The US Chamber of Commerce and more than a dozen other groups have filed lawsuits in an effort to force the EPA to follow the rule-making procedures mandated by the Administrative Procedures Act.

5 The EPA released for comment its proposed emissions standards for new vehicles on September 15, 2009, and emissions standards for large stationary sources on September 30, 2009.

6 Section 103 of the Clean Air Act authorizes the EPA to conduct research on CO₂ control technologies for stationary sources.

7 Petitioners included International Center for Technology Assessment; Alliance for Sustainable Communities; Applied Power Technologies, Inc; Bio Fuels America; California Solar Energy Industries Association; Clements Environmental Corp.; Earth Day Network; Environmental Advocates; Environmental and Energy Study Institute; Friends of the Earth; Full Circle Energy Project, Inc.; Green Party of RI; Greenpeace USA; National Environmental Trust; Network for Environmental and Economic Responsibility of the United Church of Christ; NJ Environmental Watch; NM Solar Energy Association; Public Citizen; Solar Energy Industries Association; and SUN DAY Campaign.



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8 Petitioners included Massachusetts; California; Connecticut; Illinois; Maine; New Jersey; New Mexico; New York; Oregon; Rhode Island; Vermont; Washington; the District of Columbia; American Samoa Government; New York City; the Mayor and City Council of Baltimore; Center for Biological Diversity; Center for Food Safety; Conservation Law Foundation; Environmental Advocates; Environmental Defense; Friends of the Earth; Greenpeace; International Center for Technology Assessment; National Environmental Trust; Natural Resources Defense Council; Sierra Club; Union of Concerned Scientists; and the US Public Interest Research Group.

9 If the EPA finds that there is endangerment, then Section 202 requires them to set new vehicle emission standards.

10 Although the Supreme Court decision only involved new vehicle standards, an endangerment finding would invoke other provisions of the Clean Air Act that would require regulations for stationary sources of emissions.

11 Lewis (2008) estimates that any source of emissions with CO₂ volumes equal to the central heating systems of a dozen medium houses—about 50,000 ft²—would require a permit.

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