NOVEMBER/DECEMBER 2010

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EPA's Regulatory Barrage and the Lone Star State

BY KATHLEEN HARTNETT WHITE & MARIO LOYOLA

At their annual meeting in 1997, state environmental commissioners handed out T-shirts with the slogan "The states are not branches of the federal government." Under the Obama administration, that slogan is starting to seem like wishful thinking.

Today's Environmental Protection Agency (EPA) is expanding regulatory jurisdiction over economic activity at all levels and supplanting long-upheld state authority with breathtaking speed. In the last 18 months, the EPA has proposed or adopted at least 25 rules under the *Clean Air Act* (CAA): regulatory edicts of unprecedented scope and stringency and with little identifiable environmental benefit. Along with other heavy-handed federal initiatives, such as the healthcare law, President Obama's environmental agenda is rapidly turning into a historic assault on the constitutional constraints that were meant to keep the federal government from growing too powerful.

Over most of its history, the EPA has strengthened environmental standards in an incremental manner, allowing some balance between environmental and economic needs. Indeed, much environmental improvement has been achieved. On this fortieth anniversary of the CAA, the record is impressive. Nationally averaged ambient levels of many pollutants have been dramatically reduced. From 1980 to 2008, lead has been reduced by 92 percent, carbon monoxide by 79 percent, sulfur dioxide by 71 percent and ozone by 25 percent. Today's new vehicles emit 88 percent less nitrogen oxides (the key precursor of ozone) than cars and trucks 10 years older.

Innovative emission control technology and cost-driven energy efficiency account for most of the air quality improvement, but EPA regulations played a major role. The new heavy-handed EPA, however, operates far more like an activist for whom no standard is too high, no impact too onerous, no risk too low and no science too speculative.

A new National Ambient Air Quality Standard (NAAQS) for ozone, anticipated new NAAQS for particulates, and impracticable emission standards for industrial and commercial boilers, cement kilns, coal-fired power plants, and greenhouse gases (GHG) are a few of the EPA's new headlining projects. The steady onslaught of aggressive EPA actions is creating a regulatory climate that has started to freeze investment and job creation.

With our many energy intensive industries, Texas is disproportionately impacted—and in some cases, it has been directly targeted by EPA. Texas is resisting the barrage of EPA actions, in part through at least eight lawsuits against the agency. Texas is resolutely refusing to acquiesce to EPA's demands that the state begin regulating greenhouse gases on Jan. 2, 2011. As our Attorney General Greg Abbott and the Chairman of the Texas Council on Environmental Quality (TCEQ) Bryan Shaw wrote to the EPA in August 2010, "Texas has neither the authority, nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gases."[1]

EPA actions threaten not only the future of the Texas economy but also state environmental programs that have been highly successful. From 2000 to 2008, Texas lowered ozone emissions by 22 percent compared to a national average of only eight percent. Houston, the nation's largest petrochemical complex, long vying with Los Angeles as the most ozone-polluted urban region in the United States, met the legally binding federal standard for ozone (85 parts per billion or ppb) in 2009. Remarkably, this clean air achievement occurred while the Texas economy was growing a third faster than the nation as a whole. Instead of rewarding the state's performance, EPA has begun invalidating the air quality rules of the TCEQ and federalizing state-issued permits.

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Federalizing State Authority - Texas Flexible Permits

Last July, the EPA formally disapproved the sixteen-year-old Texas Flexible Permitting Program. As a strategic mechanism for achieving huge emission reductions, the flexible permits impose tight facility-wide emission caps for individual pollutants, while leaving plant operators some flexibility. Coal and petroleum-coke fired power plants with flex permits have decreased sulfur dioxide by 25,803 tons per year, nitrogen oxides by 10,330 tons per year and particulate matter by 795 tons per year. Over 120 of our major industrial facilities, including most Texas refineries, large manufacturers, and some power plants, currently hold these permits. As a result of the EPA's invalidation, their operating authority was immediately thrown into legal limbo.

Although the EPA has yet to conclude how the state permitting rules should be changed to satisfy its concerns, the EPA considers the facilities that hold Texas flexible permits to be in violation of the CAA. The facilities fully comply with the state-issued permits but the EPA elects to use blunt coercive authority against the facilities in the guise of a "voluntary" audit to conclude with an enforcement decree. In so doing, the EPA subverts the state's proper regulatory role under the CAA. The EPA has apparently invented a new method of rulemaking through enforcement, outside the constraints of the *Administrative Procedures Act*. Texas is now challenging the EPA's invalidation of the Texas Flexible Permitting Program in a petition for review before the 5th Circuit Court of Appeals.

The EPA's action jeopardizes the planned construction of a new $6.5 billion Motiva refinery in Port Arthur and Total's planned $3 billion refinery expansion. Thousands of new highly-skilled and well-paying jobs are at risk. And it's not just Texas that suffers. EPA's heavy-handed response to a dispute over permit rules strikes the heart of the state's industrial base, one of the vital engines of the U.S. economy. Texas produces more than 25 percent of the country's transport fuel and more than 60 percent of its industrial chemicals—and over the past year was single-handedly responsible for over 60 percent of all job creation in the country.

Legal Uncertainty Hobbles Economic Activity

To plan and thus prosper, businesses depend on a predictable legal system in which to operate. When environmental regulations no longer secure clear and reliable obligations, legal uncertainty freezes business decisions. Regulatory risk has an adverse impact on investment valuation. "Regulatory uncertainty is the enemy of economic development," says one Valero executive. "If you can't estimate the value of a project, you don't make the investment."

The new EPA rules do not merely impose added marginal costs on production; they threaten entire sectors of the economy. If the Administration's real goal is "to end the era of fossil fuels in our generation," as President Obama has repeatedly declared, the EPA is blazing the path. There's just one problem: no alternative to fossil fuels yet exists that can replace 85 percent of our energy with remotely comparable supply, efficiency and affordability.

The sheer number of recent EPA actions is staggering, but the revised federal standards for ozone and fast-tracked greenhouse gas regulation are the most heavy-hitting. These rules would impact large industry and small business across the country on a scale that could drive the lion's share of the U.S. manufacturing base to foreign countries without the EPA's regulatory burden.

In a June 2010 report, the Business Roundtable, which represents companies that employ more than 12 million people, warned of the economic harm posed by the EPA's new agenda. "As the U.S. manufacturing sector continues to struggle and is shedding jobs overall, the EPA's actions will … create uncertainty and place U.S. companies at competitive disadvantage compared with foreign firms."[2] Organized labor, historically not a regular opponent of EPA rules, has formed Unions for Jobs and the Environment to resist EPA's job-killing plans. In response to the proposed rule for industrial boilers, the United Steel Workers commented: "Tens of thousands of these jobs will be imperiled. In addition many more tens of thousands of jobs in the supply chain and in the communities where these plants are located will also be at risk."[3]

New Ozone Standard

In January 2010, the EPA proposed a far stricter ozone standard. Final adoption of the standard is expected this fall. Within a range of 70-60 parts per billion, the new ozone limit will be the third new federal standard in six years.[4] Many scientists and medical doctors contest the EPA's scientific justification for lowering the standard below 85 ppb. Dr. Roger McClellan, former chairman of the EPA's own Scientific Advisory Committee, testified that a lower ozone standard is a "policy judgment based on a flawed and inaccurate presentation of the science."[5]

When establishing the health-based ozone standard, the EPA relies on epidemiological, toxicological and clinical studies as well as multiple risk-assessment methodologies. The EPA's new standard heavily rests on epidemiological studies that are inconclusive and contradictory. The largest study looked at 95 U.S. cities over 14 years. A correlation between ozone levels and adverse health effects was found in only six of the 95 cities, and Los Angeles, with by far the worst ozone pollution, was not among them.

One Texas study even showed fewer hospital visits for asthma during the summer ozone season than during winter when ozone levels are far below the

standards. Federal regulatory decisions of the magnitude of EPA's proposed ozone standards should be justified by state-of-the-art science demonstrating a causal connection between ozone levels and health effects, rather than relying on vague correlations between ozone levels and health effects.

The EPA's new standard will have widespread impacts across Texas and the country. According to the Congressional Research Service, only 85 of the more than 3,000 counties in the U.S. currently exceed the 85 ppb standard. Under the EPA's new standard, the number of federally shackled non-attainment counties could increase to 650, including every county with an ozone monitor. Texas would go from having two non-attainment areas to 10 or more, including Brewster County in the Big Bend area of southwestern Texas—one of the most remote and sparsely populated areas of the country.

Federal non-attainment status imposes complex administrative and technical requirements on state and local governments. Federal designation of a non-attainment area immediately sets a ceiling on economic growth. When industries plan to expand or open a new plant, they typically avoid location in an ozone non-attainment area.

After reducing ozone forming emissions from major stationary sources by 80 percent Texas has few industrial sources left which could yield significant emission reductions. Mobile sources such as cars and trucks are now the overwhelming source of ozone-forming emissions. But state regulation of these sources is preempted by the CAA and as a result states have no means of directly controlling those sources without a rarely given and minimally effective special exemption from the EPA. In Dallas-Fort Worth, mobile sources now account for 79 percent of ozone pollution. Even in industry-heavy Houston, mobile sources account for over 70 percent. Emissions from mobile sources are the EPA's responsibility, but the agency shows little desire to effectively tackle the issue. The EPA demands that states attain the federal ozone standard—with sanctions at the ready if the state does not succeed—but denies states the regulatory authority to address the remaining bulk of the problem.

The originally envisioned relationship of cooperation between the EPA and state environmental agencies has been replaced by federal command and control over states. In an early version of the CAA, Congress found "that prevention and control of air pollution at its source is the primary responsibility of States and local government."[6] In practice, this meant that the EPA was to establish national air quality standards and each state was to design and implement the means to attain the standards. Subsequent amendments to the CAA increased the EPA's oversight and control over state decisions, such that federal authority to approve State Implementation Plans now gives the EPA essentially dictatorial authority over all state regu-

The Offshore Drilling Moratorium's Assault on Jobs

The Obama administration is leveraging environmental regulations to impose an energy policy that seeks to stymie the domestic production of fossil fuels. Most of the scientists whose names were cited as having recommended a blanket ban on offshore drilling have since loudly protested that they did no such thing, and Undersecretary of Commerce Rebecca Blank recently testified that the administration didn't bother to assess what the economic impact might be before it issued the moratorium. The ban had no basis in the *Oil Pollution Act*, which permits the feds to halt drilling on a case-by-case basis but not for the industry as a whole. Three federal courts struck down the moratorium as an illegal, "arbitrary and capricious" exercise of regulatory power, but the administration simply ignored them.

By the time Ken Salazar declared an end to the offshore drilling moratorium on October 12, 2010, the regulatory uncertainty had already driven five major drilling rigs to other countries, with millions of dollars in disrupted contracts. The new head of the Bureau of Ocean Energy Management, Regulation, and Enforcement assures environmentalists that he won't be in any hurry to approve new permits, and industry leaders have made it clear that they've gotten the message.

As if further proof were needed of the administration's animosity to the domestic oil and gas industry, the processing of permit applications for shallow water drilling (in less than 500 feet of water) has slowed to a tiny fraction of what it was before the BP spill. One report estimates that the slowdown in permit processing will eliminate perhaps 40,000 jobs on the Gulf Coast, according to one report. The Louisiana Economic Development Agency has predicted that 20,000 jobs will be lost in Louisiana alone if new offshore drilling—deepwater and shallow-water—doesn't start again quickly, and that most of those job losses will be felt by small and family-owned businesses.

The Obama administration defends its disregard for the obligation of private contracts by saying that the companies are big enough to take the losses—and that the thousands who lose their jobs can be compensated from the BP liability fund, as if they don't need jobs so long as they get handouts. But the BP liability fund won't protect those who lose their jobs in the shallow water drilling sector which was never subject to a moratorium; nor the jobs lost from slow-walking leases along Alaskan shores, including Beaufort Sea; nor jobs lost from the delay and denial of leases on federal land in the Western U.S.

lations remotely related to air quality.

Regulating Greenhouse Gases via the Clean Air Act

EPA's "Endangerment Finding," that carbon dioxide (CO2) is a pollutant under the CAA, wins top honors for reckless bureaucratic overreach. As Iain Murray noted in the Dec. 31, 2009, issue of *National Review*, the Endangerment Finding demonstrates "the administration's contempt for the Constitution," and is "an act of legislative thuggery and an economic suicide note, all in one package."[7]

Many proponents and opponents of carbon limits agree that the CAA is wholly unsuited to regulate CO2, a ubiquitous by-product not just of all economic activity but indeed of oxygen respiration in all forms of life. CO2 constitutes a major fraction of the Earth's atmosphere, and as Justice Scalia argued in dissenting from the landmark Supreme Court's ruling in *Massachusetts vs. EPA*, something cannot "pollute the air" if it *is* the air.

In fact, the average human being exhales about 800 pounds of CO2 annually, slightly less than 1/250 of the 100 tons per year threshold for pollutants under the CAA. In other words, every business that emits as much CO2 as 250 persons exhale in a year would need an EPA Title V operating permit, which would include millions of buildings and restaurants. By the EPA's own estimate, the number of Title V permit holders would increase from the current 14,000 to more than 6 million, at a cost to permit holders of $49 billion over three years, just in the costs of securing the permits, on top of the $23 billion administrative cost for the agencies issuing the permits.

Even the EPA recognized that the result of regulating greenhouse gases under the literal terms of CAA would be "absurd," "infeasible," and "adversely affect national economic development." To avoid this, the EPA simply re-wrote the law in rule, changing the black-letter regulatory triggers in the CAA and substituting its own vastly higher thresholds in order to narrow the number of entities affected in the *initial phase* of implementing the new regulation. In this "Tailoring Rule," EPA changed the statutory thresholds that trigger Title V and Preventions of Significant Deterioration (PSD) permits from 100 tons per year (tpy) and 250 tpy, respectively, to 100,000 and 75,000 tpy.

Through an unlawful change to federal law, comically strained interpretation of existing rules and a six-hundred word new definition of what "subject to regulation" now means to state agencies, the EPA declared regulation of CO2 automatic January 2, 2010. If states are unwilling or legally unable to meet this effective date, the EPA will immediately take over with Federal Implementation Plans (FIP). EPA's Federal Register notice of early September lists 13 states as the most likely candidates for a FIP, with Texas among them.

As Gov. Rick Perry said recently, to accept EPA's greenhouse gas lawless initiative would be "following flawed science down a road that will lead to the loss of hundreds of thousands of Texas jobs, while doing nothing more to protect human health."[8] In a now famous Aug. 2, 2010, letter to EPA, the Texas Attorney General Greg Abbott and TCEQ Chairman Bryan Shaw communicated the categorical refusal of the state of Texas to comply with the new regulation. "The State of Texas," they wrote, "does not believe that EPA's 'suggested' approach comports with the rule of law. The United States and Texas Constitutions, United States and Texas statutes, and EPA and TCEQ rules all preclude TCEQ from declaring itself ready to require permits for greenhouse gases from stationary sources as you request."

As the stakes increase dramatically in this showdown between Texas and the EPA, what hangs in the balance is not just the autonomy and economic future of all the states, but indeed the very balance of shared sovereignty that is essential to our federalist Constitutional framework. The Obama administration's assault against economic freedom and Constitutional constraints must be resisted. ■

ENDNOTES

1. Shaw, Bryan W., and Greg Abbott. Letter to Hon. Lisa Jackson. Aug. 2, 2010. <http://www.alec.org/AM/PDF/Energy/AM2010/txletterepa.pdf>.
2. *Policy Burdens Inhibiting Economic Growth*. Business Roundtable, June 2010.
3. United Steel Workers Union. *Comment: Proposed Rule, National Emission Standards for Hazardous Air. EPA-HQ-OAR-2002-0058-2964.1.* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b3b688.>
4. EPA initially adopted the eight-hour 85 ppb standard in 1997 but did not give legal effect to the standard until 2004 with federal designation and classification of non-attainment areas. In March 2008, EPA adopted a 75 ppb standard. EPA, with questionable legal authority, and again proposed a revised standard in January 2010. The adopted federal standard does not impose legal obligations on states until EPA designates non-attainment areas although frequent change creates acute regulatory uncertainty for state government and the private sector.
5. Senate Subcommittee on Clean Air and Nuclear Safety Hearing on EPA's Proposed Revision to the National Ambient Air Quality Standards for Ozone (2007) (testimony of Roger O. McClellan). <http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=57ca4cda-7a2a-4da7-afba-80a4d2fbbb6d>
6. 81 Stat. 485, 42 U.S.C. § 1857(a)(3).
7. Murray, Iain. "Air Power: In Which the EPA Mistakes Itself for Congress." *National Review* Dec. 31, 2009. Print.
8. Office of the Governor Rick Perry. *Statement by Gov. Perry Regarding Proposed Revision of National Ozone Limits*. Jan. 7, 2010. <http://governor.state.tx.us/news/press-release/14128/>.

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