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REGULATORY PRE-EMPTION AS PRELUDE TO CARBON PRICING

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INTRODUCTION

A significant contributor to the polarizing politics of climate-mitigation policy is the concern that any intervention to address greenhouse gas emissions comprehensively will necessarily be expensive. However, such analysis fails to recognize the multiple federal policies that already price carbon in economically and administratively expensive ways that restrict choice and drive prices up for consumers. In some cases, these policies have not been approved or defined by Congress. This opaque and expansive patchwork of policies allows the federal bureaucratic engine to operate without responsibility to the American public.

Consistent with his pledges to revive the coal industry and use domestic oil and gas resources to execute a strategy of "energy dominance," President Donald Trump has started to eliminate or reconsider many of these policies.[1] However, in order to curb such overreach permanently, Congress must pass legislation that clarifies or eliminates a number of authorities across government agencies. Once the bureaucratic quagmire is reduced, lower carbon emissions from the energy, industrial and transportation sectors would remain achievable.

R Street has long advanced the concept of a revenue-neutral carbon price as an approach to mitigate long-term climate risk; to finance deep cuts to or the outright elimination of the corporate income tax; and to pre-empt federal policies that currently price carbon.[2] This paper details why pre-emption legislation is necessary and the particular policies Congress should target for elimination upon the adoption of a federal carbon price alternative.

UNINTENDED CONSEQUENCES AND CASCADING IMPACTS

Six months into the Trump administration, it has thus far targeted the rollback of Obama-era climate regulations through the tools at its disposal: executive orders, administrative policy and budget requests. Executive efforts, however, can only delay the inevitable. The Environmental Protection Agency (EPA) remains mandated by the U.S. Supreme Court to issue regulations that limit greenhouse gas emissions across the U.S. economy and, perversely, this obligation exists without congressional definition of the agency's specific authority to do so. Instead, its authorities are derived from murky legislative language and the court's equally vague directive.

Air quality regulation, as it exists today, was a response to the 1960s environmental movement. In 1970, Congress issued the Clean Air Act (CAA), which broadly expanded the government's ability to limit emissions and enforce air quality standards through the newly created Environmental Protection Agency. The CAA directs the EPA on how (and how often) to set standards for air quality, industry best practices and even the installation of specific technologies to limit emissions that diminish air quality or harm the atmosphere.

Last amended in 1990, the CAA stipulates the regulation of a number of emissions, including ground-level ozone, lead, particulate matter and acid-rain-causing sulfur dioxide. It also contains language that emboldens the agency to protect public health from any number of hazards not identified at the time of passage. Under the CAA, Congress' definition of "air pollution" is quite broad: "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air."[3]

1. "President Trump Vows to Usher in Golden Era of American Energy Dominance," *The White House Blog*, June 30, 2017. https://www.whitehouse.gov/blog/2017/06/30/president-trump-vows-usher-golden-era-american-energy-dominance.

2. Catrina Rorke, Andrew Moylan, et al., "Swapping the Corporate Income Tax for a Price on Carbon," *R Street Policy Study* No. 79, December 2016. http://www.rstreet.org/wp-content/uploads/2016/12/79.pdf.

3. 42 U.S.C. § 7602 (g). https://www.law.cornell.edu/uscode/text/42/7602.

During the Clinton administration, officials indicated that this broad definition gave the EPA authority to regulate greenhouse gas emissions, but that it had, "not yet determined that [carbon dioxide] meets the criteria for regulation."[4] Prompted by the ambiguity, in 1999, 20 technology, consumer and environmental organizations took the opportunity to petition the EPA to regulate such emissions from motor vehicles.[5] By the time the EPA formally responded to the petition under the Bush administration in 2003, it declined to do so, citing a lack of congressional authority to regulate emissions "for climate change purposes."[6]

In response, a number of parties, including 12 states and a range of environmental advocacy groups, sued for a reversal of that administrative decision. Ultimately, the Supreme Court sided with the petitioners and its *Massachusetts v. EPA* decision charged the agency to issue regulations under existing Clean Air Act authorities if greenhouse gas emissions were found to, "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[7]

This decision set the regulatory ball in motion when—in 2009, after the administration changed hands again, and in accordance with the decision in *Massachusetts v. EPA*—the agency issued its regulatory finding that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations."[8] Shortly after the issuance of this "endangerment finding," the EPA initiated regulations for greenhouse gas emissions from motor vehicles,[9] which triggered the regulation of other greenhouse gas emissions sources. The result of this clumsily forced authority was the highly contentious Clean Power Plan (CPP), which limited emissions from power facilities that burn coal and natural gas. The Trump administration has since petitioned the courts to hold the rule in abeyance in order to offer the time and opportunity to craft a regulatory alternative.

4. U.S. Environmental Protection Agency, "Memorandum on the EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources," Office of General Counsel, April 10, 1998. http://www.law.umaryland.edu/environment/casebook/documents/epaco2memo1.pdf.

5. Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act, Int'l Ctr. for Tech. Assessment v. Browner, No. A-2000- 04 (EPA Oct. 20, 1999), available at http://www.ciel.org/Publications/greenhouse_petition_EPA.pdf.

6. U.S. Environmental Protection Agency, "EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles," News Release, Aug. 28, 2003. https://yosemite.epa.gov/opa/admpress.nsf/fb36d84bf0a1390c8525701c005e4918/694c8f3b7c16ff6085256d900065fdad!OpenDocument.

7. *Massachusetts v. EPA*, 549 U.S. 497 (2007). https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf

8. 74 Fed. Reg. 66495 (Dec. 15, 2009). https://www.epa.gov/sites/production/files/2016-08/documents/federal_register-epa-hq-oar-2009-0171-dec.15-09.pdf.

9. 40 C.F.R. § 85, 86, 600; 49 C.F.R. § 531, 533, 536-38 (2010). https://www.gpo.gov/fdsys/pkg/FR-2010-05-07/pdf/2010-8159.pdf.

In the buildup to the 1990 amendment process, Congress had debated using the CAA to limit climate emissions. Indeed, the original draft of the bill included a proposal that mandated stringent increases in gas mileage requirements to address climate change, though it was later dropped from consideration. An amendment incorporated into the final bill required companies to report greenhouse gas emissions to the EPA, but created no new regulatory authority to reduce those emissions. The Congressional Record does not reveal that any member of Congress thought that the CAA already afforded the EPA such authority.[10]

A PERMANENT FIX: REGULATORY PRE-EMPTION

The case for pre-empting any regulation under the CAA is straightforward: Congress never intended the CAA to give the EPA the power to reduce greenhouse gas emissions from any particular sector.

Nevertheless, the Clean Power Plan is not the only piece of regulation issued by the EPA to address carbon emissions without the express intent of Congress. For example, the current iteration of the Corporate Average Fuel Economy (CAFE) Standards for cars and light trucks, along with separate mileage requirements on heavy-duty trucks, both also include greenhouse gas targets. In both cases, the EPA's role alongside the National Highway Traffic Safety Administration (NHTSA) is likewise a direct response to the *Massachusetts v. EPA* court decision. Under the CAA, the EPA issues operating permits for large facilities that require the application of "best available control technology" to limit emissions.[11]

Worse, the CAA is littered with language that potentially allows the EPA to expand greenhouse gas emissions regulation under a future administration. Fuel economy standards for off-road vehicles, boats and planes fall within the framework, as does a national low-carbon fuel standard. Provisions that set local air quality standards or require the reduction of emissions that harm the welfare of foreign countries could easily be adapted to target domestic greenhouse gas emissions.[12] Combined with the "endangerment finding," the vague definition of "air pollution" in the CAA will continue to empower subsequent administrations to target greenhouse gas emissions from any number of sources under any variety of provisions.

10. Philip Wallach, "U.S. Regulation of Greenhouse Gas Emissions," The Brookings Institution, October 2012.

11. U.S. Environmental Protection Agency, "Clean Air Act Permitting for Greenhouse Gases," March 14, 2017. https://www.epa.gov/nsr/clean-air-act-permitting-greenhouse-gases.

12. Bob Sussman, "The essential role of Section 115 of the Clean Air Act in meeting the COP-21 targets," The Brookings Institution, April 29, 2016. https://www.brookings.edu/blog/planetpolicy/2016/04/29/the-essential-role-of-section-115-of-the-clean-air-act-in-meeting-the-cop-21-targets/.

Only Congress can clarify, narrow or eliminate the EPA's authority to use CAA provisions for such a purpose. Accordingly, some proposals to do just that have emerged. For example, members have proposed the elimination of the endangerment finding; the prevention of regulations that would have adverse impacts on employment; and a delay of regulatory implementation until certain economic targets are met.[13] Further, the texts of certain cap-and-trade proposals in both the House and Senate have used language to eliminate EPA authority to regulate greenhouse gas emissions, and to rely instead on a legislative mechanism to accomplish reductions.[14]

BEYOND CAA: OTHER PRE-EMPTION OPPORTUNITIES

Much of the attention over climate policy has been paid to the regulatory frameworks under the CAA, and for good reason. However, there is a web of federal policies related to pricing carbon that permeates government. Should Congress pass legislation that creates a mechanism to reduce greenhouse gas emissions through other means—including R Street's preferred revenue-neutral carbon tax option—these programs would have only limited remaining value and thus should be reformed or eliminated.

Environmental Protection Agency

The Greenhouse Gas Reporting Program (GHGRP) at EPA collects data from 41 categories of emitters across the United States, which amounts to 8,000 facilities.[15] This program pre-dates any attempt at greenhouse gas regulation and was designed to create an inventory of sources and emissions to inform policy. Should a formal carbon price be imposed, greenhouse gas emitters would by necessity participate in a mandatory reporting scheme to ensure compliance. Unless the GHGRP is converted into just such a compliance-reporting program, it will be redundant and carry unnecessary costs for emitters.

Additionally, the Renewable Fuel Standard (RFS) was ostensibly designed to improve energy security and reduce the environmental impacts of fuel use in our transportation sector. Created by Congress in the Energy Policy Act of 2005, the RFS mandates the blending of ethanol into the gasoline supply at specific volumes through 2022.[16] In the past decade, however, gasoline usage in the United States has slumped. This creates obstacles for the integration of compliant quantities of ethanol into a smaller gasoline market.[17] Moreover, justification for the program on national security grounds has almost entirely eroded; domestic production of crude oil and refined products have dramatically increased over the last decade. Particularly in the presence of a federal carbon policy, there would be no remaining environmental justification for the program. For these reasons, the RFS should be eliminated.

U.S. Energy Department

The Energy Department's (DOE) Office of Energy Efficiency and Renewable Energy operates the Appliance and Equipment Standards Program, which creates mandatory efficiency requirements for five dozen categories of devices used in homes and businesses. Such standards restrict access to appliances or technologies that consumers may prefer and carry substantial costs to industry and consumers.[18] With an economywide carbon policy, the price of electricity would reflect the marginal environmental damages associated with energy use and render such mandatory efficiency standards unnecessary. Accordingly, the program should be eliminated, particularly as the complementary ENERGY STAR labeling program at EPA can provide consumers the efficiency information they need to make their own best decisions.

Further, DOE operates loan-guarantee programs that support emerging types of energy technology, advanced manufacturing facilities and alternative vehicle technologies. These programs pick winners in the marketplace and have been the subject of controversy over high-profile failures.[19] Particularly to the extent that these loan-guarantee programs attempt to compensate for unpriced carbon in the electric-generation, transportation and industrial sectors,

13. A partial list includes H.R. 910, Energy Tax Prevention Act of 2011. https://www.congress.gov/bill/112th-congress/house- bill/910/; S. 482, Energy Tax Prevention Act of 2011. https://www.congress.gov/bill/112th-congress/senate- bill/482/; H.R. 1872, Employment Protection Act of 2011. https://www.congress.gov/bill/112th-congress/house- bill/1872/; S. 1292, Employment Protection Act of 2011. https://www.congress.gov/bill/112th-congress/senate-bill/1292/; S. 231, EPA Stationary Source Regulations Suspension Act. https://www.congress.gov/bill/112th-congress/senate-bill/231/; and S. 2414, Protecting Jobs, Families, and the Economy From EPA Overreach Act. https://www.congress.gov/bill/113th-congress/senate- bill/2414.

14. Jason James, "Preemption and Alteration of EPA and State Authority to Regulate Greenhouse Gases in the Kerry-Lieberman Bill," Sabin Center *Climate Law Blog*, May 20, 2010. http://blogs.law.columbia.edu/climatechange/2010/05/20/preemption-and-alteration-of-epa-and-state-authority-to-regulate-greenhouse-gases-in-the-kerry-lieberman-bill/.

15. U.S. Environmental Protection Agency, "Learn About the Greenhouse Gas Reporting Program," October 2016. https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp.

16. U.S. Environmental Protection Agency, "Overview for Renewable Fuel Standard," June 7, 2017. https://www.epa.gov/renewable-fuel-standard-program/overview-renewable-fuel-standard.

17. U.S. Energy Information Administration, "Today in Energy: Almost all U.S. gasoline is blended with 10% ethanol," May 4, 2016. https://www.eia.gov/todayinenergy/detail.php?id=26092.

18. The controversial decision to phase out the incandescent light bulb came out of this program. See Edward Wyatt, "Give Up Familiar Light Bulb? Not Without Fight, Some Say," *The New York Times*, March 11, 2011. http://www.nytimes.com/2011/03/12/business/energy-environment/12bulb.html.

19. Rachel Weiner, "Solyndra, explained," *The Washington Post*, June 1, 2012. https://www.washingtonpost.com/blogs/the-fix/post/solyndra--explained/2012/06/01/gJQAig2g6U_blog.html.

any federal carbon policy would render such loan guarantees unnecessary.

Tax Code

The federal income tax code for businesses and individuals is littered with special provisions that provide incentives to engage in behaviors and investments generally preferred by the political establishment. The resulting tangle encourages industries to thrive off tax provisions, rather than a competitive position in the market. Reforming the code to eliminate provisions that favor lower-carbon solutions could save roughly $7.8 billion per year.[20] These savings could be used to finance reforms that are beneficial industrywide, such as lower rates, immediate expensing and accelerated asset depreciation for all forms of energy.

Administration Policy

Through an executive order signed in March, President Trump has undertaken efforts to roll back policies that imposed a carbon price as a matter of policy, rather than statute.[21] It may be helpful and consistent with a federal carbon price to limit the ability of this or any future White House from exercising such authority, particularly in two select ways.

Under President Barack Obama, the Council on Environmental Quality (CEQ) issued guidance that would integrate climate considerations into the environmental analysis conducted for any major federal actions to include permitting and land management decisions and the construction of government facilities. For any activity covered by a national carbon price—particularly those related to energy development, infrastructure or use—no further analysis of climate impacts would be warranted, as they would be accounted for in the market price.

In 2016, the U.S. Interior Department imposed a moratorium on issuing new leases for the production of coal on federal lands, in part to provide time for an evaluation of how coal leasing impacts greenhouse gas emissions.[22] In a world where federal policy prices carbon, no such piecemeal evaluation of lifecycle emissions would be necessary, as such an evaluation is likewise priced directly into the market.

CONCLUSION

The status quo of climate mitigation policy is a complicated web of existing policies, including some required by law. Congressional interest in restraining the EPA's authority to regulate carbon under the CAA is apparent, but legislators have paid little attention to additional authorities seized by EPA, DOE, the Interior Department or the CEQ. For this reason, sweeping reform is warranted.

Legislation to eliminate these authorities outright would curb market distortions; clarify opportunities for new technologies and solutions; and shrink the footprint of bureaucratic influence in energy decisionmaking. On their own, however, such reforms would be incomplete. Climate change is a not a singular challenge, but rather is caused by trillions of accumulated daily decisions that result in the emission of greenhouse gases worldwide. Federal policy to address this challenge is necessary. To date, however, those policies have embraced centralized decisionmaking and have relied unsuccessfully on bureaucratic processes to select particular technologies, processes and behaviors. A market-based pricing instrument like R Street's preferred revenue-neutral carbon tax could replace such inefficient policies; achieve faster reductions in greenhouse gas emissions; and provide the market with clarity and certainty around the costs of climate risk.

ABOUT THE AUTHOR

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20. Nicolas Loris and Katie Tubb, "Allow Energy Tax Credits to Expire," The Heritage Foundation, Nov. 16, 2016. http://www.heritage.org/environment/report/allow-energy-tax-credits-expire.

21. Exec. Order No. 13,783, 82 Fed. Reg. 16093 (March 28, 2017). https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

22. U.S. Department of the Interior, "Secretary Jewell Launches Comprehensive Review of Federal Coal Program," Press Release, Jan. 15, 2016. https://www.doi.gov/pressreleases/secretary-jewell-launches-comprehensive-review-federal-coal-program.