

The Murkowski Resolution: Stopping Back Door Climate Change Regulations

by

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Executive Summary

Late last year the Environmental Protection Agency (EPA) issued an “endangerment finding” that allows the agency to regulate greenhouse gases under the Clean Air Act, which was designed to regulate specific pollutants rather than something as ubiquitous as carbon dioxide. With Congress still assessing the potential economic costs of climate change regulations, Sen. Murkowski has introduced a resolution of disapproval to keep the EPA from

leapfrogging Congress with its own regulations. The Murkowski resolution is a prudent step, given the current state of the economy and new questions surrounding the underlying science of climate change. Any attempts to regulate greenhouse gases by the EPA would have substantial impacts on consumers and small businesses, raising costs and slowing job growth.

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Introduction

Although both the Obama administration and Congress have vowed to pass climate change legislation, efforts to forge a bill are stalled in the Senate due to concerns about the costs and potential impact on the economy. Attempts to reduce greenhouse gas emissions by definition will entail a costly reduction in the use of energy, given current technologies and the limited availability of alternatives to fossil fuels.

Proponents of climate change legislation are now hoping the EPA will use its recently acquired powers to break the logjam and implement rules without waiting for Congress.

To avoid an end-run by the EPA before Congress has even concluded deliberations on climate change, Sen. Lisa Murkowski (R-Alaska) introduced a resolution of disapproval under the Congressional Review Act to challenge the EPA's recent "endangerment" finding, which allows the agency to regulate carbon dioxide as a pollutant under the Clean Air Act. Relying on the Clean Air Act to regulate carbon would be a major increase in EPA regulation, with consumers, small businesses, and the economy as a whole facing substantial new costs. Sen. Murkowski's disapproval resolution would prevent the EPA from implementing new regulations under the endangerment finding.

EPA Powergrab Would Be Cumbersome and Costly

With the legislation mired in the Senate and the EPA poised to act, the Murkowski resolution has taken on particular prominence as perhaps the only vote on climate change before the upcoming elections. Already, 38 senators, including Blanche Lincoln (D-Ark.), chair of the Agriculture, Nutrition, and Forestry Committee, have signed Sen. Murkowski's resolution. A vote in the Senate is scheduled for late February or early March, and proponents of climate change legislation are making

a full court press to defeat the resolution and allow the EPA to move forward on its own with climate change regulations.

Proponents of new mandates on greenhouse gas emissions are using the endangerment finding to push forward with two goals. First, they want to force Congress to hastily pass a cap and trade program, despite concerns that have been raised about the costs of the legislation and its limited impact on global temperatures.

Second, the endangerment finding provides a fallback should Congress fail to act, granting unelected officials at the EPA sweeping new powers to regulate carbon dioxide as a pollutant.

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Yet the Clean Air Act was designed to regulate criteria pollutants, defined by the Clean Air Act as particulate matter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.¹ Carbon dioxide, which is ubiquitous, would be extremely difficult to regulate with the tools designed to regulate the criteria pollutants. Consumers and businesses would face higher costs as new monitoring and compliance mandates are imposed across the economy.

Congress and Climate Change Legislation

Congress has been debating sweeping climate change legislation since at least 1997, when the U.S. signed the Kyoto Protocol. Current legislation opts for a "cap and trade" program, which purports to harness market forces to reduce the costs of the regulation. Under the cap and trade program, companies would be required to obtain permits to emit greenhouse gases. Any unused permits can be traded in a new market set up on Wall Street under the new government regulations.

¹ Environmental Protection Agency, <http://www.epa.gov/air/urbanair/>.

The House has already passed legislation, and the Senate is attempting to pass its version by Earth Day, April 22. The legislation is a fundamental transformation of the energy sector, which comprises 8 percent of the economy. Overall, the Energy Information Administration estimates that the House version of the bill would have the government collecting up to \$1.3 trillion to \$6.4 trillion in revenue between the years 2012 and 2030 for redistribution.²

While shrouded in the language of markets, the cap and trade legislation is actually a top-to-bottom redesign of America’s energy sector that puts the government squarely at the forefront of many decisions better left to markets. Moreover, given the absence of an international effort to reduce greenhouse gases, analysts across the board find that U.S. cap and trade legislation will have little impact on global temperatures.³

The Obama White House and other supporters of the legislation, claim that if Congress fails to do anything, then the EPA will. In response to a lawsuit that began in the Bush administration, the Supreme Court found that the agency had the authority to regulate greenhouse gases if they were found to be a public health threat by the EPA. Last year, on December 7, President Obama’s EPA administrator issued just such a finding—the endangerment finding: “The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons

(PFCs), and sulfur hexafluoride (SF₆)—in the atmosphere threaten the public health and welfare of current and future generations.”⁴ As such, carbon dioxide and other greenhouse gases can be regulated under the Clean Air Act.

Legislators are right to be worried about costs; allowing the EPA to move forward with its regulations would be a throwback to heavy handed, top-down regulation that has produced unwieldy bureaucracies, costly regulations, and mounting government expenditures that impose costs on consumers and stifle economic growth. At the same time, the EPA’s approach would install a massive new regulatory regime that would provide the agency with significant discretionary power over enforcement, allowing the agency to intervene in almost any economic activity.

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Legal Challenges to the EPA

The EPA already has begun to regulate greenhouse gases from mobile sources with a new tailpipe emissions standard that the agency is developing. What has raised alarm is concern that the EPA will use the endangerment finding to introduce an additional rulemaking to regulate greenhouse gases from stationary sources, which would affect consumers and businesses alike and prove much more costly than the tailpipe standard alone. A wide range of groups are pursuing legal challenges to thwart any move by the EPA to establish new controls on greenhouse gas emissions from stationary sources.

These lawsuits target the agency’s controversial endangerment finding; to date, sixteen

² Energy Information Administration “Energy Market and Economic Impacts of H.R. 2454, the American Clean Energy and Security Act of 2009,” August 2009, p. 37.

³ See, “Supplemental EPA Analysis of the American Clean Energy and Security Act of 2009 *H.R. 2454 in the 111th Congress*,” available at http://www.epa.gov/climatechange/economics/pdfs/HR2454_SupplementalAnalysis.pdf

⁴ Environmental Protection Agency, “Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act,” <http://www.epa.gov/climatechange/endangerment.html>.

challenges have been filed against the EPA. Those filing suit range from states such as Texas, Alabama, and Virginia to industry associations such as the U.S. Chamber of Commerce and the National Association of Manufacturers to free market groups such as the Competitive Enterprise Institute and FreedomWorks, to 13 lawmakers.⁵

The outcome of these legal challenges is uncertain, with the courts first having to allow standing by these groups and, if granted, then evaluating the merits of the lawsuits. In all likelihood, the suits will probably be merged together by the courts to allow a ruling that addresses all concerns. Essentially, there are two issues to be considered. One is a challenge to the science underlying the EPA's endangerment finding, alleging that the EPA's actions lack scientific support. The second is a challenge based on the Regulatory Flexibility Act, claiming that the EPA did not properly assess the impact on small businesses.

An area that may prove more fruitful for those opposed to the EPA's endangerment finding is a challenge to the EPA's so-called "tailoring rule." The agency admits that strict application of the Clean Air Act to greenhouse gases could affect millions of small businesses with costly new paperwork and regulatory burdens. To limit the impact on small businesses, the EPA is proposing to set arbitrary thresholds, below which no new regulatory requirements would apply.

While this may ease the burden of many small businesses, the tailoring rule demonstrates both the discretion and reach of the agency's ability to regulate economic activity.⁶ As many have commented, such arbitrary actions may pose legal challenges for the agency: "The proposed rule raises

a number of questions – foremost among them is the viability of EPA's legal rationales for departing from the statutory thresholds for applicability and significance levels."⁷

Given the significant economic impact of greenhouse gas regulation under the Clean Air Act and the potential legal challenges to the EPA's authority, the Murkowski resolution provides an important opportunity to avoid the creation of a new, excessively burdensome regulatory regime. At the same time, it could avoid costly litigation that drains both public and private resources.

Shift to EPA Would Raise Costs

The push to regulate the energy sector has been a contentious debate in Congress, with legislation barely passing in the House (and only after a number of special interest deals had been cut). The legislation has stalled in the Senate, missing several promised deadlines. Spurring the debate forward through unilateral action by the EPA eliminates any opportunity to assess the economic burden that new energy regulations may impose.

Due to the scope of the new regulations and the costs to the economy, some in the Senate are wary of moving forward hastily. As Sen. Murkowski stated in her floor speech, "Make no mistake: if Congress allows this to happen, there will be severe consequences. Businesses will be forced to cut jobs, if not move outside our borders or close their doors for good. Domestic energy production will be severely restricted, increasing our dependence on foreign suppliers and threatening our national security. Housing will become less affordable, and consumer goods more expensive, as the impacts of the EPA's regulations are felt in towns and cities and on farms all across America."⁸

⁵ Robin Bravender, "16 'Endangerment' Lawsuits Filed Before Deadline," Greenwire, available at <http://www.eenews.net/gw/>.

⁶ Marlo Lewis, "EPA's Tailoring Rule: Temporary, Dubious, Incomplete Antidote to Massachusetts v. EPA's Legacy of Absurd Results (Part 2)," MasterResource, <http://www.masterresource.org/>.

⁷ Kyle Danish, Stephen Fotis, Britt Fleming, Doug Smith, Megan Cernock, "EPA Proposes to 'Tailor' Applicability of Greenhouse Gas Emission Regulations for Stationary Sources" Van Ness Feldman, available at <http://www.vnf.com/news-alerts-396.html>.

⁸ Sen. Lisa Murkowski, "Floor Statement: Introduction of Disapproval Resolution," (As prepared for delivery), January

Recent questions arising about the science underlying climate change have increased concerns over a rushed regulatory regime for greenhouse gases. To reach its conclusions, the EPA relied on the findings of the Intergovernmental Panel on Climate Change (IPCC), an international body created by the United Nations to evaluate climate change.

However, in recent months many have taken issue with the IPCC's analysis, beginning with "climategate," a series of emails that were recently made public that suggest scientists in favor of tough new regulations possibly have skewed results to strengthen their claims. Since then, claims by the IPCC with respect to glacier melt in the Himalayas, rain forest depletion, and hurricane intensity have come under question. These controversies have sparked new interest by Congress, making it even more important that the EPA does not short-circuit current deliberations by the legislative body.

Reigning in the EPA

The Murkowski resolution would prevent this transfer of power from Congress to an independent agency, yet the legislative future of the resolution is uncertain. It first must be referred to the committee of jurisdiction; if the resolution is not reported out by the chair within 20 days, it can be placed on the calendar by a petition signed by 30 senators. It then only requires a simple majority in the Senate. However, the resolution must then be approved by the House and signed by the president.⁹

21, 2010, pp. 1-2. Available at http://murkowski.senate.gov/public/?a=Files.Serve&File_id=46342a62-3e24-4f69-98fa-437d6f6f29db

⁹ Richard S. Beth, "Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act," Congressional Research Service, October 10, 2001,

Although its outcome is unclear, Sen.

“Massive new regulations to control greenhouse gases will undoubtedly inflict significant new costs on the economy, which is perhaps why Congress has yet to finalize any climate change legislation. Allowing the EPA to intervene in this process raises important legal questions while limiting any further discussion in Congress.”

Murkowski's resolution is an early and important volley in the Senate's looming debate on cap and trade legislation. With the economy in a slump and continuing unemployment, many in the Senate want to carefully examine the potential costs of cap and trade legislation without the threat of new

EPA rules forcing their hand. Others are wary granting the EPA such far-reaching new powers without any input from elected officials. In either case, support for the resolution suggests a renewed interest by many in the Senate on the economic impacts of cap and trade legislation and mounting concerns over the rush to pass legislation that may prove to do more harm than good.

Conclusion

The complexity and burden of new regulations for carbon dioxide under the Clean Air Act are undeniable. Massive new regulations to control greenhouse gases will undoubtedly inflict significant new costs on the economy, which is perhaps why Congress has yet to finalize any climate change legislation. Allowing the EPA to intervene in this process raises important legal questions while limiting any further discussion in Congress.

In effect, the Murkowski amendment is an attempt to avoid backdoor regulations that would cover a substantial portion of the economy. With continuing unemployment and lagging economic growth, America cannot afford the added costs of increased regulation that would threaten market activity and the nation's global competitiveness.

[http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E,*P_%3D"P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E,*P_%3D).

Sen. Murkowski is right to be cautious, and her resolution of disapproval provides an important signal to the EPA that imposing sweeping new costs on an ailing economy is unacceptable. Expanding the reach of the EPA at the expense of a more public debate in Congress does not serve the American people, nor does it make good policy.