



Précis Paper

Evolution of US Environmental Policy under the Trump Administration

A fascinating discussion about topical issues in environmental regulation and climate change in the USA.

Discussion Includes

- Evolution of environmental regulation in the United States
- Cases considered under the Clean Air Act
- The role of the States
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Evolution of US Environmental Policy under the Trump Administration

1. In this edition of BenchTV, Professor Robert Glicksman (J.B. & Maurice C. Shapiro Professor of Environmental Law, George Washington University Law School, Washington DC) and Ian Benson (Solicitor, AR Conolly and Company) discuss current issues in US environmental regulation under the Trump Administration.

Evolution of Environmental Regulation in the United States

2. The starting point for environmental regulation in the US was the adoption of the *Clean Air Act*, 42 U.S.C. §7401 (1970) by the US Congress. The *Clean Air Act* was the first major pollution control statute in the US. At the time, relatively few scientists and policy-makers were aware of the dangers posed by climate change, and so the statute does not specifically address climate change. However, over the years, the Environmental Protection Agency (EPA) began to search for legal mechanisms it could use to combat climate change and turned to the *Clean Air Act*.
3. The impetus was the filing of a petition with the EPA by several environmental protection groups and States seeking the issuance of regulations to control greenhouse gas emissions from newly manufactured motor vehicles, as a means of addressing climate change. Under the Bush administration, the EPA initially decided that the statute did not give it the authority to address climate change, denying the petition to issue a rulemaking and declining to use the statute to tackle climate change.
4. The petitions challenged this decision by the EPA and in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), the Supreme Court decided that the EPA did have the authority to regulate greenhouse gas emissions under the *Clean Air Act*. Moreover, the EPA had a responsibility to act if it found that greenhouse gas emissions cause a danger to public health and welfare. The statute had been drafted expansively and Congress had intentionally drafted the statute to give the EPA the authority to address newly-discovered threats. Finally, the only justification for refusing to address climate change under the *Clean Air Act* would be a finding that climate change was not endangering public health and welfare, a finding that the EPA was not capable of making at the time.
5. Under the Obama administration, the EPA issued the "endangerment finding", in which it concluded that greenhouse gas emissions from newly manufactured vehicles do contribute to endangering public health and welfare. That finding triggered a responsibility to issue regulations restricting greenhouse gas emissions, and the EPA quickly issued fuel efficiency standards that measure the efficiency with which a vehicle burns fuel. Under

these standards, car companies were required to meet a standard of fuel efficiency in new cars that they manufactured.

6. The recent executive action on environmental regulation issued by the Trump administration does not refer to the endangerment finding. Absent a finding that greenhouse gas emissions cause or contribute to endangerment of public health or welfare, the EPA would have no authority to address climate change. There appears to be a split of opinions within the administration as to whether the EPA should review the endangerment finding, however many consider that a reversal of the endangerment finding would never stand up in Court. Any review would occur under the *Clean Air Act* judicial review provision, which provides that EPA acts may be overturned if they are found by the court to be arbitrary and capricious. Although this is a deferential standard, courts have overturned agency determinations if they have found that the agency has not properly explained a reversal of position that it has taken. The Court would therefore have to be convinced that there is a legitimate scientific basis for reversing the determination, which would be difficult to establish based on the current state of scientific consensus.

The Role of the States

7. The *Clean Air Act* is based upon principles of cooperative federalism and is designed to be a partnership between the EPA and the States. Under this process, the federal government sets the objectives for the environmental regime, and then invites the States to help accomplish those goals, usually by giving the States considerable discretion.
8. The Clean Power Plan was the principle mechanism adopted by the Obama administration to regulate factory emissions, which applied to existing coal-fired and other fossil-fuel fired electric utilities. Under the Plan, the EPA set a target for each State to meet over time in order to reduce greenhouse gas emissions, and it was up to States to decide how they wanted to allocate their right to make greenhouse gas emissions between their different utilities. For example, a State could decide that the best way for it to meet the target was to induce utilities to shift their power sources from fuels that generate considerable greenhouse gas emissions, like coal, to cleaner fuels like solar or natural gas. Some States have been willing participants, but others have not.
9. Those States which were not willing to comply with the Clean Power Plan have filed a lawsuit against the EPA challenging the legality of the Clean Power Plan. The case against the Clean Power Plan argues that the EPA does not have the authority to restructure electrical utility emissions. The Supreme Court issued a stay of the regulations while the lawsuit is pending in the DC Circuit. Arguments were heard in 2016, but a decision is yet to be issued.

The International Sphere

10. The US is a participant in the Paris Agreement, which is a supplement to the 1994 UN Framework Convention on Climate Change. The US, under President Obama, was influential in the drafting of the Paris Agreement. However, due to Senate opposition, President Obama never submitted the agreement for Senate ratification, meaning that the Agreement does not have the status of a treaty, but is merely an executive action.
11. The Trump administration has not yet withdrawn from the Paris Agreement, although there is speculation that this may occur.

The Trump Administration's Approach to Climate Change and Science

12. Donald Trump has long expressed skepticism about climate change. President Trump's recent executive action expressed an overriding policy of increasing domestic energy production, which includes production of fossil fuels. The order also repeals all executive orders issued by President Obama relating to climate change, including measures to prepare for climate change and extreme weather events.
13. The executive order also repealed the Climate Action Plan, which contained a commitment to reduce greenhouse gas emissions, and lead global efforts to reduce greenhouse gas emissions. In addition, the executive order also repealed a moratorium on coal leasing by the Federal government, and ordered the EPA to review a series of regulations relating to climate change, including the Clean Power Plan.
14. Scott Pruitt, the former Attorney-General of Oklahoma, is the new head of the EPA under the Trump administration. As Attorney-General of Oklahoma, Pruitt filed a number of lawsuits against the EPA, designed to limit its authority. Other members of the Trump administration have also expressed skepticism about the existence of climate change, or the extent of human contribution towards climate change, including Rex Tillerson, the Secretary of State, and Jeff Sessions, the Attorney-General, who has previously been an opponent of vigorous regulation of greenhouse gas emissions under the *Clean Air Act*.
15. The President has also been slow to appoint officials to key scientific positions in the administration, and Professor Glicksman considered that the administration does not see science as playing a key role in its policy determinations. The Trump administration's proposed budget threatens to cut funding for bodies like the Inter-Governmental Panel on Climate Change, which has previously found that the significance of human contributions towards climate change is enormous. Under the budget, no further money would be

allocated to the National Aeronautics and Space Administration (NASA), which has so far been the key agency engaged in research about climate change

16. Professor Glicksman believed that the Clean Power Plan will either be abolished or significantly weakened. If the EPA decides to limit or modify the Clean Power Plan, there will probably be litigation brought by environmental groups and some States. However, some States have committed to the Clean Power Plan and its targets regardless of action by the Trump administration. Even if the regulations are not formally repealed, the EPA can refuse to enforce them, as there is a strong tradition of prosecutorial discretion on the part of the Executive branch.

Climate Change Adaptation

17. In contrast to mitigation, which is an attempt to reduce the activities that contribute to climate change, adaptation is an attempt to deal with the climate change that is already fated to occur. This is important because we cannot eliminate all of the adverse effects of climate change, no matter what we do going forward.
18. The Obama administration took a number of steps to try to facilitate climate change adaptation, however the Trump executive action eliminates this commitment on the part of the Federal government. The Obama administration also issued an executive order that mandated that all federal agencies make it a part of their responsibility to begin planning for adaptation in relation to their own activities. However again, this has been abolished by the Trump administration. There is therefore unlikely to be federal leadership on climate change adaptation, meaning that any adaptation activity will take place at the State or local level. Many local governments have begun considerable efforts to deal with climate change. For example, Miami has taken steps to move key infrastructure away from coastal areas to prepare for rising sea levels.
19. There are bills pending in Congress that would reduce or eliminate the EPA's authority to address greenhouse gas emissions that contribute to climate change. Professor Glicksman considered that the upshot of this evolution is that the United States is poised to take a giant step backwards on environmental regulation under the Trump administration. Any meaningful regulation of greenhouse gas emissions is likely to come from the States.

BIOGRAPHY

Professor Robert Glicksman

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Robert L. Glicksman is a nationally and internationally recognized expert on environmental, natural resources, and administrative law issues. Before joining the law school faculty in 2009, Professor Glicksman taught at the University of Kansas School of Law, where he was named the holder of the Robert W. Wagstaff Distinguished Professor of Law in 1995. Professor Glicksman has practiced with law firms in DC and New Jersey and has an extensive list of publications in his areas of expertise. Robert has been a member scholar for the Center for Progressive Reform since 2002, a non-profit research and educational organisation, that also frequently testifies before congressional committees on a range of topics from climate change to access to justice.

Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in Law.

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