Forbes

A Supreme Court EPA Decision That Could Cost Taxpayers $21 Billion Per Year

By Marlo Lewis, May 8, 2013

Is the Clean Air Act so badly flawed that it will cripple environmental enforcement and economic development alike unless the EPA and its state counterparts defy clear statutory provisions or, alternatively, spend $21 billion a year to employ an additional 320,000 bureaucrats?

That is a central issue in a recent lawsuit by the Southeastern Legal Foundation, the Competitive Enterprise Institute and a host of lawmakers and several companies.

They are petitioning the Supreme Court to review an appellate court decision upholding the EPA's global warming regulations. The litigation challenges the EPA's interpretation of both the Clean Air Act and the Supreme Court's April 2007 *Massachusetts v. EPA* decision. In that case, the Court held the EPA must determine whether greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare.

If so, the EPA must establish greenhouse gas emission standards for new motor vehicles. In part, the Court based its ruling on the assumption an endangerment finding would not lead to "extreme measures." At most, cars might get better gas mileage. What's not to like?

But in July 2008, the EPA argued it might also have to establish greenhouse gas emission standards for aircraft, marine vessels, non-road vehicles, fuels and numerous industrial source categories. It might even have to establish national ambient air quality standards (NAAQS) for greenhouse gases. In short, an endangerment finding could empower the EPA to implement an economy-wide de-carbonization program without having to clear any of it with Congress. Somehow none of this was discussed in *Mass. v. EPA*.

But wait, it gets weirder. In October 2009, the EPA acknowledged that regulating greenhouse gases through the Clean Air Act leads to "absurd results" and "administrative impossibility."

Here's why. As the EPA reads the statute, "major" stationary sources – entities that emit 250 or 100 tons per year of a regulated air pollutant – must obtain permits from environmental agencies to construct or operate their facilities. Carbon dioxide became a regulated air pollutant when the EPA's greenhouse gas motor vehicle standards took effect on Jan. 2, 2011.

Whereas only large industrial facilities emit 250 or even 100 tons of conventional air pollutants per year, literally millions of small, non-industrial facilities – office buildings, restaurants,

schools – emit CO2 in those quantities. The EPA and its state counterparts suddenly faced the prospect of having to process 81,000 pre-construction permits annually (instead of 280) and 6.1 million operating permits annually (instead of 15,000).

That gigantic work load would overwhelm their administrative resources unless, the EPA estimated, agencies hire 320,000 additional full-time staff at a cost of $21 billion annually. Otherwise, ever-growing bottlenecks would paralyze environmental enforcement and freeze economic development. Both the application of complex and costly permitting requirements to tens of thousands of non-industrial facilities and the quantum jump in taxpayer burden qualify as "extreme measures."

To avoid an administrative meltdown, the EPA in July 2012 adopted its Tailoring Rule, which defines the major source cutoff for greenhouse gases as a potential to emit 100,000 tons per year. But the statutory cutoff is a potential to emit 100/250 tons per year of "any air pollutant." Interpretive leeway may be appropriate when statutory language is vague, but there is nothing unclear about "250 tons." The Tailoring Rule actually amends law. It, too, is an extreme measure, because agencies constitutionally have no power to amend statutes.

The SLF-CEI lawsuit shows the way out of this morass. Read in context, the pre-construction permit program applies only to pollutants for which the EPA has issued national ambient air quality standards. Since there are no NAAQS for greenhouse gases, the EPA has no authority to regulate stationary sources – hence has no need to play lawmaker and flout clear statutory language.

What if the EPA is correct and regulation of "any" air pollutant under any part of the Clean Air Act automatically imposes permitting requirements on "major" sources? There are only two possibilities. Either *Mass. v. EPA* brought to light a flaw previously hidden in the Act, or the Court misread the statute and the EPA has no authority to regulate greenhouse gas emissions from motor vehicles.

To maintain, as the EPA does, that both *Mass. v. EPA* and the agency's interpretation of the permitting provisions are correct, one must suppose that when Congress enacted the Clean Air Act in 1970, it somehow inserted the statutory equivalent of malicious code into the text, the bug lay dormant for 40 years, and then suddenly the malware became active, causing programs that had worked reasonably well since their inception to go haywire, implode and block shovel-ready projects throughout the land.

And if EPA officials truly believe that, I have a bridge I'd like to sell them.

Marlo Lewis is a senior fellow at the Competitive Enterprise Institute.