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The Clean Air Act Is in No Shape to Be Celebrated



By David Schoenbrod

The Clean Air Act is 40 years old. On Sept. 14, 2010, EPA Administrator Lisa Jackson will lead a day-long celebration of the anniversary. It is appropriate to celebrate past successes, but in truth the Clean Air Act cannot handle today's pollution problems, and not just those caused by greenhouse gases. EPA has found that traditional pollutants continue to harm public health, but the Clean Air Act, a statute passed in 1970 during the dawn of environmentalism, mandates an ineffective, inefficient response: a requirement that each state adopt its own plan to control emissions. Congress should replace the state plan requirement with federal market-based regulation.

The assumptions behind that 1970 scheme no longer hold true. First, Congress assumed back then that each state's pollution came almost entirely from smokestacks within that state and, on that basis, required each state to adopt a formal plan to cut pollution. Experience has shown, however, that much pollution comes from other states and even other nations. Yet, the state plan requirement remains the Clean Air Act's major program.

Second, Congress assumed in 1970 that the best way to control pollution was for the state plan to tell each big factory what to do. This top-down approach worked well enough when industries had yet to install well-known, relatively inexpensive control devices. Today it is far less obvious how to eke out further progress. To cut pollution further often requires changes in the industrial processes themselves, changes in small businesses, buildings, and other small sources, and changes based on innovation still being worked out. Regulators writing state plans today cannot know enough to pick the most effective and efficient ways to further reduce pollution. Yet, the state plan requirement continues.

Third, Congress assumed in 1970 that each state would design, implement and enforce a plan sufficient to meet federal environmental targets. The result has been an overwhelmingly complex and disappointingly ineffective program. According to a 2004 National Research Council study, the state plan requirement is "legalistic," "often

frustrating” and “probably discourages innovation.” It “overtaxes the limited financial and human resources available” and “draws attention and resources away from the more germane issue of ensuring progress.” Yet, the state plan requirement continues.

There is an alternative to this top-down, state-by-state approach: market-based regulation. Congress adopted a market-based approach in 1990 when it placed a declining cap on total acid rain emissions from power plants. Within this cap, each plant was given an allowance to emit pollutants, along with permission to trade allowances that it did not use. This approach let the market rather than regulators decide at which plants to cut emissions and how. As a result, acid rain emissions were halved at far less than the cost of top-down regulations.

Barack Obama called cap-and-trade “a smarter way of controlling pollution” than top-down regulation, but the state plan requirement places many obstacles in the way of national trading of emission allowances. Under the Clinton and Bush II administrations, EPA worked around the state plan requirement by adopting national regulations that impose market-based approaches to interstate pollution problems. But the state plan requirement got in the way. A federal court in July 2008 invalidated the EPA’s market-based Clean Air Act Interstate Rule, to the consternation of industry, environmentalists and states. EPA in July 2010 proposed a new rule to replace the market-based approach invalidated by the court. The result: a collapse of the price of allowances to emit sulfur from more than \$300 to \$5, which wrecked the market incentive to cut emissions.

The Clean Air Act has achieved its greatest successes without state plans. These include making new cars 99 % cleaner than they were a half century ago and eliminating lead from gasoline as well as halving acid rain. These successes share three features that the state plan requirement lacks: (1) direct federal regulation, (2) flexibility on how to cut pollution provided through market-based approaches that allow wide choice, and (3) an overt political decision by Congress on how much to cut pollution and who bears the burden. A new Clean Air Act in which Congress replaces the state plan requirement with a federal market-based regulation would bring more health protection at less cost. How to restructure the Clean Air Act to protect health across the country is spelled out in the [report](#) of the New York Law School-NYU School of Law project, *Breaking the Logjam*.

The time to celebrate will come when the Clean Air Act is itself reformed to make it capable of dealing with today's challenges. For Congress to take on this job, EPA will need to show some leadership.

Mr. Schoenbrod is a professor at New York Law School, an adjunct scholar at the American Enterprise Institute, and a former attorney at the Natural Resources Defense Council. Along with Richard B. Stewart and Katrina M. Wyman, he co-authored Breaking the Logjam: Environmental Protection That Will Work (Yale University Press, 2010).