Case Archive

# Chapter 13: Regulation and the Courts

## Who Should Set Environmental Policy—California or the Federal Government?

Is the Environmental Protection Agency (EPA) irrelevant? In late December 2007, it blocked California’s cutting-edge plan to reduce greenhouse gases, but that decision is looking increasingly like the last gasp of a losing battle. The new fight is how the nation will fight the campaign against global warming and who—EPA or the states—will call the shots.

At the center of the struggle is California’s tough air pollution law, which requires auto manufacturers to reduce greenhouse gas emissions by 30 percent by 2016. EPA Administrator Stephen L. Johnson, standing alone against even his own agency’s policy and legal experts, rejected California’s request for a waiver to pursue its standards. He could not allow the states to set their own course, Johnson said, because a “patchwork of state rules” would cause chaos. But Johnson’s plan, critics charged, would take far too long to bring any meaningful improvement in air quality.

California Governor Arnold Schwarzenegger countered that “Anything less than aggressive action on the greatest environmental threat of all time is inexcusable.” Republican Jim Douglas, Vermont’s governor, called Johnson “out of touch with the reality of climate change.” Democrat Jon Corzine of New Jersey labeled the decision “horrendous.” In all, sixteen states sued to challenge Johnson’s decision.

Fueling the political battle were back-channel conversations Vice President Cheney and other top White House officials had with automakers. They were fighting hard to block California’s tough standards and the costly investments they would require. In the short run, they won. Even if EPA loses in the federal courts or a new administration switches course, the automakers will have delayed those investments for at least a couple of years.

The long run is another matter, for the lawsuit is a twentieth-century-style tussle over one of the biggest twenty-first-century issues. We’ve moved away from the question of whether we should try to reduce global warming to how: what strategies will work best? The Bush administration is not only fighting a losing battle but also fighting the wrong battle. Some kind of greenhouse gas strategy will come. The questions are what will work best and who will shape it.

The smart money is that the next round of clean air standards will be market-driven, especially through “cap and trade” plans. Both the Obama and McCain campaigns proposed just such a strategy as the cornerstone of their environmental program. In “cap and trade,” the government would set overall pollution-reduction targets. Companies could then buy, sell, and trade pollution credits. Companies that find it cheapest to reduce their emissions can sell credits to companies where pollution reduction requires larger investments. The 1989 Clean Air Act reduced acid rain by creating such a market on the Chicago Board of Trade for sulfur dioxide credits, and the success of the strategy surprised even its critics.

A market-driven plan for greenhouse gases would be much tougher to create, however. Europe has struggled to find the right caps for its carbon trading market because the greenhouse gas problem is far more complex than acid rain. Tweaking the system along the way could undermine the predictability that companies find attractive about it.

But two things are certain: EPA’s decision only benefits those playing for time, and it doesn’t resolve the question of who will run a market-driven strategy. It’s impossible to build markets completely from the states, because the scale would be too small, even in California. And it’s impossible to develop market-based strategies from Washington without bringing in the states, because they do much of the front-line work on air quality. There is no escaping the need to act on climate change, but there’s also no avoiding the fact that an effective climate change strategy is going to require a new environmental partnership between Washington and the states.

On this and other fronts, the Bush administration left behind a fractious legacy on federalism. The states lost their battles on lowering greenhouse gases and increasing health coverage through the State Children’s Health Insurance Program. They struggled over the renewal of No Child Left Behind and the creation of Real ID driver’s licenses. But it’s hard to escape the sense that they have the feds on the run. The Bush administration’s decisions were holding actions. Pressures are building for everyone to dance more to the states’ tune, but they can’t dance alone.

That shapes the environmental challenge for the next administration. The next steps will require a move from stonewalling to stronger incentives for collaboration, because neither the states nor the federal government will be able to take the inescapable next steps alone. EPA will need to find a strategy that makes it relevant in one of the policy issues sure to define this century.

## Questions to Consider

Is it wise national policy to allow individual states to set the most aggressive standards for pollution control? Or does waiting for Washington mean that policy will float to the least common denominator, with standards that are acceptable to everyone and, therefore, slow to emerge and lower than would be the case with far-reaching, fast-moving states?

What ethical standards do you think that a government regulator ought to follow? Was Johnson right to issue a decision that was consistent with the Bush administration’s policy, even though that meant overruling his own technical staff?

Is a private cap and trade system, which relies on private markets for setting the cost of meeting government standards, a good strategy? Or should the government set clear standards that all companies must meet, regardless of cost?

What regulatory strategy should government—federal, state, and local—pursue in the effort to manage climate change?

## Note

Portions of this case originally appeared in *Governing* magazine in February 2008. See http://www.governing.com/articles/0802poto.htm.