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Clean Air Act Reform: A Necessity for the Act's Survival

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This past year has probably been the most unpleasant in many years for those working on environmental regulation and legislation. Everything was very polarized, ranging from legislation that would start by repealing the 1990 Clean Air Act Amendments (CAAA),¹ to positions taken by some of my colleagues in the environmental community. The Environmental Protection Agency (EPA) characterized every change that might be made in the rules in the Clean Air Act (CAA)² as the complete destruction of air pollution control in the United States. It is very difficult to deal with reform when every change is characterized as a retreat.

My thesis today is that, ultimately, unless we fix the CAA, it will be seriously damaged in the not too distant future. A number of the control requirements mandated by the 1990 CAAA have not yet started to bite. When they do start to bite, there will be a whole new community of people brought into the debate. Members of this community will not be acquainted with, or interested in, the overall policy goals of the CAAA, only its immediate effect on them. They will only know that pain is being inflicted and they will want it to go away. Because of this, you will see legislation introduced removing many of the those requirements of the CAAA.

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1. Clean Air Act Amendments of 1990 (CAAA), Pub. L. No. 101-549, 104 Stat. 2399 (1990).

2. Clean Air Act (CAA) §§ 101-618, 42 U.S.C. §§ 7401-7671q (1994).

There will be little opportunity to fine tune the current program.

There is an old Polish fable about a farmer walking along the road on a freezing winter day, when he sees a crow freezing to death on the side of the road. Being a kindhearted man, he picks the crow up and holds it, but he cannot stay there because he has to get into town. As he is trying to figure out what to do, he sees a cow patty lying in the pasture still steaming from having been left there by a cow. He thinks a little and says "I will wrap the crow in this and it will warm the crow." Well, he does that and he walks on down the road. After a little while, the warmth of the cow patty starts to revive the crow. The crow, seeing what condition it is in, starts cawing loudly and complaining. A wolf hears the crow and comes over and eats the crow.

The moral of this story is: the guy that got you into it is not necessarily your enemy and the guy that got you out of it is not necessarily your friend. But, if you are up to your neck in it you should not crow about it. The analogy here is that some of us are actually in loyal opposition to some of the policies that have been promulgated under the CAA. In fact, although we have a genuine belief that the CAA has to be amended, we do not really have any problems with the degree of control that is required by it. The loyal opposition wants to save the CAA from itself.

If you want to see the kind of process that I am afraid will happen, look at what has been happening with employer commuting options (ECO) and inspection and maintenance (I&M) centers. Both programs would have been extremely cost effective. The employer commuting option program was basically a down payment on the ultimate requirement of attainment under the CAA, which is to get people out of their cars. If we do not get people out of their cars, we might as well forget about attainment, our constant promise to the public on which we never deliver. If we leave the CAAA's permit program for the toxins requirement in place, allowing it to grind along, a cry will come up from the small business community.

Ironically, the greatest hardship will be imposed upon those companies that are actually trying to comply with the CAAA, because the companies avoiding compliance will not suffer any hardship. And the problem with many programs in the CAA is that they try to use paperwork to assure compliance. Ultimately, you must inspect each plant, examine its processes and compare the results to other information, such as fuel use, emissions reporting data, and maintenance data. In other words, you must really find out what each plant has been doing. The front end processes, such as permitting and paperwork, will never find the true culprits. If a facility is really trying to avoid the requirements of the CAA, it will submit false paperwork whether there is a tight paperwork process or a loose paperwork process. Yet, the program is being designed as if it relies totally on paperwork.

The new paradigm that needs to be created in the CAA is that the EPA and the states are co-administrators of its programs. This is just starting to be understood at the EPA. The Agency cannot be sitting on the state's shoulders in every decision that is made. The system must be changed so that the EPA is looking for the true bad actors out there and bringing enforcement actions against them, not checking to see if the states are making decisions with which the agency has marginal disagreements. The EPA should, therefore, audit the states' performance overall, not routinely look at individual decisions.

Assume that at the top of this chart³ is one hundred percent of the control that you would get from a nominal control requirement. Pick anything, for example, a new toxics control requirement for refineries. At the bottom of the chart is no improvement. Assume then that you have set a standard and that you have all enforcement authorities that are in the CAA: field citations, civil penalties, fines, whistleblowers, etc., some of which existed before the 1990 CAAA. How much control will you actually achieve? The short answer, from companies that have an intention to comply, is that a substantial part of this new requirement will be achieved.

3. On file with speaker.

Who would you miss? You would miss the people who are not on the enforcement agencies' radar screens. You would miss the people that are not going to comply because there is confusion over the control requirements or their applicability of the standard. You can fix these shortfalls by having a permit program. That would force everyone to be on the radar screen, instead of the agencies first having to go out there and say: (a) I am going to prove that you are subject to this requirement, and (b) I am going to prove that you did not meet the requirement. Thus, if you have a permit program that says for each facility, "this is a rule that you are subject to," then you are going to get a substantial piece of the ultimate goal. However, you are still not going to get the guys who are hiding under the rocks.

If you add to that a system in which you must have a prior approval method for major modifications or construction of a new source, you will make further progress towards achieving nominal control - the one hundred percent line. Now, if you add on top of that the authority of the EPA to revoke a permit, modify a permit, or bring an enforcement action, you are going to get even more compliance. The argument that we have heard until now is that unless you add to the process public participation, prior review, and prior approval for every minor change, you are not going to get significant improvements.

I submit to you that this argument is nonsense. You have to look at the incremental benefit that you will gain compared to the enormous incremental pain that you will inflict by requiring a substantial administrative process for even minor changes. That is at the core of most of the amendments to the CAA on which I have been working.

The CAAA expanded the geographic scope of the non-attainment program. In the past, the non-attainment program was the principle mechanism by which existing facilities were brought under federal control. It expanded the controls for sources of hazardous air pollutants (HAPs) enormously, both in the number of sources and the number of pollutants regulated. It also lowered the control threshold. For air toxics, a major source is one which has the potential to emit just two

and one-third pounds per hour of a toxic substance. Thus, a facility using the amount of solvent from one can of paint could be viewed as a major source under the CAA.

The CAAA added whistleblower provisions and also provided for citizen suits directly against violating sources. Field citations were added which are, for all intents and purposes, \$5,000 traffic tickets to be written against facilities that have no real means of challenging them. The CAAA also increased criminal penalty exposure for facilities that were violating the CAA, and it added permits. But, permits are not the only things that were added to achieve the ends of the CAA.

Beyond these additional compliance assurance tools given to the agencies by the 1990 CAAA, and the expansion of the applicability of the Act's control and procedural requirements, a number of policies also reduce flexibility facilities subject to the Act's several programs. First, we have the issue of the potential to emit, which you have already heard about from a previous speaker. I am talking about this only from the standpoint of what it does to flexibility under the CAA. The CAA, unlike other environmental laws, regulates and exposes you to penalties based on your *potential* to add pollutants to the environment. You are not regulated under the Resource Conservation and Recovery Act (RCRA)⁴ or the Clean Water Act (CWA)⁵ on your potential to release anything.

Under those laws, you are only subject to penalties for what you actually release or for what you actually generate and mismanage. The CAA assumes emissions. Even if you feel that you have no leaks anywhere in your facility, it assumes that you have fugitive emissions from all your tanks, valves, and pumps, etc., with all the points in your facility having the potential to release. The cost of demonstrating that you do not have those assumed leaks would be higher than controlling them. Thus, effectively, you are controlled

4. Resource Conservation and Recovery Act (RCRA) §§ 1002-11012, 42 U.S.C. §§ 6901-6992k (1994).

5. Federal Water Pollution Control (Clean Water) Act §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

on assumed emissions from thousands of different points in your facility.

What that all boils down to is the regulatory significance and importance of the very small change that you would make on a daily basis just to stay competitive and keep your facility running. These changes trigger regulatory requirements under the CAA that would have no consequences under RCRA or CWA. Importantly, you cannot simply restrain production until you get your paperwork completed, because you are controlled on your potential to release. So, the fact that you might never actually reach the threshold point, in terms of emissions at which controls would be required, does not matter. As soon as you make a change, it is assumed that you are going to be operating that way twenty-four hours a day, three hundred sixty-five days a year, unless you have a federally enforceable limit. To get a federally enforceable limit, you must deal with the process. This means that you are controlled throughout your facility with regard to what you do and what you make, not just what your wastes or releases are, and there is nothing you can do in terms of production limits or controls to avoid the delays associated with meeting the federal permitting requirements.

Beyond "potential-to-emit" and the unnecessary permitting it triggers, there are additional CAAA requirements which impose unnecessary prior review and approval. Emission monitoring requirements trigger their own process requirements for prior review and approval. Thus, they present an additional source of inflexibility and delay problems that will make it difficult to maintain support for the CAAA. There is a serious problem when the cost of demonstrating compliance costs more than the cost of actual compliance. A continuous emissions monitor costs over \$100,000 to install, and over \$100,000 a year to operate. That is the cost to monitor a single emission point for one pollutant.

What is worse is that these procedural requirements reduce the utility of one of the main tools under the CAA for avoiding control and procedural delays. Everyone has talked about the use of emissions trading under the CAAA in order to build some flexibility into the process. Emissions trading

is killed by excessive procedural burdens. Most control rules rely upon rate-based controls. These require that, on an ongoing basis, you are not allowed to emit more than X units of emissions per hour or per unit of heat input or production. However, when you want to trade, you have to come up with a mass limit; otherwise, you do not know how many tons you are trading. In other words, you have to know and control not only the rate, but also how many hours you are going to be employing the emitting production process. Thus, you suddenly have to change from a system that has been monitored for rate-based control to a system that has to be monitored for mass-based control.

Until now, EPA has required such a change in monitoring to go through a "significant" operating permit modification. That imposes a nondiscretionary requirement on the state to provide time for public participation and EPA review of the proposed decision *before* the source can do anything. This means that one of the principle mechanisms under the CAAA that allows you to make a fast change without having to wait for the permitting process has been killed by a requirement that makes you wait around for 18 months to get approval for a modification. The amendments to the Act that the manufacturing community has been focusing on are amendments to process needed to address this situation, not rollback amendments.

There is a fundamental inconsistency here between flexibility and public participation, and between flexibility and certainty on the part of the enforcement authorities. Unless you start looking at the CAA as a whole, and unless you accept that something is going to slip through the net initially, then the whole thing is going to collapse, at least as far as the toxins and permitting process is concerned - not because of the degree of emission control required, but because of excessive and unproductive process burdens. In a reformed system, the cases that do slip by because the public and EPA are not reviewing decisions before the fact would still be subject to enforcement, which in turn is buttressed by the new whistle-blower and citizen suit authorities. Unfortunately, a significant portion of the CAA relies on the procedural

provisions that I have been criticizing. You will notice that I have not mentioned the non-attainment requirements and the air quality standards or the basic levels of control required for air toxics and the rest of the controls under the CAA. I will save that for another discussion.

For now, let me conclude by saying simply that the CAA is necessary. It is good law. However, some of the CAAA need to be rethought and restructured in order for the CAA to survive in the future.