

Published: 10.10.2009

Cap and trade is preferable to hodgepodge regulation

By David M. Driesen and Kirsten H. Engel
SPECIAL TO THE ARIZONA DAILY STAR

Opponents of proposals for a cap-and-trade program addressing global climate disruption love to portray the fight as a battle between unfettered free markets and intrusive government regulation.

They've missed a central lesson of the economic meltdown — that free markets need some regulation. But their bigger mistake is that the choice over whether to regulate has already been made. The federal Environmental Protection Agency is required by the Clean Air Act to set standards for greenhouse gases, whether Congress passes climate legislation or not. Furthermore, the courts might order some greenhouse-gas cleanup on their own.

Hence, rather than "regulation vs. the free market," the choice is about the kind of regulation — either a comprehensive market-based approach like that passed in the House and proposed in the new Kerry-Boxer bill in the Senate, or piecemeal regulation by the EPA, perhaps supplemented by a smattering of cleanup orders from courts in cases brought against polluters.

The EPA under President George W. Bush resisted regulating greenhouse-gas emissions, asserting that the Clean Air Act does not apply. The United States Supreme Court disagreed in *Massachusetts v. EPA*, directing the agency to set vehicle emission standards if the EPA determined that vehicles' greenhouse gas emissions endanger the environment.

The EPA recently did just that, proposing to list greenhouse gases as pollutants under the Clean Air Act and to establish vehicle emission standards at levels achievable by raising the average fuel economy of each manufacturer's fleet of vehicles to 35 miles per gallon by 2016.

Recently, the EPA went further, proposing to regulate greenhouse-gas emissions from large stationary sources.



Kirsten Engel of Tucson is a law professor at the University of Arizona.



David Driesen is a law professor at Syracuse University.

Now that the EPA has announced that greenhouse gases endanger public health and the environment, it will be legally difficult and often impossible for the agency to turn down petitions calling for regulation of other major sources of these same greenhouse gases.

By our count, environmental groups, states and local governments have already filed at least eight petitions seeking EPA regulation not just of cars, but of petroleum refineries, aircraft, non-road vehicles (such as construction equipment and tractors), ships and vehicle fuels.

Meanwhile, the EPA is no longer the only source of regulation that the industry needs to worry about.

In September, a federal appeals court gave the go-ahead to an ambitious lawsuit filed by eight states and several environmental groups alleging that the greenhouse-gas emissions from American Electric Power and other major coal-fired utilities constitute a public nuisance.

While the ultimate outcome remains to be seen, the sweeping decision by two judges appointed by Republican presidents takes the prospect of common-law liability out of the realm of the fanciful and into that of the possible.

Thus, in an ironic twist, market-loving opponents of cap-and-trade may succeed in blocking climate legislation in Congress only to have it replaced by what they hate more: command and control regulatory standards from the federal bureaucracy and unpredictable, piecemeal litigation-derived standards from the courts.

It's a bad trade-off for the free marketers and it's not so great for the public either. A legislative cap-and-trade program would set clear goals for greenhouse-gas reductions, but employ a market-based approach to achieving them.

Under cap-and-trade, national emissions must come down. But individual polluters can choose between making reductions at their own facilities and purchasing allowances — buying someone else's ticket to pollute.

This trading approach offers flexibility, allowing polluters to choose the most cost-effective approach to achieving emission-reduction goals.

A hodgepodge of EPA and litigation-driven standards is not the best choice for the country, either. The very unpredictability of the regulatory standards will hamper the transition to a less-carbon-intensive economy and waste time and money on litigation and agency rule makings, resources that could more productively be turned to implementing a comprehensive, predictable and flexible scheme of regulation mandated by our elected representatives in Congress.

While EPA regulation is needed to address climate disruption if Congress fails to enact a comprehensive program, freshly tailored legislation would be best. A number of polluting firms have worked with moderate environmentalists to craft a cap-and-trade bill.

These firms understand that greenhouse-gas regulation is inevitable, and welcome the opportunity to get a cap-and-trade program enacted, thus avoiding less predictable regulation.

But those intent on ignoring the issue of global warming insist on referring to "cap-and-trade" legislation as "cap-and-tax" legislation in an attempt to nix it.

They would be wise to look at the alternative regulatory regime now developing in the shadow of these ideological battles and ask themselves which they'd prefer.

David M. Driesen and Kirsten H. Engel are member scholars of the Center for Progressive Reform. Write to Driesen at ddriesen@law.syr.edu Write to Engel at engel@law.arizona.edu

All content copyright © 1999-2009 AzStarNet, Arizona Daily Star and its wire services and suppliers and may not be republished without permission. All rights reserved. Any copying, redistribution, or retransmission of any of the contents of this service without the expressed written consent of Arizona Daily Star or AzStarNet is prohibited.