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"Yes, He Can"--Obama's power to make climate change commitment w/o Congress

By Paul Rosenberg

Natasha helped set up a couple of email interviews with Copenhagen participants. The first was with Kassie R. Siegel, whom she introduced to me as "an attorney with the Center for Biological Diversity, who's been speaking on the topic of what the Obama administration can do wrt establishing strong climate action with or without the Congress and in keeping with the law. In particular, she's highlighted the EPA's power under the Clean Air Act and as mandated by the SCOTUS, in contrast with the current likely legislative action which will gut the CAA and strip the EPA of a great deal of authority over GHGs."

In the course of the interview, she answered a central question--" What's the alternative via the EPA?"--with an extended excerpt from a footnoted paper, "Yes He Can: President Obama's Power to Make an International Climate Commitment Without Waiting for Congress" that she co-authored. Since it goes to the heart of understanding what she's proposing, it made sense to present the excerpt first, so that people fully understand what she's proposing, after which I will run the rest of the interview. It's a bit technical, but not too much. Grab a cup of coffee, and in 15 minutes, you'll know more about the Clean Air Act & global warming than than probably 99% of people on Capitol Hill--a simultaneously inspiring and depressing thought.

Hmmm.... Better make that two cups of coffee!

EXCERPT---

"Yes He Can"

The Clean Air Act, one of the nation's and the world's most important and successful environmental laws, uses a variety of complementary pollution control mechanisms to reduce pollution from all sectors of the U.S. economy. [1] Studies have shown that the substantial improvements in air quality achieved through the Act have resulted in enormous public health, ecological, and other benefits, the economic value of which is 42 times greater than the cost of regulation.[2]

Among existing domestic laws, the Clean Air Act is the preeminent choice for regulation of domestic greenhouse gas emissions within the context of an international executive agreement.[3] In fact, comprehensive greenhouse gas reductions could be implemented much more quickly, and with far greater scientific credibility, under the Clean Air Act's well-established regulatory framework than under the "cap-and-trade" system contemplated in existing legislative proposals. Indeed, in light of a recent landmark Supreme Court decision, the EPA is now legally obligated to use its authority under the Clean Air Act for this purpose, and already has begun to take regulatory steps in this direction.

1. The EPA's Long-Awaited "Endangerment Finding"

In 2007, the Supreme Court ruled in Massachusetts v. EPA that greenhouse gases meet the definition of "air pollutants" under the Clean Air Act. [4] As a result, EPA must determine whether greenhouse gases "may reasonably be anticipated to endanger public health or welfare."[5] The Supreme Court directed the EPA to consider whether the Clean Air Act required this determination, known as an "endangerment finding," for greenhouse gases emitted by automobiles.[6]

After reviewing applicable science and taking extensive public comment, EPA finalized its endangerment finding on December 7, 2009, concluding that "the evidence provides compelling support for finding that greenhouse gas air pollution endangers the public welfare of both current and future generations. . . . [T]here is good reason to act now given the urgency of the threat of climate change and the compelling scientific evidence."[7]

EPA's endangerment finding has enormous legal and political significance. The finding required in the context of automobile emissions is similar or identical to findings in other sections of the Clean Air Act that trigger regulation of greenhouse gas emissions from ships, aircraft, power plants, factories, and other sources. Such a finding also compels the issuance of nationwide pollution caps for greenhouse gases.

2. Criteria Air Pollutant Designation, National Ambient Air Quality Standards, and State Implementation Plans for Greenhouse Gases

The "criteria air pollutant" program is in many ways the heart of the modern Clean Air Act.[8] For each air pollutant

emitted by a wide variety of sources that can reasonably be anticipated to endanger public health and welfare, EPA must establish air quality "criteria" and set a national pollution cap-known technically as a "national ambient air quality standard" or "NAAQS"-to address the pollutant's impacts.[9] Such caps take the form of national standards specifying the total amount of pollution allowed in the ambient air (as opposed to the total amount of pollution that may be emitted from a given facility), and are set at a level sufficient to protect the public health and welfare. Each state then must do its part to meet the national pollution cap by developing and implementing a "state implementation plan" or "SIP."

Criteria air pollutant designation for greenhouse gases would fully activate the Clean Air Act's tools and, combined with other provisions of the statute, provide a comprehensive system with a proven track record of success in pollution reduction. On December 2, 2009, the Center for Biological Diversity and 350.org filed a petition with the EPA seeking the designation of several greenhouse gases as "criteria" air pollutants and the imposition of national caps for those pollutants.[10] Based on current science, the petition requests that EPA set a cap of no more than 350 ppm for CO2 and appropriate limits for the other greenhouse gases as necessary to protect public health and welfare. This petition asks EPA to make use of one of the most powerful tools in the Clean Air Act tool box-one that would allow the agency to impose a science-based national cap on greenhouse gas emissions.

Using national pollution caps to control greenhouse gases is controversial, but ultimately could be highly effective. For example, national pollution caps for greenhouse gases would provide a strong basis for immediate action to reduce emissions, unlike the untested (and still largely hypothetical) market-based "cap-and-trade" systems under consideration in Congress. There is great risk that the scientific rigor of the Clean Air Act will not be replicated in new legislation, where a cap could simply be set by Congress according to political calculations, then further diluted by free emission allowances and offsets pursuant to industry pressures. That said, there is no fundamental inconsistency between a national pollution cap and a "cap-and-trade" system.[11] Indeed, NAAQS could provide a protective, science-based "cap" for greenhouse gas emissions while also serving as a potent regulatory backstop in case "trading" failed to produce results.

Under the SIP process, moreover, all fifty state governments would be enlisted in the effort to meet national greenhouse gas targets. Important reductions could be achieved by changes in land use, utility regulation, transportation, and forestry-areas traditionally regulated by state and local governments.[12] States also could incorporate their existing climate efforts into SIPs. As of August 2009, at least forty-seven states had completed or were completing greenhouse gas inventories, thirty-eight were drafting or had drafted climate action plans, and twenty-three states had adopted emissions reduction targets.[13]

Finally, the federal government, the states, and emitters already know and use the NAAQS and SIP framework-an existing system that has served the public well for decades. Like other key provisions of the Clean Air Act, the criteria air pollutant program gives the President powerful tools that could serve as the basis of an agreement on international greenhouse gas reductions.

3. Reducing Pollution from Mobile Sources

Title II of the Clean Air Act regulates mobile sources of air pollution (such as cars, trucks, airplanes, and ships). Section 202(a) of the Act authorizes EPA to regulate emissions of air pollutants from new motor vehicles.[14] On September 28, 2009, the Obama administration issued a proposal to reduce greenhouse gas emissions from automobiles under the Clean Air Act in conjunction with increasing fuel economy standards (so-called "CAFE" standards).[15] This proposal would raise the average fuel economy of new cars, SUVs and pickup trucks to about 34 mpg in 2016, with accompanying reductions in greenhouse gas emissions due to decreases in gasoline consumption and other measures.[16]

Petitions asking the EPA to regulate greenhouse gas pollution from ocean-going vessels and other types of non-road vehicles under Section 213, as well as from airplanes under Section 231, are currently pending. Because the transportation sector accounts for about a third of total U.S. greenhouse gas emissions, expeditious adoption of greenhouse gas reduction measures for automobiles and other mobile sources would represent substantial and meaningful progress towards achieving the emissions reductions that are necessary to avoid dangerous climate change.

4. Reducing Pollution from Stationary Sources

Emissions from stationary sources such as power plants and industrial facilities are controlled under the complementary programs of Titles I and V of the Clean Air Act. Under Title I's new source performance standards ("NSPS") program, the EPA sets baseline pollution limits for about 80 different types of emissions sources, so that each type of facility must meet the same minimum standards nationwide.[17] The new source review ("NSR") program in Title I complements these national rules by requiring permits and additional site-specific pollution control

measures for new major sources of air pollution. Title V establishes an "operating permit" program for major sources that consolidates all Clean Air Act requirements into a single document, facilitating agency and public review of compliance with the Act's provisions.

The NSR program consists of two sub-programs, "prevention of significant deterioration" ("PSD") and "non-attainment new source review" ("NNSR"). The PSD program applies to non-criteria air pollutants, and to criteria air pollutants in areas currently meeting the national pollution caps set for each pollutant. NNSR applies to emissions of criteria pollutants in areas where concentrations exceed national caps. The two subprograms are structurally similar, although the NNSR program contains more ambitious pollution reduction measures. Because greenhouse gases are not yet designated as criteria air pollutants, they are currently subject only to the PSD program. If and when the EPA designates greenhouse gases as criteria air pollutants and sets national pollution caps at levels below current greenhouse gas concentrations, the more stringent NNSR measures will apply.

EPA recently proposed a regulation that would initially subject only the largest of "major" stationary sources of greenhouse gases-generally those emitting the equivalent of 25,000 tons of CO2 per year-to the PSD and Title V operating permit programs.[18] EPA believes that this "tailoring rule" is necessary because strict adherence to the pollutant thresholds set forth in the Clean Air Act-100 to 250 tons per year-would subject thousands upon thousands of smaller sources to burdensome regulatory requirements. EPA claims that by "tailoring" the PSD and Title V programs to only the largest stationary sources of greenhouse gases, it would be able to regulate about 70% of these emissions.

[19] While the proposal can and should be improved, the approach represents a feasible first step.

In sum, the Clean Air Act offers a wealth of proven, effective tools for controlling greenhouse gas emissions. These existing tools could form the basis of an international commitment in Copenhagen without any further action from Congress.

Okay, I just can't help myself. Here's the concluding remark from the interview itself in which I asked Kassie what people can do. She replied:

I think right now the most important things are to press the EPA to move forward quickly with comprehensive greenhouse pollution reductions under the Clean Air Act, and to demand that Congress not gut existing law when passing new climate legislation. Please join our activist network here: http://www.biologicaldiversity.org/action/activist/index.html,and sign our petition for strong legislation here: http://salsa.democracyinaction.org/o/2167/t/5243/petition.jsp?petition_KEY=2181.

Individual phone calls and meetings with your Senator and Representatives really do make a difference, and we can help you set up a meeting on this issue. Email Rose Braz at rbraz@biologicaldiversity.org for more information.

Footnotes:

(1) For a comprehensive discussion of the Clean Air Act's effective and immediately available tools for addressing climate change, see Kassie Siegel, Bill Snape, and Matt Vespa, No Reason to Wait: Reducing Greenhouse Gas Emissions Through the Clean Air Act (June 2009), available at http://www.biologicaldiversity.org/publications/papers/index.html.

(2) See generally Envtl. Prot. Agency, The Benefits and Costs of the Clean Air Act: 1970 to 1990 (1997), available at http://www.epa.gov/air/sect812/ (finding the economic value of the Act's benefits to be 42 times greater than its costs); see also Chettiar & Schwarz, supra note 21, at 10 ("Historically, regulations under the (Clean Air Act) have proven to be effective, flexible, and cost efficient.... The Act sets up a public and transparent process, and it fosters coordination between federal agencies and with the states.").

(3) Purvis, supra note 16, at 1041-44 (arguing that the existing Clean Air Act provides an adequate basis for an executive agreement); Chettiar & Schwarz, supra note 21, at 69 (same); but see Chang, supra note 21, at 15-16 (questioning whether president may commit EPA to particular course of regulation).

(4) Massachusetts v. EPA, 549 U.S. 497 (2007).

(5) Id. at 532-33.

(6) Id. at 534-35.

(7) Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202 of the Clean Air Act at 17, 27 (Dec. 7, 2009); see also Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202 of the Clean Air Act, 74 Fed. Reg. 18,886 (Apr. 24, 2009) ("the case for finding that greenhouse gases in the atmosphere endanger public health and welfare is compelling and, indeed, overwhelming.... The evidence points ineluctably to the conclusion that climate change is upon us as a result of greenhouse gas emissions, that climate changes are already occurring that harm our health and welfare, and that the effects will only worsen over time in the absence of regulatory action.").

(8) See Clean Air Act §§ 108-110; 42 U.S.C. §§ 7408-7410.

(9) To date the EPA has designated six criteria pollutants: particulate matter (PM), ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead.

(10) Center for Biological Diversity and 350.org, Petition to Establish National Pollution Limits for Greenhouse Gases Pursuant to the Clean Air Act (filed Dec. 2, 2009), available at http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Petition_GHG_pollution_cap_12-2-2009.pdf.

(11) See, e.g., Clean Air Act § 110(a)(2); 42 U.S.C. § 7410(a)(2) (recognizing that states may use economic incentives such as fees, marketable permits, and auctions of emission rights to achieve NAAQS); Chettiar & Schwartz, supra note 21, at 78-81 (discussing implementation of a cap-and-trade program using existing Clean Air Act authority).

(12) Holly Doremus & W. Michael Hanemann, Of Babies and Bathwater, Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming, 50 Ariz. L. Rev. 799, 827-28 (2008); Alice Kaswan, A Cooperative Federalism Proposal for Climate Change Legislation: The Value of State Autonomy in a Federal System, 95 Denv. U. L. Rev. 791, 829 (2008). For example, one study found that residential and commercial buildings-structures that fit squarely within a state's jurisdiction-account for one-third of U.S. carbon emissions. Marilyn A. Brown et al., Shrinking the Carbon Footprint of Metropolitan America (May 2008), available at http://www.brookings.edu/reports/2008/05_carbon_footprint_sarzynski.aspx. Another study concluded that compact development can reduce vehicle miles traveled, and associated carbon emissions, by as much as 20-40 percent. Reid Ewing et al., Growing Cooler: The Evidence on Urban Development and Climate Change, 10-11 (2007).

(13) Envtl. Prot. Agency, State and Local Governments, State Planning and Measurement, available at http://www.epa.gov/climatechange/wycd/stateandlocalgov/state_planning.html#three (last visited Nov. 25, 2009); Pew Ctr. On on Global Climate Change, U.S. Climate Policy Maps, available at http://www.pewclimate.org/what_s_being_done/in_the_states/state_action_maps.cfm (last visited Nov. 25, 2009).

(14) 42 U.S.C. § 7521(a)(1).

(15) See Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (Sept. 28, 2009).

(16) See id. at 49468. Even with these improvements, U.S. fuel economy in 2016 would still be slightly lower that what China achieves today (35.8 mpg) and far lower than the currently effective European and Japanese standards (43.3 and 42.6 mpg, respectively).

(17) Clean Air Act § 111(a)(1); 42 U.S.C. § 7411(a)(1) (2006).

(18) Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

(19) See id. at 55,332-33.