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Global Warming and Federalism

State and Local Governments Overreach in Regulating Carbon

Think globally, act locally." It's an environmental slogan that has taken hold. But in some parts of our country, it has become a justification for insinuating global-warming analysis into local permit decisions—and so for bullying local authorities into stepping beyond the bounds of their authority and their competence.

In November 2010, the commissioners of Cowlitz County, Washington, considered a proposal by Millennium Bulk Logistics (MBL), a subsidiary of an Australian energy firm that wants to create what would be one of the largest coal export terminals on the West Coast at the port of Longview on the Columbia River. The terminal promises to be a good deal for the region, and for the country. Global demand for coal is soaring; in 2009, China went from exporting coal to becoming one of the world's leading importers. Meanwhile, the unemployment rate in Cowlitz County is over 12 percent (three points higher than the national average). Furthermore, MBL promised to clean up the currently contaminated site, which now houses an abandoned aluminum smelting plant.

The coal itself would come from the Powder River Basin in the neighboring state of Montana. Montana considers the project so important that its governor, Democrat Brian Schweitzer, made a rare out-of-state visit to Cowlitz County to push for its acceptance. Washington Governor Christine Gregoire, also a Democrat, has voiced support for the project, and even recently toured China and Vietnam to drum up export business for her state.

After finding that MBL had adequately examined the potential environmental impacts and described how they would comply with regulations, the county commissioners unanimously approved the permit. As expected, environmental groups appealed the decision a short time later. Perhaps less expected, the state's Department of Ecology supported the environmental groups, moving the decision into the hands of a quasi-judicial state body called the Shoreline Hearings Board. Among the reasons the environmental groups and the state gave for their

appeal was the claim that the county did not adequately consider the local impacts on health and environmental quality of coal dust and industrial processes at the plant.

But the objection that environmental critics most emphasized is that the commissioners had failed to consider the effects that burning the coal would have on greenhouse gas emissions *in China*. Columbia Riverkeeper, an environmental advocacy group that was one of the petitioners for appeal, said on its website, "[Cowlitz County] officials pushed through approval of the coal facility permit without adequate scientific review of the project's impacts, *including greenhouse gas emissions*; as well as traffic, hazards, and air pollution in the local community; and potential harm to fish and wildlife in the Columbia River," and it urged in a newsletter that "opening a gateway to export coal to China could decimate our climate achievements."

The commissioners say they have adequately considered local risks, and have neither the legal authority nor the ability to analyze global warming impacts. "The Cowlitz commissioners can be excused for thinking all of these issues are above their pay grade," *The Oregonian* commented, in an editorial entitled "The Northwest's Newest Export: Global Warming." Even California's climate-change law, held up as an example of state overreach by some conservative critics, regulates only in-state sources of carbon dioxide emissions. The only exception is for electric power imported into California across state lines. The state claims that under its emissions law, it can hold out-of-state power companies responsible for the coal they burn to generate power—but only for the portion of the power that is sent into and used in California. An information officer for the California Air Resources Board confirmed to me that the state has no plans to require any calculation by its ports of the impact of coal exported to and burned in other countries.

For their part, the environmental challengers to Longview's coal terminal say they don't see any jurisdictional issues. According to the attorney who represents them, the broad language of Washington's State Environmental Policy Act (SEPA) provides enough authority. "Law is not about jurisdictional boundaries," he told me in an interview, but added, "The law is just now getting a handle on how to address carbon emissions."

As it happens, a global-warming analysis might end up actually supporting the project. Despite widely publicized climate-change concerns, coal has been the fastest-growing fossil fuel in the past decade, due mostly to China's rise. Powder River coal burns much more cleanly than the sulfur-rich coal China has available within its own borders and from its neighbor Indonesia. Joseph Cannon, chief executive officer of MBL, told the board that Powder River coal has 90 percent less mercury than domestic Chinese coal, according to the Associated Press. In any event, even if the Longview termi-

nal is blocked, U.S. coal companies will most likely still find a way to export the coal to Asia via Canada's western ports. And, as James Fallows recently argued in *The Atlantic*, since coal is here to stay for the foreseeable future, due to overwhelming and growing demand from countries like China and India over which we have no control, it is better to find ways to burn coal more cleanly while we figure out how to transition from fossil fuels over the coming decades. In the meantime, when it comes to domestic consumption, new renewable sources of energy like wind and solar are not expected, even with great increases in funding for subsidies and research, to account for more than a few percentage points of U.S. energy consumption for many years to come.

But none of these pragmatic considerations are likely to stop environmental activists who tend to think that increasing fossil fuel usage is uniformly bad. David Graham-Caso, spokesman for the Sierra Club, told the *New York Times* that China's importing drive "is a worst-case scenario," adding, "We don't want this coal burned here, but we don't want it burned at all. This is undermining everything we've accomplished."

In March 2011, amid revelations that the amount of coal MBL planned to export was many times greater than had been stated in its permit application, the company withdrew its request, saying that it planned to restart the permit process (though it did not say when). So for now, the question of whether the global-warming aspect of the protesters' argument might have prevailed, and potentially established a precedent, remains unsettled. But this means the opportunity is ripe to ponder the implications of requiring local jurisdictions to consider questions of global climate policy. It will surely not be the last time they will be asked to do so.

It is reasonable to expect a city, town, or port district to consider the environmental effects of a proposed project on its own area and any surrounding or downstream areas before issuing permits for a project. Americans widely agree on that, and laws already require it. But should a permit decision by an American port depend on the actions of a country on the other side of the globe? The proper determinant of such decisions ought to be a national debate that produces a consensus on environmental policy, and foreign policy related to it—but we have not yet developed anything approaching this. Without a concerted national or international policy, it is not only cumbersome, but meaningless to expect local entities to factor global warming into their decisions.

The closest the United States *does* have to such a policy has not been the result of the legislative process, at least not directly. That policy comes from the Supreme Court's 5-4 decision in *Massachusetts v. Environmental Protection Agency* (2007), from which the environmentalists in the Longview case evidently took their cue. The majority in that case argued that the

possibility of carbon dioxide emissions leading to a future rise in sea levels threatens the "health and welfare" of U.S. citizens (giving the term "welfare" a sweeping meaning that embraces coastlines). Further, it argued that the Clean Air Act allows the EPA to regulate carbon dioxide, because its language authorized the agency, as the decision put it, to regulate "all airborne compounds of whatever stripe."

But while the decision carefully parsed such terms in the law as "any" and "substance," it followed the EPA's lead in defining the terms "health" and "pollution" so broadly as to encompass almost anything, thus allowing virtually limitless federal action. That is precisely why the EPA's action in announcing that it would regulate carbon dioxide even without congressional authorization has been so provocative.

The misuse of laws like the Clean Air Act to regulate carbon dioxide, which (unlike other pollutants) is not directly harmful to human or other life, has this in common with the requirement that ports consider global carbon use: each disregards settled jurisdictional boundaries, not to mention the intended meanings of legislative texts, treating them as mere obstacles to dealing with an alleged global emergency, and seeking to force a *de facto* national environmental policy on issues that have not, as yet, been nationally debated and decided upon.

Both types of "policy creep"—first from courts and federal agencies and now from localities—are possible only because of Congress's avoidance of its responsibilities. While the *Massachusetts* decision enabled the Longview challenge, even more directly responsible for that situation has been the Washington SEPA law, which lists among its stated purposes "prevent[ing] or eliminat[ing] damage to the environment and biosphere" and requires state agencies and local governments to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."

SEPA's sweeping language may be considered an encroachment on congressional and federal prerogatives enumerated in the U.S. Constitution's Commerce Clause. While the EPA's overreach gets most of the press attention, policy creep from below is just as much of an erosion of congressional powers; these kinds of state laws will remain on the books unless and until Congress challenges them.

Congress should pass legislation explicitly forbidding local and state governments from introducing global environmental analysis into their permit decisions. Too many of those who believe that climate change is an emergency that must be dealt with by any means necessary see democracy itself as an obstacle to an effective response. On global warming, as with many ideologically charged issues, ends and foundational principles tend to dominate debate—but they should not override the importance of using the right

policy and legal tools. Passing such a law would help avoid distortions of jurisdiction and legal authority that harm the balance between state, local, and national governments in our federal system. Such a move should not be seen as a blow to the environmental movement, but rather as a positive step toward forcing us to confront these important questions in their proper setting: on the national stage.

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