

# spotlight

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## CO<sub>2</sub> REGULATION

*Will the Environmental Management Commission Ignore the Legislature?*

**KEY FACTS:** • North Carolina may for the first time begin regulating emissions of carbon dioxide (CO<sub>2</sub>), an invisible, odorless gas prevalent in almost every sector of the economy and also vital to human health.

• The Environmental Management Commission, a state commission that adopts environmental regulations, is considering regulations that would mandate certain facilities to report their CO<sub>2</sub> emissions. These regulations would lay the groundwork for far costlier CO<sub>2</sub> regulations.

• CO<sub>2</sub> regulation is not an ordinary policy question — that would be like arguing that global warming is just another environmental issue. Regardless of one's perspectives, there are significant and unprecedented implications for regulating CO<sub>2</sub>.

• The EMC, if it approves the regulations, would be doing so without proper statutory authority and ignoring the will of the legislature — basically taking unilateral action.

• Even if the EMC finds some weak statutory grounds for CO<sub>2</sub> regulation, it is the wrong governing body to make such a critical policy decision — that is the role of the legislature. The legislature is an elected and accountable body that is expected to make these critical policy decisions. The EMC is neither elected nor directly accountable to the public.

• The legislature already is addressing questions regarding CO<sub>2</sub> regulation through a special study commission. The EMC should not preempt the legislature on the question of regulating CO<sub>2</sub>.

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**f**or the first time, North Carolina may begin regulating carbon dioxide (CO<sub>2</sub>) emissions.<sup>1</sup> CO<sub>2</sub> is an invisible, odorless gas that some claim is contributing to catastrophic levels of global warming.<sup>2</sup> CO<sub>2</sub> emissions are prevalent in almost every sector of the economy and in many personal actions that we take, including the most basic to human survival — when we exhale, we emit CO<sub>2</sub>.

Broad-based CO<sub>2</sub> regulation such as a cap-and-trade program could have

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devastating impacts on the economy.<sup>3</sup> For those who believe CO<sub>2</sub> emissions need to be curtailed, it is a critical environmental question as well. CO<sub>2</sub> regulation is not an ordinary policy question — saying otherwise that would be like saying global warming is just another environmental issue. Regardless of one’s perspectives, there are significant and unprecedented implications for regulating CO<sub>2</sub>.

The legislature has not passed a law requiring the regulation of CO<sub>2</sub>. In fact, the legislature has decided to *study* whether there should be CO<sub>2</sub> regulation.<sup>4</sup> Furthermore, no statutory authority exists for CO<sub>2</sub> regulation.

The legislature’s desires and this lack of statutory authority have not, however, stopped the North Carolina Department of Environment and Natural Resources (DENR) from moving forward with CO<sub>2</sub> regulation. DENR is asking the Environmental Management Commission (EMC), a state commission that adopts environmental regulations, to approve CO<sub>2</sub> regulation.<sup>5</sup>

This *Spotlight* report does not focus on whether the state should regulate CO<sub>2</sub>. The argument here is that the EMC is not the governing body to make that decision. The EMC has no statutory authority to regulate CO<sub>2</sub>. In addition, even if the EMC did have some weak authority to regulate CO<sub>2</sub>, the legislature clearly has chosen not to regulate CO<sub>2</sub>. The EMC should regulate CO<sub>2</sub> only after clear legislation is enacted authorizing the regulation.

### **The Proposed CO<sub>2</sub> Regulations**

The EMC is considering whether to mandate Title V permitted facilities (larger emitting facilities) to report their CO<sub>2</sub> emissions.<sup>6</sup> This reporting requirement may sound relatively inconsequential, but it would represent the first time North Carolina has regulated CO<sub>2</sub>, and it would lay the groundwork for the EMC to approve far costlier CO<sub>2</sub> regulations unilaterally.

### **EMC Lacks Statutory Authority for these Proposed Regulations**

The proposed rule lists two relevant statutory sections as providing authority: § 143-215.65 and § 143-215.107.

#### *143-215.65 and “Air Pollution”*

This section requires certain entities to file reports. The purpose of the reports is made expressly clear within the section: “The information shall be used by the Commission only for the purpose of *air and water pollution control*.”<sup>7</sup> [Emphasis added.]

The question then is whether CO<sub>2</sub> meets the statutory definition of “air pollution”:

The term “air pollution” shall mean the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or tends to be injurious to human health or welfare, to animal or plant life or to property or that interferes with the enjoyment of life or property.<sup>8</sup>

As is typical, a further statutory definition is required — the definition of “air contaminant”:

The term “air contaminant” means particulate matter, dust, fumes, gas, mist, smoke, or vapor or any combination thereof.<sup>9</sup>

First, it is clear that CO<sub>2</sub> would be an “air contaminant” (CO<sub>2</sub> is a gas) — of course, under this definition, *oxygen also would be an “air contaminant.”* The question remains, however, whether CO<sub>2</sub> in the atmosphere exists “in such quantities and duration as is or tends to be injurious to human health or welfare,” etc.

DENR itself had not made that determination nor even *attempted* to make that determination prior to the hearings on the regulations. Only *after* being called out for simply ignoring the definition of “air pollution” did DENR throw

together some research citations attempting to support a claim that CO<sub>2</sub> is injurious to human health. DENR has done no analysis of any kind on this issue.<sup>10</sup>

This is far from a proper or compelling determination on such a critical question — any determination made based on a list of randomly thrown out research citations would be arbitrary and capricious. Not even the federal government, and specifically the Environmental Protection Agency (EPA), has made that type of determination.

Proponents of CO<sub>2</sub> regulation like to point to the United States Supreme Court case, *Massachusetts v. EPA*,<sup>11</sup> to argue there is support for CO<sub>2</sub> being a pollutant. They are right to point to this case to help guide the analysis.

The Court held that the EPA was *authorized* to regulate CO<sub>2</sub> under the federal Clean Air Act, but it did not determine that CO<sub>2</sub> caused air pollution.<sup>12</sup> As the EPA stated:

The Court found that the Clean Air Act authorizes EPA to regulate tailpipe greenhouse gas emissions [such as CO<sub>2</sub>] if EPA determines they cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.<sup>13</sup>

To date, the federal government has not determined that CO<sub>2</sub> causes air pollution that endangers public health or welfare (basically the same analysis DENR would need to do). There is simply no support, at least as of now, that CO<sub>2</sub> would meet the definition of “air pollution” under the state statute.

This lack of support may be the explanation why DENR had simply decided to ignore the issue of whether CO<sub>2</sub> was “air pollution” under the law. DENR simply wanted to jump past this critical analysis and instead go straight to regulating CO<sub>2</sub>.

#### *§ 143-215.65 and § 143-215.108*

Under 143-215.65, entities that are subject to § 143-215.108 (Title V permitted facilities) must file reports with the EMC. DENR has argued that these facilities must report whatever the EMC wants regarding air contaminants, regardless of whether it has any connection to why these entities are regulated under § 143-215.108.<sup>14</sup>

This is a skewed reading of these sections (they fail to read the two sections together). The reporting requirements are imposed on these Title V facilities because of *why* they are regulated under § 143-215.108 — they engage in activities “that contravene or will be likely to contravene” air quality standards. There are no CO<sub>2</sub> standards, and as a result the EMC does not have authority to require the reporting of CO<sub>2</sub>. If DENR’s logic were used, the EMC would be able to require the reporting of oxygen or water vapor emissions from Title V facilities, without there ever being standards for these “air contaminants.”

#### *§ 143-215.107*

The same arguments for § 143-215.65 and its applicability to air pollution would apply to § 143-215.107. The relevant subsection is § 143-215.107(4). The subsection states that the EMC has the power:

To collect information or to require reporting from classes of sources which, in the judgment of the Environmental Management Commission, may cause or contribute to *air pollution*.<sup>15</sup>  
[Emphasis added.]

The reporting requirement is conditioned on whether CO<sub>2</sub> may cause or contribute to air pollution — it basically requires looking at the definition of “air pollution” again.

#### *Clean Smokestacks Act*

While the proposed regulations do not mention the Clean Smokestacks Act (CSA),<sup>16</sup> it is important to address this

legislation. DENR being fond of citing the CSA for authorization for many of its actions, it is good to dispel any notion that the act provides authorization for CO<sub>2</sub> regulation.

The CSA probably is not listed in the proposed regulations because even DENR knows it does not provide the basis for the CO<sub>2</sub> regulations. The section that would be cited is Section 13 of the law:

SECTION 13. The Division of Air Quality of the Department of Environment and Natural Resources [DAQ] shall study issues related to the development and implementation of standards and plans to implement programs to control emissions of carbon dioxide (CO<sub>2</sub>) from coal-fired generating units and other stationary sources of air pollution. The Division shall evaluate available control technologies and shall estimate the benefits and costs of alternative strategies to reduce emissions of carbon dioxide (CO<sub>2</sub>). The Division shall annually report its interim findings and recommendations to the Environmental Management Commission and the Environmental Review Commission beginning 1 September 2003. **The Division shall report its final findings and recommendations to the Environmental Management Commission and the Environmental Review Commission no later than 1 September 2005.** The costs of implementing any air quality standards and plans to reduce the emission of carbon dioxide (CO<sub>2</sub>) from coal-fired generating units below the standards in effect on the date this act becomes effective, except to the extent that the emission of carbon dioxide (CO<sub>2</sub>) is reduced as a result of the reductions in the emissions of oxides of nitrogen (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) required to achieve the emissions limitations set out in G.S. 143-215.107D, as enacted by Section 1 of this act, shall not be recoverable pursuant to G.S. 62-133.6, as enacted by Section 9 of this act.<sup>17</sup> [Emphasis added.]

This provision states absolutely nothing about CO<sub>2</sub> reporting or regulation of any kind. It *did*, however, unambiguously allow DENR to *study* CO<sub>2</sub> issues. It also just as clearly stated that the studying of these issues would expire when DAQ's final findings and recommendations were made (no later than September 1, 2005).

The temporary nature of this provision is supported by the fact that it was not codified in the General Statutes. The provision did not amend any statutory provision because it was just a *temporary* provision that sunset when the final findings were made.

#### *Separation of Powers*

The issue of statutory authority may seem "picky" or not particularly important; however, it is critical to remember that proper authorization is a state constitutional issue as well as a statutory issue. If the EMC or any rulemaking body develops rules without proper authorization, it is performing a legislative role by creating a policy out of whole cloth. The legislative function is a role that is reserved to the General Assembly. The legislature has proactively chosen to study CO<sub>2</sub> regulation,<sup>18</sup> not regulate it — this action further demonstrates that the legislature does not intend for existing law to authorize regulation.

#### **Deference to the Legislature**

Even if the EMC finds some weak statutory grounds for the CO<sub>2</sub> regulation, it simply is inappropriate for it to be the governing body that decides the government should regulate CO<sub>2</sub> for the first time.

#### *Significance of CO<sub>2</sub> Regulation*

As stated above, CO<sub>2</sub> regulation is not just some ordinary regulations. The implications of CO<sub>2</sub> regulation are unprecedented.

### *Unique Nature of CO<sub>2</sub>*

CO<sub>2</sub> is required for life — it must be present in the ambient air for life to continue. Almost every facet of our economy involves CO<sub>2</sub> emissions. In simple terms, regulating CO<sub>2</sub> would be vastly different from any other environmental regulation.

### *Proper Role for Legislature*

Issues of this magnitude, especially when statutory authorization is not expressly clear, should be left to the legislature. The legislature is an elected and accountable body that is expected to make these critical policy decisions. The EMC is neither elected nor directly accountable to the public — this is not a criticism, but a statement of fact.<sup>19</sup> As a matter of good government and preserving democratic principles, the EMC should defer to the legislature on CO<sub>2</sub> regulation.

### *Preempting the Legislature*

The EMC should not preempt the legislature on the question of regulating CO<sub>2</sub>. The legislature already is addressing questions regarding CO<sub>2</sub> regulation. There is a special commission called the Legislative Commission on Global Climate Change (LCGCC). This past legislative session, the work of the Commission was extended.<sup>20</sup>

The Commission has before it over 50 recommendations that DAQ itself had developed through an advisory group it formed called the Climate Action Plan Advisory Group (CAPAG).<sup>21</sup> One of the recommendations being considered is mandated CO<sub>2</sub> reporting (the same thing that DENR wants to require in the proposed regulations).<sup>22</sup> To date, the LCGCC has not even recommended that there should be CO<sub>2</sub> reporting. The EMC should allow the LCGCC and the General Assembly to finish their work.

## **Conclusion**

DENR tried unilaterally to impose CO<sub>2</sub> regulation in this state and apparently hoped that nobody would be paying attention to their actions. Their actions are an insult to the legislature and, more importantly, to the people of North Carolina. The EMC has a chance to do the right thing and reject these regulations. They will face pressure to adopt the regulations because of the political pressure related to global warming.

Were our constitutional structure of government to be superseded by special interests, the effects on North Carolina would be dire. Recent government scandals and abuses have already reduced the public's faith in government. By rejecting these unauthorized regulations, the EMC can show that it recognizes that good government is far more important than the political motivations of some individuals in an out-of-control agency.

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## **End Notes**

1. The proposed rule (regulations), "5A NCAC 02Q .0207 Annual Emissions Reporting," can be accessed online at [daq.state.nc.us/rules/hearing/0207.pdf](http://daq.state.nc.us/rules/hearing/0207.pdf).
2. See John R. Christy and William H. Schlesinger, "A Forum on Climate Change: Opposing Views," hosted by the John Locke Foundation and The Reese Institute for Conservation of Natural Resources at Lenoir-Rhyne University, Hickory, North Carolina, February 11, 2009, [www.johnlocke.org/lockerroom/lockerroom.html?id=18938](http://www.johnlocke.org/lockerroom/lockerroom.html?id=18938).
3. "North Carolina Economic Impact on the State from the Lieberman-Warner Proposed Legislation to Reduce Greenhouse Gas Emissions," National Association of Manufacturers and American Council for Capital Formation, March 13, 2008, [www.acf.org/nam.html](http://www.acf.org/nam.html).
4. General Assembly of North Carolina, Session Law 2008-81, [ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=HB2529](http://ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=HB2529).
5. *Op. cit.*, note 1.
6. *Ibid.*

7. N.C. Gen. Stat. § 143-215.65, [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-215.65.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-215.65.html).
8. N.C. Gen. Stat. § 143-213(5), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-213.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-213.html).
9. N.C. Gen. Stat. § 143-213(2), [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-213.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-213.html).
10. “Report of Proceedings of Public Hearing on Proposed Amendment to Rule 15A NCAC 02Q. 0207,” North Carolina Department of Environment and Natural Resources, Division of Air Quality, October 28, 2008, [h2o.enr.state.nc.us/admin/emc/documents/AttachmentAtoAG09-13HRFinalGHG.pdf](http://h2o.enr.state.nc.us/admin/emc/documents/AttachmentAtoAG09-13HRFinalGHG.pdf).
11. *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007), [www.supremecourtus.gov/opinions/06pdf/05-1120.pdf](http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf).
12. *Ibid.*
13. See the United States Environmental Protection Agency’s web page discussing the Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions under the Clean Air Act, [www.epa.gov/climatechange/anpr.html](http://www.epa.gov/climatechange/anpr.html).
14. *Op. cit.*, note 10 at A-6.
15. N.C. Gen. Stat. § 143-215.107(4), [www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter\\_143/gs\\_143-215.107.html](http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter_143/gs_143-215.107.html).
16. General Assembly of North Carolina, Session Law 2002-4, [ncleg.net/gascrpts/BillLookUp/BillLookUp.pl?Session=2001&BillID=S1078](http://ncleg.net/gascrpts/BillLookUp/BillLookUp.pl?Session=2001&BillID=S1078).
17. *Ibid.* at Section 13.
18. *Op. cit.*, note 4.
19. See the EMC home page, [h2o.enr.state.nc.us/admin/emc](http://h2o.enr.state.nc.us/admin/emc).
20. *Op. cit.*, note 4.
21. North Carolina Climate Action Plan Advisory Group, [www.ncclimatechange.us](http://www.ncclimatechange.us).
22. “Recommended Mitigation Options for Controlling Greenhouse Gas Emissions: Final Report,” North Carolina Climate Action Plan Advisory Group, October 2008, CC-2, [www.ncclimatechange.us/ewebeditpro/items/O120F19992.pdf](http://www.ncclimatechange.us/ewebeditpro/items/O120F19992.pdf).