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Murray L. Weidenbaum
Washington University in St Louis

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Contact: Melinda Warren
Assistant Director
(314) 935-5630
The New Wave of Environmental Regulation: The Impacts on Business and Consumers
by Murray Weidenbaum

The policy pendulum is swinging again. The regulatory excesses of the 1970s led to the reforms of the 1980s and, in turn, they are being followed by the regulatory expansions of the 1990s. The rest of the world may be moving toward smaller government, but the forces for greater government intervention in the American economy have gotten their second wind.

A few numbers point up the new trend. During the 1970s, the headcount of the federal regulatory agencies rose 71 percent. During the 1980s, the number of regulators declined, from 121,700 in 1980 to 106,000 in 1989. The budget for fiscal year 1992 projects the largest number of federal regulators ever — 122,400. The sad fact is that once again we are seeing the expanding regulatory trends of the Carter years.

We hear a lot of talk in Washington about off-budget spending as a way of getting around statutory limits on deficit spending. For government officials, regulation of business is an easy way to advance their policy agendas without spending much federal money. Congress just imposes more burdens directly on business. Remember the old saying, "The best tax is a hidden tax." The cost of complying with regulation is a very hidden tax.

At first glance, government imposing socially desirable requirements on business seems to be a cheap way of achieving national objectives. It appears to cost the government very little and does not seem to be much of a burden on the public. Hence, there is little pressure to relate the benefits to be achieved from regulation to the costs that are being imposed. But the public does not escape paying the full cost. Every time a government agency attempts to safeguard

Murray Weidenbaum is Director of the Center for the Study of American Business and Mallinckrodt Distinguished University Professor at Washington University in St. Louis. This paper was presented at the Mont Pelerin Society meeting in Big Sky, Montana, on August 23, 1991.
the environment or foster occupational health or promote product safety, it imposes on business a more expensive method of production. The cost of the products being made will necessarily go up.

If consumers knew how much they were paying for regulation, they would be very upset. Environmental regulations alone cost each family more than a thousand dollars a year. But government agencies do not feel much pressure to worry about the expense. Those compliance costs do not show up in their budgets, but in the budgets of private companies.

Regulation is a hidden tax with a double payoff for politicians. First, they can crow to their constituents that they voted for clean air, clean water, and all those other good things. Then they can berate "greedy" companies for raising prices even though they are merely passing on the costs of complying with environmental mandates.

It is the rare government official who acknowledges the connection between the high costs imposed by government regulation and the difficulties that American businesses experience in trying to be competitive in an increasingly global marketplace.

**Environmental Regulation**

The Environmental Protection Agency (EPA) has been king of the regulatory hill for years. The EPA alone accounts for more than one-third of the total spending by all federal regulatory agencies. That is double its share since Earth Day One in 1970. Two factors virtually assure EPA its primacy among regulatory agencies in the 1990s. The first is President Bush's pledge to be the "environmental president." The second and perhaps the more compelling factor is the highly emotional nature of the public reaction to any proposal with the word environment in it.

The fact is that regulatory growth is tied more closely to dramatic news events than to scientific evaluations of risk to public health. EPA spending rises with reports of leaking dump sites. The Coast Guard budget benefits from oil spills. Food and Drug Administration outlays rise in response to hysteria about alar in apples.
The new Clean Air Act will add $25-35 billion a year to the more than $100 billion already spent annually on pollution control.³ President Bush's initial proposal was hailed for incorporating economic incentives to make the legislation more cost-effective.

The final version of the act does provide for creating tradeable emissions permits. That is a cost-minimizing approach long advocated by economists. Unfortunately, the tradeable permit provisions became far more complex as the Clean Air bill wended its way through the congressional committee process.

It is fascinating to read what EPA itself has been publishing on the new Clean Air Act. Here are a few samples from a recent issue of the EPA Journal:

- The 1990 law comes to nearly 800 pages, compared to fewer than 50 pages for the 1970 Clean Air Act.⁴ It contains massive new regulatory programs, including acid rain controls, a new air toxics program, and a comprehensive program for ozone and carbon monoxide.

- Federal operating permits are required for all major sources, but these permits do not replace the SIP (state implementation plan) system. The typical state implementation plan "may be a file cabinet full of rules, amendments to rules, detailed technical tables, and analytical and monitoring methods. A SIP is also a hodgepodge of different sorts of rules... Despite the complexity, rarely is a SIP indexed or organized so that a lay person can navigate through it. Often only a handful of people in the state regulatory agency and the EPA regional office even knows where the SIP is, much less what is in it."⁵

  Former deputy administrator of EPA John Quarles describes issuing air permits as "a huge administrative challenge. It may become an administrative nightmare."⁶ "In addition, the regulatory officials will be overwhelmed by the challenge of processing permit applications for existing sources, distracting their attention from those permits which must be issued to give the green light to new projects."⁷

- Former EPA General Counsel Frank Blake writes, "There is more to be commanded and controlled under this legislation than has ever been attempted before. The legislation is an odd mixture of marketplace philosophies with standard command-and-control approaches."⁸

  We should not overlook the disproportionately harsh effects on small business, which does not experience the usual economies of scale in complying with environmental regulations. Each small auto-body repair shop will have to spend about $100,000 for equipment to catch hydrocarbon emissions from spray paint. Furniture makers will need incinerators to burn off
releases of hydrocarbons. One firm says it will have to spend more than one-fourth of its $11 million in annual sales to buy new pollution-abatement equipment.

About 150,000 small businesses will have to acquire clean air permits. Just to obtain one set of the air quality permits required under the new Clean Air Act will force a small company to spend $10,000-$15,000 to collect the data and do the paperwork. The monitoring devices needed to track emission rates will cost another $10,000 to $50,000.9

Some insight into the legislative process that produces environmental legislation helps to explain the results. Two EPA staff members described the clean air debate as "an often savage political crossfire."10 How true. How sad.

The Pollution Prevention Act of 1990 is not as widely known as the Clean Air Act, but its effects deserves attention. The law was quietly passed in the closing hours of the last Congress. It was buried in the budget reconciliation package. The new law requires an annual report from each manufacturing facility with more than 10 employees that uses one or more of 300 listed chemicals. The report must include, among other things, the following:

- the quantity of each of the 300 chemicals released into the environment prior to recycling, treatment, or disposal during the calendar year and the percentage change from the previous year;
- the amount of the chemical recycled, the percentage change from the previous year, and the recycling process used;
- the source reduction practices used;
- the amount expected to be reported for the two calendar years following the calendar year for which the report is filed (that comes to four years of data);
- the ratio of production in the production year to production in the previous year;
- the techniques used to identify source reduction opportunities;
- the amount of any toxic chemical released into the environment that resulted from a catastrophic event, remedial action, or any other one-time event not associated with production processes; and
- the amount of the chemical from the facility that is treated, and the percentage change from the previous year.11
Ecologists should mourn for the trees that will be cut down to provide the paper for all of the reports that will be prepared, in triplicate at least, under the Pollution Prevention Act of 1990.

The Clean Air Act and Pollution Prevention Act are not the end of the line. The legislative victories of the environmental activists only whetted their appetites. They are now gearing up for a new legislative drive. That includes a revised Clean Water Act, a revised toxic wastes law (the Resources Conservation and Recovery Act or RCRA), renewal of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA), and perhaps a redo of TOSCA, the Toxic Substances Control Act, as well as a "toughening" of the Occupational Safety and Health Act (or OSHA, our favorite four letter word).

Fines and Jail Sentences

The federal government has quietly launched an expanded effort to prosecute and jail people for "environmental crimes" rather than to rely on traditional civil or administrative proceedings. This is reminiscent of the tendency in communist nations to label previously legal business activities as "criminal." But, as mentioned earlier, if the word environment is included in the label, it becomes difficult to oppose an expansion of governmental power, no matter how arbitrary.

Nearly all federal environmental laws, including the new Clean Air Act, contain provisions that call for criminal sanctions, including fines and imprisonment. Recently revised federal sentencing guidelines greatly add to the possible severity of environmental prosecutions.

In some cases, the new guidelines can require that the maximum sentence stated in the environmental law becomes the minimum punishment allowed. A first-time violation will normally lead to time in jail. For example, under RCRA, subjecting a human being to "knowing endangerment," by exposing them to risk due to unlawful disposal, treatment, or
storage of a hazardous waste, can result in 15 years imprisonment as well as a million dollar corporate fine.

EPA now offers a $10,000 bounty for information that leads to the conviction of individuals who violate Superfund statutes. In 1989, the Justice Department’s Environmental Crimes Section indicted 101 corporations and individuals resulting in 72 convictions and a total of 53 years of prison time and $13 million in fines.

It is easier to prove environmental offenses than other crimes. For most crimes, the prosecution must show that an individual acted with specific intent — that the individual knew that the activity was unlawful and acted willfully, despite that knowledge. But, in environmental crimes, the prosecution must show only that an individual acted "knowingly." No proof of specific intent to cause harm or injury has to be shown. The definition of "knowing" is evolving rapidly. Some legal experts contend that the standard is getting close to that of "strict liability," where individuals can be held liable even when no personal illegal activity is involved.12

For example, Disneyland recently paid a $550,000 fine for 38 violations of toxic waste laws. The law breaking arose because the dump sites that Disneyland’s waste hauler used to dispose of paint thinners and cleaning materials were not licensed to process those materials.13

What happened to "willful" and "knowingly"?

Buried in the 1990 budget deficit reduction package is a sharp sevenfold hike in maximum penalties for civil violations of OSHA regulations; the top civil penalty for a single repeated or willful violation of OSHA will rise to $70,000. The compulsory minimum penalty for a willful violation is now $5,000.

A parallel fivefold increase is mandated for civil violations of the Mine Safety and Health Act. Federal agencies expect to raise more than $1 billion over five years from the two sets of increases in fines.

These onerous changes were a compromise. Some members of Congress were urging mandatory minimum penalties for all OSHA civil infractions, even the most trivial and
unintentional. They dropped tougher criminal penalties only because they would not have raised much revenue. Pressure for revamping the OSHA law continues. The Senate Subcommittee on Labor has already held hearings on the 1991 version of the proposed OSHA Criminal Penalty Reform Act.

If they become widespread, these extreme approaches to environmental controls and enforcement could regulate our modern economy back to the Stone Age — which was a very unsafe period for human existence.

**Other Federal Regulation**

EPA regulation is not the only area of social regulation in which Washington is imposing increased burdens on business — and ultimately on the consumer. "Deregulation" has been limited to traditional economic regulation. Social regulation is on a growth trajectory.

The new Nutrition Labeling and Education Act requires that, after November 7, 1991, all new food products must contain an ingredient declaration and a color declaration. Colors that must be declared by name include the following:

- FD&C Blue No. 1
- FD&C Blue No. 2
- FD&C Green No. 3
- Orange B
- Citrus Red No. 2
- FD&C Red No. 3
- FD&C Red No. 40
- FD&C Yellow No. 5
- FD&C Yellow No. 6

Wherever you look, the tempo of social regulation is rising. The new Food and Drug Administration (FDA) commissioner has singled out prescription drug advertising as an area
"desperately needing enforcement." Any objective analyst of our world-class pharmaceutical industry must quickly conclude that it is the commissioner who is desperate — for headlines.

The Americans with Disabilities Act is another social regulatory law whose title made it a hard bill to oppose or even modify. Yet the new statute is likely to be extremely burdensome because its benefits extend far beyond the usual definition of disability to include drug addicts and alcoholics. It took a lot of doing to get Congress to write in a provision so that this complex new law would not cover current illegal drug users and alcoholics who cannot safely perform their jobs. If a company believes that an individual cannot safely perform a job, it must back that up with "objective, medically supportable methods."

In the words of a Justice Department pamphlet explaining the Americans with Disabilities Act, "Some litigation is inevitable." That is a needless understatement.

A new effort is underway to pass a civil rights bill at least as onerous as the one the President vetoed last year. The headline in the April 3 issue of the New York Times says it all, "Rights-Bill Backers Issue Call To More Transcendent Battle." By the way, Congress would be exempt. That's not surprising because most environmental and other social regulatory statutes do not cover the legislative branch.

Sauce for the Goose

Many people fall into the common trap of associating wrongdoers, such as polluters, exclusively with business. In a recent Roper Poll, 61 percent of the people surveyed put the blame for environmental problems squarely on the shoulders of large companies. Private firms do generate lots of hazardous waste, and not all of them — large or small — handle it properly.

But the same can be said about federal agencies, hospitals, schools, and colleges. Moreover, the regulatory agencies lack the enforcement power over the government that they possess over the private sector. Reports of plant closings because of the high cost of meeting environmental and OSHA standards are common. In contrast, there is no record of a single
federal facility closing down because it was failing to meet the requirements of social regulations.

The General Accounting Office (GAO) says, in its understated way, that the regulatory performance of federal agencies "has not been exemplary." A GAO study of 72 federal facilities reported that 33 were in violation of EPA requirements; 22 had been cited for Class 1 (serious) violations. Three facilities had been out of compliance for more than three years.¹⁹

The Department of Defense is a major offender. It generates approximately 500,000 tons of hazardous waste a year. That is more than is produced by the five largest chemical companies combined.

The estimated cost of cleaning up the contamination at 16 military installations is approximately $4 billion. The Pentagon's Office of Inspector General figures that the total environmental cleanup bill for the military establishment may exceed $100 billion. Furthermore, the cost of cleaning up approximately 70 nuclear plants, laboratories, and other sites of the Department of Energy is expected to come to more than double the Pentagon's environment bill.²⁰

Civilian agencies, including state and local governments, are reluctant to follow the same standards that they impose on the private sector. The storm drains at one NASA facility flow into San Francisco Bay and have contaminated the bay with toxins; wildlife has died in the marshlands. Another NASA site discharges waste from its electroplating operation into the sanitary sewer system, contaminating the sewage treatment plant. The NASA facility operates without a permit.²¹ There is a double standard.

The Energy Department says that "it would not be helpful" if EPA were able to collect the unprecedented $300,000 fine it levied on the department for all sorts of environmental violations. The departmental spokesman quickly added that such fines would be appropriate in the case of a private enterprise. Reluctantly, the Department agreed to settle for a $100,000 fine plus a pledge to spend $150,000 more on cleanup — subject to Congress appropriating the money.²²
To put it mildly, the federal government does not set a good example in complying with its own directives. It expects the private sector to take environmental, safety, and other social concerns far more seriously than it does itself. The late Admiral Hyman Rickover would toss out of "his" Navy yards inspectors from EPA and OSHA. What private company would dare to do that?

**Strategies for Change**

How can we respond to the continued rise of costly, inefficient, and often arbitrary government intervention in the economy? This is not a plea to oppose all efforts to provide a safer environment or a healthier workplace. Contrary to rumor, economists breathe the same air and drink the same water as real people. The challenge is how to achieve the nation's environmental and other social objectives in the most efficient manner.

As a first step, we need to improve public understanding of the new wave of government regulation. There is no good reason why government should adopt the most disruptive and costly ways of cleaning the air or the nation's rivers. After all, society's bottom line is not the impact of regulation on government or on business — but the effect on the consumer, on the citizen. It is we consumers who wind up paying the costs of regulation every time we buy a product whose price includes the rising expense of complying with an ever-widening array of governmental directives.

Regulation also generates serious side effects, such as the stifling of innovation. I doubt that Henry Ford's original model T could have survived today's environmental challenges. It had no pollution gear and it was dangerous. Why, you could break your arm cranking it.

The public is much more ambivalent on the subject of the environment than we are led to believe. It is true that three-fourths or more of the people sampled regularly agree that protecting the environment is so important that "requirements and standards cannot be too
high" and improvements must be made "regardless of cost." But it is easy for people to endorse glib generalities.

When it gets down to details, the responses are very different. National surveys also report that clear majorities oppose closing polluting factories if that means "the loss of jobs." Moreover, they are unwilling to pay $200 more in taxes a year to reduce air pollution, and they also oppose a 25 cents a gallon gas tax to finance pollution control. In effect, the public wants environmental improvement "regardless of cost" — to the other guy.

By the way, I am still waiting for just one of the ecological enthusiasts who so vigorously attack capitalism as the basic source of pollution to explain why the communist countries are the worst polluters. In contrast to the dying forests and filthy rivers of Eastern Europe, it is the capitalistic nations of the West that have the resources to devote to improving the physical environment, and we do so.

We need to cool the regulatory fever by requiring government agencies to use economic incentives in the regulations that they do issue, and to weigh more carefully the benefits they expect against the costs they are imposing.

It may sound technical, but imposing a comprehensive benefit-cost test would slow down the proliferation of new regulatory statutes. Some federal agencies are already required to do that by executive order. Even within the executive branch, however, compliance with this Presidential directive is restricted by many statutes that limit or prevent any economic analysis from entering into the decisionmaking process. And, of course, no congressional committee is required to examine the costs as well as the benefits of the laws it writes. I doubt that any of the environmental bills that Congress has been voting on would meet the simplest benefit-cost test.

But economic analysis is just a start. In the longer run, the nation needs to update and redefine the notion of property rights. Although this approach is widely accepted by economists, I find that it takes special explanation to interest the average citizen. My favorite example is to compare your lawn with a public park. Neither the homeowner nor the
neighbors would think of dumping on the private lawn the kinds of garbage that are regularly left in the public park. Without even thinking about it, most citizens instinctively respect private property rights.

Perhaps the most powerful response to the new wave of federal regulation of business is to get consumers to understand that business is just a middleman. The cost of complying with regulations — like any other cost — shows up in the higher prices that we the people pay for the products that we buy.

Helping the public understand the limits of government regulation is a fundamental educational challenge. EPA is charged with administering the Clean Air Act, the Clean Water Act, the Resources Conservation and Recovery Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Noise Control Act, the Quiet Communities Act, the Safe Drinking Water Act, the Asbestos Hazard Emergency Response Act, the Medical Waste Tracking Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Emergency Planning and Community Right-to-Know Act, and portions of the Federal Food and Drug Control Act and the Marine Protection, Research, and Sanctuaries Act.

Even if EPA were staffed entirely with Newtons and Einsteins, it could not meet its present statutory obligations, much less the additional workload that Congress is anxious to impose on it. We need to set in motion the intellectual pressures for yet another swing in the policy pendulum — to less regulation of private enterprise, to restraint rather than enthusiasm in wielding governmental power.

To those who are disappointed that I do not simply oppose all government intervention in the economy, I note the views of Professor Frederich Hayek. He has made a compelling case for some significant government role in the economy, pointing out that he did not mean "that government should never concern itself with any economic matters." Rather, in his great book, The Constitution of Liberty, Hayek points out:
A functioning market economy presupposes certain activities on the part of the state; there are some other activities by which its functioning will be assisted; and it can tolerate many more, provided that they are of the kind which are compatible with a functioning market. . . . The range and variety of government action that is, at least in principle, reconcilable with a free system is thus considerable. 27

I conclude with a medical analogy: regulation is a very powerful medicine. The congressional doctor should prescribe it in small doses with full regard to all the adverse side effects on employment, innovation, productivity, and competitiveness.

Regulation is also an expensive medicine and the consumer winds up paying for it. But the congressional doctor often finds that it is a lot of fun to try to do good — with other people's money. But we citizens are those other people and it truly is our money.
Notes


7. Ibid., pp. 43-44.


