

COMMENTS

EPA's Existing Authority to Impose a Carbon "Tax"

by E. Donald Elliott

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A number of bills have been introduced in recent years to put a price on carbon via a federal carbon tax.¹ These proposals generally proceed from the implicit assumption that the federal government in general, and the U.S. Environmental Protection Agency (EPA) in particular, does not already have such authority. That is incorrect. Under a federal statute that has been on the books since 1952,² EPA could impose a carbon "tax" any time an administration in power is willing to do so. That is because a charge for using the public's air to dispose of carbon dioxide and other wastes is technically not a tax, but rather a "user fee."³

The confusion stems from a 1990 legal opinion written by the present author when he was EPA General Counsel,⁴ which ironically was intended to *increase* EPA's use of tradable permits and other economic incentives to regulate pol-

lution. It is time to set the record straight that EPA *does* have existing authority to impose a reasonable user fee on releases of carbon dioxide and other greenhouse gases (GHGs), as well as other pollutants, any time that it has the political will to do so.

For many purposes, tradable permits are admittedly superior to emission fees for regulating environmental pollutants,⁵ and I have been a longtime advocate of tradable pollution rights. However, in some circumstances, charging fees for emitting pollution into the public's air can be attractive. This is particularly true in view of our country's structural deficit and national debt of \$22.6 trillion and rising; a user fee on releasing carbon pollution into the atmosphere could raise billions of dollars annually for the U.S. Treasury,⁶ as opposed to giving away the right to pollute for free.⁷ In addition, the old adage "nothing is certain but death and taxes" captures the perception that fees paid to the government are likely to remain constant or go up, while the prices of permits fluctuate.⁸ That is crucial because to date, the problem of addressing climate change⁹ is dominated by substituting one type of lower-emitting

Author's Note: An earlier version of this Comment was presented at the University of Michigan Environmental Law and Policy Program Symposium "Planet in Peril: Averting Climate Catastrophe Through Law and Social Change" on April 11-12, 2019, and at the Yale Law School faculty workshop on April 22, 2019. Duke University Law School Prof. Jonathan Wiener also provided helpful comments on an earlier draft. I thank the commenters, but of course I am solely responsible for the errors, omissions, and opinions that remain. The opinions expressed are those of the author personally and do not reflect the positions of any organization or client; the author further states that he has not represented any client on matters related to the content of the Comment.

1. For a summary of pending carbon tax proposals and policy arguments pro and con, see CONGRESSIONAL RESEARCH SERVICE, R45625, ATTACHING A PRICE TO GREENHOUSE GAS EMISSIONS WITH A CARBON TAX OR EMISSIONS FEE: CONSIDERATIONS AND POTENTIAL IMPACTS (2019), available at <https://fas.org/sgp/crs/misc/R45625.pdf>.
2. Independent Offices Appropriation Act, 31 U.S.C. §9701, quoted and discussed *infra*.
3. See discussion *infra* notes 20-30.
4. Memorandum from E. Donald Elliott, Assistant Administrator and General Counsel, U.S. EPA, on Existing Authority to Use Economic Incentives to Regulate Pollution, to William K. Reilly, Administrator, U.S. EPA (July 13, 1990).

5. Susan Rose-Ackerman, *Effluent Charges: A Critique*, 6 CANADIAN J. ECON. 512-28 (1973), reprinted in BENEFIT-COST AND POLICY ANALYSIS 1974 (Richard Zeckhauser et al. eds., Aldine Publishing Co. 1975).
6. A U.S. Government Accountability Office (GAO) report found that 23 federal agencies charged more than 3,600 different user fees and collected nearly \$64 billion in fiscal year 2010. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, 2012 ANNUAL REPORT: OPPORTUNITIES TO REDUCE DUPLICATION, OVERLAP AND FRAGMENTATION, ACHIEVE SAVINGS, AND ENHANCE REVENUE 278-79 (2012) (GAO-12-342SP), available at <https://www.gao.gov/assets/590/588818.pdf>.
7. See Bruce A. Ackerman & Donald Elliott, *Air Pollution "Rights"*, N.Y. TIMES, Sept. 11, 1982, at 23:
The E.P.A. should, instead, sell polluters the right to dirty the air for a fixed period—just as the Government now auctions off oil and gas leases to the highest bidders. If polluters were forced to pay, they would clean up to avoid the cost—and breathers, not industry, would profit. The public would not stand for a multi-billion dollar give-away of public lands or water to industry. Why should the air be different?
8. BRUCE A. ACKERMAN ET AL., THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY (1974).
9. This is not the place to debate the role that human activities play in causing climate change, or what priority should be given to addressing climate change in national policy. The point of this Comment is a narrower one: to

capital asset for another that is more carbon-intensive; uncertainty about the future price for releasing a ton of carbon into the air distorts decisions about everything from buying a new car to building a new power plant.

To those skeptics who say that the Donald Trump Administration would never impose a carbon charge, I have two responses: (1) they will not be in office forever; and (2) politics makes strange bedfellows. As the tide to ban or greatly restrict fossil fuel use rises, it will become increasingly attractive to the fossil fuel industry and its allies in government to keep fossil fuel use legal by taxing it, which essentially makes the government a partner. That is what happened with cigarettes.¹⁰

For example, the leading contender for the Democratic nomination for president in 2020, Joe Biden, recently proposed to ban fracking over 10 years.¹¹ As someone who has advised five presidential campaigns on environmental issues, I doubt that Mr. Biden fully understood that this proposal amounts to a ban on most new oil wells in the United States, which is currently the world's leading producer of petroleum, as about 70% of both oil and gas wells are currently "fracked."¹² But be that as it may, the mere fact that the leading Democratic presidential candidate, who is currently ahead of President Trump in the polls, is endorsing such a sweeping restriction on fossil fuel production suggests that a fee on releases of carbon to the atmosphere may quickly become an attractive "second-best" solution from the perspective of large fossil fuel producers. And everybody's second-best alternative frequently gets enacted into legislation or promulgated as an administrative rule.¹³ Unlike a virtual ban on new drilling in the United States, a user fee on carbon would only have a marginal effect on the major producers of petroleum by making their product marginally more expensive versus substitutes, and it would allow for continued use in applications, such as jet fuel for air travel, for which petroleum currently has distinct advantages over available substitutes.

Unfortunately, since 1990, EPA has been laboring under the misimpression that it may not impose an emission charge without specific authorizing legislation from

the U.S. Congress.¹⁴ This conclusion is based largely on a 1990 legal opinion by the present author, then serving as EPA General Counsel, which held that EPA could impose a tradable permit program by interpretation, but not a tax.¹⁵ As the Agency's chief legal officer, EPA's General Counsel is empowered to issue legal interpretations that are binding on the Agency's program offices unless overturned by either a superior legal authority, such as the U.S. Department of Justice, the courts, or a subsequent EPA General Counsel. Unfortunately, my 1990 legal opinion has been reiterated and expanded by several generations of Office of General Counsel (OGC) lawyers, but the conclusion that EPA may impose trading programs but not fees by interpretation is wrong—or at least radically incomplete—and needs to be reexamined.

Ironically, the purpose of my 1990 legal memo to the Administrator and all the other Assistant Administrators running the program offices, including the air program, was to encourage EPA to use economic incentive systems more frequently under existing statutory authority. The opinion began by noting that many academics recommended increased use of economic incentive systems, and concluded that under the Agency's broad *Chevron* authority, "if a statute does not explicitly *preclude* an incentive-based approach, EPA probably has the legal authority to use a system of economic incentives (such as marketable permits) as a mechanism for regulating pollution." It then went on to review several precedents upholding EPA's use of economic incentive systems where statutes were phrased in general terms, but ended with the cautionary note that "[i]t may be more difficult to regulate using fees, as opposed to tradable allocations, due to problems with the general doctrine that agencies may not use outside moneys to 'supplement appropriations.'"

Unfortunately, that cautionary last sentence has been misinterpreted by subsequent generations of OGC lawyers as meaning that EPA may *never* impose emission fees, which is incorrect. What you call something often matters a lot in Washington, and, unfortunately, economists generally call Pigouvian emission fees "pollution taxes."¹⁶ Under the key U.S. Supreme Court case in the area, *National*

the extent that EPA decides to address GHGs, or other air pollutants, it may impose emission charges for regulatory purposes under existing legislation.

10. Stephanie Saul, *Government Gets Hooked on Tobacco Tax Billions*, N.Y. TIMES, Aug. 30, 2008, <https://www.nytimes.com/2008/08/31/weekinreview/31saul.html>.
11. Susan Crabtree, *Trump Campaign Spotlights Biden's Vow to Ban Fossil Fuels*, REALCLEAR POL., Aug. 1, 2019, https://www.realclearpolitics.com/articles/2019/08/01/trump_campaign_spotlights_bidens_vow_to_ban_fossil_fuels_140916.html.
12. U.S. Energy Information Administration, *Hydraulically Fractured Horizontal Wells Account for Most New Oil and Natural Gas Wells*, TODAY IN ENERGY, Jan. 30, 2018, <https://www.eia.gov/todayinenergy/detail.php?id=34732>.
13. See generally E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (describing how the automobile industry switched from opposing federal regulation of its products to supporting federal regulation in an attempt to head off a rising tide of state regulation, including proposals to ban the internal combustion engine in California and Pennsylvania), available at http://digitalcommons.law.yale.edu/fss_papers/147/.

14. Adele Morris of the Brookings Institution has suggested that EPA might impose a fee on carbon emissions, but through the indirect approach of requiring the states to do so. See Brad Plumer, *Could the EPA Push a Carbon Tax on Its Own? Maybe—Here's How*, WASH. POST, Nov. 15, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/11/15/could-the-epa-push-a-carbon-tax-on-its-own-maybe-with-this-weird-trick/>. However, the article goes on to state incorrectly that "[i]f [states] refused, the EPA can't impose taxes on its own." *Id.*

15. Memorandum from E. Donald Elliott, *supra* note 4.

16. CONGRESSIONAL RESEARCH SERVICE, *supra* note 1, at 2:

In the context of carbon price policy, terminology may be a key issue. As many policymakers, stakeholders, and academic journals use the term carbon tax, this is the default term in this report. Related terms cited in economic literature include emissions fee or emissions charge. Several proposals in recent Congresses described their approach as a GHG emissions fee. . . . The choice of terminology between a tax and fee may have procedural consequences, particularly in terms of congressional committee jurisdiction. . . . In addition, there may be legal considerations depending on whether the program is structured as a fee or tax.

Cable Television Ass'n v. United States,¹⁷ a strong presumption exists against concluding that Congress has delegated its power to *tax* to an administrative agency.

But charges for disposing of polluting gases into the public's air are not properly considered a tax, but rather a user fee. Under the Independent Offices Appropriation Act (IOAA),¹⁸ all agencies including EPA have been granted authority by Congress to charge user fees and keep the money to make their programs "self-sustaining" or rebate some of it to the Treasury if the money collected is more than they need, without offending the Anti-Deficiency Act.¹⁹ Under that latter statute, officers or employees of the United States may not obligate or expend in excess of appropriations, which was the concern mentioned in the final cautionary sentence in the legal opinion quoted in the Appendix.

31 U.S.C. §9701. Fees and Charges for Government Services and Things of Value:

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

- (1) fair; and
- (2) based on—
 - (A) the costs to the Government;
 - (B) the value of the service or thing to the recipient;
 - (C) public policy or interest served; and
 - (D) other relevant facts.

(c) This section does not affect a law of the United States—

- (1) prohibiting the determination and collection of charges and the disposition of those charges; and
- (2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

The same Supreme Court case that holds that agencies may not impose taxes, *National Cable Television Ass'n*,²⁰ also holds that under the IOAA, agencies *do* have authority delegated from Congress to impose *user fees*, as opposed to taxes. And that same statute also provides that the moneys that they collect as user fees are not an illegal supplementation of their appropriations, which was what concerned me in the last sentence of the legal opinion. Unfortunately, I was woefully ignorant of the IOAA and related jurisprudence when I wrote the 1990 legal opinion.²¹

An extensive legal literature exists on the difference between taxes and user fees. According to the best academic review article on the subject, the essence of the distinction is that "[a] user fee is a price charged by a government agency for a service or product whose distribution it controls," whereas a tax is intended to benefit the citizenry generally.²² Justice William O. Douglas, writing for the Court in *National Cable Television Ass'n*, explained this key distinction this way: "A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. . . . A 'fee' connotes a benefit. . . ." ²³ The Office of Management and Budget's (OMB's) guidance on the IOAA states that it applies to "all Federal activities that convey special benefits to recipients beyond those accruing to the general public," and that one of the "objectives" of charging user fees is to "promote efficient allocation of the Nation's resources by establishing charges for special benefits provided to the recipient that are at least as great as costs to the Government of providing the special benefits. . . ." ²⁴

Numerous states and localities already impose user fees for disposing of wastes.²⁵ Why should dumping waste into the air be any different than dumping it on land or into a river? In the context of air pollution, a user fee is appropriate because the government "controls . . . the distribution of the product or service"²⁶; it is allowing the polluter the special benefit of using the public's air for waste disposal purposes; and the polluter is engaged in the voluntary act of polluting the air. To those who might object that polluting the air is a right, not a "special benefit" conferred by government, I would remind them that at least since the Supreme Court's 2007 decision in *Massachusetts v. Environmental Protection Agency*,²⁷ the federal government has had clear authority to restrict access to the air for purposes of disposing of GHGs; by allowing polluters to use the air

17. 415 U.S. 336 (1974).

18. Pub. L. No. 97-258, 96 Stat. 877, 1051 (1982) (codified at 31 U.S.C. §9701).

19. 31 U.S.C. §1341(a).

20. *Nat'l Cable Television Ass'n*, 415 U.S. 336.

21. "No one who cannot rejoice in the discovery of his own mistakes deserves to be called a scholar." Donald Foster, *Quote of the Day*, N.Y. TIMES, June 20, 2002.

22. Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 800 (1987).

23. *Nat'l Cable Television Ass'n*, 415 U.S. at 340-41.

24. OMB Circular No. A-25 Revised (July 8, 1993), https://obamawhitehouse.archives.gov/omb/circulars_a025/.

25. See, e.g., Otsego County, New York, *Solid Waste User Fee*, https://www.otsego-county.com/departments/solid_waste/solid_waste_user_fee.php (last visited Aug. 26, 2019).

26. Gillette & Hopkins, *supra* note 22, at 800.

27. 549 U.S. 497, 37 ELR 20075 (2007).

for this purpose, the government is conferring a special benefit on them for which it is entitled to impose a user fee if it so chooses.

It is not unusual that resources are initially held in common with a right of free access by all comers, but government later gains legal authority to control access and charges user fees.²⁸ For example, consider the electromagnetic spectrum: until the 1912 federal Radio Act,²⁹ anyone could broadcast over the public's air; today, the Federal Communications Commission (FCC) charges user fees and auctions off spectrum use.³⁰ It is long past time to recognize that, like governmental permission to broadcast over the public's air, governmental permission to pollute the public's air is a privilege granted by government, not a right.³¹

At what level should a user fee for polluting be set? Jasper Cummings, a tax practitioner at Alston & Bird, suggests that as a general matter a user fee should "reasonably approximate the payer's fair share of the costs incurred by the government in providing the benefit."³² Admittedly, a fee based on the "social cost of carbon," an estimate of the full cost of pollution to society as a whole,³³ would not "approximate the fair share of costs incurred by government" to provide the benefit conferred, which is governmental permission to produce a good or service in a way that releases pollution into the public's air. Ideally, a Pigouvian emission charge should approximate the harm to society as a whole from providing the benefit of cheap disposal to the polluter, not just cover the costs to the government.

However, under the IOAA, the cost to the government is not a mandatory requirement for the definition of a user fee under subsection (a), but rather only one of the factors to be considered among others in setting the amount of the user fee under subsection (b). The IOAA provides that user fees should be established taking into consideration not

only "the costs to the Government," but also based on "the value of the service or thing to the recipient" and "public policy or interest served."³⁴ The latter two statutory factors counsel in favor of "leveling the playing field" by charging polluters the full social costs for their use of the public's air for disposal purposes, as opposed to their competitors who produce equivalent goods and services without, or at lower levels of, emissions.

If EPA wanted to be conservative and proceed step by step, it could begin by imposing a pollution charge based on an estimate of the incremental cost to the federal government attributable to the type of pollution in question. This could, for example, include additional Medicare costs and disaster relief efforts for hurricanes and other extreme events attributable to climate change as well as the costs of the air program. A rough precedent is provided by the Oil Pollution Act of 1990,³⁵ which provides that the party responsible for an oil spill into waters of the United States must reimburse the federal government for its costs in responding to the spill, as well as state and local governments for the additional costs of public services resulting from the spill.³⁶

Eventually, however, there is a good chance that a fee based on the full social costs of pollution to the public as a whole, not just the government, could be sustained as a user fee rather than a tax. Prof. Hugh D. Spitzer calls these kinds of user fees "burden offset charges," and argues they are an attractive alternative to traditional regulation to internalize costs on those responsible for creating a problem that imposes costs on the public, including air pollution as well as garbage and wastewater.³⁷

It is long past time that emission charges should take their rightful place in EPA's toolbox of instruments available to regulate pollution, including GHG pollution.

28. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

29. 37 Stat. 302 (1912).

30. FCC, *FY 2019 Regulatory Fees*, <https://www.fcc.gov/licensing-databases/fees/regulatory-fees> (last visited Aug. 26, 2019).

31. See generally Gerald Torres, *Who Owns the Sky?*, 19 PACE ENVTL. L. REV. 227 (2001) (arguing that government as trustee for the public has an obligation to charge for tradable pollution rights). For a sophisticated account of the legal history of the transition to the modern understanding that the air is public property, see Daniel H. Cole, *Property Creation by Regulation: Rights to Clean Air and Rights to Pollute*, in PROPERTY IN LAND AND OTHER RESOURCES 125 (Daniel H. Cole & Elinor Ostrom eds., Lincoln Institute of Land Policy 2012), available at https://www.lincolninstitute.org/sites/default/files/pubfiles/property-creation-rights-clean-air-pollute_0.pdf.

32. Jasper L. Cummings Jr., *User Fees Versus Taxes*, AUDIT + BEYOND, Oct. 31, 2011, <https://taxprof.typepad.com/files/62st0321.pdf>.

33. U.S. EPA, *The Social Cost of Carbon: Estimating the Benefits of Reducing Greenhouse Gas Emissions*, https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html (last updated Jan. 9, 2017).

34. 31 U.S.C. §9701(b).

35. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.

36. *Id.* §2702(a)(1), (b)(2)(F).

37. Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 345-47 (2002/2003).

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NEWS & ANALYSIS

49 ELR 10923

Appendix. 1990 Legal Opinion on Economic Incentives



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 13, 1990

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Existing Authority to Use Economic Incentives
To Regulate Pollution

FROM: E. Donald Elliott *ED Elliott*
Assistant Administrator
and General Counsel

TO: William K. Reilly
Administrator

As discussed at the roundtable of Assistant Administrators yesterday, there is a strong consensus among academics, among many in the Administration, and increasingly among environmentalists, in favor of expanding the use of economic incentives to regulate pollution.¹ You have asked me to evaluate EPA's authority under existing laws to utilize economic incentives (such as tradeable allocations) to regulate pollution. In my opinion, many of our existing statutes give EPA substantial discretion to make use of market-based incentives to regulate pollution.

While the question of statutory authority must obviously be examined closely in the context of particular statutory language and legislative history, in general, if a statute does not explicitly preclude an incentive-based approach, EPA probably has the legal authority to use a system of economic incentives (such as marketable permits) as a mechanism for regulating pollution. In the 1984 landmark decision, Chevron v. Natural Resources Defense Council,² the Supreme Court specifically upheld EPA's use of an incentive system, which was not specifically contemplated

¹ See, e.g. Administrative Conference of the United States, Providing Economic Incentives in Environmental Regulation (April 23, 1990) (copy attached); Ackerman & Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, COLUM. J. ENVIR. L. 171 (1988) (review of literature) (copy attached); See also Project '88 Harnessing Market Forces to Protect the Environment: Initiatives for the New Pre 1988) (table of contents attached).

² 467 U.S. 837 (1984).

by statute (the "bubble" concept under the Clean Air Act). The Court held that EPA could implement such an incentive-system provided that two tests were satisfied:

- (1) the language and legislative history of the statute did not clearly preclude the approach, and ~
- (2) EPA advanced a reasonable explanation that the regulations would serve the statute's environmental objectives. Id at 863.

Extending the Chevron rationale, an 1989 opinion by the Justice Department's Office of Legal Counsel determined that general statutory language giving EPA regulatory authority "for the control of any substance" that may endanger public health by affecting the stratospheric ozone (Clean Air Act Sec. 157(b)) was broad enough to authorize EPA to allocate allowances to produce CFC's through auctions or fees.³ Consistent with the OLC opinion, EPA established a system of tradeable allowances for CFCs, which was not challenged in court.

Recently OGC has taken the position that regulations establishing trading and banking under the Clean Air Act's mobile sources program satisfied statutory requirements that emission standards be set at a level reflecting the "greatest" or "maximum" degree of emission reductions achievable (CAA Secs 202(a) (3) (A)(iii) and (B)), provided that greater environmental protection would be achieved by the incentive system than through traditional techniques.⁴ This interpretation has not yet been tested in court.

In sum, individual statutes differ and the programs should consult with the Office of General Counsel on a case-by-case basis. The case for using economic incentive approaches is probably strongest where statutes are written in general terms (e.g. TSCA). However, even where specific statutory language requires EPA to set technology-based standards, we often have authority to impose an economic-incentive system in addition to existing technology-based standards in order to provide incentives for pollution prevention and technological development. It may be more difficult to regulate using fees, as opposed to tradeable allocations, due to problems with the general doctrine that agencies may not use outside monéys to "supplement appropriations."

Attachments

cc: Assistant Administrators
Associate General Counsels

³ Memorandum for Alan Raul, General Counsel, Office of Management and Budget from Douglas Kmiec, Assistant Attorney General, Office of Legal Counsel, April 14, 1989.

⁴ Memorandum, Final Rule for Heavy-Duty Engine Trading and Banking Certification Program -- Red Border Review, from E. Donald Elliott to William G. Rosenberg, January 4, 1990.