



Quick Study

A Policy Report Summary by the Institute for Policy Innovation

When the Unelected Rule: Ten Case Studies in Regulatory Abuse

A Summary of an IPI / Lexington Institute Policy Report, December 2000

Introduction

By Congressman Joseph Knollenberg (R-MI)

As a member of the House VA-HUD subcommittee that funds the Environmental Protection Agency (EPA), I have the duty of ensuring that EPA uses the taxpayers' money effectively, employs sound science, and, ultimately, respects the Constitution. Total Maximum Daily Load is a prime example of regulatory overreach, and I am pleased to see it addressed in this report. The more the public knows about the adverse impact of unscientific federal regulations, the sooner people will demand fundamental reform.



Court of Appeals ruling that EPA, in formulating the new standards, had construed sections of the Clean Air Act “so loosely as to render them unconstitutional delegations of legislative power.” EPA subsequently justified the regulations using pre-existing standards.

Yet, EPA’s own air-quality analysis revealed that, excepting a handful of areas, the nation will comply with the pre-existing standards without EPA’s draconian measures. The regulations could actually increase ozone concentrations in some regions, with an overall reduction of only 1.3 percent. Consumers will cover the costs — estimated at between \$3.5 and \$6 billion per year.

Susan E. Dudley is Senior Research Fellow and Deputy Director of the Regulatory Studies Program at George Mason University. This summary does not represent an official position of George Mason University.

revisions of the TMDL rule enables the agency to intervene in decisions the CWA left to the states. If the agency is not satisfied with the state’s progress, EPA can step in. Over 40,000 TMDLs will have to be established — an average of one per week for the next 15 years. EPA calculates compliance costs at under \$100 million a year. State officials estimate the true cost to be between \$1 billion and \$2 billion annually.

Congress, with broad bipartisan support, attached riders to appropriations bills barring EPA from implementing its TMDL rule in FY 2000 and FY 2001; however, former Administrator Browner signed the new rule into law one day before President Clinton signed the appropriations measures.

Bonner R. Cohen is a senior fellow at the Lexington Institute.

EPA’s Ill-Conceived Standards

In December 1999, EPA issued new “Tier 2” regulations that (1) set stringent new emission standards for passenger cars and light trucks, and (2) limited sulfur in gasoline from an average of 340 parts per million (ppm) to 30 ppm. The regulations were issued in spite of a May 14, 1999, U.S.

EPA Muddies the Nation’s Waters

Created in 1972, under the Clean Water Act (CWA), the Total Maximum Daily Load, or TMDL, program identifies how much pollution a body of water can receive and still meet state standards. EPA’s August 1999

The False Promise of Title VI

Title VI of the 1964 Civil Rights Act commands that: “no person in the United States shall, on ground of race, color or national origin, . . . be subjected to

discrimination under any program or activity receiving Federal financial assistance.”

Prodded by environmental justice enthusiasts, EPA issued in 1998 “interim guidance” on the application of Title VI to environmental justice. The guidance was instantly controversial. A revised version, issued in June 2000, was little better. Having examined more than 80 Title VI complaints from around the country since 1994, EPA has found no violations. Activists, however, can still reliably use Title VI to help delay siting proposals long enough to get sponsoring firms to throw in the towel. Two projects in Louisiana, for instance, evaporated recently when exhausted sponsors pulled the plug.

Christopher H. Foreman, Jr. is a senior fellow with The Brookings Institution.

Where’s the English?

The 1968 Bilingual Education Act (now Title VII of the omnibus Elementary and Secondary Education Act, revised in 1994) was supposed to make immigrant children literate in English. It is doubtful Members of Congress anticipated the following:

Developing educational software for students to develop written proficiency in Lakota (Sioux).

Lakota is an oral language; no written form exists. Why use federal dollars to develop one?

SSOW (Summer School on Wheels) trip to Costa Rica to offer LEP (limited English proficient) students new experiences. The report on this \$144,000 Title VII project noted “students gained valuable insights into the rain forests, animals, volcanoes.” What did any of this have to do with teaching English?

In Miami/Dade County, development and dissemination of two books consisting of poetry and folk stories in Haitian-Creole. This was the handiwork of the U.S. Department of Education’s \$2.6 million Project BETTER (Bilingual Education Through Training, Enhancing, and Restructuring). The BETTER report said nothing about teaching English. The Miami/Dade English for Speakers of Other Languages (ESOL) program, 60 percent of which is in English, provides an instructive contrast. ESOL graduates scored higher than *non-LEP* students and had higher graduation rates. California and Connecticut have already passed major bilingual reforms, as have schools in Chicago and Denver.

Robert Holland is a senior fellow at the Lexington Institute.

Highway Safety at Risk

The 1975 Energy Policy and Conservation Act established a new scheme for regulating the average fleet fuel economy of cars and light trucks: the Corporate Average Fuel Economy—CAFE. Current CAFE standards are 27.5 miles per gallon (mpg) for cars and 20.7 mpg for light trucks, pickups, minivans, and SUVs. The only way automakers could comply with the new federal mandate was to downsize their models.

The National Highway Traffic Safety Administration (NHTSA) estimates that the downsizing of cars from the mid-1970s to 1982 cost 2,000 lives and 20,000 serious injuries annually. The program’s advocates claim it “is critical in reducing US dependence on foreign oil” and “cutting air and carbon dioxide pollution.” Imports of foreign oil have *risen* from 35 percent of total U.S.

supply to 50 percent since CAFE was imposed. And even EPA does not consider carbon dioxide a pollutant. In October 2000, Congress extended the 1995 freeze on CAFE to 2003. Lawmakers also instructed the National Academy of Sciences (NAS) to conduct a study, to be completed no later than July 1, 2001, on CAFE’s impact on motor vehicle safety and the U.S. automotive sector.

Bonner R. Cohen is a senior fellow at the Lexington Institute.

Dial “0” for Outmoded

Largely at the FBI’s insistence, Congress passed in 1994 the Communications Assistance for Law Enforcement Act (CALEA) requiring telephone companies to engineer their networks so as to provide certain capabilities for court-ordered surveillance. Congress specifically said the FBI was not to dictate the precise method by which it was to get the limited surveillance data. Instead, the FBI presented a “punch-list” of demands that went far beyond anything the statute envisioned.

The cost of implementing CALEA rose from an initial \$500 million to tens of billions of dollars, much of this borne by the cellular telecommunications industry. The act has allowed the FBI to assume, without accountability, the *de facto* powers of an economic regulator. Recently, the FBI also used provisions of the Defense Production Act to block a string of proposed telecommunications mergers. There is also CARNIVORE, an FBI-developed program that scans reams of information, regardless of Constitutional protections.

James Lucier is a securities analyst following Internet and e-commerce regulatory trends.

Safe and Efficacious?

The Food and Drug Administration (FDA) approves new drugs on the basis of safety and efficacy. The Food and Drug Act of 1906 only attempted to protect patients from blatant fraud, not from making an informed decision to take medication. All that changed in 1962, when, in the wake of the thalidomide crisis, Congress passed the Kefauver-Harris Drug Amendments to ensure both the safety and efficacy of new drugs. Kefauver-Harris may have been the most costly piece of regulatory legislation ever passed. Moving a new drug from inception through the approval process takes eight to 10 years and costs \$500 to \$600 million. If safety were the only consideration, the review could take only \$50 million and perhaps one or two years.

The current approval process doesn't even guarantee safety. Both the anti-diabetes drug Rezulin and the antibiotic Trovan were FDA approved, but pulled after some patients developed liver toxicity. Were the FDA to drop its demand for efficacy, but require strict physician oversight and the informed consent of patients, patients would have greater access to more new drugs.

Merrill Matthews Jr., Ph.D., is a visiting scholar at the Institute for Policy Innovation.

The Futility of Internet Regulation

The government has, so far, not seized total control of the Internet. But Congress often does not understand the very technology that it is attempting to regulate. For instance, For instance, legislation has been introduced to make Internet gambling illegal, despite

the fact that forty-five countries now license and regulate Internet gaming. The legislation requires online service providers (OSPs) to deny access to offending Web pages. At worst, such legislation may force operators to change addresses — a process that takes about 45 seconds. More distressing, the law misunderstands the role of OSPs, treating Internet access as a government-granted privilege.

Witness also attempts to require the use of Internet filters. The problem with mandating filters (putting aside all questions of federalism and unfunded mandates) is that it de-emphasizes teacher or parental discretion. What policy makers in general have yet to acknowledge is that the Internet is not a telephone system with a central control point. The Internet has “smart ends” and a “dumb middle,” which merely transports information from one computer to another. The power is at the ends of the system — the power is in the individual.

Bartlett Cleland is the Director of the Center for Technology Freedom at the Institute for Policy Innovation.

Roadblock to the Investor Class

Stock ownership has expanded from 15 percent of the American population in 1980 to 50 percent today. But the over 50 percent of all Americans employed by small business have been left behind. The “roadblock” came about when Congress drafted legislation establishing the 401(k) retirement plan. The law created a complicated testing procedure designed to encourage maximum levels of participation. This “intention” was eventually codified under the

“Safe Harbor Act” in which employers, in return for matching part of an employee’s contribution, were exempted from some of the more onerous aspects of the testing procedure. The unfortunate consequence of this testing requirement is its cost of \$3,500 to \$30,000 annually, effectively pricing 401(k)s out of reach for many small companies.

Congress has passed legislation creating Simple IRAs and 401(k)s for companies comprised of 100 or fewer employees. While removing the testing burdens, the legislation required employers to make contributions many cannot afford. Congress should either exempt companies with 50 or fewer employees from the employer matching contributions in the Simple IRA and 401(k)s or exempt these companies from the testing requirements.

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The Children’s Online Privacy Protection Act

The 1998 Children’s Online Privacy Protection Act (COPPA) does little to protect children, misleads parents, burdens the new Internet economy, and reduces the availability of educational content for children. The COPPA regulation requires online services that collect personal information from children under 13 to obtain verifiable parental consent. Violators of the law are subject to FTC enforcement actions, including penalties of \$11,000 per violation.

Lawmakers would have brought children in to testify tearfully at COPPA’s one Senate hearing, but none could be found because

commercial sites pose little danger to children. More realistic dangers lurk in chatrooms and on sites that do not cater to the public. Compliance costs for COPPA are estimated at \$60,000 to \$100,000 dollars, dissuading many small entrepreneurs from putting inventive educational content online. COPPA also denies

children with absentee or non-English speaking parents access to educational Web content. Citizens, meanwhile, must reveal tremendous amounts of information to government agencies that have been known to sell such records with impunity. Likewise, Congress failed to make itself or any other part of the federal government subject to COPPA.

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Editor & Publisher Tom Giovanetti

IPI **Quick Study** is published by the Institute for Policy Innovation (IPI), a non-profit public policy organization.

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