

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 10

SPRING 2020

ISSUE 2

Comment

CORPORATE SOCIAL RESPONSIBILITY AND THE DYNAMIC ROLE OF GREENHOUSE GAS REPORTING REQUIREMENTS

Hunter Davila^{1*}

I. Introduction

Business entities of several varieties play an invaluable role in the maintenance, growth, and preservation of the socioeconomic framework, both in the United States and worldwide. Generally, corporations do not assume a duty to act in a socially proactive manner; after all, business entities typically exist to maximize profits for their constituent shareholders. The social obligations of corporations have been shifting, however, as increasingly stringent laws, regulations, and social norms require that entities mitigate the environmental damage they do in order to survive. Much of the public's attention focuses on the regulation of emitting entities especially where that regulation applies to minimizing large-scale contributions to the "greenhouse effect," which occurs

^{1*} Master of Legal Studies, Class of 2019. I am currently taking some time off from academics in preparation for the pursuit of a Juris Doctor degree. In my current staff role with the Wyoming Attorney General, I work closely with state environmental regulations and assist agency attorneys with research, litigation, and the rulemaking process. I would like to extend my thanks to AJELP for providing me with the opportunity to refine my craft and for making the Journal into the best possible place for non-J.D. law students to engage in advanced legal inquiry. I would like to additionally thank Professors Keith Swisher, Robert Williams, and Jingyuan Zhou for their guidance throughout my first attempts at formal legal writing. May this be the first steppingstone of many on a journey toward a fulfilling legal career.

when increased quantities of heat-trapping gases enter the atmosphere as a direct byproduct of industrialization.²

The natural environment is humanity's most valuable resource. Sovereign nations, including the United States, must take steps to preserve the environment's integrity or else risk irreversible damage to global socioeconomic stability and perhaps even the existence of life itself. Statutes and regulations represent some of the best mechanisms available for ensuring such preservation. A delicate balancing act comes into play during the formation of environmental regulations, however, as legislators and regulators must take care to avoid the excessive restriction of economic activity. Economic prosperity is needed to ensure liberty and social mobility for individuals on a global scale, and excessive regulation risks damaging the livelihood of those whose prosperity depends on a healthy global economy. Legislators and regulators are thus charged with protecting the environment from damage while simultaneously avoiding the imposition of excessive regulatory burdens upon emitting entities. The challenge of strengthening environmental protections without imposing excessive burdens upon emitting entities is referred to herein as the "regulatory-economic balance."

The totality of the regulatory-economic balance is far too immense to be condensed into a brief Comment, especially after considering the number of moving parts and the expanse of underlying policy implications. However, the United States Environmental Protection Agency's regulations on Greenhouse Gas Reporting Requirements offer a foundational regulatory scheme through which the regulatory-economic balance may be analyzed.³ The EPA's revision of reporting requirements under Subpart A of Title 40 of the Code of Federal Regulations (C.F.R.), Section 98 may provide an avenue to fortify environmental protections while simultaneously minimizing the burdens placed upon emitting entities relative to those protections.⁴

II. 40 C.F.R. § 98.2

40 C.F.R. Section 98.2 addresses who must report under the array of emissions controls in 40 C.F.R. Part 98.⁵ A key component is Section 98.2(i)(1) ("the 25,000 rule"), which states "[if] reported emissions are less than 25,000 metric tons carbon dioxide equivalent (CO²e) per year for five consecutive years, then the owner or operator may discontinue complying with this part provided that the owner or operator submits a notification... and explains the reason for reduction in emissions."⁶ § 98.2(i)(2) ("the 15,000 rule") provides the same relief but for emitters that produce less than 15,000 metric tons CO²e for three years.⁷

² *Massachusetts v. EPA*, 549 U.S. 497, 509 n.12 (2007).

³ 40 C.F.R. § 98 (2018).

⁴ *Id.* § 98.1.

⁵ *See id.* § 98.2.

⁶ *See id.* § 98.2(i)(1).

⁷ *See id.* § 98.2(i)(2).

The 25,000 rule is redundant considering the 15,000 rule's existence. Distinguishing between emitters using thresholds of 25,000 and 15,000 metric tons CO₂e respectively may result in a lack of environmental accountability relative to the administrative burdens associated with both clauses. A scenario where the 15,000 rule remains and the 25,000 rule is stricken illustrates this point effectively—the 15,000 rule sufficiently incentivizes emitters previously governed by the 25,000 rule to pursue the technological improvements and industrial efficiency necessary to decrease emissions to defeat the 15,000 rule's mandate. The economic incentive available to low-volume emitters would be especially notable where entities emitting in a range between the 15,000 rule and the 25,000 rule are already close to achieving the lower requirements imposed by the 15,000 rule. The reduction of administrative burdens via this method will encourage the affected lesser-emitting entities to reduce their emissions footprint while simultaneously promoting technological advancement related to the mitigation of greenhouse gas emissions (GHG) and industrial efficiency. Even though the removal of the 25,000 rule will result in an inevitable increase in the administrative burden imposed upon entities emitting between the levels of 25,000 and 15,000 metric tons CO₂e during a given period, removal of the 25,000 rule will nevertheless likely result in a reduction in greenhouse gas emissions (GHG) that outweighs the presence of the reporting obligation. The affected entities will be presented with a profit-based incentive encouraging the reduction of emissions to levels below 15,000 metric tons CO₂e to avoid extra costs associated with the reporting mandate.

An alternative argument considers the inverse of the argument raised prior—the removal of the 15,000 rule from the regulatory scheme while retaining the 25,000 rule. The argument favoring the 25,000 rule provides that the 25,000 rule is sufficient in and of itself and provides adequate relief for lesser-emitting entities and that the 25,000 rule also creates incentives promoting the environmental accountability of lesser-emitting entities for a full twenty-four months longer than mandated under the 15,000 rule. The removal of the 15,000 rule from 40 C.F.R. 98 will potentially result in increased environmental accountability as any differentiation between 25,000 and 15,000 CO₂e emitters is removed. The hypothetical increase in accountability may arise naturally through a combination of expenditure-avoidance incentives and the low cost of imposing a minimally increased burden upon organizations emitting at or below the 15,000 metric tons CO₂e threshold for an additional two years. The lesser-reporting entities may thus be encouraged to adopt technological procedures and levels of industrial efficiency necessary to retain avoidance of the reporting requirement for long periods of time thereafter, which will ultimately result in less collective emissions output and a lesser long-term administrative burden. The 15,000 rule's demise may result in an unintended side effect, however, as entities currently emitting at a level below 15,000 metric tons CO₂e may begin emitting at a level closer to 25,000 tons CO₂e due to the removal of the 15,000 rule's incentives. The

decision of whether one provision should be favored over the other is ultimately best left to agency expertise.

III. Compliance and Enforcement Considerations

40 C.F.R. Section 98.8 provides “the compliance and enforcement provisions of [40 C.F.R. 98].”⁸ The section provides that “any violation of any requirement of this part shall be a violation of the Clean Air Act” and that “a violation is not limited to failure to report GHG emissions, failure to collect data needed to calculate GHG emissions, failure to continuously monitor and test as required, failure to retain records needed to verify the amount of GHG emissions, and failure to calculate GHG emissions following the methodologies specified in this part.”⁹ The provisions contained within the Clean Air Stationary Source Civil Penalty Policy are particularly relevant to the regulatory-economic balance inquiry. Section B provides for a “gravity component,” which aims to assess the dollar amount needed to deter violations through the recovery of any economic benefit an entity has derived from non-compliance.¹⁰ The assessment of the gravity component is based upon five factors: the amount of pollutant, the sensitivity of the environment, the toxicity of the pollutant, the length of time a violation continues or has continued, and the size of the violator.¹¹ The document provides a table based upon the “Percent Above Standard” as it relates to the violation, ranging from 0% to over 300%, preceded by the text “[the] following dollar amounts assigned to each factor should be added together to arrive at the total gravity component.” The “over 300%” level provides for a dollar amount equal to \$50,000 plus \$5,000 for each 30% fraction or increment above the standard.¹²

The introduction of a penalty strong enough to divest an organization of all its assets after a certain gravity component percentage has been reached is supported by a compelling argument. The worst financial crimes are punishable by terminal penalties, as expressed in the 2018 United States Sentencing Commission Guidelines Manual.¹³ The integrity of the environment is, at a minimum, at least as important as the integrity of the nation’s financial and economic condition, as each is required to ensure the welfare of all. The comparable importance of a healthy economy and a healthy environment, then, fortifies the argument supporting the imposition of a “terminal” environmental fine similar to that of the fine for the most egregious financial violations. The imposition of a terminal fine would not create any additional administrative corporate burden that has not already been anticipated by the legislature, as the expectation that emitters do not unduly harm the natural environment is within the existing scope of the regulatory status quo. The main benefit is a stronger

⁸ *See id.* § 98.8.

⁹ *See id.* § 98.8.

¹⁰ EPA, CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY (1991).

¹¹ *Id.*

¹² *Id.* at 10.

¹³ U.S. SENTENCING COMM’N, 2018 GUIDELINES MANUAL, CHAPTER 8 PART C – FINES 523-546 (2018).

incentive for emitting entities to comply with 40 C.F.R. § 98 policies related to environmental preservation, even if those provisions must become more stringent in the future to prevent an imminent collapse of environmental integrity. Further, entities with a propensity for internal turpitude regarding how seriously the applicable environmental regulations should be taken will likely be encouraged to improve their behaviors when faced with the threat of a terminal penalty. Human livelihood rests on the integrity of the environment, and the threat of divesting an entity of all its assets reflects the gravity of the need to maintain its good condition.

IV. Conclusion

The integrity of the environment is critical in ensuring the continued prosperity of humanity. Statutes and the regulatory bodies and schemes generated by their authority are critical tools in achieving the preservation of that integrity. It is undoubtedly important that those tools anticipate the need for a regulatory-economic balance and use such a model to determine which regulatory mechanisms to implement. The number of angles by which one might approach the issue of regulatory-economic balance are innumerable; however, some considerations include the revision of greenhouse gas reporting requirements under 40 C.F.R. 98 and stiffer penalties for severe environmental crimes. Action must be taken to achieve the best possible regulatory-economic balance in a timely fashion, so as to encourage environmental accountability while simultaneously avoiding the imposition of undue economic burdens. The future of the environment—and, by connection, the future of humanity—hinges on attempts to establish the regulatory-economic balance in a logical and lasting format.