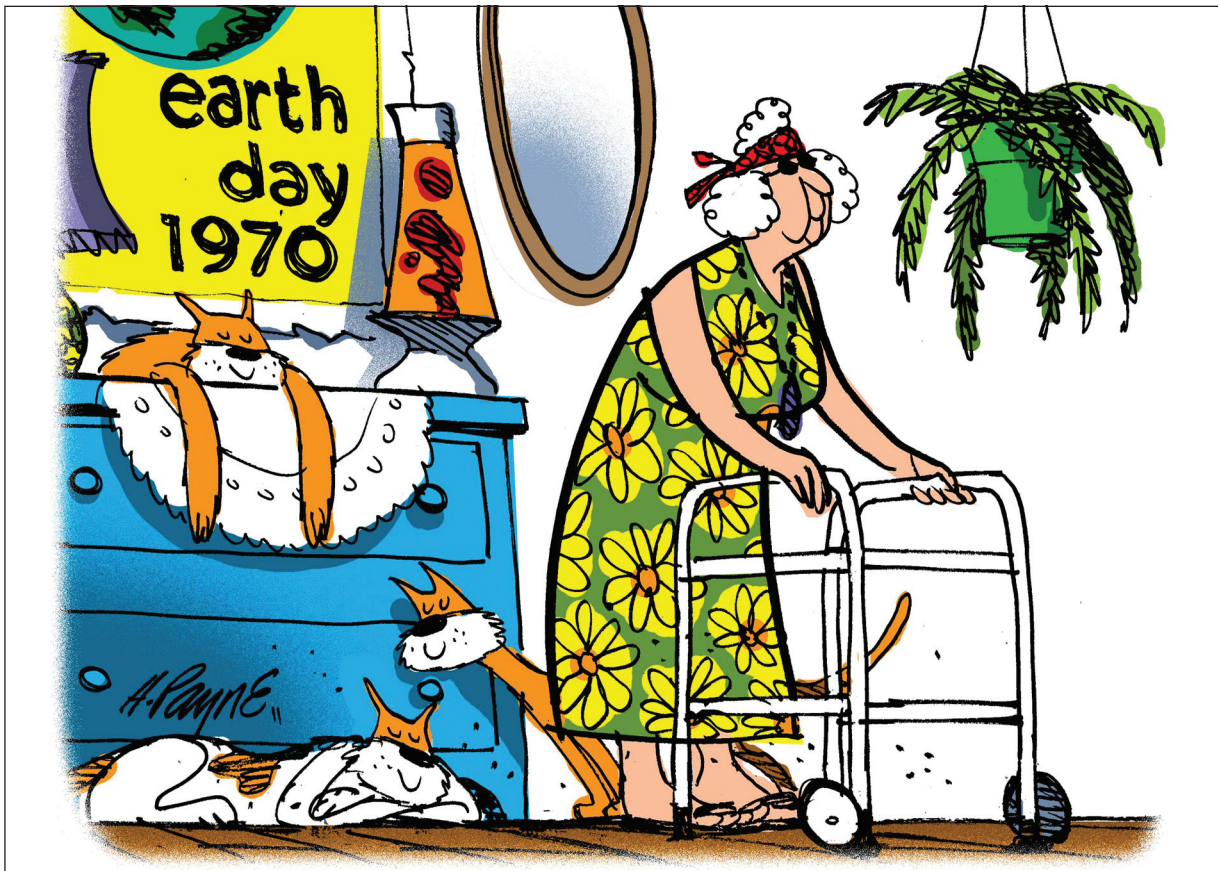


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Has the Pizazz Gone Out of Environmental Protection?

Joint Pain

*The Clean Air Act's
Arteriosclerosis*

Toxicology

*Stakeholders and
the Role of Risk*

The Practice

*Changes Over the Next
Five to Ten Years*

Clearing the Arteries

costs in setting NAAQS is a reason for restructuring the Clean Air Act's treatment of conventional NAAQS pollutants.

EPA, in the ANPR, argues that "a NAAQS would trigger a relatively rigid implementation apparatus, limiting the agency's flexibility to target cost-effective emissions reductions and to shift the burden of control requirements among different industries based on the availability of new technological approaches."

EPA Administrator Russell E. Train made essentially the same argument against a NAAQS for lead, claiming that regulating principally through a national rule on lead in gasoline would be more efficient and administratively simpler. Schoenbrod responded that setting a NAAQS would not prevent EPA from controlling lead in gasoline through a single national regulation; EPA could obviate the need for fuel regulations in SIPs by setting a national regulation sufficient to achieve the NAAQS. (The Train-Schoenbrod argument is in an exchange of five letters posted at www.nyls.edu/faculty/faculty_profiles/david_schoenbrod/train-schoenbrod_correspondence.) This counterargument was valid when the Second Circuit interpreted the Clean Air Act in 1976, but is not valid now. Congress in its 1977 and 1990 amendments to the Clean Air Act expanded the statutory requirements for SIPs from three pages to 79 pages. The new requirements including "reasonably available controls measures" for existing sources make SIPs more rigid, complex, inefficient, and inefficacious.

A 2004 National Research Council study concludes that the rigidity and procedural complexity of the SIP process hobbles pollution-control efforts. "The process now mandates extensive amounts of . . .

There is no doubt that there is room to criticize the Clean Air Act. The regulatory system would benefit if Congress could make transparent and direct value judgments regarding the regulatory approach and the division of burden. With regard to congressional action, the act of course would benefit from a legislative tune-up. Clear legal mandates from Congress, without the need for statutory interpretation and regulation, would provide clarity to regulated entities, allow investors to finance emissions reductions projects with less litigation risk, and speed delivery of environmental benefits.

But hopes for legislation are likely frustrated by the fact that the arteries of Congress are even more clogged than those of EPA. Congress has not amended a major environmental statute since 1990, which predates the rise of "Fight Club Politics" with the Gingrich-led House of 1995-96, and the politics surrounding environmental issues appear more and more polarized every day. Most directly, witness the efforts of Senators Thomas Carper (D-DE) and Lamar Alexander (R-TN), two moderates who have proposed legislation for the past five Congresses that tracks the Schoenbrod/Witte proposals. Never has the Carper/Alexander proposal made it to the floor of the Senate for a vote.

EPA's flexibility to address these issues also is understated. For example, the NOx trading program, a program akin to the lauded statute-based SO₂ trading regime, was created through the much-criticized National Ambient Air Quality Standards/State Implementation Plan process. The NOx SIP Call

created a transparent, top-down, and flexible regime to address ground-level ozone in 20 states and the District of Columbia.

Moreover, the agency's authority to find similar flexibility to address greenhouse gases under Section 111 of the act appears to be limited only by politics, not the statute's language. Under that authority, EPA could track the process of the NOx program, creating a call for coordinated state emission reduction programs that would provide many of the benefits of centralized legislation. And because the agency devised the program under a similar process, it could be coordinated with other pollutant abatement programs.

The ability to use the authority under Section 111 is more than a theory. Just this month, Justice Ruth Bader Ginsburg all but endorsed the authority as the agency's means of making an "informed assessment of competing interests," including "the environmental benefit potentially achievable," "our nation's energy needs," and "the possibility of economic disruption." Clearly in the justice's mind, the transparent balancing of interests is feasible for EPA.

None of this is to suggest that the Clean Air Act is the perfect authority for addressing our current air pollution challenges. But our political system is particularly paralyzed at this inopportune juncture, making amendments unlikely. Until we are able to return to constructive legislating, the statutory arteries given to EPA may not be quite as clogged as suggested.

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