Terminating Global Warming, Energy Dependence or Private Property Rights?

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Protecting the Public?

Earlier this month, western governors unveiled their long awaited clean energy plan for the western half of the United States. Admittedly, the plan contains several voluntary features, and its recommendations seem, at first glance, plausible. Its measured language even appears couched more in science and economics than in environmentalisms.

Appearances can be deceiving, however. Is this really an energy security plan that can also ensure regional energy reliability? Can this plan immediately lessen the western U.S. region's foreign energy dependence? Can it promote low-cost, affordable new energy generation? Or, is it actually another back-door' environmental regulatory 'takings' regime that will benefit some at the expense of others, while claiming to protect the public against the phantom menace known as global warming?

The plan's stated goal is to provide energy reliability and security for the American west. However, rather than objectively place *all* energy source alternatives on the table for consideration in a region that has limited energy supply but great energy demand, the plan summarily dismisses substantive consideration of: 1) nuclear power; 2) Alaskan-based liquified natural gas (LNG); 3) offshore oil and gas drilling; and 4) most readily available sources of coal, America's most bountiful and inexpensive natural resource. In fact, the plan mentions only two very expensive 'clean coal' technologies – 3rd generation integrated gasification combined cycle (IGCC), and supercritical and ultra-supercritical pulverized and circulating fluidized bed combustion. The plan prefers these new and promising technologies because they are said to provide total sequestration – i.e., zero carbon dioxide (CO2) emissions. But, by restricting the plan's coal portfolio to only these two costly and emerging technologies, the plan's sponsors seek to effectively ban the construction of more than a few new coal 'builds' within the western half of the nation for the foreseeable future. These restrictions simultaneously place more pressure on existing but over-extended natural gas, hydro and coal sources that require substantial upgrading to meet regional energy security and reliability needs.

The governors' long-term preference for developing emerging windmill, solar, hydro and biomass-generated energy technologies is laudable, but they do not provide practical or efficient short-term solutions. Many of these technologies are not currently available for collective large scale use, and even when fully matured, are unlikely, by themselves, to deliver more than a fraction of the region's energy supply. Instead, a holistic portfolio of energy source options must be offered that includes many currently available and environmentally clean technologies, including those coal-related. Such a menu should also include indigenous offshore (west coast) oil and gas, and clean and inexpensive Alaskan LNG that could be delivered in short order to

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west coast ports if only California environmentalists would drop their irrational opposition to the issuance of the necessary construction permits. In addition, the west's use of safe, cheap and infinitely available nuclear energy must also be continued and expanded, despite the fear-inspired propaganda-based claims made by nuclear energy-averse environmentalists. Indeed, scientists have shown government policymakers how adequate design, construction and management of LNG and nuclear facilities within and off the coast of California can mitigate earthquake and other natural disaster–related health and environmental risks. Among other reasons, this is precisely why a number of European governments are *reconsidering* nuclear power.

Furthermore, the plan's over-reliance on conservation and efficiency measures is also unrealistic. First, conservation and efficiency mandates must be delivered through mechanisms that are performance and not merely process-based – i.e., they must be measured in scientific, technical and economic terms, rather than expressed as political preferences. Poorly designed and symbolic renewable portfolio standard mandates are unlikely to produce much if any energy cost savings, and may actually be counterproductive – they may prove more costly in terms of innovation, productivity and economic growth if the necessary underlying energy supply is curtailed. Second, according to scholars, what the plan obliquely refers to as 'incentive regulations', are not as well understood by regulators as is commonly claimed, and are susceptible to political manipulation. While the plan uses language such as 'market-based incentives subject to science and cost-benefit', it is highly questionable how market-friendly regulations can actually be, and how truly objective state environmental regulators will be in implementing them, especially given their interstate nature. Will it really be the least commerce-restrictive alternative available to achieve the energy security, reliability and environmental objectives identified? How will extra-regional energy ('leakage') be treated?

For these reasons, individual businesses and consumers should be worried about the potential economic impact that the governors' clean energy plan mandates will impose upon state and regional power generators, which can be expected to be passed downstream to them.

Or, Deceiving the Individual?

Moreover, it is also difficult to see how the types of changes to the western states' regulatory landscape that would be needed to implement this plan would not also substantially diminish the economic values of existing business and personal assets and investments located throughout the region, so as to make them virtually worthless. This is particularly a concern in California, Oregon and Washington, which intend to adopt an interstate Model Rule requiring each state to impose strict CO2 and other greenhouse gas emissions caps.

Putting aside the interstate commerce, federal preemption and supremacy clause (constitutional law) issues this plan engenders, it will also likely threaten the fundamental and alienable constitutional right to exclusive private property, a central tenet of collective individualism upon which this great nation was founded.

The U.S. Supreme Court has long grappled with overly aggressive regulations used in the exercise of a state or municipal government's 'police' and/or 'eminent domain' powers. Indeed, many such rules have proliferated in recent years under the guise of environmental or economic blight. Some have mandated significant new private plant and equipment investments or imposed substantial environment-related product and plant use restrictions to address perceived environmental, health and safety hazards. And, others have authorized the dispensation of public funds for economic redevelopment of perceived 'economically blighted' areas to serve an ostensible public good. However, in the end, they serve only to benefit some private interests at the expense of others – i.e., they have had the effect of disenfranchising many small businesses and homeowners. Admittedly, Supreme Court jurisprudence in this area has been less than clear; one need only ask the Connecticut residents who were victimized as the result of the Court's twisted reasoning in last year's *Kelo*[1] decision.

Furthermore, many other citizens throughout the United States have faced similar types of disguised governmental 'economic and environmental blight'-premised measures. Some of them have already lost their homes and small businesses, while others now fear such loss. In fact, enough Americans, at this point, have become sufficiently outraged by what they perceive to be the steady erosion of their constitutionally guaranteed individual private property rights, at the hands of wealth redistribution-minded government officials, that they have appealed to President Bush to step into the political fray.

And the President has complied, with the issuance last week of a new Executive Order, "Protecting the Property Rights of the American People".[2] This E.O. makes clear, as a matter of U.S. federal policy, that economic-development-related private property 'takings' entitled to just compensation must actually serve a 'general public use'. In other words, a government cannot take away one private party's (citizen's) property ownership or use "merely for the purpose of [directly, or indirectly,] advancing the economic interest of [other] private parties [citizens]…"[3] By issuing this new E.O., President Bush's policy has largely remained consistent with, and has expanded the scope of, a prior E.O. issued by former President Ronald Reagan during March 1988.

Executive Order 12630, "Presidential Executive Order 12630 Governmental Actions and Interference With Civil Constitutionally Protected Property Rights", recognized that "governmental actions that do not formally invoke the [eminent domain] condemnation power, including regulations, may [in fact] result in a taking for which just compensation is required."[4] It also established broad guidelines that the General Accounting Office subsequently found had been essentially abandoned during the Clinton era.[5] Generally speaking, these guidelines require officials to consider whether governmental 'actions' and 'policies' could have 'takings' implications *before* rather than after *they are pursued*, i.e., to perform a 'takings impact assessment' where there is a high probability that a government action or policy could affect the use of any real or personal property.

Interestingly, E.O. 12630 also ses forth a standard to determine whether environment, health and safety (EHS) regulations so affect the value and/or beneficial use of private property as to be

deemed a 'taking' for public use that is also entitled to just compensation. The governors of the states of California, Oregon, Washington, New York, New Jersey, Massachusetts, Vermont, New Hampshire, Connecticut, Delaware and Maryland, would do well to consider these guidelines prior to adopting/or implementing the strict carbon dioxide and other greenhouse gas emissions caps, renewable portfolio standards, and energy efficiency and conservation requirements they are now contemplating.

This E.O. predates the current international debate about whether expensive European-style (socialist) regulations based on the nonscientific principle of precaution ('better safe than sorry') should also be adopted as the basis for U.S. regulation. Nevertheless, it eerily seems to have anticipated it. "…[T]he mere assertion of a public health and safety purpose is insufficient to avoid [having the regulation deemed] a taking…Actions…asserted to be for the protection of public health and safety, therefore, should be undertaken *only in response to real and substantial threats* to public health and safety, be designed to advance significantly the health and safety purpose, *and* be no greater than is necessary to achieve the health and safety purpose" (emphasis added).[6]

All politicians should take note, as have these executive orders, that the U.S. Supreme Court has continued to find that such laws, regulations and policies will qualify as illegal 'takings' of private property, even where *other than* total beneficial use and enjoyment of private property has been impaired. This admonition applies to the now-centrist-leaning California Governor, Arnold Schwarzenegger, who is one of the Western Governors' Clean Energy Plan's chief supporters, and especially, also to his Democratic opponent Phil Angelides. Mr. Angelides, who is a very rich land developer, and perhaps, even a renewable energy source investor, is not unfamiliar with how to exploit regulations that redesign the economic and environmental landscape for his and his political allies' private benefit. And, should he be elected California's governor, Mr. Anglides is even more determined than the Governator to use the *Kelo* decision as the portal through which to catapult the state and the region into a grand new universe of regulatory 'takings' that benefit some private property owners at the expense of others.

This raises an important question: If Californians and other westerners embrace the governors' clean energy plan as the recommended solution to their perceived global warming problems, how many of them will later find themselves bidding farewell ("*Hasta la vista, baby!"*) to their private property rights, which is more than possible, or to the threat of global warming and foreign energy dependence, which is not?

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[1] *Susette Kelo, et al. v. City of New London,* 545 U. S. ____ (2005). The decision is accessible at: (http://www.law.cornell.edu/supct/pdf/04-108P.ZO).
[2] *See* "Executive Order: Protecting the Property Rights of the American People," Sec. 1 ___ FR ___ (6/23/06), at: (http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html).
[3] *Ibid*., Section 1.
[4] Section 3(b) of E.O. 12630 provides that "…[R]egulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature." *See* "Presidential Executive Order 12630 - Governmental Actions and Interference With Civil Constitutionally Protected Property Rights", 53 FR 8859 (3/15/88), at: (http://www.blm.gov/nhp/news/regulatory/EOs/eo_12630.html).
[5] These guidelines were subsequently updated to reflect more recent case law following a 2003 review by the General Accounting Office which found that federal agencies had conducted few takings implications assessments, pursuant to Executive Order 12630. *See* "Regulatory Takings: Implementation of Executive Order On Government Actions Affecting Private Property Use", United States General Accounting Office Report to the Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives (Sept. 2003), at: (http://www.gao.gov/new.items/d031015.pdf).
[6] *See* Section 3(c), Presidential Executive Order 12630.