

The Anti-Energy Litigation of the State Attorneys General

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Introduction

- While several State legislatures are considering or passing bills to regulate carbon dioxide (CO₂), the principal greenhouse gas targeted by the Kyoto Protocol, seven Attorneys General (AGs) are threatening to sue U.S. EPA Administrator Christine Todd Whitman, under the Clean Air Act, unless she agrees to promulgate nationwide controls on CO₂.
 - In two recent notices of intent to sue, the AGs of CT, MA, ME, NY, NJ, RI, and WA assert that Whitman has a “mandatory duty” to regulate CO₂.
 - In effect, the AGs claim the Clean Air Act compels Whitman to implement the Kyoto Protocol—a non-ratified treaty.
- Far from it being EPA’s duty to regulate CO₂, EPA has no authority to do so. The plain language, structure, and legislative history of the Clean Air Act demonstrate that Congress never delegated such power to EPA.

The Pro-Kyoto AGs

- On July 17, 2002, Thomas F. Reilly (MA), Bruce M. Botelho (AK), Bill Lockyer (CA), Richard Blumenthal (CT), G. Steven Rowe (ME), J. Joseph Curran, Jr. (MD), Philip T. McLaughlin (NH), David Samson (NJ), Elliott Spitzer (NY), Sheldon Whitehouse (RI), and William Sorrell (VT) sent President Bush a letter threatening to balkanize U.S. energy markets unless he agrees to implement nationwide controls on CO₂. http://www.ago.state.ma.us/press_rel/climate.pdf.
- On January 30, 2003, Thomas F. Reilly (MA), Richard Blumenthal (CT), and G. Steven Rowe (ME) filed a notice of intent to sue Whitman under Section 108 of the CAA unless she agrees to begin the process of setting national ambient air quality standards (NAAQS) for CO₂. <http://www.maine.gov/ag/pr/climatechangenoi.pdf>.
- On February 20, 2003, Thomas F. Reilly (MA), Elliott Spitzer (NY), Richard Blumenthal (CT), G. Steven Rowe (ME), Peter Harvey (NJ), Patrick Lynch (RI), and Christine O. Gregoire (WA) filed a notice of intent to sue Whitman under Section 111 of the CAA unless she agrees to promulgate new source performance standards (NSPS) for CO₂ emissions from power plants. http://www.oag.ny.us/press/2003/feb/whitman_letter.pdf.

Begging the Key Question

- Nowhere in either notice do the AGs address the key question:
 - Did Congress ever delegate to EPA the power to regulate CO₂? When Congress enacted and amended the CAA, did it intend for EPA to set up a mandatory greenhouse gas control program?
- The delegation question is paramount because, “ [i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.” [Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)] Indeed, “an agency literally has no power to act ... unless and until Congress confers power upon it.” [Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986)]
- Art. 1, Sec. 1: “All legislative powers herein granted shall be vested in a Congress of the United States...”

Authority to regulate CO2: conspicuously absent by its absence

- The AGs somehow miss the obvious. The Clean Air Act (CAA) provides distinct grants of authority to administer specific programs for specific purposes. It authorizes EPA to administer a national ambient air quality standards program, a hazardous air pollutant program, a stratospheric ozone protection program, an acid rain control program, and so on.
- Nowhere does it even hint at establishing a climate protection program.
- There is no subchapter, section, or even subsection on global climate change. The terms “greenhouse gas” and “greenhouse effect” do not occur anywhere in the Act.

Conspicuously absent: CO₂ not mentioned in Act's regulatory provisions

- If Congress intended for EPA to administer a regulatory climate program, we would expect to find the terms “carbon dioxide” or “global warming” somewhere in the Act's regulatory provisions. They do not appear in any regulatory provision.
- When Congress wants EPA to regulate a substance, it has no trouble naming names and compiling lists. Sections 107-109 list six “criteria” pollutants (carbon monoxide, nitrogen oxides, ozone, sulfur dioxide, particulates, and lead) to be controlled under the NAAQS program. Section 112 lists 189 toxic substances to be controlled under the hazardous air pollutants (HAPs) program. Section 602 lists 53 chemicals to be controlled under the stratospheric ozone protection program.

Conspicuously absent: intentional

- ⑩ “Carbon dioxide” and “global warming” do appear once—in non-regulatory provisions of the CAA (about which, more below). The Supreme Court has held that, “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” [General Motors Corp. v. U.S., 496 U.S. 530, 538 (1990)]
- ⑩ Carbon dioxide’s “disparate exclusion” from the CAA’s regulatory provisions cries out for explanation. After all, CO₂ is not some arcane or newly discovered compound, but a gas emitted in vastly greater amounts than all of the substances listed for regulation. Scientists have known about CO₂’s potential to enhance the greenhouse effect since the 19th century, and Congress has taken an interest in climate change since the late 1970s. It is difficult to avoid the conclusion that Congress acted “intentionally and purposely” when it did not include CO₂ in the Act’s regulatory provisions.

AGs' case rests on “definitional possibilities”

- Lacking even vague statutory language to point to, the AGs build their case on the “definitional possibilities” of words taken out of context—a notoriously poor guide to congressional intent. [FDA v Brown & Williamson, p. 133]
- “Ambiguity is a creature not of definitional possibilities but of statutory context.” [Brown v. Gardner, 513 U.S. 115, 118 (1994)]

Synopsis of AGs' argument

1. CAA Section 302(g) defines "air pollutant" as "any ... substance which is emitted into or otherwise enters the ambient air." CO2 fits that definition, and is, moreover, identified as an "air pollutant" in Section 103(g)
2. Sections 108 and 111 require EPA to "list" a pollutant for regulatory action if the Administrator determines that it "may reasonably be anticipated to endanger public health and welfare."
3. The Bush Administration's *Climate Action Report 2002* projects adverse public health and welfare effects from human-induced global warming, and EPA contributed to the report.
4. Therefore, Administrator Whitman must initiate a rulemaking for CO2.

Definitional possibilities don't cut it – “air pollutant”

- ⑩ The AGs' argument may seem like a tight chain of reasoning. In reality, it is mere wordplay, a sophomoric attempt to turn statutory construction into a game of “gotcha.”
- ⑩ The CAA classifies CO₂ as an “air pollutant” only in the technical sense of a “substance emitted into ... the ambient air.” No delegation of regulatory authority can be inferred from the fact that CO₂ meets an abstract definition of “air pollutant” that applies equally well to oxygen and water vapor.
- ⑩ Indeed, the very text cited by the AGs—Section 103(g)—admonishes EPA not to infer such authority. 103(g) concludes: “Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements.” If **nothing** in 103(g) can authorize the imposition of control requirements, then the passing reference therein to CO₂ as an “air pollutant” cannot do so.

Definitional Possibilities—“health & welfare” (CFCs)

- As to the phrase “endanger public health and welfare,” it proves too much. It applies equally well to many substances that EPA does not—and may not—regulate under Sections 108 and 111.
- Section 108 provides authority for EPA to set national ambient air quality standards (NAAQS), which determine allowable emission concentrations for certain pollutants. Section 111 provides authority for EPA to set new source performance standards (NSPS), which determine allowable emission rates for certain pollutants from new stationary sources.
- EPA regulates 53 ozone-depleting substances under Title VI, and 189 hazardous air pollutants under Section 112. Such substances are emitted into the ambient air, and are believed to endanger public health and welfare. By the AGs’ “definitional” logic, EPA could dispense with Title VI and Section 112, and just use Sections 108 and 111—a ridiculous proposition plainly at odds with congressional intent.

Words out of context

- ⑩ To interpret a statute, one must read the words not “in isolation” but in their “statutory context” [*FDA v. Brown & Williamson*, p. 133]. The AGs cite Section 103(g)’s reference to CO₂ as an “air pollutant,” but ignore the key contextual facts.
- ⑩ 103(g) is the **only** CAA provision to mention CO₂. It is a **non-regulatory** provision (it directs the Administrator to develop “non-regulatory strategies and technologies” for controlling air emissions). As noted, it admonishes EPA not to infer pollution control “requirements.”
- ⑩ The AGs say nothing at all about Section 602(e), the CAA’s **sole** reference to “global warming.” 602(e) is also a **non-regulatory** provision (it directs the Administrator to “publish”—i.e., research—the “global warming potential” of ozone-depleting substances). It, too, concludes with a caveat: “The preceding sentence [concerning global warming potential] shall not be construed to be the basis of any additional regulation under [the CAA].”

Words in context

- So there you have it. When the CAA mentions “carbon dioxide” and “global warming,” it does so only in the context of non-regulatory provisions, and each time cautions EPA not to infer authority for “control requirements” or “additional regulation.”

A NAAQS for CO₂?

- ⑩ The AGs of Connecticut, Massachusetts, and Maine contend that EPA must begin the process of setting national ambient air quality standards for CO₂. However, the NAAQS program, with its state-by-state implementation plans, and county-by-county attainment and non-attainment designations, targets pollutants that vary regionally and even locally in their ambient concentrations.
- ⑩ The NAAQS program has no rational application to a gas, such as CO₂, which is well mixed throughout the global atmosphere.

NAAQS program: no rational application to CO2

- Consider the possibilities. If EPA set a NAAQS for CO2 above current atmospheric levels, then the entire country would be in attainment, even if U.S. hydrocarbon fuel consumption suddenly doubled. Conversely, if EPA set a NAAQS for CO2 below current levels, the entire country would be out of attainment, even if all power plants, factories, and cars were to shut down. If EPA set a NAAQS for CO2 at current levels, the entire country would be in attainment—but only temporarily. As soon as global concentrations increased, the whole country would be out of attainment, even if U.S. emissions fell by 100 percent.
- ⑩ Since even a multilateral regime like Kyoto would barely slow the projected increase in CO2 concentrations, it is incomprehensible how any state implementation plan could “specify the manner in which primary [health] and secondary [welfare] ambient air quality standards will be achieved and maintained ***within each air quality region of such State***” (emphasis added), as required by CAA Section 107(a).

Absurd exercise in futility

- When certain words in a statute lead to results that are “absurd or futile,” or “plainly at variance with the policy of the legislation as a whole,” the Supreme Court follows the Act’s “policy” rather than the “literal words” [United States v. American Trucking Ass’n, 310 U.S. 534, 543 (1939)].
- Attempting to fit CO2 into the NAAQS regulatory structure would be an absurd exercise in futility and plainly at variance with the Act’s policy of targeting place-specific air quality problems.
- Strong evidence that, when Congress enacted Section 108, it did not intend for EPA to regulate CO2.

Flunking Legislative History

- ⑩ When the Senate passed its version of the 1990 CAA Amendments (S. 1630), it declined to adopt a provision that would have established CO2 emission-rate standards for automobiles.
- ⑩ House and Senate conferees subsequently deleted provisions that would have made “global warming potential” a basis for regulating “manufactured” substances, and that would have established a new national goal: “to reduce to the maximum extent possible emissions of other gases caused by human activities that are likely to affect adversely the global climate.”
- ⑩ In short, when Congress last amended the CAA, it considered and rejected regulatory climate protection strategies. The AGs do not have a leg to stand on. As the Supreme Court has stated: “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language” [INS v. Cardozo-Fonseca, 480 U.S. 421, 442-43 (1983)].

Flunking Again

- What about Section 111—does Whitman have a duty to establish performance standards for CO2 emissions from power plants? Not a chance. Congress enacted Section 111 in 1970—before global warming was even a gleam in Al Gore’s eye. At no point in the deliberations on the 1990 CAA Amendments did Congress even consider proposals to apply the NSPS program to global warming.
- In the 105th, 106th, and 107th Congresses, Sen. Patrick Leahy introduced legislation to amend Section 111 and set performance standards for CO2 emissions from power plants. Each time the bill failed to attract even one co-sponsor. The AGs would have us believe Congress implicitly enacted the substance of Leahy’s three-time loser back in 1970. The phrase “laughed out of court” was invented for just such inanities.

Related Legislative History

- ⑩ Congress has debated climate change issues for two decades. When Congress has legislated in this area, it has authorized the executive branch to engage in research (USGCRA), administer voluntary programs (EPA Act 1604, 1605), and conduct international negotiations.
- ⑩ It has consistently rejected or declined to adopt legislative proposals to regulate CO₂. Examples:
 - ⑩ 1992 Energy Policy Act—Congress rejected Cooper-Synar language to require major CO₂ emitters to purchase carbon offset credits or pay fines, and Sen. Wirth's language to require an energy strategy designed to achieve "maximum...practicable" reductions of CO₂.
 - ⑩ Neither House nor Senate has ever voted on, much less passed, a multi-"pollutant" bill.
- ⑩ Congress has passed measures prohibiting the types of policies the AGs espouse.
 - ⑩ Byrd-Hagel resolution
 - ⑩ Knollenberg funding restriction

Dingell knows best

- ⑩ “Based on my review of this history and my recollection of the discussions, I would have difficulty concluding that the House-Senate conferees, who rejected the Senate regulatory provisions ... contemplated regulating greenhouse gas emissions or addressing global warming under the Clean Air Act.” - Rep. John Dingell (D-MI), letter to Rep. David McIntosh (R-IN), October 5, 1999.
- The UN Framework Convention on Climate Change remains the most authoritative expression of congressional intent on climate policy. “That Convention is, of course, not self-executing, and the Congress has not enacted implementing legislation authorizing EPA or any other agency to regulate greenhouse gases.” – Rep. Dingell

Junk science doesn't cut it, either

- Has Whitman “determined” that CO2 emissions endanger public health and welfare, as the AGs claim? The Bush Administration’s *Climate Action Report 2002* (CAR) is an alarmist document, and EPA contributed to it. However, the CAR’s scary climate scenarios summarize the Clinton Administration report, *Climate Change Impacts on the United States* (CCIOUS). The Bush Administration, in response to litigation by CEI, Sen. James Inhofe (R-OK), and others, agreed that the CCIOUS climate scenarios are “not policy positions or statements of the U.S. Government.”
- ⑩ Both CAR and CCIOUS rely on two non-representative climate models—the “hottest” and “wettest” out of some 26 available to Clinton-Gore officials. In addition, as Virginia State Climatologist Patrick Michaels discovered, and NOAA scientist Thomas Karl confirmed, the two underlying models (U.K. and Canadian) could not reproduce past U.S. temperatures better than a table of random numbers. The CAR thus flunks Federal Data Quality Act standards for utility and objectivity. Any rulemaking based on it could be challenged as arbitrary and capricious.

Bad science and bad legal opinions: no mandate for bad policy

- The AGs try to trap Whitman by invoking positions EPA has previously taken.
 - The EPA (as per the CAR) has said CO2 emissions endanger public health and welfare.
 - EPA, under the Clinton-Gore Administration, claimed authority to regulate CO2. (The AGs' legal argument is largely a rehash of opinions put forward by Clinton-Gore EPA General Counsels Jonathan Cannon and Gary Guzy. Clinton-Gore was a pro-Kyoto administration. It is hardly surprising that Clinton-Gore lawyers adopted opinions that would authorize EPA to implement Kyoto-style policies even though Kyoto is a non-ratified treaty.)
- Bad science and bad legal opinions cannot obligate Whitman to make bad policy.

Partisan Politics & Economic Warfare

- All seven AGs are Democrats.
- Coal's share of electricity:
 - AGs' States: Connecticut (12%), Maine (8%), Massachusetts (30%), New Jersey (17%), New York (18%), Rhode Island (0%), Washington (9%)
 - Many States get much or most of their electricity from coal: AL (62%), AZ (46%), AR (55%), CO (81%), DE (69%), GA (64%), IL (46%), IN (95%), IO (84%), KA (72%), KY (97%), MD (57%), MI (56%), MN (56%), MO (82%), MN (56%), NE (63%), NV (53%), NM (86%), NC (63%), ND (93%), OH (87%), OK (64%), PA (59%), TN (65%), UT (95%), VA (52%), WV (98%), WI (71%), (WY 96%)
- CO2 regulation would make coal generation—and the industries dependent on it—less (or non-) competitive.

Transparent power grab

- It is not difficult to see what the AGs stand to gain if EPA classifies CO₂ as a regulated pollutant. Instantly, tens of thousands of hitherto law-abiding and environmentally responsible businesses (indeed, all fossil fuel users) would become “polluters.” The number of firms potentially in violation of the CAA would vastly increase. Since states have primary responsibility for enforcing the CAA, the AGs’ prosecutorial domain would grow by orders of magnitude.
- ⑩ The AGs’ notices of intent to sue create a test of leadership for Whitman. They put her in a cross fire between President Bush, who opposes Kyoto, and the EPA career bureaucracy, which has long sought the power to regulate CO₂. Whitman should relish this challenge. The AGs have unwittingly handed her an opportunity to refute their arguments and, by so doing, avert an era of anti-energy litigation.

No shame

- July 17, 2002 letter: “A recent Department of Energy Report concluded that the United States could address carbon dioxide emissions issues with minimal disruption of energy supply and at modest cost, but only with fully integrated planning.”
- In the study cited, EIA analyzed the consumer and energy market impacts of the emission caps in Sen. Jeffords’s (I-VT) Clean Power Act. The proposed CO2 cap would require power producers to reduce emissions to 1990 levels by 2008.
- According to EIA, by 2020, Jeffords’s caps would: (1) increase electricity prices 33%; (2) increase natural gas prices 22%; (3) add \$177 billion to producers’ cumulative costs; and (4) eliminate 55% of electricity generation from coal. These costs are not “modest.”

Balkanization Strategy...

- AGs' July 17, 2002 letter: "To fill this regulatory void, states and others are being forced to rely on their available legal mechanisms. The resulting state-by-state regulations and litigation will necessarily lessen regulatory certainty and increase the ultimate costs of addressing climate change, thereby making the purported goals of the Administration's current policy illusory."
- Translation: If Bush does not adopt national energy suppression regulations, then states will adopt a patchwork of uncoordinated regulations. In other words, if Bush refuses to harm the economy, then the AGs and their allies will mess it up even worse.

...won't work—Bush should call their bluff

- States can only go so far in adopting Kyoto-style policies before the economic burdens become prohibitive—and obviously so.
- As expensive as a national program to implement Kyoto would be, state-level efforts to go it alone would be much more costly. States would be unable to take advantage of lower marginal cost opportunities outside their borders, would have to rely more on command-and-control style regulations rather than emissions trading, and would lose investment and jobs to other states with more energy-friendly policy regimes.
- A new study by the Heartland Institute estimates the following impacts of state attempts to reduce GHG emissions 7% below 1990 levels by 2008-2012: Annual revenue losses to state treasuries range from VT's \$245 million to CA's \$16.4 billion; annual consumer costs range from VT's \$149 million to CA's \$8.2 billion. Revenue losses would likely exceed the projected budget deficits of six of the states with the largest projected deficits—New York, New Jersey, Ohio, Massachusetts, Wisconsin, and Illinois.
- If Bush stays the course (and Congress does not enact energy rationing), competitive federalism will penalize and discipline on policymakers that wreck their states' economies.