

# A Court Rules Prudently... for Now

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In the latest setback for global warming activists, the federal Court of Appeals for the DC Circuit ruled last Friday that the Clean Air Act does not require the Environmental Protection Agency to regulate greenhouse gas emissions from motor vehicles. The Court did not decide whether the Clean Air Act (CAA) gives EPA the authority to regulate greenhouse gases (GHG), but merely that, in choosing not to regulate GHGs, EPA made a policy call that was within its legitimate legal discretion.

The [Court's ruling](#) came in response to a [petition](#) from a dozen states' attorneys general, ten environmental groups, and three cities, who are attempting to mandate national GHG reductions through the courts. The goal is to effectively implement the Kyoto Protocol without the approval of Congress or the President.

The ruling is good news for those who believe GHG regulations would harm Americans' prosperity, health, and freedom. However, because the Court's ruling was on such narrow grounds, the victory is cause for only a brief celebration. The Court did not address the fundamental issues of whether EPA has legal authority to regulate GHG emissions and whether the Petitioners have standing to file suit in the first place. Both questions are likely to return in some future case.

Does EPA have the authority to regulate GHGs? We won't know for sure until a court rules on the subject. But there are at least two issues that must be decided. First, are carbon dioxide (CO<sub>2</sub>) and other GHGs "air pollutants" for the purposes of the Clean Air Act? Second, the CAA requires EPA to regulate air pollution that threatens public health and welfare. Does that authority include perceived threats due to global climate change?

Title II of the Clean Air Act gives EPA the authority to regulate air pollution from motor vehicles. [Section 202\(a\)\(1\)](#) states:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

[Section 302\(g\)](#) of the Act defines an "air pollutant" as

any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive...substance or matter which is emitted into or otherwise enters the ambient air.

The attorneys general and environmentalists pursuing the case asked the court to interpret the term "air pollutant" in its broadest conceivable meaning. But by the Petitioners' definition oxygen, nitrogen, and water are air pollutants, as they all "enter the ambient air" due to the same human activities that emit CO<sub>2</sub> and air pollution. The fact that the Petitioners' definition of air pollution leads to such an absurd result suggests that it couldn't have been what Congress intended when it adopted the nation's clean air laws.

Congress presumably used the term "air pollution" in its ordinary meaning -- something that contaminates or fouls the air, making it harmful to breathe. CO<sub>2</sub>, like oxygen, nitrogen, and water, is not an air pollutant under this definition. Indeed, for the last 40 years the goal of automobile emissions control has been to achieve ever greater efficiency in converting air pollutants -- carbon monoxide, hydrocarbons, and oxides of nitrogen -- into CO<sub>2</sub>, water, and nitrogen exactly because the latter three substances are *not* air pollution.

A number of other features of the Clean Air Act suggest that Congress did not intend the Act's provisions to apply to GHGs. First, the CAA's system for reducing air pollution, as detailed in [Title I](#) of the Act, is premised on the idea that air pollution problems are regional in nature and should be addressed through state and local planning to bring "non-attainment areas" into compliance with federal standards. Furthermore, there is a relatively rapid response between reductions in air pollutants and their precursors and ensuing reductions in ambient pollution levels. In contrast, CO<sub>2</sub> diffuses globally and current reductions in CO<sub>2</sub> take decades to have an effect on ambient CO<sub>2</sub> levels.

Second, the "criteria" air pollutants -- ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter -- are mentioned many times under many specific regulatory provisions of the Act. The CAA also lists 188 "hazardous air pollutants" and prescribes that they will be controlled through "maximum achievable control technology."

On the other hand, CO<sub>2</sub> is mentioned only a few times, and never under a regulatory provision. In his dissenting opinion, Judge David Tatel, who would have required EPA to regulate motor vehicle GHG emissions, highlighted the fact that CO<sub>2</sub> is explicitly listed as an air pollutant in [Section 103\(g\)](#) of the CAA. But this section merely requires EPA to do research on "non-regulatory" strategies for reducing emissions from "stationary sources." Furthermore, Section 103(g) also cautions "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements."

Third, Congress has given the National Highway Traffic Safety Administration (NHTSA) sole authority to set motor vehicle fuel economy (CAFE) standards. Under its [legislative mandate](#), NHTSA must consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." These factors reflect

tradeoffs among "environmental [policy]...engineering design, safety, national energy policy, international competitiveness, and trade."[\[1\]](#)

EPA, unhindered by these tradeoffs, would require much larger CO<sub>2</sub> reductions than required by CAFE, rendering NHTSA's authority over fuel economy meaningless. Presumably, if Congress intended EPA to be able to override NHTSA's fuel economy authority it would have expressly said so. But Congress did just the opposite. During debate on the 1990 Clean Air Act Amendments, Congress specifically considered and rejected a bill (S. 1630; Baucus) that would have required EPA to set CO<sub>2</sub> emission standards for motor vehicles.[\[2\]](#)

Fourth, Congress generally creates specific CAA authorities when it wants EPA to regulate particular emissions. For example, the CAA includes specific authority to regulate ozone-depleting substances and specific requirements to reduce emissions of expressly listed hazardous air pollutants. But Congress has never created similar express authority regarding GHG emissions.

We depend on fossil-fuel energy for virtually every aspect of our lives, and CO<sub>2</sub> emissions are intrinsic to fossil-fuel energy. The power to regulate CO<sub>2</sub> emissions is therefore the power to regulate just about all human activity. It seems inconceivable that Congress could have intended to give EPA such extraordinary power with a few vague statements in an air pollution law.

Nevertheless, while it might seem to us out in the real world that Congress hasn't given EPA authority over GHGs, the legal world often follows arcane rules that have no counterpart in everyday experience. Call it the quantum mechanics of jurisprudence. Words and phrases have only probabilistic meanings until a court makes a ruling and collapses the judicial wave function.

The Supreme Court recently ruled that the federal government can regulate medical marijuana under the federal interstate commerce power, even if the marijuana never crosses state lines and no money changes hands, and that the Fifth Amendment's "public use" clause allows governments to seize private property from some people and transfer it to other, better-connected people.

With decisions like these, it isn't too difficult to imagine a court coming down in favor of GHG authority for EPA. Indeed, David Tatel, the dissenting judge in last Friday's decision, thought EPA's authority to regulate CO<sub>2</sub> was a slam dunk.

Opponents of GHG regulations should also be concerned that EPA has shown itself to be a somewhat lax defendant. The attorneys general and environmentalists who petitioned for GHG regulations submitted declarations by climate scientists predicting all manner of future harms -- flooding, drought, infectious disease, heat-related mortality -- due to EPA's failure to regulate emissions. EPA did not attempt to rebut these claims or to put forward a more realistic view of the weight of the climate-change evidence. EPA also weakened its defense by refusing to put forth a definition of air

pollution.

Proponents of GHG regulation are tenacious and single-mindedly committed to their goals. But the Bush Administration is not single-mindedly committed to preventing GHG regulation. Rather, various factions in the Administration pursue, with varying degrees of vigor, a number of different and sometimes contradictory goals at the same time.

Many career EPA employees no doubt want very much to regulate GHG emissions and political appointees can exert only so much control over the career staff. The Bush Administration itself, whether for reasons of politics or ignorance, has also given intellectual ground to alarmists in the climate change debate. EPA has good bureaucratic reasons for not wanting to define what constitutes an air pollutant, as this could constrain the agency's actions in other arenas besides climate change. Better to leave the definition vague and thereby maintain maximum flexibility and discretion. Because of these conflicts, regardless of who is in the White House, the best legal and scientific arguments against GHG regulations will continue to come from outside the government.

The power to regulate greenhouse gases is the power to ration energy and thereby exert great power over people's quality of life. Hopefully, the courts will continue to find that current law does not grant EPA authority over GHG emissions. But given the vagaries of judicial decisions about complex laws like the Clean Air Act, Americans' best protection against energy rationing may lie with clearer statutory direction from Congress.

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[1] From the Senate Report on the legislation (S. Rep. No. 101-228, 439, 1990 U.S.C.C.A.N. 3385, 3920), cited in Congressman John Dingell's Amicus Brief in the case.

[2] 136 Congressional Record 6479 (1989), cited in Dingell's Brief.