# Environmental Law

## The Anti-Energy Litigation of the State Attorneys General

*By Marlo Lewis, Jr.**

Does Section 108 of the Clean Air Act (CAA) impose a "mandatory duty" on the Environmental Protection Agency to regulate carbon dioxide ($CO_2$), the principal greenhouse gas targeted by the Kyoto Protocol?

"Yes," claim the attorneys general (AGs) of Connecticut, Massachusetts, and Maine in a recent (June 4, 2003) lawsuit against the U.S. Environmental Protection Agency (EPA). The same AGs, joined by their counterparts in New York, New Jersey, Rhode Island, and Washington, have also filed a notice of intent to sue EPA for "failing" to regulate $CO_2$ under Section 111 of the CAA. In effect, the AGs assert that the Clean Air Act compels EPA to implement the Kyoto Protocol—a non-ratified treaty.

However, far from it being EPA's duty to regulate $CO_2$, 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.[1]

The 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, and so on. Nowhere does it even hint at establishing a climate change prevention program. There is no subchapter, section, or even subsection on global climate change. The terms "greenhouse gas" and "greenhouse effect" do not appear anywhere in the Act.

**Definitional Possibilities Don't Cut It**

Lacking even vague statutory language to point to, the AGs build their case on "definitional possibilities" of words taken out of context—a notoriously poor guide to congressional intent.

The AGs argue as follows:

1. CAA Section 302(g) defines "air pollutant" as "any…substance or matter which is emitted into or otherwise enters the ambient air." $CO_2$ fits that definition, and is, moreover, identified as an "air pollutant" in Section 103(g).
2. Sections 108 and 111 require EPA to "list" an air 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 health and welfare impacts from $CO_2$-induced global warming, and EPA contributed to that report.
4. Hence, EPA must initiate a rulemaking for $CO_2$.

The AGs' argument may seem like a tight chain of reasoning, but it is not. No delegation of regulatory authority can be inferred from the fact that carbon dioxide meets an abstract definition of "air pollutant" that applies equally well to oxygen and water vapor. Indeed, the very text cited by the AGs—Section 103(g)—admonishes EPA not to infer such authority. That provision concludes: "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." If *nothing* in Section 103(g) can authorize the imposition of control requirements, then the passing reference therein to $CO_2$ as an "air pollutant" cannot do so.

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 gives EPA authority to set national ambient air quality standards (NAAQS), which determine allowable emission concentrations for certain pollutants. Section 111 gives EPA authority 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 of the CAA, 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.

Congress amended the CAA and added Title VI and Section 112 precisely because existing authorities—including Sections 108 and 111—were unsuited to the tasks of controlling hazardous emissions and protecting stratospheric ozone. Congress would have to amend the Act again before EPA could implement a regulatory climate change prevention program.

**Ignoring Context**

To interpret a statute, one must not only read the words, but also pay attention to where they occur—their context [*Food and Drug Administration v. Brown and Williamson*, 529 U.S. 133 (2000)]. If Congress intended for EPA to regulate $CO_2$, we would expect to find "carbon dioxide" mentioned in one or more of the CAA's regulatory provisions. The AGs note that Section 103(g) describes $CO_2$ as an "air pollutant." However, they omit to say that 103(g), which contains the CAA's

sole reference to "carbon dioxide," is a non-regulatory provision. It directs the Administrator to develop "non-regulatory strategies and technologies" for preventing or reducing emissions of "multiple air pollutants," including, among others mentioned, $CO_2$.

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)].

Carbon dioxide's "disparate exclusion" from the CAA's regulatory provisions cries out for explanation. After all, $CO_2$ is not some arcane or newly discovered compound, but a gas emitted in vastly greater quantities than any of those listed for regulation in, for example, Sections 107-109, Section 112, or Title VI. Moreover, the potential of $CO_2$ emissions to enhance the natural greenhouse effect has been known to scientists since the 19th century, and Congress has taken an interest in the subject since the late 1970s. It is difficult to avoid the conclusion that Congress acted "intentionally and purposely" when it did not mention "carbon dioxide" in the CAA's regulatory provisions.

The AGs make no reference to Section 602(e), which contains the CAA's sole reference to "global warming." It, too, is a non-regulatory provision. It directs the Administrator to "publish" (i.e., research) the "global warming potential" of ozone-depleting substances. Section 602(e) also ends with a caveat: "The preceding sentence [referring to "global warming potential"] shall not be construed to be the basis of any additional regulation under this chapter [i.e., the CAA]."

The two caveats against inferring regulatory authority—one following the CAA's sole mention of "carbon dioxide," the other following the sole mention of "global warming"—are a matched pair. Since Congress adopted both provisions in 1990, we may presume that the pairing is deliberate. In any event, the CAA mentions carbon dioxide and global warming only in the context of non-regulatory provisions, and in each instance admonishes EPA not to construe the law as the AGs profess to construe it.

**Exercise in Futility**

The AGs of Connecticut, Massachusetts, and Maine contend that EPA must begin the process of setting national ambient air quality standards for carbon dioxide. 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. The NAAQS program has no rational application to a gas such as $CO_2$, which is well mixed throughout the global atmosphere.

Consider the possibilities. If EPA set a NAAQS for $CO_2$ above current atmospheric levels, then the entire country would be in attainment, even if U.S. hydrocarbon fuel consumption were to suddenly double. Conversely, if EPA set a NAAQS for $CO_2$ 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 $CO_2$ 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 miraculously fell to zero.

Moreover, since even a multilateral regime like the Kyoto Protocol would only barely slow the increase in atmospheric $CO_2$ concentrations, it is inconceivable how any state implementation plan (SIP) could pass muster under CAA Section 107(a), which requires each SIP to "specify the manner in which national primary and secondary air quality standards will be ***achieved and maintained within each air quality control region*** in each State" *(emphasis added)*.

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 Assn*, 310 U.S. 534, 543, (1939)]. Attempting to fit $CO_2$ into the NAAQS regulatory structure would be an absurd exercise in futility, and plainly at variance with the Act's policy of devising state-level remedies for local pollution problems—powerful evidence that when Congress enacted Section 108, it did not intend for EPA to regulate $CO_2$.

**Legislative History**

Legislative history also compels the conclusion that EPA may not regulate $CO_2$. When House and Senate conferees agreed on a final version of the 1990 CAA Amendments, they discarded Senate-passed language to make "global warming potential" a basis for regulation and establish $CO_2$ reduction as a national goal. Thus, when Congress last amended the CAA, it considered and rejected regulatory climate change prevention strategies. 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. at 442-43 (1983)].

What about Section 111—does it obligate or allow EPA to establish performance standards for $CO_2$ emissions from power plants? Not a chance. In the 105th, 106th, and 107th Congresses, Senator Patrick Leahy (D-Vt.) introduced legislation to amend Section 111 and set performance standards for $CO_2$ emissions from power plants. Each time the bill failed to attract even one co-sponsor.

**Junk Science Doesn't Cut It, Either**

Has EPA "determined" that carbon dioxide emissions endanger public health and welfare, as the AGs claim? The Bush Administration's *Climate Action Report 2002* (CAR) is an alarmist document, forecasting that U.S. average tempera-

tures will rise as much as 9 degrees Fahrenheit in the 21st century, and EPA was a key contributor to the report. However, the CAR's scary climate scenarios are a rehash of the Clinton-Gore Administration's report, *US National Assessment of the Potential Consequences of Climate Variability and Change*, and the Bush Administration, in response to litigation by the Competitive Enterprise Institute, Senator James Inhofe (R-Okla.), and others, agreed that the National Assessment's climate scenarios are "not policy positions or statements of the U.S. Government."

The National Assessment/CAR climate scenarios rely on two non-representative climate models—the "hottest" and "wettest" out of some 26 models available to Clinton-Gore officials. In addition, as Virginia State Climatologist Patrick Michaels discovered, and National Oceanic and Atmospheric Administration scientist Thomas Karl confirmed, the two underlying models—British and Canadian—could not reproduce past U.S. temperatures better than could a table of random numbers. Models that cannot "hind-cast" past climate cannot be trusted to forecast future climate. At once biased and useless, the CAR flunks Federal Data Quality Act (FDQA) standards for utility and objectivity. Any rulemaking based upon it would be challengeable as arbitrary and capricious.

In any event, because the CAA provides no authority for regulatory climate strategies, EPA could not regulate $CO_2$ even if the CAR scenarios were based on credible science—which they are not.

**Power Grab**

What drives the AGs to peddle such legally challenged arguments? Partisan politics may be a factor. All seven AGs are Democrats. The $CO_2$ lawsuit will help keep the spotlight on a centerpiece of the Kerry (D-Mass.) and Lieberman (D-Conn.) presidential campaigns—criticism of the Bush Administration's non-regulatory approach to climate policy.

Regional economic warfare may also play a part. Coal is the most carbon intensive fossil fuel; $CO_2$ regulation would make coal-fired electricity—and the industries dependent on it—less competitive; and the AGs' states obtain most of their electricity from sources other than coal. Massachusetts gets 30 percent of its electricity from coal; Connecticut, 12 percent; and Maine, 8 percent. By comparison, West Virginia gets 98 percent of its electricity from coal; Kentucky, 97 percent; Indiana, 95 percent; Ohio, 87 percent; Delaware, 69 percent; Georgia, 64 percent; North Carolina, 63 percent; Pennsylvania, 59 percent; and Virginia, 52 percent. If successful, the AGs' suit would tend to shift economic power from the Midwest and Southeast to the Northeast.

Finally, the AGs would benefit personally if EPA were to classify $CO_2$ as a regulated pollutant. Instantly, tens of thousands of hitherto law-abiding and environmentally responsible businesses—indeed, all fossil fuel users—would become "polluters," and be in potential violation of the CAA. Since states have primary responsibility for enforcing the CAA, the AGs' prosecutorial domain would grow by orders of magnitude.

**Missed Opportunity**

The Bush Administration intends to fight the AGs' lawsuit, but to some extent this is a problem of the Administration's own making. Not only did the Administration publish an alarmist climate report, it apparently no longer honors its agreement with Inhofe et al. that the National Assessment climate scenarios do not represent U.S. Government policy.

Because the National Assessment/CAR climate impact scenarios flout FDQA standards of objectivity and utility, the Competitive Enterprise Institute petitioned the Administration to cease disseminating both documents. Instead of seizing this opportunity to disavow the CAR and knock down a key premise of the AGs' litigation, Administration officials have gone to bizarre lengths to preserve the report.

EPA, for example, claims it never disseminated the CAR and so cannot be compelled to cease doing so now. That is nonsense. EPA disseminates the CAR on its Web site, and conducted an extensive public notice and comment process to develop the report.

The White Office of Science and Technology Policy (OSTP), for its part, claims the National Assessment was actually produced by an "advisory committee" and, hence, is not "information" subject to review under the FDQA. That, too, is nonsense. The U.S. Global Change Research Act of 1990 assigns responsibility for production of a National Assessment report to a coordinating "council," acting through an interagency "committee," in both of which OSTP has a leadership role. Moreover, FDQA standards apply to any scientific report disseminated by federal agencies, regardless of who produced it, and OSTP transmitted the National Assessment to Congress and the President.

If victorious, the AGs' lawsuit will usher in an era of anti-energy litigation. The AGs do not deserve to win, but the Administration runs a great risk by refusing to challenge the AGs' scientific *bona fides*.

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**Footnotes**

[1] This paper is drawn from a longer treatment available at http://www.cei.org/pdf/3383.pdf. Both papers are indebted to Peter Glaser's masterful analysis, *CO2—A Pollutant?* National Mining Association Legal Foundation, October 1998, www.co2andclimate.org/Articles/1999/pollutant.htm.