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TO:James Connaughton (CN=James Connaughton/OU=CEQ/O=EOP@EOP [CEQ])
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Subject: Adler on CO2 and NE AG Potential Suits

Adler was a summer associate at K&E and is now a law professor:

Jonathan Adler

National Review Online

April 30, 2003, 10:00 a.m.
States' Hot Suits
AGs seek to force the administration's hand on global warming.

This year's brutal winter has made some New Englanders pray for global warming. Not so for the attorneys general from states in the northeast. On January 30, the Massachusetts, Connecticut, and Maine AGs announced their intention to sue the Environmental Protection Agency (EPA) to force action on climate change. Several environmentalist groups filed a similar suit last December. In both cases the plaintiffs claim that the EPA has failed to fulfill a legal obligation to regulate carbon dioxide as an "air pollutant" under the Clean Air Act (CAA).

These notices were only the beginning. On February 20, the three aforementioned AGs joined with their brethren from New York, Pennsylvania, Rhode Island, and Washington State to announce more climate-change litigation. This new suit also seeks to force federal regulation of carbon dioxide, in this case by piggybacking such controls onto overdue revisions of pollution-control requirements for industrial facilities. With each legal action the state AGs are trying to remove climate-change policy from the elected branches and thrust it into the courts.

At first blush, the AGs' case seems superficially plausible. Under the CAA, the term "air pollutant" is defined to include "any physical, chemical, [or] biological . . . substance or matter which is emitted into

or otherwise enters the ambient air." Under section 108 of the act, the EPA is required to list any such pollutant that, when emitted by numerous mobile or stationary sources, will "cause or contribute to air pollution which may reasonably be anticipated to endanger the public health or welfare." "Welfare," in turn, is defined to include effects on "weather" and "climate." Section 108 listing is important because it sets in motion a wide range of regulatory requirements. Thus insofar as carbon dioxide and other greenhouse gases are emitted from numerous automobiles and industrial facilities, and insofar as such emissions "may reasonably be anticipated" to impact the climate, it would seem that carbon dioxide must be regulated under the CAA.

The largest problem with the state AGs' arguments is that the structure, and history of the CAA make clear Congress never sought to regulate carbon dioxide or other greenhouse gases under the act. Indeed, the primary regulatory provisions triggered by a section 108 listing - the creation and enforcement of national ambient air-quality standards - are fundamentally incompatible with the regulation of greenhouse gases as such.

Section 109 requires the EPA to set national standards for all listed pollutants at the level "requisite to protect the public health" with an "adequate margin of safety." Once standards are set, states must develop "implementation plans" to ensure that all metropolitan areas within each state meet the standards by the prescribed deadlines. The premise of these provisions is that each region of the country - indeed each metropolitan area - is capable of adopting regulatory provisions capable of affecting ambient levels of the relevant pollutant so as to comply with national air-quality standards. This premise holds for traditional air pollutants, such as lead, particulate matter, and tropospheric ozone (i.e. "smog"). It does not for carbon dioxide. Indeed, there is no possible way to adopt meaningful regulation to control localized ambient concentrations of carbon dioxide. Insofar as greenhouse-gas emissions are a concern, it is due to global concentrations in the atmosphere, not their ambient concentrations.

The lack of any regulatory provisions in the CAA designed to address climate change concerns is no accident. Congress explicitly considered and rejected proposals to regulate carbon dioxide when it revised the CAA in 1990. A committee draft included provisions to regulate automotive emissions of carbon dioxide, but this provision was removed. As finally adopted, the 1990 CAA Amendments only contained provisions to study climate change and encourage various "non-regulatory" measures. Since then, numerous proposals have been introduced to regulate carbon dioxide, and none have been passed. It is simply not plausible that Congress has left such the decision whether to regulate greenhouse gases to the EPA, let alone the courts.

Even if one were to conclude that the text, structure, and history of the CAA are equivocal, the AGs would still face uphill sledding. Insofar as the text and structure of the CAA are ambiguous, federal courts will defer to the EPA's reasoned interpretation of the statute. Under the Chevron doctrine, the question before the court will be whether the EPA's construction of its statutory obligations is reasonable, not whether the state AGs' interpretation seems more plausible or will produce better policy results. This places a substantial burden on the AGs if they want to win their case.

While the AGs do not have the best legal hand, the Bush administration has not played its strongest suit. To the contrary, administration reports and actions on climate change provide underlying support to the state AGs'

claims that carbon dioxide should be considered a pollutant under the CAA. Last May, the administration released the 2002 "Climate Action Report," which embraced environmentalist claims that industrial emissions of greenhouse gases are contributing to climate change and "global mean surface air temperature and subsurface ocean temperature to rise." The report was careful to note that such conclusions are somewhat uncertain, and do not necessarily justify regulation of greenhouse-gas emissions. Nonetheless, the report weakens the EPA's claim that carbon dioxide is not a pollutant under the CAA, as do prior statements by EPA officials that embraced regulatory authority to regulate greenhouse gases.

Other Bush-administration initiatives to reduce greenhouse gas emissions further undercut the administration's position. President Bush has announced his opposition to the Kyoto Protocol, but the United States remains a signatory to the agreement, and the administration has rolled out several "voluntary" and non-regulatory climate measures. Even worse, EPA bureaucrats continue to draft agency documents suggesting the need to regulate greenhouse gases to protect "air quality." It seems as if Bush's appointees have yet to recognize the threat: If carbon dioxide is found to meet the statutory definition of a pollutant under the CAA, regulatory requirements kick in automatically, the administration's preference for non-regulatory measures notwithstanding.

A decision to regulate greenhouse gases as air pollutants would vastly increase the EPA's regulatory authority over private economic activity. Carbon dioxide is a ubiquitous byproduct of fossil-fuel energy combustion. Controlling carbon dioxide emissions would require regulating every industrial facility that burns oil, coal, or natural gas, along with all manner of agricultural practices and land-use decisions. It would further require yet another round of federal controls on automobile tailpipe emissions. If the federal government is to assume such awesome regulatory authority, the decision should be made in the halls of Congress, not a federal courthouse.

- Contributing Editor Jonathan H. Adler is an assistant professor at Case Western Reserve University School of Law.