

The Anti-Energy Litigation of the State Attorneys General: From Junk Science to Junk Law

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Summary of Key Points

- On January 30, 2003, the Attorneys General (AGs) of Massachusetts, Connecticut, and Maine filed a notice of intent to sue U.S. Environmental Protection Agency (EPA) Administrator Christine Todd Whitman unless she agrees to propose mandatory controls on emissions of carbon dioxide (CO₂), the principal greenhouse gas targeted by the non-ratified Kyoto climate treaty. The AGs assert that it is Whitman's duty, under Section 108 of the Clean Air Act (CAA or Act), to begin the process of regulating CO₂.
- Far from it being EPA's duty to regulate CO₂, EPA has no power to do so. The plain language, structure, and legislative history of the CAA demonstrate that Congress never delegated to EPA the power to regulate CO₂. The AGs furnish no textual, contextual, or historical evidence that Congress conferred such power on EPA. They simply duck the paramount question of congressional intent. Instead, the AGs argue from "definitional possibilities" of words taken out of context—a type of argument the Supreme Court shot down in *Food and Drug Administration v. Brown and Williamson* [529 U.S. 120 (2000)].
- The CAA establishes an ambient air quality program, a hazardous air pollutant program, and a stratospheric ozone protection program. Nowhere does it even hint at establishing a global warming mitigation program. It is inconceivable that on an issue of longstanding debate like global warming, Congress would authorize EPA to control CO₂—potentially the most expensive regulatory project in history—without ever once saying so in the text of the statute.
- The CAA's sole mention of "carbon dioxide" occurs in Section 103(g), which directs the Administrator to develop "non-regulatory" strategies. The CAA's sole mention of "global warming" occurs in Section 602(e), which directs the Administrator to "publish" (i.e., study) the global warming potential of ozone-

depleting substances. In short, the CAA mentions CO₂ and global warming only in the context of non-regulatory provisions.

- The AGs note that CAA Section 103(g) refers to CO₂ as an “air pollutant.” However, they ignore the provision’s concluding admonition: “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 CO₂ as an “air pollutant” cannot do so.
- A similar admonition in Section 602(e) immediately follows the CAA’s sole reference to “global warming”: “The preceding sentence shall not be construed to be the basis of any additional regulation under this chapter [i.e., the CAA].”
- The AGs claim EPA has a duty to regulate CO₂ under the national ambient air quality standards (NAAQS) program. But the NAAQS program, with its state implementation plans and county-by-county designation of attainment and non-attainment areas, addresses local and regional air quality problems. It has no rational application to a global phenomenon like the greenhouse effect.
- For example, if EPA set a NAAQS for CO₂ above current atmospheric levels, the entire country would be in attainment, even if U.S. consumption of hydrocarbon fuels 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 automobiles shut down. Attempting to fit CO₂ into the NAAQS regulatory structure would be an absurd exercise in futility—evidence that when Congress created the NAAQS program, it did not intend for EPA to regulate CO₂.
- Legislative history also compels the conclusion that EPA may not regulate CO₂. For example, the House-Senate conference committee on the 1990 CAA Amendments rejected a Senate passed version (S. 1630) that would have established a regulatory “climate protection” program. As the Supreme Court has emphasized: “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)
- The AGs invoke the authority of Clinton-Gore EPA General Counsels Jonathan Z. Cannon and Gary S. Guzy, who opined that several CAA regulatory provisions are “potentially applicable” to CO₂. During the 106th Congress, National Mining Association Legal Affairs Committee Counsel Peter Glaser and House Subcommittee Chairman David McIntosh (R-IN) produced extensive rebuttals of the Cannon-Guzy opinions. The AGs are surely aware of this debate, yet do not address any of the Glaser-McIntosh arguments. They simply recycle the Cannon-Guzy line as if it had never been challenged and were completely unproblematic.

- The scary scenarios presented in the Bush Administration’s *Climate Action Report 2002* (CAR), which the AGs cite as the scientific basis for EPA regulation of CO₂, come from climate models that could not reproduce past U.S. temperatures better than could a table of random numbers. The CAR fails to meet Federal Data Quality Act standards for objectivity and utility of information. Any policy decisions EPA based upon it would be challengeable as arbitrary and capricious.
- On February 20, 2003, the three AGs, joined by four others, filed a separate notice of intent to sue Administrator Whitman unless she agrees to promulgate New Source Performance Standards (NSPS) for CO₂ emissions from power plants, pursuant to Section 111 of the CAA. Once again the AGs rely on “definitional possibilities” and duck the pivotal question of congressional intent. 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 1977 and 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 (D-VT) introduced legislation to establish CO₂ performance standards for power plants. Each time the bill failed to attract even one co-sponsor. The AGs would have us believe that 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.
- 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 increase exponentially. Since States have primary responsibility for enforcing the CAA, the AGs’ prosecutorial domain would grow by orders of magnitude.
- The AGs’ Notices create a test of leadership for Administrator Whitman. The Notices are designed to put her in a cross fire between President Bush, who opposes CO₂ regulation, and the EPA career bureaucracy, which has long sought the power to regulate CO₂ in order to increase its control over the U.S. economy. Whitman must decide where her loyalties lie—with the rule of law, economic growth, and affordable energy, or with the rule of bureaucrats, regulatory excess, and Kyoto-style energy rationing. The AGs’ action gives Whitman a superb opportunity to repudiate Clinton-Gore EPA’s mischievous legal opinions and avert an era of anti-energy litigation.

I. Background

On January 30, 2003, the Attorneys General (AGs) of Massachusetts, Connecticut, and Maine – all Democrats – filed a notice of intent to sue U.S. Environmental Protection Agency (EPA) Administrator Christine Todd Whitman unless she agrees to propose

mandatory controls on emissions of carbon dioxide (CO₂), the principal greenhouse gas targeted by non-ratified Kyoto Protocol. The AGs claim Whitman has a legal obligation, under Section 108 of the Clean Air Act (CAA or Act), to “list” CO₂ as a pollutant endangering public health and welfare—the first step towards setting national ambient air quality standards (NAAQS) for CO₂.¹

The AGs’ Notice is a follow-up action to a July 17, 2002 letter (hereafter “Letter”) that 11 State AGs sent to President Bush. The Letter criticized the Administration’s energy policies, urged Bush to institute nationwide controls on CO₂, and, in effect, threatened to balkanize U.S. energy markets with a crazy quilt of statewide restrictions if he refuses to initiate regulatory action.²

On August 6, 2002, the Competitive Enterprise Institute (CEI) published a line-by-line critique of the Letter, entitled, *The Anti-Energy Manifesto of the State Attorneys General*.³ The three AGs filing the Notice were among the 11 who signed the Letter, but they apparently have learned nothing from CEI’s critique, readily available to them via the online news publication *Greenwire*.⁴

Like the Letter, the Notice partly builds the case for CO₂ regulation on Chapter 6 of the Bush Administration’s *Climate Action Report 2002* (CAR), which forecasts dramatic temperature increases and climate shifts in the United States during the 21st century. Invoking the administration’s alarmist climate report to attack the administration’s non-alarmist climate policy is fair game, but misses the larger point.

The Chapter 6 climate scenarios are science fiction, a rehash of the Clinton-Gore Administration’s discredited⁵ U.S. National Assessment report, *Climate Change Impacts on the United States* (USNA). Since September 2001, Administration officials have acknowledged, in response to litigation, that the USNA climate scenarios “do not represent government policy” and “are not policy positions or statements of the U.S. Government.”⁶ The Bush team should not have published Chapter 6 in the first place. The

¹ The AGs are Thomas F. Reilly (MA), Richard Blumenthal (CT), and G. Steven Rowe (ME). Their January 30th Notice is available at <http://www.maine.gov/ag/pr/climatechangenoi.pdf>.

² AGs who signed the July 17, 2002 letter are: 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), http://www.ago.state.ma.us/press_rel/climate.pdf.

³ <http://www.cei.org/pdf/3156.pdf>.

⁴ “Bush administration urged to withdraw report from IPCC,” *Greenwire*, 08/09/02.

⁵ In October 2000, the Competitive Enterprise Institute, joined by Consumer Alert, the Heartland Institute, 60 Plus, David Wojick, Ph.D., Rep. Joseph Knollenberg (R-MI), Rep. Jo Ann Emerson (R-MO), and Sen. James Inhofe (R-OK), sued the Clinton Administration for, *inter alia*, releasing the report before subjecting it to appropriate peer review, as required by Public Law 106-74 (the FY 2000 EPA appropriations bill). In return for plaintiffs withdrawing their complaint, the Bush Administration asserted that the report’s climate impact assessments “are not policy positions or official statements of the U.S. government.” See footnote 6, below.

⁶ Letter of Rosina Bierbaum, Acting Director of Science and Technology Policy, to Christopher C. Horner, September 6, 2001, <http://www.cei.org/gencon/003.03045.cfm>; Testimony of Thomas R. Karl, Director National Climate Data Center, Subcommittee on Oversight and Investigations, House Energy and

President should now withdraw the CAR from the UN Intergovernmental Panel on Climate Change.

The USNA/CAR climate impact assessments are based on two non-representative climate models: the Canadian Climate Centre model and British Hadley Centre model. Those models are “worst-case” calculators – the “hottest” and “wettest” of some 26 that Clinton-Gore officials might have used. The Canadian model overestimates U.S. warming during the 20th century by 300 percent. In subsequent reanalysis by Virginia State Climatologist Patrick Michaels, confirmed by NOAA scientist Thomas Karl, the two models could not reproduce past U.S. temperatures better than could a table of random numbers.⁷ The models are not fit to serve as the basis for climate assessments, much less for public policy decisions.

Whereas the AGs’ Letter relied mainly on the Bush Administration’s unwitting embrace of a Clinton-Gore “science” report to make a case for CO₂ controls, the AGs’ Notice relies mainly on Clinton-Gore legal opinions, specifically the April 10, 1998 memorandum of EPA General Counsel Jonathan Z. Cannon and the October 6, 1999 testimony of Cannon’s successor, Gary S. Guzy.

Neither the Cannon memorandum,⁸ which opined that several EPA regulatory provisions are “potentially applicable” to CO₂, nor Guzy’s testimony, which repeated Cannon’s opinions, nor the AGs’ Notice, which recycles the Cannon-Guzy assertions, should cut any ice with Administrator Whitman. Cannon and Guzy worked for a pro-Kyoto administration, and it is hardly surprising that their legal opinions would authorize EPA to implement Kyoto-style policies even though the Senate has not ratified the Kyoto Protocol and, indeed, preemptively rejected Kyoto via the Byrd-Hagel resolution.⁹

The National Mining Association Legal Foundation (NMALF) subjected the Cannon memorandum to a detailed critique in an October 1998 report entitled, *CO₂: A Pollutant?*¹⁰ When, some 11 months later, EPA still had not addressed NMALF’s arguments, the House Government Reform Subcommittee on Regulatory Affairs, chaired by David M. McIntosh (R-IN), and the House Science Subcommittee on Energy and Environment, chaired by Ken Calvert (R-CA), held a joint hearing to facilitate debate on the issues. Key witnesses included Guzy and attorney Peter Glaser, lead author of the

Commerce Committee, July 25, 2002, p. 3,

<http://energycommerce.house.gov/107/hearings/07252002Hearing676/hearing.htm>

⁷ Patrick Michaels, Testimony before the House Energy and Commerce Oversight and Investigations Subcommittee, July 25, 2002,

<http://energycommerce.house.gov/107/hearings/07252002Hearing676/hearing.htm>.

⁸ Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, *EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources*, April 10, 1998.

⁹ In the July 25, 1997 Byrd-Hagel resolution (S. Res. 98), the Senate, by a vote of 95-0, advised President Clinton not to sign any agreement at the Kyoto conference that would exempt developing countries from binding emission limits. The Kyoto Protocol does exempt developing countries from such limits.

¹⁰ The report (hereafter *CO₂: A Pollutant?*) is available at <http://www.co2andclimate.org/Articles/1999/pollutant.htm>.

NMALF report.¹¹ In the months following the hearing, McIntosh and Calvert further rebutted Guzy's arguments in a series of oversight letters.¹²

I participated in the hearing preparation and subsequent oversight as Rep. McIntosh's staff director, so cannot claim to be a detached observer. Nonetheless, I challenge any candid reader to examine the arguments and not find massive problems in the Cannon-Guzy position. The AGs' Notice does not address any of the issues raised by Glaser and McIntosh. Rather, the AGs proceed as if the Cannon-Guzy opinions had never been challenged and were completely unproblematic. Just as the AGs ignore Patrick Michaels' critique of the USNA/CAR climate scenarios, so they also ignore the Glaser-McIntosh critiques of the Cannon-Guzy opinions.

The AGs try to trap Whitman by invoking opinions EPA has previously taken. EPA (as per Cannon-Guzy) has asserted its authority to regulate CO₂. EPA (as per the CAR) views CO₂ emissions as a threat to public health and welfare. Hence, the AGs contend, Whitman has no choice but to begin a rulemaking for CO₂.

That is nonsense. Bad science and bad legal opinions cannot obligate Whitman to pursue bad policy. The only relevant question for Whitman is whether the CAA means what the AGs say it means. As this paper shows, neither the CAA nor any other provision of law authorizes EPA to regulate CO₂.

II. Begging the Question: Did Congress Delegate to EPA the Power to Regulate CO₂?

The AGs' Notice presents a multi-step argument why EPA must regulate CO₂. The steps may be summarized as follows:

- (1) The CAA authorizes EPA to regulate "air pollutants."
- (2) Section 302(g) of the Act defines "air pollutant" to include "any physical, chemical, [or] biological . . . substance or matter which is emitted into or otherwise enters the ambient air." CO₂ is a substance emitted into the ambient air and, hence, an "air pollutant" within the meaning of the CAA.¹³
- (3) In addition, CAA Section 103(g) refers to "carbon dioxide" as an "air pollutant."
- (4) Furthermore, "EPA itself has twice officially concluded" that CO₂ is an "air pollutant," first in EPA General Counsel Jonathan Z. Cannon's memorandum of April 10, 1998, and subsequently in EPA General Counsel Gary S. Guzy's testimony of October 6, 1999.
- (5) CAA Section 108(a)(1) requires EPA to "list" an air pollutant for regulatory action when the Administrator determines that the pollutant may "cause or

¹¹ Testimonies are available at <http://reform.house.gov/reg/hearings/Hearings106th.htm>.

¹² http://reform.house.gov/reg/oversight/gcc/gcc_index.htm. The pertinent letters are dated 10/14/99, 12/10/99, 3/10/00, and 5/10/00.

¹³ This purely formal definition is applicable to "any" substance emitted into the air, including, for example, oxygen and water vapor. A "pollutant" within the meaning of the CAA need not be a contaminant or pose any risk to human health and the environment.

- contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”
- (6) Section 302(h) defines “welfare” to include effects on “weather” and “climate.”
 - (7) The Bush Administration’s *Climate Action Report* (CAR) projects adverse health and welfare impacts as CO₂ emissions accumulate and cause climate change. EPA contributed to the CAR, and twice conducted formal “notice and comment” proceedings on it. The Bush Administration submitted the CAR to the United Nations as an official report of the United States, pursuant to U.S. treaty obligations under the UN Framework Convention on Climate Change (UNFCCC or “Rio Treaty”).
 - (8) Therefore, EPA and, in fact, the U.S. Government, have officially concluded that CO₂ emissions may “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”
 - (9) Therefore, EPA Administrator Whitman has a “mandatory duty under existing law to begin to regulate carbon dioxide as a ‘criteria pollutant’ pursuant to Section 108 of the Clean Air Act,” and “failure to do so is a violation” of that Act.

The AGs’ argument may seem at first glance like a mighty chain of reasoning. In reality, it is mere word play, a sophomoric attempt to turn statutory construction into a game of “gotcha.”

The AGs completely beg the decisive question. Did Congress 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.”¹⁴ Indeed, “an agency literally has no power to act ... unless and until Congress confers power upon it.”¹⁵

Neither the individual links of the AGs’ argument nor the chain as a whole furnish evidence that Congress, when it enacted the CAA or other relevant statutes, granted EPA authority to regulate CO₂. No such delegation can be inferred from the fact that CO₂ meets a definition of “pollutant” that applies equally well to oxygen and water vapor. Nor do EPA legal opinions, the CAR, the Rio Treaty, the CAA’s definition of “welfare,” or any addition or combination of those factors constitute evidence that Congress intended for EPA to regulate CO₂.

III. The Plain Text of the CAA: No Authority to Regulate CO₂

A. Conspicuously Absent by its Absence

The AGs somehow miss the obvious. The CAA establishes an ambient air quality program, a hazardous air pollutant program, and a stratospheric ozone protection program. Nowhere does it even hint at establishing a global warming mitigation program.

¹⁴ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

¹⁵ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

In an issue of longstanding debate like global warming, it is highly unlikely that Congress would authorize EPA to restrict emissions of CO₂—potentially the most ambitious and expensive regulatory project in history—without ever once saying so in the text of the statute. As the D.C. Circuit Court stated: “Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent.”¹⁶

Given the controversial character of climate change policy, it would be amazing if the Gore-Wirth-Baucus-Cooper-Synar-Waxman-Lieberman gang somehow inserted CO₂ regulatory authority into the 1990 CAA Amendments without Sen. Byrd, Rep. Dingell, or Sen. Gramm ever objecting. For that reason alone, the AGs would face a tough sell in court. As Justice Renquist once quipped: “In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”¹⁷

If Congress intended for EPA to regulate CO₂, we would expect to find the words “carbon dioxide,” “greenhouse gases,” or “global warming” somewhere in the CAA’s regulatory provisions. They are not there. “Carbon dioxide” and “global warming” do not appear in any CAA regulatory provisions. The terms “greenhouse gases” and “greenhouse effect” do not occur anywhere in the Act.

These simple textual facts are hard to square with the AGs’ thesis. As Peter Glaser has pointed out,¹⁸ when Congress wants EPA to regulate particular substances, it has no trouble naming names and making 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.

The words “carbon dioxide” and “global warming” each 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.”¹⁹ Carbon dioxide’s “disparate exclusion” from the CAA’s regulatory provisions cries out for explanation. After all, CO₂

¹⁶ ACLU v. FCC, 823 F.2d 1554, 1567 n. 32 (D.C. Cir. 1987). The court’s explanation is worth quoting: “The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency’s assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue.”

¹⁷ Harrison v. PPG Industries, 446 U.S. 578, 602 (1980).

¹⁸ Glaser, *CO₂: A Pollutant?*, Section I [the online version is not paginated].

¹⁹ General Motors Corp. v. U.S. 496 U.S. 530, 538 (1990).

is not some arcane or newly discovered compound, but a gas emitted in vastly greater amounts than all of the substances listed for regulation. Moreover, the potential of CO₂ emissions to enhance the 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 include CO₂ in the Act’s regulatory provisions.

The AGs might reply that Congress need not list a substance to authorize its regulation. The CAA requires the Administrator to periodically review the existing lists of regulated substances and, where appropriate, revise such lists by rule, adding gases that in her judgment may reasonably be anticipated to endanger public health or welfare, have adverse effects on human health, or deplete the stratospheric ozone layer.²⁰ However, there is a critical difference between the Administrator exercising her judgment to fill “gaps” in “congressionally created” programs,²¹ and the Administrator creating new programs Congress has not authorized. The CAA gives the Administrator considerable discretion – but only within the statutory schemes Congress has enacted. The deference courts show to agencies when they fill gaps does not extend to agency actions that exceed valid delegations of congressional authority.²²

CAA regulatory programs rest on distinct grants of authority. EPA has no power to regulate ozone-depleting substances under the NAAQS program, nor ambient air pollutants under the stratospheric ozone protection program. EPA may not list an ozone-depleting substance as a HAP solely due to its adverse effects on the environment. Similarly, EPA may not list an ambient air pollutant as a HAP unless it “independently meets the listing criteria” for the HAPs program.²³

The CAA is, in short, a structured statute, not an undifferentiated mass of regulatory authority. Before the Administrator can add a pollutant to an existing list of regulated substances, she must demonstrate that the pollutant fits into the specific statutory scheme Congress has created. To repeat, there is no global warming title or subchapter in the CAA. Indeed, Congress has never enacted a regulatory greenhouse gas emissions control program.

B. Words Out of Context

To interpret a provision of law, one must of course start with the text of the statute. The AGs purport to do this, as when they cite Section 103(g)’s reference to CO₂ as an “air pollutant.” However, as the Supreme Court has cautioned, statutory construction is a

²⁰ CAA Sections 108(a)(1), 111(b)(1)(A), 112(b)(2), 602(c).

²¹ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

²² *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990): “A precondition to deference under *Chevron* is a congressional delegation of administrative authority...*Chevron* review of agency interpretations of statutes applies only to regulations ‘promulgated pursuant to congressional authority’” [citation omitted]. Consider also *Railway Labor Executive Assn. v. National Mediation Board*, 29 F. 3d 655, 671 (D.C. Cir. 1994) (en banc): “Such deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied ‘delegation of authority to the agency’” [citation omitted].

²³ CAA Section 112(b)(2).

“holistic endeavor.”²⁴ Words or phrases should not be read “in isolation” but in their “context,” with a view to “their place in the overall statutory scheme.”²⁵

Let us then examine Section 103(g), the context of the CAA’s sole mention of CO₂. We immediately find that Section 103(g) is a *non-regulatory* provision. It directs the Administrator to develop “non-regulatory strategies and technologies” for preventing or reducing “multiple air pollutants,” including, among others mentioned, CO₂. The phrase “non-regulatory strategies and technologies” occurs in each of the first five paragraphs of Section 103(g), so the AGs must be careless readers not to see that the only activities 103(g) authorizes are non-regulatory (e.g., “basic engineering research”).

The sixth and final paragraph makes explicit what the preceding paragraphs imply: “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. The AGs are rebutted by the very text they cite. When Congress enacted 103(g), it did not delegate to EPA the authority to regulate CO₂. On the contrary, Congress cautioned EPA against assuming such authority.

An almost identical caveat occurs in Section 602(e), the sole CAA provision to mention global warming. Like 103(g), 602(e) is a non-regulatory provision. It directs the Administrator to “publish” (i.e., study) the “global warming potential” of ozone-depleting substances. 602(e) also concludes with admonitory language: “The preceding sentence [mentioning “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 as part of the 1990 CAA Amendments, we may presume the pairing is deliberate. In any event, the CAA mentions CO₂ 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.

IV. The Structure of the NAAQS Program Demonstrates No Authority to Regulate CO₂

The AGs assert that EPA has a “mandatory duty” to “list” CO₂ as a “criteria air pollutant” under Section 108 of the CAA. Section 108 establishes core elements of the NAAQS program. It requires the Administrator to begin a rulemaking process for ambient air pollutants that come from “numerous or diverse mobile or stationary sources,” and which, in the Administrator’s judgment, “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” The AGs argue as follows: (a) CO₂ is an air pollutant that comes from numerous and diverse mobile and stationary sources; (b) EPA has determined (as a key contributor to the Bush

²⁴ United Savings Ass’n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988).

²⁵ FDA v. Brown & Williamson Tobacco Corp., 529 U.S. at 133.

Administration's *Climate Action Report 2002*) that CO₂ emissions potentially endanger public health or welfare; hence (c) EPA must begin the process of setting a NAAQS for CO₂.

A. NAAQS: Think Locally, Act Locally

This tidy syllogism can impress only those who have not reflected on the structure and purpose of the NAAQS program. Peter Glaser, both in congressional testimony and the NMALF critique of the Cannon memorandum, explained in painstaking detail why the NAAQS program is wholly unsuited to address a global atmospheric phenomenon like the greenhouse effect.²⁶ Rep. McIntosh applied Glaser's argument in four oversight letters to EPA. In his 2001 textbook, *Air Pollution Control Law: Compliance and Enforcement*, Professor Arnold Reitze of George Washington University Law School also explained why "Congress cannot have intended to regulate global warming using a program [NAAQS] completely unsuited to this purpose."²⁷ The AGs have no excuse not to know they are peddling nonsense.

Section 108(a) provides authority to begin the process of "establishing primary and secondary ambient air quality standards," or NAAQS, for the United States. NAAQS are health- and welfare-based standards that determine what pollution levels or concentrations are allowable in the ambient air. Pollutants regulated under the NAAQS program are called "criteria pollutants," because EPA "regulates them by first developing health-based *criteria* (science-based guidelines) as the basis for setting permissible levels."²⁸ EPA regulates six criteria pollutants: lead, carbon monoxide, sulfur dioxide, ozone, nitrogen dioxide, and particulates. All share a common characteristic: They vary locally and regionally in their ambient concentrations.

The structure of the NAAQS program reflects the local/regional character of the pollution problems it addresses. Each State has "primary responsibility" to administer and enforce the NAAQS program in its respective "geographic area."²⁹ States do this by devising and submitting state implementation plans (SIPs), "which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in each State."³⁰ Portions of a State that meet the standard for a particular pollutant are "attainment" areas; those that do not are "non-attainment" areas. Such areas are often as small as a county.

B. NAAQS: Not Applicable to Global Risks

The NAAQS program, with its SIPs and county-by-county designation of attainment and non-attainment areas, is unsuited to address global environmental risks. Consider, for

²⁶ Glaser, *CO₂: A Pollutant?* Section II. B. 1-2.

²⁷ Arnold W. Reitze, Jr., *Air Pollution Control Law: Compliance and Enforcement* (Washington, D.C.: The Environmental Law Institute, 2001), p. 417.

²⁸ EPA, *Plain English Guide to the Clean Air Act* [original emphasis], http://www.epa.gov/oar/oaqps/peg_caa/pegcaa03.html#topic3a.

²⁹ CAA Section 107(a).

³⁰ *Idem*.

example, the risk of stratospheric ozone depletion due to man-made chlorofluorocarbons (CFCs). CFCs are “emitted into or enter the ambient air,” so they are “pollutants” within the meaning of CAA Section 302(g). CFCs come from “numerous or diverse mobile or stationary sources,” so they are pollutants within the meaning of Section 108. Finally, EPA was an early and influential proponent of the view that CFCs endanger public health and welfare by thinning the ozone layer that filters out harmful ultra-violet B radiation. Clearly, CFCs fall within the purview of Section 108 in every way the AGs claim CO₂ does. So why did Congress amend the CAA, adding Title VI on stratospheric ozone protection, to address this problem? Why not just direct EPA to use the NAAQS program and list CFCs under Section 108?

The reason is that, although Section 108 may appear to be “potentially applicable” to CFCs, *if* we consider only “definitional possibilities”³¹ and pretend to know nothing about the NAAQS program’s “object and policy,”³² Section 108 in fact has no rational application to stratospheric ozone depletion.

The NAAQS program deals with place-specific air quality problems. Accordingly, the NAAQS program measures local pollution levels against national air quality standards and seeks to remedy local problems via state implementation plans. Ambient air quality is decisively affected both by *where* pollution occurs and *where* pollution control measures are implemented.

In contrast, the location of sources and measures is wholly irrelevant to the issue of ozone depletion. A ton of CFC-12 released in Acapulco has the same effect on stratospheric ozone as a ton released in Manhattan or Beijing. By the same token, stratospheric ozone depletion has the same health effects on people living in Sacramento whether the CFCs responsible for thinning the ozone layer entered the air in Sacramento or Timbuktu.

Furthermore, it would make no sense for EPA to set NAAQS (allowable ambient levels) for particular CFCs, because it is aggregate releases worldwide—not ambient concentrations in particular areas—that determine the degree of potential harm to public health and welfare. The only effective way to reduce the risk of ozone depletion is to ban (or severely restrict) the production and use of CFCs. Attempting to protect stratospheric ozone by establishing allowable ambient concentrations of CFCs and designating county-by-county attainment and non-attainment areas would be a fool’s errand.

Since Congress is not in the habit of authorizing agencies “to impose restrictions that [are] somehow calculated to serve [an] unattainable goal,”³³ we may conclude that EPA has no power under Section 108 to control CFCs. To protect the ozone layer, Congress

³¹ Brown v. Gardner, 513 U.S. 115, 118 (1994): “Ambiguity is a creature not of definitional possibilities but of statutory context.”

³² Mastro Plastics Corp. v. NRLB, 350 U.S. 270, 285 (1956) quoting United States v. Heirs of Boisdore, 8 How. 113, 122, 12 L. Ed. 1009 (1849): “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”

³³ Huffman v. Western Nuclear, Inc. 486 U.S. 663, 673 (1988).

had to confer on EPA a new and distinct grant of authority. Congress did so when it enacted Title VI as part of the 1990 CAA Amendments.

C. An Absurd Exercise in Futility

Identical reasoning discredits the AGs' claim that EPA must list CO₂ under Section 108. Although CO₂ concentrations may vary slightly from one place to another due to different sources and sinks, CO₂ is well mixed throughout the **global** atmosphere, and what matters in terms of the greenhouse effect and potential climate change are **global** concentrations. A ton of CO₂ emitted in California has the same impact on the greenhouse effect as a ton emitted in Japan. By the same token, a CO₂-induced global warming will have the same climate impacts on New England whether the CO₂ originated in Massachusetts or Nepal.

Because CO₂ concentrations are essentially global, not local, it is not even possible to imagine how EPA, after setting a NAAQS for CO₂, could assign "attainment" or "non-attainment" status to any State or county without simultaneously assigning the same status to all other States or counties. When in the history of the CAA has EPA ever published a NAAQS that effectively—and instantly—turned the entire country into one gigantic attainment or non-attainment area? Would this not defeat a basic purpose of setting ambient air quality standards, namely, to show which areas of the country have clean air and which do not?³⁴

In addition, since even a multilateral regime like the Kyoto Protocol would barely slow the projected increase in CO₂ concentrations, it is incomprehensible how any SIP for CO₂ could "specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained **within each air quality region in such State,**"³⁵ as required by Section 107(a).

Any attempt to regulate CO₂ via the NAAQS program must founder on such imponderables. Consider that EPA has only three choices in setting an allowable level (NAAQS) for CO₂. The agency could set the NAAQS either above, below, or at current atmospheric concentrations. If EPA set the NAAQS above current atmospheric levels, then the entire country would be in attainment, even if U.S. fossil fuel consumption suddenly doubled. Conversely, if EPA set the NAAQS below current levels, the entire country would be out of attainment, even if all power plants, factories, and automobiles shut down. If EPA set the NAAQS at current levels, the entire country would be in attainment—but only temporarily. As soon as global concentrations increased, the entire country would be out of attainment, regardless of whether U.S. emissions were going up or going down.

³⁴ And what, after all, do CO₂ concentrations have to do with air **quality** anyway? A clear odorless gas that is non-toxic to humans at 20 times current concentrations, CO₂ does not foul the air, impair visibility, or contribute to respiratory illness.

³⁵ Emphasis added.

The Supreme Court has held that 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 Court follows the Act’s “purpose” and “policy,” rather than the literal words.³⁶ Clearly, attempting to fit CO₂ into the NAAQS regulatory structure would be an absurd exercise in futility, as well as plainly at variance with the purpose and policy of the NAAQS program—powerful evidence that when Congress enacted Section 108, it did not intend for EPA to regulate CO₂.

D. Making “Visibility” Invisible

The foregoing considerations show why Section 302(h), which defines “welfare” to include effects on “weather” and “climate,” also provides no evidence that Congress intended for EPA to regulate CO₂. Weather and climate obviously affect public welfare, and EPA should consider climate and weather effects when setting secondary ambient air quality standards—***but only for pollutants amenable to regulation under the NAAQS program***. The importance of weather and climate to public welfare in no way alleviates the overwhelming conceptual and administrative difficulties EPA would face if it attempted to set and enforce ambient air quality standards for CO₂.³⁷

The AGs quote somewhat selectively from 302(h). The words “weather” and “climate” appear in list of items that includes “weather, visibility, and climate.” Congress adopted this language in the 1970 Amendments to the original Clean Air Act—years before global warming was a topic of public debate. What kind of “weather” and “climate” effects might Congress have had in mind when it enacted 302(h)? CO₂ has never been associated with “visibility” concerns. However, airborne particulates can massively impair visibility. Moreover, particulate pollution has long been known to affect weather and climate. Particles can increase condensation and, thus, precipitation. Particles can also block sunlight and, thus, cool ambient temperatures. Particulates are, of course, exactly the type of pollution Congress intended the NAAQS program to address.

Peter Glaser suggests that the likely source of the phrase “weather, visibility, and climate” in the 1970 CAA Amendments is the National Air Pollution Control Administration’s *Air Quality Criteria for Particulates* (January 1969). That document discussed the inter-related effects of particulate pollution on weather, visibility, and “climate near the ground.” Until the AGs offer evidence to the contrary, it is reasonable to assume that, when Congress defined “welfare” in the 1970 CAA Amendments, it did not intend for EPA to address the greenhouse effect. Rather, Congress intended for EPA

³⁶ United States v. American Trucking Ass’n, 310 U.S. 534, 543 (1939): “When that [plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words” (internal citation omitted).

³⁷ Reitze, *Air Pollution Control Law*, p. 417: “The criteria pollutant approach also provides for secondary NAAQS that are to be set at a level ‘to protect the public welfare from any known or anticipated adverse effects with the presence of such air pollutant in the ambient air.’ Controlling such effects in a SIP would be subject to the same limitations as discussed for controlling CO₂ and other GHGs to meet a primary standard” (internal citation omitted).

to take into account the regional and local weather and climate effects of place-specific air pollution problems.

E. Less-Than-Artful Dodging

The AGs are undoubtedly aware of the foregoing arguments. For example, they cite former EPA General Counsel Gary S. Guzy’s testimony before an October 1999 joint hearing of the House Government Reform Subcommittee on Regulatory Affairs and the House Science Committee on Energy and Environment. The first panel of that hearing was to a large extent a debate between Guzy and Peter Glaser, whose testimony and earlier report for the NMALF devoted much space to debunking the claim that CAA Sections 108-110 are “potentially applicable” to CO₂.

The AGs do not address Glaser’s arguments, but apparently endeavor to dodge them. Administrator Whitman may well wonder how—or whether—EPA could (a) set ambient air quality standards for CO₂ without (absurdly) putting the entire country in or out of attainment, or (b) effectively enforce such standards via SIPs. The AGs attempt to preempt such questions about the basic conceptual coherence and administrative feasibility of regulating CO₂ as a criteria pollutant. They tell Whitman to just get on with the business of listing CO₂, and let the regulatory process sort out the mechanics later. According to the AGs:

The regulation of such [criteria] pollutants begins, under Section 108, with a process known as “listing.” *See* 42 U.S.C. § 7408(a). Subsequent to listing, the Act requires EPA to set air quality criteria and National Ambient Air Quality Standards in consultation with scientific advisory committees and based on extensive processes to evaluate risks posed by the newly-listed pollutant and to determine the appropriate, allowable levels of it in ambient air. *See* 42 U.S.C. §§ 7408, 7409, and 7417(c)(1). ***Therefore, under the Act, determination of precisely how, and at what levels, a pollutant should be regulated are only considered post-listing*** [Emphasis added].

It is of course true that the Administrator must list a pollutant before EPA undertakes to establish “allowable levels” for it, and before EPA approves any SIP describing “precisely how” the pollutant is to be regulated. But the Administrator already knows the sequence of a NAAQS rulemaking. She does not need the AGs to remind her that Step One comes before Steps Two and Three. What the AGs are driving at is something else. They want to persuade Whitman that she must list CO₂ under Section 108 without first determining whether the NAAQS program is a feasible means for its regulation. She would be unwise to accept such counsel.

The opening words of Section 108(a) make clear that listing is a means to an end. Listing is “for the purpose” of establishing NAAQS:

For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31,

1970, publish, and shall thereafter revise, a list which includes each air pollutant ... emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare ... [emphasis added].

Since listing is for the purpose of establishing national ambient air quality standards, it would make no sense for the Administrator to list a substance that does not fit into the NAAQS regulatory scheme. As we have seen, the NAAQS program has no reasonable application to global atmospheric phenomena like ozone depletion and the greenhouse effect. It is nonsensical for the AGs to claim the Administrator has a duty to do something that makes no sense.

At the time she lists a pollutant, the Administrator does not know what allowable levels EPA will decide to establish, or what precise control measures the agency will approve. However, before the Administrator lists a pollutant, she should confront and resolve the threshold question of whether the NAAQS program, with its national air quality standards, SIPs, and county-by-county attainment and non-attainment designations, is an appropriate means of addressing the supposed environmental threat. If the Administrator foresees that the NAAQS regulatory structure would not be appropriate, then she should not list the pollutant in question. Indeed, she has an obligation not to do so. Listing in such a case would be pointless and wasteful, and Congress cannot be presumed to have intended for the Administrator to do pointless and wasteful things.

V. Legislative History Evidences No Authority to Regulate CO₂

A. Clean Air Act Amendments of 1990

The legislative history of the 1990 CAA Amendments also compels the conclusion that EPA may not regulate CO₂. In the 101st Congress, the House and Senate each passed separate bills to amend the CAA. On the Senate side, the main legislative vehicle for amending the CAA was S. 1630, sponsored by Sen. Max Baucus (D-MT). As originally introduced on September 14, 1989, S. 1630 contained a Section 216 on “Carbon Dioxide Emissions from Passenger Cars.” The provision would require the Administrator to establish tailpipe emission standards for CO₂:

SEC. 216. (a) PROMULGATION OF REGULATIONS- The Administrator shall promulgate regulations providing for standards applicable to emissions of carbon dioxide from passenger automobiles (as defined in 15 U.S.C. 2001(2)). Such standards shall require that for model years 1995 to 2002, the average of such emissions from passenger automobiles manufactured by any manufacturer shall not exceed two hundred and forty two grams per mile, and for model year 2003 and thereafter, such average shall not exceed one hundred and seventy grams per mile.

However, the Senate declined to adopt that provision. Indeed, with one minor exception, which is clearly a drafting error,³⁸ S. 1630 as passed by the Senate on April 3, 1990 did not include *any* language addressing CO₂ emissions from motor vehicles.

The Senate-passed version of S. 1630 included a new Title VII on “Stratospheric Ozone and Global Climate Protection.” Title VII aims “to eliminate atmospheric emissions of manufactured substances with ozone depleting potential as well as direct and indirect global warming potential,” and “to reduce to the maximum extent possible emissions of other gases caused by human activities that are likely to affect adversely the global climate.”³⁹ Section 504 of Title VII directs the Administrator to publish “lists” of “manufactured substances which are known or may reasonably be anticipated to cause or contribute significantly to atmospheric or climatic modification, including stratospheric ozone depletion.” Section 506 directs the Administrator to “promulgate regulations” to eliminate and reduce the “production and use” of such substances.

Even if enacted, Title VII would not authorize EPA to regulate CO₂. Although the “Findings” section states that, “emissions of...carbon dioxide and methane...should be controlled,” Title VII does not mention either gas in the lists of substances for which the Administrator must promulgate regulations. That is logical, because those lists only include “substances manufactured for commercial purposes,” such as CFCs and halogens. CO₂, in contrast, is not a “manufactured substance” but a combustion byproduct. Title VII would make “global warming potential” a basis for regulation—but only for “manufactured substances.”⁴⁰

Thus, Title VII stops short of providing authority to regulate CO₂. Yet House and Senate conferees rejected even Title VII’s limited use of “global warming potential” as a basis for regulation. Instead, they adopted a subchapter (Title VI of the current CAA) that provides regulatory authority for ozone protection—but not climate protection. The only trace of Title VII’s climate language that survives in Title VI is Section 602(e), which directs the Administrator to “publish” the “global warming potential” of ozone-depleting substances. As we have seen, the text immediately cautions: “The preceding sentence shall not be construed to be the basis of any additional regulation under [the CAA].”

The AGs do not have a leg to stand on. The Senate declined to adopt Senator Baucus’ provision to establish regulatory standards for CO₂ emissions from automobiles. Title VII of S. 1630 would have made “global warming potential” a basis for regulation under the CAA, but not a basis for regulating CO₂. Congress ultimately rejected even that limited authority, and also declined to adopt S. 1630’s goal of reducing greenhouse gas emissions. As the Supreme Court has emphasized: “Few principles of statutory

³⁸ Section 221(d) states that the Administrator may commence a civil action to assess and recover civil penalties prescribed by various subsections of the bill, including “subsection (b) of 216 (pertaining to emissions of carbon dioxide).” However, in S. 1630 as passed, Section 216 addresses lead abatement, not carbon dioxide, and has no subsection (b). Thus, the “carbon dioxide” language in 221(d) is a drafting error – an unintended leftover from the initial version of S. 1630.

³⁹ The Baucus bill and other non-enacted bills discussed in section V.B of this paper are available at <http://thomas.loc.gov>.

⁴⁰ The only substances Title VII lists for regulation are manufactured ozone-depleting chemicals.

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.”⁴¹

In an October 5, 1999 letter to Chairman McIntosh, Rep. John D. Dingell (D-MI), who chaired the House-Senate conference committee on the 1990 CAA Amendments, confirmed that conferees considered and rejected a regulatory climate protection program.⁴² Rep. Dingell wrote, in pertinent part:

First, the House-passed bill (H.R. 3030) never included any provision regarding the regulation of any greenhouse gas, such as methane or carbon dioxide, nor did the bill address climate change. The House, however, did include provisions aimed at implementing the Montreal Protocol on Substances that Deplete the Ozone Layer.

Second, as to the Senate version (S. 1630) of the proposed amendments, the October 12, 1998 [NMALF] memorandum correctly points out that the Senate did address greenhouse gas matters and global warming, along with provisions implementing the Montreal Protocol. Nevertheless, only Montreal Protocol related provisions were agreed to by the House-Senate conferees (see Conf. Rept. 101-952, Oct. 26, 1990).

Dingell also disputed the claim that Section 103(g)’s reference to CO₂ as an “air pollutant” implies a delegation of regulatory power:

While it refers, as noted in the EPA memorandum, to carbon dioxide as a “pollutant,” House and Senate conferees never agreed to designate carbon dioxide as a pollutant for regulatory or other purposes.

Dingell summarized his understanding of the legislative history thusly:

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 (with the exception of the above-referenced section 821),⁴³ contemplated regulating greenhouse gas emissions or addressing global warming under the Clean Air Act.

B. Related Legislation

Congress has debated climate change issues for two decades. It has consistently rejected or declined to adopt legislative proposals to regulate CO₂. When Congress has legislated

⁴¹ *INS v. Cardozo-Fonseca*, 480 U.S. at 442-43 (1983).

⁴² Hrg. No. 66, 106th Congress, First Session, Hearing: *Is CO₂ A Pollutant and Does EPA Have the Power to Regulate It?* (October 6, 1999), p. 65, <http://www.access.gpo.gov/congress/house/house14.html>.

⁴³ According to Dingell, Section 821, a “free-standing” provision Congress enacted concurrently with the CAA Amendments, requires EPA to “monitor” (not control) CO₂ emissions from certain sources.

in this area, it has authorized the executive branch to engage in research, administer voluntary programs, and conduct international negotiations.⁴⁴

The Supreme Court has held that, “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”⁴⁵ Since the CAA refers to “carbon dioxide” and “global warming” only once, in unrelated provisions, one might expect the AGs to cite other Acts, particularly where Congress spoke subsequently and more specifically to the topic at hand. They do not.

Let us quickly consider three major Acts in which Congress spoke more specifically about climate change and greenhouse gases: the U.S. Global Change Research Act of 1990 (GCRA), the 1992 Energy Policy Act (EPAAct), and the UN Framework Convention on Climate Change (UNFCCC or “Rio Treaty”).

The GCRA became law on November 16, 1990—one day after the 1990 CAA Amendments took effect. The GCRA authorized the President to establish a Committee on Earth and Environmental Science to coordinate a 10-year research program involving 15 federal entities (including EPA). The GCRA established no regulatory authorities vis-à-vis CO₂.

The EPAAct became law on October 24, 1992, following several years of congressional debate over energy policy. As Glaser points out,⁴⁶ Senator Tim Wirth (D-CO), and Reps. Jim Cooper (D-TN) and Mike Synar (D-OK), introduced bills to regulate greenhouse gases in the context of the EPAAct debate. Wirth’s S. 2667, introduced in the 100th Congress, would have established a “national goal” of reducing CO₂ emissions 20-percent from 1988 levels by the year 2000. Wirth’s S. 324, introduced in the 101st Congress, would have required the Department of Energy to develop an energy strategy “designed to achieve to the maximum extent practicable . . . the stabilization and eventual reductions in the generation of carbon dioxide and other greenhouse gases.” The Cooper-Synar bills (H.R. 5966, H.R. 2663), introduced in the 101st and 102nd Congresses, would have prohibited new major CO₂ sources from operating unless such sources earn or purchase CO₂ “offset credits,” or pay a fine. None of those provisions made it into the EPAAct.

Instead, EPAAct Section 1604 directs the Secretary of Energy to *assess* various greenhouse gas control options, including emission caps, energy efficiency standards, and voluntary incentives programs, and *report back* to Congress. Section 1605 directs the Secretary to establish a registry for reporting *voluntary* greenhouse gas emission reductions. Interestingly, Section 1605 does not include House-passed provisions for awarding CO₂

⁴⁴ Glaser, *CO₂: A Pollutant?* Section IV A.

⁴⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

⁴⁶ *CO₂: A Pollutant?* Section IV B.

offset credits for voluntary reductions. In other words, Congress chose not to establish a pre-regulatory program that anticipates mandatory controls at a later date.⁴⁷

The United States ratified the Rio Treaty on October 15, 1992. The voluntary character of the Rio Treaty's emission reduction goals is well known. Less well known is the fact that, prior to ratification, the first Bush Administration assured the Senate it would not attempt to reinterpret Rio's voluntary goals as mandatory. The Report of the Senate Committee on Foreign Relations favorably reporting the treaty stated:

The Committee notes further that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch, and would therefore require the Senate's advice and consent.⁴⁸

What would be the point of the Senate reaching a "shared understanding" with the White House not to reinterpret Rio's goals as legally binding if EPA, under existing CAA authority, could implement equivalent or even more stringent requirements? If the first Bush Administration had asserted a claim of authority to regulate CO₂, if it had construed the CAA as the AGs do, the Senate might not have ratified the Rio Treaty.

Just as the 102nd Congress declined to adopt the Wirth and Cooper-Synar regulatory provisions in the EPAct, so the 105th, 106th, and 107th Congresses declined to enact "multi-pollutant" legislation to cap CO₂ emissions from power plants. Senator Jim Jeffords' (I-VT) S. 556, the "Clean Power Act," introduced in the 107th Congress, was the first "multi-pollutant" bill ever approved in committee. Nonetheless, S. 556 never came to a vote on the Senate floor. What then would the AGs have us believe—that when Congress revised the CAA in 1970, 1977, and 1990, it supported capping CO₂ emissions from power plants, but just forgot to tell anybody?

Finally, Congress has adopted measures expressing opposition to the types of policies the AGs claim EPA must implement. On July 25, 1997, the Senate passed S. Res. 98, the Byrd-Hagel Resolution, by a vote of 95-0. In Byrd-Hagel, the Senate advised President Clinton not to sign any agreement at the Kyoto conference that would exempt developing countries from binding emissions limits. The Kyoto Protocol does exempt developing countries from such limits. But if, from a Byrd-Hagel perspective, Kyoto is bad because it is not truly global, then what the AGs propose is worse. Regulating CO₂ under the CAA would impose Kyoto-like restrictions on the United States alone, i.e., **without including any other country**. Is it not silly to suggest that Congress has implicitly authorized EPA to do just that?

⁴⁷ For more on this topic, see Marlo Lewis, Jr., *Does The Bush Administration Have Legal Authority To Award Regulatory Credits For Greenhouse Gas Reductions?* Competitive Enterprise Institute, Nov. 18, 2002, pp. 11-12, <http://www.cei.org/pdf/3286.pdf>.

⁴⁸ Quoted by Glaser, *CO₂: A Pollutant?*, Section IV C.

In FY 1999, Congress enacted the “Knollenberg” provision as part of the appropriations bill (Veterans Affairs, Housing and Urban Development, and Independent Agencies) that funds EPA. The provision, authored by Rep. Joseph Knollenberg (R-MI), stipulates that, “None of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol.” Congress enacted the Knollenberg provision in six appropriations bills in FY 2000, and eight appropriations bills in FY 2001.⁴⁹ Kyoto is first and foremost a treaty to regulate CO₂. How could EPA regulate CO₂ without gutting the Knollenberg provision? How could that not conflict with congressional intent?

To sum up, the legislative history of the 1990 CAA Amendments and related congressional activity on energy and climate issues confirms that EPA lacks authority to regulate CO₂. The Framework Convention on Climate Change remains the most authoritative expression of congressional intent with respect to climate policy, and its emission reduction goals are not legally binding. Rep. Dingell was only stating common knowledge when, in his letter to Chairman McIntosh, he observed: “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.”

VI. Ignoring FDA v. Brown & Williamson

In *Food and Drug Administration (FDA) v. Brown & Williamson*,⁵⁰ the Supreme Court shot down arguments nearly identical to those offered by the AGs.⁵¹ In that case, the Court overturned FDA’s regulation of tobacco products as exceeding the agency’s delegated authority.

To justify its regulation of tobacco products, FDA argued as follows. The Federal Food, Drug and Cosmetic Act (FDCA) directs FDA to protect public health by regulating “drugs” and “drug delivery devices.” Nicotine has “pharmacological effects” on the central nervous system, and is therefore a “drug” within the meaning of FDCA. Cigarettes and other tobacco products deliver nicotine to the body, and thus are “devices” within the meaning of the Act. Use of tobacco products is the leading cause of premature deaths in the United States. Therefore, FDA must regulate tobacco products.

The AGs’ argument for EPA regulation of CO₂ closely parallels FDA’s argument: The CAA directs EPA to protect public health and welfare by regulating “air pollutants”; CO₂ is an “air pollutant” within the meaning of the CAA; EPA has determined that CO₂ emissions endanger public health and welfare; therefore, EPA must regulate CO₂.

In *Brown & Williamson*, the Court, considering the relevant statutes, legislative history, and common sense of the matter, held that Congress intended to regulate tobacco

⁴⁹ Rep. Knollenberg did not offer the language in subsequent years, but only after President Bush declared his opposition to the Kyoto Protocol.

⁵⁰ 529 U.S. 120 (2000).

⁵¹ This section borrows freely from Chairman McIntosh’s May 10, 2000 letter to EPA General Counsel Gary S. Guzy.

products through a separate statutory scheme, not under FDCA, a statute designed to ensure the safety and efficacy of *medical* (therapeutic) drugs and devices. The Court cautioned against agencies inferring grants of authority from words or phrases taken out of context:

In determining whether Congress has specifically addressed the question at issue a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context [p. 132].

To clarify this point, the Court cited *Brown v. Gardner* [513 U.S. 115, 118, (1994)]: “Ambiguity is a creature not of definitional possibilities but of statutory context” (*Brown & Williamson*, p. 132). As we have seen, the AGs ignore the non-regulatory context of the CAA’s sole mention of CO₂—Section 103(g). Their case rests entirely on the “definitional possibilities” of such words as “air pollutant,” “mobile or stationary sources,” and “welfare.”

The Court further stated: “It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme’” (p. 133, internal citation omitted). As noted above, the CAA contains no “statutory scheme” with respect to greenhouse gases or climate change.

The Court next stated that courts “must therefore interpret the statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into a harmonious whole’” (p. 133, internal citations omitted). CO₂ does not fit harmoniously into the NAAQS regulatory structure. Again, that structure is designed to address local and regional air pollution problems through place-specific control measures. Because CO₂ concentrations do not vary significantly from place to place, and cannot be modified at regional or local scales by SIPs, CO₂ is fundamentally unlike any currently listed criteria air pollutant. Thus, listing CO₂ under Section 108 would create an *asymmetrical* and *incoherent* regulatory scheme.

The Court partly based its decision on legislative history, stating: “In fact, on several occasions ... Congress considered and rejected bills that would have granted FDA such jurisdiction” over tobacco products (p. 144). As we have seen, Congress also considered and rejected legislative proposals to regulate greenhouse gases when it enacted the 1990 CAA Amendments and the 1992 Energy Policy Act.

The Court partly based its holding on “common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency” (p. 121). Quoting a previous decision,⁵² the Court stated that, “it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion...” (p. 160). It is even more unlikely that Congress would leave the determination of whether hydrocarbon fuels will be rationed, or suppressed, to agency discretion. Whereas

⁵² *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (512 U.S. 218, 114 (1994)).

regulating tobacco would affect just one industry, regulating CO₂ would affect entire economic sectors: energy, manufacturing, transportation, and agriculture. It is wildly implausible that Congress would delegate “a policy decision of such economic and political magnitude” to EPA without ever once saying so in the CAA.

Finally, the Court cautioned: “No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress” (p. 123). The Court was sympathetic to FDA’s goal, and did not dispute FDA’s findings that tobacco consumption is the “single leading cause of preventable death in the United States,” that “more than 400,000 people die each year from tobacco-related illnesses,” and that if “the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illnesses can be correspondingly reduced . . .” (p. 128, internal references omitted). Nonetheless, the Court held that issuing regulations to limit children’s access to tobacco products exceeds FDA’s delegated authority.

The Court’s analysis applies *a fortiori* to the AGs’ invocation of the CAR as a basis for regulating CO₂. Whereas the risks of smoking are indisputable, the risks of global warming remain speculative. Even if global warming ultimately proves to be a serious threat, EPA cannot at this time unambiguously identify a single premature death in the United States due to climate change. What is more, even under the CAR’s worst-case scenarios, U.S. casualties do not remotely approach 400,000 deaths per year. The Court’s admonition to FDA is, thus, even more appropriately addressed to the AGs: “[I]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop” (p. 161, internal citation omitted).

VII. Flouting Federal Data Quality Standards

On February 20, 2003, CEI Counsel Christopher C. Horner filed, with the Director of the Office of Science and Technology Policy, a “Petition to Cease Dissemination of the National Assessment on Climate Change, Pursuant to the Federal Data Quality Act.”⁵³ The National Assessment (USNA) produced the scary scenarios summarized in Chapter 6 of the *Climate Action Report 2002* (CAR). As previously noted, the AGs claim the CAR supplies the requisite scientific determination for EPA to list CO₂ under CAA Section 108. CEI’s Petition should put Administrator Whitman on notice. The USNA is so deeply flawed that the Agency may not lawfully even *disseminate* it. Therefore, any EPA *regulatory* use of the CAR, a document summarizing the USNA climate impact assessments, would ignite a firestorm of litigation.

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), popularly known as the Federal Data Quality Act (FDQA), requires the Office of Management and Budget (OMB) to issue government-wide guidelines, and each agency to issue agency-specific guidelines, “ensuring and maximizing the quality,

⁵³ <http://www.cei.org/gencon/027.03360.cfm> (hereafter cited as CEI Petition).

objectivity, utility, and integrity of information disseminated by the agency.” In its Guidelines,⁵⁴ OMB defines “quality” as the encompassing term, of which “utility,” “objectivity,” and “integrity” are the constituents:

“Utility” refers to the usefulness of the information to the intended users. “Objectivity” focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. “Integrity” refers to security—the protection of information from unauthorized access or revision...

EPA’s Guidelines⁵⁵ carry out OMB’s government-wide policy. EPA relies primarily on “formal, independent, external peer review” to ensure the objectivity of information it disseminates. However, Both OMB’s and EPA’s Guidelines require an agency to “meet a higher standard” when it disseminates “influential scientific, financial, or statistical information.” The “influential” category includes, for example, information disseminated in support of “top Agency actions” such as “rules,” information disseminated in support of “economically significant actions” (those having an annual effect on the economy of \$100 million or more), and “[m]ajor scientific and technical work products” that have “major impact” or involve “controversial issues.”⁵⁶

The CAR arguably falls into the “influential” category already. It summarizes a “major” scientific work product, addresses “controversial issues,” and has had “major impact” on the climate policy debate (the AGs’ Letter and Notice being cases in point). The CAR would indisputably qualify as “influential” if EPA were to use it in support of a CO₂ rule. Any EPA regulation of CO₂ would necessarily be a “top Agency action,” an “economically significant action,” and a “controversial” action with “major impact.” Thus, under the Agency’s Guidelines, EPA would have to ensure the CAR meets the highest standards of quality before using it as the AGs urge.

EPA would be crazy to follow the AGs’ counsel, because the CAR flunks minimal standards of objectivity and utility.

Again, under EPA’s FDQA Guidelines for objectivity, science reports should, at a minimum, undergo peer review. Clinton-Gore officials rushed the National Assessment climate scenarios into publication, without benefit of proper peer review. Consider the following USNA-solicited comments from scientists at the National Laboratories, obtained by CEI under the Freedom of Information Act:⁵⁷

- “This review was constrained to be performed within a day and a half. This is not an adequate amount of time to perform the quality review that should be performed on this size document.” (Ronald N. Kickert, 12/08/99)

⁵⁴ OMB 2002 (67 FR 9452), <http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf>.

⁵⁵ http://www.thecre.com/pdf/20021026_epa-final.pdf (Hereafter EPA Guidelines).

⁵⁶ EPA Guidelines, p. 20.

⁵⁷ CEI Petition, p. 11.

- “Given the deadline I have been given for these comments, I have not been able to read this chapter in its entirety.” (William T. Pennell)
- **“UNFORTUNATELY, THIS DOCUMENT IS NOT READY FOR RELEASE WITHOUT MAJOR CHANGES.”** (Jae Edmonds, capital letters and bold in original)
- “This is not ready to go!” (William M. Putnam)

Inadequate peer review was an important reason why CEI, Inhofe, et al. sued President Clinton for producing an unlawful, incomplete, severely flawed National Assessment, and why the Bush Administration, in return for plaintiffs withdrawing their complaint, agreed that the Assessment’s climate scenarios are “not policy positions or statements of the United States Government.”

The CAR violates FDQA objectivity requirements for an even more basic reason. Under OMB’s and EPA’s Guidelines, disseminated information must be “unbiased.” The National Assessment produced scary climate scenarios, because it relied on two climate models—the “hottest” and “wettest”—out of some 26 models available to Clinton-Gore officials. Whether or not the National Assessment team “cherry picked” the models to produce predetermined results, the models they used were not representative, giving the entire report an alarmist bias.

Finally, CAR Chapter 6 fails to meet rudimentary standards of utility:

- As noted above, the two models on which CAR, summarizing the National Assessment, relies—the Canadian Climate Centre model and the British Hadley Centre model—could not reproduce past U.S. temperature trends any better than could a table of random numbers.⁵⁸ If those models cannot replicate past climate, then they cannot be trusted to forecast future climate.
- The CAR’s projection of climate change on regional scales is outside the bounds of mainstream climate science. As the Intergovernmental Panel on Climate Change’s third assessment report states: “Despite recent improvements and developments, regionalisation is still a maturing process and the related uncertainties are still rather poorly known....Therefore, a coherent picture of regional climate change via available regionalisation techniques cannot yet be drawn.”⁵⁹ Junk forecasting has no “utility.”
- The models underpinning the CAR (via the National Assessment) generate conflicting results. According to an analysis conducted for the Pew Center on Global Climate Change, “estimates based on the U.K model indicate that flooding

⁵⁸ For a technical explanation, see Christopher C. Horner, *Initial Request for Correction of Information*, Competitive Enterprise Institute, February 20, 2003, pp. 6-8, <http://www.cei.org/gencon/027,03360.cfm>.

⁵⁹ John Houghton et al., *Climate Change 2001: The Scientific Basis* (Cambridge, UK: Cambridge University Press, 2001), p. 623.

could increase in much of the country, while those based on the Canadian model indicate increased water scarcity could pervade much of the country.”⁶⁰ Such conflicting information is useless to policymakers, resource managers, and farmers. Its only possible “use” is to scare the public with predictions of floods *and* droughts.

VIII. Section 111 – Last Refuge of Anti-Energy Litigants

A. Ducking Congressional Intent – Again.

On February 20, 2003, seven State Attorneys General (including the three who signed the January 30th Notice) filed a separate notice of intent to sue Administrator Whitman unless she agrees to set New Source Performance Standards (NSPS) for CO₂ emissions from electric generating units, pursuant to CAA Section 111(b).⁶¹

Unlike the NAAQS program, which requires States to attain certain air quality (emissions-*concentration*) standards, the NSPS program requires various categories of stationary sources to achieve certain performance (emission-*rate*) standards. For example, NSPS regulations require new coal-burning electric generating units to emit no more than 0.50 pounds of nitrogen oxides per million Btu.

The AGs argue as follows. (1) Section 111(b) requires the Administrator to publish (and from time to time revise) performance standards for any source category that, in her judgment, “causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare.” (2) Fossil fuel electric generating units emit CO₂. (3) CO₂ emissions cause global warming. (4) Global warming endangers public health and welfare. (5) Ergo, Whitman must establish generation performance standards for CO₂.

Aside from the fact that step (3) is debatable and step (4) is pure speculation, the AGs again duck the question of congressional intent. Congress enacted the NSPS program in 1970. In the ensuing 30-plus years, the only performance standards EPA has promulgated for electric generating units address “criteria” pollutants subject to regulation under the NAAQS program: sulfur dioxide, nitrogen oxides, and particulate matter.⁶² If this long-settled practice does not accord with congressional intent, why did the AGs wait until now to file their Notice? Why didn’t they (or their predecessors) challenge EPA during the eight years of the Clinton Administration – an Administration far more sympathetic to their cause?

Once again, the AGs argue from “definitional possibilities.” *If* CO₂ emissions cause global warming, and *if* global warming endangers public health and welfare, then CO₂-

⁶⁰ Kenneth D. Frederick and Peter L. Gleick, *Water and Global Climate Change: Potential Impacts on U.S. Water Resources*, September 27, 1999, p. 5, http://www.pewclimate.org/projects/clim_change.pdf.

⁶¹ The AGs involved in the February 20th Notice are Elliott Spitzer (NY), Richard Blumenthal (CT), G. Steven Rowe (ME), Thomas F. Reilly (MA), Peter C. Harvey (NJ), Patrick Lynch (RI), and Christine O. Gregoire (WA) – all Democrats. The Notice is available at http://www.oag.state.ny.us/press/2003/feb/whitman_letter.pdf.

⁶² 40CFR60, Subpart Da (60.40a, 41a, 42a-49a).

emitting power plants *seem* to fit Section 111(b)'s definition of a stationary source category that "may reasonably be anticipated to endanger public health or welfare." However, every category of stationary sources that emits hazardous air pollutants also fits that definition. Yet for such sources EPA promulgates MACT (maximum available control technology) standards, pursuant to Section 112, not NSPS standards, pursuant to Section 111. Air conditioners are a source category that emits ozone-depleting substances—CFCs. Yet EPA does not promulgate either NSPS or MACT standards for CFC emissions from air conditioners. Rather, EPA administers regulations to phase out and terminate production of CFCs, pursuant to Section 604. The Supreme Court's admonition quoted earlier bears repeating: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."⁶³

Congress clearly had no intention of authorizing EPA to regulate CO₂ when it adopted Section 111 in 1970—years before global warming was even a gleam in Al Gore's eye. If Congress later changed its mind, and wanted the NSPS program to address global warming, or merely wanted EPA to study the program's applicability to global warming, it had two major opportunities to say so: the CAA Amendments of 1977 and the CAA Amendments of 1990. Nothing like that appears in the text of the CAA, as amended. Nor do we find evidence of such intent in the legislative history. In the deliberations over the 1990 CAA Amendments, the Senate declined to adopt CO₂ emission rate standards for mobile sources in its version of the amendments (S. 1630). Congress considered—and rejected—Senate-passed provisions to make "global warming potential" a basis for regulating ozone-depleting substances. It is ludicrous to suggest that Congress somehow meant to authorize a kindred proposal that no member ever introduced and neither chamber ever considered.

As noted above, several members of Congress have introduced "multi-pollutant" bills to cap CO₂ emissions from power plants. Most of these bills proposed to establish tonnage caps for CO₂ emissions. Sen. Patrick Leahy (D-VT), however, sought instead to control CO₂ emissions by amending the current New Source Performance Standards. In the 105th Congress, Leahy's S. 2636, the "Clean Power Plant and Modernization Act of 1998," proposed to cap CO₂ from power plants at the following emission rates: 0.9 pounds of CO₂ per kilowatt-hour for natural gas fired units, 1.3 pounds of CO₂ per kilowatt-hour for oil-fired units, and 1.55 pounds per kilowatt hour for coal-fired units. Leahy reintroduced the bill in the 106th Congress (S. 1949), and again in the 107th Congress (S. 1131). Each time the bill attracted *zero* co-sponsors. The AGs would have us believe that 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.

B. CO₂ Control Is Not Cost-Effective

The AGs recognize that new source performance standards (unlike ambient air quality standards) are to be based partly on economic factors. When setting an NSPS, the Administrator must take into account cost, non-air quality health impacts, energy

⁶³ United States v. Heirs of Boisdore, 8 How. 113, 122, 12 L. Ed. 1009 (1849).

requirements, and whether a “best” control strategy has been “adequately demonstrated.”⁶⁴ The D.C. Circuit Court explained those requirements as follows:

[A]n adequately demonstrated system [for implementing performance standards] is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without being exorbitantly costly in an economic or environmental way.⁶⁵

The AGs claim that “technological developments have made it easier to reduce, control or capture carbon dioxide emissions” from power plants, and that “[d]emonstrated, effective technology exists to significantly reduce carbon dioxide emissions” from such sources. However, that is relevant *only if* Congress intended for the NSPS program to address global warming. As we have seen, the AGs provide no evidence of such intent.

In addition, it is one thing to say that technological developments make CO₂ reductions “easier,” another to say that such technologies are cost-effective. The AGs have a record of error on this point. In the July 17, 2002 letter to President Bush, many of the same AGs wrote:

A recent Department of Energy Report concluded that the United States could address carbon dioxide issues with minimal disruption of energy supply and *at modest cost*, but only with fully integrated planning. See ... “Analysis of Strategies for Reducing Multiple Emissions from Electric Power Plants with Advanced Technology Scenarios,” SR/OIAF/2001-05 (October 2001) [emphasis added].

In fact, the Energy Information Administration (EIA) report cited by the AGs suggests otherwise. EIA analyzed the consumer and energy market impacts of the multi-emission caps proposed in Senator Jeffords’ (I-VT) “Clean Power Act” (S. 556). That bill would require fossil fuel power plants to reduce CO₂ emissions to 1990 levels by 2008. According to EIA, by 2020, the Jeffords caps would: (1) increase electricity prices 33 percent, (2) increase natural gas prices 20 percent, (3) add \$177 billion to power producers’ cumulative costs, and (4) eliminate 55 percent of electricity generation from coal.⁶⁶ Such costs are not “modest.”

Controlling CO₂ is expensive because, the same report explains, “Within the time frame of the emission limits, economical technologies to capture and sequester CO₂ are

⁶⁴ 111(b)(1)(A): “The term ‘standard of performance’ means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”

⁶⁵ *Essex Chemical Company Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C.Cir. 1973)

⁶⁶ EIA, *Strategies for Reducing Multiple Emissions from Electric Power Plants with Advanced Technology Scenarios* (October 2001), pp. xv, 19, 21.

unlikely.”⁶⁷ Evidently, the AGs either misunderstand the EIA report, or willfully misrepresent it.

Taking a broader view of the subject, it is difficult to imagine how any regulatory strategy to control CO₂ emissions could be cost-effective. To be cost-effective, the benefits of a strategy must be in some reasonable proportion to its cost. As is well known, however, even a fully implemented Kyoto Protocol would barely slow the projected increase in global CO₂ concentrations. According to the National Center for Atmospheric Research’s climate model, Kyoto would avoid only 7/100ths of a degree C of warming by 2050.⁶⁸ Such a miniscule reduction in average global temperature would probably be too small for scientists to detect. It would surely not benefit people or the planet one whit. Yet implementing Kyoto could easily cost the United States upwards of \$100 billion annually.⁶⁹ Kyoto is all economic pain for no environmental gain. That is why President Clinton, although sympathetic to Kyoto’s aims, dared not submit the treaty to the Senate for a vote on ratification. It is also why some politicians, such as the AGs, seek to impose Kyoto-like controls through the courts rather than allow Congress to make the law.

Section 111 requires the Administrator to take into account the non-air quality health impacts of proposed standards. Because people generally use additional income to enhance their health and safety, regulatory burdens can increase mortality risks and fatalities. A robust literature suggests that every \$10-50 million in regulatory costs induces one additional adult death.⁷⁰ Kyoto would undoubtedly take more lives than it would save. An NSPS for CO₂ would be less costly than full-blown Kyoto implementation, but it would also do far less to limit emissions, since the CO₂ standards would apply only to new stationary sources, not to existing (unmodified) stationary sources, nor to mobile sources. Like Kyoto, it would be all cost for no benefit.

IX. Conclusion

The AGs’ Notices create a test of leadership for Administrator Whitman. The Notices are designed to put her in a cross fire between President Bush, who opposes CO₂ regulation, and the EPA career bureaucracy, which has long sought the power to regulate CO₂ in order to increase its control over the U.S. economy.

CO₂ is the inescapable byproduct of the hydrocarbon fuels that supply 70 percent of U.S. electricity and 84 percent of all U.S. energy. Thus, regulating CO₂ necessarily means

⁶⁷ Ibid., p. 1.

⁶⁸ Thomas Wigley, “The Kyoto Protocol: CO₂, CH₄, and Climate Implications,” *Geophysical Research Letter* 25 (1998): 2285-2288.

⁶⁹ Depending on the extent of international emissions trading, EIA estimates Kyoto would cost the U.S. economy between \$77 billion and \$338 billion annually. See EIA, Kyoto Testimony, <http://www.eia.doe.gov/neic/press/press109.html>.

⁷⁰ See, for example, Randall Lutter, John F. Morrall, and W. Kip Viscusi, “The Cost-per-Life-Saved Cutoff for Safety-Enhancing Regulations,” *Economic Inquiry* 37 (1999): 599-608; also Ralph L. Keeney, “Estimating Fatalities Induced by the Economic Costs of Regulation,” *Journal of Risk and Uncertainty*, Vol. 14, Number 1 (January 1997), pp. 5-23.

limiting people's use of energy. Moreover, enforcing CO₂ control measures unavoidably entails prosecuting people for using energy.

According to a study by the Pew Center on Global Climate Change, more than 186,000 U.S. firms each emits upwards of 1,000 metric tons of CO₂ per year.⁷¹ A study by energy analyst Mark Mills estimates that approximately one million U.S. businesses each emits at least 100 metric tons of CO₂ per year. Mills notes that, under the CAA, a "major" source is typically one that emits more than 100 tons per year of a regulated pollutant.⁷²

It is therefore not difficult to see what the AGs stand to gain if EPA were to classify 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 increase exponentially. Since States have primary responsibility for enforcing the CAA, the AGs' prosecutorial domain would grow by orders of magnitude.

Whitman must decide where her loyalties lie—with the rule of law, economic growth, and affordable energy, or with the rule of bureaucrats, regulatory excess, and Kyoto-style energy rationing. The AGs' action gives Whitman a superb opportunity to repudiate Clinton-Gore EPA's mischievous legal opinions and avert an era of anti-energy litigation.

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⁷¹ Pew Center on Global Climate Change, *Greenhouse Gas Reporting and Disclosure: Key Elements of a Prospective U.S. Program*, In Brief Number 3 (March 2002), p. 6, http://www.pewclimate.org/policy/index_ghg.cfm.

⁷² Mark P. Mills, *A Stunning Regulatory Burden: The EPA Designating CO₂ as a Pollutant*, 1998, <http://www.fossilfuels.org/Climate/burden.htm>.