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Greenhouse Gas Emissions: Does the Clean Air Act Already Provide the Legal Basis for Regulating Them?

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Diligent readers of this column may have noted my interest in how we can use the tools of our trade as environmental lawyers to confront the global environmental issues that preoccupy us as citizens. More specifically, how we can use existing domestic environmental law (e.g., to control carbon dioxide (CO_2) emissions in the face of our national failure to ratify the Kyoto Protocol), how we can apply our skills in evaluating significant environmental risks as counselors to our clients with international issues, and how we simply join in the public debate on environmental issues. Besides the moral or, as Kant would have said, categorical imperative behind acting on these issues, these are the places where our activities as environmental lawyers serve our ever deepening and more traditional lawyerly functions.

For example, I noted in the Fall 2003 issue of this publication that ten years ago, a task force of the Section (on which I was an active member) developed a set of recommendations and proposed changes in state and local energy and development law so as to reduce greenhouse gas (GHG) emissions responsible for

the relatively new concern about global climate change. (Kevin Healy still leads the charge for the Section on this issue.) Many wondered then what an individual could state do – but we were not daunted. And in the Summer 2003 issue, I lauded the efforts of Governor Pataki to develop a state-led greenhouse gas (GHG)-reduction program involving emissions trading to fill the absence of any federal efforts to accomplish the objective of GHG reductions, and noted how we state bar environmental law sections answered the call to assist in this effort.

Issue has now been joined at the national level with environmental lawyers figuring prominently on whether, in fact, the Clean Air Act (CAA) might not itself already provide sufficient tools to reduce CO_2, a major GHG, how politics may have subverted the use of existing environmental laws to accomplish such reductions, and whether global climate change might in fact be at least as grave a threat to our national security as that of terrorist attacks. These debates reflect the complexity of environmental law and the creative (and often contentious) spirit of its practitioners and how they participate in the national discussion of the subject. It's worth reviewing these developments because of their impact on the future of our planet, and also because of their illustration of just how interesting and fulfilling our professional lives can be.

There are the biblical (i.e., Clean Air Act) exegetists who find enough support in the Clean Air Act itself to protect us against GHGs, if only the Environmental Protection Agency would breathe life into those provisions. See James J. Kohanek and David C. Batson, *EPA is Abdicating its Responsibility to Control Greenhouse Gases*, TRENDS [ABA SEER NEWSLETTER], March/April 2004, at 4. These advocates point specifically to CAA § 202's two-part test for regulation of emissions from motor vehicles: first, that the emission be an "air pollutant"; second, that the pollutant cause or contribute to public health- or welfare-endangering air pollution. For the first part of § 202's test, the exegetists note that two pre-Bush EPA general counsels

determined that CO_2 is an air pollutant, and that § 103(g) explicitly identifies CO_2 as an air pollutant. Exegetists also point to the Bush administration's own *Climate Action Report 2002*, which concluded that global warming would increase heat-related death, foster disease, and cause numerous environmental harms, as sufficient evidence of the threat to public health and welfare.

On the other hand, there are those who demand a crystal clear Congressional intention that so pervasive (and natural) a gas as CO_2 be included in the CAA's scope of regulation. See Peter Glaser, *EPA Has No Business Regulating CO_2*, TRENDS, March/April 2004, at 5. In support of this demand, these literalists point out that Congress and prior administrations have repeatedly and pointedly failed to act on any legislation attempting to limit GHGs, both at the time of the CAA's 1990 amendment and ever since. This, say the literalists, evinces Congress's clear intention that GHGs *not* be regulated under the CAA. Opposing the exegetist's arguments, literalists argue that the CAA's mention of CO_2 in § 103(g) occurred specifically in a nonregulatory context, and that CO_2's ubiquitous nature defies regulation under the National Ambient Air Quality Standards program, which of course focuses on state-specific incentives and penalties. (The same has been said about PM 2.5, but we're starting to regulate it nonetheless.)

And this might well turn out to be a significant issue in the presidential election. A recent *New York Times* analysis of the utilities industry's powerful influence in the White House tracked President Bush's campaign promise to continue the Clinton administration's plan to regulate power plant emissions of CO_2. Christopher Drew and Richard A. Oppel, Jr., *AIR WAR: Remaking Energy Policy- How Power Lobby Won Battle Of Pollution Control at E.P.A.*, N.Y. TIMES, March 6, 2004, at A1. The coal-fired power companies were troubled by the early declaration, of now-departed EPA Administrator Christie Todd Whitman, that Mr. Bush would carry out his promise. Utility lobbyist Haley Barbour sent a memo on the subject to the former

chief executive of Halliburton (an oil and gas company) and current Vice President, Dick Cheney, who was heading the infamous White House task force conducting a broad review of energy policy. In March 2001, Mr. Bush reversed himself on his campaign promise, taking CO_2 control proposals off the table, declaring he was responding to the "reality" of an energy shortage. (The *Times* charted the convergence of those utilities with the greatest emissions of other important air pollutants – nitrogen and sulfur oxides – and those making the most significant contributions to, mostly, Republican campaign coffers.) Environmental lawyers were in effect the architects and engineers of these debates, initiatives, and reversals

There's no doubt about the likelihood of the environment facing us front and center as a major campaign issue in this fall's presidential election, and possibly as a national security matter, in which case it would be *the* major campaign issue other than the economy. This seems more likely since the release in late February of a report by two consultants for Andrew W. Marshall, the Pentagon's legendary guru of long-term national security threat assessment. Motivated by his review of the 2002 report from the National Academies of Science that pointed to risks of future climate change, the new report suggests that slow warming of the planet caused by melting ice, flooding the North Atlantic with fresh water, could disrupt the ocean currents that keep Europe and easternmost North America far warmer than they would otherwise be. (This has apparently occurred twice before in the Earth's history, for non-man-made reasons, most recently about 8,200 years ago.) Admittedly extreme in its findings, the Pentagon study (which can be found at www.ems.org/climate/pentagon-climate-change.pdf) was designed to force military strategists to "imagine the unthinkable," and may force changes in the Administration's reluctance so far to regulate GHGs.

The real issue in the public's reading of reports such as the Pentagon study, and weighing their importance in our national debate, is reviewing risk analysis with

a critical eye, and not confusing it with prediction – something we practicing environmental lawyers do all the time, and about which we always have to educate our clients. I expect that the debate on the urgency of addressing climate change during this fall's election will help educate the American public on these issues, ultimately influencing public policy. And how it plays out may rest on how we environmental lawyers ply our trade – whether as exegitists or as literalists – or, on the other hand, how we join in the public debate, including the national election, on the nature of GHGs and other threats to our national security. And the discussion may also include the measures, less dramatic but significant, that Section members continue to develop and promote at the State level to reduce GHGs emissions. Whatever happens, it is clear that we are not just members of some "specialized" bar on the margins of lawyering. Rather, what we do with our skills is what lawyers, acting in a multi-faceted fulfillment of their responsibilities, traditionally did before private practice became business: to intelligently develop ideas in the public fora, to "profess" what the law is, and to inform the national debate about how to solve major societal problems. These activities tend to serve and enhance the public interest. It is our continuing challenge as environmental law practitioners to play this role as well and honestly as we can. *jpericoni@periconi.com*

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