

Comment on *Developing a Comprehensive Approach to Climate Change Mitigation Policy in the United States: Integrating Levels of Government and Economic Sectors*

by Gary S. Guzy

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In marking the one year anniversary of the U.S. Supreme Court's decision in *Massachusetts v. EPA*,¹ in April 2007, then-Chair of the House Energy and Commerce Committee John Dingell argued that developing trends—without the adoption of rationalizing comprehensive federal climate legislation—would lead to a “glorious mess.”² He was referring to the potential combination facing businesses of U.S. Environmental Protection Agency (EPA) piecemeal climate regulations, emerging state and regional programs, and the consequences of continuing litigation pursuing a wide variety of legal theories that could impose liabilities for greenhouse gas emissions. Are we able to find a path out of that mess?

Peterson et al. (the authors) set forth a wonderfully laudatory goal of leveraging and integrating state strategies, economic sectors, and policy instruments to create a robust regulatory platform for addressing climate change. Yet, several of the central weapons they seek to deploy, such as the Clean Air Act's national ambient air quality standards (NAAQS) and state implementation planning process, clearly are not neat fits for this challenge. These approaches raise three kinds of concerns: can they practically be administered or accomplished; are they politically attainable; and in the end, would they provide sufficient tools to accomplish this task.

Current Clean Air Act provisions and emerging state programs at best serve as an important backstop to comprehensive congressional action to redress global warming, not as a necessarily essential component of it. One wonders whether,

in pursuing the strategy set out by the authors, they might instead exacerbate the very glorious mess envisioned by Congressman Dingell, as compared to other tools that are available to take on this challenge.

One must question the political practicality of the solution envisioned. Many of the approaches examined by the authors would themselves require targeted and deeply detailed congressional action. These steps would require at least as broad, and arguably even greater, a measure of congressional support as comprehensive cap-and-trade climate legislation, given their highly detailed nature.

The centerpiece for a robust and effective policy response to climate change is most likely to be economy-wide cap-and-trade legislation that also fully addresses, integrates, and resolves existing Clean Air Act authorities. Otherwise, our approach will have neither the operational clarity nor the level of political buy-in that will be necessary to move an effective legislative response forward. A comprehensive cap-and-trade program is essential to incenting and deploying new technology. Neither targeted source control nor sectoral cap-and-trade programs would provide the broad-based incentives for the development of solutions that are necessary to address the scale of the greenhouse gas climate problem. Nor is the relative simplicity of the acid rain program a reason why cap-and-trade would not be effective in this admittedly more complicated context.

Similarly, a critical part of the climate solution must be supplied by robust, functioning, efficient markets that provide the means to deploy capital and encourage technology solutions. Simply weaving together existing state and regional trading programs would not provide two of the essential elements for making these markets a success. First, they would not, in themselves, provide either the depth or sufficient liquidity to promote adequate levels of trading. On

1. *Massachusetts v. EPA*, 549 U.S. 497, 37 ELR 20075 (2007).

2. *Strengths and Weaknesses of Regulating Greenhouse Gas Emissions Using Existing Clean Air Act Authorities: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 110th Cong. (2008) (statement of Rep. John D. Dingell, Chairman, House Comm. on Energy and Commerce).

the other hand, these markets should not be given free reign to operate on their own. Rigorous market oversight, designed to provide a level of transparency, integrity, and confidence in these markets, is also a critical component of their success. It is hard to imagine how that level of oversight could be supplied at the state level; rather, a carefully constructed federal program is necessary to ensure that a market accomplishes its environmental objectives and that participants have the confidence to partake in a robust fashion.

Despite this concern, it is important to recognize the significance of state activities as a backstop for inadequate federal action. Likewise, many of the features of federal legislation derive from pilots created by the states over the last several years. States should be encouraged to continue to serve as laboratories for innovation and should retain a role as a backstop in the event a federal scheme ultimately does not go far enough.

The authors' fundamental tenant, that it is possible to set scientific goals at the same time as the science can—and is even encouraged to—continue to develop, is an important insight. The Clean Air Act NAAQS process has been uniquely successful in this regard. Likewise, the authors importantly recognize the significance of congressional action in some fashion in setting or ratifying the scientific basis of the fundamental emissions reduction targets, so as to provide political buy-in, long-range business planning certainty, and to help avoid state-by-state rulemaking litigation. Yet, that critical insight appears to be at tension with the multi-pronged and more disparate approach envisioned in the rest of this Article.

In envisioning complex systems, few things are likely to rival an attempt to apply the state implementation plan (SIP) process of implementing NAAQS to greenhouse gases. This challenge should not be underestimated. Certainly the SIP process is capable of accounting for extraneous contributions of pollutants, such as in the interstate transport provisions.³ But it is difficult to imagine Congress itself developing state-by-state goals or calculating and parceling out the appropriate compliance component derived from utility demand reduction state-by-state, as the authors suggest. There is no reason to think, as the authors also seem to argue, that it would be much faster or that it would root governmental action any more firmly in science to have Congress itself establish NAAQS. And if it is hard to imagine the current Congress digging into the details of state-based compliance programs for either maintaining or attaining a standard in the future, it is perhaps even more difficult to picture Congress developing the necessary detailed information and understanding to legislate firm granular backstops where EPA fails to take adequate action—akin to the highly proscriptive soft and

hard hammers of the Resource Conservation and Recovery Act⁴—as suggested by the authors.

A comprehensive cap-and-trade program looks far simpler in the end than these multiple state-based efforts. Combining such an approach with targeted source regulations, building on, for example, possible Title II findings regarding motor vehicles, is perhaps within reach and could be tremendously effective at combining firm action with cost effective compliance flexibilities. Likewise, there are also areas where states are uniquely qualified to contribute to a broad-based solution, particularly in charting plans to promote adaptation to manage unavoidable climate impacts.

Perhaps the greatest concern with the authors' approach is that it could, in the end, divert pressure for comprehensive federal legislation, rather than build consensus for it. The recently introduced discussion draft by Chairmen Waxman and Markey, the American Clean Energy and Security Act of 2009, presents a viable approach to comprehensive cap-and-trade legislation that reconciles state and targeted source reduction efforts. That proposal pragmatically suspends state activities,⁵ recognizing that it will take concentrated and broad-based effort and support to enact and implement the kind of comprehensive program necessary to address effectively the greenhouse gas challenge. It may take time to iron out the details, but state programs still serve as a critical long-term backstop and potential laboratory of experimentation.

3. 42 U.S.C. §7426, ELR STAT. CAA §126.

4. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

5. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §1 (2009).