

2011

Statutory Arteriosclerosis

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Recommended Citation

Schoenbrod, David and Witte, Melissa, "Statutory Arteriosclerosis" (2011). *Articles & Chapters*. 1269.
https://digitalcommons.nyls.edu/fac_articles_chapters/1269

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Statutory Arteriosclerosis

Should EPA set an air quality standard for greenhouse gases? And why the arguments to the contrary prove the Clean Air Act is obsolete



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Controversy over how the Environmental Protection Agency should control greenhouse gases through the Clean Air Act has pitted the agency and some environmental groups against other environmental groups. The controversy is worth understanding because it reveals a pivotal development that EPA and the environmental groups would prefer to conceal: the 40-year-old Clean Air Act is no longer a sensible way to regulate large-volume conventional air pollutants such as ozone and particulate matter. Congress should replace the core of this venerable statute and its State Implementation Plans with an updated, market-based approach such as that proposed by *Breaking the Logjam*, a joint project of New York Law School and New York University School of Law to suggest reform of our obsolescing environmental statutes. Reform of the CAA would require legislators to take responsibility for choosing how fast to cut pollution and how to allocate costs. Congressional accountability would mean less power for EPA and environmental groups — but better air quality and more economic growth. Such reform would also ease eventual passage of much-needed greenhouse gas legislation.

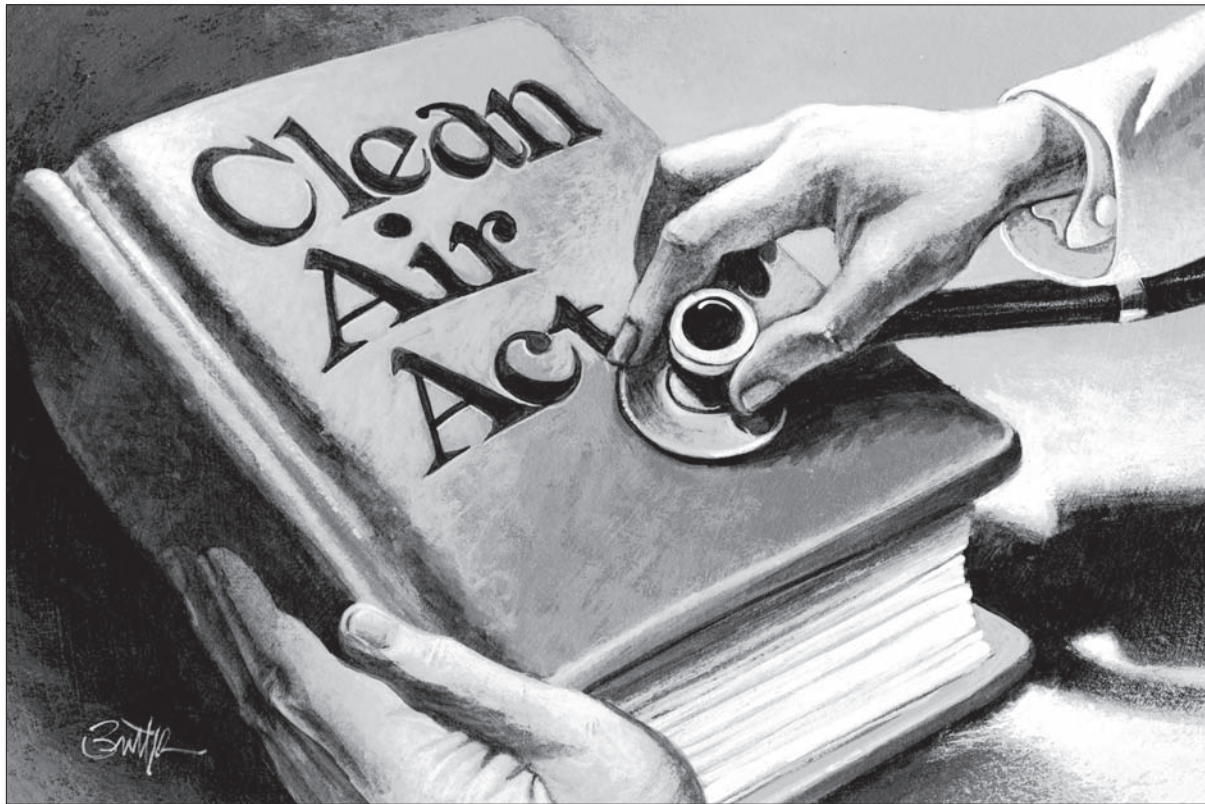
EPA has opted to control greenhouse gases under a regulatory track of the CAA that limits it to cutting emissions to the extent economically and technologically feasible. That means, in practice, at a pace that sits well politically. Some environmental groups, however, want faster, more stringent regulation. Two such groups, the Center for Biological

Diversity and 350.org, have petitioned EPA to invoke another regulatory track that would commit the agency to reducing greenhouse gases to the extent sufficient to protect public health and the environment, regardless of the cost or blowback from industry or voters. These provisions would require EPA to set a National Ambient Air Quality Standard for greenhouse gases and to meet the NAAQS through SIPs on a statutory timetable. Invoking these provisions would limit EPA's ability to bob and weave to accommodate competing political pressures.

EPA Administrator Lisa Jackson quickly voiced disagreement with the CBD petition: "This agency has never believed that setting a [NAAQS] for greenhouse gases was advisable." Other environmental groups agree with her, even though such organizations generally favor mandates that require environmental agencies to achieve environmental goals by a deadline. Jackson has said little in public about her reasons for opposing a NAAQS for greenhouse gases. But the most important reason is that SIPs are rigid, procedurally complicated, inefficient, and often ineffectual. This is an embarrassing reason, however, because SIPs are at the center of EPA's current program to control the high-volume conventional pollutants now subject to NAAQS.

Congress designed the Clean Air Act in 1970 so that each harmful pollutant would be assigned to one of three regulatory tracks.

The NAAQS track was reserved for harmful pollutants that come from "multiple or diverse sources."



es.” Examples named in 1970 included sulfur oxides and particulates. This track establishes an elaborate approach to these pollutants because achieving a safe level everywhere requires taking account of the combined effect of emissions from a variety of factories, other facilities, and vehicles. This track requires setting a NAAQS sufficient to protect health and welfare, and achieving the NAAQS. To achieve it, EPA must ensure each state has a SIP that regulates emissions from the various sources sufficiently to bring pollution levels below the NAAQS everywhere. The states get some help from EPA, which must impose national emission limits on new vehicles and new or modified stationary sources. These national regulations, however, can cut emissions only to the extent technologically and economically feasible and generally do not apply to existing sources. EPA may also regulate fuels. The SIPs must complete the job of achieving the health-based NAAQS regardless of feasibility within a statutorily set time period. This is the track that CBD wants used for greenhouse gases.

The Hazardous Air Pollutant track was reserved for pollutants that are not NAAQS pollutants but are specially hazardous. Examples of HAPs included asbestos and cadmium. Because these pollutants, by

definition, do not generally involve many sources contributing to pollution concentrations at any one place, the regulatory track skipped the elaborate SIPs and cut to the chase by ordering EPA to set emission limits for these pollutants to prevent harm. This is the track that EPA is applying to mercury in its recent rulemaking.

The “other” pollutant track is for whatever harmful pollutants are not NAAQS pollutants or HAPs. Examples included nickel and selenium. These leftover pollutants can be regulated under EPA’s authority to set national emission limits on new vehicles, new stationary sources, and fuels. Should EPA regulate emissions of one of these “other” pollutants from new stationary sources, it is supposed to require states to limit emissions from existing stationary sources to the extent technologically and economically feasible. This is the track that EPA is applying to greenhouse gases.

The first two tracks require tougher regulation than the third track. These “other” pollutants in the third track are neither the target of the elaborate SIP planning apparatus nor regulated to the extent necessary to prevent harm, as with NAAQS or HAPs. This made sense because pollutants on the third track come by definition from relatively

few sources and pose no great hazard and so are relatively unimportant.

The Environmental Protection Agency has reacted to the congressional mandate to take stringent action on the pollutants on the first two tracks by trying to keep pollutants off them. The chief example has been airborne lead. Lead in gasoline was the air-pollution issue most on the public's mind in 1970 when Congress established the three tracks. Lead clearly came from "multiple or diverse sources." After initially starting to set a NAAQS for lead, EPA decided in 1971 to put lead on the third track so that it would be free to walk a tightrope between competing political pressures. However, the Second Circuit held in 1976 that EPA was duty-bound to set a NAAQS for airborne lead. (One of us, Schoenbrod, was a litigator for the environmental plaintiffs in the case.)

The agency also resisted putting pollutants on the second track, and in many cases simply ignored them until Congress in 1990 itself listed 189 pollutants for treatment under an amended version of the second track.

As of 2008, the pollutants on the three tracks were as follows:

- The NAAQS track: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, and lead.
- The HAPs track: asbestos, chlordane, mercury, toluene, and 184 other pollutants.
- The "other" pollutant track: fluorides emitted by aluminum plants and phosphate fertilizer plants, and a few other relatively minor pollutants, each emitted by a few source categories

In 2011, greenhouse gas emissions are the most prominent pollution problem. With the Supreme Court having required EPA to regulate them under the Clean Air Act as a result of the *Massachusetts* decision, the question becomes: on which track should EPA put them?

In 2008, EPA under President George W. Bush argued strenuously in an Advance Notice of Proposed Rulemaking that it was better to regulate greenhouse gases under the "other" pollutant track rather than the NAAQS track. In 2009, Administrator Jackson reached the same conclusion, referring to the position taken by the Bush EPA. Today EPA is controlling greenhouse gases under the "other" pollutant track, the one designed for the

least important pollutants. Thus, Bush-era reasons for rejecting the NAAQS track still reign. These reasons demonstrate that Congress should restructure the Clean Air Act's treatment of conventional NAAQS pollutants.

The ANPR argued that with increasing non-U.S. emissions "the NAAQS would be unachievable (depending on the level of the standards) even if U.S. emissions were reduced to zero." This difficulty could be circumvented by setting the NAAQS as a percentage reduction in U.S. emissions rather than a concentration in the atmosphere, as suggested by former EPA General Counsel E. Donald Elliott.

Of course, past NAAQS have been set in ambient terms, and the statute refers to "ambient" standards, but Elliott's innovation finds strong support in the Supreme Court's decision in *Chevron v. NRDC*. The Clean Air Act did not address the precise question of how to set a numeric goal for domestic regulation of a pollutant whose ambient concentrations result from world-wide emissions.

Elliott's innovation nullifies the argument that emissions from other countries preclude a NAAQS for greenhouse gases. However, emissions from other countries do interfere with achieving existing NAAQS as the domestic ambient standards decrease and overseas emissions increase.

In sum, EPA argued that emissions from outside the United States are a reason against setting a NAAQS for greenhouse gases. What was left unsaid is that emissions from outside the United States are a reason for restructuring the Clean Air Act's treatment of existing NAAQS pollutants.

The Bush ANPR argued that setting a NAAQS is unworkable because "NAAQS are based purely on preventing adverse health and environmental impacts, rather than on considerations of cost, feasibility, or availability of technology," yet costs inevitably figure in controlling greenhouse gas emissions. However, to avoid a backlash from Congress, EPA has taken cost into account in setting NAAQS for conventional pollutants under every administration, even though the statute requires the agency to deny that it is doing so. The existing Clean Air Act effectively requires EPA to lie.

In sum, EPA argued that the prohibition on considering costs in setting NAAQS is a reason against setting a NAAQS for greenhouse gases. What was left unsaid is that the prohibition on considering

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costs in setting NAAQS is a reason for restructuring the Clean Air Act's treatment of conventional NAAQS pollutants.

EPA, in the ANPR, argues that "a NAAQS would trigger a relatively rigid implementation apparatus, limiting the agency's flexibility to target cost-effective emissions reductions and to shift the burden of control requirements among different industries based on the availability of new technological approaches."

EPA Administrator Russell E. Train made essentially the same argument against a NAAQS for lead, claiming that regulating principally through a national rule on lead in gasoline would be more efficient and administratively simpler. Schoenbrod responded that setting a NAAQS would not prevent EPA from controlling lead in gasoline through a single national regulation; EPA could obviate the need for fuel regulations in SIPs by setting a national regulation sufficient to achieve the NAAQS. (The Train-Schoenbrod argument is in an exchange of five letters posted at www.nyls.edu/faculty/faculty_profiles/david_schoenbrod/train-schoenbrod_correspondence.) This counterargument was valid when the Second Circuit interpreted the Clean Air Act in 1976, but is not valid now. Congress in its 1977 and 1990 amendments to the Clean Air Act expanded the statutory requirements for SIPs from three pages to 79 pages. The new requirements including "reasonably available controls measures" for existing sources make SIPs more rigid, complex, inefficient, and inefficacious.

A 2004 National Research Council study concludes that the rigidity and procedural complexity of the SIP process hobbles pollution-control efforts. "The process now mandates extensive amounts of . . .

There is no doubt that there is room to criticize the Clean Air Act. The regulatory system would benefit if Congress could make transparent and direct value judgments regarding the regulatory approach and the division of burden. With regard to congressional action, the act of course would benefit from a legislative tune-up. Clear legal mandates from Congress, without the need for statutory interpretation and regulation, would provide clarity to regulated entities, allow investors to finance emissions reductions projects with less litigation risk, and speed delivery of environmental benefits.

But hopes for legislation are likely frustrated by the fact that the arteries of Congress are even more clogged than those of EPA. Congress has not amended a major environmental statute since 1990, which predates the rise of "Fight Club Politics" with the Gingrich-led House of 1995-96, and the politics surrounding environmental issues appear more and more polarized every day. Most directly, witness the efforts of Senators Thomas Carper (D-DE) and Lamar Alexander (R-TN), two moderates who have proposed legislation for the past five Congresses that tracks the Schoenbrod/Witte proposals. Never has the Carper/Alexander proposal made it to the floor of the Senate for a vote.

EPA's flexibility to address these issues also is understated. For example, the NOx trading program, a program akin to the lauded statute-based SO₂ trading regime, was created through the much-criticized National Ambient Air Quality Standards/State Implementation Plan process. The NOx SIP Call

created a transparent, top-down, and flexible regime to address ground-level ozone in 20 states and the District of Columbia.

Moreover, the agency's authority to find similar flexibility to address greenhouse gases under Section 111 of the act appears to be limited only by politics, not the statute's language. Under that authority, EPA could track the process of the NOx program, creating a call for coordinated state emission reduction programs that would provide many of the benefits of centralized legislation. And because the agency devised the program under a similar process, it could be coordinated with other pollutant abatement programs.

The ability to use the authority under Section 111 is more than a theory. Just this month, Justice Ruth Bader Ginsburg all but endorsed the authority as the agency's means of making an "informed assessment of competing interests," including "the environmental benefit potentially achievable," "our nation's energy needs," and "the possibility of economic disruption." Clearly in the justice's mind, the transparent balancing of interests is feasible for EPA.

None of this is to suggest that the Clean Air Act is the perfect authority for addressing our current air pollution challenges. But our political system is particularly paralyzed at this inopportune juncture, making amendments unlikely. Until we are able to return to constructive legislating, the statutory arteries given to EPA may not be quite as clogged as suggested.



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time and resources in a legalistic, and often frustrating proposal and review process, which focuses primarily on compliance with intermediate process steps. This process probably discourages innovation and experimentation at the state and local levels; over-taxes the limited financial and human resources available to the nation's [air quality management] system at the state, local, and federal levels; and draws attention and resources away from the more germane issue of ensuring progress towards the goal of meeting the [NAAQS]."

The SIP process also interferes with market-based regulation, thus resulting in great economic waste. As Barack Obama pointed out during his presidential campaign, "a cap-and-trade system is a smarter way of controlling pollution" than "top-down" regulation in which agencies specify "every single rule that a company has to abide by." Market-based approaches are more cost-effective because they give businesses flexibility to decide how and where to cut emissions.

Finally, SIPs are becoming less effective. In the past, they made significant contributions to air quality, despite their emphasis on top-down regulation rather than market-based regulation. Making progress through top-down regulation was easier when many large plants had yet to adopt inexpensive, end-of-the-pipe pollution-control technologies, which regulators could readily identify and require these large plants to use. Now, however, the low-hanging fruit has largely been picked; further progress requires more expensive control technologies, changes within production processes, and the regulation of smaller sources. So it is harder for regulators to identify sensible control strategies, and top-down regulation has become less efficient and effective.

In sum, EPA argued that the rigidity, inefficiency, and inefficacy of the SIP process are reasons against setting a NAAQS for greenhouse gases. What was left unsaid is that they are also reasons for restructuring the Clean Air Act's treatment of the existing NAAQS pollutants.

The Breaking the Logjam project has proposed how to restructure the Clean Air Act. The leaders of the project — Richard B. Stewart and Katrina M. Wyman plus Schoenbrod — brought together 50 diverse environmental law experts to propose and reflect upon ways to modernize a wide spectrum of federal environmental statutes. The undertaking was built upon four principles: adopt market-based tools wherever

they can reliably achieve environmental goals; realign the responsibilities of the federal government and the states so that each level has more effective power over the environmental problems it is best placed to address; face trade-offs openly and based on reliable information; and use cross-cutting regulatory approaches that address closely related problems together rather than separately. At the end of a four-year process, the leaders of the project published a book that includes a proposal to restructure the Clean Air Act. (*Breaking the Logjam: Environmental Protection That Will Work*, Yale University Press, 2010).

The proposal is based on the most successful programs for limiting emissions:

- The regulation of new vehicles, which cut 99 percent of the emissions of three NAAQS-track pollutants from this source;
- The regulation of lead in gasoline, which eventually cut 100 percent of the emissions of another NAAQS-track pollutant from this source;
- The regulation of acid-rain-causing emissions from power plants, which cut approximately 50 percent of the emissions of some NAAQS-track pollutants from this source; and
- The regulation of stratospheric-ozone-destroying chemicals, which is in the process of cutting emissions 100 percent.

These successes are due to three characteristics shared by these programs: they used direct federal regulation; the decisions about who bore the burden of cutting emissions, and how much they would be cut, were made by Congress rather than fobbed off on a bureaucratic process; and flexibility on how and where to cut emissions was added through market-based processes. Although these successful programs applied for the most part to specific categories of sources of NAAQS-track pollutants, it is important to see that the NAAQS track as a whole lacks the characteristics that made these particular programs successful. The first two characteristics are lacking in SIPs and the third is not easy to reconcile with the current version of the Clean Air Act.

To emulate the key characteristics of those programs, the Breaking the Logjam project proposes that Congress restructure the Clean Air Act's treatment of conventional NAAQS pollutants to regulate sources rather than how the states regulate sources; decide how much to cut pollution and how to allocate the cleanup burden; and use market-based mechanisms to give sources flexibility in making the cuts. This implements the project's first principle. To keep the new program to manageable proportions, it should

not attempt to regulate all sources. Rather, as the second principle suggests, it should cover only the biggest sources — new vehicles, fuels, and several thousand of the largest stationary sources. Together these account for the lion's share of controllable emissions. The remaining stationary sources, which are large in number but relatively small in emissions, would be left to the states, which would be largely freed from the SIP requirement.

The proposal calls for the direct federal controls to take the form, largely, of cap-and-trade. Congress should set the caps to decline over time and determine the method of distributing the allowances. The reformed statute should establish backstops to remedy any failure of the federal cap-and-trade system to perform as expected; any backsliding by states or harmful interstate spillovers; hot spots; or shortfalls in achieving NAAQS.

The Obama administration is now calling for an approach to greenhouse gases that involves direct federal regulation of sources, focusing on the most important sources at the federal level, and eventually market-based mechanisms. These elements make sense, whatever might be said of the program as a whole. What is left unsaid is that the same elements make sense for conventional NAAQS pollutants, which would require reforming the Clean Air Act. On that, the Obama administration has yet to lead.

The Breaking the Logjam project urged the 111th Congress to restructure the Clean Air Act as part of the legislation to restrict greenhouse gases. Diverse individuals in Congress responded that, while the arguments for such restructuring made sense, Congress needed to focus on regulating greenhouse gases alone. But Congress fell short on that.

Actually, it would be easier for a future Congress to resolve the greenhouse gas issue if conventional pollutants are part of the mix. In July 2010, the utility industry proposed to support legislation that would subject its greenhouse gas emissions to a cap-and-trade program if environmental groups agreed to a bill freezing new regulations of the industry's conventional pollutants. The industry's proposal shows that the savings in the cost of controlling conventional pollutants would ease the passage of controls on greenhouse gases. The problem with the industry's proposal was that it would have bought greenhouse gas controls at the expense of harm to health from conventional pollutants. Instead, the country could have obtained the cost

savings that would ease the passage of greenhouse gas controls along with better protection of health from conventional pollutants by restructuring the Clean Air Act's treatment of these pollutants.

Eliminating the waste inherent in the present Clean Air Act would not only ease a legislative deal on climate, but also help protect the environment from the harm that comes from this waste of energy and material. In greening our economy, a good place to start is with pollution control itself.

Combining reform of the Clean Air Act with greenhouse gas control would facilitate legislative action in another way. Failing to reform the act's control of NAAQS pollutants would increase the cost of controlling greenhouse gases. The most efficient way to control greenhouse gases is through a market-based system, such as cap-and-trade or an emissions tax, but much of the cost savings from a market-based approach to greenhouse gases would be lost if the act still took its top-down approach to NAAQS pollutants. Because the same sources emit both kinds of pollutants, they would lose much of the flexibility that brings the cost savings in controlling greenhouse gases if they are still subject to top-down regulation for NAAQS pollutants. To make matters worse, regulatory requirements for conventional NAAQS pollutants change frequently, often on a pollutant-by-pollutant basis. The detailed, changing, top-down Clean Air Act regulation of conventional NAAQS pollutants would limit a business's ability to shape long-term investments or research plans to take advantage of a market system to control greenhouse gases. Thus, the cost savings from market-based control of greenhouse gases would be significantly reduced.

There is additional money (and resources and greenhouse gas emissions) to be saved if Congress deals with greenhouse gases and conventional pollutants together rather than separately. One reason is that steps to cut greenhouse gases often reduce conventional pollutants. The Breaking the Logjam book details the synergies. The potential savings are huge. The United Kingdom has determined that Britain's tackling of greenhouse gases and conventional pollutants together rather than separately would produce co-benefits of £24 billion by 2050. The book shows how to combine conventional and greenhouse gas programs to realize the much larger co-benefits achievable in the United States.

Reforming the Clean Air Act's treatment of conventional pollutants would both ease political resolution of the greenhouse gas issue and improve control of conventional pollutants. It's time to wake up to this basic idea and take action. •