

Comment

***355 MULTI-STATE ENVIRONMENTAL AGREEMENTS: CONSTITUTIONAL VIOLATIONS OR LEGITIMATE STATE COORDINATION?**

Katie Maxwell [FN1]

Copyright (c) 2007 Dickinson School of Law of the Pennsylvania State University; Katie Maxwell

More than two hundred years ago, the founding fathers had the foresight to provide a potentially powerful constitutional tool to permit states to resolve conflicts and make certain agreements among themselves without requiring Congress to legislate for them. The Compact Clause permits states to make binding agreements to settle disputes or even work together on specific projects in the furtherance of public interest of the particular states. [FN1] But, because the Compact Clause limits the subjects of the compacts and in most cases requires Congressional approval, state have traditionally been restrained in utilizing the Compact Clause.

More recently, however, the Compact Clause--or at least the concept underlying the clause--has been utilized to provide tougher multi-state environmental regulations that the federal government has specifically declined to approve. To some, this is an empowering device that permits states to circumvent and even undermine the policies of the federal government; but many others challenge these agreements as constitutionally infirmed. This comment will explore the pioneering multi-state environmental agreements and analyze them in the context of the Compact Clause. It first describes interstate compacts, their history and the evolution of their effect on regional problems through case law. Next, it describes global warming and how interstate compacts could be applied to regulate pollution believed to cause global warming. Lastly, this comment address a particular multi-state agreement known as the Regional Greenhouse Gas Initiative (RGGI), and questions whether that agreement faces any constitutional problems, particularly with regards to the interstate compact clause.

...II. Applying Interstate Coordination to the Challenges of Pollution and Global Warming

One regional problem states may be able to address with interstate compacts is air pollution, particularly the emission of Carbon Dioxide (CO₂). There is a growing scientific consensus that the increase in anthropogenic emissions of greenhouse gases is enhancing the natural greenhouse effect resulting in negative changes in the Earth's climate. [FN41] There is further evidence that these climate changes may pose a serious risk to human health, may accelerate a rise in sea-level, the frequency of

heavy storms, drought, and an overall increase in global temperatures, a phenomena known as global warming. [FN42] There is also increasing confirmation that one of the most significant and likely causes of global warming is the increasing amount of carbon dioxide that is being released into the atmosphere from the burning of fossil fuels. [FN43]

The world has taken notice of this problem, and scientists and nations from around the world are acting to fight the effects of global warming and limit the production of pollutants that cause it. Towards this end, in 1997, the United Nations brokered a deal between the industrialized world nations to reduce their collective emissions [FN44] of greenhouse gases by average of five percent by 2012. [FN45] This global treaty, known as the Kyoto Protocol [FN46] went into effect in February 2005 *361 with the support of 156 signing nations, including Russia, Canada, and all 25 countries of the European Union. [FN47] One country [FN48] noticeably absent from the agreement was the United States, who by all accounts is the world's largest emitter of pollutants believed to expedite global warming. [FN49]

...III. The Regional Greenhouse Gas Initiative Agreement

...**A group of seven Northeastern states [FN65] frustrated by inaction [FN66]** from the federal government, have “declared their independence” from Washington [FN67] and have joined together in the first mandatory regional program in the United States to cut greenhouse gas emissions from power plants. [FN68] These states believe [FN69] that burning excessive amounts of fossil fuels is raising the “Earth's thermostat” and potentially causing consequences that will worsen until the United States and the world reverses its trend of relying primarily on fossil fuels as its main source of energy. [FN70]

RGGI [FN71] was launched in 2003, when New York Governor George Pataki contacted other Northeastern and Mid-Atlantic governors about starting an emissions trading and capping program. [FN72] Initially, nine states [FN73] showed interest in participating in such an agreement. *364 Additionally, five Canadian provinces and two other U.S. states [FN74] wanted to act as observers to the agreement. [FN75]

RGGI describes itself as a cooperative effort by Northeastern and Mid-Atlantic states to reduce carbon dioxide emissions” [FN76] from the electric power sector. [FN77] The emission plan calls for a carbon dioxide emissions freeze [FN78] from 2009 [FN79] to 2015 and a ten percent reduction of those emissions by 2019. [FN80] RGGI plans on achieving their goals by implementing a “flexible, market-based cap-and-trade program.” [FN81] **Once RGGI is executed by the participating states in a formal agreement, it must then be implemented at the state level by each state. [FN82]** Ultimately, RGGI would like to serve “as a model for a future [national] cap-and-trade program,” [FN83] and believes that the measures that they are taking now will “stimulate the development of new technologies” to lower emissions *365 and as a result will “help avoid more expensive measures” when a national program is introduced. [FN84]

...IV. Will RGGI Suffer Constitutional Pitfalls?

While RGGI is certainly best described as a multi-state agreement, [FN92] it is not on its face an interstate compact. The seven governors of the *366 RGGI states have not signed an enforceable contract. [FN93] **Instead, they have adopted a memorandum of understanding (MOU) in which each state government [FN94] agrees to adopt regulations spelled out in the regional trading scheme. [FN95] Under the current agreement, one state could not sue another in federal court for breaching the agreement. [FN96]**

...Not having enacted any legislation about the emissions of CO₂, does not mean that the United States has failed to take a stance on the issue. Oftentimes, inaction is more signaling than actual action, and just like in *Virginia v. Tennessee* can be very telling of Congress' intent. **By *369 refusing to act on CO₂ emissions the federal government has laid out a federal climate change policy, [FN115] that shows it is opposed to regulating CO₂ emissions.** There are many plausible reasons why Congress and Bush administration may not want a national program similar to RGGI, and it is just as easy to argue that Republicans are being manipulated by energy lobbyists as it is to say that RGGI-like agreements are bad policy as they encourage other forms of energy that may cause other environmental harms that are arguably worse than an increase in CO₂ emissions. Regardless, of whether states agree with the policy plan, they should be bound by federal policy.

Furthermore, by publicly [FN116] speaking out against federal policy, the RGGI states are undermining the official policy of the Congress and the President. The United States is losing international clout on the issue of global warming, by the mere fact that it can not control its own states. [FN117] If RGGI, was forced to seek Congressional approval under the interstate compact clause, then Congress could properly exercise its authority and either force the RGGI states to comply with the federal policy, or compromise with them to come to a new national understanding on global warming and the need to regulate carbon based emissions.

Secondly, of other Constitutional concern to RGGI is the issue of Congressional preemption. [FN118] Preemption is the legal principle stemming from the “Supremacy Clause” [FN119] of the Constitution that says that federal laws are the “supreme law of the land,” [FN120] and as a result will trump any conflicting state law. If Congress were ever to affirmatively legislate on the issue of CO₂ emissions, then the RGGI agreement would be voided due to federal preemption. Conversely, the preemption doctrine may potentially help RGGI's goal of getting a national cap-and-trade system of CO₂ emissions, or at the very least force Congress to actively legislate on the issue. If Congress finds the agreement unsatisfactory, and finds that it impedes the objective of the federal government then it has to preempt RGGI with legislation. The RGGI agreement could force Congress to legislate on the issue of CO₂ emissions, but this is not necessarily a bad result for either RGGI or Congress. If Congress does *370 legislate on CO₂ emissions, and decides to go against the RGGI agreement, at the very least then, RGGI states definitively know the parameters with which Congress will let them operate on their own. Congress benefits just as much from this outcome, as legislating against CO₂ emissions would allow Congress to take back its authority to regulate air quality standards and matters of interstate commerce. If Congress votes the other way, and creates a national program to regulate CO₂ emissions, then RGGI has succeeded in its goal of helping to create a national program.

By forcing Congress to act, the RGGI states are empowering the principal of states' rights by making themselves real players at the federal level and more generally reinvigorating the idea of federalism.

Thirdly, RGGI will involve aspects of an interstate commerce, [FN121] a field that is solely reserved for the federal government to regulate, and not the states. [FN122] **Interstate commerce will be implicated in the RGGI plan because energy will be traded for and imported [FN123] into the RGGI states will be subject to the initiative's rules, the cost of which will likely be taxed. [FN124]** Additionally, since RGGI focuses mostly on electric power plants, the cost of energy produced will go up, which is at the most basic level is a tax that the state collects not through monetary terms but rather in environmental terms. RGGI stakeholders respond to the accusations that they are usurping the federal government's ability to regulate interstate commerce by saying that it is a “regionally focused state-level matter that is of no concern to federal authorities.” [FN125] The Bush administration stated that they welcome state cooperation on energy issues, as long as state agreements do not cause Americans to lose jobs or shift emissions from one state or country to another. [FN126] Presumably, the Bush administration feels this way because any loss of jobs or emissions shifting would not only be detrimental to those states' economy but would also have an effect on interstate commerce, and need to be dealt with by Congress, under their power to regulate interstate commerce, and not by the states. [FN127] Power plants in the RGGI states have already *371 indicated that there is a strong chance that the RGGI agreement will result in a loss of manufacturing jobs to countries where the cost of producing electricity is lower. [FN128]

It is further argued that RGGI needs to be approved by Congress because it could potentially affect the plenary authority of the President [FN129] and Congress [FN130] over foreign affairs and foreign commerce. The emissions trading program is planned to extend far beyond the borders of the RGGI states, and will likely link up with the emissions trading scheme going on in the European Union. [FN131] **In fact, some believe that RGGI coordinators are actively focused on trying to become part of trading schemes in Europe, Canada, and Australia. [FN132]** However, RGGI members argue in response that any trans-Atlantic trades would solely be in commercial in nature, and not government-to-government, and as a result would not be taking over the powers of the president and Congress to regulate foreign trade. [FN133]

Lastly, there is also a possibility that allowing RGGI to proceed will make it more potentially difficult for a federal program to get started. If RGGI, is not successful and comes out with a negative outcome, it will be much harder to gain support for a national program, as anyone doubting a federal CO2 emissions program will use RGGI as an example of how a cap and trade system will fail in the United States. [FN134] The only way that RGGI will enable a federal program is if it is capable of perfectly modeling how a national program should work, which is unlikely since a regional program should not be set up as a scaled down version of a national program. [FN135] RGGI states have different concerns in establishing CO2 emission than would the federal government in creating a national program. But, RGGI proponents are not discouraged *372 by this criticism, and point out that a national policy may be unnecessary if a few more giant-population states would join the agreement. [FN136] If a few more large states were to join up with RGGI, then the majority of the CO2 emissions in the United States would be regulated under the RGGI MOU, and would essentially serve as a de facto national program, without having to go through the Congressional law making system.

V. Conclusion

RGGI does not satisfy every element of an interstate compact. It is not binding on any of the state signatories, a member state can withdraw at any point, it is even arguable that it does not involve an issue of federal law. Despite these individual details, RGGI still simulates an interstate compact, particularly since the complete operation of the MOU requires the participation of all of the current states and potentially more. While the interstate compact clause has been ruled to only require Congressional approval when a compact takes a federal power and allocates it to a state government, a reallocation of federal powers can potentially occur even when there is no formal interstate compact. Congressional approval should be required anytime the powers of the federal government are questioned.

With regards to RGGI specifically, the express purpose of the program is to circumvent federal policy regarding greenhouse gases, and generally evade the authority of Congress. The net effect of the RGGI program is the same regardless of whether it is a formal or informal interstate compact, but what does matter is whether the agreement requires Congressional consent.

Despite the many Constitutional issues that the RGGI agreement raises, as the MOU is currently structured, it should not require Congressional approval. It is not an enforceable contract among the RGGI states, but rather a collaborative effort to cooperate on an issue of regional concern. Congress and the President may be frustrated by and disagree with RGGI, but until they act in a way to preempt the agreement RGGI will stand as a legitimate state effort in cooperation and not fall victim to its potential Constitutional violations.

[FN1]. Katie Maxwell is a 2007 graduate of the Dickinson School of Law of the Pennsylvania State University and a 2004 graduate of Columbia University, Barnard College.

[FN43]. Global Warming--Climate, U.S. Environmental Protection Agency, available at, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/Climate.html>.

[FN44]. Telephone Interview with Lawrence Kogan, Institute for Trade, Standards and Sustainable Development in Princeton, NJ. (Jan. 18, 2006). There is an ongoing debate within the issue of global warming, on whether it is better to approach the fight against global warming with a reduction in the emissions of greenhouse gases, or with an increase in technology that would create tools that could in effect clean emissions and strip them of their greenhouse gases. The Kyoto Protocol addresses only the issue of limiting emissions and does not provide incentives for technological improvements.

[FN45]. Cool Response to Global Warming Plan, CNN, Feb. 15, 2002, available at <http://archives.cnn.com/2002/WORLD/asiapcf/east/02/15/japan.climate/>? related.

[FN46]. For the full text of the Kyoto Protocol see United Nations Framework Convention on Climate Change, The Kyoto Protocol, available at http://unfccc.int/essential_background/kyoto_protocol/background/items/1351.php.

[FN47]. The European Union is made up of the following countries: England, Ireland, Portugal, Spain,

France, Germany, Belgium, Netherlands, Luxembourg, Italy, Greece, Hungary, Austria, Estonia, Slovenia, Cyprus, Finland, Malta, Poland, Sweden, Latvia, Czech Republic, Slovakia, Lithuania.

David Hodas, State Law Responds to Global Warming: Is It Constitutional to Think Globally and Act Locally?, 21 Pace Env'tl 53(2003).

[FN48]. World Carbon Dioxide Emissions from the Consumption and Flaring of Fossil Fuels, 2001, Environmental and Energy Study Institute, available at <http://www.eesi.org/publications/Fact%20Sheets/If%20Corporations%20Were%20Nations.htm>.

The only other arguable world power not participating in Kyoto is Australia. While a major world nation, Australia emits less than 10% of the amount of CO₂ that the United States does.

...[FN66]. Telephone Interview with Lawrence Kogan, Institute for Trade, Standards and Sustainable Development in Princeton, NJ. (Jan. 18, 2006). Kogan believes that it is not inaction that is propelling RGGI, but rather action by the federal government that is not in the direction that the RGGI states want to go.

[FN67]. Dan Goldman and Berl Hartman, Missing the Clean-Air Revolution, Bos. Globe, Dec. 10, 2005 at A13.

[FN68]. Anthony DePalma, Seven States Agree on a Regional Program to Reduce Emissions From Power Plants, N.Y. Times, Dec. 21, 2005 at B3.

[FN69]. Andrew Revkin, Past Hot Times Hold Few Reasons to Relax About New Warming, N.Y. Times, Dec. 27, 2005, at F2. Global warming is not a scientifically proven phenomena, but there is a growing scientific believe that it does exist.

[FN70]. Moore and Vandelan, supra note 42.

[FN71]. Memorandum of Understanding, Regional Greenhouse Gas Initiative, Dec. 20, 2005, available at http://www.rggi.org/docs/mou_12_20_05.pdf.

[FN72]. Resources for the future's work on the Regional Greenhouse Gas Initiative, available at http://www.weathervane.rff.org/solutions_and_actions/United_States/rggi.cfm.

[FN73]. DePalma, supra note 69. RGGI signatories in addition to Massachusetts and Rhode Island. Massachusetts and Rhode Island dropped out just days before the MOU was signed. Some critics attribute the dropping out of these two states to the fact that Mass. Governor Mitt Romney, who is expected to run for the Republican nomination for president in 2008, wanted to be able to distance himself from potential rivals, particularly New York Governor George Pataki. Romney has denied that personal politics played any role in his decision. Interestingly, it is much speculated that Pataki will also be seeking the Republican nomination in 2008. It is unclear whether Pataki so strongly supports RGGI, unlike his Massachusetts counterpart, because of a desire to gain a national and potentially international image before the election, or if he wants to distance himself from the main pack of the Republican party.

[FN74]. Pennsylvania and Maryland.

[FN75]. State observers (Pennsylvania and Maryland) to the RGGI program will fully participate in the planning of the cap and trade system, and per the MOU are invited to fully join the program at any time without needing a majority of the RGGI states to vote in favor of the acceptance. However, they need not, prior to joining RGGI, enact regulatory schemes or legislation to comply with the MOU. Canadian provinces are not, at this stage, invited to join RGGI, but have been included in all of the initial stages of the program. See The Regional Greenhouse Gas Initiative: An Overview of the RGGI Program and Its Importance, Environment Northeast, http://www.env-ne.org/Program%20Fact%20Sheets/ENE_RGGI_Background.pdf. RGGI is also prepared to allow European Union member states to act as observers.

[FN76]. Regional Greenhouse Gas Initiative, <http://www.rggi.org>.

[FN77]. Resources for the future's work on the Regional Greenhouse Gas Initiative, Weathervane, available at http://www.weathervane.rff.org/solutions_and_actions/United_States/rggi.cfm.

[FN78]. "Freeze" means that emissions would be required to not increase between 2009 and 2015.

[FN79]. The RGGI program plans to go into effect January 1, 2009.

[FN80]. Resources for the future's work on the Regional Greenhouse Gas Initiative, Weathervane, available at http://www.weathervane.rff.org/solutions_and_actions/United_States/rggi.cfm. Lowering current emissions by 10% in 2020 would put still only put the Northeastern area at about the same level of pollution as all of Germany.

[FN81]. Frequently Asked Background Questions, Regional Greenhouse Gas Initiative, <http://www.rggi.org/faq>.

[FN82]. Lawrence Kogan, Precautionary Preference: How Europe's New Regulatory Protectionism Imperils American Free Enterprise, Institute for Trades, Standards and Sustainable Development, Inc., 2005, p. 55, available at <http://www.itssd.org/White%20Papers/PrecautionaryPreference-EURegProtectionism-FULLVERSION.pdf>.

[FN83]. Resources for the Future's Work on the Regional Greenhouse Gas Initiative, Weathervane, http://www.weathervane.rff.org/solutions_and_actions/United_States/rggi.cfm.

[FN84]. Frequently Asked Questions About the Potential Impacts of the Program, What are the Benefits of the RGGI Program?, Regional Greenhouse Gas Initiative, <http://www.rggi.org/faq>.

...**[FN94].** While the governors of the seven signatory states have agreed to the MOU, it will ultimately be up to the state legislatures to pass legislation, or for the state to put into effect state regulations in order to comply with the MOU. **See also, Kogan, supra note 83, at 54.**

[FN95]. Margaret Kriz, Environment: Warm-Up Drills, National Journal, 906-911, Mar. 26, 2005, available at www.nationaljournal.com.

[FN96]. Telephone Interview with Lawrence Kogan, Institute for Trade, Standards and Sustainable Development in Princeton, NJ, Jan. 18, 2006. What is unclear at this point, and will only become clear as time goes on and as RGGI is experimented with more is whether a state, foreign nation, or corporation could sue another RGGI participant for selling emission credits that they were not entitled to.

...[FN115]. Kogan, supra note 83, at 58.

[FN116]. Some States Flirt with Europe on Carbon Controls, USA Today, Dec. 16, 2004. The original nine RGGI states went to Buenos Aires in 2004 for the U.N. conference on climate change and openly criticized the United States' policy on not imposing controls on carbon emissions.

[FN117]. Id.

[FN118]. Some also argue that RGGI presents problems with interstate commerce, but also with issues of federal preemption. See Kogan supra note 83, at 58. See also McKinsry, supra note 109, at 13.

[FN119]. U.S. Const. art. VI, § 2.

[FN120]. U.S. Const. art. VI, § 2.

[FN121]. See Kogan supra note 83, at 55.

[FN122]. Commerce Clause, Article I, Section 8, Clause 3, To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

[FN123]. “US GHG Regs Seen as Move to Protect European Business,” Power, Aug. 24, 2005. For a through understanding of the cap and trade system look to the RGGI Memorandum of Understanding available at Memorandum of Understanding, Regional Greenhouse Gas Initiative, Dec. 20, 2005, http://www.rggi.org/docs/mou_12_20_05.pdf.

[FN124]. Kogan supra note 83, at 55.

[FN125]. Supra note 116, (quoting Kenneth Colburn, Executive Director for the Northeast States for Coordinated Air Use Management).

[FN126]. Blum, supra note 91.

[FN127]. Id.

[FN128]. Id.

[FN129]. U.S. Const. art. II, §§ 2, 3.

[FN130]. U.S. Const. art. I, § 8 gives Congress the authority to “regulate commerce with foreign nations.”

[FN131]. Supra note 116.

[FN132]. Kogan, supra note 83, at 57. “In terms of other schemes, such as RGGI linking with the EU, as [RGGI] understands the currency issue, as long as the states or regions have in place an enforceable cap which has certainty in terms of expectations, there is a measurement verification protocol, real reductions are occurring, and offsets are allowed under some sort of defined process, there is no reason why RGGI could not link up with other trading schemes-be they part of Kyoto or sub-regional schemes that may come out through Canada, or Australia for example. This is something that [RGGI is] focused on at the moment.”

[FN133]. Supra note 116.

[FN134]. Telephone interview with William Pizer, Senior Economist at the National Commission on Energy, in Washington, D.C. (Jan. 19, 2006).

[FN135]. Joseph Kruger and William Pizer, Regional Greenhouse Gas Initiative: Prelude to a National Program?, Background, Resources for the Future, November 2005 available at <http://www.rff.org/rff/Documents/RFF-BCK-RGGI.pdf>.

[FN136]. Blum, supra note 91.

15 PENNSELR 355

END OF DOCUMENT

15 Penn St. Envtl. L. Rev. 355, 372