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THE CLEAR SKIES INITIATIVE: CHANGING THE CLIMATE OF ENVIRONMENTAL POLICY

HEATHER H. BRUSER*

INTRODUCTION

Emissions of pollutants and air quality have long been dominant issues of environmental legislation. Over the last few decades, public reaction to environmental hazards has prompted numerous presidential administrations to implement legislation and regulations to slow damage to public health and the environment caused by air pollution. The first major piece of legislation focused on protecting air quality was the modern Clean Air Act (CAA), enacted under the Nixon administration.[1] There have been various revisions to the regulatory regime created under the CAA, which have strengthened or relaxed air quality standards.[2] For example, the Clinton administration took an aggressive, proactive approach to enforcing emissions regulations under the CAA.[3]

However, since President George W. Bush has taken office, the policy regarding the regulation of emissions has taken a strikingly different approach. Bush began his administration by refusing to join the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Kyoto Protocol is a proposed set of international standards on emissions.[4] In February 2002, President Bush introduced his Clear Skies initiative, as an alternative to the Kyoto Protocol's approach to regulating emissions.[5] The following note will look at the evolution of United States environmental policy and how President Bush's new approach regulating emissions fairs in comparison to the current regulatory regime and the proposed international resolution provided in the Kyoto Protocol.

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[1]Thomas O. McGarity, *Jogging in Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL.L. REP. 10709 (2002).

[2]*See id.*

[3]*Id.*

[4]Sean D. Murphy, *Bush Administration Proposal for Reducing Greenhouse Gases*, 96 AM. J. INT'L L. 487, 487 (2002).

[5]*Id.*

I. IMPACT OF EMISSIONS

A. Public Health

It has been recognized for decades that the emissions of harmful pollutants has had an enormous impact on the health of Americans and people around the world. This should not surprise anyone who has seen urban smog. Smog is primarily made of ground-level ozone, produced when pollutants from many sources, such as power plants, automobiles and even common house paint, combine in the air.[6] Smog and other air pollutants contribute to premature deaths and several serious respiratory illnesses.[7] Studies show a rise in asthma and other respiratory diseases in areas that have high levels of air pollution, leaving many Americans with a number of ozone-related heath problems such as chronic bronchitis, respiratory infections and other forms of lung damage.[8] Air pollutants have also been linked to other health problems such as cancer, birth defects and brain and nerve damage.[9]

Some health effects of air pollution such as skin cancer are not as apparent to the public as respiratory problems. Most people are aware that "greenhouse gases" have been destroying the ozone for many years.[10] The ozone screens the sun's harmful, ultra-violet rays and once destroyed, there is no longer a filter to protect human skin.[11] The resulting increase in harmful ultra violet light increases the risk of cataracts and skin cancer.[12]

The "hole" in the ozone is considered one of the main causes of the incredible rise in skin cancer rates among Australians.[13] Skin cancer affects approximately two-thirds of all Australians.[14] The high incidence of skin cancer in Australia has two basic causes: first, most

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[6]Environmental Protection Agency, *The Plain English Guide to the Clean Air Act*, *at* http://www.epa.gov/ oar/oaqps/peg_caa/pegcaa01.html (last visited Nov. 29, 2002)[hereinafter *Plain English Guide*].

[7]White House Executive Summary—*Clear Skies Initiative*, at http://www.whitehouse.gov/news/releases/2002/02/clearskies.html [hereinafter *Clear Skies Initiative*].

[8]*See generally id.*

[9]*Plain English Guide*, *supra* note 6.

[10]*See generally id.*

[11]*Id.*

[12]*Id.*

[13]Sharon Beder, *The Hole Story: Ozone Depletion Research in the Areas of Medical, Biological and Veterinary Science, Physics, Pharmacy and Physiology*, *at* http://www.uow.edu.au/arts/sts/ sbeder/HoleStory/intro/intro4.html (last visited Nov. 29, 2002).

[14]*Id.*

Australians have fair skin and are close to the equator; and second, the hole in the ozone is almost directly over their country.[15] Scientists predict "[t]hat for every [1%] decrease in the ozone, there could be a 4-6% increase in skin cancer."[16] Although people may change their lifestyles in order to limit their exposure to the sun, the evidence indicates that ozone depleting "greenhouse gasses" pose a serious health risk to all people.[17]

B. Environmental Impact

The harmful effects of emissions are not only felt by human beings. Air pollution also creates significant problems for our environment. One of the most obvious examples of the consequences of air pollution on the environment is acid rain. Coal burning power plants, which emit large amounts of sulfur oxide (SO_2) and nitrogen oxides (NO_x) into the air, are a major source of acid rain.[18] SO_2 and NO_x[19] are acid based chemicals. As such, when they combine with rainwater and fall back to earth, the mixture contaminates lakes, rivers, and streams.[20] It is estimated that of the approximately 2800 lakes and ponds in the Adirondack Mountains nearly 500 are so acidic that they can no longer support plants or aquatic life.[21] This problem is not isolated to the Northeast; similar damage is present throughout the United States.[22]

In addition, although it seems the planet is warming by insignificant amounts, scientists believe that global warming will eventually have a devastating effect on our ecosystem.[23] In fact, the twentieth century has seen the largest temperature increase in the last one thousand years.[24] Substantial evidence suggests that pollutants emitted by factories and power plants are contributing to this warming trend.[25] "Greenhouse gases" increase global tem-

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[15] *Id.*

[16] *Id.*

[17] *See id.*

[18] *Plain English Guide, supra* note 6.

[19] NOx is a term that describes both NO, NO_2 and other oxides of nitrogen that play a role in the formation of ozone and acid rain. Environmental Protection Agency, *Summary of Air Quality and Emissions Trends, at* http://www.epa.gov/airtrends/sixpoll.html (last visited Nov. 29, 2002) [hereinafter *Emissions Trends*].

[20] *Plain English Guide, supra* note 6.

[21] Kate M. Joyce, *Who'll Stop the Rain?*, 7 ALB. L. ENVTL. OUTLOOK J. 94, 97 (2002).

[22] *Plain English Guide, supra* note 6.

[23] Roberta Mann, *Waiting to Exhale?: Global Warming and Tax Policy*, 51 AM. U.L. REV. 1135, 1141 (2002).

[24] *Id.*

[25] *Id.* at 1142.

peratures by insulating the earth, thereby preventing the heat produced by the sun from escaping into space.[26] As the sun's heat becomes trapped within the atmosphere, average temperatures in the United States will rise five to ten degrees Fahrenheit over the next one hundred years.[27]

If global warming continues at the current rate there are a number of consequences that could have dramatic results on our environment. First, a rise in sea levels due to the melting of permafrost, could flood islands and coastal regions.[28] Second, global warming could increase the frequency of severe storms, change precipitation levels, and alter ocean currents.[29] Finally, warmer, wetter climates could mean an increase in pests that can kill crops and cause an increase in tropical diseases such as malaria.[30]

II. EVOLUTION OF U.S. AIR QUALITY LEGISLATION

A. Prior to 1992

The concern for protecting the environment in general, and air quality specifically, began during the Nixon administration.[31] In a six-year period the federal government enacted numerous statutes aimed at the protection of the environment.[32] It was during this rush of environmental legislation that the Clean Air Act (CAA) was enacted.[33] When President Carter took office he was "faced with the daunting challenge of implementing those newly enacted statutes..."[34] Although he began somewhat tentatively, by the end of his administration he developed an aggressive regulatory agenda aimed at enforcing the intent of the CAA against private polluters.[35]

However, when the Reagan administration took over in 1981, it was the beginning of the end (at least for the next twelve years) for aggressive regulation of private entities emitting air pollutants.[36] President Reagan fought to reduce the strict regula-

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[26] *Id.*

[27] Neal F. Lane & Rosina Bierbaum, *Recent Advances in the Science of Climate Change*, 15 WTR NAT. RESOURCES & ENV'T 147, 200 (2001).

[28] Mann, *supra* note 23, at 1143.

[29] *Id.*

[30] *Id.*

[31] McGarity, *supra* note 1.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

tions promulgated by the Environmental Protection Agency (EPA) under Presidents Nixon, Ford, and Carter.[37] In addition, he attempted to bring enforcement to a halt and to prevent future regulations from being promulgated through various executive orders.[38] These executive orders required burdensome reporting requirements to a centralized White House review committee.[39] Many important protective regulations never emerged from the committee.[40] Although Congress prevented Reagan from making any meaningful headway on deregulation, the review process he instituted slowed the issuance of new protective regulation, and the progress of the environmental movement.[41]

The beginning of the George H. W. Bush administration showed promise for those who wanted to see the regulation of air pollution reenergized. To avoid the stigma created by his predecessor, Bush helped to break down some of the barriers Reagan had created with the centralized White House review process, thereby freeing the EPA to enact new environmental regulations.[42] However, towards the end of his administration he imposed a "moratorium" on new regulations and instituted another deregulatory attack.[43] These actions slowed the regulation of polluters.[44]

B. The Clinton Administration

President Clinton adopted an aggressive policy, much like the policy approach under President Carter, to further environmental protection. Although Clinton did provide greater flexibility for regulated companies by eliminating obsolete regulations, he was also very effective in achieving greater environmental protection.[45] One of Clinton's major accomplishments was his overhaul of the centralized White House review process.[46] This change removed a major obstacle facing new environmental regulation.[47] In addition, Clinton successfully protected existing regulatory pro-

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[37]McGarity, *supra* note 1.
[38]*Id.*
[39]*Id.*
[40]*Id.*
[41]*Id.*
[42]*Id.*
[43]McGarity, *supra* note 1.
[44]*Id.*
[45]*Id.*
[46]*Id.*
[47]*Id.*

grams against the 104th Congress' attempts to pass legislation that would severely lessen environmental protections.[48]

Although there were slightly different policy objectives with each administration, from Nixon to Clinton the main statutory authority dealing with the reduction of air pollutants was the CAA.[49] While there have been a variety of revisions to the CAA, its primary structure has changed very little from the time it was enacted. Essentially, the CAA requires the Environmental Protection Agency (EPA) to set national ambient air quality standards for six major pollutants.[50] These standards are generally enforced through state regulations, but if the state fails to enforce the CAA, the EPA may take over the enforcement role.[51]

One major problem with the original CAA was that it only applied to pollution generating facilities constructed after the adoption of the Act in 1970.[52] Existing facilities were grandfathered in over time.[53] The hope was that as time passed, old facilities with higher pollution emissions would close down.[54] Predictably, many companies chose to continue operating the old, unregulated, facilities rather than build new ones.[55] The Clinton administration attacked this problem by requiring old facilities, that had expanded and created new pollution sources, to undergo New Source Review (NSR) under the CAA.[56] Therefore, if the owners of old facilities wanted to expand and upgrade those facilities, the NSR program would bring them under regulation. The regulatory regime created under the CAA may soon undergo major changes with the current Bush administration's new approach to environmental protection outlined by his Clear Skies Initiative.

C. George W. Bush Administration

1. Rejection of the Kyoto Protocol

When President George W. Bush came to office in 2000, one of the first actions he took regarding air quality policy was to

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[48] *Id.*
[49] *See id.*
[50] *Emissions Trends*, *supra* note 19.
[51] *Plain English Guide*, *supra* note 6.
[52] Paul Krugman, *Bush Administration Lags in Clearing the Air*, THE MILW. J. SENTINEL Apr. 28, 2002, *available at* 2002 WL 3140306.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] McGarity, *supra* note 1.

refuse to join the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC).[57] The Kyoto Protocol is a multilateral environmental agreement resulting from nearly five years of negotiations among more than 170 countries.[58] Although it is not yet certain whether the rules regulating emissions under Kyoto will be "legally binding" international law, the political consequences of non-compliance could have significant ramifications.[59] The Kyoto Protocol provides for a "robust and novel" compliance system that is unprecedented for an international environmental agreement.[60]

Generally, the provisions of the Kyoto Protocol call on developed nations to reduce "greenhouse gas" emissions by 5.2% from 1990 levels by the year 2012.[61] The six "greenhouse gases" included in these targets are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.[62] Developed nations subject to these targets may participate in flexible compliance mechanisms, such as an emissions trading system.[63] This system provides extra allowances to countries with verified reductions in emissions, which can then be traded to countries that cannot meet their target.[64] The compliance system under the Kyoto Protocol also includes stringent reporting requirements, a Compliance Committee to determine cases of non-compliance, and specific consequences once noncompliance has been determined.[65] The provisions of the compliance system are outlined below.

Parties to the agreement will monitor and report estimates of their "greenhouse gas" emissions to the UNFCCC secretariat in Bonn, Germany.[66] "The reports will include data on emissions from most industrial, transportation and other sectors of the economy that burn fossil fuels."[67] An expert review team will check these reports for accuracy and identify possible cases of non-compliance.[68] Any

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[57]Murphy, *supra* note 4, at 487.

[58]Glenn Wiser, *Kyoto Protocol Packs Powerful Compliance Punch*, 25 INT'L ENVIR. REP. 86 (2002).

[59]*Id.* at 88.

[60]*See id.* at 86 (noting similarity to trade agreements by the World Trade Organization rules).

[61]*Id.*

[62]*Id.*

[63]Wiser, *supra* note 58, at 86.

[64]*See id.*

[65]*Id.* at 86-87.

[66]*Id.* at 86.

[67]*Id.*

[68]*Id.* at 86-87. The expert review teams will be comprised of experts from a variety of geographic areas. *Id.*

findings of non-compliance will then be referred to the Compliance Committee, which functions much like a court to enforce the emissions targets and the reporting requirements.[69] Nations failing to meet the emissions targets, or the reporting requirements, could then be subject to an array of consequences ranging from a declaration of noncompliance, to a reduction in the emissions allocated to the nation for the next period, or loss of the privilege to participate in the flexible mechanisms available under the protocol.[70]

Another important aspect of the Kyoto Protocol is its policy of providing financial assistance to developing countries.[71] The UNFCCC recognizes that industrialized nations must provide financial assistance as well as technological aid to developing counties to meet their obligations under the Kyoto Protocol.[72] Although the details of these provisions have not yet been decided,[73] it is important to realize that any long-term plan to improve our global climate must consider the future impact developing countries may have on emissions levels.

Despite the overwhelming number of nations around the world who have taken part in the drafting of the Kyoto Protocol, the Bush administration declined to join the agreement.[74] In a critique of the protocol released in June, 2001, the Bush administration pointed out several problems with the protocol that render it "fundamentally flawed."[75]

First, the Administration claimed that the reduction targets of the protocol are "precipitous."[76] The emissions targets provided in the protocol are based on 1990 emissions data.[77] Although the protocol set a target for the United States of a seven percent reduction, it does not take into account that emissions in the United States have drastically increased in the last decade.[78] Therefore, in order for the United States to actually meet a reduction of seven percent (based on 1990 data), emissions would have to be reduced

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[69]Wiser, *supra* note 58, at 87. There is also a separate branch of the Compliance Committee, which aids parties in the implementation of the protocol. *Id.*

[70]*Id.* at 87.

[71]David A. Wirth, *The Sixth Session (Part Two) and Seventh Session of the Conference of the Parties to the Framework Convention on Climate Change*, 96 AM. J. INT'L L. 648, 650 (2002).

[72]*Id.*

[73]*Id.*

[74]Murphy, *supra* note 4, at 487.

[75]Wirth, *supra* note 71, at 657.

[76]*Id.*

[77]*Id.*

[78]*Id.*

by thirty percent.[79]

The second criticism of the Bush administration is that the protocol excludes developing countries.[80] Because developing countries are considered the largest source of future increases in emissions, it is clear that they are important to long-term protection against climate change.[81] Third, and perhaps most importantly, the Bush administration argues that the costs of implementing the protocol would devastate the United States' economy, with as much as a four percent decrease in the gross national product.[82] These costs would, in fact, be much greater than initially anticipated because the United States would actually have to reduce emissions by thirty percent. Finally, the Bush administration argues that the flexible compliance mechanisms would leave the United States "dangerously dependent on other countries to meet its emissions targets."[83]

III. CLEAR SKIES INITIATIVE

In February of 2002, President Bush announced his Clear Skies Initiative as an alternative to the Kyoto Protocol's approach for the reduction of harmful "greenhouse gases."[84] Since this announcement, President Bush has sent legislation to Congress to implement this plan.[85] The legislation introduced as the "Clear Skies Act of 2002"[86] is modeled after the 1990 Clean Air Act's acid rain program.[87]

The heart of the Clear Skies Act is a market-based cap-and-trade program for emission producing facilities. Initially, the statute would set "mandatory emissions caps for the three most harmful air pollutants—sulfur dioxide (SO_2), nitrogen oxide (NO_2), and mercury."[88] It should be noted that, the statute does not include caps for carbon dioxide (CO_2), one of the largest contributors to

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[79] *Id.*

[80] *Id.*

[81] Wirth, *supra* note 71, at 657.

[82] *Id.* at 658.

[83] *Id.* (quoting Environmental Protection Agency, *An Analysis of the Kyoto Protocol* 14 (2001), *at* http:// www.books.nap.edu/books/0309075742/html/).

[84] *Remarks by President Bush on His Climate Change, Clean Air Initiative*, 33 INT'L ENV'T REP. (BNA) 8, 426 (2002).

[85] Environmental Protection Agency, *Clear Skies Legislation Introduced in Congress: Proposal Will Improve Air Quality, Prevent Premature Deaths, Illness*, at http://www.epa.gov/epahome/headline_072902 (last visited Nov. 29, 2002).

[86] Clear Skies Act of 2002, H.R. 5266, 107th Cong. (2002); Clear Skies Act of 2002, S. Res. 2815, 107th Cong. (2002).

[87] Environmental Protection Agency, *supra* note 85.

[88] *Id.*

climate change and depletion of the ozone.[89] Because there are no direct health threats from CO_2, and it is a different kind of pollutant, some argue that CO_2 should be dealt with in a separate type of program.[90] In addition, traditional coal burning power plants have had difficulty lowering CO_2 emissions.[91] With 51% of the nations energy coming from coal burning power plants,[92] to significantly reduce CO_2 emissions, an energy source switch must occur, which "would be very expensive and increase electricity prices."[93]

The goal of the Clear Skies Act is to reduce emissions of the three main problem pollutants by 70% of their current levels by the year 2010.[94] Caps on emissions levels will be reduced at two specific intervals: once in 2010 and again in 2018.[95] Generators of pollutants "must hold an 'allowance' for each ton of pollution they emit—one ton, one allowance."[96] The government controls the number of allowances distributed to each generator and reduces them over time.[97] If a generator is found to be in violation of the caps, it will be fined a statutory amount that increases until the generator complies with the cap or obtains a sufficient number of allowances.[98] As the number of allowances available across the country drops, less pollution is emitted.

Second, a trading system will be established to allow flexibility for the generator to determine how to meet declining emissions caps.[99] If a generator cannot meet the cap for the designated period, it may purchase allowances from generators whose emissions are below the statutory cap.[100] The ability to trade increases the flexibility a generator has in determining how to comply with the emissions cap.[101] The idea is that polluters will reduce emissions levels in increments that exceed the caps in earlier years to

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[89] *See* Clear Skies Act of 2002, H.R. 5266, 107th Cong. (2002).

[90] *See, President Bush's New Clean Air Proposal* (NPR radio broadcast, April 26, 2002), *available at* 2002 WL 7643499.

[91] Amanda Onion, *Battle Cries Over Clear Skies: Lawmakers, White House and Industry Clash Over Ways to Limit Pollution, at* http://abcnews.go/sections/scitech/DailyNews/energy020626.html (on file with the Journal of Natural Resources and Environmental Law).

[92] *Id.*

[93] *Id.*

[94] *Clear Skies Initiative, supra* note 7.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See generally Executive Summary of Clear Skies Act of 2002, at* http://www.epa.gov/clearsies/summary.pdf (last visited Nov. 29, 2002)[hereinafter *Clear Skies Act*].

[99] *Clear Skies Initiative, supra* note 7.

[100] *See id.*

[101] *Id.*

save allowances for use when the caps decline.[102] Just as people save and invest for retirement when their income will be less, generators will attempt to save allowances now for times when the caps are reduced.[103] In addition, generators will have an increased incentive to develop better ways to reduce emissions so they can sell allowances to others.[104]

The goal of the market-based cap-and-trade program is to allow more flexibility to generators in meeting more stringent caps on emissions levels. The allowance system gives the generator the opportunity to spread the costs of compliance over time, thereby reducing the risk that electricity prices will increase when the emissions caps are reduced. In addition, the Bush administration believes the cap-and-trade program is a more cost effective system for the government to implement.[105] Because of the strict limit on the number of allowances and specific automatic penalties for violations, there is no need for the type of litigation required by the CAA.[106] The White House estimates that this approach may be two-thirds cheaper than the traditional CAA approach.[107]

Finally, the provisions of the Clear Skies Act regarding NSR have been highly controversial. First, the provisions of the Clear Skies Act, like its predecessor the CAA, only apply to facilities constructed after its enactment.[108] To prevent companies from continuing to use old facilities not covered by the CAA, the NSR program brings these facilities under regulation as they expand and generate more emissions. However, the Bush administration believes NSR is inconsistent with the Clear Skies Act and has recently attempted to modify regulations currently implementing the NSR program to allow more exemptions for existing facilities.[109] In addition, the Clean Skies Act itself also creates additional exemptions to NSR for existing facilities by limiting the types of sources affected by the legislation.[110]

A. Benefits of the Clear Skies Initiative

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Clear Skies Initiative*, *supra* note 7.
[106] *Id.*
[107] *Id.*
[108] Onion, *supra* note 91.
[109] *Id.*
[110] *See Clear Skies Act*, *supra* note 98.

There would be an obvious benefit to human health and the environment if levels of SO_2, NO_2 and mercury are reduced by 70%. Reducing the amount of these pollutants will lessen the effects of smog and thereby reduce occurrences of serious respiratory and cardiovascular problems.[111] A decrease in health problems such as chronic bronchitis, respiratory infection and asthma attacks could prolong the lives of many Americans.[112] In addition, the toxic effect of mercury on unborn children will be reduced.[113]

There would also be an enormous benefit to the environment. Reduction of these harmful pollutants would reduce the instances of acid rain and smog, in turn saving many of our lakes, streams and national forests.[114] However, the flexibility for polluters provided by the cap-and-trade program is not necessary to reduce pollution emissions and improve the health of Americans. Since the Clean Air Act was enacted in 1970, air pollution has decreased by 29%.[115]

Another major benefit to the Clear Skies Act is that it could, through the utilization of a cap-and-trade program, ease the tension between energy needs and the protection of air quality. With the energy crisis of the western United States still weighing heavily on the minds of people across the country, the availability of affordable energy sources is of paramount importance. In addition, with the economy in a "slump," concern over the possibility of the loss of jobs and a reduction in our gross national product, due to the costs of implementing environmental regulation is a valid fear.[116] Therefore, many people believe that the cap-and-trade program is a cost-effective approach to pollution control.

There is little doubt that the costs of implementing the Kyoto Protocol were one of the Bush administration's major reasons for refusing to join the agreement.[117] According to President Bush, the cost of implementing Kyoto could be as much as four hundred billion dollars.[118] In contrast, under the Clear Skies Act, the costs of implementing new technologies to improve emissions

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[111] *Clear Skies Initiative*, *supra* note 7.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See id.*

[116] *See* Wirth, *supra* note 71, at 658.

[117] White House Fact Sheet: *President Bush Announces Clear Skies & Global Climate Change Initiatives*, *at* http://www.whitehouse.gov/news/releases/2002/02/20020214.html (last visited Nov. 29, 2002).

[118] President George Bush, Remarks, on His Climate Change, Clean Air Initiatives (Feb. 14, 2002), *in* 33 INT'L ENVIR. REP. 426 (Feb. 22, 2002).

levels can be spread over time by allowing generators to trade emissions allowances.[119] The estimated compliance costs saved by the Clear Skies Act could be as much as one billion dollars per year.[120] Therefore, sources of affordable energy would be preserved because generators would not need to raise costs to consumers in order to make up for the costly renovation of facilities to immediately reduce emissions. In addition, it would cost the government much less, due to the elimination of NSR and litigation expenses, to enforce the cap-and-trade program than to enforce the current CAA.[121] The less money spent on enforcing environmental regulation, the more money the government has available to research new technologies that could provide more environment friendly energy sources.

Similarly, the cap-and-trade program creates incentives for polluters to find innovative solutions for reducing emissions. Because a generator with more allowances than necessary to meet emissions caps can profit by trading those allowances to other generators, it has an incentive to find better ways to reduce emissions. In addition, the program creates an incentive to reduce emissions levels more rapidly because as caps are reduced, so are the number of allowances distributed. Therefore generators are forced to plan for the future by reducing emissions at a faster rate. By reducing emissions faster, generators receive more allowances to trade or save for the future when the caps are significantly lower. In addition, when inflation is considered, a reduction today is more cost effective than waiting until the future when caps are lowered.

B. Drawbacks of the Clear Skies Initiative

Despite the benefits that could come as a result of the Clear Skies Act, there are numerous drawbacks that could arise from its adoption. One of the biggest complaints of environmentalists is that the Clear Skies Act does not include any provisions for the reduction of carbon dioxide (CO_2).[122] CO_2 is largely responsible for trapping the heat of the sun, making it a dominant contributor to global warming.[123] Studies show that power plants emit forty

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[119] *Clear Skies Initiative*, *supra* note 7.

[120] *Id.*

[121] *See id.*

[122] *See generally*, Clear Skies Act of 2002, H.R. 5266, 107th Cong. (2002); Clear Skies Act of 2002, S. 2815,107th Cong. (2002).

[123] National Resources Defense Council, *Fact Sheet on the Bush Administration's Air*

percent of the United States' carbon dioxide emissions, and account for ten percent of all carbon dioxide emissions.[124] The main resistance to including caps for CO_2 in the Clear Skies Act is the amount of money required to bring coal burning power plants up to the new emissions standards.[125] Some fear that electricity costs may skyrocket if producers are forced to find alternative energy sources.[126] However, since coal remains one of the dirtiest sources of energy, perhaps it is time to find an alternative, even if electricity costs rise. In addition, some companies feel that CO_2 emissions caps are inevitable.[127] Therefore, they prefer to know what potential caps they may face so that they can upgrade their power plants now in preparation for the future.[128]

Another major criticism of the Clear Skies Act and the Bush administration's environmental policy is the plan to eliminate NSR. As previously mentioned, since the CAA did not apply to facilities constructed prior to its enactment, the NSR system was implemented to require generators to apply for a permit when they expand old facilities and increase emissions.[129] However, many argue that the NSR program is redundant and unnecessary under the new Clear Skies Act.[130] Yet the NSR may be the only thing forcing old facilities to comply with emissions standards. Despite the original belief that the old facilities would shut down over time, many companies have chosen to keep these facilities open solely because they are not covered by the CAA.[131] The NSR stops generators of pollutants from making an end run around the emissions reductions. This is sensible environmental policy. When companies have the money to expand and increase emissions, they should upgrade their pollution controls as well.

The elimination of the NSR program has not only been a concern of environmentalists, it has caused turmoil within the EPA.[132] When the EPA Director of the Office of Regulatory Enforcement, Eric V. Schaeffer, resigned in February, 2002, he stated that one of

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Pollution Plan (Aug. 1, 2002), *at* http://www.floridaclimatealliance.net/clearskies.htm (last visited Nov. 29, 2002).

[124] *Id.*

[125] Onion, *supra* note 91.

[126] *See id.*

[127] *Id.*

[128] *Id.*

[129] McGarity, *supra* note 1.

[130] Environmental Science & Technology Online, *"Clear Skies" May be Ahead for Electric Power Plants*, (April 3, 2002), *at* http://pubs.acs.org/subscribe/journals/esthag-w/2002/apr/policy/cc_skies.html (last visited Nov. 29, 2002)[hereinafter *Electric Power Plants*].

[131] Krugman, *supra* note 52.

[132] *Electric Power Plants*, *supra* note 130.

the main reasons for his departure was his belief that the Bush administration was frustrating enforcement of environmental regulations.[133] The Director's main criticism was the prospect that the Administration would eliminate NSR.[134] In the last two years of the Clinton administration, the EPA filed nine lawsuits against power companies that had expanded their plants without obtaining NSR permits.[135] Two of these companies have already agreed to settlements that would reduce emission by 750,000 tons per year.[136] If similar results were obtained in the other lawsuits, emissions would be reduced by 4.8 million tons every year.[137] However, without NSR, power companies are refusing to settle.[138] The former Director sees this breakdown in negotiations as the direct result of allowing the power plants to rewrite the law.[139]

In addition, environmental groups claim that the Clear Skies Act delays emissions reduction and weakens the current safeguards of the CAA.[140] The emissions caps are reduced in two phases, one reduction in 2010, and another in 2018.[141] Therefore, polluters may continue to pollute until the caps are reduced. Proponents of the Clear Skies Act argue that by giving pollution generators more time to comply with emissions standards, they will be more successful and less costly to the economy. They also say that the cap-and-trade program will encourage reductions to occur more quickly than caps alone, and therefore improve air quality at a faster rate. The theory is that caps will decline over time, and generators of pollutants will want to save allowances by reducing emissions levels more in earlier years.[142] In addition, generators have an added incentive to reduce emissions at rates in excess of the cap because they can sell their saved allowances to others.[143]

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[133]Blue Skies Alliance, *Coalition for Clean Air, Registration Letter Eric V. Schaeffer, EPA Director Office of Regulatory Enforcement, at* http:///www.blueskiesalliance.org/ BlueSkiesAllianceResignation LetterEricSchaeffer.htm (last visited Nov. 29, 2002) [hereinafter *Resignation Letter*].

[134]*Id.*

[135]*Id.*

[136]*Id.*

[137]*Id.*

[138]*Id.*

[139]*Resignation Letter, supra* note 133.

[140]Natasha Hunter, *It's Clear Skies for Dirty Air*, 13 THE AMER. PROSPECT 15 (August 26, 2002), *available at* http://www.propspect.org/print/V13/15/hunter-na.html (last visited Nov. 29, 2002).

[141]*Clear Skies Initiative, supra* note 7.

[142]*Id.*

[143]*Id.*

It should be noted that the success of the Acid Rain Program has not yet been proven.[144] Generally the easiest and cheapest reductions are made at the beginning of the program.[145] Later when energy prices and the price of tradable allowances rise, there could be fierce political pressure to delay the emissions reductions again.[146] If this happens, all of the benefits of the cap-and-trade program will be lost; despite a high rate of reductions in early years, they will be almost non-existent when viewed over time.

On the other hand, the success of the CAA lacks the uncertainty surrounding the Clear Skies Act. Regardless of the criticisms of the costs of implementation and enforcement, the general structure of the CAA has been proven to actually reduce air pollution.[147] Since 1970, the amount of pollutants emitted in the United States has been reduced by over fifty million tons.[148] Emissions of NO_2 have been reduced by 9% in the last two decades, SO_2 emissions are down 20% and airborne lead has been reduced by 96%.[149] Although these numbers may not sound as impressive as the goals of the Clear Skies Act, they are proof that the CAA does actually reduce air pollution and significantly increase the quality of the air we breathe.

Even if the cap-and-trade system is a better mechanism for reducing emissions, it is argued that caps on emissions provided in the Clear Skies Act are much higher, (and allow more emissions) than under the CAA.[150] In addition, these caps are lowered, reducing allowable emissions levels, in much slower intervals.[151] Over the next ten years, the Clear Skies Act may allow an additional 850,000 tons of nitrogen oxide, 2.5 million tons of sulfur dioxide and twenty-one tons of mercury to be emitted than under the current standards of the CAA.[152]

Finally, the adoption of the Clear Skies Act as an alternative to the Kyoto agreement fails to acknowledge that global warming and depletion of the ozone is a world-wide problem. Every country that emits pollution is contributing to a problem that will affect every other nation on the planet. Because the United States is one of the

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[144] *See generally* Todd B. Adams, *New Source Review Under the Clean Air Act: Time For More Market-Based Incentive?*, 8 BUFF. ENVTL. L.J. 1, 43 (2000).

[145] *Id.*

[146] *Id.*

[147] *See* Foundation for Clean Air Progress, *Clean Air Act*, *at* http://www.cleanairprogress.org/clean-air-pollution/clean-air-act.asp (last visited Nov. 29, 2002).

[148] *Id.*

[149] *Emissions Trends*, *supra* note 19.

[150] Hunter, *supra* note 140.

[151] *Id.*

[152] *Id.*

primary contributors to air pollution, the policy decisions of our government have a profound effect on other nations. In addition, the United States is an international leader. Therefore, the failure of our government to back the Kyoto Protocol could significantly reduce the agreement's impact on emission reduction.

IV. CONCLUSION

Although there are several promising aspects of the Clear Skies Act, potentially serious drawbacks are evident when compared to the current CAA and the Kyoto Protocol. First, the elimination of the NSR under the Clear Skies Act would allow old, dirty facilities to escape regulation. The Bush administration claims that the NSR is inconsistent with the flexibility of the Clear Skies Act. However, there is no hard evidence that regulating old facilities is inconsistent with the cap-and-trade program. The main objective of the NSR is preventing companies from maintaining and expanding older facilities with outdated pollution controls solely because they are not covered by the CAA. Since the Clear Skies Act, like the CAA, will only target facilities constructed after its enactment, there must be some mechanism to prevent companies from "getting around" the new emissions caps. If the NSR is eliminated, generators of pollutants would have no incentive to ever update pollution controls at older facilities. In addition, if the cap-and-trade program is significantly less burdensome for pollution generating companies to implement, why would it be inconsistent to require their older facilities to be "capped" as well?

Second, in contrast to the Kyoto Protocol, the Clear Skies Act fails to address CO_2 emissions. Because CO_2 is a leading cause of global warming, it is imperative that any new legislation address this serious pollutant. While it is true that coal burning power plants may have difficulty meeting emissions standards for CO_2, it is inevitable that CO_2 emissions have to be regulated to slow the effects of global warming.

Third, adopting the Clear Skies Act as an alternative to the Kyoto Protocol ignores the fact that global warming affects nations around the globe. Although the Kyoto Protocol may be more costly to implement than the Clear Skies Act, in order to truly impact global warming, the reduction of air pollution must be an international priority. While the protocol does not require developing countries to meet emissions standards, this does not mean that it ignores the importance of developing countries in the reduction of pollution. Although developing countries are likely to be major contributors to air pollution

in the future, it is not economically feasible for them to meet these standards at this time.

The United States continues to lead the world in pollution emissions. Thus, it makes sense for the short-term responsibilities to fall on the shoulders of those most responsible. In addition, although the details have not been established, Kyoto recognizes the importance of developing nations and provides for the sharing of technology and other resources between countries. Whether the goals of the protocol are realistic or not, it is of grave importance that some sort of international agreement be reached that makes every nation accountable for the pollution it contributes to the world's atmosphere.

Finally, the Clear Skies Act may actually slow the reduction of emissions as compared to the CAA because it extends the amount of time pollution generators have to comply with the stricter standards. The Bush administration argues the flexibility of the cap-and-trade program makes it less costly to the economy and claims the success of the Acid Rain program shows that the flexibility of the program encourages companies to reduce emissions below the required caps. In fact, the Acid Rain Program under the CAA has been very effective in reducing SO_2 emissions in the United States, and it is possible that generators of pollution will view the flexibility of the Clear Skies approach as an incentive to research new technologies to make their facilities more environmentally friendly. Therefore, it may be wise to consider extending the cap-and-trade system to other pollutants. However, the Clear Skies Act fails to address CO_2 emissions and allows old pollution-generating facilities to go unchecked, leading to the conclusion that the potential harm that could come from its enactment may outweigh the possible benefits.

In modern society it is necessary to consider the economic ramifications of environmental regulation. However, the actual and potential harms to public health and the environment that arise from air pollution should also have considerable weight in balancing the benefits of regulation against its costs. The CAA has been proven to successfully reduce pollution emissions and increase air quality. Therefore, it should not be hastily abandoned for a cheaper alternative.