

## Taking on Carbon Dioxide In Defiance Of Bush; Also, Tracking Detectors For Carbon Monoxide

by Sam Williams

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Call it a characteristic display of Big Apple chutzpah. Last month, city and state attorneys scored a [\\$1.1 billion legal victory](#) against out-of-state polluter Ohio Edison for violating the federal Clean Air Act, which regulates pollutants such as sulfur dioxide and nitrous oxide. But now, the New York State Office of the Attorney General and New York City Corporation Counsel, along with half a dozen other governments in the Northeast and West Coast, are going after carbon dioxide.

Carbon dioxide is currently unregulated by the federal Environmental Protection Agency. The chemical, CO<sub>2</sub>, is a natural byproduct of fossil fuel combustion. Though benign from a chemical safety standpoint, its ability to absorb and retain heat has led many scientists and governments around the world to attribute a recent rise in global mean temperatures to unchecked industrial and automotive exhaust.

Many business groups and even a few scientists challenge this so-called "greenhouse effect" theory, but evidence of rising carbon dioxide in the earth's atmosphere is incontrovertible. A study of atmospheric concentrations at the Mauna Loa observatory in Hawaii, the longest continuous study on record, reported an 18.8 percent increase in the mean concentration of carbon dioxide between 1958 and 2003.

With the Bush Administration currently distancing itself from the Kyoto Protocol, the recently-enacted treaty forcing developed nations to reduce "greenhouse gas" emissions, state and city governments with financial and political stake in climate stability see the legal system as the best way to reduce U.S. emissions.

"I think if we want to see progressive, responsible environmental policy, it's going to have to come from the state and local governments," says Judith Enck, policy advisor to New York Attorney General Eliot Spitzer. "If you get the West Coast and the Northeast teaming up, sooner or later you get a national global warming policy even if the federal government won't act."

### **Bush's Clear Skies Act Ignores Carbon Dioxide**

Last month, just about the same time Ohio Edison was agreeing to a court-mandated installation of smokestack-scrubbers at its largest coal-burning power plant, the Bush Administration's efforts to spare other power companies the same indignation were stalling out in Congress.

Dubbed the Clear Skies Act, the Bush air pollution plan would abandon a decades-old policy of forcing power companies to clean their facilities whenever they expand or upgrade production -- a policy known as "new source review" by insiders -- in favor of a market-oriented policy in which clean companies earn pollution credits which they can then sell to dirtier companies as a monetary reward for compliance. This policy is known as "cap and trade."

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According to the Bush administration, this market-driven system would reduce sulphur dioxide, nitrogen oxide, and mercury emissions by as much as 70 percent over the next two decades while at the same time reducing the number of costly lawsuits. Opponents, however, see major flaws: During the first decade of the plan, or at least until 2012, the so-called Bush "cap" would actually be lenient enough to relieve power companies from the compliance duties already required under new source review. More importantly, however, the Bush plan makes no mention of carbon dioxide whatsoever. Although Bush promised to regulate during the 2000 election campaign, his administration voided the promise less than 60 days into his first term, citing recessionary concerns.

### Looking At 19th Century Law To Get Around Bush In The 21st

Since then, Democratic-voting coastal states such as New York, Massachusetts and California, and even swing states such as Iowa, have been looking for alternate ways to remedy the rising cost of severe weather storms and lost wetlands. Environmental lawyers have found their remedy not in the federal case law built up since the Air Pollution Control Act of 1955 but in the common law that governed most environmental disputes in the days of limited federal authority.

David Doniger, policy director for the Natural Resources Defense Council, says the 19th century nuisance laws that once allowed cities such as New York to ban slaughterhouses, rendering plants and other unpopular businesses and to regulate their activity across jurisdictional lines offer an opportunity to go after fixed-point carbon dioxide producers. Doniger cites, in particular, *State of Georgia v. Tennessee Copper*, a 1907 case that worked its way all the way up to the Supreme Court. In that case, the state of Georgia asserted its legal right to limit the tree-killing sulphur dioxide emanating from a copper smelter operating in Tennessee. In 1915, the Supreme Court sided with Georgia, setting up the modern framework for interstate environmental regulation.

"This is old, hallowed stuff," says Doniger of the 1907 case. "A lot of it was put aside or put on pause during the last few decades because most kinds of pollution are now addressed by the Clean Air Act."

Most but not all.