

A Plan for Coordinating State Action on Environmental Protection as the Federal Government Rolls Back National Efforts

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The United States will soon have the presidency and both houses of Congress controlled by a political party whose official, 2024 national platform embraces increasing gas and oil production and eliminating policies designed to speed the transition to electric vehicles. The same party document said nothing about efforts to address climate change, advance renewable energy or tackle other environmental threats.

If incoming leaders act on this platform, federal policy will soon be directly at odds with efforts of New York and other northeastern states to expand renewable energy, reduce greenhouse gas emissions, phase out gas-powered vehicles and implement environmental protections of all kinds.

As panic sets in among environmental advocates, it is important to keep in mind that states faced this stark contrast long before Donald Trump's first term. Throughout his presidency George W. Bush repeatedly cast



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doubts on the science of climate change and opposed formal efforts to reduce emissions, including the landmark Kyoto Protocol.

Northeastern states, eager to meet global calls for climate action, responded to eight years of federal inaction by developing the Regional Greenhouse Gas Initiative (RGGI) and its implementing memorandum of understanding (MOU) among participating states. The MOU has guided their collective efforts to reduce GHG emissions from the

energy sector. RGGI, a truly bipartisan effort (at the state level at least), worked splendidly. Deftly avoiding constitutional pitfalls, RGGI is a model for keeping environmental efforts alive at the regional level for the next four years while the federal government ends them.

RGGI Was a Clever Way to Get Around Constitutional Limits on State Power

RGGI is an initiative of northeastern states (led by governors of both major political parties) to coordinate their independent efforts to reduce GHG emissions from power plants beginning in 2009. Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont each signed the RGGI MOU whereby they pledged to adopt uniform regulations that set a regional cap on GHG emissions from power plants of 25 megawatts or more, required power plant owners to acquire enough annual carbon credits to cover emissions, and allowed credit holders to trade credits among themselves as emissions rise or fall.

The 2005 MOU was designed to avoid certain constitutional pitfalls. It merely committed state signatories (i.e., the governors) to propose regulations for adoption to implement the detailed cap, trade and invest requirements of RGGI. The states were left to decide how to implement the program legislatively or administratively. (For example, New York State decided there was adequate legislative authority for DEC to act on its own through regulations.) This handshake deal is as far as states can go. Only the president has the

power to make treaties with foreign nations (Constitution Const. Art. II, §2, Cl 2).

Only congress has the authority to regulate interstate commerce. (Constitution Art. I, §8, Cl 3, Part 1 of 3). And no state can enter into any binding agreement or compact with another state without Congressional approval. (Constitution Art. 1, §10, Cl. 3). But the states each acted in good faith, making the legislative or regulatory changes needed at the state level to implement the completely uniform and voluntary RGGI program among states.

As such, challenges to the MOU were scarce and unsuccessful. See, e.g., *Thrun v. Cuomo*, 112 A.D.3d 1038 (3d Dep't 2013) ("By signing the MOU, Pataki did not obligate New York to participate in the RGGI program, but merely agreed to *propose* a carbon dioxide emissions cap-and-trade program in New York. It is the regulations implementing RGGI in New York—not the MOU—that form the legal basis for the state's participation in the RGGI program (see generally 6 NYCRR part 242; 21 NYCRR part 507). As the MOU did not actually effectuate the RGGI program or the state's participation in it, invalidating the MOU will not have the effect of repealing the regulations or otherwise affect their legality.")

RGGI Worked in Dramatically Reducing Greenhouse Gas Emissions from Power Plants

The states' collective sale of credits and collection of penalties have produced significant income for participating states, which through the MOU agree to re-invest the proceeds in energy efficiency, renewable

energy and consumer benefits. States control their respective programs but the nonprofit RGGI Inc. manages the credit trading system and otherwise helps organize state efforts.

Based on RGGI Inc.'s latest report, calculating data through 2022, power plant emissions declined from 2009 to 2022 from about 120 million tons to 80 million tons, and are set to drop further. States have realized and invested over \$300,000,000 annually from the program. The effort has huge global significance. The collective gross domestic product (GDP) of participating states is 5.5 trillion dollars, which would rank RGGI states the third largest economy on the planet after the United States and China.

Guided by RGGI, in 2007 California, Colorado, New Mexico, Oregon and Washington State signed a memorandum of understanding to take a similar state-led approach to creating the Western Climate Initiative. Various Canadian provinces soon pledged to join. Since that time, only California, Washington and Quebec have adopted the necessary regulations to implement the cap-and-trade program. But it remains meaningful. The program has reduced emissions and raised billions for climate investments, which is globally significant considering the combined GDP of the three jurisdictions would also make them the third largest economy after the United States and China.

Interstate MOUs Can be Used to Address a Wide Variety of Other Environmental and Legal Priorities

Power plant emissions were the most obvious target of emission reductions because the Clean Air Act clearly does not preempt stronger state

efforts to reduce emissions. Conversely, other economic sectors are more problematic. Courts have consistently interpreted the 1975 U.S. Energy Policy and Conservation Act to largely preempt state efforts to regulate appliance and motor vehicle energy efficiency—both major sources of GHG emissions.

Still, the RGGI model can be adapted for a host of efforts to combat climate change. For example, states have traditionally held all authority over land-use policies. They could agree to propose for adoption similar building code provisions that dramatically improve building energy efficiency or state-level zoning standards that discourage sprawl. Northeastern states also began work in 2010 on the Transportation Climate Initiative, which like RGGI would have each participating state voluntarily adopt policies to reduce GHG emissions from the transportation sector.

For example, states might each set uniform limits on GHG emissions from fuel sold into participating states (rather than emissions and fuel efficiency of vehicles themselves)—an effort to indirectly address vehicle emissions without running afoul of the Energy Policy and Conservation Act. The states put that effort on hold following the Covid 19 pandemic and resulting economic disruption.

New York in particular has ambitious climate change goals that would benefit from coordinated regional efforts. The centerpiece is the 2019 Climate Leadership and Community Protection Act (the Climate Act), which requires a 40% reduction in greenhouse gas emissions from all sources by 2030 (over 1990 levels) and an 85% reduction by 2050.

Further, the Climate Act requires electric service providers to purchase at least 70% of electricity from renewable sources by 2030 and 100% from carbon-free sources (including nuclear) by 2040. To implement the Climate Act, New York is designing an economy-wide cap and invest plan to reduce emissions from the building, transportation, agricultural and other sectors. Parallel voluntary initiatives by neighboring states could bolster those efforts and prevent cross border “leakage,” a term that refers to the movement of polluting businesses or activities to other states to avoid regulation.

Leaning into “States’ Rights” Rationales

The divergence among state climate, energy and environmental policies is likely to grow over the next four years. And in the view of the U.S. Supreme Court, that may be okay. In a landmark 1992 decision striking down a federal law requiring states to adopt certain practices regarding radioactive waste, the Court said: “States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.

The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart. The Constitution instead ‘leaves to the several States a residuary and inviolable sovereignty.’” *N.Y. v. United States*, 505 U.S. 144 (1992) (striking down portions of the Low-Level Radioactive Waste

Policy Amendments Act of 1985 that required states to take title to or responsibility for certain wastes generated within their borders.) The current Supreme Court in particular seems willing to allow states to weigh fundamental rights and policies differently and enact starkly different laws in response. See, e.g., *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022) (deciding that states, not the federal government, must decide laws governing medical abortion access and vowing to “return the power to weigh those arguments to the people and their elected representatives.”)

The divide among states is also likely to grow in other political and legal areas beyond climate and environmental issues. Although beyond the scope of this column, interstate MOUs may therefore serve to advance state goals at odds with federal policy in areas like gun safety, reproductive rights, gender rights, living wages, protections for undocumented persons, zoning for housing affordability, public transportation, health insurance exchanges and a host of other problems. Northeastern states will need to lean into the “states’ rights” rationale and coordinate their policies to defend against congressional efforts to ban or curtail them.

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