# TOGAS: The Fabric of Our Democracy

by Bill Becker and Amy Royden-Bloom

Bill Becker has been the Executive Director of the National Association of Clean Air Agencies, an association of state and local governmental air pollution control agencies in 52 states and territories and more than 165 major metropolitan areas across the country, since its inception in 1980. A graduate of Syracuse University (B.S. Civil Engineering) and Johns Hopkins University (Masters, Environmental Engineering), Mr. Becker has also advised Congress on environmental issues and headed the environmental departments at two national trade associations.

Amy Royden-Bloom is a senior staff associate with the National Association of Clean Air Agencies. She handles criteria pollutant, global warming, agriculture, and training issues for the association, which represents state and local air pollution control agencies in the United States. She has a bachelor's degree from the University of Virginia and a law degree from Harvard Law School.

In their article, *Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAS)*,[1] Judith Resnik, Joshua Civin and Joseph Frueh describe the value of organizations they term "translocal organizations of governmental actors," or TOGAs, which "could be viewed as improving deliberative democracy because they bring in . . . a particularly interesting set of voices—those of officials structurally embedded in the problems of states and localities and cutting across both."2 The article then provides examples of how the law could recognize and harness the benefits TOGAs bring to the policymaking table, including through access to federal courts, deference to their decisions and specific roles in rulemaking processes. As a TOGA, we agree that TOGAs should be treated differently than other interest groups and that TOGAs play a unique and important role in our democracy. Below we provide additional examples of how these organizations have enhanced the national policymaking process and include recommendations for actions that Congress, federal agencies, and the courts could take to support and improve the effectiveness of TOGAs as significant actors in that policymaking process.

The organization we represent, the National Association of Clean Air Agencies (NACAA), could be viewed as the archetype of a TOGA. Formed over 30 years ago,[3] NACAA is an association of the air pollution control agencies in 53 states and territories and more than 165 major metropolitan areas throughout the country. We serve to encourage the exchange of information among air pollution control officials, to enhance communication and cooperation among federal, state, and local regulatory agencies, and to promote good management of our air resources. Notably, our members include both state and local officials.

Congress recognized how critical the role of state and local air pollution control agencies was in implementing the Clean Air Act (CAA or the Act).[4] One need look no further than the findings section of the CAA, where Congress wrote that air pollution control "is the primary responsibility of States and local governments."[5] Accordingly, while Congress prescribed many important and essential tasks for the Environmental Protection Agency (EPA)—ranging from setting federal, health-based air quality standards, developing motor vehicle emission standards, conducting research, and establishing important national control measures—the states and local governmental agencies were assigned the critical responsibilities of devising and implementing the control strategies necessary to achieve clean air in their jurisdictions. Thus, the CAA is a prime example of federalism because it creates a partnership among federal, state, and local governments to achieve an important policy goal: improving public health and welfare. In the end, if one level of government fails in this partnership, the entire program suffers. And this is precisely where a TOGA, like NACAA, can play such an important role. Below are several examples where TOGAs can and do enhance this national policymaking process.

In many cases, TOGAs can bring together the regionally and ideologically diverse interests of a group of state and local officials in order to affect national policy. One recent example is EPA's Tailoring Rule proposal regarding the CAA

1. Judith Resnik et al., *Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAS)*, 40 ELR (Envtl. L. & Pol'y Ann. Rev.) 10768 (Aug. 2010) (a longer version of this Article was originally published at 50 Ariz. L. Rev. 709 (2008)).
2. *Id.* at 10771.
3. NACAA was originally known as the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials (STAPPA/ALAPCO). The organization changed its name to NACAA on October 11, 2006.
4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
5. *Id.* §7401(a)(3).

permitting program for greenhouse gas (GHG) emissions.[6] EPA proposed that only sources that emitted 25,000 tons of GHGs or more would be subject to the permitting provisions in the CAA, rather than the 100/250-ton threshold specified in the Act.[7] This interpretation would avoid the need for over six *million* new and existing sources to obtain permits for their GHG emissions, an overwhelming burden for state and local air agencies. EPA estimated that under its proposal approximately 400 sources would need to undergo a Prevention of Significant Deterioration (PSD) permitting analysis,[8] with less than 100 of these sources newly subject to PSD; approximately 14,000 large sources would need to obtain operating permits for GHG emissions under the operating permits program.

In a related proposal, EPA asked for comments about the date on which the GHG permitting program would be triggered, which turned on an interpretation of when GHGs would be "subject to regulation."[9] EPA suggested several interpretations, with the latest having the GHG permitting program triggered in the spring of 2010.[10] When NACAA discussed the proposals with its members, however, it heard two significant concerns. First, NACAA members believed that EPA had underestimated the number of sources subject to the CAA permitting provisions even at the 25,000-ton threshold—that in fact the number of sources was two to three times higher than the EPA had estimated. Second, a significant number of states indicated that they would require additional time beyond the spring of 2010 to change their own rules or regulations, which contained the 100/250-ton threshold as a state requirement and which EPA could not change by federal fiat. We worked with our members to identify some possible mechanisms the agency could use to ameliorate the state/local burden and noted these in our comments to EPA.[11] It appears, in light of recent public statements by EPA Administrator Lisa Jackson, that the agency heard our concerns and used our comments in creating its proposed solution.[12]

TOGAs can also help a federal agency conduct "one-stop shopping" in soliciting the views of a national organization of state and local agencies. In essence, we help do EPA's work of assimilating the views of all the agencies and providing them to EPA. For example, NACAA comments on all major rulemakings, so EPA can use our committee calls as a sounding board to bounce ideas that the agency is considering off our members.

In some instances, the federal government fails to fulfill statutory requirements or is unable or unwilling to follow the recommendations of state and local governments. In these cases, TOGAs can take matters into their own hands by developing model rules or guidance that states and localities can adopt to fill the federal regulatory gap. For example, in 2007, a court decision vacated rules promulgated by EPA establishing Maximum Achievable Control Technology (MACT) standards to limit emissions of hazardous air pollutants from industrial, commercial, and institutional boilers and process heaters. When EPA fails to meet a deadline for establishing limits under §112 of the CAA (or where the Supreme Court vacates a rule), state and local permitting authorities are required under §112(j)—also known as the CAA's "hammer provisions"—to set the limits for the affected facilities on a case-by-case basis, which constitutes an extremely resource-intensive and duplicative effort. These limits must be based on the use of MACT. In 2007, NACAA convened an expert technical workgroup to gather and review available information and provide recommendations for making MACT determinations for boilers. In June 2008, the association released its model permit guidance, which states and localities plan to use as a substitute for calculating MACT limits on a facility-by-facility basis.[13] In another example, in 2005, NACAA developed a model rule[14] in response to widespread concerns that EPA's Clean Air Mercury Rule (CAMR), issued in March 2005, was inconsistent with the requirements of the Clean Air Act and would not result in adequate reductions in emissions of mercury from coal-fired power plants to protect public health. In fact, the court validated NACAA's concerns by striking down CAMR.[15] Since publication of the NACAA document, over one-half of the states have used the NACAA model rule as they developed programs more stringent than CAMR.

TOGAs can also provide regulatory tools to their members to assist in accomplishing their work, particularly in areas where the federal agencies lack the resources (or desire) to help. For example, NACAA has developed sev-

6. U.S. EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55292 (proposed Oct. 27, 2009).
7. *Id.*
8. PSD applies to new major sources or major modifications and requires installation of the best available control technology (BACT), an air quality analysis, an additional impacts analysis, and public involvement.
9. U.S. EPA, Reconsideration: Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51535 (proposed Oct. 7, 2009).
10. *Id.*
11. Letter from Nat'l Ass'n of Clean Air Agencies, to U.S. Envtl. Prot. Agency on EPA's Proposed Tailoring Rule (Dec. 28, 2009), *available at* www.4cleanair.org; Letter from Nat'l Ass'n of Clean Air Agencies, to U.S. Envtl. Prot. Agency on EPA's Proposed Reconsideration of Its Prior Regulatory Interpretation of the Phrases "Subject to Regulation" and "Regulated Pollutant" (Dec. 7, 2009), *available at* www.4cleanair.org.
12. In a letter to Sen. Jay Rockefeller, EPA Administrator Jackson said the agency would phase in GHG permitting requirements for sources beginning in 2011 and that the threshold for permitting would be "substantially higher" than the 25,000-ton limit EPA originally proposed. Letter from Lisa Jackson, Administrator, U.S. Envtl. Prot. Agency, to The Honorable Jay D. Rockefeller IV (Feb. 22, 2010), *available at* http://epa.gov/oar/pdfs/LPJ_letter.pdf.
13. Nat'l Ass'n of Clean Air Agencies, *Reducing Hazardous Air Pollutants From Industrial Boilers: Model Permit Guidance* (June 2008), *available at* www.4cleanair.org.
14. Nat'l Ass'n of Clean Air Agencies, *Regulating Mercury From Power Plants: A Model Rule for States and Localities* (Nov. 2005), *available at* www.4cleanair.org.
15. New Jersey v. EPA, 517 F.3d 574, 38 ELR 20046 (D.C. Cir. 2008).

eral menus of options for controlling emissions, including emissions of fine particulate matter,[16] nitrogen oxides[17] and GHGs and conventional air pollutants.[18] We have also developed model rules on reducing paint emissions[19] and diesel truck emissions.[20]

TOGAs are also an important advocacy mechanism, and their voices carry extremely significant weight when TOGAs like NACAA speak for their members. For example, NACAA regularly testifies before Congress on the need for additional resources for our members. We also testify before Congress on legislative proposals related to air pollution. One of our key messages is the need to preserve the ability of state and local entities to regulate more stringently than the federal government.

Finally, we have participated in lawsuits to fight for important state and local rights or to provide our unique perspective in litigation. For example, in litigation regarding whether the South Coast Air Quality Management District could require public fleets to purchase cleaner cars, NACAA and other amici argued that "disregard of state sovereignty over state and local purchasing decisions would undermine environmental federalism and jeopardize vital state and local interests."[21] We also submitted an amicus brief opposing EPA's Maximum Achievable Control Technology (MACT) standard for Industrial, Commercial, and Institutional Boilers and Process Heaters. The final EPA rule, issued on September 13, 2004, allowed sources to obtain exemptions to the MACT control requirements based on risk.[22] We argued that allowing risk considerations in the establishment of MACT standards is contrary to the intent of the CAA, which calls for MACT to mandate a control technology, followed eight years later by residual risk standards to account for remaining health risks. We also provided information about the resource burden that the risk-based exemptions would impose on the state and local agencies that will review risk demonstrations and incorporate them into Title V permits.

Given the singular nature of TOGAs and their value in the policymaking process, and as a general matter, there are four actions that federal agencies and the courts should take to further enhance the effectiveness of TOGAs like NACAA in the policymaking process.

1. Federal agencies should interpret the Federal Advisory Committee Act (FACA) as permitting them to consult freely with TOGAs during the development and implementation of rules and policies. At times EPA has raised the concern of violating FACA as an obstacle to including NACAA in key discussions regarding federal rules and policies that would affect our member agencies. We read §4(c) of FACA as clearly indicating that FACA does not apply to TOGAs.[23] In addition to being consistent with the FACA statute, it makes sense to recognize TOGAs as agents of their members and thus treat TOGAs as if they were state and local government officials. This is particularly important for the CAA, which was set up by Congress to be a partnership among local, state and federal governments.
2. Federal agencies should be required to consult with relevant TOGAs prior to proposing rules or policies that would affect the TOGA members. For example, after EPA sets or revises a National Ambient Air Quality Standard, states are then required to submit State Implementation Plans (SIPs) indicating how they intend to meet or maintain the new or revised standard. EPA often issues a rule providing guidance to states on what needs to be included in SIPs. EPA should involve NACAA in developing the implementation rule *prior* to the proposal.
3. As the Supreme Court concluded in *Massachusetts v. EPA* with respect to states' standing,[24] in evaluating whether TOGAs meet standing requirements, courts should consider the special status of TOGAs as representatives of state and local government officials and defenders of state and local rights as against federal programs that may take away those rights.
4. While we believe that TOGA support for a federal statute should not mean the statute is immune from court review on federalism grounds, we do think that courts should take note when federal statutes are supported by TOGAs in their consideration of whether such statutes are unlawful on federalism grounds or not.

Looking ahead, as the federal government takes action to address global warming in the near future, it should use the expertise and resources of TOGAs for the reasons mentioned above. Most importantly, it is critical that state and local authorities not be preempted by federal agencies or Congress and that they retain the ability to adopt regulations and programs more stringent than those adopted the federal government. As noted in the MACT and mercury examples above, state and local authority is an important "backstop"

16. Nat'l Ass'n of Clean Air Agencies, *Controlling Fine Particulate Matter Under the Clean Air Act: A Menu of Options* (Mar. 2006), *available at* www.4cleanair.org.
17. Nat'l Ass'n of Clean Air Agencies, *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options* (July 1994), *available at* www.4cleanair.org.
18. Nat'l Ass'n of Clean Air Agencies, *Reducing Greenhouse Gases & Air Pollution: A Menu of Harmonized Options* (Oct. 1999), *available at* www.4cleanair.org.
19. Nat'l Ass'n of Clean Air Agencies, *Regulating Air Emissions From Paint: A Model Rule for State and Local Air Agencies* (Oct. 2000), *available at* www.4cleanair.org.
20. Nat'l Ass'n of Clean Air Agencies, *Cleaning Up Diesel Trucks: A Model Rule for States* (Sept. 2004), *available at* www.4cleanair.org.
21. Amicus Curiae Brief of National League of Cities et al. in Support of Defendant-Appellees, Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th Cir. 2007) (No. 05-56654), 2006 WL 4055757.
22. Brief of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials as Amici Curiae in Support of Petitioners, Natural Res. Def. Council v. E.P.A., 489 F.3d 1364 (D.C. Cir. 2007) (No. 04-1325), 2006 WL 2618953.
23. Section 4(c) of FACA reads in relevant part: "Nothing in this Act shall be construed to apply to . . . any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies." 5 U.S.C. App. 2, §4(c). Further, GSA regulations implementing FACA make clear that the law should not be read to hinder discussions among local, state, and federal officials, including associations of state officials.
24. 549 U.S. 497, 521-22, 37 ELR 20075 (2007).

when the federal government fails to act or does not sufficiently protect the environment and public health. TOGAs can also play important roles in effectuating global warming policy and law—educating the entire membership of the legislation's or regulation's provisions, helping to develop tools/guidance/model rules for implementation, filling in gaps where necessary, and working with EPA and other federal agencies to help them develop guidance. Tackling global warming will require action at all levels of government—federal, state, and local—and TOGAs can help make this partnership extremely effective.