

EPA has no business regulating CO₂

BY PETER GLASER

Despite more than a decade of claims of a looming climatologic catastrophe, Congress has steadfastly refused to mandate controls on the emission of greenhouse gases (GHGs). The Senate ratified the voluntary Framework Convention on Climate Change (the so-called Rio Treaty) in 1992, but neither the Clinton nor Bush administration even submitted the mandatory Kyoto Protocol to the Senate for ratification.

Legislation that would have mandated GHG controls has been repeatedly rejected in Congress, including the last time the Clean Air Act (CAA) was significantly amended in 1990 and the last time the country adopted comprehensive energy legislation in the Energy Policy Act of 1992. The energy legislation that narrowly failed to pass the Senate last year did not contain any GHG reduction mandates and the McCain-Lieberman bill containing much watered down controls as compared with Kyoto was recently defeated in a stand-alone vote.

Even though GHG legislation has been repeatedly proposed and rejected, a group of litigants is now claiming that EPA nevertheless has the authority to regulate GHGs under the CAA. See *Commonwealth of Massachusetts, et al., v. Environmental Protection Agency*, Nos. 03-1361 and 03-1365 and consolidated cases (D.C. Cir., filed Oct. 23, 2003). The petitioners assert that GHGs are "air pollutants" under the definitional section of the CAA, 42 U.S.C. § 7602. On that basis, they contend that EPA wrongfully refused to regulate GHG emissions from motor vehicle tailpipes under Title II of the CAA. Indeed, if successful, the lawsuit would likely be argued to mean that EPA must regulate GHGs under a number of CAA regulatory programs (not just under Title II) that mandate emissions controls on a finding that an air pollutant "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." See, e.g., 42 U.S.C. § 4208(a).

There are a number of problems with petitioners' theory. First, the CAA defines "air pollutant" as any substance that is emitted "into or otherwise enters the ambient air." GHGs circulate in the lower troposphere, not the ambient air.

In addition, in contrast to the comprehensive regulatory programs established for numerous explicitly referenced pollutants in the CAA, Congress addressed greenhouse gases in the CAA only in a nonregulatory context. Had Congress intended to legislate the massive regulatory program that petitioners seek to compel through litigation, it could

and would have done so authoritatively.

Moreover, the CAA National Ambient Air Quality Standards (NAAQS) program – which is the main program under which GHGs would be regulated if petitioners are successful in their ultimate strategy of imposing GHG regulation through litigation – is wholly unsuited to GHG emissions. If EPA establishes a NAAQS for, for instance, carbon dioxide (CO₂), states will be responsible for promulgating and administering State Implementation Plans (SIPs) to lower CO₂ emissions so as to comply with the NAAQS. Failure to meet this SIP requirement could result in severe sanctions to the state, including loss of federal highway money.

Yet there is nothing any state can do, either individually or in concert with other states, that will affect ambient concentrations of CO₂. This is because CO₂ circulates in the atmosphere globally, because CO₂ concentrations in the atmosphere are very long lived and because international and natural emissions of CO₂ are orders of magnitude higher than the emissions of any state or combination of states. The fact that the NAAQS program cannot rationally be applied to GHGs is convincing evidence that Congress never intended such regulation.

Finally, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court ruled that, even though tobacco is a "drug" and cigarettes are a drug delivery "device," and even though the Food, Drug and Cosmetic Act (FDCA) gives the Food and Drug Administration (FDA) authority to regulate "drugs" and drug delivery "devices," Congress did not intend that the FDCA would govern tobacco. The Court stated that the literal statutory language did not control where there was a long history in which Congress had been asked and rejected efforts to amend the FDCA to include tobacco and in which FDA had acted as if it did not have authority to regulate tobacco. In similar fashion, the long history of congressional rejection of GHG emissions conclusively demonstrates that no such regulation was ever intended.

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EPA is abdicating its responsibility to control greenhouse gases

BY RICHARD BLUMENTHAL AND KIMBERLEY MASSICOTTE

In sweeping actions this past summer, EPA denied all responsibility to regulate greenhouse gases (GHGs) – in spite of reports issued by this administration documenting severe dangers caused by GHGs generated by human activity. Connecticut and 11 other states, some cities and a number of organizations have challenged EPA's decision, which completely abdicates the federal government's responsibilities to control air pollutants causing global warming, thereby endangering vital public health and environmental interests.

On Aug. 28, 2003, EPA denied a petition filed by the International Center for Technology Assessment and 18 other groups to regulate GHGs under Section 202 of the Clean Air Act (CAA), 42 U.S.C. § 7521, which concerns emission standards for new motor vehicles and engines. 68 Fed. Reg. 52922 (1993). On the same date, EPA withdrew and reversed the determination of two previous EPA general counsels who had concluded that carbon dioxide (CO₂), the main GHG, was an air pollutant under the CAA. Memorandum to Acting Administrator Marianne Horinko from Robert E. Fabricant, General Counsel, Aug. 28, 2003.

In its denial of the petition, EPA concluded that "it cannot and should not regulate [GHG] emissions from U.S. motor vehicles under the [CAA]." EPA determined that Congress has not authorized EPA to regulate CO₂ emissions from motor vehicles. "In any event, EPA believes that setting better emission standards for motor vehicles is not appropriate at this time."

In declining to control GHGs, EPA had to overcome a major problem – the case to regulate GHGs had already been made by both this administration and the previous one. Two prior EPA general counsels found that CO₂ meets the CAA definition of "air pollution," satisfying the first part of the test required for regulation under Section 202. (Memorandum of Jonathan Z. Cannon to Carol M. Browner, Apr. 10, 1998, and *Testimony of Gary S. Guzy Before a Joint Hearing of the Subcommittee, Natural Resources and Regulatory Affairs of the Committee on Science, U.S. House of Representatives*, Oct. 6, 1999.)

Even the CAA identifies CO₂ as an air pollutant. ("[The program required by Sec. 103(g) of the CAA] shall include...(1) "...strategies and technologies for preventing or reducing multiple air

pollutants, including sulfur oxides, nitrogen oxides, heavy metals, PM-10 (particulate matter), carbon monoxide and carbon dioxide, from stationary sources including fossil fuel power plants." 42 U.S.C. § 7403(g). Emphasis added.)

Regarding the remaining legal prerequisite for requiring EPA to regulate GHGs – that in the judgment of the EPA administrator GHGs may reasonably be anticipated to endanger public health – this administration's EPA played a substantial role in the development of an official U.S. document, *Climate Action Report 2002, Third Communication of the United States of America Under the United Nations Framework Convention on Climate Change (2002)*, reaching that conclusion. According to the report, human activities cause global warming and there will likely be serious negative consequences from global warming, including an increase in heat-related deaths, spread of disease and numerous environmental harms. In other words, GHGs may reasonably be anticipated to endanger public health. Case closed, right?

Wrong – according to present EPA General Counsel Robert E. Fabricant. Relying to a great extent on *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000), Fabricant concluded that EPA must wait for "congressional direction" instead of relying on the existing CAA to regulate GHGs. In *Brown & Williamson Tobacco Corp.*, the Supreme Court ruled that tobacco could not be regulated under the Federal Food, Drug and Cosmetic Act because tobacco is so obviously deadly that the Food and Drug Administration would have to ban tobacco products contrary to Congress' otherwise clear intent to allow them to be sold.

In perverse, bizarre reasoning, Fabricant argues that Congress directed EPA to take various actions to address global warming in other parts of the CAA and therefore that Congress did not want GHGs to be regulated. Obviously, *Brown & Williamson* has nothing to do with this case where the aim is to limit – not ban – an air pollutant under a law that plainly requires EPA to do so. If EPA cannot regulate a specific air pollutant unless Congress directs it to, the CAA is made meaningless.

EPA has plainly failed to meet its obligations to protect human health and the environment. States and their citizens will suffer serious harm, economically as well as environmentally, if EPA's unjustifiable decision is permitted to stand.

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