Legal Opinion Letter

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 13 No. 23 November 14, 2003

"GREENHOUSE GAS" DEBATE ENTERS THE COURTHOUSE

By
Peter Glaser

Despite former Vice President Albert Gore's enthusiasm for global warming regulation, the Clinton Administration never seriously offered proposals in Congress to regulate greenhouse gas emissions nor did it ever submit the Kyoto Protocol to the Senate for ratification. It did, however, leave a ticking time bomb hidden away at the Environmental Protection Agency ("EPA") that was designed to enhance the ability of a Gore Administration to regulate greenhouse gases or to compel a Bush Administration to do so even against its will.

The time bomb was a statement by Administrator Carol Browner to a House of Representatives Committee in 1998 that carbon dioxide is an "air pollutant" subject to regulation under the federal Clean Air Act ("CAA"). The statement was followed by a 1998 legal opinion of then EPA General Counsel Jonathan Z. Cannon and 1999 congressional testimony of his successor Gary S. Guzy confirming EPA's view that carbon dioxide is a CAA "air pollutant" that EPA could regulate under various CAA programs if the agency made a finding that carbon dioxide emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health and welfare." Not surprisingly, the environmental community took the message and a group of environmental organizations, led by the International Center for Technology Assessment ("ICTA"), filed a petition with EPA in October 1999 demanding that the agency regulate carbon dioxide emissions from motor vehicle tailpipes under Title II of the CAA. The petition was not acted on when the Clinton Administration left office.

When the Bush Administration took office, it quickly made clear that it was not going to submit the Kyoto Protocol for ratification by the Senate nor was it going to propose to regulate carbon dioxide emissions. Instead, the Administration took the position that it favored voluntary efforts to reduce the carbon dioxide intensity of the economy (carbon dioxide emissions per unit of economic activity).

The environmental community and its allies in the offices of the attorneys general in the northeastern states, faced with the prospect that carbon dioxide regulation was not going to be adopted by Congress, moved to a strategy of regulation by litigation. Several lawsuits were commenced more or less at the same time, all based on the determination by EPA that carbon dioxide is a CAA pollutant.

In December 2002, ICTA and its allies sued EPA in federal district court in Washington, D.C., seeking to compel the Agency to act on their petition. *International Center for Technology Assessment v. Horinko*, No. 02-02376/RBW (D.D.C. Dec. 5, 2002).

On February 21, 2003, a group of environmental organizations sued EPA in federal district court in San Francisco, seeking regulation of particulate matter, sulfur dioxide and nitrogen oxides under the CAA New Source Performance Standards ("NSPS") program. The suit made passing reference to EPA being possibly required to establish an NSPS for carbon dioxide. On May 23, 2003, the Democratic attorneys general of nine states filed an *amici curiae* brief (which was later accepted by the court) seeking to include carbon dioxide as an emission subject to promulgation of an NSPS. *Our Children's Earth Foundation and Sierra Club v. EPA*, No. C 03-0770 (N.D. Cal. Feb. 21, 2003).

On June 4, 2003, the attorneys general of Massachusetts, Connecticut and Maine sued EPA in federal district court in

---

Peter Glaser is a Partner in the Washington, D.C. office of the law firm Shook, Hardy & Bacon, L.L.P.

Hartford, Connecticut, seeking to compel the Agency under section 108 of the CAA to list carbon dioxide as a criteria air pollutant. Such a listing would force EPA to establish a national ambient air quality standard for carbon dioxide and regulate the substance comprehensively under Title I of the CAA. *Massachusetts et al. v. Horinko,* No. 3:03-CV-984 (D. Conn. June 4, 2003).

While EPA initially defended these lawsuits on various procedural and substantive grounds, the agency recently adopted a new strategy of preempting these lawsuits in their entirety by withdrawing Administrator Browner's interpretation of EPA authority with respect to carbon dioxide. On August 28, 2003, EPA issued a final decision denying the 1999 ICTA petition, supported by an opinion of the same date from its General Counsel Robert E. Fabricant. EPA ruled that despite EPA's contrary view under Administrator Browner, carbon dioxide is not an "air pollutant" that can be regulated under the CAA.

The EPA decision relied heavily on the Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 120 S. Ct. 1291 (2000). In *Brown & Williamson*, the Court ruled that even though tobacco is a "drug" and cigarettes are a "drug delivery device," and even though the Food Drug & Cosmetic Act ("FDCA") gives the 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 the FDA had acted as if it did not have authority to regulate tobacco. EPA found that the failed attempt to regulate tobacco under the FDCA was analogous to attempts to regulate carbon dioxide under the CAA. EPA stated that, despite the fact that Congress had on a number of occasions been asked to regulate greenhouse gas emissions in the CAA and in other legislative vehicles, Congress had only conferred non-regulatory authority on EPA in the area of global warming. At the same time, EPA stated that it had not concluded that greenhouse gas emissions were causing or contributing to dangerous health or welfare conditions and that the science was too uncertain to justify such a conclusion.

The EPA decision immediately changed the context of the carbon dioxide litigation. The suit in federal district court in Washington, D.C., to compel EPA to act on the ICTA petition was obviously mooted. The three northeastern attorneys general voluntarily dismissed their lawsuit in federal district court in Connecticut. As of this writing, the parties to the case in federal district court in San Francisco have announced that they have reached a tentative settlement to resolve the case, and although the settlement is not yet public, indications are that it will not resolve the carbon dioxide as CAA pollutant issue.

The main action now turns to an appeal of EPA's August 28, 2003 decision. On October 23, 2003, four sets of appellants filed petitions to review EPA's action in the U.S. Court of Appeals for the D.C. Circuit: (a) the Commonwealth of Massachusetts and the States of Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, along with American Samoa and the District of Columbia; (b) the State of California; (c) a number of environmental organizations led by ICTA; and (d) the City of New York and the City of Baltimore. Each of the four petitioning groups filed two separate petitions for review, one challenging EPA's denial of the ICTA petition and one challenging the Fabricant legal opinion, which the petitions characterized as a separate final and reviewable administrative action. It is likely that the reason for the separate challenge to the Fabricant opinion is to ensure that the Court will resolve EPA authority to regulate CO_2 under the CAA generally and not just the Title II motor vehicle program. The Court is likely to consolidate all eight of these petitions into one case, and there will likely be a number of interventions.

If appellants are successful in their challenge, the result would not necessarily be EPA regulation of carbon dioxide under the CAA. EPA would still have to make the necessary finding that carbon dioxide emissions endanger the public health or welfare. But the stage would be set for the next step. This step could be a renewal of the three northeastern states' lawsuit in Connecticut seeking to compel EPA to regulate carbon dioxide emissions on the ground that, in the three states' view, EPA has already made the endangerment finding. Alternatively, if a new Administration has taken office with a desire to regulate carbon dioxide emissions and a belief that such emissions do endanger public health or welfare, the next step could be a decision by the new EPA to regulate.