

EPA Determines that it Lacks Authority to Promulgate Climate Change Regulations

September 8, 2003

On August 28, the Environmental Protection Agency (EPA) published two documents announcing its determination that it lacks authority under the Clean Air Act (CAA) to regulate for the purposes of addressing global climate change. In one document, EPA denied a petition requesting that it promulgate a rule addressing motor vehicle emissions of carbon dioxide (CO₂) and other greenhouse gases (GHGs) under section 202(a) of the CAA (the Notice of Denial). The reasoning in EPA's Notice of Denial was based in large part on a second document it released the same day, a memorandum from EPA General Counsel Robert E. Fabricant to Acting Administrator Marianne L. Horinko (the Fabricant Memorandum).

A number of state attorneys general already have announced their intention to challenge the Notice of Denial in the Court of Appeals for the District of Columbia Circuit (D.C. Circuit). If the D.C. Circuit upholds the Notice of Denial, the decision could have broad implications, including the summary defeat of other outstanding lawsuits aimed at forcing EPA to regulate GHGs under different sections of the CAA. Such an outcome could have further implications – namely, new pressures on states to fill in the regulatory “gap” left by the federal government on climate change.

The Notice of Denial and the Fabricant Memorandum

The Notice of Denial addresses a petition filed on October 20, 1999 by several environmental organizations requesting that EPA regulate certain GHG emissions from motor vehicles pursuant to CAA section 202(a).

The CAA does not expressly provide EPA authority to regulate GHGs – a point not disputed by the petitioners. Rather, the petitioners asserted that such authority is implied in the CAA's broad command that EPA regulate “air pollutants” that the Administrator determines may potentially “endanger public health or welfare.” In particular, Section 202(a) provides that “the Administrator [of EPA] shall by regulation prescribe . . . in accordance with the provisions of [section 202], standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle . . . which, in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

The petitioners asserted that GHGs fall within the CAA's broad definition of “air pollutant” (found in section 302(g)), which is “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters ambient air.” Petitioners further claimed that EPA already determined that one of the GHGs – CO₂ – is an “air pollutant,” citing an April 10, 1998 memorandum from then-General Counsel Jonathan Z. Cannon to then-Administrator Carol Browner (Cannon Memorandum). Second, the petitioners argued that EPA already has made the determination that GHG emissions may “endanger public health or welfare” – citing, among other documents, an EPA submission to the United Nations in 2002. Finally, petitioners argued that reducing motor vehicle GHG emissions is technically feasible.

**VanNess
Feldman**

ATTORNEYS AT LAW

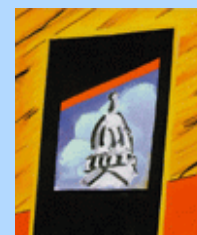
A Professional Corporation

1050 Thomas Jefferson Street, NW
Washington, DC 20007-3877
(202) 298-1800 (202) 338-2416

821 Second Avenue
Suite 2000
Seattle, Washington 98104
(206) 623-9372 (206) 623-4986

www.vnf.com

I
S
S
U
E



A
L
E
R
T

The Notice of Denial rejects the petition on a number of grounds. First, EPA concludes that it lacks authority under *any* of the CAA provisions to regulate for global climate change purposes. In coming to this conclusion, the Notice of Denial relies upon – and, indeed, largely reproduces – the Fabricant Memorandum.

The Fabricant Memorandum, revisits and formally withdraws the Cannon Memorandum in light of the subsequent Supreme Court decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000) (*Brown & Williamson*). In *Brown & Williamson* (at 1314), the Supreme Court explained that “[in] extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation.”

To this end, the Fabricant Memorandum notes the only codified provisions in the CAA addressing climate change expressly preclude use of those provisions for regulation. The Fabricant Memorandum further observes that, during the 1990 amendment process, Congress considered and rejected proposed CO₂ standards for autos. Other federal statutes addressing global climate change, including the Energy Policy Act of 1992, do not authorize regulation of GHGs. The Fabricant Memorandum also asserts that the structure of the basic regulatory provisions of the CAA suggests that Congress could not have intended its use to address global atmospheric issues. For these reasons, the Fabricant Memorandum and the Notice of Denial conclude that the CAA does not authorize regulation to address climate change, and therefore CO₂ and the other GHGs are not air pollutants under the CAA’s regulatory provisions.

The Notice of Denial further asserts that – even if GHGs *were* air pollutants subject to CAA regulation – EPA is prohibited from regulating motor vehicle GHG emissions for other reasons. EPA asserts in the Notice of Denial that, “[a]t present, the only practical way to reduce tailpipe emissions of CO₂ is to improve fuel economy of cars and light duty trucks.” Under federal law, only the Department of Transportation may regulate fuel economy.

Finally, the Notice of Denial outlines the Bush Administration’s alternative, non-regulatory approach to addressing global climate change. It highlights the Administration’s scientific research program, its technology incentive policies, and its programs promoting voluntary reduction efforts.

Potential Implications

EPA’s publication of the Notice of Denial already has had an impact on other proceedings aimed at forcing EPA to regulate GHGs. In June, the Attorneys General of Massachusetts, Connecticut, and Maine filed suit in the U.S. District Court of Connecticut asserting that the EPA should treat CO₂ as a “criteria air pollutant” under CAA section 108. In the first days of this month, the three Attorneys General dropped their pending lawsuit in Connecticut and filed a petition for review in the D.C. Circuit challenging the Notice of Denial; they intend to refile in Connecticut if they get a favorable ruling. Accordingly, the D.C. Circuit now will be the primary arena for disputing EPA’s climate change regulatory authority.

One question is the extent to which the D.C. Circuit will defer to EPA’s decision not to regulate. The D.C. Circuit has observed on a number of occasions that agency denials of rulemaking petitions merit the highest degree of deference. *See, e.g., Capital Network Sys, Inc. v. FCC*, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (quoting *American Horse Protection Ass’n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)).

A ruling by the D.C. Circuit upholding EPA’s determination likely will give new inspiration to Members of Congress that have been advocating climate change legislation, whether through “multi-pollutant” legislation aimed at power plants or through a comprehensive program, such as the McCain-Lieberman bill.

A ruling in favor of EPA also would increase pressure on states and municipalities to adopt their own GHG regulatory programs, potentially subjecting industry to a patchwork of diverse policies. Many states already are taking such steps. Led by Governor George Pataki (R-NY), ten Northeastern states have committed to entering into talks on a regional strategy addressing climate change. The majority has expressed a preference for a “cap-and-trade” program. Massachusetts, New Hampshire, Oregon, and Washington already have adopted various types of CO₂ limits for power plants. The State of California has passed a law directing the California Air Resources Board (CARB) to develop regulations limiting CO₂ emissions from motor vehicles.

It is important to note, however, that the EPA Notice of Denial could have particular repercussions for California’s CO₂ law. One potential hurdle facing California’s program is the federal pre-emption that prevents states from establishing fuel economy regulations. Industry opponents of California’s initiative likely will rely on the Notice of Denial’s finding that “at present, the only practical way” to reduce motor vehicle CO₂ emissions is through mandates to improve fuel economy.

For Additional Information

If you would like more information on the issues raised by the EPA determinations, please contact Dick Penna, Kyle Danish, or any other member of the firm’s Air Quality Practice at (202) 298-1800.

#

Based in Washington, DC — with an office in Seattle, Washington — **Van Ness Feldman** is a nationally recognized law firm specializing in energy, the environment, and natural resources. Founded in 1977, the firm now has more than 75 attorneys and public policy professionals. A number of our members have served as counsel or chief counsel to congressional committees with jurisdiction over energy and environmental policy, as well as senior advisors to Democratic and Republican Members of Congress on those committees. Others have held high-level appointments in the Department of Energy, the Department of the Interior, the Federal Energy Regulatory Commission, and the Environmental Protection Agency.