

ARMS 149

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CO2 AND THE CAA

Yesterday, the EPA rightly rejected a petition to regulate carbon dioxide emissions under the Clean Air Act. Despite earnest protestations to the contrary--the infamous 1998 memo from EPA General Counsel Jonathan Cannon; testimony, based on that memo, from former Clinton EPA Administrator Carol Browner; histrionics from environmental groups--the statutory language and legislative history of the CAA are absolutely clear on the matter: the CAA provides no authority for EPA to take such a step.

Jonathan Cannon, in responding to EPA's action, had this to say: "They're [the Bush Administration] trying to put a stake in the heart for any possible existing avenue for dealing with global climate change either by this administration or any future administration."

Not quite: President Bush's FY 2003 budget has \$4.5 billion for his climate change initiative, which directs research and study of climate change over the next decade. As to the legal question, the Bush Administration is, contra Cannon, abiding by the rule of law. Lastly, if Cannon is so confident that the CAA confers authority on EPA to regulate CO2, why didn't the Clinton EPA follow through with it?

A few notable points on the CAA and CO2:

Statutory Issues

* The CAA did not refer to CO2 until passage of the 1990 amendments. In those amendments, Congress specifically debated and ultimately rejected proposals to allow EPA to regulate CO2 emissions. Congress authorized EPA only to study certain greenhouse gasses, not regulate them. For example, CAA Section 103(g) lists carbon dioxide as one of several items to be considered as part of a "basic engineering research and technology program" to "develop, evaluate and demonstrate

nonregulatory strategies and technologies."

* Global warming is mentioned in CAA Section 602(e), directing EPA to examine the global warming potential of certain listed substances that contribute to stratospheric ozone depletion. However, this provision--the only one in the statute that mentions global warming--is accompanied by an express admonishment that it "shall not be construed to be the basis of any additional regulation under [the CAA]" [emphasis added].

* The CAA expressly provides authority to regulate numerous substances specifically referenced in the statute. Sections 108 and 109, for example, authorize EPA to regulate so-called "criteria pollutants;" section 112 directs EPA to designate and regulate hazardous air pollutants ("HAPs"), and lists 190 specific such pollutants Congress determined are the most important to regulate. Similarly, Title VI of the CAA authorizes EPA to list and regulate substances, which deplete the stratospheric ozone layer, and designates 53 substances to be so regulated. But neither global warming generally, nor carbon dioxide specifically, are mentioned anywhere in this regulatory scheme developed by Congress.

* What of the argument that carbon dioxide may be regulated as a HAP? Each of the 190 substances listed as HAPs under CAA Section 112 is a poison, producing toxic effects in small dosages. Carbon dioxide, by any stretch of the imagination, is not a poison. No surprise, then, that CO2 is not among the 190 substances mentioned in Section 112.

Legislative History

* The final CAA legislation that emerged from the conference committee and became law in 1990 contains a stratospheric ozone title that was a compromise between the House and Senate versions. However, the House version prevailed completely in eliminating the language in the Senate bill that would have authorized regulation of non-ozone depleting greenhouse gases such as carbon dioxide.

* For example, Title VI, as enacted, did not include the Senate's language authorizing EPA to regulate "manufactured substances" in terms broad enough to cover both substances that deplete the ozone layer and substances that do not deplete the ozone layer but which affect global climate. Instead, CAA Section 602(a) as enacted requires the Administrator to list "Class I" and "Class II" substances that would be phased out pursuant to CAA Sections 605 and 606. These substances are defined as those that could affect the stratospheric ozone layer--note that nothing in the definition of such substances refers to global climate change. And there are no findings or purposes included anywhere in the CAA specifically regarding global warming or the need to regulate greenhouse gases, as there had been in the Senate bill.