

August 29, 2003

## E.P.A. Says It Lacks Power to Regulate Some Gases

By JENNIFER 8. LEE

**W**ASHINGTON, Aug. 28 — The Environmental Protection Agency said today that it did not have the legal authority to regulate emissions of carbon dioxide and other heat-trapping gases under the Clean Air Act.

The act "does give us authority to do research on climate change, not to issue regulation," said Jeffrey R. Holmstead, the assistant administrator who oversees air programs. "Where there is a major public policy issue, Congress needs to decide."

The general counsel, Robert E. Fabricant, issued a memorandum that said "E.P.A. cannot assert jurisdiction to regulate in this area."

This contrasts with assessments made by two Clinton-era general counsels, who said such heat-trapping gases could potentially be regulated if the agency found that they could reasonably be expected to harm human welfare. They noted that the Clean Air Act listed "climate" as an aspect of human welfare.

But the environmental agency has never determined that carbon dioxide does indeed harm human welfare, though there is a growing body of scientific knowledge that says carbon dioxide plays a role in global warming. The E.P.A. has never issued any regulations on carbon dioxide with respect to global warming.

"The authority exists if the proper findings are made under the specific regulatory provisions of the act," said Jonathan Z. Cannon, who was general counsel in the Clinton administration and now a professor at the University of Virginia Law School.

Environmental groups and Northeastern states are also pushing that interpretation. This year, Northeastern states filed two suits against the E.P.A. to force it to regulate carbon dioxide under the Clean Air Act. Environmental groups filed a petition with the agency in 1999, asking it to regulate carbon dioxide emissions from vehicles.

Some of those groups, led by the International Center for Technology Assessment, sued the agency in 2002 to speed a response to their petition. The general counsel decision on carbon dioxide today is a response to that 1999 petition.

The general counsel grounded his reasoning on a 2000 Supreme Court decision, *Food and Drug Administration v. Brown & Williamson Tobacco*, that said the F.D.A. could not try to regulate tobacco as a "drug" and cigarettes as a "device."

"The Supreme Court said where there is a major public policy decision to be made, an agency can't just go out and use a broadly worded statute to deal with that," Mr. Holmstead said.

Mr. Fabricant, the general counsel, wrote, "It is clear that an administrative agency properly awaits Congressional direction on a fundamental policy issue such as global climate change, instead of searching for an existing statute that was not designed or enacted to deal with that issue."

Environmental groups contested the environmental agency's representation of the Supreme Court decision, saying the case cannot be applied to carbon dioxide. They argue that Congress had taken a stand on tobacco regulation, whereas it has not taken clear stances on carbon dioxide regulation.

In the F.D.A. decision, Justice Sandra Day O'Connor wrote, "If Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible."

The decision went on to say that Congress had specifically spoken on this issue, noting that Congress had directly addressed the problem of tobacco and health through legislation six times since 1965.

This kind of clarity does not exist on heat-trapping, or greenhouse, gases, said David Doniger, policy director of climate change of the Natural Resource Defense Council.