

whether GHGs would meet the CAA definition of “air pollutant” for regulatory purposes were they subject to regulation under the CAA for global climate change purposes.<sup>3</sup>

#### *B. Interference With Fuel Economy Standards*

Even if GHGs were air pollutants generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate CO<sub>2</sub> emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks. No technology currently exists or is under development that can capture and destroy or reduce emissions of CO<sub>2</sub>, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO<sub>2</sub> is to improve fuel economy. Congress has already created a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT—not EPA—to implement those standards. The only way for EPA to proceed with CO<sub>2</sub> emissions standards without upsetting this statutory scheme would be to set a standard less stringent than CAFE for cars and light duty trucks. But such an approach would be meaningless in terms of reducing GHG emissions from the U.S. motor vehicle fleet.<sup>4</sup>

Congress' care in designing the CAFE program makes clear that EPCA is the only statutory vehicle for regulating the fuel economy of cars and light duty trucks. Under EPCA, DOT may set only “corporate average” standards that automakers meet on a fleetwide basis. Automakers thus have flexibility to design different vehicle models having different fuel economy so long as the average of the vehicles sold by the automaker in a given model year and class meets the CAFE standard for that year. In fact, EPCA offers automakers additional flexibility by allowing them to meet the CAFE standard for a given

model year by “carrying back” or “carrying forward” the excess fuel economy performance of their fleets for the three years before or after the applicable model year.

EPCA also builds in an opportunity for congressional oversight of CAFE standard-setting that reinforces the notion that Congress intended fuel economy to be governed by EPCA alone. The statute specifies a CAFE standard of 27.5 miles per gallon for passenger cars in model years 1984 and beyond (49 U.S.C. 32902(b)), but authorizes DOT to amend the standard to the “maximum feasible average fuel economy level” for the relevant model year. However, to the extent DOT raises or lowers the standards beyond specified levels, EPCA provides an automatic opportunity for Congress to disapprove and effectively void the amended standard (49 U.S.C. 32902(c)). Given that the only practical way of reducing tailpipe CO<sub>2</sub> emissions is by improving fuel economy, any EPA effort to set CO<sub>2</sub> tailpipe standards under the CAA would either abrogate EPCA's regime (if the standards were effectively more stringent than the applicable CAFE standard) or be meaningless (if they were effectively less stringent).

#### *C. No Mandatory Duty*

As explained above, in light of the language, history, structure and context of the CAA and Congress' decision to give DOT authority to regulate fuel economy under EPCA, it is clear that EPA does not have authority to regulate motor vehicle emissions of CO<sub>2</sub> and other GHGs under the CAA. In any event, the CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment. Instead, section 202(a)(1) provides the Administrator with discretionary authority to address emissions in addition to those addressed by other section 202 provisions (*see, e.g.*, sections 202(a)(3) and (b)). While section 202(a)(1) uses the word “shall,” it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator's judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

The Web site statements, legal memorandum and other documents cited by petitioners and commenters in support of the petition are not sufficient to satisfy the criteria for setting standards under section 202(a)(1). Exercise of section 202(a)(1) authority

turns on the judgment made by the Administrator, and CAA section 301 does not permit the Administrator to delegate her standard-setting authority under section 202(a)(1). None of the statements petitioners claim constitute the requisite endangerment finding for GHGs under section 202(a)(1) were made, or subsequently adopted, by the Administrator. As the Cannon memorandum stated in 1998, no Administrator had made a finding under any of the CAA's regulatory provisions that CO<sub>2</sub> meets the applicable statutory criteria for regulation. (Notably, the Web site statements on which the petitioners partly rely were in existence at the time Mr. Cannon issued his memorandum.) That statement remains true today—no Administrator has made any finding that satisfies the criteria for setting CO<sub>2</sub> standards for motor vehicles or any other emission source. In any event, for such findings to suffice for standard-setting purposes, they must be established through a notice-and-comment process.

EPA also disagrees with the premise of the petitioners' claim—that if the Administrator were to find that GHGs, in general, may reasonably be anticipated to endanger public health or welfare, she must necessarily regulate GHG emissions from motor vehicles. Depending on the particular problem, motor vehicles may contribute more or less or not at all. An important issue before the Administrator is whether, given motor vehicles' relative contribution to a problem, it makes sense to regulate them. In the case of some types of air pollution, motor vehicles may be one of many contributors, and it may make sense to control other contributors instead of, or in tandem with, motor vehicles. The discretionary nature of the Administrator's section 202(a)(1) authority allows her to consider these important policy issues and decide to regulate motor vehicle emissions as appropriate to the air pollution problem being addressed. Accordingly, even were the Administrator to make a formal finding regarding the potential health and welfare effects of GHGs in general, section 202(a)(1) would not require her to regulate GHG emissions from motor vehicles.

#### *D. Different Policy Approach*

Beyond issues of authority and interference with fuel economy standards, EPA disagrees with the regulatory approach urged by petitioners. We agree with the President that “we must address the issue of global climate change” (February 14, 2002). We do not believe, however, that

<sup>3</sup> As General Counsel Fabricant notes in his memorandum, a substance does not meet the CAA definition of “air pollutant” simply because it is a “physical, chemical, biological, radioactive \* \* \* substance or matter which is emitted into or otherwise enters the ambient air.” It must also be an “air pollution agent.”

<sup>4</sup> Although the ICTA petition focuses on passenger cars and light duty trucks, it seeks regulation of GHG emissions generally from motor vehicles and engines, which include heavy duty engines and trucks. Passenger cars and light duty trucks are subject to CAFE standards; heavy duty trucks are not. The contribution of heavy duty trucks to the U.S. motor vehicle GHG inventory is relatively small, about 16 percent. EPA believes it would be ineffective, inefficient, and unreasonable to set CO<sub>2</sub> and other GHG reductions from the many types of sources of these emissions.