

Client Alert

Latham & Watkins
Environment, Land & Resources Department

Supreme Court Rules that EPA Can Regulate Greenhouse Gases under the Clean Air Act

Overview

On April 2, 2007, the US Supreme Court issued a landmark decision concerning global climate change, *Massachusetts v. Environmental Protection Agency* (*Massachusetts v. EPA*), No. 05-1120 (Apr. 2, 2007). In a 5-4 split, the Court rejected EPA's position that it did not have authority under Section 202 of the Clean Air Act to regulate greenhouse gas emissions from automobiles. In reaching this result, the Court held that greenhouse gases fall within the Clean Air Act's definition of an "air pollutant," and it ruled that unless EPA affirmatively concludes that greenhouse gases are not causing climate change (a conclusion that the Court pointedly noted that EPA has not made), the Agency *must* regulate greenhouse gas emissions from automobiles under the Clean Air Act.

The Court's decision in *Massachusetts v. EPA* will have important ramifications in a number of contexts. First, and most directly, EPA will be obligated to revisit its decision not to regulate automobile greenhouse gas emissions. The Court explained that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." Unless

the Agency takes the small opening provided by the Court, EPA must initiate a process for regulating such emissions.

Second, the Court's conclusion that greenhouse gases are "air pollutants" covered by the Clean Air Act appears to apply with equal force to stationary sources of greenhouse gases. Because the Clean Air Act does not regulate stationary sources in the same way as mobile sources, however, it is not yet clear to what extent the Agency would be required to regulate greenhouse gas emissions from stationary sources.

Third, *Massachusetts v. EPA* may impact the judicial challenge to the State of California's regulation of motor vehicle greenhouse gas emissions.¹ The interplay between the regulation of fuel economy standards and mobile source air emissions – the issue that is pending in California – was not before the Court, but the Court made at least two statements *in dicta* that are sure to provide grist for arguments by the litigants in that matter.

When commenting on limitations on state sovereignty in addressing the standing question, the Court noted that "Massachusetts . . . cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted." Later, when addressing

"This ruling is likely to provide additional impetus for Congressional action on climate change."

EPA's argument that it cannot regulate carbon dioxide emissions from motor vehicles "because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to [Department of Transportation] DOT," the Court suggested that the alternative policy goals are not necessarily inconsistent, noting that simply because DOT sets mileage standards, "in no way licenses EPA to shirk its environmental responsibilities."

Finally, *Massachusetts v. EPA* may further test EPA's ability to fashion market-based approaches to environmental regulation under the Clean Air Act. Some may argue that just as Congress enacted a new, separate title of the Clean Air Act in 1990 to institute a "cap and trade" system to address acid rain caused by sulfur dioxide emissions, it should take the lead here in addressing, and balancing, the multiple environmental and energy considerations involved in any economy-wide climate change program.

In sum, the Supreme Court's decision in *Massachusetts v. EPA* will force EPA to enter the climate change arena in a new, serious way, while ratcheting up the stakes in on-going litigation regarding the appropriate roles for federal and state governments in addressing greenhouse gas emissions and increasing pressure on the US Congress to enact comprehensive restrictions on greenhouse gas emissions. This complex set of issues will demand the careful attention of lawyers and policymakers in the months ahead. Latham & Watkins' Climate Change Practice Group will be involved in these developments and available to assist clients as they work through these difficult and important issues.

Background

This litigation began in 1999 when a group of private organizations petitioned

EPA to regulate greenhouse gas emissions from new motor vehicles. In 2003, EPA denied the organizations' rulemaking petition. EPA concluded that the Clean Air Act did not authorize the Agency to issue mandatory regulations to address global climate change (also referred to as "global warming").² In reaching this decision, the Agency rejected the reasoning of EPA General Counsels from the prior Administration, who had opined that greenhouse gases qualified as "air pollutants" under the Clean Air Act. The Agency also determined that regulating greenhouse gas emissions was unwise at the time. The organizations sued to overturn EPA's decision.

The petitioners included 12 states, three major cities, the American Samoa, and 13 environmental groups.³ Ten states and six trade associations intervened on behalf of EPA.⁴ The case reached the Supreme Court on the petitioners' appeal of the dismissal of their challenge by a divided three-judge panel from the US Court of Appeals for the D.C. Circuit. *See Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

Summary of the Opinion

Justice John Paul Stevens delivered the Supreme Court's opinion, which reversed the D.C. Circuit's dismissal. Justices Kennedy, Souter, Ginsburg and Breyer joined Justice Stevens. Chief Justice Roberts and Justice Scalia filed dissenting opinions. They, along with Justices Thomas and Alito, joined each other's dissenting opinions.

As a threshold issue, the Court held that it could reach the merits of the case because at least one of the petitioners had standing to challenge EPA's refusal to regulate greenhouse gas emissions from new motor vehicles. The Court concluded that Massachusetts' uncontested affidavits demonstrated that rising sea levels attributable to global climate change had already damaged,

and would continue to damage, the state's coastline.

The Court also ruled that the widespread effects of global climate change did not negate Massachusetts' injury and associated right to sue because Massachusetts showed that its injury was concrete. In fact, because EPA did not dispute the existence of a causal connection between greenhouse gas emissions and global warming, the Court found that "EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." Similarly, the Court concluded that EPA's inability to solve the global warming problem entirely did not cancel out the Agency's capacity to redress the state's injury by complying with the Clean Air Act's directive to reduce air pollution.⁵

Justice Steven's majority opinion acknowledged that the Court's review of EPA's denial of a rulemaking petition is "extremely limited" and "highly deferential." The majority opinion stressed, however, that the Clean Air Act expressly permits this review under an "arbitrary, capricious, abuse of discretion" standard. 42 U.S.C. § 7607(b)(1).

The Court wasted little time concluding that greenhouse gases fall within the Clean Air Act's "sweeping definition" of an "air pollutant." The Court rejected EPA's claims to the contrary. First, the Court found that Congress' rejection of "limitations to combat global warming" did not show that Congress meant to preclude EPA from regulating greenhouse gases.

Second, the Court concluded that its previous decision in *Brown & Williamson Tobacco*, which held that tobacco products are not "drugs" or "devices" within the meaning of the Food, Drug and Cosmetic Act (FDCA), was inapplicable. While the FDCA would have banned tobacco, EPA would only regulate greenhouse gases. In addition, the Federal Drug Administration, which

administers the FDCA, had stated that it lacked the power to regulate tobacco. By contrast, EPA had claimed in 1998 that it had the authority to regulate greenhouse gases.

Finally, the DOT's obligation to set mileage standards that could potentially overlap with EPA's responsibility to protect public health did not lead to an inevitable conflict. Rather, the Court found that both DOT and EPA could "administer their obligations and yet avoid inconsistency."

The Court also rejected EPA's argument that even if it possessed the authority to regulate greenhouse gases, to do so now would be an unwise public policy. The Court held that the text of the Clean Air Act did not permit EPA to make this judgment without determining "whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.' [citing 42 U.S.C. § 7521(a)(1)]." Instead, "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."

Consequently, EPA must answer the "statutory question . . . whether sufficient information exists to make an endangerment finding." The Court noted, however, that if "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so."

The Court stopped short of finding that EPA must "make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding." The Court held instead that "EPA must ground its reasons for action or inaction in the statute."

The Dissents

Chief Justice Roberts parted company with the majority on standing, starting with the majority's finding that "'States are not normal litigants for the purposes of invoking federal jurisdiction,' and that given 'Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.'" Arguing that this special treatment has no basis in the Court's jurisprudence, the Chief Justice contended that the standing barrier is more difficult for a State to cross as a *parens patriae* petitioner (or petitioner seeking to protect public or governmental interests that concern the state as a whole) than if it was suing on a direct injury.

The Chief Justice explained that Massachusetts cannot establish standing because: (1) the present loss of its coastline to rising sea levels allegedly caused by global climate change is unsupported by the petitioners' affidavits, (2) projected future sea level rise is too distant to satisfy judicial imminence and certainty requirements, and (3) the causal connection between new motor vehicle emission standards and Massachusetts' coastal losses is too remote to be particularized and too uncertain to be redressed by EPA regulation.

Justice Scalia challenged the majority's reading of the Clean Air Act. First, he found no grounds for the majority's finding that the EPA Administrator must make a judgment on whether greenhouse gases contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. See 42 U.S.C. § 7521(a)(1). Instead, Justice Scalia argued that nothing in the Clean Air Act prevents the EPA Administrator from deferring judgment, especially when supported by public policy determinations such as those that EPA provided when denying the petitioners' rulemaking request.

Next, Justice Scalia wondered why EPA's citation to scientific uncertainty surrounding the phenomenon of global climate change was insufficient to satisfy the majority, when EPA could still conclude that "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming" Finally, Justice Scalia disputed the Court's interpretation of the Clean Air Act's definition of an "air pollutant," based on his view that the Court had impermissibly ignored the first half of the definition, which requires that the substance be an "air pollution agent or combination of such agents." 42 U.S.C. § 7602(g). Because the Clean Air Act does not clearly define an "air pollution agent or combination of such agents," Justice Scalia would have deferred to EPA's definition of the term.

Endnotes

¹ In 2004, the California Air Resources Board (CARB) adopted regulations to implement AB 1493, a state law designed to reduce tailpipe carbon dioxide emissions starting with 2009 models and reaching a 34 percent cut with 2016 models. Several auto dealerships and automakers sued CARB, contending that both the federal Energy Policy and Conservation Act (EPCA) and the Clean Air Act preempt CARB's regulations (among other grounds). See *Central Valley Chrysler-Jeep Inc. v. Witherspoon*, No. 04-cv-06663-AWI-NEW (E.D. Cal., filed Sept. 26, 2006). In January 2007, the federal district court in Fresno stayed the case pending the Supreme Court's decision in *Massachusetts v. EPA*. CARB had acknowledged the need to obtain a waiver from EPA to implement the regulations, although it reserved its right to enforce the regulations in the absence of an EPA waiver. The court therefore also enjoined CARB from enforcing its 2004 regulations.

² Although often used interchangeably, the terms "global climate change" and "global warming" have different meanings. "Global climate change" describes all anticipated effects of climactic changes, while "global warming" more narrowly describes the effects of rising temperatures.

³ The petitioners included: (1) California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington; (2) Baltimore, the District of Columbia and New York City; (3) American Samoa; and (4) the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists and US Public Interest Research Group.

⁴ The following states and trade associations intervened on behalf of EPA: (1) Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas and Utah; and (2) the Alliance of Automobile Manufacturers, CO₂ Litigation Group, Engine Manufacturers Association, National Automobile Dealers Association, Truck Manufacturers Association and Utility Air Regulatory Group.

⁵ The majority gave special deference to Massachusetts' special status as a state, protecting its "quasi-sovereign" interests. The Court concluded that because of this status, "the Commonwealth is entitled to special solicitude in our standing analysis." As noted below, Chief Justice Roberts strongly criticized the standing deference accorded to Massachusetts in his dissent.

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