BEVERIDGE & DIAMOND PC

Supreme Court Says EPA Has Power to Regulate GHG Emissions

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In a 5-4 decision issued on April 2, 2007, the Supreme Court held that the U.S. Environmental Protection Agency ("EPA" or "the Agency") acted arbitrarily and capriciously in denying a rulemaking petition under which several organizations had asked the Agency to regulate greenhouse gas ("GHG") emissions from new motor vehicles under Section 202 of the Clean Air Act. Among the Court's holdings in reaching this conclusion were that the Commonwealth of Massachusetts, as a quasi-sovereign, had special status under standing doctrine that allowed it to successfully bring the challenge and, contrary to EPA's assertion, that GHG emissions are air pollutants subject to regulation under the Clear Air Act. These findings, individually and collectively, are likely to have tremendous implications in terms of environmental law, policy, regulation and litigation for years to come.

To view a copy of the opinion, please go to www.bdlaw.com/assets/attachments/Massachusetts_v_EPA_opinion_2007-04-02.pdf.

I. BACKGROUND ON THE CASE

The matter began on October 20, 1999, when a collection of organizations filed their rulemaking petition with EPA. The petitioners alleged that four GHG emissions commonly associated with automobile exhaust, carbon dioxide (CO_2), methane, nitrous oxide and hydrofluorocarbons, are "heat trapping greenhouse gases" that are contributing to climate change. They further alleged that climate change would have significant negative effects on human health and the environment. In calling for EPA to use Section 202 of the Clean Air Act to establish GHG emission standards for new motor vehicles, the petitioners noted that EPA's General Counsel at the time, Jonathan Z. Cannon, who now is Senior Counsel at Beveridge & Diamond, had prepared a legal opinion for the EPA Administrator concluding that "CO_2 emissions are within the scope of EPA's authority to regulate."

After soliciting public comment on the issues in the petition, on September 8, 2003, EPA entered an order denying the petition. See 68 Fed. Reg. 52,922. The Agency essentially gave two reasons for its decision: (1) that the Clean Air Act "does not authorize" EPA to issue mandatory regulations to address global climate change; and (2) that even if the Agency had the authority to set GHG standards, it believed it would neither be "effective or appropriate" for EPA to establish GHG emission standards for motor

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vehicles at the time. Id. at 52,925, 52,930.

Petitioners, joined by intervenor states and local governments, then sought review of EPA's order in the United States Court of Appeals for the District of Columbia Circuit. At issue were the standing of the petitioners, EPA's authority to regulate GHG emissions, and EPA's decision not to establish GHG emission standards for new motor vehicles. While each of the three judges on the panel wrote separate opinions, two – Judges Randolph and Sentelle – agreed "that the EPA Administrator properly exercised his discretion" under Section 202(a)(1) of the Clean Air Act in denying the petition for rulemaking. Massachusetts v. EPA, 415 F. 3d 50, 58 (D.C. Cir. 2005). Judge Randolph did not definitively rule on the standing issue, while Judge Sentelle wrote that he believed that the petitioners failed to demonstrate the particularized injuries needed to establish standing. Id. at 562. In his dissent, Judge Tatel wrote that he believed that at least Massachusetts had satisfied each element of standing, that EPA has authority under the Clean Air Act to regulate GHG emissions, and that the reasons cited by EPA for denying the petition did not justify its decision not to regulate. Id. at 64, 67-82. Petitioners sought a writ of certiorari from the Supreme Court, which granted that writ and heard arguments on November 29, 2006.

II. THE SUPREME COURT DECISION

A. The Majority

Writing for the Court, Justice Stevens made three important holdings: (1) as quasi-sovereigns, states are entitled to an elevated level of deference on standing issues; (2) carbon dioxide and other GHGs are "air pollutants" under the Clean Air Act and therefore can be regulated by EPA; and (3) EPA's reasons for not regulating GHG emissions were insufficient.

To have standing to sue the federal government in federal court, at least one petitioner must be able to show they suffer from an actual or imminent injury that is fairly traceable to an agency action, and that the injury is one that a court can redress. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992). Invoking a 1907 opinion by Justice Holmes, the Court held that as a quasi-sovereign state that had ceded certain authority, Massachusetts deserved special deference under standing doctrine to bring a suit to enforce its ceded sovereign rights through the federal mechanisms available to it. Massachusetts v. EPA, 549 U.S. ___, slip op. at 15 (2007). In the context of air pollutants, Massachusetts' otherwise sovereign

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authority to regulate such emissions is lodged with EPA, which Congress allowed to be challenged if it acted arbitrarily or capriciously. Therefore, the Court held, Massachusetts has a "procedural right and . . . stake in protecting its quasi-sovereign interests" through EPA that entitles Massachusetts "to special solicitude in our standing analysis." Id. at 17.

The Court then turned to whether Massachusetts had received an injury traceable to an agency action that could be redressed. As to the injury, the Court noted that "[t]he harms associated with climate change are serious and well recognized." Id. at 18. For Massachusetts, these harms include the loss of coastline - an injury to Massachusetts' sovereign interests "in all the earth and air within its domain." Id. at 15. Second, because "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. . . . EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries," thereby satisfying the traceability requirement. Id. at 20. Finally, in what appears to be a lowering of the bar for redressibility, the Court found that this prong of the standing test can be satisfied – at least with respect to a State's legal challenge – if the harm alleged is "reduced to some extent." Id. at 23. Because the Court then found that even though other countries (notably China and India) might increase their GHG emissions, "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere," the Court found that Massachusetts' alleged injury was redressible. Id. at 23. Therefore, the Court held, Massachusetts had standing to bring suit against EPA.

Next, the Court addressed EPA's interpretation of Section 202 of the Clean Air Act. EPA argued that: (1) Congressional action in the arena of GHG regulation indicated that Congress did not consider GHGs to be "air pollutants" under the Clean Air Act, so that EPA had no authority to regulate such emissions; and (2) that even if EPA had the authority to regulate GHGs it would not because regulation "would conflict with other administration priorities" and should be done by Congress. Id. at 25. The Court summarily rejected both of these arguments.

While the Clean Air Act grants EPA some discretion to "regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change," the Court held that such judgment must be supported by scientific data and factual analysis. Id. at 25, 30. The Court found that EPA's "steadfast refusal to regulate" ignored the "Clean Air Act's sweeping definition of 'air

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pollutant' [that] includes 'any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air." Id. at 18, 26 (citing Section 202). The Court also rejected EPA's argument that any regulation of tailpipe emissions would conflict with the Department of Transportation's authority to regulate car mileage standards: "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." Id. at 29.

Having concluded that Massachusetts had standing to challenge the denial of its petition for rulemaking, and that the Clean Air Act specifically authorized EPA to regulate GHG emissions, the Court remanded the matter to EPA to reevaluate its decision not to regulate GHGs and directed EPA to "ground its reasons for action or inaction in the [Clean Air Act]." Id. at 32.

B. The Dissents

Four justices dissented from the opinion. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, focused on the lack of the plaintiffs' standing. States have "no special rights or status" under standing doctrine, the Chief Justice wrote, and States are not entitled to rely on their quasi-sovereign status to bring suits against the federal government for a harm that is "harmful to humanity at large," rather than to the State or its citizens particularly. Id. at 7 (Roberts, J., dissenting). Moreover, nothing the Court could do would redress the injuries complained of, because any decrease in emissions here will be "overwhelmed many times over by emissions increases elsewhere in the world." Id. at 11. Thus, Chief Justice Roberts would have found that the states failed to present a cognizable injury that was sufficiently particularized and concrete to support their standing to bring suit.

Justice Scalia filed a separate dissent concentrating on the Court's interpretation of Section 202 of the Clean Air Act. Nothing in the Act, Justice Scalia argued, requires EPA to make a "judgment" on whether a pollutant harms public health with respect to every petition for rulemaking that is filed, and EPA's decision not to make a judgment on GHGs was well within its discretionary bounds. Id. at 2 (Scalia, J., dissenting). Moreover, EPA's interpretation of "air pollutant" as not including GHGs under the Clean Air Act was entitled to deference, because while GHGs

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enter the ambient air, they are not "pollution agents" under the Act. Id. at 10-11. The Court's broad definition of air pollutants, Justice Scalia noted, would include "everything airborne, from Frisbees to flatulence." Id. at 10 n.2. Finally, Justice Scalia urged that because GHGs reach the upper atmosphere, rather than the air we breathe, EPA's interpretation of "air pollution" as excluding carbon dioxide and other GHGs was reasonable and should have been upheld.

III. IMPLICATIONS

The headline outcome of the case is that GHGs are subject to regulation as air pollutants under the Clean Air Act as it exists today. This decision promises to change the political and legal landscape with respect to climate change, while other aspects of the decision are likely to have sweeping effects as well. Regulation by EPA now appears likely over time, whether under the Clean Air Act or new legislation, but the immediate impact is likely to be felt in the legislative and litigation contexts, where climate change issues already are active.

A. Federal Greenhouse Gas Regulation

Although it now is clear that GHGs are subject to regulation under the Clean Air Act, the immediate impact on the federal regulatory front is likely to be limited in the absence of new legislative action. The Court's opinion does not require EPA to immediately initiate a rulemaking to regulate GHG emissions in new motor vehicles. Instead, the Court's remand provides EPA with some flexibility to draw out regulatory action or attempt to avoid it altogether -- flexibility that, while limited, could well extend through the remainder of the current Administration.

The Court's remand requires EPA to either (a) make an affirmative judgment that GHGs do cause or contribute to climate change that "may reasonably be anticipated to endanger public health or welfare"; (b) make a judgment that GHGs do *not* have that effect; or (c) provide "some reasonable explanation as to why it cannot or will not exercise its discretion" to make that determination.

If EPA follows the first course and makes a definitive judgment that GHG emissions *do* contribute to climate change, it would be required under Section 202 of the Clean Air Act to "prescribe standards" to address those emissions from new motor vehicles or new motor vehicle engines. Even if EPA does initiate a rulemaking proceeding, however, the Court observed

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that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." Id. at 30. The complexity of the issues associated with such a rulemaking would entail an extensive proceeding that could last for years, even if it begins today. Alternatively, EPA may choose to establish automobile emission standards that simply complement existing or planned fleet fuel economy measures to be set by the Department of Transportation, an approach that would almost certainly lead to further litigation.

EPA's options for completely sidestepping a rulemaking proceeding are limited. It would be very difficult for EPA to follow the second course and conclude definitively that GHG emissions do not contribute to climate change, or that climate change is not reasonably anticipated to endanger public health or welfare. Both the Court's opinion and the Administration's own stated positions with respect to climate change appear to significantly narrow the possibility that EPA could reach such a conclusion. (The White House recently stated, for example, that "President Bush has consistently acknowledged climate change is occurring and humans are contributing to the problem.") (Open Letter on the President's Position on Climate Change, Feb. 7, 2007, available online at http://www.whitehouse.gov/news/releases/2007/02/20070207-5.html).

The decision does, however, leave open the possibility that EPA might follow the third course and identify some "reasoned justification for declining to form a scientific judgment." Id. at 31. Here again, though, the Court's opinion leaves EPA little room to maneuver in this regard. It dismissed as statutorily irrelevant the "laundry list" of reasons not to regulate that EPA has offered to date, such as the effectiveness of voluntary programs or the implications for foreign affairs. Instead, if EPA is keen to avoid action under the Clean Air Act, it will effectively be required to state affirmatively 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 . . . ." Id. While it remains to be seen whether EPA can and will make such an affirmative assertion, such a decision is likely to require significant time. And the litigation that would be sure to follow it certainly would extend into the next Administration.

In addition to enabling regulation of new mobile sources under Section 202 of the Clean Air Act, the Court's decision also opens up other federal regulatory possibilities. Specifically, the prospect of federal regulation

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arises in other areas where EPA has authority to set standards for "air pollutants." Indeed, the question of whether EPA has the authority to (or may be required to) regulate GHG emissions from new power plants under its new source performance standards already is at issue in a case before the United States Court of Appeals for the District of Columbia Circuit. See Coke Oven Environmental Task Force v. EPA, No. 06-1322 (D.C. Cir. filed April 27, 2006).

Moreover, should EPA ultimately find that CO_2 or other GHGs are "criteria pollutants" pursuant to Section 108 of the Clean Air Act, 42 U.S.C. § 7408, this could result in a federally-imposed system, to be implemented by the states, for regulating existing sources in areas deemed to not be "in attainment" of whatever National Ambient Air Quality Standards (NAAQS) standards that may be established specific to these gases pursuant to Section 109 of the Clean Air Act. 42 U.S.C. § 7409. Again, however, getting to such a result would take time and involve a number of hurdles, including a series of findings by EPA that such regulation is warranted under the statute in light of the circumstances. Accordingly, it is unlikely that any such regulation will be developed in the near term.

B. Federal Greenhouse Gas Legislation

The opinion also will have implications for the various emissions control bills that have been introduced in Congress. As an initial matter, proponents of such measures are likely to seize on the opinion as lending political weight to the Congressional efforts to address climate change, notwithstanding the Court's efforts to confine its analysis to the questions of administrative law presented in the case before it. We have already seen leaders in Congress embrace this view of the decision.

Perhaps more significantly, the opinion may increase the chances that key parts of the regulated community will be more receptive to engaging with the Congress on devising a new legislative framework to address GHG emissions. Why? The Supreme Court has now clarified that EPA can regulate GHG emissions without further Congressional action. Even if the current Administration is not eager to use that authority, the decision leaves open the possibility that a future administration could adopt GHG regulations under the Clean Air Act – without the need for additional statutory authority – under the discretion of that administration. This default outcome (which will apply if no new legislation is adopted, or if the

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President vetoes any legislation that is adopted) thus may engender greater support among industry for a targeted legislative approach in the current Congress.

C. State Greenhouse Gas Regulation

The Court's decision may also give a significant political boost to the various state and regional GHG regimes under development. As a legal matter, however, by concluding that GHGs may be regulated by EPA as pollutants under the Clean Air Act, the opinion also raises a variety of potential implications for state measures that the Court did not identify (and perhaps did not foresee), resulting in issues that the lower courts will have to resolve in coming years.

Perhaps most significant in this regard is the possibility that additional preemption challenges may be brought to the various state and regional GHG regimes. Indeed, as a result of Massachusetts v. EPA, certain aspects of these regimes being developed now may be expressly preempted by the Clean Air Act. Moreover, even in the absence of express preemption, concurrent state and federal regulation still can raise preemption questions. The Supreme Court has held that state law must yield to federal statutes when Congress "intends federal law to occupy the field" or to the extent that the state law conflicts with a federal statute. Crosby v. NFTC, 530 U.S. 363, 372 (2000) (internal citations omitted). State law is preempted where it is impossible for a private party to comply with both federal and state law, or where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 372-73.

As none of the state or regional GHG regimes are yet operational, these legal challenges remain theoretical. However, the Supreme Court's decision will have a direct impact on the effort by several states to limit GHG emissions from mobile sources. In addition to the authority granted to the federal government to establish emission standards for new mobile sources, the Clean Air Act expressly allows California to set its own mobile source emissions standards, which other states then may adopt as well, as long as EPA grants a preemption waiver under statutory criteria. See 42 U.S.C. § 7543(b). In 2004, California adopted GHG emission standards for motor vehicles. Those standards were then challenged by the automobile industry in Central Valley Chrysler-Jeep v. Witherspoon, which

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alleged, in addition to other preemption arguments, that a waiver from EPA was required and had not yet been issued. In addressing this issue, the district found that such a waiver indeed was required, and had not been granted. Additionally, the district court has issued a stay of the proceedings, including consideration of the other preemption arguments, pending the outcome of Massachusetts v. EPA.

California's request for a waiver is pending at EPA and the State has asserted that EPA has unlawfully refused to grant it. In the meantime, ten other states have adopted California's motor vehicle GHG standards. As the Supreme Court now has ruled on Massachusetts v. EPA, the district court in Central Valley Chrysler-Jeep v. Witherspoon is poised to allow the remainder of the case to proceed.[1] At the same time, the question arises as to whether EPA will continue to decline to grant the waiver to California's regulations. If EPA does not grant the waiver, it is likely we will see yet another round of litigation over that issue. While implementation of the mobile source GHG emissions standards adopted by California and ten other states likely will remain stayed as litigation proceeds up the courts, there is no doubt that the Supreme Court's decision will accelerate that process -- and will give a boost to these states' efforts to regulate GHG emissions from automobiles.

D. Litigation

The Court's decision is likely to have significant implications for pending and future litigation, certainly with respect to climate change and other environmental matters, but also with respect to non-environmental matters where a State seeks to challenge action or inaction by a federal agency. To this latter point, the Court's holding that Massachusetts was entitled to "special solicitude" in terms of standing, and the apparent lowering of standing thresholds for States seeking to protect their "quasi-sovereign interests," may embolden States to take on the federal government more often. Indeed, while the State's quasi-sovereign interest in this case was to protect its coastline (among other things), there may well be such quasi-sovereign interests in other areas where the States have ceded authority, such as securities regulation, homeland security, and so on. Moreover, non-governmental organizations seeking to challenge federal action may team with States to effectively lower the standing bar.

In addition to its impact on the standing doctrine, the decision may affect nuisance and other tort litigation involving climate change. A common

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defense in climate change nuisance cases has been that they raise political questions that are not appropriate for the judiciary, but, rather, are the province of the legislature. See, e.g., Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *appeal docketed*, No. 05-5104 (2d Cir. 2006) (global warming case brought against six large utilities by eight states and others dismissed as a non-justiciable political case). The Connecticut case currently is pending before the Second Circuit, which heard arguments last June. It is conceivable that the Massachusetts v. EPA decision will prompt the Second Circuit to issue its decision, and perhaps even to reverse the lower court's dismissal.

While the Supreme Court's consideration of a challenge under the Clean Air Act's statutory authority is not comparable to a nuisance case, now that the Supreme Court has demonstrated that a court can grapple with the climate change issue, has found that the Clean Air Act covers GHGs, and has endorsed the conclusion that public welfare is affected by GHGs, some activist lower courts may find that the political questions, while still open to a significant degree, do not foreclose judicial action. One court that likely will be faced with this issue is the Northern District of California in San Francisco, which currently is considering a motion to dismiss California's nuisance lawsuit against six large auto manufacturers. Arguments were heard on the motion to dismiss last month, which is based these same grounds of non-justiciability. See California v. Gen. Motors Corp., No. C 06-05755 MJJ (N.D. Cal.).

Further, the Supreme Court's opinion likely will provide significant ammunition for plaintiff's tort lawyers. In addition to finding that "[t]he harms associated with climate change are serious and well recognized," Massachusetts v. EPA, slip op. at 18, the Court implies that at least some of the damage caused by Hurricane Katrina might be specifically attributable to the impacts of climate change. Id. at 19, n. 18. Further, the Court went so far as to conclude that "motor vehicle emissions make a meaningful contribution to greenhouse gas concentrations." Id. at 22. While there certainly is room for continued debate among the experts, we can expect these and other such statements by the Court to carry significant weight as they find their way into the next rounds of litigation. They may even assist plaintiffs in establishing causation and damages, two significant hurdles that no GHG tort case has cleared as yet.

Finally, the decision also will affect similar legal challenges that have been on hold pending the resolution of Massachusetts v. EPA. For example, the

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U.S. Court of Appeals for the D.C. Circuit has been holding in abeyance the Coke Oven Environmental Task Force v. EPA case noted above, in which several States, cities and industry and environmental groups filed a petition challenging EPA's failure to establish GHG emissions limits for power plants. In declining to establish GHG emission limits in that matter, EPA largely relied on its view that it did not have authority to regulate such emissions under the Clean Air Act. As this case raises issues similar to those in Massachusetts v. EPA, it is likely that the D.C. Circuit's decision would be similar to the Supreme Court's, raising the question of whether EPA might voluntarily seek a remand.

IV. THE FUTURE

The implications of the Massachusetts v. EPA decision are significant and far-reaching. Though change may come slowly, undoubtedly, the environmental, climate change and legal standing landscapes are forever altered.

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[1] A decision on the merits also may be forthcoming soon in the lawsuit brought by the auto industry against Vermont's parallel auto emission standards; that case was set to go to trial on April 9. See Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Torti, No. 2:05-cv-00302-wks (D. Vt.).