

# E – Outlook

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*Editor's Note: In this issue, Suzanne Lacampagne and Ian Sutton analyze a recent United States Supreme Court decision, Massachusetts v. EPA, No. 05-1120, 549 U.S. \_\_\_ (Apr. 2, 2007), which concluded that the U.S. Environmental Protection Agency has the authority to regulate greenhouse gases, such as carbon dioxide, emitted from motor vehicles. Ms. Lacampagne is a partner and Mr. Sutton is an associate of Miller Nash LLP. Both focus their practices in environmental and natural resources law.*

## **SUPREME COURT CHASTISES EPA FOR FAILING TO REGULATE GREENHOUSE GAS EMISSIONS FROM VEHICLES**

In a dramatic and far-reaching decision, the U.S. Supreme Court issued a 5-4 opinion chastising the U.S. Environmental Protection Agency ("EPA") for failing to regulate greenhouse-gas emissions. *Massachusetts v. EPA*, No. 05-1120, 549 U.S. \_\_\_ (Apr. 2, 2007). The decision has no doubt accelerated the legislative urgency of climate-change issues and demanded the attention of federal lawmakers to consider taking quicker action to curtail the effects of greenhouse gases.

### BACKGROUND

In 1999, a number of private parties and state and local governments petitioned EPA to regulate greenhouse-gas emissions, including carbon dioxide, from new motor vehicles, under Section 202 of the Clean Air Act. EPA denied the petition. The private parties and states then sought judicial review of EPA's denial, and the D.C. Circuit agreed with EPA's position. Massachusetts and the other petitioners, including Oregon, then appealed to the Supreme Court. Section 202 of the Clean Air Act expressly requires EPA to regulate emissions of air pollutants from

new motor vehicles that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

### THE DECISION

In a hotly divided opinion, the Supreme Court ruled against EPA, finding that EPA does have the statutory authority to regulate vehicle emissions that contribute to climate change. First, the Court held that the petitioners had standing to challenge EPA's denial of their petition for rulemaking on greenhouse-gas emissions. EPA contended that the global harm that greenhouse-gas emissions cause is indistinguishable from the harm caused to a particular plaintiff. The Court rejected this argument, explaining first that states are different private plaintiffs and that the Court had historically given states "special solicitude" to bring suit on behalf of their citizens. The majority continued that the Clean Air Act affords states a procedural right to challenge EPA's denial of the plaintiffs' rulemaking petition.

The Court then applied the traditional three-prong test in determining that the petitioners had standing. First, Massachusetts suffered an injury that is both "actual and imminent." Rising seas caused by climate change have impacted the Massachusetts coastline. In addition, global warming has caused and will continue to cause harm to other natural ecosystems, among other things. Second, the majority explained that the risks and consequences of climate change are serious and well recognized. Thus, EPA's refusal to regulate greenhouse gases, in light of its failure to dispute the connection between climate change and man-made greenhouse-gas emissions, at least contributes to the petitioners' injuries. The majority noted that motor vehicles alone contribute enormous quantities of carbon dioxide

to the atmosphere. Finally, the majority held that there is a substantial likelihood that the judicial relief requested—EPA regulation of greenhouse-gas auto emissions—will prompt EPA to reduce that risk. Thus, the petitioners had standing to bring their suit under the traditional test.

Second, the Court noted that its review of the merits of the statutory issue was narrow, and focused on the express authority in the Clean Air Act to allow judicial review of the denial of such petitions.

Third, and most importantly, the Court found that greenhouse gases "fit well within" the Clean Air Act's definition of "air pollutants," and thus EPA has the authority to regulate such emissions. EPA had disputed this authority in the lower court. The Supreme Court rejected EPA's reliance on post-enactment congressional deliberations to refrain from regulating greenhouse-gas emissions because the statute expressly and unequivocally requires EPA to regulate "any pollutant" that endangers public welfare.

Finally, the Court rejected EPA's reasoning that even if it had the authority to regulate greenhouse-gas emissions, it would be unwise to do so at this time because of Administration policy judgments and the uncertainty of climate change. Because EPA failed to determine that greenhouse-gas emissions were not contributing to climate change, the Court found that EPA's refusal to regulate such emissions was arbitrary and capricious, and the Court remanded the decision to EPA to "ground its reasons for action or inaction in the statute."

## THE IMPACTS

This decision will, in all likelihood, profoundly expand the scope of EPA's obligations in regulating motor-vehicle emissions. While the Court remanded the matter to EPA for further explanation as to how its decision to reject the rulemaking petition is grounded in language of the statute, the decision may well require EPA to regulate such emissions unless EPA can come up with clear scientific evidence that such emissions

do not contribute to climate change. Producing such clear scientific evidence will be difficult. EPA does not dispute "the existence of a causal connection between man-made greenhouse gas emissions and global warming."

The decision will also have significant implications for Oregon. Specifically, it may help Oregon's and other states' efforts to get EPA to approve their programs to regulate tailpipe emissions. In June last year, Oregon joined ten other states in adopting California's stricter auto-emissions standards when the Environmental Quality Commission promulgated an administrative rule on the recommendation from the governor's Advisory Group on Global Warming. Oregon's rule requires that all new cars beginning with the 2009 model year must meet California's stricter auto-emissions standards that impose progressively more restrictive limits from 2009 through 2016. Collectively (there are different standards for cars and light trucks), the greenhouse-gas emissions from the new breed of California car must be 22 percent below 2002 levels by 2012 and 30 percent by 2016.

In addition to Oregon, nine other states have piggybacked on California's adoption in 2005 of auto-emissions standards that are substantially stricter than those imposed by the federal government. The Clean Air Act expressly states that with federal approval California may set more stringent auto-emissions than the federal government and that other states may follow suit, but states choosing to do so may not set standards stricter than California's. This program effectively creates "federal cars" and "California cars." Until the *Massachusetts v. EPA* decision, EPA withheld permission, arguing that the Department of Transportation holds sole authority to set fuel-economy standards—standards that EPA sees as key to the regulation of emissions. But in light of the Supreme Court's decision, EPA has agreed to reconsider California's waiver request.

The *Massachusetts v. EPA* decision may also encourage future citizen-suit litigation based on climate-change arguments and could have far-

reaching effects on whether EPA regulates greenhouse-gas emissions from stationary sources regulated by other sections of the Clean Air Act, such as utilities and manufacturers. For example, EPA's decision not to impose greenhouse-gas limits on power plants has been challenged in other courts and will clearly be affected by this decision.

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