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LITIGATION UPDATE

THE GLOBAL WARMING CASE:

MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY

by Meryl Eschen Mills*

INTRODUCTION

On November 29, 2006, the Supreme Court heard oral arguments in *Massachusetts v. Environmental Protection Agency*,¹ the decision of which may have major implications for the regulation of carbon dioxide (“CO₂”) and other greenhouse gases (“GHGs”). The case addresses whether the Environmental Protection Agency (“EPA”) has statutory authority under the Clean Air Act (“CAA”) to regulate CO₂ and other GHGs emitted by new motor vehicles, and if it does, whether such authority is mandatory or discretionary.² The case was brought by twelve states, three cities, an American territory, and various environmental organizations. Although the Court is unlikely to take a stand on the scientific legitimacy of climate change, its decision will have important implications for future climate-related claims, specifically regarding standing and regulatory issues.

BACKGROUND

Section 202(a)(1) of the Clean Air Act provides that “[t]he Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”³ Several states and environmental groups claimed that under this section, the EPA must regulate various GHGs, including CO₂, methane, nitrous oxide, and hydrofluorocarbons.⁴ EPA sought public comment, and the White House requested the assistance of the National Academy of Sciences (“NAS”) in researching the issue.⁵

EPA found that the public comments it received did not add any significant insight to the information studied by the NAS.⁶ The agency therefore decided to rely on the NAS’s finding that a causal link between the emission of GHG and climate change could not be “unequivocally established.”⁷ Based on the scientific uncertainty of the causes of climate change, EPA chose not to regulate CO₂, nor several other GHGs, under Section 202 of the CAA.

Petitioners brought suit against EPA in the U.S. Court of

Appeals for the District of Columbia Circuit to compel EPA to regulate the gases under the CAA.⁸ The court however found in favor of EPA, holding that the Administrator “properly exercised his discretion under Section 202(a)(1).”⁹ The court reasoned that the Administrator relied on several factors in making his decision, including policy judgments in addition to the scientific uncertainty cited by the NAS report,¹⁰ and that “[i]n requiring the EPA Administrator to make a threshold ‘judgment’ about whether to regulate, Section 202(a)(1) gives the Administrator considerable discretion.”¹¹

Petitioners appealed the decision of the U.S. Court of Appeals for the District of Columbia and the Supreme Court granted certiorari.

THE ARGUMENTS

The questions presented to the Supreme Court were: (1) whether Section 202(a)(1) of the CAA authorizes the EPA Administrator “to regulate air pollutants associated with climate change;” and (2) whether the Administrator may “decline to issue emission standards for motor vehicles based on policy considerations not enumerated” under Section 202(a)(1)?¹²

In their brief, petitioners argued that the CAA authorizes EPA to regulate pollutants associated with climate change and that EPA may not base its decision not to regulate on policy considerations not laid out under the CAA.¹³ More specifically, petitioners argued that the GHGs associated with climate change are “air pollutants” subject to regulation under the CAA, that Congress did not intend to forbid EPA from regulating air pollutants associated with climate change under the CAA, and that the Agency’s interpretation did not deserve deference under the standard in *Chevron v. Natural Resources Defense Council* because the text was unambiguous, or alternatively because the Agency’s interpretation was arbitrary and capricious.¹⁴

Petitioners further argued that the Administrator’s decision should be based only on whether air pollutants emitted from motor vehicles “may reasonably be anticipated to endanger public health or welfare,” as provided under Section 202(a)(1) of the

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CAA, or in the alternative, that the CAA makes clear that three of the factors relied on by the Administrator in making his decision were irrelevant. In short, the Agency appropriately considered scientific uncertainty, but it failed to relate such uncertainty to the statutory endangerment requirement.¹⁵ Petitioners also argued that although Section 202(a)(1) refers to the Administrator's "judgment" in regulating air pollution, such "judgment" does not imply "unfettered discretion."¹⁶

The EPA first responded by arguing that petitioners lacked Article III standing to bring the suit.¹⁷ The Agency claimed that petitioners failed to demonstrate that regulating the pollutants under the CAA would affect climatic conditions in Massachusetts, that the effects of the requested regulation were too speculative to satisfy causation and redressability requirements, and that petitioners' references to other regulatory actions do not establish standing.¹⁸ Furthermore, EPA argued that its conclusion that the CAA does not authorize it to regulate GHGs associated with climate change was reasonable because the main CAA provisions do not appear to apply to GHGs. Further, the EPA argued that Congress intended the Agency to collect additional information before regulating GHGs, made evident through several federal statutes, and that regulation of GHGs could have potentially detrimental economic and political consequences.¹⁹

Finally, EPA argued that even if the CAA authorized the Agency to regulate GHG emissions, its decision to decline exercising such authority was reasonable. First, it claimed that the principles of administrative law afford federal agencies broad discretion in choosing whether or not to initiate rulemakings.²⁰ Second, the EPA noted that Section 202(a)(1) does not require the Agency to make a determination regarding GHGs and the endangerment standard within a particular time frame, evidencing Congress' intent that such a determination is discretionary.²¹ Finally, the Agency argued that its denial of petitioners' requested regulation was "a reasonable exercise of agency discretion" based on the numerous factors it considered.²²

THE HEARING

During petitioners' oral argument, the Justices focused primarily on questions of standing and interpretation of the CAA's statutory authority.²³ With respect to standing, Justice Scalia questioned whether the harm alleged by petitioners was in fact "imminent," asking "when is the predicted cataclysm?"²⁴ The Justices were also concerned with the relationship between the potential harm and regulating GHGs. Justice Alito inquired whether such potential harm could even be traceable to the emissions petitioners sought to reduce.²⁵ Chief Justice Roberts noted that even if EPA regulated GHG emissions, the potential harm may not be reduced; it "depends upon what happens across the globe."²⁶

With respect to the statutory authority issue, Justice Scalia focused on the Act's endangerment requirement and where the effects of global warming occurred. He posited, "is it an air pollutant that endangers health? I think it has to endanger health by reason of polluting the air, and this does not endanger health by reason of polluting the air at all."²⁷ He went on to note that the CAA is about "air pollution. It's not about global warming and

it's not about the troposphere."²⁸

The Justices also focused on the issue of standing during the government's oral argument. In particular, the Justices seemed to suggest that EPA was requiring too strict a correlation between the potential harm of GHGs and their effect on climate change relating to petitioners. For example, Justice Souter asked, "But why do [petitioners] have to show a precise correlation as opposed simply to establishing what I think is not really contested, that there is a correlation between GHGs and the kind of loss that they're talking about; and it is reasonable to suppose that some reduction in the gases will result in some reduction in future loss."²⁹ Justice Souter went on to remark, "They don't have to show that it will stop global warming. [Petitioners'] point is that [regulation of GHGs] will reduce the degree of global warming and likely reduce the degree of loss."³⁰

With respect to the statutory authority argument, the Justices inquired as to whether air pollution encompassed global warming, and if not, how to reconcile that with the fact that acid rain, while being an effect and not a pollutant, was regulated under the CAA.³¹

CONCLUSION

Massachusetts v. EPA is certain to become a landmark case in environmental and administrative law. Although public awareness and concern over climate change has existed for many years, this is the first time that the Supreme Court has entered the climate change debate. Its decision, expected by June,³² could set important precedent regarding standing requirements, federal discretion in regulating environmental harms, and establishing causation.



Endnotes: Litigation Update

¹ *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), cert. granted 126 S. Ct. 2960 (2006).

² *Massachusetts v. EPA*, id. at 53.

³ 42 U.S.C. § 7521(a)(1) (2000).

⁴ *Massachusetts v. EPA*, 415 F.3d at 56.

⁵ *Massachusetts v. EPA*, id.

⁶ *Massachusetts v. EPA*, id. at 57.

⁷ *Massachusetts v. EPA*, id.

⁸ Under Section 307(b)(1) of the Clean Air Act, the Court of Appeals for the District of Columbia has exclusive jurisdiction over "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. Section 7607(b)(1).

⁹ *Massachusetts v. EPA*, 415 F.3d at 58.

¹⁰ *Massachusetts v. EPA*, id.

¹¹ *Massachusetts v. EPA*, id. at 57-58.

¹² Br. for the Pet'r, *Massachusetts v. EPA*, No. 05-1120 (S. Ct. Aug. 31, 2006) at I, 2006 WL 2563378.

¹³ Br. for the Pet'r, id. at 11, 35.

¹⁴ Br. for the Pet'r, id. at 12, 20, 32.

¹⁵ Br. for the Pet'r, id. at 35, 39.

¹⁶ Br. for the Pet'r, supra note 12, at 44.

¹⁷ Br. for the Resp't, *Massachusetts v. EPA*, No. 05-1120 (S. Ct. Oct. 24, 2006) at 10, 2006 WL 3043970.

ENDNOTES: LITIGATION UPDATE *continued from page 68*

¹⁸ Br. for the Resp't, *id.* at 13, 14, 18.

¹⁹ Br. for the Resp't, *id.* at 20, 26, 31.

²⁰ Br. for the Resp't, *id.* at 36.

²¹ Br. for the Resp't, *id.* at 39.

²² Br. for the Resp't, *supra* note 17, at 45.

²³ Transcript of Oral Arguments, *Massachusetts v. EPA*, No. 05-1120 (S. Ct. Nov. 29, 2006), 2006 WL 3431932.

²⁴ Transcript of Oral Arguments, *id.* at 4, 5.

²⁵ Transcript of Oral Arguments, *id.* at 10.

²⁶ Transcript of Oral Arguments, *id.* at 12.

²⁷ Transcript of Oral Arguments, *supra* note 23, at 23.

²⁸ Transcript of Oral Arguments, *supra* note 23.

²⁹ Transcript of Oral Arguments, *supra* note 23, at 35.

³⁰ Transcript of Oral Arguments, *supra* note 23, at 36.

³¹ Transcript of Oral Arguments, *supra* note 23, at 44-45.

³² CNN News, *Global Warming Debate Hits Supreme Court* (Nov. 29, 2006), available at <http://www.cnn.com/2006/TECH/science/11/29/scotus.carbon.dioxide/index.html> (last visited Feb. 9, 2007).
