

Changing the Climate of Climate Change

Overview of *Massachusetts v. EPA*
No. 05-1120 (April 2, 2007)

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Background - Timeline

- 1999 -- Petition filed with EPA
 - Regulate CO₂ emissions from motor vehicles under CAA Section 202

- 2001 -- EPA seeks public comment

- 2003 – EPA denies petition
 - No authority to regulate CO₂ as air pollutant
 - EPA has discretion not to regulate
 - Exercised discretion – uncertainties, premature, Kyoto-type concerns



Background - Timeline

- 2005 – U.S. Court of Appeals for D.C. Circuit denies petition for review of EPA decision (2-1)
 - Deference to EPA discretion not regulate
 - No Article III standing – injury not particularized
 - Dissent: Standing, authority and abuse of discretion
- 2006 – Petition for Cert granted and case argued before Supreme Court
- 2007 – Supreme Court reverses and remands to EPA (Justice Stevens writes for 5-4 majority)



Main Issues

- Standing?
- Is there authority to regulate CO₂ as an air pollutant?
- Were grounds asserted for denying the petition sufficient under Section 202?
- 5 “No” votes on any one of these three results in win for EPA



Standing – Two Analyses

- Massachusetts has “special position and interest” – special solicitude
 - Sovereign that owns land likely to be affected
- “Regular” standing analysis
 - Widely shared injury ≠ preclude standing; loss of coastal land is sufficient
 - EPA refusal to regulate CO₂ “contributes” to MA’s injury
 - Fact that regulating CO₂ from motor vehicles won’t “reverse” global warming ≠ no redressability



Standing – Dissent

- Chief Justice Roberts: No special standing for state as public litigant
- Case meets none of three “essential elements”
 - No particularized injury; not actual or imminent
 - No causal connection between lack of motor vehicle CO2 emission standards and loss of coastal land
 - Loss of coastal land will not “likely” be redressed by issuance of CO2 motor vehicle emission standards



Merits

Section 202(a)(1): EPA shall by regulation prescribe standards applicable to the emission of any air pollutant from any motor vehicle...which in EPA's judgment causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare



Merits – Statutory Authority

- Statute is unambiguous: “any air pollutant” includes any physical or chemical substance that is emitted into the ambient air
- No evidence that Congress did anything to curtail authority to regulate CO₂
- CAA gives EPA statutory authority to regulate CO₂



Merits – Discretion not to Regulate

- EPA's discretion is conditioned on a judgment that the air pollutant does not cause or contribute to an endangerment – i.e., climate change
- In the context of acting on the petition, EPA can only decide not to regulate if:
 - It determines that GHGs do not contribute to climate change; or
 - It provides a reasonable explanation why it cannot or will not make that judgment



Merits – Discretion not to Regulate

- EPA offered no reasoned explanation for its refusal to decide whether GHGs cause or contribute to climate change
- EPA's rationale rested on a laundry list of reasons not to regulate CO₂
 - Voluntary programs are effective response
 - Would impair President's ability to negotiate in Kyoto-type setting
 - Would result in inefficient, piecemeal approach to climate change
 - Uncertainties



Merits – Discretion not to Regulate

- This list sets forth policy judgments – but it does not address either the issue of whether GHGs contribute to climate change or why EPA declined to make a scientific judgment that GHGs contribute to climate change
- EPA’s justifications don’t address statutory requirement
- Remand to EPA for further proceedings



Merits -- Dissent

- Justice Scalia – Three flaws in majority’s analysis of merits – all rest on Chevron deference to EPA discretion
 - EPA properly exercised discretion under §202 – defer making judgment on endangerment because of uncertainties
 - Record shows “scientific uncertainty so profound that EPA cannot make endangerment judgment”
 - Language of definition of air pollutant allows EPA discretion to decide that CO₂ is not an “air pollution agent”



Most Striking Aspect of Decision

The majority cites throughout the opinion to record evidence supporting conclusion that CO2 emissions are causing “endangerment” as that term is used in the Clean Air Act

“The harms associated with climate change are serious and well recognized.”

“The risk of catastrophic harm, though remote [in time], is nevertheless real.”



What Does it Mean?

- EPA must reconsider action on motor vehicle petition
 - Would be hard to justify not regulating – Court’s opinion supports endangerment finding

- California Clean Car standards -- petition pending before EPA
 - EPA has requested public comment and will hold public hearing
 - At least 11 other states in line behind California



What Does it Mean?

- Obligation to regulate GHG from stationary sources?
 - Once EPA makes endangerment finding EPA has very little discretion not to regulate
 - Sections 108/109 have very similar “endangerment”
 - NAAQS?
 - Mass case seeking to have EPA set NAAQS for CO2 dismissed w/o prejudice pending *Mass v. EPA* – refile?
 - NSPS
 - D.C. Circuit case challenging utility boilers rule stayed pending *Mass v. EPA* -- voluntary remand?



What Does it Mean?

- Motor Vehicles
 - Auto manufacturers challenging states in California and Vermont (trial underway)
 - If GHGs are CAA air pollutant then does federal preemption bar state regulation because EPA has not yet acted on California petition?
- PSD/NSR Permitting
 - Does Court holding that GHGs are air pollutants require that PSD/NSR permits contain BACT limits for CO₂



What Does it Mean?

- Petition under section 115 filed by Canada seeking control of CO₂ from power plants because of impact on Canada – amended to include impact from global warming
- Emission standards for aircraft engines must include CO₂ standards?



What Does it Mean?

- Relaxed Article III standing in environmental cases?
 - Cannot deny standing because injury is too widespread/far-reaching or remedy does not completely cure injury
- Impact on SEC Disclosures?
- Congressional response?