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Supreme Court Directs EPA to Address Greenhouse Gas Pollutants

In a recent decision, the U. S. Supreme Court held that the United States Environmental Protection Agency (EPA) can regulate carbon dioxide emissions, and must now analyze whether to do so. *Massachusetts v. EPA*, No. 05-1120, 549 U.S. ____ (April 2, 2007).

The Supreme Court, in a 5-4 decision, held on April 2, 2007 that carbon dioxide can be regulated as a “pollutant” under the Clean Air Act. The Supreme Court rejected EPA’s policy-based rationale for not engaging in such rulemaking, saying, “Under the clear terms of the Clean Air Act, 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.”

This case was initiated by several states and environmental groups to address global warming, and more specifically to have the federal government issue rules regulating U. S. emissions of greenhouse gases (GHGs). The case on its surface treated a limited class of GHGs — vehicle tailpipe carbon dioxide emissions. That was the subject of the states’ rulemaking petition that gave rise to the litigation. EPA argued both legal and policy grounds for not considering such regulations: That carbon dioxide was not a “pollutant” subject to regulation under the Clean Air Act and even if it were, as a policy matter any “piecemeal” regulation of GHGs by EPA under the Clean Air Act would be of limited efficacy and conflict with other administration initiatives on climate change. The Supreme Court rejected both EPA’s legal and policy arguments, finding that carbon dioxide fits within the statutory definition of “pollutant” in the Clean Air Act, and finding that EPA must evaluate issuing carbon dioxide emissions standards as it would other pollutants that it regulates under the Clean Air Act.

The case affects much more than just tailpipe standards, however. The Supreme Court’s rationale establishes that carbon dioxide can be regulated as a “pollutant” under the Clean Air Act generally. Further, similar pending rulemaking petitions demand that EPA regulate carbon dioxide emissions under other provisions of the Clean Air Act, including the New Source Review (NSR) provisions for major stationary sources.

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The Supreme Court also made a significant ruling on "standing" in this case, holding that the state of Massachusetts was legally entitled to bring the lawsuit. The Supreme Court relied on the principle that a state "is entitled to special solicitude in our standing analysis" to find: *injury in fact* (as a result of sea-level rise, among other impacts); *causation* (because of the measurable contribution to U. S. GHG emissions from the transportation sector); and *redressability* (as a result of the potential incremental mitigation that rulemaking might provide).

This decision lands on top of an ongoing legislative debate on climate change. The leading GHG regulation bills introduced in this

Congress would not integrate regulation of GHG emissions with the existing provisions of the Clean Air Act. Most would add a new, separate GHG regulation title to the Clean Air Act, and would not otherwise alter the existing tailpipe emissions and NSR stationary source provisions of the Clean Air Act. Several bills are framed as "stand-alone" legislation that are not even part of the Clean Air Act. Given the current consensus expectation that Congress will not enact comprehensive GHG legislation in this Congress (before the 2008 elections), EPA is likely to have to respond to the Supreme Court's ruling under current law, prior to Congressional action.