

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb is filled with a dark blue color, and the bottom bulb is filled with a light blue color. The globe is centered in the narrow neck of the hourglass.

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*The Supreme Court's Climate Change Decision:  
Massachusetts v. EPA*

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May 18, 2007

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# The Supreme Court's Climate Change Decision: *Massachusetts v. EPA*

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May 18, 2007

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## Summary

On April 2, 2007, the Supreme Court handed down *Massachusetts v. EPA*, its first pronouncement on climate change. By 5-4, the Court held that (1) Massachusetts had standing to sue, (2) Section 202 of the Clean Air Act authorizes EPA to regulate emissions from new motor vehicles on the basis of their possible climate change impacts, and (3) Section 202 does *not* authorize EPA to inject policy considerations into its decision whether to so regulate. The Court's decision leaves EPA with three options under the section: find that motor vehicle greenhouse gas emissions may "endanger public health or welfare" and issue emission standards, find that they do not satisfy that prerequisite, or decide that climate change science is so uncertain as to preclude making a finding either way. The decision also has implications for other climate-change-related litigation, particularly a pending suit seeking to compel EPA regulation of greenhouse gas emissions from stationary sources of emissions.

On April 2, 2007, the Supreme Court handed down *Massachusetts v. EPA*, its first pronouncement on climate change.<sup>1</sup> By a narrow 5-4 margin, the Court held three things: that (1) Massachusetts had standing to sue, (2) the Clean Air Act (CAA) authorizes EPA to regulate emissions from new motor vehicles on the basis of their climate change impacts, and (3) the act does *not* authorize EPA to inject policy considerations into its decision whether to so regulate. The decision does not compel EPA to regulate greenhouse gas (GHG) emissions from new motor vehicles, but it does limit the range of options available to the agency that would justify not doing so.

This report traces the events leading up to the Court's decision, then describes what the decision says. It then lays out the decision's implications both within the CAA mobile-source program and elsewhere.

## EPA's Denial of the Section 202 Petition

In 1999, 19 organizations petitioned EPA to regulate emissions of GHGs (CO<sub>2</sub>, methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles. The petition cited the agency's alleged mandatory duty to do so under CAA Section 202(a)(1).<sup>2</sup> That provision directs the EPA Administrator to prescribe by regulation

standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles ... which, in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

In 2003, after receiving about 50,000 comments, EPA denied the Section 202 petition.<sup>3</sup> Much of the agency's rationale followed a General Counsel memorandum issued the same day.<sup>4</sup> Contrary to its Clinton Administration precursor,<sup>5</sup> this General Counsel memorandum concluded that the CAA does *not* grant EPA authority to regulate CO<sub>2</sub> and other GHG emissions based on their climate change impacts.

## *Massachusetts v. EPA* in the D.C. Circuit

EPA's denial of the Section 202 petition prompted a suit, *Massachusetts v. EPA*, in the D.C. Circuit. Petitioners were twelve states (CA, CT, IL, MA, ME, NJ, NM, NY, OR, RI, VT, WA); three cities (New York, Baltimore, and Washington, D.C.); two U.S. territories (American Samoa and Northern Mariana Islands); and several environmental groups. Opposing the challenge, besides EPA, were 10 state intervenors (AK, ID, KS, MI, ND, NE, OH, SD, TX, UT), plus several automobile- and truck-related trade groups.

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<sup>1</sup> Recent years have seen an explosion of litigation involving climate change, *Massachusetts v. EPA* being just one (though the most important) example. For a review of all the significant climate change litigation in the U.S., decided and pending, see CRS Report RL32764, *Climate Change Litigation: A Growing Phenomenon*, by Robert Meltz.

<sup>2</sup> 42 U.S.C. § 7521(a)(1).

<sup>3</sup> EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (September 8, 2003).

<sup>4</sup> Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (August 28, 2003).

<sup>5</sup> Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

In 2005, a split panel rejected the suit.<sup>6</sup> The two judges supporting rejection, however, did so for different reasons. Judge Randolph concluded that EPA had properly exercised its discretion in choosing not to wield its Section 202 authority. As to this discretion issue, recall that CAA Section 202(a)(1) directs the EPA Administrator to prescribe standards for any motor vehicle emissions that “in his judgment” cause harmful air pollution. Judge Randolph read “in his judgment” broadly to allow EPA consideration of not only scientific uncertainty about the effects of GHGs but also policy considerations that justify not regulating. Thus, EPA in his view was entitled to rely, as it did, on such factors as the current Bush Administration’s policy preference for voluntary GHG control measures, and its belief that regulating motor vehicle emissions was a piecemeal, hence inefficient, approach to dealing with climate change. By contrast, Judge Sentelle, the other judge supporting rejection of the petition, simply held that petitioners lacked standing.<sup>7</sup>

In dissent, Judge Tatel asserted that Massachusetts had demonstrated standing through past and future loss of shore land as a result of climate-change-induced sea level rise. On the merits, he found that EPA has authority under Section 202(a)(1) to regulate GHG emissions.<sup>8</sup> He further concluded that EPA’s 202(a)(1) discretion does not extend to policy considerations, as Judge Randolph held, but relates exclusively to whether the emissions cause harmful air pollution.

## ***Massachusetts v. EPA* in the Supreme Court**

It was somewhat of a surprise that the Supreme Court agreed to review the D.C. Circuit decision in *Massachusetts v. EPA*. There was no split in the circuits, which often disposes the Court not to take a case, and the D.C. Circuit majority had not even ruled on the key issue: whether Section 202(a)(1) authorizes regulation of GHG emissions. Moreover, grants of certiorari over the opposition of the United States, as here, are rare. But as the Supreme Court stated in its decision, “the unusual importance of the underlying issue persuaded us to grant the writ.”

The Court ruled 5-4 for petitioner states and environmental groups on all three issues in the case: standing, authority (whether “air pollutant” includes GHG emissions), and discretion (whether “in his judgment” allows policy considerations).<sup>9</sup> Justice Kennedy provided the fifth vote by joining Justice Stevens’ opinion for the Court’s “liberal/moderate” bloc. The ruling in favor of petitioners was forecast early in the majority opinion by its opening sentences: “A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.” (Nor did the dissenters dispute this.)

Most of the decision is devoted to standing, an issue that is ubiquitous in climate change litigation. At the outset, the Court found that petitioners had two factors in their favor. First, the CAA specifically authorizes challenges to agency action unlawfully withheld, such as this one.<sup>10</sup> A litigant to whom Congress has accorded such a procedural right, said the Court, can assert that

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<sup>6</sup> 415 F.3d 50 (D.C. Cir. 2005).

<sup>7</sup> The test for whether a plaintiff in federal court has standing is described in greater detail in the following discussion of the Supreme Court’s decision on appeal of the D.C. Circuit ruling.

<sup>8</sup> 415 F.3d at 62 (emphasis added by court).

<sup>9</sup> 127 S. Ct. 1438 (2007).

<sup>10</sup> CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

right without meeting the normal standards for standing. Second, the Court found it “of considerable relevance” that the petitioner injury on which it focused—Massachusetts’s loss of shore land from global-warming-induced sea level rise—was that of a sovereign state rather than a private entity. States are “not normal litigants for the purposes of invoking federal jurisdiction,” said the Court, noting their quasi-sovereign duty to preserve their territory.

Having described petitioners’ favored position with regard to standing, it was curious that the Court then undertook a fairly traditional standing analysis. As to the first prong of the black-letter standing test—whether plaintiff has demonstrated actual or imminent “injury in fact” of a concrete and particularized nature—the Court homed in on Massachusetts’s status as owner of much of the commonwealth’s shore land. That this injury may be widely shared with other coastal states does not disqualify this injury, said the Court; it is nonetheless concrete.

The second prong of the standing test is causation, requiring that the injury of which the plaintiff complains is fairly traceable to the defendant. EPA did not dispute the existence of a causal relationship between GHG emissions and climate change. It did argue, however, that any reduction in GHG emissions achieved through the current litigation would be too tiny a fraction of worldwide GHG emissions to make a cognizable difference in climate change. In an important ruling that may be of benefit to environmental plaintiffs in many contexts, the Court held that even an agency’s refusal to take a “small incremental step” that would result in only a modest reduction in worldwide GHG emissions, is enough for standing purposes.

The third and final prong of the standing test is redressability, demanding that the remedy sought by the plaintiff is one that is likely to redress his injury. In this case, the remedy sought is EPA regulation of GHG emissions from new motor vehicles. The Court found that this remedy satisfied redressability because while it would not by itself reverse climate change, it would nonetheless slow or reduce it. Nor, given the “enormity” of the potential effects of climate change, was it relevant to the Court that the full effectiveness of the remedy would be delayed until existing cars and trucks on the road were largely replaced by new ones.

Given the large number of pages devoted by the majority opinion to standing, its discussion of the two CAA issues in the case seems strangely brief. On the authority question, the CAA’s “sweeping” definition of “air pollutant”—embracing “any air pollutant ... including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air”<sup>11</sup>—simply could not be squared, in the Court’s view, with EPA’s position that GHGs are not included. The Court rejected EPA’s argument that federal laws enacted following enactment of this statutory language—laws emphasizing interagency collaboration and research—suggest that Congress meant to curtail EPA’s power to use mandatory regulations in addressing air pollutants. Nor was the Court impressed with EPA’s contention that “air pollutant” in the CAA could not include vehicle GHG emissions because EPA standards for such emissions could be satisfied only by improving fuel economy, a job EPA asserted was assigned solely to the Department of Transportation under a different statute (the Energy Policy and Conservation Act<sup>12</sup>).

Finally, on the discretion issue, the majority concluded that “in his judgment” allows the EPA Administrator to consider only whether an air pollutant “may reasonably be anticipated to endanger public health or welfare,” not the agency’s policy preferences. Policy considerations, at

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<sup>11</sup> Emphasis added by the Court.

<sup>12</sup> 49 U.S.C. § 32902.

least those that led EPA to reject the petition, “have nothing to do with whether greenhouse gas emissions contribute to climate change.” Thus, said the Court, EPA can avoid taking further action in response to the Section 202 petition “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.” In sum, whether EPA decides to act or not, “[it] must ground its reasons for action or inaction in the statute.”

Accordingly, the Court reversed the D.C. Circuit opinion, and remanded the case to that court for further proceedings. It is almost certain that the D.C. Circuit will issue an order sending the petition back to EPA.

A four-justice dissent by Chief Justice Roberts vigorously disputed the majority’s finding of standing. A four-justice dissent by Justice Scalia disputed that “air pollutant” in Section 202 includes GHGs.

## Implications of the Supreme Court Decision for Mobile Sources

The Court’s decision leaves EPA with three options under Section 202: make a finding that motor vehicle GHG emissions may “endanger public health or welfare” and issue emissions standards, make a finding that they do not satisfy that prerequisite, or decide that the science is so uncertain as to preclude making a finding either way (or cite some other “reasonable explanation” why it will not exercise its discretion either way).

The EPA Administrator has said following *Massachusetts v. EPA* that while the decision bars EPA use of policy considerations as a basis for *denying* the petition, it left open whether the agency can invoke them later when actually *writing* the regulations, should it make an endangerment finding.<sup>13</sup> In this regard, it should be noted that CAA Section 202 does not explicitly impose any stringency or other criteria on GHG emission standards promulgated under the section. While Section 202 states numerical formulae for emissions of carbon monoxide, hydrocarbons, and nitrogen oxides, none is stated for GHG emissions other than nitrogen oxides.

Reflecting the apparently wide latitude EPA has in setting mobile-source GHG emission standards under Section 202 (other than for nitrogen oxides), commentators have suggested that EPA, following an endangerment finding, could be creative. The agency might, some have opined, set (1) voluntary standards, (2) standards pegged to the CAFÉ standards for fuel economy, or (3) standards that must be complied with only after the President certifies that developing nations have put adequate GHG emission limits into effect, among other options. It is not clear whether courts would uphold all of these innovative interpretations. In any event, on May 14, 2007, the President asked the EPA Administrator, working with the Departments of Transportation, Energy, and Agriculture, to have CAA regulations limiting vehicle GHG emissions in place by the end of 2008, and to use the President’s 2007 State of the Union proposal for raising the CAFÉ standards as a guide.<sup>14</sup> This appears to mean that EPA will be making the prerequisite finding that motor vehicle GHG emissions endanger public health or welfare.

<sup>13</sup> The EPA Administrator is apparently referring to the Court’s statement that “We need not and do not reach the question ... whether policy concerns can inform EPA’s actions in the event that it makes [an endangerment finding].”

<sup>14</sup> *Briefing by Conference Call on the President’s Announcement on CAFÉ and Alternative Fuel Standards*, May 14, 2007 (statement of EPA Administrator Stephen Johnson), available at <http://www.whitehouse.gov/news/releases/2007>.

## Other Implications of the Supreme Court Decision

The Court's ruling in *Massachusetts v. EPA* resonates well beyond its four corners. At this early date, however, only broad predictions are possible. Most obviously, the finding of standing likely will be pivotal to the fortunes of plaintiffs in other climate change litigation. A key question will be whether the finding was contingent, as could be argued, on the existence of a state petitioner and the presence in the CAA of an explicit provision allowing the filing of administrative petitions. In cases seeking injunctive relief, this query is relevant only for private plaintiffs not joined by state plaintiffs. In injunctive cases with mixed private and state plaintiffs, a court can focus on the latter; as *Massachusetts v. EPA* instructs, it is only necessary that one plaintiff in such a case have standing. The decision also helps rebut other no-standing arguments often made in climate change litigation (e.g., that even were the defendants to reduce their GHG emissions substantially, it would make but an insignificant contribution to mitigating climate change).

Elsewhere, the Court's ruling upholding CAA coverage of GHG emissions from mobile sources improves the prospects of litigation seeking to have EPA restrict GHG emissions from *stationary* sources, such as coal-fired power plants and factories.<sup>15</sup> The stationary-source provisions of the CAA use terms similar to that of Section 202—in particular, “air pollutant,” “in his judgment,” and “may reasonably be anticipated to endanger public health and welfare.”<sup>16</sup> Contrariwise, the ruling could undermine pending cases making federal common law claims against entities alleged to contribute to climate change, such as coal-fired power plants and auto manufacturers, since it strengthens the argument that Congress in the CAA intended to leave no room for courts to develop overlapping federal common law restricting GHG emissions. Ironically, this means that the victory for the “environmental” side in *Massachusetts v. EPA* enhances the possibility of a defeat for that side in the federal common law cases.

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<sup>15</sup> *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 13, 2006) (severed from pre-existing case by order of the court).

<sup>16</sup> *See, e.g.*, CAA § 108(a)(1)-(2), 42 U.S.C. § 7408(a)(1)-(2) (requiring the EPA Administrator to maintain a list of each “air pollutant” “emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,” and then issue air quality criteria and national ambient air quality standards for that air pollutant).