

---

# Massachusetts v. EPA

## Global Warming Decision: What Does It Mean?

Peter S. Glaser and Douglas A. Henderson

---

On April 2, 2007, the U.S. Supreme Court finally spoke on global climate change. In its decision in *Massachusetts v. Environmental Protection Agency*, No. 05-1120 (slip op. Apr. 2, 2007), the Court ruled that (1) greenhouse gas (GHG) emissions are air pollutants under Title II of the Clean Air Act (CAA) and (2) the U.S. Environmental Protection Agency (EPA) must regulate GHG emissions from new motor vehicles if the EPA Administrator, in his judgment, finds that such emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. The Court reversed the decision of the United States Court of Appeals for the District of Columbia Circuit, which had upheld a decision by EPA that the agency did not have authority under the CAA to regulate GHGs for global warming purposes and that, even if it did, the agency could choose not to regulate GHGs.

Is *Massachusetts* the most important environmental case ever issued by the Supreme Court? Probably not. While it is likely to generate a great deal of activity and set the direction in the near term, in the end it will remain up to Congress to decide the nature, scope, and timing of a GHG regulatory program.

There were three main aspects of the Court's decision. First, the Court found the petitioner states and environmental interest organizations had standing to challenge EPA's decision not to regulate GHGs. The standing issue was whether the petitioners' assertion of harm by global warming was specific and particular to the states, as opposed to a general injury experienced by the public at large; whether the EPA action the petitioners complained of (i.e., failure to regulate new motor-vehicle GHG emissions) caused the harm complained of; and whether the relief sought (regulation of new motor-vehicle emissions) would ameliorate that harm. Second, the Court specifically held that the CAA authorizes regulation of GHGs, relying on the broad definition of "air pollutant" and "air pollution" in the statute. Third, and perhaps most importantly, the Court ruled that, although EPA has discretion to decide whether or not to regulate GHGs, the only factor EPA can consider in exercising that discretion is endangerment to the public health and welfare. The Court criticized EPA's reliance on other factors, such as foreign policy concerns and the need for national, economywide, and international approaches to the global warming issue.

The Court's opinion was written by Justice Stephens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justices Scalia, Thomas, and Alito and Chief Justice Roberts dissented. Chief Justice Roberts, who has promoted consensus and civility on the Court, was moved to write a stinging dissent, joined in by the other dissenting justices, on standing.

The Chief Justice particularly criticized the Court's reliance on a century-old case, one that had not been cited in any brief, for the contention that states should be given "special solicitude" in standing analysis. Justice Scalia wrote a separate dissent, also joined in by the other dissenters, sharply criticizing the majority's view that the CAA authorizes GHG regulation and, assuming EPA had authority to regulate, that EPA had improperly exercised its discretion in choosing not to do so.

The case will now be remanded to EPA for further action consistent with the Court's decision. It is now law that EPA has authority to regulate GHGs for global warming purposes under Title II of the CAA. It is also now law that EPA must regulate if it makes an endangerment finding. EPA's options are either to make the endangerment finding and regulate or find that science at this point does not justify the conclusion that GHGs endanger public health and welfare.

Technically, because the original petition to EPA seeking GHG regulation was restricted to motor-vehicle regulation under Title II, the Court's decision only applies to that Title and not to the broader Title I under which stationary and area sources are regulated. In determining what to do next, EPA is not required to take any action under Title I, assuming no further petition is filed. However, under the logic of the Court's decision, because EPA has authority to regulate GHGs under Title II, it also has that authority under Title I.

Despite the widespread attention the case attracted, it is possible the case will have less meaning to the future of GHG regulation than many anticipate. Arguably, it was never the primary intention of the petitioners or their allies to force EPA to regulate GHG emissions under the CAA. The petition was brought under Title II because GHG regulation under Title I is a square peg in a round hole. Under Title I, EPA is required to set National Ambient Air Quality Standards (NAAQS) for pollutants that endanger the public health or welfare. States are then required to adopt State Implementation Plans to ensure the NAAQS are met. Yet, given the global nature of the GHG issue, there is nothing any state can do, individually or collectively, to ensure NAAQS compliance.

Those seeking meaningful federal regulation of GHGs have always been interested in the case as a lever to force congressional action. In this regard, it is difficult to judge how much impact the decision will have on future congressional action. It has been about eight years since the original rulemaking petition was filed with EPA. With the passage of time, momentum towards congressional legislation of GHGs had increased anyway. The automotive industry may be more willing to compromise on increased fuel-economy standards out of fear of what the next EPA might do under the CAA. Industry in general may also feel more willing to compromise rather than face a highly uncertain Title I GHG regulatory regime.

Given the decision in *Massachusetts*, the spotlight will be on EPA and its response to motor-vehicle carbon dioxide emissions, with at least two areas potentially subject to CAA regulation of stationary sources to be affected. Assuming EPA makes an endangerment finding, regulatory requirements would be triggered under both the New Source Performance

Standards (NSPS) and the Prevention of Significant Deterioration programs (PSD). Both programs apply to new and modified sources. Prior to the litigation, environmental interest groups had sought EPA GHG regulation under the NSPS program and had appealed EPA's refusal to do so. *Coke Oven Environmental Task Force et al. v. EPA*, Nos. 06-1131, 06-1148, 06-1149, 06-1154, 06-1155 (D.C. Cir. 2006). That appeal was stayed because of *Massachusetts*, and the petition will now undoubtedly be renewed in light of the decision.

The NSPS program is administered by EPA, and the PSD program is administered by states (subject to active EPA supervision) as a part of permitting new and modified sources in areas that are in attainment of the NAAQS. Both programs require new and modified sources to install advanced pollution-control technology called Best Demonstrated Technology (BDT) under NSPS and Best Available Control Technology (BACT) under PSD. BDT and BACT are set considering the feasibility of possible technology, although the standards are intended to be "technology forcing." Accordingly, the technology does not have to be commercially common in the industry, but it does have to be available and practical.

Carbon capture technology, for instance, at conventional coal plants is technologically feasible, although it has not been demonstrated on a broad scale. Carbon sequestration is similarly technologically feasible but also has not been demonstrated on a broad scale and raises a number of technical and legal issues. One can now expect fairly contentious proceedings before EPA on whether there is "demonstrated" technology available to capture and store GHGs from stationary sources, and similarly contentious proceedings before state PSD permitting authorities each time a source seeks a PSD permit.

The Court's decision in *Massachusetts* may very well benefit industry in the various lawsuits that have been filed seeking to tag industry with liability for GHG regulation. For instance, in *Connecticut v. American Electric Power Co.*, No. 04-5669 (S.D.N.Y. 2005), *app. pending*, a number of states and environmental interest organizations sued five electric utilities in the United States District Court for the Southern District of New York on a claim that defendants' out-of-state GHG emissions constitute a federal common law nuisance. The case was dismissed on motion on the ground that the claims involved a nonjusticiable political question, and it is currently on appeal to the Second Circuit. Now that the Supreme Court has ruled that EPA has authority to regulate GHG emissions under the CAA, a serious question arises as to whether federal common law nuisance claims based on GHG emissions are now preempted. *See, e.g., Milwaukee v. Illinois*, 451 U.S. 304 (1981).

Similarly, a large number of energy and chemicals companies were sued under state and federal common law theories

in the U.S. District Court for the Southern District of Mississippi alleging that defendants' GHG emissions intensified Hurricane Katrina. Given the Supreme Court's decision, serious questions arise as to whether Mississippi common law can be applied to out-of-state GHG emissions. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Under *Ouellette*, it could be argued that the Mississippi court could apply the common law of the home state of the emitters because the CAA allows all states to adopt more stringent standards than the federal standards.

The decision in *Massachusetts* should have no direct effect on state efforts to regulate their own GHG emitters because, as noted, the CAA allows states to adopt more stringent standards than the CAA. However, some states have laws preventing them from adopting more stringent standards than the CAA, and that may have an impact on how the Court's decision plays out for them.

One area of emerging state GHG regulation is the adoption of state GHG standards for electric utilities both generating in state and out of state and seeking to sell in state. *Milwaukee* should have little or no impact on the application of these standards to in-state generation for reasons just discussed, but it could have an impact on application of the standards to out-of-state generation. With the decision, it is at least arguable that application of in-state GHG standards to out-of-state generators is an attempt to project the state's air-quality laws to out-of-state emitters in contravention of the *Milwaukee* case.

On the other hand, in a case involving an attempt by California to regulate GHG emissions from motor vehicles, *see Central Valley Chrysler Jeep v. Witherspoon*, No. 04-6663 (E.D. Ca. 2006), the automotive defendants have argued that California GHG regulation is preempted because it conflicts with federal foreign policy. That argument could also apply to any state GHG regulatory effort, including an attempt to regulate in-state or out-of-state GHG emissions. EPA had argued that if it had authority to regulate it would choose not to do so, in part, because of U.S. global warming foreign policy. That argument is likely weakened by the Supreme Court's decision.

The Court's 5-4 split decision illuminates the Court's struggle to make sense of these fundamental issues in the context of agency regulation. An issue such as global climate change regulation must and ultimately will be decided not only in Congress but in the court of public opinion.

**Mr. Glaser is a partner in the Washington D.C., office and Mr. Henderson is a partner in the Atlanta office of Troutman Sanders LLP. They may be reached at [peter.glaser@troutmansanders.com](mailto:peter.glaser@troutmansanders.com) and [doug.henderson@troutmansanders.com](mailto:doug.henderson@troutmansanders.com).**