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

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Summary

In 2007, the Supreme Court handed down *Massachusetts v. EPA*, its first pronouncement on climate change and arguably the most important environmental law decision of the past decade. This report reviews that decision, but leaves coverage of the many EPA actions based on the decision to other CRS reports.

Massachusetts v. EPA was a case brought to challenge EPA's denial of a petition asking the agency to regulate greenhouse gas (GHG) emissions from new motor vehicles under the Clean Air Act (CAA). By 5-4, the Court held first that Massachusetts had standing to sue, an issue that took up most of the majority opinion. On the merits, the Court found that the CAA definition of "air pollutant" was broad enough to include GHGs. That being so, the Court held, CAA Section 202 authorizes EPA to regulate emissions from new motor vehicles on the basis of their possible climate change impacts. Finally, the Court determined that the phrase "in his judgment" in Section 202 did *not* authorize EPA to inject policy considerations into its decision whether to so regulate. For these reasons, the Court reversed the lower court decision upholding the petition denial.

The Court's decision left EPA with three options for responding to the petition: (1) find that new motor vehicle GHG emissions may "endanger public health or welfare," the prerequisite to limiting them under Section 202, then issue emission standards; (2) find that they do *not* satisfy that prerequisite, or (3) decide that climate change science is so uncertain as to preclude making either finding (1) or (2). Given the state of climate change science by 2007, it was widely believed at the time that option (1) was the only legally defensible one for EPA. This is the option that EPA took, as covered in other CRS reports.

A few legal comments may be made about the *Massachusetts v. EPA* decision from the vantage point of 2013. At the outset, the finding of standing in Massachusetts has not proved helpful to non-state plaintiffs in climate change litigation, leaving intact this considerable threshold hurdle for climate change plaintiffs. In addition, the *Massachusetts* holding was used by a 2011 Supreme Court decision to bar federal common law claims against entities based on their contribution to climate change. On the other hand, *Massachusetts* helped bring about a 2010 litigation settlement that committed EPA to restricting GHG emissions from certain *stationary* sources of emissions, which it has now set about doing.

Now six years old, the *Massachusetts* decision remains judicially unquestioned. Its holding that the CAA authorizes EPA to regulate GHG emissions remains the governing law, barring Supreme Court reversal or congressional amendment of the CAA. Quite recently, the Supreme Court agreed to hear its third climate change case, but limited argument to a narrow issue, making it very unlikely the Court will disturb *Massachusetts*.

Contents

Contacts

In 2007, the Supreme Court handed down *Massachusetts v. EPA*, its first pronouncement on climate change and arguably its most important environmental law decision in the past decade.[1] By a narrow 5-4 margin, the Court held that the Environmental Protection Agency (EPA) in 2003 had improperly denied a petition asking the agency to regulate greenhouse gas (GHG) emissions from new motor vehicles under the Clean Air Act (CAA). Contrary to EPA's position, the Court said that the CAA definition of "air pollutant" was broad enough to include GHGs. Accordingly, the Court reversed the lower court decision upholding the petition denial.

The Supreme Court decision did not *compel* EPA to regulate greenhouse gas (GHG) emissions from new motor vehicles, but it did limit the range of options available to the agency so that doing so was its most defensible course of action.

This report confines itself to the *Massachusetts v. EPA* litigation and leaves to other CRS reports the numerous EPA actions taken as a result of the Supreme Court decision.[2] The report traces the events leading up to the Court's decision, describes the decision itself, notes some general implications, and then comments on the decision's continuing force.

EPA's Denial of the Section 202 Petition

The saga of *Massachusetts v. EPA* began in 1999. In that year, 19 environmental and energy organizations petitioned EPA to regulate emissions of GHGs (CO_2, methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles.[3] The petition cited the agency's alleged mandatory duty to do so under CAA Section 202(a)(1),[4] which directs the EPA Administrator to prescribe "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 this petition.[5] Much of the agency's rationale followed a General Counsel memorandum issued the same day.[6] Contrary to its Clinton Administration precursor,[7] this new General Counsel memorandum concluded that the CAA does *not* grant EPA authority to regulate CO_2 and other GHG emissions based on their climate change impacts. Thus the agency had no choice but to reject the petition, though it also had policy reasons for doing so.

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[1] 549 U.S. 497 (2007). Recent years have seen an explosion of litigation involving climate change, *Massachusetts v. EPA* being just one (though the most important) example. See CRS Report R42613, *Climate Change and Existing Law: A Survey of Legal Issues Past, Present, and Future*, by (name redacted).

[2] *See, e.g.*, CRS Report R41103, *Federal Agency Actions Following the Supreme Court's Climate Change Decision in Massachusetts v. EPA: A Chronology*, by (name redacted).

[3] Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under Section 202 of the Clean Air Act, filed October 20, 1999.

[4] 42 U.S.C. § 7521(a)(1).

[5] EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (September 8, 2003).

[6] 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).

[7] 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).

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 seeking review of the denial. Petitioners were 12 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.

In 2005, a split panel of the D.C. Circuit rejected the suit—in effect upholding EPA's denial of the petition.[8] The two judges supporting rejection of the suit, 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 George W. 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.[9]

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. 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 CAA 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."[10]

The Court ruled 5-4 for petitioner states and environmental groups on all three issues in the case. It held first that at least one petitioner, the Commonwealth of Massachusetts, had standing to sue, so the Court could proceed to the merits. On the merits, it found that the CAA gives EPA authority to regulate GHG emissions from new motor vehicles (and, by implication, from other emission sources), and does not give EPA discretion to inject policy considerations into its

[8] 415 F.3d 50 (D.C. Cir. 2005).

[9] 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.

[10] 549 U.S. at 506.

decision whether to so regulate. Justice Kennedy provided the fifth vote by joining Justice Stevens's 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."[11] Nor did the dissenters dispute this.

Standing to Sue

Most of the Supreme Court's decision is devoted to whether plaintiffs had standing to sue, an issue that is recurring 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 the *Massachusetts* suit.[12] A litigant to whom Congress has accorded such a procedural right, said the Court, can assert that right without meeting the normal standards for standing.[13] 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.[14] States are "not normal litigants for the purposes of invoking federal jurisdiction," said the Court, noting their quasi-sovereign duty to preserve their territory.[15]

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.[16]

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.[17] 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.[18]

The third and final prong of the standing test is redressability, demanding that the remedy sought by the plaintiff is one likely to redress his injury. In this case, the remedy sought was EPA regulation of GHG emissions from new motor vehicles. The Court found that this remedy

[11] *Id.* at 504-505.

[12] CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

[13] 549 U.S. at 517-518.

[14] 549 U.S. at 518.

[15] *Id.*

[16] *Id.* at 522.

[17] *Id.* at 523.

[18] *Id.* at 524.

satisfied redressability because while it would not by itself reverse climate change, it would nonetheless slow or reduce it.[19] 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.[20]

The Clean Air Act Issues

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 question of EPA's authority to regulate GHG emissions, the Court looked to 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."[21] Such a broad definition, it said, simply could not be squared with EPA's position that GHGs are not included.[22] The Court rejected EPA's argument that federal laws enacted following enactment of this statutory definition—laws emphasizing interagency collaboration and research—suggest that Congress meant to curtail EPA's power to use mandatory regulations in addressing air pollutants.[23] Nor was the Court moved by 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).[24]

As to the other, discretion issue, the Court concluded that the phrase "in his judgment" in CAA Section 202 should be read narrowly.[25] That is, it allows the EPA Administrator, in deciding whether to set emission standards, to consider only whether an air pollutant, in the section's words, "may reasonably be anticipated to endanger public health or welfare."[26] The phrase does not give EPA discretion to factor in its policy preferences. Policy considerations, at least those that led EPA to reject the petition, "have nothing to do with whether greenhouse gas emissions contribute to climate change."[27] 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."[28] In sum, whether EPA decides to act or not, "[it] must ground its reasons for action or inaction in the statute."[29]

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[19] *Id.* at 525.

[20] *Id.* at 525.

[21] *Id.* at 528-529 (emphasis added by Court). The CAA definition of "air pollutant" is in Section 302(g) of the act, 42 U.S.C. § 7602(g).

[22] 549 U.S. at 528.

[23] *Id.* at 529-530.

[24] *Id.* at 531-532. The Energy Policy and Conservation Act provision on which EPA relied is at 49 U.S.C. § 32902.

[25] 549 U.S. at 532-534.

[26] *Id.* at 532-533.

[27] 549 U.S. at 533.

[28] *Id.*

[29] *Id.* at 535.

Based on its resolution of the authority and discretion issues, the Court reversed the D.C. Circuit opinion, and remanded the case to that court. Months later, the D.C. Circuit vacated EPA's denial of the rulemaking petition and remanded the matter to the agency.[30]

A four-justice dissent by Chief Justice Roberts vigorously disputed the majority's finding of standing.[31] A four-justice dissent by Justice Scalia disputed that "air pollutant" in Section 202 includes GHGs.[32]

Since the Supreme Court Decision

Since the high court ruling in *Massachusetts v. EPA*, EPA has begun building a broad regulatory edifice for controlling GHG emissions, beginning with a Section 202 "endangerment" finding in 2009.[33] Since this finding, the agency has regulated GHG emissions from new motor vehicles.[34] Under a different section of the CAA, the agency likely will be regulating soon GHG emissions from certain stationary sources. It is interesting to note that because the *Massachusetts* decision was 5-4, a different vote by a single Justice would have meant that the CAA would have been found *not* to give EPA authority over GHG emissions, and this entire regulatory edifice probably would not exist or be under consideration today. As indicated earlier, these post-*Massachusetts* agency actions are described elsewhere; here, only a few select points are made.

Standing. So far, the finding of standing in *Massachusetts* has not proved helpful to *non-state* plaintiffs seeking to establish standing in other climate change litigation. It was conjectured soon after the *Massachusetts* decision that the Court's finding of standing might be contingent on the existence of the *state* petitioner there, plus the CAA's explicit provision allowing the filing of administrative petitions. And indeed, climate change cases since *Massachusetts* involving non-state plaintiffs and non-CAA causes of action (such as common law nuisance) have rejected extending its lenient standard for standing.[35]

Regulation of GHG emissions under CAA sections other than 202. The *Massachusetts* ruling upholding CAA coverage of Section 202 GHG emissions contributed to a 2010 litigation settlement that committed EPA to establishing new source performance standards for GHG emissions from fossil-fuel-fired power plants, under CAA Section 111.[36] *Massachusetts* may have further reverberations in EPA's clean air program, given its discussion of CAA terms found not only in Sections 202 and 111. Examples include "air pollutant," "in his judgment," and "may reasonably be anticipated to endanger public health and welfare."[37]

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[30] 249 Fed. Appx. 829 (D.C. Cir. 2007).

[31] 549 U.S. at 535-549.

[32] *Id.* at 555-560.

[33] 74 Fed. Reg. 66496 (2009).

[34] *See, e.g.*, 75 Fed. Reg. 25323 (GHG emission standards for 2012-2016 model year light-duty vehicles); 76 Fed. Reg. 57106 (GHG emission standards for 2014 and later model year medium- and heavy-duty vehicles).

[35] *See, e.g.*, Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), *affirmed on other grounds*, 718 F.3d 460 (5th Cir. 2013).

[36] 42 U.S.C. § 7411. The settled case is *New York v. EPA*, No. 06-1322 (D.C. Cir. September 13, 2006) (severed from pre-existing case by order of the court).

[37] *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 (continued...)

Displacement of federal common law. The holding of *Massachusetts* was used by a 2011 Supreme Court decision to bar federal common law claims (such as nuisance) against entities on the basis of their contribution to climate change.[38] *Massachusetts* strengthened the argument that Congress in the CAA intended to leave no room for courts to develop overlapping federal common law restricting GHG emissions, since it made clear that a congressional enactment, the CAA, was available for that same purpose. Ironically, this result meant that the victory for the "environmental" side in *Massachusetts v. EPA* contributed to the defeat for that side in the federal common law case. Though the 2011 ruling of the Court involved plaintiffs seeking a damages remedy, the ruling has been held to displace federal common law actions seeking injunctive relief as well.[39] The availability of *state* common law claims for reducing GHG emissions remains an open question.

Massachusetts *remains good law.* Now six years old, the *Massachusetts* ruling remains in full effect. Its holding that the CAA authorizes EPA to regulate GHG emissions from new motor vehicles is the governing law, barring Supreme Court reversal or congressional amendment unlikely in the near term.

Recently, no less than nine petitions for certiorari were filed in the Supreme Court seeking review of a D.C. Circuit opinion upholding EPA GHG rules that trace back to *Massachusetts*.[40] In the Supreme Court, the case is styled *Utility Air Regulatory Group v. Environmental Protection Agency (UARG)*.[41] Though several of these petitions raised issues that would have allowed the Court to reconsider *Massachusetts*, the Court declined the invitation. The Court did indeed grant certiorari in *UARG*, but limited to a narrow question that left *Massachusetts* intact—at least as applied to coverage of GHG emissions from new motor vehicles under CAA Section 202 (directly at issue in *Massachusetts*) and to new source performance standards under CAA Section 111[42] (conceded by petitioners' counsel at the *UARG* oral argument). The *UARG* petitioners did argue to the Court, however, that *Massachusetts* notwithstanding, GHG emissions are not within the term "air pollutant" as that term is used in the "prevention of significant deterioration" portion of the CAA.[43] A decision in *UARG* is expected by June, 2014.

(...continued)

anticipated to endanger public health or welfare," and then issue air quality criteria and national ambient air quality standards for such pollutants).

[38] American Elec. Power, Inc. v. Connecticut, 131 S. Ct. 2527 (2011).

[39] *Comer*, 839 F. Supp. 2d 849.

[40] Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted*, 134 S. Ct. 418 (2013).

[41] Docket no. 12-1146.

[42] 42 U.S.C. § 7411.

[43] CAA Title I, Part C; 42 U.S.C. §§ 7470-7492.

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