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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 issued its decision in *Massachusetts v. EPA*, its first pronouncement on climate change and a singularly important environmental law decision. 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 a vote of 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 unambiguously 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 [the Administrator's] 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, starting with an "endangerment finding" issued in 2009.

Since 2007, the finding of standing in *Massachusetts* generally 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, in part, 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* has been applied by EPA to support regulations not only of motor vehicles but also of stationary sources of GHG emissions. In particular, *Massachusetts* helped bring about a 2010 litigation settlement that committed EPA to restricting GHG emissions from certain *stationary* sources of emissions under Section 111 of the CAA. EPA issued two rules based in part on this settlement: New Source Performance Standards (NSPSs) for GHG emissions from new, modified, or reconstructed fossil fuel fired power plants, and emission guidelines (known as the "Clean Power Plan") for GHG emissions from existing fossil fuel fired power plants. Both rules are being challenged in litigation, and the Clean Power Plan was stayed by the Supreme Court in February 2016, as discussed in other CRS reports.

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.

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In 2007, the Supreme Court issued its decision in *Massachusetts v. EPA*, its first pronouncement on climate change and still one of the most important environmental law decisions in the past decade.[1] By a vote of 5-4, 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 unambiguously broad enough to include GHGs.[2] 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.[3] 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 (carbon dioxide [CO_2], methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles.[4] The petition argued that EPA had a mandatory duty to do so under CAA Section 202(a)(1),[5] 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.[6] Much of the agency's rationale followed a General Counsel memorandum issued the same day.[7] Contrary to a precursor memorandum authored under the Clinton Administration,[8] this new General Counsel memorandum concluded that the CAA does *not* grant EPA authority to regulate CO_2 and other

[1] 549 U.S. 497 (2007).

[2] *Id.* at 528-32.

[3] *See, e.g.*, CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by (name redacted) et al. ; CRS Report R44480, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, by (name redacted) ; CRS Report R40506, *Cars, Trucks, and Climate: EPA Regulation of Greenhouse Gases from Mobile Sources*, by (name redacted) and (name redacted) .

[4] International Center for Technology Assessment et al., Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under Article 202 of the Clean Air Act (October 20, 1999), *available at* https://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2001-0002-0001; CAA Section 202, 42 U.S.C. §7421.

[5] 42 U.S.C. §7521(a)(1).

[6] EPA, "Control of Emissions from New Highway Vehicles and Engines; Notice of Denial of Petition for Rulemaking," 68 *Federal Register* 52922 (September 8, 2003).

[7] 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), *available at* https://yosemite.epa.gov/oa/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/BC82F18BAC5D89FF852574170066B7BD/$File/UARG%20Attchmnt%20G ... 43.pdf.

[8] 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).

GHG emissions based on their climate change impacts.[9] Thus, EPA concluded that it had no choice but to reject the petition, though it also described policy reasons for doing so.[10]

Massachusetts v. EPA in the D.C. Circuit

EPA's denial of the Section 202 petition prompted a lawsuit, *Massachusetts v. EPA*, in the D.C. Circuit seeking review of the denial. Petitioners were 12 states (California, Connecticut, Illinois, Massachusetts, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington); three cities (New York, Baltimore, and Washington, DC); two U.S. territories (American Samoa and Northern Mariana Islands); and several environmental groups.[11] Opposing the challenge, besides EPA, were 10 state intervenors (Alaska, Idaho, Kansas, Michigan, North Dakota, Nebraska, Ohio, South Dakota, Texas, and Utah), plus several automobile- and truck-related trade groups.[12]

In 2005, a split panel of the D.C. Circuit rejected the suit—in effect upholding EPA's denial of the petition.[13] 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.[14] As to this discretion issue, as noted above, 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.[15] Thus EPA, in his view, was entitled to rely 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 and inefficient approach to dealing with climate change.[16] Judge Sentelle, the other judge supporting rejection of the petition, held that petitioners lacked standing.[17]

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.[18] On the merits, he found that EPA has authority under Section 202(a)(1) to regulate GHG emissions.[19] 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.[20]

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[9] *See generally* Memorandum from Robert E. Fabricant, *supra* footnote 7.

[10] *Id.*; *see also* 68 *Federal Register* at 52922-33.

[11] *See* docket for Massachusetts v. EPA, No. 03-1361 (D.C. Cir.).

[12] *See id.*

[13] 415 F.3d 50 (D.C. Cir. 2005).

[14] *Id.* at 56-59.

[15] *Id.* at 57-58.

[16] *Id.* at 56-58.

[17] *Id.* at 59-61. 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.

[18] *Id.* at 64-67.

[19] *Id.* at 61-64, 67-73.

[20] *Id.* at 73-82.

Massachusetts v. EPA in the Supreme Court

The Supreme Court agreed to review the D.C. Circuit decision in *Massachusetts v. EPA*, although the D.C. Circuit majority had not ruled on the key issue of whether CAA Section 202(a)(1) authorizes regulation of GHG emissions. As the Supreme Court stated in its decision, "the unusual importance of the underlying issue persuaded us to grant the writ."[21]

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 does not give EPA discretion to inject policy considerations into its decision whether to so regulate. 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."[22] The dissenters did not dispute these statements.

Standing to Sue

Most of the Supreme Court's decision is devoted to whether plaintiffs had standing to sue, an issue that has recurred in climate change litigation.[23] 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.[24] 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.[25] 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.[26] States are "not normal litigants for the purposes of invoking federal jurisdiction," said the Court, noting their quasi-sovereign duty to preserve their territory.[27]

Although the Court described petitioners' favored position with regard to standing, it 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 focused 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.[28]

The second prong of the standing test is causation, requiring that the injury of which the plaintiff complains is fairly traceable to the defendant.[29] EPA did not dispute the existence of a causal relationship between GHG emissions and climate change. It did argue, however, that any

[21] 549 U.S. at 506.

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

[23] *See id.* at 516-26; *see also infra*, footnote 51 and accompanying text.

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

[25] 549 U.S. at 517-518.

[26] *Id.* at 518.

[27] *Id.*

[28] *Id.* at 522.

[29] *Id.* at 517, 523.

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.[30] In an important ruling that may be of benefit to environmental plaintiffs in other contexts, the Court held that even an agency's refusal to take a "small incremental step," here, one that would result in only a modest reduction in worldwide GHG emissions, is enough for standing purposes.[31]

The third and final prong of the standing test is redressability, demanding that the remedy sought by the plaintiff is one likely to redress that plaintiff's injury. In this case, the remedy sought was EPA regulation of GHG emissions from new motor vehicles.[32] 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.[33] 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.[34]

The Clean Air Act Issues

Compared to the large number of pages devoted by the majority opinion to standing, its discussion of the two CAA issues in the case is relatively 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."[35] Such a broad definition, it said, could not be squared with EPA's position that GHGs are not included.[36] 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.[37] 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).[38]

As to the issue of EPA's discretion, the Court concluded that the phrase "in [the Administrator's] judgment" in CAA Section 202 should be read narrowly.[39] 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."[40] 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

[30] *Id.* at 523.

[31] *Id.* at 524.

[32] *Id.* at 517, 525-26.

[33] *Id.* at 525.

[34] *Id.* at 525.

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

[36] 549 U.S. at 528.

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

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

[39] 549 U.S. at 532-534.

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

greenhouse gas emissions contribute to climate change."[41] 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."[42] In sum, whether EPA decides to act or not, "[it] must ground its reasons for action or inaction in the statute."[43]

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.[44]

A four-justice dissent by Chief Justice Roberts disputed the majority's finding of standing.[45] A four-justice dissent by Justice Scalia disputed that "air pollutant" in Section 202 includes GHGs.[46]

Since the Supreme Court Decision

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. Based on the Supreme Court ruling in *Massachusetts v. EPA*, EPA has engaged in efforts to control GHG emissions under a range of CAA programs, beginning with a Section 202 "endangerment" finding in 2009.[47] Since this finding, the agency has regulated GHG emissions from new motor vehicles.[48] Under other sections of the CAA, EPA has regulated GHG emissions from various stationary sources.[49] Most recently, the agency issued its Clean Power Plan rule to regulate GHG emissions from existing fossil fuel fired power plants, but this rule was stayed by the Supreme Court while the rule is challenged in litigation.[50] As indicated earlier, these post-*Massachusetts* agency actions are described in other CRS reports; here, only a few select points are made in relation to the continuing impact of the *Massachusetts v. EPA* decision.

[41] *Id.* at 533.

[42] *Id.*

[43] *Id.* at 535.

[44] 249 Fed. Appx. 829 (D.C. Cir. 2007).

[45] 549 U.S. at 535-549.

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

[47] 74 *Federal Register* 66496 (2009).

[48] *See, e.g.*, 75 *Federal Register* 25323 (GHG emission standards for 2012-2016 model year light-duty vehicles); 76 *Federal Register* 57106 (GHG emission standards for 2014 and later model year medium- and heavy-duty vehicles). *See generally* CRS Report R40506, *Cars, Trucks, and Climate: EPA Regulation of Greenhouse Gases from Mobile Sources*, by (name redacted) and (name redacted) .

[49] *See, e.g.*, Util. Air Regulatory Group [UARG] v. EPA, --- U.S. ---, 134 S. Ct. 2427 (2014). (affirming, in part, EPA's ability to regulate majority of U.S. stationary-source GHG emissions under Prevention of Significant Deterioration and Title V permitting authorities of CAA).

[50] *See generally* CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by (name redacted) et al. ; CRS Report R44480, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, by (name redacted) .

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.

Standing

So far, the finding of standing in *Massachusetts* generally has not proved helpful to *non-state* plaintiffs seeking to establish standing in other climate change litigation.[51] Climate change cases since *Massachusetts* involving non-state plaintiffs and non-CAA causes of action (such as common law nuisance) have largely rejected extending its lenient standard for standing.[52]

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.[53] *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.[54] Perhaps 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.[55] The availability of *state* common law claims for reducing GHG emissions remains an open question.

Regulation of GHG Emissions from Stationary Sources Through Permits

With GHGs being regulated under CAA Section 202, EPA proceeded with regulating GHGs under other CAA authorities for stationary sources. In particular, the agency interpreted the mobile source GHG regulations as triggering regulations under the Prevention of Significant Deterioration (PSD) program[56] and Title V permitting program.[57]

In 2014, in *Utility Air Regulatory Group v. EPA* (*UARG*), the Supreme Court held that EPA cannot regulate a power plant under these authorities *solely* due to its GHG emissions,[58] but affirmed the agency's authority under the CAA to regulate GHG emissions from power plants if

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[51] *See, e.g.*, Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in* Washington Environmental Council v. Bellon, 63 AM. U.L. REV. 1525 (2014) (analyzing standing in *Massachusetts*, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), and other cases).

[52] *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); *but see but see* Juliana v. United States, No. 6:15-cv-1517 (D. Or. April 8, 2016), *available at* http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf (magistrate judge findings and recommendations to find standing and deny motion to dismiss lawsuit brought by group of youths alleging violations of substantive due process, equal protection, and other constitutional principles by government actions and omissions increasing greenhouse gas emissions).

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

[54] *Id.* at 424-25.

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

[56] CAA Sections 160-169, 42 U.S.C. §§7470-7479.

[57] *See* CAA Sections 501-07, 302(j), 42 U.S.C. §§7661-7661f, 7602(j).

[58] Util. Air Regulatory Group [UARG] v. EPA, --- U.S. ---, 134 S. Ct. 2427, 2439-46 (2014).

the source is *already regulated* for other air pollutants.[59] In sum, *UARG* held that EPA "may not treat greenhouse gases as a pollutant for purposes of defining a 'major emitting facility' … in the PSD context or a 'major source' in the Title V context.… EPA may, however, continue to treat greenhouse gases as a "pollutant subject to regulation under this chapter" for purposes of requiring BACT for 'anyway' sources."[60] The Court in *UARG* interpreted the *Massachusetts* decision, saying that it "did not hold that EPA must always regulate greenhouse gases as an "air pollutant" everywhere that term appears in the statute.... *Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme."[61]

Regulation of GHG Emissions Under CAA Section 111

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 (NSPSs) for GHG emissions from new fossil fuel fired power plants, and emission guidelines for existing fossil fuel fired power plants, under CAA Section 111.[62] EPA published Section 111 NSPSs and emission guidelines for GHGs from power plants in October 2015.[63] Both rules have been challenged in the D.C. Circuit; the emission guidelines rule, known as the Clean Power Plan, is, as noted above, stayed during the litigation.[64]

While some *amici curiae* supporting the challenges to the Clean Power Plan in that litigation object to the "endangerment findings" that EPA has issued since *Massachusetts*,[65] the petitioners and intervenors challenging the Clean Power Plan do not dispute or, for the most part, reference the decision.[66] EPA, in defense of the Clean Power Plan, cites *Massachusetts* repeatedly in its brief,[67] as do several of the intervenors and *amici curiae* supporting EPA.[68]

Massachusetts may continue to have further reverberations not only in the Clean Power Plan litigation but also in other elements of EPA's clean air program, given its discussion of CAA

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[59] *Id.* at 2447-49.

[60] *Id.* at 2449.

[61] *Id.* at 2441.

[62] 42 U.S.C. §7411. The settled case is *New York v. EPA*, No. 06-1322 (D.C. Cir. September 13, 2006) (severed from preexisting case by order of the court). *See* Settlement Agreement Between State of New York, et al., and U.S. EPA, December 23, 2010, *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/boilerghgsettlement.pdf; CRS Report R41103, *Federal Agency Actions Following the Supreme Court's Climate Change Decision in Massachusetts v. EPA: A Chronology*, by (name redacted), p. 7. Please contact (name redacted) with any questions regarding this report.

[63] EPA, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," Final Rule, 80 *Federal Register* 64661 (October 23, 2015); EPA, "Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," Final Rule, 80 *Federal Register* 64510 (October 23, 2015).

[64] For more information on the litigation and the stay, *see* CRS Report R44480, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, by (name redacted) .

[65] *See generally* Brief for *Amicus Curiae* Scientists in Support of Petitioners, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed April 23, 2016).

[66] *Cf.* Reply Brief of Petitioners on Core Legal Issues at 8, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed April 15, 2016) (citing *Massachusetts* in parenthetical).

[67] *See* Respondent EPA's Initial Brief at 8, 51-53, 100, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed March 28, 2016).

[68] *See, e.g.*, Brief of Amici Curiae of Current and Former Members of Congress in Support of Respondents at 7, 13-14 (D.C. Cir. filed March 31, 2016).

terms found not only in the CAA sections that EPA has used so far to regulate GHGs. Examples include "air pollutant," "in his judgment," and "may reasonably be anticipated to endanger public health and welfare."[69]

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Acknowledgments

An earlier version of this report was originally written by (name redacted), Legislative Attorney, who has retired from CRS. (name redacted), Legislative Attorney, is now handling legal inquiries relating to this subject.

[69] *See, e.g.*, CAA Section 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 such pollutants).