

## SUPREME COURT ALERT

### SUPREME COURT PROVIDES IMPORTANT PREDICATE FOR CHANGE IN U.S. CLIMATE CHANGE POLICY



On April 2 the Supreme Court ordered EPA to review its decision to not regulate greenhouse gas emissions from new motor vehicles (*Massachusetts v. EPA*, No. 05-1120). The decision puts automakers and others on notice that the regulatory environment may be ripe for a change and settles, at least temporarily, an issue almost a decade in the making.

In October 1999, 19 environmental organizations filed a petition for rulemaking with U.S. EPA seeking to induce EPA to regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Clean Air Act (CAA). Relying on two EPA general counsel opinions from the Clinton administration and a number of reports of international scientific bodies, the petitioners contended that greenhouse gas emissions caused climate change, that the CAA authorized EPA to regulate greenhouse gas emissions, and that the resulting climate changes would have adverse effects on human health and the environment.

In September 2003 EPA denied the petition. First, rejecting the prior general counsels' opinions, EPA concluded that the CAA did not authorize it to regulate greenhouse gas emissions. Second, even if such authority did exist under the CAA, EPA announced that it was exercising its discretion not to regulate on the grounds that such regulation would be unwise. Citing a long line of congressional enactments related to climate change issues, EPA reasoned that no such general authority to regulate existed under the CAA. As the Supreme Court characterized EPA's position, "climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it." Slip op. at 9.

In its denial of the rulemaking petition, EPA characterized any regulation of motor-vehicle emissions as a piecemeal approach to climate change that would conflict with the Bush administration's comprehensive approach to the problem. EPA further explained that this approach involves additional support for technological innovation, the creation of nonregulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change — not actual regulation. According to EPA, unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the president's ability to persuade key developing countries to reduce greenhouse gas emissions. The private petitioners, joined now by several states and others, petitioned for review of EPA's decision.

In a splintered decision, the U.S. Court of Appeals for the D.C. Circuit abjured a definitive ruling on the petitioners' standing and upheld both EPA's conclusion that the CAA did not authorize regulation of greenhouse gas emissions and its decision not to exercise such authority. Noting that the case did not present a circuit split and that there were serious questions of standing, the Supreme Court granted certiorari because of the importance of the climate change issues.

In a lengthy opinion that provoked a vigorous dissent from Chief Justice Roberts (joined by Justices Scalia, Thomas and Alito), and relying heavily on declarations filed on behalf of the commonwealth of Massachusetts, the Supreme Court held that petitioners had standing to sue. Turning to the merits, the Court noted that "[t]he scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." Slip op. at 24.

After summarizing EPA's position on the merits, the Court concluded that it had "little trouble concluding" that EPA acted arbitrarily and capriciously in denying the petition for rulemaking. The Court explained:

The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of air pollutant includes "any air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . ." §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any". Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." The statute is unambiguous.

Slip op. at 26. The Court thus concluded that the CAA provides EPA the authority to regulate greenhouse gas emissions.

Having concluded that EPA is authorized to regulate greenhouse gas emissions, the Court turned to the issue of whether EPA could choose not to regulate greenhouse gas emissions. Again, with apparently little trouble, the majority ruled that EPA could not so conclude on the basis set forth in its decision. The Court ruled:

If EPA makes a finding of endangerment, the Clean Air Act **requires** the agency to regulate emissions of the deleterious pollutant from new motor vehicles. . . . EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or inaction **must** conform to the authorizing statute. 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. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

*Id.* at 30 (citations omitted; emphasis added). EPA's attempted reliance on "scientific uncertainty" afforded it no further comfort. The Court held that if EPA believed that the scientific uncertainty precluded EPA from making a reasoned judgment, or otherwise concluded that there was no endangerment, it had to explain those reasons or "ground its reasons for action or inaction in the statute." *Id.* at 31-32.

The Court thus eviscerated many of the Bush administration's rationales for declining to take action to regulate greenhouse gas emissions. The Court laid the statutory foundation for EPA to take action, now or under a new administration, to regulate greenhouse gas emissions under the CAA. Moreover, the Court's decision will likely add considerable momentum to congressional consideration of proposed legislation to accelerate the United States' joining the international community in taking affirmative action to address climate change. The CAA, as it exists today, is ill-suited for that task. The CAA does not adequately account for the global nature of the issues, the impact of emissions from countries such as China or India, implementation issues such as the validity and valuation of emissions credits, or the sundry other issues Congress will consider in the weeks and months ahead.

## CONTACT INFORMATION

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