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**Before the United States Senate
Committee on Environment and Public Works**

**The Implications of the Supreme Court's Decision Regarding EPA's
Authorities With Respect to Greenhouse Gas Emissions
Under The Clean Air Act**

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Madam Chairman, Members of the Committee, I am pleased to be here today to testify on the issue of EPA's authority to regulate greenhouse gas emissions under the Clean Air Act in the wake of the Supreme Court's decision in *Massachusetts v. EPA*, No. 05-1120, 549 U.S. ____ (2007). Before I begin, however, I would like to make clear that my testimony today reflects my personal views and analysis of the law based upon my experience as General Counsel of the U.S. Environmental Protection Agency (from 2004 until August 2006), as Chief Counsel of this Committee (from 1997 until 2000), and most recently as a lawyer in private practice.

Overview

On April 2, 2007, the United States Supreme Court issued its landmark vacating the Environmental Protection Agency's (EPA's) denial of a petition to regulate greenhouse gas emissions from new motor vehicles. The Court's majority found that greenhouse gas emissions are "air pollutants" under the Clean Air Act and, therefore, potentially subject to regulation if, *in the judgment of the Administrator*, they "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." The Court did not reach the issue of whether greenhouse gases from new motor vehicles, in fact, endanger public health or welfare, but it potentially significantly constrained EPA's discretion with respect to that determination.

Undoubtedly, the decision has changed the regulatory landscape. The determination that greenhouse gases are air pollutants will likely lead EPA to regulate greenhouse gas emissions, and carbon dioxide (CO₂) in particular, from new motor vehicles. It also likely will lead to regulation of stationary sources of greenhouse gases since the Clean Air Act's stationary source provisions are also triggered by an "endangerment" finding. In this respect, the decision is a significant one – an endangerment finding under one program will make it very difficult for EPA not to regulate under other programs.

The decision will not, however, have any meaningful impact in terms of addressing global climate change. Forcing the square peg of greenhouse gas emissions through the round holes of EPA’s existing regulatory tools – tailpipe standards, national ambient air quality standards, new source performance standards, *etc.* – may have the effect of reducing U.S. emissions over time, but it will do nothing to reduce atmospheric concentrations of greenhouse gases, which is the true measure of effectiveness of regulation for climate change purposes. Unless our trading partners, China and India in particular, are also part of the effort to reduce global emissions of greenhouse gases, piece-meal regulation in the United States will not only achieve little; it may, in fact, have the unintended effect of leading to increased emissions by encouraging the relocation of U.S. businesses to countries not subject to greenhouse gas regulation.

The *Massachusetts v. EPA* decision

The *Massachusetts* case involved a challenge to EPA’s denial of a petition to regulate greenhouse gas emissions from new motor vehicles under section 202 of the Clean Air Act. EPA denied the petition on the grounds that it lacked the authority under the Act to regulate emissions for climate change purposes and, in the alternative, that even if it had the authority to set greenhouse gas standards, it would not be “effective or appropriate” to do so at this time. On appeal to the Supreme Court, petitioners raised two central questions: (1) whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles under section 202 of the Clean Air Act; and (2) if the Agency does have the authority, whether its stated reasons for declining to regulate greenhouse gas emissions from new motor vehicles was consistent with the statute.¹

¹ A substantial portion of the Majority’s opinion focuses on the issue of standing and, in particular, whether the petitioners in this case have satisfied the elements of Article III standing under the Constitution. After setting forth a novel theory of standing premised upon “a special solicitude” for the State of Massachusetts based upon its “stake in protecting its quasi-sovereign interests,” the Stevens Majority concludes essentially that loss of Massachusetts coastline constitutes sufficient injury in fact that might be traced, in some small part, to climate change and redressed, again in some small part, by future regulation of emissions from new motor vehicles. Chief Justice Roberts, in a dissenting opinion joined by Justices Scalia, Thomas and Alito, would have rejected the challenge to EPA’s action as nonjusticiable. The dissent notes that there is no basis in law for the Majority’s “special solicitude” for the State of Massachusetts in its standing analysis. Furthermore, as the dissent sets forth in some detail, the State’s injury is neither particularized, nor imminent; the injury cannot reasonably be traced to the lack of regulation of greenhouse gas emissions from new motor vehicles, particularly given

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Writing for the Majority in a 5-4 decision, Justice Stevens answered the first question in the affirmative, concluding that the Clean Air Act's language is unambiguous and that carbon dioxide is an "air pollutant" within the meaning of the Act and, therefore, potentially subject to regulation. Justice Stevens went on to reject the basis upon which EPA had decided not to regulate greenhouse gas emissions at this time. Justice Scalia filed a dissenting opinion on the merits on behalf of himself, Chief Justice Roberts, and Justices Alito and Thomas. The dissenting opinion reached the opposite conclusion with respect to both questions.

The term "air pollutant" is defined in the statute as "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." Focusing solely on the language following the word "including," Justice Stevens adopts the view that carbon dioxide is a chemical or physical substance emitted into the air and must therefore be an air pollutant.² His opinion does not address whether carbon dioxide meets the first element of the definition, namely whether it is first an "air pollution agent." As EPA argued in its brief, and as Justice Scalia noted in his dissenting opinion, the fact that the statutory definition uses the words "any" and "including" does not end the analysis. As he points out, "in order to be an 'air pollutant' under the Act's definition, the 'substance or matter [being] emitted into the . . . ambient air' must also meet the first half of the definition – namely it must be an "air pollution agent or combination of such agents." The phrase following the term "including" can be illustrative of the kind of substances that might also be air pollution agents, but does not necessarily substitute for the first element of the definition. EPA provided the following example, quoted by Justice Scalia, in support of this point: "The phrase 'any American automobile, including any truck or minivan,' would not naturally be construed to encompass a foreign-manufactured [truck or] minivan." Scalia Dissent at 9.

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the numerous and complex factors that affect all predictions with respect to climate change; and, finally, the injury cannot be meaningfully addressed by the action sought – regulation of new motor vehicles – because emissions from new motor vehicles account for only a minute percentage of the global atmospheric concentration of carbon dioxide. For these reasons, the State of Massachusetts and the other petitioners cannot meet the three requirements of Article III standing.

² As Justice Scalia noted in footnote 2 of his dissenting opinion, this interpretation of the language of the definition of "air pollutant" would make little sense as it would then follow that "*everything* airborne, from Frisbees to flatulence, qualifies as an air pollutant." Scalia dissent at 10.

Having concluded that greenhouse gas emissions are “air pollutants” within the meaning of the statute, Justice Stevens has “little trouble concluding” that EPA is “authorize[ed] to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a “judgment” that such emissions contribute to climate change.” Slip op. at 25. Section 202(a)(1) of the Act provides that EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” To date, EPA has never made an endangerment finding with respect to carbon dioxide.

Finally, the Court rejected EPA’s alternative basis for its decision not regulate greenhouse gas emissions from new motor vehicles at this time. EPA had argued that even if the Clean Air Act did authorize the Agency to regulate greenhouse gas emissions from new motor vehicles, that it appropriately exercised its discretion not to make an endangerment finding and regulate those emissions at this time. The Agency based its decision on, among other things, the continuing scientific uncertainties that were summarized in a 2001 National Academy of Sciences Report, as well as legitimate policy considerations, including the President’s comprehensive approach to addressing climate change through investment in technology and voluntary actions. As EPA noted, “establishing [greenhouse gas] emissions standard for U.S. motor vehicles at this time would . . . result in an inefficient, piecemeal approach to addressing the climate change issue. . . . A sensible regulatory scheme would require that all significant sources and sinks of [greenhouse gas] emissions be considered in deciding how best to achieve any needed emissions reductions.” 68 Fed. Reg. 52,929-931.

The Court, however, concluded that EPA’s exercise of its “judgment” in this case was based upon “reasoning divorced from the statutory text” and therefore invalid. Slip op. at 30. Even though the statute is silent with respect to how the Agency shall exercise its “judgment” in the context of an endangerment finding, and even though the term “endanger” is not defined in the statute, the Court substantially constrained the Agency’s ability to exercise its judgment, at least with respect to a determination under section 202 of the Act. In effect, the Court held that “EPA can avoid taking further action only if it determines that greenhouse gas emissions 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.” Slip op. at 30. With respect to the latter, the Court suggests that the only basis for not exercising its discretion would be if “the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.” Slip op. at 31.

Significantly, the Court did not reach the question of whether EPA must actually make an endangerment finding, only that its explanation for making, or not

making, such a finding must be based upon permissible statutory grounds – *i.e.*, the relationship between greenhouse gas emissions from new motor vehicles and public health or welfare.

Implications of the *Massachusetts* Decision

In the wake of the Supreme Court’s decision, there has been both a call for EPA to take immediate action to begin regulating carbon dioxide emissions from motor vehicles and, perhaps more interestingly, intensified lobbying for Congressional action on climate change legislation. The former is hardly surprising. The Supreme Court held that carbon dioxide is an air pollutant, thereby setting the stage for EPA to initiate the regulatory process, or at least the process for deciding whether or not to make an endangerment finding. The latter, however, suggests that even advocates of regulation recognize that the victory of the decision may be a hollow one. If the goal is truly to reduce the atmospheric concentration of carbon dioxide and other greenhouse gases that scientists indicate are causing or contributing to global warming, and all of its attending effects, regulation under the Clean Air Act is not the answer. As discussed in greater detail below, the tools of the Clean Air Act are simply not well suited to address a global pollutant like carbon dioxide.

First, it is important to understand exactly what the Court’s decision does, and does not, require.

- As noted above, the Court did not reach the issue of whether EPA must make an endangerment finding. On remand, however, if the Agency opts *not* to make an endangerment finding, it must articulate why there is such profound scientific uncertainty that it cannot make that finding.
- *If* the Agency does make an endangerment finding, it must then propose regulations to address greenhouse gas emissions from new motor vehicles. That is really the only true regulatory mandate of the Supreme Court’s decision.
- Significantly, the Agency retains substantial discretion with respect to the content of any regulation. The Majority opinion states that “EPA has no doubt significant latitude as to the manner, timing, content and coordination of its regulations with those of other agencies.” Slip op. at 30.
- The Supreme Court’s decision does not address stationary sources and therefore does not require that EPA undertake any action with respect to the regulation of stationary sources.

EPA's Existing Statutory Authority to Regulate Air Pollutants

As noted above, the Court's decision could have far-reaching implications beyond simply the regulation of mobile sources under section 202 of the Clean Air Act. First, the Court's holding that greenhouse gases are "air pollutants" means that EPA has broad authority to regulate greenhouse gases under all the significant Clean Air Act programs, including the National Ambient Air Quality Standards (NAAQS), New Source Review (NSR), New Source Performance Standards (NSPS), Prevention of Significant Deterioration (PSD), stratospheric ozone (Title VI), and mobile sources and fuels (Title II) programs. Second, the Court's constrained approach to the endangerment finding may limit, although not preclude, EPA's ability to decide not to regulate greenhouse gas emissions under those programs since they, like section 202, are triggered when the Administrator determines that an "air pollutant" causes or contributes to air pollution that "may reasonably be anticipated to endanger public health or welfare." Having the authority to regulate under existing law, however, does not mean that regulation will be effective.

National Ambient Air Quality Standards

Section 108 of the Clean Air Act requires the Administrator to publish and, "from time to time thereafter revise," a list of air pollutants: (1) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; and (2) that are emitted from numerous or diverse mobile or stationary sources.³ Once a pollutant is listed, EPA is required to establish primary and secondary air quality standards for that pollutant.

States deemed to be in attainment must develop State Implementation Plans ("SIPs") demonstrating how they will maintain compliance; nonattainment states must develop SIPs demonstrating how they will come into attainment with the standards "as soon as practicable" but no later than five years after designation.⁴ States that fail to submit SIPs or to come into attainment within the statutory deadlines attain face potential sanctions, including the potential loss of highway funding, and a federal takeover of their CAA programs.

³ The six listed criteria pollutants are: ozone, nitrogen dioxide, particulate matter, sulfur dioxide, carbon monoxide and lead.

⁴ The statute provides that States must come into attainment within five years, but it authorizes EPA to grant one five-year extension. Additionally, states can seek two additional one-year extensions. Thus, under the CAA, can get up to twelve years to attain the (non-ozone) NAAQS.

Although the argument could be made that CO₂ meets the statutory threshold for designation and regulation as a criteria pollutant, it is evident that this would make little sense from a regulatory perspective. If the standard were set at a level intended to force reductions in emissions, *i.e.*, at some atmospheric concentration below current levels (approximately 370-380 parts per million CO₂, then the entire country would be designated as being in nonattainment.⁵ This would trigger the regulatory mechanisms of the NAAQS program – SIPs, NSR, reasonably available control technologies (RACT) to reduce emissions—but the reality is that none of the measures will have any effect in terms of bringing any individual State or county into attainment. Unless international emissions are also reduced, global CO₂ concentration will continue to increase and the entire United States would remain in nonattainment status. Even with international reductions, which are not currently occurring, the statutory deadline for compliance – a maximum of 12 years – is patently unrealistic and unachievable. This should be of concern to States that face potentially significant penalties for persistent nonattainment. For these reasons, it should be clear that the NAAQS program is ill suited to address a global pollutant like CO₂.

New Source Performance Standards

Section 111(b)(1)(a) of the Clean Air Act requires the Administrator to adopt new source performance standards for categories of emission sources that “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” EPA is also required to review, and, if appropriate, revise, the NSPS every eight years to ensure that the standards continue to protect public health and the environment. CAA § 111(b). These standards are developed on a specific unit-by-unit basis, and apply to both attainment and nonattainment areas. Emission standards under the NSPS program must reflect “the degree of emission limitation achievable through the application of the best system of emission reduction” that has been “adequately demonstrated,” while considering the “costs of achieving such reductions and any non-air quality health and environmental impact and energy requirements.” CAA § 111(a)(2).

⁵ Alternatively, if the standard were set above current levels of CO₂, the entire country would, at least for the short term, be classified as an attainment area and no regulatory mechanisms to reduce emissions would be triggered. This result, would be short-lived, however, as emissions from China and India continue to increase dramatically. Thus, regardless of what individual States or counties do with respect to their CO₂ emissions, global atmospheric concentrations will continue to increase.

In the wake of the Supreme Court decision, EPA could issue sector-specific emissions standards for CO₂, assuming that it makes the necessary endangerment finding. These standards, however, by definition would not be economy-wide and furthermore would generally apply only to new sources. It is true that the Agency could, through multiple rulemakings, ultimately seek to regulate a number of industry sectors, but the process would certainly be a lengthy one extending over a period of many years. The standards themselves must be based upon the best demonstrated technology, which EPA has interpreted to mean technology that is in existence *and* widely commercially available. This could further limit the value of NSPS in terms of achieving significant and immediate reductions in emissions.

Cap and Trade Programs

Most proponents of regulation or legislation to address greenhouse gas emissions argue that the most effective means of achieving reductions is through a market-based cap and trading program. In a more limited context, EPA has successfully implemented a trading program to reduce sulfur dioxide (SO₂) from utilities under the Acid Rain program specifically authorized by Title IV of the Clean Air Act. It subsequently developed a cap and trade program for nitrogen oxides (NO_x) under the NO_x SIP call using its authority under section 110 of the Act. More recently, the Agency promulgated the Clean Air Interstate Rule (CAIR) pursuant to its authority under section 110, to further reduce NO_x and SO₂ from power plants. These programs have generally been upheld by the courts or not challenged.

Whether or not EPA has the authority to develop a cap and trade program for greenhouse gases, however, may still be at issue. Experience with the NO_x SIP call and CAIR suggest that a trading program under section 110 of the Act would likely survive judicial challenge. That would first require the listing and regulation of CO₂ as a criteria pollutant, which as discussed above, makes little sense. Alternatively, EPA could use its authority under the NSPS provisions of section 111 of the Act to create a cap and trade program, as it did recently for mercury in the Clean Air Mercury Rule. However, the mercury rule, and specifically EPA's assertion of authority under section 111 to create a cap and trade program rather than unit-specific standards, is being challenged in the D.C. Circuit. Until that fundamental legal question is resolved, EPA's ability to craft an effective cap and trade program under existing law remains unclear.

Conclusion

While the *Massachusetts v. EPA* decision put to rest the question of whether greenhouse gases are "air pollutants" under the Clean Air Act, this in and of itself, will do little to address climate change in a meaningful way. The Clean Air Act's existing regulatory tools were simply not designed to address global pollution.

Climate change is an international problem; it demands an international solution.
It is a national policy issue; it demands a national policy solution.