

NATIONAL AFFAIRS

USA

US Supreme Court Ruling Opens the Door to Climate Change Measures

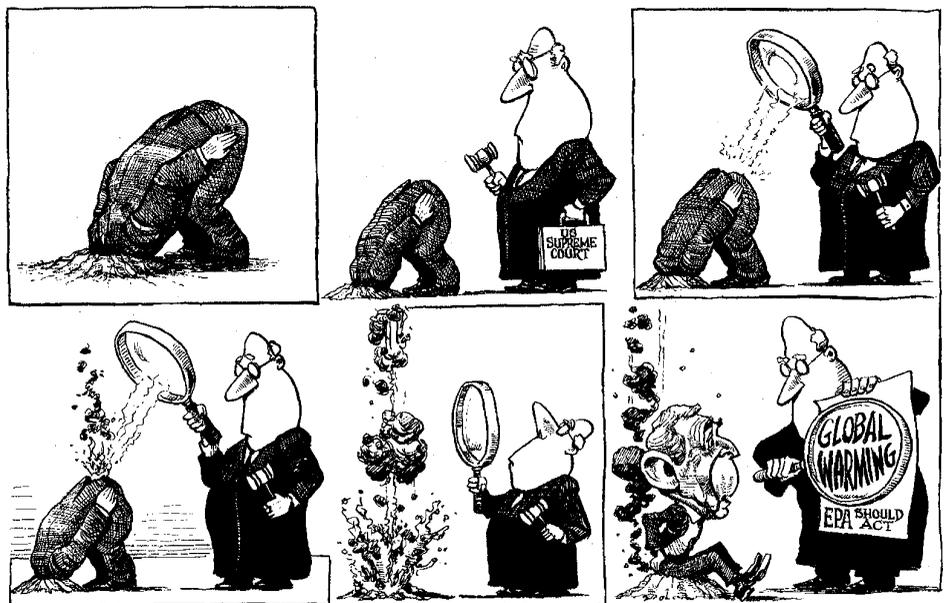
In a split decision, following eight years of litigation, the US Supreme Court has declared that greenhouse gases can be considered “air pollutants” under Federal air quality control laws. This ruling forces the US EPA to formally evaluate whether there is a need to control emissions of carbon and other greenhouse gases, to prevent climate change.

The ruling in the case of *Massachusetts et al. v. Environmental Protection Agency*¹ arose out of the EPA’s 1999 decision not to evaluate greenhouse gas emissions from motor vehicles to determine whether there was a need to regulate them. As do most developed countries, the US regulates motor vehicle emissions in a number of ways, including by requiring catalytic converters on each vehicle to control certain emissions, and by the phase out of leaded gasoline. In deciding not to consider adding the four greenhouse gases² to the list of motor vehicle emissions that are controlled under the Clean Air Act (CAA), the EPA argued that these cannot be “pollutants” as defined in that Act – that is, that they are not toxic or directly harmful to human beings, animals or plants, and are already present in the air naturally. Plaintiffs, including the State of Massachusetts and 11 other states as well as 13 environmental organisations, challenged this decision, claiming that the EPA owed a duty under the CAA to determine whether these emissions “contribute to climate change”.

Beginning from the statement that “[t]he harms associated with climate change are serious and well recognised”, the Court noted that the EPA itself had noted the strong scientific consensus about the risks of global warming³ and that nothing in its documents or evidentiary presentation had disputed the causal connection between man-made greenhouse gas emissions and global warming. It further specifically reaffirmed an important principle of

environmental law – that the fact that the potential risks are “widely shared” does not prevent one individual, organisation or group from bringing action on behalf of all the others affected.⁴

The Court also discounted the EPA’s claims that any efforts it might make in lowering vehicle emissions would be insignificant, in light of the enormous amount of greenhouse gases being emitted by other sources. “Because of the enormous potential consequences, the fact that a remedy’s effectiveness might be delayed during the (relatively



Courtesy: The Economist

short) time it takes for a new motor vehicle fleet to replace an older one is essentially irrelevant”. In particular, it rejected the EPA’s arguments that “predicted increases in emissions from China, India and other developing nations will likely offset any marginal domestic decrease” in US emissions as a result of an EPA measure controlling these motor vehicles. Even if the USA, and the EPA “may not by itself reverse global warming, the EPA [would have] a duty to take steps to slow or reduce it”, if it finds that emissions contribute to climate change, and that measures to control it are possible and necessary.⁵

The EPA put forward three other points in support of its position, all of which were unsuccessful. First, it noted

that “energy efficiency and the setting of mileage standards” (the primary mechanisms currently under discussion for the control of greenhouse gas emissions) are within the mandate of the US Department of Transportation (DOT) and therefore should not be addressed by EPA. Second, it claimed that other federal programmes (“voluntary executive branch programs”) already exist, so that the addition of EPA regulation would “reflect an inefficient, piecemeal approach to address the climate change issue.” The court’s decision dispatched both of these arguments very quickly, simply noting that neither one of these constituted “a reasoned justification for declining to form a scientific judgement”. They did not, in short, alter the EPA’s statutory obligation to protect public health and welfare, by specifically considering whether greenhouse gas emissions from motor vehicles contribute to climate change. Essentially, the decision did not prevent the EPA from coordinating with the DOT and Office of the President in the event that it determined that greenhouse gases must be regulated, but requires that initial determination as a first step toward making certain that the USA’s climate-change measures meet scientific and protective requirements under the CAA.

A third, and most telling, argument put forward by the Agency was that it should not address the issue because to do so might “impair the president’s ability to negotiate with ‘key developing nations’ to reduce emissions.” In essence, this argument suggests that the USA’s failure to develop greenhouse-gas control measures is part of a negotiating strategy, by which the USA seeks to use promises to lower emissions as a currency to obtain other trade offs in negotiation with countries that are presumably already controlling greenhouse emissions. Noting that this argument “rests on reasoning divorced from the statutory text”, the Court said that such objectives could not excuse the EPA from taking their legally mandated actions of determining whether greenhouse gases pose a threat to public health and welfare.

The decision ends with a tacit adoption of the precautionary principle in the context of greenhouse-gas emission. The court noted that “If scientific uncertainty was so profound that it precluded EPA from making a reasoned

judgement as to whether greenhouse gases contribute to global warming, then the Agency should say so.” A process involved in this case – an “endangerment finding” – is well established, and the EPA would have to, at minimum, undertake a detailed determination of the sufficiency of scientific evidence, in a public process, in order to conclude whether the potential risk is, or is not, too uncertain for regulation.

Four of the nine justices dissented from this decision, however. The primary dissent (written by the Chief Justice) opposed the majority’s decision solely on procedural grounds. A second dissenting opinion also considered the regulatory questions of the Clean Air Act, and the uncertainty regarding the “causal link” (whether greenhouse gases are the cause of observed climate changes), the atmospheric mechanism (“how the climate system varies naturally and reacts to the emissions of greenhouse gases and aerosols”) and statistical estimates (regarding the magnitude of future warming).

Although it stops far short of mandating that EPA adopt climate-change-oriented measures for control of motor vehicle emissions, this case is an important landmark in US environmental law. In particular, it has strongly warned the current administration that political gamesmanship at the international level cannot be used as a justification for avoiding or delaying critical environmental decisions and their implementation. (TRY)

Notes

1 United States: 127 S.Ct.1348 (April 2, 2007), viewable online at <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>.

2 Carbon dioxide, methane, nitrous oxide and hydrofluorocarbons.

3 68 Fed.Reg. 52930, in which the EPA cites approvingly a 2001 report by the National Research Council, entitled “Climate Change: An Analysis of Some Key Questions” which recognises and adopts this consensus.

4 Citing United States: *Federal Election Comm’n v. Akins*, 524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), but espousing a position adopted in the earliest modern environmental cases in federal courts of the USA.

5 Citing United States: *Larson v. Valente*, 456 U.S. 228, 243, n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33. The court also noted that “Agencies, like legislatures, do not generally resolve massive problems in one fell swoop, see *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563, but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed, cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203, 67 S.Ct. 1575, 91 L.Ed. 1995.”



US Congress Considers New Bills on Climate Change

With new Democrat majorities in both the House of Representatives and the Senate, the 110th Session of the US Congress has seen a wave of environmental and social legislative proposals, including 12 bills directly seeking to address climate change. These measures respond directly to the most recent draft documents of the various working groups of the Intergovernmental Panel on Climate Change, which have been the basis for recent claims that the administration’s current climate policy “will re-

sult in emissions growing 11 percent in 2012 from 2002” amid other concerns.¹ Most of the bills have been added in direct response to the Supreme Court Decision in *Massachusetts v. EPA* (page 352), and thus include a strong focus on the transportation sector.² The following is a brief summary of the bills presently before Congress:³

- **Senate Bill 162 – “National Fuels Initiative”**

This bill would amend the tax credits currently available for alcohol-based and alternative fuels, and re-

quire the automobile industry to manufacture “dual-fuelled automobiles”. It would also impose requirements and create incentives for the petroleum industry, from refining/reuse through retail sales.

- **Senate Bill 183 – “Improved Passenger Automobile Fuel Economy”**

A policy-oriented bill, this bill would set a goal for corporate average fuel economy in passenger automobiles of 40 miles per gallon by 2017 and create an emission trading system.

- **Senate Bill 280 – “Climate Stewardship and Innovation”**

This bill proposes an emissions trading system (ETS) for greenhouse gases, with some basic similarities to the EU-ETS.

- **Senate Bill 309 – “Global Warming Pollution Reduction”**

Focused on the transport and energy sectors, this bill would provide allowances for transition to new fuels and mechanisms, set emission standards for vehicles and power generation, and measures for disposal of greenhouse gases. It would call for a new set of standards for energy efficiency performance, acceptable percentage of renewable sources in energy portfolios, biological carbon sequestration, and deployment of clean energy technology in developing countries. It would also instruct US officials on issues such as international negotiations and trade restrictions.

- **Senate Bill 317 – “Electric Utility Cap and Trade”**

This bill would regulate greenhouse gas emissions from electric utilities.

- **Senate Bill 485 – “Global Warming Reduction”**

Would create an ETS, as well as establishing vehicle emission standards for passenger vehicles, and provide tax incentives for the development and marketing of “advanced technology vehicles”. It would also set standards and targets for energy efficiency, renewables in energy portfolios, biological sequestration of carbon, reporting, corporate disclosures, international negotiations and biofuels.

- **Senate Bill 489 – “Green Buildings”**

This bill would create a US Office of Green Buildings, to support public outreach, fund research and development, implement budget and life-cycle costing and contracting in all Federal facilities. It would require the Comptroller General to audit implementation of this Act, and report its findings to Congress.

- **Senate Bill 506 – “High-Performance Green Buildings”**

This bill would provide grants to qualified state agencies for assistance in the “green design” of State school buildings and environmental quality plans. It would also authorise (but not specify) incentives to encourage the use of green buildings and related technology. Provisions on Federal procurement are intended to encourage the use of integrated design principles to optimise each building’s impacts relating to energy, water, waste, construction materials and indoor environmental quality.

- **House Bill 121 – “High-Performance Green Buildings”**

This House bill appears to be the earlier version of the two previously mentioned Senate Bills, encompassing the various elements described above.⁴

- **House Bill 182 – “TEAM up for Energy Independence”**

This bill would create a tax on all automobiles sold in the USA that are not alternative fuelled automobiles, and use the proceeds to fund a trust fund to provide infrastructure grants that would enable small retail fueling stations to retool their facilities to enable them to dispense alternative fuels. Its title demonstrates the current political interest in the United States of “eliminating the US’s dependence on foreign petroleum”.

- **House Bill 620 – “Climate Stewardship”**

This is the House bill focused on designing a greenhouse gas ETS. It, too, emphasises the need to reduce dependence on foreign petroleum. It also highlights the need to address adaptation technologies, to mitigate the impacts of these regulations on the poor, and wildlife conservation.

- **House Bill 1590 – “Safe Climate”**

This bill addresses the issues of *Massachusetts v. EPA*, calling for emission reduction targets and regulations, motor vehicle emissions standards, and national standards and targets for renewable energy and energy efficiency.

In connection with its work on climate change, the Senate invited former Vice-President Al Gore, now closely associated with the climate-change issue, following the release of his documentary *An Inconvenient Truth*, to testify before the Committee on Environment and Public Works. The same day, the House of Representatives heard his testimony before the Subcommittee on Energy & Air Quality (within the Energy & Commerce Committee) and before the Subcommittee on Energy & Environment (Science & Technology Committee).⁵ (ATL)

Notes

1 New York Times 3 March 2007 “US Predicting Steady Increase for Emissions”, available online at: <http://www.nytimes.com/2007/03/03/science/03climate.html?ex=1330578000&en=2529a857f0779711&ei=5088&partner=rssnyt&emc=rss>.

2 Unlike most countries, bills in the US are submitted in very preliminary (often incomplete) form, and are completed and/or winnowed out, through the committee and other processes after the bill has been submitted. Hence, these summaries should not be taken as previews of actual laws. Many of these bills may evolve into entirely different documents (with different names in some cases) by the time they are enacted or dropped. Over the next several months, this plethora of documents will probably be merged into one or two documents in each chamber of Congress, and if adopted, will then go into another committee which will merge or reconcile the Senate and House bills. The following summaries do not address the party affiliations of the Congressmen who have proposed these bills.

3 To access the current versions of all these bills and other relevant information, and/or to follow the evolution of these bills over the coming months, go to <http://thomas.loc.gov> and enter the session and bill numbers.

4 See footnote 2 above. If a “green buildings bill” is passed in both Houses of Congress, they will be sent to a special bi-cameral committee to develop an agreed text which will be resubmitted to both Houses.

5 Former Vice President Gore’s written testimony to the Senate Committee can be read at: http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=e060b5ca-6df7-495d-afde-9bb98c9b4d41. His written testimony to both House Committees can be found at: http://energycommerce.house.gov/cmtc_mtgs/110-eaq-hrg.032107.Gore-testimony.pdf.