

## Legal Updates & News

### Legal Updates

#### Teaching an Old Dog New Tricks—The Supreme Court Decides in *Massachusetts v. EPA* that the Decades-Old Clean Air Act May Regulate Greenhouse Gases

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The United States Supreme Court has issued its eagerly-anticipated climate change decision in *Massachusetts v. EPA*, 549 U.S. \_\_\_\_ (2007). In a controversial 5 to 4 decision, the Court has handed a significant victory to Massachusetts, holding:

1. that the states have standing to challenge the U.S. EPA's decision to not regulate greenhouse gases;
2. that greenhouse gases are air pollutants under the Clean Air Act; and
3. that the EPA can choose to not regulate greenhouse gases only if the agency's reasons are grounded in the text of the Clean Air Act—suggesting this would mean finding that greenhouse gases are not causing climate change.

Both Chief Justice Roberts and Justice Scalia authored dissenting opinions, with Justice Roberts maintaining that the standing of the states is based on “pure conjecture,” and with Justice Scalia calling for greater deference to EPA.

With the extraordinary media attention devoted to the topic of climate change, there will undoubtedly be a host of opinions interpreting this decision. In practical terms, however, one glaring result should be featured—greenhouse gases may now be regulated within the existing regulatory framework of the federal Clean Air Act. The Court in *Massachusetts v. EPA* interprets the Clean Air Act's definition of “air pollutant” as “embrac[ing] all airborne compounds of whatever stripe.” Notwithstanding Justice Scalia's dissent that such a broad definition will encompass “*everything* airborne, from Frisbees to flatulence,” the Court has framed the national debate over how to regulate greenhouse gas emissions in terms of the Clean Air Act. The regulated community, therefore, should pay close attention to *all* of the mechanisms that exist within the Act regarding air pollutants, and prepare for future developments accordingly.

To that end, the Court offers some predictions on the regulatory future, stating that “[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.” The Court adds that, at least with respect to vehicular emissions, EPA “would have to delay any [regulatory] action ‘to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.’” (Quoting Clean Air Act Section 202(a)(2)).

Nevertheless, the Court does leave open the door for the EPA to determine that it will not regulate greenhouse gases. That would require the EPA to decide that greenhouse gases do not “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health and safety.” The Court interprets this as meaning the EPA would have to determine “that greenhouse gases do not contribute to climate change,” or to provide “some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” Importantly, how the EPA makes this determination will likely trigger other mandatory parts of the Clean Air Act, not just vehicle emission and fuel standards.

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