Two Landmark Interpretations of the Clean Air Act

EPA Authority to Regulate GHGs and Increases in Annual Emissions Trigger NSR

by Richard Ayres

Richard E. Ayres, environmental attorney, Ayres Law Group, Washington, DC.

The most recent U.S. Supreme Court term is notable for two landmark interpretations of the Clean Air Act (CAA). In *Massachusetts vs. EPA* (U.S., No. 05-1120, 4/2/07), the court held that greenhouse gases (GHGs) are air pollutants subject to regulation under the CAA, overruling an interpretation by the Bush administration. In *Environmental Defense vs. Duke Energy Corp.* (U.S., No. 05-848, 4/2/07), the court held that when renovation of an industrial facility results in an increase in annual emissions, modern emission controls must be installed, even if the hourly rate of emissions does not increase. This article traces the history of these cases and considers their implications.

MASSACHUSETTS VS. EPA

Section 202 (a) of the CAA directs the U.S. Environmental Protection agency (EPA) administrator to adopt standards to control emissions of any air pollutant from motor vehicles or vehicle engines that he or she determines "may reasonably be anticipated" to endanger public health and welfare. In 1999, a group of private organizations filed a petition with EPA requesting it regulate GHG emissions from motor vehicles under Section 202. In a report commissioned by EPA in response to the petition, the National Research Council warned that "[GHGs] are accumulating in the Earth's atmosphere as a result of human activities, causing the surface air temperatures and subsurface ocean temperatures to rise." EPA received more than 50,000 comments, largely supporting the petition.

Nevertheless, EPA denied the petition, offering two reasons. First, the agency said that, despite opinions to the contrary written by two EPA General Counsels in previous administrations, the agency now believed the CAA did not authorize EPA to issue mandatory regulations to address climate change because GHGs are not air pollutants under the CAA. Second, even if the agency had such authority, it would be unwise to exercise it because of certain enumerated "policy considerations." These included the likelihood of conflict with the president's "comprehensive approach" to the problem, and the possibility that regulation might hamper the president's ability to persuade developing countries to control emissions.

The petitioners, joined by Massachusetts and other state and local governments, then filed suit in the U.S. Court of Appeals for the District of Columbia (DC Circuit). ("Massachusetts" is used here to indicate the entire group that sought Supreme Court review, even though the petition was brought originally by private parties. The states supporting Massachusetts were California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. The states supporting EPA's position were Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah.) The three-judge panel of the DC Circuit split three ways: one judge holding that the petitioners had no constitutional "standing" to bring suit; a second that the CAA provides no authority to regulate GHGs; and the third that petitioners had standing, EPA had authority to act, and should have. Though closely divided, the Supreme Court definitively untangled this muddle.

Standing

Much of the court's opinion is taken up with the obscure, but critical, subject of the "standing" of Massachusetts and its fellow petitioners to invoke the federal courts' jurisdiction. As a legal notion, standing comes from Article 3 of the Constitution, which limits the jurisdiction of the federal courts to "cases or controversies." In practice, standing is an elastic concept that tends to expand and contract with changes in the composition of the court from more to less willing to address social issues such as global warming.

The court rejected EPA's argument that, because the harm inflicted by GHGs is "widespread" rather than particular to a specific entity, the plaintiffs lacked standing to invoke the federal courts' jurisdiction. Justice Stevens wrote that Massachusetts had standing for two reasons. First, as an owner of coastal land and facilities, the state would suffer "concrete and particularized injury" from global warming traceable to EPA's refusal to adopt standards to reduce emissions of GHGs from motor vehicles—harm that could be redressed in part by a court decision against the agency. Second, the court held that states have special standing before the federal courts, dating to the creation of the Union, to litigate on behalf of the interests of their citizens. Having given up their full sovereignty—and with it their right to use armed force or otherwise coerce neighboring states—they retain "quasi-sovereign" rights to use the federal courts to protect their citizens' welfare. Thus, over a strongly worded dissent written by Chief Justice Roberts, the court concluded that it could hear Massachusetts' case.

Clean Air Act Authority

Reaching the merits, the court first tackled the question of whether the CAA gives EPA authority to regulate GHGs emitted by motor vehicles. "We have little trouble concluding that it does," said the court, quoting Section 202(a), which directs the EPA Administrator to prescribe standards applicable to emissions of any air pollutant from new motor vehicles or engines "which in [the administrator's] judgment cause,

or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

The court dismissed EPA's argument that GHGs are not air pollutants intended to be regulated by the CAA. Justice Stevens pointed to the CAA's broad definition of an air pollutant 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." This definition, the court maintained, "embraces all airborne compounds of whatever stripe." In answer to EPA's claim that the CAA was not intended to regulate GHGs, the court said that even though the Congresses that wrote the CAA and its amendments may not have anticipated global warming, they did provide for regulatory flexibility to take into account "changing circumstances and scientific developments" that would otherwise have rendered the CAA obsolete.

The court also rejected EPA's argument that it could not regulate GHG emissions from motor vehicles because the Department of Transportation (DOT) sets fuel economy standards. The fact that DOT sets fuel economy standards, the court said, "in no way licenses EPA to shirk its environmental responsibilities." While the obligations may overlap, the court said, "there is no reason to think the two agencies cannot both administer their obligations."

Exercise of CAA Authority

The court then turned to EPA's argument that, even if it had legal authority, regulation would be unwise. Generally speaking, the federal courts today tend to defer to an agency's exercise of discretion in implementing a law. But not this time. Instead, the court said that EPA's position "rests on reasoning divorced from [the CAA]." While regulation of GHG emissions from motor vehicles is required only if, in the EPA administrator's judgment, they cause or contribute to air pollution threatening public health or welfare, "the use of the word 'judgment' is not a roving license to ignore the statutory text." Thus the court rejected the agency's "laundry list" of policy reasons not to move forward with emission control regulations. In particular, it rejected EPA's reliance on "the uncertainty surrounding various features of climate change." "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether [GHGs] contribute to global warming, EPA must say so." Otherwise, it must move forward with regulations.

Having rejected the rationales proffered by EPA for its decision to deny the Massachusetts' petition, the court remanded the matter to the DC Circuit. The DC Circuit has now asked the parties to suggest how to proceed. Since the Supreme Court has rejected EPA's claim that it lacks authority to regulate GHGs under the CAA, and also the agency's rationale for refraining from exercising that authority, a new EPA ruling on the Massachusetts petition seems certain. And unless EPA can support a claim of "profound" uncertainty with regard to whether GHGs contribute to global warming

(or convince Congress to change the CAA), the agency seems bound by Section 202(a) of the CAA to adopt emissions standards for GHGs from motor vehicles and vehicle engines.

Implications of the Court's Decision

Despite the narrow 5–4 margin, the court's decision has already been characterized as a "landmark." Within two months of the decision, President Bush abandoned his claim that the science was insufficient. He instructed his administration to work on a global warming regulatory program and said he would convene a meeting of the major GHG-emitting nations to develop a long-term program of control.

The court's decision, coupled with the president's change of position, has strengthened Congressional efforts to adopt comprehensive GHG legislation. The court's ruling is likely also to assure that EPA, rather than the Department of Energy, is the lead agency for implementing any legislation Congress adopts.

While the court's opinion applies in its terms only to regulation of GHGs from motor vehicles, it seems likely to have significant collateral effects. Several lower court cases regarding the GHG control program for motor vehicles adopted by California and 11 other states, which have been held in abeyance while the Supreme Court considered the *Massachusetts* case, now seem likely to be decided in favor of the California program.

Section 202(a)'s endangerment language, which the court read to authorize regulation of GHGs, also appears in Section 111 of the CAA, which applies to industrial sources of air pollution. In a case pending before the DC Circuit (held in abeyance while the Supreme Court considered the *Massachusetts* case), EPA defended its refusal to regulate GHG emissions from industrial sources on the grounds that it had no authority to regulate GHGs under the CAA. That defense would now appear untenable in light of *Massachusetts vs. EPA*.

Endangerment language virtually identical to that construed by the court also appears in Section 108(a) of the CAA, which instructs the EPA administrator to list air pollutants as the first step toward adopting National Ambient Air Quality Standards (NAAQS). If a NAAQS for CO_2 were adopted, states would be required to adopt state implementation plans to reduce GHG concentrations. Since U.S. contributions to global warming, large as they are, are a minority of the global emissions, this approach seems unlikely to be adopted by EPA or pursued by environmental organizations.

Similar language appears in the purposes of the Prevention of Significant Deterioration (PSD) code of the CAA. New units in specified industrial categories that emit more than 100 tons of an air pollutant are subject to PSD, which requires installation of Best Available Control Technology (BACT). Requirements to control GHG emissions from new industrial units could be enforced by citizen suit or by the Federal Land Managers, who are charged with "an

affirmative responsibility to protect the air quality-related values" of National Parks and Wilderness Areas. Several permits for new coal-fired power plants are currently under challenge because the BACT determinations do not require technology to control GHG emissions.

ENVIRONMENTAL DEFENSE VS. DUKE ENERGY

The court's second decision addressed an issue that determines whether overhauls or expansions of old coal-fired power plants and other industrial facilities will give rise to an obligation to install up-to-date pollution control equipment. While the legal issues were esoteric, the National Association of Clean Air Agencies (NACAA) argued that the implications were down-to-earth. In a "friend of the court" brief, NACAA argued that if the court agreed with the rate interpretation, it would present a "probably insuperable" barrier to attaining federal health standards in many areas, limit economic growth, and hinder modernization of our energy infrastructure.

The CAA's PSD program requires that whenever a unit is modified, it must undergo New Source Review (NSR) and install modern pollution control technology. The CAA defines modification as "any physical change…which increases the amount of any air pollutant emitted." The substantive legal question before the court was how to interpret the word "amount"—whether it indicates an annual amount of emissions or an increase in the rate of emissions (e.g., emissions per hour). The court's answer came in a nearly unanimous opinion.

In the lower court enforcement case, Duke Energy admitted significant renovation of the units in question, but argued that since the emission rates did not increase, EPA's regulations did not require updating pollution controls. The district court agreed with Duke. But on appeal the Fourth Circuit offered a different rationale, holding that the PSD regulations were illegal because EPA had not defined "modification" the same way in the PSD rule as in the earlier New Source Performance Standards (NSPS) rules.

The Fourth Circuit's decision raised a seemingly arcane CAA procedural question of great importance. Section 307 of the CAA provides that a challenge to any regulation of national applicability may be heard only if filed within 60 days in the DC Circuit. This provision was designed to provide certainty by (1) eliminating the potential for different interpretations in different federal circuits; and (2) eliminating the opportunity to relitigate regulatory requirements in the context of enforcement actions. This Congressional policy has been repeatedly endorsed by the Supreme Court and the lower federal courts, and has rarely been challenged—until the Fourth Circuit's decision in the *Duke Energy* case.

The appellants in the Supreme Court (two environmental organizations and EPA) argued that the Fourth Circuit had improperly entertained the case—wrong circuit, and more than 20 years too late. EPA quoted an earlier Supreme Court interpretation that "any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding." The appellants were supported by former EPA Administrators Train and Browner, who asserted in an amicus brief that "ad hoc review of final rules by the lower courts would undermine EPA's ability to…protect our nation's air."

The court, rather obliquely, agreed. It concluded that under the PSD regulations, an increase in annual emissions triggers NSR, while NSPS applies only if there is an increase in the rate of emissions. When the Fourth Circuit said that the triggering event for NSR must be the same as for NSPS, it effectively invalidated the PSD rule. "Any such result," the court said, "must be shown to comport with the [CAA's] restrictions on judicial review of EPA regulations for validity." In other words, the Fourth Circuit erred when it overturned the PSD regulations because only the DC Circuit has jurisdiction to review CAA regulations of national applicability.

The court also rejected the Fourth Circuit's interpretation of the CAA, as well as the reading of the PSD regulations by both lower courts. First, the court rejected the Fourth Circuit's statutory interpretation that Congress had "affirmatively mandated" that "modification" be interpreted identically in both NSPS and NSR programs. In this case, Congress' cross reference to NSPS when it adopted NSR "is certainly no unambiguous congressional code for eliminating the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term."

Second, the court rejected the lower courts' reading of the PSD regulations. It held that under the PSD regulations, NSR is triggered by an increase in annual emissions, not an increase in the hourly rate. "[While] the 1980 PSD regulations may be no seamless narrative," the court said, "they clearly do not define a 'major modification' in terms of an increase in the 'hourly emission rate.'" Two EPA enforcement division letters to the contrary were dismissed as not "heavy ammunition." The Fourth Circuit's interpretation failed because it "assumed that increases in operating hours…must be ignored even if caused or enabled by an independent 'physical change'…or change in the method of operation."

So the court has now resolved with finality that the CAA does not require EPA to define an increase in emissions for purposes of NSR in terms of an emission rate; and that the current PSD regulations require installation of modern pollution controls whenever an increase in emissions is caused or enabled by renovation. Based on this ruling, the Eleventh Circuit recently invited briefing on whether it should send back a similar case against Alabama Power to the district court for reconsideration.

Given the stakes for industries with old plants, it should perhaps not be surprising that, like a boardwalk "whack-a-mole," the idea of exempting fixed-up or expanded old units from updating pollution controls keeps popping up. In spite of the Supreme Court's decision in the *Duke Energy* case, EPA recently proposed to amend the PSD regulations to align the definition of "increase in the amount" of emissions with the rate definition of the NSPS. It is unclear whether this proposal will become a federal regulation. Thus it is still too early to tell whether *Duke Energy* is the last word on this issue. **em**