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CONTACTS:

Wendy James
818-563-9111

Jamie Knapp
530-756-3611

Frank O'Donnell
202-558-3527

The Supreme Court Global Warming Case *Massachusetts v. EPA*

On June 26, 2006, the Supreme Court agreed to decide whether the Clean Air Act authorizes the Environmental Protection Agency to regulate the greenhouse gases (“GHGs”) that cause global warming. Challenging EPA’s position that it has no such authority is a coalition of nearly 30 states, cities, and environmental organizations. (A complete list of these Petitioners, and all other documents referred to herein, can be found at <http://www.sierraclub.org/environmentallaw/lawsuits/viewCase.asp?id=316.>)

While the case directly concerns EPA’s authority over motor vehicle GHG emissions, it has strong implications for California (which has set its own GHG limits for motor vehicles) and the 10 other states that have adopted California’s standards. The outcome also will likely determine whether EPA can regulate GHG emissions from power plants and other industries.

The history of this case goes back to 1998 when, in response to a request from former Congressman Tom DeLay, EPA’s General Counsel formally opined that the Clean Air Act gives EPA authority to regulate the greenhouse gases that cause climate change. EPA’s opinion was based on the fact that the Act authorizes EPA to regulate emissions of “any air pollutant” that “may reasonably be anticipated to endanger public health or welfare.” EPA concluded that GHGs are “air pollutants” (defined in the Clean Air Act as “any physical [or] chemical ... substance or matter emitted into ... the ambient air”), and Congress further defined “welfare” to include “effects on weather and climate.”

In 1999, the Center for Technology Assessment (CTA) led a coalition of environmental groups in petitioning EPA to set emission standards for CO₂ and other vehicle GHG emissions. (Vehicle emissions are the second-largest source of greenhouse gas emissions in the U.S., comprising almost 24% of U.S. GHG emissions.) After more than three years without a response, in 2002 CTA and Sierra Club sued EPA to for unreasonably delaying action on the petition. This resulted in EPA’s decision denying the petition, where EPA first reversed its prior position and now asserted that Congress did not intend to give it authority under the Clean Air Act to regulate anything related to global warming, and then said that even if it had such authority, it would not regulate GHGs because it would be bad public policy to do so.

Petitioners challenged this decision, and in July 2005 the U.S. Court of Appeals for the District of Columbia Circuit voted 2-1 to let EPA's decision stand. The panel splintered three ways, producing no majority opinion; Judge Sentelle found that because climate change affects everybody, no one has the "particularized injury" required to establish standing. Judge Randolph assumed the existence of EPA's authority, but ruled for EPA on its "policy" grounds. Judge Tatel wrote that the Clean Air Act does authorize EPA to regulate greenhouse gases, and that EPA's "policy reasons" for refusing to do so were not valid under the Clean Air Act.

Given the inconclusive nature of these opinions, the Supreme Court's decision to take the case was somewhat surprising; the Court usually would have waited for one or more of the other climate change cases percolating through the courts (see below). It appears that the Court recognized the enormous public policy implications of this case, and chose to resolve these issues at the first possible opportunity.

On the question of EPA's authority to regulate greenhouse gases, we have a powerful "plain text" argument that the Clean Air Act explicitly authorizes EPA to protect against adverse effects on "weather or climate." This statutory question is actually no harder than other recent environmental cases that resulted in favorable -- and unanimous -- decisions. See *Whitman v. American Trucking Assns*, 531 U.S. 457 (2001) (Scalia, J., upholding national ambient air quality standards); *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 126 S.Ct. 1843 (2006) (Souter, J., construing the plain meaning of "discharge" under Clean Water Act).

As to whether EPA may decline to act based on "policy considerations" that are not found anywhere in the statute, the Supreme Court has repeatedly rebuffed agencies that base regulatory decisions on criteria that Congress has not put into the relevant law. Here, Congress said that EPA's only role is to decide whether the climate change caused by these emissions is "reasonably anticipated to endanger public health or welfare." Anxious to avoid that issue, EPA instead relied on factors such as its preference for voluntary action.

If we are successful on both issues, the Supreme Court would send the matter back to EPA with instructions for it to then make the required determination whether greenhouse gas emissions and the resulting climate change is "reasonably anticipated to endanger public health or welfare."

The case will be argued on November 29, 2006 and will be decided before June of 2007. This decision will have significant impacts for the other pending global warming cases. First, the auto industry has sued California, arguing that the state's GHG vehicle standards are illegal. (They have also filed two parallel cases against Vermont and Rhode Island, two of the states that have adopted California's standards.) If the Court rules favorably on Clean Air Act authority, the states will likely prevail.

The other major climate change case is a challenge by States and environmental groups to EPA's refusal to regulate CO₂ emissions from power plants on the grounds that it lacked Clean Air Act authority to do so. This case will be deferred pending the decision in *Massachusetts*, which should resolve the issues in this case as well.