
Testimony of
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Before the
Select Committee on
Energy Independence and Global Warming
U.S. House of Representatives

Hearing:
***Massachusetts v. U.S. EPA* Part II:**
Implications of the Supreme Court Decision

March 13, 2008

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Thank you for the opportunity to testify before you today. My name is Lisa Heinzerling. I am a Professor of Law at the Georgetown University Law Center. After law school at the University of Chicago, I clerked for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit and then for Justice William Brennan of the U.S. Supreme Court. I was an Assistant Attorney General in the Environmental Protection Division of the Massachusetts Attorney General's Office for three years before coming to Georgetown in 1993. My expertise is in environmental and administrative law. Perhaps most pertinent to today's hearing, I was the lead author of the winning briefs for Massachusetts and other petitioners in *Massachusetts v. EPA*.

I commend the Select Committee for convening this hearing on the implications of the Supreme Court's decision in *Massachusetts v. EPA* and the Administration's response to that decision to date. In this testimony, I discuss the following issues:

- (1) EPA's obligations and authority under the Court's decision in *Massachusetts v. EPA*;
- (2) the implications of the Energy Security and Independence Act of 2007 for EPA's obligations and authority under the Clean Air Act;
- (3) EPA Administrator Stephen Johnson's recent formal statement on the causes and consequences of climate change;

(4) the implications of the latter statement for regulatory programs under the Clean Air Act; and

(5) the EPA Administrator's obligation to make a finding (if he is not deemed to have done so already) with respect to whether greenhouse gases are endangering public health or welfare.

I. EPA's Obligations and Authority Under *Massachusetts v. EPA*

In *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), the Supreme Court held that greenhouse gases are "air pollutants" within the meaning of the Clean Air Act and that the Act gives EPA authority to regulate them. In addition, the Court held that EPA could not refuse to exercise this authority by citing policy considerations not enumerated in the statute or by referring generally to the scientific uncertainty remaining with respect to climate change.

Two aspects of the Supreme Court's decision are particularly relevant to this hearing. The first is the Court's directive to EPA about what the agency may and may not lawfully do on remand. The second is the Court's treatment of EPA's argument that the Energy Policy and Conservation Act ("EPCA") precludes EPA regulation of greenhouse gases from motor vehicles under the Clean Air Act.

The Court made several important observations about EPA's obligations on remand. First, it held that EPA *must* regulate greenhouse gases from motor vehicles if the agency finds that they may reasonably be anticipated to endanger public health or welfare. ("If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles." 127 S.Ct. at 1462.) Second, to avoid regulating greenhouse gases, EPA must make one of two findings. Either the agency must find that greenhouse gases may not reasonably be anticipated to endanger public health or welfare *or* it must conclude that there is not enough information to make a decision on endangerment. ("EPA can avoid taking further action only if it determines that greenhouse gases 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.... 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, EPA must say

so.... The statutory question is whether sufficient information exists to make an endangerment finding.” 127 S.Ct. at 1462-63.) The Court’s decision in *Massachusetts v. EPA* thus directs EPA to follow the scientific evidence on climate change wherever it leads and to regulate greenhouse gas emissions from motor vehicles if that scientific evidence shows endangerment.

Another aspect of the Court’s decision pertinent to this hearing is the Court’s rejection of EPA’s argument that EPCA demonstrated a Congressional intent to preclude regulation of greenhouse gases under the Clean Air Act. In concluding that it lacked authority to regulate greenhouse gases, EPA had explained:

Even if [greenhouse gases] were air pollutants generally subject to regulation under the [Clean Air Act], Congress has not authorized the Agency to regulate CO₂ emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks... At present, the only practical way to reduce tailpipe emissions of CO₂ is to improve fuel economy.... *EPCA is the only statutory vehicle for regulating the fuel economy of cars and light duty trucks.*

68 Fed. Reg. 52922, 52929 (emphasis added). The Court rejected this argument:

[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s ‘health’ and ‘welfare,’ 42 U.S.C. § 7521(a)(1), a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5). The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations yet avoid inconsistency.

127 S.Ct. at 1462. The Court’s one-paragraph dismissal of an argument that had occupied a central place in EPA’s refusal to regulate greenhouse gas emissions speaks volumes: the Court simply did not buy the idea that fuel economy standards under EPCA and emissions standards under the Clean Air Act could not peacefully co-exist. Yet, as I next explain, that discredited argument appears to be enjoying a renaissance within the Administration.

II. EISA and the Clean Air Act

Hints abound that the Administration believes that Congress, through the passage of the Energy Independence and Security Act of 2007 (“EISA”), undid EPA’s obligation to take action in response to *Massachusetts v. EPA*. In announcing his decision to deny California a waiver for its program regulating greenhouse gases from motor vehicles, for example, EPA Administrator Stephen Johnson stated that “the solution” to the problem of climate change “must” extend “far beyond the borders of the California” and pointedly cited the EISA in concluding that this legislation would “bring a much needed national approach to addressing global climate change.” Letter from Stephen Johnson to Arnold Schwarzenegger (December 19, 2007), available at <http://www.epa.gov/otaq/climate/20071219-slj.pdf>. Similarly, in a letter to Sierra Club attorney David Bookbinder describing EPA’s response to *Massachusetts v. EPA*, EPA’s Principal Deputy Assistant Administrator, Robert J. Meyers, invoked EISA in noting that “EPA is analyzing how to proceed on the issues before us” on the remand from *Massachusetts v. EPA*, and declined to state any “specific timeline for responding to the remand.” The implication of statements such as these is that EPA believes that the passage of EISA somehow affected its obligations on the remand. But EISA did no such thing.

As I have discussed, the Supreme Court held in *Massachusetts v. EPA* that fuel economy standards under the Energy Policy and Conservation Act (EPCA) and emissions standards under the Clean Air Act may comfortably co-exist. The portions of the EISA dealing with fuel economy are amendments to EPCA; they revise EPCA’s existing standards for fuel economy. EISA, H.R. 6, § 102 (amending 49 U.S.C. § 32902). Just as the fuel economy standards existing at the time of *Massachusetts v. EPA* could exist side-by-side with emissions standards under the Clean Air Act, so too are the new fuel economy standards called for by EISA fully consistent with emissions standards under the Clean Air Act. The Court’s opinion was not dependent on the particular content of the fuel economy standards themselves, but on the structure of the two statutes in general. That structure remains compatible with Clean Air Act regulation notwithstanding the passage of EISA.

Indeed, EISA itself makes clear that Congress had no intention of erasing or altering EPA’s obligations under the Clean Air Act. Right up-

front, in section 3 of EISA, Congress provided: “Except to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.” EISA, H.R. 6, § 3. The import of this provision could not be plainer: EISA simply does not change EPA’s existing obligations – including those obligations described by the Supreme Court in *Massachusetts v. EPA* – under the Clean Air Act. Any suggestion to the contrary ignores the express text of EISA.

EISA does not in any way change EPA’s obligations on remand from *Massachusetts v. EPA*. EISA affects neither EPA’s legal obligations with respect to determining whether greenhouse gases may reasonably be anticipated to endanger public health or welfare or the regulatory obligations that flow from such a determination. This conclusion follows both from the decision in *Massachusetts v. EPA* and from the explicit language of EISA.

III. EPA’s Recent Endangerment Finding

On February 29, EPA Administrator Stephen Johnson issued the formal explanation of his previously announced decision to deny California a waiver for its program regulating greenhouse gas emissions from motor vehicles. Administrator Johnson concluded that California did not meet the Clean Air Act’s requirement that, before a waiver may be granted, the State must have “compelling and extraordinary conditions.” 73 Fed. Reg. 12156. He explained that California’s problems relating to climate change were not “compelling and extraordinary” – not because they do not exist, but because *they are no worse than the very bad problems the rest of the country faces as a result of climate change.* 73 Fed. Reg. at 12163-12168. Thus, in the course of denying California’s waiver, the EPA Administrator made explicit, for the first time, his view that greenhouse gases endanger public health and welfare.

Administrator Johnson’s decision contains a long discussion of the effect of greenhouse gases on climate and the effect of climate change on public health and welfare. The EPA Administrator states that “warming of the climate system is unequivocal.” 73 Fed. Reg. at 12165. He connects this warming to manmade greenhouse gases and describes the consequences of global warming for human health and welfare. For example: “[t]here is

strong evidence that global sea level gradually rose in the 20th century and is currently rising at an increased rate” (73 Fed. Reg. at 12165); “[b]y the end of the century, globally averaged sea level is projected to rise between 0.18 and 0.59 meters relative to around 1990” (73 Fed. Reg. at 12166); “[i]t is very likely that heat waves will become more intense, more frequent, and longer lasting...” (73 Fed. Reg. at 12166); “[i]t is likely that hurricanes will become more intense...” (73 Fed. Reg. at 12166; “...wildfire and insect outbreaks are increasing and are likely to intensify...” (73 Fed. Reg. at 12167).

These statements demonstrate that the Administrator has concluded that greenhouse gases are endangering, and may reasonably be anticipated to continue to endanger, public health and welfare. For one thing, the Administrator does not equivocate about existing problems relating to climate change or about the likelihood of future harms. His findings – including words such as “unequivocal” and “likely” – easily meet the Clean Air Act's standard of reasonable anticipation of endangerment. Indeed, the endangerment standard was amended in 1977 precisely in order to make clear that scientific certainty (or, to put it another way, “unequivocal” evidence) was not necessary for a finding of endangerment. *Massachusetts v. EPA*, 127 S.Ct. at 1447 n. 7. Moreover, Administrator Johnson’s decision contains numerous examples of “observed” climate change due to greenhouse gases (73 Fed. Reg. at 12165-66); no “reasonable anticipation” is required when harm is already upon us.

In addition, the Administrator's description of the consequences of climate change relate directly to the key Clean Air Act concepts of public health and welfare. Hurricanes, wildfires, and the rest all clearly implicate health and welfare. In addition, regarding public health, the Administrator states, for example, that the increased magnitude and duration of severe heat waves will “likely” lead to “increases in mortality and morbidity, especially among the elderly, young and frail.” 73 Fed. Reg. at 12167. He also observes that “[c]limate change is expected to lead to increases in ozone pollution, with associated risks in respiratory infection and aggravation of asthma,” and that “[o]zone exposure also may contribute to premature death in people with heart and lung disease.” 73 Fed. Reg. at 12167.¹ As for

¹ The latter statement is followed by a footnote which instructs: “But see discussion above.” 73 Fed. Reg. at 12167 n. 65. The reference is mysterious; nothing in the Administrator’s preceding discussion even relates

welfare, the Act broadly defines effects on “welfare” to include – though they are “not limited to” – “effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being...” 42 U.S.C. § 7602(h). In addition to the heat waves, hurricanes, wildfires, and insect outbreaks already discussed, the Administrator also predicts “the spread of invasive species,” the disruption of ecosystem services, and “significant adverse effects on certain vegetation” due to increased ozone pollution. 73 Fed. Reg. at 12167. Such findings indisputably pertain to “welfare” as defined in the Clean Air Act.

These formal conclusions – announced by the EPA Administrator himself, after notice and opportunity for public comment on the decision whether to grant a waiver for California’s program (73 Fed. Reg. at 12157) – amount to a finding of “endangerment” as contemplated in numerous provisions of the Clean Air Act.

Although the EPA Administrator has stated that his formal factual findings do not amount to an “endangerment finding” under the Clean Air Act (73 Fed. Reg. at 12156 n.1), the Administrator may not avoid the legal and regulatory consequences of his factual findings simply by refusing to give them the label of “endangerment.” EPA has long acknowledged, and courts have long agreed, that formal factual findings of the kind made by EPA in the waiver decision suffice to trigger regulatory obligations under the Clean Air Act.

In prior administrations, EPA did not even contest the idea that formal factual conclusions concerning the public health or welfare effects of a pollutant constituted an endangerment finding under the Clean Air Act. The regulation of lead provides an instructive example. Before regulating lead as a fuel additive under section 211 of the Clean Air Act, EPA first found that lead was endangering public health. 38 Fed. Reg. 33734. EPA was then faced with a lawsuit arguing that this endangerment finding required EPA to set air quality standards for lead under section 108 of the Clean Air Act. In that lawsuit, EPA conceded that lead had an adverse effect on public health and welfare within the meaning of section 108 of the Act. *NRDC v. Train*,

to, much less calls into question, the Administrator’s prediction regarding ozone exposure and premature mortality.

545 F.2d 320, 324 (2d Cir. 1976). EPA made no attempt to deny that a formal finding of lead's harmful effects made pursuant to one provision of the statute was decisive for purposes of a separate provision of the Act.

EPA's previous acknowledgment that a formal finding of danger to public health or welfare amounts to an endangerment finding with regulatory significance under the Clean Air Act is fully supported in the case law. In the lawsuit challenging the lead standard for fuel, industry argued that "the regulations were void because the Administrator had failed to couch his ultimate finding in the language of the statute itself." *Ethyl Corp. v. EPA*, 541 F.2d 1, 12 n. 15 (D.C. Cir. 1976) (en banc). Calling the argument "spurious," the court pointed out that "ultimate findings do not have to be expressed at all, let alone be expressed in the language of the statute." 541 F.2d at 12 n.15. In *Thomas v. State of New York*, 802 F.2d 1443 (D.C. Cir. 1986), the court faced the question whether two letters from the EPA Administrator to public officials, concluding that acid deposition from U.S. sources was endangering public welfare in Canada, sufficed as a finding that U.S. emissions were endangering public health or welfare in a foreign country within the meaning of section 115(a) of the Clean Air Act. The court said they no; rather, it concluded, the Administrator should have followed notice-and-comment procedures in issuing his findings. 802 F.2d at 1447.

Together, these authorities stand for two important propositions. First, the fact that Administrator Johnson did not label his conclusions an "endangerment finding" does not dilute their legal significance. Administrator Johnson used those conclusions as support for a momentous regulatory decision, that is, the decision denying California and other states the ability to enact programs to address greenhouse gases from motor vehicles. The Administrator may not disavow those conclusions in another legal setting simply because they are inconvenient in that other setting. Second, procedures matter. Administrator Johnson announced that climate change is upon us and that its consequences will be harmful, only after providing notice and an opportunity for public comment. He signed the announcement himself and published it in the Federal Register. Short of affixing a wax seal to the document, Johnson could not have made a more formal announcement about the causes and consequences of climate change than he did in denying California's waiver.

IV. The Regulatory Implications of the Endangerment Finding

The Clean Air Act directs EPA Administrator to regulate numerous sources of air pollution once he has found that an air pollutant emitted by them may reasonably be anticipated to endanger public health or welfare. In *Massachusetts v. EPA*, the Supreme Court explicitly held that regulation of motor vehicles under section 202 of the Clean Air Act must follow once the EPA Administrator makes such an endangerment finding. 127 S.Ct. at 1462. The same is true for many other sources of air pollution.

Section 111(b)(1)(A) of the Clean Air Act, for example, provides that EPA “shall” include on a list a category of stationary sources “if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. 7411(b)(1)(A). Section 111(b)(1)(B) requires the Administrator to regulate new sources included on this list. 42 U.S.C. 7411(b)(1)(B). Section 111(d) requires the Administrator, acting in concert with the States, to regulate existing sources included on this list. 42 U.S.C. 7411(d). There is little doubt that many categories of stationary sources – including, for example, power plants – emit greenhouse gases and thus “cause[]” air pollution which the Administrator has concluded endangers public health and welfare. Under section 111, the Administrator “shall” include these sources on a list and then “shall” regulate them. 42 U.S.C. 7411(b)(1)(A), 7411(b)(1)(B), 7411(d).

Regarding power plants specifically, in 2006, EPA refused to regulate greenhouse gases from electric utility and several other steam generating units under section 111 because, the agency explained, “it does not presently have the authority to regulate CO₂ or other greenhouse gases that contribute to global climate change.” 71 Fed. Reg. 9866, 9869. After *Massachusetts v. EPA*, this reasoning is no longer legally valid. The D.C. Circuit has remanded a challenge to EPA’s decision to the agency. In light of the reasoning set forth above, EPA must now regulate greenhouse gases from these sources.

Similarly, section 231(a)(2)(A) provides that the Administrator “shall” issue proposed standards for “the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. 7571(a)(2)(A). Currently

pending before EPA are two petitions asking EPA to regulate greenhouse gas emissions from aircraft. (California filed one petition, which is available at http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftpet6.pdf. Environmental groups filed another, available at http://cdn.sfgate.com/gate/pictures/2007/12/05/ga_aircraftghgpet.pdf.)

Provisions regarding the regulation of fuels (42 U.S.C. 7545(c)(1)(A)) and nonroad engines (42 U.S.C. 7547(a)(4)) provide somewhat more discretion to the Administrator because they state that he “may” rather than “shall” regulate after a finding of endangerment. Nevertheless, the Administrator will need to take into account his finding of endangerment in explaining his course of action under these provisions. Here, too, a petition to regulate greenhouse gases (in this case, from nonroad engines) awaits a response from EPA. (The petition is available at http://ag.ca.gov/cms_pdfs/press/N1474_Petition.pdf.) As the Supreme Court said in *Massachusetts v. EPA*, in responding to a petition for rulemaking, the agency’s “reasons for action or inaction must conform to the authorizing statute,” and EPA must offer a “reasoned explanation” for its decisions. 127 S.Ct. at 1462, 1463. Thus, the mere existence of some discretion on the part of EPA, suggested by the inclusion of the word “may” with respect to regulation of fuels and nonroad engines, does not dilute the agency’s general obligation to follow statutory criteria and explain its decisions in reasoned terms.

V. EPA’s Obligation to Make an Endangerment Determination

If, contrary to my belief, the EPA Administrator’s formal factual findings about the causes and consequences of climate change do not amount to an endangerment finding triggering an obligation to regulate, then EPA must issue a decision as to whether endangerment exists in order to respond to the Supreme Court’s decision in *Massachusetts v. EPA*. Almost a year ago, the Supreme Court directed the agency to provide a lawful explanation as to why it would or would not regulate greenhouse gases from motor vehicles. The agency’s options, under the Court’s decision, are limited. So far, however, the agency has not – again, assuming for the moment that EPA’s findings on the causes and consequences of climate change do not constitute a finding of “endangerment” – exercised any of the lawful options presented by the Court. Utter inaction is not one of the options the Court permitted.

A little over a month after the Court issued its decision in *Massachusetts v. EPA*, the President issued an Executive Order directing EPA and the Departments of Transportation and Energy to undertake a coordinated effort to develop regulations to “protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines.” Executive Order: Cooperation Among Agencies in Protecting the Environment with Respect to Greenhouse Gas Emissions From Motor Vehicles, Nonroad Vehicles, and Nonroad Engines (May 14, 2007), available at www.whitehouse.gov/news/releases/2007. At a press conference announcing the Executive Order, referring to the entire process of developing final regulations for motor vehicles, President Bush stated that he had “directed members of [his] administration to *complete the process by the end of 2008*.” (A transcript of the press conference is available at <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>.) Yet here it is, March of 2007, and EPA continues to insist not only that it has made no endangerment finding but that it need not provide a specific timeline for doing so.

It has been nine years since the International Center for Technology Assessment and other groups asked EPA to regulate greenhouse gases from motor vehicles due to the threat they posed to public health and welfare. In *Public Citizen Health Research Group v. Chao*, the petitioners had also waited nine years for an answer to their request that the Occupational Safety and Health Administration regulate workplace exposures to hexavalent chromium. The court observed: “[I]n no reported case has a court reviewed a delay this long without compelling action.” 314 F.3d 143, 152 (3d Cir. 2003) (emphasis added). Under any understanding of the obligations of an agency not to engage in “unreasonable delay,” EPA has tarried too long.