MEMORANDUM

TO: Metropolitan Washington Air Quality Committee

FROM: Lee Ruck

DATE: May 23, 2007

SUBJECT: Recent Air Quality Decisions in the Supreme Court

Last month the United States Supreme Court issued decisions concerning regulations under the Clean Air Act. These opinions have received substantial comment in the popular and trade media. At the Chair's request, I will attempt to briefly describe the legal issues and the Court's rationale and, perhaps, intimate possible future impacts.

Global Warming

The case which has received the greatest notoriety concerns global warming. In ***Massachusetts v. Environmental Protection Agency***, 127 S. Ct. 1438, 167 L. Ed. 2d 248, 2007 U.S. LEXIS 3785, 75 U.S.L.W. 4149 (April 2, 2007), a group of private organizations petitioned EPA to begin regulating the emissions of four "greenhouse gases," including carbon dioxide, under § 202(a)(1) of the Clean Air Act, which requires that the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator's] judgment causes, or contributes to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare." The Act defines "air pollutant" to include "any air pollution agent . . . , including any physical, chemical . . . substance . . . emitted into . . . the ambient air." EPA ultimately denied the petition, reasoning that (1) the Act does not authorize it to issue mandatory regulations to address global climate change, and (2) even if it had the authority to set greenhouse gas emission standards, it would have been unwise to do so at that time because a causal link between greenhouse gases and the increase in global surface air temperatures was not unequivocally established. The agency further characterized any EPA regulation of motor-vehicle emissions as a piecemeal approach to climate change that would conflict with the President's comprehensive approach involving additional support for technological innovation, the creation of non-regulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change, and might hamper the President's ability to persuade key developing nations to reduce emissions.

Petitioners, joined by intervenor Massachusetts and other state and local governments, sought review in the D. C. Circuit. Although each of the three judges on the panel wrote separately, two of them agreed that the EPA Administrator properly exercised his discretion in denying the rulemaking petition. One judge concluded that the Administrator's exercise of "judgment" as to whether a pollutant could "reasonably be anticipated to endanger public health or welfare," could be based on scientific

uncertainty as well as other factors, including the concern that unilateral U.S. regulation of motor-vehicle emissions could weaken efforts to reduce other countries' greenhouse gas emissions. The second judge opined that petitioners had failed to demonstrate the particularized injury to them that is necessary to establish standing under Article III, but accepted the contrary view as the law of the case and joined the judgment on the merits as the closest to that which he preferred. The court therefore denied review.

The Supreme Court first addressed the issue of standing, holding that the case suffers from none of the defects that would preclude it from being a justiciable Article III "Controversy." See, *e.g.*, Luther v. Borden, 48 U.S. 1, 7 How. 1, 12 L. Ed. 581. Moreover, the proper construction of a congressional statute is an eminently suitable question for federal-court resolution, and Congress has authorized precisely this type of challenge to EPA action. To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351. However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests," -- here, the right to challenge agency action unlawfully withheld -- "can assert that right without meeting all the normal standards for redressability and immediacy." Only one petitioner needs to have standing to authorize review. Massachusetts has a special position and interest here. It is a sovereign State and not, as in *Lujan*, a private individual, and it actually owns a great deal of the territory alleged to be affected. The sovereign prerogatives to force reductions in greenhouse gas emissions, to negotiate emissions treaties with developing countries, and (in some circumstances) to exercise the police power to reduce motor-vehicle emissions are now lodged in the Federal Government. Because congress has ordered EPA to protect Massachusetts (among others) by prescribing applicable standards and has given Massachusetts a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious, petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process. EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both "actual" and "imminent," and there is a "substantial likelihood that the judicial relief requested" will prompt EPA to take steps to reduce that risk.

The harms associated with climate change are serious and well recognized. The Government's own objective assessment of the relevant science and a strong consensus among qualified experts indicate that global warming threatens, *inter alia,* a precipitate rise in sea levels, severe and irreversible changes to natural ecosystems, a significant reduction in winter snowpack with direct and important economic consequences, and increases in the spread of disease and the ferocity of weather events. That these changes are widely shared does not minimize Massachusetts' interest in the outcome of this litigation. See FEC v. Akins, 524 U.S. 11, 24, 118 S. Ct. 1777, 141 L. Ed. 2d 10. According to petitioners' uncontested affidavits, global sea levels rose between 10 and 20 centimeters over the 20th century as a result of global warming and have already begun to swallow Massachusetts' coastal land. Remediation costs alone, moreover,

could reach hundreds of millions of dollars.

EPA failed to dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. Its refusal to regulate such emissions, at a minimum, "contributes" to Massachusetts' injuries. EPA overstates its case in arguing that its decision not to regulate contributes so insignificantly to petitioners' injuries that it cannot be hauled into federal court, and that there is no realistic possibility that the relief sought would mitigate global climate change and remedy petitioners' injuries, especially since predicted increases in emissions from China, India, and other developing nations will likely offset any marginal domestic decrease EPA regulation could bring about. Agencies, like legislatures, do not generally resolve massive problems in one fell swoop, but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed. That a first step might be tentative does not by itself negate federal court jurisdiction. Reducing domestic automobile emissions is hardly tentative. Leaving aside the other greenhouse gases, the record indicates that the U.S. transportation sector emits an enormous quantity of carbon dioxide into the atmosphere.

While regulating motor-vehicle emissions may not by itself *reverse* global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. See Larson v. Valente, 456 U.S. 228, 243, n. 15, 102 S. Ct. 1673, 72 L. Ed. 2d 33. Because of the enormous potential consequences, the fact that a remedy's effectiveness might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries are poised to substantially increase greenhouse gas emissions: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. The Court attached considerable significance to EPA's espoused belief that global climate change must be addressed.

Although an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review, there are key differences between non-enforcement and denials of rulemaking petitions that are, as in the present circumstances, expressly authorized. EPA concluded alternatively in its petition denial that it lacked authority to regulate new vehicle emissions because carbon dioxide is not an "air pollutant" under § 7602, and that, even if it possessed authority, it would decline to exercise it because regulation would conflict with other administration priorities. Because the Act expressly permits review of such an action, the Court "may reverse [it if it finds it to be] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Because greenhouse gases fit well within the Act's capacious definition of "air pollutant," EPA has statutory authority to regulate emission of such gases from new motor vehicles. That definition -- which includes "*any* air pollution agent . . . , including *any* physical, chemical, . . . substance . . . emitted into . . . the ambient air . . . ," -- embraces all airborne compounds of whatever stripe. Moreover, carbon dioxide and

other greenhouse gases are undoubtedly "physical [and] chemical . . . substances." EPA's reliance on post-enactment congressional actions and deliberations it views as tantamount to a command to refrain from regulating greenhouse gas emissions is unavailing. Even if post-enactment legislative history could shed light on the meaning of an otherwise unambiguous statute, EPA identifies nothing suggesting that Congress meant to curtail EPA's power to treat greenhouse gases as air pollutants. The Court found unpersuasive EPA's argument that its regulation of motor-vehicle carbon dioxide emissions would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to the Department of Transportation. The fact that DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public "health" and "welfare."

EPA's alternative basis for its decision -- that even if it has statutory authority to regulate greenhouse gases, it would be unwise to do so at this time -- rests on reasoning divorced from the statutory text. While the statute conditions EPA action on its formation of a "judgment," that judgment must relate to whether an air pollutant "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." Under the Act's clear terms, EPA can avoid promulgating regulations 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. It has refused to do so, offering instead a laundry list of reasons not to regulate, including the existence of voluntary Executive Branch programs providing a response to global warming and impairment of the President's ability to negotiate with developing nations to reduce emissions. These policy judgments have nothing to do with whether greenhouse gas emissions contribute to climate change and do not amount to a reasoned justification for declining to form a scientific judgment. EPA cannot avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment, it must say so.

EPA’s rejected the rulemaking petition based on impermissible considerations. Its action was therefore "arbitrary, capricious, or otherwise not in accordance with law." The Supreme Court therefore reversed and remanded the decision of the U.S. Court of Appeals. On remand EPA must regulate greenhouse gases or ground its inaction within the four corners of the Clean Air Act.

Within the Supreme Court's opinion are several key principles which will govern future litigation concerning global warming and climate change.

- The Court accepted the scientific nexus between greenhouse gases and global warming. Although the predominance of scientific opinion has supported this nexus, certain industries and the Administration have either rejected this relationship or have asserted that additional scientific investigation is necessary. This opinion accepts the nexus as a legal presumption. Just as the scientific

basis of radar (Doppler effect) must no longer be proved in speed cases, so future courts will be able to take judicial notice of this relationship and its scientific basis without expert testimony.

- The Court accepted the scientific predictions of future harm due to global warming (at least in terms of the rise of oceans). This permitted (or even required) it to grant standing to Massachusetts, which will lose coastal property or suffer damage to its interests on the shore. Future standing in global warming cases will probably be governed by the likelihood of future harm rather than existent injury or immediate threat.
- EPA must find its policy guidance in whether or not to regulate in the terms and concepts of the Clean Air Act, itself, not in policies expressed by other agencies or departments, or in their separate enabling or controlling legislation.

New Source Performance Standards

On the same day as the global warming case, the Supreme Court issued an opinion in ***Environmental Defense v. Duke Energy Corporation,*** 127 S. Ct. 1423, 167 L. Ed. 2d 295, 2007 U.S. LEXIS 3784, 75 U.S.L.W. 4167 (April 2, 2007), relating to New Source Review.

In the 1970s, Congress added two air pollution control schemes to the Clean Air Act (Act): New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD), each of which covers modified, as well as new, stationary sources of air pollution. The NSPS provisions define "modification" of such a source as a physical change to it, or a change in the method of its operation, that increases the amount of a pollutant discharged or emits a new one. The PSD provisions require a permit before a "major emitting facility" can be "constructed," and define such "construction" to include a "modification (as defined in [NSPS])," § 7479(2)(C). Despite this definitional identity, the EPA's regulations interpret "modification" one way for NSPS but differently for PSD. The NSPS regulations require a source to use the best available pollution-limiting technology, but the 1980 PSD regulations require a permit for a modification only when it is a "major" one, and only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years.

After respondent Duke Energy Corporation replaced or redesigned the workings of some of its coal-fired electric generating units, the United States filed this enforcement action, claiming, among other things, that Duke violated the PSD provisions by doing the work without permits. A number of environmental groups intervened as plaintiffs and filed a complaint charging similar violations. Duke moved for summary judgment, asserting, *inter alia*, that none of its projects was a "major modification" requiring a PSD permit because none increased hourly emissions rates. Agreeing, the District Court entered summary judgment for Duke on all PSD claims. The Fourth Circuit affirmed, reasoning that Congress's decision to create identical statutory definitions of "modification" in the Act's NSPS and PSD provisions affirmatively mandated that this term be interpreted identically in the regulations promulgated under those provisions. When the court *sua sponte* requested supplemental briefing on the relevance of the

Supreme Court's decision in Rowan Cos. v. United States, 452 U.S. 247, 250, 101 S. Ct. 2288, 68 L. Ed. 2d 814, that the Government could not adopt different interpretations of the word "wages" in different statutory provisions, plaintiffs injected a new issue into the case, arguing that a claim that the 1980 PSD regulation exceeded statutory authority would be an attack on the regulation's validity that could not be raised in an enforcement proceeding, since judicial review for validity can be obtained only by a petition to the District of Columbia Circuit, generally within 60 days of EPA's rulemaking. The Fourth Circuit rejected this argument, ruling that its interpretation did not invalidate the PSD regulations because they can be interpreted to require an increase in the hourly emissions rate as an element of a major "modification."

The Supreme Court vacated the lower court opinion, holding that the Fourth Circuit's reading of the PSD regulations in an effort to conform them with their NSPS counterparts on "modification" amounted to the invalidation of the PSD regulations Rather, the PSD regulations must comport with the Clean Air Act's limits on judicial review of EPA regulations for validity.

The Supreme Court's opinion is a relatively narrow decision holding that the principles of statutory interpretation do not rigidly mandate identical regulation. Most words have different shades of meaning and even when used more than once in the same statute it is possible to conclude that they were employed in different parts of the act with different intent. Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433, 52 S. Ct. 607, 76 L. Ed. 1204. A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different ways of implementation. The point is the same even when the terms share a common statutory definition, if it is general enough. See Robinson v. Shell Oil Co., 519 U.S. 337, 343-344, 117 S. Ct. 843, 136 L. Ed. 2d 808. It makes no difference here that the Clean Air Act does not merely repeat the same definition in its NSPS and PSD provisions, but that the PSD provisions refer back to the section defining "modification" for NSPS purposes. Nothing in the text or legislative history of the statutory amendment that added the NSPS cross-reference suggests that Congress meant to eliminate customary agency discretion to resolve questions about a statutory definition by looking to the surroundings in which the defined term appears. EPA's construction need do no more than fall within the outer limits of what is reasonable.

The Fourth Circuit's construction of the 1980 PSD regulations to conform them to their NSPS counterparts was not a permissible reading of their terms. The PSD regulations clearly do not define a "major modification" in terms of an increase in the "hourly emissions rate." On its face, the definitional section specifies no rate at all, hourly or annual, merely requiring a "physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any" regulated pollutant. But even when the regulations mention a rate, it is annual, not hourly. Further at odds with the idea that hourly rate is relevant is the mandate that "actual emissions shall be calculated using the unit's actual operating hours," since "actual emissions" must be measured in a manner looking to the number of hours the unit is or probably will be actually running. Consequently, the Court of Appeals'

construction of the 1980 PSD regulations must be seen as an implicit invalidation of those regulations, a form of judicial review implicating the provisions of § 7607(b), which limit challenges to the validity of a regulation during enforcement proceedings when such review "could have been obtained" in the Court of Appeals for the District of Columbia within 60 days of EPA rulemaking.

Duke's claim that, even assuming the Act and the 1980 regulations authorize EPA to construe a PSD "modification" as it has done, EPA has been inconsistent in its positions and is now retroactively targeting 20 years of accepted practice was not addressed below. To the extent the claim is not procedurally foreclosed, Duke may press it on remand.

- As a narrow and technical opinion, involving only the nature of judicial authority in review, this opinion does not necessarily portend an enforcement enhancement of the New Source Review provisions.

However, less than a month later, the Supreme Court denied *certiorari* in another New Source Review case. In New York v. EPA, 370 U.S. App. D.C. 239, 443 F.3d 880 (2006), the United States Court of Appeals for the District of Columbia invalidated a rule of the EPA exempting as “routine maintenance” a Clean Air Act provision requiring electric utilities to install pollution control equipment when undertaking certain modifications. EPA and the electric power sector asked the Supreme Court to reverse the lower court decision, urging that the industry be allowed to make important modifications without following NSR standards if the modifications did not exceed 20% of the replacement value of the specific units. ***Environmental Protection Agency v. New York,*** 2007 U.S. LEXIS 4708, 75 U.S.L.W. 3584 (April 30, 2007).

- Although the Supreme Court did not indicate why it refused to hear the case (the usual procedure in *certiorari* denials), when combined with the earlier decision in the *Duke Energy Case,* it is possible, perhaps even likely, that lower courts will look with disfavor on attempts to avoid, undercut, or limit the provisions of New Source Review.