Legal Opinion Letter

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# WILL EPA BE FORCED TO ISSUE CLIMATE CHANGE ENDANGERMENT FINDING?

by
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On April 2, 2008, exactly one year after the landmark U.S. Supreme Court decision in *Massachusetts v. EPA*, twelve states, supported by an additional five states as *amicus curiae*, as well as the District of Columbia, the cities of New York and Baltimore, and a number of environmental organizations, filed a petition for mandamus with the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") seeking to compel the U.S. Environmental Protection Agency ("EPA" or the "Agency") to act on remand within sixty days. In *Massachusetts*, the Supreme Court found that greenhouse gases ("GHGs") are "pollutants" under the Clean Air Act ("CAA"); that EPA must determine whether GHGs emitted from new motor vehicles do or do not endanger public health or welfare, or supply a reason for not making this determination; and that, if EPA makes an "endangerment finding," it must issue regulations.

The *Massachusetts* decision set no deadline for EPA action, and the mandate to the Agency on remand from the D.C. Circuit was not issued until September 14, 2007. EPA, however, was widely expected to respond to the remand in December of last year with a proposed endangerment finding and a regulatory proposal, in time for the Agency to finalize both by the end of the current Administration.

The Agency, however, did not take action, citing enactment of the Energy Independence and Security Act ("EISA") on December 19, 2007. According to EPA, EISA's strengthened corporate average fuel economy and renewable fuel standards for automobiles accomplishes much of the agenda the Agency might otherwise have implemented to reduce motor vehicle GHG emissions if it made an endangerment finding and regulated in response to the *Massachusetts v. EPA* remand. EPA also stated that EISA implemented the President's objective of reducing gasoline usage by twenty percent in ten years, the objective that had animated EPA's desire to finalize motor vehicle GHG emission standards by the end of the Administration. EPA further stated that it did not proceed with a proposed endangerment finding and regulations because, in the words of EPA Administrator Stephen Johnson, "[a] decision to control GHG emissions from motor vehicles would impact other Clean Air Act programs with potentially far-reaching implications for many industrial sectors."

EPA recognizes that, the EISA notwithstanding, it must eventually respond to the Supreme Court mandate. The Agency has announced that, at some point this Spring, it will issue an Advance

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Notice of Proposed Rulemaking (ANPR) seeking comment on a wide variety of potential GHG regulatory issues, including how best to respond to the mandate. EPA's decision to issue an ANPR makes it highly unlikely that EPA will take final action on GHG regulation in the current Administration.

Seeking to force that result through the legal process, Petitioners argue in their mandamus petition that the D.C. Circuit "has the power to grant relief enforcing the terms of its mandates in cases that have been remanded directly to an administrative agency, including the power to compel an unreasonably delayed agency response to the Court's mandate." Citing the "TRAC" test for unreasonable delay in the D.C. Circuit, *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("*TRAC*"), Petitioners argue, "[e]very potential justification for inaction recognized by *TRAC* is unavailable to the EPA Administrator in this case." The TRAC factors a court should consider in determining unreasonable delay are: (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) the statutory scheme may supply content for the rule of reason; (3) delay is less tolerable when human health and welfare is at stake; (4) the effect that expediting delayed action may have on the agency's competing priorities; (5) the nature and extent of interests prejudiced by delay; and, (6) the court need not find impropriety to find unreasonable delay. *In re American Rivers*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citing *TRAC*, 750 F2d at 80). In arguing that EPA is not acting under the rule of reason, Petitioners claim that the Agency has already completed all necessary work required to make its endangerment finding. They argue that, even though the D.C. Circuit mandate was only issued last September, mandamus is appropriate because human health and welfare are at stake and delay is causing significant harm to the public.

Notably, Petitioners seem to argue that EPA should be compelled to actually make an endangerment finding, not merely to decide whether endangerment does or does not exist. Although the conclusory paragraph of the Petition seems to indicate that the court is only being asked to compel EPA to make a decision on endangerment either way, Petitioners' central argument as to why EPA has unreasonably delayed and should be compelled to act within sixty days is based on the assertion that EPA has a final endangerment finding already prepared. Petitioners seem to be asking the court to compel EPA to issue that finding. As Petitioners state, "[s]ixty days is more than enough time for EPA to issue a document it has already prepared." However, since the Supreme Court did not order EPA to make an endangerment finding – only to decide the endangerment issue or explain why it cannot – the chances of obtaining a court-ordered endangerment finding, if that is what Petitioners truly seek, seem slim. Indeed, in a little reported recent case from the Northern District of California, Judge Charles Breyer dismissed a lawsuit that only sought to compel EPA to decide the endangerment question either way on remand of *Massachusetts*. *Philip Randolph Institute v. EPA*, 2008 U.S. Dist. LEXIS 27794 (N.D. Ca. 2008).

D.C. Circuit rules prohibit responses to mandamus petitions except on order of the court. On April 18, the Court ordered EPA to file a response within twenty days.

The petition for mandamus was filed the same day that the House Select Committee on Energy Independence and Global Warming subpoenaed EPA's draft endangerment finding and regulatory proposal that the Agency, pre-EISA, may have intended to issue last December. One day later, Sens. Dianne Feinstein (D-Calif.) and Olympia Snowe (R-Maine) introduced legislation that would force the Agency to issue its endangerment finding within 60 days. Three congressional committees have held hearings to demand EPA action. The Agency thus faces pressure from many angles. Whether EPA will be forced to issue an endangerment finding before the end of the Bush Administration's term remains to be seen.



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