Legal Opinion Letter

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COURT REJECTS ACTIVISTS' SUIT TO FORCE FEDERAL CO_2 LIMITS

by
Peter S. Glaser

On July 15, 2005, the U.S. Court of Appeals for the D.C. Circuit denied a petition for review brought by a group of states and environmental organizations seeking to compel the U.S. Environmental Protection Agency (EPA) to regulate carbon dioxide and other greenhouse gas (GHG) emissions under Title II of the Clean Air Act (CAA). *Massachusetts v. Environmental Protection Agency*, No. 03-1361 *et al.* (D.C. Cir. July 15, 2005). The Court in *Massachusetts* reviewed an EPA decision denying a petition by environmental organizations that sought agency regulation of GHG emissions from new motor vehicles. EPA ruled that it did not have authority to regulate GHG emissions under the CAA and, even if it did, EPA would decline to exercise that authority on scientific and policy grounds. Although the environmental organizations' petition to EPA and the resulting court action directly concerned only new motor vehicle emissions, it was widely understood that the petition and court action potentially implicated GHG regulation of all significant sources.

All three judges on the three-judge panel issued separate opinions. In the lead opinion by Judge Randolph, the court denied the petitions for review. Despite extensive briefing by the parties as to whether the CAA confers authority on EPA to regulate GHG for the purposes of addressing global climate change, Judge Randolph explicitly declined to address this issue. Instead, his opinion concluded that, even if the CAA authorized EPA to regulate GHG emissions, EPA correctly exercised its policy judgment to decline to do so.

Judge Randolph relied on Section 202(a)(1) of the CAA, which directs the EPA Administrator to regulate motor vehicle tailpipe emissions if "in his judgment" such emissions "may reasonably be anticipated to endanger public health or welfare." Judge Randolph found that EPA appropriately concluded there is too much "scientific uncertainty" to make this judgment. Judge Randolph relied extensively in this regard on the National Research Council's 2001 *Climate Change Science: An Analysis of Some of the Key Questions*, which is the principle scientific document on which EPA relied. Slip op. at 10-13.

Additionally, citing *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), Judge Randolph ruled that EPA appropriately relied on non-science "policy judgments" in determining not to regulate GHG emissions under Section 202(a)(1). He cited EPA's conclusions that new motor vehicles are only one of

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Peter S. Glaser is a partner at Troutman Sanders LLP in the firm's Washington, D.C. office.

many sources of GHG emissions; that unilateral U.S. GHG efforts might undermine international efforts; that the Administration was pursuing a GHG program, including voluntary efforts and technology-promotion; and that the Department of Transportation was pursuing fuel efficiency standards. *Id*. at 13-15.

Judge Randolph's opinion noted that petitioners alleged they had standing based on affidavits asserting that motor vehicle tailpipe emissions were causing dangerous global warming which in turn created various harms to petitioners. Judge Randolph also noted, however, that these assertions were disputed in the record by EPA's findings regarding the uncertainties of global warming science. While recognizing that courts normally must resolve standing issues before proceeding to the merits, Judge Randolph concluded that in this instance he would reverse the normal order, given the overlap between the standing inquiry and the merits inquiry. *Id* at 7-10.

In a concurring opinion, Judge Sentelle opined that he would have dismissed the case on the ground of standing. He concluded that the injury petitioners asserted from motor vehicle GHG emissions was general (global warming) and not individual and particular as required for standing. Judge Sentelle recognized that his decision created a "slight problem" in that he would *dismiss* the petitions for lack of jurisdiction (*i.e.*, standing) whereas Judge Randolph would *deny* the petitions on the merits. He resolved this problem by accepting as the law of the case the decision of both Judge Randolph and Judge Tatel in dissent that the court had jurisdiction to decide the petitions on the merits (while disagreeing with that decision). He then "join[ed] Judge Randolph in the issuance of a judgment closest to that which I myself would issue," citing a similar resolution in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

In a lengthy dissent, Judge Tatel concluded that (1) at least one petitioner (Massachusetts) had standing because it would suffer specific coastal erosion injury; (2) EPA does have authority under the CAA to regulate GHG emissions; and (3) EPA erred by relying on non-scientific factors in determining whether to exercise its "judgment" in regulating GHG emissions.

Given the three separate opinions, it is not surprising that a petition for rehearing *en banc* in the D.C. Circuit has been filed, although it is somewhat surprising that only some of the state petitioners and none of the environmental organization petitioners joined the rehearing petition. All the petitioners will certainly consider a petition for *certiorari* in the Supreme Court if rehearing is denied. While petitioners plainly suffered a defeat in their efforts to mandate GHG regulation under the CAA, the court left open the central question of whether the CAA may be used as a vehicle to compel GHG emission reductions. That question first became a matter of public debate when then EPA Administrator Carol Browner first asserted authority to mandate GHG reduction under the CAA in 1998 Congressional testimony. It is a critical question in the GHG debate because an affirmative answer means GHG regulation could be implemented administratively without Congress enacting further legislation or the U.S. entering into the Kyoto Protocol. On this question, the debate continues.

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