

BRIEFING AND ORAL ARGUMENT NOT YET SCHEDULED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT FILING DEPOSITORY

STATE OF NEW YORK, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

Case No. 06-1322

MOTION GOVERNING FURTHER PROCEEDINGS

Petitioners the States of New York, California, Connecticut, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York and Environmental Defense, Sierra Club, and Natural Resources Defense Council, and the Intervenor States of Delaware and Washington (collectively "State/Environmental Petitioners"), hereby submit this motion as required by this Court's September 13, 2006 order in Case No. 06-1131 (and consolidated cases).

Petitioners respectfully move this Court to: (i) summarily reverse and vacate the decision made by Respondents United States Environmental Protection Agency and Stephen L. Johnson, Administrator (collectively "EPA") that EPA does not have the authority under the Clean Air Act to regulate carbon dioxide ("CO₂") and other greenhouse gas emissions; and (ii) remand this matter to EPA for further proceedings consistent with the Supreme Court's decision in Massachusetts v. EPA, 127 S.Ct. 1438 (2007).

In support of the motion, the State/Environmental Petitioners state:

1. Section 111 of the Clean Air Act, 42 U.S.C. § 7411, requires EPA to set performance standards applicable to new sources of air pollution (“NSPS”). Under Section 111(b)(1)(A), EPA must adopt performance standards for each category of sources that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Section 111(a)(1) requires the standards to “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated.” Section 111(b)(1)(B) of the Act requires EPA to “at least every 8 years, review and, if appropriate, revise such [standards] following the procedures required by this subsection.”

2. EPA promulgated new source performance standards for utility and industrial steam boilers entitled “Standards of Performance for Electric Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Rule”).¹

3. During the public comment period on the proposed Rule, several State Attorneys General and environmental organizations, including State/Environmental Petitioners, submitted written comments requesting, *inter alia*, that EPA establish emission limits for carbon dioxide (CO₂) from power plants as part of this rulemaking. In the final Rule, however, EPA declined to set a standard for power plant emissions of CO₂. The sole basis EPA expressed for its decision was the statement that it does not have authority under the Act to regulate CO₂. See, e.g., 71 Fed. Reg. 9869 (EPA “does not presently have the authority to set NSPS to regulate CO₂ or other

¹ EPA acted under a consent decree settling a lawsuit over its failure to complete the eight-year review required by Section 111(b)(1)(B). See consent decree in *Our Children’s Earth Foundation v. EPA*, Civ No. 03-0770 CW (N.D. Cal.), entered February 9, 2004.

greenhouse gases that contribute to global climate change”). EPA expressed no other reasons for refusing to adopt a standard for CO₂ emissions.

4. In April 2006, the State/Environmental Petitioners challenged EPA’s final action refusing to set a standard for power plant CO₂ emissions.

5. After the Supreme Court granted certiorari in Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (Jun. 26, 2006), the State/Environmental Petitioners and EPA jointly moved this Court to sever the CO₂ issue raised in the consolidated cases, assign that issue its own case name and number, and hold it in abeyance pending action by the Supreme Court in Massachusetts v. EPA. The Court granted this joint motion on September 13, 2006, and docketed the challenge on the CO₂ issue as New York v. EPA, Case No. 06-1322. The Court ordered the parties to file motions to govern further proceedings within 30 days of the Supreme Court’s decision in Massachusetts v. EPA.

6. On April 2, 2007, the Supreme Court issued its decision in Massachusetts v. EPA, 127 S.Ct. 1438 (Apr. 2, 2007). The Supreme Court first held that EPA has the clear legal authority to regulate CO₂ and other greenhouse gases as “air pollutants” under the CAA: “Because greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’ we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.” Id. at 1462. The Court also noted that adverse effects on “welfare” include adverse effects on “climate.” Id. Second, the Court held that EPA must regulate those emissions unless “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.” Id.

7. Pursuant to 42 U.S.C. § 7607(d)(9), this Court may “reverse” any action by EPA found to be “arbitrary, capricious, . . . or otherwise not in accordance with law.”

8. The statutory definitions of “air pollutant” and “welfare” that govern EPA’s authority to regulate CO₂ emissions from motor vehicles, at issue in Massachusetts v. EPA, apply for all purposes under the Clean Air Act and are therefore applicable to the NSPS program. See 42 U.S.C. §§ 7602(g) and (h). Because the Supreme Court has rejected as a matter of law EPA’s claim that it lacks authority under the Clean Air Act to regulate CO₂ emissions, and because that is the only basis upon which EPA relied in deciding not to set a standard for power plant CO₂ emissions under Section 111 of the Act, EPA’s determination at issue in this case is arbitrary, capricious, or otherwise not in accordance with law.

9. Therefore, this Court should reverse and vacate EPA’s determination that it does not presently have authority to regulate CO₂ emissions under Section 111 of the Clean Air Act and remand the Rule to EPA for action consistent with the Supreme Court’s decision in Massachusetts v. EPA.

Dated: May 2, 2007

Respectfully submitted,

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I hereby certify that I have served the foregoing **MOTION GOVERNING FURTHER PROCEEDINGS** by sending a copy via First Class Mail to each of the following addresses on this Wednesday, May 02, 2007:

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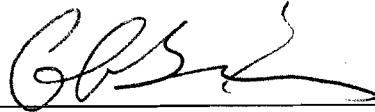
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A handwritten signature in black ink, appearing to read 'Colin G. Dixon', written over a horizontal line.

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