

# One Minute Memo™



## United States Supreme Court Greenhouse Gas Decision

In a decision issued Monday, April 2, 2007, the United States Supreme Court held that the United States Environmental Protection Agency (U.S. EPA) has the authority to regulate greenhouse gases, including carbon dioxide, and was arbitrary and capricious in declining to do so. A group of private environmental organizations petitioned the U.S. EPA in 1999, asking it to regulate greenhouse gas emissions from new motor vehicles, pursuant to U.S. EPA's authority under § 202 of the Clean Air Act. In 2003, U.S. EPA declined, saying that the Clean Air Act does not authorize U.S. EPA to issue regulations to address global climate change, and, even if it did, U.S. EPA declined to do so. The U.S. Supreme Court disagreed.

Briefly, the Supreme Court noted that the Clean Air Act includes a sweeping definition of "air pollutant" that encompasses carbon dioxide and other greenhouse gases. The Court also noted that Congress's failure to date to enact mandatory limitations on greenhouse gases in no way barred U.S. EPA from regulating such compounds. The Court further noted that U.S. EPA General Counsels had twice taken the contrary position that U.S. EPA did, in fact, have the authority to regulate greenhouse gases.

Having decided that U.S. EPA wrongly concluded that greenhouse gases were not "air pollutants," the Court next held that U.S. EPA abused its discretion by declining to regulate greenhouse gases. According to the Court, U.S. EPA has an obligation to consider whether any air pollutant endangers or may reasonably be anticipated to endanger public health or welfare. If the air pollutant does endanger public health or welfare, U.S. EPA must either regulate it or provide a reasonable explanation as to why it cannot or will not exercise its authority. In this case, the Court held that U.S. EPA had offered no reasonable explanation for its failure to regulate greenhouse gases.

Although the Court did not hold that greenhouse gases endanger public health or welfare, it cited numerous uncontroverted scientific studies and reports that have reached that conclusion. The Court concluded that the U.S. EPA must consider whether greenhouse gases endanger public health or welfare, and, if not, it must provide a reasonable basis for its decision.

The Supreme Court's decision is likely to accelerate national legislative efforts to regulate and reduce greenhouse gases. Currently, California, Oregon, Washington, New York, Pennsylvania, New Jersey, Massachusetts, Rhode Island, Vermont, and Maine have

statutes regulating greenhouse gases, although some, notably California's, are currently subject to challenge in court. Because piecemeal regulation by the states is the worst of all possible worlds for automakers, industry executives have already expressed willingness to work with legislators and others on a "cap and trade" program for reducing emissions.

Although the *Massachusetts v. U.S. EPA* decision involves only the discharge of greenhouse gases from new motor vehicles, the decision is likely to influence other pending cases seeking to compel U.S. EPA to regulate greenhouse gases from other sources. Further, the Supreme Court's 9-0 decision in *Environmental Defense v. Duke Energy* (affirming U.S. EPA's use of annual, as opposed to hourly, emissions in determining whether an air pollution source was "major" for purposes of Prevention of Significant Deterioration rules), issued the same day, is likely to put the power industry under considerable pressure to retrofit or build new plants or buy power from alternate energy providers to accommodate less polluting fuels.

*If you have questions or would like additional information on this decision, please contact the Seyfarth Shaw attorney with whom you work or any member of the Environmental Group listed on our website [www.seyfarth.com](http://www.seyfarth.com).*

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