SUPREME COURT ROUNDUP

PIVOTAL CASES FOR THE CLEAN AIR ACT

How greenhouse gases and Best Available Control Technology could shape the regulatory landscape—and the environment.

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Illustration by Hal Sherrerd

The United States Supreme Court soon will decide two Clean Air Act (CAA) cases important to electric utilities: *Environmental Defense v. Duke Energy Corp.* (Duke Energy) and *Massachusetts v. EPA* (Massachusetts). The cases concern, respectively, a long-standing controversy over traditional pollutants and the issue of climate change.

Duke Energy is an enforcement case in which the Environmental Protection Agency (EPA) claimed that Duke Energy Corp. violated "Prevention of Significant Deterioration" (PSD) regulations through refurbishment projects that allegedly increased annual utilization of the plant, which the EPA says required a permit and installation of Best Available Control Technology (BACT). The court of appeals rejected EPA's enforcement claims, cutting through what most likely has been the most controversial and longstanding regulatory battle under the CAA. *Massachusetts* is a regulatory challenge to EPA's decision not to regulate emissions of greenhouse gases (GHGs) from motor vehicles under the CAA. Regulation of GHGs has taken center stage among environmental, political and legal battles.

In addition to these substantive questions concerning EPA's regulatory power, both cases raise critical threshold "jurisdictional" questions about the courts' role in addressing them. *Duke Energy* highlights the threshold question of whether the court of appeals even had the authority in an enforcement case to consider Congress' intent in interpreting EPA's regulations, or whether that kind of analysis could have been addressed only in a facial challenge to EPA's regulations before the District of Columbia Circuit Court of Appeals. In *Massachusetts*, the threshold question is whether the state challenging EPA's decision could show a sufficiently definite injury resulting from the decision not to regulate greenhouse gases so as to create a "case or controversy" that could be brought to court at all. These jurisdictional questions, though legalistic, might well be the only issue the court will address in either case, and could alter the role of courts in future similar disputes.

Environmental Defense v. Duke Energy Corp.

One objective of the CAA is to ensure that, when new plants are built, they are equipped with the best current technology, so that as industrial stock turns over or is refitted, lower-emissions technology gradually replaces higher-emissions equipment, thereby improving air quality, even in areas meeting national ambient air quality standards.[1] The CAA attempts to balance this objective against economic considerations by limiting requirements to obtain a PSD permit and install BACT controls to the time that plants are constructed or modified.

The controversy is about what constitutes a "modification" of an existing facility triggering the requirements for purposes of PSD. In codifying the PSD program in the 1977 amendments to the CAA, Congress defined "modification" for PSD purposes by incorporating by reference a pre-existing definition in the New Source Performance Standards (NSPS) program, which provides that a modification is a physical change in the plant that increases emissions.[2] Under the NSPS program, dating from the 1970 CAA,[3] the EPA has adopted best-demonstrated technology standards for new and modified sources in various source categories, regardless of where those sources are located.[4] Under that program, EPA's regulations defined the emissions increase required to trigger the NSPS for an existing source as an increase in maximum emissions capacity on an hourly basis.[5] Hence, changes affecting plant availability and reliability but not changing hourly capacity would not trigger the NSPS.

At issue in *Duke Energy* is whether EPA's definition of "modification" for PSD purposes is different, triggering the requirement to install BACT when there is an expansion of an existing plant's utilization over an annual period, such as by improvements in reliability and availability, or whether there also must be an expansion in the existing plant's hourly emissions capacity, such as through a true production expansion.[6] Emissions of principal concern include nitrogen oxide, implicated in contributions to ozone smog pollution far downwind, as well as formation of fine particulate matter, and sulfur dioxide, which raises concerns over health effects and with respect to formation of fine particulates and acid rain.[7]

Facts and History

Duke Energy originated in December 2000 with an enforcement action in the United States District Court for the Middle District of North Carolina.[8] Duke had undertaken a project to refurbish equipment, enabling it to increase plant utilization and extend its hours of operation.[9] Longer running hours also increased annual emissions, though the hourly rate of emissions remained constant.[10] As a result, EPA argued that Duke had "modified" its plants, triggering PSD permitting requirements.[11] Duke claimed (among other things), that the projects—installing new but comparable equipment with identical hourly emissions rates—did not cause an increase in emissions because the regulations, based on the NSPS defini-

tion, required an increase in hourly capacity, not merely an increase in hours of operation.[12]

The United States Court of Appeals for the Fourth Circuit agreed with Duke.[13] Relying substantially on a 1981 Supreme Court decision,[14] the Fourth Circuit held that, "when Congress itself [has] provided 'substantially identical' statutory definitions of a term in different statutes, the agency charged with enforcing the statutes [cannot] interpret the statutory definitions 'differently.'"[15] The court reasoned that, because Congress provided that the definition of "modification" was incorporated by reference from NSPS to PSD, the regulatory interpretation of the term "increase" under PSD had to be the same as the definition EPA adopted for NSPS.[16] The court then said it had no choice but to conclude that the hourly rate of emissions, not annual emissions, must be the relevant metric under both programs.[17] Because Duke's projects had not increased the hourly rate of emissions, the Fourth Circuit held that the district court had correctly resolved the case in Duke's favor.[18]

The *New York* and *Cinergy* Decisions

After the Fourth Circuit's decision, two other U.S. courts of appeals reached conclusions that are in tension with, or which contradict, the *Duke Energy* decision. First, just days after the Fourth Circuit's decision, the D.C. Circuit resolved a challenge to the validity of the PSD rules in *New York v. EPA*.[19] In addition to addressing revisions to those rules that EPA had adopted in 2002,[20] the D.C. Circuit addressed an issue that previously was raised in a challenge to the 1980 rules and had been held in abeyance for the past 25 years. Specifically, industry had raised a concern about the emissions increase aspect of the definition of "modification" back in 1980, but suspended its challenge pending an EPA agreement to revisit that issue in further rulemaking.[21]

EPA finally resolved the issue in the 2002 rule, deciding to stick with its definition based on annual emissions;[22] the D.C. Circuit subsequently allowed industry to revive its challenge.[23] In considering that challenge, the D.C. Circuit decided that EPA had not actually adopted the existing NSPS definition of "modification" for PSD purposes.[24] As to the Fourth Circuit's holding just days before in *Duke Energy*—that Congress required the regulatory definitions to be the same—the D.C. Circuit held that industry had waived that argument, and so upheld EPA's rules as valid.[25]

United States v. Cinergy Corp., an enforcement case similar to *Duke Energy*, was certified for appeal to the United States Court of Appeals for the Seventh Circuit in October 2005.[26] In an August 2006 decision, the Seventh Circuit held that the Fourth Circuit ruled incorrectly in *Duke Energy*,[27] thus creating a clear split between the courts of appeals. Specifically, the Seventh Circuit found that EPA is free to adopt different emissions increase tests for the definition of "modification," even if the statutory PSD definition cross-references the NSPS definition.[28] Moreover, the Seventh Circuit found that reliance on an the statutory cross-reference was beyond the power of the courts of appeals to consider because it involved the validity of EPA's rules, an issue reserved only to the D.C. Circuit.[29]

The Supreme Court's Review

In December 2005, Environmental Defense, an advocacy group that had intervened in the *Duke Energy* case on EPA's side, petitioned the Supreme Court for review. (EPA actually opposed such review.) The Supreme Court has certified two questions it will consider: (1) whether the CAA's "definition of 'modification,' which turns on whether there is an 'increase' in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD 'increases' by reference to actual, annual emissions"; and (2) whether the D.C. Circuit has exclusive jurisdiction over the issue.[30]

What Constitutes a Modification?

In its brief, EPA argues that the Fourth Circuit erred in ruling that the EPA lacks discretion to apply a regulatory test for PSD "modification" that differs from the NSPS test.[31] EPA contends that Congress had distinct purposes for NSPS and NSR.[32] EPA's divergent tests for "modification," it argues, effectuate this intent.[33] EPA further argues that the Fourth Circuit erred in holding that Congress' cross-reference in the PSD definition of "modification" to the NSPS requires that EPA adopt identical regulatory tests for determining what is an "emissions increase" for the two programs.[34] "Congress's repeated use of an ambiguous term," the government argues, "reflects a repeated delegation, not a command of parity."[35, 36]

Duke reiterates the arguments it advanced to the Fourth Circuit that EPA historically intended its regulations to apply a consistent test. Specifically, Duke argues under the "plain language" of both NSPS and NSR, a project is a "modification" only if it causes an increase in a unit's basic emissions capacity, as measured by its hourly emissions rate, and that EPA engaged in an erroneous "reinterpretation" of the rules that is inconsistent with Congress' intent.[37]

Jurisdiction

Before deciding who is right about the meaning of EPA's definitions of "modification," the Supreme Court first must consider whether the Fourth Circuit properly had authority to consider Congress' intent in the context on an enforcement action. EPA argues that the Fourth Circuit (and the Supreme

Court in the *Duke Energy* case) does not have the power to consider that issue, because the CAA requires that it be considered only in a challenge to the validity of the rule itself, such as occurred in the *New York* case.[38]

EPA bases its claim that the lower courts lacked jurisdiction[39] on Section 307 of the CAA, which provides that any petition for review of regulations promulgated under the CAA must be filed in the D.C. Circuit within 60 days of notice in the *Federal Register*.[40] Section 307 further specifies that regulations are not "subject to judicial review in civil or criminal proceedings for enforcement" if such review "could have been obtained" under the first provision.[41] EPA contends that although the Fourth Circuit framed its decision as an "interpretation" of NSR regulations, the ruling actually affected the validity of the regulation and therefore "could have been" heard by the D.C. Circuit.[42] Moreover, the EPA argues that the express purpose of the jurisdictional provision is to prevent the inconsistent results that follow from *Duke Energy* and *New York*.[43]

In contrast, Duke claims that, in this case, there was no EPA action that could have been resolved in a challenge to the rule because Duke was objecting only to EPA's interpretation of the NSR rules, not to the validity of the rules themselves.[44] Duke further claims that it could not have challenged EPA's enforcement position facially at the time the rules were issued because EPA did not then interpret the rules then the way it does now.[45] Rather, Duke argues that EPA originally interpreted the emissions test for PSD to require an hourly emissions rate increase, just like the NSPS emissions test, and only at the time of the enforcement cases in the late 1990s did EPA announce its new position.[46] Indeed, Duke argues, had they filed such a petition challenging the rules in 1980, it would have been dismissed as "unripe."[47] As a result, Duke urges, EPA is "essentially … seeking a ruling that its enforcement position is insulated from review altogether," since its *Duke Energy* position was "not articulated until decades after the time for challenging the [NSR rules] had expired."[48] In light of the civil and criminal penalties that can result from a PSD violation, Duke argues, "this Catch-22 contravenes fundamental fairness, as well as a presumption that agency decisions are subject to judicial review."[49]

In light of EPA's change in policy since the institution of this enforcement action, it is unclear whether resolution of the substantive question will lead to an immediate change in EPA's enforcement approach.

What Is at Stake?

Whether decided on procedural or substantive grounds, this case has important implications for the regulated community. If decided on procedural grounds, this case could heighten the importance of pre-enforcement review of CAA regulations. The court could decide that the D.C. Circuit had exclusive jurisdiction over the interpretive question at issue under section 307 pre-enforcement review procedures, and that, by failing to challenge EPA's interpretation through the procedures allowed under section 307, Duke waived the opportunity to do so. Thus, this case could put the regulated community on notice to pay careful attention to new interpretations of regulations and policies as they are issued because a Section 307 challenge could be the only avenue for review.

If the court holds that the Fourth Circuit acted within its authority, it will then have to address the substantive split between *Duke Power* and *Cinergy*, and also consider the tension with the D.C. Circuit's decision in *New York*. This ultimately is a potential morass involving nearly 30 years of regulatory implementation and interpretation. In light of EPA's change in policy since the institution of this enforcement action, it is unclear whether resolution of the substantive question—the interpretation of "increase" under PSD—will lead to an immediate change in EPA's enforcement approach. Nonetheless, it could provide important guidance to both the agency and the entities it regulates with respect to the proper interpretation of this and other provisions going forward.

Massachusetts v. EPA

Massachusetts concerns EPA's denial of a petition to regulate certain GHGs from motor vehicles pursuant to section 202(a)(1) of the CAA.[50,51] In its notice of denial, EPA concluded that it "[could] not and [should] not regulate GHG emissions from U.S. motor vehicles under the CAA" based on several factors:[52]

1. EPA lacks authority to so regulate under the CAA;[53]
2. Regulation would impermissibly interfere with Department of Transportation fuel-economy standards;[54]
3. EPA's has *discretionary* authority to address emissions;[55] and
4. Lack of a evidence of a "causal linkage" between GHGs and climate change.[56]

Pursuant to section 307(b)(1) of the CAA, petitioners chal-

lenged the denial in the D.C. Circuit.[57] Of note, the D.C. Circuit reserved the question of petitioners' standing. Specifically, the D.C. Circuit could not resolve whether the petitioning states sufficiently could establish some injury to themselves flowing from EPA's refusal to regulate GHGs from automobiles, which injury could be redressed by the court's decision.[58] Without such an injury, the court under Article III of the United States Constitution lacks a "case or controversy" that it can decide.[59] Rather than resolving that issue, however, the D.C. Circuit chose to proceed on the merits with respect to EPA's decision not to regulate.[60]

The D.C. Circuit then "assume[d] arguendo that EPA [had] statutory authority to regulate [GHGs] from new motor vehicles" and considered only whether EPA "properly declined to exercise that authority."[61] The court, relying on *Ethyl Corp. v. EPA*,[62] explained that the EPA administrator has considerable discretion to make a judgment about whether to regulate, and his decision whether or not to do so may be based on scientific evidence as well as policy judgments.[63] The court concluded that EPA's analysis, as articulated in the notice of denial, was "entirely consistent with" *Ethyl Corp.* and, therefore, EPA's denial was proper.[64, 65]

The Supreme Court's Review

On March 2, 2006, the petitioning states sought Supreme Court review, arguing that the decision of the D.C. Circuit was "an extreme departure from [the Supreme Court's] precedents on statutory interpretation," since EPA "rewrote [Section 202(a)(1) of the CAA] to justify its decision."[66] The court granted review with respect to two questions: (1) whether the EPA administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in Section 202(a)(1) of the CAA; and (2) whether the EPA administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under Section 202(a)(1) of the CAA.[67] The D.C. Circuit had not reached or addressed the second question.

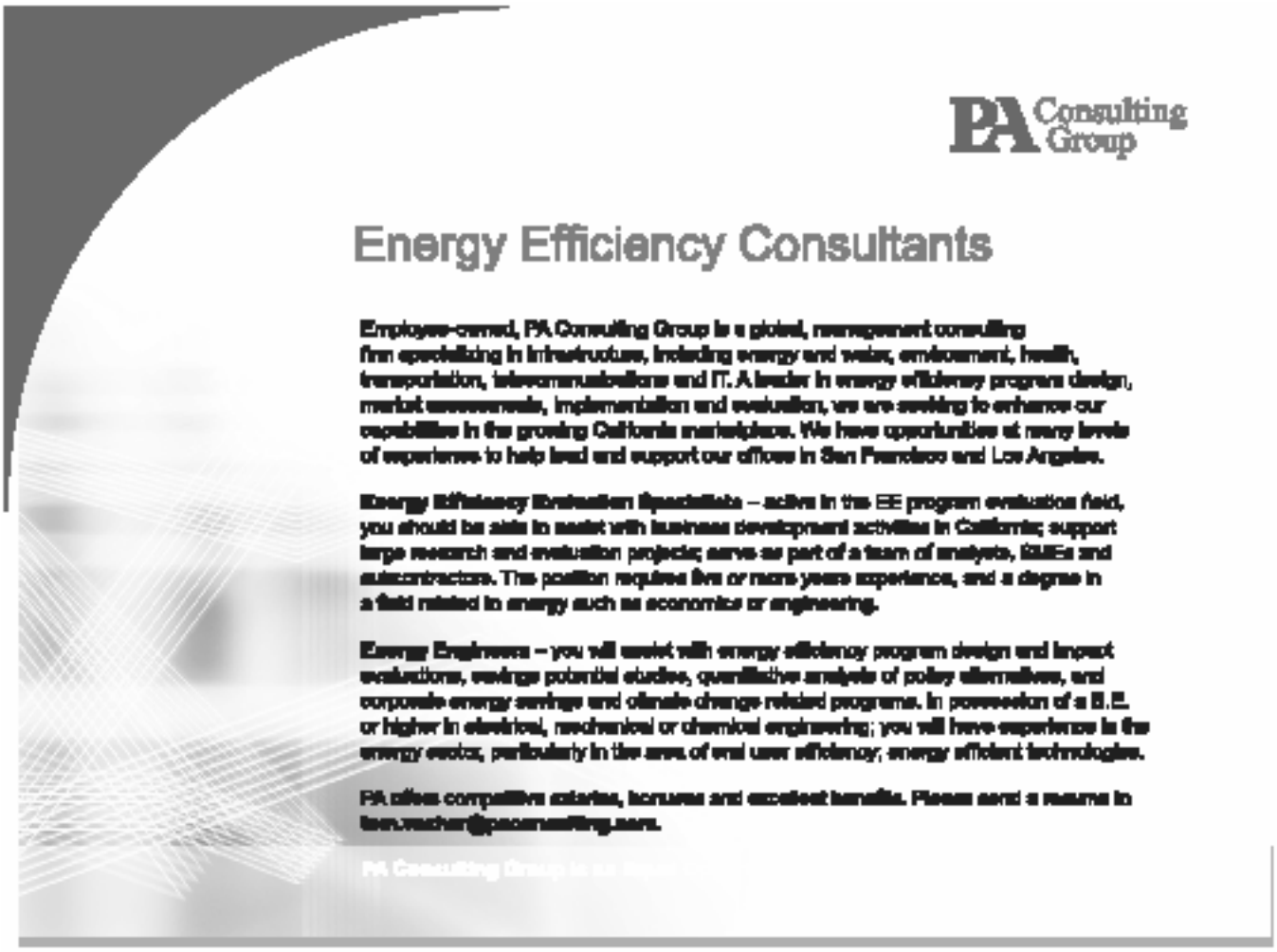
Climate-Change Authority Issues

In support of their claim that the EPA administrator is required to issue emission standards for motor vehicles, the states set fourth three arguments.[68] First, they argue that the only relevant factor under section 202(a)(1) is whether air pollution from motor vehicles "may reasonably be anticipated to endanger the public health or welfare."[69] Petitioners argue that Congress intended for any endangerment to trigger regulation under the CAA, as evidenced by the fact that, in numerous other provisions of the CAA, Congress "carefully specified which factors are relevant, and which are not, to various agency decisions under the [CAA]."[70] EPA and the D.C. Circuit, the states argue, "strayed from this well-marked path" by "invok[ing] a mélange of factors not mentioned" in section 202(a)(1) as the basis for EPA's decision not to regulate.[71] Petitioners next argue that, even if section 202(a)(1) "did not so plainly rule out consideration of factors other than endangerment in the initial decision whether to regulate emissions," the three policy judgments cited by EPA in declining to regulate GHGs were either irrelevant under section 202(a)(1) or ignored the statutory endangerment standard."[72] According to the states, two of these judgments—that regulation would "result in an inefficient, piecemeal approach" to addressing climate change, and that foreign policy issues were implicated because reduction of GHGs in the United States might be offset by increases in GHGs abroad—were overridden by the language of the CAA.[73, 74] Finally, the petitioning states argue that the D.C. Circuit misconstrued section 202(a)(1)'s reference to the administrator's judgment.[75] They argue that the phrase "in his judgment" simply emphasizes that the "decision-making authority under Section 202 is lodged in the administrator of the EPA, not in any other official" and that "Congress recognized the substantial challenges that may attend determinations about air pollution and endangerment, and did not expect or desire the administrator to adhere to any rigid or mechanistic scientific formula in making decisions under conditions of uncertainty."[76]

In rejecting petitioners' claims that it may not decline to regulate GHGs, EPA argues that section 202(a)(2) expressly conditions the establishment of motor vehicle emission standards on the discretionary exercise of EPA's judgment.[77] Since EPA identified a "variety of sound reasons"[78] for declining to regulate, the D.C. Circuit properly followed the "established principles of administrative law" that recognize both EPA's broad discretion in deciding whether to initiate regulation and the "particular deference" to which agencies in general are entitled.[79] This discretion, EPA argues, extends to the threshold determination of whether the scientific record is sufficiently well developed to make an endangerment finding.[80]

May EPA Regulate GHGs Under the CAA?

Petitioners make three broad arguments with respect to EPA's authority to regulate GHGs. First, petitioners assert that, contrary to EPA's determination, GHGs fit easily within the definition of an "air pollutant" subject to regulation under Section 202(a)(1).[81] Petitioners claim that, in declining to regulate, EPA misinterpreted the statute.[82] Next, petitioners argue that EPA was incorrect in concluding that Congress intended to prohibit regulation GHGs.[83] Finally, petitioners argue that EPA's conclusion conflicts with other provisions of the CAA.[84, 85]



EPA, on the other hand, argues that its conclusion that it lacks authority to regulate GHG emissions from new motor vehicles is reasonable for several reasons. First, EPA argues that "key provisions" of the CAA "cannot be coherently applied" to GHG emissions.[86] Specifically, EPA argues that the National Ambient Air Quality Standards program focuses on the actions taken by individual states to comply with national standards, with distinct regulatory regimes for different areas.[87] Because GHG emissions are "well-mixed globally throughout the atmosphere," EPA contends that it would have no "practical basis" for distinguishing between complying and non-complying areas.[88] EPA argues that increasing fuel economy standards would be the only "practical" way EPA could limit vehicle emissions of carbon dioxide, but such regulations would "subvert the implementation by the Department of Transportation of the Energy Policy and Conservation Act," which was expressly created by Congress to address fuel economy standards.[89]

Further, EPA argues that more recent laws—including 1990 additions to the CAA and the 1998 Kyoto Protocol—reflect Congress' "intent to assimilate more information as a predicate to legislation or international agreements to address global climate change."[90] Finally, EPA argues that regulation of GHGs would have "potentially vast economic and political consequences," since "virtually every sector of the U.S. economy is either directly or indirectly a source" of GHG emissions.[91] Moreover, since the "problem" of GHG emissions is "global" in nature, EPA argues that Congress "cannot reasonably be thought to have intended that EPA would regulate [GHG] emissions from new motor vehicles but from no other source."[92]

Is There Even a Controversy for The Court to Decide?

The court may decide the case on the threshold issue of standing. Specifically, the Constitution authorizes courts only to decide "cases or controversies," meaning that petitioners must demonstrate a personal stake in the case outcome. Thus, the petitioning states must show that EPA's decision impacts them and that a favorable court ruling would redress their concerns.[93] EPA argues that petitioners have failed to carry their burden of establishing that they will be harmed by EPA's decision not to regulate GHG emissions from new motor vehicles,[94] since the

"vast majority" of GHG emissions occur outside of the United States, thereby making any EPA regulation unlikely to have any "significant long-term impact."[95] Further, EPA claims that petitioners' have failed to demonstrate that the proposed regulations would redress their concerns, since their theory of redressability depends on "highly speculative" predictions made by petitioners' experts: (1) that EPA regulation of GHG emissions within the U.S. will "spur technological advances by private industry"; and (2) "foreign governments, including foreign governments in developing countries that face added economic dilemmas, will mandate use of the resulting technology."[96]

What Is at Stake?

Like *Duke Energy*, *Massachusetts* deals with the extent of EPA's power to regulate or, in this case, to decline to regulate greenhouse-gas emissions from motor vehicles. A court decision in favor of Massachusetts and the other petitioners that EPA can or even must regulate GHG emissions under the CAA would have dramatic implications. As there is no current federal regulation specifically addressing climate change, finding that EPA must use the CAA for this purpose would be revolutionary. Not only would auto emissions be subject to such regulation, but EPA could be found to have authority to adapt the statute to address GHG emissions from other sectors, such as electric utilities, as well. Moreover, this surely would provide substantial further impetus for Congress to step in and adopt a more specific framework for such regulation.

Further, the "standing" issue also is potentially very important. The Supreme Court's view on what proof a plaintiff must have to demonstrate that he or she is affected by particular GHG emissions dramatically could affect the involvement of courts in the climate change debate. Given the state of the science, and the global nature of the issue, it could be very difficult for plaintiffs to show with any degree of certainty that any particular U.S. industry's emissions standing alone have a particular effect.

Both *Duke Energy* and M*assachusetts* have the potential to shape both the regulatory landscape and the environment itself in different but significant ways. For stationary sources, *Duke Energy* may bring about changes in the process of challenging EPA interpretive determinations. In addition, it may present the court with an opportunity to resolve the key substantive issue of whether a change in a facility which increases overall emission triggers EPA review, even without an increase in the rate of emissions. *Massachusetts* turns on the question of EPA's power to refrain from regulating greenhouse gases and what evidence that such regulation will make a difference to particular plaintiffs is necessary before courts will become involved. Whereas *Duke* presents to the high court the ability to resolve issues that have been debated for decades, *Massachusetts* sets up the high court to shape how the emerging debate over climate change will unfold into the coming decades. F

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Endnotes

1. See generally Act to Amend the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977).
2. See id.
3. See generally Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676-1713 (codified at 42 U.S.C. §§ 7401- 7671q (2000)).
4. See 42 U.S.C. § 7429(a).
5. See 40 C.F.R. § 60.14(a) (2006).
6. See *United States v. Duke Energy Corp*., 411 F.3d 539, 544-45 (4th Cir. 2005).
7. See, *e.g.*, Complaint ¶¶ 1-6, *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001) (No. 1:00CV1262).
8. *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001).
9. *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 624-25 (M.D.N.C. 2003).
10. *Id.*
11. *Id.* at 623-24.
12. *Id.* at 626.
13. *Duke Energy Corp*., 411 F.3d at 550.
14. *Rowan Companies v. United States*, 452 U.S. 247 (1981). The issue in *Rowan* was whether the Commissioner of the Internal Revenue Service could interpret the statutory term "wages" differently in different statutes. Id. at 250.
15. *Duke Energy Corp*., 411 F.3d at 547 (quoting Rowan, 452 U.S. at 257).
16. *Id.* at 550.
17. *Id.* at 550-51.
18. *Id.* at 546.
19. 413 F.3d 3 (D.C. Cir. 2005).
20. *Id.* at 18-25.
21. *Id.* at 14.
22. *Id.* at 19-20.
23. *Id.* at 10.
24. *Id.* at 19-20.
25. *Id.* at 20 (citing *Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002)).
26. 438 F.3d 705 (7th Cir. 2006).
27. *Id. at 710.*
28. *Id.* at 710-11.
29. *Id.* at 710.
30. See Questions Presented, *Envtl. Def. v. Duke Energy Corp*., No. 05-848 (May 15, 2006), available at *http://www.supremecourtus.gov/qp/05-00848qp.pdf* (last visited Sept. 26, 2006).
31. See generally Brief for the United States as Respondent Supporting Petitioners, *Envtl. Def. v. Duke Energy Corp.*, No. 05-848, (July 21, 2006), 2006 WL 2066660,
32. *Id.* at 35.
33. *Id.*
34. *Id.* at 42-43.
35. *Id.* at 39.
36. The brief of the petitioner, ED, parallels EPA's argument. Additionally, nine briefs have been filed by *amici* in ED's support; these *amici* include twenty states and the District of Columbia; state and local clean air agencies; seven current and former members of Congress; two former EPA administrators; a group of law professors; various medical associations; and other environmen-

tal organizations.

37. Brief for Respondent Duke Energy Corp., *Envtl. Def. v. Duke Energy Corp.*, No. 05-848 (Sept. 15, 2006), 2006 WL 2689784, at *17-19.
38. Brief for the United States as Respondent Supporting Petitioners at 19, 31, *Envtl. Def. v. Duke Energy Corp.*, No. 05-848,
39. *Id.*.
40. 42 U.S.C. § 7607(b)(1).
41. *Id.* § 7607(b)(2).
42. Brief for the United States as Respondent Supporting Petitioners at 19, 31, *Envtl. Def. v. Duke Energy Corp.*, No. 05-848.
43. *Id.* at 32.
44. Brief for Respondent Duke Energy Corp., *Envtl. Def. v. Duke Energy Corp.*, No. 05-848 (Sept. 15, 2006), 2006 WL 2689784, at *25-26.
45. *Id.* at *28.
46. *Id.* at *29-30.
47. *Id.* at *29.
48. *Id.*
49. *Id.* (citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).
50. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003) (notice of denial of petition for rulemaking).
51. Section 202(a)(1) provides that the EPA Administrator "shall by regulation prescribe . . . in accordance with the provisions of [Section 202], standards applicable to the emission of any air pollutant from any class or classes of new motor vehicle . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).
52. *Id.*
53. 68 Fed. Reg. 52,925-29.
54. *Id.* at 52,929.
55. *Id.* (emphasis added).
56. *Id.* at 52,930.
57. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).
58. *Id.* at 55.
59. See, *e.g., Morrison v. Olson*, 487 U.S. 654, 677 (1988) (citing *Muskrat v. United States*, 219 U.S. 346, 356 (1918)).
60. *Id.* at 55-56.
61. *Id.*
62. 541 F.2d 1 (D.C. Cir. 1976).
63. *Massachusetts*, 415 F.3d at 57-58 (citing *Ethyl Corp.*, 541 F.2d at 20, 26).
64. *Id.* at 58.
65. Judge Sentelle concurred in the judgment but dissented in part. He found that EPA correctly asserted that petitioners lacked standing because they alleged only a "generalized public harm," *id.* at 59, posed by EPA's denial rather than a "distinct risk to a particularized interest" of petitioners, *id.* at 60. Judge Tatel dissented, having found that at least one of the petitioners—the Commonwealth of Massachusetts—satisfied the standing requirement, and that to reach the merits, the court need only determine that one petitioner had standing. *Id.* at 64. Tatel concluded that the CAA "plainly cover[ed] GHGs emitted from motor vehicles," *id.* at 67, and that EPA in its denial "failed to provide a statutorily-based justification for refusing to make an endangerment finding," *id.* at 80-82.
66. *Petition for Writ of Certiorari* at 4, 12, *Massachusetts v. EPA*, No. 05-1120.
67. *Massachusetts v. EPA*, 126 S. Ct. 2960 (2006); see also United States Supreme Court Docket, No. 05-1120, available at *http://www.supremecourtus.gov/docket/05-1120.htm* (last visited Sept. 26, 2006).
68. Brief for the Petitioners, *Massachusetts v. EPA*, No. 05-1120 (Aug. 31, 2006), 2006 WL 2563378.
69. *Id.* at 11 (citing 42 U.S.C. § 7521(a)(1)).
70. *Id.* at 35-36.
71. *Id.* at 38.
72. *Id.* at 39.
73. *Id.* at 39-40. Specifically, petitioners argue that EPA's concern about a "piecemeal approach" is obviated by the fact that Section 202(a)(1) "directs the EPA to regulate . . . emissions that 'cause, or contribute to' air pollution that passes the endangerment threshold." *Id.* at 39. This language, petitioners claim, demonstrates that the CAA "endorses incremental responses to air pollution problems." *Id.* With respect to EPA's foreign policy argument, petitioners claim that in enacting Section 202(a)(1), Congress was "clearly aware that emissions from mobile sources might not be the sole cause of an air pollution problem, yet it directed EPA to regulate even when they 'contribute to' such a problem." *Id.* at 40.
74. Petitioners acknowledge that EPA's third concern—that technologies might not be available to control GHGs—was a relevant consideration. However, petitioners argue, even this concern is unavailing because EPA "failed to relate its discussion of scientific uncertainty to the statutory standard of endangerment." *Id.* at 41.
75. *Id.* at 44.
76. *Id.* at 45.
77. Brief for the Respondents at 36, *Massachusetts v. EPA*, No. 05-1120 (Oct. 24, 2006).
78. *Id.* at 8.
79. *Id.* at 36-38.
80. *Id.* at 39.
81. *Id.* at 8.
82. *Id.* at 8.
83. *Id.* at 20.
84. *Id.*
85. *Id.* at 33-34.
86. Brief for the Respondents at 23, *Massachusetts v. EPA*, No. 05-1120 (Oct. 24, 2006).
87. *Id.* at 24.
88. *Id.*
89. *Id.* at 24-25.
90. *Id.* at 8.
91. *Id.* at 32.
92. *Id.*
93. See generally Zachary Tyler, *Massachusetts v. EPA: The D.C. Circuit's Failure to Extend the Clean Air Act to Greenhouse Gas Emissions*, 36 Envtl. L. Rep. (Envtl. Law Inst.) 10,456, 10,465 (2006).
94. Brief for the Respondents at 13, *Massachusetts v. EPA*, No. 05-1120 (Oct. 24, 2006).
95. *Id.* at 13.
96. *Id.* at 15.