UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, *et al.*,	)	
Petitioners	)	
	)	**No. 03-1361 and consolidated cases**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RESPONSE OF INTERVENOR CO_2 LITIGATION GROUP TO PETITION FOR WRIT OF MANDAMUS

Intervenor CO_2 Litigation Group submits the following response to the Petition for Writ of Mandamus to Compel Compliance with Mandate (the "Petition") filed on April 2, 2008 by most of the petitioners in this action (hereafter, "Petitioners"). The Petition unjustifiably asks the Court to order respondent Environmental Protection Agency ("EPA") to take an action within 60 days that is not mandated *per se* by statute and for which there is no statutory deadline. Importantly, the writ of mandamus Petitioners seek necessarily would set in motion a series of events that would affect not just manufacturers of new

motor vehicles, but all manufacturers and indeed all segments of the economy. It is especially important in these circumstances that the Court defer to EPA's assessment of the scope of analyses and public participation necessary before commencing a rulemaking to limit greenhouse gas emissions from motor vehicles.

The CO_2 Litigation Group believes that the Petition inaccurately describes EPA's obligations under the Clean Air Act, clouding over the true legal requirements (or lack thereof) applicable to EPA. The Petition also seeks to end-run the rulemaking process, depriving the CO_2 Litigation Group of the opportunity to participate in EPA's consideration of an "endangerment finding" at all, much less in assessing the broader implications of such a finding. For these reasons, the CO_2 Litigation Group offers the following to supplement EPA's response to the petition, from the perspective of affected businesses.

I. The Action Petitioners Seek To Compel Is Not an Action EPA Can Be Required To Take.

Mandamus is "an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network and Ocean Advocates*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Petitioners bear the "burden of showing that the petitioner's right to issuance of the writ is clear and

indisputable." *See Gulfstream Aerospace Corp. v. Mayacqmas Corp*., 485 U.S. 271, 289 (1988). In this case, the action that Petitioners seek to compel—EPA "issuing its determination on endangerment within sixty days" (see Petition at 2)—is not a separate action that the Clean Air Act requires EPA to take, and there is no statutory or judicial deadline for such a determination.

Petitioners claim that EPA "has already developed an endangerment determination" and assert that EPA must now be ordered to "issue a document it has already prepared." Petition at 22. But the Clean Air Act contains no requirement to prepare and issue such a document. Petitioners refer to Clean Air Act section 202(a)(1), 42 U.S.C. § 7521(a)(1). That provision states:

> The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life….

Thus, EPA's obligation is to promulgate emission standards for air pollutants emitted by new motor vehicles (if the Administrator determines that emissions of such pollutants from such motor vehicles cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare). Nothing in the statute requires an "endangerment determination" separate from

and in advance of the promulgation of motor vehicle emission standards.[1]

The Supreme Court opinion does not support Petitioners' assertion that EPA is obligated to issue an "endangerment determination." In fact, the Supreme Court specifically declined to decide whether EPA is required to make an endangerment finding at all: "We need not and do not reach the question *whether on remand EPA must make an endangerment finding,* or whether policy concerns can inform EPA's actions in the event that it makes such a finding….We hold only that EPA must ground its reasons for action or inaction in the statute." 127 S. Ct. 1438, 1463 (emphasis added, citation omitted).

Thus, the action that Petitioners are now asking the Court to order EPA to take is not even an action specified as such in the statute or in the Supreme Court's opinion and remand. Rather, the finding that Petitioners ask this Court to order EPA to document is simply an element of a rulemaking to establish emission standards for motor vehicles. Indeed, the petition for rulemaking that triggered this litigation was a petition for EPA to issue standards for certain

[1] In contrast, when EPA establishes National Ambient Air Quality Standards under the Clean Air Act, it must follow an explicit multi-step process, beginning with publication of a list of air pollutants the "emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," following which health effects criteria and, ultimately, applicable ambient standards are developed. *See* 42 U.S.C. §§ 7408(a)(1), 7408(a)(2), 7409(a), (d).

GHGs under section 202 of the Clean Air Act, not a petition for EPA to make an "endangerment determination." *See* ICTA petition for rulemaking, Joint Appendix for initial briefing of this case at pp. JA002, JA033-035. EPA's refusal to issue regulations limiting greenhouse gas emissions is what was challenged in this case and what the Supreme Court remanded. *See* 68 Fed. Reg. 52,922-23, 52,925 (describing, and denying, the ICTA petition's request that EPA promulgate GHG emission standards for new motor vehicles and engines); *Massachusetts v. EPA*, 127 S. Ct. at 1450-51 (reviewing EPA "order" set forth at 68 Fed. Reg. 52,922 *et seq*.).

This Court does not even have jurisdiction to order EPA to take an action that was not the subject of the underlying petition for review and, of course, not the subject of the Supreme Court's remand. Clearly this is a far cry from a situation presenting the "clear duty to act" required for a court to issue a writ of mandamus. *See In re Bluewater Network and Ocean Advocates*, 234 F.3d at 1315.

II. There Is No Deadline for EPA's Endangerment Determination.

Neither the Clean Air Act, nor any other legal requirement, establishes a deadline for EPA to complete its assessment of whether GHG emissions from new motor vehicles endanger health or welfare, as Petitioners tacitly concede.

The statute does not even contain a deadline for agency action on emission standards for motor vehicles once the Administrator determines that emissions of an air pollutant may reasonably be anticipated to endanger public health or welfare, let alone a deadline for making an "endangerment determination."[2] The Supreme Court's opinion in this case does not set a deadline for any EPA action, stating to the contrary that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." 127 S. Ct. at 1462. Nor did this Court's order remanding the matter to EPA set any deadlines for EPA action (and no party asked the Court to do so).

The District Court for the Northern District of California recently identified these same inadequacies, in denying a similar petition for writ of mandamus to force EPA to make an "endangerment finding" for GHGs under 42 U.S.C. § 7521(a)(1). *San Francisco Chapter of A. Philip Randolph Institute v. EPA* , 2008 U.S. Dist. LEXIS 27794 (March 28, 2008). The district court held that:

EPA has violated no duty that is so plain as to be free from doubt

[2] *See* 42 U.S.C. § 7521. Congress did, in contrast, include many deadlines for EPA to issue other determinations and promulgate other types of emission limitations. *See, e.g.*, 42 U.S.C. §§ 7409(a), 7412(b)(3), 7412(e)(1), 7476(a).

> simply because it has not yet responded to the Supreme Court's directive. The Supreme Court was careful not to place a time limit on the EPA, and indeed did not even reach the question whether an endangerment finding had to be made at all. See *Massachusetts v. EPA, 127 S. Ct. at 1463*. The notion that this Court would fill the void by ordering the EPA, by writ of mandamus, to immediately respond to the Supreme Court's decision is so far afield from notions of comity and propriety that it need not be seriously considered. No plain duty has been violated, therefore no writ of mandamus will issue.

Id. at *10-*11. Petitioners' "request that this Court order the Administrator to comply with the terms of the Supreme Court's remand and this Court's mandate by issuing its determination on endangerment within sixty days," Petition at 2, is a *non sequitur*: there is no such requirement to comply with, in either the Supreme Court's remand or this Court's mandate.

III. Petitioners' Claim of Unreasonable Delay Is Unjustified.

Petitioners attempt to show that EPA's alleged failure to issue an "endangerment determination" "document" constitutes unreasonable delay, under the criteria set forth in *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). *See* Petition at 13-22. But *TRAC* makes clear that the Court ordinarily will not even consider a claim of unreasonable delay unless it arises in the context of "'clear right' such as outright violation of a clear statutory provision…or violation of basic rights established by a structural flaw, and not requiring in any way a consideration of

the interrelated aspects of the merits…." *Id*. at 78-79. Since Petitioners cannot point to any statutory entitlement to the issuance of an "endangerment determination" "document" that they seek, and certainly not outside of the context of a rulemaking to establish emission standards for new motor vehicles (which Petitioners have not even asserted could be promulgated within 60 days or even within the year), there is no "clear right" (*id*.) or "clear duty to act" (*see* p. 5, *supra*) that would justify the Court's consideration of Petitioners' arguments about unreasonable delay.

Even if there were a legal requirement to publish an endangerment determination, however, the facts of this case, far from presenting "extraordinary circumstances" that might justify the Court's "interference with an ongoing agency process," reinforce the appropriateness of deferring to EPA's judgment about the timing and process for responding to the remand. *See Community Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985). EPA has announced it will commence a rulemaking responding to the remand in this case later this spring by issuing an Advance Notice of Proposed Rulemaking ("ANPR"). March 27, 2008 letter of EPA Administrator Johnson (Petition Exh. I). EPA explained that the ANPR "will present and request [public] comment on the best available science including specific and quantifiable effects of

greenhouse gases relevant to making an endangerment finding." *Id.* at 2. The Court should not interfere with EPA carrying out its ANPR and planned rulemaking process.[3]

Achieving the President's goal of substantial reductions in GHG emissions from motor vehicles will be a huge challenge, and the exhibits that Petitioners attached to the Petition confirm this: "Developing these regulations will require coordination across many different areas of expertise….This is a complicated legal and technical matter, and it's going to take time to fully resolve." Petition Exh. B at 2 of 2. "This rule-making will be complex and will require a sustained commitment from the administration to complete it in a timely fashion." *Id*. Exh. C at 1 of 8. EPA recognizes the need to "solicit comments on a proposed rule from a broad array of stakeholders and other interested members of the public." *Id*. at 2 of 8. The Agency's "ultimate decision must reflect a thorough consideration of public comments and an evaluation of how it fits within the scope of the Clean Air Act." *Id*. In order to

[3] Petitioners seem to assume that the finding they seek is a foregone conclusion. But whether GHG emissions from new motor vehicles in the U.S. can fairly be deemed to endanger public health or welfare, in the context of all of the other activities in the U.S. and abroad contributing to atmospheric concentrations of GHGs, is not self-apparent and deserves public input and debate, rather than a court-ordered conclusion based only on reported EPA staff recommendations.

propose standards for motor vehicle emissions of a pollutant, EPA must first put together an evaluation of the effects of the pollutant on health and the environment, including issues of safety, and assess the costs and benefits of the particular approach or approaches EPA will propose. *Id*. at 5 of 8.

Recognizing the many factors that will go into EPA's consideration of how to respond to the petition for regulation of new motor vehicle GHG emissions, the Supreme Court wisely observed that "EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies." 127 S. Ct. at 1262. The Court did not attempt to dictate how or on what schedule EPA must address the petition for rulemaking, holding only that "once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." *Id*. This is the antithesis of a specific directive to take action that might qualify for judicial interference in the Agency rulemaking process through a writ of mandamus.

IV. EPA Has Correctly Concluded that It Needs To Consider New Motor Vehicle Emissions in a Larger Context.

A key consideration in assessing the reasonableness of the timing of EPA's evaluation of GHG emissions from new motor vehicles is the fact that the

"endangerment finding" Petitioners ask this Court to compel is part and parcel of a larger regulatory context. As noted above, if EPA makes such a finding, EPA would then be compelled to promulgate emission standards for new motor vehicles under Clean Air Act section 202(a)(1), 42 U.S.C. § 7521(a)(1). But the Clean Air Act also states that EPA may (although it is not required to) regulate fuels used in motor vehicle or nonroad engines, based on a similar finding that "any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare…." CAA § 211(c)(1), 42 U.S.C. § 7545(c)(1).[4]

[4] The analysis and decisions EPA applies to the determination of whether GHG emissions from new motor vehicles endanger public health and welfare may be relevant also for EPA's judgment whether the GHGs warrant development of air quality criteria and National Ambient Air Quality Standards, which ultimately impose constraints on both mobile and stationary sources. The first step in development of National Ambient Air Quality Standards is listing pollutants the "emissions of which, in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "for which he plans to issue air quality criteria…." *See* 42 U.S.C. § 7408(a); 42 U.S.C. § 7409(a)(1). While the considerations under the motor vehicle provisions addressed in the Petition are not identical to those for listing of "criteria pollutants" under 42 U.S.C. § 7408(a), some of the same scientific data would be considered under both processes. Once National Ambient Air Quality Standards have been adopted, states must develop and enforce implementation plans to reduce and maintain emissions so that the ambient standards will be met. 42 U.S.C. §§ 7501-7503. Implementing such plans can impose huge costs on businesses and on U.S. citizens generally. *See, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 462-63, 465, 470 (2001).

Additionally, once CO_2 or another GHG is regulated in motor vehicle emissions or fuels, it becomes a "pollutant subject to regulation under" the Clean Air Act, and then under the Act's Prevention of Significant Deterioration ("PSD") provisions any new or modified major stationary source which emits that pollutant must use Best Available Control Technology to limit its emission. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4). Since "Best Available Control Technology" is defined to represent "the maximum degree of reduction…which the permitting authority…determines is achievable for such facility through application of production processes and available methods, systems, and techniques," triggering that requirement could impose substantial costs and operating constraints on businesses. *See* CAA § 169(3), 42 U.S.C. § 7479(3).

The PSD permitting ramifications of limiting GHG emissions from motor vehicles may even be greater, however, as a result of the fact that EPA regulations define the "major stationary sources" and "major modifications" subject to PSD permitting in terms of whether they involve emissions of a "regulated NSR [New Source Review] pollutant" above a specified annual emissions threshold. *See* 40 C.F.R. § 52.21(b)(1)(i). Since EPA defines "regulated NSR pollutants" to include not only specific classes of air pollutants but also "any pollutant that otherwise is subject to regulation under the" Clean

Air Act, except for listed hazardous air pollutants, *see* 40 C.F.R. § 52.21(b)(50), the issuance of emission standards for new motor vehicles that would follow the "endangerment finding" the Petition seeks to compel would, absent modification of the PSD regulations by EPA and perhaps Congress, bring thousands of additional facilities into the PSD permitting program because they would be "major" only in terms of their GHG emissions.

EPA has recognized these interconnected considerations and is addressing the "endangerment finding" that Petitioners seek to compel in that broader context. *See*, *e.g*., Petition Exhs. H and I. The *TRAC* court specifically acknowledged that whether a delay is "unreasonable" must be considered in the context of other rulemaking that the Agency must address at the same time. *See* 750 F.2d at 80 ("the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority"). The EPA Administrator's stated intention to address motor vehicle GHG emissions in the context of other climate change mitigation efforts, including consideration of the effects of Congress' passage late last year of the Energy Independence and Security Act of 2007 (*see* Petition Exhs. G, H, I), fits squarely within this need to consider competing priorities and regulatory activities mentioned in *TRAC*. It also corresponds directly to the Supreme Court's acknowledgment that, in

implementing Clean Air Act section 202, "EPA no doubt has significant latitude as to…coordination of its regulations with those of other agencies." 127 S. Ct. at 1262.

Virtually every sector of the economy is tied to GHG emissions, because GHG emissions result from almost all forms of transportation and from the generation of most of the electricity used in this country. Given the huge impact on businesses and our economy that may result from limits on GHG emissions, it is essential that climate change be addressed through careful, comprehensive planning. EPA (and potentially Congress) must be accorded the opportunity to develop the information and analysis it believes are necessary, solicit vital input from the public, and produce effective, reasonable mitigation measures. The relief requested by Petitioners would not even allow EPA time to solicit and consider public comments on the "endangerment finding," despite the fact that a finding that GHG emissions from new motor vehicles endanger public health or welfare would set in motion rulemaking that would have a pervasive impact on the public. There is no statutory or judicial directive justifying this Court's interjection into the Agency proceedings and truncating public debate as Petitioners demand.

Dated: May 15, 2008 Respectfully submitted,

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