

SPECIAL REPORT

Climate in court

A forthcoming case in the Supreme Court could push the United States towards regulating against global warming, says Emma Marris.

Is carbon dioxide a pollutant? And, if so, should a reluctant Environmental Protection Agency (EPA) be forced into regulating the gas? These questions will be put before the Supreme Court's nine justices this winter, as they consider the case of the Commonwealth of Massachusetts *et al.* v. EPA.

The case is important for a number of reasons. It is the first of the many lawsuits on climate change to reach the country's highest court. If the EPA loses, it would be forced to contemplate regulations to cap the amount of greenhouse gases emitted by cars. And, most importantly, it may encourage Congress to pass laws regulating carbon dioxide and other gases, lest the courts do its work for it.

It is also a sign of the frustration felt by many US states with the Bush administration's inaction on climate change. States and even cities across the country have entered into their own regional climate agreements and tried to regulate greenhouse gases. California has even signed agreements with the United Kingdom, and on 27 September passed a bill that will return the state's emission levels to those of 1990 by 2020.

The case is being brought by the state of Massachusetts, along with climate warrior California, ten other states, American Samoa and a long list of cities and environmental groups. It stems from a 1999 formal request to the agency that it regulate greenhouse-gas emissions by cars and trucks under the landmark Clean Air Act. The issue has been working its way through the EPA's regulatory system and the courts ever since.

The case is not yet on the Supreme Court's

schedule, but James Milkey, the counsel of record for Massachusetts *et al.*, says it is likely to be heard in "the last week in November or the first week of December". Milkey's side filed its arguments on 31 August; the EPA has applied for an extension to its 5 October filing deadline. But the agency will probably use arguments similar to those it filed when it tried to dissuade the Supreme Court from taking the case (see 'Legal arguments'). Following a day-long hearing, the court will issue an opinion by the end of its term, in late June or early July next year.

"Carbon dioxide is clearly a pollutant — it is the dose that makes the poison."

Among its arguments, the EPA will probably say that the science on global warming is too uncertain to be the basis of expensive regulations. This threadbare argument has elicited two 'amicus curiae' briefs — documents filed with the court by someone not party to the case. One was from a group of scientists and one from four former EPA administrators. Both say there is a strong scientific consensus, and point out that nothing in science is ever completely certain.

The scientists' brief was filed by 18 researchers, including James Hansen, head of the NASA Goddard Institute for Space Studies in New York, and Nobel prizewinner Sherwood Rowland of the University of California, Irvine. They accuse the EPA of misrepresenting their findings, adding: "The evidence of these changes...has crystallized a remarkable consensus within the scientific community: climate warming is happening, and human activities are very likely a significant causal factor."

Another EPA argument, that greenhouse gases are not pollutants, has met with derision from environmentalists. "Carbon dioxide is



clearly a pollutant — it is the dose that makes the poison," says Andrew Aulisi of the World Resources Institute, an environmental think-tank in Washington DC. "These are political appointees at the top of the agency taking their cues from the White House."

The Supreme Court took the case, experts believe, because of the larger questions it raises over whether a US agency can decide not to do what it is called upon to do by law because of external considerations. In this case, the EPA

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Action on greenhouse gases

The courts are a popular avenue for those wanting action on greenhouse-gas emissions. If challenges are won, they can force government agencies to do something concrete; even if lost, they publicize the issue. Either way, they light a fire under Congress, which would probably rather write regulations on greenhouse gases

itself. Here are a few key cases: **California v. 6 Automakers.** Filed on 20 September, this complaint sees the greenest US state claiming that car makers' carbon-emitting vehicles are a "public nuisance". A similar case in 2004 against power companies was dismissed, but will be appealed.

Friends of the Earth v. Watson. Environmental groups are suing government agencies for spending money on overseas energy projects without taking into account the environmental impacts of the carbon that will ultimately be emitted. The parties await a decision from the California federal district court.

Center for Biological Diversity v. Kempthorne. The idea is that, under the Endangered Species Act, the government must limit threats from emissions to species such as polar bears and corals. The case was settled this summer when the government agreed to look at the status of polar bears. Green groups hope to use the strategy again. **E.M.**



Twelve US states are suing the Environmental Protection Agency for not regulating greenhouse gases emitted by cars.

has argued that regulating greenhouse gases would interfere with the Bush administration's foreign policy: it would remove the bargaining chip of reducing emissions in exchange for reductions by developing countries.

Madeleine Albright, former secretary of state, criticizes this argument. She has filed an amicus brief saying that the president's foreign policy should not influence agencies directed by Congress. Power thus leaks from Congress to the president — a trend that political observers have kept a wary eye on under George Bush. Albright adds that, in any case, negotiation over emissions reductions has not been the Bush administration's strategy.

"The United States is not actually negotiating with developing countries," says Jody Freeman, who directs the environmental law programme at Harvard Law School in Cambridge, Massachusetts, and drafted the Albright brief. "It is pursuing a volunteerism strategy."

"You strip away the global warming and the question is really 'can they do that?'" she says. For this reason, many believe Massachusetts could be favoured by the current judges, despite

Legal arguments

Standing

For the judges to accept the arguments of Massachusetts *et al.*, the group must prove that it has standing — in other words, that it is the injured party, and that a decision in its favour will redress the injury. Massachusetts says it is already seeing the effects of climate change — for example, the resulting sea-level rise threatens the coastal state. The Environmental Protection Agency (EPA) is likely to say that the injury is not caused directly by its decision not to regulate greenhouse gases, that regulation would be unlikely to significantly roll back climate change, and thus that the injury cannot be fixed by a decision in Massachusetts' favour.

Does the EPA have authority to regulate greenhouse gases under the Clean Air Act?

The EPA says not, reasoning that if Congress wanted it to regulate greenhouse gases

— a politically contentious and economically significant action — it would have said so explicitly. The agency notes that when Congress wanted it to regulate pollutants that thinned the ozone layer, language was added to the Clean Air Act to say so. Massachusetts *et al.* say arguments about Congress's intent are not legally robust — the agency must conform to the law as it is written. The act defines a pollutant as "any air pollution agent... including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters into the ambient air". Massachusetts *et al.* say this describes greenhouse gases perfectly. The EPA notes that, strictly speaking, the definition requires a pollutant also to be an "air pollution agent", and it has come up with various reasons why

greenhouse gases should not count as such.

If the EPA does have the authority to regulate greenhouse gases under the act, can it decide not to do so?

Massachusetts *et al.* think not. The law says the agency "shall" regulate pollutants "which may reasonably be anticipated to endanger public health or welfare". But the EPA says it can choose even whether to determine if a pollutant is a threat. The EPA hasn't judged greenhouse gases on this and says it won't do so because the science is still too uncertain. It says regulation would undercut US foreign-policy manoeuvres that might bargain over greenhouse gases with other nations, and that regulation would amount to setting miles per gallon limits, which is already the job of the transportation department. **E.M.**

their conservative leanings. "Even justices who may not be particularly sensitive to the need to regulate global warming may think that an agency is overreaching," says Freeman.

If Massachusetts wins, the EPA will not immediately regulate car emissions. Agency scientists would merely have to determine formally whether greenhouse gases are likely to endanger public health. If they decide this is the case, the agency may begin hammering out regulations. But all this would take years to unfold.

More to the point, the case may push Congress to pass some climate-change laws. "Part of all this litigation that's going on in various places is to try to force the issue onto the congressional agenda," says Deborah Sivas, director of the Environmental Law Clinic at Stanford University in California, and drafter of the brief by the four former EPA administrators (see 'Action on greenhouse gases').

While it waits for the court case to play out, the EPA has remained mute on California's request that it be allowed to regulate greenhouse-gas emissions from cars at state level

— cutting them 30% by 2016. Thanks to a historical quirk in the Clean Air Act, California is the only state allowed to set different standards from those set by the federal government — with the agency's permission. But once California changes its standards, any state can follow. A letter released on 26 September, signed by more than 100 members of Congress, called on EPA administrator Stephen Johnson to stop stalling. "There is no basis for EPA to treat this request differently" from the many other requests it has granted, the letter said.

Almost a quarter of the members of Congress signed that letter. So perhaps the rumour in green circles that a bill addressing climate change could pass in the next session of Congress is well founded. Much depends on the November elections, in which all congressmen and a third of senators will fight their seats. If the Democrats gain a majority in the House of Representatives — a possibility at least — they would control the committee where climate-change bills will come up, and things may really start to move. ■

For more on the impact of the mid-term elections, see next week's issue of Nature.



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