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Global Warming and the Government: How Much Agency Deference Is Due?

Allen Haroutounian[*]

INTRODUCTION

"Global warming has been called the most pressing environmental challenge of our time."[1] Most of the warming that has occurred over the past century has been due to the emission of greenhouse gas concentrations, specifically carbon dioxide. Carbon dioxide levels have risen from 316 parts per million in 1959, to 382 parts per million in 2006.[2] This increase in carbon dioxide is due to human activity, the primary source being the burning of fossil fuels to provide electricity and energy to humans.[3] The United States contributes to global warming (often referred to as "climate change") more than any other country in the world, emitting more carbon dioxide into the atmosphere than all of Europe combined.[4]

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[*] Allen Haroutounian is majoring in Political Science with a minor in Management and will graduate from UCI in June of 2009. Allen has served as a founder of the campus Environmental Law Society, Internal President of the UCI Pre-Law Society, and Chief Justice of the Judicial Board of ASUCI. He is an active member and programming intern for the Law Forum, and he has served as a contributing author, Lead Editor, and Editorial Board member for the Law Forum Journal. Allen plans to begin law school in 2010, and in his spare time he enjoys travelling.

[1] *Massachusetts v. Environmental Protection Agency (EPA)*, 127 S. Ct. 1438, 1446 (2007).

[2] *Id.* at 1438. After 1959, the US Weather Bureau began to monitor carbon dioxide levels in the atmosphere at an observatory in Mauna Loa, Hawaii. At that time, carbon dioxide levels were recorded at 316 parts per million, which was well above the 300 parts per million revealed in the 420,000 year old ice record. By 1970, carbon dioxide levels reached 325 parts per million. This recorded rise in carbon dioxide levels over such a short period of time was considered significant. *Id.* at 1446.

[3] The National Research Council, Section on Climate Change Science, *Climate Change Science: An Analysis of Some Key Questions*, http://www.nap.edu/html/climatechange/summary.html (last visited Nov. 4, 2007).

[4] IPCC, 2007: Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the*

Climate change has become a controversial issue, with moral concerns often dominating the discussion. Allegations of blame and calls for responsibility in the protection of human health and the environment, directed toward a variety of countries, have taken the forefront in this debate. At times, courts must set aside these moral challenges and look at such disagreements from a strictly legal point of view. For example, what happens when a government agency, whose purpose is "to protect human health" and "safeguard the natural environment," is given the authority to regulate certain greenhouse gas emissions but refuses to do so? [5]

The specific legal context of rulemaking petitions to administrative agencies will be explored by analyzing the recent case of *Massachusetts v. Environmental Protection Agency (EPA)*. The legal framework for dealing with agency denials of rulemaking petitions will be introduced through discussion of three background cases: *Natural Resources Defense Council v. Securities and Exchange Commission*, *WWHT, Inc. v. Federal Communications Commission*, and *American Horse Protection Association v. Lyng*. The Supreme Court's application of the legal standard will then be analyzed by comparing these cases to *Massachusetts v. EPA*. Although climate change is a serious issue, this analysis will ultimately demonstrate that the Supreme Court should have given more deference to the EPA's expertise and its reasons for the denial of the rulemaking petition at issue in the *Massachusetts* case.

BACKGROUND

Over the course of the 20th Century, the planet's average surface temperature has increased by 0.6º C, snow and ice coverage have decreased, and average sea levels and ocean temperatures have increased. The 1990s have been recognized as the warmest decade on record.[6] While it is possible that this could be due to natural climate variability, the changes that are occurring now have never been observed in the past.

Intergovernmental Panel on Climate Change, http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf (last visited February 28, 2008).

[5] Environmental Protection Agency, About EPA, http://www.epa.gov/epahome/aboutepa.htm (last visited November 4, 2007).

[6] Intergovernmental Panel on Climate Change, Section on Summary for Policy Makers, *Climate Change 2001: The Scientific Basis*, available at http://www.grida.no/climate/ipcc_tar/wg1/005.htm (last visited February 28, 2008).

In light of the increasing concern over climate change, on October 20, 1999, nineteen private organizations filed a rulemaking petition asking the EPA to regulate greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act.[7] The petitioners claimed 1998 was the warmest year on record and greenhouse gas emissions had significantly accelerated climate change.[8] Fifteen months after the petitioners filed their request for rulemaking, the EPA requested public comment on "all the issues raised in the petition," including any scientific, technical, legal, or economic information that may be relevant.[9] Over the next five months, the EPA received more than 50,000 comments.[10]

Before the close of the comment period, the White House directed the National Research Council (NRC), the "working arm" of the National Academy of Sciences, to conduct research into the science of climate change and "where there [were] the greatest certainties and uncertainties."[11] As a result, the NRC issued a 2001 report, "Climate Change: An Analysis of Some Key Questions."[12] The report concluded that "greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise."[13]

On September 8, 2003, the EPA denied the rulemaking petition based on two claims.[14] The agency reasoned that: (1) the Clean Air Act does not give it the authority to issue mandatory regulations to address global climate change, and (2) even if it did have the authority to regulate vehicle emissions, it would be "unwise to do so at this time."[15] The EPA put forth several specific justifications for its view.

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[7] *Massachusetts v. EPA*, 127 S. Ct. at 1449.

[8] *Id.* at 1449.

[9] *Id.* A rulemaking petition is a petition filed by an individual requesting the administrative agency to amend or repeal an existing rule, or issue a new one.

[10] *Id.*

[11] *Id.* at 1448-49.

[12] *Id.* at 1450.

[13] *Id.*

[14] *Id.* at 1450.

[15] *Id.* The case of *Massachusetts v. EPA* presumed two issues, the first of which is in regard to the authorization of the EPA to mandate regulations concerning global climate

(1) Congressional Intent

First, the EPA reasoned that Congress was well aware of the global climate change issue when it last revised the Clean Air Act in 1990, yet Congress declined to adopt a proposed amendment that would have given the EPA clear authority to regulate carbon dioxide emission standards for motor vehicles.[16] Further, as a result of Congress' investigations into climate change, the EPA argued that climate change had its own "political history."[17] Imposing emissions limitations on greenhouse gases would have great economic and political repercussions, and the EPA did not believe it had the power to impose such limitations without more specific guidance from Congress.[18]

(2) Lack of Conclusive Evidence

The EPA acknowledged that: (a) the concentration of greenhouse gases has risen dramatically, mostly as a result of human activity, and (b) there has been a rise in global temperatures.[19] However, the EPA adopted the NRC Report's conclusion that a "causal link" could not be "conclusively" established between human activity and an increase in global temperatures. Based on the NRC's uncertainty regarding this link, the EPA asserted that regulating greenhouse gas emissions would be "unwise."[20]

(3) Potential Conflict with Department of Transportation

Based on the assumption that greenhouse gases were not "air pollutants" under the Clean Air Act's regulatory provisions, the EPA concluded that the only way to reduce emissions from new motor vehicles would be to improve fuel economy.[21] The EPA argued that this action would conflict with

change; however, this issue is beyond the scope of this article and will only be briefly discussed.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1451.

[20] *Id.* (quoting NRC Report 17).

[21] The EPA argued that Congress originally designed the Clean Air Act to address *local* air pollutants rather than a substance [carbon dioxide] that "is fairly consistent in its concentration throughout the "*world's*" atmosphere. Furthermore, Congress in 1990 declined to enact proposed amendments to force the EPA to set carbon dioxide emission standards for motor vehicles. Thus, the EPA argued that because Congress did

the Department of Transportation's (DOT) mandate, which includes passage of detailed mandatory fuel economy standards.[22]

(4) Potential Conflict with Executive Negotiations

Finally, the EPA argued that regulation of greenhouse gas emissions from new motor vehicles would be a "piecemeal approach" to the problem of climate change.[23] Essentially, the EPA's regulations would interfere with the President's "comprehensive approach" to climate change. The President's approach included: (a) voluntary private sector reductions in greenhouse gas emissions through non-regulatory programs, (b) more room for technological innovation, and (c) further research on climate change.[24] The EPA believed that its own regulation of greenhouse gas emissions from new motor vehicles would conflict with the President's "ability to persuade key developing countries to reduce greenhouse gas emissions."[25]

Petitioners sought review of the EPA's denial for rulemaking in the U.S. Court of Appeals for the District of Columbia.[26] Two out of the three judges ruled in favor of the EPA, holding that "the EPA Administrator properly exercised his discretion under section 202(a)(1) [of the Clean Air Act] in denying the petition for rulemaking."[27] Petitioners appealed the D.C. Circuit opinion, and the Supreme Court granted certiorari in 2006.[28]

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not specify that the EPA must regulate carbon dioxide, then it did not mean for the EPA to address that issue. *Id.* at 1450 (emphasis in original).

[22] *Id.* at 1451.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] The Court first dealt with the question of whether or not the petitioners had standing to file a claim against the EPA in court. To demonstrate standing, a litigant must show that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favorable decision will likely redress that injury. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Court held that the petitioners did have standing to challenge the EPA's decision not to promulgate rules requiring greenhouse gas emission regulation. Further analysis of the standing issue is beyond the scope of this paper. *Massachusetts v. EPA*, 127 S. Ct. at 1452.

LEGAL STANDARD

General Legal Standard

When a petition for rulemaking is filed by an individual or organization, the federal Administrative Procedures Act (APA) provides the guidelines a government agency must follow. The APA provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[29] When a petition is filed, agencies are required "to receive and consider [the] requests for rulemaking."[30] If an agency decides to deny a petition for rulemaking, it must then give an explanation for its actions to ensure that the decision was "neither arbitrary, nor capricious, nor an abuse of discretion, nor otherwise contrary to statutory, procedural, or constitutional requirements."[31]

In addition, section 202(a)(1) of the Clean Air Act (CAA) provides a standard that government agencies must follow when dealing with air pollutants in particular. The Act states:

> [The EPA] shall by regulation proscribe … 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 [the Agency's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[32]

The Clean Air Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive … substance or matter which is emitted into or otherwise enters the ambient air…."[33] Thus, greenhouse gas emissions arguably fall within this definition.

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[29] *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 813 (D.C. Cir. 1981).

[30] *WWHT, Inc. v. FCC*, 656 F.2d at 813.

[31] *Id.* at 820.

[32] *Massachusetts v. EPA*,127 S. Ct. at 1459-60 (quoting 42 U.S.C.S §7521(a)(1)).

[33] *Id.* at 1460 (quoting 42 U.S.C.S. § 7602(g)).

In *Massachusetts v. EPA*, the request for rulemaking was filed under Section 202(a)(1) of the CAA. The petition asked the EPA to regulate greenhouse gas emissions from new motor vehicles. The EPA had the option to either accept the petitioner request and promulgate a rule, or deny the petitioner request and take no action. In order to deny the rulemaking petition, the EPA must, as required by the CAA, determine that greenhouse gases do not contribute to climate change, or the Agency must provide some other reasonable explanation as to why it would not exercise discretion in regulating such emissions.[34] The "reasonable explanation" ensures the petitioners and, if necessary, a reviewing court, that the Agency's decision of inaction was neither arbitrary nor capricious, nor an abuse of discretion. Thus, the CAA creates a standard with the same basic protections as the APA.

Application of Legal Standard in Other Cases

Natural Resources Defense Council v. Securities and Exchange Commission

On June 7, 1971, the Natural Resources Defense Council (NRDC) petitioned the Securities and Exchange Commission (SEC) to promulgate rules requiring corporate disclosure for environmental and equal employment information, as required by the National Environmental Policy Act (NEPA).[35] A few months later, the SEC declined to adopt NRDC's disclosure rules. Instead, the SEC announced other regulations that required more limited forms of corporate disclosure.[36] In response, the NRDC challenged the SEC's action

[34] *Id.* at 1462.

[35] *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, 606 F.2d 1031, 1035 (D.C. Cir. 1979). The petition submitted by the NRDC proposed that companies that file with the SEC be required to describe the nature and extent of the resulting pollution or injury to natural areas and resources and the feasibility of plans for correcting such pollution or injury. Furthermore, the registered company would be required to disclose if it changed company products, projects, production methods, policies, investments, or advertising to advance environmental values. With regard to equal employment disclosure, each company making claims about its employment of minorities or women would be required to include statistical data by which the facts could be tested by interested persons. *Id.* at 1036.

[36] *Id.* at 1036-37. The SEC received written comments regarding the new rules that required more limited forms of corporate disclosure and, as a result, adopted rules which required only the disclosure if the material financial effects of corporate

in district court. The district court agreed with the NRDC and instructed the SEC that fuller proceedings should be conducted.[37]

Under pressure from the district court, the SEC held new hearings and received both oral presentations and written comments, which expressed support and opposition to the NRDC's proposed rules.[38] The file consisted of over ten thousand pages of comment and testimony. The SEC announced that it would not adopt the NRDC's proposed disclosure rules, arguing that despite broad discretion, its authority was "limited to context[s] related to the objectives of the federal securities laws."[39] These laws, in the SEC's view, were "designed generally to require disclosure of financial information in the narrow sense only."[40]

The parties moved to the district court for summary judgment after the SEC's rejection of NRDC's proposals. The court ruled in favor of the NRDC, finding the SEC's actions "arbitrary and capricious." In response, the SEC appealed to the U.S. Court of Appeals for the District of Columbia, which reversed the lower court's decision.[41] In considering whether the SEC's decision not to require comprehensive disclosure was "arbitrary or capricious," the court considered a number of factors, including:

> [1] the intent of Congress, as expressed in the enabling statute;
> [2] the needs, expertise, and impartiality of the agency with

compliance with environmental laws. The NRDC supplemented these new rules in their suit in district court.

[37] *Id.* at 1037.

[38] *Id.* at 1037-38.

[39] *Id.* at 1039.

[40] *Id.* The SEC also argued that NEPA did not authorize the Agency to promulgate disclosure rules "unrelated to its responsibilities under its organic statute." *Id.*

[41] *Id.* at 1036. The NRDC also argued that the SEC failed to comply with certain procedures required by NEPA. NRDC challenged the SEC's failure "to consider the possibility of requiring disclosure of environmental information to shareholders … solely in connection with proxy solicitations and information statements," as required by NEPA. The court held that the SEC was not required to consider a limited proxy disclosure rule because the SEC was not obligated to consider the proxy alternatives, and that the SEC is not required to consider such alternatives when such consideration would serve no purpose. The court was satisfied with the reasons the SEC gave for rejecting a limited proxy disclosure rule and found them to be in accordance with the procedural duty required under NEPA. *Id.* at 1041, 53-54.

> regards to the issue presented; and [3] the ability of the court to effectively evaluate the questions posed.[42]

In its opinion, the D.C. Circuit pointed out that when there are serious doubts about the reviewability of agency action, it must employ a particularly narrow scope of review.[43] Following this logic, the court exercised a narrow review of the SEC's factual and policy determinations, which was limited to ensuring that the SEC had adequate explanations of its action on record.

Under the arbitrary and capricious standard, the first challenge brought by the petitioners involved the SEC's decision not to adopt equal employment rules. The court disagreed with the NRDC and held that the "[SEC] was under no obligation to adopt rules identical to or even similar to those sought by the appellees."[44] The court pointed out that Congress gave the SEC broad discretionary powers to promulgate or not promulgate rules requiring disclosure of information beyond what is specifically required by statute.

The NRDC also challenged the SEC's conclusion that "the costs and administrative burdens involved in the proposed disclosure rule would be excessive, extremely voluminous, subjective, and costly."[45] The appellate court ruled in favor of the SEC, holding that NRDC did not make any credible effort to quantify costs or benefits.[46] The court stated that "there [was] still remarkably little hard data on costs and benefits, due to inherent uncertainties in quantifying the net cost of gathering and disseminating information."[47] The court found that the absence of firm data did not preclude the SEC from adopting or declining to adopt rules.[48]

Overall, the *NRDC* Court held that the SEC's decision to deny the request for rulemaking was neither arbitrary nor capricious. According to the court, "an agency is allowed to be master of its own house…."[49]

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[42] *Id.* at 1050.
[43] *Id.* at 1047.
[44] *Id.* at 1045.
[45] *Id.* at 1058.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1059.
[49] *Id.* at 1052-53, 56.

WWHT, Inc. v. Federal Communications Commission

The case of *WWHT, Inc. v. FCC* also arose when an administrative agency denied a petition for rulemaking.[50] In 1968, the Federal Communications Commission (FCC) proposed a subscription television service that would require local cable television operators (CATV) to carry scrambled signals of local subscription television stations.[51] Some examples of these subscription television stations included HBO and CNN.[52] To enact this new service, the FCC proposed amendments to its existing cable carriage rules. The FCC then invited interested persons to comment on its new propositions.[53] The FCC took no further action regarding this 1968 rulemaking proceeding until September 21, 1978, when the Agency decided to terminate the original 1968 proceeding without adopting its proposed amendments.[54]

On September 22, 1978, Blonder-Tongue Laboratories, Incorporated filed a petition contesting the FCC's termination of the 1968 proceeding. Blonder-Tongue requested that the FCC institute another rulemaking proceeding that would require CATV to carry subscription television signals.[55] Comments were filed in support of Blonder-Tongue, arguing that no good reason existed to distinguish conventional television signals from subscription signals.[56] After reviewing the comments, the FCC denied Blonder-Tongue's request, reasoning that Blonder-Tongue's petition and all other comments would "leave [the FCC] in essentially the same position [the Agency was] in when the earlier [1968] proceeding was terminated [in 1978]."[57] Petitioners

[50] *WWHT, Inc.*, 656 F.2d at 807, 809.

[51] *Id.* at 810. This was called the *Fourth Report and Order-Subscription Television*.

[52] Noel D. Uri, *The Market for Subscription Television Service in the United States. (Federal Communications Commission)*, 51.3 Engineering Economist 205 (2006).

[53] According to rulemaking protocol, administrative agencies, like the EPA, are required to invite public opinion. *WWHT, Inc.*, 656 F.2d at 810.

[54] In 1978, the FCC concluded that CATV no longer needed to carry subscription television signals. *Id.*

[55] *Id.* at 811.

[56] *Id.*

[57] *Id.* at 811-12. The Commission stated that "the reasons advanced [in the petition and comments] … do not persuade us that the rule suggested should be proposed by the Commission for adoption. In particular, the suggested parallel with the conventional station carriage rules ignores the very significant economic and technical differences

challenged the FCC's decision in the U.S. Court of Appeals for the District of Columbia.

Section 4 of the Administrative Procedures Act (APA) provides the guidelines that administrative agencies must follow when it comes to informal rulemaking.[58] The Act imposes minimum notice requirements as well as requirements that allow "interested persons" the right to submit comments. Specifically, Section 4(d) specifies that an agency must respond to petitions for rulemaking and take any actions as may be required.[59] The agency may either grant the petition or deny it. Prompt notice, along with a brief explanation, must be issued when a petition is denied.[60]

The *WWHT* Court applied the reasoning of the *NRDC v. SEC* opinion to its own decision.[61] As noted in *NRDC*, the majority called for the court's scope of review to be "narrow… limited to ensuring the [agency] has adequately explained the facts and policy concerns it relied on."[62] In *WWHT*, the court reasoned that when an agency decides not to proceed with rulemaking, the court's role for purposes of review only, applies to the specific "petition for rulemaking, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition."[63] This ensures that the agency's decision in denying a rulemaking petition is neither arbitrary nor capricious. Administrative agencies, like the FCC, have broad discretionary powers to promulgate or not promulgate rules, and the courts must apply a very narrow scope of review.[64] In fact, according to the court, "only in the rarest and most compelling circumstances" have courts forced agencies to institute rulemaking proceedings after an agency has declined to do so.[65]

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between the two types of services. At the outset, there is no evidence and barely even a suggestion in the comments that cable carriage is fundamental to the survival or economic success of [subscription television] stations…." *Id.*

[58] *Id.* at 813.

[59] *WWHT, Inc.*, 656 F.2d at 813.

[60] *Id.*

[61] *Id.* at 817.

[62] *Id.*

[63] *Id.* at 818.

[64] *Id.*

[65] *Id.*

Following this reasoning, the *WWHT* Court believed that the FCC was indeed required to give some explanation for its actions, to satisfy the "arbitrary and capricious" standard. However, the court held that the FCC had adequately explained the facts and policy concerns it had relied upon, and nothing suggested that the Agency's decision had been "unlawful, arbitrary, capricious, or wholly irrational."[66] The court further stated that the agency's determination was "essentially a legislative one," and that the rule of the reviewing court is to make sure that the Agency acts in a way as to "negate the dangers of arbitrariness and irrationality…."[67]

American Horse Protection Association v. Lyng

In dealing with agency decisions not to promulgate new rules, sometimes the court finds the Agency's reasons for denying the rulemaking request to be insufficient. In *American Horse Protection Association v. Lyng*, the American Horse Protection Association (the Association) asked the Secretary of Agriculture, Robert Lyng, to institute a new rule prohibiting the practice of "soring" as regulated by the Horse Protection Act. Soring is the practice of attaching heavy chains (called action devices) on the front limbs of a horse. This causes the horse intense pain, but also forces the horse to adopt a high stepping gait which is highly prized among walking horses.[68]

The Horse Protection Act sought to end soring by prohibiting the showing or selling of sored horses.[69] Under the Horse Protection Act, the Secretary issued regulations that prohibited soring devices and other soring

[66] *Id.* at 820. Some of the reasons cited by the FCC were: (1) carriage requirements imposed no substantial burden on the ordinary CATV operator or his subscribers while the same has not been established with respect to the carriage of the subscription programming of [subscription television] stations, (2) the transmission of "scrambled transmissions" would impose burdens on cable operators not associated with the carriage of conventional stations, (3) [subscription television] Service would be purchased by only a fraction of total subscribers although all subscribers would be required to bear the cost of carriage, and (4) the requested rule would involve a costly redundancy of transmission paths with the same signal going to the same subscriber locations both over-the-air and by cable. *Id.* at 811-13.

[67] *Id.* at 817.

[68] *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987).

[69] *Id.*

methods.[70] The Association argued that developments put in place by the Secretary had made the original rules inadequate and that those rules should therefore be revised.[71] Efforts were undertaken by the Secretary and Department of Agriculture. New regulations to prevent soring were drafted, but were not implemented right away because the Secretary preferred to observe the self-regulation efforts of the industry first.[72]

In March 1984, the Department of Agriculture met with officials from the walking horse industry, including the Association. The Association again requested a rulemaking proceeding, and the Department of Agriculture again responded by saying that it would withhold publication of the proposed rules pending further studies within the industry.[73] The Secretary's explanation for the Agency's refusal was the following:

> I have reviewed studies and other materials, relating to action devices, presented by humane groups, Walking Horse industry groups, and independent institutions, including the study referred to in the Complaint. On the basis of this information, I believe that the most effective method of enforcing the Act is to continue the current regulations.[74]

When the Association sued, the district court ruled in favor of the Secretary. The Association appealed to the U.S. Court of Appeals for the District of Columbia.[75]

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[70] *Id.*

[71] *Id.* The Secretary also commissioned the Auburn University School of Veterinary Medicine to study soring methods that may eventually result in further changes in the regulations. The study concluded that eight, ten, and fourteen ounce action devices that were used on horses fell within the statutory definition of sore, causing lesions, bleeding, and inflammation. In tests of two, four, and six ounce devices, no harmful effects were found. The Horse Protection Association used the study to challenge the Secretary's regulations. Even before the Secretary commissioned Auburn University to conduct a study, the agency considered revising its regulations on action devices because he had recognized that soring had not been eliminated.

[72] *Id.* at 2-3.

[73] *Id.* at 4.

[74] *Id.* at 5.

[75] *Id.* at 3.

The *American Horse* Court adopted the Supreme Court's rationale from a prior case, where it had held that "when an agency does act to enforce, that action itself provides a focus for judicial review…."[76] When such petitions are denied, the agency must give "a brief statement of the grounds for denial."[77] In the *American Horse* case, the D.C. Circuit concluded that "refusals to institute rulemaking proceedings are distinguishable from other sorts of non-enforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation."[78]

The case required the court to determine, as a matter of law, whether the Secretary's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[79] According to prior case precedent, specifically *WWHT, Inc. v. FCC*, an order directing an agency to institute rulemaking is appropriate "only in the rarest and most compelling circumstances."[80] Following its prior reasoning in *WWHT*, the *American Horse* Court reasoned that it must carefully "examine the petition for rulemaking, comments pro and con … and the agency's explanation of its decision to reject the petition."[81]

The D.C. Circuit disagreed with the district court judge and held that the Secretary's two-sentence explanation for its denial to make a new rule was "insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decision making."[82] Thus, the court overturned the judgment of the district court and held that the Secretary did not present a reasonable explanation for his failure to grant the Association's rulemaking petition. Therefore, the court ordered the Secretary to "be given a reasonable opportunity to explain his decision or to institute a new rulemaking proceeding on action devices and other soring practices.[83]

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[76] *Id.* at 5 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

[77] *Id.* The Administrative Procedure Act (APA) requires agencies to allow interested persons to "petition for the issuance, amendment, or repeal of a rule." *Id.*

[78] *Id.*

[79] *Id.* at 3.

[80] *Id.* at 7 (citing *WWHT*, 656 F.2d at 818).

[81] *Id.* at 2.

[82] *Id.* at 6.

[83] *Id.* at 8.

Application of Legal Standard in Massachusetts v. EPA Case

In *Massachusetts v. EPA*, the state of Massachusetts, along with a number of other private organizations, filed a rulemaking petition asking the EPA to regulate greenhouse gas emissions for new motor vehicles under Section 202 of the Clean Air Act. The Supreme Court held that the EPA failed to adequately justify its denial of the rulemaking petition. The Court's reasoning warrants a close examination.

Majority Opinion

The Court first addressed the EPA's claim that even if it did have the authority under the Clean Air Act to regulate greenhouse gas emissions, it would be "unwise to do so at this time."[84] According to the Clean Air Act, once an agency denies a petition for rulemaking, it must give a brief explanation of its reasons for doing so, and its reasons cannot be "arbitrary, capricious, … or otherwise not in accordance with law."[85] Ultimately, the Majority of the Court found that the claims stated by the EPA were not reasonable, and that the EPA merely "offered a laundry list of reasons not to regulate."[86]

The Court considered whether Section 202(a)(1) of the Clean Air Act authorized the EPA to regulate greenhouse gas emissions from new motor vehicles. Section 202(a)(1) states that:

> [The EPA] shall by regulation proscribe … 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 the [Agency's] judgment, cause, or contribute to, air pollution which may be reasonably anticipated to endanger public health or welfare.[87]

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[84] *Massachusetts v. EPA*, 127 S. Ct. at 1462.

[85] *Id.* at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A)).

[86] *Id.* at 1462.

[87] *Id.* at 1460. The EPA argued that carbon dioxide is not an "air pollutant" as defined by the CAA because Congress had not intended for it to regulate substances related to climate change. Because Congress addressed ozone pollution in specific legislation, the EPA argued that greenhouse gases are excluded from the Clean Air Act's definition of "air pollutant." The Court rejected this argument, stating that the Clean Air Act's

The Court interpreted the language of the Clean Air Act (CAA) broadly, finding that the EPA should be afforded discretion to act based on its expertise and knowledge as to whether such a connection exists. If the EPA is not afforded such discretion, then the Clean Air Act would be rendered obsolete.[88] In other words, the CAA's broad language allows agency efforts the necessary flexibility to respond to situations not expressly anticipated.[89] Since greenhouse gas emissions qualify as an "air pollutant" under the Act's broad definition, the Court held that the EPA does have the authority to regulate greenhouse gas emissions from new motor vehicles.[90]

The EPA further claimed that it could not regulate carbon dioxide emissions from new motor vehicles because it would conflict with the issues left to regulation by the Department of Transportation (DOT). According to the EPA, regulating carbon dioxide emissions from new motor vehicles would mean tightening mileage standards, interfering with DOT standards.[91] The Court rejected this argument as well, stating that DOT's obligations to set mileage standards does not conflict with the EPA's job to protect the public's "health and welfare."[92]

The EPA also claimed that voluntary executive branch programs to reduce vehicle emissions "already provide an effective response to the threat of [climate change]" and that regulation of greenhouse gases might interfere with the President's ability to negotiate with key developing nations, creating a "piecemeal approach" to the problem of climate change.[93] The Court did not accept this argument, reasoning that while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.[94] According to the Global Climate Protection Act of 1987, Congress

"sweeping" definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical … substance or matter which is emitted into or otherwise enters the ambient air." *Id.* at 1447. Moreover, the Court, held that the EPA never identified any action suggesting Congress meant to "curtail its power to treat greenhouse gases as air pollutants." *Id.* at 1460.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Massachusetts v. EPA*, 127 S. Ct. at 1462.

[92] *Id.*

[93] *Id.* at 1462-63.

[94] *Id.* at 1463.

authorized the State Department, not the EPA, to formulate U.S. foreign policy with regard to environmental matters.[95] Therefore, the Court found the EPA's claim regarding the President's ability to deal with key developing nations unreasonable, pointing out that the EPA made no showing that it issued its denial of rulemaking after consultation with the State Department, even though Congress directed the EPA to consult with other agencies in formulation of its policies and rules.[96]

Finally, the Court was unpersuaded by EPA's claim that the scientific link between vehicle emissions and climate change was not strong enough. The Court reasoned that "if the scientific uncertainty is so profound that it precludes the EPA from making a reasoned judgment, as to whether greenhouse gases contribute to [climate change], the EPA must say so."[97] Thus, the Court held that the EPA did not provide a reasonable explanation for refusing to regulate greenhouse gas emissions from new motor vehicles and ordered the EPA to "ground its reasons for action or inaction in the statute."[98]

Dissent

Justice Scalia, joined by Justices Thomas and Alito, dissented from the Majority opinion and argued that the Clean Air Act does not require the EPA to come to a decision regarding the emission of greenhouse gas emissions when a rulemaking petition is filed.[99] Justice Scalia posed this question: "Does anything *require* the Administrator to make a 'judgment' whenever a petition for rulemaking is filed?"[100] Scalia then looked at the Clean Air Act and argued that no provision in the Act requires the EPA to come to a decision regarding greenhouse gas emissions from new motor vehicles. Scalia asserted:

[95] *Id.*

[96] *Id.* at 1462.

[97] *Id.* at 1463.

[98] *Id.*

[99] Chief Justice Roberts filed the first dissenting opinion which dealt with the issue of whether or not the state of Massachusetts had standing to bring suit against the EPA. Roberts disagreed with the Majority arguing that the Court had no jurisdiction to decide this case because the petitioners lack standing. Justice Scalia's dissent expressed similar concern about the standing issue. That issue is beyond the scope of this paper.

[100] *Id.* at 1471 (Scalia, J., Dissenting) (emphasis in original).

> [The Court is inventing a] multiple-choice question that the EPA administrator must answer when a petition for rulemaking is filed. The Administrator must exercise his judgment in one of three ways:
>
> (a) by concluding that the pollutant *does* cause, or contribute to, air pollution that endangers public welfare (in which case the EPA is required to regulate);
>
> (b) by concluding that the pollutant *does not* cause, or contribute to, air pollution that endangers public welfare (in which case EPA is *not* required to regulate); or
>
> (c) by 'provid[ing] some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether' greenhouse gases endanger public welfare (in which case EPA is *not* required to regulate).[101]

Scalia insisted that the EPA was not required to make a judgment and therefore regulation was not necessary. The discretion to regulate greenhouse gases should rest solely on the EPA Administrator.

Scalia also accused the Court, "with no basis in text or precedent," of rejecting all of the EPA's reasons not to regulate.[102] Scalia argued that the EPA gave "perfectly valid reasons" in its statement for rejecting the petitioner's request.[103] He pointed out that the Clean Air Act "says *nothing at all* about the reasons for which [the EPA] may *defer* making a judgment."[104] Pointing to the EPA's statement that the greenhouse gas science is still uncertain, according to the 2001 report by the National Research Center, Scalia could "not conceive of what else the Court would like EPA to say."[105] Thus, according to Justice Scalia's view, deference must be afforded to the EPA, similar to the approach taken in the *NRDC* case.

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[101] *Id.*

[102] *Id.* at 1472.

[103] *Id.*

[104] *Id.* at 1473 (emphasis in original).

[105] *Id.* at 1475.

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Irvine
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ANALYSIS

After examining the previous cases, the arguments surrounding the issue of agency action or inaction with respect to a governing statute seem logical. An agency must show whether or not it has the authority under its governing statute to issue a new rule. If the agency determines that it does have the authority to regulate, then it must decide whether or not to take action. When it comes to denying a rulemaking petition, an administrative agency must demonstrate that its reasons for doing so are neither arbitrary nor capricious.

In *Massachusetts v. EPA*, the EPA contends that it does not have the authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles, and that even if it did, it was not wise to regulate at the time the petition was raised. The Supreme Court was correct in holding that the EPA did have the authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles. However, by ignoring some of the reasons offered by the EPA to decline rulemaking, the Court made a serious error.

Application of the "Arbitrary or Capricious" Standard

Under the Clean Air Act (CAA), the Court held that greenhouse gases fall within the meaning of "air pollutant" and therefore required the EPA to regulate emissions of the "deleterious pollutant" from new motor vehicles. Since the EPA refused to comply with the rulemaking petition, the Agency must show sufficient evidence that it followed the rules of the authorizing statute, the CAA. Under the "clear terms" of the Act:

> [T]he EPA can avoid taking further action only if 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.[106]

The Court held that the EPA did not comply with the clear terms of the Act and instead "offered a laundry list of [unpersuasive] reasons not to regulate."[107] According to the Court, the reasons stated by the EPA had nothing to do with the question of whether or not greenhouse gas emissions contribute to climate

[106] *Id.* at 1462 (Majority opinion).
[107] *Id.*

change. Here, the Court commits a mistake in dismissing some of the reasons offered by the EPA. Particularly, the Court gave too little deference to the EPA's articulated explanations regarding lack of conclusive science and the potential conflict with the President's efforts to address climate change internationally.

(1) Congressional Intent

The EPA deemed that it would be unwise to regulate motor vehicle emissions at the time the rulemaking petition was filed for four reasons.[108] The EPA's first reason for not regulating greenhouse gas emissions was that such an action did not appear to fall within Congress' original intent for the Clean Air Act. Section 202(a)(1) of the Clean Air Act provides:

> [The EPA] shall by regulation proscribe … 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 [the Agency's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[109]

The EPA's main argument is that carbon dioxide is not an "air pollutant" within the meaning of the CAA. However, the key to understanding the meaning of the Act is to look at the words. The term "air pollutant" is written in very broad terms: "*any* air pollutant." Furthermore, "air pollutant" itself is defined broadly as "*any* air pollution agent … including *any* physical, chemical, … substance, … which is emitted into or otherwise enters the *ambient air*."[110] Carbon dioxide is a chemical substance that can be emitted into the ambient air through the emissions of new and old motor vehicles. In other words, carbon dioxide fits the broad requirements that define a substance as an air pollution agent under the Act.

In addition, it is reasonable to conclude that Congress recognized without regulatory flexibility for changing circumstances and scientific developments, the Act would soon become obsolete. Thus, Congress

[108] *Id.* at 1450.

[109] *Id.* at 1459-60.

[110] *Id.* at 1460 (emphasis added).

intentionally worded the Act (specifically Section 202(a)(1)) very broadly.[111] The fact that a statute can be applied in situations that are not expressed does not mean that such a statute is ambiguous. Instead, this flexibility demonstrates the breadth of the statute.[112]

The *EPA* Majority appropriately applied the statutory language of the CAA when ruling that the EPA had authority to regulate emission standards for new vehicles. In fact, the EPA failed to prove anywhere in its argument that Congress' post-enactment actions and deliberations constituted a proper form of legislative history. The EPA could not find anything that would keep it from regulating greenhouse gas emissions from new motor vehicles.[113] However, the Court's finding does not automatically imply that the EPA's articulated reasons refusing to regulate are impermissible, and further examination of those reasons is warranted.

(2) Lack of Conclusive Evidence

A second reason the EPA provided for its failure to regulate greenhouse gas emissions was the lack of conclusive evidence linking human activity to climate change. As previously mentioned, the Court correctly concluded that the EPA does have statutory to regulate emissions from new motor vehicles. However, the Court's decision to discount the EPA's refusal to regulate (based on a lack of conclusive scientific evidence) was insufficient.

As the reasoning in *NRDC* demonstrates, when sufficient data with regard to a specific issue is lacking, or when a considerable amount of uncertainty exists over that issue, deference is given to the administrative agency. The agency has the expertise to decide whether or not a proposed rule should be adopted. In the *NRDC* case, one can apply the same reasoning to *Massachusetts v. EPA*. For example, one of the EPA's stated reasons for refusing to promulgate rules requiring regulation of greenhouse gas emissions was the National Research Council's finding that a causal link between human activity and the buildup of greenhouse gas concentrations could not be "unequivocally established." The EPA acknowledged the finding in the NRC's report that greenhouse gas concentrations are increasing in the atmosphere, and

[111] *Id.*
[112] *Id.* at 1462.
[113] *Id.* at 1460.

as a result, global air temperatures are increasing. However, the EPA also pointed out that the NRC had reported:

> [B]ecause of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents (and particularly aerosols), a [causal] linkage between the buildup of greenhouse gases in the atmosphere and the observed climate changes during the 20th century cannot be unequivocally established….[114]

The EPA then went on to say:

> The science of climate change is extraordinarily complex and still evolving. Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed. As the NRC explained, predicting future climate change necessarily involves a complex web of economic and physical factors…. The NRC noted in particular, that "the understanding of the relationships between weather/climate and human health is still in its infancy…."[115]

First, the EPA's statement demonstrates that it has acknowledged that greenhouse gas concentrations along with global air temperatures are rising. The EPA recognizes that this may be due to human activity. However, in supporting its decision not to regulate, the EPA pointed out a crucial finding in the NRC's report which seems to have been overlooked by the petitioners and the Court: a causal link between the increase in greenhouse gas concentrations and human activity has not been "unequivocally established." Therefore, the EPA correctly decided that because of this lack of strong, irrefutable data, the regulation of greenhouse gas emissions from new motor vehicles may not be appropriate action.

Finally, the statement above demonstrates that the EPA's reasoning is, in fact, related to the science of climate change. In fact, the EPA addressed the issue of climate change head-on, specifically stating why it would not grant the

[114] *Massachusetts*, 127 S. Ct. at 1474.
[115] *Id.* at 1474-75.

petitioner's request to regulate greenhouse gas emissions from new motor vehicles. Taking this into account, given the fact that there is inconclusive evidence regarding a causal link between an increase in greenhouse gas concentrations and human activity, deference must be given to the EPA, which has the "special expertise" to determine whether or not regulating greenhouse gas emissions from new motor vehicles is appropriate. As was stated by Judge McGowan in *NRDC*, "greater agency freedom to manage and structure decision making" is required.[116]

(3) Potential Conflict with Department of Transportation

The EPA's third reason for not regulating greenhouse gas emissions had to do with a potential conflict with the Department of Transportation (DOT). The EPA contended that if carbon dioxide did fall under the category of an "air pollutant," then the best way to regulate it would be by improving fuel economy.[117] However, according to the EPA, tightening the mileage standard to improve fuel economy is a job "that Congress has assigned to the DOT."[118] The EPA did not want to encroach upon this authority of the DOT, and reasoned that regulation of carbon dioxide would do so.

This is not a strong argument provided by the EPA. The EPA's reasoning that its regulation of carbon dioxide emissions would encroach upon the DOT's authority ignores the fact that it is the EPA's responsibility to ensure public health and to protect environmental well-being.[119] Therefore, it would be understandable if the EPA made the decision to not regulate emissions due to the lack of evidence relating greenhouse emissions from human activity to climate change. It would also be justifiable if the EPA found conclusive evidence showing that carbon dioxide was not an air pollutant. However, basing its decision to not regulate greenhouse emissions because it would tread on the DOT's concurrent domain would allow for the EPA to evade fulfilling its responsibility to protect the environment. The Court was correct in treating this as an unreasonable justification for EPA's refusal to regulate vehicle emissions.

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[116] *Natural Resources Defense Council*, 606 F.2d at 1056.

[117] *Massachusetts v. EPA*, 127 S. Ct. at 1451.

[118] *Id.* at 1462.

[119] *Id.* at 1447.

(4) Potential Conflict with Executive Negotiations

The EPA's fourth explanation for not regulating greenhouse gas emissions was that such regulation would affect the President's approach to climate change. The EPA explained the nature of the President's plan to approaching climate change. This shows that the Agency had reviewed the plan and determined that it was sufficient. The EPA did not want to interfere with, and possibly hinder the President's plan.

Having two separate approaches to climate change would create more inefficiency and confusion, and may even send a mixed message to other nations that are looking to solve the problem of climate change. The EPA could certainly approach the President and work with the White House to formulate a more comprehensive plan. That plan would include regulation of greenhouse gas emissions from new motor vehicles. Until then, however, deference should be given to the EPA, as it is the agency that has the authority, and more importantly, the special expertise in dealing with matters relating to climate change.

How Much Deference Is Due?

Considerable deference is usually afforded to the administrative agency in charge of dealing with a particular social issue. The agency has a substantial amount of expertise with regard to its specific issue. Regarding climate change, scientific uncertainty still exists over the rise in greenhouse gas concentrations due to human activity and an increase in global temperatures. Because of this uncertainty, considerable deference should have been given to the EPA, as it is the administrative agency charged with regulating greenhouse gas emissions from new motor vehicles. Courts in the past have realized the importance of granting deference to agencies due to their special expertise in their particular field of jurisdiction.

An administrative agency is given its authority to regulate (or not regulate) based on legislation passed by Congress. One such piece of legislation is the Administrative Procedure Act (APA). The APA is a general statute which sets the rules regarding the promulgating of other rules. Specifically, Section 4(d) of the APA states that an agency must respond to petitions for rulemaking, take such actions as may be required, and notify the petitioner in case the request is denied. The agency may either grant the petition or deny it. Prompt notice, along with a brief explanation must be issued when a petition is denied.

In *WWHT, Inc. v. FCC*, the court held that the FCC was required, under the APA, to give a reasonable explanation as to why it had denied a petition requesting rulemaking proceedings to amend its mandatory cable carriage rules. The court then reviewed the reasons stated by the FCC and held that the FCC's denial was neither arbitrary nor capricious. The court reasoned that the scope of review of agency action only applies to the specific "petition for rulemaking, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition."[120]

Further, in *NRDC v. SEC*, the court held that the SEC's reasons not to promulgate new rules regarding equal employment data were neither arbitrary nor capricious, giving considerable deference to the SEC. The SEC had stated that the costs and administrative burdens involved in promulgating such rules would be excessive. Although the district court ruled that these statements were not supported by any specific facts, the reviewing court held that in the absence of data regarding the costs and benefits, such absence of data should not keep the SEC from adopting (or not adopting) rulemaking requests. The court arrived at this conclusion because when certain facts are not apparent, agencies are forced to make "quasi-legislative policy judgment[s]" just like Congress does when it deals with controversial legislation.[121] When an agency is forced to make such policy judgments, it must be given a considerable amount of freedom to ensure that its decision making is sound.

In reviewing an agency's decision not to promulgate new rules, the court, as established in *WWHT*, must simply "examine the petition for rulemaking, comments pro and con…and the agency's explanation of its decision to reject the petition."[122] The administrative agency, in turn, must give

[120] *WWHT, Inc.*, 656 F.2d at 818. If *Massachusetts v. EPA* was to be considered under the APA as well as the Clean Air Act, the EPA would still not be at fault. Under the APA, the EPA responded to the petitioner's request, took the action that was necessary, and notified the petitioners when the request was denied. It offered a prompt notice, along with a "brief" explanation of why it denied the petitioners request. However, the APA was not mentioned in any of the arguments presented by either side. The Clean Air Act was the controlling piece of legislation in *Massachusetts v. EPA.* Under that Act, the EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or provide some reasonable explanation as to why it cannot or will not exercise its authority.

[121] *Natural Resources Defense Council*, 606 F.2d at 1059.

[122] *American Horse*, 812 F.2d at 5.

a reasonable explanation to ensure the public and the reviewing court that its conclusion was neither arbitrary nor capricious.

During this process, a reviewing court might occasionally find that the agency has not fulfilled its duties. For instance, in *American Horse*, the court held that the Secretary's two-sentence explanation of his denial to institute rulemaking was not enough to ensure that his decision was reasonable. *American Horse* is different from *NRDC* and *WWHT* because in that case, the court rejected the Secretary's explanation of his denial to institute rulemaking. *American Horse* is also similar to *Massachusetts v. EPA* in that the court rejected the agency's stated reasons for refusing to promulgate new rules. More importantly, however, *American Horse* is different from *Massachusetts v. EPA* because the reasons offered by the EPA and the Secretary are quite different. In *Massachusetts v. EPA*, the EPA issued reasons for denying the petitioner's request and followed those reasons with lengthy explanations that justified its decision. For example, in addition to citing the National Research Council's study on climate change, the EPA stated that regulating greenhouse gas emissions from new motor vehicles would be a "piecemeal approach" that would subvert the President's current plan to address climate change. The EPA cited the President's approach to climate change in detail and argued that interference by the EPA could stand in the way of the President's ability to negotiate with key developing countries.[123] Unlike the Secretary's 2-sentence justification in *American Horse*, the EPA set forth several reasons when it denied the petitioner's request for regulatory action.

According to Justice Scalia, he could not "conceive of what else the Court would like the EPA to say."[124] An agency should not just say that it has considered the arguments brought to it and has decided that current regulations in effect are sufficient. It must give a reasonable explanation, one that ensures to the public that the decision not to regulate was neither arbitrary nor capricious. One may argue that the EPA did not provide strong enough reasons to support its argument. However, the EPA did not simply say that it had considered all the factors relating to climate change and decided that new rules

[123] *Massachusetts v. EPA*, 127 S. Ct. at 1473. The exact statement offered by the EPA regarding the President's approach to the problem of climate change includes calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development so that the government may take a long-term outlook.

[124] *Massachusetts v. EPA*, 127 S. Ct. at 1475 (Scalia, J., Dissenting).

would be unnecessary at that time. Instead, the EPA demonstrated, through its stated reasons, that it had considered many relevant factors regarding climate change and thereby concluded that the regulation of greenhouse gas emissions at that time would be unwise. For these reasons, the EPA actions were neither arbitrary nor capricious. The Court mistakenly took this as a "laundry list" of reasons, rather than giving the Agency proper recognition for its efforts.

An agency's decision not to regulate a given activity can rely on a number of factors that lie within its *special expertise.* These factors include "internal management, considerations as to budget and personnel … [and] evaluations of its own competence."[125] More importantly, if an agency decides that a given problem does not warrant regulation, it should be allowed to choose not to regulate. When Congress gives an agency the authority to regulate a specific issue, it recognizes that the agency possesses the special expertise to regulate that specific issue. Congress trusts that agency with the job of regulating, and the courts must also offer similar deference.

What Does This All Mean?

Climate change is a serious environmental problem that the world faces today. Debate continues over the existence of. Some argue that climate change is real and it is here. Others argue that the world is just experiencing another weather cycle. As this article demonstrates, there is also some dispute as to whether greenhouse gas emissions, including carbon dioxide emitted from new motor vehicles, cause an increase in global air temperatures. The EPA contends that regulating greenhouse gas emissions from new motor vehicles will create a piecemeal approach to the President's own strategy for addressing climate change. However, the petitioners contend that with the 1990s being the warmest decade on record, the EPA has a duty to regulate greenhouse gas emissions from new motor vehicles.

The moral arguments associated with climate change must be separated from the legal arguments. There is a real uncertainty in the science of climate change. Uncertainty is a strong justification for the EPA to decline (for now) to promulgate a rule that would regulate the greenhouse gas emissions from new motor vehicles. More importantly, the EPA gave sufficient reasons, as required by the Clean Air Act, to ensure that its decision not to regulate at this time was neither arbitrary nor capricious.

[125] *Natural Resources Defense Council*, 606 F.2d at 1046.

In its statement, the EPA gave lengthy explanations as to why it decided not to regulate greenhouse gas emissions from new motor vehicles. As Justice Scalia said in his dissent:

> The Court's alarm over [climate change] may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us, but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business in substituting its own desired outcome for the reasoned judgment of the responsible agency.[126]

Despite serious social concern over the extent of climate change, *EPA v. Massachusetts* demonstrates the validity of Justice Scalia's point.

CONCLUSION

In *Massachusetts v. EPA*, two questions were addressed: Did the Clean Air Act give the EPA the statutory authority to regulate greenhouse gases from new motor vehicles and, if so, were the reasons given by the EPA to not promulgate these rules reasonable? The Supreme Court held that the EPA did have the statutory authority under the Clean Air Act to regulate greenhouse gas emissions from new motor vehicles,[127] and that the EPA's stated reasons to deny the petitioner's rulemaking petition were arbitrary rather than reasonable.

This article first demonstrates that the CAA's sweeping definition of "air pollutant" gave the EPA statutory authority to regulate greenhouse gas emissions from new motor vehicles. Next, this article demonstrates that the Supreme Court was incorrect in discounting some of the EPA's stated reasons for denial of the petitioner's rulemaking petition. *NRDC v. SEC* showed that considerable deference should be afforded to agencies when uncertainty exists regarding the benefits of the regulation at issue. *WWHT, Inc. v. FCC* further solidified this point, and also showed by implication that the EPA did follow the proper method for denial of a rulemaking petition. Finally, *American Horse Protection Association v. Lyng* illustrated what does, and what does not,

[126] *Massachusetts v. EPA*, 127 S. Ct. at 1478 (Scalia, J., Dissenting).

[127] The Court's full analysis of this question is beyond the scope of this article.

constitute a reasonable explanation when an agency denies a petition for rulemaking. Through the above mentioned cases it is apparent that deference must be granted to agencies, so long as the agencies do not act in an "arbitrary or capricious" manner.

Ultimately, climate change remains a controversial issue today. However, the courts must address the issue from a strictly legal point of view. Scientific evidence regarding greenhouse gas concentrations and human activity is not certain. As prior case precedent shows, considerable deference must be given to the administrative agency in charge of dealing with any social issue, particularly when there is no widely recognized consensus on the related science. The solutions to social problems should not be left up to a court. As Justice Scalia pointed out, "no matter how important the underlying policy issues at stake, this Court has no business in substituting its own desired outcome for the reasoned judgment of the responsible agency."[128]

Justice Scalia's preferred ruling (in favor of the EPA) would not have foreclosed the possibility of using other democratic measures to nudge the EPA in a new direction. The American system of government provides its citizens with the opportunity to influence public policy. These citizens can always take advantage of these democratic mechanisms to voice their opinions about current EPA policies and environmental concerns, and to propose changes to these policies as they deem fit. In the meantime, administrative agencies and the courts must each tread carefully to ensure that their vital functions are respected and preserved.

AUTHOR'S POST SCRIPT

When the *Massachusetts v. EPA* case was initiated, the National Research Council's (NRC) report, "Climate Change: An Analysis of Some Key Questions" was the main source of authority used by the EPA to assert that the science connecting new vehicle emissions to climate change was uncertain. Had the Court ruled in the EPA's favor based on this concern, then the EPA would have been under no burden to proceed with the proposed rulemaking. In such a case, the petitioners would have been free to renew their request for rulemaking when more definite data linking vehicle emissions to climate change became available.

[128] *Massachusetts v. EPA*, 127 S. Ct. at 1478 (Scalia, J., Dissenting).

Since the Supreme Court ruled on *Massachusetts v. EPA*, more and more data suggests that there seems to be less scientific uncertainty regarding the issue of climate change. For example, the foremost authority on climate change, the Intergovernmental Panel on Climate Change (IPCC),[129] has stated that increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations. The atmospheric buildup of CO2 and other greenhouse gases is largely the result of human activities such as the burning of fossil fuels. Scientists have confirmed that an "unequivocal" warming trend of about 1.0 to 1.7°F occurred from 1906-2005, in both the northern and southern hemispheres. The major greenhouse gases emitted by human activities remain in the atmosphere for periods ranging from decades to centuries. It is therefore reasonable to expect that atmospheric concentrations of greenhouse gases will continue to rise over the next few decades.[130]

Furthermore, there has been a shift in tone regarding climate change from the previous Bush Administration to the current Obama Administration. President Obama has brought the issue of energy and the environment to the forefront. President Obama has stated that he plans to create millions of green jobs aimed at building a clean energy future, implement programs to cut greenhouse gas emissions by 80 percent by 2050, and make the United States a leader on climate change.[131]

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[129] IPCC, 2007: Summary for Policymakers. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf (last visited March 30, 2009). The IPCC published "Climate Change 2007: Fourth Assessment." In it, the IPCC concluded that "global atmospheric concentrations of carbon dioxide, methane and nitrous oxide have increased markedly as a result of human activities since 1750." Therefore, "warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level."

[130] Environmental Protection Agency, Section on Climate Change- Science, State of Knowledge, http://www.epa.gov/climatechange/science/stateofknowledge.html (last visited March 30, 2009).

[131] The White House, Section on The Agenda, Energy and the Environment, http://www.whitehouse.gov/agenda/energy_and_environment/ (last visited March 30, 2009).

Signifying a sharp reversal from former President Bush's stance on the environment, in January of 2009, President Obama directed the EPA to reconsider a waiver that President Bush originally rejected. The waiver was requested by California and 13 other states allowing them to set stricter automobile emission and fuel efficiency standards than the current federal regulations require. This marks a radical shift and separation from the previous Bush Administration, and also reflects the growing consensus among the world that climate change is an important issue that will have a significant effect on our lives if we do not begin dealing with it now.[132]

Ultimately, under the circumstances raised in the original case, I still believe that deference should have been given to the EPA. However, in light of the passage of time and the discovery of new scientific data, it would be increasingly difficult for the EPA to justify the refusal to regulate emissions from new motor vehicles. If *Massachusetts v. EPA* was to be analyzed today, with the same justifications given by the EPA for its failure to regulate vehicle emissions, and with this new information at hand, I would instead argue that the EPA has a statutory duty to regulate these greenhouse gas emissions in the hope of preventing further global warming.

[132] John M. Broder & Peter Baker, Section on U.S. Politics, Obama's Order Is Likely to Tighten Auto Standards, N.Y. Times, Jan 25, 2009, http://www.nytimes.com/2009/01/26/us/politics/26calif.html?_r=1&scp=4&sq=obama%20bush%20epa&st=Search (last visited March 29, 2009).

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