Climate Change in the Supreme Court: Massachusetts v. EPA, 127 S.Ct.1438 (2007)

Robert B. McKinstry, Jr., Esquire
Ballard Spahr Andrews & Ingersoll, LLP
Philadelphia

A chapter from Environmental Law Forum 2008
Pub. No. 4846, published April 2008

To purchase this book:
- See the PBI Online Bookstore at www.pbi.org
- Email info@pbi.org, or
- Call 1-800-932-4637

© 2008 Pennsylvania Bar Institute. All rights reserved.
This file is licensed only to the person downloading this file from PBI’s website, for printing and for saving to his or her personal computer. No further use is permitted. This file may not be shared electronically with any other person without the express written permission of the Pennsylvania Bar Institute.

The Pennsylvania Bar Institute does not render any legal, accounting, or other professional services. The Institute’s programs and publications are designed solely to help attorneys maintain their professional competence. In dealing with specific legal matters, the attorney using PBI publications or orally conveyed information should also research original sources of authority.
# Table of Contents

Climate Change in the Supreme Court: Massachusetts v. EPA, 127 S.Ct. 1438 (2007)  
*Robert B. McKinstry, Jr., Esquire*


II. International Law Background ........................................................................ 17  
   A. United Nations Framework Convention on ClimateChange ("UNFCCC") ............................................................... 17  
   B. Kyoto Protocol to the United Nations Framework Convention on Climate Change .................................................. 18  
   C. Dispute between Clinton Administration and Congress ................. 19  
   D. Initial EPA General Counsel Opinions ............................................ 19

III. The Law ............................................................................................................. 20  
   A. CAA 202(a)(1), 42 U.S.C. § 7521(a)(1) ..................................................... 20  
   B. Other Sections of CAA Contain an Identical "Endangerment" Standard ........................................................................... 20  
   C. Prior Experience with Lead .................................................................. 21

IV. Background to *Massachusetts v. EPA* ............................................................ 22

V. Involvement of Amici Climate Scientists ......................................................... 24  
   A. Scientist Amici and the Scientific Issue Presented ............................ 24  
   B. Climate Scientists’ Strategy on Petition for *Certiorari v. Merits* .......... 25

VI. The Holding ..................................................................................................... 26

VII. Standing ............................................................................................................ 27

VIII. Decision on the Merits .................................................................................. 29  
   A. Authority to Regulate Carbon Dioxide and Emissions of Other GHGs Under the CAA .......................................................... 29  
   B. EPA’s Reasons for Not Regulating GHG Emissions Even if it had Authority .......................................................... 29  
   C. Scalia’s Dissent: Justice Scalia Dissented from the Majority’s Decision in a Confusing Decision that Appears to Rest on Two Grounds .... 30

IX. Debate over Judicial Competence .................................................................. 30

X. Implications of the Decision .......................................................................... 31  
   A. Implication No. 1: Economy-wide Regulation under the Clean Air Act is Now Inevitable .................................................. 31  
   B. Implication No. 2: Federal Legislation is Now Inevitable ................. 32
C. Implication No. 3: State Climate Regulation will Continue
and Expand and Affect All Sectors of the Economy .................................. 32
D. Implication No. 4: Litigation will expand and Create
New Risks for Those Who do not Address GHG Emissions..................... 33
E. Implication No. 6: International Logjam will be released,
with Creation of Additional Opportunities for Technology
Transfer and Investment in Developing World........................................... 34

XI. Our Challenge .......................................................................................... 34