UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS, et al.	)	
Petitioners,	)	
v.	)	Docket No. 03-1361 (& consolidated cases)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.	)	
Respondents.	)	

PETITION FOR WRIT OF MANDAMUS
TO COMPEL COMPLIANCE WITH MANDATE

On April 2, 2007, the U.S. Supreme Court issued its landmark ruling in this case, holding that greenhouse gases are "air pollutants" that the Administrator of the Environmental Protection Agency (EPA) is authorized to regulate under Section 202 of the Clean Air Act. *Massachusetts v. EPA,* 549 U.S. ___, 127 S.Ct. 1438, 1459-62 (2007). The Court also struck down EPA's alternative policy grounds for denying a rulemaking petition for regulation of greenhouse gas emissions from new motor vehicles, and it ordered the case remanded for further proceedings consistent with its opinion. *Id.* at 1462-63. The Court's ruling requires the Administrator to review the pending rulemaking petition based on proper statutory factors. As discussed below, this means that the agency has to make a formal determination -- based solely on the science -- as to whether these emissions contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C. 7521(a).

A full year later, the EPA Administrator has not complied with the Supreme Court's order and the mandate issued by this Court to effectuate that order. As EPA's own statements and a Congressional inquiry demonstrate: the Administrator publicly set a firm deadline for making the endangerment determination by the end of 2007; the agency has already completed all of its work on issues that, under the Supreme Court's decision, are relevant to that determination; the Administrator has in fact made an internal decision in favor of endangerment; and the Administrator has forwarded the full formal write-up of that determination to the White House Office of Management and Budget. The publication of the endangerment determination, however, is now being withheld. The Administrator has refused to give the petitioners or Congress a timetable for action, and he has explained his delay by reference to considerations that are not legally relevant under the Supreme Court's ruling.

For these reasons, pursuant to Rule 21 of the Federal Rules of Appellate Procedure, 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.[1]

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[1] The parties joining this Petition for Mandamus are the Commonwealth of Massachusetts, the States of California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, the District of Columbia, the City of New York, the Mayor and City Council of Baltimore, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense Fund, Friends of the Earth, Greenpeace, International Center for Technological Assessment, Natural Resources Defense Council, Sierra Club, and U.S. Public Interest Research Group. In addition, the following states have joined as *amici curiae* to express their support for the petition: Arizona, Commonwealth of Pennsylvania Department of Environmental Protection, Delaware, Iowa, Maryland, and Minnesota. *See* Fed.R.App.P.29(a) (allowing states to file an amicus-curiae brief without the consent of the parties or leave or court).

FACTUAL BACKGROUND

In 1999, Petitioner International Center for Technology Assessment (ICTA) and others filed a rulemaking petition requesting EPA to regulate four greenhouse gases pursuant to Section 202 of the federal Clean Air Act. EPA put the petition out for public comment (66 Fed. Reg. 7486 (2001)) and received nearly 50,000 comments. Four years after it was submitted, EPA denied the petition.[2] 68 Fed. Reg. 52922 (September 8, 2003). EPA claimed first that it lacked authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act. EPA also stated that it would not regulate those substances even if it had authority to do so, referencing several policy reasons why the agency preferred not to act. For example, EPA stated its view that adopting motor vehicle regulations under Section 202 would amount to an "inefficient, piecemeal approach," and it stated its preference for delaying regulatory action until more is understood about "the potential options for addressing" the problem. 68 Fed. Reg. at 52931.

Thirty parties, including twelve states, three cities, and fourteen environmental groups, challenged EPA's denial of the rulemaking petition. In a divided ruling, this Court allowed EPA's decision to stand. *Massachusetts v. EPA*, 450 F.3d 50 (D.C. Cir. 2005). On April 2, 2007, the Supreme Court reversed, ruling that EPA has authority to regulate greenhouse gases under the Clean Air Act. 127 S.Ct. at 1459-62. The Court also ruled that EPA had no authority to rely on policy reasons unrelated to the question of endangerment of public health or welfare. The Court reasoned that the policy reasons

[2] EPA issued its decision only after the original petitioners filed an unreasonable delay case. *Ctr. for Technology Assessment v. Whitman*, No. 02-CV-2376 (D.D.C. filed Dec. 5, 2002).

EPA cited – such as the agency's desire to avoid "piecemeal" approaches – "have nothing to do with whether greenhouse gas emissions contribute to climate change." *Id.* at 1462-63. The Court also ruled that the Clean Air Act and the federal fuel economy law are "wholly independent" mandates, and rejected EPA's view that the latter law restricted the agency's authority to regulate motor vehicle emissions of carbon dioxide. *Id.* at 1462. Accordingly, the Court reversed the judgment of this Court and it remanded the case for further proceedings consistent with its opinion. *Id*. at 1463.

In its opinion, the Supreme Court specifically ruled that EPA could avoid regulating greenhouse gas emissions from motor vehicles "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." 127 S.Ct. at 1462. Thus, the Court made it clear that EPA has only three options on remand: (1) to make a positive endangerment determination and commence the standard setting process, (2) to make a negative endangerment determination by "determin[ing] that greenhouse gases do not contribute to climate change," or (3) to provide "a reasoned justification for declining to form a scientific judgment." *Id*. at 1462-63. With regard to the third option, the Court made clear that any such explanation would have to be grounded in the science only: "The statutory question is whether sufficient information exists to make an endangerment finding." *Id.* at 1463. "If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so." *Id.* Otherwise, it must make an affirmative or negative endangerment determination. On September 14, 2007, this Court issued its mandate vacating the EPA's 2003 ruling

and ordering the agency to take action consistent with the Supreme Court's decision. A copy of this Court's mandate is attached as Exhibit A.

In its opinion, the Supreme Court itself noted that there is little remaining scientific debate about the gravity and cause of the looming climate change crisis. For example, the Court stated:

> The harms associated with climate change are serious and well recognized. Indeed, the NRC Report itself -- which EPA regards as an "objective and independent assessment of the relevant science," 68 Fed.Reg. 52930 -- identifies a number of environmental changes that have already inflicted significant harms, including "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years ...." NRC Report 16.

127 S.Ct. at 1455. *See also id.* at 1457 ("EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.").

EPA Commitments and Actions After the Supreme Court's Decision

In response to the Court's ruling, President Bush on May 14, 2007, announced that he had directed the Administrator to issue standards to reduce emissions of greenhouse gases from motor vehicles under Section 202 of the Clean Air Act.[3] In a press briefing immediately after the President's announcement, the Administrator stated:

> On April 2, 2007, the U.S. Supreme Court decided in Massachusetts versus EPA that the Clean Air Act provided EPA the statutory authority to regulate greenhouse gas emissions from new vehicles if I determine in my judgment

[3] Statement of President Bush, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html (Attached as Ex. B). The President simultaneously directed EPA to issue regulations for the content of motor vehicle fuels, to reduce the amount of carbon dioxide released when those fuels are burned, under Section 211 of the Clean Air Act, 42 U.S.C. 7545. The fuel regulations were not subject to this litigation, and relief is sought only for the action due under Section 202 regarding motor vehicle emissions.

> whether such emissions endanger public health and welfare under the Clean Air Act. Today the President has responded to the Supreme Court's landmark decision by calling on EPA and our federal partners to move forward and take the first regulatory step to craft a proposal to control greenhouse gas emissions from new motor vehicles.
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> * * *
>
> [O]ur target for a draft proposal will be fall of this year. And as part of that proposal, we will address the endangerment finding as part of the proposal.
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> * * *
>
> The proposal – the sequence, we develop a proposed rule-making; then we take public comment on that proposed rule-making, which I said we would – our goal is to have a proposal out this fall, fall of 2007. Then there would be a notice and comment; then we then review all of those comments, and then make a final decision, which would then be issued in the final regulation, which the President has asked for us to have it completed by the end of 2008.[4]

By stating that it was moving forward with proposed regulations under Section 202(a)(1), EPA acknowledged its view that endangerment was occurring and that any remaining scientific uncertainty on climate change was not so profound as to preclude the agency from making a judgment on endangerment. This follows because that section "condition[s] the exercise of EPA's authority on its formation of a 'judgment'" concerning the statutory endangerment standard. 127 S. Ct. at 1462.

Throughout the summer and fall, in public statements, in testimony under oath to Congressional committees, and in Federal Register notices, the EPA Administrator and his agency repeatedly reiterated the intention to issue an endangerment determination, as well as proposed standards, by the end of 2007. For example, at a hearing on November

[4] Briefing, May 14, 2007, *available at* http://www.whitehouse.gov/news/releases/2007/05/20070514-6.html, (attached as Ex. C).

8, 2007, before the House Committee on Oversight and Government Reform, the Administrator said:

> Of course, before the agency, given the Supreme Court decision in Massachusetts v. EPA, the focus is on mobile sources. So we are, as I have already mentioned, going to be proposing regulating CO2 greenhouse gases, from mobile sources by the end of this year.[5]

EPA reaffirmed its end-of-the-year schedule in a formal "regulatory plan" published on December 10, 2007: "[W]e have established a schedule to issue a notice of proposed rulemaking by the end of 2007 and a final rule by the end of October 2008." Unified Agenda, Environmental Protection Agency, 72 Fed. Reg. 69922, 69934 (Dec. 10, 2007). EPA cited the Supreme Court's ruling as the legal basis for its plan, and it characterized that ruling as requiring EPA to make an endangerment determination. *See id.* ("On April 2, 2007, the Supreme Court ruled that the EPA must determine, under Section 202(a) of the Clean Air Act, whether greenhouse gas emissions (GHG) from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.").

An investigation conducted by the House Committee on Oversight and Government Reform has established that, consistent with its announced schedule, EPA had in fact completed its internal process of drafting an affirmative endangerment determination during fall 2007. Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson dated March 12, 2008, at 3-6 (attached as Ex. E). The House investigation concluded that the Administrator personally approved the affirmative determination and that, in early December of 2007, EPA transmitted a fully-drafted

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[5] Hearing on EPA Approval of New Power Plants: Failure to Address Global Warming, before the Committee on Oversight and Government Reform, House of Representatives, at 57 (Nov. 8, 2007), available at: http://oversight.house.gov/documents/20071115145634.pdf (attached as Ex. D).

Federal Register notice announcing the affirmative endangerment determination to the White House Office of Management and Budget where it now apparently sits. *Id.* at 5-6. In addition, the investigation found that EPA had completed an extensive scientific review document in support of the endangerment determination (*id.*, at 3-5), but that work regarding the endangerment determination stopped once the proposed determination was sent to the White House. *Id.* at 7.

Further evidence that the Administrator has in fact completed his scientific review and reached his conclusions regarding the adverse effects of greenhouse gas emissions is found in the Federal Register notice published on March 6, 2008, to explain the Administrator's action under Section 209 of the Clean Air Act denying California permission to implement its own greenhouse gas emission standards. 73 Fed. Reg. 12156 (March 6, 2008). In this notice, the Administrator endorsed the conclusion of the Intergovernmental Panel on Climate Change (IPCC) that global warming "is unequivocal and is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global sea level." 73 Fed. Reg. 12165/2, *citing* IPCC (2007) Summary for Policymakers. He also expressly concluded that greenhouse gas emissions, including from motor vehicles, are contributing to global warming. *Id.* at 12165 ("It is widely recognized that greenhouse gases have a climatic warming effect."); *id*. at 12162 (acknowledging the contribution of motor vehicle emissions to global greenhouse gas concentrations). The Administrator also catalogued the diverse dangers that such warming will pose to public health and welfare. For example, he specifically found that "[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with

likely increases in mortality and morbidity, especially among the elderly, young, and frail." *Id.* at 12167/2.[6] The Administrator made these findings after a full notice and comment process.[7]

Despite having transmitted its affirmative endangerment determination to OMB in early December, EPA never issued it. When the end of 2007 came and went, Petitioners wrote the EPA Administrator by letters dated January 23, 2008, noting that EPA had not met its promised deadline, and requesting that the Administrator inform Petitioners when he intended to act. *See e.*g., Letter from Massachusetts Attorney General Martha Coakley, *et al*., to Administrator Stephen Johnson dated January 23, 2008 (attached as Ex. F). In its responses to these letters, and in letters and testimony to Congress, EPA stated that "the Agency does not have a specific timeline for responding to the remand." Letter from Principal Deputy Administrator Robert J. Meyers to Massachusetts Attorney General Martha Coakley, dated February 27, 2008 (attached as Ex. G), at 1.

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[6] As but one additional example, EPA recognized that "[t]he IPCC projects with virtual certainty declining air quality in U.S. and other world cities due to warmer and fewer cold days and nights and/or warmer/more frequent hot days and nights over most land areas." *Id*., *citing* IPCC (2007) Summary for Policymakers.

[7] Ultimately, the Administrator denied the California waiver, but only because he concluded that the harms from global warming being felt in California *are occurring across the country* and because vehicular greenhouse gas emissions *from all over the country* are contributing to those harms. *See id.* at 12162-69. On this basis, he concluded that California does not have "compelling and extraordinary conditions" as provided in Section 209(b) of the Clean Air Act. California and other Petitioners in this case are separately challenging EPA's denial of the waiver as inconsistent with the statute. *State of California v. U.S. Environmental Protection Agency*, Nos. 08-70011 and 08-70030 (9th Cir. filed Jan. 2, 2008).

In an attempt to explain the abrupt change of course, EPA pointed to the recent enactment of the Energy Independence and Security Act of 2007 (EISA), signed into law on December 19, 2007. *Id*. Specifically, EPA stated:

> Given the passage of EISA, and consistent with the Executive Order and the consultation provision in EISA, EPA is analyzing how to proceed on the issues before us on the remand, as well as how to proceed on any rulemaking that would regulate or substantially and predictably affect emissions of greenhouse gases from vehicles and engines.
>
> As a result, at this time, the Agency does not have a specific timeline for responding to the remand. However, let me assure you that developing an overall strategy for addressing the serious challenge of global climate change is a priority for the Agency, and we are taking very seriously our responsibility to develop an effective, comprehensive strategy.

Id.

As is explained fully below, however, EISA specifically provides that nothing in the new energy law alters EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand. In fact, at a Congressional hearing on EPA's delay in acting on the remand in this case, the EPA Administrator conceded this point: "EPA recognizes that the new energy law does not relieve us of our obligation to respond to the Supreme Court's decision in *Massachusetts v. EPA*." Statement of Stephen L. Johnson, Administrator, Before the House Select Committee on Energy Independence and Global Warming, March 13, 2008 (attached as Ex. H), at 4.

In this testimony, Administrator Johnson also put forth a second justification for putting the endangerment determination under Section 202 on hold. He explained that:

> We are formulating a response as part of our development of an overall approach to most effectively address GHG [greenhouse gas] emissions. A decision to control GHG emissions from motor vehicles would impact other Clean Air Act programs with potentially far reaching implications for many industrial sectors, so it is vitally important that we consider our approach to GHG control from this broader perspective.

Id. He added that EPA had begun a process of "developing an overall GHG approach," and he indicated that this process would take significant information gathering and regulatory analysis, and may be delayed even further by the need for research and development of new technologies for carbon capture and sequestration. *Id*. at 4-5. Administrator Johnson declined to say when EPA would act on the remand in this case, saying only that the agency was "continu[ing] to make progress in developing an approach." *Id*. at 5.

On March 27, 2008, Administrator Johnson sent a letter to Congress confirming that this "broader perspective" on endangerment would further delay action on the remand. *See* Letter from Administrator Stephen L. Johnson to Chairman Barbara Boxer et al. dated March 27, 2008 (attached as Ex. I), at 1. EPA's new plan is to issue an Advanced Notice of Proposed Rulemaking ("ANPRM") "later this spring" in order to invite public comment on "the broader ramifications" of regulating greenhouse gases in relation to "the many relevant sections of the Clean Air Act."[8] The ANPRM will also seek comment on the same "specific and quantifiable effects of greenhouse gases" that the agency, consistent with the IPCC's findings, previously found would have dramatic human health and welfare effects. *Id*. at 2; *see* 73 Fed. Reg. 12615 (2008). Only at an unspecified period of time after the public comment period has concluded does the agency intend to "consider how to best respond to the Supreme Court decision." *Id*.

[8] The Administrator concedes that in examining such questions, he "has gone beyond the specific mandate of the Court under section 202 of the Clean Air Act." Johnson March 27, 2008 letter, Ex. I, at 1.

ARGUMENT

I. This Court Has Jurisdiction to Enforce Its Mandate.

The Court has the power to grant relief enforcing the terms of its mandates in cases that have been remanded directly to an administrative agency, including the power to compel an unreasonably delayed agency response to the Court's mandate.[9] *Potomac Electric Power Company v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1032-33 (D.C. Cir. 1983) (appellate court has jurisdiction to determine whether agency unreasonably delayed responding to Court's earlier mandate); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (appellate decision binds further action in litigation by agency subject to its authority, and the court "is amply armed to rectify any deviation"); *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) ("this Court has the power to enforce its mandates"). Although the issuance of a writ of mandamus "is an extraordinary remedy reserved for extraordinary circumstances[,] [a]n administrative agency's unreasonable delay presents such a circumstance because it signals the 'breakdown of regulatory processes.'" *In re American Rivers*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations omitted). Further, this Court has long recognized that it has an interest in seeing that "an unambiguous mandate is not blatantly disregarded by parties to a court proceeding." *Int'l Ladies Garment Union v. Donovan*, 733 F.2d 920, 922 (D.C. Cir. 1984).

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[9] The Court's jurisdiction arises from the All Writs Act, 28 U.S.C. 1651(a), which provides that "the Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." *See Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984); *see also Sierra Club v. Thomas*, 828 F.2d 783, 795-96 (D.C. Cir. 1987).

II. EPA Has Unreasonably Delayed Acting in Accordance with the Supreme Court's Ruling and this Court's Mandate.

This case presents a textbook example of unreasonable delay under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("*TRAC*"). Every potential justification for inaction recognized by *TRAC* is unavailable to the EPA Administrator in this case. The Administrator – and indeed the President – assigned this rulemaking the highest priority and set clear deadlines for action. The facts demonstrate unambiguously that the Administrator and his agency have completed all work legally relevant to the endangerment determination and that this work has resulted in the fully-documented preparation of a Federal Register notice of an affirmative determination. There is no basis to say that agency resources are inadequate or that an order to respond to the mandate would prevent EPA from carrying out other priorities. Each of the agency's new excuses for further delay runs directly counter to the Supreme Court's ruling. An order to act within 60 days is necessary and appropriate.

TRAC provides the standards in this Circuit for determining whether agency delay warrants mandamus relief:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

In re American Rivers, 372 F.3d at 418 (*quoting TRAC*, 750 F.2d at 80); *see also In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Analysis of these factors shows that EPA has unreasonably delayed issuing an endangerment determination in response to the Supreme Court's remand and this Court's mandate, and that mandamus relief is warranted.

A. EPA Has Not Acted Consistently with the "Rule of Reason."

No legitimate reasons justify EPA's failure to issue the endangerment determination it has already prepared. While courts have sometimes held that the complexity of the issues facing an agency, or the work and resources required to address these issues, justifies an agency's delay, *see Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987), those factors are unavailing in this case, where EPA has already completed all the work required to make its determination. As discussed above, several months ago EPA completed and submitted to the White House OMB a fully-documented Federal Register notice of an affirmative endangerment determination. *See* pp. 7-8, *supra*. Further, as discussed above, the EPA administrator, in his recent Notice denying California's waiver request, effectively presented the substance of an endangerment determination, acknowledging that greenhouse gas emissions, including from motor vehicles, contribute to global warming and cause significant public harm across the country. *See* pp. 8-9, *supra*.

In response to Petitioners' letters and in testimony and letters to Congress, EPA does not argue that any further scientific assessment is necessary before an endangerment determination can be made. Rather, the Administrator attempts to justify his delay by pointing to two policy factors just like those that the Supreme Court held to be irrelevant

to the endangerment determination: (1) the Department of Transportation's authority to regulate fuel economy, as exemplified in the recent enactment of the EISA; and (2) a desire to develop an "overall approach" to greenhouse gas regulation.

i) The Department of Transportation's Fuel Economy Authority and the Enactment of EISA Does Not Excuse EPA's Inaction.

The Supreme Court determined in *Massachusetts* that the Administrator's obligations under the Clean Air Act are "wholly independent" from the obligations of the DOT under the Energy Policy and Conservation Act (EPCA), the law providing for issuance of fuel economy standards. 127 S.Ct. at 1462. EISA, enacted in December 2007, tightened the fuel economy standards that DOT is required to set under EPCA. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007). EISA did not, however, alter EPA's authority or duties under Section 202 of the Clean Air Act or under the Supreme Court's remand, as the Administrator has already conceded.

In enacting the new legislation, Congress could not have been clearer that it was not modifying EPA's existing obligations under Section 202 of the Clean Air Act. *See id.* § 3, 121 Stat. 1492, 1498 ("Except to the extent expressly provided in this Act, or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation."). Thus, the enactment of EISA provides EPA no excuse not to respond to this Court's mandate or to delay issuing the endangerment determination that it has already prepared. The Supreme Court's conclusion stands

unchanged: "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities." *Mass. v. EPA*, 127 S.Ct. at 1462.

ii) EPA May Not Delay its Endangerment Determination in Order to Develop an "Overall Approach" to Greenhouse Gas Emissions.

As noted above, EPA has now stated its intention to issue an ANPRM to examine a broad array of topics going far beyond the question posed by the Supreme Court's remand and – only at some unspecified time after that process has concluded – to "then consider how best to respond to the Supreme Court's decision." Johnson March 27, 2008 letter, Ex. I, at 2. The High Court's ruling was clear: "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare,' *ibid*." 127 S. Ct. at 1462. Thus, "[t]he statutory question is whether sufficient information exists to make an endangerment finding." *Id.* 1463.

As described in the March 27 letter, EPA's planned ANPRM will explore issues going well beyond the specific question the Supreme Court has defined -- in a ruling that binds EPA and this Court -- as "*[t]he* statutory question." 127 S. Ct. at 1463 (emphasis added). Thus, the planned ANPRM is not responsive to the Supreme Court's remand and this Court's order implementing that remand. EPA's new rationale for delay is disturbingly similar to those that EPA put forward in 2003 to justify its preference not to regulate, and that was expressly rejected by the Supreme Court. 68 Fed. Reg. at 52931 (Establishing motor vehicle greenhouse gas emissions standards now would "result in an inefficient, piecemeal approach to addressing the climate change issue…. A sensible

regulatory scheme would require that all significant sources and sinks of GHG emissions be considered in deciding how best to achieve any needed emission reductions.”).

Under the Supreme Court’s decision, these considerations have no bearing on the endangerment determination – a question that must be answered based on the science. Indeed, these are exactly the kinds of policy justifications for inaction that the Supreme Court expressly held invalid and irrelevant to the endangerment determination. *Massachusetts*, 127 S.Ct. at 1463 (rejecting EPA’s argument that an aversion to “piecemeal” regulation warrants inaction on motor vehicle emissions.) The Supreme Court made clear that courts may not excuse agency inaction on the endangerment question on the basis of these extraneous policy considerations. *Id*. (“Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment.”) Thus, EPA simply is not free to delay issuing an endangerment determination on the grounds that the agency wants to develop an “overall approach” or to address how greenhouse gas regulation should be undertaken for sources other than motor vehicles. *See Sierra Club v. EPA*, 479 F.3d 875, 884 (D.C. Cir. 2007) (“If the Environmental Protection Agency disagrees with the Clean Air Act's requirements for setting emissions standards, it should take its concerns to Congress. If EPA disagrees with this court's interpretation of the Clean Air Act, it should seek rehearing en banc or file a petition for a writ of certiorari. *In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court*.”) (emphasis added).

Moreover, it bears emphasis that EPA plans an *advance* notice of proposed rulemaking, an approach that augurs years of delay in responding to the remand. As this Court has recently recognized, an ANPRM is a tool "seeking information to assist [the agency] in deciding on the *possibility* of a *future* proposed rule," -- that is, "a preparatory step, antecedent to a potential future rulemaking." *P&V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (emphasis in original). Given the narrow scope of the question posed by the Supreme Court remand, EPA's completion of the work necessary to address that question, and the urgency of the global warming problem, the huge delay announced in EPA's March 27 letter is utterly unreasonable.[10]

Because EPA cannot show that any work or any complex decision-making remains to be done with regard to the endangerment decision, EPA's delay fails the "rule of reason." *See In re American Rivers*, 372 F.3d at 419 (finding agency delay unreasonable because "none of its reasons comports with the specific considerations outlined in *TRAC*" and because "a reasonable time for agency action is typically counted in weeks or months, not years.").

Finally, in assessing the reasonableness of EPA's ongoing delay, it is worth remembering that the rulemaking petition at issue was filed in 1999. While there is no specific statutory deadline for taking action under Section 202, the Supreme Court ruled that once having decided to respond to the petition, EPA is obligated to act on the basis of the proper statutory factors. Through a combination of agency inaction and invalid legal arguments, EPA has now already delayed action consistent with those statutory factors

[10] While EPA may be free to seek broad public comment on issues that go beyond the mandate, what the agency cannot do is to substitute that process for fulfilling its obligations under the mandate in a timely manner.

for almost a decade, with no end in sight. As this Court stated: "[W]e have seen it happen time and time again, ... action ... for the protection of public health all too easily becomes hostage to bureaucratic recalcitrance, factional infighting, and special interest politics. At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987).

B. Human Health and Welfare Are at Stake.

As discussed above, the EPA has already submitted to OMB a proposed determination that greenhouse gas emissions contribute to air pollution which may reasonably be anticipated to endanger public welfare. *See* pp. 7-8, *supra*. Further, in his denial of California's waiver request, the EPA Administrator concluded that greenhouse gas emissions, including from motor vehicles, contribute to global warming and are causing significant public harm. 73 Fed. Reg. at 12163-69. For example, the Administrator noted that, as a result of this greenhouse-gas-driven global warming, "[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young, and frail." 73 Fed.Reg. 12167/2. It is clear that extremely significant human health and welfare concerns are at stake here.

C. Ordering Issuance of the Endangerment Determination Will Not Hamper Agency Activities of Higher or Competing Priority.

Issuance of the endangerment determination would constitute concrete progress in the regulation of greenhouse gas emissions under Section 202 of the Clean Air Act, and it would allow the Agency to focus on the type and manner of emission standards needed to achieve meaningful reductions from motor vehicles. Because EPA has already

completed all of the work necessary to issue the endangerment determination, an order directing the agency to issue the document within sixty days will not affect other agency activities of higher or competing priority. As shown above (*see* pp. 7-8, *supra*), EPA has submitted a fully-documented affirmative determination to OMB. Further, the Administrator himself had already placed the endangerment determination on a fixed schedule consistent with its self-evident importance. To meet that schedule, the Administrator "internally redirected $5.3 million in contract dollars and redeployed 53 employees" to work on the development of the endangerment determination and the emissions regulations. Letter from Administrator Stephen L. Johnson to Chair Dianne Feinstein dated March 3, 2008 (attached as Ex. J). Issuing the endangerment determination will therefore expend little or no additional agency resources and will constitute the first step in what the agency itself identified as one of its highest priorities. Finally, as the Supreme Court expressly noted, "[t]o the extent that [moving forward with regulation under Section 202] constrains agency discretion to pursue other priorities of the Administrator or the President, this is by congressional design." 127 S.Ct. at 1462.

D. Delay is Causing Significant Harm to the Public.

EPA's delay has serious consequences. Greenhouse gases continue to accumulate in the atmosphere at an alarming rate and the window of opportunity in which we can mitigate the dangers posed by climate change is rapidly closing. *See, e.g.,* IPCC Third Assessment Report (2001), Synthesis Report, Summary for Policymakers, at 19, 21 (explaining how significant reductions in greenhouse gas emissions are needed in the short term to stabilize atmospheric concentrations, and how a delay in implementing emission reductions will result in increased extent and magnitude of adverse impacts). Thus, delay is not only causing harm, it is reducing the effectiveness of any subsequent

regulatory efforts to address the problem.[11] *See Cutler v. Hayes*, 818 F.2d at 897-98 (in assessing whether delay is unreasonable, court "must also estimate the extent to which [the] delay may be undermining the statutory scheme, either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all") (internal quotations omitted). As then-EPA Administrator Christie Todd Whitman succinctly acknowledged over seven years ago: "If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk."[12]

E. Although Petitioners Need Not Show Agency Impropriety to Make Out a Case for Mandamus, There is Ample Evidence that EPA Has Acted, and Continues to Act, Improperly.

Despite the Supreme Court's plain directive that EPA act in accordance with its statutory responsibilities, EPA continues to withhold action a year later. Moreover, this is not a case where a court has to make a difficult assessment about when an agency's inaction is sufficiently prolonged that it becomes actionable. Rather, this is a case where the agency has already prepared its affirmative determination of endangerment and where its continued delay is based on exactly the kinds of policy considerations that the Supreme Court held invalid. Thus, although Petitioners need not prove "impropriety

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[11] As a federal District Court recently found after trial, the planet may soon reach a "tipping point" on global warming, a point at which concentrations of carbon dioxide are so great that the consequences "will become dramatically more rapid and out of control." *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombi*e, 508 F.Supp.2d 295, 313-14 (D.Vt. 2007), *appeal pending,* Second Circuit Nos. 07-43-42-CV; 07-43-60-CV.

[12] Remarks delivered at the G8 Environmental Ministerial Meeting Working Session on Climate Change, Trieste, Italy (March 3, 2001), available at: http//yosemite1.epa.gov/administrator/speeches.nsf/b1ab9f485b098972852562e7004dc686/36bca0e3a69a0d8b85256a41005d2e63?OpenDocument.

lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed'" (*TRAC*, 750 F.2d at 80), such impropriety is manifest here.

III. Petitioners Have No Other Adequate Remedy.

Mandamus is proper only if "there is no other adequate remedy available to the plaintiff." *Northern States Power Co. v. DOE*, 128 F.3d 754, 758 (D.C. Cir. 1997) (citation omitted). Because EPA's error is its unreasonable delay in acting, there is no agency action to review and Petitioners' only avenue for relief is to seek a writ of mandamus.

IV. EPA Should Be Ordered to Issue Its Endangerment Determination Within 60 Days.

Given that EPA has already developed an endangerment determination, and sent it to OMB four months ago, the Court does not need to wrestle with the question of how much more time is needed for EPA to complete its task. Sixty days is more than enough time for EPA to issue a document it has already prepared.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court issue a writ of mandamus requiring EPA to issue within sixty days its determination on whether the air pollution to which greenhouse gas emissions from motor vehicles contribute "may reasonably be anticipated to endanger public health or welfare."

Respectfully submitted,

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