United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1361 **September Term 2007**

EPA-68FR52922

Filed On: June 26, 2008

Commonwealth of Massachusetts, et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Alliance of Automobile Manufacturers, et al.,
Intervenors

Consolidated with 03-1362, 03-1363, 03-1364, 03-1365, 03-1366, 03-1367, 03-1368

BEFORE: Sentelle, Chief Judge, and Randolph and Tatel*, Circuit Judges

O R D E R

Upon consideration of the petition for writ of mandamus to enforce the mandate, EPA's response thereto, and the reply, the motions of the CO_2 Litigation Group and the Utility Air Regulatory Group for leave to file responses and the lodged responses, it is

ORDERED that the motions for leave to file be granted. The Clerk is directed to file the lodged responses. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Deputy Clerk

* A separate statement of Circuit Judge Tatel, concurring in part and dissenting in part from the denial of the petition, is attached.

TATEL, *Circuit Judge*, concurring in part and dissenting in part: Given the year that has passed since the Supreme Court held in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), that the Environmental Protection Agency has authority under the Clean Air Act to regulate greenhouse gas emissions from vehicles, petitioners seek mandamus to force EPA to decide within sixty days whether such emissions endanger public health or welfare and therefore must be regulated under section 202 of the Act, 42 U.S.C. § 7521(a)(1) (requiring the EPA Administrator to "prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . , which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare"). Although "[m]andamus 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 Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n.156 (D.C. Cir. 1987)). To determine whether an agency's delay is unreasonable, thus warranting the extraordinary remedy of mandamus, this court considers the six factors listed in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"):

> (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.'"

Id. at 80 (citations omitted).

In this case several of these factors support granting mandamus: human health and welfare are plainly at stake, ordering EPA to act would have little impact on agency activities of a competing or higher priority given that EPA has apparently already prepared a draft of the endangerment finding petitioners seek, *see* Letter from Representative Henry A. Waxman to Stephen L. Johnson, EPA Administrator (Mar. 12, 2008), and the nature and extent of the interests prejudiced by delay are deep and fundamental.

That said, I agree that mandamus is not yet appropriate here. The first two *TRAC* factors compel this conclusion. To begin with, nothing in section 202, the Supreme Court's decision in *Massachusetts v. EPA*, or our remand order imposes a specific deadline by which EPA must determine whether a particular air pollutant poses a threat to public health or welfare. Moreover, though "a reasonable time for agency action is typically counted in weeks or months, not years," *In re Am. Rivers*, 372 F.3d at 419, petitioners have pointed to no case, nor have I found one, in which this court granted mandamus based on agency delay of a year or less. *See Midw. Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" (quoting *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980))). Indeed, we have often allowed delays significantly beyond a year, especially where, as here, the issue facing the agency was both complicated and controversial. *See, e.g.*, *Sierra Club v. Thomas*, 828 F.2d 783, 799 (D.C. Cir. 1987) ("Given the complexity of the issues facing EPA and the highly controversial nature of the proposal, agency deliberation for less than

three years—little more than one year since the close of the public comment period—can hardly be considered unreasonable.").

Attempting to distinguish these precedents, petitioners argue that this case differs because the determination they ask EPA to make is straightforward. They ask only that the Administrator exercise his judgment and decide whether greenhouse gases emitted from motor vehicles endanger public health or welfare. Responding, EPA explains that at least since 1990 it has issued draft endangerment findings together with the regulations enforcing them, Decl. of Robert J. Meyers ¶¶ 39-40, and that nothing in the Clean Air Act requires it to issue endangerment findings separately from their accompanying regulations. Petitioners reply that while the statute may allow the agency to issue endangerment findings and implementing regulations concurrently, in *Massachusetts v. EPA* the Supreme Court required the agency to make a separate endangerment finding when it said: "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." 127 S. Ct. at 1462.

EPA has the best of this argument, as *Massachusetts v. EPA* simply will not bear the weight petitioners place on it. As EPA points out, "nothing in the Court's opinion . . . requires EPA on remand to depart from its longstanding practice and reconsider the endangerment question *on its own*, separate from consideration of what emission standards would be appropriate if EPA were to take final action on a proposed positive endangerment finding." Resp't's Br. 14. Thus, EPA has every right to issue regulations implementing its possible endangerment finding concurrently with that finding, and given the dramatic impact such regulations could have on the auto industry and American life generally, there is nothing inherently unreasonable in the agency's taking over a year to develop them.

Although I believe that mandamus is not yet warranted in this case, that hardly ends the matter. In several prior cases in which this court has deemed mandamus inappropriate, we have held the motion in abeyance and required periodic updates from the agency because of the agency's recalcitrance, bad faith, delays bordering on the unreasonable, or other similar factors. *See, e.g.*, *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 553-56 (D.C. Cir. 1999) (retaining jurisdiction over case because of agency's "substantial" delay and failure to provide a "reasonably definite" estimate of when it would comply with its statutory obligations); *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353-54 (D.C. Cir. 1986) (retaining jurisdiction "because of [the agency's] history of chronic delay and its repeated failure to meet its own projections"); *TRAC*, 750 F.2d at 80 (retaining jurisdiction "in light of the Commission's failure to meet its self-declared prior deadlines for these proceedings"). Here I would do the same because EPA has postponed—now indefinitely—deciding whether greenhouse gas emissions endanger public health and welfare, calling into question whether the agency's desire to promulgate regulations concurrently with the endangerment finding is simply an excuse to avoid complying with the statute.

Shortly after the Supreme Court issued its decision in this case, EPA assigned several dozen staff members to work on a proposed endangerment finding and accompanying regulations. Letter from Stephen L. Johnson, EPA Administrator, to Senator Dianne Feinstein (Mar. 3, 2008). Moreover, the EPA Administrator repeatedly pledged to issue proposed regulations governing greenhouse gas emissions from motor vehicles by the end of 2007. *See, e.g.*, EPA Approval of New Power Plants: Failure to Address Global Warming Pollutants, Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. 57 (2007) (statement of EPA Administrator Stephen Johnson) ("[W]e are . . . going to be proposing regulating . . . greenhouse gases[] from mobile sources by the end of this year."). And according to a report by the House Committee on Government Oversight and Reform, which petitioners attached to their mandamus request, EPA actually completed a

draft endangerment finding and proposed regulations by its self-imposed deadline, forwarding both to the White House in December 2007. Letter from Representative Waxman to Administrator Johnson (Mar. 12, 2008). But "after the White House received the endangerment finding . . . , work on the finding and regulation was stopped." *Id.* EPA denies none of this. By February of this year, top EPA officials were saying "the Agency does not have a specific timeline for responding to" the Supreme Court's decision. Letter from Robert J. Meyers, EPA Principal Deputy Assistant Administrator, to Martha Coakley, Massachusetts Attorney General (Feb. 27, 2008). And in March, EPA announced a new approach that essentially postpones regulation indefinitely: at some unknown future point, it will issue an Advance Notice of Proposed Rulemaking—"a preparatory step, antecedent to a potential future rulemaking," *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008)—soliciting comments on the ramifications of regulating greenhouse gases under section 202. Letter from Stephen L. Johnson, EPA Administrator, to Senators Barbara Boxer & James Inhofe (Mar. 27, 2008).

Given this indefinite postponement, I would not deny the petition, but rather would hold it in abeyance, direct the agency to file within thirty days a detailed schedule for complying with this court's mandate, and require the agency to file progress reports every four months thereafter. "In this way we c[ould] ensure future compliance with the statute without having to speculate over the possibility of further agency delays." *Ctr. for Auto Safety*, 793 F.2d at 1354.