

GHG REGULATION & LITIGATION

The Impact of MASS v. EPA

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Carolinas Air Pollution Control Association
Spring Meeting
Asheville, NC
April 13, 2007

Litigation as Extension of State Policy

- Lawsuits by State Attorneys General have emerged as a significant force by some State efforts to compel GHG regulation
- Mostly, but not exclusively, suits from States that are adopting their own GHG programs (California & Northeast)

Litigation Issues

- Is GHG a Clean Air Act Pollutant?
- Do GHG Emissions Constitute a Nuisance?
- Did GHG Emissions Intensify Katrina?
- Can California and Other States Regulate Motor Vehicle GHG Emissions?
- Other Issues

Are GHGs CAA Pollutants?

- Clinton Administration EPA says they are
- Environmental organizations file petition with EPA asking it to regulate tailpipe GHG emissions
- No action on petition when administration leaves office
- State AGs and environmental organizations file district court action seeking to compel EPA regulation of tailpipe GHG emissions
- EPA then denies administrative petition
- EPA's denial appealed to D.C. Circuit, and district court action dismissed

EPA Decision

- CAA does not provide authority to regulate GHG emissions.
- Even if it did, Agency would decline to exercise that authority
 - Science grounds (uncertainty)
 - Policy grounds (better ways to address global warming)

GHGs a CAA Pollutant?

D.C. Circuit

- Petition denied on 2-1 vote – both judges in majority wrote separately, neither reached issue of whether EPA has authority under the CAA to regulate GHG emissions:
- Judge Randolph: EPA correctly denied the petition
 - Scientific judgment as to asserted environmental impacts
 - Policy judgment as to desirability of regulating GHGs
- Judge Sentelle: No standing
 - Asserted grievance is general, not particular to Petitioners
- Judge Tatel: Lengthy dissent on all issues

Are GHGs a CAA Pollutant?

Supreme Court

- 5-4 Yes
- Standing - States get “special solicitude”
- Statute: broad definition of “air pollutant” and “air pollution”
- Discretion
 - No non-endangerment policy factors allowed
 - Scrutiny on endangerment finding

DISSENT

- All 4 Dissenters join both dissents
- Roberts – Standing “SCRAP for a new generation”
- Scalia – “I simply cannot conceive of what else the Court would like EPA to say.”

Potential Ramifications

National Level

- Case not just about motor vehicle emissions
- Large Stationary Sources
 - Pending NSPS Lawsuit
 - BACT?
 - NAAQS?
- Congress?

Do GHG Emissions Constitute a Nuisance?

The SDNY Lawsuit

- 8 States sue 5 utilities over GHG emissions from powerplants in 20 states – one plaintiff State with powerplant challenged: Wisconsin
- Suit alleges GHG emissions create public nuisance
- Parallel lawsuit by environmental organizations alleging both public and private nuisance
- Seeking order to permanently enjoin powerplants to abate contributions to the nuisance:
 - Relief sought
 - Require cap on GHG emissions & annual reductions for at least a decade

Do GHG Emissions Constitute a Nuisance? SDNY Decision

- Suit dismissed on motion – Raises a political question & Court does not have jurisdiction
- Potential global climate change – Policy issue to be resolved in Congress, not the Courts:
 - “While at times, some judges have become involved with the most critical issues affecting America, political questions are not the proper domain of judges.”
- Court did not reach other arguments raised by defendants

Do GHG Emissions Constitute a Nuisance?

2d Cir. Appeal of SDNY

- Briefs filed last Winter
- Oral argument held in June
- Decision expected soon
- Impact of Mass v. EPA

Did GHG Emissions Intensify Katrina?

- Plaintiff Gulf Coast property owners sue utilities, coal companies, oil companies, chemical companies & others from around the country alleging liability in monetary damages on theory that defendants' GHG emissions intensified Katrina
- Suit started as claims against insurance companies
 - Second amended complaint morphed into global warming claims – now on 4th amended complaint
- Suit alleges liability under various state and federal common law theories, including nuisance, negligence and trespass

Did GHG Emissions Intensify Katrina? – 2

- Defendants moved for dismissal in June-July
- Theories
 - Failure to state a claim under state law (causation)
 - Political question
 - Preemption
 - Interference with foreign policy
 - Standing (causation)

Did GHG Emissions Intensify Katrina? – 3

- Plaintiffs filed opposition briefs in August, then further briefing
- Uncertain when decision will be issued
- Victory on motions by plaintiffs would pave the way for discovery, trial
- Lawsuit could engender additional global warming lawsuits
- Impact of Mass v. EPA

Can States Regulate Motor Vehicle Tailpipe GHGs?

- Clean Air Act gives California authority to set more stringent tailpipe emissions standards
- CARB uses to establish GHG emissions standards
- Only method to lower vehicle GHG emissions – increasing fuel economy
- Auto manufacturers bring two lawsuits:
 - Federal action: CARB regulations preempted by federal CAFE standards, other
 - State action: Administrative defects
- Federal trial scheduled for January 2007 but stayed pending *Mass v. EPA*

California Ratchets Up Pressure On Autos

- Lawsuit by former California AG vs. autos seeks monetary damages for alleged global warming impacts
- Says autos are targeted since their GHG emissions are increasing most rapidly
- Legal theories are Federal & State law nuisance
- Requests jury trial

Other States Follow CARB

- About a dozen follow CA
- Lawsuits challenging those standards pending

OTHER

- Extent to which global warming should be considered in EIS' (DM&E Railroad, Border Transmission Line, OPIC / Export-Import Bank financing)
- Polar Bear Endangered Species
- Federal Endangered Species Petition

STATE EFFORTS

- CA and West
- RGGI
- Effect of Mass v. EPA

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