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Developments in Climate Change Law in the United States of America

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Introduction

Since President Barack Obama took office in January 2009, U.S. climate change law has developed at a remarkable pace. The U.S. Environmental Protection Agency (EPA), in particular, has taken several steps to regulate greenhouse gas emissions from motor vehicles and stationary sources, and the courts have issued opinions that make it more likely that the common law may restrict emissions of greenhouse gases from large facilities. Even the U.S. Congress has made climate change a focal point of legislative activity. Although it remains uncertain whether Congress will enact a federal cap-and-trade program or other climate change legislation, it seems likely that the law of climate change will continue to develop rapidly in the years ahead. This update will briefly describe the most recent and significant activities in Congress, the courts, and the Executive Branch of the U.S. Government.

Regulatory Developments

In 2007, the U.S. Supreme Court issued a decision in *Massachusetts v. EPA*, holding that the EPA had failed to comply with the Clean Air Act when it denied a petition to regulate greenhouse gas emissions from motor vehicles.[1] The Court's decision resulted in a remand for the agency to make two findings: an "endangerment

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[1] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

finding," which asks whether the air pollutant emissions endanger public health and welfare; and a "cause and contribute finding," which asks whether the sources at issue "cause or contribute" to the endangerment.[2] In December 2009, the EPA issued the much-anticipated findings, concluding that greenhouse gases do, indeed, endanger public health and welfare, and that emissions from motor vehicles contribute to this endangerment.[3] These findings, in turn, led to several recent decisions that may result in broader regulation of greenhouse gases under the Clean Air Act.

Most directly, the findings served as the necessary prerequisite to the EPA's decision to establish federal vehicle emissions standards for greenhouse gases from new fleets of vehicles.[4] The EPA's emissions standards complement Corporate Average Fuel Efficiency (CAFE) standards, which mandate the average fuel economy levels for vehicles sold in the United States.[5] The combined standards appear to signal an increased interest among different regulatory agencies in simultaneously promoting efficiency and reducing emissions through joint regulation.[6]

The EPA's promulgation of vehicle emissions standards, moreover, has made it more likely that coal-fired power plants, refineries, cement manufacturers, and other large emitters of greenhouse gases will require permits and perhaps new pollution control technology.[7] Under a part of the Clean Air Act known as Prevention of Significant Deterioration (PSD), new or modified major facilities require permits and must meet emissions standards achievable using the Best Available Control Technology (BACT).[8] However, this requirement applies only to air pollutants that are 'subject to

[2] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
[3] Ibid.
[4] EPA and National Highway Transportation Safety Admin., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (pre-publication final rule issued Apr. 1, 2010), *available at* http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf (to be codified at 40 C.F.R. Parts 85, 86, and 600 and 49 C.F.R. Parts 531, 533, 537 and 538) [hereinafter Vehicle Emissions and Economy Standards].
[5] Ibid.
[6] Ibid.
[7] Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,019-17,020 (Apr. 2, 2010) [hereinafter Reconsideration Memo] (discussing consequences of the federal vehicle emissions standards).
[8] 42 U.S.C. § 7475(a).

regulation' under the Clean Air Act.[9] Until the EPA promulgated federal vehicle emissions standards, various courts and administrative bodies had reached different conclusions about whether greenhouse gases were already 'subject to regulation' under parts of the Act requiring facilities to monitor and report their greenhouse gas emissions.[10] The new federal vehicle emissions standards clearly make greenhouse gases subject to such regulation and thus also to the PSD permitting process and BACT standards.[11]

However, the EPA has attempted to lessen the impact on potentially regulated facilities through two separate actions. First, one day after the EPA issued its final vehicle emissions standards, it issued a memorandum explaining how the vehicle emissions standards would affect the PSD program.[12] In EPA's view, greenhouse gases would become 'subject to regulation' only once the vehicle emissions standards become effective, on January 1, 2011.[13] Second, in anticipation of the vehicle emissions standards, the EPA issued a proposed rule known as the 'Tailoring Rule' that attempts to limit the application of the PSD program to very large emitting facilities.[14] Under the Clean Air Act, emissions of 100 or 250 tons per year (depending on the type of facility at issue) trigger PSD.[15] In the Tailoring Rule, the EPA proposed to increase the threshold emissions of greenhouse gases to 25,000 tons per year, arguing that the lower statutory thresholds would make permitting administratively impossible and lead to absurd results.[16] These new regulatory proposals would limit the Clean Air Act's permitting and technology requirements to larger sources of greenhouse gas emissions and would give the agency nearly a year to figure out how it will implement the PSD program.

It remains unclear, however, whether EPA's new proposals will take effect as proposed. The EPA's Administrator has hinted that she may increase the threshold

[9] Ibid.
[10] *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008); Longleaf *Energy Assoc., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753 (Georgia Court of Appeals 2009).
[11] Reconsideration Memo (n.7) 17,019-17,020.
[12] Reconsideration Memo (n.7).
[13] Reconsideration Memo (n.7) 17,019-17,020.
[14] Proposed Rule, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009) [hereinafter Tailoring Rule].
[15] 42 U.S.C. § 7479(1).
[16] Tailoring Rule (n.14).

emissions triggering PSD up to 75,000 tons per year and therefore significantly limit PSD's applicability to all but the largest U.S. sources.[17] Several states and industrial groups have also challenged in court EPA's vehicle emission standards and the endangerment finding.[18] If these challenges succeed, parties will go back to arguing whether greenhouse gases are 'subject to regulation' under the Clean Air Act and thus whether PSD applies at all. Finally, members of Congress have proposed preempting all Clean Air Act regulation of greenhouse gas emissions from stationary sources.[19] While no one can realistically predict whether Congress will act at all, preemption appears to be a likely outcome of any congressional action that may result.

Congressional Developments

In June 2009, the U.S. House of Representatives made history when it narrowly passed the first U.S. climate change bill, the American Clean Energy and Security Act (ACES).[20] If enacted into law, ACES would establish a national cap-and-trade program covering about 85% of all U.S. greenhouse gas emissions.[21] It would also establish a national Renewable Electricity Standard, requiring utilities to obtain a certain percentage of electricity from renewable energy sources.[22] Additionally, ACES would fund research and development in renewable energy, nuclear energy, and carbon capture and sequestration and incentivize energy efficiency to reduce overall electricity demand.[23]

Since the House passed ACES, momentum to address climate change in the Senate has waxed and waned. Momentum increased in 2010 with the so-called Kerry-

[17] C. Horowitz, 'Tailoring the Tailoring Rule – We're Up to 75,000 TPY' (4 Mar. 2010), http://legalplanet.wordpress.com/2010/03/04/tailoring-the-tailoring-rule-were-up-to-75000-tpy/. 2010.
[18] R. Bravender, 'States Take Sides in Greenhouse Gas "Endangerment" Brawl' *NY Times* (19 Mar. 2010), http://www.nytimes.com/gwire/2010/03/19/19greenwire-states-take-sides-in-greenhouse-gas-endangerme-29019.html.
[19] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

Graham-Lieberman (KGL) bill, which sought some sort of cap-and-trade system and other energy-related measures.[24] However, the day before the anticipated release of KGL, Senator Graham pulled his support for the legislation to protest other Senators' interest in advancing immigration legislation instead.[25] At the time of writing, it is unclear if KGL is merely dormant or dead. If KGL has indeed met a premature end, hopes for U.S. climate change legislation will fade.

Court Developments

In 2005, a federal district court in New York dismissed a lawsuit filed by several states and a handful of land trusts alleging that emissions of greenhouse gases from coal-fired power plants contributed to a public nuisance and property damage.[26] The district court ruled that it lacked jurisdiction to decide the case, because the claims presented non-justiciable political questions more appropriately decided by the political branches of government rather than the courts.[27] Other courts quickly followed the New York court's lead.[28] The courts repeatedly made clear they had no intention of adjudicating climate change issues, when Congress and President Bush had signaled resistance to addressing climate change through legislation or regulation.

In 2009, however, the tide began to turn. In September, the Court of Appeals for the Second Circuit reversed the New York district court decision.[29] In a lengthy and detailed decision, the appellate court rejected the lower court's conclusion that climate change presents a dispute unfit for court review. The court first held that climate change cases do not by their nature present only political questions.[30] The Second Circuit also rejected the lower court's assertion that tort law cannot apply to

[24] B. Johnson, 'Outline of Kerry-Graham-Lieberman appears to hew to Obama's clean energy principles' *Grist* (19 Mar. 2010), http://www.grist.org/article/2010-03-18-outline-kerry-graham-lieberman-bill-hew-to-obamas-clean-energy/.
[25] J. Broder, 'Graham Pulls Support for Major Senate Climate Bill' *NY Times* (24 Apr. 2010), http://www.nytimes.com/2010/04/25/us/politics/25graham.html?hp.
[26] *Connecticut v. American Electric Power Co., Inc*., 406 F. Supp.2d 265 (S.D. N.Y. 2005).
[27] Ibid.
[28] *California v. General Motors Corp*., 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. 2007); *Comer v. Murphy Oil USA, Inc*., Civ. Action No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007).
[29] *Connecticut v. American Electric Power Co. Inc*., 582 F.3d 309 (2d Cir. 2009).
[30] Ibid, at pp. 322-32.

claims related to climate change.[31] By simply comparing the language of the Restatement of Torts to the plaintiffs' allegations, the Second Circuit readily concluded that the plaintiffs' complaint raised claims capable of adjudication under traditional tort principles. Last, the Second Circuit readily held that both state and private plaintiffs had Constitutional standing to litigate the case.[32] The court's decision thus reopened the doors - at least in that jurisdiction - to climate change-related tort cases.

It is however unclear how far the Second Circuit's decision will extend. In 2009, a three-judge panel of the Fifth Circuit Court of Appeals agreed with the Second Circuit that plaintiffs had justiciable tort claims against companies whose greenhouse gas emissions allegedly contributed to the harms associated with Hurricane Katrina.[33] However, a few months later the Fifth Circuit agreed to hear the case *en banc*,[34] and many court watchers think the panel's decision will not remain good law. A district court in California dismissed a different lawsuit on political question grounds, disagreeing with the Second Circuit's decision.[35] Finally, the D.C. Circuit Court of Appeals narrowed the class of cases for which private parties have Constitutional standing to address harms associated with climate change.[36] Ultimately, it seems likely that some of these issues will reach the Supreme Court. While it is impossible to predict how the Supreme Court will rule, several justices seem likely to oppose any effort to broaden the class of plaintiffs or cases addressing climate change.

Conclusion

Climate change law in the United States is an incredibly dynamic area of environmental law. While this update explores only developments at the federal level, state and local laws and policies also continue to develop and change rapidly. It is unclear how, or whether, these laws will ultimately coalesce into relatively stable legal regimes. Yet it seems likely that the United States will soon have some system

[31] Ibid, at pp. 350-58.
[32] Ibid, at pp. 332-49.
[33] *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009).
[34] *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010).
[35] *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009).
[36] *Center for Biological Diversity v. U.S. Dept. of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).

of laws that finally qualify as national climate change law. Compared to where things stood only a few years ago, these changes are worth noting and, perhaps, even celebrating.