

# Greenhouse Enters the Courthouse

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**W**ith Congress so far having declined to adopt mandatory restrictions on greenhouse gas (GHG) emissions, advocates have turned to the judicial system as a potential means of compelling GHG regulation through litigation. There are two main lawsuits currently pending that, if successful, could lead to GHG emission restrictions without Congress first having legislated a GHG regulatory program.

Frustration with national efforts on GHGs has also led a number of states to enact or propose enactment of their own state regulatory GHG control programs. Such actions have already spawned two related lawsuits, and new lawsuits are possible if some of the current proposals are adopted.

We explore the GHG litigation landscape below.

## ARE GHGS “POLLUTANTS” TO BE REGULATED UNDER CLEAN AIR ACT AUTHORITY?

The prospect that GHGs could be regulated under existing statutory authority, without adoption of the Kyoto Protocol or enactment of new legislation, was first raised in 1998 during the Clinton administration. The administrator of the Environmental Protection Agency (EPA) told a congressional committee that GHGs are no different than any other Clean Air Act (CAA) “pollutant” and could be regulated under that statute if the agency determined they posed a

danger to public health or welfare.<sup>1</sup> Several weeks later, the EPA produced a legal opinion by its then-general counsel to support the EPA’s claim of authority in this regard.<sup>2</sup>

The EPA’s declaration was followed by an October 1999 petition by environmental and other groups to the EPA seeking regulation of carbon dioxide (CO<sub>2</sub>) and three other GHGs from new motor vehicles. Because of the precedential importance of such regulation to industry in general, 20 industry groups filed comments in early 2000 opposing the petition. However, the EPA took no action on the petition while the Clinton administration was in office nor did it otherwise seek to exercise the authority it claimed under the CAA to regulate GHGs.

The EPA’s continued inaction on the petition during the first term of the Bush administration led to two lawsuits. In one case,<sup>3</sup> petitioners argued that the EPA was unreasonably delaying action on the petition and asked the court to compel the EPA to act. In another, related case,<sup>4</sup> the attorneys general of Massachusetts, Connecticut, and Maine asked the court to compel the agency under Section 108 of the Clean Air Act to list CO<sub>2</sub> as a criteria air pollutant. Such a listing would force the EPA to establish a national ambient air quality standard for CO<sub>2</sub>, with an attendant regulatory program. Plaintiffs argued that the EPA had already determined that it had authority to regulate CO<sub>2</sub> and had already allegedly determined through various statements that CO<sub>2</sub> endangers the public health and welfare. Accordingly, plaintiffs argued that the EPA had a mandatory duty to proceed to regulation.

Both of these suits were essentially mooted when the EPA decided to deny the pending peti-

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tion on August 28, 2003. The EPA ruled that, in fact, it did not have the authority to regulate GHG emissions under the CAA for purposes of addressing potential global climate change and, even if the EPA did, it would decline to exercise that authority on science and policy grounds. The EPA's denial led to the plaintiffs in the two *Horinko* lawsuits and others to file petitions in the US Court of Appeals for the DC Circuit seeking judicial review. In all, the petitioners included 12 states;<sup>5</sup> the cities of Washington DC, New York, and Baltimore; and American Samoa and eight environmental organizations. Intervenors on the side of the EPA included ten states<sup>6</sup> and three large industry trade association coalitions.

On July 15, 2005, the court denied the petitions for review.<sup>7</sup> All three judges on the three-judge panel issued separate opinions, with the lead opinion for the court authored by Judge Randolph. Despite extensive briefing by the parties as to whether the CAA confers authority on the EPA to regulate GHGs for the purposes of addressing global climate change, Justice Randolph explicitly declined to address this issue. Instead, his opinion concluded that, even if the CAA authorized the EPA to regulate GHG emissions, the EPA correctly exercised its policy judgment to decline to do so.

Judge Randolph relied on Section 202(a)(1) of the CAA, which directs the EPA administrator to regulate motor vehicle tailpipe emissions if "in his judgment" such emissions "may reasonably be anticipated to endanger public health or welfare." Judge Randolph found that the EPA appropriately concluded there is too much "scientific uncertainty" to make this judgment. Judge Randolph relied extensively in this regard on the National Research Council's 2001 "Climate Change Science: An Analysis of Some of the Key Questions," which is the principal scientific document on which the EPA had relied in denying the petition.<sup>8</sup>

Additionally, citing *Ethyl Corp. v. EPA*,<sup>9</sup> Judge Randolph ruled that the EPA appropriately relied on nonscience "policy judgments" in determining not to regulate GHG emissions under Section 202(a)(1). He cited the EPA's conclusions that new motor vehicles are only one of many sources of GHG emissions; that unilateral US GHG efforts might undermine international efforts; that the administration was pursuing a GHG program, including vol-

untary efforts and technology-promotion; and that the Department of Transportation was pursuing fuel efficiency standards.<sup>10</sup>

In a concurring opinion, Judge Sentelle opined that he would have dismissed the case on the ground of standing. Judge Sentelle concluded that the injury petitioners asserted from motor vehicle GHG emissions was general (global warming) and not individual and particular as required for standing. Judge Sentelle recognized that his decision created a "slight problem" in that he would dismiss the petitions for lack of jurisdiction (i.e., standing), whereas Judge Randolph would deny the petitions on the merits. He resolved this problem by accepting as the law of the case the decision of both Judge Randolph and Judge Tatel in dissent that the court had jurisdiction to decide the petitions on the merits (while disagreeing with that decision). He then "join[ed] Judge Randolph in the issuance of a judgment closest to that which I myself would issue," citing a similar resolution in *Hamdi v. Rumsfeld*.<sup>11</sup>

In a lengthy dissent, Judge Tatel concluded that at least one petitioner (Massachusetts) had standing because it would suffer specific coastal erosion injury, the EPA does have authority under the CAA to regulate GHG emissions, and the EPA erred by relying on nonscientific factors in determining whether to exercise its "judgment" in regulating GHG emissions.

On December 2, 2005, in a 4–3 vote (two judges did not participate), the court of appeals issued an order denying the petition for rehearing. It is expected that petitions for certiorari will soon be filed with the Supreme Court.

## ARE GHG EMISSIONS A PUBLIC NUISANCE ACTIONABLE AS A TORT?

On July 21, 2004, eight state attorneys general<sup>12</sup> and the corporation counsel of New York City sued five major utilities (AEP, Southern Company, Xcel Energy, Cinergy, and TVA) in the US District Court for the Southern District of New York seeking to extend the law of public and private nuisance to utility emissions of CO<sub>2</sub>. Plaintiffs did not seek monetary damages but sought injunctive relief "under the federal common law of public nuisance or, in the alternative, under state law of public nuisance." A parallel suit was filed by a group of environmental organizations.

The complaints alleged that defendants' electricity-generating plants in 20 different states contribute to global climate change, giving rise to an actionable public nuisance under both federal common law and the law of each state in which the facilities are located. Plaintiffs alleged injuries to public health, coastal resources, water supplies, ecology, agriculture, and economic interests. (Perhaps not without coincidence, the lawsuits did not challenge emissions from power plants in any of the plaintiff states, with the exception of Wisconsin.)

Complaints alleged that defendants' electricity-generating plants in 20 different states contribute to global climate change, giving rise to an actionable public nuisance.

Both lawsuits asked the court to hold "each defendant jointly and severally liable for creating, contributing to, and/or maintaining a public nuisance" and to permanently enjoin "each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." Plaintiffs asserted that defendants were responsible for one-quarter of the CO<sub>2</sub> emissions of utility power plants in the United States.

These lawsuits built on similar tort lawsuits in the tobacco, asbestos, pharmaceutical, lead paint, chemical, firearms, fast food, and other industries. By seeking injunctive relief, the plaintiffs, in essence, were asking the court to determine the amount of CO<sub>2</sub> these 20 state power plants could emit. Since there is no technology the power-plant owners could install to reduce CO<sub>2</sub> emissions from these plants, the court was effectively faced with a request that it determine the amount of coal-fired power these utilities could generate.

Defendants filed motions to dismiss on various grounds, including lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and lack of personal jurisdiction. On September 15, 2005, the judge issued an opinion and order in both cases dismissing the complaints.<sup>13</sup> The court ruled that "these actions present nonjusticiable political

questions that are consigned to the political branches, not the Judiciary."<sup>14</sup>

The judge was clearly uncomfortable with the breadth of policy determinations she would have to make to grant the relief sought by plaintiffs. The judge wrote that

[d]efendants have set forth just a few of the difficult "initial policy determination[s]" that would have to be made by the elected branches before any court could address these issues: Given the numerous contributors of greenhouse gases, should the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers? Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries? What are the economic implications of these choices? What are the implications for the nation's energy independence and, by extension, its national security?

Judge Preska concluded that "cases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases."<sup>15</sup>

Plaintiffs have appealed the decision to the US Court of Appeals for the Second Circuit. The case is in the process of being briefed.

## MAY STATES REGULATE TAILPIPE EMISSIONS OF CO<sub>2</sub>?

In 2002, the California legislature adopted legislation directing the California Air Regulatory Board (CARB) "to develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."<sup>16</sup> In September 2004, CARB adopted Resolution 04-28 under which it established fleetwide standards limiting GHG emissions from motor vehicles manufactured for sale in California.

Two lawsuits resulted from that action. On December 7, 2004, ten car dealers and the Alliance of Automobile Manufacturers filed for declaratory and injunctive relief in federal district court in Fresno, California, under the Su-

premacry Clause of the US Constitution and 42 USC Section 1983, asserting that California is regulating the fuel economy of motor vehicles in a manner reserved by, and for, the federal government.<sup>17</sup> The plaintiffs assert that California's action is preempted by the federal corporate average fuel economy (CAFE) and clean air laws.

The court granted motions to intervene by the Sierra Club, the Natural Resources Defense Council, other environmental groups, and the International Automobile Manufacturers. The court denied preliminary motions to dismiss, and the suit is currently in litigation.

In a related case, several dealers and DaimlerChrysler and General Motors Corporations have filed suit in state court asserting that the California air board has violated several California procedural statutes in developing the above regulations. This case is also presently in litigation.<sup>18</sup>

#### **POTENTIAL LITIGATION OVER OTHER STATE GHG ACTION**

There are a number of other actions being considered in various states to control GHG emissions. The most comprehensive and the furthest along, and with the most potential to generate litigation, are occurring in California and the Northeast.

California is considering two actions that raise significant legal issues. First, the California Energy Commission (CEC), in its 2005 Integrated Energy Policy Report (IEPR), recommended a "GHG performance standard to be applied to all utility procurement, both in-state and out-of-state, both coal and non-coal." The standard would be set "no lower than levels achieved by a new combined-cycle natural gas turbine." No coal-based generating station (including integrated gasification combined-cycle plants) can come close to meeting such a standard absent carbon capture and carbon storage technologies, technologies the CEC recognizes will be feasible only for plants coming on line after 2015–20.<sup>19</sup>

Following issuance of the CEC 2005 IEPR, the California Public Utilities Commission (CPUC) adopted a policy statement determining to adopt procurement regulations along the lines recommended by the CEC. First, the CPUC directed its staff:

to investigate adoption by the PUC of a greenhouse gas emissions performance standard for IOU [investor-owned utility] procurement that is no higher than the GHG emissions levels of a combined-cycle natural gas turbine for all procurement contracts that exceed three years in length and for all new IOU owned generation. In the case of coal-fired generation, the capacity to capture and store carbon dioxide safely and inexpensively is necessary to meeting the standard.<sup>20</sup>

Second, on February 16, 2006, the CPUC voted to adopt a load-based GHG emissions cap, which lays the groundwork for the state to adopt a cap-and-trade system to control utility emissions of GHGs.<sup>21</sup> Although the proposal provides that the cap would be based on 1990 emissions levels, it does not include a specific emissions cap. Rather, specific provisions on the cap, penalties for noncompliance, and financial incentives for the sale of unused offsets outside the state will be established through a public participation process likely to involve public comment and informational workshops.

Once established, the cap would apply to all California investor-owned utilities and other non-public-power load-serving entities providing power to customers within the utilities' territories, including any energy purchases made by California IOUs, even those from out-of-state generators. However, the proposal does not currently provide for enforcement of the GHG cap against California's regulated municipal utilities: such enforcement would have to be authorized by the State Legislature. Additionally, the commission's long-term plans include the development of a similar GHG cap for emissions generated in the natural gas sector.

In the Northeast, on December 20, the governors of seven northeastern states signed a Memorandum of Understanding (MOU) committing their states to adopt the Regional Greenhouse Gas Initiative (RGGI). Under the MOU, the states of Connecticut, Delaware, Maine, New Hampshire, New Jersey, and Vermont agreed to promulgate, as expeditiously as possible but no later than January 1, 2009, laws and regulations capping electric generation GHG emissions and providing for trading of GHG emission credits. The RGGI states intend


to issue a proposed model rule providing trading procedures within 90 days, to conduct a 60-day comment period, and to issue a final rule within 45 days thereafter. The individual states would then take legislative or regulatory action to adopt the model rule.

Absent from the seven-state accord were the states of Massachusetts and Rhode Island. These states had participated in the RGGI process but in the end refused to sign on to the MOU out of concern as to the potential cost to the states of reducing emissions.

The MOU sets individual state GHG emission budgets for an initial period of 2009–14. The budget level for the initial period is approximately equal to the 2000–2004 level, meaning GHG emission levels in the initial period must be held to the 2000–2004 level. Between 2015 and 2018, the budget levels will decline by 2.5 percent a year so that budget levels for 2018 will be 10 percent below the initial levels. Under the MOU, each state may allocate allowances in their own discretion, except that 25 percent of allowances must be reserved for a specified “consumer benefit or strategic energy purpose.” Limited provisions for use of offsets are provided for. The MOU allows for Massachusetts and Rhode Island to join the program and also provides for other states to join as well. Because GHGs circulate globally and not merely regionally, there would be no environmental reason why states that are not contiguous to the Northeast could not join.

Both the California and RGGI initiatives potentially raise issues under the Commerce Clause of the US Constitution because of their interstate nature. The two California initiatives would regulate the environmental characteristics of energy imported into the state. The RGGI initiative, by its nature, is an effort by seven states to control the environmental characteristics of energy flowing within their region. The Commerce Clause<sup>22</sup> explicitly grants Congress the authority to regulate commerce among the states. The Commerce Clause has also long been understood to directly limit the power of the states to discriminate against or burden interstate commerce.<sup>23</sup> This “negative” aspect of the Commerce Clause is often referred to as the “Dormant Commerce Clause” and is invoked to invalidate overreaching provisions of state regulation of commerce. Whether the California and

RGGI actions overreach state authority and intrude on federal authority may ultimately be decided in the courts.

The RGGI initiative also raises questions as to whether the states may act in concert without entering into a congressionally approved interstate compact and may also raise questions as to whether the RGGI may be implemented through state rule making absent new state legislative authority. Both the RGGI and the California initiatives may raise issues of federal preemption and interference with the federal conduct of foreign policy as well. 

## NOTES

1. Departments of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1999, Hearings before a Subcommittee of the House Committee on Appropriations, 105th Cong., 2d Sess. (1998) at 199–200.
2. April 10, 1998 Memorandum of Jonathan Z. Cannon, General Counsel, to Carol M. Browner, Administrator, subject “EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources” (“Cannon Memorandum”) at 5.
3. *International Center for Technology Assessment v. Horinko*, No. 02-02376/RBW (D.DC Dec. 5, 2002).
4. *Massachusetts et al. v. Horinko*, No. 3:03-CV-984 (D. Conn. June 4, 2003).
5. CA, MA, CT, IL, ME, NJ, NM, NY, OR, RI, VT, and WA.
6. MI, TX, OH, AK, ID, KS, NE, ND, SD, and UT.
7. *Commonwealth of Massachusetts v. EPA*, 415 F.3d 50 (DC Cir. 2005).
8. *Ibid.*, at 56–58.
9. 541 F.2d 1 (DC Cir. 1976).
10. *Ibid.*, at 56–58.
11. 124 S.Ct. 2633 (2004).
12. CT, NY, NJ, VT, RI, CA, WI, and IA.
13. *Connecticut et al. v. American Electric Power Co., Inc. et al.*, 2005 US Dist. LEXIS 19964 (2005).
14. *Ibid.*, at 27.
15. *Ibid.*, at 23.
16. Assembly Bill 1493, § 3(a).
17. *Central Valley Chrysler–Jeep, Inc. et al. v. Witherspoon ex rel. California Air Resources Board*, No. 043v 6663 (E.D. Cal. Dec. 7, 2004).
18. *Fresno Dodge, Inc. et al. v. California Air Resources Board et al.*, No. 04CECG03498 (Cal. Super. Ct., Fresno County, Central Div. Dec. 7, 2004). California’s action has led other states to implement motor vehicle CO<sub>2</sub> restrictions, and there are now similar federal lawsuits pending in Rhode Island and Vermont.
19. California Energy Commission. (2005). *2005 integrated energy policy report*. Sacramento, CA: Author, Chapter 4.
20. The policy directive is available at <http://www.cpuc.ca.gov/PUBLISHED/REPORT/50432.htm>.
21. The proposal is available at [http://www.cpuc.ca.gov/PUBLISHED/FINAL\\_DECISION/53720.htm](http://www.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/53720.htm).
22. US Const. Art. I, § 8, cl. 3.
23. *Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of the State of Oregon*, 511 US 93, 98 (1994).