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CLIMATE CHANGE LITIGATION: THE BEAT GOES ON

Peter Glaser

Second Annual Conference on Climate Change
Regulation and Policy
Washington, D.C.
April 15, 2008

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Litigation Issues

- Can EPA Be Forced to Regulate?
- Can States Be Prevented from Regulating?
- Can Air Quality Permitting Agencies Be Forced to Consider GHGs?
- Can Projects Be Stopped Because of Insufficient Consideration of GHGs?
- Can Firms Be Forced to Disclose GHG Risk?

Can EPA Be Forced to Regulate?

- ICTA Petition: October 20, 1999
- Supreme Court Decision: April 2, 2007
- Mandamus Action: April 2, 2008
- End of Administration: January 19, 2009

Can States Be Prevented from Regulating? Autos – Waiver Case

- CAA § 209(b) allows CA to adopt more stringent emission standards for new motor vehicles if Administrator grants a “waiver”
- If Administrator grants waiver, other states may adopt the CA standards
- CARB petitions for waiver on December 21, 2005
- 17 other states either want to adopt or are exploring adoption of CA standards – w/ CA, 50% of U.S. population

STANDARDS FOR ISSUING WAIVER

- Administrator must deny waiver if he finds:
 - State determination that standards are at least as protective of public health and welfare as federal standards is arbitrary and capricious
 - State does not need such State standards to meet “compelling and extraordinary” conditions; or
 - State standards and enforcement procedure are inconsistent with § 202(a)

EPA DENIES WAIVER

- November 9, 2007 - CA et al. sue to mandamus decision
- December 19, 2007, President signs EISA
- December 19, 2007, EPA informs Gov. Schwarzenegger it will be denying waiver
- February 29, 2008, EPA issues 47-page formal decision document explaining denial

EPA'S REASON

- CA standards not needed to meet “compelling and extraordinary” circumstances
 - Because climate change is not “unique to California”
 - 209(b) intended to allow CA to address pollution problems that are “local or regional,” not global
- Lengthy discussion of climate change science: did EPA tacitly make an endangerment finding?

INTO THE COURTS

- CA, et al. appeal denial reflected in letter to Gov. Schwarzenegger in 9th Cir. – Court refuses to dismiss, but leaves issue open for main briefing
- CA, et al. appeal decision document in D.C. Circuit
- Jurisdictional issue pending

INTO CONGRESS AND THE POLITICAL ARENA

- All three candidates say they would overturn decision
- Committee chairs take turns bashing EPA Administrator – hearings, subpoenas

CAN STATES BE PREVENTED FROM REGULATING AUTO GHGs? EVEN IF WAIVER GRANTED?

- If waiver granted, is state auto GHG regulation nevertheless unlawful?
- Auto industry sues in several states to enjoin regulation
- Defeats in U.S.D.C. in VT (9/07), CA (12/07)
- Main theory is preemption under EPCA, because standards are related to CAFE standards

CAN STATES BE PREVENTED FROM REGULATING? OTHER SOURCES

- State Electricity Import Limitations
- State GHG Requirements
- Regional Agreements

No Lawsuits (yet?)

Can Air Quality Permitting Agencies Be Forced to Consider GHGs?

- Environmental groups claim CO₂ is already a regulated pollutant under the CAA
- Since *Mass v. EPA* (and in some cases even before), they are demanding that state and federal PSD permitting agencies require BACT for CO₂
- Leading EAB case: *Deseret*
- State appeals
- State law: *Sunflower*

Can Projects Be Stopped Because of Insufficient Consideration of GHGs?

- Federal and State NEPA Lawsuits
 - STB certificating
 - DOT certification of tax credits for new technology coal plants
 - MMS mineral leasing
 - RUS lending
 - Transmission line approvals
 - Etc., etc.

Can Firms Be Forced to Disclose GHG Risk? NY AG Subpoenas

- 9/14/07 NY AG Cuomo issues subpoenas against 5 energy companies seeking information on companies' potential financial liabilities from GHG emissions and whether they have been adequately disclosed
- Implies failure to adequately disclose could be violation of NY law as misrepresentation or fraud

Can Firms Be Forced to Disclose GHG Risk? SEC Petition

- 9/18/07 – Large institutional investors, state AGs, 11 state pension funds, environmental groups
- Seeks: “Interpretive guidance clarifying registrants’ obligation under existing regulations to disclose material information concerning the effect of climate change and regulation of greenhouse gas emissions upon their financial condition and business operations.”
- Also seeks immediate review of adequacy of climate change risk disclosures for companies filing 10-Ks and 10-Qs.

Peter Glaser

Troutman Sanders

401 9th Street, N.W., #1000

Washington, D.C. 20004

202-274-2998

peter.glaser@troutmansanders.com