Allen Matkins Environmental Alert

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Busy Times in Climate Change Regulation

Supreme Court Confirms EPA Authority; Congress Fails to Strip EPA of Regulatory Power; California Responds to Court Injunction and Then Delays Cap and Trade

July 13, 2011

The past few weeks have seen some very important developments in the area of greenhouse gas regulation, at both the federal and state levels.

In the Courts: Supreme Court Weighs In Again on Greenhouse Gas Regulation

On June 20, the U.S. Supreme Court issued an important ruling on climate change regulation. In *American Electric Power Co. v. Connecticut* (No. 10-174), the Court dismissed a lawsuit against major greenhouse gas emitters under the federal common law of nuisance, holding that federal common law has been displaced by the Clean Air Act in the field of greenhouse gas regulation. This case follows the Court's 2007 decision in *Massachusetts v. EPA* (No. 05-1120), which required the U.S. Environmental Protection Agency ("EPA") to make a finding on whether greenhouse gases endanger the public health and welfare, and if they do, to regulate greenhouse gases under the Clean Air Act. In December 2009, the EPA issued a finding that greenhouse gases do indeed endanger the public health and welfare, and announced its intention to begin regulating greenhouse gases pursuant to its authority under the Clean Air Act.

Background. In July 2004, several states, cities and nonprofit land trust filed complaints against four electric utilities and the federally-owned Tennessee Valley Authority, alleging that greenhouse gases (mainly carbon dioxide) emitted by these defendants constituted a public nuisance under federal common law. The complaint relied on the principle that when no federal statute regulates a pollutant in the air or water, states may sue under federal common law to abate such pollution produced in other states. As a remedy, the plaintiffs sought a cap on the allowable level of carbon dioxide emissions for each defendant, to be reduced annually at a rate determined by the court.

The Ruling. On an 8-0 vote, the Supreme Court overturned a lower court ruling that the case could proceed, finding that the Clean Air Act and EPA efforts to regulate greenhouse gases displace any federal common law right to seek relief from greenhouse gas emissions. Because Congress and the EPA are addressing greenhouse gas pollution directly, the Court concluded that there is no need for the federal judiciary to impose limits on carbon dioxide emissions under federal common law.

The case was not about whether greenhouse gases should be regulated. Instead, it was about which branch of government should oversee the regulation. The Supreme Court decided that the complicated problem of regulating greenhouse gases should be left to Congress, acting through the EPA. Justice Ginsburg, writing for the Court, stated that

> [i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

Open questions. Left unanswered in the Supreme Court's decision was the question whether EPA's exercise of its authority under the federal Clean Air Act to regulate greenhouse gas emissions also preempts *state* common law. Plaintiffs had alleged a violation of state, as well as federal law. Several suits alleging violations of state nuisance law are currently pending against greenhouse gas emitters. Defendants in these cases are likely to rely on the holding in *American Electric Power* that the legislative and executive branches, not the courts, should be the ones to regulate greenhouse gases.

In Congress: Efforts Stall to Rein In EPA Authority to Regulate Greenhouse Gases

In April, the U.S. House of Representatives approved a bill intended to strip the EPA of its authority to regulate greenhouse gases under the Clean Air Act – in other words, to overrule legislatively the Supreme Court's holding in *Massachusetts v. EPA* that EPA is compelled under the Clean Air Act to regulate greenhouse gas emissions upon a finding of endangerment to public health and welfare. Defying a threat of veto by President Obama and impossible odds in the Senate, the House passed the bill 255 to 172, with nineteen House Democrats and every House Republican voting in favor. As expected, an identically worded bill failed in the Senate shortly thereafter. Given the failure of the bill, a change in EPA's authority to regulate greenhouse gases seems unlikely—at least until after the 2012 election cycle.

Of course, if Congress were to deprive EPA of its regulatory authority over greenhouse gas emissions, one of the likely consequences would be to moot the holding of *American Electric Power* and potentially reinstate common law theories of nuisance – on the ground that EPA regulation under the Clean Air Act does not occupy the field of greenhouse gas regulation after all.

At EPA: The Rulemaking Process Lumbers On

In December of 2010, the EPA settled several lawsuits by agreeing to develop New Source Performance Standards for greenhouse gas emissions from new steam electric generating units (power plants) and new processing facilities at petroleum refineries. The proposed standard for new power

plants is due by September 30, 2011, and the proposed standard for new refineries by December 10, 2011. A comment period will follow publication, after which EPA is expected to promulgate final standards. While the EPA has already issued greenhouse gas regulations for mobile sources, the forthcoming standards will represent the first effort by the EPA to regulate greenhouse gases from major stationary sources.

New Source Performance Standards are set by the EPA, and apply only to certain classes of equipment in new sources and in existing sources that undergo significant modifications. The forthcoming greenhouse gas emission standards are expected to place efficiency limits on critical pieces of equipment used in power plants and oil refineries. The limits will not apply to existing facilities that are not in the process of making significant modifications.

In California: Cap and Trade in the Courts and at the Air Resources Board

On June 24, 2011, the California First District Court of Appeal reinstated work on California's cap and trade program for greenhouse gas emission reductions. This decision followed an injunction by the San Francisco Superior Court issued in March of this year in *Association of Irritated Residents v. California Air Resources Board* (*AIR v. CARB*). In that case, the plaintiffs, environmental justice advocates, sought to invalidate CARB's Scoping Plan—a document outlining the planned implementation of California's landmark climate change law, AB32—on several grounds, including a claim that it violated the California Environmental Quality Act (CEQA). The Superior Court rejected most of the claims but did find that the Scoping Plan was inadequate in its analysis under CEQA of alternatives to cap and trade, an essential element of the Scoping Plan, and enjoined CARB from further development of that program. The California Attorney General promptly appealed the ruling. Meanwhile, on June 13, 2011, in an effort to address the CEQA defects identified by the Superior Court, CARB posted a Supplement to the Scoping Plan EIR, greatly expanding the original analysis of alternatives to cap and trade. Eleven days later, the Court of Appeals stayed (i.e., lifted) the superior court's injunction, allowing work on the program to continue pending resolution of the appeal on the merits. On August 24, 2011, the CARB Board will consider a proposal to approve the Supplement formally, but in the meantime, implementation of the cap and trade program can continue.

But, as we now know, implementation will not be smooth. On June 29, 2011, in a surprise announcement before the California Senate Select Committee on the Environment, the Economy and Climate Change, CARB Executive Officer Mary Nichols announced a delay in enforcement of California's cap and trade program until January 1, 2013. The program was previously set to go into effect in 2012. According to Ms. Nichols, the program will be "initiated" in 2012, but will not be enforced against emitters until 2013. This will give businesses time to review the program, and prepare strategies for compliance. The yearlong delay will also give CARB an opportunity to test the cap and trade program to be certain that it is not susceptible to "gaming," said Nichols.

As previously planned, the cap and trade program would not have imposed emissions reductions until 2013. The delayed program will begin straightaway with the 2013 emissions reductions. Thus, the delay will not affect progress toward the ambitious emissions cuts called for by AB32.
