

Georgetown Environmental Law & Policy Institute

GLOBAL WARMING IN THE COURTS: A LITIGATION UPDATE – March 5, 2007

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INTRODUCTION

This update to GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES describes developments in global warming litigation that have occurred since the original report was issued in November, 2006.¹ Courts have released opinions in three of the cases originally discussed and disposed of one case in an unpublished decision. In addition, a new NEPA lawsuit has been filed and, two other suits have been filed in a new category of global warming litigation—information-forcing lawsuits. An additional lawsuit involving public utility regulation can best be categorized under a miscellaneous category. Current global warming litigation can now be broken into six categories:

- Clean Air Act Litigation**
- NEPA Litigation**
- Nuisance Litigation**
- Preemption Litigation**
- Information-Forcing Litigation**
- Miscellaneous Litigation**

Other categories of litigation may emerge as litigants continue to grapple with the issues that surround global warming. This update will only discuss those categories of litigation that have experienced development since the original version of the report was released.

NEPA LITIGATION

Eighth Circuit Upholds EIS for Rail Project in Powder River Basin

On December 28, 2006, the U.S. Court of Appeals for the Eighth Circuit decided *Mayo Foundation v. Surface Transportation Board*,² upholding a Supplemental Environmental Impact Statement (SEIS) on a rail extension project to service coal mines in the Powder River basin. In a 2003 decision,³ the Court had ordered the government to analyze the possible environmental impacts of an increase in coal consumption that would result from the rail extension project. The resulting SIES found no adverse environmental impacts based on a supply-demand computer

¹ This update supplants that issued on January 26, 2007.

² 472 F.3d 545 (2006).

³ *Mid State Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003).

model that indicated that the project would lead to only a small increase in national coal consumption. The Sierra Club and Mid-States Coalition for Progress argued in *Mayo Foundation* that the government had improperly relied on the computer model, failed to establish a threshold of significance for climate change and air pollution impacts, and that even the small increase in coal consumption identified would cause environmentally significant impacts because it accounted for the burning of three million additional tons of coal.⁴

The Eighth Circuit rejected plaintiffs' contentions. The Court replicated much of the text contained in the SEIS and concluded, with little analysis, that the government "extensively discuss[es] the potential impacts on air quality that may result from the implementation of the project."⁵ The Court thus found that the SEIS satisfied NEPA.

The outcome in *Mayo Foundation* could have implications for other global warming NEPA cases. The SEIS postulates that the project will cause no significant environmental impacts because it accounts for only a small increase in national coal consumption, and thus will only slightly increase the volume of greenhouse gas emissions. However, this will be the case for virtually all environmental review processes; few projects are likely to increase national, or global, emissions of greenhouse gases by more than a few percent. By upholding such an analysis, the Court possibly paves the way for future agencies to similarly dispose of global warming impacts by reference to the small percentage of net emissions a particular project will cause.

Even under such a regime, the application of NEPA to the greenhouse gas emissions of government projects may have important ramifications. While agencies may have little obligation to meaningfully analyze their climate impacts under *Mayo Foundation*, they may still be required to disclose greenhouse gas emissions, which may, in itself, provide environmentally-beneficial incentives. If public attention to global warming increases, these incentives will become more powerful.

Center for Biological Diversity Challenges Regulations Authorizing Incidental Take of Polar Bears and Pacific Walrus

In *Center for Biological Diversity v. Kempthorne*,⁶ the Center for Biological Diversity and Pacific Environment, two environmental organizations brought suit in the U.S. District Court for the Northern District of California against incidental take regulations (IT regulations) promulgated by the Department of Interior.⁷ The plaintiffs claim that the IT regulations, which authorize the oil and gas industry to incidentally take polar bears and Pacific walrus while engaging in industrial activities in the arctic, violate NEPA and the Administrative Procedure Act (APA). Both species of marine mammal are protected under the Marine Mammal Protection Act (MMPA). Under the MMPA, the Department can only authorize incidental take if it

⁴ For a more detailed discussion of the SEIS and the contentions of the parties, refer to GLOBAL WARMING IN THE COURTS at 13.

⁵ *Mayo Foundation*, 472 F.3d at 554-56.

⁶ No. 3:07CV00894.

⁷ Under the MMPA, "[t]he term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. 1362(13). The incidental take rules apply to the unintentional take of a protected marine mammal.

determines, among other things, that “the total of such taking . . . will have a negligible impact” on the affected populations.⁸ The IT regulations were supported by an environmental assessment (EA) under NEPA, based on a finding that they would have no significant environmental impacts.

Plaintiffs allege that the Department failed to consider the combined impact that oil and gas exploration and global warming will have on polar bears and Pacific walrus. In plaintiffs’ view, industrial activities authorized under the IT regulations will exacerbate existing stress, caused by increased temperatures and decreased ice pack, that face both species. Because of this interactive effect, plaintiffs argue that the IT regulations will have significant environmental impacts and require an EIS, rather than an EA. Plaintiffs further assert that the Department failed to consider an adequate range of alternatives in completing its environmental review and improperly relied on mitigation measures that are not mandated by the regulations.

Plaintiffs also argue that the IT regulations violate the APA, which prohibits arbitrary and capricious decision making. Plaintiffs assert that the IT regulations are arbitrary and capricious because the industrial activities they permit will have more than a “negligible” impact on each species in contravention of the MMPA. Like plaintiffs’ NEPA claim, their APA argument is based on the fact that the incidental take authorized by the regulations, coupled with global warming induced stress, poses serious risks to each species.

NUISANCE LITIGATION

Second Circuit Affirms Dismissal of Nuisance Suit Against Government

The U.S. Court of Appeals for the Second Circuit affirmed the U.S. District Court for the Eastern District of New York’s order dismissing a nuisance suit against the City of New York, the State of New York, and the U.S. Environmental Protection Agency. In *Korsinsky v. EPA*, the plaintiff alleged that the government defendants’ contribution to global warming constituted a public nuisance. The District Court dismissed the case for lack of standing, finding that plaintiff had not satisfied the particularized harm or causation requirements. In an unpublished opinion, the Second Circuit affirmed.⁹

PREEMPTION LITIGATION

Northern District of California Stays Automobile Preemption Challenge Pending Supreme Court Decision in *Massachusetts v. EPA*

On January 16, 2007, Judge Anthony Ishii of the U.S. District Court for the Northern District of California issued a stay in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*¹⁰ pending the Supreme Court’s resolution of *Massachusetts v. EPA*.¹¹ In addition, the order expressly prohibited California from enforcing A.B. 1493, which regulates greenhouse gas emissions from

⁸ 16 U.S.C. 1371(a)(5)(A)(i)(I).

⁹ *Korsinsky v. U.S. Environmental Protection Agency*, 192 Fed. Appx. 171 (2006).

¹⁰ A copy of the order is available at http://www.calcleancars.org/news/OrderFiled_1-16-07.pdf.

¹¹ For a full discussion of *Central Valley Chrysler-Jeep*, refer to GLOBAL WARMING IN THE COURTS at 14-15.

motor vehicles, without a Clean Air Act (CAA) waiver from the EPA. The State had not contested the latter issue.

Judge Ishii justified the imposition of the stay in two ways. First, he opined that the Supreme Court may, in effect, find that CAA preemption of state regulation of greenhouse gas emission from motor vehicles is unwaivable. Second, he opined that the decision in *Massachusetts v. EPA* could shed light on both the Energy Policy and Conservation Act (EPCA) and foreign affairs preemption issues remaining in the case.

Judge Ishii's opinion analyzed the first of these justifications in some depth. Under CAA § 202(a), EPA has the authority to regulate the emission of pollutants from motor vehicles. However, CAA § 209(a) preempts state regulation of motor vehicle emissions without qualification. Judge Ishii concluded that "[t]he preemptive scope of the Clean Air Act is therefore broader than the potential scope of EPA's authority to control emissions with respect to automobiles."¹² He further states that "EPA can only grant . . . waiver if it has the power to regulate."¹³ Thus, the order suggests that, if the Supreme Court rules that EPA has no authority to regulate greenhouse gas emissions from motor vehicles, then it cannot waive CAA preemption for A.B. 1493. In that event, Judge Ishii will not have to reach the foreign policy and EPCA preemption issues because the case will be resolved solely under the CAA.

District of Vermont Refuses to Dismiss Automobile Preemption Challenge to Vermont's Adoption of California Emission Standards

In *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*,¹⁴ the automobile industry sued the State of Vermont for adopting California's greenhouse gas emission standards for motor vehicles, alleging preemption claims similar to those involved in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*. The State of Vermont moved for dismissal, arguing that the case was not ripe because EPA has not yet granted California's request for a Clean Air Act waiver. The U.S. District Court for the District of Vermont denied the State's motion. In the Court's view, the fact that manufacturers would have to start redesigning their vehicles before enforcement of the Vermont law made the case ripe for adjudication.

INFORMATION-FORCING LITIGATION

Information-forcing litigation is based upon statutory requirements that compel government entities to generate, compile, and disclose information. Such legal obligations can take two forms. First, statutes can require disclosure of existing information. The Freedom of Information Act (FOIA)¹⁵ is an example of this type of law, obliging the federal government to

¹² *Central Valley Chrysler-Jeep*, Memorandum Opinion and Order, Doc. # 378, at 17 n. 2 (Jan. 16, 2007).

¹³ *Id.* at 16. The legal basis for this conclusion is not explicated in the order. Under CAA § 209(b), EPA can grant a preemption waiver if it finds that "that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." Perhaps Judge Ishii's view that EPA's waiver power and regulatory authority are coterminous comes from this comparison of state to federal standards in § 209(b).

¹⁴ ___ F. Supp. 2d ___, 2006 WL 3469622 (2006).

¹⁵ 5 U.S.C. § 552 (1966).

disclose internal documents to the public.¹⁶ Second, statutes can require government agencies to compile information. The Global Change Research Act of 1990 (GCRA)¹⁷ is an example of such a statute. It requires the government to generate specific information about global warming.

Information-forcing litigation relies on laws such as FOIA and the GCRA to compel government to generate and disseminate information. Future law suits could use information-forcing statutes to generate information to support other types of litigation. For instance, FOIA suits could be used to obtain non-published information about the environmental impacts of government projects in preparation for a global warming NEPA challenge.

FOIA Lawsuit Seeking Documents from Council of Environmental Quality

In *Citizens for Responsibility and Ethics in Washington v. Council on Environmental Quality*,¹⁸ Citizens for Responsibility and Ethics in Washington (CREW) sued the Council on Environmental Quality (CEQ) for allegedly failing to disclose documents related to global warming. CREW had previously filed a FOIA request seeking all documents discussing global warming and, in particular, documents related to the activities of upper level staff. This request was intended, in part, to dovetail with an ongoing investigation by the House Committee on Government Reform into allegations that the CEQ censored and modified reports produced by government scientists. CREW alleges that CEQ has not disclosed all responsive documents responsive and has not justified nondisclosure under an exception to FOIA.

Suit Filed over Non-Compliance with the GCRA

In November 2006, the Center for Biological Diversity, Greenpeace, and Friends of the Earth filed *Center for Biological Diversity v. Brennan* against the Office of Science and Technology Policy and the Federal Coordinating Council on Science, Engineering and Technology.¹⁹ The suit alleges that the agencies failed to meet two statutory deadlines established by the GCRA.

GCRA requires the executive branch to submit an assessment of existing global warming science to Congress at least every four years.²⁰ The Act also requires the executive branch to publish, at least every three years, a National Global Change Research Plan recommending research priorities and identifying the role of federal entities in conducting such research.²¹

Plaintiffs allege that the Bush administration has failed to meet both of these requirements. First, the agencies have not submitted to Congress a national assessment of global warming science

¹⁶ The Bush Administration has aggressively shielded government documents from public disclosure under a 2001 directive from Attorney General John Ashcroft that adopts a policy that information should not be disclosed if there is any legal basis for nondisclosure. By contrast, the Clinton Administration authorized disclosure unless it gave rise to “foreseeable harm.” See Adam Clymer, *Government Openness at Issue as Bush Holds on to Records*, N.Y. TIMES Jan. 3, 2003, at A1.

¹⁷ 15 U.S.C. §2921 *et seq.*(1990).

¹⁸ No. 1:07CV00365 (filed Feb. 20, 2007).

¹⁹ No. 4:06CV07062 (filed Nov. 14, 2006).

²⁰ *Id.* at § 2936.

²¹ *Id.* at § 2934.

since 2000.²² Second, the agencies have failed to prepare a National Global Change Research Plan since July 24, 2003.

Plaintiffs seek injunctive relief ordering the agencies to meet their obligations under the GCRA. They moved for summary judgment in the case on January 22, 2007. On February 27, 2007, the Federal Government filed a motion to dismiss asking the District Court to find that plaintiffs' lacked standing.

MISCALANEOUS LITIGATION

Washington Supreme Court Finds that Utility Cannot Use Ratepayer Money to Mitigate Its Greenhouse Gas Emissions

In *Orekson v. City of Seattle*,²³ the Washington Supreme Court found that Seattle City Light, a municipal public utility, lacked the authority to use ratepayer money to purchase carbon offsets. In 2000, Seattle City Light had adopted a policy of trying to become carbon neutral. In the short-term this policy was effectuated by paying other private and public utilities to reduce their carbon emissions in order to offset the emissions of Seattle City Light. Ratepayers filed a class action lawsuit claiming that the offset program was a misuse of ratepayer funds. The Washington Supreme Court sided with plaintiffs, finding that the offset program was prohibited by state utility law because it served a general governmental purpose and was not "sufficiently related to the purpose of supplying electricity."²⁴

Because *Orekson* involved the application of state law, it may have little ramification outside of Washington State. However, should its reasoning prove persuasive to other state courts, utilities in other states could face successful challenges if they seek to offset their carbon emissions using ratepayer funds.

²² In a 2005 report, the Government Accountability Office substantiated the claim that the Bush Administration failed to meet its obligations under the GCRA. GOVERNMENT ACCOUNTABILITY OFFICE, CLIMATE CHANGE ASSESSMENT: ADMINISTRATION DID NOT MEET REPORTING DEADLINE, GAO-05-338R (2005).

²³ 150 P.3d 556 (Wash. 2007).

²⁴ *Id.* at 565.