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Pollution Liability Report

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Massachusetts, et al. v. EPA

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**A commentary article
reprinted from the
August 2006 issue of
Mealey's
Pollution Liability Report**



Commentary

Judicial Activism In Overdrive: Massachusetts, et al. v. EPA

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[Editor's Note: Marlo Lewis is a Senior Fellow at the Competitive Enterprise Institute, a non-profit public policy organization in Washington, D.C., dedicated to advancing the principles of free enterprise and limited government. Copyright 2006 by the author. Replies to this commentary are welcome.]

August 31 is the deadline for filing the petitioners' brief with the Supreme Court in *Massachusetts et al. v. U.S. Environmental Protection Agency*. Plaintiffs, who include the attorneys general (AGs) of 12 states, are suing the EPA to regulate carbon dioxide (CO₂) emissions from new motor vehicles (See July 2006, Page 10).

A victory for plaintiffs would not only result in fewer choices for U.S. auto buyers and a less competitive U.S. auto industry, it would also establish the precedent for judicial imposition of economy-wide CO₂ controls like those proposed in the Kyoto Protocol and the McCain-Lieberman Climate Stewardship Act. Plaintiffs' game plan, which the Court can either aid and abet or nip in the bud, aims at nothing less than litigating America into compliance with a non-ratified treaty and/or a non-enacted bill. This is judicial activism in overdrive, perhaps the most audacious attempt ever to legislate from the bench.

Economy In The Balance

Carbon dioxide is the inescapable combustion by-product of gasoline and other carbon-based fuels. Larger, heavier vehicles burn more fuel per mile driven, and consequently emit more grams of CO₂

per mile. No technology exists, or is on the drawing boards, that can remove CO₂ from tailpipe emissions. Consequently, to meet a CO₂ standard, automakers must either reduce average vehicle size and weight, or make design and engineering modifications that increase average vehicle cost. The more stringent the CO₂ standard, the greater the number of consumers it will price and/or regulate out of market for SUVs, pickups, and other large vehicles.

So at a minimum, a victory for plaintiffs will restrict consumer choice and further erode the competitiveness of the already languishing U.S. auto industry.

Far more damaging is the precedent plaintiffs hope to set. Plaintiffs are suing the EPA under Section 202 of the Clean Air Act, which specifies the process for regulating emissions from "mobile sources" (cars and trucks). The trigger for regulatory action under Section 202 is a "judgment" by the EPA that "air pollution" from emissions of a particular "air pollutant" "may reasonably be anticipated endanger public health or welfare." The same regulatory trigger expressed in the same language occurs in Section 108, the cornerstone of the national ambient air quality standards program.

Because the regulatory trigger in both provisions is identical, the EPA could not make a "judgment of endangerment" under Section 202 without also obligating itself to regulate CO₂ under Section 108. The history of the Clean Air Act confirms this. Every pollutant the EPA regulates under Section 202 is also regulated under Section 108.

Thus if the EPA were to regulate CO₂ under Section 202, it would also have to begin the process of setting national ambient air quality standards (NAAQS) for CO₂ under Section 108. In due course, the EPA would administer an economy-wide CO₂ reduction program indistinguishable in substance, if not detail, from the policies and measures needed to implement the Kyoto Protocol, a non-ratified treaty, or the McCain-Lieberman Climate Stewardship Act, a non-enacted bill.

If the EPA failed to take regulatory action under Section 108, after being ordered by the Court to regulate CO₂ under Section 202, plaintiffs would sue again. This is obvious, because in January 2003, the AGs of three of the states currently suing the EPA, including Massachusetts AG Tom Reilly, the lead attorney in the present case, filed a notice of intent to sue the EPA unless the agency agreed to list CO₂ as a regulated pollutant under Section 108. *Massachusetts et al. v. EPA* is only phase one of a far more ambitious litigation strategy and regulatory agenda.

No Valid Delegation Of Authority

The Court is well-advised to keep its collective eye on the core issue: What did Congress intend when it enacted and amended Section 202? Did Congress ever delegate to the EPA the power to regulate CO₂? That is the paramount legal question, because administrative agencies have only as much regulatory power as Congress lawfully delegates to them.

Congress has debated climate science and climate change policy for more than 20 years. Whenever it has legislated in this area, it has directed the executive branch to do one of three things: negotiate international agreements, conduct research, and administer voluntary programs.

Congress has considered numerous proposals to regulate CO₂ and other greenhouse gases in the context of the global warming debate. In every instance, Congress either declined to enact or specifically rejected regulatory climate policies.

A telling case in point occurred during the debate on the Clean Air Act Amendments of 1990. The initial Senate draft of the amendments, S. 1630, contained a provision requiring the EPA to set CO₂ emission standards for automobiles. The Senate dropped that

language before passing its version of the amendments. The Senate bill as passed contained other regulatory provisions pertaining to greenhouse gases, but the House-Senate conference committee stripped out those provisions. The final legislation as enacted did not include any regulatory authority with respect to climate change or CO₂.

Thus the last time Congress amended the Clean Air Act, it considered and rejected the very course of action that plaintiffs assert the EPA is obligated to take.

Laughed Out Of Court?

Congressional concerns about global warming and support for Kyoto-style policies have grown over the years. Even today, however, supporters of regulatory policies have not been able to enact legislation. In October 2003, the Senate rejected the McCain-Lieberman bill by 55-43. In July 2005, McCain-Lieberman lost by a wider margin — 60-38. In the House, support for Kyoto-type measures is so much weaker that a bill like McCain-Lieberman has never come to the floor for a vote.

Section 202 was added to the Clean Air Act in 1965, amended in 1970, and amended again in 1977. Section 108 was first adopted in 1955, and amended in 1977. As explained above, the AGs hope to bootstrap a favorable decision in the present case into a mandate for economy-wide regulation of CO₂ under Section 108. Was congressional concern about global warming stronger in 1955, 1965, 1970, or 1977 than it is today? Did Congress implicitly endorse the kinds of fossil-energy restrictions contemplated by Kyoto or McCain-Lieberman when it enacted and amended Sections 108 and 202? The very idea is ludicrous.

The AGs' attempt to re-write U.S. energy policy under cover of the Clean Air Act deserves to be laughed out of court.

Flouting Common Sense

Plaintiffs' argument is essentially semantic. Section 202 authorizes the EPA to regulate "air pollutants" that cause "air pollution" anticipated to "endanger public health or welfare." The Clean Air Act defines "air pollutant" as anything "emitted into the ambient air" (not exactly, but let that pass for now). Carbon dioxide is surely emitted. Therefore, the AGs conclude,

if the EPA judges that CO₂ emissions may reasonably be anticipated to harm public health or welfare, it has a mandatory duty to regulate CO₂.

The form of this argument closely parallels that made by the Food and Drug Administration (FDA) to justify its attempted regulation of cigarettes. The FDA argued as follows. Under the Food Drug and Cosmetic Act (FDCA), FDA has a duty to protect public health and welfare by regulating drugs and drug delivery devices. Nicotine has pharmacological effects on the central nervous system, so it is a “drug” within the meaning of the FDCA. Cigarettes and other tobacco products deliver nicotine to the body, so they are “drug delivery devices.” Cigarette smoking kills 400,000 Americans per year, clearly endangering public health and welfare. Therefore, the FDA must regulate the cigarette industry.

In *Brown & Williamson Tobacco Company v. FDA* (529 U.S. 120), the Court struck down the FDA's regulation of tobacco products as exceeding the agency's delegated authority. Nowhere did the relevant statute — which deals with therapeutic drugs and delivery devices — even hint at authorizing FDA regulation of tobacco products. The Court partly based its decision on “common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” Quoting a previous decision, the Court stated that, “it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”

It is even more unlikely that Congress would leave the question of whether carbon-based fuels will be rationed, or suppressed, to the EPA discretion or, worse, to the vagaries of litigation. Whereas regulating tobacco would affect just one industry, regulating CO₂ would directly affect about 70 percent of the U.S. electric power sector, about 99 percent of the U.S. transportation sector, and just about every farm and factory in the nation. It is wildly implausible that Congress would delegate a “policy decision of such economic and political magnitude” without ever saying so in the text of the relevant statute.

When Congress decides that the EPA should regulate particular substances or types of substances, it has no

trouble making its will known. Some 188 hazardous air pollutants are listed for regulation in Section 112 of the Clean Air Act, and 53 ozone-depleting substances are listed for regulation in Title VI. Carbon dioxide is emitted in vastly greater amounts than all those substances combined, and CO₂'s potential to raise average global temperatures has been known since the 19th century. Yet the Clean Air Act mentions CO₂ only once, in Section 103(g), in a discussion of “non-regulatory strategies.” In the Clean Air Act, the absence of authority to regulate CO₂ is conspicuous.

Also consider that, although the Act contains an ambient air quality standards program, a hazardous air pollutant program, and a stratospheric ozone protection program, it contains no title, section, or even sub-section on global climate change. In fact, the terms “greenhouse gas” and “greenhouse effect” do not appear anywhere in the Act. If Congress had intended the Clean Air Act to authorize regulatory climate policies, wouldn't it at least have mentioned “greenhouse gas” or “greenhouse effect” somewhere in the Act?

CO₂: An ‘Air Pollutant’?

Plaintiffs argue that the EPA has authority to regulate “air pollutants,” and they note that Section 103(g) of the Clean Air Act refers to CO₂ among other gases as “multiple air pollutants.” But 103(g) concludes with an admonition: “Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements.” If “nothing” in 103(g) authorizes the imposition of regulatory controls, then the passing reference therein to CO₂ as an “air pollutant” cannot possibly do so.

Plaintiffs also argue that CO₂ is an “air pollutant” for regulatory purposes because it meets the Section 302(g) definition of air pollutant as a substance “emitted into the ambient air.” But they leave out part of the definition. For a substance to be an “air pollutant,” it must not only be “emitted,” it must also be an “air pollution agent.” Section 302(g) does not define “agent,” because it does not have to. An air pollution agent causes air pollution — makes air dirty, foul, or unhealthy to breathe. It degrades air quality.

Carbon dioxide simply does not fit the bill. It is a clear, odorless gas that is non-toxic to humans at 20 times ambient levels. Without CO₂, no life would exist on

this planet, and rising CO₂ concentrations help trees, crops, and most other plants grow faster, stronger, use water more efficiently, produce more fruit, and resist the damaging effects of bona fide pollutants like sulfur dioxide. Carbon dioxide is not an “air pollutant” in any recognizable sense of the term.

To be sure, rising CO₂ levels increase the amount of heat energy retained by the Earth's atmosphere. But that does not make CO₂ an air pollutant. Rather, it means that CO₂ is a climate-forcing agent — like water vapor, the atmosphere's main greenhouse gas. Nobody, not even Tom Reilly, calls water vapor an “air pollutant.”

Trying to pin the “air pollution” label on CO₂ is especially dubious in the context of Section 202. The central goal of Section 202 since its adoption in 1965 has been to encourage auto companies to make cars so clean burning that, ultimately, nothing comes out of the tailpipe except water vapor and CO₂. By design and for more than 40 years, Section 202 has worked to increase CO₂ emissions from vehicle tailpipes! Only the most tortured logic could square this reality with plaintiffs' claim that Section 202 mandates CO₂ suppression.

Fuel Economy By Another Name

Plaintiffs acknowledge that the Energy Policy and Conservation Act (EPCA) authorizes the National Highway Traffic Safety Administration (NHTSA) — not the EPA — to set corporate average fuel economy (CAFE) standards for automobiles. They further acknowledge that CO₂-emission standards might increase average new-car fuel economy. But, they contend, this in no way prohibits the EPA from regulating vehicular CO₂ emissions, because “Congress understood that emission standards would sometimes affect fuel economy.”

Plaintiffs gloss over the fundamental difference between setting emission standards that “affect” fuel economy and setting emission standards that are just fuel economy mandates by another name. The EPA

hit the nail on the head when it rejected an October 1999 petition by environmental groups to regulate vehicular CO₂ emissions: “No technology currently exists or is under development that can capture and destroy or reduce emissions of CO₂, unlike other emissions from motor vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO₂ is to improve fuel economy.”

Carbon dioxide emissions are so directly a function of fuel economy that, although NHTSA regulations express CAFE standards in terms of miles per gallon, the EPA monitors and enforces automakers' compliance with those standards via emission tests that measure CO₂ grams per mile. The EPA cannot set vehicular CO₂ standards without setting de-facto fuel economy standards — something it has no authority to do.

Conclusion

There are risks of climate change but also of climate change policy. Carbon dioxide emissions derive from energy use, which in turn derives from economic activity. About 85 percent of all U.S. energy comes from carbon-based fuels, and the U.S. Energy Information Administration projects that U.S. fossil fuel consumption will grow substantially over the next few decades, boosting CO₂ emissions from 5,967 million metric tons in 2005 to 8,115 million metric tons in 2030 — a 36 percent increase.

Clearly, CO₂ emissions cannot be stabilized at today's levels, much less lowered below 1990 levels (as per the Kyoto Protocol), without heavy constraints on U.S. energy consumption and economic growth.

It is Congress's job to weigh and balance the costs and benefits of competing policy choices, and so far Congress has declined to embrace the policy paths prescribed by Kyoto and McCain-Lieberman. The AGs, however, refuse to let democracy work, and seek instead to substitute their will for that of the people's elected representatives. The Court should politely but firmly say no. ■

MEALEY'S ASBESTOS BANKRUPTCY REPORT

edited by Samantha Drake

The Report is produced monthly by



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ISSN 1528-5383