After Federal Court Ruling, What's Next for States' Rights to Control Vehicle Emissions?

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To date, the U.S. Environmental Protection Agency has not issued any broad-based greenhouse gas (GHG) emission control regulations, either for mobile sources, such as automobiles, or for stationary sources, such as power plants.

In Massachusetts v. EPA, 127 S. Ct. 1438 (2007), the Supreme Court decided that the EPA has authority to regulate greenhouse gas emissions. The Court required the EPA to either regulate GHG emissions or provide a reasoned explanation as to why it cannot. Following the Supreme Court's decision, President Bush issued Executive Order No. 13432 requesting the EPA, the Department of Transportation and other agencies to protect the environment from GHG emissions from automobiles.

In the absence of federal regulation, and often to the consternation of industry, states have stepped into this regulatory vacuum and started issuing their own GHG regulations. Nowhere is this increasingly pro-active state regulation more prominent than in the states' attempts to regulate vehicle emissions.

California, in particular, has sought permission from the EPA to enact regulations that would require automakers to reduce fleet average GHG emissions by 30 percent by 2016. Several states have adopted the California Standards, pending EPA approval.

Automakers and related industry groups have filed lawsuits against the states, asserting that the regulations are pre-empted by the federal Energy Policy and Conservation Act of 1975 or by national foreign policy considerations. See, for example, Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Crombie, No. 05-cv-362 (D. Vt. Sept. 12, 2007); Central Valley Chrysler-Jeep, Inc. v. Witherspoon, No. 1:04-cv-06663 (E.D. Cal. filed Dec. 7, 2004); Ass'n of Int'l Automobile Mfrs. v. Sullivan, No. 06-cv-69 (D.R.I. filed Feb. 13, 2006). Only Green Mountain Chrysler has been decided.

On Sept. 12, the U.S. District Court for Vermont held that, assuming the California Standards are approved by the EPA, Vermont was authorized to regulate GHG emissions from automobiles and that Vermont's actions were not pre-empted by EPCA, which governs U.S. fuel economy standards, or by national foreign policy considerations.

If California's request for stricter vehicle emissions standards is approved by the EPA, the Green Mountain Chrysler decision allows states to force automakers to adjust their emissions on both coasts.1 Until the EPA decides how it plans to regulate GHG emissions on a national level, states will continue to attempt to regulate in this area, leaving all industries in the predicament of having to adjust practices on a state-by-state basis.

BACKGROUND

California's automobile emissions regulations play a unique role in national clean air policy. The Clean Air Act generally pre-empts an individual state's regulation of motor vehicle air emissions. 42 U.S.C. §7543(a). However, the CAA requires the EPA grant California a waiver from pre-emption and allow California to set standards stricter than national emissions levels if the standards meet specified conditions. 42 U.S.C. §7543(b). Once the waiver is granted, compliance with the state standard shall be treated as compliance with the applicable federal standard. Other states then have the option of adopting the federal regulations or the California regulations. 42 U.S.C. §7507. Further, the EPA has "never denied California an emissions waiver in its entirety." Green Mountain Chrysler, slip op. at 115.

California adopted the most recent California Standards in 2004 and petitioned the EPA for an emissions waiver in 2005. If the waiver is approved by the EPA, the California Standards will require manufacturers, beginning with model year 2009, to reduce their fleet average GHG emissions by 30 percent by 2016. If the EPA does not grant California's waiver application, the regulations enacted by Vermont and other states' will be expressly pre-empted by the CAA, and the Green Mountain Chrysler decision will be moot. The period for public comment on the California waiver request closed on June 15, 2007, and the EPA has indicated it will issue a determination before the end of the year. The EPA may grant California a temporary waiver, allowing states to implement the California Standards only until the federal government adopts its own automobile GHG regulations. California had planned to file a lawsuit to compel the EPA’s decision on Oct. 24, 2007, but opted to postpone filing so that the state can focus on the San Diego wildfires. (‘Governor Postpones Suit EPA Over Vehicle Emission Standards,” Bob Egelko, San Francisco Chronicle, Oct. 24, 2007.)

'GREEN MOUNTAIN CHRYSLER'

In November 2005, Vermont amended its automobile emissions standards to include the California Standards. Thereafter, a group of motor vehicle dealers, automobile manufacturers and associations of automobile manufacturers sued Vermont, claiming that the emissions standards were pre-empted by the CAA, EPCA and national foreign policy. Green Mountain Chrysler, slip op. at 2.

The district court rejected all of the plaintiffs pre-emption claims and upheld the California Standards as adopted by Vermont. The main questions

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decided by the court were whether EPCA or national foreign policy pre-empt the California Standards. EPCA requires the U.S. DOT to establish mandatory national fuel economy standards for new automobiles. 49 U.S.C. §32902. Section 509 of EPCA pre-empts state laws or regulations "related to fuel economy standards." 49 U.S.C. §32919. Finding that when the EPA grants a waiver approving the California Standards they would not be state laws or regulations but will have the same force as a federal regulation, the district court found that the pre-emption doctrine would not apply to the EPA-approved California Standards. Moreover, the court held that the California Standards, as an extension of the CAA, may overlap EPCA without conflicting with it. (See also Massachusetts v. EPA, 127 S.Ct. 1438 (2007), holding that the EPA's authority under the CAA to regulate GHG emissions from new automobiles did not conflict with DOT's authority to set national fuel economy standards).

The court further held that, even if the California Standards were considered to be state regulations, they would not be pre-empted by EPCA because automobile manufacturers could implement a variety of options to comply with the California Standards without necessarily impacting fuel economy. For example, the court noted manufacturers could use alternative fuels or take advantage of the California Standards' credits for air conditioning.

Finally, the court rejected plaintiffs' claim that the California Standards are pre-empted by U.S. foreign policy. Relying on numerous Climate Action Reports submitted by the U.S. Department of State to the United Nations Framework Convention on Climate Change, including the most recent report that "applauds nonfederal policies and measures that limit GHG emissions," the court held that the U.S. State Department had found that state action to limit GHG emissions did not conflict with national foreign policy.

**ONGOING CONCERNS**

Under the pre-emption provision of the CAA, the California Standards will take effect only if THE EPA approves California's petition for waiver; however, if approved, the California Standards will become effective in each of the additional 14 states that have adopted them. Absent a contrary finding by another district court, the court's decision in *Green Mountain Chrysler*, requires automakers to manufacture cars that meet the California Standards. Even moving beyond GHG emissions from automobiles, however, the court's holding that the California Standards did not conflict with the nation's foreign policy sets the stage for GHG emissions regulations in other contexts. In particular, the CAA does not pre-empt states from regulating GHG emissions from stationary sources such as power plants and manufacturing facilities. For this reason, even if the EPA denies California's waiver request, the court's holding that the California Standards do not conflict with national foreign policy will logically apply to the regulations in place in many states affecting manufacturing and other industries.

The decision regarding whether to grant California's waiver request has been highly politicized. In a letter dated Sept. 24, 2007 (pdf), Rep. Henry Waxman, D-Calif., suggested that members of the DOT had been lobbying behind the scenes and with White House approval against EPA approval of the California Standards. These allegations may make it more difficult for EPA to deny the waiver request. Despite EPA Administrator Stephen Johnson's pledge to California Gov. Arnold Schwarzenegger to issue a final determination by the end of 2007 and further signifying the frustration and dissatisfaction of environmental groups, on Sept. 18, 2007, the Western Environmental Law Center notified the EPA of its intent to file suit if the EPA had failed to issue a decision regarding California's request for waiver within 180 days (or by March 17, 2008).

Similarly, a Congressional Research Service report indicated that California has a strong case for EPA approval. After finding that (1) the proposed standards are at least as stringent as the federal standards; (2) the state was not acting in an arbitrary and capricious manner; (3) there is enough evidence that climate change could adversely affect California's coasts, inland water supplies and human health; and (4) many of the technologies automakers need in order to reduce GHG emissions are already available, the report indicated that the proposed California Standards satisfied the requirements of the CAA. (See *James E. McCarthy, California's Waiver Request to Control Greenhouse Gases Under the Clean Air Act* (Cong. Research Serv., Report for Congress, Order Code RL 34099, Aug. 20, 2007).)

Until the EPA issues its decision, auto manufacturers are on notice that these regulations may take effect in 2009. However, in light of the pending appeal of the *Green Mountain Chrysler* decision, automakers may still find themselves in limbo until the 2nd Circuit issues a decision.\(^1\)

**CONCLUSIONS**

At this time there are two questions pending review by the EPA. First, the EPA must decide whether to approve or deny California's Petition for Waiver. If it is approved and the *Green Mountain Chrysler* decision is upheld, automobile manufacturers will be required to produce cars for sale in accordance with more stringent requirements. If it is denied, automakers will have at least a brief reprieve until the EPA decides if and how it intends to regulate greenhouse gas emissions from mobile sources. Given the Supreme Court's admonition to the EPA in *Massachusetts v. EPA*, and President Bush's subsequent Executive Order, it seems almost a foregone conclusion that, absent the politicization of the issue, either the California Waiver will be approved or the EPA will issue its own rule addressing GHG emissions from automobiles. Furthermore, although Green Mountain Chrysler only addressed GHG emissions from automobiles, the decision could still reach other manufacturing industries. By finding that regulation of GHG emissions does not conflict with foreign policy, the court left the door open for states to regulate GHG emissions on a broader scale. Accordingly, automakers and industry should be prepared to respond.

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\(^2\) Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Washington have also enacted regulations adopting the California Standards. Executive Orders outstanding in Arizona, Florida and New Mexico require these states to adopt the California Standards. 3. On the other hand, the U.S. District Court for the Northern District of California has found that global warming, climate change and the causes thereof are not considered nuisances that can be litigated. *People of the State of California v. General Motors Corp.*, No. C06-05755 MJF, slip op. at 1 (N.D. Cal. Sept. 7, 2007) (dismissing California's nuisance lawsuit against the automakers as nonjusticiable); see also *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (appeal pending before the 2nd U.S. Circuit Court of Appeals, No. 05-5104-cv. argued June 7, 2006); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-cv-436LG (S.D. Miss., case dismissed Aug. 20, 2007).

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