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Greenhouse Gas Litigation – Emerging Trends and Strategies in a Dynamic Landscape

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A Change in Climate Part I: The Global Economic Environment

December 8, 2008 12:23 PM in GHG Regulation ▪ International Law and Policy ▪ US Law and Policy | Ken Markowitz | ShareThis

What follows is the first post in our series on the Obama administration and its likely policy on climate change. In this piece, we focus on the challenges presented by the global economic slowdown.

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One of the major symptoms of the current economic crisis has been the dire state of global credit markets. These frozen credit markets have made it very difficult to finance renewable energy projects. These projects require significant amounts of capital up front and provide returns over long periods. With debt financing so scarce, and alternative energy stocks mirroring the general decline of world markets, the necessary capital has become increasingly difficult to obtain.

Investment in clean energy technology achieved record highs in 2006 and 2007. Public investment in clean energy cratered in 2008; the WilderHill New Energy Index, which tracks leading alternative energy companies, has fallen over 60% since December 2007. Financing concerns led even T. Boone Pickens, who recently became one of the most publicly visible advocates of alternative energy, to drop-at least for the time being-his plans for a multi-billion dollar wind farm in west Texas.

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Massachusetts v. EPA

- 1999 – Nineteen environmental NGOs petitioned EPA to regulate GHGs from automobiles
- 2001 – EPA requested public comment on petition
  - Over 50,000 comments received
- 2003 – EPA denies petition
  - Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change
  - Even if the agency had authority, it would be unwise to do so at that time
- 2005 – D.C. Circuit rules that EPA properly exercised its discretion in denying the petition

Massachusetts v. EPA (April 2, 2007)

- **Standing**
  - EPA's failure to regulate presented actual and imminent harm
    - Rising seas can swallow coastal land
    - Coastal damage costs states to remediate flooding and storm surge
  - State can show causation even though climate change is global
    - Court rejected "erroneous assumption" that small incremental step cannot be said to address causation
    - "Agencies, like legislatures, do not generally resolve massive problems in one fell swoop"
  - States can show redressability because reductions in domestic emissions would slow pace of global GHG emissions

Massachusetts v. EPA (April 2, 2007)

- **Merits**
  - Repeated use of "any," as in "any air pollutant," underscores sweeping definitional scope
  - EPA reliance on subsequent federal legislation (largely through research efforts) does not alter its duties under the CAA
  - If EPA makes endangerment finding, it must regulate GHGs
  - CAA Is Unambiguous

Massachusetts v. EPA (April 2, 2007)

- **Remand**
  - EPA can avoid taking further action *only*
    - "[I]f it determines that greenhouse gases do not contribute to climate change;" or
    - "[I]t provides some reasonable explanation of as to why it cannot or will not exercise its discretion to determine whether they do."

Consequences of Massachusetts v. EPA

<u>True watershed event</u>

- Mobile Sources
  - EPA looking at adopting Title II mobile source emission regulations, and also CAA stationary source regulations
  - EPA obtained remand in *NY v. EPA* (D.C. Cir.) revisions to NSPS for electric utility boilers
- Stationary Sources
  - NSR Program if CO2 is considered a “pollutant regulated under CAA”
  - NSR arguably triggered by any net emissions increase of CO2 if it is a “regulated pollutant.”

Advanced Notice of Proposed Rulemaking

- Regulating Greenhouse Gas Emissions Under the Clean Air Act – 73 Fed. Reg. 44345 (July 30, 2008)

- Describes advantages and disadvantages of regulating GHGs under existing CAA provisions
- How a decision to regulate GHG emissions under one section of the CAA could or would lead to regulation of GHG emissions under other sections of the Act
- Identifies issues for possible future climate legislation and potential for overlap between future legislation and regulation under the existing CAA
- Lists scientific information relevant to an endangerment analysis.

Mobile Sources – California v. EPA

CAA Section 209 Emissions Standard Waiver

- Authorizes EPA to allow California to impose emissions standards
  - If the standards "are at least as protective of public health and welfare as applicable Federal standards"
- Requires EPA to deny a California waiver request
  - If the Administrator finds that:
    - the determination of the State is arbitrary and capricious,
    - such State does not need such State standards to meet compelling and extraordinary conditions, or
    - such State standards and accompanying enforcement procedures are not consistent with Federal guidelines

Mobile Sources – California v. EPA

- Denial of CA Waiver request http://www.epa.gov/otaq/climate/20071219-slj.pdf; 73 Fed. Reg. 12156 (March 6, 2008)
- California v. EPA (9th Cir. Jan. 2, 2008) http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf
- California Request for Reconsideration; EPA-HQ-OAR-2006-0173-7044[1].1.pdf (January 21, 2009)
- EPA grants reconsideration; 74 Fed. Reg. 7040 (Feb. 12, 2009)
  - Public hearing – March 5, 2009
  - Close of comment period – April 6, 2009

Stationary Sources – Coal Plant Cases

- Opponents argue:
  - CO_2 already " subject to regulation under CAA," based on *Mass* decision
    - Triggers NSR for any project that results in any net increase of CO_2 emissions,
    - Requires that NSR permit include BACT-based CO_2 emission limit
- Utilities argue:
  - *Mass* case did not require EPA to regulate CO_2 – still up to EPA to decide
    - CO_2 not otherwise "currently regulated"
    - Thus no BACT for CO_2 mandated

Stationary Sources – Coal Plant Cases

- *In re Deseret Electric Power Cooperative*, PSD Appeal No. 07-03 (Nov. 13, 2008)
- http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/C8C5985967D8096E85257500006811A7/$File/Remand...39.pdf

- Region 8 erred in ruling that it did not have authority to require installation of BACT to control CO_2 emissions at a proposed coal-fired power plant
- CAA does not specific meaning of "subject to regulation"
- Region has discretion to determine
- Caution concerning nationwide import of decision

Stationary Sources – Coal Plant Cases

- EPA Interpretive Rule on Pollutants Subject to PSD Review (December 18, 2008)
- http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf

- "Definitive" interpretation of regulations
- A "regulated NSR pollutant" excludes pollutants for which EPA regulations required only monitoring or reporting
- EPA Regions did not have to consider whether a new or modified stationary source had to install BACT for CO_2
- 73 Fed. Reg. 80,300 (December 31, 2008)

Stationary Sources – Coal Plant Cases

- *In re Desert Rock Energy Company, LLC*, PSD Permit No. AZP 04-01

- Region 9 issues PSD permit for new 1,500 MW coal-fired power plant on July 31, 2008
- Sierra Club and other environmental groups challenge permit
- Region 9 withdraws portion of permit concluding not to impose CO2 limits; http://www.epa.gov/region/air/permit/desert-rock/withdrawal-notice-desertRockSBaddendum.pdf
- Region 9 issues Addendum to Statement of Basis; http://www.epa.gov/region/air/permit/desert-rock/desertRockSBaddendum.pdf

Stationary Sources – Coal Plant Cases

New Climate at EPA

EPA Interpretive Rule on Pollutants Subject to PSD Review (December 18, 2008)

- Sierra Club and others file petition for administrative reconsideration (December 31, 2008)
- Sierra Club and others file petition for review in D.C. Circuit (January 15, 2009)
- EPA grants petition for reconsideration; http://www.epa.gov/nsr/documents/20090217LPJlettertosierraclub.pdf

Questions

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