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WILL STATE "NEPA" LAWS SURVIVE FEDERAL CLIMATE CHANGE REGULATION?

by
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Questions of political and "green" opportunism aside, current state and regional efforts to address climate change are in part a response to the current absence of a comprehensive federal program addressing greenhouse gas (GHG) emissions. In this context, most discussion is focused on the regulation of mobile sources, electric power producing facilities, and other carbon-intensive industries. If, and most likely when, the federal government takes action to address GHG emissions, many of the recently adopted state and regional climate change initiatives may face preemption under federal law.

In contrast, *even if* a federal climate change program is adopted, it will likely not displace state laws patterned after the National Environmental Policy Act, commonly referred to as "state NEPAs," that call for environmental impact assessments on major actions requiring discretionary state or local agency approval. In contrast to NEPA, many of these state NEPA laws, such as California's Environmental Quality Act (CEQA), contain *substantive* mandates requiring the mitigation of environmental impacts. As discussed below, recent litigation brought in California is attempting to force planning agencies and developers to address *and* mitigate GHG emissions.

The Supreme Court Rules that Carbon Dioxide is an "Air Pollutant" under the Clean Air Act, but Questions of Federal Preemption Remain Unanswered. In a five-to-four decision, the Supreme Court in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), ruled that the most common GHG, carbon dioxide, is an air pollutant within the plain meaning of the Clean Air Act, § 202(a)(1). In brief, the Court held that EPA has the authority to regulate GHG emissions from motor vehicles if it makes a judgment that such emissions contribute to climate change. The Court further rejected EPA's justifications for postponing regulation of GHGs, stating that EPA had offered no "reasoned explanation" for its refusal to decide whether GHGs cause or contribute to climate change.[1] The case was remanded to EPA for further deliberation. Given the complexities and political dynamics of setting GHG emission standards, any EPA regulation is unlikely to be final until several years from now.

The Court did not specifically address the question of federal preemption over regulation of GHG emissions. However, in its majority opinion, the Court advised: "When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted. . . . These sovereign prerogatives are now lodged in the Federal Government." *Id*. at 1454 (citation and quotation omitted). Expect

[1]In dissent, Justice Scalia argued that EPA had acted well within its discretion in declining to make a "judgment" on *whether or not* to regulate GHGs. *Id*. at 1474. In taking direct issue with the Court's ruling that EPA's analysis offered no "reasoned explanation," Justice Scalia opined: "I simply cannot conceive of what else the Court would like EPA to say." *Id*. at 1475.

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litigation over the significance of this language as states continue to adopt climate change programs in the absence of comprehensive federal legislation. As discussed below, once again at the forefront of environmental policymaking and litigation is the State of California, which was the first state to enact legislation requiring a reduction in economy-wide GHG emissions.

California's Global Warming Solutions Act of 2006 and Climate Change CEQA Litigation. In September 2006, the State of California passed into law the Global Warming Solutions Act of 2006, Assembly Bill 32 (AB 32).[2] The goal of AB 32 is to reduce California's GHG emissions to 1990 levels by the year 2020. Consistent with how most environmental policy is established today, AB 32 fails to specify exactly how or from what sources such GHG reductions will be achieved. Instead, AB 32 delegates this task to the governor-appointed 11-member California Air Resources Board (ARB). By 2011, ARB is required to adopt GHG emission reduction regulations, which will go into effect in 2012. In setting regulations, ARB must "achieve the maximum technologically feasible and cost-effective reductions in GHG emissions" in furtherance of the State's 2020 goal.[3]

Seizing upon the statutory language in AB 32, several environmental groups, such as the Center for Biological Diversity and the Sierra Club, have filed lawsuits under CEQA alleging that lead agencies failed to address and mitigate climate change impacts in their environmental impact reports. Likewise, on April 13, 2007, California's Attorney General Jerry Brown filed a Petition for Writ of Mandate against the County of San Bernardino and its Board of Supervisors challenging the Board's approval of an update of its General Plan for allegedly failing to fully address and mitigate climate change impacts in its environmental impact report. General Brown alleges that the County failed to identify and adopt "all feasible mitigation measures" to minimize the General Plan's adverse effects on global warming and to adequately address the statutory mandate of AB 32.

Climate Change Developments and State NEPA Litigation Risks in Other States. CEQA litigation is of obvious importance to developers with major projects planned in California. However, it is also likely a harbinger of things to come in other states that have state NEPA laws. Indeed, after the Supreme Court's ruling in *Massachusetts* that carbon dioxide emissions are "air pollutants" under the Clean Air Act, states have begun to assert independent authority to require consideration of climate change in environmental impact assessments.

For example, on April 23, 2007, the State of Massachusetts' Executive Office of Energy and Environmental Affairs (EOEEA) issued its Greenhouse Gas Emissions Policy. The policy requires certain projects to quantify the GHG emissions associated with the project and to propose alternatives to avoid, minimize or mitigate the emissions. Under the Policy, until a formal protocol is developed, a project proponent is required to identify and describe sources of project-related GHG emissions. Likewise, in King County, Washington, the County recently issued an Executive Order requiring all County agencies to consider climate change impacts under Washington's State Environmental Policy Act (SEPA).

Conclusion. The adoption of a comprehensive federal program addressing climate change will likely not preempt "state NEPA" laws. The well-publicized state and regional climate change initiatives are primarily focused on motor vehicles and electric power producing facilities. Assuming the federal government takes action, many of these initiatives will be displaced by federal law. However, major development projects that do not involve federal approval are still subject to state NEPA environmental impact assessments. As illustrated above, major development projects and planning efforts in California and elsewhere that fail to adequately address climate change impacts, do so at a significant litigation risk. These risks are further compounded by the fact that currently no generally accepted standards exist on how project GHG emissions should be identified, quantified or mitigated.

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[2]Codified at California Health & Safety Code section 38501, *et seq*.

[3]AB 32 provides no definition for "technologically feasible," and provides only a general definition of "cost-effective"—"the cost per unit of reduced emissions of [GHGs] adjusted for its global warming potential."

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