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Brianne Ardila

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Green Mountain: A “Fleeting” Win for the States

*Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*¹

I. INTRODUCTION

As spring comes earlier and summer grows hotter, the phrase on everyone’s lips, from Presidential candidates to companies going green, is global climate change. While the long-term effects of the increase in greenhouse gases (“GHG”) is still unknown, one thing is for certain: the United States accounts for around one-third of the total GHGs in the world. Therefore, it is up to Americans to take responsibility for global pollution and begin to change how we live. Progressive states have already begun to take action to curb carbon dioxide emissions from motor vehicles within their own state boundaries by promulgating stricter emission standards than the federal government has enacted. Vermont is just one of those states trying to take a step toward creating a sustainable environment for future generations.

On September 12, 2007, the U.S. District Court for the District of Vermont upheld Vermont’s regulations regarding the emission standards for new automobiles that would apply to automakers’ fleet of vehicles beginning in 2009. Vermont adopted the standards established by California in 2005. California has historically been allowed to experiment with emission standards due to the state’s high levels of pollution and the state is permitted to apply for a waiver, submitted to the Environmental Protection Agency (“EPA”), of the national emission standards. California’s regulations have consistently been approved by the EPA. Vermont’s adoption of the regulations depended on the approval by the EPA of California’s proposed 2005 standards. At the time of the decision of this case, California’s application was still pending. Green Mountain Chrysler Plymouth Jeep along with other new motor vehicle dealers, automobile manufacturers, and associations of automobile manufacturers subsequently brought a claim against Vermont on the ground that the regulation was preempted by federal law and requested declaratory and

¹ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007).

injunctive relief under the Supremacy Clause of Article VI of the United States Constitution. The court concluded, that Vermont's adopted regulations are not preempted by the Energy Policy and Conservation Act ("EPCA"), which provides that federal fuel economy standards preempt any state laws or regulations related to fuel economy. The court also held that Vermont's regulations do not undercut the foreign affairs objectives of the President and the Congress.

The victory was illusory, however, due to the fact that the EPA denied California's application for a waiver of the federal emission standards in December 2007, the very standard Vermont sought to adopt. As it stands now, the holding of the instant decision is moot because the court's reasoning depended on the presumption that the adopted regulation of Vermont would have approval by the EPA. Had the EPA approved the standards submitted by California, this decision would have been a major victory for states that were trying to reduce GHG emissions by regulating the transportation sector. Now, states need to reduce the GHG emissions from other sectors of the economy, such as the energy sector. For states such as Missouri, the energy sector could become disproportionately responsible for emission reductions where fossil fuels such as coal are the primary sources of energy.

II. FACTS

In 2005, Vermont adopted a set of regulations that established GHG emissions standards for new automobiles.² However, new motor vehicle dealers, automobile manufacturers, and associations of automobile manufacturers brought a claim seeking declaratory and injunctive relief from Vermont's regulations.³ After the claim was filed, the State of New York and five non-profit environmental advocacy groups intervened on behalf of the defendants.⁴ The plaintiffs claimed that Vermont's regulations were expressly and impliedly preempted under the Energy

² *Id.* at 300.

³ *Id.*

⁴ *Id.*

Policy and Conservation Act of 1975 and were preempted under the Clean Air Act (“CAA”), and by United States’ foreign policy.⁵

The alleged invalidity of Vermont’s statute on preemption grounds is based on the interplay and overlap of two federal statutes - the EPCA and the CAA.⁶ The CAA requires that the EPA set standards to control air pollutants emitted from new motor vehicles or new motor vehicle engines which cause or contribute to air pollution that may pose a danger to public health or welfare.⁷ Additionally, the CAA preempts states from adopting their own motor vehicle emission control standards.⁸ However, preemption is waived if standards that mirror those of California are adopted by a state⁹ so long as the EPA Administrator grants California a waiver under § 209(b) of the CAA.¹⁰ States are permitted to adopt California’s standards as long as states adopt the standard at least two years before the start of the model year.¹¹

In 2004, California adopted a set of GHG emissions regulations for new motor vehicles and subsequently applied to the EPA for a waiver of federal preemption under the CAA in 2005.¹² At the time the instant decision was decided, California’s application for a waiver was still pending.¹³ That same year, Vermont also adopted California’s GHG regulations.¹⁴ The court’s decision was based on the presumption that California’s standards would be approved by the EPA, and subsequently Vermont’s standards would be as well, due to the fact that the EPA had consistently granted California’s applications for a waiver of preemption previously.¹⁵

The EPCA directs the Department of Transportation (“DOT”) to set fuel economy standards for new passenger vehicles and light trucks.¹⁶

⁵ *Id.*

⁶ *Id.* at 302

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ 42 U.S.C. § 7543(b), 209(b) (2000).

¹¹ *Green Mountain*, 508 F.Supp.2d at 302.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

To regulate motor vehicle fuel economy, the EPCA established a program of "corporate average fuel economy," or "CAFE," standards. This statute preempts any state law or regulation related to fuel economy standards.¹⁷ The plaintiffs challenged Vermont's regulations as being preempted by EPCA because of the relationship between decreasing carbon dioxide emission from the tailpipes of motor vehicles and increasing its fuel economy.¹⁸

The court proceeded on the assumption that the EPA would grant California's waiver application¹⁹ and entered judgment in favor of Vermont on the claims based on preemption under the EPCA and foreign policy preemption while the claims under the CAA were dismissed as moot.²⁰

III. LEGAL BACKGROUND

Green Mountain deals with the intersecting requirements of two important Environmental statutes: the Clean Air Act ("CAA") and the Energy Policy and Conservation Act ("EPCA"). Under the CAA, the EPA regulates motor vehicle emissions that are either harmful pollutants or substances that form harmful pollutants. The federal fuel economy standards are regulated under the EPCA and are administered by the National Highway Traffic Safety Administration ("NHTSA"), an agency within the U.S. Department of Transportation ("DOT"). The Supreme Court case *Massachusetts v. EPA*, also provided an impetus for the action when it held that the EPA was *required* to regulate carbon dioxide emissions from motor vehicles.

a. *The Clean Air Act*

The CAA was initially enacted in 1963 to improve air pollution conditions at the state and local level by way of grants to conduct research

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

and create control programs.²¹ The statute also recognized the dangers of motor vehicle exhaust and stationary source emissions and required the implementation of emission standards.²² With the enactment of the Air Quality Act of 1967, federal government activities were expanded and the new provision preempted states' power to set standards for emissions from new motor vehicles and engines.²³ Enforcement proceedings commenced in those areas subject to interstate air pollution transport and the federal government conducted extensive ambient monitoring studies and stationary source inspections for the first time as part of the proceedings.²⁴ Section 208(b) of the Air Quality Act provided a waiver from preemption of federal standards for any state that had adopted standards, other than crankcase emission standards, for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 20, 1966.²⁵ California was the only state that satisfied this criterion.²⁶ The new provisions provided that California could set more stringent standards if it had shown that it required such standards to meet compelling and extraordinary conditions.²⁷ In addition, the state had to show that the standards were consistent with the federal emission standards.²⁸

Most of the provisions of the CAA, however, were implemented in the 1970 and 1977 amendments and were written²⁹ at a time when public pressure was building for government action to rectify the United States' air pollution problems.³⁰ However, the amendments were not a direct reaction to public pressure, but were aimed at correcting the failures of the

²¹ Clean Air Act of 1963, Pub. L. No. 84-159, 69 Stat. 322 (1963). (replacing the Air Pollution Control Act of 1955).

²² *Id.*

²³ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

²⁴ Environmental Protection Agency, History of the Clean Air Act, http://www.epa.gov/air/caa/caa_history.html [hereinafter EPA History of CAA] (last visited Aug. 13, 2008).

²⁵ Air Quality Act of 1967, §208(b) (codified at 42 U.S.C. § 7543(b)).

²⁶ 42 U.S.C. § 7543 (2000).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Clean Air Act of 1979, Pub. L. No. 91-604, 84 Stat. 1676-1713 (codified at 42 U.S.C. §§ 7401-7671 (2000)).

³⁰ Paul Rogers, *The Clean Air Act of 1970*, <http://www.epa.gov/history/topics/caa70/11.htm> (last visited Aug. 13, 2008).

previous regulations.³¹ The amendments made air pollution primarily a state responsibility and states were to address local and regional problems.³² The amendments required the EPA to publish national ambient air quality standards (“NAAQS”) for pollutants such as carbon monoxide, nitrogen oxides, sulfur oxides, photochemical oxidants, hydrocarbons, and particulate matter.³³ Areas of each state were to be classified as either in “attainment” or “nonattainment” of these standards.³⁴ The CAA established deadlines for the states to develop state implementation plans (“SIPs”) to meet these standards.³⁵ The states had to take inventory of emissions that contributed to local pollution which caused it to exceed the NAAQS and develop measures which would reduce the emissions to be in compliance with the NAAQS.³⁶ The 1977 amendments required the EPA to conduct a national review of overall air quality every five years and to extend the deadline for states that had not complied with NAAQS and motor vehicle emissions requirements of the 1970 CAA.³⁷ These amendments established major permit review requirements in order to ensure attainment and maintenance of the NAAQS.³⁸

The 1990 amendments increased the authority and responsibility of the federal government.³⁹ New regulatory programs were created to control acid deposition (acid rain) and to issue stationary source operating permits.⁴⁰ The National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) were incorporated to control toxic air pollutants and the provisions for attainment and maintenance of NAAQS were modified and expanded.⁴¹ These amendments required more specific requirements for

³¹ *Id.*

³² *Id.*

³³ Jonathan S. Martel & Kerri L. Stelcen, *Clean Air Regulation*, in GLOBAL CLIMATE CHANGE AND U.S. LAW 133, 135 (Michael B. Gerrard ed., 2007) [hereinafter *Clean Air Regulation*].

³⁴ *Id.*

³⁵ 42 U.S.C. §§ 7409-10 (2000).

³⁶ *Clean Air Regulation*, *supra* note 33, at 135.

³⁷ Act to Amend the Clean Air Act, Pub. L. No. 95-95, 91 Stat. 685 (1977).

³⁸ EPA History of CAA, *supra* note 24.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

SIPs in order to bring local areas into attainment of NAAQS and added new requirements for fuels, motor vehicles and nonroad engines.⁴² Other provisions included in the amendments were regarded stratospheric ozone protection, increased enforcement authority, and expanded research programs.⁴³

Section 209(a) of the CAA preempts states from establishing their own motor vehicle tailpipe emissions standards to control GHG.⁴⁴ However, § 209(b) provides a waiver for a state that adopted motor vehicle emissions standards prior to March 30, 1966 as long as the standards are "at least as protective of public health and welfare as federal standards."⁴⁵ California is the only state that is allowed to receive a waiver under § 209(b) because it is the only state that has established standards prior to March 30, 1966.⁴⁶ Section 177 allows states that have adopted California's standards to also receive a waiver so long as the standard does not require car manufacturers to produce a "third car" (one that is different from the type required by the California or federal standards).⁴⁷

b. Energy Policy and Conservation Act

The 1975 Energy Policy and Conservation Act ("EPCA") was enacted in response to the energy crisis of the 1970s and contains the motor vehicle fuel economy laws. The EPCA was not originally enacted to deal with climate change and does not reference any environmental considerations.⁴⁸ The Act was primarily enacted in response to the OPEC oil embargo of 1973-74 and was designed to decrease the United State's dependence on imports, to enhance national security, and to promote

⁴² *Clean Air Regulation*, *supra* note 36, at 136.

⁴³ EPA History of CAA, *supra* note 24.

⁴⁴ 42 U.S.C. § 7543(a) (2000).

⁴⁵ 42 U.S.C. § 7543(b)(1).

⁴⁶ *Clean Air Regulation*, *supra* note 36, at 154.

⁴⁷ *Id.*

⁴⁸ Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 735. (2003) [hereinafter *California's Authority to Regulate*].

efficient energy use while insuring energy supply at reasonable cost.⁴⁹ Under § 502, the Secretary of Transportation is required to promulgate rules that establish maximum feasible average fuel economy standards for automobiles.⁵⁰ In order to regulate motor vehicle fuel economy, the EPCA established a program of “corporate average fuel economy” (CAFE) standards.⁵¹ CAFE requires each automobile manufacturer or importer to meet average fuel economy standards for the fleet of new vehicles it manufactures or imports in each model year.⁵² The Act regulates the GHG emissions from motor vehicles since carbon dioxide emissions are used to measure fuel economy under the EPCA.⁵³ Fuel economy is determined by measuring how much carbon dioxide a vehicle emits and then uses a formula to convert those carbon dioxide emissions in the number of miles that vehicle can travel on a gallon of gasoline (miles per gallon).⁵⁴ Therefore, the more carbon dioxide that is emitted from a vehicle’s tailpipe, the lower the fuel efficiency of the vehicle. The CAFE standards do not apply to individual vehicles or models, rather they regulate a manufacturer’s entire fleet of cars or trucks.⁵⁵ Therefore, a manufacturer can produce a combination of cars as long as the fuel economy of the entire fleet as a whole meets or exceeds the required average miles per gallon.⁵⁶

The regulation provides special treatment for vehicles that utilize alternative fuel⁵⁷ and CAFE provides a credit system as well. Manufacturers earn credits if the average fuel economy of either a manufacturer’s passenger car or light truck fleet for a particular model year exceeds the established standard.⁵⁸ Credits can then be applied to any three consecutive model years immediately prior or subsequent to the

⁴⁹ See H.R. REP. NO. 94-340, at 1 (1975), as reprinted in 1975 U.S.C.C.A.N. 1762, 1763-64.

⁵⁰ 49 U.S.C. § 32902(a)-(c) (2000).

⁵¹ Complaint, ¶ 34 *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295 (D. Vt. 2007) (No.2:05-CV-302).

⁵² See generally 49 U.S.C. §32902 (2000).

⁵³ *Clean Air Regulation*, supra note 36, at 134.

⁵⁴ Complaint, supra note 59.

⁵⁵ *Id.* at ¶ 35.

⁵⁶ *Id.* at ¶ 36.

⁵⁷ 49 U.S.C. § 32908(b)(3) (2000).

⁵⁸ See *id.* § 32903(a)-(b).

model year in which the credits are earned.⁵⁹ However, these credits cannot be passed between manufacturers or between fleets (for example, between domestic passenger cars and light trucks).⁶⁰ As under the CAA, states are also preempted under § 509 of the EPCA from adopting or enforcing regulations inconsistent with federal regulations concerning fuel economy standards or fuel costs.⁶¹ The federal government has exclusive authority to "determine and enforce" fuel economy standards.⁶²

c. Massachusetts v. EPA

Until 2007, the Supreme Court of the United States had not acknowledged the graveness of change in climate. However, in its decision *Massachusetts v. EPA*, the Court recognized the jurisdiction of the EPA to regulate and set emission limits of GHGs. Through this decision, the Supreme Court acknowledged the importance of conserving sources of energy, choosing alternative sources of energy over fossil fuels, and being aware of the fact that the United States is dependent on energy for transportation, industry, recreation, and other aspects of our daily lives.⁶³ Currently, 17 states and two cities are pushing the EPA for its action plan to regulate GHG emissions from new motor vehicles.⁶⁴

IV. INSTANT DECISION

The automakers advanced two main arguments challenging Vermont's regulations: (1) the Energy Policy and Conservation Act preempted Vermont's regulations, both expressly and implicitly; and (2)

⁵⁹ *Id.* § 32903(a)(1)-(2).

⁶⁰ *Id.* § 32903(e).

⁶¹ *Id.* § 32919(b).

⁶² Chanin, *California's Authority to Regulate*, *supra* note 48, at 733.

⁶³ Matthew Bender & Co., *Global warming Revolution and Its Impact*, 2-1A TREATISE ON ENVIRONMENTAL LAW § 1A.03 (2007).

⁶⁴ *Cities Accuse EPA of Stalling Following Massachusetts Remand*, 21-5 MEALEY'S POLLUTION LIABILITY REP. 4 (2008).

Vermont's regulations intrude upon the foreign affairs interests of the President and Congress.

a. EPCA Preemption

The court first addressed the express and implied preemption claim under the EPCA. The Supremacy Clause of the United States Constitution proclaims that state laws that are contrary to or interfere with federal laws are invalid.⁶⁵ The automakers argued that the regulations under EPCA expressly and implicitly preempt the state's GHG regulations.⁶⁶ The express provision in the statute prohibits states from adopting or enforcing a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by the standard.⁶⁷ The automakers claimed that Vermont's attempt to regulate emissions was a *de facto* fuel economy standard, which is for the federal government to establish not a state. In the alternative, they argued that even if the standards were not a *de facto* fuel economy standard, they were at least "related to fuel economy standards," and were therefore preempted by the EPCA.

On the assumption that the EPA would approve California's waiver of its standards, the court disagreed with the automakers that Vermont's regulation was preempted by the federal EPCA statute.⁶⁸ Since the waiver would allow California's emission to be on the same authoritative level as the federal standards, Vermont's regulations would be as well and neither would be preempted by the statute.⁶⁹ Additionally, in response to *Massachusetts v. EPA*, President Bush issued an executive order that required agencies to cooperate with one another to protect the environment with respect to GHG emissions from motor vehicles.⁷⁰ Therefore, the court found that if a conflict between a state emissions standard undergoing EPA waiver review and as CAFE standard

⁶⁵ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 343 (D. Vt. 2007).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 344.

⁶⁹ *Id.*

⁷⁰ *Id.* at 349.

promulgated by NHTSA arose, the EPA and NHTSA would cooperate in a joint accommodation or resolution to solve the problem.⁷¹ Essentially, this case involved “potential conflict between ‘federal’ provisions.”⁷² The court also reasoned that once the EPA grants a waiver, the state’s regulations become “other motor vehicle standards of the Government,” which is a factor that the EPCA requires NHTSA to consider when setting fuel economy standards.⁷³ For these reasons, the court held that the preemption doctrines do not apply as to the intersection between Section 209(b) of the CAA and EPCA.⁷⁴

Although the court found that the preemption doctrine was inapplicable in this case, the court went on to address the manufacturers’ preemption arguments. The court noted that because Vermont’s standards regulated additional pollutants and not just carbon dioxide emissions,⁷⁵ the court found that the regulations were not *de facto* fuel economy standards.⁷⁶ The Court noted that while the bulk of the GHG regulations pertain to carbon dioxide, they still include emissions which are not connected to fuel economy.⁷⁷

⁷¹ *Id.* (citing Exec. Order No. 13,432, 72 Fed.Reg. 27,717 (May 14, 2004)) The executive order requires the coordination of regulatory action to be undertaken jointly and/or in consultation with other agencies when possible. Exec. Order No. 13,432, 72 Fed.Reg. 27,717 (May 14, 2004)

⁷² *Id.* at 398.

⁷³ *Id.*

⁷⁴ *Green Mountain*, 508 F.Supp.2d at 302 at 349.

⁷⁵ *Id.* at 351-52. Carbon dioxide is the principal emission that is regulated by the GHG emission standards. A manufacturer can comply with GHG regulations by improving the fuel economy of the vehicles it produces. However, GHG regulations are not simply a fuel economy standard because fuel economy deals only with how much carbon dioxide is produced while the GHG regulations deal with a multitude of pollutants such as methane, nitrous oxide, hydrofluorocarbons and carbon dioxide. *Id.*

⁷⁶ *Id.* at 353. Vermont and calf regulations are not fuel economy standards because they allow manufactures to comply through various means such as receiving credits for air conditioning, or using alternative fuels, or using plug-in hybrid vehicles. Also, they contain regulations for upstream emissions adjustments for corn ethanol, liquid petroleum gas, or propane, and compressed natural gas. Additionally, the regulations allow for adjustment of GHG emission n values for energy sources that don’t have tailpipe emissions of GHG, such as electricity and hydrogen. *Id.*

⁷⁷ *Id.* at 353.

Additionally, the court noted that while the text of the EPCA prohibits states from adopting or enforcing laws that are "related to" fuel economy standards, is too general and there is no evidence of Congressional intent concerning its limits.⁷⁸ Also, there is a specific requirement to accept EPA-approved California emissions regulations into consideration which supports the conclusion that Congress did not intend to preempt these regulations.⁷⁹ The court held that the preemption doctrines do not apply because the auto manufacturers failed to show that Congress expressed a clear and manifest intent to designate the regulation of carbon dioxide emissions for motor vehicles under the exclusive domain of the federal government.⁸⁰

The court then examined the manufacturer's claim of conflict preemption. A conflict preemption exists if a state law conflicts with a federal statute or regulation or is an obstacle to accomplishing or executing Congressional objectives.⁸¹ The automakers contended that the state's regulation would conflict with the Federal CAFE program. They argued that it would frustrate Congressional intent to create a unitary, nationwide fuel economy standard. It would restrict consumer choice, reduce employment in the domestic automobile industry and decrease traffic safety. According to the automakers, these factors would disturb the balance that the National Highway Traffic Safety Administration ("NHTSA") settled on when it set "maximum feasible average fuel economy" levels⁸², and EPA's waiver process would not eliminate a conflict with EPCA objectives.⁸³

The legislative history of the EPCA and the CAA as well as the agencies' practices shows that there is no conflict between the CAA's mandate to regulate air pollution and that of the EPCA to regulate fuel economy.⁸⁴ The court was not convinced that consumers would be deprived of their choice of vehicles or that manufacturers would be forced

⁷⁸ *Id.* at 354.

⁷⁹ *Id.*

⁸⁰ *Id.* at 355.

⁸¹ *Id.* (citing *Int'l Paper co. v. Ouellette*, 479 US 481, 492 (1987)).

⁸² *Id.* at 356.

⁸³ *Id.*

⁸⁴ *Id.*

to curtail or abandon their product lines.⁸⁵ Additionally, the evidence provided by the plaintiffs failed to persuade the court that traffic safety will decrease as a result of the regulations.⁸⁶

The court also found that the evidence provided by the manufacturers failed to show that the auto industry would not be able to meet the challenges posed by the stricter regulations.⁸⁷ The court further stated that the automakers will be able to meet the challenges because of the industry's ability to "develop and utilize new technologies to increase fuel efficiency and reduce emissions."⁸⁸ In addition, the EPA would have the ability to give automakers additional lead time through the use of the waiver process if it would be necessary to develop the technology.⁸⁹ Finally, the court held that the manufacturers failed to show that Congress' purposes and objectives had been frustrated by Vermont's GHG regulation.⁹⁰

b. Foreign Policy Preemption

The last argument the court addressed was the foreign policy preemption. The automakers claimed that Vermont's GHG regulations encroached upon the United States foreign policy and the foreign affairs goals of the President and Congress.⁹¹ The automakers argued that it conflicts with the United States' ability to participate in multilateral agreements for the reduction of international GHG emissions, reduces its bargaining power, and impedes the United States' ability to "speak with one voice upon matters of global climate change."⁹² The court concluded that the manufacturers failed to demonstrate that the state's regulation intruded upon the field of foreign affairs or that it conflicted with a

⁸⁵ *Id.* at 359.

⁸⁶ *Id.*

⁸⁷ *Id.* at 399.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 357.

⁹¹ *Id.* at 392.

⁹² *Id.* (citing Plaintiff's Compl. ¶ 121).

national foreign policy.⁹³ The District Court of Vermont ordered judgment for Vermont on all counts.

V. COMMENT

Global climate change is a major issue for courts and legislators today. During the last 100 years, the Earth's average surface temperature has increased by about 1.2 to 1.4 degrees Fahrenheit.⁹⁴ Climate models predict that the average temperature at the Earth's surface could increase from 3.2 to 7.2 degrees Fahrenheit above 1990 levels by the end of this century if greenhouse gases continue to increase.⁹⁵ The nine warmest years in this century have all occurred in the last 14 years.⁹⁶ The United States' energy-related activities account for three-quarters of the human-generated greenhouse gas emissions, which come primarily in the form of carbon dioxide emissions from burning fossil fuels.⁹⁷ More than half of the energy-related emissions come from sources such as power plants and about a third of the emissions come from transportation. Other sources of greenhouse gas emissions in the U.S. are industrial processes (production of cement, steel, and aluminum), agriculture, forestry, and waste management.⁹⁸ The level of carbon dioxide continues to increase and soon will reach 400 parts per million ("ppm") in the earth's atmosphere, which is the highest amount in 650,000 years.⁹⁹ This level could rise to 500 ppm by 2050 unless drastic measures are taken.¹⁰⁰ Around the globe, public awareness is growing and litigation is mounting. We are embarking on an environmental revolution.

⁹³ *Id.* 397.

⁹⁴ Environmental Protection Agency, *Climate Change*, <http://www.epa.gov/climatechange/basicinfo.html> [hereinafter *EPA Climate Change*].

⁹⁵ *Id.*

⁹⁶ Environmental Protection Agency, *Climate Change and Missouri*, [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUTGH/\\$File/mo_impct.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUTGH/$File/mo_impct.pdf) (1997) [hereinafter *Climate Change and Missouri*].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Matthew Bender & Co., *Coping with Global Warming: A Critical Summary of Proposals*, 2-1A TREATISE ON ENVIRONMENTAL LAW § 1A.09 (2007).

¹⁰⁰ *Id.*

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Missouri is also aware that if global warming occurs, it could have serious consequences for the state's citizens and economy. According to the projections made by the Intergovernmental Panel on Climate Change, by 2100 temperatures in Missouri could increase by about two degrees Fahrenheit in the summer and about three degrees Fahrenheit in other seasons.¹⁰¹ Additionally, it is predicted that precipitation will increase and extreme hot days in the summer will increase due to the general warming trend.¹⁰² While similar changes have occurred in the past, those changes took place over the course of centuries rather than decades.¹⁰³ Missouri has taken steps to address climate change issues and in 1994 it began two projects to fight global warming.¹⁰⁴ The first project compiled information on statewide GHG emissions for 1990 and was completed in 1996. The second project evaluated GHG emission trends, predicted future statewide GHG emissions, and "identifie[d] and analyze[d] options for reducing the state's contribution to global GHG emissions."¹⁰⁵

While the instant decision made by the Vermont Court at first blush seemed encouraging for those states that want to take more aggressive steps towards combating the causes of global warming, all illusions of progress disappeared when the head of the EPA, Stephen Johnson, denied California's waiver petition. On December 19, 2007, Johnson published the official explanation of his decision to deny a waiver of preemption for California's emission standards.¹⁰⁶ The agency stated that new legislation signed by President Bush setting a unified federal fuel economy standard for vehicles of 35 miles per gallon provides sufficient reductions in greenhouse gas emissions from cars and trucks throughout the United States.¹⁰⁷ The agency felt this would be a more effective

¹⁰¹ *Climate Change and Missouri*, *supra* note 96.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ John Noller, *Missouri Action Options for Reducing Greenhouse Gas Emissions*, available at <http://www.dnr.mo.gov/pubs/pub1447.pdf>. (2002) [hereinafter *MO Action Options*].

¹⁰⁵ *Id.*

¹⁰⁶ *California Sues EPA Over Denial of Waiver Request for Emissions Regulations*, 21-4 MEALEY'S POLLUTION LIABILITY REP. 1 (2008).

¹⁰⁷ *Id.*

approach to the reduction of emissions than a partial state-by-state approach of 33.8 miles per gallon.¹⁰⁸

Arnold Schwarzenegger, the governor of California, however, felt that although the new federal standard would help the United States reduce its dependency on foreign oil, it did not constitute grounds for denying the state's waiver.¹⁰⁹ According to the governor, California's vehicle greenhouse gas standards were designed to combat climate change through 2050, whereas the federal standards do not reflect a vision to deal with climate change beyond 2020.¹¹⁰ The EPA's denial of California's waiver application raises concerns about the United States' ability to make aggressive changes to combat global warming because of the lack of initiative taken by Washington and the Bush Administration and by preventing states from filling that void in leadership.

In Missouri, the utility sector and the transportation sector of the economy accounted for an 88 percent increase carbon dioxide emissions between 1990 and 1996.¹¹¹ Carbon dioxide emissions from coal accounted for more than 99 percent of the utility sector's increase and 99 percent of the increase in the transportation sector came from carbon dioxide emissions from petroleum-based fuels.¹¹² Although a large portion of carbon dioxide emissions does come from the utility sector, the primary source of carbon dioxide emissions in transportation is personal travel (gasoline).¹¹³

Since the EPA denied California's waiver, Missouri will be forced to look to the utility sector of its economy to reduce GHG rather than the problem sector, transportation. The sector of the economy for Missouri to target would be electric generation to reduce carbon dioxide emissions. Electric generation relies on centralized coal-fired plants, which is the main source of GHG emissions in Missouri. Missouri has many options to reduce emissions in this area such as increasing the industry's efficiency, switching the fuel energy-source from fossil fuel to something that contains less carbon, and relying more on renewable sources of energy

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *MO Action Options*, *supra* note 104.

¹¹² *Id.*

¹¹³ *Id.*

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such as energy from wind, solar thermal energy, photovoltaic cells and panels, crops specifically grown for energy production, organic waste biomass, and hydropower.

Other states as well will be forced to look to other sectors of their economies to reduce GHG emissions if they cannot be cut in the transportation section. After *Massachusetts v. EPA*, the court recognized that the EPA has authority to regulate GHG emissions from automobiles. However, the agency has not established a federal standard, and states have been initiating their own. With California's application denied, states will have to accept the federal standard and look to other industries and sources to cut emissions, while they wait for the EPA to aggressively regulate automobile emissions. With a new President in office, how strict the standards will be depends upon the new President's appointment for the head of the EPA.

For the moment, things may look bleak for California and other progressive states, but all could change with the upcoming Presidential election. While Senator John McCain proposes an increase in auto fuel economy to 35 mpg (the same standard already implemented by the administration) and opposes a 40 mpg standard, Senator Barack Obama favors increasing the standard to 40 mpg. Senator Hillary Clinton however, has a mixed track record regarding her stance on fuel economy. In 2003, she supported an increase to 40 mpg, but in 2005, she opposed it. Both Democratic candidates, however, support cutting emissions by 80 percent by 2050. The EPA's stance could change depending on which candidate takes office.

VI. CONCLUSION

The decision in *Green Mountain* depended upon the EPA's waiver of California's emission standards since Vermont had based their own regulations upon those established by California. However, as indicated by the court in the instant decision,¹¹⁴ because California's wavier application was denied, Vermont's regulation is preempted by § 209(a) of the CAA.

¹¹⁴ *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 302 (D. Vt. 2007).

States that had chosen to adopt California's emission standards are now forced to look to regulation of other sectors of the economy in order to reduce carbon dioxide levels. The EPA's denial of California's waiver impedes the state's ability to move forward with its ambitious vehicle emission program. A total of 18 states, representing 45% of the nation's auto market, which adopted or wanted to adopt California's standards, will not be able to pursue their programs either. States will have to rely on the EPA to establish a more aggressive action plan to combat the rising levels of GHG emissions or drastically cut emissions from other sectors of their economies. Although the EPA's denial of California's proposed standards was a loss for those states taking steps to reduce carbon dioxide emissions, the Presidential election of 2008 may change nothing or everything.

BREANNE ARDILA