By Richard Lazarus

Courts Continue to Needle on Climate

The only things accumulating these days as fast as greenhouse gas emissions in the atmosphere are climate change lawsuits in federal and state courts. There are approximately 36 pending or recently decided climate change cases in federal or state courts, raising a host of federal and state law issues, and the number of petitions now pending before administrative agencies should soon reach double figures.

These various actions rely on a wide range of laws with an alleged nexus to climate change. There are obvious candidates such as the Clean Air and Clean Water Acts, less obvious ones like the Endangered Species Act, Marine Mammal Protection Act, National Environmental Policy Act, and Freedom of Information Act, 1960s flashbacks to federal and state common law nuisance theories, creative efforts based on the Securities and Exchange Act and international human rights law, and finally reliance on some laws that I must confess I never knew even existed.

The latest significant ruling is the Ninth Circuit’s decision in Center for Biological Diversity v. National Highway Traffic Safety Administration. Mirroring other lawsuits against the federal government, the plaintiffs include the usual suspects: 11 states, the District of Columbia, and the city of New York, and a host of the nation’s leading environmental organizations joining together in the claim that a federal agency has acted unlawfully under existing law by failing to account for climate change. The specific claim in this case is that NHTSA promulgated corporate average fuel economy standards for light trucks that are invalid because the standards neglect to consider the relationship of climate change to fuel economy in several significant respects.

The Ninth Circuit ruled in favor of the plaintiffs. And for the third time in six months, environmentalists enjoyed front page headlines in many of the nation’s leading newspapers. It is also likely the third time in at least six years, but that is a different story.

The Ninth Circuit did not accept all of the plaintiffs’ arguments, but the result is nonetheless a sweeping victory. The most noteworthy fault in the agency’s reasoning, according to the appellate court, was the agency’s decision to assign no value to the climate change benefits of better fuel economy. Under the federal fuel economy standard-setting law, both the costs and benefits are relevant in determining the stringency of the standard. Yet, NHTSA gave zero value to climate change benefits of more stringent standards, asserting that any such benefits were too uncertain. The court disagreed, reasoning that whatever uncertainty might exist regarding their precise value, that value is clearly neither zero nor so small as to be incapable of affecting the agency’s choice of fuel economy standards.

Also significant is the court’s ruling that NHTSA was arbitrary and capricious in failing to close the longstanding loophole for SUVs, which has subjected those vehicles to the less demanding fuel economy standards applicable to light trucks rather than those applicable to passenger vehicles. The NHTSA declined to change its classification of SUVs even though, as the court found, SUVs are clearly designed to carry passengers and marketed by manufacturers for just that use. The court similarly rejected the agency’s decision to exclude 8,500–10,000-pound pickup trucks from any standards at all, concluding that there was compelling evidence that fuel economy standards are feasible for such vehicles and substantial evidence that they would result in significant benefits.

Finally, the appellate court held that the NHTSA had violated NEPA because the environmental assessment that it prepared to accompany its fuel economy standard is deficient and, in light of the potential for the fuel economy standards to have a significant environmental impact, a full environmental impact statement is necessary. First, the assessment failed to consider the cumulative effects of fuel economy standards on climate change, which is precisely the kind of cumulative impact analysis that NEPA requires an agency to conduct.” The court also concluded that the agency’s consideration of reasonable alternatives was lacking, because it failed to weigh the possibility of higher fuel economy standards that were within the agency’s authority to promulgate.

The most telling statement of the opinion, however, is not a strict holding, but an aside buried within its pages. Or perhaps, even a bit of a judicial warning, at least to those governmental agencies that, like NHTSA in this case and EPA in Massachusetts v. EPA, are dragging their feet in the face of what the judiciary is increasingly persuaded presents a potentially catastrophic global threat.

The court cautions that “what was a reasonable balancing of competing statutory priorities 20 years ago may not be a reasonable balancing of those priorities today.” In short, business as usual when climate change is at stake may no longer satisfy judicial review. More cases to come.

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