Sustainable Development Law & Policy

Volume 10
Issue 2 *Winter 2010*

Article 3

1-1-2010

Introductory Comments: The Current State Of Climate Change Law

Michael B. Gerrard

Introductory Comments: The Current State Of Climate Change Law

Keywords
Climate change, Climate change law, Massachusetts v. EPA, U.S. Environmental Protection Agency, Greenhouse gas ("GHG") emissions

Introductory Comments: The Current State of Climate Change Law

*by Michael B. Gerrard**

The three words that best characterize the current state of climate change law are fragmentation, uncertainty, and insufficiency.

Almost everyone who takes climate change seriously believes that comprehensive federal legislation is needed. President Obama and the majority leadership of the House and the Senate agree, but regional politics, massive lobbying by various interest groups, and partisan posturing, have combined to form an almost impenetrable bramble bush. The legislative journey may have begun with a rational plan, but to accumulate the necessary votes, important elements are cast aside and dreadful provisions are added. As I write this in mid-March 2010, I do not know if a bill will reach the President's desk and, if it does, whether it will have any potency.

Meanwhile, existing legal tools are being hurled at the problem. They were all designed for tasks other than solving global climate change; some are federal, some are state, some are local. Adding them all up reveals some overlap, even more gaps, and precious little coordination. Hence the fragmentation.

The future course of all this is unknown. Empowered by the U.S. Supreme Court's landmark 2007 decision in *Massachusetts v. EPA* and by the 2009 inauguration of a sympathetic president, the U.S. Environmental Protection Agency is moving forward with its best existing tools, disparate portions of the Clean Air Act, to regulate what it can. Opponents are lobbing legislative and litigation grenades in the path; some may be duds, but all are scary. Thus industries, both clean and dirty, cannot plan because they cannot see the road ahead. Hence the uncertainty.

Any legislative outcome that is plausible in the near term will achieve far less greenhouse gas ("GHG") emissions reduction than the scientists tell us is needed to avoid serious climate consequences. The existing legal tools fall even shorter of the mark. Almost all of these efforts are focused on mitigation of emission levels; none seriously grapples with adaptation to the climate change that is coming, or with governance of the geoengineering schemes that will surely be proposed as bad climate events accelerate. Hence the insufficiency.

If there is a ray of light, it is in the area of energy. This matters, since 80% of U.S. GHG emissions come from fossil fuel combustion.[1] Congress has not enacted a major new environmental statute since 1990, but it manages to pass new energy bills every two or three years. Thus we have major new incentives for energy efficiency and renewable energy, and even more may be coming soon, even if comprehensive climate legislation remains stalled. Many brilliant minds are also at work in private enterprises devising energy solutions; those who succeed stand to become the next billionaires. States and cities have been especially vigorous laboratories of innovation, and some of the techniques they have devised, such as renewable portfolio standards and green building codes, can make a real difference, especially if expanded nationally.

The rest of the world is waiting for the U.S. tumult to subside. Though China has overtaken the U.S. as the largest GHG emitter, the U.S. is still responsible for the largest portion of the GHGs that have accumulated in the atmosphere. It is difficult for leaders abroad to adopt strong climate controls when the biggest historic emitter still hasn't. It is too much to expect Congress to remove all the fragmentation, uncertainty and insufficiency in one swoop, but the need for real progress is urgent.

Endnotes:

[1] U.S. Environmental Protection Agency, 2010 Draft U.S. Greenhouse Gas Inventory Report, ES-5 - ES-6, (Mar. 2010), *available at* http://www.epa.gov/climatechange/emissions/downloads10/US-GHG-Inventory-2010-Chapter-Executive-Summary.pdf.

* *Michael B. Gerrard is Andrew Sabin Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School.*