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Implications of the Supreme Court's *Massachusetts* Decision for California Greenhouse Gas Regulation

The Supreme Court's April 2 decision in *Massachusetts v. EPA*, (No. 05-1120), has been hailed by some as the most important environmental law decision of the decade. In *Massachusetts*, the Court held that the Clean Air Act's definition of the term "air pollutant" is broad enough to encompass greenhouse gases (GHG) such as CO2, and that the EPA must therefore regulate such emissions if it finds that they are a threat to public health or welfare. This decision has major repercussions not only for federal environmental policy but also for state GHG regulatory programs. In particular, the *Massachusetts* decision should have important effects on the implementation of the California Global Warming Solutions Act of 2006 (also known as "AB 32"), and is also expected to have significant implications for the types of impacts that must be considered during the CEQA review process for public and private development projects in California.

As we have previously reported (Legal Alert: California Greenhouse Gas Regulation (January 2007)), the Governor's Office, the California Air Resources Board (ARB) and a number of other state agencies (including the California Energy Commission and the California Public Utilities Commission) are currently developing the regulatory mechanisms to achieve the AB 32 goal of reducing GHG emissions in California to 1990 levels by the year 2020. A critical element of the California program is the set of fuel economy standards for new motor vehicles sold in California (more stringent than current federal CAFÉ standards) that the ARB adopted pursuant to AB 1493 in order to reduce GHG emissions from one of the major sources of such gases, California's enormous fleet of cars and trucks. These standards are currently under legal challenge in the District Court for the Eastern District of California in *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, (Case No. CIV-F-04-6663), based on, among other grounds, the fact that the EPA had previously determined that it had no authority to regulate GHG emissions under the CAA and so, therefore, could not grant a waiver to California to enact its own separate motor vehicle emission standards under Section 209 of the Act. The district court had prohibited enforcement of the California fuel economy standards and stayed the case pending the Supreme Court's decision in the *Massachusetts* case.

Now that the High Court has decided that the EPA has the requisite authority and must regulate if public health or safety are threatened by CO2 or other GHG emissions, at least one obstacle to enforcement of the California fuel economy standards appears to have been removed. However, the EPA may still determine that the requisite threat does not exist or that a waiver to implement the California regulations should not be granted. Furthermore, the legal

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challenge can be expected to continue on other fronts, including whether separate California regulation of GHG emissions from new motor vehicles is preempted by the Energy Policy and Conservation Act or the federal government's exclusive authority over foreign affairs, including the degree to which a truly international issue – how GHG emissions should be controlled to reduce the effects of global warming – should be addressed through multi-national negotiations and treaties.

In any event, the ARB and the other California agencies involved in implementing the AB 32 goals have heralded the *Massachusetts* decision as a major victory for regulation of GHG emissions in general, and as a green light for further state action in this important area. However, other observers point to language in the Court's ruling that they believe makes clear that only the federal government can regulate GHG emissions. More specifically, the majority opinion advises that "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 power to reduce in-state motor-vehicle emissions might well be pre-empted . . . These sovereign prerogatives are now lodged in the federal government." The exact meaning of this language will undoubtedly be the subject of much additional litigation, as well as an impetus for Congress to enact clarifying legislation.

Even before the Supreme Court's decision in *Massachusetts*, environmental groups and opponents of significant public and private development projects in California that could produce or affect GHG emissions were contending that such emissions were an environmental impact that must be considered during the CEQA review process. A number of cases challenging the failure to consider such effects are currently pending in California at the trial court level. The Supreme Court's decision will only strengthen the resolve of these litigants to continue to insist that Negative Declarations and Environmental Impact Reports include project specific and cumulative analyses of GHG impacts, and mitigation measures to address them. Impact and mitigation analyses that cover GHG emissions will be demanded for all significant project facilities and the traffic such facilities will generate, first through comments on the CEQA documents and, if the comments are ignored, then in litigation. We expect these efforts to continue for the next several years until an opinion from the California Supreme Court, or possibly a series of consistent appellate court decisions, establishes the appropriate role for consideration of GHG-related emissions in the CEQA process.

Mayer, Brown, Rowe & Maw LLP is closely following implementation of the California GHG program and has been involved with the current litigation concerning the validity of the California fuel economy standards. It is also following federal GHG developments that may affect companies operating in the state. The firm has assembled a California Greenhouse Gas Regulation Team that primarily focuses on local efforts, but coordinates with lawyers in our Brussels, London, Washington, DC, and other offices who are tracking climate change-related issues in the EU and on the federal level. The California Team members included the former Majority Leader of the California State Assembly and one of the primary authors of AB 32, other California Government Practice partners with strong contacts in the Governor's Office and at the various agencies involved in implementing the enabling legislation, Energy and Environmental Law practitioners with decades of experience representing trade groups for, and members of, the major industries affected by carbon regulation, litigation specialists who are involved in several of the current lawsuits challenging state efforts to impose unique local GHG emission controls on the transportation industry, including auto manufacturers and rail carriers, and lawyers in other related disciplines.

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