RECENT DEVELOPMENT

POLLUTION V. PREEMPTION: VERMONT AND THE FIGHT FOR CO_2 REGULATION

I. INTRODUCTION

On September 12, 2007, the federal District Court of Vermont handed environmental advocates a significant victory in the ongoing battle over the future course of greenhouse gas ("GHG") regulation in the case of *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie* ("*Green Mountain*").[1] Against a challenge initiated by a coalition of several car manufacturers, dealers, and the Alliance of Automobile Manufacturers, the *Green Mountain* court vindicated a newly implemented Vermont regulation designed to reduce carbon dioxide ("CO_2") emissions from newly purchased automobiles beginning in 2009.[2]

The dispute in *Green Mountain* grew from a provision in the Clean Air Act ("CAA") setting two standards for regulating air pollution from automobiles: the federal standards and the standards set by the State of California.[3] Since 1977, states have expressly retained the option under the CAA to adopt either of these standards.[4] For the most part, California and other states following California's lead enjoyed substantial leeway under the CAA in terms of adopting emissions standards other than those mandated by Congress. However, upon California's 2004 enactment of a new provision extending the regulation of air pollution to include GHG

1. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295 (D. Vt. 2007). *Green Mountain* was initially filed on Nov. 18, 2005; *see* Complaint, Green Mountain Chrysler Plymouth Dodge Jeep v. Torti, No. 2:05-cv-302 (D. Vt. filed Nov. 18, 2005) [hereinafter *Green Mountain* Complaint] (filing complaint against three Vermont officials enforcing the state GHG regulations), *available at* http://www.calcleancars.org/legal/vermont1.pdf. A sister suit was also filed on the same day; Complaint, Ass'n of Int'l Auto Mfrs. v. Torti, No. 2:05-cv-304 (D. Vt. filed Nov. 18, 2005), *available at* http://www.calcleancars.org/lega/vermont2.pdf. *Green Mountain* and *AIAM* were consolidated for trial, and current Secretary of the Vermont Agency of Natural Resources George Crombie later replaced former Secretary Thomas W. Torti as the named defendant.

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

3. 42 U.S.C. § 7543 (2000).

4. 42 U.S.C. § 7507 (2000).

emissions, the California standards came under attack in the case of *Central Valley Chrysler-Jeep v. Goldstone* ("*Central Valley*").[5] The *Central Valley* complaint challenged California's authority to regulate GHGs, particularly CO_2.[6] Similarly, the *Green Mountain* plaintiffs brought suit to protest Vermont's 2005 enactment of the California GHG regulations. The action pitted a state's right to implement a statutorily permissible regulatory scheme against the plaintiffs' argument that GHG emissions are inextricably linked with fuel economy, a field in which the federal government enjoys sole authority and in which states are preempted from creating their own rules.

Part II of this Recent Development describes the events that precipitated the *Green Mountain* lawsuit, while Part III reviews the arguments asserted by each party during the course of litigation. Part IV discusses the complexities of key issue at play, and finally, Part V analyzes the current status of the *Green Mountain* opinion and its potential importance to current and future litigation concerning efforts to regulate GHG emissions.

II. EVENTS LEADING TO THE LAWSUIT

In the 1967 amendments to the CAA, Congress included language to expressly preempt states from enacting individual emissions regulations under section 209(a).[7] The lone exception to this provision was the State of California. As the only state to have developed its own emissions regulations prior to enactment of the CAA, California was afforded the opportunity to adopt stricter standards through a special waiver provision.[8] In 1977, Congress again amended the CAA to allow other states to adopt the stricter California standards under section 177.[9] In permitting states to choose between either the federal or California standards, section 177 carefully avoided the so-called "third vehicle" problem that threatened to

5. Central Valley Chrysler-Jeep, Inc. v. Goldstone, 529 F. Supp.2d 1151 (E.D. Cal. 2007). The *Central Valley* plaintiffs initially filed suit on Dec. 7, 2004 against Catherine E. Witherspoon, then the Executive Director of the California Air Resources Board ("CARB"). *See* Complaint, Central Valley Chrysler-Jeep, Inc. v. Witherspoon, No. 1:04-cv-06663-REC-LJO (E.D. Cal. filed Dec. 7, 2004) [hereinafter *Central Valley* Complaint], *available at* http://www.calcleancars.org/legal/state_complaint.pdf. Current CARB Executive Director James Goldstone later replaced Witherspoon as the named defendant. *Central Valley*, 529 F. Supp.2d at 1154 n.1. For a discussion of the *Central Valley* decision, see *infra* Part V.A.

6. *Central Valley* Complaint, *supra* note 5.

7. 42 U.S.C. § 7543(a).

8. 42 U.S.C. § 7543(b). To enact its own standards, California must obtain a waiver, which the EPA shall grant unless the EPA Administrator finds that: "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title." *Id*. §§ 7543(b)(1)(A)–(C).

9. 42 U.S.C. § 7507.

result in a patchwork of different standards in each state.[10] This law put two conditions on a state's ability to adopt the California standards, requiring that: "1) such standards are identical to the California standards for which a waiver has been granted for such model year, and 2) California and such State adopt such standards at least two years before commencement of such model year."[11]

With the history of these CAA amendments in mind, the chain of events prompting the *Green Mountain* plaintiffs to seek legal relief began on July 22, 2002, when California Governor Gray Davis signed into law Assembly Bill 1493 ("A.B. 1493").[12] This law included a provision calling for the California Air Resources Board ("CARB") to "develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles" by January 1, 2005.[13] CARB responded to this mandate in December of 2004 with new rules regulating the emission of CO_2 and other GHGs beginning with the 2009 model year and subsequent model passenger cars, light-duty trucks, and medium duty passenger vehicles.[14]

According to the authority provided under CAA section 177, Vermont adopted California's Low Emission Vehicle ("LEV") program in 1996 and has amended the program a number of times to remain consistent with the California regulations.[15] To continue to satisfy the "identical" requirement of section 177(1), Vermont incorporated California's GHG regulation into its LEV program in November of 2005,[16] and the action was instantly met with the *Green Mountain* lawsuit.

III. THE LAWSUIT: FEDERAL PREEMPTION V. STATES' RIGHTS

A. CO_2 Emissions Should Be, and Already Are, Federally Regulated

In *Green Mountain*, the plaintiffs sought to enjoin Vermont from

10. *Id.* ("Nothing in this section . . . shall be construed . . . to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a 'third vehicle') or otherwise create such a 'third vehicle.'").

11. *Id.* at § 7507(1)–(2).

12. Assembly Bill No. 1493, 2002 Cal. Legis. Serv. ch. 200, § 3 (West) (codified at CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2002)), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1451-1500/ab_1493_bill_ 20020722_chaptered.pdf.

13. CAL. HEALTH & SAFETY CODE § 43018.5(a) (West 2002).

14. CAL. CODE REGS. tit. 13, § 1961.1 (2004), *available at* http://www.ecy.wa.gov/programs/air/cars/CleanCar /CleanCarPDF/1961_1.pdf.

15. AIR POLLUTION CONTROL DIV., VT. AGENCY OF NATURAL RES., AIR POLLUTION CONTROL REGULATIONS SUBCHAPTER XI—LOW EMISSION VEHICLES, ECONOMIC IMPACT STATEMENT: ATTACHMENT A, at 1 n.1 (2005), *available at* http://www.anr.state.vt.us/air/docs/Economic%20Statement%20Attachment%20A.pdf.

16. AIR POLLUTION CONTROL DIV., VT. AGENCY OF NATURAL RES., AIR POLLUTION CONTROL REGULATIONS § 5-1103(b) (2005), *available at* http://www.anr.state.vt.us/air/docs/Adopted%20GHG%20Rule.pdf.

enforcing its LEV program, to the extent that such enforcement required regulation of GHG emissions. Primarily, plaintiffs asserted that, in attempting to regulate CO_2 emissions by adopting the CARB standards, Vermont was in fact implementing a state fuel economy standard.[17] In their complaint, plaintiffs noted that two federal statutes, the CAA and the Energy Policy and Conservation Act ("EPCA"), regulate emissions from new automobiles.[18] Under the CAA, the EPA regulates emissions of harmful pollutants or emissions that combine with others to form harmful pollutants.[19] The EPCA, on the other hand, is administered by the National Highway Traffic and Safety Administration ("NHTSA") and serves as the federal fuel economy law.[20] According to the plaintiffs, "[t]here is a direct chemical relationship between the amount of gasoline that a vehicle burns and the amount of carbon dioxide that it releases. By regulating automotive fuel economy, NHTSA also regulates carbon dioxide emissions . . . ."[21] Further, the EPCA expressly preempts states from implementing their own fuel economy standards without exception.[22]

B. States Have the Right to Follow California's GHG Standards Under Federal Law

While the *Green Mountain* plaintiffs demonstrated clear statutory support for their case, the defendants, including Vermont Agency of Natural Resources Secretary George Crombie, responded by showing that the CAA provided the statutory basis protecting Vermont's choice to opt-in to the CARB standards. In carving out the waiver provision for California, Congress recognized that, in addition to pioneering the regulation of automotive emissions, California had a need for stricter standards on account of the prevalent smog problem not yet experienced in other areas

17. Vermont's rules "require substantial reductions in carbon dioxide, which can only be achieved with reductions in fuel consumption, and thus increases in fuel economy." *Green Mountain* Complaint, *supra* note 1, at 20.

18. *Id*. at 12.

19. Specifically, the CAA states that:

> The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g) (2000).

20. *Green Mountain* Complaint, *supra* note 1, at 4–5.

21. *Id*.

22. *See* 49 U.S.C. § 32919(a) (2000) ("When an average [federal] fuel economy standard . . . is in effect, a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles . . . ."); *see also* Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006).

of the country.[23] Thus, the circumstances under which Congress passed the California waiver provision were such that California faced "unique problems" and needed to experiment with stricter regulations.[24] Further, "once California's standards have been approved under the waiver provision, other States are permitted to adopt 'identical' standards without having to apply for a waiver."[25] Therefore, "[o]nce California has established the need for a separate program . . . there is no reason to require the state to make a showing of a 'compelling and extraordinary' need for that particular standard."[26]

In enacting A.B. 1493, the California legislature indicated that the effects of global warming would impose "compelling and extraordinary" impacts on California, such as reductions in water supply and adverse health and agricultural impacts from increased air pollution caused by higher temperatures.[27] Even assuming that these vulnerabilities to the effects of global warming do not constitute "compelling and extraordinary" conditions, it has also been argued that the section 209(b) waiver provision was not intended to restrict California but, rather, was meant to grant California broad discretion to operate as a laboratory for the benefit of the country as a whole.[28] Though the *Green Mountain* plaintiffs persuasively argued that the EPA had not yet granted a waiver for the CARB standards,[29] the history of the waiver provision demonstrated that no EPA Administrator had ever refused a California waiver request due to failure to demonstrate a "compelling and extraordinary" need.[30] Thus, the CARB standards appeared to enjoy considerable support in terms of both a compelling need to prevent the negative impacts of global warming and the past practices of the EPA in granting broad discretion to California for the purpose of experimenting with stricter emissions regulations. In turn, these

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23. Rachel L. Chanin, Note, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 716 (2003); *accord Green Mountain* Complaint, *supra* note 1, at 15.

24. Chanin, *supra* note 23, at 717.

25. *Id*. at 719.

26. *Id*.

27. Assembly Bill No. 1493, 2002 Cal. Legis. Serv. ch. 200, §§ 1(d)(1)–(6) (West). For a summary of the Pavley law, see ENVTL. PROTECTION AGENCY AIR RES. BOARD, STATE OF CAL., FACT SHEET—REDUCING CLIMATE CHANGE EMISSIONS FROM MOTOR VEHICLES (2002) [hereinafter CARB FACT SHEET], *available at* http://www.arb.ca.gov/cc/factsheets/ccfactsheet.pdf. For a detailed argument in support of the CARB regulations, see also ENVTL. PROTECTION AGENCY AIR RES. BOARD, STATE OF CAL., REPORT TO THE LEGISLATURE AND THE GOVERNOR ON REGULATIONS TO CONTROL GREENHOUSE GASES EMISSIONS FROM MOTOR VEHICLES 3 (2004), *available at* http://www.arb.ca.gov/cc/ccms/ reports/legreport0205.pdf.

28. Chanin, *supra* note 23, at 718 (quoting from 113 Cong. Rec. 32,478 (statement of Sen. Murphy), "I am firmly convinced that the United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions").

29. *See Green Mountain* Complaint, *supra* note 1, at 17 (stating that "California and other States like Vermont intend to implement the CO2 regulations without awaiting the completion of any review process by EPA").

30. Chanin, *supra* note 23, at 723.

odds seemed to lend support to the conclusion that the EPA would inevitably grant California a section 209 waiver for the CARB GHG regulations. If so, the CAA would not require that Vermont show its own compelling circumstances in order to adopt the California standards but, instead, would mandate only that Vermont incorporate the CARB standards identically and with adequate notice to manufacturers.[31]

IV. THE KEY ISSUE: DOES THE EPCA PREEMPT THE CARB STANDARDS?

While each side of the dispute in *Green Mountain* demonstrated solid statutory support for their arguments, the outcome of the case hinged upon a much more technical issue: whether state regulation of CO_2 is tantamount to impermissible fuel efficiency regulation under the EPCA or whether the CAA and the EPCA were designed to work together to create a more comprehensive and functional emissions and fuel efficiency regulation scheme.[32]

A. The Conflict: To Regulate or Not to Regulate?

The plaintiffs initially advocated that CO_2 is not appropriately regulated at the local or state level. According to the complaint, "unlike smog and pollutants emitted from vehicle tailpipes . . . carbon dioxide disperses globally throughout the upper atmosphere . . . it is unrelated to the state or country that emitted the carbon dioxide—and it is therefore not responsive to local, state-level or regional controls."[33] The plaintiffs found further support in the EPA's September 2003 denial of a petition requesting that the EPA regulate CO_2 under the CAA.[34] In addition to questioning the effectiveness of regional GHG mitigation efforts, the Agency noted that "[u]nilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies."[35]

The denial notice was published almost simultaneously with a memorandum issued by EPA General Counsel Robert E. Fabricant ("the Fabricant Memo") establishing that the EPA lacked authority to regulate

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31. 42 U.S.C. §§ 7507(1)–(2).

32. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295, 344 (D. Vt. 2007) (phrasing the issue as "whether EPA's authority to issue a waiver under the CAA's Section 209(b) for a California GHG emissions standard presents . . . overlap without conflict"); *see* 42 U.S.C. § 7602(g).

33. *Green Mountain* Complaint, *supra* note 1, at 9–10.

34. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003). A group of state and local governments and environmental organizations appealed the EPA's denial all the way to the United States Supreme Court, which recently ruled that the EPA may regulate CO_2 under the CAA. *See* Massachusetts v. U.S. Envtl. Prot. Agency, ___ U.S. ___, 127 S. Ct. 1438 (2007), discussed *infra* Part IV.B.

35. Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. at 52,931.

climate change.[36] The Fabricant Memo explained that "[a]n administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as climate change, instead of searching for authority in an existing statute that was not designed or enacted to deal with the issue."[37] Specifically, Fabricant took issue with what he interpreted as the CAA's facially broad and ambiguous grant of authority, refusing to "delegate a decision of such . . . significance . . . in so cryptic a fashion."[38]

Fabricant's findings were not immune from criticism. For example, some skeptics pointed to the fact that the Fabricant Memo apparently assumed congressional silence on the matter of climate change.[39] However, section 302(h) of the CAA specifically includes "climate" impact as a relevant factor in evaluating whether an emission can be regulated under the CAA.[40] With specific regard to the *Green Mountain* case, on August 14, 2006, NASA scientist James E. Hansen, Ph.D. filed a declaration with the federal district court in support of Vermont's GHG regulations.[41] Hansen's analysis focused in part on the effectiveness of CO_2 regulation within a limited region, representing what he referred to as an independent "climate threshold."[42] Hansen suggested that multiple climate thresholds mean "that there is a reasonable chance that reduced emissions from such a region could prevent the climate system from crossing one or more thresholds."[43] In other words, the reduction of GHG emissions from one limited area might prevent a tipping point at which widespread abrupt climate change would result. Hansen further asserted that "accumulated emissions are a relevant measure of existing responsibilities," indicating that, because the United States produces almost four times the CO_2 emissions of any other country, it should assume a proportionate role in achieving reduction of GHG emissions to avoid abrupt climate changes.[44]

The Fabricant Memo also represented a complete reversal from the position taken by the prior administration. In 1998, EPA General Counsel Jonathan Z. Cannon published a memorandum ("the Cannon Memo") which expressly recognized the EPA's authority to regulate CO_2 as an air

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36. Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator (Aug. 28, 2003) [hereinafter Fabricant Memo] (on file with author).

37. *Id*. at 10.

38. *Id*. (quoting FDA v. Brown & Williamson Tobacco, Corp., 529 U.S. 120, 160 (2000)).

39. Nicholle Winters, Note, *Carbon Dioxide: A Pollutant in the Air, But is the EPA Correct That It Is Not an "Air Pollutant"?*, 104 COLUM. L. REV. 1996, 2012 (2004).

40. 42 U.S.C. § 7602(h) (2000) ("All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate. . . .").

41. Declaration of James E. Hansen, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295 (D. Vt. 2007) (No. 2:05-cv-302, 2:05-cv-304), 2006 WL 4761053.

42. *Id*. at ¶ 89.

43. *Id*.

44. *Id*.

pollutant.[45] Cannon noted that the EPA regulates numerous naturally occurring substances that become harmful in increased quantities due to human activities.[46] Regardless, the Cannon Memo concluded that "[w]hile CO_2 emissions are within the scope of EPA's authority to regulate, the Administrator or [sic] has made no determination to date to exercise that authority under the specific criteria provide [sic] under any provision of the Act."[47]

B. Massachusetts v. EPA: *The EPA Has Authority to Regulate CO_2, After All*

On April 2, 2007, the United States Supreme Court delivered its decision in the case of *Massachusetts v. EPA*, a matter in which various stakeholders had challenged the EPA's earlier decision that the agency lacked authority to regulate CO_2 under the CAA.[48] In a five-to-four decision, the Supreme Court held that CAA section 202(a)(1) authorizes the EPA to regulate GHG emissions from "new motor vehicles in the event that the EPA forms a 'judgment' that such emissions contribute to climate change."[49]

In arriving at its decision, the Supreme Court found that, not only may the EPA regulate CO_2, in fact the agency "can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[50] Unlike the Fabricant Memo, which found the text of the CAA too vague to permit EPA regulation of CO_2,[51] the Court held that "[t]here is no reason . . . to accept EPA's invitation to read ambiguity into a clear statute."[52] However, the majority also recognized the value of regulatory flexibility in adapting decades old statutory text to unforeseen circumstances while preserving the ultimate benefit intended by the drafters.[53]

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45. Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator (Apr. 10, 1998), *available at* http://www.law.umaryland.edu/environment/casebook/documents/EPACO2memo1.pdf.

46. *Id*. at 3.

47. *Id*. at 5. Even with regulatory authority under the CAA, EPA administrator must make a determination that certain air pollutants may reasonably be anticipated to endanger public health or welfare in order to regulate. 42 U.S.C. § 7521(a)(1) (2000).

48. Massachusetts v. U.S. Envtl. Prot. Agency, ___ U.S. ___, 127 S. Ct. 1438 (2007); *see supra* text accompanying notes 34–38.

49. *Id*. at 1459.

50. *Id*. at 1462.

51. *See* Fabricant Memo, *supra* note 36, at 10.

52. *Massachusetts*, 127 S. Ct. at 1461.

53. *Id*. at 1462 (noting that "[w]hile the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete").

Though forced to abandon their position opposing the EPA's authority to regulate CO_2 emissions under the CAA, the *Green Mountain* plaintiffs insisted that *Massachusetts v. EPA* did not dispose of all issues before the federal District Court of Vermont. Instead, plaintiffs characterized the remaining threshold issue as "whether California's CO_2 regulation frustrates the purpose and objective of EPCA's regulatory scheme and is thus preempted."[54] According to the plaintiffs, the Supreme Court did not decide that the EPA could simply promulgate any GHG regulation without regard to potential conflicts with other statutes, such as the EPCA, and, likewise, did not address a state's authority to write and implement any GHG regulation without regard to potential federal preemption.[55] Rather, the plaintiffs argued that the EPCA continued to preempt any state regulation concerning fuel economy because "state regulations that may be saved from preemption by one provision are not immune from the preemptive scope of other provisions."[56]

Notwithstanding the EPCA's intended preemptive authority over state fuel economy standards, the statute shares no such priority over other federal statutes.[57] According to the *Green Mountain* defendants, "[w]hat Plaintiffs present as a conflict between state and federal law really turns on the interpretation of two coordinated federal statutes."[58] Indeed, Congress expressly provided in EPCA section 502 that any rules promulgated under the EPCA must take into account "the effect of other motor vehicle standards of the Government on fuel economy."[59] Under the interpretation advanced by the defendants, "California emissions standards that receive a Clean Air Act Section 209(b) waiver from EPA, and identical emission standards adopted by Vermont and other states under Section 177, are

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54. Memorandum of Plaintiffs Green Mountain Chrysler Plymouth Dodge Jeep, *et al*. Regarding *Massachusetts v. EPA* at 7, Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295 (D. Vt. 2007) (No. 2:05-cv-302, 2:05-cv-304), *available at* http://www.communityrights.org/PDFs/Second%20Plaintiff%20Brief%20on%20Mass%20v.%20EPA.pdf.

55. *Id.* at 5 (arguing that "a waiver of preemption under section 209(b) only waives preemption under 'this section'—*i.e.*, the preemption that would otherwise apply under section 209(a); it does not block preemption that might apply under other federal statutes, such as EPCA. Similarly, the waiver of preemption under section 177 of the Clean Air Act, for States adopting standards identical to California's, also only extends to the preemption that would otherwise apply under section 209(a)").

56. *Id*. at 7–8. In further support, the plaintiffs pointed out that *Massachusetts v. EPA* "expressly recognized that state regulation of 'in-state motor-vehicle emissions might well be pre-empted.'" *Id*. at 6.

57. *Green Mountain*, 508 F. Supp.2d at 343–44 (noting that "[t]he Supremacy Clause is not implicated when federal laws conflict or appear to conflict with one another. In such a case courts have a duty to give effect to both provisions, if possible").

58. Defendants and Defendant-Intervenors' Post-Trial Brief, *Green Mountain*, 508 F. Supp.2d 295 (No. 2:05-cv-302, 2:05-cv-304), 2007 WL 2688106 [hereinafter Defendants' Post-Trial Brief].

59. 49 U.S.C. § 32902(f) (2000) ("When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, *the effect of other motor vehicle standards of the Government on fuel economy*, and the need of the United States to conserve energy") (emphasis added).

'other motor vehicle standards of the Government' . . . and are not state standards subject to preemption under EPCA's express preemption."[60]

In addition, while the plaintiffs accurately noted that *Massachusetts v. EPA* did not explicitly decide the issue of EPCA preemption, the Supreme Court did indicate that the mere fact that the Department of Transportation ("DOT") "sets mileage standards in no way licenses EPA to shirk its environmental responsibilities" and found the EPA's statutory obligation to protect the health and welfare of the public to be "wholly independent of DOT's mandate to promote energy efficiency."[61] Thus, the Supreme Court observed, to the benefit of the *Green Mountain* defendants, that "[t]he two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[62]

Regardless, the *Green Mountain* plaintiffs would not be so easily dissuaded from presenting their preemption argument. In spite of the Supreme Court's pronouncements in *Massachusetts v. EPA*, or perhaps because of them, the plaintiffs insisted that the federal District Court in Vermont remained "the only forum that can resolve, in a timely and definitive manner, whether the specific CO_2 standards adopted by California are subject to EPCA preemption."[63]

C. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie: *The CARB Standards Constitute "Other Motor Vehicle Standards of the Government" That Are Not Preempted by the EPCA . . . but Only if the EPA Approves California's Waiver Request*

After evaluating the strengths of each side, the *Green Mountain* court concluded that "[b]ecause this case involves potential conflict between 'federal' provisions, preemption analysis does not apply."[64] Regardless, the court proceeded to conduct a preemption analysis in further support of its opinion. In rejecting the plaintiffs' argument that the Vermont regulations constituted a de facto fuel economy standard, the court noted that car manufacturers could achieve compliance with the regulations through measures not entirely dependent upon improved fuel efficiency, such as increasing the use of alternative fuels and plug-in hybrid vehicles.[65] In addition, the text and legislative history of both the CAA and the EPCA

60. Defendants' Post-Trial Brief, *supra* note 58.

61. Massachusetts v. U.S. Envtl. Prot. Agency, ___ U.S. ___, 127 S. Ct. 1438, 1443 (2007).

62. *Id*. at 1462. One month after the Supreme Court decided *Massachusetts v. EPA*, President Bush responded by issuing an executive order calling for cooperation among the DOT, the Department of Energy, and the EPA and mandating that "the head of an agency undertaking a regulatory action that can reasonably be expected to directly regulate emissions" of automotive GHGs shall do so "jointly with the other agencies." Exec. Order No. 13,432, 72 Fed. Reg. 27,717 (May 14, 2007).

63. *Id*. at 5.

64. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295, 398 (D. Vt. 2007).

65. *Id*. at 353.

proved equally influential to the court's preemption analysis. The court recognized that Congress enacted the EPCA in 1975 amid an already existing regulatory framework including regulations that "affected motor vehicles and could have an effect on fuel economy" such as CAA sections 202 and 209(b).[66] Moreover, the 1977 amendments to the CAA, allowing other states to adopt California's emissions regulations, indicated to the court that "Congress reaffirmed its commitment to ambitious efforts at reducing emissions from new motor vehicles . . . while acknowledging an overlap between regulations designed to improve motor vehicles' fuel economy and regulations designed to reduce their emissions."[67] Under this rationale, preemption under the EPCA is not to be viewed in a vacuum or favored above other federal policies but, rather, within the context of a complex but unified statutory scheme.

In a move that foreshadowed the events that would follow the *Green Mountain* decision, all parties agreed to assume, for purposes of framing the issues before the court, that the EPA already granted California's waiver application as required by the CAA.[68] At trial, this working assumption proved absolutely crucial to the defendants' case. The court found that "once EPA issues a waiver for a California emissions standard, it becomes a motor vehicle standard of the government, with the same stature as a federal regulation with regard to determining maximum feasible average fuel economy under EPCA."[69] Thus, the court held that "Congress could not have considered an EPA-approved California emissions standard to be automatically subject to express preemption as a 'law or regulation relating to fuel economy standards,' because it required that NHTSA take into consideration the effect of such standards when determining maximum feasible average fuel economy."[70]

The *Green Mountain* defendants appeared to enjoy a victory that would enable states around the country to lawfully implement the CARB emissions standards. In the immediate wake of *Green Mountain*, the lone obstacle to widespread adoption of the CARB standards was a final decision regarding California's long-awaited section 209 waiver application. As acknowledged in *Green Mountain*, "[t]here is no dispute that if California fails to receive a waiver from EPA for its standards, then Vermont's GHG standards are invalid."[71] On the other hand, the court also

66. *Id*. at 354.

67. *Id*. at 346.

68. *Id*. at 397; *see* 42 U.S.C. § 7543(b). In order to implement CARB's proposed GHG standards, California requested a section 209 waiver on Dec. 21, 2005. *Green Mountain*, 508 F. Supp.2d at 347–48. The waiver application remained pending at the time the *Green Mountain* court issued its opinion. *Id*. at 348.

69. *Green Mountain*, 508 F. Supp.2d at 347.

70. *Id*. at 354.

71. *Green Mountain*, 508 F. Supp.2d at 344. The court further recognized that "[i]f EPA denies California's waiver request, then Vermont's regulations are invalid under the CAA, and the issue of preemption under EPCA is moot." *Id*.

indicated that, in the event that the EPA granted the California waiver, "California and Vermont's GHG standards [will] become part of the regulatory backdrop against which NHTSA must design maximum feasible fuel economy levels."[72] At first, California's virtually unblemished record of success in achieving waivers of preemption from the EPA favored the conclusion that the EPA's waiver determination might be little more than a formality.[73] However, the EPA would soon show that this prior course of conduct would not necessarily predict the agency's approach to the pending CARB waiver.

V. THE AFTERMATH: THE EPA DENIES CALIFORNIA'S WAIVER, AND CALIFORNIA TAKES THE EPA TO COURT

When viewed together, the decisions in *Massachusetts v. EPA* and *Green Mountain* suggested the arrival of a new day in the realm of environmental regulation and enforcement. Previously, CO_2 emissions were commonly viewed either as strictly related to fuel efficiency and, thus, preempted under the EPCA or as a global problem for which more localized controls would be ineffective. However, under *Massachusetts v. EPA*, CO_2 emissions may now be regulated as an air pollutant under the CAA, and according to *Green Mountain*, states may adopt the more stringent California emissions standards without risking federal preemption under the EPCA because, once California receives an EPA waiver, such alternative standards become the equivalent of federal standards. Early reports indicated that the car manufacturers intended to challenge the *Green Mountain* decision on appeal.[74] However, before 2007 came to an end, the analysis advanced in *Green Mountain* achieved not only further success but also a monumental setback, providing the *Green Mountain* plaintiffs with a glimmer of hope that the CARB standards might not come to pass, after all.

A. Central Valley Chrysler-Jeep v. Goldstone: *The Eastern District of California Follows* Green Mountain's *Lead*

Barely three months after the District Court of Vermont issued its opinion in *Green Mountain*, the Eastern District of California dismissed the claims of a similar group of plaintiffs concerning the very same California emissions standards in the case of *Central Valley Chrysler-Jeep v.*

72. *Green Mountain*, 508 F. Supp.2d at 344.

73. Chanin, *supra* note 23, at 723; Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 293 (2003) (noting that "[t]he EPA has never denied California an emissions waiver in its entirety, although it has sometimes denied part of a waiver or delayed implementation of California emissions standards").

74. Felicity Barringer, *U.S. Court Backs States' Measures to Cut Emissions*, N.Y. TIMES, Sept. 13, 2007, at A1.

Goldstone.[75] Presented with virtually identical arguments as those set forth in *Green Mountain*, the *Central Valley* court found that:

> [J]ust as the *Massachusetts* Court held EPA's duty to regulate greenhouse gas emissions under the Clean Air Act overlaps but does not conflict with DOT's duty to set fuel efficiency standards under EPCA, so too California's effort to regulate greenhouse gas emissions through the waiver of preemption provisions of the Clean Air Act overlaps, but does not conflict with DOT's activities under EPCA.[76]

Further, the court expressed "no disagreement with the *Green Mountain* court's conclusion that California regulations that are granted waiver of preemption under section 209 of the Clean Air Act become laws of the federal government not subject to preemption."[77] The court's opinion represented a wholesale confirmation of *Green Mountain* and provided the *Green Mountain* defendants with additional authority upon which to rely, in the event that the car manufacturers ultimately challenged the dismissal of their claims. However, though unknown to the parties at the time *Central Valley* was dismissed, the EPA would take only eight more days to throw the line of precedent developed by *Massachusetts v. EPA*, *Green Mountain*, and *Central Valley* back into disarray.

B. Not So Fast: The EPA Refuses to Grant a Section 209 Waiver for the CARB GHG Emissions Standard

On December 19, 2007, the EPA announced that it would not grant California's section 209 waiver request.[78] The EPA's decision represented the first denial of a section 209 waiver in the thirty-seven year history of the California waiver provision.[79] The decision to reject the waiver coincided with the passage of a new law signed by President Bush designed to increase both federal fuel efficiency standards and renewable fuel requirements for commercial motor oil.[80] According to EPA Administrator Stephen L. Johnson, the new law presented "a clear national solution—not a confusing patchwork of state rules" and would "achieve significant

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75. Central Valley Chrysler-Jeep, Inc. v. Goldstone, 529 F. Supp.2d 1151 (E.D. Cal. 2007).

76. *Id*. at 1174.

77. *Id*. at 1189.

78. Letter from Stephen L. Johnson, Administrator, U.S. Envtl. Prot. Agency, to the Hon. Arnold Schwarzenegger [hereinafter EPA Waiver Denial Letter], *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epa-letter.pdf; Press Release, U.S. Envtl. Prot. Agency, America Receives a National Solution for Vehicle Greenhouse Gas Emissions (Dec. 19, 2007) (on file with author).

79. Juliet Eilperin, *EPA Chief Denies Calif. Limit on Auto Emissions*, WASH. POST, Dec. 20, 2007, at A1.

80. *See* H.R. Res. 6, 110th Cong. (2007) (enacted). For a detailed summary of the provisions of H.R. 6, see H.R. 6: Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007, http://www.govtrack.us/congress/bill.xpd?tab=summary&bill=h110-6 (last visited Mar. 10, 2008).

benefits by applying to all 50 states."[81]

As justification for its determination, the EPA indicated that the California waiver in question was "distinct from all prior requests."[82] More specifically, the agency noted that "[p]revious waiver petitions covered pollutants that predominantly impacted local and regional air quality. Greenhouse gases are fundamentally global in nature, which is unlike the other air pollutants covered by prior California waiver requests."[83] As a result, "EPA did not find that separate California standards are needed to 'meet compelling and extraordinary conditions'" as required in order to obtain a waiver under CAA section 209.[84]

The EPA determination effectively halted implementation of the CARB CO_2 standard in its tracks by exploiting the *Green Mountain* court's fundamental assumption that the EPA would approve California's waiver of preemption for the program. The determination also marked the spot of the next legal battleground concerning GHG regulation. On January 2, 2008, California filed suit in the Ninth Circuit Court of Appeals in order to challenge the EPA's decision to reject the California waiver.[85] Until California's claims are fully litigated and the controversies surrounding the waiver denial finally put to rest, the full impact of *Green Mountain* will not likely be realized. However, for several reasons, the *Green Mountain* opinion should remain a valuable source of authority, especially in the context of the case now pending in the Ninth Circuit.

First of all, the EPA indicated that, as compared to the newly signed national fuel efficiency law, the GHG standards proposed by CARB might lead to an unworkable "patchwork" of state standards. On this point, *Green Mountain* and *Central Valley* provide authority for the opposite proposition. In *Green Mountain*, one of the court's fundamental findings was that, "once EPA issues a waiver for a California emissions standard, it becomes a motor vehicle standard of the government."[86] The *Central Valley* court later confirmed this holding.[87] In other words, the most recent judicial precedent suggests that standards proposed and implemented by

81. Eilperin, *supra* note 79 (statement of EPA Administrator Stephen L. Johnson); *see* Press Release, U.S. Envtl. Prot. Agency, *supra* note 78. The EPA further suggested that the new law will achieve a "unified federal standard of 35 miles per gallon . . . which would be more effective than a partial state-by-state approach of 33.8 miles per gallon." *Id*. This federal standard of 35 miles per gallon would be achieved by 2020. Eilperin, *supra* note 79. However, California state officials critiqued the EPA's assertion, arguing that the California regulation would result in an average standard of 36 miles per gallon by 2016, thereby eclipsing the net benefit of the new federal law in terms of both miles per gallon and overall rate of achievement. *Id*.

82. Press Release, U.S. Envtl. Prot. Agency, *supra* note 78.

83. *Id*.

84. *Id*.

85. Press Release, Cal. Office of the Attorney Gen., Brown Sues EPA for Illegally Blocking California's Plan to Curb Tailpipe Emissions (Jan. 2, 2008) (on file with author).

86. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295, 347 (D. Vt. 2007).

87. Central Valley Chrysler-Jeep, Inc. v. Goldstone, 529 F. Supp.2d 1151, *39 (E.D. Cal. 2007)

California, pursuant to receiving a section 209 waiver, are not state standards but, rather, are on equal footing with other federal regulations. Thus, the fear of an unpredictable patchwork of state standards is unwarranted under *Green Mountain*. Even if the EPA granted the California waiver and even if the other forty-nine states adopted the California standards, there can only be two standards: (1) those passed by Congress and (2) those implemented in California under authority of a section 209 waiver. Thus, the EPA's decision to deny a waiver for the California CO_2 regulation rests on an unsteady foundation, and *Green Mountain* might become an important source of persuasive authority for the Ninth Circuit as it evaluates the merits of California's challenge to the EPA's determination.

Second, the EPA determination suggested that CO_2 emissions are "global in nature" and, thus, unaffected by more localized, statewide mitigation efforts, such as those proposed by CARB.[88] Of course, the EPA was not the first entity to advance this argument. In fact, the agency's rationale exactly mirrors one of the foundational arguments advanced by the *Green Mountain* plaintiffs.[89] However, in reviewing the effect of *Massachusetts v. EPA*, the *Green Mountain* court observed that, according to the United States Supreme Court, "'[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.'"[90] Further, based upon the expert evidence presented, the *Green Mountain* court determined that "regulation of greenhouse gases emitted from motor vehicles has a place in the broader struggle to address global warming."[91] Thus, in asserting that regional mitigation efforts would be ineffective or simply not effective enough, the EPA adopted an argument that appears questionable under authority of *Massachusetts v. EPA* and incorrect under *Green Mountain*.

The most contentious area of debate might surround whether or not California succeeded in showing a "compelling and extraordinary" need to implement stricter CO_2 regulations. According to the EPA, California did not meet this standard "in light of the global nature of the problem of climate change."[92] Naturally, the EPA is correct in finding that California is not alone in enduring the adverse effects of climate change. Regardless, as advocated by *Green Mountain* amicus Dr. James Hansen and later observed by the *Green Mountain* court, current science points toward "an

88. EPA Waiver Denial Letter, *supra* note 78.

89. *See supra* text accompanying note 33.

90. *Green Mountain*, 508 F. Supp.2d at 309 (quoting Massachusetts v. U.S. Envtl. Prot. Agency, 127 S. Ct. 1438, 1457 (2007)).

91. *Green Mountain*, 508 F. Supp.2d at 340.

92. EPA Waiver Denial Letter, *supra* note 78.

intensification of the climatic patterns of rainfall belt in the tropics and dry subtropical regions on both sides, leading to more intense dry conditions in the western United States."[93] In addition, the *Green Mountain* court noted that, according to Dr. Hansen's testimony, the California CO_2 standards, as adopted by Vermont, "are scientifically important, not because of their effects when taken alone, but because they are consistent with the rates of change necessary to avoid the most drastic consequences of global warming."[94] Therefore, perhaps California's position at the tip of the spear, in terms of the potentially ruinous effects of climate change, coupled with a scientifically reasonable standard by which to avoid such adverse impacts lean toward satisfying this "compelling and extraordinary" factor.

Because of California's prior success in receiving section 209 waivers, the vague concept of "compelling and extraordinary" need has not received much in the way of judicial clarification. Thus, California's challenge to the EPA's waiver denial presents a unique opportunity, through judicial scrutiny, for both party and nonparty stakeholders alike to obtain greater understanding with regard to how California might meet this standard in the future. Due to the ambiguity surrounding this issue, the Ninth Circuit might place particular value on cases such as *Green Mountain* that address the subject of "compelling and extraordinary" need, even if only tangentially, in seeking insight into the policy and scientific arguments at play.

VI. CONCLUSION

In a sense, *Green Mountain* followed *Massachusetts v. EPA* as the second act to a story portraying the complexity of effectuating the sometimes contrary public policies that exist at the intersection of commerce and climate change. Plaintiffs correctly argued that state fuel economy standards are expressly preempted under the EPCA.[95] On the other hand, Congress specifically authorized the EPA to regulate pollutants that adversely affect health and welfare,[96] and as CO_2 production rises, global warming increases, resulting in "more emissions, increased smog, respiratory disease and heart-related illness."[97] The Supreme Court's decision in *Massachusetts v. EPA* underscored that, as *Green Mountain* was being decided, the stakes loomed large as the energy and environmental communities continue to adjust to the crowded and

93. Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp.2d 295, 315 (D. Vt. 2007).

94. *Id.* at 316.

95. 49 U.S.C. § 32919(a).

96. 42 U.S.C. § 7602(h); *see also* Winters, *supra* note 39, at 2005 (noting that "Congress intended the EPA to regulate any air pollutant that may have an 'actual or potential' adverse effect, and carbon dioxide fits within that broad description").

97. CARB FACT SHEET, *supra* note 27.

somewhat discordant dynamics of their necessarily symbiotic relationship.

In the face of a dizzying array of scientific, statutory, and policy arguments, the *Green Mountain* court found that the issue in question did not turn on a distinction of state law versus federal law but, instead, upon the competing factors of two strongly crafted, if imperfectly matched, federal statutes. While the CAA permits individual states to opt out of the federal emissions standards in favor of those GHG regulations developed by the State of California,[98] such authority is bestowed, not by virtue of state sovereignty, but by the precise and deliberate efforts of Congress to provide an alternative to the default federal rules.[99] Thus, despite the headline grabbing states' rights arguments, *Green Mountain* essentially decided that Congress will need to consider the effects on the CAA when legislating changes to the EPCA and vice versa, leaving courts to interpret such federal mandates accordingly. Like the competitive communities on either side of the *Green Mountain* divide, the CAA and the EPCA must learn to live together.

Regardless, the final chapter has yet to be written. Despite the apparent momentum behind efforts to regulate CO_2 emissions, as evidenced by the decisions in *Massachusetts v. EPA*, *Green Mountain*, and *Central Valley*, the EPA's decision to deny a section 209 waiver for California's alternative GHG standard pushed *Green Mountain* into a state of legal limbo. Ironically, California's decision to appeal the EPA's waiver denial squarely placed the fate of *Green Mountain*, an opinion issued by the federal District Court of Vermont, with the Ninth Circuit Court of Appeals. Further, even if the Ninth Circuit reverses the EPA's waiver denial, several other similar cases remain pending in other states that have also adopted the CARB emissions standards,[100] and such courts might independently choose to either reject or rely upon *Green Mountain*. Due to the powerful interests involved and the intensity of the debates on each side, the District Court of Vermont's *Green Mountain* opinion might just emerge as the opening salvo of a future battle in the circuit courts of appeal, perhaps taking the case all the way to the United States Supreme Court just like *Massachusetts v. EPA* before it.

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98. 42 U.S.C. § 7507.

99. *See* Massachusetts v. U.S. Envtl. Prot. Agency, ___ U.S. ___, 127 S. Ct. 1438, 1454 (2007) (noting that "[w]hen 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").

100. *See, e.g.*, Ass'n of Int'l Automobile Mfrs. v. Sullivan, No. 06-cv-69 (D. R.I. filed Feb. 13, 2006); Lincoln Dodge, Inc. v. Sullivan, No. 06-cv-70 (D. R.I. filed Feb. 13, 2006).