INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session VII Updates on Environmental Law

Title: Global Warming, Local Governments and the Courts

by

Presenter: Doug Kendall

Presenter's Title: Executive Director

Presenter's Office: Community Rights Counsel

2006 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2006 Annual Conference, held September 17-20, 2006 in Portland, Oregon. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Global Warming, Local Governments, and the Courts

By Doug Kendall and Julia Fuma[1]

INTRODUCTION

As the on-going impacts and devastating threats of global warming have emerged over the last decade, local governments have been at the forefront of our nation's response. For example, more than 275 cities have now pledged to lower greenhouse gas emissions to 7 percent below 1990 levels by 2012. This is the level set out in the Kyoto Protocol, which the United States signed in 1997 but never ratified. But actions by local governments alone cannot fully combat global warming, which is why three major U.S. cities -- New York City, Baltimore, and Washington D.C. -- joined more than a dozen states in 2003 in suing the U.S. EPA for not using its authority under the Clean Air Act to limit greenhouse gas pollution from mobile sources.

The debate over how to best respond to global warming is now being fought out in the judicial arena, as indicated by the U.S. Supreme Court's decision to grant review in *Massachusetts v. EPA*, the case challenging the EPA's refusal to regulate global warming under the Clean Air Act. So far, the judicial results have not been good for local governments. For example, the appeals court in *Massachusetts v. EPA* ruled in EPA's favor, upholding EPA's decision that it did not have power under the Clean Air Act to address global warming. In other cases, such as the Supreme Court's 2003 ruling in *Engine Manufacturers Association v. South Coast Air Quality Management District*, courts have preempted state and local efforts to reduce air pollutants, including greenhouse gases.

The results to date present a legal Catch-22 of sorts for local governments. In *Massachusetts v. EPA*, the federal government is arguing that it lacks authority to address global warming. In *Engine Manufacturers* and other cases, the federal government has argued that the Clean Air Act and other federal laws leave little room for state and local efforts to respond on their own. The result is that no level of government seems able to fully combat the global warming threat.

This paper summarizes the potential impacts of global warming, the response by local governments to this problem to date, and the status of global warming cases before the courts. The paper tracks an *amicus curiae* brief Community Rights Counsel filed in late August in the *Massachusetts v. EPA* case on behalf of IMLA, the U.S. Conference of Mayors, the National Association of Counties and other local government clients.

---

[1] Julia Fuma is a third year law student at New York University Law School. She was a summer intern at Community Rights Counsel.

GLOBAL WARMING AND LOCAL GOVERNMENTS: THE IMPACTS AND THE RESPONSE TO DATE

In fighting the consequences of climate change, local governments are the first line of defense. They are the government closest to those people suffering most, and the government expected to provide the initial relief in case of disaster or even extreme inconvenience.

As has been made tragically clear in the United States in the wake of recent man-made and natural disasters, municipal governments are responsible for orderly evacuations from fires and floods, and local officials must plan and reconstruct neighborhoods or entire cities afterwards. Global warming is likely to mean more disasters like intense hurricanes and high storm surges crashing into America's eastern seaboard, which is one of the most urbanized parts of the country and one of the fastest growing. While the federal government will reimburse local governments for most of the money spent in natural disasters, local governments must have the infrastructure in place in order to be able to respond to their citizens' needs as soon as disaster strikes.

Emergency preparedness is not cheap. For example, Pinellas County, which includes the Florida cities of St. Petersburg and Clearwater, will spend $1.7 billion in the next year on hurricane preparedness, including $100,000 on a telephone dialing system that will be able to call 2000 people a minute and give them information in case of evacuation.[2] The City of Philadelphia paid $1 million to a consultant to analyze the city's emergency readiness. The resulting report indicated that the city is woefully unprepared for extreme disaster, and it will cost many millions of dollars for it to build a system capable of handling an emergency of Hurricane Katrina's magnitude for the 72 hours before the federal government's aid arrives. An early estimate of the costs includes $450,000 to double the budget of the city's emergency management office, $20 million to wire tunnels with equipment capable of transmitting radio signals of police and firefighters, and $1 million for a public education campaign.[3] Furthermore, even though FEMA reimburses local governments after a disaster, for many local governments it is insufficient. For one thing, while costs of treating disaster victims may be reimbursed, long term costs of medical care for those affected may never be recouped.[4]

Municipalities, particularly large ones, also have to grapple with the less cataclysmic but still threatening challenges of climate change, such as higher temperatures that lead to more smog and federal sanctions for violating clean air standards; or sudden ferocious rainstorms that overwhelm and pollute municipal water supplies and flood transportation networks; or droughts that disrupt hydropower transmission and deplete local reservoirs.

The draining costs to cities from climate change can most clearly be seen in the summer 2006 heat wave. Responding to the triple-digit temperatures, New York opened 383 cooling centers, kept public pools open one extra hour, and printed guides for city dwellers on dealing

---

[2] Aaron Sharockman and Nicole Johnson, *Cities prepare water, warnings*, St. Petersburg Times, June 1st, 2006, at.1B.
[3] Jennifer Lin, *Phila. Unready For a Big Disaster*, The Philadelphia Inquirer July 13, 2006, at A01.
[4] Gary Martin, *S.A. Left Out of First Round of FEMA Reimbursements*, San Antonio Express News, October 7, 2005, at 8A.

with extreme heat. It was also forced to use generators for many city facilities in order to avoid power failures. Chicago's 1995 heat wave killed 700 people; to avoid the same magnitude of casualties in 2006, municipal officials evacuated more than 1000 residents after a power failure in high-rise apartments and opened scores of cooling centers, called 300 citizens most at-risk from the heat and left messages for 30,000 additional residents. Philadelphia increased emergency room staffing, moved the homeless off the streets and into shelters, and implemented a program which has volunteers go door to door and check on those in danger from the heat. If, as predicted, such heat waves become more common, city governments will have to use more and more resources to take on heat-related health emergencies.

Affidavits submitted by New York City and Baltimore in support of their standing to bring suit in *Massachusetts v. EPA* detail the consequences of climate change that are already being felt by both cities. New York City documents that the climate is already changing fairly rapidly in the New York Metropolitan Region. Over the past 100 years average temperature has increased by nearly two degrees Fahrenheit (2°F).[5] Global climate models project an additional warming of between 1.7 and 3.5°F by 2020 and 4.4 to 10.2° by 2080.

Warming has already contributed to a significant rise in sea levels over the past century, and this rate of change is expected to increase dramatically in the 21st Century.[6] The result will be more frequent and more damaging storms, more flooding, more erosion and a correspondingly dramatic increase in the city's spending on storm-damaged infrastructure.[7]

Global warming also impacts public health in the New York Metropolitan Region. Most directly, warming results in "an increase in summer-season heat stress morbidity and mortality, particularly among the elderly poor."[8] Other potential health effects include an increase in the incidence of vector-borne diseases and an increase in other forms of photochemical air pollutants such as smog.[9]

The City of Baltimore documents equally devastating injuries. According to Peter Conrad, a long-serving planner in the Baltimore City Department of Planning, the temperature increase projected for the Baltimore area "would result in a variety of localized effects, including increased production of ground level ozone due to higher temperatures, and increased pollen production by noxious and invasive plants. * * * Sea level rise would produce increased storm surge, increased frequency of tidal flooding, and increased average water levels."[10] As a result of these injuries, the city would face greater costs in repairing and building new infrastructure and adverse effects on its tourism industry and economy.[11]

Because local governments are first responders to any crisis, they also have an incentive to be on the front lines in tackling an issue that could lead to many more crises. As the effects of

---

[5] Massachusetts v. EPA Petitioners' App, at 261, Joint Decl. of Solecki et al, ¶ 8c.
[6] , Joint Decl. of Solecki et al., ¶ 10b.
[7] *Id*. at ¶ 11b.
[8] *Id*. at ¶ 14a.
[9] *Id.* at ¶14b.
[10] Massachusetts v. EPA, Petitioners' App, at 36, Conrad Decl. ¶ 12.
[11] Conrad Decl., ¶¶ 10-11.

climate change become more evident, cities cannot sit idly by. Indeed, many have decided to take action to lower the amount of global warming pollutants in their own communities.

The projects are both large and small. On the grandest scale is former President Bill Clinton's recently announced Climate Initiative. Twenty-two of the world's largest cities have signed on to the plan, including Chicago, New York, Los Angeles, and Philadelphia, and also Cairo, Delhi, London and Mexico City. The Clinton Climate Initiative is a three-part plan. It will use a consortium of cities to leverage purchasing power for energy-saving products; provide advice and assistance to cities that are trying to reduce their greenhouse gas emissions; and create more advanced measurement tools for global warming.[12] The plan targets cities with populations over 3 million, but smaller cities will benefit from the plan because they will be able to buy energy-efficient products at the same price as the group of cities bargaining as a unit.[13]

Long before President Clinton announced his plan, American cities of all sizes were taking the lead in the fight against global warming. In June of 2005, the U.S. Conference of Mayors, which represents 1183 cities, approved a resolution, sponsored by Seattle mayor Greg Nickels, that called on member cities to lower greenhouse gas emissions to 7 percent below 1990 levels by 2012. This is the level set out in the Kyoto Protocol, which the United States has not joined. The resolution also urged federal and state governments to meet the goals of the Kyoto protocol. Even before the resolution was adopted by the U.S. Conference of Mayors, 164 mayors had signed a pro-Kyoto pledge.[14] As of late July 2006, 275 mayors had signed.

In line with the resolution, individual cities have taken steps to reduce carbon dioxide and other pollutants related to climate change in their communities. For example, Seattle, the leader among the cities in the fight against global warming, has reduced its greenhouse gas emissions 60 percent since 1990. It did this in part by requiring more fuel efficiency in its cars and attempting to reduce automobile use by city employees.[15] Additionally, Nickels created a "green ribbon" commission that came up with a blueprint for Seattle to meet or beat Kyoto's targets.

Salt Lake City, another municipality dedicated to fighting climate change, committed to the goal of reducing greenhouse gas emissions to Kyoto-specified levels in 2002. Since then Salt Lake City has reduced emissions of carbon dioxide by buying wind power, using energy efficient bulbs in light signals, and using methane captured at the landfill to generate electricity. The city has also eliminated 35 SUVs from its fleet, increased recycling 87 percent, purchased three-wheeled parking-enforcement vehicles, which use one-eighth the gasoline of previous vehicles, and encouraged the use of mass transit, bicycles, and walking.[16]

The city of Burlington, Vermont began its fight against greenhouse gases in 2000. The City Council adopted the Climate Action Plan, which aimed to reduce annual carbon dioxide emissions by 156,000 tons a year by 2005. The plan included making municipal buildings and

---

[12] Steve Hymon, *Clinton Unveils Global Warming Initiative*, Los Angeles Times, August 2, 2006, at B3.
[13] Juliet Eilperin, *22 Cities Join Clinton Anti-Warming Effort*, Washington Post, August 2, 2006, at A03.
[14] Seattle Times Staff and New Service, *Pacific Northwest*, The Seattle Times, June 14, 2005 at B3.
[15] Kathy Mulady, *Seattle Dreams of Green Team*, The Seattle Post-Intelligencer, February 17, 2005, at A1.
[16] Heather May, *Anderson to tell world how to go green, SLC style*, The Salt Lake Tribune, December 7, 2004, at C9.

operations more energy efficient, supporting energy efficiency by other service providers, implementing a public education campaign, and supporting biomass-fueled community energy and means of transportation other than cars.[17]

Portland, Oregon has been fighting global warming since 1993, when it adopted a strategy to reduce emissions of carbon dioxide to 10 percent below 1990 levels by 2010. Local greenhouse gases in Portland are now less than 1 percent above the 1990 levels. The city has added two major light rail lines, has purchased for the last several years renewable energy for more than 10 percent of its electricity use, has constructed nearly 40 "green" buildings, and has planted over 750,000 trees and shrubs since 1996.[18]

Counties have also taken steps to mitigate the effects of greenhouse gases. In 2004, Montgomery County, Maryland, signed a contract with a wind energy supplier to purchase 5 percent of the county's energy.[19] The county has also adopted a clean energy incentive program in which residents receive 1 cent and commercial entities 1.5 cents for each kilowatt of clean energy (wind, solar or biomass) consumed.[20] The county also recently completed an inventory of its sources of greenhouse emissions. The results will be used to come up with measures that will allow Montgomery County to achieve its goal of reducing greenhouse gas levels to 20 percent below 1990 levels by 2010.[21]

King County, Washington, home of Seattle as well as 38 other towns, has gone even further than its biggest city in combating climate change. In addition to purchasing 235 hybrid buses and 140 cars for its fleet, and incorporating biodiesel into its Metro bus and solid waste fleets, the county has taken steps to prevent sprawl. It has purchased the development rights to 90,000 acres of forest. Preserving this land will be the equivalent of taking 11,000 cars off the road each year.[22] King County is also the first county to join the Chicago Climate Exchange, a legally binding program that requires its members to reduce emissions and allows for the trading of climate credits.[23]

These are just a few examples of what local governments have done to reduce carbon dioxide emissions. Cities such as Chicago, Los Angeles, and Cleveland have also taken steps to fight global warming.

---

[17] Burlington Electric Website, available at http://www.burlingtonelectric.com/SpecialTopics/climate.htm.
[18] Portland Office of Sustainable Development Website, available at http://www.portlandonline.com/osd/index.cfm?c=41896.
[19] Montgomery County News Release, *Montgomery County Signs Agreement to Purchase Wind Energy; Largest Local Government Purchase in Country*, May 13, 2004, available at http://www.montgomerycountymd.gov/Apps/News/press/DisplayInfo.cfm?ItemID=895.
[20] Montgomery County Maryland Clean Energy Rewards program, available at http://www.montgomerycountymd.gov/ deptmpl.asp?url=/content/dep/rewards.asp.
[21] Montgomery County Climate Protection Initiative, available at http://www.montgomerycountymd.gov/deptmpl.asp?url=/content/dep/Energy/climate.asp.
[22] King County Executive News Release, *King County Climate Change Conference: Sims outlines efforts to reduce emissions, prepare for global warming*, October 26, 2005, available at http://www.metrokc.gov/exec/news/2005/1026climate.htm.
[23] King County Executive News Release, *King County to become first county to join innovative market for reducing global warming pollution*, May 15, 2006, available at http://www.metrokc.gov/exec/news/2006/0515transit.aspx.

GLOBAL WARMING AND THE COURTS: THE RESULTS SO FAR

As impressive as local efforts have been to date, all the policies that local governments have implemented have still only resulted in a tiny reduction in world-wide emissions of greenhouse gases. The local response has been hampered by court rulings that have taken valuable tools away from local governments and rubberstamped federal inaction. If this nation is going to meet the challenge of global warming, all levels of government must be willing, and fully empowered, to join this fight

Due to their role as first responders, it may be obvious to local governments that they need to fight climate change through local legislation. What may be less apparent is that there is also work to be done within the judicial system. The courts may be used to compel the federal government to take on its role in fighting climate change, and courts should not find federal preemption of state and local initiatives where federal law is ambiguous.

The legislative pieces are in place for the federal government to tackle climate change. The Clean Air Act gives the EPA the authority to regulate greenhouse gases. One of the most important tasks facing anyone who cares about global warming is to make the reluctant EPA use that power to regulate carbon dioxide emissions. Twelve states, led by Massachusetts, and three cities, New York, Baltimore and Washington DC, have brought a case against the EPA to require it to regulate carbon dioxide and other greenhouse gases as is required by section 202 of the Clean Air Act.

The origin of this case is a 1999 rulemaking petition originally filed by the International Center for Technology Assessment and several other organizations to the EPA, requesting that it regulate greenhouse gas emissions, most importantly carbon dioxide, under section 202(a)(1) of the Clean Air Act. The EPA denied the petition in September of 2003, claiming that it lacked authority to regulate those emissions because the emissions were not air pollutants under the act. The agency also cited various policy considerations, including scientific uncertainty regarding the precise impact of global warming, the inefficiency of tackling just one source of global-warming emissions, and a general preference for voluntary measures to lower emissions.[24]

But the EPA's statutory justification depended on a tortured reading of the Clean Air Act. Section 202 directs EPA to regulate tailpipe emissions of any "air pollutant" that "may reasonably be anticipated to endanger public health or welfare." The statute's definition of "air pollutant" is exceedingly broad, including any physical or chemical "substance or matter which is emitted into or otherwise enters the ambient air." And the act expressly refers to carbon dioxide as an air pollutant in section 103(g).

Moreover, the Clean Air Act does not allow policy considerations to affect EPA's decision whether to regulate. The only question that the agency may consider is whether the specific tailpipe emissions "may reasonably be anticipated to endanger public health or welfare." Policy considerations such as the costs and benefits of regulation or the existence of alternative methods or voluntary compliance schemes are off the table. Thus, in making its global-warming emissions decision, the EPA ignored its legislative mandate.

---

[24] EPA Denial of Rulemaking Petition. 68 Fed.Reg. 52922 (September 8, 2003).

The D.C. Circuit Court of Appeals ruling that upheld EPA's decision not to regulate global warming pollution from new cars was badly fractured, with one judge affirming on standing grounds, one judge affirming on policy grounds that (as noted) go beyond what the statute allows, and one judge dissenting.[25] Had the Supreme Court not agreed to hear the case, there would have been no definitive judicial ruling on the critical legal issue of whether the EPA may regulate global-warming pollution emitted by new cars and trucks under the Clean Air Act.

In late August, CRC filed an amicus brief in support of Massachusetts on behalf of IMLA, the U.S. Conference of Mayors, National Association of Counties, American Planning Association, and the Cities of Seattle and Burlington. IMLA's amicus brief focuses on the effect of global warming on cities and towns. The brief points out the ways in which state and local governments are the first responders to the catastrophes brought about by melting ice caps, rising sea levels, more severe hurricanes, epidemics, and deaths from heat waves. It is local governments that have to bear the social and economic consequences of global warming. The brief then discusses an issue of particular concern for local governments: preemption. Local governments' efforts to convince residents to take action personally and support local efforts to be more energy efficient may all be undermined by the federal government's stance, backed recently by the courts, that the Clean Air Act preempts local carbon dioxide emissions initiatives. It is imperative, then, that local governments monitor and battle these court rulings.

The Supreme Court preemption decision in *Engine Manufacturers Association v. South Coast Air Quality Management District* has been one of the most troubling of recent years. The Supreme Court held that fleet rules imposed throughout Southern California by the District were preempted by section 209(a) of the Clean Air Act.[26]

The Supreme Court has stated that it has a presumption against preemption of state laws by federal statutes, [27] but in *Engine Manufacturers*, the Court discarded this presumption, and instead decided that the fleet rules promulgated by the South Coast Quality Management District, were "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines," and thus outside the ability of the local air quality agency to enforce. While the Supreme Court did not disavow the presumption against preemption in *Engine Manufacturers*, and lower courts have continued to apply this method,[28] the Court seemed to ignore its own analytic tools in finding preemption of state and local efforts to fight air pollution.

---

[25] *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005)

[26] For a more detailed explanation of the case and the dire circumstances that led the Air Quality Management District to adopt the fleet rules see Douglas T .Kendall (ed), *Redefining Federalism: Listening to the States in Shaping "Our Federalism"*, Chapter 2, (2004).

[27] *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

[28] See *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, 410 F.3d 493 (9th Cir. 2005)(holding that California's appliance regulation requiring appliance manufacturers to submit data about their appliances to the California Energy Resources Conservation Commission, mark their appliances with basic information such as brand name and energy performance, and be subjected to related compliance and enforcement rules, is not preempted by Federal Law.); *Bronco Wine v. Jolly*, 33 Cal. 4th 943, 956-57 (Cal. 2004)(holding that federal wine label regulations do not pre-empt California's more stringent wine label regulations).

Fleet rules are a good example of what local governments could be doing to reduce greenhouse gas emissions. In the four years between the Southern California rules' enactment and invalidation, fleet operators bought more than 5,500 clean-burning heavy-duty vehicles, replacing some of the most polluting machines on Southern California roads with some of the least-polluting.[29] Three U.S. airports have clean fleet programs; in Phoenix, 90 airport shuttle vans, 180 airport taxis, 24 buses that take passengers between terminals, and more than 170 airport support vehicles run on compressed natural gas, which emits less global warming pollution than conventional gasoline.[30] Several public fleets in Seattle run on a mixture of 80 percent conventional or low-sulfur diesel and 20 percent biodiesel, an alternative fuel that has less than one quarter of the global warming emissions of conventional diesel.[31]

New York City's taxi fleet numbers almost 13,000, most of them large sedans that get an abysmal 12 miles per gallon on city streets.[32] Chicago has 6,900 cabs in its fleet, Boston has 1800.[33] According to the federal government's fuel economy calculator, a large sedan emits about nine tons of greenhouse gases a year, while a large hybrid emits about 5.5 tons per year.[34] Fleet rules that would replace even a tenth of the cabs in these cities with hybrids would cut almost 8000 tons a year in greenhouse gas emissions.[35]

Combined, the D.C. Circuit's ruling in *Massachusetts v. EPA* and the Supreme Court's ruling in *Engine Manufacturers* leave local governments in a Catch-22. The D.C. Circuit Court has ruled that the federal government is powerless under the Clean Air Act to control global warming pollution. The Supreme Court has ruled that the Clean Air Act limits the availability of tools such as fleet controls that would help state and local governments combat global warming. Putting these results together, neither federal nor state officials can effectively respond to the looming threat of global warming.

Despite setbacks, local governments need to continue to take action, both in the legislative arena to create and implement new strategies to limit the greenhouse gas emissions in their own communities and in the courts to continue to oppose preemption of state and local global warming initiatives and to require the federal agencies to execute their own plan to fight this national and global problem.

---

[29] Kendall *supra* n. 24, p. 15.
[30] U.S. Dept. of Energy Clean Cities Taxi Vehicles Success Stories website, available at http://www.eere.energy.gov/cleancities/progs/new_success_ddown.cgi?137.
[31] City of Seattle, Seattle City Light Conservation Global Warming page, available at http://www.seattle.gov/light/conserve/ globalwarming/.
[32] *How Green Is My Yellow Cab*, New York Times, July 26, 2005, at Section 14, Column 1, pg. 9.
[33] Kathy Bergen, *Ads appeal to taxi firms*; *More than 30% of Cabs Apply for Rooftop Permits*, Chicago Tribune, June 2, 2006, at C1; Naomi R. Kooker, *Faring Poorly, Shabby cab service is costing the Boston economy; can it improve?*, Boston Business Journal, March 17, 2006.
[34] The Fuel calculator is available at www.fueleconomy.gov.
[35] This calculation is based on the emissions of a 2000 Ford Crown Victoria (the majority of New York City cabs are Crown Victorias) and a 2006 Ford Escape Hybrid.