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Community Rights Report

CRC's Monthly Newsletter

Community Rights Counsel

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FEATURE CASE

Regulation of Greenhouse Gases Under the Clean Air Act
Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (cert. pet. pending)
(Amicus opportunity, see below)

On March 2, 12 States, the District of Columbia, the cities of New York and Baltimore, and many others filed a petition for certiorari asking the U.S. Supreme Court to review a ruling by the D.C. Circuit that upholds a decision by the U.S. Environmental Protection Agency not to regulate carbon dioxide and other greenhouse gases as "air pollutants" under the federal Clean Air Act. The matter is plainly of extraordinary importance and worthy of review by the high court. As Judge David Tatel said in dissent, "if global warming is not a matter of exceptional importance, then those words have no meaning."

Section 201(a)(1) of the Act requires EPA to set emission standards for "any air pollutant" -- a term the Act defines very broadly -- emitted by new motor vehicles that "contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." In 1999, 30 parties petitioned EPA to use section 201 to regulate vehicle emissions that contribute to global warming. In rejecting the petition, EPA did not make any health or welfare finding under section 201(a)(1), but instead cited policy concerns not mentioned in this provision.

The D.C. Circuit produced a result as badly fractured as a judicial ruling possibly can be, with one judge affirming on standing grounds, another judge affirming on policy grounds, and a third judge authoring a lengthy and blistering dissent, capped by an en banc rehearing denial by the barest of margins.

It is difficult to imagine issues of federal statutory law of greater importance, or more worthy of the Supreme Court's review, than the questions presented here. How else could one describe issues directly implicating a potential catastrophe that could bring melting ice caps, rising sea levels, more severe hurricanes and other storms, epidemic increases in cholera, malaria, dengue fever, and other diseases, increased deaths from heat waves, more frequent floods and droughts, extensive crop damage with resulting starvation, and devastating harm to wildlife and the natural environment?

The scientific community is the leading voice of concern. The Director of Princeton University's Carbon Mitigation Initiative put it this way: "In most cases it's the lay community that is more exercised, more anxious. * * * But in the climate case, the experts -- the people who work with climate models every day, the people who do ice cores -- they are *more* concerned. They are going out of their way to say, Wake up!"

CRC plans to file an amicus brief in support of the petition on May 8. Any state and local officials whose employers are interested in joining this brief should contact us immediately at crc@communityrights.org.

EYE ON WASHINGTON

"Breaking the Bank":
The Budget Implications of TESRA's Takings Provisions

In our December 2005 newsletter, we reported on the takings provisions set forth in the federal Threatened and Endangered Species Recovery Act of 2005 (TESRA), which would pay people for simply complying with federal law. The bill, introduced by California Rep. Richard Pombo and passed by the House last fall, would require the payment of financial "aid" to landowners who forgo a proposed use of land that would harm threatened or endangered species. The amount of "aid" would be the market value of the forgone use of the affected portion of the land, including businesses losses, without regard to the extent of economic impact, the owner's reasonable expectations, or other factors traditionally considered in regulatory takings analysis.

Dale Hall, the Director of the Interior Department's Fish & Wildlife Service, recently threw cold water on the bill, testifying that it "would break the bank." This message tracks what state and local officials have been saying about similar compensation schemes floated in Congress for ten years.

Thankfully, the latest word from the Hill is that TESRA has stalled due to concerns over the takings provisions and other serious flaws. Although we've had large problems with much of what has come out of the Interior Department in recent years, Director Hall deserves credit for some straight talk on TESRA's financial implications.

ON THE HORIZON

When a Court Takes Takings Too Far

In a very disturbing ruling, a Texas appeals court has determined that a zoning change that reduced the value of commercial property by 35 percent (according to the owner) constitutes a taking under the Texas Constitution. *City of San Antonio v. El Dorado Amusement Co*, 2006 Tex. App. Lexis 1179, No. 04-04-00638-CV (Tex. App. Feb. 15, 2006).

For almost twenty years, El Dorado Amusement Co. owned a building in San Antonio that was leased out and used as a pool hall, bar, and club. A "disturbance" of some sort at the club in November 1998 led to its closure (the appeals court opinion gives no details, and CRC could not find any news reports about the incident). Two months later, the neighborhood's city council member asked that the property be rezoned to prohibit the sale of alcohol on the premises. The zoning commission and the city council approved the request.

El Dorado applied for a variance, but the city and then the zoning adjustment board refused. Over the next few years, the property was often vacant or leased at a much lower rent than the club had once paid. Eventually the owner sold the property and sued the city for a taking. The Texas Fourth District Court of Appeals held that the owner was entitled to $242,000, which was the difference between the post-rezoning sale price and the owner's estimation of the value of the land and the building, plus interest. (This was actually a significant reduction from the amount awarded by the trial court, which included more than $400,000 for lost profits.)

The court decided that "existing and permitted use of the property constitutes a 'primary expectation.'" Prior to the rezoning, the property owner had a license to sell alcohol and had leased the premises to places that sold alcohol. This history, coupled with the much lower rents the property commanded after the zoning change, was enough to constitute a taking in the eyes of the trial court and appellate judges.

This decision could turn garden-variety changes in zoning law into compensable takings. If San Antonio takes the case to the Texas Supreme Court, CRC stands ready to provide amicus support.

OUTRAGE OF THE MONTH

Something in the Water

You'd think that even the most ardent property rights defender would blanch at the idea of putting a septic tank ten yards from a stream, or 50 yards from a spring or reservoir that provides a community's drinking water. But a bill that has already passed the Georgia Senate, and a state House committee, would do just that, all in the name of preserving property rights.

Georgia currently requires minimal stream buffers of 25 feet for ordinary streams, 50 feet for trout streams, and 150 feet for drinking water sources and watersheds. Buffer zones slow down storm runoff, keep waters cool, and contribute to the health of waterways. In 2000, the Georgia legislature the cut the minimum buffer zone around trout streams from 100 feet to 50 feet, and as a result the young trout population plummeted by 80 percent, because the waters were warmer and dirtier.

Currently, local governments can expand buffer zones when they think it necessary. SB 510, introduced by Sen. Chip Pearson, makes it difficult for local officials to increase those buffer zones. And homeowners with large lots (two acres or more) could ignore these local regulations when building their homes, driveways, outbuildings and even digging their septic tanks, going right up to edge of the minimal, state-mandated zone. State environmental officials would also be able to grant variances from local buffer zone ordinances.

"Let property owners use their property to build a house on it, a cabin for their children, or whatever they want to do," Pearson said at a rally in defense of his law. But it is a fundamental principle of property law that owners cannot do "whatever they want to do" when it might harm others.

SB 510 does not affect regulations that protect the purity of drinking water for metropolitan Atlanta, but that exception seems to prove the rule: all Georgians should have clean water, not just Atlanta area residents.

The Atlanta Journal-Constitution has blasted SB 510 as the work of a legislature whose members "have been most eager to kow-tow to the altar of private profits over the public good." We couldn't have said it better ourselves.