Sustainability & Climate Change Reporter

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Lawsuit Challenges WA Governor's Climate Change Executive Order

Six Washington state taxpayers have filed a lawsuit (PDF) to stop implementation of Gov. Christine Gregoire's May 2009 Executive Order to reduce greenhouse gas emissions. The lawsuit claims the governor exceeded her constitutional authority and invaded the province of the legislature by issuing the order, but the challenge is a real stretch in light of existing state climate change law, the Governor's inherent power to communicate to state agencies what she wants them to accomplish, and what the Executive Order actually requires.

Washington's Climate Law

The Washington legislature in 2008 established greenhouse gas emissions targets for the state -- reduce emissions to 1990 levels by 2020; 25% below 1990 by 2035; and 50% below 1990 by 2050. That same session also set benchmarks for reducing vehicle miles traveled, which are a key component of the state's GHG reduction program since the transportation sector contributes a substantial share of the state's GHG emissions.

During the 2009 session, the legislature considered SB 5735 (PDF), which would have directed the Department of Ecology to establish statewide and sector-specific GHG emission caps and criteria for forestry offsets; continue participation in the development of the Western Climate Initiative's (WCI) cap-and-trade program; and implement an electric vehicle and alternative fuels infrastructure program. SB 5735, however, did not pass and so Gov. Gregoire issued Executive Order 09-05 (PDF).

Taxpayer Lawsuit

The Complaint in the taxpayer's lawsuit quotes a confidential briefing document from then-Ecology director Jay Manning stating that the Governor directed preparation of "an executive order that accomplishes what the bill would have authorized and more." Even if true, most of the provisions in the order already are authorized by existing law, although the Complaint brushes existing statutory authority aside as "***purportedly*** authorizing such actions." [emphasis added]

But there's no purportedly here. For example, the Executive Order directs Ecology to continue participating in the WCI, and under RCW 70.235.030(1)(a) Ecology already has been told to "develop in coordination with WCI a design for a regional multisector market-based system to limit GHG emissions." Similarly, to fulfill the statutory mandate to participate in designing the cap-and-trade system, Ecology reasonably would be expected to develop emission benchmarks by industry sector and also forestry offsets, both of which are key components of the WCI's cap-and-trade program.

A second statute adopted in 2008, RCW 47.01.440, set benchmarks for reducing vehicle miles traveled and requires that Ecology develop a collaborative process with the Transportation and Commerce departments, regional planning councils and businesses to devise strategies, including public transportation options. The Executive Order does virtually the same thing by directing the Department of Transportation to work with local governments, business and environmental representatives on the issue.

Directive to Agencies

Even if the legislature had not adopted the climate bills in 2008, the Executive Order still should be valid because the Governor is allowed to direct state agencies to accomplish her policies, although the directives would not have the force and effect of law. A 1991 Attorney General Opinion, Wash. AGO 1991 No. 21 (available on Westlaw at 1991 WL 521712), issued in connection with another governor's wetlands preservation executive order, described three basic types of executive orders: 1) general policy statements to persuade and encourage persons within and outside of government to accomplish the Governor's policy; 2) directives from the Governor to state agencies communicating what the Governor wants the agency to accomplish; and 3) operative effect executive orders.

According to the opinion, only the last type of order has the force and effect of law. That does not mean that the first two types of executive orders are invalid or voidable. Indeed, the AG's opinion recognized that the Governor can direct state agencies to take actions to accomplish her policies and fire the agency head if he or she does not comply.

"Force & Effect of Law"

The lawsuit claims that the Executive Order is void because it improperly has the "force and effect of law," but there is no Washington case law interpreting the term and Black's Law Dictionary calls it "a redundant legalism." Black's defines it to mean "legal efficacy."

But the actions that the order directs the various agencies to undertake -- "continue participating," "provide estimates," "request recommendations," "work with business to develop benchmarks," "develop recommendations," "develop strategies," and "provide alternatives" -- all sound like they stop well short of having any teeth to them. Put another way, how could there be any legal consequence to anyone if the agencies provide estimates, request recommendations, work with business, develop strategies or provide alternatives?

What makes this lawsuit even more odd is that no one challenged the Governor's 2007 executive order (PDF) that established GHG emissions reduction targets a year and a half ahead of the legislature. What makes this later Executive Order different? Probably nothing, except perhaps the move in California to halt that state's climate change law, AB 32, has emboldened opponents everywhere. To be sure the economy is in far different shape than it was in 2007, with the state's budget in continuing dire straits, but that does not make the Executive Order an unconstitutional intrusion on the legislature's prerogatives. There may be other ways to challenge the state's involvement in climate change regulation, but this lawsuit does not appear to be one of them.

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Lane Powell PC | Your Pacific Northwest Law Firm®
Seattle
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2339
Phone:
206.223.7000

Fax:
206.223.7107
Portland
601 SW Second Avenue
Suite 2100
Portland, OR 97204-3158
Phone:
503.778.2100

Fax:
503.778.2200
Olympia
111 Market Street NE
Suite 360
Olympia, WA 98501
Phone:
360.754.6001

Fax:
360.754.1605
Anchorage
301 West Northern Lights Blvd.
Suite 301
Anchorage, AK 99503
Phone:
907.277.9511

Fax:
907.276.2631
London
Office 2.24
148 Leadenhall Street
London, EC3V 4QT, England
Phone:
020.7645.8240

Fax:
020.7645.8241