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Climate Change Litigation: A Growing Phenomenon

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Summary

The scientific, economic, and political questions surrounding climate change have long been with us. This report focuses instead on a relative newcomer: the legal debate. Though the first court decisions related to climate change appeared over a decade ago, such litigation has proliferated in recent years.

The court cases, decided and pending, arise in five contexts. The first is the Clean Air Act (CAA). On April 2, 2007, the Supreme Court held in *Massachusetts v. EPA* that at least as to mobile sources of emissions (cars, trucks), EPA has authority under the CAA to regulate greenhouse gas (GHG) emissions, and cannot invoke policy considerations to refuse to do so. This decision may put pressure on EPA to move forward with regulation of GHGs from stationary sources (powerplants, factories) as well, and indeed litigation in the D.C. Circuit seeks to force this very result. In addition, the Supreme Court's finding that Massachusetts had standing may help at least state plaintiffs surmount the no-standing defense often raised in climate change litigation.

Second, can the common law of nuisance be used to force cutbacks in GHG emissions? In one nuisance case, eight states sued five electric utility companies alleged to be the largest CO_2 emitters in the U.S. The district court rejected the suit on political question grounds, and plaintiffs have appealed. However, the Supreme Court ruling above may pose an obstacle to federal common law claims on the ground that the CAA, now held to reach GHGs, preempts those claims.

Third, a case alleges that regulations under the Marine Mammal Protection Act allowing "incidental takes" of polar bears and Pacific walrus from Alaska north slope oil and gas activities were promulgated without adequate consideration of climate change impacts on the arctic.

Fourth, do any of various statutes requiring government analysis and information dissemination apply? Invoked in the litigation so far have been the National Environmental Policy Act (the oldest and most numerous category of climate change litigation), Global Change Research Act, and Freedom of Information Act.

And fifth, is state regulation of GHG emissions from motor vehicles preempted by federal law? Recently adopted state regulations imposing limits on GHG emissions from cars and light-duty trucks have been challenged. A decision in the California case found preemption by the CAA, unless EPA grants a preemption waiver.

Finally, the report discusses international law aspects of the U.S. contribution to climate change.

Many commentators believe that one motivation for much of the climate change litigation is to pressure Congress and U.S. foreign policy makers to address the issue.

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Climate Change Litigation: A Growing Phenomenon

The scientific, economic, and political questions surrounding climate change have long been prominent topics. This report focuses instead on a relative newcomer: the legal debate. Though the first court decision related to climate change appeared 17 years ago, the quantity of such litigation has mushroomed in recent years: more than a dozen cases pursuing multiple legal theories are now pending.

The court cases, decided and pending, arise in five contexts. The first is the Clean Air Act (CAA). On April 2, 2007, the Supreme Court held in *Massachusetts v. EPA* that at least as to mobile sources of emissions (cars, trucks), EPA has authority under the CAA to regulate greenhouse gas (GHG) emissions, and cannot invoke its stated policy considerations to refuse to do so.[1] Second, can the common law of nuisance be used by state or private plaintiffs to force cutbacks in GHG emissions? Third, must global-warming effects on the environment be considered before allowing "incidental takes" under the Marine Mammal Protection Act? Fourth, may any of several information statutes, particularly the National Environmental Policy Act, be invoked to compel government analysis of and dissemination of information about climate change? Fifth, is state regulation of GHG emissions from motor vehicles (in California and states adopting the California standards) preempted by federal law?

Sections I through V of this report address these five areas of litigation in turn, summing up the decided and pending cases and other legal events.[2] Looking beyond the domestic lawsuits, Section VI summarizes some international law arguments that might be or have been used to compel or induce GHG emission reductions from the United States and other major GHG emitters. Finally, Section VII offers overall comments.

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[1] 127 S. Ct. 1438 (2007).

[2] Similar ground is covered by Justin R. Pidot, GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES (Georgetown Environmental Law and Policy Institute 2006) (available, together with a March, 2007 update, at [http://www.law.georgetown.edu/gelpi]); Michael Gerrard (ed.), GLOBAL CLIMATE CHANGE AND U.S. LAW (ABA 2007); and Todd O. Madden and Eric McLaughlin, *Climate Change Litigation: Trends and Developments*, BNA Daily Env't Rpt. B-1 (April 3, 2007).

I. Clean Air Act

Stationary Sources of GHG Emissions

The First EPA General Counsel Memorandum.

Aware that prospects for Senate approval of the Kyoto Protocol were dubious,[3] some Members of Congress became concerned in the late 1990s that the Clinton Administration EPA might seek to regulate GHG emissions in the absence of approval, under either of two claimed authorities. One authority would derive from an argument that even prior to ratification, the Protocol provided some sort of legal basis for emissions restrictions, perhaps citing past treaties signed by the United States that were provisionally implemented prior to going into effect.[4] This possibility provoked a series of enactments barring EPA's use of appropriated funds to implement the Kyoto Protocol in the absence of approval and ratification.[5]

The rest of this section deals with the second issue: EPA's possible authority to regulate GHG emissions independently of the Protocol, under the CAA. This authority has now, in 2007, been confirmed by the Supreme Court, at least as to mobile sources; nonetheless, this report retains from earlier versions some of the historical evolution of the issue for the sake of a full appreciation of its complexity.

During hearings on EPA's FY1999 appropriations, Representative Tom DeLay asked then-EPA Administrator Carol Browner whether the EPA believed it had authority under the CAA to regulate GHG emissions. This led, weeks later, to an EPA General Counsel memorandum,[6] which concluded that CO_2 satisfies the CAA definition of "air pollutant," and thus may *potentially* be regulated under the act. But, the memorandum continued, determining that a substance is an "air pollutant" is only the first step. Before EPA can regulate emissions of the substance, it must further conclude they meet criteria in other CAA provisions, often requiring the agency to

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[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change, concluded December 10, 1997, U.N. Doc. FCC/CP/1997/L.7 Add. 1, reprinted at 37 I.L.M. 22 (1998). One indication of Senate antipathy to the Kyoto Protocol was its adoption by 95-0 of the so-called Byrd-Hagel resolution urging the President not to sign any international agreement on climate change that would result in serious injury to the U.S. economy or that did not include provisions regarding the GHG emissions of developing countries. S. 98, 105th Congress (1997).

[4] *See generally* David M. Ackerman, *Global Climate Change: Selected Legal Questions About the Kyoto Protocol*, CRS Report 98-349 (updated October 1, 2002). This report concluded that "there does not appear to be any clear legal authority that could be invoked to sustain the provisional application of the Kyoto Protocol." *Id.* at 6.

[5] P.L. 105-276, 112 Stat. at 2496 (1998) (barring EPA's use of FY1999 funds to implement Protocol); P.L. 106-74, 113 Stat. at 1080 (1999) (same for FY2000); P.L. 106-377, 114 Stat. at 1141A-41 (2000) (same for FY2001).

[6] Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (April 10, 1998).

determine that the substance poses harm to public health, welfare, or the environment. This next step, determining that CO_2 meets these added criteria, was one that EPA declined to take. The 1998 memo concluded that while CO_2 is an "air pollutant" under the CAA, EPA had not yet determined that it met the criteria for regulation under one or more of the other provisions in the act.

The House of Representatives Hearing.

At a House hearing in October, 1999,[7] a panel of legal experts argued the question of EPA's authority to regulate CO_2 under the CAA. First, a new EPA General Counsel endorsed his predecessor's analysis in the 1998 memorandum.[8] But just as his predecessor, he stressed that the EPA's legal analysis was "largely theoretical" since "EPA currently has no plans to regulate carbon dioxide ...."[9] This hands-off position was prompted in part by strong congressional opposition based on uncertainties as to the economic impact of regulating a pollutant as widespread as CO_2. In addition, some in Congress argued that CAA implementation of a CO_2 standard was barred by the aforementioned enactments (appropriation riders) prohibiting implementation of the Kyoto Protocol.[10]

An industry attorney argued that the CAA did *not* allow EPA to regulate CO_2 emissions. Given that such regulation "would have major consequences for all sectors of the economy," he asserted, "the fact that Congress never expressly gave EPA the authority to regulate such emissions is highly convincing of Congress' intent not to do so."[11] Representative David McIntosh homed in on the extreme breadth, in his view, of EPA's reading of the CAA definition of "air pollutant." He noted that the very CAA Section 103(g) that recognizes CO_2 as an air pollutant says that "[n]othing in this subsection shall be construed to authorize the imposition ... of pollution control requirements." In response, EPA's General Counsel clarified that the agency cited Section 103(g) only in support of its argument that Congress viewed CO_2 as an air pollutant, not for the purpose of drawing regulatory authority from 103(g).

Suits Enforcing the CAA Against EPA.

Two suits have been filed seeking to compel EPA to regulate GHG emissions from stationary sources.

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[7] *Is CO_2 A Pollutant and Does EPA Have the Power to Regulate It?*, Joint Hearing Before the Subcomm. on National Environmental Growth, Natural Resources and Regulatory Affairs of the House Comm. on Gov't Reform and the Subcomm. on Energy and Environment of the House Comm. on Science, 106th Cong. (1999).

[8] Testimony of Gary Guzy, General Counsel, EPA, Joint Hearing, *supra* note 7.

[9] Testimony of Gary Guzy, Joint Hearing, *supra* note 7, at 11.

[10] See Veronique Bugnion and David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 Envtl. L. 491 (2000).

[11] Testimony of Peter Glaser, Joint Hearing, *supra* note 7, at 27.

In *Massachusetts v. Whitman*, filed June 4, 2003, three Northeast states (MA, CT, ME) sought to force EPA to list CO_2 as a "criteria pollutant" under the CAA.[12] They argued that on various occasions, EPA had indicated its belief that CO_2 emissions contribute to climate change, with its harmful effects. These EPA statements constituted, in the words of CAA Section 108,[13] a "judgment [that GHG emissions] cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and, also per Section 108, that such emissions "result[] from numerous or diverse mobile or stationary sources." These prerequisites being satisfied, the suit argued, Section 108 required EPA to add CO_2 to its list of "criteria pollutants," then proceed under Section 109[14] to develop national ambient air quality standards for CO_2. On September 3, 2003, a few days after EPA's denial of a petition asking the agency to regulate GHG emissions from motor vehicles, the plaintiff states voluntarily dismissed this suit without prejudice, reportedly so as to transfer their energies to a suit challenging the petition denial.

The second suit is *New York v. EPA*, which seeks to compel EPA to issue a New Source Performance Standard (NSPS) for CO2. Unlike the first case, however, this one will be litigated in the shadow of the Supreme Court's 2007 decision that EPA has authority under the CAA to regulate GHGs from *mobile* sources. Now that the Court has so ruled, the question is how this litigation seeking to compel EPA regulation of *stationary-source* GHG emissions will be affected.

New York began with an EPA proposal to revise its NSPSs for electric utility and other steam-generating units. Some commenters on the proposed rule argued that EPA must, in addition to the revisions proposed, set NSPSs for GHGs emitted from steam generating units. The commenters pointed to CAA Section 111's command that EPA promulgate NSPSs to address emissions from new stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." In promulgating its final rule in February, 2006,[15] however, EPA rejected this demand, noting succinctly that it lacked authority to set NSPSs for GHGs.

Multiple petitions for review of the final rule were filed in the D.C. Circuit.[16] In September, 2006, the court severed the portion of the case dealing with regulation of GHGs, titling it *New York v. EPA*.[17] This severed case was ordered held in abeyance pending the Supreme Court decision in *Massachusetts v. EPA*. The parties were directed to file motions to govern further proceedings within 30 days of that decision. Very likely, the case will be remanded to EPA for further action in light of the Supreme Court decision.

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[12] Civ. Action No. 3:03CV984 (PCD) (D. Conn.).

[13] 42 U.S.C. § 7408.

[14] 42 U.S.C. § 7409.

[15] 71 Fed. Reg. 9866 (February 27, 2006).

[16] Coke Oven Environmental Task Force v. EPA, No. 06-1131 (D.C. Cir. filed April 7, 2006).

[17] No. 06-1322.

Suits Enforcing the CAA Against Stationary Sources.

In *Northwest Environmental Defense Center v. Owens Corning Corp*., environmental groups invoke the CAA citizen suit provision to enforce the act's "new source review" requirement as to GHG emissions.[18] They contend that Owens Corning is constructing a manufacturing plant in Oregon with the potential to emit more than 250 tons per year of harmful gases, without having obtained the required permit.[19] The principal such gas is HCFC-142b, which plaintiffs contend is a potent GHG, along with its other harmful effects. In a preliminary ruling, the court held that plaintiffs have standing, notwithstanding that the climate change impacts of the plant's GHG emissions would be "indirect." Anticipating the Supreme Court's rationale for granting standing in *Massachusetts v. EPA* (this section *infra*), the court found that standing was not precluded by the fact that the injury to plaintiffs would be shared with many others, nor because the relief sought would not lead to a complete elimination of climate change impacts.

Mobile Sources of GHG Emissions

The Section 202 Petition Denial and the Second EPA General Counsel Memorandum.

In 1999, the International Center for Technology Assessment (ICTA) and 18 other organizations[20] petitioned EPA to regulate emissions of GHGs (CO_2, methane, nitrous oxide, and hydrofluorocarbons) from new motor vehicles. The petition cited the agency's alleged mandatory duty to do so under CAA Section 202(a)(1).[21] That section directs the EPA Administrator to prescribe emission standards for "any air pollutant" from new motor vehicles "which, in his judgment cause[s], or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare."

In 2003, EPA denied the Section 202 petition.[22] Much of the agency's rationale followed a new General Counsel memorandum, issued the same day.[23] Contrary to its Clinton Administration precursor, this new OGC memorandum concluded that the CAA does *not* grant EPA authority to regulate CO_2 and other GHG emissions for their climate change impacts.

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[18] 434 F. Supp. 2d 957 (D. Or. 2006).

[19] CAA § 165, 42 U.S.C. § 7475.

[20] The 18 organizations comprise environmental groups and groups advocating greater use of renewable energy.

[21] 42 U.S.C. § 7521(a)(1).

[22] EPA, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (September 8, 2003).

[23] Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, EPA Acting Administrator, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (August 28, 2003).

Massachusetts v. EPA: The Challenge to EPA's Petition Denial.

D.C. Circuit Decision.

EPA's denial of the Section 202 petition prompted a suit in the D.C. Circuit by twelve states (CA, CT, IL, MA, ME, NJ, NM, NY, OR, RI, VT, WA), three cities (New York, Baltimore, and Washington, D.C.), two U.S. territories (American Samoa and Northern Mariana Islands), and several environmental groups. Opposing the challenge, besides EPA, were ten state intervenors (AK, ID, KS, MI, ND, NE, OH, SD, TX, UT), plus several automobile- and truck-related trade groups.[24]

In 2005, a split panel in *Massachusetts v. EPA* rejected the suit.[25] The two judges supporting rejection, however, did so for different reasons. Judge Randolph, bypassing the standing issue and assuming arguendo that EPA has CAA *authority* to regulate GHG emissions, proceeded to resolve whether EPA properly *exercised its discretion* in choosing not to wield that authority. As to this discretion issue, recall that CAA Section 202(a)(1) directs the EPA Administrator to prescribe standards for any motor vehicle emissions that *"in his judgment"*[26] cause harmful air pollution. Judge Randolph read "in his judgment" broadly to allow EPA consideration of not only "scientific uncertainty" about the effects of GHGs but also "policy considerations" that justified not regulating. Thus, EPA in his view was entitled to rely, as it did, on such factors as the fact that new motor vehicles are but one of many sources of GHG emissions, resulting in an inefficient piecemeal approach to climate change, and efforts to promote fuel cell and hybrid vehicles. He concluded that EPA had properly exercised its 202(a)(1) discretion in denying the petition for rulemaking. By contrast, Judge Sentelle, the other judge supporting rejection of the petition, held that petitioners had not suffered the requisite injury required for standing.[27]

Finally, Judge Tatel in dissent asserted that at least one petitioner had standing. Massachusetts, he said, had adequately demonstrated the possibility of injury from global-warming-induced rising sea levels. On the merits, he found first that EPA has the authority under Section 202(a)(1) to regulate GHG emissions, noting the section's coverage of "*any* air pollutant."[28] Second, he concluded that EPA's 202(a)(1) discretion does not extend to policy considerations, as Judge Randolph held, but relates exclusively to whether the emissions cause harmful air pollution.

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[24] In current political lingo, almost all the challenger states are "blue"; almost all the states opposing the challenge are "red."

[25] 415 F.3d 50 (D.C. Cir. 2005).

[26] Emphasis added.

[27] The test for whether a plaintiff in federal court has standing is described in greater detail in the following discussion of the Supreme Court's decision on appeal of the D.C. Circuit ruling.

[28] 415 F.3d at 62 (emphasis added by court).

Supreme Court Decision.

It was somewhat surprising that the Supreme Court agreed to review the D.C. Circuit decision in *Massachusetts v. EPA*. There was no split in the circuits, which often disposes the Court not to take a case, and the D.C. Circuit majority had not even ruled on the key issue: whether Section 202(a)(1) authorizes regulation of GHG emissions. Moreover, grants of certiorari over the opposition of the United States, as here, are rare. But as the Supreme Court stated in its decision: "the unusual importance of the underlying issue persuaded us to grant the writ."[29]

The Court ruled 5-4 for petitioners on all three issues in the case: standing, authority (whether "air pollutant" includes GHG emissions), and discretion (whether "in his judgment" allows policy considerations).[30] Justice Kennedy provided the fifth vote by joining Justice Stevens' opinion for the Court's "liberal/moderate" bloc. The ruling in favor of petitioners was forecast early in the majority opinion by its opening sentences: "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."[31] (Nor did the dissenters dispute this.)

Most of the decision is devoted to standing. At the outset, the Court found that petitioners had two factors in their favor. First, the CAA specifically authorizes challenges to agency action unlawfully withheld, such as this one.[32] A litigant to whom Congress has accorded such a procedural right, said the Court, "can assert that right without meeting the normal standards for redressability and immediacy"[33] — two prerequisites of the standing test. Second, the Court found it "of considerable relevance"[34] that the petitioner injury on which it focused — Massachusetts' loss of shoreland from global-warming-induced sea level rise — was that of a sovereign state rather than a private entity. States are "not normal litigants for the purposes of invoking federal jurisdiction,"[35] said the Court, noting their quasi-sovereign duty to preserve their territory.

Having described petitioners' favored position with regard to standing, it was surprising that the Court then undertook a fairly traditional standing analysis. As to the first prong of the black-letter standing test — whether plaintiff has demonstrated actual or imminent "injury in fact" of a concrete and particularized nature — the Court homed in on Massachusetts' status as owner of much of the commonwealth's shoreland. That this injury may be widely shared with other coastal states does not disqualify this injury, said the Court; it is nonetheless concrete.

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[29] 127 S. Ct. 1438, 1447 (2007).

[30] 127 S. Ct. 1438 (2007).

[31] *Id*. at 1446.

[32] CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

[33] 127 S. Ct. at 1453.

[34] *Id*. at 1454.

[35] *Id*.

The second prong of the standing test is causation, requiring that the injury of which the plaintiff complains is fairly traceable to the defendant. EPA did not dispute the existence of a causal relationship between GHG emissions and climate change. It did argue, however, that any reduction in GHG emissions achieved through the current litigation would be too small a portion of worldwide GHG emissions to make a cognizable difference in climate change. In an important ruling that may be of benefit to environmental plaintiffs in many contexts, the Court held that even an agency's refusal to take a "small incremental step"[36] that would result in only a modest reduction in worldwide GHG emissions, is enough for standing purposes.

The third and final prong of the standing test is redressability, demanding that the remedy sought by the plaintiff is one that is likely to redress his injury. Here, the remedy sought is EPA regulation of GHG emissions from new motor vehicles. The Court found that this remedy satisfied redressability because while it would not by itself reverse climate change, it would nonetheless slow or reduce it. Nor, given the "enormity"[37] of the potential effects of climate change, was it relevant to the Court that the full effectiveness of the remedy would be delayed until existing cars and trucks on the road were largely replaced by new ones.

Given the large number of pages devoted by the majority opinion to standing, its discussion of the two CAA issues in the case seems strangely brief. On the authority question, the CAA's broad definition of "air pollutant" — embracing "*any* air pollutant ... including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air"[38] — simply could not, the Court said, be squared with EPA's view that GHGs are not included. The Court rejected EPA's argument that federal laws enacted following enactment of this statutory language — laws emphasizing interagency collaboration and research — suggest that Congress meant to curtail EPA's power to use mandatory regulations in addressing air pollutants. Nor was the Court impressed with EPA's argument that "air pollutant" in the CAA could not include vehicle GHG emissions because EPA standards for such emissions could be satisfied only by improving fuel economy, a goal EPA asserted was assigned solely to the Department of Transportation under a different statute (the Energy Policy and Conservation Act[39]).

Finally, on the discretion issue, the majority concluded that "in his judgment" refers only to whether an air pollutant "may reasonably be anticipated to endanger public health or welfare." Thus, said the Court, EPA can avoid taking further action in response to the Section 202 petition "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." It rejected EPA's stated policy reasons for refusing to regulate GHG emissions, such as its claim that voluntary executive branch programs already provide an effective response to climate change

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[36] *Id*. at 1457.

[37] *Id*. at 1458.

[38] Emphasis added by the Court.

[39] 49 U.S.C. § 32902.

and that unilateral EPA regulation of vehicle GHG emissions could weaken U.S. efforts to persuade developing countries to reduce the GHG intensity of their economies. Such reasons "have nothing to do with whether greenhouse gas emissions contribute to climate change."[40] In short, said the Court, the only question is whether sufficient information exists to make an endangerment finding under Section 202.

Accordingly, the Court reversed the D.C. Circuit opinion and remanded the case to that court for further proceedings. That court has now ordered the parties to submit motions by June 7 on how the case should proceed. It is almost certain that the D.C. Circuit will issue an order sending the petition back to EPA.

A four-justice dissent by Chief Justice Roberts disputed the majority's holding of standing. A dissent by Justice Scalia for the same four justices argued that agency policy preferences may appropriately be considered as part of EPA's decision *whether* to issue a "judgment," conceding that the judgment, *if made*, must be limited to whether vehicle GHG emissions cause endangerment. Justice Scalia also disputed the majority's holding that "air pollutant" in Section 202 includes GHGs.

Implications of Supreme Court Decision.

The Court's decision leaves EPA with three options: make a finding that motor vehicle GHG emissions may "endanger public health or welfare" and issue emissions standards; make a finding that such emissions do not satisfy that prerequisite; or decide that climate change science is so uncertain as to preclude making a finding either way (or cite some other "reasonable explanation" why it will not exercise its discretion either way).[41] As to the state of climate change science, the Court's focus on the policy reasons EPA gave as part of exercising its "judgment" obscures the fact that the agency's rejection of the petition stemmed in part from expressions of scientific uncertainty in a 2001 National Research Council report on the science of climate change. Whether scientific reports since the petition rejection in 2003 have foreclosed the scientific-uncertainty rationale is beyond the scope of this report.

The EPA Administrator did say following the decision that although it bars EPA use of policy considerations as a basis for *denying* the petition, it left open whether the agency can invoke them when actually *writing* the regulations, should the agency make an endangerment finding.[42] In this regard, it should be noted that CAA Section 202 does not explicitly impose any stringency or other criteria on GHG emission standards that might be promulgated under the section. Reflecting the apparently

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[40] 127 S. Ct. at 1463.

[41] Justice Scalia's dissent characterizes EPA's three options similarly: 127 S. Ct. at 1472.

[42] *The Implications of the Supreme Court's Decision Regarding EPA's Authorities with Respect to Greenhouse Gases Under the Clean Air Act: Hearing Before the Senate Comm. on Environment and Public Works*, 110th Cong. (2007) (prepared statement of EPA Administrator Stephen Johnson). The EPA Administrator is apparently referring to the Court's statement that "We need not and do not reach the question ... whether policy concerns can inform EPA's actions in the event that it makes [an endangerment finding]." 127 S. Ct. 1438, 1463.

wide latitude EPA has in setting Section 202 standards for GHGs, commentators have suggested that EPA, following an endangerment finding, could set voluntary standards, or standards pegged to the CAFÉ standards for fuel economy, or standards that must be complied with only after the President certifies that developing nations have put adequate GHG emission limits into effect. We offer no opinion here as to the legal viability of these options. In any event, on May 14, 2007, the President asked the EPA Administrator, working with the Departments of Transportation, Energy, and Agriculture, to have CAA regulations limiting vehicle GHG emissions in place by the end of 2008 and to use the President's 2007 State of the Union proposal for raising the CAFÉ standards as a guide.[43] This appears to mean that EPA will be making the prerequisite finding that motor vehicle GHG emissions endanger public health or welfare.

The Court's ruling in *Massachusetts v. EPA* has many implications beyond its four corners. At this early date, however, only broad predictions are possible. Most obviously, the ruling on standing will likely be pivotal to the fortunes of plaintiffs in other climate change litigation. The question will be the extent to which the Court's finding of standing was contingent, as it obliquely suggested, on the existence of a state-sovereign plaintiff and the presence in the CAA of an explicit provision allowing the filing of administrative petitions. In cases seeking injunctive relief, this query is relevant only for private plaintiffs not joined with state plaintiffs. In injunctive cases with mixed private and state plaintiffs, a court can focus on the latter; as *Massachusetts v. EPA* instructs, it is only necessary that one plaintiff in the case have standing.

On the substantive issues, the Court's ruling upholding CAA coverage of GHG emissions from mobile sources will likely improve the prospects of litigation seeking to have EPA restrict GHG emissions from stationary sources as well. The stationary-source provisions of the CAA use terms similar to that of Section 202 — in particular, "air pollutant" and "in his judgment."[44] As the above discussion of *New York v. EPA* indicates, such an effort to compel EPA regulation of stationary source GHGs is already underway. Contrariwise, the ruling could undermine the cases making federal common law claims (Section II), since it strengthens the argument that Congress intended to leave no room for courts to develop overlapping federal common law restricting GHG emissions. Ironically, this means that the victory for the "environmental" side in *Massachusetts v. EPA* enhances the possibility of a defeat for that side in the federal common law cases.

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[43] *Briefing by Conference Call on the President's Announcement on CAFÉ and Alternative Fuel Standards*, May 14, 2007 (statement of EPA Administrator Stephen Johnson), available at whitehouse.gov/news/releases/2007. *See also* Exec. Order No. 13432, 2007 Westlaw 1405388 (White House), signed May 14, 2007.

[44] *See, e.g.*, CAA § 108(a)(1)-(2), 42 U.S.C. § 7408(a)(1)-(2) (requiring the EPA Administrator to maintain a list of each "air pollutant" "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and then issue air quality criteria and national ambient air quality standards for that air pollutant).

II. Common Law of Nuisance

On July 21, 2004, eight states (CA, CT, IA, NJ, NY, RI, VT, WI) and New York City sued five electric utility companies.[45] *Connecticut v. American Electric Power Co.*, Civ. No. 04 CV 05669 (S.D.N.Y. filed July 21, 2004). These defendants were chosen as allegedly the five largest CO_2 emitters in the U.S., through their fossil-fuel-fired electric powerplants. Invoking the federal and state common law of public nuisance,[46] plaintiffs seek an injunction requiring defendants to abate their contribution to the nuisance of climate change by capping CO_2 emissions and then reducing them. Plaintiffs sue both on their own behalf to protect state-owned property (e.g., the hardwood forests of the Adirondack Park in New York), and as *parens patriae* on behalf of their citizens and residents to protect public health and well-being.

Also on July 21, 2004, three non-governmental organizations (the Open Space Institute, Open Space Conservancy, and Audubon Society of New Hampshire) filed a similar suit against the same defendants, in the same court, adding a private nuisance claim.[47] *Open Space Inst. v. American Electric Power Co.*, No. 04 CV 05670 (S.D.N.Y. filed July 21, 2004). They seek to protect land owned and preserved by them in the state of New York.[48] This suit was consolidated with the state suit.

In a series of motions, defendants sought to dismiss these actions on a wide spectrum of threshold grounds. Though the case has now been decided by the trial level on a single threshold issue, it is worth reviewing the grounds advanced in these motions because they may reappear later, in this or other private GHG litigation.[49] To reiterate, many of these grounds typify the difficulties encountered when one seeks to address through private litigation a ubiquitous, long-term environmental problem to which countless parties contribute.

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[45] American Electric Power Co., Inc., The Southern Co., Cinergy Corp., Tennessee Valley Authority, and Xcel Energy, Inc.

[46] An activity is a public nuisance if it creates an unreasonable interference with a right common to the general public. Unreasonableness may rest on the fact that the activity significantly interferes with public health and safety, or has produced a permanent or long-lasting effect and, as the actor knows or has reason to know, has a significant effect on the public right. Restatement (Second) of Torts § 821B (1979).

[47] An activity is a private nuisance if it is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Id.* at § 821D.

[48] *See* Vincent S. Oleskiewicz and Douglas B. Sanders, *The Advent of Climate Change Litigation Against Corporate Defendants*, BNA Daily Env't Rpt. B-1 (November 15, 2004). The authors review the *State of Connecticut* and *Open Space Institute* suits in some detail, assess the defenses available in tort-based climate change suits generally, and extract clues as to the potential success of such litigation from the history of litigation against tobacco companies.

[49] *See generally* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293 (2005) (discussing threshold hurdles of standing, the applicability of federal common law, and foreign policy preemption).

In a motion for dismissal, some defendants argued there is no federal common law cause of action for climate change. Creating such common law, they argued, runs afoul of Supreme Court directives that federal courts create common law only in limited areas — especially where, as with climate change, the problem at issue has sweeping national and international implications. Moreover, because the political branches are actively engaged in international negotiations about climate change (according to these defendants), this matter is not one that a court should resolve in private litigation. Even assuming a viable federal common-law nuisance theory, they continued, Congress' enactment of a comprehensive scheme of air pollution regulation in the CAA displaces federal court authority in this area. Defendants also challenge plaintiffs' standing to sue. Plaintiffs, they argued, have not demonstrated the "injury in fact" requisite of standing because they allege only injuries from climate change in the indefinite future. Nor, said these defendants, have plaintiffs shown "causation" because they do not allege that defendants' conduct will directly cause the consequences of climate change — especially since defendants' collective emissions are admitted to be less than 2-1/2% of the global total from human activities.[50] As mentioned, the viability of these federal common law of nuisance and no-standing arguments will likely be significantly affected — the displacement argument helped, the others hurt — by *Massachusetts v. EPA*.

A second motion, filed by a different subset of defendants, seeks dismissal for lack of personal jurisdiction. These defendants alleged that although their powerplants are located in 20 states, none is in New York (where the case was filed) or any other plaintiff state except Wisconsin. The jurisdiction of a federal district court in New York, they argue, cannot be invoked to enjoin non-resident defendants from conducting lawful activities outside of New York with alleged effects occurring almost entirely outside of New York. Doing so would violate the New York personal jurisdiction statutes. Nor, according to these defendants, do plaintiffs satisfy the "sufficient minimum contacts" (with New York) standard of constitutional substantive due process.

A final motion to dismiss was filed by several defendants solely in the suit by private plaintiffs. They asserted that to the limited extent a federal common law claim to abate an interstate nuisance has been recognized, it has been limited to actions brought by state entities. Nor, said defendants, can plaintiffs assert state law claims for public nuisance, because they have not alleged special injury to their properties, or claims for private nuisance, because they have not alleged substantial harm.

On the merits and appropriate remedies, plaintiffs attacking the causes of climate change face hurdles of a type seen years ago in acid rain and toxic tort litigation. Presumably the lenient civil standard of proof (preponderance of the evidence) can be met by plaintiffs on the threshold question of whether human activity, as a general matter, contributes to climate change. The hard part for

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[50] An interesting question raised by the Prof. Merrill article, *supra* note 49, is whether these general standing requirements, developed in the context of private lawsuits, should apply in a suit such as *State of Connecticut* — that is, in a parens patriae suit brought by state attorneys general under public nuisance law.

plaintiffs is to show that climate change is a cause of specific climate events in their states, and, if so, how to apportion damages as between the defendants collectively and non-defendant emitters, and among the defendants themselves. The success of Massachusetts in persuading the Supreme Court to find sufficient causation for purposes of standing, with regard to one particular injury, should not be read as foreclosing contrary judicial rulings in different contexts.

As indicated, the dismissal motions in *State of Connecticut* and *Open Space Institute* have now been ruled on by the district court[51] — which dismissed the case on political question grounds. This judicial doctrine requires a court to look into "the appropriateness under our system of government of attributing finality to the action of the political departments [i.e., the legislative and executive branches] and also the lack of satisfactory criteria for a judicial determination ...."[52] One situation judicially recognized as pointing to a political question, hence dismissal of the action, is "the impossibility of deciding [the case] without an initial policy determination of a kind clearly for nonjudicial discretion."[53] This situation, said the court, perfectly fit the GHG cases, touching as they do on so many areas of national and international policy. As a political question, the court believed the climate change issue in these suits to be for the legislature, not the courts, to resolve. Very possibly, the amorphousness of nuisance law, giving the court little guidance in resolving these cases, may have hurt the plaintiffs' cause. This case is now pending before the Second Circuit.[54]

A similar action was filed in 2006 by the California Attorney General against several automobile manufacturers, citing federal common law, or in the alternative, state law, and citing the manufacturers' past and ongoing contributions to climate change, an alleged public nuisance. *California ex rel. Bill Lockyer, Attorney General v. General Motors Corp.*, No. 06-05755 (N.D. Cal. filed Sept. 30, 2006). In contrast with *State of Connecticut* that seeks injunctive relief, this suit seeks monetary damages. The complaint recites that "[d]efendants' motor vehicle emissions in the United States account for approximately nine percent of the world's carbon dioxide emissions and over thirty percent of emissions from sources within the State of

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[51] State of Connecticut v. American Elec. Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

[52] Baker v. Carr, 369 U.S. 186, 210 (1962).

[53] *Id*. at 217.

[54] Presumably two of the plaintiffs, New York State and New York City, have been able to support their standing to sue by arguments not contrary to those they made *against* plaintiff standing in another public-nuisance climate change case in which they were the defendants. Avoiding contradictory arguments was presumably facilitated by the idiosyncratic nature of the global-warming harms alleged by the *pro se* plaintiff — e.g., those based on plaintiff's enhanced vulnerability to disease-causing pollution as compared to the general population. According to the court, plaintiff appeared to be requesting an injunction ordering the defendants to, among other things, use his invention for reducing carbon dioxide. Korsinsky v. U.S. EPA, 192 Fed. Appx. 171 (2d Cir. 2006) (affirming district court dismissal based on lack of standing).

California." Again, however, *Massachusetts v. EPA* may undercut the federal common law claim.[55]

III. Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA)[56] bars the taking and importation of marine mammals, but allows multiple exceptions. One exception is for "incidental takings" by specified activities.[57] It provides that persons "engage[d] in a specified activity (other than commercial fishing) within a specified geographical region" may request the Secretary of the Interior or Commerce to authorize, for up to five years, the incidental, but not intentional, taking of small numbers of marine mammals. The Secretary must grant the authorization if he makes certain findings — including that the effect of the incidental take will be "negligible" — and promulgates rules setting out permissible methods of taking by the specified activity.

In *Center for Biological Diversity v. Kempthorne*, No. 07-CV-00894 (N.D. Cal. filed February 13, 2007), environmental groups challenge one such "incidental taking" rule promulgated by the Fish and Wildlife Service. The rule authorizes the incidental take of polar bears and Pacific walrus for five years resulting from oil and gas industry activities in the Beaufort Sea and adjacent coastal areas of the Alaska north slope.[58] Plaintiffs challenge the accompanying environmental assessment and finding of no significant impact under NEPA, charging that the Service put out the rule "without seriously analyzing the effects of climate change on them or their habitat." The accusation, it should be noted, is not that the oil and gas activities contribute to climate change, but that direct harms to polar bears and walruses from those activities will be exacerbated by climate change impacts on the arctic that are already stressing those species. Plaintiffs also argue that the rule violates the MMPA and thus is arbitrary and capricious by permitting more than a "negligible" impact on the species, again based on the combined impact of oil-and-gas activities and climate change.

Center for Biological Diversity may be joined in the future by other suits dealing with the effects of climate change on wildlife. On January 9, 2007, the Fish and Wildlife Service proposed listing the polar bear as a threatened species under the

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[55] Reportedly, California will argue that *Massachusetts v. EPA* does not eliminate the state's federal common law right because EPA, while now held to be authorized to regulate GHG emissions, still has not done so. In addition, the state reportedly will argue that nothing EPA does in a regulatory vein undercuts the state's claim for damages based on injuries that have already occurred. Amanda Bronstad, *Justices reignite Calif. emissions battle*, Nat'l. L. J. 6 (Apr. 23, 2007). See Section II of this report.

[56] 16 U.S.C. §§ 1361-1421h.

[57] 16 U.S.C. § 1371(a)(5). In the MMPA, "take" means "to harass, hunt, capture, or kill" any marine mammal, or attempt to do so. 16 U.S.C. § 1362(13).

[58] 71 Fed. Reg. 43,926 (August 2, 2006).

Endangered Species Act (ESA),[59] in fulfillment of a settlement agreement with environmental groups including the Center for Biological Diversity.[60] If the Service ultimately lists the polar bear (its decision is due by January 9, 2008), at least two ESA provisions are potentially implicated. One, Section 9, makes it unlawful to "take" a member of a listed endangered species within the United States, its territorial sea, or the high seas[61] — and has been extended by regulation to most threatened species.[62] The other provision, Section 7, demands that each federal agency "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species *or threatened species* or result in the destruction or adverse modification of [designated critical habitat] of such species ...."[63] Section 7 further instructs that federal agencies consult with the Fish and Wildlife Service or National Marine Fisheries Service, as appropriate, if a proposed action of the agency might have these effects.

Query, for example, whether starting up a new powerplant after the polar bear listing might run afoul of Section 9 through the effects of its GHG emissions, via climate change, on polar bear habitat. Notable here is that the Section 9 term "take" is statutorily defined to include "harm" to members of a listed species, and that "harm," in turn, is defined by regulation to include certain "significant habitat modification[s] or degradation[s]."[64] These inclusions arguably enhance the chances that habitat modification resulting from climate change could be a Section 9 "take." A federal agency issuing a permit for powerplant construction might also have to initiate Section 7 consultation, for the same reason. To be sure, however, the ESA and its regulations do contain mechanisms — e.g., incidental take permits, "reasonable and prudent alternatives," and "special rules" for threatened species — that can ease the act's constraints on human activities affecting listed species.

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[59] 16 U.S.C. §§ 1531-1544.

[60] 72 Fed. Reg. 1,064 (Jan. 9, 2007).

[61] 16 U.S.C. § 1538(a)(1)(B)-(C).

[62] By general rule, the Fish and Wildlife Service has extended all of the endangered species prohibitions to threatened animals. 50 C.F.R. § 17.31. "Special rules," withdrawing particular threatened species from aspects of the general regime, have been promulgated for those species with atypical management needs, such as grizzly bears. 50 C.F.R. § 17.40(b).

[63] 16 U.S.C. § 1536(a)(2) (emphasis added).

[64] 50 C.F.R. §§ 17.3 (Fish and Wildlife Service), 222.102 (NOAA Fisheries).

IV. Information Statutes

Much of the climate change litigation is based on statutory requirements that the government generate, compile, or disclose information.

National Environmental Policy Act

To be sure, the National Environmental Policy Act (NEPA) is a bit more than just an information statute, declaring as it does a sweeping policy that the federal government must consider the environmental impacts of its actions. However, it ensures that such environmental consideration will occur chiefly through the production of information, in the form of environmental assessments and environmental impact statements, and does not require that an agency choose from among its options the one with the least environmental impact.

The NEPA cases involving climate change represent the oldest and the most numerous category of climate change litigation. The dominant issue is whether plaintiffs have standing to sue — as mentioned, an issue on which plaintiffs may be helped by the Supreme Court decision in *Massachusetts v. EPA*. Thus, all the standing issues discussed here should be viewed through the prism of that decision. The standing determination has been particularly difficult in the context of NEPA, which confers only a *procedural* right (having a federal agency prepare an adequate environmental impact statement (EIS)), not a *substantive* right (having the agency select a particular course of action after preparing the EIS). Where courts have found standing and reached the merits, they have usually accepted that climate change impacts in the proper circumstances are a required consideration in an EIS.

District of Columbia Circuit.

Standing barriers have proved particularly daunting in the D.C. Circuit, thus it is here that *Massachusetts v. EPA* may have its greatest effect. In the first significant climate change case, *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.3d 478 (D.C. Cir. 1990), the city attacked a National Highway Traffic Safety Administration (NHTSA) decision not to prepare an EIS when it set the corporate average fuel economy standard at 26.5 mpg for model year 1989 passenger cars — below the statutory default setting of 27.5 mpg.[65] A majority of the D.C. Circuit panel concluded that petitioners had standing based on their argument that had NHTSA done an EIS considering the climate change impacts of its one mpg rollback, the agency might have rejected it. This provided the requisite causal nexus, said the majority, between NHTSA's decision not to do an EIS and climate change. In dissent, however, one judge argued that Article III demanded a more precise causal showing, with clear proof of a nexus between the agency action and harm to the petitioners. On the merits, one judge in the majority concluded that NHTSA had "inadequately explained why the admitted increase in carbon dioxide is insignificant

[65] Other model years were involved, too, but only the challenge to the model year 1989 CAFE standard involved a climate change argument.

within the context of the environmental harm posed by global warming."[66] She would have remanded NHTSA's NEPA decision but left the rollback in place in the meantime. Because the other majority judge ruled for the agency, however, the petition was denied.

The plaintiff-friendly *City of Los Angeles* standard for finding global-warming-based standing was to prove short-lived. Six years later, a divided D.C. Circuit declared *en banc* that to obtain standing, a procedural-rights plaintiff must show not only that the government omitted a required procedure, but that it is substantially probable that the procedural omission *will cause a particularized injury to the plaintiff*[67] — adopting the dissenter's position in that case. To the extent *City of Los Angeles* dispensed with the second, causation-of-a-particularized-plaintiff-injury requirement, it was expressly overruled. Still later court decisions, however, have cast doubt on this strict standard.[68]

In *Foundation on Economic Trends v. Watkins*, 794 F. Supp. 395 (D.D.C. 1992), the standing bar was lifted *during* the litigation. Plaintiffs claimed that NEPA required the Secretaries of Energy, Agriculture and the Interior to evaluate the effect on climate change of 42 actions and programs under their authority. Plaintiffs' standing argument was based on "informational standing," under which failure to do an EIS discussing possible climate change impacts satisfies the injury requirement of standing merely by harming plaintiffs' programs for disseminating information about climate change to the public. In so arguing, plaintiffs relied on a line of D.C. Circuit decisions going back two decades. Unfortunately for them, however, informational standing was repudiated by the D.C. Circuit during the pendency of their suit. An amended complaint by the individual plaintiff, arguing that his expected use of his oceanfront cottage may be curtailed if oceans rise from climate change, was also rejected. Among other things, said the court, the plaintiff had not met the causation requirement of standing in that he had not related the environmental harm he predicted to any of the 42 challenged agency actions. "[T]here is no 'global warming' exception to the standing requirements of Article III or the [Administrative Procedure Act]."[69] it asserted.

Ninth Circuit.

The standing barriers in the D.C. Circuit seem to be attenuated in the Ninth Circuit where, as far as research reveals, plaintiffs raising climate change claims in NEPA suits have yet to encounter standing problems.

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[66] 912 F.2d at 501.

[67] Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996). The four dissenting judges argued that the majority had "misapplied the doctrine of standing to the assertion of a procedural right, such as the preparation of an EIS, with the consequence that it will be effectively impossible for anyone to bring a NEPA claim in the context of a rulemaking with diffuse impact." *Id*. at 673.

[68] *See, e.g.*, Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000).

[69] 794 F.2d at 401.

In 2002, environmental groups sued the Overseas Private Investment Corp. (OPIC) and Export-Import Bank of the United States for their alleged continued failure to comply with NEPA. *Friends of the Earth v. Mosbacher*, No. 02-4106 (N.D. Cal. filed September 3, 2002). These federal agencies provide insurance, loans, and loan guarantees for overseas projects, or to U.S. companies that invest in overseas projects. Plaintiffs allege that these overseas projects include oil and gas extraction and refining, and power plants, which together result in the annual emission of billions of tons of GHGs, causing climate change in the United States.

In 2005, the district court held that plaintiffs' allegations conferred standing, given what it saw to be the relaxed standards in the Ninth Circuit for showing standing in cases alleging procedural violations — here, failure to prepare an EIS.[70] It is "reasonably probable," said the court, that emissions from projects supported by the defendants will threaten plaintiffs' concrete interests. And, OPIC's organic statute does not preclude judicial review, including review under NEPA. This case is still pending before the district court.

In *Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003), plaintiff challenged the environmental assessment accompanying applications for permits and federal rights of way to build electricity transmission lines connecting new power plants in Mexico with the power grid in Southern California. In part because four of its members were seen to have procedural standing, the plaintiff organization was held to have organizational standing.[71] The court's standing discussion made no mention of climate change, however, perhaps because climate change was only a small part of plaintiff's case. On the merits, the court agreed with plaintiff that the environmental assessment was legally inadequate because, among other things, it failed to discuss CO_2 emissions from the powerplants and "[t]he record shows that carbon dioxide ... is a greenhouse gas."[72]

The newest NEPA/climate change case in the Ninth Circuit, *Center for Biological Diversity v. NHTSA*, No. 06-71891 (9th Cir. filed April 6, 2006), offers a deja vu to *City of Los Angeles*, discussed earlier. Both cases involve a NHTSA rule

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[70] In finding standing, the judge repudiated an earlier climate change/standing decision of the same court. In *Center for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143 (N.D. Cal. 2002), plaintiffs had sought enforcement of the Energy Policy Act as it related to the acquisition of alternative fuel vehicles by the United States. In rejecting standing, this decision spurned plaintiffs' climate change concerns as "too general, too unsubstantiated, too unlikely to be caused by defendant's conduct, and/or too unlikely to be redressed by the relief sought to confer standing." In *Friends of the Earth*, the court neutralized this pronouncement by noting that "*Center for Biological Diversity* was decided before the Ninth Circuit clarified in [Citizens for Better Forestry v. U.S. Dep't of Agriculture, 341 F.3d 961, 972 (9th Cir. 2003)] that environmental plaintiffs raising procedural concerns need not present proof that the challenged federal project will have particular environmental effects."

[71] An organization has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

[72] 260 F. Supp. 2d at 1028.

setting a corporate average fuel economy standard — this time, for light trucks — and in both cases, the agency did no EIS. The petitions for review filed by environmental groups in this case have been consolidated with petitions from 11 states (CA, CT, ME, MA, NJ, NM, NY, OR, RI, VT and MN). NHTSA's argument in defense is that the incremental change in GHG emissions under its rule will be small, and that alternative fuel economy standards would not be consistent with the Energy Policy and Conservation Act (the statute under which the fuel economy program is administered).

State NEPAs.

A few GHG-related suits also have been filed under state "little NEPAs" — state laws requiring state (and sometimes local) agencies to consider the environmental impacts of their proposed actions, just as the federal NEPA does for federal agencies. For example, in *General Motors Corp. v. California Air Resources Bd.*, No. 05-02787 (Ca. Sup. Ct. filed September 2, 2005), two car manufacturers claimed that the Board's adoption of California's GHG emission standards involved delayed and inadequate compliance with the state's NEPA-type law. This suit offers as a prime reason for advance environmental analysis the argument that GHG emissions regulation has, in addition to a possible benefit, some environmental downsides. In particular, it contends that restriction of GHG emissions may cause an increase in new-vehicle sticker prices and a consequent decrease in the rate at which old, higher-emissions vehicles are retired from use.

The most recent state-NEPA cases were filed in April, 2007 by conservation groups and the California attorney general to require San Bernardino County (the largest county in the United States by area) to address climate change in its General Plan update.[73] In broaching the vast realm of local land use plans, these cases portend a major new front in climate change litigation, particularly in states that require environmental impact analysis under a state NEPA.

Global Change Research Act

The Global Change Research Act of 1990 (GCRA)[74] commands the President to create an interagency United States Global Change Research Program to improve understanding of "global change." "Global change" is defined broadly by the GCRA to include all changes in the global environment "that may alter the capacity of the Earth to sustain life." Thus, the statute includes, but goes well beyond, climate change.[75] The Program is to be implemented by a National Global Change Research Plan, with regular assessments that, among other things, evaluate the findings of the Program.

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[73] The attorney general lawsuit is State of California v. County of San Bernardino, No. CIV-SS07-00329 (Cal. Super. Ct. filed April 12, 2007).

[74] 15 U.S.C. §§ 2921-2961.

[75] *See* 15 U.S.C. § 2931(a) (congressional findings suggestive of the act's scope).

In *Center for Biological Diversity v. Brennan*, No. C-06-7061 (N.D. Cal. filed November 14, 2006), environmental groups charge that the latest update of both the Research Plan and the assessment are now overdue. The GCRA demands that revised Research Plans be submitted to the Congress at least every three years,[76] with the last one allegedly having been submitted July 24, 2003. The GCRA further demands that assessments be submitted to the President and Congress not less often than every four years,[77] with the only assessment to date allegedly having been submitted October 31, 2000.

Freedom of Information Act

The Freedom of Information Act (FOIA)[78] states a broad policy that documents in the possession of federal executive branch agencies are to be disclosed to the public upon request, unless covered by a FOIA exemption.

In May, 2006, Citizens for Responsibility and Ethics in Washington (CREW) invoked FOIA to request from the Council on Environmental Quality (CEQ) all of its records relating to the causes of climate change — later negotiated to mean all records from January 20, 2001, to October 26, 2006. Though CEQ produced many documents, CREW sued under FOIA seeking a court order that CEQ release all records responsive to its request. *Citizens for Responsibility and Ethics in Washington v. Council on Environmental Quality*, No. 1:07CV00365 (D.D.C. filed February 20, 2007). In formulating a defense, CEQ is likely not to claim any FOIA exemptions (since it has not so far), but may well point out to the court that CREW's complaint appears to assert informational standing, which the D.C. Circuit has recently repudiated.

This lawsuit parallels highly charged allegations that political appointees at CEQ have edited many of the agency's reports to minimize the danger and human causes of climate change. In July, 2006, the House Committee on Government Reform[79] requested that CEQ provide documents and communications relating to the agency's edits of climate change materials, its efforts to influence the statements of government scientists, its communications with federal agencies and non-governmental parties regarding climate change, and so on.

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[76] 15 U.S.C. § 2934(a).

[77] 15 U.S.C. § 2936.

[78] 5 U.S.C. § 552.

[79] Renamed the House Committee on Oversight and Government Reform early in the 110th Congress.

V. Federal Preemption

This section turns to the opposite side of the litigation equation: suits seeking to *eliminate* regulation (by the states) of GHG emissions. The theory used is federal preemption.

Whether federal law preempts state regulation of GHG emissions appears to arise chiefly in connection with *mobile* sources. The CAA disclaims any intention to preempt state air pollution controls on *stationary* sources.[80] And the Energy Policy and Conservation Act does not set fuel economy standards for other than mobile sources, so it too would be unlikely to preempt state regulation of stationary sources. Concededly, however, there is the possibility of a successful argument that state regulation of stationary-source GHGs might be preempted as contrary to a federal policy of dealing with climate change through international agreements — an argument being pressed now in suits challenging state regulation of mobile-source GHG emissions (see below). The most prominent state enactment against GHG emissions from stationary sources is in California, which so far has not been challenged.[81]

The picture is quite different for mobile sources. The CAA preempts states from adopting any "standard relating to the control of emissions from new motor vehicles ..."[82] and the act defines "emission standard" as certain limits on "emissions of *air pollutants*."[83] The Supreme Court has now held that at least for purposes of mobile sources, "air pollutants" includes GHGs. Thus CAA preemption of state regulation of car and truck GHG emissions seems clear, whether or not EPA proceeds to regulate a particular mobile-source GHG. The only exception is the act's provision allowing EPA, on specified criteria, to waive preemption for California,[84]

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[80] CAA § 116, 42 U.S.C. § 7416.

[81] *See* Global Warming Solutions Act of 2006, A.B. 32, Cal. Health & Safety Code § 38500 et seq. This law requires that GHG emission limits be in effect in California by 2012 to reduce statewide GHG emissions to the 1990 level by 2020. Note, however, that although A.B. 32 applies chiefly to stationary sources, it provides that if the mobile source GHG emission limits imposed by an earlier state enactment are struck down, "alternative regulations" to restrict mobile-source GHG emissions shall be imposed under A.B. 32. As the following paragraphs of the text discuss, this earlier enactment is now the subject of a preemption challenge.

[82] CAA § 209(a), 42 U.S.C. § 7543(a).

[83] CAA § 302(k), 42 U.S.C. 7602(k). Emphasis added.

[84] CAA § 209(b), 42 U.S.C. § 7543(b). No waiver shall be granted, states the CAA, if EPA finds that (1) the state's determination that its standards are at least as protective as the federal ones is arbitrary and capricious, (2) the state does not need the standards to meet "compelling and extraordinary conditions," and (3) the state standards and accompanying enforcement procedures are not consistent with CAA Section 202(a). CAA § 209(b)(1)(A)-(C), 42 U.S.C. § 7543(b)(1)(A)-(C).

and its automatic preemption waiver for nonattainment states with California-identical emission limits.[85]

Preemption suits are pending in each of the three federal judicial circuits containing a state that has adopted GHG controls on vehicles. The first suit, in the Ninth Circuit, harks back to 2002 when the first state statute calling for limits on GHG emissions from cars became law. Assembly Bill 1493[86] instructs the California Air Resources Board (CARB) to adopt regulations that achieve the maximum feasible reduction of GHGs emitted by passenger vehicles and light-duty trucks. Enactment was accompanied by official statements that the law aimed at filling the void left by federal inaction as to regulation of GHG emissions.

The CARB adopted the required regulations in September, 2004. The regulations target CO_2, methane, nitrous oxide, and hydrofluorocarbon emissions, setting "fleet average greenhouse gas exhaust mass emission requirements for passenger car, light-duty truck, and medium-duty passenger vehicle weight classes." The first model year to which the fleet averages apply is 2009. The averages are reduced for each subsequent model year through 2016.

In December 2004, the CARB regulations were challenged by 13 California car dealers plus the Alliance of Automobile Manufacturers in *Central Valley Chrysler Jeep, Inc. v. Witherspoon.*[87] In 2006, the district court in a preliminary ruling[88] refused to dismiss the plaintiffs' preemption arguments — holding that (1) the plaintiffs had stated a claim that the regulations are preempted by the fuel economy standards set under the Energy Policy and Conservation Act, which instructs that states not enforce any rule related to fuel economy standards;[89] (2) the regulations are preempted by the CAA,[90] absent a waiver approved by EPA;[91] and (3) the plaintiffs

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[85] CAA § 177, 42 U.S.C. § 7507. There are now 11 such states: CT, ME, MD, MA, NJ, NY, OR, PA, RI, VT, and WA.

[86] Cal. Heath & Safety Code § 43018.5.

[87] The same day that *Central Valley* was filed, auto and truck dealers and auto manufacturers filed a separate suit against the GHG regulations in state court, alleging violations of state law. Fresno Dodge, Inc. v. California Air Resources Bd., No. 04 CE CG 03498 (Cal. Super. Ct. filed December 7, 2004).

[88] 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

[89] EPCA states: "When an average fuel economy standard prescribed under this act is in effect, a State ... may not adopt ... a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this act." 49 U.S.C. § 32919(a).

[90] CAA § 209(a), 42 U.S.C. § 7543(a). This prohibition on state regulation appears to apply even in the absence of a federal emission standard. Thus, despite EPA's having no vehicle emission standards for CO_2, methane, and hydrofluorocarbons, a state would still be preempted from setting its own emission standard.

[91] CAA § 209(b), 42 U.S.C. § 7543(b). California applied for an EPA waiver on December 21, 2005, but EPA has yet to rule. Since 1975, every California request for a 209(b) waiver has been approved by EPA, but the agency's resistance in the current Bush Administration

(continued...)

had stated a claim that the regulations were preempted as conflicting with federal policy to address climate change through multilateral international agreements. In contrast, two other arguments made by the plaintiffs — that the CARB regulations violate the dormant commerce clause of the Constitution by imposing economic burdens far outweighing any benefits, and offend an antitrust statute by requiring cooperation among otherwise competitive automobile manufacturers in the California new-vehicle market — were rejected on the merits.

On January 16, 2007, the district court stayed further proceedings in the case pending the Supreme Court's decision in *Massachusetts v. EPA*.[92] In the meantime, California is enjoined from enforcing the CARB regulations due to the court's holding as to CAA preemption, unless EPA grants a waiver.

Similar preemption claims to those in California, also made by car dealers and trade associations, are pending in suits challenging the adoption of the California standards by Vermont (Second Circuit) and Rhode Island (First Circuit). In *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse*, No.2:05-CV-302 (D. Vt. filed November 18, 2005), plaintiffs assert the same five legal theories as in the California suit, but limit themselves to challenging the state's CO_2 standards. In a companion suit filed the same day, *Association of International Automobile Manufacturers v. Dalmasse*, No. 2:05-CV-304 (D. Vt. filed November 18, 2005), only the EPCA and CAA preemption theories are advanced, but the suit encompasses all four GHG emissions covered by the regulations (CO_2, methane, nitrous oxide, and hydrofluorocarbons), not just CO_2. These two suits have been consolidated, and the State of New York (which would be bound by any Second Circuit decision on appeal) has intervened on the side of Vermont. Recently, the state's motion to dismiss on ripeness grounds was rejected.[93]

The legal theories presented and the types of emissions covered in the *Dalmasse* litigation are the same, respectively, in two Rhode Island suits — *Lincoln Dodge, Inc. v. Sullivan*, No. 1:06-CV-00070 (D.R.I. filed February 13, 2006); *Association of International Automobile Manufacturers v. Sullivan*, No. 1:06-CV-00069 (D.R.I. filed February 13, 2006).

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[91] (...continued)
to use of mandatory GHG emission controls suggested pre-*Massachusetts* that EPA approval of this latest waiver request was not a foregone conclusion. Shortly after the Supreme Court ruling, EPA announced that it will begin processing of California's waiver request, but stated no deadline for a decision.

[92] 2007 Westlaw 135688. As of this writing, the stay is still in effect, despite the Supreme Court's having ruled.

[93] 2006 Westlaw 3469622.

VI. International Law

Could the United States, as a major GHG emitter that has declined to participate in the Kyoto Protocol, be sued in international forums for the adverse effects of climate change? Gauging the viability of such claims against the United States involves a good deal of guesswork, as they lie on the frontiers of international law. This report, concerned primarily with actually filed claims, notes only a few highlights, taken mostly from what appears to be the most pertinent article in the area.[94] The article suggests that the International Court of Justice (ICJ) might be one forum for resolution of climate change claims, with jurisdiction established through treaties that specifically provide for dispute resolution before the court. A problem with the ICJ approach is that the treaties most likely to be invoked are Friendship, Commerce, and Navigation or similar treaties, which focus on how each party *within its own country* treats the other country's nationals and property. A climate change suit, by contrast, likely would have an extraterritorial focus. Another ICJ possibility would be for the court to render an advisory opinion, at the request of a body authorized under the U.N. Charter to request one.

Other possibilities include voluntary submission of a climate change dispute to any of several international arbitral forums or resort to the specialized dispute resolution systems created under various treaties. An example of the latter, reportedly being actively considered, is a fisheries conservation agreement under the UN Law of the Sea Convention, presumably on the argument that increased ocean temperatures from climate change imperil certain fish stocks.[95]

Some principles that might be applied to a claim alleging GHG-caused injury might be taken from the international law of transboundary pollution. For example, the Restatement (Third) of Foreign Relations Law describes an international law principle under which a nation must "take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control ... are conducted so as not to cause significant injury to the environment of another state ...."[96] Similarly, the *Trail Smelter* arbitration decision, probably the seminal ruling on state liability for transboundary pollution, declared that "[a] State owes at all times a duty to protect other States against injurious acts

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[94] Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 Envtl. L. Rptr. 10185 (2003).

[95] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 34 Int'l Legal Materials 1547. The United States is a party to this agreement and, by reference to the Law of the Sea Convention, it incorporates binding dispute-resolution mechanisms.

[96] Restatement (Third) of Foreign Relations Law § 601(1). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226, 241-242 (July 8, 1996) ("the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment").

by individuals from within its jurisdiction."[97] Of course, as with the domestic common law litigation described in Section III, daunting hurdles confront the claimant in making the link between climate change in general and specific environmental harms, and in apportioning how much of such harms are attributable to the charged party or parties, in this instance the United States.

A widely noted international-law action was filed, unsurprisingly, by a group based in the Arctic, where the temperature rise from climate change is the greatest. In 2005, the Chair of the Inuit Circumpolar Conference, on behalf of herself and all affected Inuit of the arctic regions of the U.S. and Canada, filed a petition against the United States with the Inter-American Commission on Human Rights, the investigative arm of the Organization of American States (OAS)[98]. The petition alleged that the United States, through its failure to restrict its GHG emissions and the resultant climate change, has violated the Inuit's human rights — including their rights to their culture, to property, to the preservation of health, life, and physical integrity, and so on.[99] Inuit culture is described in the petition as "inseparable from the condition of [its] physical surroundings." Generally, the Inter-American Commission on Human Rights is empowered to recommend measures that contribute to human rights protection, request states in urgent cases to adopt specific precautionary measures to avoid serious harm to human rights, or submit cases to the Inter-American Court of Human Rights. The United States, however, has not accepted the jurisdiction of this court, so the Inuit petition sought only to have the Commission prepare a report declaring the responsibilities of the United States and recommending corrective measures.

In 2006, the Inuit petition was rejected, with no reasons given (as is customary for the Commission). However, at the request of petitioners the Commission held a hearing on March 1, 2007 on the generic issue of climate change and human rights. One may speculate that the Commission felt more comfortable with the hearing format than the petition because the former did not single out the United States. Or that the Commission was concerned the petition took it into a realm of global scale, orders of magnitude vaster than the typical human rights petition it receives.

Still pending are five petitions to the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value (World Heritage Committee), part of UNESCO.[100] The petitions request that various designated World Heritage Sites be placed on the List of World Heritage in Danger[101] owing to alleged impacts of climate change. The sites covered by the petitions are Waterton-Glacier International Peace Park (U.S./Canada), Sagarmatha National Park

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[97] Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1938, 1965 (March 11, 1941).

[98] For an eight-page summary of the 176-page petition, go to [http://earthjustice.org/news/documents/12-05/Petition_Summary.pdf].

[99] *See generally* Sara C. Aminzadeh, Note, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 Hastings Int'l & Comp. L. Rev. 231 (2007).

[100] Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 8, signed Nov. 23, 1972, entered into force Dec. 17, 1975, 27 U.S.T. 37.

[101] *Id*. at art.11, par. 4.

(Nepal), Belize Barrier Reef Reserve System (Belize), Huarascan National Park (Peru), and the Great Barrier Reef (Australia).

Only the Waterton-Glacier petition was filed by entities within the United States (12 environmental groups) and involves a natural resource within the United States. As a party to the World Heritage Convention, the United States is obligated to "do all it can ... to the utmost of its own resources and, where appropriate, with any international assistance and cooperation" to protect its cultural and natural heritage.[102]

VII. Comments

Gauging the prospects of the pending climate change lawsuits is a precarious venture; for many of the suits, there is little precedent. Still, it is hard to gainsay that even after the Supreme Court decision in *Massachusetts v. EPA*, plaintiffs pressing the environmental side of the argument (Sections I through IV of this report) face significant hurdles. A court may be reluctant to impose expensive measures to address a global problem on a defendant that is a minor contributor, using statutory provisions or common law principles that were not likely formulated with global problems in mind, against a backdrop of scientific uncertainty as to the precise consequences (if not the general cause) of climate change.[103] This does not stymie NEPA claims, where plaintiffs seek only to have climate change factored into an agency's decision.

As this report makes plain, standing has been a persistent issue — though at least to state plaintiffs, the Supreme Court decision is likely to work a sea change in improving their prospects. As noted earlier, the big question is the extent to which the Supreme Court decision finding standing will be seen by the lower courts to generalize to non-state plaintiffs, other statutory and common law contexts, and injuries (as from weather events) not as clearly attributable to climate change as Massachusetts' loss of shore land.

Causation is not only a component of the threshold standing test but a component of the plaintiff's case on the merits. Several writers have identified proof of causation as a key obstacle to a tort action seeking relief from climate change

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[102] *Id*. at art. 4.

[103] Nowhere is this judicial reluctance to get involved with climate change more evident than in an exchange that took place during the oral argument in *Massachusetts v. EPA* (see Section I of this report). After Justice Scalia suggested that climate change occurs when CO_2 accumulates in the stratosphere, counsel for Massachusetts corrected him, pointing out that CO_2 accumulates in the troposphere. Justice Scalia replied: "Troposphere, whatever. I told you before I'm not a scientist. That's why I don't want to have to deal with global warming, to tell you the truth."

injury.[104] And at the remedy stage, allocation of damages among specific defendants will likely present both factual and legal challenges.

In either the standing or case-in-chief contexts, the climate change issues before the courts reprise an intractable problem in environmental law: imposing liability for harms that are remote in time and place from the pollution sought to be abated, particularly where the pollution comes from multiple sources.[105] Lawmakers of yesteryear encountered this same redistributive conundrum in tackling the problem of acid rain, where pollution cause and effect are separated by hundreds of miles and weeks or months. Imposing liability for harm from exposure to toxic chemicals is of the same ilk: exposure to contamination from multiple sources may result in ill effects manifested only a decade or two later.

Perhaps because of these hurdles under existing law, new directions are now being explored.[106] Within the United States, several Northeast states plus Washington, Oregon, and California have adopted their own GHG emission controls, citing, among other things, inaction at the federal level.[107] It has been reported that some of these states also have explored the idea of emissions trading with Europe.[108] Use of the shareholder proposal process has been suggested as a means of forcing the issue in the corporate world.[109] More loosely, 31 states and two Canadian provinces announced in May 2007 the formation of a Climate Registry to track greenhouse gas emissions from major industries, with independent verification of data. California and the United Kingdom signed an agreement on July 31, 2006, committing both parties to implement market-based mechanisms, to share results from studies to

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[104] Myles R. Allen and Richard Lord, *The Blame Game: Who Will Pay for the Damaging Consequences of Climate Change?*, 432 Nature 551 (December 2004); David A Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003): Eduardo M. Penalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 Nat. Res. J. 563, 569 (1998).

[105] *See generally* Richard J. Lazarus, THE MAKING OF ENVIRONMENTAL LAW ch. 1 (2004).

[106] *See, e.g.*, Kristin Marburg, *Combating the Impacts of Global Warming: A Novel Legal Strategy*, 2001 Colo. J. Int'l L. & Pol'y 171 (2001).

[107] *See, e.g.*, California's A.B. 32, the Global Warming Solutions Act of 2006, *supra* note 81. *See also* Claire Carothers, Note, *United We Stand: The Interstate Commerce Clause as a Tool for Effecting Climate Change*, 41 Ga. L. Rev. 229 (2006).

[108] Congressional Green Sheets Newsroom, December 17, 2004. The same source reports that Rep. Joe Barton (R-Texas), then-chairman of the House Energy and Commerce Committee, said that any international compact involving state governments would have to be approved by Congress and that "we would tend to look at it with a lot of skepticism." Kenneth Colburn, who is helping to coordinate the states' effort, was said to question the need for federal authorization, on the theory that any trans-Atlantic trades would be commercial transactions, not government-to-government.

[109] *See, e.g.*, Sung Ho (Danny) Choi, Note, *It's Getting Hot in Here: The SEC's Regulation of Climate Change Shareholder Proposals Under the Ordinary Business Exception*, 17 Duke Envtl. L. & Pol'y Forum 165 (2006).

quantify the economic impacts of climate change, collaborate on research, etc.[110] Also internationally, this report noted earlier the unsuccessful Inuit petition with the Inter-American Commission on Human Rights[111] and the pending petitions before the World Heritage Committee. Reportedly, the low-lying Pacific nation of Tuvalu threatened to sue the United States and Australia four years ago in the ICJ, but held off for a variety of reasons.[112]

Whether these new paths will yield results for complainants, only time will tell. It is clear, however, that if there is to be a government response to climate change at all, a solution from the political branches is more likely to be comprehensive and fully reflective of societal priorities than the typically narrowly targeted results of litigation.

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[110] United Kingdom and California Announcement on Climate Change and Clean Energy Collaboration.

[111] Andrew C. Revkin, *Eskimos Seek to Recast Global Warming as a Rights Issue*, NY Times, December 15, 2004, at A3.

[112] *See* [http://www.tuvaluislands.com]. Tuvalu alleges that Australia is the biggest per capita producer of GHGs, and that the United States is the biggest single emitter.