

# Climate change and litigation in the US



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Climate change is the most threatening environmental challenge of recent years. Addressing global climate change is a daunting task and one for which to date the US has no focused regulatory response. There are:

- No federal standards for concentrations of greenhouse gases (GHGs) in the air.
- No federal technological standards to constrain GHG emissions from automobiles, power plants, or other sources.
- No federal cap and trade schemes to foster economically efficient reductions of GHG emissions, although regional programmes are being established by a number of states.

This article examines the background to the lack of climate change regulation in the US and the variety of recent litigation focusing on climate change which it has engendered, including:

- Cases based on statutory law, such as the:
  - Clean Air Act;
  - National Environmental Policy Act;
  - Endangered Species Act;
- Challenges under state laws addressing:
  - public utility regulation;
  - cap and trade systems; and
  - securities regulation.
- Common law cases against GHG emitters, including:
  - *Connecticut v American Electric Power*;
  - *Comer v Murphy Oil*;
  - *Native Village of Kivalina v ExxonMobil Corp.*

## BACKGROUND

The lack of focused regulatory response to climate change is a result of a number of factors. In the best of circumstances, it is difficult and time-consuming to reconcile competing interests in Congress and allocate the burdens of a major regulatory scheme in a politically acceptable manner.

Additionally, climate change is a global problem. The US and now China are the largest industrial emitters of GHGs, but other rapidly industrialising nations such as Brazil and India are making ever greater contributions to the GHG load. A solution that would be considered fair to the American economy must, sooner or later, include foreign sources of GHGs. The Bush Administration has come to accept the reality of climate change, but it has been slow to back any mandatory scheme to address it beyond the fuel economy standards which Congress recently enacted which will require more miles per gallon of fuel over time. In 2007, at the G8 Summit, the US announced a willingness to join a mandatory cap and trade plan for a 50% reduction in its GHG emissions by 2050. This commitment is contingent on China and India agreeing to similar reductions. In April, 2008, the President announced a goal for the US of stopping the growth of GHG emissions by 2025, but he did not back any mandatory measures for achieving this objective, despite the fact that Congress was actively debating the establishment for a cap and trade regime for GHG. Despite this movement toward regulation of GHG, the US government remains sensitive to American economic interests and the impact of unilateral action on the American economy.

In recent years, the voices arguing that climate change is not an issue or a problem have diminished so that that even in many of the industries most likely to be affected, there is a belief that programmes to reduce the emissions of GHGs, and eventually the atmospheric load of GHGs, are inevitable. But there is no agreement on how the burdens should be allocated or how inclusive any solution should be.

The public sense of urgency that something should be done has led to a growing number of law suits primarily seeking the future control, reduction, or elimination of GHG emissions, and also, in a few cases, damages for the alleged effects of past emissions.

The more ambitious the scope of the lawsuit, the less it is suited to resolution in a court and the greater the need for a legislative response. This suggests that the courts are not particularly fit to lead the country to an acceptable solution on climate change issues.

However, there are two additional rationales for these lawsuits: they may push the legislative process forward, and they can place burdens on executive agencies or on the defendants which are likely to make these parties more active in pressing for legislative solutions.

## CASES BASED ON STATUTORY LAW

### Clean Air Act

**Automobiles:** *Massachusetts v EPA*. In 1999, a coalition of states and NGOs petitioned the Environmental Protection Agency (EPA)

to issue regulations under the Clean Air Act (CAA) to reduce GHG emissions from new automobiles. EPA denied the petition and the plaintiffs (claimants) lost their appeal. The case was taken by the US Supreme Court (*Massachusetts v EPA*, 127 S.Ct. 1438 U.S.(2007)).

In April 2007, by a five to four vote, the Supreme Court ruled in favour of the states and NGOs and remanded the matter back to the EPA. In doing so, the Supreme Court took the position that global climate change is real, caused by human industrial activities, and that, if unabated, could be ruinous.

Massachusetts not only had to convince the Supreme Court that its interpretation of the CAA was correct, but that it had legal standing to bring the case, that is:

- Massachusetts had been harmed by climate change;
- The relief it was seeking would address that harm; and
- EPA's inaction had contributed to that harm.

EPA argued that climate change had not yet harmed Massachusetts and that, even if it had, regulating new automobiles would not alleviate the injury. The Court rejected both contentions. The Court left no doubt that it believed climate change caused by humans to be real, that its adverse effects are already evident and that "this only hints at the environmental damage yet to come".

The Court also did not agree with EPA that incremental steps to address GHG emissions were insignificant. EPA argued that emissions from new automobiles constituted only an inconsequential portion of world GHG emissions and would quickly be offset by rising contributions from China and India. The Court reasoned that even if regulation of new automobiles does not alleviate global climate change, the failure to do so at least "contributes" to future environmental damage.

On the underlying merits of the dispute regarding whether the CAA allowed or required EPA to regulate carbon dioxide emissions from new cars, the Court noted that section 202 of the CAA provides that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in [its] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Therefore, the central statutory question was whether carbon dioxide qualifies as an air pollutant under the Act. The CAA's definition of air pollutant is broad and circular: "any air pollution agent . . . substance or matter which is emitted into or otherwise enters the ambient air" (42 U.S.C. § 7521(a)(1)). On its face, this would seem to include carbon dioxide.

The history of the CAA was not conclusive of Congress's intent. When Congress wrote the law, it addressed climate change by providing funds for research and directed EPA to collect information on carbon dioxide emissions from power plants. The CAA, however, includes no specific regulatory programme to address carbon dioxide. A 1998 memorandum from EPA's general counsel determined that EPA could treat carbon dioxide in the same manner as conventional pollutants under the CAA, but, at that time, EPA chose not to do so. The new Bush administration re-

jected that interpretation. EPA now reasoned that the only way to reduce carbon dioxide emissions from automobiles was to require greater fuel economy - an authority provided exclusively to the Department of Transportation.

EPA noted that Congress had explicitly rejected a requirement to reduce GHG emissions from automobiles in the Clean Air Act Amendments in 1990. Even if it had the power to regulate GHGs, EPA believed that doing so without a clear mandate from Congress or the assent of the President would undermine foreign policy efforts to convince developing countries to reduce their emissions, and the domestic preference for cutting GHGs through voluntary efforts due to economic concerns. EPA offered that, since the question of regulating an air pollutant is left to its discretion, it would rather wait for Congress or the President to make this decision, given scientific and economic uncertainties, Congress's 1995 rejection of the Kyoto Protocol, and the potential for an inefficient, piecemeal approach to addressing the climate change issue.

The Supreme Court majority had little trouble finding carbon dioxide to be an air pollutant. It stated that the CAA unambiguously defined "all airborne compounds of whatever stripe" as air pollutants and that "there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter". Nor was the Department of Transportation's exclusive power to regulate automobile fuel economy a hindrance, as "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." Lastly, the Court rejected EPA's argument that it could consider non-statutory factors, such as foreign or economic policy, for avoiding GHG regulation. EPA's "judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare'". In short, the Court held that if EPA determines that GHG emissions threaten the public health or welfare, then it is obligated to regulate them.

In response to the Supreme Court's *Massachusetts* decision, President Bush signed an executive order requiring EPA to regulate GHG emissions from new automobiles, non-road vehicles and non-road engines. In creating these regulations, the EPA is free to consider changes in motor vehicle fuel content or require the use of alternative fuels (72 Fed. Reg. 27717 (16 May 2007)). But a year after the Supreme Court ruling in *Massachusetts*, EPA had not yet made the central judgment which the case required: whether GHG emissions contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare" (42 U.S.C. Sec. 7521(a)). As a result, in April, 2008, 18 states and a number of environmental groups petitioned the DC Circuit for a writ of mandamus to compel EPA to make that judgment quickly (*Massachusetts v. U.S. EPA*, No. 03-1361 (D.C. Cir.)).

**Stationary sources: *Coke Oven Env't Taskforce v EPA*.** In 2005, a number of States, cities, and NGOs petitioned the EPA to require GHG emission controls for stationary sources, such as power plants and factories, under section 111 of the CAA (42 U.S.C. § 7411). This section requires the EPA to establish performance standards to limit air pollutant emissions from new stationary sources. In denying this petition, the EPA again

claimed a lack of authority to regulate on the premise that carbon dioxide is not an air pollutant under the CAA. In April 2006, the States and NGOs sued the Agency in the DC Circuit (*Coke Oven Environmental Taskforce v EPA, No. 06-1131 (D.C. Cir.)*). The case has not yet been briefed or argued, but is likely to present a question parallel to that in the *Massachusetts* case: whether carbon dioxide or other GHGs are air pollutants under the CAA for stationary sources which must be regulated under the Act. After the US Supreme Court issued its decision in *Massachusetts*, the D.C. Circuit remanded the case for EPA to determine how the decision impacts regulation under section 111 of the CAA.

In a parallel case, on 30 April 2008, EPA declined to regulate GHG emissions from petroleum refineries, taking the position that section 111 of the CAA does not require EPA to regulate all pollutants emitted by sources subject to that provision of the Act (presently available only on EPA's website). The Administrator has announced that EPA will issue an advance notice of proposed rulemaking which will provide an opportunity to comment on the best method of comprehensive regulation of GHG. EPA views such a rule-making as the preferred approach to GHG regulation (*Letter of Stephen L. Johnson to John Dingell, Joe Barton, 3/27/08*).

**Challenges to power plant permits.** Whenever a company builds a fossil fuel power plant, it must first receive a permit under CAA provisions addressing "new source review" (NSR) and "prevention of significant deterioration" (PSD) (*see 42 U.S.C. §§ 7475, 7502, 7503*). The permitting scheme requires new power plants to implement controls for traditional, regulated pollutants specified under the CAA, such as sulphur dioxide or particulate matter.

Several challenges, brought by NGOs against EPA and state environmental agencies (which may administer the NSR and PSD requirements), claim that the CAA requires power plants to install control technology that reduces or eliminates carbon dioxide emissions. Despite the fact that carbon dioxide is not currently on the CAA's list of power plant air pollutants, the NGOs claim that a CAA requirement for power plants to monitor and report on carbon dioxide emissions, together with the Supreme Court's ruling in the *Massachusetts* case, is enough to make it a regulated pollutant under the CAA (*see Pub. L. 101-549 § 821 (1990)*), requiring monitoring of carbon dioxide emissions from all Title V sources and reporting to EPA). The CAA requires the NSR/PSD permitting agency to set pollutant emission levels based on the Best Available Control Technology (BACT) for each regulated pollutant.

A common claim in these cases is that permitting agencies asked to license a coal-burning power plant must require BACT for carbon dioxide emissions and must require the construction of an integrated gasification combined cycle (IGCC) plant, instead of a traditional pulverised coal plant, as BACT. IGCC plants can achieve lower nitrogen oxide, mercury and sulphur dioxide emissions than conventional coal plants, and they also release less carbon dioxide. IGCC plants are also considered "capture ready", in that it will be easier and cheaper to incorporate carbon capture and sequestration technology if and when it is perfected in the future. Demanding IGCC as BACT for conventional pollutants would make it easier for permitting agencies to impose capture

and sequestration requirements on utilities in the future while obtaining lower carbon dioxide emissions now, without pressing the more controversial argument that the CAA presently mandates carbon dioxide emission limits.

Utilities are wary of IGCC technology for several reasons. Capital costs are much higher than for pulverised coal plants and early pilot projects showed significant reliability problems, especially when operated more than 100 metres above sea level. Probably neither of these challenges is insurmountable, but they are not yet solved. The Department of Energy and various states are subsidising projects to achieve technological advances and several major companies are investing heavily in eliminating operational problems.

Where utilities are currently proposing a handful of IGCC units, they have encountered an unexpected obstacle: the same NGOs that demanded IGCC be considered as BACT are moving to block the construction of those plants. For instance, in July, 2007, the Sierra Club appealed the approval of an Illinois IGCC permit to the EPA's Environmental Appeals Board (EAB) (*In re: Christian County Generation, LLC, PSD Appeal No. 07-01*). The challenge claims that *Massachusetts v EPA* requires Illinois to impose BACT emission limits for carbon dioxide. Sierra Club claims that existing regulations for acid rain and Illinois state law indirectly regulate carbon dioxide. Even without formal regulation, the group argues, permitting agencies must consider the "collateral impacts" of their permitting decisions, which would include potential contribution to climate change. The EAB denied the *Christian County Generation* appeal on procedural grounds, but the EAB is currently considering another appeal raising the same arguments (*In re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03*).

**State GHG regulations for automobiles.** In an attempt to do for itself what the EPA was unwilling to do under federal law, California passed a law requiring the California Air Resources Board (CARB), the state's primary air pollution agency, to issue regulations to reduce GHG emissions from new automobiles. In December 2005, California requested a CAA waiver from the EPA, allowing it to implement these regulations (*see 42 U.S.C. § 7543(b)*), allowing states to request that EPA waive federal regulation of new autos and allow the state to impose emission standards that are at least as protective of public health and welfare as federal standards).

General Motors, DaimlerChrysler and a consortium of California auto dealers sued CARB to vacate the regulations, which would impose the new standards beginning with 2009 model year cars (*Central Valley Chrysler-Jeep, Inc. v Witherspoon, 529 F. Supp. 2d 1151 (E.D. Cal. 2007)*). The auto makers and dealers argue that the regulations are pre-empted by the CAA and federal laws setting fuel economy standards.

In November 2005, a group of Vermont auto dealers and manufacturers filed suit to invalidate the Vermont Agency of Natural Resources' adoption of California's GHG emission standards for new automobiles (*Green Mountain Chrysler Plymouth Dodge Jeep v Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007)*) (*see 42 U.S.C. § 7505*, allowing states to adopt California automotive emission standards so long as California has obtained a waiver from the

EPA). The plaintiffs claim that, since California's waiver request, filed in December 2005, is still under EPA review, adoption of California's GHG automobile emission standards is invalid and pre-empted by the CAA, the Energy Policy and Conservation Act of 1975 (EPCA). The state of New York and several NGOs intervened on behalf of Vermont.

In September 2007, after a 16-day trial, the Court rejected the dealers' and manufacturers' arguments. It held that, in *Massachusetts*, "the Supreme Court found overlap but no conflict between EPA's authority to regulate greenhouse gases from new motor vehicles" and the NHTSA's authority under EPCA to set fuel economy standards (508 F. Supp. 2d at 344). The Court held that, should California be given a waiver by EPA, the CAA allowed any other state to adopt those standards (42 U.S.C. § 7507). The case is now on appeal to the Second Circuit.

In December, 2007, the *Central Vally Chrysler-Jeep, Inc.* court filed its opinion reaching the same conclusion. That case is now on appeal to the Ninth Circuit.

On 19 December 2007, just days after the *Central Valley Chrysler-Jeep* decision, EPA Administrator Stephen Johnson issued a letter to California Governor Arnold Schwarzenegger informing him that EPA would deny California's waiver request. In March 2008, EPA published its denial of the waiver request, which states that section 209(b)(1)(B) of the CAA (42 U.S.C. § 7543(b)(1)(B)) only allows EPA to grant California a waiver from national standards for local or regional air quality problems.

The draft states that California has a number of unusual geographic features, wind patterns and temperature inversions that lead to automobile emissions being highly concentrated in metropolitan areas, and that Congress intended the waiver to allow California to have alternate standards because national standards did not account for California's geography. But global warming is an international problem that is not exacerbated by California's geography and climatic conditions. The Administrator also defended the denial by claiming that new federal fuel economy standards are a uniform, national solution that will be as effective as California's GHG regulations.

Governor Schwarzenegger and Attorney General Jerry Brown have filed suit to overturn the decision which they claim is final (*California v. EPA*, No. 08-70011 (9th Cir.)). Other states, 13 of which are waiting to adopt the California GHG standards, are expected to join the suit.

### National Environmental Policy Act

The National Environmental Policy Act (NEPA) is also being used in an effort to reduce or prevent GHG emissions. NEPA requires government agencies to:

- Assess the environmental impacts of their actions (taking a "hard look" at environmental effects).
- Make that assessment publicly available for review and comment.
- Undertake their major actions appropriately.

In 2005, NGOs and cities in California and Colorado sued the Overseas Private Investment Corporation (OPIC), a government-owned company that insures and finances projects in developing countries, and the Export-Import Bank of the United States (Ex-Im), a government-owned company which finances exports from the US through credit insurance and guarantees, alleging that they violated NEPA (*Friends of the Earth v Watson*, Civ. 2005 WL 2035596 (N.D. Cal.)).

One or both of these companies supported a series of pipeline, oil field or power plant projects outside the US. The plaintiffs claimed that OPIC and Ex-Im did not consider how the disputed projects impacted global climate change. While OPIC and Ex-Im argued that it is the actions of third-party governments and companies that would potentially emit GHGs, they admitted that, if these GHG emissions were known to them, they might not have extended financing and insurance. In March 2007, the court held that not all of the projects involved categorically constitute major federal agency actions subject to NEPA review. The decision is on appeal.

In July 2007, NGOs similarly claimed that the Rural Utilities Service (RUS), a part of the Department of Agriculture which lends money and guarantees loans to private utilities to build power plants, had violated NEPA by making loans for the development of coal-fired power plants without providing the requisite "hard look" at GHG emissions (*Montana Environmental Information Network v Johanns*, Civ. No. 07-1311 (D.D.C.)). The case focuses on the GHG emissions of one project in particular, the proposed Highwood Generating Station in Montana. It also charges that RUS also must consider "the incremental impact of the action, when added to other past, present and reasonably foreseeable future" sources of GHG emissions, regardless of whether those emission sources are created with federal aid or solely by private entities. To succeed, however, the NGOs must show that the Highwood Station will not be constructed without federal funding.

Recently, another NGO, Appalachian Voices, sued the Department of Energy and the Department of the Treasury, claiming that their approval of about US\$1 billion (about EUR643 million) in tax credits for coal projects using advanced technology such as IGCC or gasification, as authorised in the Energy Policy Act of 2005, required review under NEPA of the environmental impact not only of coal extraction and transportation, but also eventual GHG production by coal-burning projects (*Appalachian Voices v. Bodman*, Civ. No. 08-00380 (D.D.C.)).

### Endangered Species Act

On 10 March 2008, NGOs sued the Department of Interior demanding that it designate the polar bear as an endangered species because global warming and the consequent changes to its Arctic habitat is putting the polar bear on a path to extinction (*Center for Biological Diversity v. Kempthorne*, Civ. No. 08-1339 (N.D. Cal.)). According to the suit, the Department of Interior issued a proposed rule to list the polar bear as a threatened species under the Endangered Species Act but did not issue a final listing determination within one year, as required by the Act. The Court ordered the Department of Interior to take action on the listing by 15 May 2008; on 13 May 2008, the Department of Interior



listed the polar bear as a threatened species (*Department of Interior, Determination of Threatened Status for the Polar Bear (Ursus Maritimus) Throughout Its Range, available on the Department of Interior website (www.doi.gov)*).

Since the Endangered Species Act bars the “taking” of an endangered species without a permit, including the degradation of a species’ habitat, the case implicitly claims that any entity emitting GHGs in the US will be in violation of the Act. This would provide a basis to challenge federal actions that result in or fund GHG emissions, such as approval of railroad lines by the Surface Transportation Board or grants of funds from the Department of Energy.

## CHALLENGES UNDER STATE LAWS

### Public utilities commissions

NGOs are also intervening in state public utility commission proceedings to pursue their climate change agenda. When a vertically integrated electric utility proposes to build a new power plant, state public utility commissions typically determine whether the plant is needed and, if so, whether it can produce electricity at a reasonable rate for the consumers.

In these proceedings, NGOs make two arguments. First, they argue that a proposed coal-fired power plant is not needed and that all necessary power can be gained from renewable energy sources or programmes to reduce electricity demand. Second, they assert that the proposed power plant will be too expensive because the plant will be responsible for future carbon taxes, the purchase of future emission allowances, installation of expensive retrofit carbon capture and sequestration technology, and civil damages for catastrophic impacts of climate change.

Several NGOs have opposed proposed IGCC plants before the public utility commissions including those of Indiana and Minnesota. They argue that the technology is too expensive, unreliable, and not qualified as an Innovative Energy Project (therefore disqualifying the projects from receiving government subsidies). They further argue that IGCC plants should be prohibited in favour of renewable energy sources, natural gas combined cycle turbines and programmes that reduce demand for energy (*Joint Petition and Application of PSI Energy, Inc. Requesting a Certificate of Public Convenience and Necessity, Cause No. 43114* (Indiana Utility Regulatory Commission); *Petition for Approval of Power Purchase Agreement, Determination That Clean Energy Technology Is Likely To Be a Least-Cost Resource and Establishment of the CET Minimum, No. 05-1993* (Minnesota Public Utilities Commission)).

The NGOs argued to the Indiana Utility Regulatory Commission that “it is irresponsible to increase baseline carbon emissions on the theory that carbon emissions will be able to be reduced in the future if the technology is developed . . . .” This is a turnaround from previous NGO arguments to state environmental agencies that carbon sequestration and capture technology is on the cusp of realisation, will not be prohibitively expensive, and will be mandated in the near future.

Raising GHG emissions issues in state public utility commission permitting proceedings is a recent development and the early

results are mixed. The NGOs have yet to prevail before a state environmental agency or public utility commission, but they continue to file appeals in state and federal courts and with the EPA’s Appeals Board (for example, *In re Christian County Generating LLC (PSD Appeal No. 07-01 (EAB))*; *Dean v Kansas Department of Health & Environment (Civ. No. 07-706* (Shawnee Co., KS Dist. Ct.)) and *CleanCOALition v TXU Power (Civ. No. 06-355 (W.D. Tex.)*, (court granted motion to dismiss; plaintiff filed notice of appeal in May 2007).

The threat of these suits has had some impact. In July 2006, Springfield City Water Light and Power, a utility owned by the City of Springfield, Illinois, settled with the Sierra Club. Under the agreement, Springfield can build its new power plant if it (*Press Release, Sierra Club, Springfield Create Groundbreaking Clean Energy Plan (17 November 2006)* available at [www.illinois.sierraclub.org/news/061117pr.htm](http://www.illinois.sierraclub.org/news/061117pr.htm)):

- Closes an older power plant.
- Takes measures to increase energy efficiency (thereby reducing demand for electricity).
- Invests substantial amounts in wind turbine generators.
- Agrees to meet Kyoto Protocol terms requiring the city to reduce its 2005 carbon dioxide levels by 25% by 2012.

NGOs hailed these as model settlement terms for challenges to power plant construction and have settled other suits on similar terms (*Press Release, Environmental, Community Groups Announce Important Energy Agreement with Major Utility (20 March 2007)* available at [www.sierraclub.org/pressroom/releases/pr2007-03-20.asp](http://www.sierraclub.org/pressroom/releases/pr2007-03-20.asp)).

### Future challenges to cap and trade systems

In recent comments submitted in response to a California administrative law judge’s review of recommendations on how to design California’s GHG cap-and-trade system, some power companies have argued that California’s proposed system conflicts with the US Constitution, the CAA, and the Federal Power Act (*Order Instituting Rulemaking to Implement the Commission’s Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies, Docket No. 07-OIIP-01*).

California’s proposed cap and trade system would require the “first sellers” of electricity into the state to comply with GHG caps and potentially purchase emission allocations through an auction. Therefore, this provision potentially puts non-California power companies and brokers under the requirements of California law. The power companies argue that:

- The system would violate the CAA, which prohibits states from directly regulating out-of-state sources.
- Under the Federal Power Act the federal government has pre-empted regulation of the interstate transmission and sale of electricity.

As a result, California, if it wants to curb GHG emissions from neighbouring state power plants, would be restricted to filing its

own comments and to advocating GHG controls during permit proceedings in the neighbouring state (for example, *PacifiCorp's Response to Administrative Law Judge's Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report* (filed 6 August 2007)).

These legal arguments against California's proposed cap and trade system could also impact similar plans developed by a group of north-eastern states (the Regional Greenhouse Gas Initiative (RGGI)) and a consortium of western states and Canadian provinces (the Western Climate Initiative).

### State securities laws

In September 2007, the New York Attorney General issued subpoenas to five utilities planning to build coal-fired power plants. The subpoenas were issued under the Martin Act, a state securities law, as part of an investigation to determine whether the utilities have properly disclosed the economic risks of these plants including new or likely regulatory initiatives to control carbon dioxide emissions (*New York Times* at 23 (16 September 2007)). This initiative parallels efforts by activist shareholders who have been filing petitions with companies seeking similar information.

## COMMON LAW CASES AGAINST GHG EMITTERS

### Connecticut v American Electric Power

In 2004, a group of states and the city of New York sued six companies that own and operate coal-fired power plants, alleging that they are "the largest emitters of carbon dioxide in the United States and are among the largest in the world". The states claimed that GHG emissions from electric power generation were a public nuisance that contributed to climate change. They sought an injunction to reduce over time the defendants' carbon dioxide emissions.

In September 2005, the district court dismissed the complaint (*Connecticut v American Electric Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005)). The judge held that the central issue of whether and how to regulate GHG emissions was a political question, and therefore inappropriate for judicial determination. There are six benchmarks for deciding when a case presents a non-judicial political question, including:

- The case involves a textually demonstrable constitutional commitment of the issue to a political branch of government.
- There is no judicially discoverable and manageable standard to resolve the suit.
- It is impossible to decide the case without an initial policy determination of a kind clearly left to non-judicial discretion.

The court found that Connecticut's case lacked judicially discoverable and manageable standards and required the court to make an initial policy determination regarding energy policy. Further, the court risked embarrassment by having the judiciary branch break with the Congress and President on the question of climate change and the implicated issues of energy production, economic impacts, and foreign policy.

To support her holding, the judge recounted the history of climate change debate in Congress which had resulted in:

- Laws requiring studies and data collection on climate change.
- International negotiations.
- Repeated Congressional directives not to join the Kyoto Protocol or implement its terms until developing countries restrict their GHG emissions.

The judge also noted that President Bush opposed mandatory GHG emission regulations and used this position as leverage when negotiating with developing countries. The judge dismissed the case, finding that the states presented the court, not with a simple nuisance case, but with a political question involving high policy issues of economics, international relations and science, whose resolution was not appropriate for an unelected judge without scientific or economic expertise. The states appealed the decision, which was argued in 2006 but has not been decided by the Second Circuit.

### Comer v Murphy Oil

In September 2005, individuals whose property was damaged by Hurricane Katrina in August 2005 brought a class action suit against various oil, power, chemical and coal mining companies (*Comer v. Murphy Oil*, No. 1:05-CV 00436 LTS-RHW (S.D. Miss)). The plaintiffs alleged that the collective emissions of methane and carbon dioxide through mining, drilling, refining and combustion activities increased the frequency and intensity of hurricanes. Therefore these emissions, they claimed, made the damage of Hurricane Katrina "the direct and proximate result of the defendants' greenhouse gas emissions". The plaintiff class's principal claims included:

- **Nuisance.** Defendants' emissions of GHGs were alleged to be wrongful and unreasonable uses of the defendants' property that created a public nuisance resulting in the lost use and enjoyment of private property, public beaches and natural resources.
- **Trespass.** The defendants' actions allegedly caused saltwater, debris, sediment and hazardous materials, deposited by Hurricane Katrina, to enter the plaintiffs' property.
- **Negligence.** By failing to control GHGs, the defendants' negligently conducted their businesses in a way that endangered the public.

The defendants' motion to dismiss led with the political question argument which had prevailed in *Connecticut v American Electric Power* as well as in a nuisance case California had brought against auto manufacturers for the contribution of cars and trucks to global warming (*People of the State of California ex rel. Lochyer v. General Motors Corp.*, Civ. No. 06-05755, 2007 WL 2726871 (N.D. Cal.) (on appeal to the 9th Circuit)). Although the plaintiffs' were asking for monetary damages instead of an injunction limiting future emissions, defendants argued that climate change should not be addressed by the courts: "In suing the [defendants] under the guise of 'nuisance,' 'trespass,' and 'negligence,'

plaintiffs effectively ask the Court to rule on our society's choices about use of fossil fuels for energy, and more generally to decide the energy policy of the United States Government." Defendants also claimed that a finding of liability would conflict with federal laws regulating the defendants' industries and the government's foreign policy.

In August 2007, the district court dismissed the case, without a written opinion, on the grounds of lack of standing and the political question doctrine. The case is on appeal to the Fifth Circuit.

#### **Native Village of Kivalina v ExxonMobil Corporation**

On 26 February 2008, an American Indian tribe in Alaska and the Native Village of Kivalina, filed suit against 23 oil, coal and power companies, alleging that their GHG emissions constitute a common law nuisance (*Native Village of Kivalina v. ExxonMobil Corp., Civ. No. 08-2095 (N.D. Cal.)*). They allege that these emissions, in combination with historic global emissions of GHGs, have resulted in global warming which has caused the loss of sea ice and flooding and erosion from storms so severe that the tribe must now relocate its village. The plaintiffs demand damages for all future expenditures the village may incur. Motions to dismiss are scheduled to be filed in July 2008.

The increase in climate change litigation in the US reflects the growing consensus that climate change is a real and serious issue that must be addressed. Proponents of projects and major emitters of GHG can expect future challenges. At the same time, the day seems to be rapidly approaching when Congress will enact a programme to address GHG emissions. However, what that programme will look like and when it will be enacted remain uncertain.

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