



## ENVIRONMENTAL LAW

BY MICHAEL B. GERRARD

### *Survey of Climate Change Litigation*

Approximately 35 lawsuits have been filed in the United States concerning global climate change, together with several administrative proceedings and officially threatened actions. About half of them have led to judicial decisions, and several of those are under appeal; most of the rest are pending.

Much attention has deservedly gone to the U.S. Supreme Court's decision in *Massachusetts v. the EPA*, but that is only the tip of the figurative iceberg; and unlike most of the real ones, it is growing rather than melting.

This article surveys U.S. climate change litigation. The lawsuits can be broadly divided between those raising statutory claims and (a far smaller group) common-law claims. There is also a small third category of public international law claims.

#### **Clean Air Act**

Some statutory claims aim to force government action. We start with the Clean Air Act cases, beginning of course with *Massachusetts v. EPA*.<sup>1</sup> Because it has been so exhaustively covered elsewhere, it will be treated only briefly here. By a 5-4 vote, the Supreme Court ruled on April 2, 2007 that *Massachusetts* had standing to bring the suit, which was the most hotly contested issue in the case. The Court said that petitioners' uncontested affidavits had shown that the rise in sea levels associated with global warming has already harmed and will continue to harm *Massachusetts*. The Court said that though a decision by the Environmental Protection Agency (the EPA) to regulate greenhouse gas (GHG) emissions from new motor vehicles might have only a small benefit to the *Massachusetts* coastline, that is enough to confer standing.

The Court then found that the Clean Air Act authorizes the EPA to regulate greenhouse gases (GHGs) from new motor vehicles. The Court remanded the case to the EPA to consider whether GHGs endanger public health or welfare, and therefore should be regulated. The EPA has begun the formal process of considering this finding, but its decision appears to be at least months away.

*Massachusetts* concerned mobile sources of air pollution (i.e., motor vehicles). A parallel litigation



concerns the EPA's authority to regulate stationary sources (such as factories and power plants). These cases, *Coke Oven Environmental Task Force v. EPA* and *New York v. EPA*, have been consolidated, and the EPA consented to their remand for further consideration in view of *Massachusetts*.

#### **Other Statutes**

Environmental groups are using a broad array of other statutes to attempt to make the federal government to take action.

• *Endangered Species Act*—*Natural Resources Defense Council v. Kempthorne*<sup>2</sup> concerns a large water diversion project in California. One of the affected areas is inhabited by a fish called the Delta smelt, whose population has declined significantly. The U.S. Fish & Wildlife Service (FWS) issued a biological opinion about the project's effect on the Delta smelt and other species. The FWS assumed that the hydrology of the water bodies affected by the project will follow historical patterns for the next 20 years. However, it appears that climate change will produce earlier flows, more floods, and drier summers. The court found that it was arbitrary and capricious for the FWS to ignore this evidence.

The Center for Biological Diversity (CBD) petitioned and then sued the FWS to list the polar bear as an endangered species. Under a settlement agreement, on Jan. 9, 2007, the FWS proposed listing the polar bear as a threatened species. Its final decision is due by Jan. 9, 2008. Under another settlement with CBD, the FWS is considering listing several species of penguins.

• *Clean Water Act*—The CBD filed petitions with eight states in 2007 asking them to declare

their coastal waters "impaired" by carbon dioxide emissions under the Clean Water Act. The aim is to force states to develop a water pollution standard for carbon dioxide (which turns waters acidic) under the CWA's nonpoint source provisions, and to limit emissions to achieve that standard.

• *Global Change Research Act*—This 1990 enactment required a federal scientific body to prepare periodic scientific assessments of the effects of global climate change, and to make research recommendations. Several environmental groups, led again by the CBD, brought suit. In August 2007, a federal district court found that the federal defendants had failed to file the required reports and ordered them to do so.<sup>3</sup>

• *Freedom of Information Act*—Controversy surrounds whether officials of the Council on Environmental Quality (CEQ), a unit of the Executive Office of the President, edited government reports to downplay the human impact on the climate. Though CEQ has released many documents about this issue pursuant to the Freedom of Information Act, a suit has been brought seeking the release of still more documents. The case is pending in federal district court in Washington, D.C.<sup>4</sup>

#### **Stopping Government Action: NEPA**

The above suits are aimed at forcing government to act. Suits in the next category seek to stop government from acting.

Several of these cases concern the National Environmental Policy Act (NEPA), which requires the preparation of an environmental impact statement (EIS) for major federal actions that may significantly affect the human environment. These suits are typically brought when the government has made a decision that the plaintiffs seek to overturn. The first NEPA decision on climate change was *City of Los Angeles v. National Highway Traffic Safety Administration*.<sup>5</sup> It concerned the setting of the Corporate Average Fuel Economy (CAFE) standard. The complaint alleged that a lower standard would worsen global warming. The court found that plaintiffs had standing to bring the lawsuit (itself a significant holding), but that the one-mile per gallon change at issue was not so significant as to require an EIS.

The next decision was *Border Power Plant Working Group v. Department of Energy*,<sup>6</sup> a challenge to the construction of transmission lines to carry electricity from new power plants in Mexico to users in southern California. The court found in 2003 that carbon dioxide emissions should have been analyzed under

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NEPA. The same year, the U.S. Court of Appeals for the Eighth Circuit considered the construction of a rail line to bring coal from mines in Wyoming to power plants in Minnesota and South Dakota. The court found that the EIS should have considered the air emissions (including carbon dioxide) from the power plants.<sup>7</sup> The agency went back and supplemented the EIS, adding a cursory discussion of climate change impacts; when that new document was challenged, the court found it to be sufficient.<sup>8</sup>

In another case, plaintiffs have won several procedural motions. *Friends of the Earth, Inc. v. Mosbacher* concerns the actions of the Overseas Private Investment Corp. and the Export-Import Bank in financing several energy projects abroad. Plaintiffs said these projects would generate GHGs that would affect the climate in the United States, and defendants should have analyzed the projects under NEPA. The U.S. District Court for the Northern District of California ruled that the case should go forward. It found that, because domestic effects were alleged and the relevant decisions were made in the United States, the case did not fail for alleging only extraterritorial impacts.<sup>9</sup> The district court subsequently certified several key issues in the case for interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit.

Another NEPA case was argued in the Ninth Circuit on May 14, 2007. It concerns whether the federal government ignored global warming when it set national gas-mileage standards for SUVs and pickup trucks.<sup>10</sup>

On July 20, 2007, Montana environmental groups brought a NEPA challenge to the financing of coal-fired power plants by the Rural Electrification Service, a unit of the U.S. Department of Agriculture.<sup>11</sup>

Fifteen states have their own environmental impact review laws similar to NEPA. Massachusetts authorities recently announced that some EISs under their law must consider GHGs, and New York is considering a similar rule. There is no such rule in California, but several suits have been brought to try to force such analysis under the California Environmental Quality Act (CEQA). Most significantly, the attorney general of California, Bill Lockyer, sued the county of San Bernardino. The lawsuit was so controversial that critics held up passage of the state budget hoping to obtain a prohibition on CEQA climate litigation; they did obtain a limited and temporary ban on certain kinds of this litigation, and also a mandate for guidelines on climate analysis under CEQA. In August 2007, Mr. Lockyer's successor, Edmund G. Brown Jr., settled that case under terms that require the county to develop an inventory of GHG emissions related to land-use decisions and county operations, set emissions reduction goals, and adopt mitigation measures. Then, on Sept. 10, 2007, Mr. Brown settled another CEQA dispute by securing the agreement of ConocoPhillips to offset GHG emissions caused by the expansion of its oil refinery in Contra Costa County.

## Regulating Private Conduct

Some litigants are using environmental statutes to try to regulate private conduct directly rather than by suing the government.

Environmental groups sued Owens Corning Corp. for starting to build a manufacturing plant in Oregon with the potential to emit a GHG known as HCFC-142b without obtaining a required Clean Air Act permit. The court ruled that plaintiffs had standing

to sue.<sup>12</sup> A settlement was then reached under which the company pledged not to use HCFC-142b, and to pay for certain environmental projects.

Ratepayers in Seattle sued an electric utility challenging its payments to public and private entities to offset its GHG emissions. The Washington Supreme Court held such payments should not be borne by ratepayers.<sup>13</sup>

On Sept. 14, 2007, New York Attorney General Andrew Cuomo issued subpoenas to five electric utility companies as part of an investigation into whether they adequately disclosed in their securities filings the risk that anticipated carbon regulation poses to their financial performance. Four days later, a coalition led by Environmental Defense petitioned the Securities and Exchange Commission to issue guidance clarifying that securities filings must disclose the risks posed by climate regulation and climate change.

## Industry Lawsuits

Some suits have been brought by industries to fight regulation of GHGs. In particular, while authority to set emissions standards for motor vehicles ordinarily resides with the EPA, the Clean Air Act allows California to promulgate its own if the EPA grants a waiver. The statute also allows other states to adopt California's standard. California has indeed adopted its own carbon dioxide standards for motor vehicles, and 18 other states have followed suit or are in the process of doing so. All told, these states constitute about half of the domestic auto market.

The automobile industry has brought suits challenging several of these state actions. The case brought against Vermont went to trial, and on Sept. 12, 2007, the court issued a 224-page ruling dismissing the suit in its entirety. The court found that the environmental evidence about the adverse effects of climate change was reliable, the auto industry had overstated the difficulty in achieving the stricter standards, and the Vermont law was not preempted by federal statutes, and did not interfere with the powers of the President and Congress to conduct foreign affairs.<sup>14</sup>

The automobile industry's suit in California has been scheduled for a hearing on Oct. 22. Meanwhile, the EPA is now considering whether to grant the required waiver, and some in Congress are prodding the EPA to issue the waiver quickly.

Several industry groups have indicated an intent to use a variety of legal theories to challenge the Regional Greenhouse Gas Initiative (a joint effort of 10 northeastern and middle Atlantic states) and the climate change law adopted by California. The suits have not yet been brought; perhaps they are not yet considered ripe.

## Common-Law Claims

Much attention has been paid to whether common-law tort remedies such as nuisance are available against emitters of GHGs. Four lawsuits have been brought under these theories. All four have been dismissed.

Two of these suits sought injunctive relief. One was brought pro se and readily dismissed, and had limited significance.<sup>15</sup> The second, *Connecticut v. American Electric Power*,<sup>16</sup> was more serious. Eight states, the city of New York and several nongovernmental organizations sued five electric utilities seeking a reduction in their carbon dioxide emissions.

The district court dismissed the suit as presenting nonjusticiable political questions. An appeal was argued in the Second Circuit in June 2006. The court requested supplemental briefing in June 2007 on the effect of *Massachusetts v. EPA*. A decision is eagerly awaited.

Two other suits were brought seeking money damages. Both were dismissed in the past month. In both cases, the courts indicated, much like the district court in *Connecticut*, that the cases raised political questions that are better suited for the executive and legislative branches.<sup>17</sup>

## Public International Law

The Inuit Circumpolar Conference filed a petition with the Inter-American Commission on Human Rights in December 2005 claiming that U.S. climate-change policy violates their rights by degrading the Arctic. The commission, a body created by the Organization of American States, held a hearing on the petition on March 1, 2007.

The World Heritage Committee, which implements the World Heritage Convention (to which the United States is a party), has received four petitions to designate certain World Heritage Sites as endangered because of deterioration caused by climate change. In response, the committee in July 2006 adopted a set of recommendations on ways to respond to the threat of climate change to many World Heritage sites.<sup>18</sup>



1. 127 S. Ct. 1438 (2007).
2. 2007 WL 1577896 (E.D. Cal. May 25, 2007).
3. *Center for Biological Diversity v. Brennan*, 2007 WL 2408901 (N.D. Cal. Aug. 21, 2007).
4. *Citizens for Responsibility and Ethics in Washington v. Council on Environmental Quality*, No. 1:07CV00365 (D.D.C. filed Feb. 20, 2007).
5. 912 F.2d 478 (D.C. Cir. 1990).
6. 260 F. Supp.2d 997 (S.D. Cal. 2003).
7. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003).
8. *Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545 (8th Cir. 2006).
9. 488 F. Supp.2d 889 (N.D. Cal. 2007).
10. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, No. 06-71891 (9th Cir.).
11. *Montana Environmental Defense Center v. Johanns*, No. 1:2007CV01311 (D. D.C., filed July 23, 2007).
12. *Northwest Environmental Defense Center v. Owens Corning Corp.*, 434 F. Supp.2d 957 (D. Or. 2006).
13. *Okeson v. City of Seattle*, 159 Wash.2d 436, 150 P.3d 556 (2007).
14. *Great Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 2007 WL 2669444 (D. Vt. Sept. 12, 2007).
15. *Korsinsky v. EPA*, 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005), aff'd 2006 WL 2255110 (2d Cir. Aug. 4, 2006).
16. 406 F. Supp.2d 265 (S.D.N.Y. 2005).
17. *Comer v. Murphy Oil USA, Inc.*, F.Supp.2d\_\_\_ (S.D. Miss. 2007), appeal pending; *People of State of California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).
18. <http://whc.unesco.org/en/news/262>.