



By Richard Lazarus

Greenhouse Gases Light Up Litigation

Whatever may be happening in the upper atmosphere, global climate change is already heating things up down below in court. As detailed in a forthcoming report by Justin Pidot for the Georgetown Environmental Law and Policy Institute, there are at least 14 cases in federal and state courts raising climate change issues. The cases fall into four categories: Clean Air Act, National Environmental Policy Act and related state law, federal preemption, and public nuisance.

The two Clean Air Act cases are *Massachusetts v. EPA*, pending before the Supreme Court, and *Coke Oven Environmental Task Force v. EPA*, now before the U.S. Court of Appeals for the D.C. Circuit. The first challenges EPA's failure to regulate motor vehicle emissions of greenhouse gases based on their contribution to climate change. Led by 12 states, petitioners contest the agency's determination that those emissions are not air pollutants within the meaning of the act, and they question the virtually unbridled policymaking discretion that EPA asserts in support of its refusal to conclude that those emissions present an "endangerment" to public health and welfare requiring regulation.

The legal issues presented in *Coke Oven* are closely analogous, with the major difference being that the case concerns EPA's decision not to regulate GHG emissions from stationary sources.

The four NEPA-related cases all have a California connection. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, now before the Ninth Circuit, challenges the Depart-

ment of Transportation's Corporate Average Fuel Economy standards for failing to consider their climate impact.

Friends of the Earth v. Mosbacher, pending in a federal district court in northern California, raises a claim that the federal government violated NEPA by funding the construction of fossil fuel combustion facilities overseas without considering their impact on climate change within the United States.

Natural Resources Defense Council, Inc. v. Reclamation Board, in California trial court, challenges a state agency's approval of a development plan in the San Joaquin Delta, which the organization claims violates state environmental assessment law by not considering how climate change will be changing the region and, therefore, the future impact of that development.

Last, *Border Power Plant Working Group v. Department of Energy* is a NEPA challenge to the federal government's approval of transmission lines linking power plants in Mexico to the U.S. electricity grid, without considering the impact of emissions from the Mexican plants on climate change within our borders. It was recently decided in favor of the plaintiffs by a federal trial court in southern California.

The five preemption cases likewise share a California nexus. The most prominent, *Central Valley Chrysler Jeep v. Witherspoon*, challenges California's assertion of authority to regulate emissions of GHGs from motor vehicles. Carmakers and dealerships contend that any such air pollution regulation invariably amounts to fuel economy regulation and is therefore preempted by DOT's exclusive regulatory authority over fuel economy. They further contend that such state regulation transgresses presidential plenary authority over foreign affairs. On these same two grounds, the motor vehicle industry has brought suits in Rhode Island, Maine, and Vermont contesting each of those states' enactments of legislation that effectively piggybacks on any successful California regulation.

The fifth preemption case is part of the *Center for Biological Diversity* case in the Ninth Circuit contesting CAFE standards. Petitioners fault DOT for including in a Federal Register preamble statement a lengthy discussion of why

state regulation of motor vehicle GHGs is preempted.

Finally, the four public nuisance cases seek injunctive relief or money damages for defendants' alleged contributions to global warming. *Connecticut v. American Electric Power*, now pending in the Second Circuit, seeks injunctive relief from five companies operating 174 power plants that emit 650 million tons of carbon dioxide a year. *California v. General Motors* seeks money damages from motor vehicle manufacturers for damage to the state from global warming. *Comer v. Murphy Oil* alleges that defendant's oil and coal companies damaged plaintiffs by contributing to global warming and therefore the severity of Hurricane Katrina. And *Korinsky v. EPA* faults federal, state, and local governments for causing global warming and seeks a judicial mandate that defendants use a technology that the plaintiff himself invented to reduce carbon dioxide emissions.

The most significant case by far is the first in this article, *Massachusetts v. EPA*, set for oral argument before the Supreme Court on November 29. An environmental victory could underscore the seriousness of climate change in a manner that generates a favorable headwind in the other cases.

But it is the litigation land mine present in *Massachusetts* that has everyone on edge. Should the Court embrace the solicitor general's sweeping suggestion that the nature of the injury, causal chains, and judicial remedies implicated by climate change generally fail to satisfy the Constitution's Article III case and controversy requirements, such a ruling could be a serious blow to all climate change litigation now pending in federal courts.

There are likely at least four votes opposed to the SG's argument: Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Steven Breyer. Justice Anthony Kennedy seems the most likely fifth vote favoring jurisdiction, with Chief Justice John Roberts and Justice Samuel Alito less certain. But whichever way the Court tilts may well determine the federal judiciary's significance on climate change issues.

Richard Lazarus is on the law faculty of Georgetown University. He can be reached at lazarusr@law.georgetown.edu.

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