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Growth of U.S. Climate Change Litigation: Trends & Consequences

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Introduction / Letter

In the absence of federal legislation regulating greenhouse gas emissions, litigation is playing an increasingly important role in interpreting government power under existing law to address the climate problem. On one hand, activists and some state and local governments are prodding federal agencies to expand their reach; on the other hand, industries and other states are arguing that the federal agencies are going too far. The courts are in the middle of these fights, and (barring legislative intervention) will make the final decisions.

It is no surprise to find both “sides” turning to the courts for help. As we have noted before, investors seek transparency, longevity and certainty in policy frameworks in order to properly manage their investment risk. In the effort to achieve TLC, it is probably inevitable that people are turning to litigation to fill the void left by the lack of legislation. And it is possible that the threat of court action will in some cases galvanize legislators to take action where before they had simply avoided the issue. This is certainly the objective of some of the litigation now coming to the courts.

We believe, therefore, that investors need to be keenly aware of these developments because of their potential to transform local and even national regulatory structures that will, in turn, deeply affect investment decisions.

This report examines the various categories of cases being brought and assesses the likely outcomes. It looks at who the litigants are. And it gauges the scale of litigation which, since about 2004, has dramatically increased in volume. We expect the number of climate change related court cases to continue growing for the foreseeable future and we believe its consequences will be increasingly important in the transition to a low carbon economy.

- The number of climate change lawsuit filings doubled between 2006 and 2007. They then reached a plateau for three years, but already in 2010 are on a path to triple over 2009 levels.
- The largest increase in litigation has been in the area of challenges to federal action, specifically industry challenges to proposed EPA efforts to regulate greenhouse gas emissions.
- From 2001 to date, 24% of total climate change-related cases were filed by environmental groups aiming to prevent or restrict the permitting of coal-fired power plants.
- Approximately 37 states have joined, or have stated their intention to join, either side of the EPA litigation challenge.



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Litigation has played an important role in the development of greenhouse gas (GHG) regulation in the United States. With the collapse of the latest efforts to enact comprehensive legislation in Congress, litigation will take on an even more central part. The U.S. Environmental Protection Agency (EPA) is moving vigorously to adopt and implement GHG regulations using its existing authority; virtually every move it makes will be challenged in court by industrial interests that are trying to block these moves, and some will be challenged by environmental interests saying that EPA has not gone far enough. Many new energy facilities -- both fossil and renewable -- are the subject of litigation. Finally, the important question of whether common law theories of public nuisance can be applied to climate change is headed to the United States Supreme Court.

This paper summarizes the current state of play with climate litigation in the U.S., and assesses the range of likely outcomes.

Federal rulemaking litigation

Many of the statutes enacted by Congress authorize federal agencies to adopt regulations implementing them. The agencies must follow the Administrative Procedure Act, which requires the agencies to publish draft regulations plus explanatory background information, invite public comment, and then publish the final regulations. At that point, the regulations may be challenged in federal court by anyone will be adversely affected by them. Interested parties may also petition agencies to adopt regulations, and sue the agencies if they fail to do so.

Early in the presidency of George W. Bush, EPA denied a petition brought by several states and NGOs to regulate GHGs under the Clean Air Act. In 2007 the U.S. Supreme Court, in the landmark case of *Massachusetts v. EPA*, held by a vote of 5 to 4 that EPA has the authority to regulate GHGs. Not much happened right away, but as soon as Barack Obama took office in January 2009, EPA began a vigorous program of issuing GHG regulations.

Three EPA actions are of particular importance:

- 1. Endangerment finding** -- As a prerequisite to further regulation, EPA needed to make a formal finding that GHGs pose a threat to human health or welfare. EPA issued this "endangerment finding" on December 7, 2009.
- 2. Cars/light trucks rule** -- On April 1, 2010 EPA and the National Highway Traffic Safety Administration issued regulations tightening the Corporate Average Fuel Economy (CAFÉ) standards for cars and light trucks.
- 3. Tailoring rule** -- The Clean Air Act provides that once an air pollutant is regulated (such as after an endangerment finding), any stationary source (like a power plant or factory) requires a permit if it emits more than 250 tons/year. That number is sensible for conventional pollutants such as sulfur dioxide, but it is so small for GHGs that it would sweep in hundreds of thousands or perhaps millions of facilities. Thus EPA on May 13, 2010 adopted the "tailoring" rule to increase the permitting threshold to 100,000 tons per year of GHGs for most purposes.

All of these regulations, and several other smaller ones, are currently being challenged in court. Among the entities that have brought multiple lawsuits are the U.S. Chamber of Commerce, the American Iron and Steel Institute, the National Association of Manufacturers, the American Chemistry Council, and a newly-formed group called the Coalition for Responsible Regulation. As required by statute, all these cases have been filed in the U.S. Court of Appeals for the District of Columbia. The lawsuits begin with a one-page petition; some time after filing, the court establishes a schedule for briefs to be filed and for other entities to join as parties or as amici curiae (friends of the court), meaning they can file briefs. The court will also decide which cases to consolidate with other cases, and when to hold oral argument.

Parties and amici curiae are already piling on to both sides of these cases. States that oppose GHG regulation (most of which have Republican governors) and industry groups are filing on the side of the plaintiffs; states that favor GHG regulation (most of which have Democratic governors) and environmental groups are filing on the side of EPA. The court has not yet scheduled oral argument in any of these cases, and it appears the arguments will not take place before early 2011.

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Merely filing a lawsuit does not stop the action from going forward, and EPA is plowing ahead in the face of all these suits. Some of the plaintiffs have indicated they will ask the court to issue a “stay”, which would block the rules pending the outcome of the litigation. Stays are granted in only a small minority of these kinds of cases.

The suits challenging the endangerment finding primarily attack the underlying climate science. They rely heavily on the “Climategate” e-mails, errors in the IPCC reports, and the like. The courts tend to defer to the judgments of expert agencies in cases like this, especially when those judgments are well documented, and most observers give the challenges to the endangerment finding a slim chance. If they succeed, however, most of the ensuing EPA rules would topple.

The suits challenging the cars/light truck rule are likewise based largely on scientific arguments, and they too are not given a high probability of success. Significantly, these suits are not brought by the vehicle manufacturers, which have agreed to the regulation; instead, they are brought by other industries that (by operation of the Clean Air Act) will automatically become regulated once any industry (such as vehicle manufacture) is regulated.

The challenges to the tailoring rule mostly assert that since the Clean Air Act defines the numerical thresholds for regulation, EPA lacks the authority to raise the threshold. Since this raises a legal rather than a factual issue, the courts are less deferential to agency judgments, and these cases have a greater likelihood of success than the others -- perhaps as much as a 50/50 chance. If this challenge succeeds, it would greatly impede EPA’s ability to regulate GHGs from stationary sources, though authority over mobile sources like cars and trucks would not be affected. Other sections of the Clean Air Act also provide some authority for different kinds of regulation, but those are more cumbersome and uncertain.

A decision on the tailoring rule litigation is likely to come in the second or third quarter of 2011. Whoever loses may seek review in the U.S. Supreme Court. If the Supreme Court takes the case (it refuses to hear the great majority of cases presented to it), a decision is likely to take at least one year from the issuance of the Court of Appeals decision.

Meanwhile, opponents of GHG regulation are continuing their efforts in Congress to block these rules. A resolution offered by Senator Lisa Murkowski (R.-AK) to annul the endangerment finding was defeated on June 10, 2010. Senator Jay Rockefeller (D.-WV) is offering a narrower resolution. With both the House and the Senate currently controlled by the Democrats, final passage of such a resolution is currently unlikely, and President Obama has indicated that he would veto it. However, the odds of enactment will increase if as a result of the November election, the Republicans take control of the House) and the Senate and if the measure is attached to an appropriations bill or other measure that President Obama would have difficulty vetoing.

EPA is now proceeding to issue technology standards on a sector-by-sector bases, and will continue unless Congress acts or the Court of Appeals issues a stay or annuls the tailoring rule. Every further move taken by EPA is likely to be challenged in court by industry.

State challenges

Most of the states that favor GHG regulation are proceeding with their own programs. Most of those are modest in scope and, so far, lack regulatory teeth. The most vigorous state so far has been California, whose A.B. 32 law, enacted in 2006, has led to a wide-ranging set of planned rules. In response, several companies financed a successful campaign to put before the California voters in November a proposition that would freeze implementation of A.B. 32. The campaigns for and against this proposition, together with campaigns for Governor and Senator in California where this is also an issue, have taken on national significance.

Most of the regulations in California and other states are at least a year or two from taking effect. Once they do, many will surely be challenged in court. Challenges have also been threatened to the cap-and-trade programs that are being developed under the Western Climate Initiative and the Midwestern Greenhouse Gas Reduction Accord. The cap-and-trade program under the Regional Greenhouse Gas Initiative (encompassing ten northeastern and mid-Atlantic states) took effect in January 2009; it was the subject of one lawsuit, which was settled.

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Lawsuits against energy and other projects

A considerable volume of litigation has been brought against proposed energy projects and other projects. These cases fall into several categories.

Coal-fired power plants -- These are the largest source of GHG emissions in the United States. The Sierra Club is leading a concerted effort by the U.S. environmental community to fight every proposed coal-fired power plant. These campaigns utilize administrative procedures and litigation to challenge a broad range of matters related to these facilities -- GHG emissions, conventional air pollutant emissions, cooling water discharges, ash disposal, land acquisition, rail lines to carry fuel, public utility commission approvals, and others. At the same time, the environmental community is also litigating against mountaintop removal and other aspects of coal mining. These challenges, together with the uncertainty over future GHG regulation, have created a major cloud of uncertainty over proposed coal-fired power plant projects.

Real estate development projects -- Those fighting proposed land development projects for various reasons now often use GHG emissions as one basis. Others whose primary concern is GHG emissions choose to fight land development projects because of their GHG impacts. It is often difficult to distinguish cases whose principal motivating factor is the project or the emissions, and no doubt there is considerable overlap. In any event, the most common tools used are the National Environmental Policy Act (NEPA), the federal law that requires environmental impact review of federal actions that could significantly affect the environment; and the California Environmental Quality Act (CEQA), that state's equivalent to NEPA.

Renewable energy projects -- Unlike the situation with coal-fired power plants, there is no concerted effort nationwide to fight wind, solar, and other renewable energy projects; no major group opposes them in principle, and there is widespread acceptance that these facilities are an important part of the solution to climate change. However, many of these projects elicit local opposition on aesthetic grounds (for example, some people do not want their views spoiled by wind turbines) or environmental grounds (for example, certain large solar projects may pose a threat to desert ecology, and some wind projects have been found to threaten a species of endangered bats). The most prominent of these controversies concerned the proposed "Cape Wind" project off the coast of Massachusetts, which has been -- and continues to be -- a fertile source of litigation. No federal statute preempts litigation or local legislation against such facilities (though some have argued for such a statute, along the lines of the federal law that inhibits local laws against telecommunications towers). This local litigation can be a significant problem for specific projects, but it is not aimed at any industry as such.

Public Nuisance Litigation

Four prominent lawsuits have been filed in federal courts claiming that GHGs are a "public nuisance" under old common law doctrines. All four of them were dismissed at the trial court level on the grounds that they pose political questions that are more appropriately decided by the executive and legislative branches. One of the cases was subsequently dropped (a suit by the state of California against the motor vehicle manufacturers), but the other three are pending on appeal.

State of Connecticut v. American Electric Power was brought by several states, cities and NGOs seeking an injunction requiring the five power company defendants to reduce their GHG emissions. The U.S. Court of Appeals for the Second Circuit ruled in September 2009 that the case could proceed. On August 2, 2010 a petition for certiorari was filed with the U.S. Supreme Court by four of the electric utilities. The petition focused on three arguments:

1. That Plaintiffs' injury cannot be traced to the actions of the defendants, because climate change results from the greenhouse gas emissions from billions of independent sources over centuries.
2. That any federal common law of air pollution has been displaced by the Clean Air Act's authorization of EPA to regulate greenhouse gases -- an authorization that EPA has in fact been exercising.
3. That the case presents non-justiciable political questions.

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This petition was widely expected, as were its main points. But later in August came a major surprise in this case. The Solicitor General of the United States (the Department of Justice official who represents the federal government in the Supreme Court), acting for the fifth defendant, the Tennessee Valley Authority, filed a brief supporting the electric utilities. This brief said that the suits should be barred as generalized grievances more appropriately addressed by Congress and the executive branch; and that any federal common-law claims have been displaced by actions the EPA took after the Second Circuit issued its decision last fall. Thus the Solicitor General asked the Supreme Court to vacate the Second Circuit decision, and to remand the case to the Second Circuit to further consider plaintiffs' standing and the effect of the recent EPA actions.

Many in the environmental community were stunned by this brief. The Obama Administration has been calling for greenhouse gas regulation, and there was dismay that the Department of Justice would ask the courts not to get involved in this dispute. Meanwhile, several states and labor organizations have filed briefs agreeing that the Supreme Court should take the case; and when it is time for the plaintiffs to file their opposition, it is expected that several other states and environmental groups will line up on the other side.

If the Supreme Court adopts the position urged by the Solicitor General, the other public nuisance would likely also be doomed. However, it would not likely have much effect on any of the other categories of climate change litigation.

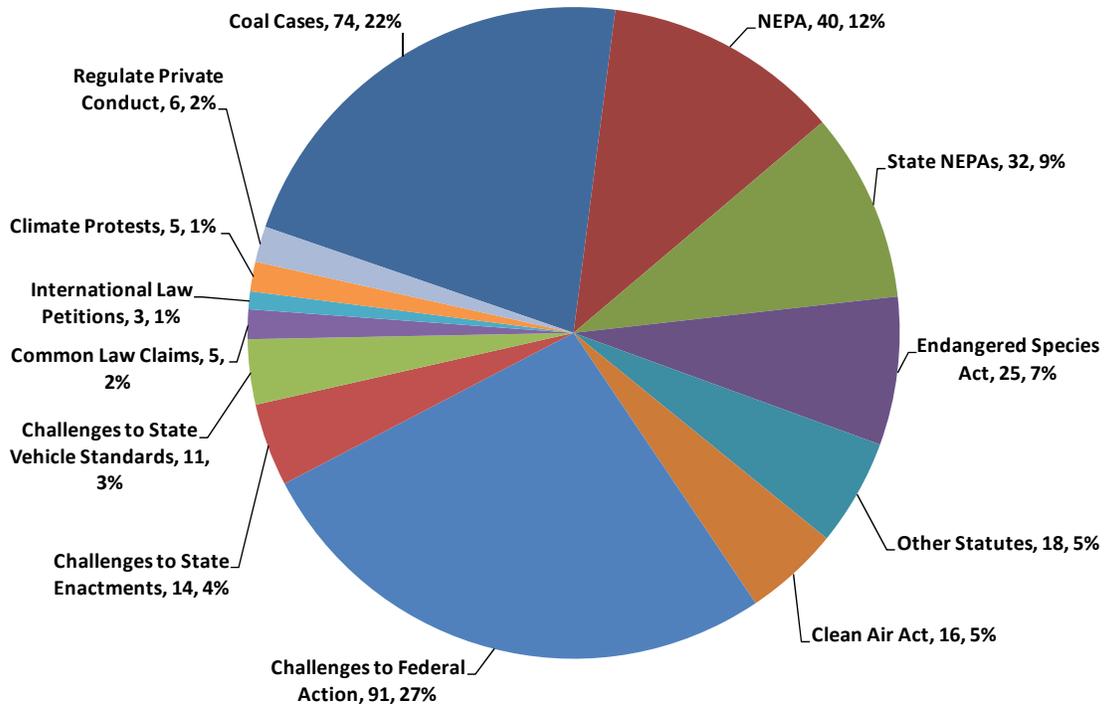
The second pending case is *Comer v. Murphy Oil*, which was brought by Mississippi landowners against numerous industrial companies alleging that their property was damaged by Hurricane Katrina, that the hurricane had been intensified by global warming, and that greenhouse gas emitters should be held liable for these damages. The U.S. District Court in Mississippi dismissed the case on political question grounds; the U.S. Court of Appeals for the Fifth Circuit reversed; the full Fifth Circuit vacated that decision and granted en banc review (meaning it would be heard by all the judges on the court -- not just the three judges on the panel that was assigned to hear it); and then the Fifth Circuit found it had lost a quorum (apparently because several of the judges owned stock in some of the defendant companies and disqualified themselves) and cancelled the en banc review, but left the panel decision vacated. That reinstated the District Court decision dismissing the case. In the face of this bizarre sequence of events, on August 26, 2010 the *Comer* plaintiffs filed an unusual petition with the Supreme Court. Rather than asking the Supreme Court to grant certiorari, they asked it to issue a mandamus ordering the Fifth Circuit to reinstate the appeal. The petition did not get into the merits at all. Instead it argued that the circuit courts have a duty to decide appeals within their jurisdiction, and that there were various procedural options available for the Fifth Circuit to decide the case.

The final pending climate change public nuisance cases is *Village of Kivalina v. Exxon Mobil*, which was brought by an Alaskan village claiming it is eroding into the sea as a result of climate change, and asking for relocation expenses from various greenhouse gas emitters. That suit was dismissed by the U.S. District Court in San Francisco, and is being appealed to the Ninth Circuit. Each side has filed its main brief, though the plaintiffs' time to file their reply brief has not yet run, and oral argument has not been scheduled.

These cases have received a great deal of attention in the legal, environmental and academic communities. If the plaintiffs ultimately prevail in Connecticut, the courts would be put in the business of directly regulating GHG emissions from industrial sources. If the plaintiffs ultimately prevail in *Comer* or *Kivalina*, the result would be years of highly contentious litigation about what companies are liable to whom for what potentially enormous damages. However, there is a widespread -- though by no means unanimous -- view among legal observers that ultimately these cases will fail, either because the courts find that they are displaced by EPA regulations, or that they present issues that Congress and the executive branch should decide. The Supreme Court decision on whether to take the Connecticut or *Comer* cases is likely 4Q 2010 or 1Q 2011.

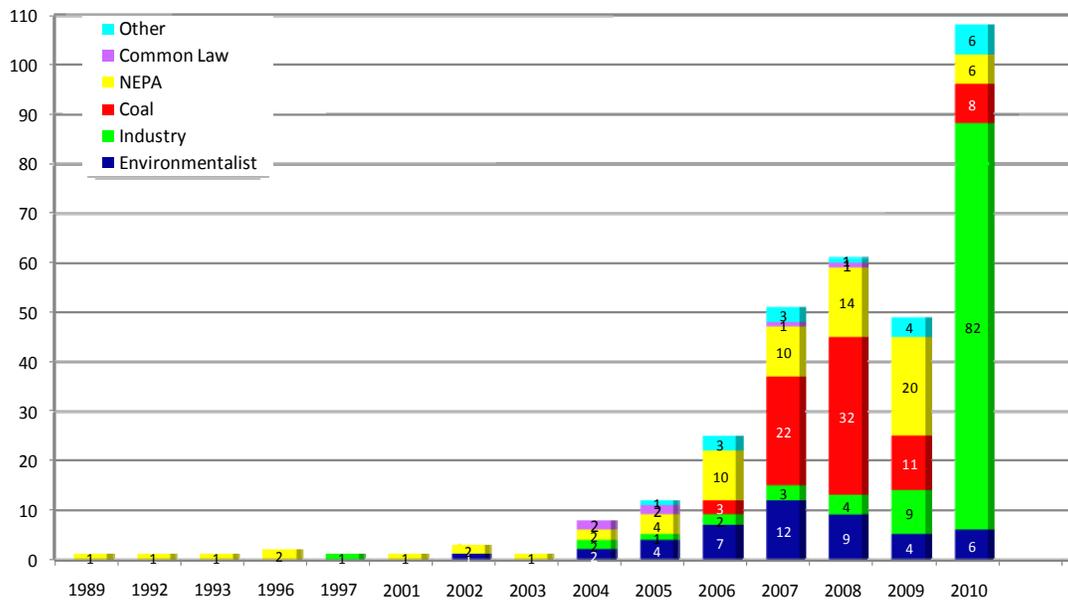
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Types of Climate Cases filed (through Oct 8, 2010)



Source: Arnold & Porter, LLC.

Climate Litigation Filings over time (through Oct 8, 2010)



Source: Arnold & Porter, LLC.

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