Analysis&Perspective

CLIMATE CHANGE

GLOBAL WARMING

''Whether Congress acts or EPA proceeds under the Clean Air Act, greenhouse gas regulation is coming,'' attorney Michael J. Steel says in this Analysis & Perspective article. The author discusses administrative developments in GHG regulation, the potential for congressional action, as well as recent court decisions in global warming suits, concluding that a wave of litigation is likely.

Climate Litigation: New Approaches to Climate Control Mean New Issues to Litigate

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Most scientists agree that the earth's atmosphere is warming, and that this change in our climate is likely to have significant impacts on our health, environment and economy. Lawyers, however, can always disagree, and the potential for a Scopes trial on climate change still looms large. Whether the pace of change can be altered or reversed is still the subject of intense debate—a debate that has spilled over into the courts.

The watershed event that catalyzed efforts to control climate change came in April 2007 when the U.S. Supreme Court determined that greenhouse gases (GHGs) emitted by automobiles are ''pollutants'' that could be regulated under the federal Clean Air Act (CAA).[1] Although the Bush Administration did nothing to implement the Supreme Court's decision, in July 2008 the U.S. Environmental Protection Agency (EPA) did issue an Advanced Notice of Proposed Rulemaking (ANPR) outlining various approaches to regulating GHGs under the CAA, if and when an endangerment finding was made.[2] Notably, EPA emphasized that the endangerment provisions of section 202 relating to automobiles were essentially the same as other provisions of the act applicable to stationary sources. The net effect would be that a finding under section 202 would result in regulation of not only motor vehicles, but stationary sources as well.[3]

The new Administration's EPA is aggressively pursuing a CAA regulatory regime for GHGs. On September 22, 2009, EPA issued the Final Mandatory Reporting of Greenhouse Gases Rule. Under the rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHGs are required to submit annual reports to EPA beginning with 2010. On September 30, 2009, the agency proposed new thresholds for GHGs that define when CAA permits would be required under the New Source Review and Title V programs. The proposed thresholds would cover nearly 70 percent of the nation's largest stationary source GHG emitters—including power plants, refineries, and cement production facilities.

While the Supreme Court's decision was prompted by the efforts of California and other states to regulate GHGs at the state level, the decision—along with EPA's ANPR—effectively confronted Congress with a choice: regulate GHGs under the complex and ill-suited Clean Air Act, or start fresh with a new approach tailored to GHGs. In effect, the Supreme Court's decision positioned the CAA as a sword of Damocles poised to fall if Congress fails to act. EPA's proposed endangerment finding, the reporting rule and the draft permit rule could be viewed as the sword descending in an effort to

[1] *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

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[2] 73 Fed. Reg. 44,354 (7/30/08).

[3] *Id.* at 44,367.

put pressure on Congress. But whether Congress acts or EPA proceeds under the Clean Air Act, GHG regulation is coming, and with it myriad issues will be litigated.

EPA's Proposed Endangerment Finding

Section 202(a)(1) of the CAA requires EPA to promulgate ''standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' Under this two-step test, EPA must first make an endangerment finding regarding air pollution and then must decide whether emissions of an air pollutant from new motor vehicles or engines cause or contribute to this air pollution.

On April 24, 2009, EPA published its proposed finding that certain greenhouse gases ''may reasonably be anticipated to endanger public health and welfare.''[4] EPA made both the endangerment and the cause-or-contribute findings, identifying six greenhouse gases that together constitute the root of the climate change problem: carbon dioxide (CO_2), methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. These findings pave the way for the Administrator to promulgate national GHG standards for motor vehicles. But only four of these gases are emitted by motor vehicles: CO_2, methane, nitrous oxide and hydrofluorocarbons. Thus, although EPA's endangerment finding flows from its authority to regulate motor vehicles, the finding has much broader implications.[5]

EPA's proposed finding makes it clear that the agency will likely create a system for the regulation of stationary source GHG emissions. The CAA provides several avenues for regulating stationary sources, but none is a good fit for regulating GHGs. Section 108 of the CAA contains language similar to 202(a) for the listing of ''criteria pollutants,'' which are then subject to primary and secondary national ambient air quality standards (NAAQS) under section 109.[6] After these standards are established, states are required to list areas that meet these standards (attainment areas), do not meet them (nonattainment areas), or cannot be classified as one or the other. Depending on whether an area is in attainment, there are different technological standards new and existing major sources of a pollutant must meet. Each state with nonattainment areas must promulgate a state implementation plan (SIP) that provides for the implementation, maintenance, and enforcement of the primary and secondary standards,[7] with the goal of bringing the entire state into attainment and maintaining that condition.

Problems With Using the CAA to Regulate Stationary Sources

Identifying GHGs as criteria pollutants would create immediate and myriad administrative feasibility problems. The first major problem arises from classifying areas for attainment purposes. Unlike the other criteria pollutants, which are concentrated in varying degrees depending on the geographic area, GHGs diffuse into the atmosphere in a relatively equal concentration around the world. EPA, therefore, could be forced to determine either that the entire country is in attainment—or that it is *not* and is therefore subject to stringent and costly permit and control requirements.

It could also be difficult to determine which sources are ''major.'' In attainment areas, the CAA provisions designed for the prevention of significant deterioration (PSD) define ''major sources'' as sources with the potential to emit 100 or 250 tons per year of any pollutant, depending on the type of source.[8] In nonattainment areas, the threshold is 100 tons per year or less, depending on the pollutant and the level of nonattainment.[9] Most GHGs are generated at a rate much greater than existing criteria pollutants and thus EPA must develop a new approach to identifying the sources subject to regulation.[10]

EPA's recent proposed permit rule attempts to resolve these issues by targeting large facilities emitting over 25,000 tons of greenhouse gases a year. These facilities would be required to obtain permits that would demonstrate they are using the best practices and technologies to minimize GHG emissions. The rule proposes new thresholds for greenhouse gas emissions (GHG) that define when Clean Air Act (CAA) permits under the New Source Review (NSR) and Title V operating permits programs would be required for new or existing industrial facilities.

Under the Title V operating permits program, EPA is proposing an emissions applicability threshold of 25,000 tons per year (tpy) of CO_2 equivalent (CO_2e) for existing industrial facilities. Facilities with GHG emissions below this threshold would not be required to obtain an operating permit. Under the Prevention of Significant Deterioration (PSD) portion of NSR—which is a permit program designed to minimize emissions from new sources and existing sources making major modifications—EPA is proposing a:

- Major stationary source threshold of 25,000 tpy CO2e. This threshold level would be used to determine if a new facility or a major modification at an existing facility would trigger PSD permitting requirements.
- Significance level between 10,000 and 25,000 tpy CO2e. Existing major sources making modifications that result in an increase of emissions above the significance level would be required to obtain a PSD permit. EPA is requesting comment on a range of values in this proposal, with the intent of selecting a single value for the GHG significance level.

Operating permits contain air emissions control requirements that apply to a facility, such as national

[4] 74 Fed. Reg. 18,886, 18,887 (4/24/09).

[5] EPA recognizes that, while section 202(a) mobile sources produce four GHGs, ''[t]here are other gases which share these common properties which are not emitted by the section 202(a) source categories.'' *Id*. at 18,904.

[6] CAA §§ 108(a), 109(b), 42 U.S.C. §§ 7408(a), 7409(b).

[7] *Id.* at § 110(a), 42 U.S.C. § 7410(a).

[8] CAA § 169(1), 42 U.S.C. § 7479(1).

[9] CAA §§ 181-87, 302(j), 42 U.S.C. §§ 7511-7512a, 7602(j).

[10] EPA's fact sheet for the permit rule it proposed states: ''The current thresholds for criteria pollutants such as lead, sulfur dioxide and nitrogen dioxide, are 100 and 250 tons per year (tpy). These thresholds are in effect now, and are appropriate for criteria pollutants. However, they are not feasible for GHGs. Without the tailoring rule, these lower thresholds would take effect automatically for GHGs with the adoption of any EPA rule that controls or limits GHG emissions.'' http://www.epa.gov/NSR/fs20090930action.html.

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emissions standards for hazardous air pollutants, new source performance standards, or best available control technologies required by a PSD permit. In general, since there are currently no such air emission control requirements for GHGs, there would be no immediate changes to permits for existing facilities with GHG emissions greater than 25,000 tpy. At the end of a five-year period when the operating permit must be renewed, these facilities would be required to include estimates of their GHG emissions in their permit applications. Facilities may use the same data reported to EPA under the Mandatory Reporting Rule to fulfill this requirement.

New or modified facilities with GHG emissions that trigger PSD permitting requirements would need to apply for a revision to their operating permits to incorporate the best available control technologies and energy efficiency measures to minimize GHG emissions. These controls are determined on a case-by-case basis during the PSD process.

Under the proposed emissions thresholds, EPA estimates that 400 new sources and modifications would be subject to PSD review each year for GHG emissions. Less than 100 of these would be newly subject to PSD. In total, approximately 14,000 large sources would need to obtain operating permits for GHG emissions under the operating permits program. About 3,000 of these sources would be newly subject to CAA operating permit requirements as a result of this action. The majority of these sources are expected to be municipal solid waste landfills.[11]

EPA's authority for these actions is less than clear, and will certainly be challenged in the courts. EPA's own discussion of the rule highlights the many uncertainties the CAA pathway presents. The agency notes, for example, that it ''intends to evaluate ways to streamline the process for identifying GHG emissions control requirements and issuing permits'' and to ''re-evaluate the final GHG emissions thresholds after an initial phase, during which PSD and Title V permitting authorities will gain experience in issuing permits to GHG sources.'' In effect, EPA is experimenting with how the CAA might be applied, a risky proposition when a misstep could cost billions of dollars. Lest there be any doubt about the experimental nature of the EPA's proposal, the agency itself states that: ''By the end of the first phase, which is proposed to last five years, the Agency is proposing to complete a study to evaluate whether it is administratively feasible for PSD and Title V permitting authorities to adequately administer their programs at lower GHG thresholds.''

Setting the technological standards also poses a challenge. Under the New Source Review program (NSR), new sources in PSD areas require the use of ''best available control technology'' (BACT) and new sources in nonattainment areas require the more stringent ''lowest achievable emission rate'' (LAER).[12] However, no control technology has been established for GHGs for purposes of meeting BACT or LAER standards.

In the proposed permit rule, EPA says that it plans to develop supporting information to assist permitting authorities as they begin to address permitting actions for GHG emissions for the first time. The guidance would first cover source categories that typically emit GHGs at levels exceeding the thresholds established through this rulemaking. Although EPA has not yet identified specific source categories, the Agency ''plans to develop sector- and source-specific guidance that would help permitting authorities and affected sources better understand GHG emissions for the selected source categories, methods for estimating those emissions, control strategies for GHG emissions, and available GHG measurement and monitoring techniques.'' According to EPA, this guidance also will include approaches for making BACT determinations as required for a PSD permit.

If uncertainty is fodder for litigation, EPA's actions surely provide ample fuel and a few sparks to create a firestorm.

Clearing the Decks: Resolving Litigation Relating to Auto Standards

On May 19, 2009, the Obama Administration announced its intent to promulgate new fuel economy standards and the first ever national GHG standards for cars, beginning in model year 2012, through 2016. According to the Administration, this proposed national policy weaves together EPA's legal authority pursuant to the CAA and *Massachusetts v. EPA* to promulgate vehicle standards addressing GHGs with the Corporate Average Fuel Economy standards administered by the National Highway Traffic Safety Administration (NHTSA), while respecting California's authorities under the CAA.

As an essential part of this strategy, the Administration obtained commitment letters[13] from the State of California (including the California Air Resources Board and the Attorney General), the Alliance of Automobile Manufacturers, and nine auto manufacturers, all agreeing to a nationwide standard; to the granting of California's waiver request for model years 2009 through 2016; and to the dismissal by the motor vehicle manufacturers and trade associations of all pending litigation in the various state and federal courts challenging the California standards for automobile GHG emissions.[14] EPA granted the waiver request, allowing Cali-

[11] Municipal solid waste landfills are the second largest source of human-related methane emissions in the United States, accounting for approximately 23 percent of these emissions in 2007. Landfill methane, a powerful greenhouse gas, can be captured, converted, and used as an energy source, reducing emissions and providing an important renewable energy source. *Id*.

[12] CAA §§ 165(a)(4), 173(a)(2), 42 U.S.C. §§ 7475(a)(4), 7503(a)(2).

[13] The commitment letters are available at http://www.epa.gov/OMS/climate/regulations.htm.

[14] The cases include: *Central Valley Chrysler-Jeep v. James Goldstene*, No. 08-17378 (9th Cir., filed 10/23/08) (stayed until October 2009, based on joint motion); *Green Mountain Chrysler-Plymouth-Dodge v. Crombie* , No. 07-4342 (2nd Cir., filed 10/5/07) (stayed until October 2009, based on joint motion); and *Lincoln Dodge, Inc. v. Sullivan*, No. 1:06-cv-00070-S-LDA (D. R.I., filed 2/13/06) (case brought by auto manufacturers rejected, 588 F. Supp.2d. 224 (2008); dealers' portion of case stayed pending action on manufacturers' First Circuit appeals; manufacturers have not so far sought to stay the appeals). Automobile dealers were not included in the Administration's deal; however, *Fresno Dodge v. California Air Resources Board*, No. 04CECG03498 (Fresno County Super. Ct., filed 12/7/04), brought by dealers and manufacturers, has been stayed, while *Zangara Dodge, Inc. v. Curry*, No. 1:07-cv-01305-MCA-LFG (D. N.M., filed 12/27/07), brought by New Mexico

fornia to implement its own GHG standards beginning with model year 2009.[15]

Despite the Administration's success in reaching an initial agreement over what have been highly contentious issues, new lawsuits challenging the endangerment or the cause or contribute findings are already brewing. On September 8, 2009, the U.S. Chamber of Commerce and the National Automobile Dealers Association challenged the waiver approval in the D.C. Circuit (No. 09-1237). The Chamber also filed a supplemental request for an ''on-the-record'' hearing to debate the evidence behind the endangerment finding. If the EPA denies the Chamber's petition for climate science debate, the group could add this denial to their pending lawsuit, seeking a ''Scopes Monkey Trial''[16] to test the scientific validity of climate change. As stated by Bill Kovacs, the Chamber's vice president for environment, regulatory and government affairs: ''They don't have the science to support the endangerment finding. We can't just take their word for it.''[17]

Thus, even if the pending manufacturer lawsuits relating to automobile standards are ultimately dismissed according to the agreement, this will leave the issues they have raised open to disputes, including the case filed by the Chamber and the auto dealers. In addition, as noted above, the reach of the endangerment finding extends far beyond motor vehicles. Its implications for stationary sources will almost certainly overshadow the impacts on automobiles. Regardless of the approach EPA ultimately adopts, litigation by stationary source operators will almost certainly ensue.

Construction Permit Litigation

Just as EPA action will certainly be litigated, inaction by EPA will spur perhaps even more problematic lawsuits. Over the last few years, there have been a number of suits against power companies constructing coal-fired power plants, based on noncompliance with technological standards for CO_2. Environmental groups brought the first few of these cases to the Environmental Appeals Board (EAB) two years ago, challenging the granting of NSR permits to facilities not using BACT to control CO_2 in PSD areas.[18] In *In re Deseret Power Electric Collective*,[19] the EAB ruled that a new coal-fired unit in an existing Utah power plant was not exempt from using BACT to limit CO_2. This ruling came in November of 2008, six months prior to the proposed endangerment finding on GHGs. One month later, then-EPA Administrator Stephen Johnson issued a memorandum suggesting that permitting agencies did not need to consider CO_2 emissions in their permits. The Sierra Club filed suit against the EPA challenging this memo, but the point may now have become moot, as current Administrator Lisa Jackson has said she will reconsider this memorandum and has asked for public comments on its reversal.[20]

Obama's EPA has already begun to shed some light on its new policy with its recent motion to the EAB to require low-CO_2 gasification technology in a new coal-fired power plant in New Mexico.[21] Although the agency under the Bush Administration rejected calls by environmental groups to require examination of the plant's CO_2 emissions during the PSD permitting process, the current motion notes that Jackson supports permitting authorities considering such technology in the BACT analysis.[22] And EPA's motion points to low CO_2 -gasification as BACT for coal-fired plants, though BACT can vary from one source to another.

Aside from the Sierra Club[23] and the NRDC, smaller environmental organizations also are now challenging NSR permits for coal-fired power plants. Appalachian Voices, an organization based in the southern Appalachian region, has challenged permits for plants in Virginia and North Carolina. Citizens for Environmental Inquiry, an environmental organization in Presque Isle County, Michigan, filed suit against the MDEQ in 2008 for not regulating GHGs from power plants.

It remains to be seen whether these smaller organizations will see successes in their efforts to prevent permitting, or whether these efforts will be superseded by

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dealers, has not (however, briefing schedules in that case have been extended in light of the EPA/NHTSA rulemaking and the waiver). A recent decision in *Metro. Taxicab Board of Trade v. NYC*, 2009 WL 1748871 (S.D. N.Y., 6/22/09), now prohibits New York City from implementing its program to encourage taxicab owners to convert to hybrid vehicles. Thus, although some litigation regarding the vehicle standards continues, the filing of stays in pending cases, following the issuance of the Federal Register notice by EPA and NHTSA announcing a joint rulemaking (74 Fed. Reg. 24,007 (5/22/09)), indicates that litigation may be less of an issue if the automakers and dealers are generally satisfied with the joint national standards. If those standards are promulgated as set forth in the announcement of the joint rulemaking, the Administration agreement calls on the parties to dismiss their cases.

[15] 74 Fed. Reg. 32,744 (7/8/09). Under the Administration agreement, California committed to revise its GHG standards for model years 2009-2011, such that compliance with the standards can be demonstrated based on the GHG emissions of the combined fleet of vehicles sold in California and any state that adopts California's standards. California also committed to revise its standards for 2012 through 2016, such that compliance with the nationwide standards to be adopted by EPA will be deemed compliance with California's standards. California adopted changes to its rule on September 24, 2009.

[16] The 1925 trial involved the prosecution of Tennessee high school teacher John Scopes for teaching evolution and featured Clarence Darrow for the defense and three-time presidential candidate Williams Jennings Bryan for the State.

[17] Quoted in Michael Burnham, Climatewire (New York Times) ''Chamber Threatens Lawsuit if EPA Rejects Climate Science 'Trial,'' '' August 25, 2009

[18] Two of the earliest such cases, *In re Christian County Generation*, 13 EAD ___ (1/28/08), and *In re ConocoPhillips*, 13 EAD ___ (6/2/08), were dismissed on procedural grounds.

[19] PSD Appeal No. 07-03, *In re Deseret Power Electric Cooperative*, 14 EAD ___ (11/13/08).

[20] EPA Press Release, ''EPA Administrator Jackson Orders Review of Key Clean Air Document,'' Feb. 17, 2009. See http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/3274377ad2d9fc4285257560077efb5!OpenDocument.

[21] *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03, 08-04, 08-05, 08-06, 14 EAD ___ (9/24/09).

[22] *Id.*

[23] In 2008 and 2009, the Sierra Club filed several other suits against power companies in various states on the grounds that they did not comply with BACT emission limits for carbon dioxide. *See Sierra Club v. Duke Energy Indiana,* No. 1:2008cv00437 (S.D. Ind., filed 4/3/08); *Sierra Club v. Two Elks Generation Partners,* No. 2:2009cv00022 (D. Wyo., filed 1/29/09); *Sierra Club v. Florida DEP*, No. 1D08-4881 (Fla. 1st Dist. Ct. App., filed 11/08) (challenging Seminole Electric Cooperative PSD permit). One such challenge was remanded to the Michigan Department of Environmental Quality with instructions to be guided by the decision in *Deseret*. *See In re N. Mich. Univ. Ripley Heating Plant*, 14 EAD ___ (2/18/09).

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regulatory action. Aided by the Sierra Club and GreenLaw, Friends of the Chattahoochee, an organization based in Georgia, initially received a favorable decision from a state judge who reversed and remanded a permit granted by an administrative law judge, finding that CO_2 emissions are subject to BACT requirements.[24] However, the Georgia Court of Appeals reversed the decision and remanded the case to the Superior Court, finding that using the CAA to regulate CO_2 emissions from coal power plants would ultimately lead to ''a regulatory burden on Georgia never imposed elsewhere.''[25] Other courts dealing with permitting issues may come to similar conclusions, or refrain from making decisions regarding coal-fired power plant permitting until the GHG regulatory structure is more clearly defined. This abstention seems all the more likely in light of EPA's recent proposed permit rule and the pending efforts in Congress.[26]

Although these cases were brought before EPA proposed the endangerment finding, they came in the wake of *Massachusetts v. EPA* and in anticipation of the endangerment finding. If EPA fails to act, or if the agency's actions get bogged down in the courts, the environmental groups may see this type of litigation as their best strategy for forcing a resolution of these issues. Although these lawsuits may drain both the government and companies of resources, they serve to encourage Congress to push through new legislation so that GHGs can be regulated more efficiently and effectively.

Each of these cases slows down the process of building vital energy capacity and adversely affects jobs—two issues that cannot escape Congress's attention. Thus, although these cases may be designed to address local concerns, they serve a much larger purpose in keeping attention focused on sources of greenhouse gases and the need for predictable requirements with quantifiable costs. Any regulatory approach, whether under the CAA or new legislation, will provide more certainty than exists today, even if litigation slows implementation.

Public Nuisance/Tort Litigation

As the scientific community continues to sound the alarm on global climate change, it is likely that more individuals, municipalities, and governments that bear the brunt of the worst effects of this phenomenon will sue greenhouse gas producers.

The first significant case of this nature was *Connecticut v. Am. Elec. Power Co.*,[27] in which eight states and the city of New York brought suit against five electric utilities that owned coal-fired power plants, claiming they were responsible for significant contributions to global warming. The plaintiffs sought injunctions against the power plants, based on theories of federal common law and state public nuisance law. This case was decided under the political question doctrine, with the judge holding that it was impossible to decide the case ''without an initial policy determination of a kind clearly for nonjudicial discretion.''[28] On September 21, 2009, however, the Second Circuit reversed the district court, holding that public nuisance actions can be brought against private emitters of greenhouse gasses.[29] Citing *Massachusetts v. EPA*, the two-judge panel rejected all of the power company defendants' arguments, holding that the claims do not present nonjusticiable political questions; the plaintiffs have standing to bring their claims; the claims are not ''displaced'' by existing federal law; and the claims were rightly brought under the common law doctrine of nuisance.

In a similar case, *Comer v. Nationwide Mut. Ins. Co.*,[30] plaintiffs brought a class action suit against greenhouse gas-producing defendants, including major oil and chemical refiners, on the grounds that weather patterns caused by the greenhouse gas emissions of the defendants led to Hurricane Katrina and the ensuing damages. The District Court dismissed the case on standing and justiciability grounds.[31]

The *Comer* plaintiffs appealed the dismissal, and on October 16, 2009, a three-judge panel on the 5th U.S. Circuit Court of Appeals in New Orleans cited the September 21 ruling the *AEP* case in holding that the class-action lawsuit could go forward. The 5th Circuit noted that ''Although we arrived at our own decision independently, the Second Circuit's reasoning [in *Connecticut v. AEP*] is fully consistent with ours, particularly in its careful analysis of whether the case requires the court to address any specific issue that is constitutionally committed to another branch of government.''

A judge on the U.S. District Court for the Northern District of California came to a different conclusion in dismissing a public nuisance lawsuit brought by the Alaskan coastal town of Kivalina against 24 energy and utility firms. *Native Village of Kivalina v. ExxonMobil Corp*.[32] Kivalina, a small village of approximately 400 Inupiat Eskimo, has experienced severe erosion allegedly caused by global climate change and is now suing 24 major oil and energy companies for causing the climate change and conspiring to use ''disinformation tactics'' to blind the public from the dangers of global warming.[33] The defendants moved to dismiss the case on the grounds that federal law does not recognize such claims and that Congress has displaced any authority of the federal courts to regulate GHGs through common law. Granting the defendants' motion, the district court explicitly broke from the 2nd Circuit's reasoning. In a ruling issued on October 16, Judge Saundra Brown Armstrong wrote:

> ''Based on the judiciary's history of addressing 'new and complex problems,' including those concerning environmental pollution, the [2nd Circuit] court con-

[24] *Friends of the Chattahoochee Inc. v. Couch*, No. 2008CV146398 (Ga. Sup. Ct.,6/30/08).

[25] *Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.*, 2009 Ga. App. LEXIS 787 (7/7/09).

[26] *But see Connecticut v. American Electric Power Co.* 2d Cir., No. 05-5104 (9/21/09), *infra.*

[27] 406 F. Supp. 2d 265 (S.D. N.Y. 2005).

[28] *Id.* at 272.

[29] *Connecticut v. American Electric Power Co.*, 2d Cir., No. 05-5104 (9/21/09).

[30] 2006 U.S. Dist. LEXIS 33123 (S.D. Miss. 2006).

[31] Although the district court was reversed, its prediction that there would be ''daunting evidentiary problems'' for plaintiffs attempting to prove that GHG producers caused the global climate change that increased the intensity of the hurricane and led to catastrophic damages may yet prove right. *See* ''Federal Judge Rejects Resident's Lawsuit Tying Industry Emissions to Katrina Damages,'' 38 ER 1956, 9/14/07.

[32] N.D. Cal., No. cv-08-1138, 2/26/08.

[33] ''Village in Alaska Sues Energy Companies Over Erosion Linked to Warming Climate,'' 39 ER 440, 3/7/08.

cluded that '[w]ell-settled principles of tort and public nuisance law provide appropriate guidance to the district court in assessing Plaintiffs' claims and federal courts are competent to deal with these issues' such that their global warming concerns can 'be addressed through principled adjudication. . . .This Court is not so sanguine. While such principles may provide sufficient guidance in some novel cases, this is not one of them.''

The Judge seemed particularly concerned that allowing the nuisance claim would require the judiciary to make a policy decision about who should bear the cost of global warming:

''Though alleging that defendants are responsible for a 'substantial portion' of greenhouse gas emissions, plaintiffs also acknowledge that virtually everyone on Earth is responsible on some level for contributing to such emissions. Yet, by pressing this lawsuit, plaintiffs are in effect asking this court to make a political judgment that the two dozen defendants named in this action should be the only ones to bear the cost of contributing to global warming.''

Plaintiffs have already indicated they will appeal to the Ninth Circuit.

Other courts may follow the Second and Fifth Circuits, or may find that the endangerment finding addresses the ''initial policy determination'' some judges believe to be lacking. Thus, the political question doctrine seems to provide an increasingly difficult defense to such actions. One can expect that plaintiffs will argue that once the government has set the policy, it is the judiciary's duty to enforce it. The decision of the Ninth Circuit, assuming the *Kivalina* plaintiffs actually do appeal, may set the stage for a split that the Supreme Court may have to resolve.

Difficulties in Proving Causation

Assuming the endangerment finding does answer the political question, and the *AEP* and *Comer* decisions are widely followed, this does not mean that industries should cower in fear of an immediate onslaught of damage claims. There is still the complicated issue of causation, which will likely prevent plaintiffs from being successful in these suits, at least in the current state of scientific uncertainty.

Even when the damages are more easily attributable to global climate change (for example, coastlines disappearing as sea levels rise), it is essentially impossible to link individual polluters with ensuing damages to the extent necessary to bring a successful lawsuit. In 2006, automobiles in the U.S. accounted for 4.3% of all global GHG emissions and electricity production in the country accounted for 6.1%.[34] Although these numbers are not insignificant, they represent an uncountable number of sources. In allocating liability, a court could have to calculate how much of that damage was caused by sources in the U.S., and how much was caused by each different type of source. Then a court might need to determine what percentage of GHGs produced within each type of source was generated by each defendant. The matter is complicated further by the fact that this calculus is only applicable if a court makes a blanket statement that all sources of greenhouse gas cause global climate change in direct proportion to the weight of CO_2 they produce. This is a declaration that courts may not be ready to make given the current level of scientific knowledge.

Federal Preemption

Perhaps counter-intuitively, the endangerment finding could potentially give industry defendants another defense through federal preemption. If a source complies with the CAA regulations regarding its GHG emissions, it may be exempt from state law tort claims. There have already been instances of courts holding that the CAA preempts nuisance claims based on allegations of air pollution.[35] On the other hand, the citizen suit provisions of the CAA allow any person to bring a civil suit against any person who is in violation of an emission standard or limitation.[36] If the bulk of major sources may be in violation of these standards, as cases like *Kivalina* would suggest, then citizens could have a potent weapon for suing greenhouse gas producers. As of now, the endangerment finding is only proposed and claims of this nature are not ripe. However, actual EPA regulation would preempt such nuisance suits, and the same result would probably occur if the Congress enacts comprehensive federal legislation such as that now being considered in the U.S. Senate.

Congressional (In)Action?

The American Clean Energy and Security Act (ACES), also known as the Waxman-Markey Bill (H.R. 2454), was passed by the House in June 2009.[37] On September 30, 2009, Senators Barbara Boxer and John Kerry introduced the long-awaited Senate version of the climate bill, the Clean Energy Jobs and American Power Act (CEJAPA). The Senate bill differs in some important respects from the House version and is generally much vaguer, leaving many ''details'' to be worked out. For simplicity's sake, we describe the key terms of the House version in order to give a flavor of things to come.

A key focus of the house bill (downplayed in the Senate version)[38] is plan for a comprehensive cap-and-trade approach to regulating GHG emissions from stationary sources, whereby companies receive a certain number of allowances for CO_2 produced and are free to sell or trade these allowances on the open market. The bill contains provisions that add new Titles VII and VIII to the CAA as the primary tools to regulate GHGs. The bill also contains citizen suit provisions that can potentially lead to litigation against companies that produce GHGs beyond their set allowances.[39]

[34] 74 Fed. Reg. at 18,907 (4/24/09).

[35] *See United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D. N.J. 1982); *Save Our Summers v. Washington State Dep't of Ecology*, 132 F. Supp. 2d 896 (E.D. Wash. 2000); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1993).

[36] CAA § 304(a), 42 U.S.C. § 7604(a).

[37] On June 26, 2009, ACES was approved by the U.S. House of Representatives in a close vote after intensive lobbying by Democratic leaders and the President. The bill is now in the Senate where its fate is uncertain.

[38] In a curious bit of ''newspeak,'' the Senate bill avoids using the term cap-and-trade to describe its cap-and-trade provisions, instead calling it a pollution reduction and investment (PRI) program.

[39] Section 304 of the CAA could also allow industry and environmental groups to sue the EPA to review any regulations it

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The proposed l;egislation looks to clear up many of the administrative complications that may result from GHGs being regulated under the current CAA. The addition of Title VIII, sections 831-35, to the CAA effectively excludes GHGs from the most restrictive portions of the act. Section 831 declares that GHGs may not be listed as criteria pollutants; section 832 eliminates them from the list of international air pollutants; section 833 bars them from being listed as hazardous air pollutants unless they otherwise qualify; and sections 834 and 835 help to distance them from NSR and the Title V permit processes.[40]

These sections would exempt GHGs as pollutants taken into account for PSD and would effectively end litigation regarding the issuance of NSR permits with respect to CO_2. Theoretically, these provisions would be applied retroactively so that cases already pending would be dismissed. Coal-fired power plants may also be able to use the provisions to argue for federal preemption in subsequent legal disputes.

The Senate climate change bill—CEJAPA—faces an uncertain future, but was crafted to encourage dialogue and compromise. The House measure met solid Republican opposition and dissenting votes among conservative Democrats. The Senate seems likely to be even more hostile and the authors thus chose to leave many key issues for committee resolution. But at least the bill is being debated. And in spite of the many holes in the bill, it does contain some important new ideas. One is a ''price collar'' for emissions allowances – a system that would prevent allowances dropping in the first year to less than $11 per ton of carbon, or rising to more than $28 per ton. In later years the collar would be adjusted. Other provisions—like the goal of higher reductions by 2020—are more symbolic, allowing the bill to be characterized as more aggressive to satisfy environmental groups.

Assuming climate legislation can be cobbled together and enacted, it seems almost certain that years, and perhaps decades of litigation will follow and the complex and probably internally inconsistent law is sorted out.

CONCLUSION

The endangerment finding may lead to future liability issues and litigation, although these may be tempered by congressional foresight. However, environmental groups might continue to use other sections of the CAA to sue utility companies seeking permits for new power plants without using the most up-to-date GHG-reducing technologies. Furthermore, as more communities begin to suffer physical damages related to global climate change, they might sue GHG emitters to compensate them for the damages suffered. Although these lawsuits seem unrealistic at this point, one or two key victories for plaintiffs could spark a wave of litigation.

The passage of federal climate legislation would also affect future GHG liability and litigation. The federal law is likely to contain provisions that will exempt GHGs from certain requirements of the CAA and may establish standards that are more feasible for industry. However, it may also adopt the CAA's citizen suit provisions so that individuals and environmental groups can sue companies that produce GHGs beyond their allotted amounts or otherwise violate the law. But even a new federal statute, designed to address climate change specifically, is likely to be heavily litigated if for no other reason than the major impacts it will have on the world economy. As Bette Davis once intoned, ''Fasten your seatbelts, it's going to be a bumpy night.''[41]

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may pass to control GHGs under ACES. *See* ''House Global Climate Bill Mandates Many EPA Rulemakings With Tight Deadlines,'' 40 ER 1672 (7/10/09).

[40] H.R. 2454, 111th Cong. §§ 831-35.

[41] As Margo Channing in ''All About Eve'' (1950).