

New Federal Initiatives Project

EPA's Endangerment Rule

By

Jeffrey Bossert Clark*

April 26, 2010



*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.

www.fed-soc.org

EPA'S Endangerment Rule

On December 7, 2010, the U.S. Environmental Protection Agency (“EPA”) promulgated a final rule commonly known as the “Endangerment Rule.”¹ In that finding, EPA determined that greenhouse gas (“GHG”) emissions endanger the public health and welfare, and that motor vehicle emissions in particular are contributing to such harmful effects. The Endangerment Rule was issued pursuant to EPA’s authority under Clean Air Act Section 202(a),² which itself deals exclusively with the regulation of emissions from new motor vehicles and new motor vehicle engines (often known collectively in Clean Air Act parlance as “mobile sources”).

The implications of the Endangerment Rule are likely to be much more far-reaching than simply initiating the regulation of GHG emissions from mobile sources alone. Importantly, EPA’s final rule has been challenged in the D.C. Circuit under Clean Air Act Section 307(b)(1)’s³ judicial review provision. But if it withstands review, the Endangerment Rule will not only mandate the regulation of GHG emissions from mobile sources, it will potentially trigger the regulation of such emissions from stationary sources as well, and could well then be asserted as support by States, environmental groups, and a federal Indian tribe in several pending tort suits they have already brought against industrial emissions sources.

EPA argues that this rule is purely a scientific finding that “do[es] not impose any requirements,” and on that basis found that the rule “will not have a significant economic impact on a substantial number of small entities.”⁴ But the statutory consequences of the Endangerment Rule could well make this the most costly rule in regulatory history, penetrating more deeply into the national economy than the Clean Air Act ever has before.

Background

The story of the Endangerment Rule could be opened at a number of different points, including by recounting the history of the Kyoto Protocol,⁵ or by setting forth the origin of the theories advanced several decades ago that the man-made emissions of certain gases were causing global warming.⁶ In the interests of brevity, however, familiarity with the basic issue of climate change and with the fact that the United States has not signed the Kyoto Protocol is assumed.

For present purposes, the best place to begin to understand the Endangerment Rule is with the filing of a rulemaking petition at EPA by the International Center for Technology Assessment (“ICTA”) and 18 other environmental and renewable energy industry organizations in 1999.⁷ For the purpose of averting climate change, the ICTA Petition called for EPA to set new motor vehicle emissions standards for four gases — carbon dioxide, methane, nitrous oxide, and hydrofluorocarbon. Before leaving office, the Clinton Administration raised the profile of the ICTA Petition by putting it out for public comment. The Bush Administration reviewed the comments filed upon assuming office, and later denied the ICTA Petition in the Fall of 2003.⁸ After an initial affirmance by the D.C. Circuit, 2-1, and the denial of *en banc* review, the Supreme Court took the case and ultimately reversed (5-4) the denial of this rulemaking petition in *Massachusetts v. EPA*.⁹

The Supreme Court held that EPA had provided legally deficient reasons for denying the petition that were not wholly rooted in the Clean Air Act: “[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.”¹⁰ For instance, the reasons EPA cited for denying the ICTA petition included protecting the President’s foreign policy prerogatives. To this the Supreme Court said: “Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change.”¹¹

The Bush Administration responded to the remand in *Massachusetts v. EPA*, by issuing an advance notice of proposed rulemaking (“ANPRM”).¹² The ANPRM was criticized as simply “punting” the questions involved in the remand to the next Administration. Others maintained that the ANPRM attempted to explore on a comprehensive basis all of the complexities and consequences that would result if GHG emissions, especially from stationary sources, were regulated under the Clean Air Act. Proposals from EPA officials to mesh GHG regulations with the machinery of the Act appeared alongside the views of both Cabinet and other key White officials that such GHG regulation would seriously damage the national economy and overwhelm the administrative machinery of the Act. Summarizing the Executive Branch materials before him, the Administrator of the EPA offered the following preliminary view:

I believe [this notice] demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely pre-empt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.[¹³]

No action was taken in response to the public comments received on the ANPRM before the Bush Administration left office.

When the Obama Administration came into office, it shifted course. President Obama had campaigned on establishing a vigorous new regulatory regime to control carbon emissions, and he and his appointees also took important steps to make use of the existing framework of the Clean Air Act to regulate GHG emissions. In President Obama’s first year in office, the new EPA announced three key interrelated initiatives:

First, beginning in February 2009 EPA reconsidered and reversed a Bush-era decision to deny California a preemption waiver, thereby allowing the Golden State to operate its own program setting tailpipe standards for GHG emissions from new vehicles.¹⁴ EPA’s grant of the waiver has been challenged in the D.C. Circuit. That case remains pending.¹⁵

Second, in May 2009, the President announced in a Rose Garden ceremony an agreement between several major automobile manufacturers and the State of California, as brokered by the Administration.¹⁶ Pursuant to the commitment letters signed by the manufacturers and California, the manufacturers agreed, *inter alia*, to drop preemption lawsuits under the Energy Policy and Conservation Act of 1975¹⁷ against California and the dozen other States that had

adopted California's GHG standards, while California agreed to accept compliance with new federal emissions standards to be issued by EPA and the National Highway Traffic Safety Administration ("NHTSA"), as compliance with California's own standards.¹⁸

The agreement was premised on the occurrence of certain future events. For instance, the manufacturers agreed that they would undertake particular steps regarding existing litigation, if the joint standards were issued "as substantially described" in the EPA-NHTSA notice of intent to conduct a rulemaking.¹⁹ The notice of intent in question suggested that EPA would promulgate standards of the following stringency:

EPA currently is considering proposing standards that would, if made final, achieve on average 250 grams/mile of CO₂ in model year 2016. The standards for earlier years would begin with the 2012 model year, with a generally linear phase-in from MY 2012 through to model year 2016. NHTSA expects to propose appropriate related CAFE [corporate average fuel economy] standards.^[20]

At the time, EPA stated that it had concluded that "[t]here is a critically important need for our country to address global climate change and to reduce oil consumption."²¹ As contemplated in the May 2009 agreement, EPA later issued the proposed joint standards, along with NHTSA, in September of last year.²² Those standards have now been finalized.²³

Third, just before the May 2009 presidential announcement, EPA had issued a proposed rule that would find endangerment to the public from six GHGs (the four included in the ICTA petition that are emitted from motor vehicles, plus two that are not — perfluorocarbons and sulfur hexafluoride).²⁴ Many of the conclusions in the proposed Endangerment Rule were premised on the United Nation's Fourth Assessment, including prominently citing the Intergovernmental Panel on Climate Change ("IPCC") for the following conclusion on the first page of the *Federal Register* notice:

The heating effect caused by the human-induced buildup of greenhouse gases in the atmosphere is very likely [footnote] the cause of most of the observed global warming over the last 50 years.

[Footnote:] According to Intergovernmental Panel on Climate Change (IPCC) terminology, "very likely" conveys a 90 to 99 percent probability of occurrence.^[25]

To summarize, by September of last year, the Obama Administration had (1) granted California a waiver of preemption to allow it to set its own *state* GHG standards for new vehicles for model years 2012-2016 (this also allows other States to borrow California's regulatory regime, under Section 177 of the Clean Air Act²⁶); (2) also promised to create a new *federal* regulatory regime encompassing two different agencies to govern the same mobile source emissions; and (3) as a necessary predicate for the issuance of EPA regulations in this area under the text of Clean Air Act Section 202(a),²⁷ had proposed finding that GHG emissions both from new motor vehicles and from non-vehicle sources endanger the public health and welfare. When the final Endangerment Rule was issued on December 7, 2009, EPA stated that "[t]he Administrator's findings are in response to the Supreme Court's decision in *Massachusetts v. EPA*."²⁸

Hence, by last Fall, it had become clear that the stage would soon be set for yet another round of judicial review, testing whether this second set of EPA attempts to grapple with the issue of GHG regulation under the existing Clean Air Act would be deemed consistent with law. This time around, however, two prominent legislative attempts to override or delay the impacts of Clean Air Act GHG regulation have also been launched in Congress. Some of the challenges to the Endangerment Rule are first discussed below.

Current Litigation and What We Know About the Legal Issues Presented

Seventeen petitions for review have been filed to challenge the Endangerment Rule in the D.C. Circuit (the only place such a rule can be reviewed under Section 307(b)(1) of the Act). Sixteen States and the Pennsylvania Department of Environmental Protection seek to intervene on EPA's side. And thirteen States and the Governor of Mississippi seek to intervene on the side of those challenging the Endangerment Rule. Numerous environmental group intervenors and *amici* have also notified the Court of their desire to participate.

Climategate — Lists of issues that petitioners expect to raise in briefing have just been filed. Many of the issues raised track points of contention in several pending petitions for reconsideration that have been filed with EPA,²⁹ including by the Commonwealth of Virginia and the State of Texas.³⁰ Reconsideration is premised on Clean Air Act Section 307(d)(7)(B).³¹ Most of the petitions for reconsideration point to Climategate as the basis for reconsideration. For instance, the Competitive Enterprise Institute's petition for reconsideration states: "In our view, this Endangerment Rule was unjustifiably based on unscientific reports by the UN Intergovernmental Panel on Climate Change (IPCC) and scientifically indefensible global temperature sets."³²

Setting out the full extent of the Climategate controversy is beyond the scope of this paper. But the controversy began when e-mails from the Climate Research Unit ("CRU") of the University of East Anglia were posted to the Internet in November 2009. Virginia characterizes the documents as follows: "[T]he e-mails and documents suggest that the CRU scientists questioned the reliability of their own data, the methodologies used in developing and analyzing such data, and the conclusions based thereon."³³

Other Alleged Legal Defects — The reconsideration petitions also assert other legal flaws. For instance, a supplement to CEI's petition for reconsideration argues that EPA's statement that applying the Clean Air Act to the regulation of stationary source GHG emissions would be absurd was not addressed when EPA issued its Endangerment Rule. Nor, in CEI's view, was the issue adequately vented in the *Massachusetts v. EPA* briefing: "If EPA had forthrightly admitted to the Supreme Court that construing the Clean Air Act to cover carbon dioxide would end up forcing EPA to resort to the absurdity canon to deal with that construction, the outcome in *Massachusetts* might well have been different."³⁴

In its proposal to adopt the so-called Tailoring Rule, EPA reached its conclusion that application of the stationary source provisions in the Act known as the Prevention of Significant Deterioration program ("PSD") would be absurd.³⁵ The Tailoring Rule proceeds on the theory that Clean Air Act Section 165(a)(4)³⁶ will trigger the application of the PSD program to stationary sources as soon as EPA issues the joint auto standards with NHTSA in final form.

“This proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions from light-duty motor vehicles and, as a result, trigger PSD and title V applicability requirements for GHG emissions.”³⁷ EPA’s view that the regulation of mobile sources automatically carries with it or “triggers” stationary source regulation is itself highly significant and underscores the potential significance of the Endangerment Rule for the national economy. Recently, EPA has taken the position that stationary source regulation will not be triggered until January 2, 2011, because that is the date on which the joint auto standards will become effective.³⁸

The Tailoring Rule’s name derives from EPA’s view that applying the statute to stationary source GHG emissions was beyond Congress’s intentions at the levels referred to in the text of the statute — i.e., to any source emitting more than 250 tons per year.³⁹ That level of emissions means, in the GHG context, that the PSD program would morph from a small program applicable to only the largest pollution sources in America, into a vast program that would require at least 40,000 PSD permits and six million Title V permits.⁴⁰

Finally, it is likely that one or more petitioners will argue that it was impermissible for EPA to make an endangerment finding under Section 202(a), relating exclusively to mobile sources, as to the two GHGs that are *not* emitted from vehicles. Other petitioners may argue that EPA prejudged the outcome of its proposed Endangerment Rule, by arranging in May 2009 for the California and auto industry settlement several months before the final Endangerment Rule in December 2009. Still other petitioners may argue that the Endangerment Rule has economic consequences that cannot bear scrutiny.

Efforts in Congress to Overturn or Delay the Endangerment Rule

The Endangerment Rule has engendered a strong negative reaction from many in Congress. Senator Murkowski is widely acknowledged as the leader of this effort. On her website, she explains her views on the subject, which bear many similarities to the views of Administrator Johnson as expressed in 2008’s ANPRM:

Sen. Murkowski believes that climate change is a real threat that must be addressed. She is also steadfast in her belief that Congress is the only agency in the United States with the power to tackle the problem in a responsible manner. Unfortunately, the Environmental Protection Agency (EPA) is moving toward regulating greenhouse gases under the Clean Air Act. Written in 1977, the Clean Air Act was never intended to regulate climate change. The economy-wide implications of regulating greenhouse gases are not compatible with the blunt tools afforded the EPA under the Act.^[41]

Initially, Senator Murkowski sought to impose a one-year moratorium on the application of the Clean Air Act to stationary sources, based on the concern that the Endangerment Rule could trigger such regulation. More recently, Senator Murkowski has introduced a resolution under the Congressional Review Act⁴² to disapprove the Endangerment Rule in its entirety. She summarized her current legislative thinking as follows:

“If you truly believe that EPA climate regulations are good for the country, then vote to oppose our resolution,” Murkowski said. “But if you share our concerns, and believe that climate policy should be debated in Congress, then vote with us to support it.”

Murkowski filed her disapproval resolution pursuant to the provisions of the Congressional Review Act (CRA). Sen. Don Nickles, R-Okla., and Sen. Harry Reid, D-NV, were the principal sponsors of the CRA, incorporated into the Contract with America Advancement Act of 1996, and signed into law by President Bill Clinton.

Upon introduction, a disapproval resolution is referred to the committee of jurisdiction, which in this case will be the Senate Committee on Environment and Public Works. If the committee does not favorably report the resolution, it may be discharged upon petition by 30 Senators. Once a disapproval resolution is placed on the Senate calendar, it is then subject to expedited consideration on the Senate floor, and not subject to filibuster.^[43]

Murkowski’s resolution has 41 cosponsors, and thus has created a significant political event that calls for careful response by the Obama Administration.⁴⁴ A companion resolution was introduced into the House on March 2, 2010.⁴⁵

Senator Rockefeller has launched a second legislative effort concerning the Endangerment Rule. Senator Rockefeller’s proposal is to delay the onset of PSD regulation of stationary sources under the Clean Air Act for two years. “The ‘two-year suspension’ will give Congress ‘the time it needs to address an issue as complicated and expansive as our energy future,’ Rockefeller said in an e-mail.”⁴⁶

Both the Murkowski and Rockefeller initiatives remain pending. Controversies have swirled, particularly around the Murkowski approach, as to whether passage of the CRA resolution would effectively block implementation of the impending auto rules or cause the May 2009 settlement agreement to collapse.⁴⁷ Proponents of the resolution dispute that claim.⁴⁸

Implications for Pending “Public Nuisance” Tort Suits

Several collections of plaintiffs have filed tort suits, principally advancing federal or state common law public nuisance theories against various groupings of industry GHG sources. To date, four such suits have been filed — two in the Northern District of California,⁴⁹ one in the Southern District of New York,⁵⁰ and one in the Southern District of Mississippi.⁵¹

All of those cases have gone up on appeal, and two remain pending there. The first such nuisance suit, against automobile manufacturers, was dismissed pursuant to the May 2009 arrangement between those companies and the plaintiff State of California. Industry’s threshold defenses of a lack of standing and the presence of political questions were rejected 2-0 by a panel of the Second Circuit in the *Connecticut v. AEP* appeal, with *en banc* rehearing recently being denied.⁵² And a unanimous panel of the Fifth Circuit essentially reached the same conclusion in *Comer v. Murphy Oil*, but *en banc* rehearing there has been granted.⁵³

The remaining suit (the second to be filed in the Northern District of California) is in the early stages of briefing to the Ninth Circuit. In that case, captioned *Native Village of Kivalina v. ExxonMobil*, the District Judge dismissed the complaint of a Native Alaskan tribe on the grounds that it could not meet the causation prong of constitutional standing doctrine and that the tribe's theory of tort liability required the resolution of political questions. The tribe sought to show that climate change was causing their native village to sink into the ocean. In their opening brief, the plaintiffs have argued that their tort action is supported by EPA's Endangerment Rule. "EPA found that during this century, the 'largest warming [in the United States] is projected to occur in winter over northern parts of Alaska.'"⁵⁴ When relevant briefing opportunities present themselves, plaintiffs in each of the public nuisance cases may also argue, along with the *Kivalina* plaintiffs, that the Endangerment Rule supports their bids for large tort recoveries or expansive injunctions.

Conclusion

The Endangerment Rule, related rulemakings, together with associated litigation, and the congressional responses thereto, all premised on GHG emissions, present numerous novel legal questions too important to the national economy to get wrong. The debate has just begun and will continue in earnest throughout this year and beyond.

** Jeffrey Bossert Clark is a partner in the D.C. office of Kirkland & Ellis LLP and is a member of the Firm's Appellate Litigation Practice.*

¹ See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (signed by EPA Administration Lisa Jackson on December 7, 2009) [hereafter "Endangerment Rule, 74 Fed. Reg. at ___"].

² 42 U.S.C. § 7521(a).

³ 42 U.S.C. § 7607(b)(1).

⁴ Endangerment Rule, 74 Fed. Reg. at 66,545.

⁵ 37 I.L.M. 22 (1998). The full text of the Protocol is also available at http://unfccc.int/kyoto_protocol/items/2830.php.

⁶ See Intergovernmental Panel on Climate Change, Fourth Assessment Report, available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [hereafter "Fourth Assessment at ___"]. The Fourth Assessment has come under attack in the so-called "Climategate" scandal. See, e.g., Richard O. Faulk, *The 'Climategate' Controversy: A Tree Falls in the Forest, But is Copenhagen Listening?*, 30 No. 11 Andrews Env'tl. Litig. Rep. 4 (Dec. 23, 2009).

⁷ See <http://www.icta.org>.

⁸ See 68 Fed. Reg. 52,922 (Sept. 8, 2003).

⁹ See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *en banc denied*, 433 F.3d 66 (D.C. Cir. 2005) (majority of judges voting against), *rev'd & remanded*, 549 U.S. 497 (2007).

¹⁰ *Massachusetts*, 549 U.S. at 533.

¹¹ *Id.* at 534.

¹² See 73 Fed. Reg. 44,354 (July 30, 2008).

¹³ *Id.* at 44,355.

¹⁴ See 73 Fed. Reg. 12,156 (Mar. 6, 2008) (Bush Administration denying California a waiver of preemption under Clean Air Act Section 209(b), 42 U.S.C. § 7545(b)); 74 Fed. Reg. 7,040 (Feb.

12, 2009) (Obama Administration initiating reconsideration of waiver denial); 74 Fed. Reg. 32,744 (July 8, 2009) (current Administration granting California the waiver at issue).

¹⁵ See *Chamber of Commerce of the United States of America v. EPA*, No. 09-1237 (D.C. Cir.) (pending).

¹⁶ See President Obama Announces National Fuel Efficiency Policy, available at http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ (May 19, 2009).

¹⁷ See 49 U.S.C. § 32919(a).

¹⁸ See <http://www.epa.gov/otaq/climate/regulations.htm>.

¹⁹ See, e.g., Honda's Commitment Letter (May 17, 2009), available at

<http://www.epa.gov/otaq/climate/regulations/honda.pdf>.

²⁰ 74 Fed. Reg. 24,007, 24,008 (May 22, 2009). Greenhouse gas emissions standards are effectively fuel economy standards because no technology exists to capture or convert the principal GHG emitted by driving: carbon dioxide. "CO₂ emissions and always and directly linked to fuel consumption because CO₂ is the ultimate end product of burning gasoline"

71 Fed. Reg. 17,566, 17,659 (Apr. 6, 2006). Indeed, EPA measures fuel economy under its EPCA regulations by measuring carbon dioxide emissions. See 40 C.F.R. § 600.113-78.

²¹ *Id.* at 24,007.

²² See 74 Fed. Reg. 49,454 (Sept. 28, 2009). To meet a requirement in EPCA that gives manufacturers 18 months of lead time before new fuel economy standards can be issued, see 49 U.S.C. § 32902(a), EPA and NHTSA were due to issue the joint automobile standards at the end of March 2010. The joint standards were released just one day later, on April 1, 2010.

²³ See <http://www.epa.gov/otaq/climate/regulations.htm>.

²⁴ See 74 Fed. Reg. 18,886 (Apr. 24, 2009).

²⁵ See *id.* at 18,886 & n.2.

²⁶ 42 U.S.C. § 7507.

²⁷ "The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, 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 his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1) (excerpt).

²⁸ 74 Fed. Reg. at 66,499.

²⁹ EPA has posted the reconsideration petitions — ten in all thusfar — on a website:

<http://www.epa.gov/climatechange/endangerment/petitions.html>.

³⁰ See, e.g., Matthew Tre Saugue, *Texas Challenges EPA's Global Warming Findings*, HOUSTON CHRONICLE (Feb. 17, 2010), available at

<http://www.chron.com/disp/story.mpl/metropolitan/6870313.html>.

³¹ 42 U.S.C. § 7607(d)(7)(B). This provision establishes a non-discretionary duty for EPA to put such petitions out for a new round of notice and comment if they are filed within the 60-day window for seeking judicial review under Section 307(b)(1).

³² CEI's Petition for Reconsideration, at 1 (Feb. 12, 2010), available at

http://www.epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Competitive_Enterprise_Institute.pdf.

³³ Commonwealth of Virginia’s Petition for Reconsideration, at 2 (Feb. 16, 2010), available at http://www.epa.gov/climatechange/ endangerment/downloads/Petition_for_Reconsideration_Commonwealth_of_Virginia.pdf.

³⁴ CEI Supplement to Petition for Reconsideration, at 4-5 (Feb. 16, 2010), available at http://www.epa.gov/climatechange/ endangerment/downloads/Supplement_to_Petition_Competitive_Enterprise_Institute.pdf.

³⁵ See 74 Fed. Reg. 55,292 (Oct. 27, 2009).

³⁶ 42 U.S.C. § 7475(a)(4).

³⁷ *Id.* at 55,292.

³⁸ See 75 Fed. Reg. 17,004 (Apr. 2, 2010).

³⁹ See Clean Air Act Section 169(1), 42 U.S.C. § 7479(1).

⁴⁰ See 74 Fed. Reg. at 55,295.

⁴¹ Policy Statement on the Murkowski EPA Amendment, available at <http://murkowski.senate.gov/public/index.cfm?p=PolicyStatement>.

⁴² See 5 U.S.C. §§ 801-808.

⁴³ Sen. *Murkowski Offers Disapproval Resolution to Block EPA Endangerment of Economy Legislative Veto of Agency Rule will Take Worst Option for Reducing Emissions off Table* (Jan. 21, 2010), available at http://murkowski.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=7a4b5017-15eb-41ff-922b-6ae3975cbe87&ContentType_id=b94acc28-404a-4fc6-b143-a9e15bf92da4&Group_id=c01df158-d935-4d7a-895d-f694ddf41624.

⁴⁴ “The resolutions would require a simple majority vote in both houses, and must be signed by the President. Murkowski’s resolution has 41 sponsors, not enough to pass the Senate, but enough to force the White House to expend political capital to defeat it, said ClearView Energy Partners analyst Kevin Book in a note to clients. ‘The White House doesn’t want to win the Murkowski vote, it wants to stop it outright, because even a victory that blocks Murkowski is likely to drain all the political will for comprehensive cap and trade legislation,’ he said.” Daniel J. Goldstein, *EPA’s Jackson Says No Endangerment Regulatory Action in 2010* (Feb. 23, 2010), available at <http://www.cleanskies.com/articles/epas-jackson-says-no-endangerment-regulatory-action-2010>.

⁴⁵ See Press Release, *Boehner, Barton Introduce Proposal to Halt EPA Ruling on CO₂: Resolution of Disapproval Would Prevent Back Door Attempt at National Energy Tax* (Mar. 2, 2010), available at <http://republicans.energycommerce.house.gov/news/PRArticle.aspx?NewsID=7679>.

⁴⁶ Simon Lomax, *Rockefeller Introduces Bill to Delay EPA Carbon Rules* (Update2) (Mar. 4, 2010), available at <http://www.businessweek.com/news/2010-03-04/rockefeller-introduces-bill-to-delay-epa-carbon-rules-update1-.html>.

⁴⁷ See Letter from Dave McCurdy, President and CEO, Alliance of Automobile Manufacturers, to Speaker Nancy Pelosi, *et al.* (Mar. 16, 2010) (“[I]f these resolutions are enacted into law, the historic agreement creating the One National Program for regulating vehicle fuel economy and greenhouse gas emissions would collapse.”).

⁴⁸ See Letter from Senator John Thune to Department of Transportation Secretary Ray LaHood (Mar. 23, 2010) (asserting that the Administration has conceded that NHTSA (part of DOT) has the power to issue the agreed-upon standards without a parallel rulemaking by EPA).

⁴⁹ The first such case was *People ex rel. California v. General Motors Corp.*, No. C06-5755-MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2017). The second was *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal pending*. See also *infra* n.49.

⁵⁰ See *Connecticut v. American Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.2d 309 (2d Cir. 2009).

⁵¹ The Southern District of Mississippi's decision dismissing the complaint on political question and standing grounds was not issued in a published decision.

⁵² See *Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

⁵³ See *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted by ---* F.3d ---, 2010 WL 685796 (5th Cir. Feb. 26, 2010).

⁵⁴ Appellants' Opening Brief in *Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (Mar. 10, 2010).

Related Links:

"If Congress Won't Act the EPA Must" by Jonathan Capehart, *Washington Post*:
http://voices.washingtonpost.com/postpartisan/2010/03/_efforts_by_congress_to.html.

Intergovernmental Panel on Climate Change, Fourth Assessment Report, available at
http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

EPA has posted the reconsideration petitions:
<http://www.epa.gov/climatechange/endorsement/petitions.html>.

"16 'Endangerment' Lawsuits Filed Against EPA Before Deadline," by Robin Bravender, *New York Times*: <http://www.nytimes.com/gwire/2010/02/17/17greenwire-16-endangerment-lawsuits-filed-against-epa-bef-74640.html>.

"E.P.A. Clears Way for Greenhouse Gas Rules" by John M. Broder, *New York Times*:
<http://www.nytimes.com/2009/04/18/science/earth/18endanger.html>

"U.S. Chamber Petitions EPA to Reconsider Greenhouse Gas Endangerment Finding" by Robin Bravender, *New York Times*: <http://www.nytimes.com/gwire/2010/03/16/16greenwire-us-chamber-petitions-epa-to-reconsider-greenho-18205.html>.

"EPA Calls Greenhouse Gases a Public Threat" by Jeffrey Ball, Charles Forelle, and Ian Talley:
<http://online.wsj.com/article/SB126020179812780059.html>.