Administrative Law and Regulation

Climate Change Litigation Since *Mass v. EPA*

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Although Congress failed to pass climate change legislation in 2007, the year was nevertheless highly significant for climate change litigation. Many courts are increasingly willing to interpret existing statutes (particularly the Clean Air Act and the National Environmental Policy Act) to require federal agencies to address some aspect of global warming. At the same time, they generally have proven far more reluctant to frame judicial climate change relief under federal or state common law nuisance theories. Such claims have largely been dismissed on standing or justiciability grounds.

Nevertheless, a pattern is clearly emerging in which states and private groups that are impatient with federal efforts to deal with global climate change on the international level seek to force U.S. domestic action either directly under existing statutory schemes (or through new state laws) or indirectly by targeting the industries they believe should be the subject of regulation in this area. At this point, it is by no means safe to assume that these efforts will be found by the courts to be preempted by federal law.

Massachusetts v. EPA

On April 2, 2007, the United States Supreme Court ruled that the Environmental Protection Agency (EPA) already has the authority to regulate greenhouse gas ("GHG") emissions under the Clean Air Act, at least GHG emissions from new motor vehicles and motor vehicle engines. That case, *Massachusetts v. EPA*, was one of the most closely watched and decided by the Court last year.[1]

The controversy underlying *Massachusetts v. EPA* dates to 1999, when several environmental groups petitioned EPA to set GHG motor vehicle emissions standards, including and especially for carbon dioxide. CAA § 202(a) requires EPA to establish "standards applicable to the emissions of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines" which in its "judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[2]

After considering the matter for nearly four years, EPA rejected the petition in September, 2003. In its final rule, the Agency concluded that carbon dioxide was not a "pollutant" within the CAA's meaning, and that, as a result, it did not have the authority to regulate carbon emissions under that law. Moreover, EPA also explained that it would not have exercised that authority even if the CAA had granted it the power. Here the Agency noted in particular that the United States was determined to promote a global strategy for addressing climate change issues, and that unilateral American action in this area would undermine that goal.

EPA's denial of the petition was challenged by a number of environmental groups and seventeen state and local governments. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Agency's decision, but in a badly fractured series of opinions.[3] The Supreme Court noted the unusual importance of the underlying issues and determined to review the case. In the event, the Court addressed three questions: (1) whether the plaintiffs had "standing" to raise the claims; (2) whether EPA had CAA § 202(a) authority to regulate carbon dioxide and other air emissions associated with climate change; and (3) whether, if the Agency had that authority, it could decline to exercise it for the essentially foreign policy reasons articulated in the final rule.

In granting that Massachusetts at least had standing to challenge EPA's decision (because its coastline is allegedly threatened by rising sea levels attributable to global warming), the Court articulated a new and relaxed threshold of standing for state claims—granting them what it termed a "special solicitude." Writing for the majority, Justice Stevens noted that it is of "considerable relevance that the party seeking review here is a sovereign state and not, as it was in *Lujan,* a private individual," citing the century-old case of *Georgia v. Tennessee Copper Co*.[4]

In dissent, Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito) attacked the majority's reliance on the *Tennessee Copper* case, noting that it had not involved a state's standing to sue under Article III of the Constitution, but the remedies a state might seek in a case where it clearly had that standing—which explained why this precedent was not cited by the parties or the D.C. Circuit below. The Chief Justice went on to criticize the majority's use of established standing doctrines, and especially its failure to link Massachusetts supposed injury—loss of coastal land—to EPA's failure to regulate GHG emissions from motor vehicles, and to show how reversal of that decision would prevent that harm:

> The Court's sleight-of-hand is in failing to link up the different elements of the three-part standing test [injury in fact, causation and redressibility]. What must be likely to be redressed is the particular injury in fact.... But even if regulation does reduce emissions—to some indetermine degree, given events elsewhere in the world—the Court never explains why that makes it likely that the injury in fact—the loss of land—will be redressed.[5]

The "special solicitude" shown to Massachusetts here suggests that this standing analysis, as noted by the dissenters, is limited to this case. At the same time, there are twenty-four states and the District of Columbia with coastlines, oceanic or tidal, that might be affected by sea levels.

On the merits, the Court determined that EPA did have CAA authority to regulate greenhouse gases, and especially carbon dioxide, as "air pollutant[s]," which are defined as "any air pollution agent... including any physical, chemical... substance or matter which is emitted into or otherwise enters the ambient air..."[6] Concluding that carbon dioxide, methane,

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nitrous oxide, and hydrofluorocarbons are clearly "physical [and] chemical substance[s] which [are] emitted into... the ambient air," the Court found that such gases "fit well within the Clean Air Act's capacious definition of 'air pollutant'" and thus held that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles and new motor vehicle engines sold in the United States.

Finally, the Court addressed EPA's decision that, even if it had the authority to regulate greenhouse gases under the CAA, "it would be unwise to do so." EPA had explained in denying the original petition for rulemaking that a causal connection between greenhouse gases and global surface temperatures was not unequivocally established, and that piecemeal attempts to address climate change would—in any case—conflict with the President's decision to promote a comprehensive approach to these issues. This approach included support for technological innovations, voluntary emission reduction and sequestration measures, additional research, and attempts to involve developing countries (which account for an increasing percentage of worldwide GHG emissions) in any global solution.

The majority found this explanation inadequate to support EPA's decision because it was "divorced from the statutory text." That text, the Court concluded, requires EPA to adopt standards to regulate an air pollutant emitted from new motor vehicles if the Agency concludes that those emissions endanger the public welfare, including by contributing to climate change. Significantly, however, the Court did not require regulation. Rather, it made clear that EPA could decline to regulate GHG emissions under § 202(a), but only if the Agency concluded that the emissions do not contribute to climate change, or if it were to provide a reasoned explanation for why it cannot undertake a determination as to the effects of such greenhouse gas emissions on climate change at this time.

This portion of the Court's decision was also met with a vigorous dissent, written by Justice Scalia and joined by Justices Alito, Thomas, and the Chief Justice. Justice Scalia began by noting that nothing in the CAA requires EPA to make a "judgment" about any particular air pollutant in response to a rulemaking petition and that still less does the statute require the Agency's refusal to make a judgment be related to the public health and welfare considerations applicable when it does decide to regulate.[7] On the question of whether the CAA even permits the regulation of GHG, the dissenters argued that the CAA's definition of "air pollutant," subject to regulation under section 202, was ambiguous, and that the majority had failed to explain why EPA's interpretations of the statute were "incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference."[8]

Whether the Supreme Court's decision in *Massachusetts v. EPA* will have a long-term, substantial impact on climate change initiatives remains to be seen. The Court manifestly did not require EPA to make an "endangerment finding" under CAA § 202(a), or to regulate GHG emissions from new motor vehicles and motor vehicle engines. It made clear that GHG emissions, including carbon dioxide, are pollutants under the statute, and that if EPA chooses not to regulate its reasons must properly relate to the law's public health and welfare requirements.

Thus, although EPA could certainly conclude that an endangerment finding is inappropriate because unilateral U.S. regulation would undercut efforts to reach a global solution to the climate change issue, it must relate this to the statute's public health and welfare requirements—*i.e.,* because unilateral U.S. reductions will actually lead to greater GHG emission on a global basis, making the problem worse—rather than simply referencing the clear foreign policy problems that a unilateral approach creates. As Justice Stevens, writing for the majority, noted clearly, EPA still "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."[9]

Perhaps the most immediate impact of the *Massachusetts v. EPA* decision, however, is in the standing area. By effectively granting state governments a new, special standing status, the Court has all but guaranteed additional litigation by those states determined to force federal policy on the global climate change issue. Ironically, however, the Court's decision in *Massachusetts v. EPA* has arguably undercut one of the state's core arguments against private parties (rather than the federal government): that GHG emissions and "global warming" constitute common law nuisances. Indeed, as discussed below, some lower court decisions that consider *Massachusetts v. EPA* have already concluded that the states' ability to seek redress from the federal government supports their decision to not consider common-law-based nuisance claims brought by those states. This aspect points to a narrower impact than the victorious states and environmental groups might have anticipated.

Central Valley Chrysler-Jeep v. Goldstone

In 2002, the California legislature enacted Assembly Bill 1493, which required the California Air Resources Board (CARB) to develop regulations to achieve the "maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."[10] CARB was required to apply these regulations starting with the 2009 model year. It adopted regulations in 2004, addressing the greenhouse gases of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.

On December 7, 2004, a coalition of automobile manufacturers, dealers, and related associations challenged those regulations, claiming that they were preempted by the federal Energy Policy and Conservation Act of 1975 (EPCA)[11]—under which the National Highway Traffic Safety Administration (NHTSA) sets corporate average fuel economy, or "CAFE," standards, by CAA § 209(a) (which permits California to adopt stricter motor vehicle emissions standards in certain circumstances), and by federal foreign policy considerations.[12] Although the district court initially ruled in the manufacturers' favor, finding that the state's effort to regulate GHG emissions from motor vehicles was preempted by § 209(a), the bulk of the case was stayed early in 2007, pending the Supreme Court's resolution of *Massachusetts v. EPA*. Following the Supreme Court's *Massachusetts v. EPA* decision on April 2, 2007, the *Central Valley Chrysler-Jeep* court reconsidered its initial ruling, and resolved the remainder of the case.

The pre-emption challenge to California's program required the court to consider the interplay between EPCA and the CAA. CAA § 202(a)(1), of course, empowers EPA to prescribe motor vehicle emissions standards, and the statute

generally preempts states from also regulating motor vehicle emissions. California is the exception, as it may impose more stringent standards under CAA § 209—assuming the requisite criteria are established for the grant of an EPA waiver.[13] In addition, other states may adopt California's EPA-approved regulations—although they may not adopt their own regulatory regime requiring automobile manufacturers to produce a "third" car.

Under EPCA, the Department of Transportation's NHTSA sets federal fuel economy standards for new vehicles on a fleet-wide basis.[14] In adopting these "CAFE" standards, NHTSA must consider "(1) technological feasibility; (2) economic practicability; (3) the effect of other Federal motor vehicle standards on fuel economy; and (4) the need of the nation to conserve energy."[15] In addition, EPCA contains an express preemption provision which states that "a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."[16] EPCA does not contain a waiver provision for this preemption.

Following the Supreme Court's *Massachusetts v. EPA* discussion of whether NHTSA's exclusive right to establish fuel economy standards for energy conservation purposes precluded EPA from establishing similar requirements as a means of limiting GHG emissions under the CAA, the court concluded that California's regulations were not pre-empted—assuming an EPA waiver was, in due course, actually granted under § 209. It reasoned that EPCA and the CAA established different, if related, standards for regulation, and that EPA's regulatory authority—in the "public health and welfare"—was broader.[17] It was, therefore, NHTSA that must take EPA's regulations into account in establishing its CAFE rules, and California rules approved by EPA under CAA § 209 were not, as a result, preempted either expressly or by implication because of EPCA.

The court also considered whether the California program is barred on foreign policy preemption grounds. It acknowledged that "[i]ntrusions of state law on the Federal Government's exercise of its authority to conduct foreign affairs are subject to preclusion."[18] However, the court also concluded that United States foreign policy with respect to climate change—at least as proven by the parties before it—did not prevent private or state efforts, even those compelled by law, to reduce GHG emissions. It concluded that "[t]o the extent [the] United States has articulated a concrete policy with respect to its international approach to control of greenhouse gas emissions from the motor vehicle sector," it is found in the "G8 Summit Report of 2007 which provides that the member states will ask their governments to: '... foster a large number of possible measures and various instruments that can clearly reduce energy demand and CO2 emissions in the transport sector....'"[19] California's regulations, it determined, were not in conflict with this policy.

The fear, raised both by the manufacturers in this case and by EPA in its September 8, 2003 order declining to regulate under CAA § 202, that state regulation would undercut the President's bargaining position *vis-à-vis* other countries, by effectively reducing his collateral, was dismissed by the court as a "strategy," rather than a statement of national policy.[20] The court refused, as a logical matter, to interfere with the U.S.'s supposed stated policy on the basis of the loss of "bargaining chips," suggesting that this would require invalidation of virtually all state efforts to improve energy efficiency, from encouraging the use of florescent light bulbs to "enhanced energy efficiency building codes."[21]

Significantly, however, the court did not have before it an authoritative statement by the executive branch that state regulation of GHG emission from motor vehicles would undercut the U.S.'s negotiating position abroad. In this respect, the court disallowed both arguments advanced ("without offer of proof") by the Solicitor General before the Supreme Court in *Massachusetts v. EPA*, and EPA's statements in its September 8, 2003, rule. Again following the majority in *Massachusetts v. EPA*, the court noted that Congress had tasked the State Department—rather than EPA—to formulate American foreign policy on climate change matters.[22] Its holding, therefore, is based on a lack of federal foreign policy interest, rather than the suggestion that the President's bargaining position cannot be such an interest.

Green Mountain Chrysler Plymouth v. Crombie

The *Central Valley Chrysler Jeep* decision built upon a similar decision issued on September 12, 2007 by the U.S. District Court for the District of Vermont: *Green Mountain Chrysler Plymouth v. Crombie*.[23] That case involved a challenge by vehicle manufacturers to Vermont's version of the California GHG emissions limitation program at issue in *Central Valley Chrysler-Jeep*. Vermont had adopted the program under CAA § 177, which permits other states to adopt California—rather than federal—motor vehicle emissions standards. The principal issue was whether these standards were preempted by the EPCA and NHTSA's CAFE requirements.

The *Green Mountain* court cited the Supreme Court's views, expressed in *Massachusetts v. EPA,* on the relationship between EPA's authority under the Clean Air Act, and NHTSA's authority under EPCA, and concluded that the "Court rejected outright the argument that EPA is not permitted to regulate carbon dioxide emissions from motor vehicles because it would have to tighten mileage standards, which is the province of the Department of Transportation under EPCA." The court's legal analysis was similar to that of the *Central Valley Chrysler Jeep* decision, although the *Green Mountain* Court had determined that an approved California program becomes "federalized" and therefore cannot be preempted by a federal regulation. The *Central Valley* Court avoided conferring this status on the California regulations, instead concluding that NHTSA had to harmonize its CAFE standards with the California rules, just like it would have to do relative to any EPA regulations.

The Vermont decision is notable because it was the first trial to host a battle of experts. During the sixteen-day trial, the judge overruled the manufacturers' evidentiary objections and found Vermont's expert scientists to be more credible and reliable than the industry's. In particular, the judge found NASA scientist James Hanson, often identified as the nation's most well-known climatologist, and other experts supporting the state, to be persuasive. They offered testimony on the existence

and generally adverse consequences of climate change, leading the court to conclude that "evidence presented to this Court... supports the conclusion that regulation of greenhouse gases emitted from motor vehicles has a place in the broader struggle to address global warming."[24]

The automakers appealed the judge's decision to the Second Circuit on October 5, 2007.

Center for Biological Diversity v. NHTSA

Federal courts have also considered directly NHTSA's obligation to take into account the impact of GHG emissions under both EPCA (in setting fuel economy standards), and the National Environmental Policy Act,[25] which requires federal actors to assess the environmental impact of their decisions. In *Center for Biological Diversity v. NHTSA*, the petitioner/environmental organization claimed that NHTSA, in its calculation of the costs and benefits of alternative fuel economy standards for light trucks, improperly applied a zero value to the benefit of carbon dioxide emissions reductions.[26] Under NEPA, the petitioners claimed that NHTSA had not given a "hard look" to the greenhouse gas implications of its rulemaking and failed to analyze a reasonable range of alternatives because it had not examined the rule's cumulative impact. The U.S. Court of Appeals for the Ninth Circuit ruled that NHTSA had failed to give due consideration to greenhouse gases under either statute.

In considering revision of its CAFE standards, NHTSA was obliged to set the standard at the "maximum feasible" level, considering "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[27] In setting these levels, NHTSA had monetized some externalities—such as the emission of criteria pollutants during gasoline refining and distribution—and crash and noise costs associated with driving. However, NHTSA did not monetize the benefit of reducing carbon dioxide emissions, finding the value of such reductions "too uncertain to support their explicit valuation and inclusion among the savings in environmental externalities from reducing gasoline production and use."[28]

The court reviewed a number of studies presented by the petitioners that showed the benefit of carbon emissions reductions, including one from the National Commission on Energy Policy, which found the benefit to be between $3 to $19 per ton of carbon dioxide equivalent. Environmental Defense and Union of Concerned Scientists recommended a minimum of $13.60 per ton carbon dioxide. NHTSA acknowledged the value of such reductions but found that the wide variation in estimates rendered the values too uncertain to support their explicit valuation. The court rejected this, finding that the record showed a range of values, and concluded that NHTSA's assignment of a zero-dollar value (which was outside the range) was arbitrary and capricious. In addition, the court noted that NHTSA had monetized other uncertain benefits, and that its failure to do so for reduced carbon emissions was arbitrary and capricious.

The court also noted that GHG emissions have the kind of cumulative impact that NEPA was designed to address. NEPA requires the federal government to assess the environmental ramifications of its decisions before acting.[29] NEPA requires federal agencies to prepare a detailed statement on the environmental impact of major federal actions "significantly affecting the quality of the environment."[30] If there is a substantial question of whether the action may have a significant effect, either individually or cumulatively, on the environment, the agency must prepare an Environmental Impact Statement ("EIS").[31]

The court faulted NHTSA for failing to consider the actual impact of the proposed CAFE standard, and directed the agency to "evaluate the 'incremental impact' that [those] emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions such as other light truck and passenger automobile CAFE standards."[32] When NHTSA claimed that a cumulative impact assessment was not warranted because climate change is affected by contributions outside the agency's control, the court responded that this "does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming."[33] This decision provides further support that courts will interpret existing laws to require a consideration of climate change impacts that may not have been understood when the laws were passed.[34]

California v. General Motors Corp.

In September 2006, the State of California sued the six largest automobile manufacturers, claiming that the emissions from their products, automobile exhaust, contributed to global warming and was therefore a public nuisance under both federal common law and California state common law. The automobile manufacturers asked the court at the outset to dismiss the case because, among other reasons, the complaint raised "nonjusticiable claims" reserved for resolution by the political branches of government.

In September 2007, a federal judge agreed that the complaint was non-justiciable and dismissed the case.[35] The court began by examining the activities of the federal government in the climate change area, starting with the 1978 National Climate Program Act[36] and continuing with the 1987 Global Climate Protection Act and the 1990 Global Change Research Act. It noted President George H.W. Bush's signature and the subsequent ratification of the United Nations Framework Convention on Climate Change in 1992, as well as President Clinton's signing of the Kyoto Protocol and the Senate's unanimous resolution urging the President not to sign any agreement that would result in serious harm to the U.S. economy or did not include provisions regarding the emissions of developing nations. Finally, the court noted the current administration's stance against Kyoto.

While the non-justiciability doctrine has many manifestations, the court felt that the most appropriate inquiry, indicated by the tests laid out in the Supreme Court's leading decision in *Baker v. Carr*,[37] asks the question of whether a court can decide a case "'without [making] an initial policy determination of a kind clearly for nonjudicial discretion.'"[38] The vehicle manufacturers argued that any court reviewing the question of whether a particular industry sector's emissions contribution was a public nuisance would have to first consider the broad array of other domestic and international activities

that contribute to climate change. Citing the prior district court decision in *Connecticut v. AEP*[39] (discussed below) on non-justiciability, the court agreed that to decide California's claim would require it to balance the "competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development."[40] The court concluded that this is the type of initial policy determination that is to be made by the political branches of government, not by the court.

The court also concluded that *Massachusetts v. EPA* supported its view that the political branches of government are best tasked with addressing climate change. As explained above, the *Massachusetts* Court created a new, relaxed standing requirement that permitted Massachusetts—as a state potentially affected by GCC impacts—"special solicitude" to seek review of decisions by federal administrative agencies regarding climate change. Because the Supreme Court found that Congress had given EPA the authority to regulate carbon emissions, the district judge in *California v. General Motors Corp.* concluded that a state that is dissatisfied with the federal government's approach to global warming can advance its interests first through the administrative channels and then through the courts if it feels that the rejection of its rulemaking petition is arbitrary and capricious.

While the court found sufficient for dismissal the requirement that it would have otherwise needed to make an impermissible policy decision, it also found other grounds to reinforce its decision to dismiss the case. First, it found that, by seeking to impose damages for the lawful sale of automobiles worldwide, the case implicated the political branches' powers over interstate commerce and foreign policy. In considering non-justiciability, *Baker v. Carr* requires a court to consider whether there has been a textually demonstrable constitutional commitment of the issues to the political branches of government—such as, in this case, the Commerce Clause and foreign affairs powers of the Constitution.

The court also discussed the lack of judicially discoverable or manageable standards by which it could resolve California's claims against the manufacturers. This bears on non-justiciability under *Baker v. Carr*. The court distinguished a raft of trans-boundary pollution cases presented by California, and concluded that none of these cases implicated the number of national and international policy issues presented by climate change challenges.

California has appealed the district court's dismissal of its case.

Connecticut v. AEP

The dismissal of the California nuisance claim followed by several years the dismissal of another nuisance claim brought by states against another industry sector: electric utilities. In *State of Connecticut v. American Electric Power* and *Open Space Institute v. American Electric Power*,[41] the Attorneys General from eight states and the City of New York, along with two environmental groups, sued American Electric Power Co., Inc., Cinergy Corp., Southern Co., Xcel Energy Inc., and the Tennessee Valley Authority over their carbon dioxide emissions. The suit, filed in the Southern District of New York in July, 2005, claimed that the electric utilities' carbon dioxide emissions from coal-fired electric power plants contributed to global warming. The plaintiffs sought an injunction restricting the amount of allowed carbon dioxide emissions from the defendants' plants in eight states.

Judge Loretta Preska, on September 15, 2005, dismissed the case because it raised non-justiciable political questions. In her decision, she found that explicit statements from both the legislative and executive branch, dating back to the earliest consideration of climate change issues, indicated a specific refusal to impose limits on carbon dioxide emissions. Applying the standard for determining non-justiciability, the court found that the case would require it to make an initial policy determination as to how to address global climate change, and that this responsibility was vested in the political branches of government, not in the courts.

Judge Preska's decision was appealed to the Second Circuit on September 22, 2005, and has been briefed and argued. In June, 2007, the Second Circuit ordered supplemental briefing on the impact of *Massachusetts v. EPA*. A decision is expected in 2008.

Comer v. Murphy Oil[42]

At the end of August, a district court judge in Mississippi dismissed a class-action lawsuit brought by some individuals against energy companies, including coal, electric utility, and chemical companies. The lawsuit, filed in April 2006, alleged that the defendant's carbon emissions contributed to climate change.

The lawsuit was filed by Ned Comer, and other Gulf Coast residents who suffered storm damage from Hurricane Katrina. It alleged that the energy companies knew that their emissions produced the conditions whereby a storm of the strength and size of Katrina would form and strike the Gulf Coast. The plaintiffs' claims included damages for personal injury, loss of property, and business interruption, and sought to apply tort theories of unjust enrichment, civil conspiracy, and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment.

Coal companies filed a motion to dismiss the case. In dismissing the case, Judge Louis Guirola determined that the plaintiffs did not have standing. Ruling from the bench, he noted that the alleged injuries are "attributable to a larger group that [is] not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." He also decided that the claims raised in the class-action suit were political questions that were reserved for resolution by Congress and the executive branch. This was the first climate-change decision following the Supreme Court's ruling in *Massachusetts v. EPA*. While the Court was willing to extend "special solicitude" to the states in that case, the dismissal of the *Comer* case suggests that non-state plaintiffs will not similarly benefit.

While it was the coalition of coal company defendants that brought the motion to dismiss the case against them, the judge, on his own initiative, dismissed the remaining defendants as well. The plaintiffs have appealed the dismissal to the U.S. Court of Appeals for the Fifth Circuit.

Endnotes

1 127 S. Ct. 1438 (2007).

2 42 U.S.C. § 7521(a)(1).

3 *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).

4 206 U.S. 230 (1907).

5 *Mass. v. EPA*, 127 S. Ct. at 1470.

6 42 U.S.C. § 7602(g).

7 *Mass v. EPA*, 127 S. Ct. at 1473.

8 *Id.* at 1477.

9 *Mass. v. EPA*, 127 S. Ct. at 1459.

10 A.B. 1493 § 43018.4(a).

11 49 U.S.C. §§ 32901-32919.

12 In addition, plaintiffs claimed that the regulations violated the "dormant" Commerce Clause and the Sherman Antitrust Act. The District Court granted CARB's motion for summery judgment on these claims in 2006.

13 California sought a § 209 waiver from EPA on December 21, 2005. EPA-HQ-OAR-2006-0173. EPA announced that it had denied this waiver request on December 19, 2007. It is expected that California and other states who adopted California's emissions standards will seek judicial review of this denial.

14 49 U.S.C. §§ 32902(a), (c).

15 49 U.S.C. § 32902(f).

16 49 U.S.C. § 32919.

17 2007 U.S. Dist. LEXIS 91309 at *48-*49.

18 2007 U.S. Dist. LEXIS 91309 at *82.

19 *Id.* at *109-111.

20 *Id.* at *104.

21 *Id.* at *107-08.

22 *Id.* at *99.

23 508 F. Supp. 2d 295 (D. Vt. 2007).

24 508 F. Supp. 2d at 340.

25 42 U.S.C. §§ 4321-4347.

26 508 F.3d 508 (9th Cir. 2007).

27 49 U.S.C. § 32902(f).

28 71 Fed. Reg. 17,566, 17,638 (Apr. 6, 2006).

29 *See, e.g.,* Friends of the Earth, Inc. v. Watson, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. 2005).

30 42 U.S.C. § 4332(2)(C)(i).

31 *See* 40 C.F.R. 1508.7 (defining "cumulative impact").

32 508 F.3d at 550.

33 *Id.* at 549.

34 Among other cases attempting to address GCC concerns through existing federal statutory regimes are the following:

In *Montana Environmental Information Center v. Johanns,* Civ. No. 07-1311 (D.D.C, filed on July 23, 2007) the plaintiffs claim that the US Department of Agriculture's Rural Utilities Service prepared an Environmental Impact Statement that failed to consider the contribution of a proposed 250 megawatt coal-fired plant in Montana. The complaint also claims that the EIS failed to consider alternatives, such as renewable energy sources or conservation, to address power needs. This case is pending

In *Natural Resources Defense Council v. Kempthorne,* an environmental group challenged a biological opinion by the U.S. Fish & Wildlife Service on the basis that FWS assumed that the hydrology of water bodies affected by a proposed water diversion project would remain constant for twenty years. The court found that it was arbitrary and capricious for the FWS to ignore evidence that climate change will produce earlier flows, more floods, and drier summers. 2007 WL 1577896 (E.D. Cal. May 25, 2007)

The Center for Biological Diversity has sued the U.S. Climate Change Science Program for failing to prepare a periodic scientific assessment of climate change, as required by the Global Change Research Act of 1990. A federal district court ordered the body to do so. *Center for Biological Diversity v. Brennan*, 2007 WL 2408901 (N.D. Cal. Aug. 21, 2007).

35 California v. General Motors Corp., 2007 U.S. Dist. LEXIS 68547 (N.D. Ca. Sept. 17, 2007).

36 15 U.S.C. §§ 2901.

37 369 U.S. 186, 217 (1962).

38 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007), at *18.

39 406 F. Supp 2d 265 (S.D.N.Y. 2005).

40 Citing *AEP,* 406 F. Supp. 2d at 272.

41 406 F Supp. 2d 265 (S.D.N.Y. 2005).

42 05-CV-00436-LG-HW (S.D. Miss.).