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Global Warming Litigation: States and Citizens v. Federal Government and Industry

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GLOBAL WARMING LITIGATION: STATE AND CITIZENS V. FEDERAL GOVERNMENT AND INDUSTRY

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I. INTRODUCTION

Five years ago, a discussion of state efforts to address global warming or reduce emissions of carbon dioxide (CO₂) would have been very short. Of course, many states have a long tradition of addressing air pollution, including the emissions of sulfur dioxide and nitrogen oxides from large power plants. Northeastern states, in particular, have targeted those emissions based on their contribution to smog and acid rain. Many of these same states have been at the forefront of seeking the reduction of some of the same pollutants from motor vehicles.

But, until recently, the states have done very little to address global warming. In many ways, though, attacking CO₂ emissions is a logical next step, considering that the pollution comes from the same sources that states have been focused on – motor vehicles and power plants – and has the same dispersed effect on public health and the environment. The last few years have therefore seen a sea change in the states' approach. States have taken a variety of actions to address the contribution of CO₂ to global warming, including regulatory actions and litigation.¹

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1. For example, many northeastern states filed petitions under section 126 of the Clean Air Act (the "Act"), seeking reductions in upwind states' emissions of nitrogen oxides, which contribute to elevated levels of ozone (smog) in the northeast. 64 Fed. Reg. 28,250, 28,252 (May 25, 1999). Many of the same states have joined in litigation against several large power companies under the new source review (NSR) provisions of the Act, seeking reduction in emissions of nitrogen oxides and sulfur dioxide, which contribute to fine particulate matter and acid rain levels in the northeast. *See United States v. Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003);

The northeast states' regional greenhouse gas initiative (RGGI) program, which panelist Dale Bryk described, is a prime example of the states playing their role as laboratories of democracy. Other examples of the northeast states taking action to combat global warming include adopting California's motor vehicle CO₂ emissions standards and enacting renewable portfolio standards, which require a significant expansion of CO₂-free power generation in the states that have adopted them.²

But these efforts only reduce emissions in the state taking the initiative, which is of limited value in addressing global warming caused by emissions worldwide. Therefore, several states, in many cases joined by citizen groups, are using the courts to obtain emission reductions beyond their borders.³ They have brought lawsuits against the federal government seeking to force it to take action, and against the polluters themselves to achieve actual reductions in their greenhouse gas emissions.⁴ These lawsuits complement the states' regulatory activities directed at in-state emissions, because the litigation is targeted at achieving reductions from CO₂ emission sources that fall primarily outside a state's borders.

One way to look at this litigation is to imagine a pie with three equal pieces: one represents the electric power industry, one represents motor vehicles, and the third represents all other man-made sources of CO₂ emissions. These three slices roughly represent each sector's percentage of nationwide CO₂ emissions.⁵ The states' litigation has been directed at the first two slices, where emissions are more concentrated. For example, the top five power companies in

United States v. Am. Elec. Power Serv. Corp., 136 F. Supp. 2d 808 (S.D. Ohio 2001).

2. See, e.g., N.Y. Env'tl. Conserv. Law § 218-8 (Consol. 2005) (New York's motor vehicle CO₂ emission standards); <http://www.nyserda.org/rps/regulations.asp> (New York's renewable performance standard).

3. See *infra* note 7.

4. See *infra* note 10.

5. The share of the electric generating industry is actually the largest slice, measuring in at approximately 40% of the United States' CO₂ emissions. The transportation sector accounts for 32%, and all other industrial sectors, combined with commercial and residential sources – largely burning of heating oil and natural gas for residential heat – account for the remaining 28%. See NATURAL RESOURCES DEFENSE COUNSEL, BENCHMARKING AIR EMISSIONS OF THE 100 LARGEST ELECTRIC GENERATION OWNERS IN U.S. – 2000 at 3 (Mar. 2002), available at http://www.ceres.org/pub/docs/Ceres_bnmkrng_electric_cos_0302_esumm.pdf.

the United States are responsible for 25% of the power sector's emissions, or 10% of nationwide anthropogenic CO₂ emissions.⁶

Each of those two slices of the emissions pie has been the subject of various lawsuits. In the power plant slice, many states joined in an action against the federal government for failing to regulate CO₂ emissions from power plants,⁷ and in a common law nuisance action against the power plant owners themselves.⁸ Unfortunately, industry attorneys have strongly suggested that they will challenge the northeast states' RGGI program, so the attorneys general of the various RGGI states will be defending the program in those lawsuits.⁹ Regarding the motor vehicle slice, the states and citizens have sued the Bush Administration to force it to regulate motor vehicle CO₂ emissions at the same time as several states have had to defend their own state laws regulating motor vehicle CO₂ emissions.¹⁰ Beyond the bounds of the pie are lawsuits directed against emissions outside the United States. I will mention one of these cases, because it was filed in a federal court against federal agencies, rather than in an international tribunal. There are several similar suits worldwide.

II. LAWSUITS REGARDING THE POWER INDUSTRY

In *Connecticut et al. v. American Electric Power Co. et al.*, eight States and the City of New York, joined by a group of land trusts, sued the top five United States contributors to global warming in the United States District Court for the Southern District of New York under the federal common law of public nuisance. The emissions share of these five companies is striking: together they emit more

6. NATURAL RESOURCES DEFENSE COUNSEL, BENCHMARKING AIR EMISSIONS OF THE 100 LARGEST ELECTRIC GENERATION OWNERS IN U.S. - 2002 at Table 1 (Apr. 2004), available at http://www.ceres.org/pub/docs/Ceres_bnmchrk_ing_electric_2002_0404_part2.pdf.

7. *New York v. EPA*, No. 06-1148 (D.C. Cir. 2006) (consolidated with *Coke Oven Envtl. Task Force v. EPA*, No. 06-1131 (D.C. Cir. 2006)).

8. *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp. 2d 265 (S.D.N.Y. 2005).

9. See, e.g., Norman W. Fichthorn & Allison D. Wood, *Constitutional Principles Prohibit States from Regulating CO₂ Emissions*; LEGAL BACKGROUNDER (Wash. Leg. Found.), Sept. 23, 2005 (arguing that state efforts to regulate carbon dioxide emissions, such as RGGI, are unconstitutional).

10. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), cert. granted, 2006 LEXIS 4910 (June 26, 2006); *Cent. Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359 (E.D. Cal. 2006).

CO₂ than the total emissions – from all sources – of all but six nations.¹¹

The lawsuit is based on the longstanding principle that federal common law is available for interstate nuisances. It has two doctrinal roots. One is the principle that “control of interstate pollution is primarily a matter of federal law.”¹² Therefore, if no statute is available to govern an interstate dispute, federal common law must apply.¹³ The second root is that the states have a special right of access to federal courts based on our federal structure. The states gave up the right to settle their disputes through war or diplomacy in return for access to federal courts. In one of the leading cases, Justice Oliver Wendell Holmes explained:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.¹⁴

Congressional enactment of the Clean Water Act, the Clean Air Act and a myriad of other environmental statutes in the latter half of the 20th century largely displaced the application of federal common law to interstate environmental disputes.¹⁵ However, thanks to the inaction of Congress and the EPA, the federal common law has not, in the view of the states, displaced the application of federal common law principles to CO₂ emissions. Wading through the century-old interstate nuisance cases reveals that those cases address a variety of injuries that bear a striking resemblance to the injuries caused by global warming: harm to public health, harm to water supplies,

11. The six countries that each had total anthropogenic CO₂ emissions in 2002 that are higher than the domestic emissions of the five defendants are United States, Russia, China, Japan, India, and Germany. Available at <http://cdiac.esd.ornl.gov/emis/top2002.tot>.

12. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

13. *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (When we deal with air and water in their ambient or interstate aspects, there is federal common law).

14. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

15. See, e.g., *Illinois v. Milwaukee*, 451 U.S. 304 (1982).

flooding and harm to forests and other natural resources.¹⁶ The states' lawsuit falls squarely within this tradition.

The power company defendants moved to dismiss the nuisance action on a variety of jurisdictional grounds.¹⁷ They claimed that the federal common law claims were displaced by federal statutory law, that the claims were barred by the separation of powers doctrine, that the states did not have standing, and that all but one of the defendants were not subject to personal jurisdiction in New York.¹⁸ One argument they expressly did not make was that the suit was a nonjusticiable political question.¹⁹ However, U.S. District Court Judge Loretta Preska used that rationale to dismiss the case in September 2005.²⁰

The political question doctrine has been limited to a few types of cases in which judicial action would clearly intrude in the exclusive business of other branches, such as declaration of war,²¹ recognition of foreign countries,²² training the military,²³ or proceedings for impeachment,²⁴ all of which are committed to the political branches.

16. See, e.g., *Tenn. Copper Co.*, 206 U.S. at 238-39 (damage to public health and vegetation caused by air pollution); *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97 (1838) (river siltation); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (13 How.) (1851) (interference with navigation); *Wisconsin v. Duluth*, 96 U.S. 379 (1877) (drying of a river); *Missouri v. Illinois*, 180 U.S. 208 (1901) (threat to public health from sewage); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (inundation of land); *New Jersey v. New York City*, 283 U.S. 473 (1931) (ocean dumping).

17. See Brief for Defendants-Appellees, *Connecticut v. Am. Elec. Power Co.*, No. 04-5669-cv (S.D.N.Y. Sept. 16, 2005).

18. *Id.*

19. In response to questions from the bench in the course of the oral argument on the power companies' motion, their counsel expressly stated that a motion to dismiss on political question grounds was "not the motion that we filed." Transcript of Oral Argument at 59:20, *Am. Elec. Power Co.*, 406 F.Supp. 2d 265 (No. 69) (Joseph Guerra, counsel for defendants).

20. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 271-74.

21. See e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (challenges to military action abroad). See also *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985) (challenge to military preparations abroad); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (claim of unconstitutionality of military action without declaration of war).

22. See e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410-11 (1964) (recognition of Cuba); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) (recognition of Mexico); *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997) (recognition of Hong Kong).

23. See generally *Gilligan v. Morgan*, 413 U.S. 1 (1973).

24. *Nixon v. United States*, 506 U.S. 224 (1993).

This case fits into none of those categories. Simply because a case may have "political" ramifications does not make it a political question case.²⁵

Discussing the details of all of the arguments in play in the appeal is beyond the scope of this presentation. But a few overarching themes underlie each of the power companies' arguments. The first such theme is redressability: defendants argue that the states cannot show that a remedy against them would redress the totality of the harms to the states from global warming.²⁶ But that is not the test for either standing or liability on the merits. Instead, the states are just required to show that defendants' emissions are contributing to their injuries.²⁷ Defendants' second overarching argument is that the states should be seeking a top down solution to global warming from Congress and the executive branch.²⁸ Although a comprehensive solution to global warming certainly may be preferable, no principle

25. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("the doctrine of which we treat is one of 'political questions', not one of 'political cases'."); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions.).

26. See Brief for Defendants-Appellees at 21-33, *Connecticut v. Am. Elec. Power Co.*, No. 05-5104-cv (2d Cir. 2006).

27. With regard to standing, see *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 180-81 (2000) (plaintiffs not required to demonstrate that specific discharges traced to the defendants were causing discrete environmental harm, but only that the pollution to which they contributed, taken as a whole, was injuring the plaintiffs); *Nat. Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (standing established if defendant "contributes to the pollution"); *PIRG v. Powell Duffryn*, 913 F.2d 64, 72 n.8 (3d Cir. 1990) (plaintiff need not sue every discharger [of pollutants] in one action, since the pollution of any one may be shown to cause some part of the injury suffered); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (traceability requirement does not require plaintiff in an environmental case to connect the harm to the "particular molecules" emitted by defendants). Regarding liability on the merits, see *California v. Gold Run Ditch & Mine Co.*, 4 Pac. 1152, 1157 (Cal. 1884) (holding one of several mining companies dumping mine tailings into a river liable, because "in an action to abate a public or private nuisance all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally"); *Woodyear v. Schaefer*, 57 Md. 1, 9-10 (Md. 1881) (in a nuisance action by a downstream landowner, the court rejected defendant's argument that its pollution alone was insignificant in light of the large number of co-contributors, stating that "it is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream"); *The Lockwood Co. v. Lawrence*, 77 Me. 297, 310 (1885) (similar).

28. See, e.g., Brief for Defendants-Appellees, *supra* note 26, at 3.

of law requires a state to await such a solution – for years perhaps – rather than exercising its right to have a federal court resolve an interstate dispute regarding the emissions of specific companies. Although crafting a comprehensive solution to global warming may be the responsibility of the political branches, the states are seeking a remedy for the harm caused by the CO₂ emissions of these five power company defendants, which is a remedy committed to the judicial branch.

Defendants also argue that requiring any emission reductions from these five defendants would deprive the Bush Administration of a “bargaining chip” in trying to negotiate CO₂ reductions from the developing countries.²⁹ In other words, the power companies contend that the Bush Administration is playing a global game of “chicken,” withholding reductions from American sources in order to induce India and China to reduce their emissions. Not only is this argument not legally available to bar action by the judicial branch, but the factual premise is not true. First, the official position of the Bush administration is to encourage reductions, albeit voluntarily.³⁰ Second, the administration’s official position is that it is not seeking any international commitments to reduce emissions whatsoever.³¹ So it is unclear why the Bush Administration would need this “bargaining chip.”³²

The appeal was argued before the Second Circuit on June 7, 2006. At the time this article went to press, the Second Circuit had not reached a decision.

29. *Id.* at 46-47.

30. For example, the official U.S. position is that it is “currently pursuing a broad range of strategies to reduce net emissions of greenhouse gases.” U.S. DEP’T OF STATE, U.S. CLIMATE ACTION REPORT 2002 51 (2002), *available at* <http://unfccc.int/resource/docs/natc/usnc3.pdf>.

31. Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative and Alternate Head of the U.S. Delegation, COP 11/MOP 1 Press Conference (Nov. 29, 2005), *available at* <http://www.state.gov/g/oes/rls/rm/57449.htm> (stating that it is *not* current American policy to seek any binding limits on developing country emissions).

32. For a more detailed discussion of these arguments, see Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006).

III. LITIGATION AGAINST US DEPARTMENT OF ENERGY SEEKING
REDUCTIONS IN POWER SECTOR CO₂ EMISSIONS

States and citizens have also brought cases that will reduce energy demand. The relief obtained in these cases will reduce the need for power plants to burn fuel to produce electricity and thereby reduce CO₂ emissions.

In *Natural Resources Defense Council v. Abraham*,³³ New York and six other States joined with the NRDC in suing the Department of Energy (DOE) over its attempt to roll back energy efficiency requirements for air conditioners. The Energy Policy and Conservation Act³⁴, as amended by the National Appliance Energy Conservation Act of 1987 (NAECA)³⁵ requires the DOE to set efficiency standards at the "maximum level that is technologically feasible and economically justified."³⁶ Notably, it also prohibits the DOE from weakening an existing standard.³⁷

In 2001, seven years later, the DOE issued standards requiring central air conditioners to be 30% more efficient.³⁸ Within two weeks of the Bush administration taking office, however, the DOE first delayed and then withdrew this rule. New York and the NRDC led a group of eight states and environmental groups that challenged that action as illegal and won.³⁹ The stricter standard is now in effect. As more efficient central air conditioners get phased in, this standard will save the equivalent of the energy consumed by twenty-six million households over an entire year.⁴⁰ Looking at it another way, the standard will avoid the need for thirty-nine new 400 megawatt power plants.⁴¹

More recently, in *New York State et al. v. Bodman*,⁴² New York and fourteen other states have joined with the NRDC and two con-

33. 335 F.3d 179, 179 (2d Cir. 2004).

34. 42 U.S.C.S. §§ 6201-6422 (LexisNexis 2006).

35. Pub. L. No. 100-12, 1987 U.S.C.C.A.N. (101 Stat.) 103.

36. *Id.* at §§ 5, 325(1)(2)(A).

37. 42 U.S.C. § 6295(o)(1).

38. Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 7170, 7171 (Jan. 22, 2001).

39. *Nat. Res. Def. Council v. Abraham*, 335 F.3d 179.

40. Energy Conservation Program for Consumer Products, 66 Fed. Reg. 7170, 7171.

41. *Id.*

42. *New York v. Bodman*, No. 05-7807-cv (S.D.N.Y. Sept. 30, 2005).

sumer advocacy organizations to sue the DOE to require it to issue updated standards for twenty-two major products such as ranges, furnaces and transformers. The DOE is now four to fourteen years late implementing these standards.⁴³ Again, assuming we are successful here, these standards are likely to reduce energy consumption further. The projected energy savings from adoption of the required standards should amount to approximately one-tenth of the entire electricity usage of all American households.⁴⁴ This reduced energy usage will lead to the avoidance of approximately 110 million metric tons (121,254,244 short tons) of CO₂ emissions every year (nearly 2 percent of total CO₂ emissions from all sources in the United States in 2004).⁴⁵ These reductions are roughly equal to the total current emissions from electric generating units subject to the RGGI program, prior to the addition of Maryland.⁴⁶

43. See DEP'T OF ENERGY, REPORT TO CONGRESS 7-15 (Jan. 31, 2006).

44. According to the American Council for an Energy-Efficient Economy (ACEEE), electricity consumption will be reduced by 129 TWh per year (one TWh is a billion kWh), and natural gas consumption will be reduced by 392 trillion Btus per year nationwide once the standards reach their full impact. American Council for an Energy-Efficient Economy, *Leading the Way: Continued Opportunities for New State Appliance and Equipment Efficiency Standards*, 13 (2006)(Energy savings from DOE and ACEE analyses). For comparison, in 2004 electricity consumption by all U.S. households totaled approximately 1,294 TWh. ENERGY INFORMATION ADMINISTRATION, ELECTRICAL POWER ANNUAL 2004, available at <http://www.eia.doe.gov/cneaf/electricity/epa/epat7p2.html>. Natural gas consumption by all U.S. households totaled approximately 5,000 trillion Btus. ENERGY INFORMATION ADMINISTRATION, NATURAL GAS CONSUMPTION BY END USE, available at http://tonto.eia.doe.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm (EIA presents natural gas consumption data in million cubic feet. 1 cubic foot = 1,031 Btu).

45. U.S. ENVTL. PROT. AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2004 – DRAFT REPORT (2006).

46. RGGI Multi-State Memorandum of Understanding, available at http://www.rggi.org/docs/mou_12_20_05.pdf (The baselines by state are: Connecticut: 10,695,036 short tons; Delaware: 7,559,787 short tons; Maine: 5,948,902 short tons; New Hampshire: 8,620,460 short tons; New Jersey: 22,892,730 short tons; New York: 64,310,805 short tons; and Vermont: 1,225,830 short tons).

IV. CASES SEEKING ACTION BY THE EPA TO LIMIT MOTOR VEHICLE
CO₂ EMISSIONS

The primary case regarding motor vehicle CO₂ emissions is *Massachusetts v. EPA*, a lawsuit brought by twelve states and the District of Columbia, joined by New York City, Baltimore, the American Samoa and various citizen groups to require the EPA to regulate motor vehicle CO₂ emissions.⁴⁷ In 1999, a group of environmental groups petitioned the EPA to regulate CO₂ emissions from motor vehicles under section 202 of the Clean Air Act, which requires the EPA to regulate "the emission of any air pollutant" from motor vehicles that "may reasonably be anticipated to endanger public health or welfare."⁴⁸ The Act defines an "air pollutant" as any chemical emitted⁴⁹ and welfare is defined to include "weather" and "climate."⁵⁰ Accordingly, two EPA general counsels in the Clinton EPA issued formal opinions that this language gave the EPA the authority to regulate CO₂ emissions from motor vehicles.⁵¹ However, the EPA did not take action on that petition while President Clinton was in office.

The Bush EPA finally addressed the petition on August 28, 2003, issuing a denial of the petition⁵² on the same day that it released an opinion of the EPA's general counsel at the time, Robert Fabricant.⁵³ Reversing the interpretations of the two prior EPA gen-

47. 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 2006 LEXIS 4910 (June 26, 2006).

48. *See, e.g.*, Press Release, Office of N.Y. State Att'y Gen., States, Cities, Environmental Group Sue Bush Administration on Global Warming, Challenging EPA's Refusal to Reduce Greenhouse Gas Pollution, (Oct. 23, 2005).

49. Clean Air Act, 42 U.S.C. § 7602(g) (2006)(defining "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological . . . substance or matter which is emitted into or otherwise enters the ambient air").

50. *See id.* at § 7602(h)("All language referring to effects on welfare includes, but is not limited to, effects on . . . weather . . . and climate, . . . whether caused by transformation, conversion, or combination with other air pollutants.").

51. *See, e.g.*, Memorandum from Jonathan Z. Cannon to Administrator Carol M. Browner, "EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources" (Apr. 10, 1998); Letter from Gary Guzy to Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs of the Committee on Government reform, and the House Subcommittee on Energy and the Environment of the House Committee on Science (Dec. 1, 1999).

52. 68 Fed. Reg. 52922 (Sept. 8, 2003).

cant.⁵³ Reversing the interpretations of the two prior EPA general counsels, the EPA determined that CO₂ is not a pollutant, reasoning that it was not an "air pollution agent" under the statutory definition of air pollutant.⁵⁴ Denying the petition for regulation of CO₂ emissions, the EPA also asserted various policy reasons for not regulating CO₂ emissions, including the "bargaining chip" argument advocated by power industry attorneys in the nuisance action.⁵⁵

In November 2003, a coalition of states and environmental groups sued to reverse this decision.⁵⁶ In July 2005, the D.C. Circuit denied the petition for review,⁵⁷ but only Judge Tatel, in dissent, reached the key question posed by the statute of whether the EPA has the statutory authority to regulate CO₂ emissions.⁵⁸ Judge Randolph, in what would be called the lead opinion, sidestepped the question of whether CO₂ is a pollutant. Instead, he wrote that the EPA had justified its failure to regulate based on the various other policy reasons articulated in the EPA's decision, none of which are reflected in the statutory endangerment test, including the EPA's "bargaining chip" argument.⁵⁹ He also expressed some skepticism regarding the scientific proof of global warming.⁶⁰

Judge Sentelle joined the majority opinion based on his view that nobody has standing to sue over global warming, essentially because the harms are widely dispersed across the globe.⁶¹ In dissent, Judge Tatel issued the most comprehensive opinion, opining that CO₂ is a pollutant and emphasizing the impacts of CO₂ on climate.⁶²

A rehearing petition was denied by a 4-3 vote and Judge Rogers joined Judge Tatel in dissent.⁶³ Noting the standard for en banc review, Tatel wrote that "if global warming is not a matter of exceptional importance, then the words have no meaning."⁶⁴ The Su-

53. See Memorandum of Robert E. Fabricant to Acting Administrator Marianne L. Horinko, "EPA's Authority to Impose Mandatory Controls to Address Global climate Change under the Clean Air Act" (Aug. 28, 2003).

54. *Id.* at 10; 68 Fed. Reg. 52,928 (Sept. 8, 2003).

55. 68 Fed. Reg. 52,931 (Sept. 8, 2003).

56. See *Massachusetts*, 415 F.3d 50.

57. *Id.*

58. *Id.* at 67-68 (Tatel, J., dissenting).

59. *Id.* at 58.

60. *Id.* at 57.

61. *Id.* at 59-60.

62. *Massachusetts*, 415 F.3d at 61-82.

63. *Id.* at 66.

64. *Id.* at 67 (Tatel, J., dissenting).

preme Court granted the States' and Citizens' petition for certiorari on June 26, 2006,⁶⁵ and argument was held on November 29, 2006. At the time this article went to press, the Supreme Court had not issued a decision.⁶⁶

V. REGULATION OF CO₂ EMISSIONS FROM POWER PLANTS

The governing language in the Clean Air Act's New Source Performance Standards (NSPS) provision is very similar to the statutory language at issue in *Massachusetts*. Under section 111(b)(1)(A),⁶⁷ the EPA is required to regulate categories of sources that cause or contribute significantly to "air pollution which may reasonably be anticipated to endanger public health or welfare." The applicable definitions of "air pollutant" and "welfare" are the same as those applicable under section 202, at issue in *Massachusetts*.⁶⁸ In accordance with a consent decree arising out of litigation brought by environmental groups, joined by several States, the EPA committed to update the NSPS for power plants.⁶⁹ In accordance with that settlement, the EPA issued revised standards on February 27, 2006, in which it stated that it would not regulate CO₂ because it is not a pollutant.⁷⁰ This time, however, the EPA does not provide any other justification for failing to regulate CO₂ as a pollutant. Again, a coalition of state and environmental groups challenged the EPA's decision,⁷¹ and this time the D.C. Circuit will have to deal with the issue of the EPA's authority to regulate CO₂ head on if the Supreme Court does not reach it in *Massachusetts*.⁷²

65. See *Massachusetts*, 415 F.3d 50.

66. In September 2006, California filed a public nuisance suit against automobile manufacturers that contains allegations similar to *Connecticut v. Am. Elec. Power Co.*, but seeks damages. See *People v. Gen. Motors Corp.*, No. C06-05755-MJJ (N.D. Cal. Sept. 20, 2006).

67. 42 U.S.C. § 7411(b)(1)(A).

68. See 42 U.S.C. §§ 7602(g) and (h).

69. *Our Child. Earth Found. v. EPA*, No. C 03-0770 (N.D. Cal. Feb. 21, 2003); 68 Fed. Reg. 65,699 (Nov. 21, 2003).

70. 71 Fed. Reg. 9866, 9869 (Feb. 27, 2006).

71. Petitions for review filed by ten States (joined by the District of Columbia and New York City) and by citizen groups have been consolidated with a case entitled *Coke Oven Environmental Task Force v. EPA*, No. 06-1131 (D.C. Cir. 2006).

72. On September 13, 2006, the D.C. Circuit granted the parties' joint motion to stay proceedings in this action, pending decision in *Massachusetts*. If the Su-

Another similar lawsuit worth mentioning was recently brought in the DC Circuit⁷³ by a number of citizen groups challenging the EPA's determination that the federal prevention of significant deterioration (PSD) requirements does not require the use or evaluation of gasified coal processes for new plants.⁷⁴ This integrated gasification combined cycle (IGCC) process concentrates the CO₂ emissions, enabling the CO₂ to be captured and sequestered by injection into bedrock or the deep sea bed.⁷⁵ Considering that approximately 150 new power plants are being planned, designed or constructed,⁷⁶ and that these plants that will be around for 40-50 years, it is essential that they be designed in a way that enables CO₂ capture. This case has been settled, based on the EPA's agreement that the determination at issue is not binding.

VI. DEFENDING STATE EFFORTS TO CONTROL MOTOR VEHICLE CO₂ EMISSIONS

Back to the motor vehicle slice, at the same time as they are trying to require the EPA to set motor vehicle CO₂ emission standards, several states, including New York, have adopted California's greenhouse gas emission standards for motor vehicles.⁷⁷ These regulations will reduce greenhouse gases from new vehicles by 30% for the 2016 model year. Under the Clean Air Act, states are not al-

preme Court holds in *Massachusetts* that EPA has authority to regulate CO₂, EPA will likely seek a voluntary remand to determine whether to regulate CO₂ emissions from power plants under section 111.

73. Nat. Res. Def. Council v. EPA, No. 06-1059 (D.C. Cir. 2006).

74. The PSD requirements require that new or modified sources utilize the best available control technology (BACT). Clean Air Act § 165(a)(4), 42 U.S.C. § 7475(a)(4) (2000). BACT is defined to mean "an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter . . . achievable. . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant." 42 U.S.C. § 7479(3).

75. See, e.g., Jonathan Shaw, *Fueling Our Future*, Harvard Magazine, May-June 2006, at 46-47.

76. See, e.g., Press Release, National Energy Technology Laboratory, Department of Energy Tracks Resurgence of Coal-Fired Power Plants (Aug. 2, 2006), available at http://www.netl.doe.gov/publications/press/2006/06046-Coal-Fired_Power_Plants_Database.html.

77. See, e.g., Greenhouse Gas Exhaust Emission Standards, N.Y. COMP. CODES R. & REGS.[hereinafter NYCRR] tit. 6, § 218-8 (2005).

lowed to regulate motor vehicle emissions unless they adopt whatever standards California adopts.⁷⁸

The auto industry has sued California and the other states under both state and federal law. They have brought federal suits in California, Rhode Island and Vermont,⁷⁹ apparently motivated by a strategy to have one federal lawsuit in each of three circuits to pave the way to the Supreme Court. The federal cases will likely raise once again the issue of whether CO₂ is a pollutant. The automobile industry has also argued that the federal fuel economy standards preempt the states from regulating CO₂ emissions, based on a theory that the only way to reduce such emissions is to increase fuel economy.⁸⁰ The auto industry lawsuits also include a series of challenges under state law, but the state law suit in New York was recently discontinued after the State moved to dismiss.⁸¹

A. *Informational Cases*

Cases proceeding in international tribunals are outside the scope of this presentation. One case involving extraterritorial CO₂ emissions, however, was filed in U.S. district court, against United States agencies that fund overseas projects that increase CO₂ emissions. In *Friends of the Earth v. Watson*,⁸² the plaintiffs challenged the decision of the Export-Import Bank and the Overseas Private Investment Corp. to fund oil pipeline and other projects without considering their global warming impacts. In August 2005, the court denied Defendants' motion for summary judgment on standing and other grounds.⁸³

78. 42 U.S.C. § 7543(a) (2000) sets forth the bar on state standards, but California is exempted under § 7543(b) because it regulated motor vehicle emissions prior to March 30, 1996. Other states may adopt the California standards under section 177, 42 U.S.C. § 7507 (2000).

79. *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-CV-066632006 WL 2600149, (E.D. Ca. Sept. 11, 2006); *Lincoln Dodge, Inc. v. Sullivan*, Case 1:06-cv-00070-T-LDA (D. R.I. Feb. 13, 2006); *Green Mountain Chrysler Plymouth Dodge Jeep v. Torti*, No. 05-CV-302 (D. Vt. Nov. 18, 2005).

80. *See Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, Case No. Civ-F-04-6663 AWI LJO (E.D. Ca. Sept. 26, 2006).

81. *Alliance of Auto. Mfrs. v. Sheehan*, No. 4757-05 (N.Y. Sup. Ct. filed Aug. 5, 2005).

82. No. 3:02-cv-04106 (N.D. Cal. filed Aug. 27, 2002).

83. *Watson*, 2005 WL 2035596 at *1.

This case was not entirely unprecedented, because at least two previous cases⁸⁴ concerned similar failure of federal agencies to evaluate environmental impacts under the National Environmental Policy Act of 1969 (NEPA).⁸⁵ What is ironic about the factual context of the *Friends of the Earth* case is that at the same time the Bush Administration is using the failure of the developing world - including China and India - to control their emissions as an excuse for American failure to act, these federal agencies are actually subsidizing projects in the third world, including construction of power plants that increase CO₂ emissions.⁸⁶

VII. SUMMARY

Five years ago, this would have been a very short presentation, as all this activity has occurred in the past five years. Undoubtedly, other creative lawyers will come up with additional theories of liability. Possibilities include litigation regarding a company's obligations to disclose risks relating to global warming or shareholder derivative suits based on a corporation's mismanagement of the risks relating to its CO₂ emissions.

A comprehensive solution that limits CO₂ from all sources would certainly be preferable - an approach that would spur technological growth, job growth, help air quality and public health, enhance energy independence, and have many other positive side benefits. But absent such a resolution, many of the states are doing all they can in the meantime to address this pressing issue.

84. *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d. 997 (S.D. Cal. 2003); *Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990).

85. 42 U.S.C. § 4321.

86. See, e.g., *Climate Change: Assessing Our Actions*, Overseas Private Investment Corporation, Oct. 2000, at 16 (reporting that coal-fired power plants make up 21% of the capacity of overseas projects supported by the Overseas Private Investment Corp.).

