

Revised August 17, 2007

ISSUE PAPER ON GHG LITIGATION

Notes: Developments since the last litigation report are indicated in bold-face type. Cases will occasionally be dropped as appropriate.

I. Litigation

A. Clean Air Act Cases

There are several related cases in which plaintiffs have sought, seek or will seek to regulate CO₂ and GHGs under the Clean Air Act (CAA).

1. *International Center for Technology Assessment v. Horinko*, No. 02-02376/RBW (D.D.C. Dec. 5, 2002)

In October 1999, environmental and other groups filed a petition seeking to compel EPA to regulate CO₂ and three other GHGs under title II of the CAA, pertaining to new motor vehicles and engines. Because of the precedential importance of such regulation to industry, 20 industry groups filed comments in early 2000 opposing the petition. EPA noticed the petition for public comment in January 2001. In December 2002 petitioners sued EPA in federal district court in D.C., seeking to compel the Agency to act on their petition. In 2003 EPA filed a motion to dismiss the complaint for lack of standing. Plaintiffs opposed that motion. On August 28 EPA mooted the suit by issuing a final decision denying the 1999 petition for rulemaking, supported by an opinion of the same date from its General Counsel. On September 24, 2003, the court entered an order dismissing the suit.

2. *Massachusetts et al. v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. ___, 127 S.Ct. 1438 (2007)

On October 23, 2003, 12 states and others filed petitions appealing both the August 28 EPA decision denying the ICTA petition under section 202 of the CAA and the August 28 EPA General Counsel's opinion supporting that decision (see I.A.1 above), which addressed sections 108, 109, 111, 112 and 202 of that act. Petitioner states are CA, MA, CT, IL, ME, NJ, NM, NY, OR, RI, VT and WA. Other petitioners include the cities of Washington, D.C., New York and Baltimore as well as American Samoa and eight environmental organizations. The court consolidated the eight petitions into two sets of cases, one addressing the EPA decision and the other addressing the General Counsel's opinion.

On July 15, 2005, the Court of Appeals issued a 2-1 decision dismissing the challenges to EPA's decision and General Counsel's memorandum denying the petition to regulate

CO₂ and other greenhouse gases under the CAA. Writing for the majority, Judge Randolph held that the EPA Administrator properly exercised his discretion under section 202(a)(1) (involving motor vehicles) in denying the petition. Judge Sentelle concurred in the judgment, but dissented in part because he would have found that the petitioners lacked standing to bring the judicial challenge. Judge Tatel dissented from EPA's denial of the petition because he would not have sustained EPA on the merits, and he also would have found that Massachusetts had standing. Plaintiffs petitioned for rehearing and hearing en banc, and the government responded on October 3 that the petition should be denied.

On December 2, in a 4-3 vote (two judges did not participate), the Court of Appeals issued an order denying the petition for rehearing. Judge Tatel, joined by another judge, filed a dissenting statement. On March 2, 2006, several parties in the appeals filed a petition for writ of *certiorari* to the Supreme Court. On June 26, the Supreme Court grant *cert.*

On April 2, in a 5-4 decision, the Court found standing and held that EPA has the authority to regulate CO₂ and other GHGs from new motor vehicles and engines as “air pollutants” under the CAA. The Court sent the case back to EPA, which must conduct a rulemaking to determine whether GHG emissions contribute to climate change “which may reasonably be anticipated to endanger public health or welfare.” Because of parallel provisions in the CAA, EPA is likely to have to conduct similar proceedings regarding stationary sources.

On May 9, the case was remanded to the Court of Appeals on its own motion to decide how to govern future proceedings in this matter. On June 7, the parties filed a joint motion to vacate the ICTA petition denial and remand to EPA for further consideration in light of the Supreme Court's decision.

Unless Congress enacts legislation directing otherwise, EPA and the states in a few years could begin to regulate GHGs under the comprehensive and complex regulatory apparatus of the CAA.

See also I.A.5 below.

3. *Massachusetts et al. v. Horinko*, No. 3:03-CV-984 (D. Conn. June 4, 2003)

On January 30, 2003, the attorneys general of Massachusetts, Connecticut and Maine noticed their intent to file a citizen's suit against EPA, seeking to compel the Agency under section 108 of the CAA to list CO₂ as a criteria air pollutant. Such a listing would force EPA to establish a national ambient air quality standard for CO₂. On June 4 the three attorneys general sued EPA in federal district court in Hartford, Connecticut, seeking the aforementioned relief. This suit would affect mobile and stationary sources. On August 28 the government moved to dismiss the suit since 1) EPA's authority to revise the list of criteria air pollutants under CAA section 108(a)(1) is discretionary and

2) EPA has not made any of the threshold determinations that are a prerequisite to the addition of CO₂ to the list of criteria air pollutants. The supporting memorandum of law refers to EPA's August 28 decision denying the ICTA petition (see I.A.1 above) and the EPA General Counsel's memorandum supporting that decision. As a result of EPA's August 28 decision that it lacks authority to regulate CO₂ and the government's motion to dismiss, the three attorneys general on September 3, 2003, voluntarily dismissed their suit without prejudice and issued a press release saying that they will seek review of EPA's August 28 decision in the D.C. Circuit. See I.A.1 and I.A.2 above. (In their notice of voluntary dismissal, the three states indicated that they would refile their case if the D.C. Circuit either rejects the EPA position that it lacks authority to regulate GHGs or decides the appeal of the ICTA decision without reaching that issue.)

4. Impending state Attorneys General suit to compel EPA to regulate CO₂ and further regulate air emissions under section 111 of the Clean Air Act

The Democratic attorneys general of seven states (ME, MA, CT, NY, NJ, RI, WA) have noticed their intent to file a citizen's suit against EPA, seeking to compel the Agency under section 111 of the CAA to revise the NSPS for SO₂ and particulate matter relating to fossil fuel-fired electric generating units, and to consider setting an NSPS for power plants' CO₂ emissions. This suit may be filed in federal district court at any time. EPA's August 28, 2003, decision denying the ICTA petition (see I.A.1 above) and the government's September 5, 2003, filing in *Our Children's Earth Foundation et al. v. EPA*, No. C 03-0770 (N.D. Cal. Feb. 21, 2003), initially may have forestalled such a suit. This nascent suit may have been superseded by I.A.5 below.

5. *Coke Oven Environmental Task Force et al. v. EPA*, Nos. 06-1131 and consolidated cases; *New York v. EPA*, No. 06-1322 (D.C. Cir. 2006)

These consolidated cases have been brought by 10 state attorneys general, Washington, D.C. and the City of New York; several environmental groups; and several industry groups, including UARG (of which EEI is a member), to review EPA's NSPS rules under the Clean Air Act. The 10 attorneys general are among the 12 attorneys general suing in *Massachusetts v. EPA*, the case in which the same circuit upheld EPA's discretionary authority not to regulate CO₂ and other GHGs under title II of the CAA (see I.A.2 above). This new challenge will likely involve the same issue under title I of the CAA. UARG will likely support some portions of the NSPS rules and oppose at least one portion. UARG and another commenter have filed petitions for reconsideration with EPA.

On June 14, 2006, EPA moved 1) to hold the case in abeyance for seven months to allow it to make determinations on the two reconsideration petitions and 2) for a remand of the record for the same time to allow it to more fully articulate its rationale for denying a request to regulate CO₂ and other GHGs under title I of the CAA. On June 26, state, local and environmental group petitioners (state petitioners) opposed the portion of the EPA motion for a remand of the record to allow it to more fully articulate its GHG rationale. On the same day Entergy moved to leave to participate as *amicus curiae* in support of the

state, local and environmental petitioners, which was granted by the court. On July 10, EPA replied in support of its motion to hold the case in abeyance and remand the record, and state petitioners and EPA jointly moved to sever portions of case numbers 06-1148 and 06-1149 (addressing CO₂ and other GHGs under title I of the CAA) and hold them in abeyance pending the Supreme Court's decision in *Massachusetts v. EPA*. The court granted the motion on September 13 and the case was held in abeyance for seven months until *Massachusetts v. EPA* was decided.

On May 2, EPA filed a motion to hold the case in abeyance for an additional 45 days, as it analyzed the Supreme Court decision to determine the effect that it has on the case and on the governance of further proceedings. Also on May 2, petitioners filed a motion to govern further proceedings requesting that the Court summarily reverse and vacate the decision by EPA that led to the filing of the case, and remand the matter back to EPA for further proceedings, consistent with the Supreme Court's decision. On May 17, the states and petitioners filed in opposition to EPA's motion and requested the court to summarily reverse and vacate EPA's determination that it does not have authority to regulate CO₂ emissions under section 111 of the CAA, and remand the rulemaking back to the EPA. On June 18, EPA filed a reply motion on the governance of future proceedings, in which it asked the court to remand the issues back to EPA, but not to reverse or vacate any agency action taken to date. EPA argued that the ability to first analyze the actions should be given to the agency as a matter of precedence. Industry intervenors filed a similar joint motion on the same day. On June 28, the states and environmental petitioners filed a combined response to the EPA and industry intervenors' motions.

See also I.A.3 above.

B. CO₂ Nuisance Cases

Two related suits have been brought against five major utilities on the grounds of common law theories of nuisance.

1. *Connecticut et al. v. American Electric Power Co., Inc. et al.*, No: 05-5104 (2d Cir.)

On July 21, 2004, eight state attorneys general (CT, NY, NJ, VT, RI, CA, WI and IA) and the corporation counsel of New York City sued five major utilities (AEP, Southern, Xcel Energy, Cinergy and TVA) in federal district court seeking to 1) hold each defendant jointly and severally liable for contributing to the "ongoing public nuisance, global warming" and 2) direct each defendant to cap its CO₂ emissions and then reduce them by a specified percentage (*e.g.*, 3 percent) annually for at least a decade. Plaintiffs do not seek monetary damages but seek injunctive relief "under the federal common law of public nuisance or, in the alternative, under state law of public nuisance."

On September 30, defendants filed motions to dismiss and supporting memoranda of law on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Four defendants (excluding AEP) also moved to dismiss for

lack of personal jurisdiction. In addition, TVA moved to dismiss on federal discretionary function grounds. Moreover, Unions for Jobs and the Environment moved to file an *amicus curiae* memorandum in support of defendants' motion to dismiss. On November 19, plaintiffs responded to the motions to dismiss.

Oral argument was held on the motions to dismiss in both cases on August 12, 2005. On September 15, the judge issued an opinion and order in both cases dismissing the complaints. Judge Preska wrote, "[C]ases presenting political questions are consigned to the political branches that are accountable to the People, not to the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases" (p. 2, slip op.). "[T]hese actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary" (*id.* at 19). Plaintiffs have appealed the decision to the U.S. Court of Appeals for the Second Circuit.

Appellants' (the states' and land trusts') opening briefs were filed on December 16, and opposition briefs by the utility company appellees were filed on January 30, 2006. A joint industry *amicus* brief headed by EEI and other *amicus* briefs supporting the utility companies were filed on March 2. Appellants filed reply briefs on March 16. Oral argument was held on June 7.

In April 2007, AEP and New York filed letters with the court, discussing the relevance of *Massachusetts v. EPA*. On June 21, the court issued an order requiring each party to file a letter brief further discussing the effect of the recent Supreme Court decision. **Briefs were filed by both parties on July 6.**

2. *Open Space Institute, Inc. et al. v. American Electric Power Co., Inc. et al.*, No. 04-CV-05670 (LP)/ECF Case (S.D.N.Y. Sept. 15, 2005), No. 05-5119 (2d Cir.)

On July 21, 2004, three land trust and environmental groups (Open Space Institute, Open Space Conservancy and Audubon Society of New Hampshire) sued five major utilities (AEP, Southern, Xcel Energy, Cinergy and TVA) in federal district court seeking to 1) hold each defendant jointly and severally liable for contributing to the "ongoing public nuisance of global warming" and 2) direct each defendant to cap its CO₂ emissions and then reduce them by a specified percentage annually for at least a decade. Plaintiffs do not seek monetary damages but seek injunctive relief "under the federal common law of public nuisance or, alternatively, under state private and public nuisance law."

On June 21, the judge ordered that letter briefs be filed as to how *Massachusetts v. EPA* should be applied. On July 6, both parties filed their briefs.

For further proceedings, see I.B.1 above.

3. *California v. General Motors Corp. et al.*, No. 06-05755 (N.D. Cal. Sept. 20, 2006)

A complaint was filed in federal district court by the then Attorney General on behalf of California on September 20, 2006, which sought monetary damages based on the past and ongoing contributions of numerous motor vehicle distributors to global warming. The complaint claims that these contributions constitute a “public nuisance” under federal common law.

On December 15, defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. In their memorandum in support of the motion to dismiss, the defendants argued that contribution to global warming is a nonjusticiable issue, which should be reserved for the political arena. The defendants also argued that the CAA and Energy Policy and Conservation Act (EPCA) preempt states from adopting their own vehicle emissions standards. The enactment of the CAA and EPCA, the defendants maintain, created a comprehensive national scheme, which precludes federal courts from ruling on such issues.

The court denied motions to file *amicus* briefs by the Pacific Legal Foundation and Michigan on January 23, 2007.

On January 31, the newly appointed California Attorney General sent a letter to the automakers, raising a possible settlement.

Nonetheless, California filed its opposition to defendants’ motion to dismiss on February 1. California argued that defendants’ interpretation of the CAA and EPCA was misleading. First, California argued that the CAA does not preclude EPA from regulating the CO₂ and other GHGs. Second, the state argued that EPCA was enacted for purposes of energy conservation and not to have an effect on global warming. Lastly, California argued that the statutes are not comprehensive and leave gaps that the federal courts are able to fill in through interpretation. A hearing was held on March 6. The court allowed for additional motions to be filed based on *Massachusetts v. EPA*. Defendants’ argued that the decision abandoned nuisance as a cause of action where GHGs are involved. California replied in opposition asserting that although the Supreme Court has allowed the EPA to establish remedies for harms caused by GHGs, since none has been introduced nuisance is still a viable cause of action for states seeking this type of relief.

A case management conference is scheduled for **September 4**.

For further proceedings, see I.D.1 below.

C. Class Action Damages Suits

1. *Comer et al. v. Murphy Oil, U.S.A. et al.*, No. 1:05-cv-00436-LTS-RTW (S.D. Miss. Apr. 19, 2006)

In the third amended complaint in federal district court, plaintiffs now target 20 utilities – 19 of them EEI member companies – in their class action damages suit seeking to link defendants’ actions to increased GHG emissions and increased “destructive capacity” of Hurricane Katrina. Plaintiffs also are suing oil, chemical and coal companies and several trade associations, but not EEI. It is our understanding that many defendants have not been served. The utilities named in the complaint are: American Electric Power, Southern Company Services, Tennessee Valley Authority, Xcel Energy, TXU, Cinergy and Duke Energy, Reliant Energy, Edison International, E.ON AG (doing business as Powergen and LG&E Operating Services), Progress Energy, Ameren Corp., Scottish Power (doing business as MidAmerican and PacifiCorp), Entergy, Allegheny Energy, FirstEnergy, Dominion Resources, DTE Energy, FPL Group, Mirant and AES.

On June 19, 2006, Dominion Resources moved to dismiss the complaint on the grounds of lack of personal jurisdiction and because the complaint was filed without leave of court and without authority under the Federal Rules of Civil Procedure. On July 21, plaintiffs and Dominion Resources filed a joint motion to dismiss Dominion Resources without prejudice. The court granted the motion on July 24.

On June 30 and July 19, various motions to dismiss were filed by the oil company defendants jointly, by DuPont and Dow Chemical, by the coal companies, and by Xcel Energy, Ameren Corp. and Reliant Energy. On August 2, the court dismissed TXU, American Electric Power, Progress Energy, DTE Energy, Southern Company Services and Edison International without prejudice. Plaintiffs and Ameren Corp. filed a joint motion to dismiss without prejudice on November 17, which was granted on November 20.

Motions to dismiss for lack of subject matter jurisdiction were filed by 13 oil and coal companies on December 6. In an attempt to forestall additional motions to dismiss, plaintiffs filed a motion to amend/correct its amended complaint on December 19. In their motion, the plaintiffs claimed that additional scientific evidence would answer the claims raised in the motions to dismiss filed by several defendants. Defendants have filed oppositions to the motion, arguing that the motion attempts to change the jurisdictional basis of the suit.

On January 17, 2007, plaintiffs filed a motion in limine to suppress several documents cited by defendants in their motions to dismiss. In opposition, defendants claimed that the documents were self-authenticating documents because they were derived from a federal agency. On March 6, Entergy filed a motion for summary judgment based on improper service of process. Later that week, BP joined Shell Oil and Entergy joined Arch Coal in filing motions to dismiss. Opposition was filed on March 29.

In April, 25 companies filed in opposition to the plaintiffs' December motion to amend its complaint. **An order filed on July 11 set the hearing date for August 30 on the motion to dismiss that was filed on December 6, 2006.**

D. CAFÉ and Clean Air Act Cases

Several suits have been brought to address attempts by states to regulate CO₂ from motor vehicles.

1. *Central Valley Chrysler–Jeep, Inc. et al v. Witherspoon ex rel. California Air Resources Board*, No. 04cv6663 (E.D. Cal. Dec. 7, 2004)

On December 7, 2004, 10 car dealers and the Alliance of Automobile Manufacturers filed for declaratory and injunctive relief in federal district court in Fresno, California under the Supremacy Clause of the U.S. Constitution and 42 U.S.C. § 1983, asserting that the air pollution control agency of California is regulating the fuel economy of motor vehicles in a manner reserved by, and for, the federal government. The plaintiffs assert that the state has interpreted a 2002 state statute as requiring the adoption and enforcement of rules to limit the release of CO₂ from new motor vehicles sold in California beginning in the 2009 model year, and that such regulation is preempted by the federal corporate average fuel economy (CAFÉ) and clean air laws.

On June 13, 2005, defendants filed a memorandum in support of a motion to dismiss the amended complaint and asked the court to take notice of several listed authorities. The parties, pursuant to court order, filed supplemental briefs on August 1.

On September 16 the defendants gave notice that the state administrative process for the rules "is now complete" with approval on September 15 by California's Office of Administrative Law. On September 19, the U.S. Magistrate Judge provided a Summary of Undisputed and Disputed Legal Issues," a "Summary of Uncontested and Contested Facts" and a schedule for the litigation, noting that "all parties do not consent to the conduct of all further proceedings, including trial, before a United States Magistrate Judge." The scheduling order included pretrial motions in October and November 2006, a pretrial conference on December 1, 2006, and a court trial estimated to take 20 days beginning January 16, 2007. The order adds that if the case is transferred to a different trial judge, "the transfer will be with the acknowledgement that the trial date is firm." In fact, the case was reassigned from a retired judge to District Court Judge Anthony Ishii.

On October 20, 2005, the court granted motions to intervene by the Sierra Club, NRDC, other environmental groups and the International Automobile Manufacturers. In addition, the court denied the defendants' motion to dismiss and to transfer venue from the Fresno division of the federal court to its Sacramento division. The defendants claimed that this is a civil action arising in Sacramento County, not the Fresno counties. The court held that plaintiffs demonstrated that the Fresno venue is "proper," but on motion of the plaintiffs, the court agreed to certify the issue of "intradistrict venue" to the

9th Circuit to allow an “immediate appeal” because a reversal of this holding later could cause the vacating of substantive holdings.

The court also denied defendants’ motion to dismiss on the basis that the question raised in the suit – namely, whether the proposed regulations by CARB “are preempted” under section 209 of the CAA under the doctrine of “primary jurisdiction” – must be decided by the U.S. EPA Administrator with review by the U.S. Court of Appeals for the D.C. Circuit. The court said that 1) the doctrine “does not apply” here because the issue concerns a “statutory interpretation” under the CAA, which must be decided by the court, and 2) there is no principle of administrative law requiring an agency interpretation before the court decides. Whether a waiver of section 209 is possible is for the court to decide.

On June 1, 2006, defendants moved to dismiss on the grounds that the complaint failed to set forth claims upon which relief could be granted. The court denied in part and granted in part. The court denied the claims based on preemption under EPCA, CAA and United Nations Framework Convention on Climate, but granted dismissal of the claims based on the dormant Commerce Clause and Sherman Antitrust Act.

On July 17, the court granted a request to modify the prior scheduling order, with the principal result that the trial date was moved from January 16 to January 30, 2007. The schedule was also changed regarding some discovery issues leading up to trial. As to the defendants’ request for trial delay until after the Supreme Court decides *Massachusetts v. EPA*, the court said that the plaintiffs had shown that they would be prejudiced by delay in the proceedings. The court also said that while having the Supreme Court’s decision would be convenient and helpful before a trial decision, defendants had not argued that would be prejudiced from proceeding in the case pending the Supreme Court outcome. The court further indicated that the complaint has five claims, with only one or possibly two being affected by the other case. In addition, defendants did not argue that the Supreme Court will dispose of all possible issues in the California case.

The defendants moved for summary judgment on October 27, 2006, on the ground that the plaintiffs’ claims were not constitutionally ripe. The court found that the plaintiffs are unlikely to suffer any harm as a result of a stay and found that the issue of regulation of GHGs under federal law would eventually be decided outside the judicial system. The court stayed the case until a decision was reached in *Massachusetts v. EPA*. A status conference was held on June 18, 2007. A hearing on motions has been scheduled for October 22. **The defendants filed a supplemental brief on July 20, which claims that there are no triable issues of fact subsequent to *Massachusetts v. EPA*. In their brief, defendants argue that the CAA does not give California any less authority to regulate GHGs and that California’s authority to regulate GHGs is not diminished if a decision is made by EPA to regulate particular air pollutants.**

See I.A.2.

2. *California et al. v. NHTSA*, No. 06-72317 (9th Cir. May 3, 2006)

California and nine states, New York City and Washington, D.C. filed a petition for review of the final rule establishing CAFE standards for light trucks for the model years 2008 to 2011 and on the draft National Environmental Policy Act (NEPA) statement for failing to consider changes in the environment since the last NEPA statement in the 1980s and for failing to evaluate the impact of CO₂ emissions despite identifying the threat of CO₂ and global climate change as new information about the environment. Previously, petitioners filed comments with the National Highway Transportation and Safety Administration on November 22, 2005. There was a docketing link with other cases as of August 22, 2006. The case was heard on May 14, 2007.

2.3. *Green Mountain Chrysler-Plymouth-Dodge-Jeep et al. v. Torti et al.*, Nos. 05-CV-302 (D.Vt. Nov. 18, 2005)

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On November 18, 2005, several automobile manufacturers, retailers and the Alliance of Automobile Manufacturers filed a complaint in the U.S. District Court for Vermont against the Secretary of the Vermont Agency of Natural Resources and others, seeking injunctive and declarative relief. The complaint claimed Vermont's 1996 adoption of a "Low Emission Vehicle" program was preempted by federal regulation of GHGs under EPCA. According to the claim, Vermont's 2004 amendment to the legislation called for the regulation of CO₂, which is not classified as an air pollutant by the federal government or Vermont's Air Pollution Control Regulations.

The case concluded on May 8, 2007, and is awaiting decision.

34. There are several other climate-related cases primarily affecting the automobile industry, which are being litigated or followed by the Alliance of Automobile Manufacturers. A table of such cases, which the Alliance has prepared and updated, is available.

E. NEPA Cases

In addition, several NEPA cases have addressed CO₂. See also I.D.3 above.

1. *Friends of the Earth et al. v. Mosbacher et al.*, No. 3:02- cv-04106-JSW (N.D. Cal. Aug. 27, 2002)

Several environmental groups (joined by several municipalities in Colorado and California) sued the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank of the United States for failing to comply with NEPA in financing \$32 billion worth of power plants, oil fields and pipelines overseas over a 10-year period. The complaint alleges that defendants' financing programs and financing decisions for projects that directly or indirectly emit CO₂ are subject to NEPA. Defendants moved to transfer venue from San Francisco to federal district court in D.C., and later answered the

complaint. On June 30, 2003, the court granted the motion to transfer venue. On July 15 plaintiffs filed a petition for writ of mandamus with the U.S. Court of Appeals for the Ninth Circuit to overturn the transfer of venue, and on September 11 that court granted the writ and vacated the order to transfer venue.

Plaintiffs subsequently filed a second amended complaint for declaratory and injunctive relief, and on February 5, 2004, the government answered that complaint. The plaintiffs stipulated to a briefing and hearing schedule, and the court issued an order on July 30 calling for defendants' brief on November 3, plaintiffs' opposition brief on December 22 and defendants' reply brief on January 21, 2005. The case was originally set for hearing on February 11, 2005. However, on November 3, 2004, the government filed a motion for summary judgment and a memorandum in support on standing, jurisdiction and failure to state a claim. Cross-motions for summary judgment as well as motions to strike were subsequently filed. Hearing was reset on January 13, 2005, for April 29. On August 23 the court denied defendants' motion for summary judgment. On August 25, a hearing was set for February 10, 2006. However, the plaintiffs filed motions for summary judgment in late December 2005, which was followed by cross-motions. On March 22, 2006, the hearing on further motions was rescheduled to April 14.

The court issued a decision on the motions for summary judgment on March 30, 2007. The court granted in part and denied in part the defendants' motion and denied the plaintiffs' motion. In its decision, the court indicated that it could not, as a matter of law, find that Congress was aware that OPIC is not subject to NEPA. The court found against the plaintiffs' in its holding that OPIC's alleged "energy programs" did not qualify as major federal projects, because the programs lacked concerted actions to implement a plan or statutory program. On plaintiffs' claim that seven other projects' funding by OPIC reached the major federal project standard, the court indicated that it could not find whether the funding qualified based on the evidence. In examining the nature of federal funds and extent of federal involvement in the projects, the court found an issue of fact still existed as to whether the funding reached the standard of a major federal project and declined to enter summary judgment. Case management was held on April 27. Also on that day, the defendants filed a motion requesting that the court stay certification of both orders to the Ninth Circuit Court of Appeals for 60 days to give the defendants adequate time to file an interlocutory appeal. The court granted the motion in part on May 9, and permitted a stay until June 6. On June 6, the court issued an order certifying orders to interlocutory appeal, which stated that if either party filed for interlocutory appeal, all further action in the instant proceedings would be stayed pending a decision of the Ninth Circuit. **On June 20, plaintiffs filed for an interlocutory appeal and sought appellate review of the denial of summary judgment on the issue of whether the projects at issue were actions under NEPA. On June 28, the defendants opposed plaintiffs' petition, stating that the defendants did not satisfy the criteria for interlocutory appeal.**

2. *Montana Environmental Information Center et al. v. Johanns et al.*, No. 07-cv-01311 (D. D.C. July 20, 2007)

The Montana Environmental Information Center, Citizens for Clean Energy and Sierra Club filed suit in federal district court in D.C. against the U.S. Secretary of Agriculture and others on July 20, 2007. The suit claims that the Department of Agriculture through its Rural Utilities Service (RUS) is preparing to lend a large amount of money to the Highwood Generating Station in Montana at the request of Southern Montana Electric Generation and Transmission Cooperative (SME) in addition to seven other similar funding projects. According to the complaint, these coal-fired power plants will produce large amounts of GHGs and the Highwood Generating Station will destroy a National Historic Landmark.

Plaintiffs state that under federal statute, RUS can fund a new generating facility only if there are no existing sources of power that can provide equally affordable electricity to an area. On May 10 RUS issued a record of decision to participate in funding the Montana project following a review of the project, which began in 2004 and included two environmental impact statements. The plaintiffs allege that after receiving comments that established viable options, RUS instead changed the location to build the plant in Montana's "Golden Triangle," an area recognized nationally for its prime agricultural land.

Plaintiff assert that the plant will emit 2.8 million tons of GHGs each year, but that RUS failed to properly examine the effects as required by NEPA. In the second cause of action, plaintiffs claim that RUS is required to define the purpose and need for financing a project based on true energy needs. However, according to the complaint, RUS accepted SME's purpose and need without verifying it with local consumers. The plaintiffs demand relief based on a lack of consideration for alternatives and failure to supplement the alternatives analysis based on significant new information (the expense of coal-fired plants) in addition to two other violations of NEPA and one of the National Historic Preservation Act.

F. Miscellaneous

1. *NRDC et al. v. Norton et al.*, No. 1:05-CV-1207 (E.D. Cal. Sept. 23, 2005)

The Natural Resources Defense Council filed suit against the Secretary of the Interior and others in February 2005 in federal district court in the Northern District of California. In September the case was transferred to the U.S. District Court for the Eastern District of California. The complaint claimed that in July 2004 the U.S. Fish and Wildlife Service (FWS) issued a biological opinion on the operations of the Central Valley Project and State Water Project. The opinion concluded that the operation of both projects would not harm the Delta smelt, a fish protected under the Endangered Species Act, nor would the projects adversely affect the Delta smelt's critical habitat. According to the complaint, the projects are

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two of the largest water storage and diversion projects in the world, pumping an average of 1.6-2 trillion gallons of water annually out of the Delta to irrigate water users to the south.

The complaint alleges that the defendants failed to base the biological opinion regarding the harm to the Delta smelt on any evidence other than future mitigation measures and adaptive management, in addition to failing to consider the most pertinent scientific information. Plaintiffs argued that the defendants' conclusion that the Delta smelt would not be harmed in the biological opinion was arbitrary and capricious and therefore an abuse of discretion.

The California Department of Water moved to intervene on October 12, which was granted in January 5, 2006. On June 9, the plaintiffs filed for summary judgment. Opposition was filed in July. A hearing was held on April 26, 2007, with a decision rendered on May 25. The motion was granted and denied in part. The court found that the current projects do not provide reasonable certainty for mitigation of harm to the Delta smelt and the FWS did not utilize the best scientific data in rendering its opinion. The court also found that the opinion did not adequately consider the impacts on the smelt's critical habitat.

On June 19, the plaintiffs filed a motion for a temporary restraining order for the California Department of Water Resources to implement recommendations of the Delta Smelt Working Group, which was denied without prejudice on June 22. Plaintiffs filed a motion proposing interim remedies on July 9, which was followed by defendants' motion on July 23. A hearing has been set on these motions for August 21.

2. *Sierra Club et al. v. Pub. Serv. Comm'n et al.*, No. 2006CV1304 (Wis. Cir. Ct. 2006), Appeal No. 2007AP000117 (Wis. Ct. App. 2007).

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On March 23, 2006, the Public Service Commission of Wisconsin (PSC) issued an order authorizing Wisconsin Public Power, Inc. (WPPI) to purchase an ownership share in the Prairie State Energy Campus (PSEC). The PSEC is a coal-fired power plant, which is planned to begin commercial operation in 2010. On April 21, the Sierra Club and Valley Watch filed a request for judicial review of the PSC's order.

Under Wisconsin administrative law, the court must reverse or remand an agency's decision if it deviates from an agency's stated policy or prior practice. Wis. Stat. §227.57. Petitioners argued that based on the PSC's prior practice it arbitrarily and capriciously failed to 1) consider the cost of future GHG regulation to determine the most cost-effective option, and 2) require cost-effective energy-efficiency measures. On the first issue, petitioners referred to two prior PSC decisions, which discussed the monetization of future GHG regulations. In opposition, the PSC argued that it has, since those cases, adopted a policy that does not allow for such monetization to be a deciding factor. Congruently, the PSC produced its case log, which showed no discussion of the monetization of future GHG regulations. After examination, the court held that based on

the case log, it was evident that the only policy or practice exemplified by the PSC was that it does not consider monetization in its orders.

For its argument of cost-effective energy-efficiency measures, petitioners again referred to two recent cases in which the PSC required energy-efficiency programs to cost less to conserve energy than to produce an equivalent amount of energy, even if these programs did not completely replace the need for energy met by the proposed plant. The PSC again referred the court to its case log, which exemplified that only those two cases mandated energy efficiency as a condition of approval. The court held in favor of the PSC after examining the case log and finding that two cases are not enough to establish the practice or procedure of the agency.

Notice of appeal was filed on January 11, 2007. The appellant filed its brief on April 23. On May 23, respondent filed its brief. The appellant filed a motion to dismiss on June 20. **The case was voluntarily dismissed on August 8.**

3. *Center for Biological Diversity v. Brennan*, No. 06-CV-07062-SBA (N.D. Cal. Nov. 14, 2006)

In 1990, Congress addressed the growing concern over global warming by enacting the Global Change Research Act (GCRA). 15 U.S.C. § 2934. Under the GCRA, Congress directed the creation of two documents. The first is a National Global Change Research Plan (Plan) setting forth the goals and priorities of a national research program, which must be updated every three years. The second, a scientific assessment (Assessment), compiles the up-to-date research involving climate change and must be updated every four years.

On October 31, 2000, the first Assessment was completed. In 2002, the Bush Administration announced the formation of the Climate Change Science Program (CCSP). In January 2003, CCSP made available the Plan, which was submitted to Congress in July.

On November 14, 2006, the Center for Biological Diversity filed suit against the Acting Director of the CCSP for declaratory and injunctive relief. In its complaint, the plaintiff invoked the GCRA, and requested court orders for the creation of both a Plan and Assessment.

Plaintiff also moved for summary judgment on January 22, 2007. Sen. Kerry (D-MA) and Rep. Inslee (D-WA) filed an *amicus* brief in support of plaintiff in early February. The defendants filed a motion to dismiss or, in the alternative, for summary judgment on February 27. A hearing date was originally set for May 1 and rescheduled for July 10. **On July 6, the court vacated the hearing scheduled for July 10, and required further briefing on the following questions: 1) Do the plaintiffs have a basis for seeking an injunction compelling the reviewed Research Plan or merely the summary? 2) What is the connection between the Scientific Assessment and the Global Change Research Program? 3) Does the procedural injury extend to the Scientific**

Assessment? and 4) What if the injury is found to only apply to the summary and not the full Scientific Assessment and Global Research Plan? Briefs were filed by the parties on July 24 and August 10.

4. *Natural Resources Defense Council et al. v. Reclamation Board of the Resources Agency of California*, Case No. 06CS01228 (Cal. Super. Ct. Sacramento Aug. 18, 2006)

On August 18, 2006, the Natural Resources Defense Council, California Sportfishing Protection Alliance, Deltakeeper Chapter of Baykeeper and Natural Heritage Institute filed a petition for a preemptory writ of mandate against the Reclamation Board of the Resources Agency of the State of California to require the respondent to reexamine its approval of fill and encroachment permits for a project known as the River Islands at Lathrop. On June 16, 26 and July 21, the respondent approved the permits based on an environmental impact report (EIR) prepared by the City of Lathrop in 2005. The petitioners claim that the respondent's approval based on the EIR violated the California Environmental Quality Act (CEQA) because of changes made to the project subsequent to the EIR being filed. The project includes converting an island in the Sacramento San Joaquin Bay Delta (Delta) from primarily agricultural to a development of 11,000 homes and 5 million square feet of commercial and retail space. In order to do this, the project included altering existing flood levees to reduce chances of flooding both on the island and in the surrounding areas.

Under CEQA, the lead agency in carrying out approvals on a project must prepare a supplemental EIR when there are substantial changes that would require major revisions to the EIR or new information becomes available that could not have been known at the time the EIR was completed. Petitioners claim that the EIR included a flood bypass called "Paradise Cut," which was intended to reduce the impact of the island on the surrounding areas; however, when the project was proposed to the respondent the bypass was not included. Petitioners further claimed that a recent California Department of Water Resources study, made available subsequent to the EIR, found that climate change would greatly affect the levees' ability to control flooding along the San Joaquin Delta. For these reasons, petitioners urged the court to require respondents to set aside the permits, require an updated EIR for the project to be approved and require the proposal for the project to be in compliance with CEQA and respondent's regulations prior to any approvals.

Real parties in interest Califia and Cambay Group, Inc. (the permit applicants) filed motions to dismiss, which were denied by the court on April 13, 2007. A hearing on the merits was held on April 27. **The court found that the petitioners failed to demonstrate significant new information with regard to climate change, which would have required a full environmental review. Climate change and its impact on the Delta are not new information, and although scientific and political consensus on climate change may have grown, there has been no new evidence specifically in regard to the Delta as a result of this consensus. The court did find, however, that the respondents did violate administrative regulations when they failed to dedicate a**

flood control easement over the entire levee plus 10 feet and a limited easement to allow structures to be built atop the levee. As a result, the writ of mandate was granted solely with regard to the easements.

II. Impacts of CO₂ and GHG Regulation on States, Business and the U.S. Economy

Government regulation of CO₂ and GHGs could be one of the costliest regulatory actions of the 21st century. Macroeconomic studies show that mandatory command-and-control regulation of CO₂ and GHGs could cost the U.S. economy 1-4 percent of GDP – or \$130-520 billion per year; cause the loss of hundreds of thousands of jobs; and force business and industry to move offshore (thereby effectively relocating rather than reducing emissions). In short, regulation of CO₂ and GHGs could result in severe energy rationing, hefty increases in energy prices or both. See, *e.g.*, Energy Information Administration, Impacts of the Kyoto Protocol on U.S Energy Markets and Economic Activity (October 1998). See www.eia.doe.gov/oiaf/kyoto/execsum.html. Moreover, state budgets could be affected by regulation of CO₂, which would eliminate or lower the taxable income of businesses and individuals.

Another way of looking at this issue is that U.S. regulation of CO₂ and other GHGs would be tantamount to backdoor implementation of the Kyoto Protocol, an international treaty that is acknowledged would cause serious economic harm to the U.S. while doing virtually nothing to reduce global GHG atmospheric concentrations. This is in part because it does not require actions by developing countries such as China and India; these two countries' combined CO₂ emissions exceeded those of the U.S. in 2005, and China's alone surpassed the U.S.'s in 2006. Similar legislative approaches in Congress have included the Sanders-Boxer and Waxman bills, Carper's "four-emissions" bill and the Lieberman-McCain bill, all of which would have Kyoto-like deleterious impacts on the U.S. economy, jobs and international industrial competitiveness.

Here are the URLs for four sites with information on harmful impacts to states and various stakeholders from regulating CO₂ and GHGs:

CRAI/ACCF studies (state assessments)

<http://www.accf.org/publications/reports/revisedmccainlieberman.html>

Heartland Institute (link to page with further link to pdf file for printing)

<http://www.heartland.org/Article.cfm?artId=11133>

WEFA/DRI study (with national assessment, state assessments and selected municipalities)

<http://www.api.org/globalclimate/wefanatimpacts.htm>

CEED study on sector impacts from Kyoto Protocol

<http://www.ceednet.org/resources/pdf/981271.pdf>

CEED study on impacts to elderly

http://www.ceednet.org/resources/kyoto_manifesto.asp

CEED study on impacts to agriculture

<http://www.ceednet.org/resources/agintro.asp>

III. Voluntary Climate Programs by Business and Industry

Voluntary climate programs by business and industry – as well as all other sectors of the economy, including commercial and residential – have been the preferred approach to addressing GHGs rather than mandatory, command-and-control regulation. Virtually all major U.S. industries have engaged in robust voluntary programs to reduce, avoid or sequester GHGs. Note the launching of DOE's Climate VISION programs in February 2003 and the participation of 15 major industries in those voluntary programs.

These industries are: the Business Round Table; oil and gas production, transportation and refining; electricity generation; coal production and mining; minerals; manufacturing (aluminum, cement, iron and steel, semiconductors, magnesium, lime, and chemicals); transportation (railroads and automobiles); and forest and paper. Here is the URL for detailed information on the 15 industries' voluntary climate programs:

<http://www.climateinitiatives.gov/initiatives.html>

The international counterpart to the voluntary domestic programs is the Asia-Pacific Partnership on Clean Development and Climate (APP). The six partnership nations – U.S., Japan, Australia, China, India and South Korea – comprise half of the world's CO₂ emissions, so activities to reduce air and GHG emissions in these countries will have significant effects. For information on the APP, go to:

www.asiapacificpartnership.org

and

www.asiapacificpartnership.org/APPTaskForces.htm

Any effective response to global climate change must be technologically driven and economically sensible and must recognize the long-term and global nature of the issue.