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# Climate Change Regulation and Litigation: A "Lost Decade" of Controversy and Confrontation

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## Expert Analysis

### Climate Change Regulation and Litigation: A 'Lost Decade' of Controversy And Confrontation

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"Whether one believes, as a matter of science, that the problem of climate change is real or imagined, exaggerated or understated, there is no doubt that the storm has already broken — and those legal issues present real risks and real benefits that can only be ignored at our clients' peril."<sup>1</sup>

These words commenced our first article regarding climate change. In it, we foresaw "stormy weather ahead," but we attempted to begin a "constructive dialogue" about the issues raised by global climate change. Today, we can look back over a decade of controversy and confrontation regarding climate change in virtually all legal forums and institutions and say, without hesitation, that the issue of global climate change has truly experienced a "lost decade."

Whatever one's perspective may be regarding the issue, the controversy remains unresolved in virtually every governmental body in which it has been addressed. In regulatory agencies, in the halls of Congress and state legislatures, in state and federal trial and appellate courts (including the U.S. Supreme Court), in international treaty negotiations and in the United Nations itself, the science and regulation of climate change continue to be a controversial — but unresolved — subjects.

The Earth's climate is a global public resource. That principle is axiomatic. No single person or nation has a divisible "ownership" interest in the atmosphere, but all people everywhere have an interest in its preservation and resources. Since every greenhouse gas emission cumulatively contributes to the overall impact on the atmosphere, nations and peoples are affected by an incalculable array of factors — only some of which exist as persons who can be regulated and held responsible for contributing to the global warming phenomenon.

Many such persons live in societies that are either incapable because of economic deprivation or unwilling because of adverse economic effects or political inertia to reduce emissions in proportion to their respective contributions to the problem. On

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the other end of the spectrum, even if relatively affluent countries reduce emissions substantially, they will still have to suffer from emissions released by countries that fail, for whatever reason, to match their progress. Thus, the planet remains in “gridlock” regarding climate change — even when it comes to measures needed to adapt to warming temperatures, such as those necessary to assist Pacific Islanders who are increasingly threatened by rising seas.

Finally, nations that are sufficiently prosperous to embrace climate change measures are now afflicted by a prolonged and severe economic recession. Even before the recession began in 2007–2008, many developed countries were concerned that unilateral reductions in greenhouse gases would significantly harm the economies of participating nations — in exchange for uncertain benefits. As the economic crisis deepened, political and economic incentives for unilateral GHG reductions became even less popular. Even when large emitters such as the United States impose regulations by administrative measures rather than by congressional statutes, the regulations are vigorously opposed, and they are often delayed or diluted substantially.

At such times, it seems appropriate to survey the history of this frustrating controversy and to comment, however briefly, upon what, if any, resolution can be forecast for the future. Although the limited space available here is not sufficient for an exhaustive review, we will survey selected issues that illustrate the controversy’s confrontational history — a history that, despite deep concerns, extraordinary efforts and tremendous costs, has achieved little, if any, true benefits for the global environment.

Congress appears hopelessly deadlocked on the issue, thereby leaving it to the Environmental Protection Agency under the Obama administration to chart and navigate the course our country will follow. This, however, is a far cry from five to seven years ago when a handful of state-sponsored suits were leading the charge asking the judiciary to be in charge of regulating climate change after the Bush-era EPA concluded that the Clean Air Act did not give it authority to regulate GHGs.

At the same time, a handful of private suits were asking the judiciary to award massive damages under the federal common law for alleged climate-related harms associated with Hurricane Katrina and receding sea ice. Now, in the wake of a 9th U.S. Circuit Court of Appeals panel decision affirming the dismissal of *Native Village of Kivalina v. ExxonMobil Corp.*,<sup>2</sup> it is time to look back, recap and reflect on this issue.

When we first began writing about climate change, the U.S. Supreme Court had just issued its landmark holding in *Massachusetts v. EPA*,<sup>3</sup> ruling that despite the EPA’s arguments to the contrary, it has the authority to regulate GHGs as “air pollutants” under the Clean Air Act.<sup>4</sup> At that time, we were not presuming to offer comprehensive solutions but summarizing the issues, identifying questions and laying the foundation for a constructive dialogue about the legal issues raised by global climate change. We begin this reflection by setting the stage in Act I of this unfolding drama.

## **ACT I: THE WAY WE WERE**

### ***The Kyoto Protocol***

When the last millennium was closing, many people did not believe that current global warming trends were significant or relevant to the long-term survival of life on earth. They also did not believe that international efforts to reduce greenhouse gases such as the Kyoto Protocol would be effective.

The public’s perception was also jaded because early “greenhouse politics” suffered from a tendency to exaggerate when making proclamations based on what was termed “scientific certainty.” Many people questioned the rationality of these proclamations and the agenda of their promoters. Consequently, in 1997, the U.S. Senate unanimously passed a resolution effectively preventing the Kyoto Protocol’s ratification because it did not contain commitments for developing countries.<sup>5</sup> Thus, even though President Clinton signed the treaty, it remained only a symbolic act and was never officially submitted to the Senate for ratification.

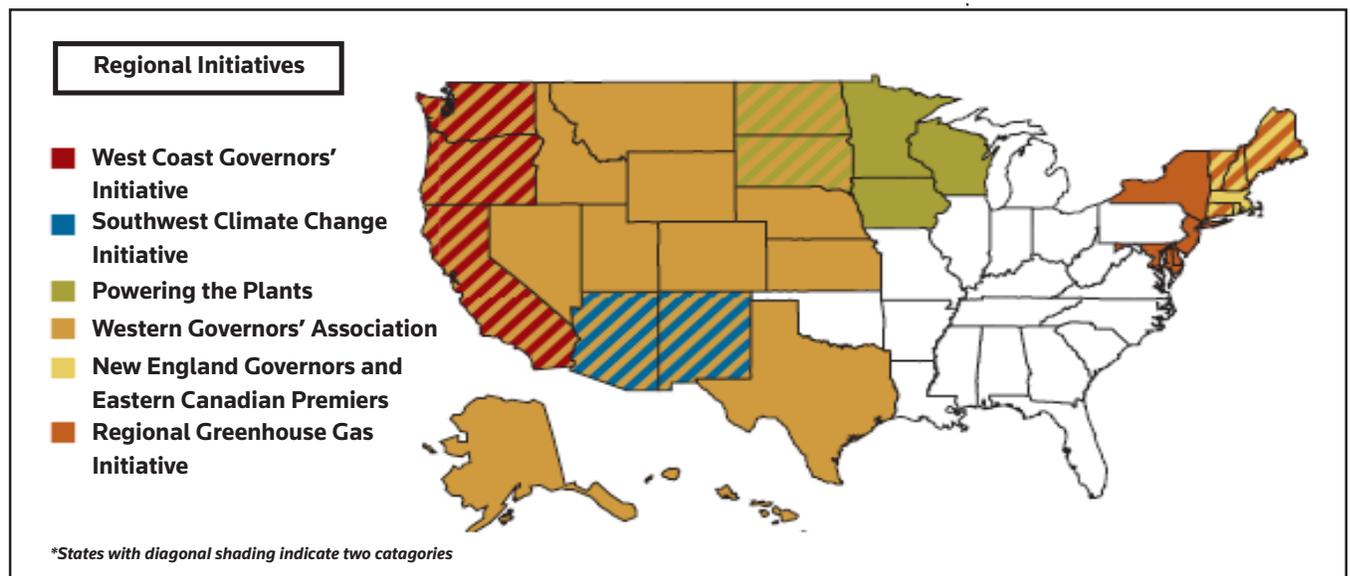
**The impact of the IPCC’s report**

Despite the Senate’s rejection of the Kyoto Protocol, an international coalition of scientists and policy advocates continued to make the case for collectively addressing climate change. The World Meteorological Organization, for example, established the Intergovernmental Panel on Climate Change in the late 1980s. Recognizing a need for collective action, the United Nations Environment Program supported the IPCC. Soon thereafter, the continuing effort of the coalition was endorsed by the U.S. General Assembly.

The IPCC was tasked with the review of all available scientific information and the preparation of a report on climate change and its impacts, as well as the formulation of realistic response strategies. In 2007, the IPCC issued its fourth assessment report reviewing the science. The report proclaimed that the threat of harm from unregulated greenhouse gases was real and undeniable, and it strongly urged governments to reduce their GHG emissions.<sup>6</sup>

**Federal and state efforts**

Although Congress and the executive branch did not address GHG emissions before 2007, some states took action. California took the lead by becoming the first state to require GHG reductions from new automobiles starting in 2009,<sup>7</sup> and the California Air Resources Board adopted regulations setting “fleet average greenhouse gas exhaust mass emission” for certain vehicles, requiring emission reductions by 2016.<sup>8</sup>



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To accomplish this, California sought a Clean Air Act waiver from the EPA,<sup>9</sup> and 14 other states accounting for 44 percent of the total U.S. population soon adopted California's regulations. The EPA did not respond to California's waiver request, because it was waiting for the U.S. Supreme Court to decide *Massachusetts v. EPA*. California also passed Assembly Bill 32 in 2006, creating the first state-level GHG cap and trade program using market-based incentives.<sup>10</sup>

Other states — individually and regionally — also addressed climate change regulatory issues by setting reduction goals for GHG emissions by adopting policies that promoted renewable energy and energy efficiency and by developing statewide climate action plans.<sup>11</sup> Recognizing the efficiency of collective efforts, many states reached beyond their borders to create regional initiatives. These initiatives presently cover a broader geographic area, eliminate duplication and help businesses by bringing greater uniformity and predictability to state rules and regulations.<sup>12</sup> They are designed to reduce GHG emissions, develop clean energy sources and achieve other goals. The following figure lists some of the regional climate change initiatives that were active in 2006.<sup>13</sup>

#### **Public nuisance litigation**

Finally, litigants asked the judiciary to use the common law of public nuisance to regulate greenhouse gases and to force emitters to pay damages for harms allegedly caused by GHG emissions. These suits reflected a belief that, as between the "victims" of the climate and the major corporate emitters of GHGs, the business community should bear the costs of climate change. Such emitters allegedly can absorb such costs or internalize them as a cost of doing business by, for example, raising the price of fossil fuels. The claimants alleged that internalization of these costs would make efficient consumption of fossil fuels more desirable.<sup>14</sup>

At the time, the plaintiffs' attorneys viewed public nuisance litigation as the best legal tool for change because, in their view, the government lacked the desire and will to regulate GHG emissions. The three most important public nuisance cases associated with climate change are *Connecticut v. American Electric Power Co.*,<sup>15</sup> *Comer v. Murphy Oil USA*<sup>16</sup> and *Native Village of Kivalina v. ExxonMobil Corp.*<sup>17</sup> Despite many years of litigation and appellate review by federal appellate courts, including the U.S. Supreme Court, all of these cases remain pending — and none has reached beyond threshold motions.

In *American Electric Power*, eight states and New York City sued five large electric utility companies and asked the court to declare climate change to be a "public nuisance" and to enjoin the defendants to abate their contribution to the nuisance by first capping carbon dioxide emissions and then reducing them.<sup>18</sup>

In *Comer*, 14 individuals filed a class-action suit in the Mississippi federal court against eight named oil companies, 100 unidentified oil and refining entities, and 31 coal companies, as well as numerous insurance and mortgage companies, alleging that they suffered severe damage to their homes as a result of Hurricane Katrina. The plaintiffs claimed that the damages to their homes were worsened by climate change.<sup>19</sup> The plaintiffs sought monetary damages under various tort theories including public and private nuisance, trespass, civil conspiracy and unjust enrichment.

In *Kivalina*, the plaintiffs sued several oil, energy and utility companies for allegedly contributing to the effects of global warming which exacerbated the rise in sea level and contributed to increased coastal erosion that was destroying part of their village and would require millions of dollars to relocate Kivalina's residents. The district court hearing each of these cases dismissed the lawsuits, finding that they presented

a non-justiciable political question.<sup>20</sup> Each was appealed — and the results will be discussed below.

With the stage now set, it is time for Act II. Here, we will review how the EPA chose to address climate change and how states, the regulated community and environmental activists reacted to the EPA's decisions. Of course, Texas played and continues to play a major role by confronting the EPA's many efforts. Therefore, this recap will also discuss the state's continuing role in this drama.

## **ACT II: EPA'S RESPONSE TO MASSACHUSETTS V. EPA**

After *Massachusetts v. EPA*, the Bush EPA announced that it would pass greenhouse gas regulations for cars and trucks. Before that happened, however, Congress passed the Energy Independence and Security Act of 2007 that altered the Clean Air Act and required the Department of Transportation and the EPA to work jointly to establish fuel economy and GHG vehicle emissions standards.<sup>21</sup> The Bush EPA then decided that a broader approach was required and issued a lengthy advance notice of proposed rulemaking in 2008 outlining possible means to regulate GHGs.<sup>22</sup>

Shortly after President Obama was inaugurated in 2009, the EPA began promulgating rules and regulations and issuing memoranda and guidance designed to first collect information and then build the foundation and framework through which the EPA would regulate GHGs from large industrial sources.

### **The rulemakings**

The EPA began with the 2009 Mandatory Reporting of Greenhouse Gases Rule, which requires large U.S. sources and suppliers to report GHG data and other relevant information.<sup>23</sup> The EPA then issued the following four significant documents/rules that form the cornerstone of its GHG regulations:

- A 2009 finding that atmospheric concentrations of GHGs may reasonably be anticipated to endanger public health and welfare and that emissions from motor vehicles contribute to this pollution.<sup>24</sup>
- A 2010 conclusion that any new regulated GHG becomes covered under the Prevention of Significant Deterioration program on the date when the EPA rule regulating that new pollutant takes effect, which for GHGs would be Jan. 2, 2011, when the cars rule took effect.<sup>25</sup>
- A 2010 ruling, known as the Tailpipe Rule, promulgated with the U.S. Department of Transportation limiting GHG emissions from automobiles and light trucks.<sup>26</sup>
- A 2010 rule, known as the Tailoring Rule, in which the EPA used its discretion to alter the requirements of the CAA emissions thresholds to limit covered facilities to only the nation's largest GHG emitters — power plants, refineries and cement production facilities — and defined when permits under the New Source Review, PSD and Title V operating permit programs are required for new and existing industrial facilities.<sup>27</sup>

### **The challenges**

It did not take long for a large coalition of states and industry groups to challenge the validity of these actions, filing about 80 different lawsuits by more than 35 petitioners. Those challenges were consolidated into *Coalition for Responsible Regulation v.*

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EPA, No. 09-1322, *complaint filed* (D.C. Cir. Dec. 10, 2010). The challenges were consolidated into three principal proceedings:

- The EPA's determination that GHG emissions are "reasonably ... anticipated to endanger human health and welfare."
- The EPA/National Highway Traffic Safety Administration rule limiting GHG limitations on new passenger cars and light trucks.
- The EPA's rule to "tailor" the applicability of Clean Air Act standards for stationary sources for GHG emissions, and the EPA's reconsideration of when restrictions on GHG emissions from stationary sources would trigger.

In these suits, petitioners challenged the endangerment finding's scientific underpinnings, the rule's cost-benefit analysis and the Tailoring Rule's "absurd results" justification. Under the CAA, states are required to take primary responsibility for implementing the permitting programs and other requirements that apply to individual air emission sources.

### **Texas**

The EPA reviewed all state implementation plans in the country to determine which PSD programs would automatically become applicable to GHG sources on Jan. 2, 2011. In September 2010, the EPA released a determination that the SIPs in 13 states, including Texas, were "substantially inadequate" and sought assurances that those states would allow a federal implementation plan for GHG permitting to go into effect in those states while they developed changes to their PSD programs.

On Dec. 1, 2010, the EPA issued a final determination that the PSD programs in all or part of those 13 states were deficient. All of the states reached an agreement with the EPA except Texas. Some are nonetheless challenging the EPA's regulations, but they were concerned that a failure to cooperate with the EPA in the interim could result in an inability to issue PSD permits in their states while those challenges played out. Texas, however, refused to reach an agreement, explaining that its laws would not allow it to do as the EPA requested. The EPA responded by partially disapproving the Texas PSD program, effective Jan. 2, 2011, and instituting a FIP for GHG emissions in Texas.

If this action survives legal challenge in Texas, then major new and modified sources in Texas will be required to obtain a dual permit, with the EPA imposing conditions on GHG emissions and the state doing so for all other regulated emissions.

This was not Texas' first disagreement with the EPA. In September 2009, the EPA announced that it planned to disapprove three sets of Texas air pollution rule changes that it determined did not comply with the Clean Air Act. Specifically, the EPA took issue with Texas' flexible permitting process, definition of qualified facilities and components of its NSR permitting program.<sup>28</sup>

Texas used flexible permits to regulate about 140 power plants. The EPA originally approved Texas' air permitting program for major sources in 1992, and these rules changes were subsequently promulgated to improve the SIP. Although they have been on the books for many years, the EPA failed to approve or disapprove of them within the requisite 12 months after promulgation. In 2010, the EPA officially disapproved these rules.<sup>29</sup> Texas responded by challenging the EPA's disapproval of these rules in the 5th Circuit.

***These suits reflected a belief that, as between the "victims" of the climate and the major corporate emitters of GHGs, the business community should bear the costs of climate change.***

In the meantime, the EPA announced a process to allow Texas facilities to transition from a flexible permit to an EPA-approved permit, a process that included a voluntary audit by a third party and an invitation to 74 permit holders to confer with the EPA. Texas also created its own transition plan.

Acts I and II have set the scene and laid the groundwork for the judiciary to resolve the many positions and disputes of disparate stakeholders — states, the EPA, the regulated community and parties alleging to be harmed by climate change. Over the past year or so, the judiciary has heard from all the stakeholders through voluminous briefing by the parties and *amici curiae*. Now it is time for the curtain to rise on Act III, where we will review the judiciary's progress — or lack thereof — in resolving these lawsuits.

### ACT III: IN THE FEDERAL COURTS

#### *The public nuisance litigation*

#### **The 2nd Circuit reverses *Connecticut v. AEP***

As discussed above, all three district courts hearing the climate change public nuisance suits dismissed the lawsuit, finding that the suits presented a non-justiciable political question, and each decision was appealed. The 2nd Circuit was the first appellate court to weigh in on this controversy. In September 2009, a two-judge panel reversed the District Court's dismissal, concluding that climate change did not present a non-justiciable question. "It is error to equate a political question with a political case," the panel said. "Given the checks and balances among the three branches of our government, the judiciary can no more usurp executive and legislative prerogatives than it can decline to decide matters within its jurisdiction simply because such matters may have political ramifications."<sup>30</sup>

Moreover, the court held that all of the plaintiffs had standing to bring the suit and that none of their claims were preempted by regulations or legislation. Interestingly, the 2nd Circuit characterized climate change as being "ordinary tort case" that was governed by "well-settled" principles of tort and public nuisance.<sup>31</sup>

Finally, the court held that the Clean Air Act had not displaced the federal common law because, at the time, the EPA had merely "proposed" to regulate the area, and Congress was still deliberating whether to pass climate change legislation. The court held that the federal common law remains available in the absence of concrete action to regulate GHGs.<sup>32</sup>

The plaintiffs appealed the 2nd Circuit decision, and the U.S. Supreme Court granted *certiorari*.<sup>33</sup> Nonetheless, the panel's decision quickly influenced proceedings in the 5th Circuit, which was set to rule in *Comer*.

#### **5th Circuit reverses — and then undercuts — *Comer***

A 5th Circuit panel agreed with the 2nd Circuit and reversed the dismissal of the common-law tort claims in *Comer v. Murphy Oil USA*.<sup>34</sup> Because this was a diversity case grounded on state common-law rights of action, the plaintiffs had to satisfy both state and federal standing requirements. Relying on the Supreme Court's decision in *Massachusetts v. EPA*, which had accepted "a causal chain virtually identical in part to that alleged by plaintiffs," the panel rejected the defendants' arguments "that traceability is lacking because their emissions contributed only minimally" to climate change.<sup>35</sup>

***Moreover, the court held that all of the plaintiffs had standing to bring the suit and that none of their claims were preempted by regulations or legislation.***

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After examining a series of Clean Water Act decisions, the court concluded that the “plaintiffs need not show to a scientific certainty that ... defendant’s [pollutants] alone, caused the precise harm suffered by the plaintiffs.” The court said it was sufficient if “the [defendant’s] pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.”<sup>36</sup> Under this logic, a plaintiff need not “pinpoint[] the origins of particular molecules, [but rather] merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern.”<sup>37</sup>

Unlike the situation in *Connecticut v. AEP* and *Kivalina*, the fact that *Comer* presented private state law claims was very important to the panel’s decision. The panel stated that it could find no example of a federal court dismissing such an action on political question grounds.<sup>38</sup> Instead, it noted:

Three circuits have stated, in the political question context, that “the common law of tort provides clear and well-settled rules on which the district court can easily rely.” ... Mississippi and other states’ common law tort rules provide long-established standards for adjudicating the nuisance, trespass and negligence claims at issue. The policy determinations underlying those common law tort rules present no need for nonjudicial policy determinations to adjudicate this case.<sup>39</sup>

Ultimately, the panel reversed the dismissal, holding that neither Congress nor the EPA had affirmatively “displaced” the common law of public nuisance and finding that climate change is an ordinary tort that does not raise a non-justiciable political question.

The defendants sought and were granted a motion for rehearing *en banc* before nine of 16 circuit judges, with seven judges recusing themselves from the case. Under 5th Circuit local Rule 41.3, the rehearing *en banc* order vacated the panel decision and left the district court dismissal intact.

Before the *en banc* court could rehear the case, however, a judge recused himself or herself, leaving only eight circuit judges to hear the case. This predicament caused the 5th Circuit to cancel the scheduled oral argument in late April, to question whether it has a requisite quorum to hear the case and in May to ask for briefing from the parties as to its options. Ultimately, the 5th Circuit determined that, without a quorum, it did not have authority to act further on the case, leaving intact the dismissal by the District Court.

The plaintiffs appealed that 5th Circuit’s decision regarding its lack of a quorum, but not the underlying District Court dismissal. The U.S. Supreme Court denied review, and the plaintiffs refiled their case in the Mississippi federal court, which once again dismissed claims on the doctrines of *res judicata*, collateral estoppel, standing and preemption.<sup>40</sup> The case is currently back before the 5th Circuit.<sup>41</sup>

#### **Supreme Court reverses and remands AEP**

On June 20, 2011, the U.S. Supreme Court held 8-0 that federal courts do not have jurisdiction to hear federal common-law nuisance claims relating to GHG emissions because the authority to regulate GHGs has been delegated to the EPA — not to federal courts.<sup>42</sup> This decision reversed the 2nd Circuit’s decision.

Contrary to the 2nd Circuit’s assertion, the Supreme Court held that Congress’ delegation under the Clean Air Act and the EPA’s regulatory efforts have “displaced” any federal common-law nuisance claims the plaintiffs might have had. “*Massachusetts* made

plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the act. And we think it equally plain that the act ‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants,” the high court said.<sup>43</sup>

Thus, displacement occurred, not when the EPA actually exercised its regulatory authority, but when “Congress delegated to the EPA the decision whether and how to regulate carbon dioxide emissions from power plants.”<sup>44</sup>

Although the Supreme Court’s ruling regarding displacement disposed of the plaintiffs’ federal claims, the court affirmed — by a 4-4 tie vote — the 2nd Circuit’s rejection of the defendants’ argument that the case raised non-justiciable political questions.<sup>45</sup> In addition, since the issue of whether the plaintiffs’ public nuisance claims under state law was not decided by the 2nd Circuit, the Supreme Court remanded the case for a determination of whether those claims were preempted. The case remains pending — with threshold issues still unresolved.

### 9th Circuit affirms dismissal of *Kivalina*

On Sept. 21, 2012, a 9th Circuit panel also refused to open the door to climate change complaints using the federal common-law tort of public nuisance.<sup>46</sup> Adhering to the Supreme Court’s ruling in *AEP*, the court ruled that the plaintiffs’ federal common-law damage claims are displaced by the Clean Air Act.

In *Kivalina*, the plaintiffs tried to avoid the application of *AEP* by arguing they sought money damages, not injunctive relief. The panel was not convinced. It stated simply that “under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies.”<sup>47</sup> It did not matter that the EPA had not acted before the damage was incurred: “Congressional action, not executive action, is the touchstone of displacement analysis.”<sup>48</sup> Nor did it matter that the court’s decision would be applied retroactively.<sup>49</sup>

Although a concurring opinion was more sympathetic, even that opinion determined that the case was not justiciable — for lack of standing. Hence, all three panel members ultimately agreed that the door should be closed on all public nuisance claims regarding GHG emissions under federal common law — irrespective of the type of relief that is sought. As to the plaintiffs’ state law nuisance claims, the concurring opinion said, “Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law.”<sup>50</sup> The District Court below dismissed *Kivalina*’s state law nuisance claim without prejudice to refiling it in state court.

### Challenges to the EPA’s rules and regulations

On June 26, 2012, the D.C. Circuit upheld the EPA’s determination that GHG emissions endanger public health and welfare by contributing to climate change and its rules regulating GHG emissions from major stationary sources.<sup>51</sup> The EPA’s rules require new major sources and major modifications to existing sources permitted after Jan. 2, 2012, to implement the “best available control technology,” or BACT, to limit greenhouse gas emissions.

The court was not persuaded by the petitioner’s arguments, holding that the EPA’s endangerment finding was supported by the record, and the rules based upon the finding were compelled by requirements of the CAA and the U.S. Supreme Court’s decision in *Massachusetts v. EPA*. It also rejected arguments that the EPA erred by relying on assessments prepared by the IPCC and other scientific bodies because

those assessments were peer-reviewed. It disagreed that the EPA delegated its judgment to the IPCC when it relied on the IPCC's assessments, explaining "[t]his is how science works. The EPA is not required to re-prove the existence of the atom every time it approaches a scientific question."<sup>52</sup>

After concluding that the Clean Air Act requires PSD and Title V permits for major GHG emitters, the court turned to the petitioners' challenge to the two rules that the EPA adopted to mitigate the impact of this new permitting requirement on GHG sources: the Tailoring Rule and the Timing Rule. The Timing Rule is the EPA's ruling regarding when regulations of greenhouse gases will begin (in in this case, concomitant with regulation of tailpipe emissions). The court quickly disposed of the petitioners' challenges to these rules, concluding that none of them had standing because they suffered no injury from these rules.<sup>53</sup>

The appellants are expected to take their challenge to the Supreme Court — if the court will hear it. Meanwhile, all new air permits for major sources will continue to require BACT for GHG emissions.

### **Challenges to the EPA's Texas disapprovals**

Two different 5th Circuit panels separately agreed with Texas that the EPA overstepped its bounds when it disapproved parts of its air permitting program. On March 26, 2012, in *Luminant Generation Co. v. EPA*, the court overturned the EPA's delayed disapprovals of revisions to the minor NSR rules in Texas' SIP, finding that the "EPA overstepped the bounds of its narrow statutory role in the SIP approval process."<sup>54</sup>

Accordingly, the court held that the EPA's disapproval was arbitrary and capricious and exceeded the agency's statutory authority because the EPA "created out of whole cloth" three different and incorrect legal theories to justify its disapproval:

- The EPA improperly reviewed the Pollution Control Project Standard Permit for compliance with Texas law, because "it is beyond cavil that the EPA may consider only the requirements of the CAA when reviewing SIP submissions."
- The EPA's "similar source" requirement was not "warranted by any applicable provision of the [Clean Air] Act."
- The EPA's "replicability" requirement was "not a legal standard the [Clean Air] Act authorized EPA to enforce."<sup>55</sup>

Then, on Aug. 13 a different panel overturned the EPA's disapproval of a 1994 revision to the Texas SIP establishing the Flexible Permit Program. The court held that the EPA's actions were based "on demands for language and program features of the EPA's choosing, without basis in the [CAA] or its implementing regulations."<sup>56</sup>

In a 2-1 decision, the court found that in order for the EPA to disapprove a SIP revision, it must show that the change would "interfere with any applicable requirement concerning attainment of NAAQS [National Ambient Air Quality Standards] or any other applicable requirement of the CAA."<sup>57</sup> It then concluded that provisions in the flexible permit regulations requiring compliance with PSD and nonattainment review were sufficient to prevent major sources from using flexible permits to evade major NSR, and that the EPA's insistence on an express negative statement had no basis in the CAA or applicable regulations.<sup>58</sup>

As to the monitoring, reporting and recordkeeping provisions, the court concluded that the EPA's concerns and misgivings about the level of discretion given to the state

agency's director when setting specific MRR permit requirements also had no basis in the CAA or applicable regulations.<sup>59</sup> Finally, the court concluded that the CAA provisions and regulations for minor NSR do not require that the methodology for calculating emissions be identical from permit to permit.<sup>60</sup>

In vacating the EPA's disapproval of these SIP revisions, the panels remanded them to the agency for further consideration. These issues will be resolved, since the Texas Commission on Environmental Quality has already issued rules clarifying the scope of the Flexible Permit Program and has pledged to do rulemaking to address any MRR issues. Regardless of the decisions the TCEQ may make, these opinions may prove to be a milestone for how future courts will review the EPA's decisions about SIP approval.

As we emerge from the "lost decade" of response to climate change, the efforts to deal with this controversy — and to constructively resolve it for the benefit of mankind — remain incomplete. Irrespective of one's personal position regarding climate change, it is objectively true that most efforts are either stalled or, at best, barely "out of the starting gate." At this point, it seems that regulatory efforts are making some headway, but they faced determined opposition that will probably succeed in substantial delays and enormous transaction costs for all persons involved in the debate.

As for the planet, it will surely go on spinning and orbiting the Sun in the same manner as it has done for the billions of years of its existence — largely indifferent to the survival of any particular species, culture or enterprise. "Whether one believes, as a matter of science, that the problem of climate change is real or imagined, exaggerated or understated," it is unlikely that this great debate will be resolved in our lifetimes. Let us hope, therefore, for the sake of our posterity, that whatever measures and adaptations are implemented after this prolonged and vituperative conflict are sufficient to preserve and protect our environment, cultures, institutions and, ultimately, the people who we value.

## NOTES

- <sup>1</sup> Richard O. Faulk & John S. Gray, *Stormy Weather Ahead? The Legal Environment of Global Climate Change* (2007), available at [http://works.bepress.com/richard\\_faulk/2/](http://works.bepress.com/richard_faulk/2/).
- <sup>2</sup> *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. Sept. 21, 2012), available at <http://www.ca9.uscourts.gov/datastore/opinions/2012/09/21/09-17490.pdf>.
- <sup>3</sup> 127 S. Ct. 1438 (2007).
- <sup>4</sup> *Id.* at 1462.
- <sup>5</sup> S. Res. 98, 105th Cong., 143 Cong. Rec. S8113-05, S8138 (1997).
- <sup>6</sup> See [http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml) for links to the different working group reports.
- <sup>7</sup> The law, Assembly Bill 1493, Stats. 2002 ch. 200 § 3, instructed the California Air Resources Board to adopt regulations that achieve the maximum feasible reduction of GHGs emitted by passenger vehicles and light-duty trucks, and any other vehicles whose primary use is noncommercial personal transportation. See Health & Safety Code § 43018.5 (see particular § 43018.5(a), available at <http://www.pewclimate.org/docUploads/ab1493.pdf>).
- <sup>8</sup> California Code of Regulations, Title 13, section 1961.1.
- <sup>9</sup> Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Dec. 21, 2005), available at <http://www.arb.ca.gov/cc/docs/waiver.pdf> (requesting a waiver of preemption under the Clean Air Act § 209[b]).
- <sup>10</sup> GHGs are to be reduced to 2000 levels by 2010 (11 percent below business as usual), to 1990 levels by 2020 (25 percent below business as usual) and 80 percent below 1990 levels by 2050. Press Release, Office of the Governor of California, Gov. Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions, GAAS:684:06 (Sept. 27, 2006), available at <http://www.casfcc.org/2/StationaryFuelCells/PDF/Governor%20Signs%20Greenhouse%20Gas%20Bill.pdf>.

- <sup>11</sup> Climate Change 101: Understanding and Responding to Global Climate Change, Pew Center on Global Climate Change and the Pew Center on the States 1 (2006), available at [http://www.pewclimate.org/docUploads/101\\_States.pdf](http://www.pewclimate.org/docUploads/101_States.pdf) (noting that “many individual states are major sources of these emissions. Texas, for example, emits more greenhouse gases than France, while California’s emissions are comparable to those of Australia”).
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.* (describing the various regional initiatives).
- <sup>14</sup> See David A. Grossman, *Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003) (discussing possible common-law theories for climate change litigation).
- <sup>15</sup> No. 04 CV 05669, *complaint filed* (S.D.N.Y. July 21, 2004).
- <sup>16</sup> No. 1:05CV436-LG\_RHW, *complaint filed* (S.D. Miss. Sept. 30, 2005).
- <sup>17</sup> No. C 08-1138 SBA, *complaint filed* (N.D. Cal. Feb. 26, 2008).
- <sup>18</sup> See Robert Meltz, *Climate Change Litigation: A Growing Phenomenon*, Cong. Research Serv., Report for Congress, Order Code RL32764 (May 18, 2007), at CRS-114, available at [http://communityrights.org/PDFs/Warming%20Law/CRS\\_4\\_7\\_08.pdf](http://communityrights.org/PDFs/Warming%20Law/CRS_4_7_08.pdf).
- <sup>19</sup> Memorandum Opinion, *Comer v. Nationwide Mut. Ins. Co.*, 2006 WL 1066645 at \*1 (S.D. Miss. Feb. 23, 2006).
- <sup>20</sup> *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005); *Comer v. Murphy Oil USA*, No. 05-CV-436LG (S.D. Miss. Aug. 30, 2007); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 863 (N.D. Cal. 2009).
- <sup>21</sup> Pub. L. No. 110-140 (2007).
- <sup>22</sup> See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44354 (July 30, 2008).
- <sup>23</sup> 74 Fed. Reg. 56260 (Oct. 30, 2009) (applying to fossil fuel suppliers and industrial gas suppliers, direct GHG emitters and manufacturers of heavy-duty and off-road vehicles and engines).
- <sup>24</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66496 (Dec. 15, 2009). In support of this judgment, the EPA explained, *inter alia*, that GHG concentrations in the atmosphere have risen to unprecedented levels as the result of human activities, that this buildup of atmospheric gases has been a substantial cause of warming over the past half-century, and that this warming is causing and will continue to cause a variety of adverse effects to human health and welfare in this country. Numerous parties filed administrative petitions for reconsideration and the administrator denied those petitions in the “Reconsideration Denial.” 75 Fed. Reg. 49,556 (Aug. 13, 2010). These findings were a prerequisite for implementing GHG vehicle emissions standards.
- <sup>25</sup> Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010).
- <sup>26</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010).
- <sup>27</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31514 (June 3, 2010).
- <sup>28</sup> Approval and Promulgation of Implementation Plans; Texas; Revisions to the NSR SIP; Modification of Existing Qualified Facilities Program and General Definitions, Proposed Rule, 74 Fed. Reg. 48450 (Sept. 23, 2009); Approval and Promulgation of Implementation Plans; Texas; Revisions to the NSR SIP; PSD, Nonattainment NSR (NNSR) for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit Proposed Rule, 74 Fed. Reg. 48467 (Sept. 23, 2009); Approval and Promulgation of Implementation Plans; Texas; Revisions to the NSR SIP; Flexible Permits, Proposed Rule, 74 Fed. Reg. 48480 (Sept. 23, 2009).
- <sup>29</sup> Approval and Promulgation of Implementation Plans; Texas; Revisions to the NSR SIP; Flexible Permits, Final Rule, 75 Fed. Reg. 41311 (July 15, 2010); Approval and Promulgation of Implementation Plans; Texas; Revisions to the NSR SIP; PSD, NNSR for the 1997 8-Hour Ozone Standard, NSR Reform, and a Standard Permit, Final Rule, 75 Fed. Reg. 56423 (Sept. 15, 2010).
- <sup>30</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 323 (2d Cir. 2009).
- <sup>31</sup> *Id.* at 329.
- <sup>32</sup> *Id.* at 381.
- <sup>33</sup> *Am. Elec. Power*, 582 F.3d 309 (2d Cir. 2009), *reh’g en banc denied* (Mar. 5, 2010), application to stay mandate pending cert. filed (Mar. 11, 2010).
- <sup>34</sup> *Comer v. Murphy Oil USA*, No. 05-436 (S.D. Miss. Aug. 30, 2007), *rev’d*, 585 F.3d 855 (5th Cir. 2009), *vacated on grant of reh’g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

- <sup>35</sup> *Comer*, 585 F.3d at 866.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.* at 867.
- <sup>38</sup> *Id.* at 873 n.11.
- <sup>39</sup> *Id.* at 873-75.
- <sup>40</sup> *Comer v. Murphy Oil USA Inc.*, No. 1:11-CV-220-LG-RHW (S.D. Miss. Mar. 20, 2012).
- <sup>41</sup> *Comer v. Murphy Oil USA Inc.*, No. \_\_\_-\_\_\_\_ (5th Cir. \_\_\_).
- <sup>42</sup> *Am. Elec. Power Co. v. Connecticut*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2527 (2011).
- <sup>43</sup> *Id.* at 2537.
- <sup>44</sup> *Id.* at 2539.
- <sup>45</sup> *Id.* at 2535.
- <sup>46</sup> *Kivalina*, 696 F.3d 849.
- <sup>47</sup> Opinion at 11655.
- <sup>48</sup> *Id.* at 11656.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Id.* at 11671 (citing *AEP*, 131 S. Ct. at 2540).
- <sup>51</sup> *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. June 26, 2012).
- <sup>52</sup> Slip Op. at 27.
- <sup>53</sup> *Id.* at 74.
- <sup>54</sup> 675 F.3d 917 at \*10.
- <sup>55</sup> *Id.* at \*11-\*20.
- <sup>56</sup> *Texas v. EPA*, No. 10-60614, 690 F.3d 670 at \*2 (5th Cir. Aug. 13, 2012).
- <sup>57</sup> Slip Op. at 8.
- <sup>58</sup> *Id.* at 8-11 (noting the EPA's disapproval over a difference in "drafting style").
- <sup>59</sup> *Id.* at 14-17.
- <sup>60</sup> *Id.* at 17-23 (noting that the EPA's decision "undermines the cooperative federalism that the CAA envisions").



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