

Ramifications of
Massachusetts v. EPA
On Other
Pending Litigation

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Four Primary Types of GHG Litigation

■ Tort cases (Nuisance Claims)

- Plaintiffs assert industry defendants' GHG-producing activities have contributed to global warming and have created a public nuisance under both state and federal common law.




- Cases:

- ***Connecticut v. American Electric Power, Inc.***, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (states and municipalities filed suit against power companies arguing that the carbon dioxide emitted from their units creates a public nuisance).

- The district court found in favor of the defendants holding that the question of GHG emissions is properly decided by the legislature (*i.e.*, nonjusticiable).


- Plaintiffs appealed the court's ruling to the Second Circuit.

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- ***California ex. rel. Lockyer v. General Motors Corp.***, No. 3:06-CV-05755 (N.D. Cal. filed Sept. 20, 2006) (claims against automobile manufacturers alleging that the carbon dioxide emissions from their products contribute to a public nuisance under state and federal common law; requesting compensation for California's current and future expenditures related to global warming).
 - ***Comer v. Murphy Oil***, No. 1:05-CV-436 (S.D. Miss. 2006) (class action suit by individuals against energy companies alleging that the power plants operated by the defendants emit GHG, which have contributed to global warming, which has contributed to increased strength of hurricanes (Katrina), which have massively damaged plaintiffs' property).



■ Cases Challenging U.S. Policy/Seeking Regulation of GHG


- States, environmental groups and municipalities request regulation of GHG emissions.
- Cases:
 - ***Massachusetts v. EPA***, 127 S. Ct. 1438 (2007) (plaintiffs filed suit asking EPA to regulate carbon dioxide emissions).

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- ***Coke Oven Env'tl. Taskforce v. EPA***, No. 06-1131 (D.C. Cir. filed Apr. 7, 2006) (petitioners filed suit asking EPA (in the context of issuing NSPS under the CAA) to enforce reductions in air pollution (including GHG) for new stationary sources).
 - On September 13, 2006 the court filed an order severing and holding in abeyance those issues related to GHG regulation pending the Supreme Court's decision in *Massachusetts* (No. 06-1322 – *NY v. EPA*).
 - On May 2, 2007, petitioners filed a petition to remand the case to EPA for summary reversal; response pending from EPA).
 - Impact of *Massachusetts*? Significant, because EPA's main argument in the case was that it lacks the authority to regulate carbon dioxide as an air pollutant.



■ NEPA and Related Cases

- Plaintiffs allege that the government defendants failed to assess the environmental ramifications of projects to be licensed or financed before taking action.
- Cases:
 - ***Friends of the Earth, Inc. v. Watson***, 2005 WL 2035596 (N.D. Cal. 2005) (environmental groups and municipalities assert that government investment agencies provided funding assistance to projects that contribute to climate change without complying with the requirements of NEPA (*i.e.*, failed to consider the climate change impacts of the projects)).

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- ***Center for Biological Diversity v. San Bernardino County***, No. 0700295 (filed Apr. 11, 2007) (environmental groups filed suit in San Bernardino Superior Court challenging the county's General Plan Update alleging that the development authorized thereunder would contribute to climate change through the emission of GHG and that the county would be adversely affected therefrom).
 - ***NRDC v. Reclamation Board***, No. 06CS01228 (filed Aug. 18 2006) (environmental groups filed a suit in Sacramento County Superior Court seeking to require the Reclamation Board to consider whether the viability of a proposed development project is impacted by potential impacts from climate change (rising sea levels)).




■ Preemption Cases


- Automobile manufacturer defendants challenge state motor vehicle regulations arguing that more lenient federal automobile emission standards preempt more stringent state regulations.





- Cases:

- ***Central Valley Chrysler Jeep v. Witherspoon***, No. CV-04-6663 (E.D. Cal. 2006) (plaintiff automobile manufacturers and dealers filed suit arguing that California's law regulating GHG emitted from automobiles is preempted by the fuel efficiency standards promulgated by the Energy Policy and Conservation Act (EPCA)).
 - California moved for a judgment on the pleadings, but the Court found that the plaintiffs had stated a sufficient claim.

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- On January 12, 2007, Judge Ishii issued a stay pending the Supreme Court's decision in *Massachusetts*.
 - The stay has been lifted and a status conference is scheduled for June.
 - Summary judgments from both sides are pending a decision from the court


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- ***Lincoln Dodge, Inc. v. Sullivan***, No. 1:06-CV-0070 (D.R.I. filed Feb. 13, 2006) (automobile dealers and manufacturers are challenging California-style carbon dioxide regulations enacted in Rhode Island).
 - ***Green Mountain Chrysler v. Crombie***, No. 2:05-CV-00302 (D. Vt. filed Nov. 18, 2005) (automobile dealers and manufacturers are challenging California-style carbon dioxide regulations enacted in Vermont).
 - Vermont's motion to dismiss based on lack of subject matter jurisdiction and ripeness was dismissed in November 2006.

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- Of the three automobile emissions preemption cases, *Crombie* is the furthest along.
 - Impact of *Massachusetts*?
 - The Court held carbon dioxide *is* a pollutant that may be regulated by EPA.
 - In support of state regulation: The Supreme Court stated that EPA's duty under the CAA is "wholly independent" from DOT under EPCA and the fact that DOT sets mileage standards "in no way licenses EPA to shirk its environmental responsibilities".
 - Challenging state regulation: The Supreme Court noted "in some circumstances the exercise of [Massachusetts] police powers to reduce in-state motor-vehicle emissions might well be preempted."



Connecticut v. American Electric Power, Inc.


- Consolidated with *Open Space Institute, Inc., v. AEP*
- Plaintiffs: 8 states (CT, NY, NJ, VT, RI, CA, WI, IA); City of New York; 3 land trusts and environmental groups (Open Space Institute, Inc., Open Space Conservancy, Inc., and Audubon Society of New Hampshire)
- Defendants: 5 electric utility companies (AEP, Cinergy, Southern Company, TVA and Xcel Energy)


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- Cause of Action: Suits allege carbon dioxide emissions from the utilities' electric generating plants constitute a public and private nuisance.
 - Public nuisance: An unreasonable interference with a right that annoys the whole community in general.
 - Private nuisance: A nontRESPASSORY invasion of the lands, tenements, or hereditaments of another.





■ Relief Sought:

- No monetary damages.
- Issuance of an injunction requiring the defendant utilities to cap their carbon dioxide emissions and reduce them by a specified percentage (e.g., 3%) each year for at least 10 years.

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- On September 30, 2004, industry defendants filed a joint motion to dismiss stating:
 - The suits circumvent and undermine policies set by Congress and the President to address global climate change.
 - The suits violate separation-of-powers principles and are, thus, nonjusticiable.

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- There is no recognized federal common law cause of action to abate GHG emissions that allegedly contribute to global warming.
 - Congress has displaced any federal common law cause of action to address the issue of global warming because it, along with the President, has chosen to establish a policy of voluntary compliance, research, and international negotiations.
 - The plaintiffs lack standing to bring suit.

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- On September 22, 2005, the district court granted the defendants' motion holding that the suit raised nonjusticiable political questions that were beyond the limits of its jurisdiction.
 - The court declined to address the issue of standing because the plaintiffs' claims were “intertwined with the merits and because the federal courts lack jurisdiction over this patently political question.”

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- “A non-justiciable political question exists when a court confronts ‘the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.’”
 - The court explained, to resolve air pollution cases, courts must strike a balance between pollution reduction schemes and industrial development, and in the case *sub judice* balancing those interests “is impossible without an ‘initial policy determination’ first having been made” by Congress and the President.




- The court concluded: “Because resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial discretion’ is required.”
- Case appealed to the Second Circuit where defendants are arguing that the Supreme Court’s decision supports their separation-of-power arguments.



Green Mountain Chrysler v. Crombie

- Plaintiffs: 3 automobile dealers; DaimlerChrysler Corporation and General Motors Corporation; Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers
- Defendant: State of Vermont; Intervenors: State of New York and 5 environmental organizations, including NRDC

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- On November 18, 2005, plaintiffs filed an action for declaratory relief challenging the legality of the Vermont Department of Environmental Conservation's 2002 Low Emission Vehicle Rules, which set stringent tailpipe standards for carbon dioxide emissions and other GHG (fleet average of 43.7 mpg by 2016; by 2016 24% – 34% CO₂ reductions from 2002 levels)



- Trial began on April 10, 2007, marking the first case in which the issue of whether states have the authority to set their own fuel economy standards will be decided.
- Legal Background: Federal regulation of new motor vehicle emissions and fuel economy proceeds under two separate statutory schemes:



- Clean Air Act

- Section 209(a) of the CAA generally preempts states and their political subdivisions from adopting or enforcing “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”
- However, CAA Section 209(b) allows California to set its own pollution standards with the approval of EPA.
- CAA Section 177 gives other states authority to adopt and enforce the same motor vehicle emission control regulations as those in California under Section 209(b).
- In 2005, California added carbon dioxide to the list of regulated pollutants, effective with the 2009 model year.




- Energy Policy Conservation Act

- The National Highway Traffic Safety Administration (NHTSA) (an agency within DOT) sets corporate average fuel economy (CAFE) standards for cars and light trucks under the Energy Policy Conservation Act (EPCA).
- The CAFE standards do not apply to individual motor vehicles, but instead regulate the fuel economy of each manufacturer's entire fleet on a fleet average basis, thus giving manufacturers flexibility and consumers greater choice.



■ Plaintiffs' arguments:

- Carbon dioxide is not a pollutant under the CAA.
- Only the federal government can set fuel efficiency standards and, by extension, carbon emission standards for motor vehicles (the only way to emit less carbon dioxide is to burn less fossil fuels); the states are preempted by federal law (EPCA) from interfering with the federal economy program.


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- The CAA permits EPA to disapprove California's GHG regulations if it finds them to be inconsistent with the scope of EPA's own regulatory power under Section 202(a) of the CAA.
 - Adverse environmental, economic, and safety-related consequences.
 - The regulations are preempted because they impermissibly interfere with the foreign policy of the U.S. and the foreign affairs of the federal government.
 - Dormant commerce clause.



■ *Post-Massachusetts* arguments:

○ Plaintiffs


- Even if EPA decides to regulate carbon dioxide, and that states can adopt their own carbon dioxide regulations, Vermont's regulations are expressly preempted under EPCA. [**“When an average fuel economy standard prescribed under this chapter [49 U.S.C. §§ 32901 et seq.] is in effect, a state or a political subdivision of a state may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter”**]

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- The regulations stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and, thus, are impliedly preempted.
 - *Massachusetts* opens the way for EPA to collaborate with NHTSA in the regulation of fuel consumption from automobiles, at the *federal* level, but it says nothing about the relationship between federal and state powers in this area.
 - The *Massachusetts* decision merely clears the way for the waiver proceeding to get under way; EPA still must decide whether the California regulation complies with all of the criteria for approval under section 209(b).



- Defendants


- The Court's decision clears the way for California to obtain a waiver of federal preemption under the CAA and for Vermont to proceed with similar programs under CAA Section 177; California (and by extension Vermont) has the authority to regulate any pollutant that EPA has the authority to regulate under Title II.
- EPCA does not distinguish between EPA standards set under CAA Section 202 and California standards set under Section 209 — both standards are treated as standards of the federal government; the Court found that EPCA and the CAA are complementary statutes.


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- The Court's statement that "in some circumstances the exercise of [a state's] police powers to reduce in-state motor-vehicle emissions might well be pre-empted" is merely a reference to the fact that non-California states are generally preempted by CAA Section 209 from setting their own motor vehicle emission standards except as provided in Section 177 of the Act.
 - The plaintiffs' foreign policy argument is the same as the one rejected by EPA in *Massachusetts*, and if federal regulation of vehicle carbon dioxide emissions does not, as a matter of law, interfere with the President's foreign policy prerogatives, the same must be true of state regulation authorized by the same statute.




California Waiver Request

- On December 21, 2005, California submitted a written request to EPA requesting a grant of a waiver of preemption for its motor vehicle regulations regulating GHG.
- On April 30 and May 10, 2007, EPA issued *Federal Register* notices concerning California's waiver request.
- Hearings are set for May 22, 2007, (Washington D.C.) and May 30, 2007 (Sacramento, CA).

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- CAA Section 209(b) states that EPA may not grant a waiver if it is determined that “such State does not need such State standards to meet compelling and extraordinary conditions.” Query: Given the global nature of GHG emissions, is California’s problem any more unique/different than that of others?

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- Effect of Bush's May 14, 2007, Executive Order
 - Requires coordination among DOT, DOE, DOA, EPA, OMB, and the Council on Environmental Quality when taking regulatory action “that can reasonably be expected to directly regulate emissions, or to substantially and predictably affect emissions, of greenhouse gases from motor vehicles, nonroad vehicles, nonroad engines, or the use of motor vehicle fuels, including alternative fuels.”

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- Regulations will not be final until 3 weeks before Bush leaves office; an early draft is expected this fall.
 - Concerns that the Executive Order may use the 17-month rulemaking process to delay or deny California's waiver request.
 - Will the bureaucratic process created by the Executive Order create roadblocks to state and federal regulation of GHG emissions?