••Climate Change and Litigation

ABA/American University Conference,
November 8, 2006

Peter Lehner, Chief, Environmental Protection Bureau
New York Attorney General's Office

Domestic Climate Change Cases Filed or Decided as of Oct. 10, 2006

1. ***Alliance of Automobile Manufacturers v. Sheehan***, No. 4757-05 (N.Y. Supr. Ct. filed Aug. 5, 2005): Automobile dealers and a trade association of automobile manufacturers file an Article 78 petition challenging New York's determination that no environmental impact statement was needed before the State adopted California's greenhouse gas motor vehicle emission standards requiring reductions in carbon dioxide, methane, nitrous oxide and hydrofluorocarbons. Petitioners withdrew the petition after receiving the State's opposition papers on the merits of their claims. Because the statute of limitations has expired, petitioners are barred from renewing their suit.

2. ***American Lung Association of Metropolitan Chicago v. EPA***, No. 06-1063 (D.C. Cir. filed Feb. 13, 2006): The American Lung Association, Ohio Environmental Council, Sierra Club, and Valley Watch, Inc. have petitioned the D.C. Circuit for review of a final action by EPA on December 13, 2005 which they claim weakened federal permitting requirements for air pollution control at new coal-fired power plants. EPA issued a report stating that coal gasification does not need to be considered in a best available control technology (BACT) or lowest achievable emissions rate (LAER) analysis for coal-fired power plants. The organizations allege that in addition to violating the Clean Air Act, this new statement of law is a change from prior rules and interpretations and was promulgated without notice or opportunity to comment. The states of New York, Connecticut, Maine, and Massachusetts have all filed notices of intention to participate as amicus curiae on behalf of the petitioners, and the case has been consolidated with cases filed by NRDC, Environmental Defense, and the Montana Environmental Information Center. This case is now in the briefing stage.

3. ***Association of International Automobile Manufacturers v. Sullivan***, No. 06-cv-69 (D. RI. filed Feb. 13, 2006): Rhode Island's Department of Environmental Management adopted California's regulations limiting motor vehicle greenhouse gas emissions. Plaintiffs challenged these regulations raising, among other things, preemption, commerce clause, and antitrust claims. The companion case brought by automobile dealers and domestic manufacturers, *Lincoln Dodge, Inc. v. Sullivan,* No. 06-cv-70 (D.R.I. filed Feb. 13, 2006), was consolidated with this action. A motion to intervene as defendants by the Conservation Law Foundation, Sierra Club, NRDC, and Environmental Defense was granted on June 2, 2006. A hearing on the motion to dismiss will be held on Oct. 20, 2006.

4. ***Border Power Plant Working Group v. DOE***, 260 F. Supp. 2d 997 (S.D. Cal 2003):

Environmentalists challenged the Department of Energy's finding of no significant impact for electric line permits to be granted within the United States and across the US-Mexican border. The court held that the DOE's environmental analysis was inadequate because it failed to disclose and analyze the significance of ammonia and carbon dioxide emissions. The court determined that because of the "potential environmental impacts" of carbon dioxide and ammonia, *id.* at 1029, these gases must be considered. The court also suggested that it is irrelevant that carbon dioxide and ammonia are not "criteria pollutants" when determining whether the department must consider their impacts. There has been no subsequent appellate history.

5. ***Center for Biological Diversity v. Abraham***, 218 F. Supp. 2d 1143 (N.D. Cal 2002): Three environmental organizations sought enforcement of provisions of the Energy Policy Act of 1992, alleging that the government agencies had not complied with several of the Act's requirements such as ensuring that a specified portion of their automobile fleets were comprised of alternative fuel vehicles. The court granted the plaintiffs standing for other reasons, but held that plaintiffs' concerns about global warming were "too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing." *Id.* at 1155.

6. ***Center for Biological Diversity v. NHTSA***, No. 06- 71891 (9th Cir. filed Apr. 6, 2006): The Center for Biological Diversity, the Sierra Club, Public Citizen, Environmental Defense, NRDC, the states of California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont, and New York City and the District of Columbia have petitioned the Ninth Circuit for review of the newly revised federal fuel economy standards that were issued on April 6, 2006. Claims by all of the above petitioners have been consolidated. The Petitioners argue that NHTSA did not conduct environmental and safety analyses mandated by NEPA and the EPCA when promulgating these standards. If upheld, the standards will relax the corporate average fuel economy (CAFÉ) standards by 2.4 miles per gallon for light trucks by 2011. The case is currently in the briefing stage.

7. ***Center for Biological Diversity v. Norton***, No. 3-05- 05191 (N.D. Cal filed Dec. 15, 2005): The Center for Biological Diversity, NRDC, and Greenpeace petitioned the U.S. Fish and Wildlife Service on Feb. 16, 2005 to list the polar bear as "threatened" under the Endangered Species Act, claiming that the melting of the arctic ice was impairing the bears' habitat. Petitioners received no response and thus on December 15, 2005, they sued the FWS to list polar bear as threatened. On July 5, 2006, the court entered a negotiated settlement under which the FWS will complete and publish a twelve-month finding on the petition by Dec. 27, 2006, and the court will retain jurisdiction to oversee compliance for a period of one year. If polar bears become listed as a result of twelve-month finding, they will be the first mammal found to be at risk because of global warming.

8. ***Central Valley Chrysler-Jeep, Inc. v. Witherspoon***, No. Cv-f-04-0663, 2006 U.S. Dist. LEXIS 48892 (E.D. Cal. July 7, 2006): Chrysler, GM, and the Alliance of Automobile Manufacturers, together with several automobile dealers, sued Witherspoon, the

executive officer of the California Air Resources Board, over the adoption of a rule requiring all motor vehicles sold in the state to meet emission standards for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. CARB estimates that these standards will lead to a 18% reduction in automobile and light truck greenhouse gas emissions by 2020 and a 27% reduction by 2030. The international automobile manufacturers intervened as plaintiffs and Sierra Club, NRDC, and Environmental Defense intervened as defendants. Eight states, led by New York, joined as amicus supporting California. Plaintiffs seek declaratory and injunctive relief arguing preemption, Commerce Clause, and Sherman Act violations. The magistrate has denied defendants' motion to stay proceedings until the decision in *Massachusetts v. EPA*. Defendants' motion to dismiss was argued on Sept. 15, 2006. On Sept. 22, 2006, Defendants' motion for judgment on the pleadings was granted with regard to claims brought under the Dormant Commerce Clause and the Sherman Act, but denied for all other claims.

9. *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478 (D.C. Cir. 1990), *overruled in part by Florida Audubon v. Bentsen*, 94 F.3d 658 (D.C. 1996):
A group of cities, states, and environmental groups challenged a decision by NHTSA not to prepare an environmental impact statement addressing global warming impacts of its relaxation of the Corporate Average Fuel Economy (CAFE) standards for model years in the late 80s. The environmental groups were found to have standing based on their global warming claims, but the petition was denied on the merits. The court noted that "no one, including NHTSA, appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming." 286 F.2d at 493-94. In finding that the small percentage increase in greenhouses gas emissions from the challenged action was sufficient to confer standing, the majority stated, "the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming." *Id*. at 501. *Florida Audubon* held that the case was overruled to the extent it allowed standing to be found without a showing that the agency action would lead to a demonstrable increase in risk.

10. *Coke Oven Environmental Task Force v. EPA*, 2006 U.S. App. LEXIS 23499 (D.C. Cir. 2006): Ten states, led by NY, the cities of D.C. and New York, and various environmental groups challenged EPA's decision, under Section 111 of the Clean Air Act, 42 U.S.C. § 7411(b)(1), not to establish a new source performance standard for carbon dioxide from new, modified, and reconstructed stationary sources, alleging that such sources "cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." (The case also challenges as too weak the standards set for sulfur dioxide emissions.) The case has been stayed pending the Supreme Court's decision in *Massachusetts v. EPA.*

11. ***Comer v. Nationwide Mut. Ins. Co.***, 2006 U.S. Dist. LEXIS 33123; now *Comer v. Murphy Oil, U.S.A.,* Case No. 1:05cv436 LTS-RHW (S.D. Miss. Sept. 20, 2005): Property owners in Louisiana filed a class action suit against their insurance companies for property damage caused by Hurricane Katrina, and also included three chemical companies as defendants, alleging that damages sustained during the hurricane were partially as a result of the chemical company defendants' contributions to global warming. The court commented about the difficulty of proving the existence or causation of global warming, and concluded that these claims could not be litigated in the same action as against their insurance companies. Plaintiffs then filed an amended complaint on Apr. 19, 2006 again asking for class action status to sue oil, chemical, and coal companies for their emissions which they allege have increased the frequency of hurricanes and other storms and thus were a proximate cause of the severity of Katrina. **12.** ***Connecticut v. American Electric Power, Inc.***, 406 F.Supp. 2d 265 (S.D.N.Y. 2005): New York, seven other states, and the City of New York brought suit grounded in federal common law public nuisance and interstate harm to state sovereign interests against the five largest emitters of carbon dioxide (CO2) among electricity generators. This case was consolidated with a suit filed by a group of land trusts, *Open Space v. American Electric Power Co*. The plaintiffs allege that defendants' CO2 emissions contribute to global warming that causes present and inevitable future harms to the States and their citizens that support the injunctive relief sought in the suit. Those harms include sea level rise, more frequent and intense weather conditions, deleterious impacts on state agriculture, water supply, tourism and the very fabric of state ecology. Defendants moved to dismiss on failure to state a claim, preemption, standing, and personal jurisdiction grounds. The district court dismissed the complaint as a non-justiciable political question, finding that resolution of the issues require "identification and balancing of economic, environmental, foreign policy, and national security interests." *Id.* at 274. The plaintiffs appealed and argument before the Second Circuit was held on June 7, 2006.

13. ***Friends of the Earth v. Watson***, No. C-02-4106 JWS, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. Aug. 23, 2005): Several environmental groups sued the Overseas Private Investment Corporation and the Export-Import Bank, two independent government corporations, for declaratory and injunctive relief, claiming that they failed to comply with National Environmental Policy Act by failing to consider the global warming impacts when deciding to provide assistance to development projects which would lead to increased production and use of oil and thus to increased carbon dioxide emissions. The court denied defendants' motion for summary judgment, holding that plaintiffs have standing because, among other things, they could show that "it is reasonably probable that the challenged action will threaten their concrete interests," *id.* at *9, and plaintiffs have successfully demonstrated that "OPIC and Ex-Im's decisions *could be* influenced by further environmental studies," *id.* at *16. The court also found that the plaintiffs were in fact challenging final agency action, that OPIC's statute did not preclude judicial review, and that environmental procedures in OPIC did not replace NEPA. A decision on cross-motion for summary judgment on the merits is pending.

14. ***Foundation on Economic Trends, et al. v. Watkins***, 794 F. Supp. 395 (D.D.C. 1992):
Petitioners - - information-disseminating organizations - - sued the Departments of Agriculture, Energy, and Interior, alleging that defendants did not adequately address effects of 42 federal actions, such as the energy conservation standards for new residential buildings, on global warming, and thus did not conform with NEPA requirements. The court granted summary judgment for the defendants, stating that plaintiffs did not have standing because their claim of informational injury was indistinguishable from an ideological interest and insufficiently concrete. Plaintiffs sought to amend their complaint to include an individual plaintiff with environmental injuries. However, the court denied the motion, determining that plaintiffs would still not have standing as the individual had not alleged an adequate causal connection. The court stated "notwithstanding the seriousness of the phenomenon, there is no "global warming" exception to the standing requirements of Article III or the APA." *Id.* at 401.

15. ***Green Mountain Chrysler v. Torti***, No. 05-CV-302 (D. Vt. filed Nov. 18, 2005): Domestic automobile manufacturers and local dealers bring claims, similar to those brought in Rhode Island and California, challenging Vermont's adoption of California's greenhouse gas automobile emission regulations. Again, the parallel suit brought by the international manufacturers, *Association of International Automobile Manufacturers v. Torti*, No. 2:05-CV-304 (D. Vt. filed Nov. 18, 2005), has been consolidated. New York has intervened as a defendant.

16. ***Korsinsky v. EPA***, No. 05-6802-cv, 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y., Sept. 28 2005): Pro se plaintiff brought "public nuisance" action against EPA, the New York State Department of Environmental Conservation, and the New York City Department of Environmental Protection for their contributions to global warming and for not implementing (plaintiff's soon-to-be patented) solution to global warming. The court dismissed the case for lack of subject matter jurisdiction, stating that plaintiff's "enhanced risk" argument was not sufficient for standing and his argument that he has a mental illness derived from knowledge about global warming could only be considered a generalized grievance. The Second Circuit affirmed. 2006 U.S. App. LEXIS 21024.

17. ***In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Chapter 356, Section 3***, 578 N.W.2d 794 (Minn. Ct. App. 1998): The Minnesota Legislature asked the Minnesota Public Utilities Commission to determine the environmental costs associated with every method of electricity generation, which in turn would be factored in when determining what rates power companies could charge customers. The Commission set values for five pollutants, including carbon dioxide, and several power companies brought suit claiming the decision to set values for carbon

dioxide was improper. The court held that the Commission's interpretation of the statute was not contrary to the legislature's intent, that deference should be given to the agency's decision, and that there was substantial evidence for the carbon dioxide cost values determined by the agency.

18. ***Massachusetts, et al. v. EPA***, 415 F.3d 50 (D.C. Cir. 2005), *cert*. *granted*, 126 S.Ct. 2960 (June 26, 2006): Twelve states and many environmental organizations sued the EPA, alleging that the EPA administrator had improperly declined to regulate carbon dioxide from automobiles under Section 202 the Clean Air Act, 42 U.S.C. § 7521. The petitioners argued that EPA was required to regulate carbon dioxide, as the CAA provides that EPA "shall" regulate "air pollutants" which "may reasonably be anticipated to endanger public health or welfare," that CO_2 is a "chemical substance" emitted into the air and thus an "air pollutant," and that "welfare" is defined to include impacts on "weather" and "climate." Judge Randolph of the DC Circuit found that plaintiffs has standing for purposes of the petition for review and, assuming that EPA had the authority r to regulate CO2 under the Act, held that the EPA Administrator properly exercised his discretion to decide not to so regulate. Judge Sentelle, concurring in the judgment only, stated that the case should be dismissed based on lack of standing because global warming presents a generalized grievance. Certiorari has been granted by the Supreme Court and argument will be heard before the end of 2006.

19. ***New York v. Bodman***, No. 05cv7807 (S.D.N.Y.) (JES): Fourteen states, two state agencies, the City of New York, and three organizations challenged the failure of the Department of Energy to meet statutory deadlines for prescribing energy efficiency standards for residential and commercial products such as air conditioners, furnaces and dishwashers. Pursuant to the Energy Policy and Conservation Act, DOE was required to prescribe amended energy efficiency standards at the "maximum" level that is "technologically feasible and economically justified" for 22 categories of products by set dates. However, DOE is now between 4 and 14 years behind schedule. Plaintiffs seek an order directing DOE to publish the overdue rules and setting deadlines by which it must do so. At oral arguments held in May 2006, the judge directed the parties to attempt to work out a consent decree. The next status conference is on Oct. 12, 2006.

20. ***NRDC v. Abraham****,* 355 F.3d 179 (2d Cir. 2004): Several states, led by New York, and advocacy organizations challenged the Department of Energy's actions with regard to energy efficiency standards for central air conditioners (which use over one third of peak electricity). DOE published efficiency standards in the Federal Register in early 2001, but then, several days after a new administration took office, delayed the date on which the published standards would become effective and later, issued new lower standards. Plaintiffs alleged this process violated the Energy Policy and Conservation Act, NEPA, and the APA. The court held that the DOE did not have authority to lower the efficiency

standards once they were published and also violated procedural requirements of the APA regarding amendment of implementation dates.

21. ***NRDC v. EPA***, 440 F.3d 476 (D.C. Cir. 2006); *reh'g granted*, *NRDC v. EPA*, 2006 U.S. App. LEXIS 22074 (Aug. 29, 2006): NRDC filed a petition for review of an EPA order which allowed "critical use" exceptions to the Montreal Protocol's ban on production and consumption of methyl bromide, a pesticide that both destroys the ozone layer and contributes to climate change. NRDC alleged that this rule violated the treaty and the Clean Air Act. NRDC claimed standing because the rule would lead to more emissions, leading to more ozone depletion, which would in turn harm the health of its members. The D.C. Circuit held that NRDC lacked standing, stating that the probability of the alleged harm occurring was not sufficient to meet the "injury in fact" standard. NRDC petitioned for rehearing and, on rehearing, the court found NRDC to have standing. The court stated that there were mathematical errors within the information presented to it in the first decision, and found that using the correct numbers, 2-4 members of the group might develop cancer, meeting the injury-in-fact requirement. However, the court held that the ban was a post-treaty agreement and thus an international commitment only and thus not reviewable in domestic courts.

22. ***Northwest Environmental Defense Center, et al. v. Owens Corning***, 434 F. Supp.2d 957 (D.Or. 2006): Environmental organizations sued, alleging that defendant was building a facility without a preconstruction permit required under the Clean Air Act. The organizations claimed they met standing requirements because the facility will contribute to global warming and injure members of their organization. The court denied defendants' motion to dismiss, holding that plaintiffs did have standing. The court stated that "issues such as global warming and ozone depletion may be of 'wide public significance' but they are neither 'abstract questions' nor mere 'generalized grievances.' An injury is not beyond the reach of the courts simply because it is widespread." *Id.* at 969. The court further stated that "it is likely that the evidence of harm to Oregon from ozone depletion and global warming would at least be sufficient to create a material factual dispute." *Id.* at 964. The court reasoned that while global warming may affect everyone on earth, it will affect different areas in different ways; thus, claims brought by those in Oregon would not necessarily be injuries shared by all or 'generalized grievances.' The court also distinguished its holding from *Connecticut v. American Electric Power, Inc.*, stating that this was not a political question because it is about whether courts will enforce the "congressional mandates set forth in the Clean Air Act and its enabling regulations." *Id.* at 970.

23. ***People of the State of California v. General Motors Corp***, No. C06-05755, (N.D.Ca., filed Sept.20, 2006): California's Attorney General filed suit against the "Big Six" auto manufacturers, alleging that under federal and state common law the automakers have created a public nuisance by producing millions of vehicles that collective emit massive quantities of carbon dioxide, the

chief greenhouse gas. The public nuisance theory here is similar to that in *Connecticut v. American Electric Power, Inc.*, the public nuisance suit against the five largest carbon dioxide emitters among electricity generators (see case number 10). The suit asks the court to hold defendants liable for damages, including future harm, caused by their ongoing, substantial contribution to the public nuisance of global warming.

24. *Utsey v. Coos County*, 32 P.3d 933 (Ore. Ct. App. 2001): The League of Women Voters petitioned for review of an Oregon county Land Use Board of Appeals' decision to grant a permit to an off-highway vehicle trail system and racetrack asserting standing based on the global warnings report of projected vehicle emissions. The court held that plaintiffs lacked standing. One judge argued in dissent argues that because global warming is an issue that could potentially effect everyone living on the planet, a legislature could reasonably believe that everyone has a stake in energy facility siting and thus properly confer standing. *Id.* at 963-64.