Profile: Durwood Zaelke, the Campaigner

Looking Back at a Quarter Century of Progress

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The Supreme Court ruled last term that the Environmental Protection Agency can regulate greenhouse gases. Meanwhile, in the absence of legislation to guide national policy, state petitions and litigation pending in federal courts could create a piecemeal approach to global warming.

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The Supreme Court ruled last term that climate change can be regulated under federal law. But will the continuing lack of action by Congress, the Environmental Protection Agency, and most states be replaced by new litigation by activist states and public interest organizations against government agencies and private parties? Is this an area where litigation will, or alternatively should, fill a void left by meaningful government activity? When EPA separately receives a record-breaking 100,000 comment letters on the request by California to waive the Clean Air Act’s barrier to state regulation of greenhouse gases from motor vehicles, one realizes that the public’s demand for concrete action is urgent. A legitimate fear, however, is that these petitions and lawsuits could produce a patchwork response to global warming where a comprehensive national strategy is called for.

Without federal legislation setting out a clear and comprehensive policy on GHGs, what is certain is that court cases to address alleged damages from global warming emissions will continue under authorities litigants claim are in the CAA or under public nuisance and other common law torts. Whether seeking federal statutory pre-emption of state action or affirmation that the claimants’ issues are non-justiciable political questions, cases that would bar some of those assertions are now squarely before two federal appeals courts. The stakes in those cases — which I expect will go to the Supreme Court — are high. At issue are the responsibilities and rights of both the federal government and the states in environmental policymaking as well as the role that courts play in resolving the special issues, such as causation, injury, and standing, raised by global warming.

The Supreme Court’s holding in Massachusetts v. EPA, decided April 2, 2007, has already had a tremendous impact on climate change policy development and litigation in the United States. In Massachusetts, 13 states, 3 cities, 13 environmental organizations, and American Samoa asked for review of EPA’s denial of a petition for rulemaking to regulate GHGs — in this case four specific gases, including carbon dioxide — from new motor vehicles under Section 202(a)(1) of the CAA. That section requires EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the administrator’s] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.” The act defines air pollutant to include any physical or chemical substance emitted into the ambient air.

EPA’s denial of the petition reasoned that the CAA does not authorize it to issue mandatory regulations to address GHGs, especially when, as argued by the federal government, there is no science firmly linking emissions with an increase in global surface air temperatures. From a political perspective, EPA also reasoned that regulating new motor vehicles would conflict with President Bush’s comprehensive, voluntary strategy and undermine his ability to con-
duct foreign policy with developing countries over their emissions. EPA’s denial was not without support: 10 states and 6 trade associations filed briefs against the petition.

Although the agency claimed that Massachusetts had failed to demonstrate an injury that could be tied to GHG emissions, the Court found that the state had standing to pursue review of EPA’s denial of its petition. The Court held that carbon dioxide and other GHG emissions do meet the definition of air pollutant under the CAA. The Court next held that the CAA requires EPA to regulate GHGs from new motor vehicles if it forms a judgment that such emissions under Section 202(a) “may reasonably be anticipated to endanger public health or welfare.” Welfare under the CAA includes effects on climate. EPA can only avoid regulatory action if it is apparent that GHGs from new motor vehicles do not contribute to climate change. Because of the Court’s linking of GHGs with the definition of air pollutant under the CAA, future litigation and other actions to reduce emissions will be strengthened.

In reaction to Massachusetts, and the lack of any decisions on GHG regulation by the agency since the decision last April, there are a variety of efforts underway to force EPA or other federal agencies to formulate a national approach to GHG regulation. Unfortunately, such an approach has to be taken up piecemeal since there is no single authority in the Clean Air Act that is a logical target. As a result, U.S. climate policy could become a crazy-quilt of differing standards and regulations across the country.

More Unanswered Petitions

In a lawsuit pending while Massachusetts’s petition for a rulemaking was on its journey, on September 12, 2007, another New England state received a favorable response to its separate petition to regulate GHGs from motor vehicles in a federal trial court — although the final result will depend on the outcome from yet another state petition. In Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, a case brought by a group of car dealers, manufacturers, and their associations, a U.S. district court found that the state of Vermont’s regulations adopting California’s GHG standards for new automobiles were not preempted by either the CAA or the Energy Policy and Conservation Act of 1975, as amended. EPCA authorizes the Department of Transportation to set mileage standards for new cars and light trucks.

Section 202 of the CAA, the object of Massachusetts, requires the agency to establish standards for air pollutants emitted by new motor vehicles. Section 209(a) preempts a state from adopting its own motor vehicle emission standards, while Section 209(b) requires EPA to waive the preemption barrier for standards that meet certain conditions. The most important condition, of course, is that the state adopt the same regulations as California, which because it suffers from the worst air pollution in the country and was already legislating emissions reductions before the national government can receive a waiver to adopt standards stricter than federal regulations. Other states may adopt California standards for which a waiver has been granted if they
do so at least two years before commencement of a new automotive model year.

California adopted GHG standards for new vehicles to begin in model year 2009, and asked EPA for a waiver of federal preemption in 2005, the same year as Vermont enacted its standards. It is this request that engendered the 100,000 comment letters, the most ever received on any regulatory petition. The federal agency is expected to act on California’s waiver request after it reviews the letters. However, California has decided not to wait on EPA to act on its request. On November 5, 2007, the state sued the agency in federal court to compel it to act on the petition. California Attorney General Edmund G. Brown Jr. said, “We have waited two years and the Supreme Court has ruled in our favor. What is the EPA waiting for?” California pointed particularly to the fact that 16 other states have adopted California standards or will do so soon. The ruling in Green Mountain Chrysler Plymouth allows Vermont’s petition to go forward, where it will have to await EPA’s decision on the California petition.

The Green Mountain decision draws support from Massachusetts, because the Supreme Court commented that despite the overlap between EPCA and the CAA, EPA must act to carry out its obligations without regard to what DOT does under EPCA. The Supreme Court held that “EPA has been charged with protecting the public’s health and welfare . . . a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency.” While recognizing that those emissions contribute to global warming, the district court recognized that Vermont’s attempt to regulate GHGs from cars is part of its comprehensive strategy to reduce GHG emissions statewide. Vermont is undertaking its motor vehicle program and other actions through its participation in the Regional Greenhouse Gas Initiative, an agreement among nine northeastern and mid-Atlantic states to adopt a regional cap-and-trade program for GHGs associated with large stationary sources such as power plants.

One other interesting issue raised in the Vermont case is the allegation that the state’s regulations intrude upon the foreign affairs prerogatives of the president and the Congress and that they interfere with U.S. pursuit of international agreements to reduce GHGs. Again relying on Massachusetts, the district court said that the Supreme Court had dismissed EPA’s similar contention that regulating GHGs under the CAA might impair the president’s ability to negotiate with developing nations to reduce greenhouse gas emissions. Based on the evidence before it, the district court concluded that there was no demonstration that Vermont’s regulations would have a recognizable intrusion in the field of foreign affairs. The district court weighed the burden that the automotive industry bears to show that the Vermont regulations are beyond its ability to meet, and concluded that “the court remains unconvinced automakers cannot meet the challenges of Vermont and California’s greenhouse gas regulations.”

Staying in the world of motor vehicle emissions, on November 15, 2007, the Ninth Circuit reversed and remanded NHTSA’s corporate average fuel economy standards for light trucks for model years 2008–2011 issued under EPCA in Center for Biological Diversity v. National Highway Traffic Safety Administration. The standards were challenged by 11 states, the District of Columbia, the city of New York, and four public interest organizations. Emissions from light trucks make up about 8 percent of annual U.S. greenhouse gas emissions. NHTSA claimed it weighed all of the benefits of improved fuel savings, concluding that “there is no compelling evidence that the unmonetized benefits would alter our assessment of the level of the standard for [model year] 2011.” The appeals court found that NHTSA “assigned no value to the most significant benefit of more stringent CAFE standards: reduction in carbon emissions” and thus will have to promulgate new CAFE standards that take GHGs into account.

In yet another petition to EPA, on October 2, 2007, California Attorney General Brown joined three national environmental organizations in asking the agency to adopt strict regulations for GHGs from ocean-going vessels under the CAA — “and to begin the process immediately.” Brown said that ocean-going vessels emit more CO₂ emissions than any nation in the world except for the United States, Russia, China, Japan, India, and Germany. The petition asserts that ocean-going vessels over 100 tons are estimated to emit up to 3 percent of the total world inventory of GHGs, while by comparison in Massachusetts v. EPA the Court found that the contribution of the U.S. transportation sector to the worldwide GHG total is about 6 percent. California asserts that such a large sectoral contribution to global warming is “vital to regulate.”

California has also turned to litigation and legislation. Its case against the automobile manufacturers under federal common law and state law was dismissed...
on September 18 when the district court refused to entertain the federal common law claim, ruling that it comprises a nonjusticiable political issue, and then refused to exercise supplemental jurisdiction under state law. But the state is moving on its own: On September 27, 2007, Governor Arnold Schwarzenegger signed a bill that establishes a comprehensive program of regulatory and market mechanisms to achieve GHG reductions.

The Question of Political Questions

Another issue facing current and future litigants concerns a political question, as decided by the Southern District of New York in Connecticut v. American Electric Power Company. In that case, Connecticut and seven other states, the city of New York, and environmental groups sued a number of electric utilities, including American Electric Power Company, the Southern Company, TVA, Xcel Energy, and Cinergy Corporation under federal common law to abate the public nuisance of global warming. The complaint alleged that the defendants were the five largest emitters of carbon dioxide in the United States, constituting approximately one fourth of the electric power sector's carbon dioxide emissions, and that U.S. electric power plants are responsible for 10 percent of worldwide carbon dioxide emissions from human activities.

As in the California suit against the automakers, the court held that filing nuisance suits against utilities to abate emissions that allegedly contribute to global warming raises non-justiciable political questions that are beyond the limits of a court's jurisdiction. The court concluded that “the scope and magnitude of the relief plaintiffs seek reveals a transcendentally legislative nature of this litigation. Plaintiff asks this court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage.” The court found that a case is “justiciable in light of the separation of powers ordained by the Constitution only if the duty asserted can be judicially identified and its breach judicially determined and protection for the right judicially molded.” The district court then went through an analysis of the six situations recognized as indicating the existence of a non-justiciable political question, citing two U.S. Supreme Court cases, Baker v. Carr, decided in 1962, and Vieth v. Jubelirer, decided in 2004.

Among the factors in the Vieth v. Jubelirer case, which concerned gerrymandering, is whether a court faces “the impossibility of deciding [the case] without an initial policy determination of a kind clearly for nonjudicial discretion.” In Connecticut, the district court was honestly puzzled. It struggled with a variety of policy determinations concerning whether the cost of GHGs would be borne just by the defendants, the entire electricity generating industry, or all industries. It also struggled with the economic implications of making these choices, not to mention the effect on the country’s energy policy. In the end, the court concluded it is the judicial branch that decides when a political question is raised, but “looking at the past and current actions (and deliberate inactions) of Congress and the executive within the United States and globally in response to the issue of climate change merely reinforces my opinion that the questions raised by plaintiffs' complaints are non-justiciable political questions.” The decision was appealed to the U.S. Court of Appeals for the Second Circuit. Oral argument on appeal was held before the Massachusetts decision and although the Second Circuit sought additional briefing in light of the decision, it has not yet ruled in the case.

Another court decision that addressed the non-justiciable political question issue is Comer et al. v. Murphy Oil USA Inc., et al., decided last August by the U.S. District Court for the Southern District of Mississippi. This case, brought in the aftermath of Hurricane Katrina, was a putative class action on behalf of Mississippi citizens against defendants which included named oil company defendants (plus an additional 100 oil companies licensed to do business in Mississippi), insurance firms, utilities, and chemical companies. The allegation was that these businesses emit GHGs, which changed the environment so as to cause more frequent and intense hurricanes over the past 30 years, resulting in, among other things, Hurricane Katrina and the damages suffered by the plaintiffs.

Interestingly the plaintiffs did not ask the court to regulate global warming or change national global warming policy, but instead they sought damages for direct action by the defendants in contributing to the cause of Hurricane Katrina. The plaintiffs, similarly to those in the Connecticut v. American Electric Power Company case, said in a class action complaint, “To the extent that this complaint raises political issues, those issues are subordinate to the plaintiffs’ physical and monetary damages. Furthermore, although global
warming causes tremendous damage to the environment, public health, and public and private property every year, there is a dearth of meaningful political action in the United States to address global warming problems. Thus, to the extent that the political process has failed to provide people harmed by global warming with means to recover for their injuries, the courts must execute their constitutional mandate embodied in Article III of the U.S. Constitution.

Motions to dismiss were filed in the case, following arguments, similar to those made in Connecticut, that the case presented a non-justiciable political question and must be dismissed. In an opinion that received little notice, the district court found that the plaintiffs did not have standing to assert claims against any of the defendants and that their claims were nonjudiciable pursuant to the political question doctrine. An appeal has been docketed with the U.S. Court of Appeals for the Fifth Circuit.

The Special Standing of States

Another issue that has not been developed further since Massachusetts v. EPA is standing to challenge government GHG inaction. As a backdrop to its decision, the Supreme Court was careful to explain that it was deciding whether GHGs should be regulated based on the wording of the CAA. The justices explained that “Article III of the Constitution limits federal court jurisdiction to cases and controversies.” In other words, federal courts address “questions presented in an adversary context . . . capable of resolution through the judicial process.” The justices were also clear that “no justiciable controversy exists when parties seek adjudication of a political question.” In the Court's view, “While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”

The Supreme Court took an additional step in recognizing that the state of Massachusetts had a special position in the case. The Court said that “when a state enters the union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be preempted.” The Court stated that EPA had an obligation to protect all U.S. citizens under the CAA and the agency’s refusal to act presented a risk that Massachusetts had to sue to protect. The Court found that “the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.”

The standing conclusion in Massachusetts needs to be used carefully in future cases due to the strong dissent written by Chief Justice John Roberts, who argues that the granting of special standing to a state has no precedent. He worries that the Article III standing threshold has been lowered for all future litigants: “The good news is that the Court’s ‘special solicitude’ for Massachusetts limits the future applicability of the diluted standing requirements applied in this case. The bad news is that the Court’s self-professed relaxation of those Article III requirements has caused us to transgress ‘the proper-and-properly limited-role of the courts in a democratic society.”

Is Climate Change Material?

A final outgrowth of Massachusetts takes a completely different tack in reducing GHGs. Buoyed by the removal of barriers to EPA regulation of climate change, on September 18, 2007, a coalition of shareholders, environmental groups, and state officials filed a petition with the Securities and Exchange Commission requesting that it issue an interpretive release clarifying that material climate-related information must be included in corporate disclosures under existing law. The petition is notable because it calls for disclosures beyond the types of generic climate impacts that have been the subject of disclosures in the past and it alleges that the voluntary disclosures to date are insufficient. The petition seeks evaluation of the risks in three categories: physical risk, financial risk, and legal proceedings. In citing Massachusetts v. EPA and pending federal legislation, the petition makes as its central point that “the transition to a carbon-constrained economy is underway, and public access to material information concerning the risks and opportunities that companies face, and their means of addressing those risks and opportunities, is vital to investors.”

All of the efforts described in this article, some in and some out of courts, tell us that a chaotic path lies ahead for those seeking satisfactory solutions to global climate change.