

CASE NOTE

Between Voluntary Incentives and Man-Made Burdens, Who Is to Bear the Risk?

The Economics of Climate Change

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I. Introduction

The fiscal impacts of unregulated global warming have blurred the line between political conservatives and those favoring conservation of natural assets. This shifting alignment is reflected in a 2007 decision by our nation's highest court. The laws in question date back three decades, to an era when our economy suffered from dependence on foreign oil suppliers, and a recession resulted. Beyond recognizing that the Atlantic seaboard is eroding due to the increased incidence of extreme weather events, the case also scaled back judicial deference to executive agency officials' politically motivated agendas, re-examined the legal status implied by states' interests in their citizens' well-being, and overall, acknowledged that multinational property interests are potentially jeopardized.

Greenhouse gases have indisputably accumulated in the Earth's atmosphere as a result of human actions; the repercussions are striking the global economy.¹ Calling global warming "the most pressing environmental challenge of our time," a group of governmental and private petitioners sought certiorari, and alleged that the Environmental Protection Agency (the EPA) had abdicated its responsibility under the Clean Air Act to regulate emissions of four greenhouse gases, including carbon dioxide (CO₂).² Twelve

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1. Nicholas Stern, *Stern Review on the Economics of Climate Change, Part II, Ch. 6.1* http://www.hm-treasury.gov.uk/media/5/6/Chapter_6_Economic_modelling_of_climate-change_impacts.pdf (last visited Jan. 24, 2008).

2. *Massachusetts v. Environmental Protection Agency* (Mass. v. EPA), 127 S. Ct. 1438, 1446 n.1 (2007).

states and thirteen environmental groups, frustrated with the agency's stalling, filed the suit.³

The unusual importance of the core topic persuaded the United States Supreme Court to grant certiorari.⁴ In *Massachusetts v. Environmental Protection Agency*, the majority found that the EPA has statutory authority to regulate CO₂ and other greenhouse gases, and that the agency shirked statutory obligations by declining to do so.⁵

II. The EPA Role Under the Clean Air Act

The Clean Air Act requires the EPA to prescribe standards for new motor vehicles' emission of any air pollutant that is reasonably anticipated to endanger public health or welfare.⁶ In 1998, EPA General Counsel John Cannon determined that the EPA's regulatory authority encompassed CO₂ emissions.⁷

EPA General Counsel Robert Fabricant took the opposite position in 2003, saying that the Clean Air Act does not address climate change, and therefore CO₂ and other greenhouse gases are not air pollutants.⁸ EPA officials argued that a reviewing court would closely scrutinize any EPA assertion of authority to regulate for global climate change, since *Food and Drug Administration (FDA) v. Brown & Williamson Tobacco Corp.* found that despite a facially broad grant of authority, the FDA was not empowered to regulate tobacco products.⁹

III. Scientific Background

Climate change refers to any significant change in measures of climate such as temperature, precipitation, or wind, that lasts decades or longer.¹⁰ The National Environmental Satellite, Data, and Information Service defines abrupt climate change as a change that is faster than the adaptation time of social and/or ecological systems.¹¹

3. See *Top court: EPA can control emissions*, AFX INTERNATIONAL FOCUS, April 2, 2007, available at <http://www.abcmoney.co.uk/news/02200749807.htm> (last visited Jan. 24, 2008).

4. *Mass. v. EPA*, 127 S. Ct. at 1447.

5. *Id.* at 1462-63.

6. *Id.* at 1462.

7. *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50, 72 (D.C. 2005), *rev'd* *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, (2007).

8. See Seth Borenstein, *Bush Administration Says It Won't Regulate Carbon Dioxide*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Aug. 29 2003, available at <http://www.nrdc.org/news/newsDetails.asp?nID=1080> (last visited Jan. 24, 2008).

9. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

10. U.S. Environmental Protection Agency (EPA), *Glossary of Climate Change Terms*, <http://www.epa.gov/climatechange/glossary.html#C> (last visited Jan. 24, 2008).

11. National Climatic Data Center, *Abrupt Climate Change, Glossary*, <http://www.ncdc.noaa.gov/paleo/abrupt/glossary.html> (last visited Jan. 24, 2008).

This results from natural processes and from activities that change atmospheric composition, e.g., fossil fuel combustion, and alter the land surface, e.g., deforestation, urbanization, and desertification.¹² Researchers have learned that humans are predominantly responsible for most of the warming recorded over the past half-century and atmospheric CO₂ concentration far exceeded the natural range (for the last half-million years) in 2005.¹³ American law has begun to trace the components that humans can control, with consequent fault attribution.

The effect of greenhouse gases was first noted in the 1800's.¹⁴ Scientists proved that gaseous CO₂ could trap solar heat rays, but their research was disregarded because at the 1896 coal burn rate it would take millennia to critically elevate the CO₂ level.¹⁵

That complacent attitude began to erode in the 1950's.¹⁶ Following World War II, the pressing military needs of the Cold War drove many fields of research.¹⁷ Multiple studies computed that heightened CO₂ levels presaged drastic global warming.¹⁸ With the passage of time, the financial fallout from adhering to a political position that doubts the scientific basis of climate change is increasingly detrimental to investment and insurance enterprises, and harshly affects innumerable individuals, too.

United Nations' top experts reported in 1990 that emissions resulting from human activities would enhance the greenhouse effect, tending to torrefy¹⁹ the terrestrial surface.²⁰ From the 1990's onward, scientists confirmed that an increased atmospheric level of CO₂ was a key feature of abrupt temperature shifts in the Earth's climate system.²¹ Two years later, the United Nations concluded that the balance of evidence indicates a discernable human influence on global climate.²² As climate changes, the prospects of destructive weather events are affected.²³ Worsened vulnera-

12. U.S. Environmental Protection Agency (EPA), *Glossary of Climate Change Terms*, <http://www.epa.gov/climatechange/glossary.html#C> (last visited Jan. 24, 2008).

13. See Intergovernmental Panel on Climate Change, *Climate Change 2007 - The Physical Science Basis Working Group I Contribution to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Chapter 1, Historical Overview of Climate Change Science*, pp. 100, 105, [hereinafter *Climate Change 2007*], available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter1.pdf> (last visited Jan. 24, 2008).

14. See Spencer Weart, *The Discovery of Global Warming: The Carbon Dioxide Greenhouse Effect*, available at <http://www.aip.org/history/climate/co2.htm> (last visited Jan. 24, 2008).

15. *Id.*

16. *Id.*

17. *Id.*

18. http://www.amazon.com/gp/reader/0735556660/ref=sib_dp_pt-reader-link (last visited Jan. 24, 2008).

19. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1926 (2d ed. 1979). "Torrefy," "to dry, parch, scorch or roast by exposure to heat."

20. *Mass. v. EPA*, 127 S. Ct. at 1448.

21. See Spencer Weart, *The Discovery of Global Warming: Rapid Climate Change*, available at http://www.aip.org/history/climate/rapid.htm#L_M015 (last visited Jan. 24, 2008).

22. *Mass. v. EPA*, 127 S. Ct. at 1449 n.14.

23. *Climate Change 2007*, *supra*, at 105.

bility to climate change manifests itself as climatic disasters such as Hurricane Katrina (Katrina).

IV. *Massachusetts v. Environmental Protection Agency*²⁴

Environmental organizations encouraged the EPA to regulate vehicle emissions, including CO₂, by filing a rulemaking petition in 1999.²⁵ Former EPA general counsels, Jonathan Cannon and Gary Guzy, averred that the Clean Air Act provided legal authority to regulate emissions of CO₂.²⁶ The EPA reversed that position while the petition was pending, asserting that it could not issue mandatory regulations to slow global climate change, and that even if the agency could set greenhouse gas emissions standards, it would be unwise to do so.²⁷

The two questions before the U.S. Supreme Court were: 1) whether the EPA has statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, 2) whether its stated reasons for refusal comported with the statute.²⁸ A three-judge panel in the district court, in the District of Columbia circuit found that the EPA had discretion to deny the petition. The D.C. Circuit Court of Appeals denied review, but the United States Supreme Court granted certiorari.²⁹

The petitioners alleged that the EPA sidestepped its responsibility under the Clean Air Act.³⁰ Experts assessing global warming foresaw a significant part of coastal states' property being "either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events."³¹ Clean up and reconstruction costs are forecasted to devour hundreds of millions of state dollars.³² Accountability for such expenses must be assigned so financial risks can be apportioned fairly.

The EPA belittled even minimal regulation of motor-vehicle emissions as "piecemeal" interference with the president's approach.³³ Unilateral regulation of motor-vehicle greenhouse gases might dissuade certain countries from cooperatively reducing emissions.³⁴ Nonetheless, the EPA failed to deny two facts: 1) that greenhouse gas' concentration has dramatically in-

24. *Mass. v. EPA*, 127 S. Ct. 1438.

25. *Mass. v. EPA*, 127 S. Ct. 1438, 1449 (See Clean Air Act § 202, 42 U.S.C. § 7521).

26. See Richard Blumenthal and Kimberly Massicotte, *Seven States Notify EPA of Their Intent to Sue Over Global Warming*, American Bar Association Climate Change Committee, available at http://www.abanet.org/environ/committees/climatechange/newsletter/june03/global_warming/ (last visited Jan. 24, 2008).

27. *Mass. v. EPA*, 127 S. Ct. at 1450.

28. *Mass. v. EPA*, 127 S. Ct. 1438, 1446 (refers to 42 USC § 7521).

29. *Mass. v. EPA*, 127 S. Ct. at 1451.

30. *Id.* at 1446.

31. *Id.* at 1456.

32. *Id.*

33. Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).

34. *Id.*

creased due to human activities; and 2) there has been an attendant increase in global surface air temperatures.³⁵ It did not dispute the nexus between man-made greenhouse gas emissions and global warming.³⁶

The agency's main thrust was that petitioners had no standing to invoke the Court's jurisdiction. Justice Stevens scoffed at the suggestion that new motor vehicles' greenhouse gas emissions contribute so little to petitioners' injuries that the EPA cannot be haled into federal court.³⁷ However, Chief Justice Roberts' dissent asserted it was "pure conjecture to suppose that EPA regulation of new automobile emissions will likely prevent the loss of Massachusetts coastal land."³⁸

V. Standing - Separating State from Federal Authority

Applying the *Baker v. Carr* rubric for standing, the Court examined whether petitioners had a sufficient personal stake to inspire the "concrete adverseness" that will sufficiently illuminate the issues.³⁹ Though global warming may be the most exigent environmental peril of our era, the dissent declared the court had overstepped its bounds, since the executive and legislative branches have not yet chosen a scheme to neutralize human-induced climate change.⁴⁰ Investors, insurers, policyholders, and humanity as a whole await legal precedent, to allocate responsibility for the shifting risks of climate change.

Lujan v. Defenders of Wildlife held that redress of a similar grievance is within the ambits of congress and the chief executive, but the decision stressed that congress can recognize injuries and chains of causation that were not acknowledged before.⁴¹ A pivotal factor in *Mass. v. EPA* was that the party seeking review was a sovereign state and not, as in *Lujan*, a private individual.⁴²

To have *parens patriae*⁴³ standing, a state must assert an injury to a quasi-sovereign interest, a judicial construct discerned by comparing other interests of a State.⁴⁴ The powers to enforce laws over entities within its jurisdiction, and to demand recognition of borders, are sovereign interests.⁴⁵

35. *Mass. v. EPA*, 127 S. Ct. at 1451.

36. *Id.* at 1457.

37. *Id.* at 1457.

38. *Id.* at 1470.

39. *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1453 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

40. *Mass. v. EPA*, 127 S. Ct. at 1463-64 (Roberts, C.J., dissenting).

41. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (majority opinion), 580 (Kennedy, J., concurring) (1992).

42. *Mass. v. EPA*, 127 S. Ct. at 1454.

43. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (*Parens patriae* "is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort, and welfare of the people, interstate water rights, general economy of the state, etc.").

44. *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

45. *Id.*

Non-sovereign interests include proprietary ones like land ownership or participation in a business, and private real party in interests' rights in suits where the state is a nominal party.⁴⁶

Congress conferred a right to challenge a petition's rejection, via the Clean Air Act's rulemaking procedures.⁴⁷ Between this prerogative and quasi-sovereign interests, petitioners' standing merited unique solicitude.⁴⁸ As stated in *Georgia v. Tennessee Copper Co.*, the state has "the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."⁴⁹

The dissent conceded that that century-old holding distinguished a state from a private litigant, but as to available remedies, not Article III standing.⁵⁰ Also, a state has neither a duty nor any power to enforce citizens' rights relative to the federal government.⁵¹ Nonetheless, the majority was unswayed by the contention that relaxing Article III constraints transgressed proper limits.⁵²

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. requires that a court defer to a federally empowered agency's interpretation of a statute that it administers, if based on a permissible construction.⁵³ Such deference is only warranted pursuant to congressionally delegated authority.⁵⁴ If congress confers interstitial rulemaking power, the agency controls the outcome unless it is "arbitrary, capricious, or manifestly contrary to the statute."⁵⁵

Courts first check whether congress confronted the precise topic.⁵⁶ The meaning or ambiguity of a phrase may only be evident from the overall regulatory scheme.⁵⁷ In determining whether an ambiguity exists, the agency is owed no deference; the court has the final say.⁵⁸ For example, Justice Scalia's dissent avowed that the EPA's exclusion of greenhouse gases from the category of air pollution agents merited *Chevron* deference,

46. *Id.* at 601-02.

47. *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1454 (2007) (citing 42 U.S.C. § 7607(b)(1)).

48. *Mass. v. EPA*, 127 S. Ct. at 1454-55.

49. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

50. *Mass. v. EPA*, 127 S. Ct. at 1465 (Roberts, C. J., dissenting).

51. *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C. J., dissenting) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)).

52. *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438, 1464 (2007) (Roberts, C. J., dissenting) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

53. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.* (*Chevron v. NRDC*), 467 U.S. 837, 843 (1984) (See also *Food and Drug Administration v. Brown & Williamson Tobacco Corporation* (*FDA v. Brown & Williamson*), 529 U.S. 120, 131 (2000)).

54. *American Bar Association v. Federal Trade Commission* (*ABA v. FTC*), 430 F.3d 457, 468 (D.C. Cir. 2005).

55. *Chevron v. NRDC*, 467 U.S. at 843-44.

56. *Id.* at 842-43.

57. *FDA v. Brown & Williamson*, 529 U.S. at 133.

58. *ABA v. FTC*, 430 F.3d at 469.

since greenhouse gases permeate the entire atmosphere rather than a limited zone near the earth's surface.⁵⁹ Deference was inapt, as the statute refers to "the ambient air" without differentiating atmospheric layers; a narrowed reading would alter legislative commands.⁶⁰ The Court in *Mass. v. EPA* did not allow the EPA to ignore its statutory mandate.⁶¹

VI. Attempted Regulation by Individual States

Connecticut v. American Electric Company, Inc. (AEP) was an inter-state attempt to enjoin several public utilities to lower their CO₂ emissions.⁶² The *AEP* court weighed stringent plans to rapidly reduce pollution against arguments that such restrictions will retard industrial development.⁶³ It rejected the matter as a non-justiciable political question, based on congressional and executive refusals to limit emissions of CO₂.⁶⁴ Unlike *AEP*, in *Barasich v. Columbia Gulf Transmission Co.*, a suit for Katrina damages, a federal district court denied a motion to dismiss for non-justiciability, distinguishing monetary damages from injunctive relief in the political question context, but dismissed on other grounds.⁶⁵

Without federal leadership, the burden of reducing greenhouse gases falls to the states, which are having difficulty with procedural restrictions. California formally applied for a waiver in December 2005, to permit standards for tailpipe emissions that are stricter than the national level.⁶⁶ The Clean Air Act preempts states from posing new motor vehicle emission standards, but prescribes conditions for a waiver of EPA preemption, for standards adopted by California.⁶⁷ By September 2007, more than a third of all states tentatively endorsed the California-standard regulation of cars' CO₂ emissions, pending an EPA waiver.⁶⁸

59. *Mass. v. EPA*, 127 S. Ct. at 1460 n.26 (majority opinion), 1476-77 (Scalia, J., dissenting).

60. *Mass. v. EPA*, 127 S. Ct. at 1460 n.26.

61. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie (Green Mt. Chrysler)*, 508 F. Supp. 2d 295, 309 (D. Vt. 2007).

62. *Connecticut v. American Electric Company, Inc. (AEP)*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

63. *Id.* at 272.

64. *Id.* at 268-69, 274.

65. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 685-87 (D. La. 2006).

66. Tom Doggett, *EPA on Track to Act on California Emissions Waiver*, REUTERS, Oct. 3, 2007 <http://www.reuters.com/article/GlobalEnvironment07/idUSN0325496020071003> (last visited Jan. 25, 2008).

67. *Green Mt. Chrysler*, 508 F. Supp. 2d at 301 (See 42 U.S.C. § 7543(a), (b)).

68. Mark Clayton, *As Feds Stall On Climate, States Go Forth*, Sept. 14, 2007, CHRISTIAN SCIENCE MONITOR, listing: Vermont, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island and Washington with California; and Arizona, Florida, New Mexico, Utah, Illinois, and Minnesota (18 total), poised to proceed. <http://www.cbsnews.com/stories/2007/09/14/national/main3261202.shtml> (last visited Jan. 25, 2008).

While dawdling with California's petition, the EPA claimed to be on track to decide whether to let states impose tougher emission limits.⁶⁹ Instead, "[t]he same day the president signed a groundbreaking fuel economy bill, his administration reversed course and denied California a waiver to regulate global warming pollution from vehicles, the first time in the history of the Clean Air Act that the federal government has denied the state a waiver."⁷⁰ Implementing such standards with existing cost-effective means would lessen global warming emissions by at least 392 million metric tons before 2021, but delay increases the impending menace.⁷¹ The legal logjam also impedes counsels' capacity to pinpoint probable liability.

An expert in *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie* testified that scientific evidence indicates that global warming is severely detrimental to Vermont's economy, in particular to maple trees' foliage and sugar production, and to the ski industry.⁷² Judgment was ordered in Vermont's favor, but its regulation that would reduce greenhouse gas emissions is unenforceable until California gets a waiver.⁷³

In *California v. General Motors Corporation (GMC)*, California brought a tort claim for harms from CO₂ emissions such as "increases in the risk and intensity of wildfires."⁷⁴ GMC was not an administrative challenge to an EPA decision; it sought monetary damages for interstate global warming.⁷⁵ The circuit court dismissed without prejudice to re-filing in state court, under public nuisance statutes.⁷⁶

The federal judge in GMC lamented the lack of "guidance in determining what is an unreasonable contribution to [the] carbon dioxide in the earth's atmosphere, or in determining who should bear the costs associated with global climate change that admittedly result from multiple sources around the globe."⁷⁷ Absent precedents that assign liability for purposeful acts that either escalate or conceal dangers attributable to anthropogenic climate change, investors, insurers and policyholders still cannot accurately measure risks. For now, a legal vacuum persists.

69. Doggett, *supra*.

70. Michelle Robinson, *EPA Denies California Waiver to Regulate Vehicle Global Warming Pollution*, KANSAS CITY INFOZINE, Dec. 20, 2007, <http://www.infozine.com/news/stories/op/storiesView/sid/26143/> (last visited Jan. 25, 2008).

71. Jason Barbose, *California Files Suit against U.S. EPA to Remove Roadblock to Cleaner Cars*, GLOBAL WARMING SOLUTIONS NEWS, Nov. 8, 2007, <http://www.environmentamerica.org/news-releases/global-warming-solutions/global-warming-solutions/california-files-suit-against-u.s.-EPA-to-remove-roadblock-to-cleaner-cars> (last visited Jan. 25, 2008).

72. *Green Mt. Chrysler*, 508 F. Supp. 2d at 321.

73. *Id.* at 343.

74. *California v. General Motors Corporation (GMC)*, No. C06-05755 MJJ, at 2:17-26 (N.D.Cal. 2007), <http://online.wsj.com/public/resources/documents/globalwarming.pdf> (last visited Jan. 25, 2008).

75. *Id.* at 17:19-22.

76. *Id.* at 24:4-7.

77. *Id.* at 21:28, 22:1-3.

VII. Economic Impacts of Unregulated Global Warming

Long before Katrina, climate scientist Michael MacCracken's affidavit noted that since global warming may augment hurricanes' ferocity, destruction of the wetland "shock absorber" worsened the chance of storm surges flooding New Orleans' urban population.⁷⁸ The U.S. Supreme Court described this scientifically calculated risk appraisal as "eerily prescient."⁷⁹

Of Katrina's estimated \$200 billion devastation, only a fraction is recoverable under existing insurance law, due to defective distribution of flood risk.⁸⁰ Even government-sponsored flood insurance is not free; rates are inversely proportional to "Base Flood Elevation,"⁸¹ so buyers drawn to lower priced land in floodplains often lack such coverage. Mortgagees insist on sufficient homeowner's protection, but after catastrophic Katrina numerous New Orleans homes that had been passed down for generations were lost forever.⁸² Increased hurricane intensity also led to commercial risks like oilrigs, pipelines and commercial fishing being badly hurt by Katrina and Rita.⁸³ Many insurers will not write new policies in coastal areas; most raised rates and imposed higher deductibles for formally named storms.⁸⁴

Financial positions throughout the world are being affected by climate change. Wealth management experts plan to "weather" the economic downturn by lowering their investment exposure in high-risk states, as well as in subprime mortgages.⁸⁵ Because climate change increasingly impacts financial performance, investors formally asked that the Securities and Exchange Commission clarify a registrant's duty to disclose critical climate-related factors, for value assessment.⁸⁶

78. *Mass. v. EPA*, 127 S. Ct. at 1455-56.

79. *Id.* at 1456 n.18.

80. See Roger D. Congleton, *The Story of Katrina: New Orleans and the Political Economy of Catastrophe*, PUBLIC CHOICE 127 at 2 n.3 (2006), available at <http://rdc1.net/forthcoming/KATRINA3.pdf> (last visited Jan. 25, 2007); See also Adam Scales, *Insurance Ex Machina: A Significant Federal Decision in New Orleans on Post-Katrina Litigation*, FINDLAW – LEGAL NEWS AND COMMENTARY (2006), available at http://writ.news.findlaw.com/commentary/20061211_scales.html (last visited Jan. 25, 2008).

81. Under the Federal Emergency Management Agency's National Flood Insurance Program, c.f., "Flood Quick-Quote: Residential Rates Effective May 1, 2006," at <http://www.floodsmart.gov/floodsmart/static/quickquoteres.html> (last visited Jan. 25, 2008).

82. In many of pre-Katrina New Orleans less-affluent districts, the incidence of home ownership was unusually high given the general income range; compare 2003 data at http://gnocdc.org/xls/nbhd_housing.xls, with Greater New Orleans Community Data Center's current data, see "Impact Data" link at <http://www.gnocdc.org> (last visited Jan. 25, 2008).

83. See Tom Zucco, *High Rates on the High Seas*, ST. PETERSBURG TIMES, June 30, 2006, available at http://www.sptimes.com/2006/06/30/Business/High_rates_on_the_hig.shtml (last visited Jan. 25, 2008).

84. *Id.*

85. *Insurers See Perils, Promise in Mortgage Meltdown*, BESTWIRE, August 20, 2007.

86. See Letter to Director, Division of Corporation Finance of Securities and Exchange Commission (SEC), from Ceres (September 18, 2007), available at <http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=397&scid=330>, select link to "Letter to the Division of Corporate Finance" (last visited Jan. 25, 2008).

Publicly traded corporations face lawsuits alleging misstatements in their disclosures. For example, New York's Attorney General contested five energy companies' plans for coal-fired plants, due to risks hidden from their shareholders.⁸⁷ Legal allotment of accountability is critical for investors who wish to correctly quantify climate-related risk.

As environmental impact liability policies became more difficult to obtain, insured companies began attempting to use their Directors and Officers ("D&O") policies to supplement or replace that environmental coverage.⁸⁸ Supposing that allegations of "failure to disclose" expose a business that carries D&O insurance to greenhouse gas-related litigation, consider the potential effect on coverage, if there are pollution exclusions in its D&O policy.

Pollution exclusion clauses might not preclude coverage for an insured that does not have a significant "carbon footprint,"⁸⁹ but skirting that pitfall will likely be more difficult for greenhouse gas emitters. The *Mass. v. EPA* Court declared that without a doubt CO₂, methane, nitrous oxide, and hydrofluorocarbons meet the Clean Air Act's definition for pollutants, since they are physical and chemical substances that are emitted into the ambient air.⁹⁰ A parallel may be drawn to cases that applied D&O exclusion clauses to liabilities arising from environmental hazards like asbestos or pollution.

Where a corporation sought coverage under a D&O policy for defending and indemnifying officers as to claims based on its sale of contaminated property to a partnership that then leased the property back to the corporation, a federal court found the pollution exclusion broad enough to preclude each asserted claim involving the contaminated property.⁹¹ A relationship existed between the claims and the insured's release of pollutants, and the exclusion applied to losses involving claims that related in any manner to wrongful acts concerning the discharge of pollutants.⁹²

Similarly, when an expanding business acquired numerous smaller waste management operations, aggrieved shareholders contended that the rapid growth campaign was pursued without disclosure of those companies' improper waste disposal practices.⁹³ Public knowledge of the polluting ac-

87. See Felicity Barringer and Danny Hakim, *New York Subpoenas 5 Energy Companies*, NEW YORK TIMES, September 16, 2007, available at <http://www.nytimes.com/2007/09/16/nyregion/16greenhouse.html> (last visited Jan. 28, 2008).

88. Dan L. Goldwasser and Alan A. Harley Solinger, *Policy Exclusions*, 3-12A THE LAW OF LIABILITY INSURANCE § 12A.06(2)(j) (2007).

89. The term "carbon footprint" refers to the range of carbon emissions from a given business enterprise, both direct and indirect. (Charles J. Bennett and Meredith Armstrong Whiting, *Carbon Footprint a Growing Management Concern*, Conference Board Report#: A-0213-06-EA (2006)).

90. *Mass. v. EPA*, 127 S. Ct. at 1460.

91. 1-3 BUSINESS INS. LAW & PRACTICE GUIDE § 3.05, n.31/fn.29 (2007).

92. *Id.*

93. *National Union Fire Insurance Company v. U.S. Liquids, Inc.*, 88 Fed. Appx. 725, 727 (5th Cir. 2004).

tivities originated when the FBI investigated one of the acquired companies; the criminal investigation of the parent corporation that followed revealed illegal practices that were actively concealed from investors.⁹⁴

Faced with lawsuits that included a consolidated securities class action brought by shareholders, and a shareholder derivative suit filed on behalf of the corporation against certain directors and officers, the corporation demanded that its insurer defend.⁹⁵ Where, as in that jurisdiction, courts apply general rules of contract construction to insurance policies, there may be no duty to indemnify even if a claim only has an incidental relationship to the described act of pollution, provided that an exclusion clearly applies to all claims in an underlying suit.⁹⁶

If remediation is ordered, the problem of who must compensate losses incurred through corrective measures also looms behind suits involving pollutants. Commercial General Liability (CGL)⁹⁷ insurers typically raise several grounds for refusal of environmental coverage.⁹⁸ For instance, a decision by the California First Appellate District that concerns primary CGL and excess/umbrella policy insurers' duties to defend and indemnify awaits further state review.⁹⁹ At stake is a \$10 million settlement, plus defense costs, in an action involving federally imposed environmental compliance.¹⁰⁰ The question posed is whether a proceeding before the U.S. Department of the Interior Board of Contract Appeals constitutes a "suit" that triggers insurance coverage under a CGL policy.¹⁰¹

Four California decisions describe limits on insurers' duties in environmental enforcement actions.¹⁰² For primary CGL policies wherein "suit" was not defined, the duty to defend a suit seeking damages was triggered only by a civil action prosecuted in a court of law.¹⁰³ Where "suit" and "damages" were undefined, a policy imposed two duties: 1) to defend

94. *Id.*

95. *Id.*

96. *Id.* at 728.

97. In 1986, the name of the standard CGL policy was altered, from comprehensive general liability insurance policy to Commercial General Liability insurance policy (See, e.g., *Certain Underwriters at Lloyd's of London v. Superior Court* (Powerine I), 24 Cal. 4th 945, 959 n.3 (2001)).

98. *Comprehensive General Liability Environmental Coverage*, 5-19 LAW OF HAZARDOUS WASTE § 19.05(2)(B)(d)(i) (2007). The most commonly contested exclusion clauses in this context include those for expected or intended damage, pollution, and owned property.

99. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania*, 150 Cal. App. 4th 1050 (1st Dist. 2007) (review granted, No. S153852).

100. *Ameron*, 150 Cal. App. 4th at 1055.

101. Based on official website's general subject matter statement of issues, which states that this may not reflect the court's view of specific issues to be addressed. (No. S153852, http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=477935&doc_no=S153852 (last visited Jan. 25, 2007)).

102. *Ameron*, 150 Cal. App. 4th at 1055-56.

103. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania*, 150 Cal. App. 4th 1050, 1056 (1st Dist. 2007) (citing *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal. 4th 857, 878-82 (1998)).

in any suit seeking damages; and 2) to only indemnify for legally obligated damages ordered by a court, as opposed to environmental administrative proceedings.¹⁰⁴ In a third action precise wording was paramount; agreements including “expenses,” as well as “damages,” generated a duty to indemnify for the cleanup of contaminated sites.¹⁰⁵ Another decision that was issued on the same date discerned no such duties where policies’ literal language did not include “expenses.”¹⁰⁶

VIII. Conclusion

In the wake of the U.S. Supreme Court’s centennial resurrection of quasi-sovereign standing, states may assert a more active role in protecting their interests, e.g., in the “health, comfort, and welfare of the people, interstate water rights, [and] general economy.”¹⁰⁷ Hence, the *Mass. v. EPA* precedent may prove useful as a legal tool in advancing other matters, beyond environmental regulation.

Further, the Court fortified the proposition that where a legislative enactment delegates authority to a governmental agency, the courts, not the agency, have final say on the legal interpretation of the underlying legislation.¹⁰⁸ While this decision enabled a state to challenge an appointive federal office’s adverse decision, its impact extends generally by diminishing the emphasis on *Chevron* deference to administrative agencies.

As for global warming, political polarization frivolously hinders fiscal practicality; financial managers need to gauge risks accurately. Currently governing decisions have observed that the serious harms associated with climate change are well recognized.¹⁰⁹ From a pragmatic perspective, CO₂ compliance will implicate the finances of companies that are regulated and of others doing business with those firms, while the demand for cleaner energy offers significant opportunities.¹¹⁰ This is noteworthy to those involved with planning and succession, securities, investment, and insurance law, because of the mounting potential for such economic shifts to affect appraisals of many interests, from real property to intangible assets.

104. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania*, 150 Cal. App. 4th 1050, 1055 (1st Dist. 2007) (citing *Certain Underwriters at Lloyd’s of London v. Superior Court* (Powerine I), 24 Cal. 4th 945, 950-51 (2001)).

105. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania*, 150 Cal. App. 4th 1050, 1056 (1st Dist. 2007) (citing *Powerine Oil Co., Inc. v. Superior Court* (Powerine II), 37 Cal. 4th 377, 383 (2005)).

106. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania*, 150 Cal. App. 4th 1050 (1st Dist. 2007) (citing *County of San Diego v. Ace Property & Casualty Ins. Co.*, 37 Cal. 4th 406, 411 (2005)).

107. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) and *Mass. v. EPA*, 127 S. Ct. 1438, 1454 (2007) are one century apart. BLACK’S LAW DICTIONARY 1114 (6th ed. 1990) “*Parens patriae*.”

108. *Mass. v. EPA*, 127 S. Ct. at 1460.

109. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508, 530 (9th Cir. 2007) (citing *Mass. v. EPA*, 127 S. Ct. 1438, 1455 (2007)).

110. Letter to SEC from Ceres, *supra* note 86.