

## AN INTRODUCTION TO CLIMATE CHANGE LIABILITY LITIGATION AND A VIEW TO THE FUTURE

MICHAEL B. GERRARD\*  
JOSEPH A. MACDOUGALD\*\*

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*This article discusses the advancement of climate change litigation. It explores two approaches to climate change litigation; the first is to use the federal regulatory apparatus and the second is to use the tort system. The article explores key questions in climate change litigation such as, who is responsible for deciding the appropriate level of harmful emissions? How should courts handle the long tail effects of climate change? What are the proper forums to litigate in? And, what is the role of the federal government in climate change litigation?*

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Climate change liability litigation is a United States phenomenon. Though climate related litigation exists in other countries,<sup>1</sup> more climate change cases have been brought in the United States than in the rest of the world combined, and the United States stands alone in seeing significant litigation that seeks to hold greenhouse gas (GHG) emitters liable for the harms caused by climate change.

The first wave of climate liability litigation began in the mid-2000's during President George W. Bush's administration. Frustrated by the absence of a national climate change regulatory scheme in the United States, climate liability litigation began as environmental groups sought to compel policy development through two litigation avenues. One approach was to use the existing United States legal and regulatory apparatus to

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\*Michael B. Gerrard is the Andrew Sabin Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School, as well as Senior Counsel to Arnold & Porter LLP.

\*\*Joseph Allan MacDougald is a Professor in Residence and Executive Director of the Center for Energy & Environmental Law (CEEL) at the University of Connecticut School of Law. He would like to extend his thanks to the CEEL Research Assistant, Kathleen Coss (JD Candidate 2014) for all of her hard work and research for this article.

<sup>1</sup> A collection of non-U.S. climate litigation can be found at <http://web.law.columbia.edu/climate-change/resources/non-us-climate-change-litigation-chart> (last visited Aug. 24, 2013). See also CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE (Richard Lord et al., eds., 2012).

address rising GHG emissions. The second approach was to use the tort system to seek monetary or injunctive relief from the largest emitters of GHGs, such as coal fired power plant operators, and the manufacturers of emitting equipment, such as automobile companies.

This article introduces both approaches through their leading cases. It also serves as an introduction to a volume arising from an October 2012 conference at the University of Connecticut School of Law, *Climate Change Risks & Liability - The Future of Insurance & Litigation*. It is adapted in part from Michael Gerrard's morning keynote address to that conference.

Now is a remarkable time in the nearly decade long history of this topic. As of the writing of this article, the United States Environmental Protection Agency (EPA) has proposed its first regulatory framework for GHGs from coal fired power plants as anticipated by the Supreme Court's rulings in this area. Many of the liability cases discussed at the October 2012 conference came to their procedural end only by June 2013. However, this subsequent litigation history only serves to reinforce the view of the future and questions presented at the end of the conference and recounted here.

#### A. MASSACHUSETTS V. EPA – ENGAGING THE EPA

One avenue of climate litigation is to invoke the existing environmental laws to address climate change. Following this plan of attack, a collection of states, municipalities, non-profits, and land trusts filed a set of rulemaking petitions with EPA. These petitions sought to establish GHGs as air pollutants under the Clean Air Act (CAA).<sup>2</sup> The administrative and court cases around this strategy culminated in 2007 in the landmark decision from the United State Supreme Court of *Massachusetts v. Environmental Protection Agency* (hereinafter *Mass v. EPA*).<sup>3</sup>

The CAA requires the EPA Administrator to set emissions standards for any air pollutant from stationary or mobile sources that contributes to air pollution that "may reasonably be anticipated to endanger the public health or welfare."<sup>4</sup> While the case presented to the Court sprang from the part of the CAA that addressed mobile sources of pollution, Respondents made clear at oral argument that a ruling in their favor would establish CO<sub>2</sub> as a pollutant under the CAA for the purpose of regulating not only motor vehicles, but also stationary sources (of which the largest category is coal fired power plants).

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<sup>2</sup> 42 U.S.C. §§ 7401 – 7671 (2006).

<sup>3</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>4</sup> 42 U.S.C. § 7521(a)(1) (2006).

In initially responding to the rulemaking requests, EPA adopted the position that it should not regulate GHGs as air pollutants as a result of various policy considerations.

The Agency's rationale was based on several considerations<sup>5</sup> including, among others, the assertion that since GHG emissions were the subject of international negotiations by the Executive Branch, regulatory development by the EPA would disrupt these delicate, international proceedings. In disagreement, twelve States, several United States cities, and land trusts<sup>6</sup> brought suit. In March of 2007, the Supreme Court, by a vote of 5 to 4, held that carbon dioxide and other GHGs are within the definition of air pollutant under the Clean Air Act and that EPA does indeed have the authority to regulate them.<sup>7</sup> Subsequent to the decision, the EPA under the Obama administration did indeed issue a two-part endangerment finding, concluding that rising GHG levels endanger public health, safety, and welfare.<sup>8</sup> Thereafter, the EPA began issuing substantive regulations to restrict GHG emissions.

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<sup>5</sup> At oral argument, Justice Breyer made much of EPA's considerations (plural). As the agency attempted to argue that there were legitimate grounds throughout their responses that would be consistent with administrative deference provided by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), Justice Breyer noted that their responses consistently integrated all *considerations* including a separation of powers argument involving international negotiations. For those interested in such matters, the oral argument, easily found on websites such as oyez.org, represents high theater for listeners. "JUSTICE BREYER: If they write that all of these considerations justify our result, again, one of them by themselves, it sounds, they think would not have been sufficient." *Massachusetts v. Environmental Protection Agency*, THE OYEZ PROJECT AT IIT CHICAGO KENT COLLEGE OF LAW (Nov. 10, 2013), [http://www.oyez.org/cases/2000-2009/2006/2006\\_05\\_1120/](http://www.oyez.org/cases/2000-2009/2006/2006_05_1120/).

<sup>6</sup> The inclusion of land trusts in the litigation was strategic and presented itself in the briefing and oral arguments for the case. Land trusts hold an unusual position as large landowners who have a declared public purpose for stewardship of the land.

<sup>7</sup> *Massachusetts v. EPA*, 549 U.S. 497, 500 (2007).

<sup>8</sup> Little happened for the balance of the Bush Presidency except that EPA issued an Advanced Notice of Proposed Rulemaking. When President Obama took office, however, the agency began acting very quickly, promulgating the Endangerment Finding required under the Clean Air Act and triggering EPA's authority to regulate GHGs as pollutants that endanger the public as defined by the CAA, and served as the formal finding that greenhouse gases do indeed cause a danger to public health and welfare. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,495 (Dec. 15, 2009) (codified at 40 C.F.R. pts. 9, 81, 63). That finding is the basis for all further GHG regulations under the CAA. Next, the Obama administration introduced a period of active climate regulation in the United States,

## B. NUISANCE LAW AND TORT LITIGATION – TYING EMITTERS TO CLIMATE CHANGE’S CONSEQUENCES

In parallel to *Mass v. EPA*, four lawsuits sought redress from large scale GHG emitters under various nuisance law theories.<sup>9</sup> These cases were *Connecticut v. American Electric Power*,<sup>10</sup> *California v. General Motors Corporation*,<sup>11</sup> *Comer v. Murphy Oil USA*,<sup>12</sup> and *Native Village of Kivalina v. ExxonMobil Corporation*.<sup>13</sup>

*Connecticut v. American Electric Power* (hereinafter *Connecticut*) was filed in 2004 by eight states, New York City, and three land trusts, against five major electric utilities that cumulatively burned a substantial amount of coal and released a significant amount of GHG emissions.<sup>14</sup> This lawsuit sought injunctive relief from the Southern District of New York. It asked the district judge to issue an abatement order mandating that these companies’ power plants reduce their GHG emissions by specific amounts each year.<sup>15</sup> In addition to being the first lawsuit of its kind, *Connecticut* stands out for being the only such case that sought injunctive relief instead of money damages.<sup>16</sup>

In *California v. General Motors Corporation*, California sued several of the major automakers over the GHG emissions produced by vehicles they manufactured.<sup>17</sup> California alleged that these pollutants were causing injury to the State, its coastline and other harms. The case sought monetary relief.<sup>18</sup>

*Comer v. Murphy Oil* (hereinafter *Comer*) was filed in Mississippi on behalf of many property owners against thirty or so chemical companies,

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which invited counter-response litigating from industries and states alleging overregulation by the EPA.

<sup>9</sup> Maxine Burkett, *Legal Rights and Remedies*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE* 815, 824-25 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

<sup>10</sup> *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011) [hereinafter *Connecticut*].

<sup>11</sup> *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. WL 2726871 (N.D. Cal. Sept. 17, 2007).

<sup>12</sup> *Comer v. Murphy Oil USA*, No. 1:05-CV436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009); *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849 (2012), *aff'd*, 718 F.3d. 460 (2013).

<sup>13</sup> *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

<sup>14</sup> *Connecticut*, 582 F.3d at 309; Burkett, *supra* note 9, at 825.

<sup>15</sup> *Connecticut*, 582 F.3d at 309; Burkett, *supra* note 9, at 826.

<sup>16</sup> See Burkett, *supra* note 9, at 827.

<sup>17</sup> *California*, 2007 WL 2726871 at \*1.

<sup>18</sup> *Id.*

oil companies, and others.<sup>19</sup> The plaintiffs alleged that the property damage caused by Hurricane Katrina had been exacerbated, and the Hurricane's power enhanced, by climate change. The plaintiffs further alleged that the defendants' emissions had substantially worsened that change. The case sought money damages in the amount of the additional property damage that they had suffered as a result.<sup>20</sup>

Finally, *Kivalina v. ExxonMobil Corporation* (hereinafter *Kivalina*), which serves as the keystone case for this journal issue, was filed on behalf of the remote Alaskan Village of Kivalina that, according to their complaint, had been severely damaged by the effects of global climate change. The village, located on a narrow isthmus, was once protected from violent spring and fall storms by a natural sea ice barrier. As the climate has warmed, wave action and loss of ice eroded this safeguard. Rising temperatures meant that the natural ice barriers formed later and later in the season, leaving the village exposed to the harsh fall storms and currents. This exposure created even further erosion, destroying the subaquatic protective sand bars and barriers. Alleging that a large number of fossil fuel companies, chemical companies and others exacerbated the climate change that will ultimately force the Kivalina villagers to relocate, the Village sued these companies for several hundred million dollars in money damages to cover the associated costs.<sup>21</sup>

Each of these four original lawsuits was dismissed at the district court level on grounds that it raised a non-justiciable political question and each was appealed.<sup>22</sup> These district courts all held that issues of global warming policy were not suitable for adjudication by the courts, but rather more appropriately decided by the Congress and by the Executive Branch.<sup>23</sup> Some courts found other preclusive basis for dismissal, such as that the plaintiffs lacked standing to assert their claim.<sup>24</sup>

The notice of appeal for *California v. General Motors Corporation* was filed in the Ninth Circuit at the same time the automobile industry found itself deeply embedded in financial trouble. The highly publicized government bailout of the automobile industry brought an end to this case

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<sup>19</sup> *Comer*, 2007 WL 6942285 at \*1.

<sup>20</sup> *Id.*

<sup>21</sup> *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) *aff'd*, 696 F.3d 849 (9th Cir. 2012). Michael Gerrard was formerly a partner, and is currently Senior Counsel, in the law firm of Arnold & Porter LLP, which represented a defendant in *Comer* and a defendant in *Kivalina*. He has written this article purely in his academic capacity.

<sup>22</sup> Burkett, *supra* note 9, at 824 n.110. For background on the political question doctrine, see *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>23</sup> Burkett, *supra* note 9, at 824 n. 110.

<sup>24</sup> *Id.* at 824.

by including, as a term of the settlement among the Obama Administration, the automobile industry and the State of California, that the lawsuit be dropped.<sup>25</sup>

The *Comer* case enjoyed a more colorful and much less common procedural history. On appeal to the Fifth Circuit, a three-judge panel reversed the decision upon finding that the case was not, in fact, barred by the political question doctrine, and reinstated the case to the district court for further proceedings.<sup>26</sup> The defendants moved for an en banc hearing, to which the full court issued a decision granting that right and vacating the decision below.<sup>27</sup> The very day that briefs were due to the en banc court, though, it announced that it had lost a quorum.<sup>28</sup> Presumably due to the great number of defendants and the judges' ownership of stocks of some of them, enough judges had recused themselves that the case could no longer be heard en banc. There was, however, a quorum at the time that the panel decision was vacated. Thus the case was remanded to the district court, but since it had previously been dismissed at that level, the case was over.<sup>29</sup> The court did provide plaintiffs with the right to apply for certiorari to the Supreme Court, but instead they applied for a writ of mandamus, requesting that the Fifth Circuit be ordered to decide the case. The Supreme Court declined the plaintiffs' request and effectively ended that version of the case.<sup>30</sup> The *Comer* case was subsequently re-filed<sup>31</sup> and dismissed by the District Court on many grounds including res judicata. In May 2013, the Fifth Circuit confirmed that this refiling was barred by res judicata.<sup>32</sup> The time for plaintiffs to petition the Supreme Court for certiorari has now expired, so the *Comer* litigation appears to have ended.

The *Connecticut* case was argued in the Second Circuit in July 2005. It sat year after year without resolution.<sup>33</sup> The absence of this

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<sup>25</sup> For a discussion of the overall settlement, see Jody Freeman, *The Obama Administration's National Auto Policy: Lessons from the "Car Deal,"* 35 HARV. ENVTL. L. REV. 343 (2011).

<sup>26</sup> Burkett, *supra* note 9, at 827.

<sup>27</sup> *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010), *reh'g granted en banc*, 607 F.3d 1049 (5th Cir. 2010).

<sup>28</sup> *See Comer*, 607 F.3d at 1055.

<sup>29</sup> *Id.*

<sup>30</sup> *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049, 1055 (5th Cir. 2010) (en banc), *mandamus denied*, No. 10-294 (Jan. 10, 2011); *In re Comer*, 131 S. Ct. 902 (2011); Burkett, *supra* note 9, at 827.

<sup>31</sup> *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

<sup>32</sup> *Id.*

<sup>33</sup> *Am. Elec. Power Co. v. Connecticut*, 582 F.3d 309, 385 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

decision had begun to emerge as one of the great mysteries in climate change litigation. Finally in 2009, three and half years after the argument was heard, the Second Circuit issued a decision and reversed, holding that the case did not implicate the political question doctrine.<sup>34</sup> (One of the members of the Second Circuit panel that had heard argument, Sonia Sotomayor, had been elevated to the Supreme Court and did not participate in the Second Circuit decision.)

Upon the dispositions of *Comer* and *Connecticut*, where two circuits held that the issue of liability for global climate change could properly be considered by the courts, the defendants in *Conn. v. AEP* applied for, and were granted, certiorari in December of 2010.<sup>35</sup> In a unanimous eight justice decision, with Justice Sotomayor recusing herself, the Supreme Court reversed the appellate panel.<sup>36</sup> The decision was written by Justice Ginsberg and turned on *Massachusetts v. EPA's* holding that established the EPA's authority to regulate GHGs.<sup>37</sup> Congress had decided that it was the job of EPA, and therefore not the courts, to regulate GHG emissions. The federal common law of nuisance for GHG emissions had ultimately been displaced by the Clean Air Act, and these cases should have been dismissed after all.<sup>38</sup>

*Kivalina* was the last of these cases to be decided. As *Connecticut* had been the only GHG nuisance law case to be decided by the Supreme Court,<sup>39</sup> and in that case plaintiffs sought only injunctive relief, the *Kivalina* plaintiffs hoped their case was distinguishable since it claimed money damages instead. In 2012, however, the Ninth Circuit dismissed the *Kivalina* case, holding that the same rationale of displacement in the *Connecticut* case applies to money damages as well.<sup>40</sup> Finally, in the very end of the 2012-2103 term, the Supreme Court denial of the Village of *Kivalina's* petition for certiorari effectively ended the case's storied history.<sup>41</sup>

Although federal common law for greenhouse gas nuisance claims has been displaced by federal regulation, there continues to be the

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<sup>34</sup> *Id.*

<sup>35</sup> *Am. Elec. Power Co. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>36</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531 (2011).

<sup>37</sup> *See id.* at 2537.

<sup>38</sup> Burkett, *supra* note 9, at 825.

<sup>39</sup> By contrast, *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), was an administrative law case regarding statutory construction and agency obligations.

<sup>40</sup> *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 858 (9th Cir. 2012).

<sup>41</sup> *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (May 20, 2013) (No. 12-1072).

possibility of a state common law cause of action.<sup>42</sup> Such a claim was appended to the *Connecticut* case, but the Supreme Court explicitly declined the opportunity to address whether it could survive. The Connecticut plaintiffs chose not to pursue this claim. Other plaintiffs may press such a claim, but these or any similar claims face many significant hurdles.

### C. LESSONS FROM THE NUISANCE LAWSUITS

Collectively, the four cases discussed above all foundered on a threshold barrier: separation of powers. Each of the cases has turned on some variation of this constitutional issue. Whether sounding in political question or displacement, the issue remains: whose job is it to decide how much GHG emissions are too much? These cases found that the Congress gave that job to EPA and that the courts therefore are without this power.

None of these cases progressed beyond that foundational point. There was never any discovery or judicial fact-finding in any of these cases. Presuming further advancement is even possible, it will likely be met with an onslaught of additional obstacles. There would be a question of whether the particular injury suffered is really attributable to climate change, a very difficult and technical issue.<sup>43</sup> In the case of *Kivalina*, this connection was easier to argue. An Army Corps of Engineers analysis concluded that the melting ice was directly related to a changing climate.<sup>44</sup> Contrast this with *Comer*, where the plaintiffs would have had the difficult task of proving that Hurricane Katrina struck with a force augmented by global warming.

There is also the issue of how the law and courts should account for the long time scales of climate change. GHGs may reside in the atmosphere for a century or longer and, by their nature, spread rapidly and evenly across the globe. The gasses residing in our atmosphere today are the culmination of more than a century's worldwide pollution from many countries. Unclear authority, common harm, long time spans separating the injuries from the emission, and multiple emitters of varying sizes all coalesce to show the difficulty the law has in attaching any single liability to one particular defendant. As in *Kivalina*, additional defendants would almost certainly be continuously joined in the litigation, resulting in a potentially unlimited number of parties.

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<sup>42</sup> See Burkett, *supra* note 9, at 842 n.143.

<sup>43</sup> See Burkett, *supra* note 9, at 828-29. See generally Michael B. Gerrard, *What Litigation of a Climate Nuisance Suit Might Look Like*, 121 YALE L.J. ONLINE 135 (2011).

<sup>44</sup> ALASKA DIST., U.S. ARMY CORPS OF ENG'RS, ALASKA VILLAGE EROSION TECHNICAL ASSISTANCE PROGRAM 4-5, 23 (2006), available at [housemajority.org/coms/cli/AVETA\\_Report.pdf](http://housemajority.org/coms/cli/AVETA_Report.pdf).

Additional hard questions arise from jurisdictional issues. How does a U.S. court get personal jurisdiction over all emitting parties, many of which are outside the United States? What about a state court? What is the capacity for a state court in Mississippi to bring in the Chinese electric power companies emitting CO<sub>2</sub>? If admitted, what are the mechanisms for enforcing the judgment? What set of laws apply? Would the laws of the jurisdiction where the injury occurred prevail? Or rather the law where the offending power plant is located? If the parent company owns plants in several states, is it the law of each state that applies?

And finally, what is the federal government's role in such litigation? The construction and use of coal-fired power plants, the use of motor vehicles, and other practices that would emit greenhouse gasses have all been a matter of United States government policy for decades. The government subsidizes these activities, issues permits, builds interstate highway systems, and leases federal lands for coal mining and oil drilling. These greenhouse gas emitters are a central part of the economy, and certainly the historical emissions were all blessed by the government at some point, as evinced by the issued permits.

There is also a conceptual problem with liability concerning the supply chain. The use of electricity generated from coal requires one party to mine coal, one to transport it, another to burn it for electricity, a utility to deliver that power, and finally a consumer to use the electricity. Where along that supply chain does liability attach? The same issue arises with car emissions. Somebody drills the oil, somebody else refines it and another, or perhaps the same company, transports it to gas stations, where people individually put it in their cars. In addition to this supply chain, cars are also made by various manufacturers, and still additional people drive them. Every one of these activities is lawful, and many government policies and expenditures encourage them. Finally, is every injured community going to bring its own lawsuit for individual adjudication of these issues? All of these obstacles and more will need to be considered if any of these cases are to proceed.

A separate line of cases was launched in 2011 by a non-profit group called Our Children's Trust. These cases were all founded on the common law doctrine of the public trust, in which certain features of the natural world are held by the government in a public trust, and the government is obligated to protect them, at least unless the relevant legislature takes a different view. This doctrine had long been applied to certain coastal waters, and in some jurisdictions to parkland. The 2011 cases sought to extend it to the atmosphere. The lawsuits were brought against state and federal governments, and sought court orders that these governments adopt and enforce plans to reduce GHG emissions so that the atmosphere is preserved.

None of these cases has succeeded. The one that got furthest was in Texas, where a judge found in July 2012 that a provision of the Texas

constitution did include the atmosphere in the public trust; but less than a month later the judge said that it was not the court's role to intrude on the legislature's decisions as to environmental policy.<sup>45</sup> The other cases were dismissed on the grounds that the public trust doctrine does not extend to the atmosphere, or that the doctrine of separation of powers does not allow the courts to make policy decisions of the sort requested.<sup>46</sup>

#### D. THE FUTURE OF CLIMATE LITIGATION

So what is the future of climate litigation? Despite the failure of common law tort and public trust litigation against GHG emitters, from an alternate perspective one can argue that climate litigation has been extremely effective. Lawyers are struggling to find appropriate roles for the courts in this difficult debate, where the legal apparatus was not even previously engaged. While the claims attaching direct liability have recently subsided, the legitimacy of climate change as a legal and regulatory concern has been strengthened. In reviewing EPA actions regulating GHGs under the Clean Air Act, the courts have strongly reaffirmed the legitimacy of EPA's role in the face of strong challenges from industry and from states that oppose climate regulation.<sup>47</sup> Further EPA and state regulatory actions will surely be challenged in court by the same forces, but the battles will concern administrative procedures and statutory minutiae and not the underlying rationale behind protecting the climate.

It is likely that we will soon see a new phase litigation over climate change liability -- responsibility for adaptation to the effects of climate change, such as sea level rise. This kind of litigation has a much greater potential for success than common law litigation against GHG emitters, and will involve a much different set of defendants.

Perhaps the story of the Mississippi River Gulf Outlet, or MRGO, points the way to climate litigation's next phase. At issue in the case is a channel that was constructed by the Army Corps of Engineers to facilitate maritime travel to the Port of New Orleans, enabling passage so that ships

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<sup>45</sup> *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 2946041, at \*1 (D. Tex. July 9, 2012); *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561, at \*1 (D. Tex. Aug. 2, 2012).

<sup>46</sup> *See, e.g., Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012); *Barhaugh v. State*, 264 P.3d 518 (Mont. 2011).

<sup>47</sup> *E.g., Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir.), *reh'g denied*, 2012 WL 6621785, and *reh'g en banc denied*, 2012 WL 6681996 (D.C. Cir. 2012), *cert. granted sub nom, Utility Air Regulatory Group v. EPA*, 134 S.Ct. 418 (2013).

could enter from the Gulf of Mexico without having to navigate through the circuitous Mississippi River. When Hurricane Katrina came ashore, however, the impact revealed that the Army Corps of Engineers had done a very poor job of maintaining MRGO. Consequently, the channel had become much larger. This widened channel facilitated the rapid delivery of massive quantities of water, which overwhelmed dikes and levees in New Orleans, and augmented the damage caused during the hurricane.

*In Re: Katrina Canal Breaches Litigation*<sup>48</sup> constituted the numerous resulting lawsuits brought by homeowners and other parties whose property had been damaged by the breaches of those levees.<sup>49</sup> According to a federal statute, flooding related to flood control projects cannot be the basis of liability, but liability may attach to other projects, including navigation projects. Thus, when trial was held in the District Court of New Orleans on behalf of bellwether plaintiffs, the first question asked was whether MRGO was a flood control project, or a navigation project. The Court made a preliminary finding that MRGO was a navigation project, and not a flood control project. The next question at issue was whether this suit fell under the discretionary function exemption in Federal Tort Claims Act, which provided immunity from liability. The Court again found in favor of the plaintiffs, holding that this was not a discretionary function case; the Army Corps of Engineers did not make a policy choice not to maintain the canal adequately, but rather did so out of negligence.

The National Environmental Policy Act had obligated the Army Corps of Engineers to update the environmental impact statement for MRGO to reflect significant new conditions, and their failure to do so constituted a breach of duty. The District Court awarded \$750,000 in damages to the five bellwether plaintiffs. With thousands or tens of thousands of similarly situated plaintiffs, this could easily amount to billions of dollars, and the Army Corps of Engineers appealed. The Fifth Circuit affirmed, allowing the lawsuit to proceed.

This decision opened up a completely new avenue of liability litigation against the providers of infrastructure, as well as the designers and builders of structures that do not withstand foreseeable events. When the Army Corps of Engineers moved for an en banc hearing, though, the Fifth Circuit reversed itself, treating the motion as a rehearing and unanimously changing the disposition. With barely an acknowledgement or explanation, the three members of the original panel issued a decision

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<sup>48</sup> 696 F.3d 436 (5th Cir. 2012), *cert. denied sub nom.* Latimore v. United States, 133 S. Ct. 2855 (2013) (mem.).

<sup>49</sup> Robert R.M. Verchick & Joel D. Scheraga, *Protecting the Coast, in THE LAW OF ADAPTATION TO CLIMATE CHANGE* 235, 247 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

holding the exact opposite of their previous decision on the issue of sovereign immunity. Following the *Comer* case, this next internal reversal of the Fifth Circuit only generated more curiosity. The Supreme Court denied the writ of certiorari challenging the Fifth Circuit's decision on June 24, 2013.<sup>50</sup>

Although this case has presently exited the legal stage, it has successfully created an air of credibility concerning the liability for infrastructure providers and building designers. In contrast to the long list of difficulties and obstacles that pertain to the common law nuisance cases, there is a much shorter list for this type of liability litigation. These cases are not against greenhouse gas emitters, and thus do not depend on a showing that any particular event was caused by greenhouse gas emissions or by any party in particular. Here, the burden of proof pertains merely to whether this kind of weather event was foreseeable to the builders or designers of infrastructure, and whether they had a duty to take precautions.

For governmental defendants, there will still be a sovereign immunity issue. Every state has its own tort claims act and every state has its own way of interpreting the discretionary function exemption. Therefore, much to the disappointment of private architects, engineers, builders and so forth, it remains to be seen on an individual basis how each state will resolve the issue. There also remains the question of who has the ability to sue, that is to say, who owes a duty to whom. But despite these issues, this remains an area ripe to become a major and growing subject of litigation, and where there is litigation, there are, of course, claims for insurance coverage.

In closing, climate change will remain a motivation for litigation in our court system. Through *Mass. v. EPA* and many state and municipal actions, climate change has gained legitimacy as a source of harm and a cause of action. In this next phase of our evolving, societal reckoning with our changing world, litigation will surely focus on the responsibility of public and private parties to adapt to our new normal, the realities of a climate changing world.

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<sup>50</sup> *In re Katrina Canal Breaches Litig.*, 696 F.3d 436 (5th Cir. 2012), *cert. denied sub nom. Latimore v. United States*, 133 S. Ct. 2855 (2013) (mem.). See also Willis Hon, Field Report, *5th Circuit Reverses Itself on Hurricane Katrina Liability Lawsuit*, COLUM. J. ENVTL. L., (2013).