ARNOLD & PORTER LLP

Evolving Climate Change Regulations: Strategies for Reducing Corporate Risks and Liabilities

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International and National Context

United Nations Framework Convention on Climate Change

October 1992
Ratified by U.S. Senate and signed by President George H.W. Bush

Objective: "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system"

1994
came into force

Kyoto Protocol

- **Negotiated in 1997**
- **Sets binding emissions limitations on developed countries**
  - Percentage reductions from 1990 baseline for each country
  - U.S. figure: 7% below 1990 baseline
  - To be met 2008–2012
  - Covers carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride
- **Flexibility mechanisms**
  - Emission trading among developed country signatories
  - Clean Development Mechanism
  - Joint Implementation

U.S. refusal to ratify Kyoto Protocol

1997

Byrd-Hagel Resolution opposing ratification unless developing countries must also reduce emissions

March 2001

President George W. Bush repudiates Kyoto

Current status of Kyoto Protocol

- Goes into force in 2005 when Russia ratifies
- Australia ratified in December 2007, leaving U.S. as only major industrialized country not ratifying
- European Trading System

Post-2012 negotiations

U.S. Actions

- **Emissions reporting**
  - Consolidated Appropriations Act for 2008 directs EPA to enact regulation by mid-2010 for mandatory reporting of GHG emissions
- **Voluntary emissions reductions programs**
  - Industry-specific
  - Asia-Pacific Partnership on clean Development and Climate
- **Energy production and conservation incentives**
- **Technological development**

Congress

Energy Independence and Security Act of 2007
Signed by President Bush on December 19, 2007

- **Increased fuel economy standards — 35 mpg by 2020**
- **Renewable fuel standard — fuel producers must use at least 36 billion gallons of biofuel by 2022 (5x current levels)**
- **Biofuels R&D, infrastructure**
- **Energy efficiency in appliances, lighting, buildings**
- **Development of coal technologies**

Emergency Economic Stabilization Act of 2008

Signed by President Bush on October 3, 2008

- Energy production incentives
  - Renewable energy credit
  - Energy credit for small wind property
  - Energy credit for geothermal heat pump systems
  - Credit for residential energy efficient property
  - New clean renewable energy bonds
- Carbon mitigation and coal provisions
  - Advanced coal project investment credit
  - Coal gasification investment credit
  - Tax credit for carbon dioxide sequestration
- Transportation and domestic fuel security provisions
  - Credits for biodiesel and renewable diesel
  - New qualified plug-in electric drive motor vehicles
  - Alternative fuel vehicle refueling property credit
- Energy conservation and efficiency provisions
  - Qualified energy conservation bonds
  - Energy efficient commercial buildings deduction
  - New energy efficient home credit
  - Qualified green building and sustainable design projects

Lieberman-Warner Climate Security Act, S.2191

Status: Debated on floor of U.S. Senate, June 2008
Both McCain and Obama support cap-and-trade legislation

Cap and trade

- Open issues:
- Caps: targets, timing
- Sectors covered
- Point of regulation (upstream, downstream)
- Allowances
  - Free or auctioned?
  - Use of proceeds
- Eligible offsets
- Safety valves

Lieberman-Warner Climate Security Act, S.2191

Other open issues:

- Preemption
- Role of coal, biomass, nuclear
- Other pollutants
- Role of carbon capture and storage
- Securities disclosure

Not: Carbon tax or performance standards

Transition Issues

- Integration with Post-2012 Kyoto scheme
- Role of China and India
- Role of regional and state efforts
- Credit for early reductions
- Status of new fossil fuel facilities

Pending federal actions

- Federal Trade Commission proceeding on offset claims
- Pending petitions
  - Endangered Species Act
  - Clean Water Act: ocean acidification
  - Securities and Exchange Commission disclosure
  - GHG emissions from aircraft
  - GHG emissions from ships
- Clean Air Act

REGIONAL GREENHOUSE GAS INITIATIVE

CURRENT MEMBERS

- Connecticut
- Delaware
- Maine
- Maryland
- Massachusetts
- New Hampshire
- New Jersey
- New York
- Rhode Island
- Vermont

COMBINED

- Sixth in world for volume of GHG emissions
- After US, Japan, Germany, Canada, UK

INITIAL IMPLEMENTATION

- CO_2 only
- Electric power plants > 25 MW only

MODEL RULE	August 2006
IMPLEMENTATION BEGINS	January 2009

REDUCTION TARGETS

2009-2015	Current levels
By 2019	10% reduction

- **Cap and trade system**
  - First mandatory CO_2 mitigation trading system in U.S.
  - First auction: September 25, 2008 -- $3.07 per allowance
- **Allowable offset projects**
  - Landfill methane capture and destruction
  - Reduction in emissions of sulfur hexafluoride
  - Sequestration of carbon due to afforestation
  - Reduction or avoidance of CO2 emissions from natural gas, oil, or propone end-use combustion due to end-use energy efficiency
  - Avoided methane emissions from agricultural and manure management operations
  - Anywhere in U.S., with agreements with other states

WESTERN CLIMATE INITIATIVE

CURRENT MEMBERS

- Arizona
- California
- Montana
- New Mexico
- Oregon
- Utah
- Washington
- British Columbia
- Manitoba
- Ontario
- Quebec

COVERAGE

- CO2, methane, nitrous oxide, HFCs, PFCs, sulfur hexafluoride
- Electricity generation (including imported)
- Combustion at industrial and commercial facilities
- Industrial process emission sources
- Residential, commercial, and industrial fuel combustion
- Transportation fuel combustion from gasoline and diesel

PRIORITY OFFSET PROJECTS

- Agriculture (soil sequestration and manure management)
- Forestry (afforestation/reforestation, forest management, forest preservation/conservation, forest products)
- Waste management (landfill gas, wastewater management)

DESIGN RECOMMENDATIONS	September 2008
IMPLEMENTATION BEGINS	2012

MIDWESTERN GREENHOUSE GAS ACCORD
November 15, 2007

CURRENT MEMBERS ▪ Illinois ▪ Iowa ▪ Kansas	▪ Michigan ▪ Minnesota ▪ Wisconsin ▪ Manitoba, Canada
OBSERVERS ▪ Indiana ▪ Ohio ▪ South Dakota	
INITIAL IMPLEMENTATION ▪ GHG reduction targets and timeframes to be established ▪ Cap-and-trade system ▪ Climate Registry	
MODEL RULE	November 2008
IMPLEMENTATION BEGINS	May 2010

Other State Actions

- State-wide limits on GHG emissions
- Inventory and reporting requirements
- Renewable portfolio standards
- Energy efficiency standards for appliances
- Green building standards for government buildings
- Adoption of California vehicle standards
- Litigation against EPA, emitters

California Global Warming Solutions Act

- Adopted September 2006
- Addresses all sectors, pollutants
- Target: Achieve 1990 levels by 2020
- Implementation details left to California Air Resources Board

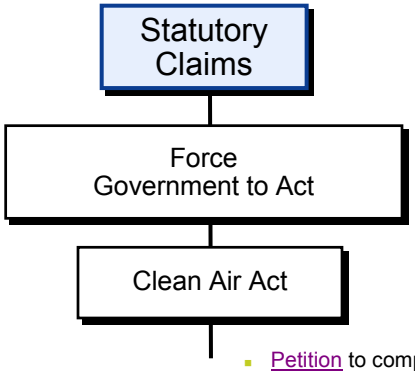
New Jersey Global Warming Response Act

- Passed by NJ Legislature June 21, 2007
- Achieve 1990 levels by 2020
- Achieve 20% of 2006 levels by 2050
- NJ DEP to design compliance measures

Municipal Programs

- U.S. Mayors Climate Protection Agreement
- Green buildings
- Vehicle fleets
- Solid waste landfills
- Sewage treatment plants

CLIMATE CHANGE LITIGATION IN THE U.S.



- *Massachusetts v. Whitman* No. 3:03CV984 (D. Conn. 2003) (voluntarily dismissed)
- *New York v. EPA* No. 06-1322 (D.C. Cir. 2006)
- *Coke Oven Environmental Task Force v. EPA* No. 06-1131 (D.C. Cir. 2006) (consol. With NY v. EPA) (settled April 2008)
- *Massachusetts v. EPA* 127 S. Ct. 1438 (2007)
- *Massachusetts v. EPA (II)* (D.C. Cir. June 2008)
- California Attorney General petition to EPA to regulate GHG emissions from ocean going vessels in U.S. waters (2007)
- Petitions to EPA by nonprofit groups to set pollution rules for ocean-going vessels in U.S. waters (2007)
- Cal. South Coast Air Quality Man. District petition to EPA requesting GHG emissions limits for ocean going vessels (2008)

- Petition to compel EPA to make decision whether to regulate GHG emission (D.C. Cir. 2008)
- EPA decision denying California waiver request
- *California v. EPA* petition concerning denial of waiver request (9th Cir. 2008) (motion to dismiss denied April 2008) (motion to dismiss granted July 2008)
- California Attorney General petition to EPA to regulate GHG emissions of aircrafts (Dec. 2007)
- California Attorney General petition to EPA to regulate GHG emissions from construction and industrial equipment (Jan. 2008)
- *Pacific Merchant Shipping Assoc. v. Goldstene* (9th Cir. 2008) (not CO2)
- EPA's Advance Notice of Proposed Rulemaking Regarding GHG Regulations (July 2008)
- Notice of intent to sue EPA for failing to regulate GHG emissions from aircraft, oceangoing vessels and other equipment (July 2008)
- *New York v. EPA* (D.C. Cir., filed Aug. 2008)

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CLIMATE CHANGE LITIGATION IN THE U.S.

Statutory Claims

Force Government to Act

Other Statutes

ESA/MMPA

- *Cntr. for Bio. Div. v. Kempthorne* (trans. Alaska, 2007)
- *Cntr. for Bio. Div. v. Kempthorne*, (N.D. Cal. Dec. 2007)
- *NRDC v. Kempthorne* (E.D. Cal. 2007)
- *Pac. Coast Fed. of Fisherman's Ass'ns v. Gutierrez* (E.D. Cal. April 2008)
- Petitions to list species under ESA and related litigation

Clean Water Act

- Center for Bio. Diversity petitions asking 10 states to declare coastal waters "impaired" (2007)
- Center for Bio. Diversity petition to EPA regarding pH standard (2007)

Global Change Research Act

- *Center for Bio. Diversity v. Brennan* (N.D. Cal. 2007)

Freedom of Info. Act

- *Citizens for Resp. and Ethics in Washington v. Council on Env. Quality* No. 1:07CV00365 (D. D.C. 2007)
- *Center for Bio. Diversity v. Office of Management and Budget* (N.D. Cal. 2008)

Adm. Procedure Act

- *Natural Resources Defense Council v. Mineta* (S.D.N.Y. 2005)

Energy Policy Act

- *Center for Bio. Diversity v. Abraham* (N.D. Cal. 2002)
- *State of New York v. U.S. Dept. of Energy* (2d Cir. 2008)

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CLIMATE CHANGE LITIGATION IN THE U.S.

Statutory Claims

Stop Government Action

Coal-Fired Power Plant Challenges

- *Montana Env. Info. Center v. Johanns* (D. D.C., filed 2007)
- *Groce v. Pa. Dept of Env. Protection* (Pa. Comm. Ct. April 2007)
- *Dean v. Kansas Dept. of Health and Env.* (filed May 2007)
- In re Florida Power & Light (Fl. Public Service Comm. June 2007)
- *Sierra Club v. EPA* (7th Cir., filed Aug. '07) (dismissed Sept. '07; rehearing denied Oct. '07)
- In re ConocoPhillips (EPA Env. App. Bd., rev. denied June 2008)
- Kansas Dept. of Health & Env. denial of air quality permits (Oct. 2007)
- *Sunflower v. Kan. Dept. of Health & Env.* (Kan. Sup. Ct., filed 2008) (dismsd July 2008)
- *SF Chptr of A. Phillip Randolph Inst. v. EPA* (N.D. Cal. March 28, 2008)
- *Friends of the Chattahoochee, Inc. v. GA Dept. of Nat. Resources* (Jan. 2008)
- *In re Otter Tail Power Co.* (S. Dakota Sup. Ct. Jan. 2008)
- In re Sevier Power Co. Power Plant (Utah Air Quality Bd. Jan. 2008)
- Mt. Env. Info. Center v. Mt. Dept. of Energy (Mt. Bd. of Env. Rev. Jan. 2008)
- In re Christian Co. Generation, LLC (EPA Env. Appeals Bd. Jan. 2008)
- In re Deseret Power Electric Cooperative (EPA Env. Appeals Bd, filed Oct. 2007)
- *Citizens for Env. Inquiry v. DEQ* (Mich. Cir. Ct., filed Jan. 2008)

Project Challenges

- Sierra Club v. Duke Energy Indiana (Indiana Office of Env. Adj., filed Feb. 2008)
- *Sierra Club v. Wellington Dev.-WVDT LLC* (W.D. Pa., filed Feb. 27, 2008)
- *Appalachian Voices v. Bodman* (D.D.C. filed March 3, 2008)
- S. Env. L. Cntr v. N.C. Div. of Air Qlty, (N.C. Off. of Adm. Hear., filed March 2008).
- In re Appalachian Power Co. (Va. Corp. Comm., April 2008)
- *Desert Rock Energy Co. and Dine Power Auth. v. EPA* (S.D. Tex., filed 2008)
- *Friends of the Chattahoochee, Inc v. GA Dept. of Nat. Res.* (June 2008)
- *Mont. Env. Info. Center v. Mont. DEQ* (Mt. Dist. Ct., filed June 2008)
- *Sierra Club v. USDA Rural Util. Serv.* (D.D.C.) (motion to dsms denied July '08)
- *S. Env. L. Cntr. v. Vir. DEQ* (Richmond Cir. Ct. July 2008)
- *South. All. for Clean Ene. v. Duke Energy Carolinas, Inc.* (W.D.N.C., filed Aug. 08)
- In re Desert Rock Energy Co. LLC (EPA Env. Appeals Bd, filed Aug. 2008)
- *Longleaf Ene. v. Friends of the Chattahoochee* (Ga. Ct. App., filed Aug. 08)
- *Sierra Club v. EPA* (11th Cir. 2008)

Other Challenges

- *Northwest Environmental Def. Center v. Owens Corning Corp.* 434 F. Supp.2d 957 (D. Ore. 2006)
- *Montana Environmental Information Center v. Montana DEQ & Bull Mountain Development* (filed June 2007)

For detailed legal analysis, see Global Climate Change and U.S. Law (ABA 2007)

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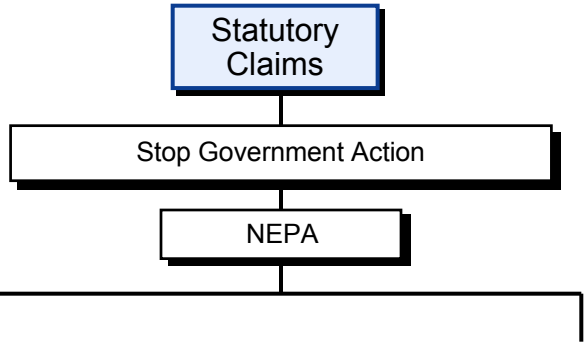

- *City of Los Angeles v. NHTSA* 912 F.2d 478 (D.C. Cir. 1990)
- *Found. on Econ. Trends v. Watkins* 794 F. Supp. 395 (D.D.C. 1992)
- *Seattle Audubon Soc. v. Lyons* 871 F. Supp. 1291 (W.D. Wash. 1994)
- *APAC, Inc. v. Bonneville Power Adm.* 126 F.3d 1158 (9th Cir. 1997)
- Council on Env. Quality Draft Memo on Climate Change (October 1997)
- *Border Power Plant Working Group v. Dept. of Energy* 260 F. Supp.2d 997 (S.D. Cal. 2003)
- *Mid States Coalition for Progress v. Surface Transportation Board* 345 F.3d 520 (8th Cir. 2003)
- *Senville v. Peters*, 327 F. Supp. 335 (D. Vt. 2004)
- *Friends of the Earth v. Watson* (N.D. Cal. 2005)
- *National Audubon Society v. Kempthorne* (D. Alaska 2006)
- *NW Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125 (9th Cir. 2006)
- *Mayo Found. v. Surface Transportation Board* 472 F.3d 545 (8th Cir. 2006)
- *Center for Bio. Diversity v. U.S. Dept. of Interior*, No. 07-1247 (D.C. Cir., filed July 2007)
- *Friends of the Earth v. Mosbacher* 488 F. Supp.2d 889 (N.D. Cal. 2007), Interlocutory appeal denied (Sept. 2007)
- *North Slope Borough v. Minerals Mgm't Service* 2007 WL 1106110 (D. Alaska 2007)
- *Izaak Walton League of America v. Kimbell* 516 F. Supp.2d 982 (D. Minn. 2007)
- *Ranchers Cattlemen Action LF v. Connor*, No. 07-Civ.-01023 (D. S.D., filed Oct. 2007)
- *Audubon v. Department of Transportation* 2007 WL 3299255 (D. Md. 2007)
- *Center for Bio. Diversity v. NHTSA* 508 F.3d 508 (9th Cir. 2007)
- Petition to CEQ to Include Climate Change Analysis In Env. Review Documents (Feb. 2008)
- *Center for Bio. Diversity v. NHTSA* No. 06-71891 (9th Cir. 2008)

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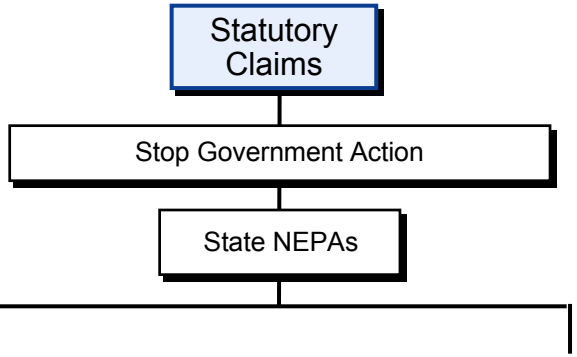

- *GM Corp. v. California Air Resources Board* 05-02787 (Cal. Sup. Ct. 2005)
- *State of California v. County of San Bernardino* No. CIV-5507-00329 (Cal. Super. Ct. 2007) (settled)
- *NRDC v. State Reclamation Bd.* No. 06 CS 01228 (Cal. Super. Ct. April 2007)
- *Center for Bio. Diversity v. City of Banning* No. INC 06848 (Riverside Co. Sup. Ct. 2006)
- *Minn. Center for Env. Advocacy v. Hudson* No. 31-CV-07-338 (Dist. Ct. Itasca Co. 2007)
- *Am. Canyon Comm. United for Resp. Growth v. City of Am. Canyon* (Napa. Co. Sup. Ct. 2007)
- *Santa Clarita Oak Conservatory v. City of Santa Clara* (L.A. Co. Sup. Ct. Aug. 2007)
- California Attorney General GHG-related CEQA materials
- Settlement concerning ConocoPhillips Clean Fuels expansion project in Contra Costa Co. (2007)
- Cal. Attorney General agreement with Los Angeles concerning GHG emissions from port (Dec. 2007)
- *Highland Springs v. City of Banning* (Riverside Co. Sup. Ct. Jan. 2008)
- Settlement concerning ConocoPhillips Clean Fuel Expansion Project in Contra Costa Co. (2007)
- Cal. Attorney General agreement with S.D. Airport to reduce GHG emissions (May 2008).
- *Env. Council of Sacramento v. Cal. Dept. of Transportation* (Sac. Co. Sup. Ct. July 2008)
- *NRDC v. South Coast Air Quality Management Dist.* (L.A. Co. Sup. Ct. July 2008)
- *El Charro Vista v. City of Livermore* (Alamada Co. Sup. Ct. July 2008)
- *Center for Bio. Diversity v. City of Desert Hot Springs* (Riverside Co. Sup. Ct. August 2008).
- Cal. Attorney General agreement with City of Stockton to curb GHG emissions (Sept. 2008)
- *Communities for a Better Env. v. City of Richmond* (Contra Costa Co. Sup. Ct. , filed Sept. 2008)

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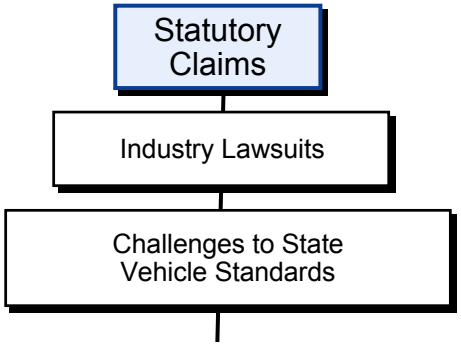

- *Green Mountain Chrysler v. Torti*
  No. 05-CV-302 (D. Vt. 2005)
- *Green Mountain Chrysler v. Crombie*
  2007 WL 2669444 (D. Vt. 2007) (dismissed) (appeal pending)
- *Central Valley Chrysler v. Goldstone*
  (E.D. Cal. Dec. 2007)
- *Central Valley Chrysler v. Goldstone*
  (E.D. Cal. June 2008)
- *Association of International Auto. Manufacturers v. Sullivan*
  No. 1:06-CV-00069 (D.R.I. 2006)
- *Lincoln Dodge, Inc. v. Sullivan*
  2007 WL 4577377 (D. R.I. 2007)
- *Zangara Dodge, Inc. v. Curry*, No. 1:07-CV-01305 (D.N.M., filed Dec. 2007)

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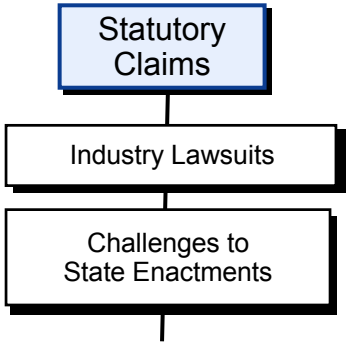

- *In re Quantification of Environmental Costs*
  578 N.W.2d 794 (Minn. Ct. App. 1998)
- *Alliance of Auto. Manufacturers v. Sheehan*
  No 4757/05 (Sup. Ct. N.Y. Co. 2005) (withdrawn)

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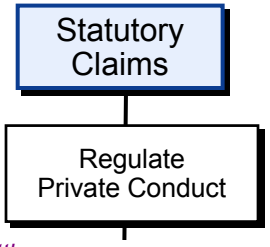

- *Okeson v. City of Seattle*
  50 P.2d 556 (Wash. 2007)
- *International Finance Corp. v. Korat*
  No. 07-5451 (S.D.N.Y. 2007)
- New York Attorney General subpoenas to coal utilities concerning disclosure of climate risks in SEC filings (Sept. 2007)
- Environmental Defense petition to Securities and Exchange Commission to require companies to disclose climate risk information (Sept. 2007)
- Free Enterprise Action Fund petition to Securities and Exchange Commission to require companies to disclose business risks of laws and regulations intended to address global warming (Oct. 2007)
- GE request to SEC to omit shareholder proposal to prepare global warming report for its 2008 annual shareholders meeting (denied by SEC 2008)
- New York AG Settlement With Xcel Energy concerning disclosure of climate risks in SEC filings (Aug. 2008)

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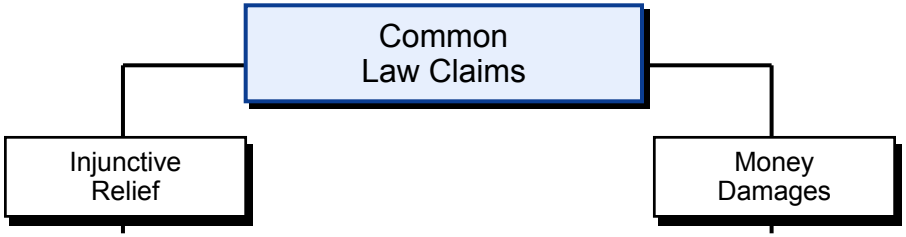

- *Connecticut v. American Electric Power* 406 F. Supp.2d 265 (S.D.N.Y. 2005) (dismissed) (appeal pending)
- *Korsinsky v. EPA* 2005 WL 2414744 (S.D.N.Y. 2005) (dismissed) Aff'd 2006 WL 2334976 (2d Cir. 2006)

- *Comer v. Murphy Oil USA, Inc.* No. 1:05-CV-436 (S.D. Miss. 2006) (dismissed August 2007) (appeal pending; oral argument scheduled for August 2008)
- *California v. GM Corp.* No. 3:06-CV-05755 (N.D. Cal. 2006) (dismissed Sept. 2007) (appeal pending)
- *Native Village of Kivalina v. ExxonMobil Corp.*, 08-CV-1138 (N.D. Cal. Feb. 2008)

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CLIMATE CHANGE LITIGATION IN THE U.S.

Public International Law Claims

- Inuit petition to Inter-American Commission on Human Rights
- Petitions to the World Heritage Committee
- United Nations Human Rights Council Resolution to Study Impact of Climate Change on Human Rights (March 2008)

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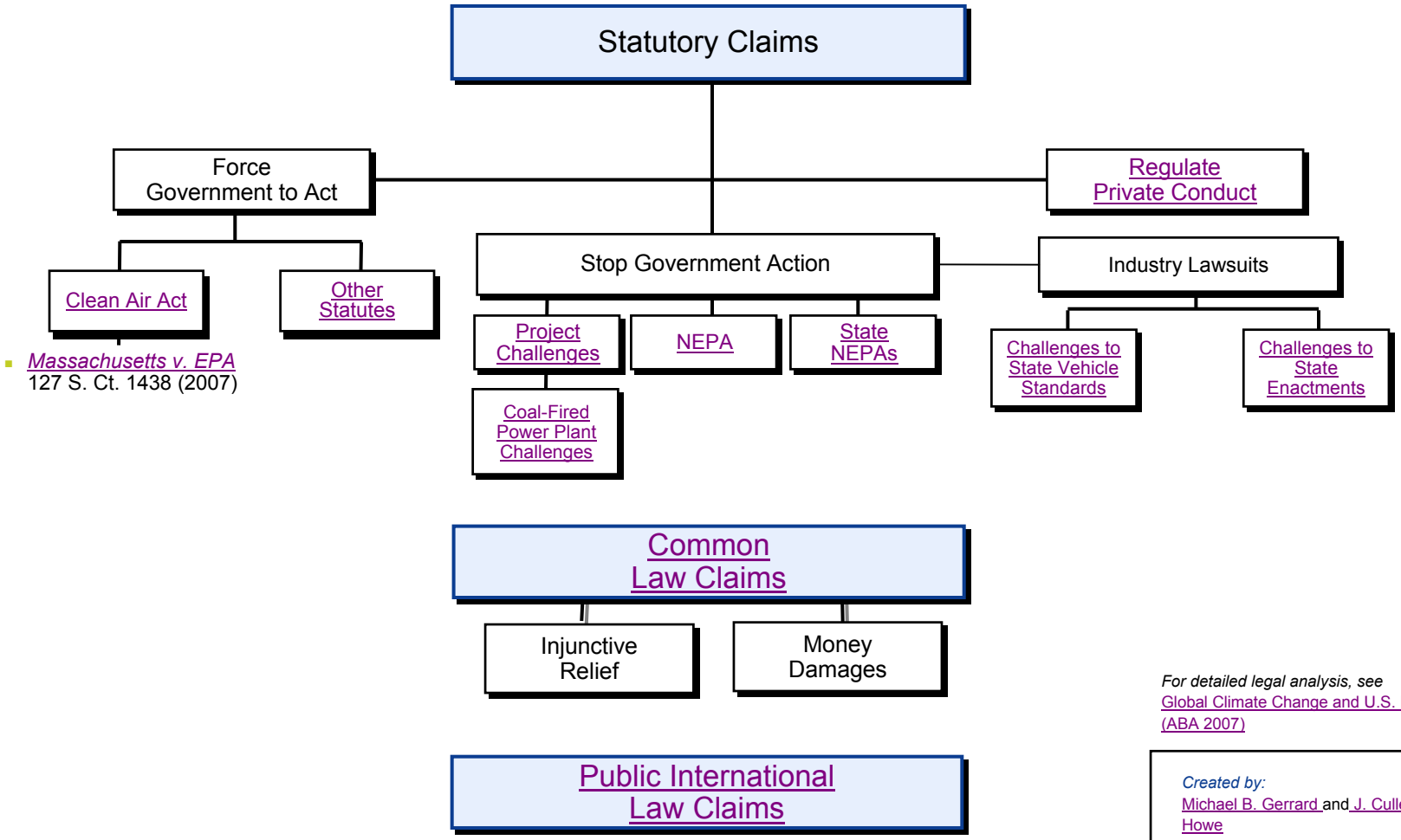

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