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Greenhouse Gas Litigation Seminar

(Tort, NEPA, Little NEPA, and Securities Disclosures Litigation Segments)

March 3, 2009

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Greenhouse Gas Tort Litigation

- *Connecticut v. American Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissed on political question grounds; appeal pending)
- *California v. General Motors,* No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (dismissed on political question grounds; appeal pending)
- *Comer v. Murphy Oil*, No. 05-CV-436 *(*S.D. Miss. Aug. 30, 2007) (dismissed due to lack of standing and on political question grounds; appeal pending)
- *Native Village of Kivalina v. Exxon Mobil* (N.D. Cal. filed Feb. 26, 2008) (motions to dismiss pending)
  - Related insurance case – *Steadfast Ins. Co. v. The AES Corp.*, No. 08-258 (Va. Cir. Ct. - Arlington filed July 9, 2008)

GHG Tort Litigation – Legal Theories

- Public and Private Nuisance under Federal Common Law and State Law
- Trespass
- Negligence
- Product Liability
- Civil Conspiracy
- Fraud

GHG Tort Litigation - Defenses

- Lack of standing
- Lack of causation
- Non-justiciable political question
- No federal common law for public nuisance

Connecticut v. American Elec. Power, 406 F. Supp. 2d 265 (S.D.N.Y. 2005)

- States and non-profit land trusts sued electric utilities for their contribution to global warming.
  - Plaintiffs sought cap on emissions and mandated annual reductions.
- Cause of Action: public nuisance (under federal common law or state law)
- Dismissed on political question doctrine grounds
  - Impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.
- Appeal pending

California v. General Motors, 2007 WL 2726871, (N.D. Cal. Sept. 17, 2007)

- California sought damages against auto companies for contributing to climate change.
- Causes of Action:
  - Public nuisance under federal common law
  - Public nuisance under CA law
- Dismissed on political question doctrine grounds
  - Requires initial policy termination of a kind clearly for nonjudicial discretion
  - Textually demonstrable Constitutional commitment to the political branches
  - Lack of judicially discoverable or manageable standards
- Appeal pending

Comer v. Murphy Oil, No. 05-CV-436 (S.D. Miss. Aug. 30, 2007)

- Third Amended Complaint: Mississippi residents claimed oil and gas companies' GHG emissions contributed to global warming, thereby intensified Hurricane Katrina, and resulted in damages to plaintiffs.
- Causes of Action included:
  - negligence, nuisance (public and private), trespass, fraudulent misrepresentation, civil conspiracy
  - Plaintiffs sought punitive damages for gross negligence
- Dismissed due to lack of standing and on political question doctrine grounds (appeal pending)

Native Village of Kivalina v. Exxon Mobil, et al. (N.D. Cal.)

- Alaskan coastal village seeks damages from oil, coal & electric utility companies for their alleged contributions to climate change.
- Causes of Action:
  - Federal Common Law Public Nuisance
  - State Law: Public and Private Nuisance
  - Civil Conspiracy
  - Concert of Action

Native Village of Kivalina v. Exxon Mobil, et al. (N.D. Cal.)

- Motions to Dismiss - Highlights
  - Lack of standing
    - Injuries too remote attenuated to support Article III causation
    - Impermissibly relies on speculation
  - Political question doctrine
  - Federal common law nuisance displaced
  - Preemption
  - Lack of causation
  - Failure to state a claim for civil conspiracy or concert of action
    - not an independent cause of action / no underlying tort

Future of GHG Tort Litigation

- Future of the political question doctrine defense in GHG litigation?
- Will causation be the death knell?
  - Use of product liability theories – e.g. market share theory?
  - Stronger evidence of conspiracy and fraudulent concealment?
- Lingering standing issues

Global Warming and NEPA

- Federal Level - National Environmental Policy Act of 1969, 42 U.S.C. 4321 § et seq. ("NEPA")
  - Requires federal agencies to prepare environmental impact statements for "major Federal actions significantly affecting the quality of the human environment."
  - Affects private projects that need federal approval.
- State Level – "Little NEPA" Statutes
  - At least 15 states have such laws.
  - They establish environmental assessment and environmental impact statement requirements for state projects modeled on the federal law.
  - They affect private projects that need state approval.
- Trend – Projects can be stopped for insufficient consideration of GHG emissions and climate change.

NEPA GHG Litigation – Key Issues

- Standing
- What is a “significant” federal action?
- Cumulative actions / cumulatively significant impacts

NEPA GHG Litigation - Examples

- *Mayo Foundation v. Surface Transp. Bd.*, 472 F.3d 545 (8th Cir. 2006)
- *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007)
- *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007)

NEPA GHG Litigation

- *Mayo Foundation v. Surface Transp. Bd.*, 472 F.3d 545 (8th Cir. 2006)
  - Surface Transportation Board (STB) approved construction of rail line to bring coal from mine in Wyoming to plants in Minnesota and South Dakota.
  - *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003) - held EIS was insufficient because it did not consider air emissions and remanded the action.
  - On remand, STB gave minor consideration to air emissions.
  - In *Mayo*, the 8th Circuit found the new EIS adequately considered emissions.

NEPA GHG Litigation

- *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007)
  - Public interest groups and states petitioned for review of NHTSA rule setting corporate average fuel economy (CAFE) standards for light trucks.
  - Ninth Circuit held:
    - NHTSA was required to prepare environmental impact statement. The Energy Policy and Conservation Act (EPCA) did not negate NHTSA's duty to assess environmental impacts, including climate change.
    - NHTSA's failure to monetize benefits of greenhouse gas emissions reduction was arbitrary and capricious. Uncertainty was not a sufficient excuse.

NEPA GHG Litigation – OPIC, Ex-Im Bank

- *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007)
  - Environmental groups and 4 cities sued the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank (Ex-Im Bank) for granting assistance to private projects that contribute to climate change without complying with NEPA.
  - Court held that OPIC is not exempt for NEPA but denied summary judgment because:
    - Fact issues existed over whether individual projects were "major Federal actions."
    - Fact issues existed whether individual projects constituted "cumulative actions."

NEPA GHG Litigation – OPIC, Ex-Im Bank

- Settled in February 2009
  - Export-Import Bank and OPEC must account for their contributions to climate change in accordance with NEPA.
  - Export-Import Bank must (1) account for its carbon dioxide emissions when considering which fossil-fuel projects to insure and (2) develop a climate change policy.
  - OPIC must reduce the greenhouse gas emissions of its major projects by 20% over the next ten years.

NEPA Petition

- On February 28, 2008, the International Center for Technology Assessment (ICTA), NRDC, and Sierra Club filed a formal legal petition with the White House's Council on Environmental Quality seeking to clarify that climate change analyses is to be considered and discussed in all federal environmental review documents for federal projects.

New NEPA GHG Cases

- *Amigos Bravos, et al. v. United States Bureau of Land Management, et al.*, D.N.M. No. 09-37, (filed Jan. 14, 2009).

- *Montana Environmental Information Center, et al. v. United States Bureau of Land Management*, D. Mont. No. 08-178 (amended complaint filed Jan. 15, 2009).

Little NEPAs

- California Developments - CEQA
  - Most active in use of Little NEPA statute to address impact of GHG emissions on global warming.
  - CA AG actions and private actions.
  - Issued draft GHG guidelines; final guidelines due Jan. 1, 2010.

- New York Developments – SEQRA
  - Considered GHG emissions in project review.
  - Issued draft guidelines.

Little NEPAs

- Massachusetts Developments - MEPA
  - Issued Greenhouse Gas Emissions Policy and Protocol for projects undergoing MEPA review
  - Considered GHG emissions in project review
- Minnesota Developments - MEPA
  - Lower court held MEPA did not require analysis of GHG emissions and mitigation on public projects.

California Environmental Quality Act ("CEQA")

- **CEQA** requires state and local agencies to disclose and evaluate the "significant" environmental impacts of proposed projects and to adopt feasible measures to mitigate those impacts. CAL. PUB. RES. CODE §§ 21000 et seq.
- California state regulators have interpreted CEQA as applying to **cumulatively significant impacts** such as increased GHG emissions.
- The **California Attorney General** has prepared numerous comment letters with agencies whose analysis under CEQA failed to properly analyze or mitigate a project's GHG emissions. The California Attorney General also has sued some of the entities for failing to consider GHG emissions.

Bringing CEQA Actions

- The rules adopted by the California Legislature ensure CEQA challenges are relatively easy to bring
  - Standing requirements are permissive
  - Rules governing exhaustion of administrative remedies are also permissive
  - Petitioners have the option of electing to prepare the record of proceedings as a means of holding down costs
  - Awards of attorneys' fees are often available to successful petitioners

CEQA – CA AG's GHG Actions

- August 2007 – Settlement with San Bernardino County (general plan amendment)
- September 2007 – Settlement with ConocoPhillips (proposed refinery expansion in Rodeo)
- December 2007 – Settlement with Port of Los Angeles (GHG source tracking)
- March 2008 – Settlement with Great Valley Ethanol (corn ethanol production plant)
- May 2008 – Settlement San Diego Airport Authority (long-term planning)
- August 2008 – Settlement with Cilion (corn ethanol production plant)
- September 2008 – Settlement with City of Stockton and Sierra Club (City plan)

CEQA - Private GHG Actions

- *Highland Springs Conf. & Training Center v. City of Banning*, No. RIC 460950 (Cal. Super. Ct. - Riverside Jan. 29, 2008)
  - No law requires considerations of GHG emissions
- *NRDC, et al. v. South Coast Air Quality Management District*, No. BS 110792, (Cal. Super. Ct. - L.A. July 28, 2008)
  - petition granted
- *Center for Biological Diversity, et al. v. City of Desert Hot Springs, et al.,* No. RIC 464585 (Cal. Super. Ct. - Riverside Aug. 6, 2008)
  - petition granted
- *Center for Biological Diversity, et al. v. San Joaquin Valley Air Pollution Dist.*, No. 08CECG03614 (Cal. Super. Ct. – Fresno, filed Oct. 16, 2008)
  - motion to dismiss pending
- *Center for Biological Diversity v. Town of Yucca Valley, et al*, No. CIVBS800607 (Cal. Super. Ct. - San Bernardino, filed Jul 29, 2008)

CEQA – Regulatory Guidance on Consideration of GHG Emissions

Continuing debate whether CEQA requires consideration of GHG emissions and when they are "significant."

SB 97 – requires CA Governor's Office of Planning and Research (OPR) to promulgate CEQA guidelines for mitigation of GHG emissions by July 1, 2009; requires California Resources Board to adopt guidelines by January 1, 2010.

Draft Guidance issued January 8, 2009: OPR issued draft guidance concerning the analysis and mitigation of the potential effects of GHG emissions associated with projects subject to review under CEQA.

OPR's Guidance on Analysis and Mitigation of GHGs

- Identify all the GHG emission sources
- Calculate / estimate GHG emissions
- Identify mitigation measures and alternative methods / approaches
- Identify preferred mitigation strategies
- GHG emissions do not trump other environmental issues
- The courts look for good faith effort, not perfection

CEQA & GHG Emissions: Implications for the Private Sector

- Prepare for extensive coordination with relevant public agencies on plans to calculate and mitigate GHG emissions related to any public project
- Analyze additional costs of possible project delays and / or settlement payouts related to excessive GHG emissions
- Analyze additional costs of project adjustments to mitigate GHG emissions and obtain project approval
- Prepare for possible litigation throughout the EIR process

New York's State Environmental Quality Review Act ("SEQRA")

- NY Department of Environmental Conservation (DEC) has signaled that it believes the SEQRA regulations provides the tools necessary to address GHGs
  - DEC has considered GHG emissions in evaluating projects under SEQRA
  - E.g., February 2008 - DEC adopted final scoping document for the Belleayre Mountain Ski Area project which requires extensive examination of the production of GHGs from every aspect of the construction and operation of the project.
  - September 9, 2008 - DEC invited informal comments on proposed guidance document on assessing GHG impacts in an EIS.

Massachusetts GHG Emissions Policy and Protocol

- October 31, 2007 – MEPA GHG Policy issued
  - Applied to certain state projects subject to MEPA.
  - Required quantification of emissions and consideration of alternatives.
- August 8, 2008 - Governor Patrick signed the Global Warming Solutions Act of 2008 – requires consideration of GHG emissions impact on climate change in all licensing, permitting, and other administrative decision-making.
- February 2, 2009 – MEPA GHG Policy amended to apply to all projects requiring an EIR.

Minnesota Center for Environmental Advocacy v. Mark Holsten, et al., No. 31-CV-07-3338 (Minn. Dist. Ct. - Itasca County, dismissed Oct. 15, 2007)

- Minnesota non-profit challenged Minnesota Steel Project.
- Minnesota Steel Project alleged to increase state's GHG emissions by 3%.
- Plaintiff alleged that EIS was flawed because it did not look seriously at the project's global warming implications nor did it look at possible alternatives to reduce global warming.
- The court confirmed that the DNR "did not specifically examine any project alternatives aimed at reducing greenhouse gas emissions or suggest mitigation measures specifically to reduce greenhouse gases."
- Still, the court ultimately found that the MEPA "does not seem to be up to the task of analyzing how greenhouse gas emissions from projects like MSI should be accounted for on the local, regional, state, national and even global scale." The environmental study, therefore, was found to be adequate under current law.
- Appeal pending.

Potential GHG & Securities Disclosures – New York Developments

- In September 2007, New York AG Andrew Cuomo subpoenaed the executives of several energy companies, including Dynegy, Xcel, AES, Dominion Resources, and Peabody Energy, seeking information on whether these companies adequately disclosed climate change risks in their SEC filings.
- AG used New York's authority under the Martin Act of 1921, N.Y. Gen. Bus. Stat. Art 23-A, § 352 et seq. to pursue these companies for disclosure issues.
- Xcel Settlement – August 28, 2008
- Dynegy Settlement – October 23, 2008