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# An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?

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## ARTICLES

### AN EMPIRICAL ASSESSMENT OF CLIMATE CHANGE IN THE COURTS: A NEW JURISPRUDENCE OR BUSINESS AS USUAL?

*David Markell*<sup>\*</sup> & *J.B. Ruhl*<sup>†</sup>

#### Abstract

While legal scholarship seeking to assess the impact of litigation on the direction of climate change policy is abundant and growing in leaps and bounds, to date it has relied on and examined only small, isolated pieces of the vast litigation landscape. Without a complete picture of what has and has not been within the sweep of climate change litigation, it is difficult to offer a robust evaluation of the past, present, and future of climate change jurisprudence. Based on a comprehensive empirical study of the status of all (201) climate change litigation matters filed through 2010, this Article is the first to fill those gaps and assess the state of play of climate change in the courts. It concludes that the story of climate change in the courts has not been one of courts forging a new jurisprudence, but rather one of judicial business as usual.

Part I of the Article outlines the scope of climate change litigation, explaining what qualifies as climate change litigation in our study, our methodology for identifying and coding case attributes, and our typology of the claims that have been or likely will be made as climate change moves relentlessly forward. Part II then presents and assesses the major theme revealed from our empirical study and largely missing from commentary on climate change litigation—that a siege-like battle between “pro” and “anti” regulation interests has led to an increasingly robust and complex litigation landscape but with mixed results for both sides. Drawing from those findings, Part III takes on a set of empirical and normative questions designed to summarize and assess the climate change litigation experience and its impacts on the content and institutions of climate policy. It is evident at all levels of inquiry that courts have taken a “business as usual” approach to climate change,

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resisting litigants' attempts to make courts a locus of direct policymaking, but courts nevertheless have influenced the policy content and its institutional contours dramatically. We extract these themes from the full experience of climate change litigation and suggest fruitful paths of research to develop a better understanding of the role and impact of the courts in the climate change policy arena. Part IV then stretches a bit from the confines of our empirical study and findings to speculate about the future of climate change litigation.

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## INTRODUCTION

It is a truism by now that climate change is one of the central public policy issues of our time.<sup>1</sup> Yet while legal scholarship seeking to assess the impact of climate change litigation on the direction of policy in this important arena is abundant and growing in leaps and bounds,<sup>2</sup> to date it has relied on and examined only small, isolated pieces of the vast litigation landscape. With few exceptions, most legal scholars have focused on the obvious, such as the Supreme Court’s decision in *Massachusetts v. EPA*,<sup>3</sup> and the sexy, such as the small handful (thus

1. See, e.g., Press Release, Obama Press Office, Obama Statement on Climate Change Negotiations in Bali (Dec. 10, 2007), available at <http://www.presidency.ucsb.edu/ws/?pid=90947> (describing climate change as “one of the greatest challenges of this generation”).

2. Westlaw searches conducted on November 6, 2011 in the Journals and Law Reviews (JLR) library for the phrase “‘climate change’ /s litigation” and using different date restrictions yielded a list of 5 articles through 2000, 34 articles through 2005, 615 articles through 2010, and 727 articles through the November 2011 search date.

3. 549 U.S. 497 (2007). A majority of the Court found that the Environmental Protection Agency (EPA) had erred in denying a citizen rulemaking petition to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. *Id.* at 534. The opinion opens with the pronouncement that “[a] well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.” *Id.* at 504–05. Although as a matter of judicial restraint the Court was silent on whether and how EPA might go about regulating emissions, the opinion seems to have been crafted to nudge the Agency toward regulation, or at least make it difficult for the Agency *not* to regulate. See *infra* note 17; see also Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. IN BRIEF 53, 59 (2007) (“The Court’s opinion seems to leave EPA little room in dealing with climate change.”); Arnold W. Reitze Jr., *Controlling Greenhouse Gas Emissions from Mobile Sources—Massachusetts v. EPA*, 37

far) of high-profile cases alleging that the sources of greenhouse gas (GHG) emissions are liable under public nuisance and other common law doctrines.<sup>4</sup> Surely these are important legal developments worthy of

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ENVTL. L. REP. 10,535, 10,538 (2007) (“[T]he Court’s opinion pushes EPA to find that GHGs need to be regulated.”). Indeed, EPA has since promulgated a series of GHG emission regulations. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533, 536, 537, 538); Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I). See generally ROBERT MELTZ, CONG. RESEARCH SERV., R41103, FEDERAL AGENCY ACTIONS FOLLOWING THE SUPREME COURT’S CLIMATE CHANGE DECISION: A CHRONOLOGY (2011), available at <http://www.fas.org/sgp/crs/misc/R41103.pdf>; U.S. Env’tl. Prot. Agency, *Climate Change—Regulatory Initiatives*, EPA.GOV, <http://www.epa.gov/climatechange/initiatives/index.html> (last visited Nov. , 2011). Commentators generally regard *Massachusetts v. EPA* as a watershed event in climate change litigation, if not also for environmental law generally. See Cannon, *supra*, at 61 (stating that “the broader cultural or symbolic significance of the decision [is that t]he Court has accepted—indeed has seemed to internalize—the beliefs, assumptions, and values that animate the environmentalists’ views on climate change”); Richard Lazarus, *A Breathtaking Result for Greens*, ENVTL. F., May–June 2007, at 12 (describing the case as “[a] breathtaking result for environmentalists” and “[t]he first time that environmentalists have both persuaded the Supreme Court to grant review over the federal government’s opposition and then won on the merits”).

4. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 859–60 (5th Cir. 2009) (reversing lower court’s granting of motion to dismiss), *vacated*, 607 F.3d 1049, 1055 (2010) (restoring trial court’s dismissal); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314–15 (2d. Cir. 2009) (reversing lower court’s granting of motion to dismiss), *rev’d*, 131 S. Ct. 2527, 2532 (2011) (holding the federal common law claims preempted because “the Environmental Protection Agency action the Act authorizes . . . displace[s] the claims the plaintiffs seek to pursue,” but leaving open the question of any preemption of state law claims); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (granting motion to dismiss); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*1–2, \*16 (N.D. Cal. Sept. 17, 2007) (granting motion to dismiss). Notwithstanding the fact that no such case has yet resulted in success on the merits, legal scholarship on the mere idea of this form of litigation is already legion. See Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 2 n.3, 4 (2011) (collecting articles and arguing that the cases are unlikely to succeed). Legal practitioners have cast the line of cases as portending a major new thrust of common law liability. See, e.g., Robert A. Wyman et al., *Significant Climate Issues Likely to Be Raised in the Federal Courts*, 39 ENVTL. L. REP. 10,925, 10,926 (2009) (suggesting that judicial decisions “may have a powerful impact on public policy” in the climate change arena); Douglas J. Feichtner & Kevin P. Braig, *Global Warming Litigation and the Ghost of Mrs. Palsgraf—Why Carbon-Heavy Entities Should Be Scared of Both*, NAT’L L. REV. (Nov. 8, 2009), <http://www.natlawreview.com/article/global-warming-litigation-and-ghost-mrs-palsgraf-why-carbon-heavy-entities-should-be-scared-> (“Any private entity with significant greenhouse gas (GHG) emissions could be identified in the next climate change lawsuit.”). Media coverage has also predicted sweeping impacts. See, e.g., Richard Ingham, *Billions of Dollars at Stake in*

attention in legal scholarship and media coverage, but we believed there had to be more to climate change litigation than that.

Indeed, what animated this project was our intuition that how the courts approach the broad array of types of climate change litigation might hold important insights, not only for how climate change policy is likely to evolve, and for who is likely to shape it, but more generally for the role of the courts in public policy governance. What is largely missing from the scholarly assessment are the dozens upon dozens of cases of climate change litigation matters which may seem mundane when taken individually, but which can inform scholarly evaluation when considered cumulatively. The scholarship has equally failed to identify and broadly assess what has *not* been the subject of climate change litigation. Without a complete picture of what has and has not been within the sweep of climate change litigation, it is difficult to offer a robust evaluation of the past, present, and future of climate change jurisprudence. This Article is the first to fill those gaps comprehensively for assessing the state of play of climate change in the courts.<sup>5</sup>

In order to attempt this broader description and evaluation of the role of the courts in climate change litigation, we designed a comprehensive empirical study to provide a knowledge base that was not available from existing legal scholarship and commentary. Our study collected pleadings and decisions from all active and resolved climate change litigation matters<sup>6</sup> and coded each file for a wide variety of attributes. Having elsewhere provided a brief initial description of the data based on the status of 139 cases filed through 2009,<sup>7</sup> we have refined and updated the study through 2010 to cover 201 discrete litigation matters and now turn in this Article to a much deeper

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*Climate Litigation—Law’s Latest Frontier*, VANCOUVER SUN, Jan. 24, 2011, at B3 (“[C]limate-change litigation is fast emerging as a new frontier of law where some believe hundreds of billions of dollars are at stake.”); John Schwartz, *Courts Emerging as Battlefield for Fights over Climate Change*, N.Y. TIMES, Jan. 27, 2010, at A1 (reporting that “Swiss Re, an insurance giant, compared the[se] suits to those that led dozens of companies in asbestos industries to file for bankruptcy, and predicted that ‘climate change-related liability will develop more quickly than asbestos-related claims’”); Editorial, *The New Climate Litigation*, WALL ST. J., Dec. 28, 2009, at A16 (“[T]he climate-change lobby is already shifting to Plan B, or is it already Plan D? Meet the carbon tort.”).

5. For examples of other work providing a broader overview than is typically found in legal scholarship, see generally ROBERT MELTZ, CONG. RESEARCH SERV., RL32764, CLIMATE CHANGE LITIGATION: A SURVEY (2009); JUSTIN R. PIDOT, GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES (2006); Alice Kaswan, *The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?*, 42 U.S.F. L. REV. 39 (2007).

6. Our definition of climate change litigation, as well as other study parameters and methods, are explained in Section II.A.

7. See David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REP. 10,644, 10,648 (2010).

assessment of the climate change litigation experience thus far.<sup>8</sup>

We did not enter this project with preconceived notions about what we would learn from review of this significant body of case law, but we inevitably brought certain assumptions, explicit and implicit, to the project. In particular, several empirical and normatively oriented questions about the place of courts in climate change policy animated our study. At a conceptual level, the imprimatur of the courts confers considerable legitimacy on the operation of the administrative state.<sup>9</sup> In addition, courts have considerable latitude to develop law on their own.<sup>10</sup> Further, courts sometimes perform a “signaling” function, in which they “prod” other government institutions to act.<sup>11</sup> But on the other hand, overly aggressive judicial review has the potential to engender administrative ossification—agency paralysis—among other phenomena that many commentators view as counterproductive.<sup>12</sup> There are constraints on unilateral judicial policymaking within our tripartite form of government, as well.<sup>13</sup> Thus, one of our overarching interests was to explore how courts are performing their “legitimizing” and “signaling” functions, and similarly, how ready they are to proceed on their own in this complex policy arena.

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8. The database and coding method for our study are publicly available at <http://www.law.fsu.edu/faculty/profiles/markell/litigationdatabase.xlsx> and <http://www.law.fsu.edu/faculty/dmarkell.html>.

9. See MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 11 (West 3d ed. 2009); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1810 (1996); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003).

10. See, e.g., *Int'l Paper v. Ouellette*, 479 U.S. 481 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (discussing a court's equitable jurisdiction when applying a statute); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

11. Benjamin Ewing & Douglas A. Kysar, *Climate Change, Courts, and the Common Law* 4 (Yale Law Sch., Pub. Law Working Paper No. 224, 2011), available at <http://ssrn.com/abstract=1749398>.

12. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386–87 (1992) (explaining the “ossification” phenomenon in agency rulemaking); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 254 (2009) (asserting that judicial review should not be blamed for inappropriate agency inaction and that it is important to look at the context in which an agency's decision to act arises); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, GEO. WASH. L. REV. (forthcoming 2012) (manuscript at 1), available at <http://ssrn.com/abstract=1699878> (claiming that their empirical study found that judicial oversight, along with White House and Congressional oversight, has “probably not unduly harmed rulemaking in the aggregate”).

13. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984); *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 323, 325 (1981) (holding that the federal common law was preempted by the Clean Water Act); *TVA v. Hill*, 437 U.S. 153, 194 (1978).

More specifically, we were interested in learning first about the following three largely empirical questions:

1. *How much action is there in the court system?* Our perception that there was far more to climate change litigation than the small number of cases discussed in legal scholarship led to this study and its central question—whether the legal system is a frequently or rarely used tool for addressing climate change-related issues? Our findings indicate a rapidly building wave of litigation.

2. *Where is the litigation action hot and where is it cold?* Climate change is paradigmatically a cross-cutting area involving a host of policy arenas and actors. Given this, we wanted to find out where the judicial action is—which policy spheres and institutions are receiving the litigation spotlight, and which have largely avoided it? As we describe, litigation is concentrated in two specific arenas, leaving some gaping holes in what could be additional fronts of action.

3. *Who are the players and what is their game?* Here we are focused on which actors are primarily seeking to use the courts and what they are trying to accomplish by doing so. Are plaintiffs trying to get the courts to set climate change policy to their benefit? Or are plaintiffs seeking to use the courts to leverage the other branches of government into action? Or are parties seeking to use the courts to prevent action by other branches? Our findings tell an unsurprising story of environmental nongovernmental organizations (NGO) frequently suing federal and state governments, though litigation by companies and industry NGOs is rising fast and intergovernmental litigation was also a significant presence.

Beyond these three empirical aspects, we hoped to learn more about what the courts are doing with the claims that have been brought in order to advance understanding about a series of important normative questions concerning the operation of our regulatory state and the role of the courts in it. This series breaks down into four separate but related inquiries:

1. *How have courts responded as agencies address (or decline to address) climate change through discrete regulatory initiatives and adjudicatory decisions?* *Massachusetts v. EPA* was about whether an agency must initiate a regulatory response to climate change under its statutory mandate. Since then, EPA and other state and local agencies have put climate change law on the books in the form of regulations, permit issuances and denials, and other discrete decisions.<sup>14</sup> Litigation over such decisions requires courts to weigh a substantive or procedural outcome against specific statutory provisions. Have courts tended to side with either pro- or anti-regulation interests as specific regulations

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14. See *supra* note 3 and *infra* Subsection I.C.1.



and adjudicatory decisions wind their way through the administrative state, and if so, why? Our study suggests a mixed bag with no clear favored position in most contexts.

2. *To what extent have courts crafted a distinct climate change jurisprudence?* Courts can direct agencies to carry out statutory mandates and review agency decisions without establishing new jurisprudential ground.<sup>15</sup> Because climate change presents so many new and different policy challenges, litigants may ask courts to chart policy directions and establish new doctrine more overtly, and one might expect this activism to be more evident when legislatures and agencies are inert. An obvious focus of ours was on the common law nuisance cases.<sup>16</sup> How receptive would the courts be to nuisance as a medium for climate change policy? If plaintiffs found an opening initially (on justiciability, for example), how would they fare in establishing standing, prevailing on liability, and securing relief? The answer, thus far, is that we do not know, as there have been few such cases and none has progressed to the merits.<sup>17</sup> But we can also ask this question in the context of regulatory litigation, where litigants may present courts with novel interpretations of statutes and regulation. Have courts resisted being pulled into these new jurisprudential waters, or have they willingly taken the dive? Our study reveals strong indications of judicial restraint in this regard—climate change in the courts has been, in fact, business as usual.

3. *To what extent have the courts prompted or forced legislative or regulatory attention to climate change policy?* The so-called “fire alarm” theory and other institutional models explore the roles of different institutions in galvanizing the regulatory state to act.<sup>18</sup> Our

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15. See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1199 (2008).

16. See *supra* note 4.

17. Although the Supreme Court recently ruled that federal common law claims are preempted by EPA’s emerging regulatory initiatives under the Clean Air Act, the Court declined to rule on the preemptive effect on state common law claims. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

18. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 739 (2011) (“To the extent constitutional law is supposed to help solve the agency problem of representative government by ‘guard[ing] the society against the oppression of its rulers,’ courts might play the valuable supplemental role of authoritatively identifying and publicizing constitutional violations and thus facilitating coordinated retaliation by the public at large. Since the public would benefit from judicial monitoring of government officials, it would have an incentive to resist any attempt by self-serving officials to interfere with the Court or undermine its authority. This ‘fire alarm’ account of the judiciary’s role in protecting popular sovereignty against untrustworthy government agents resonates with modern empirical evidence that the Court’s decisions are no less—and possibly more—consistent with public opinion than are those of the political branches.”)

question here involved the extent to which the courts are serving this role—to what extent does the climate change litigation experience reveal a strategy by parties, and possibly courts, to nudge or push legislatures and agencies into making decisions? We anticipated that a likely focus of climate change litigation would be to motivate the other branches of government to take action, either on their own initiative or because of pressure from business and environmental interest groups that would prefer regulatory action to judicial. One seminal case in the climate change litigation arena, *Massachusetts v. EPA*, fits this description,<sup>19</sup> but is this effect a more widespread phenomenon of climate change litigation? Our study shows that plaintiffs often mount this style of litigation, but that success rates are low.

4. *What has been the overall impact of climate change litigation on the institutional structures of the administrative state?* Perhaps the most abstract question, or set of questions, involved our conception of the regulatory state as comprised of many pieces and actors. We hoped that our data might provide insights that would help to unpack this messy system of actors and institutions. One of the roles of the courts is to test the strength or cohesiveness of the state, in terms of how well the pieces fit together.<sup>20</sup> We considered three features of our system that might be particularly susceptible to judicial intervention and direction. First, courts are called upon to review the legitimacy of legislative or regulatory action based on conformance to constitutional requirements.<sup>21</sup> It is the job of courts to identify significant gaps between legislative or agency action and the Constitution.<sup>22</sup> In addition,

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(footnotes omitted) (quoting THE FEDERALIST NO. 51, at 288 (James Madison) (E. H. Scott ed., 1898)) (citing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 50–51 (2007); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 731, 786 (2009); Barry R. Weingast, *The Political Foundation of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997)); see also David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 430 (2010); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (noting that a “fire alarm” mechanism empowers citizens to monitor government performance).

19. See *supra* note 3.

20. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-534T, CLIMATE CHANGE: OBSERVATIONS ON FEDERAL EFFORTS TO ADAPT TO A CHANGING CLIMATE 3 (2009) (publishing a statement of John Stephenson, Director, Natural Resources and Environment, discussing how well the regulatory pieces fit together at various levels of government), available at <http://www.gao.gov/new.items/d09534t.pdf>.

21. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (reviewing an EPA regulation under the Delegation Doctrine).

22. Courts sometimes invoke the canon that courts should avoid constitutional questions when possible in performing this responsibility. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); Kenneth A. Bamberger, *Normative Canons in the*

courts are frequently asked to adjudicate the legitimacy of agency action based on conformance to legislative direction.<sup>23</sup> Again, if courts find such gaps and find that they are unreasonable, it is up to the courts to require the agency to reconsider its approach.<sup>24</sup> Third, at least in the world of environmental law, many of the major federal laws have embraced a “cooperative federalism” structure in which EPA and the states share authority, so long as the states are interested in doing so and (in EPA’s judgment) have the requisite will, resources, and authorities.<sup>25</sup> Ultimately, the courts may become involved if this relationship somehow becomes frayed.<sup>26</sup> These appeared to be three major possible fissures in administrative governance that might have special salience in the climate change arena; hence, we sought to explore the extent to which the case law tests these fissures and how these challenges have come out. Our assessment is that climate change litigation thus far has not presented exceptional results in any of these respects.<sup>27</sup>

To be sure, these are not all the questions that could be asked about climate change litigation, nor do we purport to have complete answers even to this subset. We hope that our list will be useful in at least three ways: 1) it will facilitate discovery of any underlying assumptions we may have brought to the design of our survey and our analysis of survey results; 2) it will provide context about the survey data and thereby facilitate review of the data and our description and analysis of the results; and 3) it will stimulate future use and expansion of our data set by motivating readers to identify and pursue additional questions for which the survey data and methodology may help to yield answers, or at least some insights on which we have not focused in this Article.

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*Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008).

23. Courts exercise different levels of review, depending on the type and character of agency action they are reviewing. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

24. Courts sometimes use canons that legitimize seeming gaps or fissures of this sort. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 85–101 (2010); George F. Allen & Marlo Lewis, *Finding the Proper Forum for Regulation of U.S. Greenhouse Gas Emissions: The Legal and Economic Implications of Massachusetts v. EPA*, 44 U. RICH. L. REV. 919, 931 (2010) (discussing EPA’s attempt to invoke the doctrine of absurd results to justify the Tailoring Rule).

25. *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1565 (2007); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1107–08 (2009); David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000).

26. *See, e.g.*, *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897 (8th Cir. 1999).

27. Signs of possible regulatory state dysfunction may manifest themselves in other respects, as well, such as the failure to take action. *See, e.g.*, *Ewing & Kysar*, *supra* note 11, at 3.

To open the dialogue on these empirical and normative inquiries, Part I of this Article outlines the scope of climate change litigation. We explain what qualifies as climate change litigation in our study and our methodology for identifying and coding case attributes, including our typology of the claims that have been or likely will be made as climate change moves relentlessly forward. Part I closes with a description of representative cases comprising the two dominant forms climate change litigation has taken thus far in terms of number of cases (rather than number of headlines): litigation over whether government agencies must impose tougher restrictions on GHG emission sources in rules and permits, and litigation over whether government approval of new GHG emission sources has adequately followed environmental impact assessment procedures.

Part II then presents and assesses the major findings from our empirical study about the state of climate change jurisprudence. The vast majority of the climate change cases to date involve courts applying conventional rules of statutory construction to determine the extent to which agencies must consider climate change in decisionmaking under existing substantive and procedural laws. Most of the cases have been filed by environmental groups seeking judicial interpretations that would require an agency to regulate industry or impose liability more stringently to limit GHG emissions or respond to the effects of climate change. We call these the “pro” regulation cases. While they dominate the landscape, they are by no means always successful, and they are increasingly being challenged by the “anti” cases, in which industry and other interests use litigation in an effort to suppress climate change as a factor in regulation and liability decisionmaking. Therefore, the climate change litigation experience, for the most part, has been a story of courts deciding whether and how administrative agencies must take climate change into account in decisionmaking under existing statutes. As most of the statutes involved have been on the books for decades and have a substantial preexisting jurisprudence, little room is available for the courts to depart from precedent to forge new law for climate change in this litigation context, even if they were so inclined. The result has been that much litigation has led to little more than incremental development of law through the courts.

Part III takes what has been learned from the discussion in Parts I and II to circle back to the empirical and normative questions outlined above. The empirical story reveals a universe of litigation that is far more diverse, complex, and robust than has been outlined in previous legal scholarship, but that is also somewhat muddled in many respects. We outline the few strong themes that can be extracted and then move to our normative questions. There, the story becomes clearer, as it is

evident at all levels of inquiry that courts have generally resisted litigants' attempts to make courts a locus of direct policymaking. Nevertheless, the imprint of the courts on climate policy is substantial, as courts have engaged and decided many important questions. Some decisions have opened doors to policymaking by other institutions, and others have slammed them shut. Courts may not have established climate change policy directly, but they have influenced its content and institutional contours dramatically, even as climate change remains in its infancy. We suggest paths of research to gain a better understanding of this impact.

Part IV of this Article stretches a bit from the confines of our empirical study and findings to speculate about the future of climate change litigation. Our study identified trends in climate change litigation that seem poised for rapid acceleration, as well as gaps in the scope of litigation that will likely be filled in the not too distant future. We also expose gaps in legal scholarship on climate change litigation and opportunities for opening up new paths of research.

## I. THE SCOPE OF CLIMATE CHANGE LITIGATION

### A. *Defining, Identifying, and Coding Climate Change Litigation*

The threshold step for our study was to define what qualifies as climate change litigation. A broad view might include any litigation motivated by a concern about climate change or climate change policy. That could mean stopping a coal-fired power plant because of its anticipated GHG emissions or blocking state regulation of emission sources because of its economic impacts. We concluded, however, that such a definition is too broad of a conception for the purposes of an empirical legal study. For one thing, it would require that we identify motives for litigation, which would, in many cases, require us to make uninformed judgments about a litigant's mental state. Moreover, many cases motivated by concern over climate change might not involve issues of fact or law that bear directly on relevant questions of climate change law and policy. Opposition to a coal-fired power plant, for example, might be driven largely by concerns about climate change, but the subject matter of the actual litigation claims might not have any connection with GHG emissions or climate change impacts. The plaintiff's claim might be that the environmental impact analysis did not adequately examine the effects of mercury deposition, or that the permit hearing was procedurally defective. Such a case, to the extent that it might succeed in preventing the facility from being constructed and operating, might be thought of as influencing the law and policy of climate change in the broadest sense, but it would not be contributing to any discrete body of law bearing a direct connection to climate change

issues.

We decided to define climate change litigation as any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts. So, in the power plant example, if the claim were that the environmental impact assessment failed to take into account the effects of GHG emissions, or that the permit hearing was defective because the tribunal refused to allow evidence of GHG emissions, that would qualify the case as climate change litigation.<sup>28</sup>

We recognize that this approach has some limiting effects on the pool of cases included in the study. For example, without reading every docket entry in a piece of litigation, we cannot be sure that the mention of climate change issues of fact or law did not occur at some point in a case. Given time and resource constraints, we focused on reviewing complaints where we could obtain them, and on intermediate and final judicial decisions, to detect whether our criteria were met. Also, in some instances, particularly cases in which power plants were opposed, we suspected that climate change concerns were indeed a motivating factor behind the litigation, but excluded the case from our study because the filings failed to meet our criteria. Lastly, we did not include any matter that had not actually been filed as active administrative or judicial litigation in a tribunal, thus excluding non-adjudicatory events, such as the filing of a petition for rulemaking, or pre-litigation events, such as issuance of a notice of intent to file suit.

Having developed our general criteria for climate change litigation, the next step was to identify qualifying cases. As an initial source of candidate cases, we benefited greatly from a climate change litigation inventory system that Professor Michael Gerrard and environmental law attorney Cullen Howe have developed and kept updated on a dedicated Web site maintained by the law firm of Arnold & Porter.<sup>29</sup> We reviewed all of the materials Gerrard and Howe identified for each case and also attempted to obtain the current status of each matter identified in their inventory through traditional legal search engines, Web browser searches, and reasonably available additional methods such as

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28. Our approach is consistent with the criteria Meltz used in his 2009 survey of climate change litigation. See MELTZ, *supra* note 5, at 2 & n.4.

29. See Michael B. Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, CLIMATE CASE CHART, <http://www.climatecasechart.com> (last updated Sept. 7, 2011). Other useful litigation tracking sites are found at Howry Law Firm, *Climate Change Litigation*, GLOBAL CLIMATE LAW BLOG, <http://www.globalclimatelaw.com/articles/climate-change-litigation> (last visited Nov. 16, 2011), and *Warming Law: Changing the Climate in the Courts*, CONST. ACCOUNTABILITY CENTER, <http://theusconstitution.org/blog.warming> (last visited Nov. 16, 2011).

consulting online dockets or contacting court clerks. Moreover, independent of the Gerrard and Howe inventory, we searched for climate change litigation cases through standard legal research methods and updated any qualifying cases identified. We cut off our search and update efforts on December 31, 2010, at which point, after selecting the cases that met our criteria and accounting for consolidated litigation,<sup>30</sup> we had identified 201 discrete climate change litigation matters in various stages of progress or finality.<sup>31</sup>

Building on and expanding Gerrard and Howe's litigation inventory organization system, we developed a coding system in order to help us gain a better understanding of important features of the identified climate change cases. We sought information in ten broad categories: 1) the type of plaintiff, 2) the type of defendant, 3) the type of tribunal, 4) the year of filing and of most recent tribunal action, 5) the type of claim being brought, 6) the general objective of the litigation, 7) the statutes and other legal sources supporting the claims, 8) the jurisdictional mechanism the plaintiffs used to bring the action, 9) the status and outcome of the case, and 10) the contribution any tribunal decision made to developments in the law. We developed finer categorizations for many of these top-level attributes, such as which common law or constitutional doctrines plaintiffs relied on for their claims, the grounds for dismissal of a case, the type of relief awarded, and so on.

As we reviewed the cases, it became clear that we would need to make some judgment calls in coding. One of the dilemmas in empirical

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30. We counted consolidated cases as one discrete litigation matter if all the plaintiffs in the consolidated suits sought the same relief on the same grounds, or as two discrete matters if various suits sought opposing grounds for relief. For example, if all suits in a consolidated action sought to invalidate an agency rule promulgation on the ground that it was too restrictive of greenhouse gas emissions, we counted that as one matter; however, if some of the suits in the consolidated action sought to invalidate an agency rule promulgation on the ground that it did not go far enough in restricting emissions, we counted them as a separate matter. This approach avoided overcounting litigation matters that had been consolidated but allowed us to more accurately capture the thrust of the litigation and outcomes.

31. This number is lower than the number of cases on the Gerrard and Howe inventory. See Gerrard & Howe, *supra* note 29. Some of the cases in their inventory, such as many challenges to coal-fired power plants, did not meet our criteria for climate change litigation because the matters involved no issue related to greenhouse gas emissions or climate change impacts. Also, their inventory includes petitions for rulemakings and other pre-litigation actions. Our study also adjusted for consolidated suits, as explained *supra* in note 30. Assessments based on the Gerrard and Howe inventory thus report a higher number of climate change litigation matters and a different overall profile of climate change litigation. See, e.g., Mark Fulton et al., *Growth of U.S. Climate Change Litigation: Trends & Consequences* 6 (Nov. 3, 2010), [http://www.dbcca.com/dbcca/EN/\\_media/US\\_CC\\_Litigation.pdf](http://www.dbcca.com/dbcca/EN/_media/US_CC_Litigation.pdf) (reporting 340 litigation matters including multiple suits that have been consolidated, suits involving no climate change claims under our criteria, and petitions for rulemakings).

work is striking the right balance between detail and aggregation. Some cases presented attributes that did not obviously and neatly fit into one of our coding categories or which arguably fit into more than one. In some such instances, we developed a new category; whereas in others, we fit the case into the closest existing category. Several of these judgment calls were more problematic to resolve. First, in some instances, evaluating the threshold question of whether a matter truly qualified as climate change litigation was not straightforward. Generally, we tried to be as inclusive as possible within the scope of our criteria.<sup>32</sup> Next, in terms of coding the case outcome, we decided to focus only on the climate change portion of a case in situations involving multiple claims. For example, we coded a case as a win for the defendant if the plaintiff lost on the climate change ground, even if the plaintiff prevailed on a different count in the complaint and ultimately succeeded in, say, having a power plant permit revoked. Our rationale was that it is more important for our purposes to assess the outcome of the climate change law component of the case than to focus on the holistic litigation outcome. This approach was especially relevant to claims involving numerous alleged defects in an environmental impact assessment required for an agency action, where plaintiffs sometimes lost on the claim that GHG emissions were not adequately considered, but prevailed on some other claim that another impact, such as habitat loss, had not been properly assessed. Our study, therefore, is narrowly focused on the climate change component of each litigation matter. Finally, if all of the relevant claims in a case were advanced to the next level of review and resolved before the cutoff date—for example, a trial court opinion was reversed on appeal—we coded the case outcome based on the higher level tribunal’s decision. If, however, the matter was pending on appeal at the time of the cutoff date, we coded for the lower level tribunal’s decision and noted that the case was

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32. For example, the majority of the cases we excluded involved challenges to new power plants that were based on prevention of significant deterioration (PSD) or other Clean Air Act (CAA) claims and involved solely pollutants other than greenhouse gases. *See infra* Subsection II.C.1 (explaining the CAA PSD program cases). We readily acknowledge that the plaintiffs in such cases may have been motivated, at least in part, by a desire to reduce greenhouse gas emissions. Because at the time of the study cutoff date, EPA had not subjected any greenhouse gas to regulation for purposes of the PSD or other CAA programs involved in these cases (the various regulations did not take effect until January 2011), and because the claims in the excluded cases involved other pollutants, we excluded the cases as not meeting our criteria. *See* Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) (explaining the timing of greenhouse gas emission regulation and why it would not commence until January 2011). On the other hand, if the plaintiff raised any claim involving carbon dioxide or other GHG emissions, notwithstanding they were not subject to regulation at the time, we included the matter in our study.



on appeal as of the cutoff date.

### B. *Typology of Climate Change Litigation Claims*

To help add details to our general definition of climate change litigation matters, we also conducted pre-survey literature reviews and brainstorming sessions to develop a typology of different claims that might be expected to arise in the climate change litigation world. The typology includes claims that are actively being litigated in numerous cases, such as claims that a species should be listed under the Endangered Species Act (ESA) because of threats stemming from climate change, as well as claims that we thought were unlikely to have yet been the subject of litigation but which could arise as climate change litigation matures, such as claims that a property owner failed to take adequate adaptation measures to respond to sea-level rise.

We organized the typology first around several broad categories of claims and then identified the nature and thrust of the plaintiffs' claims in each category. This approach proved robust, accounting for all but a few of the cases we ultimately deemed to qualify as climate change litigation. Table I includes a summary of the typology categories the cases fall into and the claim types within each category that we identified in this study. Table I also includes the number of cases and the percentage of the total number of cases identified in each claim type.

Table I: Summary of Case Numbers by Category and Claim Type

Category	Claim Type	Cases # (%)
Substantive Mitigation Regulation and Enforcement	1. Substantive law claim to prevent or limit a legislative or agency decision to carry out, fund, or authorize a direct or indirect emissions source	28 (14%)
	2. Substantive law claim challenging a legislative or agency decision to reject or place limits on proposals to carry out, fund, or authorize a direct or indirect emissions source	4 (2%)
	3. Substantive law claim to require a legislature or agency to promulgate a statute, rule, or policy establishing new or more stringent limits on emissions	22 (11%)
	4. Substantive law claim challenging legislative or agency promulgation of statute, rule, or policy establishing new or more stringent limits on emissions	29 (14.5%)
	5. Government enforcement claim against	0

	direct or indirect emissions source alleging violation of regulatory or permit limits	
	<b>6.</b> Citizen enforcement claim against direct or indirect emissions source alleging violation of regulatory or permit limits	1 (0.5%)
Substantive Adaptation Regulation and Enforcement	<b>7.</b> Substantive law claim to require legislative or agency action on statute, rule, policy, or permit to require new or more extensive climate change adaptation actions	0
	<b>8.</b> Substantive law claim to prevent legislative or agency action on statute, rule, policy, or permit that proposes to require new or more extensive climate change adaptation actions	0
	<b>9.</b> Government enforcement claim against public or private entity alleging violation of regulatory or permit condition related to climate change adaptation	0
	<b>10.</b> Citizen enforcement claim against public or private entity alleging violation of regulatory or permit condition related to climate change adaptation	0
Procedural Monitoring, Impact Assessment, and Information Reporting	<b>11.</b> Claim to impose on public or private entities a new or more extensive monitoring, impact assessment, or information disclosure requirement focused on GHG emissions, impacts of climate change, or means and success of climate change adaptation	86 (43%)
	<b>12.</b> Claim to prevent imposition on public or private entities of a new or more extensive monitoring, impact assessment, or information disclosure requirement focused on GHG emissions, impacts of climate change, or means and success of climate change adaptation	1 (0.5%)
Rights and Liabilities	<b>13.</b> Claim to extend scope of human rights, property rights, or civil rights to provide protection of individual or public against effects of or responses to climate change	1 (0.5%)
	<b>14.</b> Claim to impose statutory, tort, nuisance, or other property damage or personal injury liability on source of emissions or for inadequate climate change mitigation or adaptation measures	8 (4%)
	<b>15.</b> Claim to impose contract, insurance, securities, fraud, failure to disclose, or other business or economic injury liability on	3 (1.5%)

	source of emissions or for inadequate climate change mitigation or adaptation measures	
Identification of Climate-Threatened Resources	<b>16.</b> Claim to force agency to identify species or other resource as climate-threatened	11 (5.5%)
	<b>17.</b> Claim to prevent or reverse decision by agency to identify species or other resource as climate-threatened	2 (1%)
Other	<b>18.</b> Other—not defined by other categories	5 (2.5%)
Total Number of Cases		201

As shown in the case number figures in the third column, some of the claim types had no matching cases.<sup>33</sup> This is a significant finding in that it shows that some forms of likely climate change litigation remain latent. For example, no case involved a claim regarding substantive climate change adaptation regulation or enforcement (claim types 7 through 10), whereas 42% of the cases focused on the adequacy or legality of substantive mitigation regulation measures in agency permits and rules (claim types 1 through 6). The other major category, accounting for 43% of the cases, involved claims that the causes or effects of climate change had not adequately been incorporated into monitoring, impact assessment, or disclosure procedures (claim type 11). The remaining cases account for only 15% (claim types 12 through 18) of the total and involve a range of claims including litigation over whether a species should be protected under the ESA and tort and contract liability litigation. Given the strong predominance of the substantive mitigation regulation claims and the monitoring, assessment, and disclosure claims, this Section delves into more detail about their respective content and litigation experiences.

Because we depend heavily on the typology categories in our assessment of climate change litigation in the courts, some elaboration on the category descriptions and divisions is appropriate here.

### 1. Substantive Mitigation Regulation and Enforcement

As the underlying context of *Massachusetts v. EPA* suggests, a major thrust of climate change litigation will likely fall into the broad category of litigation over what is referred to as climate change mitigation—the scope, demands, and enforcement of substantive

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33. Two cases contained claims that fell into two or more different categories. We coded them as separate matters for each claim type in order to track the characteristics and outcome of each claim. As these were the only such instance, we did not consider this coding method to skew the statistical analyses in any meaningful sense.

regulation of GHG emission sources.<sup>34</sup> This scope of litigation includes, for example, a claim to prevent or limit a legislative or agency decision to carry out, fund, or authorize a direct or indirect source of GHG emissions, such as to stop a state government from building, funding, or permitting a coal power plant. It also includes actions to require a legislature or agency to promulgate a statute, rule, or policy establishing new or more stringent limits on GHG emissions by regulating direct or indirect sources, such as to force EPA to regulate GHG emissions or to force local government to impose green building requirements. Enforcement of emissions limits already in place, whether in permits or in regulations, also fits this category. And of course, actions to prevent or reverse emissions limits in permits or regulations must also be accounted for in this category. Unsurprisingly, many cases in our study fell into this set of claims, and because of their volume and variety, we provide a more in-depth analysis of their content and outcomes following the description of the basic typology.

## 2. Substantive Adaptation Regulation and Enforcement

Although climate change mitigation had dominated the policy scene until recently,<sup>35</sup> it is now widely agreed that no plausible mitigation policy will prevent climate change from occurring—climate change is happening already and more will come for decades as “committed warming” is locked in based on past emissions, regardless of mitigation policy.<sup>36</sup> Hence, climate change adaptation will be necessary,<sup>37</sup> making

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34. See J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363, 366 n.1 (2010) (“Climate change mitigation ‘refers to options for limiting climate change by, for example, reducing heat-trapping emissions such as carbon dioxide, methane, nitrous oxide, and halocarbons, or removing some of the heat-trapping gases from the atmosphere.’” (quoting U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 10–11 (Thomas R. Karl et al. eds., 2009), available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>) (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: MITIGATION app. II at 716 (Bert Metz et al. eds., 2001), available at [http://www.grida.no/climate/ipcc\\_tar/wg3/pdf/app.pdf](http://www.grida.no/climate/ipcc_tar/wg3/pdf/app.pdf) (defining mitigation as “[a]n anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases”))).

35. See *id.* at 365–71 (recounting the history of policy attention to mitigation).

36. See J.B. Ruhl, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 76 n.59 (citing Neil Adger et al., *Summary for Policymakers*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 19 (M.L. Parry et al. eds., 2007) [hereinafter IPCC, IMPACTS], available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf> (“Past emissions are estimated to involve some unavoidable warming . . . even if atmospheric greenhouse gas concentrations remain at 2000 levels.” (citation omitted)); V. Ramanathan & Y. Feng, *On Avoiding Dangerous Anthropogenic Interference with the Climate System: Formidable Challenges Ahead*, 105 PROC. OF THE NAT’L ACAD. OF SCI. 14,245 (2008) (estimating committed warming of 2.4°C even if greenhouse gas

“[m]itigation and adaptation . . . both essential parts of a comprehensive climate change response strategy.”<sup>38</sup> All recent legal scholarship and policy dialogue now recognizes that formulating and implementing climate change adaptation strategies must be a significant component of our domestic climate change law and policy.<sup>39</sup> The federal government and a few states have only just begun to formulate adaptation policy,<sup>40</sup>

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concentrations are held to 2005 levels); Susan Solomon et al., *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 PROC. NAT'L ACAD. SCI. 1704 (2009) (estimating a 1000-year committed warming effect)).

37. See Ruhl, *supra* note 34, at 366 n.2 (“Climate change adaptation ‘refers to changes made to better respond to present or future climatic and other environmental conditions, thereby reducing harm or taking advantage of opportunity. Effective mitigation measures reduce the need for adaptation.’” (quoting U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 34, at 11) (citing IPCC, IMPACTS, *supra* note 36, app. I at 869, available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-app.pdf> (defining adaptation as “[a]djustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities”))).

38. U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 34, at 11. For summaries of the legal and policy issues likely to come with climate change, including reviews and syntheses of science and law literature on the topic, see Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1 (2009); Robin Kundis Craig, “Stationarity Is Dead”—Long Live Transformation: Five Principles for Climate Change Adaptation Law, 34 HARV. ENVTL. L. REV. 9 (2010); Holly Doremus, *Adapting to Climate Change with Law that Bends Without Breaking*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 45 (2010); Robert L. Glicksman, *Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management*, 87 NEB. L. REV. 833 (2009); Ruhl, *supra* note 34.

39. See, e.g., Katherine M. Baldwin, *NEPA and CEQA: Effective Legal Frameworks for Compelling Consideration of Adaptation to Climate Change*, 82 S. CAL. L. REV. 769, 775 (2009) (“[A]daptation measures must still be employed to combat the impacts of climate change that will inevitably occur, despite the institution of heroic mitigation efforts.”); Camacho, *supra* note 38, at 14 (“Unfortunately, legislators and regulators in the United States and elsewhere have only begun to consider the role of adaptation in combating climate change.”); Craig, *supra* note 38, at 14 (“American environmental law and policy are not keeping up with climate change impacts and the need for adaptation.”); Daniel A. Farber, *Adapting to Climate Change: Who Should Pay*, 23 J. LAND USE & ENVTL. L. 1, 2 (2007) (“Adaptation has been a neglected topic . . . . In my view, this is a mistake.”); Peter Hayes, *Resilience as Emergent Behavior*, 15 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 175, 175 (2009) (“[T]he main game is now adaptation which renders mitigation no less urgent, but shifts the political equation in dramatic ways that cannot be ignored any longer.”); Thomas Lovejoy, *Mitigation and Adaptation for Ecosystem Protection*, 39 ENVTL. L. REP. 10,072, 10,073 (2009) (“The adaptation part of the climate change agenda is only just beginning to get attention, and needs much more right away.”); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 593 (2009) (“Most climate change experts and policy-makers recognize that adaptation and mitigation are not mutually exclusive strategies but must, on the contrary be employed in tandem.”).

40. See Ruhl, *supra* note 34, at 374 n.31. The Government Accountability Office concluded a comprehensive review in 2009 of federal adaptation policy with the finding that “[w]hile federal agencies are beginning to recognize the need to adapt to climate change, there is a general lack of strategic coordination across agencies, and most efforts to adapt to potential

but to the extent that adaptation measures begin to be implemented through proactive or reactive responses to climate change, it stands to reason that the courts will get involved (sooner or later) in sorting out the scope and demands of any substantive adaptation regulation requirements.

As with the mitigation regulation claims, one can reasonably foresee actions being filed to require legislative or agency action on a statute, rule, policy, or permit to require new or more extensive climate change adaptation measures, such as to require a coastal development permittee to retain wetlands as a buffer against sea-level rise. Actions to enforce such requirements, as well as to prevent or reverse their promulgation, also fit into this set of claims. As shown in Table I, however, our study found no cases fitting this category. We discuss the implications of this finding later.

### 3. Procedural Monitoring, Impact Assessment, and Information Reporting

The first two typology categories focus on actions leveraging substantive statutory requirements relating to climate change mitigation or adaptation, such as facility-siting restrictions and emissions limits. One can also envision claims leveraging procedural requirements through actions to impose on public or private entities a new or more extensive monitoring, impact assessment, or information disclosure

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climate change impacts are preliminary.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-113, CLIMATE CHANGE ADAPTATION: STRATEGIC FEDERAL PLANNING COULD HELP GOVERNMENT OFFICIALS MAKE MORE INFORMED DECISIONS 5 (2009), available at <http://www.gao.gov/new.items/d10113.pdf>. A significant step forward came in President Barack Obama’s October 2009 Executive Order 13,514, which, among other things, endorsed an interagency Climate Change Adaptation Task Force “already engaged in developing the domestic and international dimensions of a U.S. strategy for adaptation to climate change.” See Exec. Order No. 13,514, 74 Fed. Reg. 52,117, 52,124 (Oct. 8, 2009). A November 2010 survey of federal agency actions concluded that federal agencies have since then begun to develop more coherent adaptation policies. See PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE CHANGE ADAPTATION: WHAT FEDERAL AGENCIES ARE DOING 1 (2010), available at [http://www.pewclimate.org/docUploads/FederalGovernmentLeadershiponAdaptation\\_Nov2010.pdf](http://www.pewclimate.org/docUploads/FederalGovernmentLeadershiponAdaptation_Nov2010.pdf). To follow the work of the Task Force, see Council on Env’tl. Quality, *Climate Change Adaptation Task Force*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/ceq/initiatives/adaptation> (last visited Nov. 10, 2011). Up-to-date information about state mitigation and adaptation strategies can be found through an interactive map tool maintained by the Center for Climate Strategies. CTR. FOR CLIMATE STRATEGIES, <http://www.climatestrategies.us> (last visited Nov. 10, 2011). California has established the most detailed state adaptation strategy. See CAL. NAT. RES. AGENCY, 2009 CALIFORNIA CLIMATE ADAPTATION STRATEGY (2009), available at <http://www.energy.ca.gov/2009publications/CNRA-1000-2009-027/CNRA-1000-2009-027-F.PDF>. At the local level, New York City offers an example of a local jurisdiction taking proactive steps toward developing a climate change adaptation policy. See Edna Sussman et al., *Climate Change Adaptation: Fostering Progress Through Law and Regulation*, 18 N.Y.U. ENVTL. L.J. 55 (2010).

requirement focused on emissions, impacts of climate change, or means and success of climate change adaptation (such as a demand that publicly traded companies disclose their GHG emissions). Indeed, the Securities and Exchange Commission issued guidance in 2010 covering disclosures related to climate change,<sup>41</sup> and Congress recently required EPA to promulgate a rule “to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States,”<sup>42</sup> which EPA did in 2009.<sup>43</sup> Most of the cases falling in this category, however, arise under impact assessment statutes that are more general in scope and do not explicitly mention GHG emissions or climate change, the issue being whether these general requirements should integrate GHG emissions and climate change impacts within their scope. While the plaintiffs’ objectives in using such procedural requirements may be to prevent approval of a facility, the underlying legal context is sufficiently distinct from the substantive mitigation category as to warrant separate treatment. Indeed, we identified many cases fitting into this category—it is the largest single category of cases—and because of their volume and variety, we provide a more in-depth analysis of their content and outcomes below after describing the basic typology.

#### 4. Rights and Liabilities

We designed the first three claim types outlined above to capture litigation focused directly on GHG emission sources and climate change adaptation measures. These are, for the most part, fueled by existing or new statutory programs. Climate change, however, is also likely to unsettle human relations governed by broader constitutional, statutory, and common law rights and liabilities. We envisioned three types of claims that could fall into this broad “rights and liabilities” category. The first includes actions to extend the scope of human rights, property rights, or civil rights to provide protection to individuals or the public against the effects of or responses to climate change, such as a claim that an emissions source violates civil rights or that immigration policy for climate refugees violates human rights. Another type includes actions to impose statutory, tort, nuisance, or other property damage or personal injury liability on emissions sources or for inadequate climate change mitigation or adaptation measures, such as a public nuisance

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41. See Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) (to be codified at 17 C.F.R. pts. 211, 231, 241). See generally Scott D. Deatherage, *The SEC Enters the Fray on Climate Risk Disclosure*, 25 NAT. RESOURCES & ENV'T 35, 35 (2011) (discussing SEC regulations and guidance governing climate risk disclosure).

42. Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, 2128 (2008).

43. See Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,264 (Oct. 30, 2009) (to be codified at scattered sections of 40 C.F.R.).

action against emission sources or a private nuisance claim for destruction of coastal dunes. The third type of action involves claims to impose contract, insurance, securities, fraud, failure to disclose, or other business or economic injury liability on an emissions source or for inadequate climate change mitigation or adaptation measures, such as an insurance recovery claim for effects of sea-level rise or a contract dispute over a carbon credit market transaction. Like the adaptation category of cases, however, the rights and liabilities category of claims focuses on litigation over the effects of climate change, rather than ways to prevent those effects, and thus is unlikely to be an active field of litigation at this time.<sup>44</sup> Indeed, Table I shows that very few cases fall in this category, the implications of which we discuss later.

### 5. Identification of Climate-Threatened Resources

A somewhat specialized field of climate change litigation that was well underway when we conducted our study involves claims that agencies responsible for implementing the ESA should or should not use the species “listing” procedures of the statute to identify species threatened by the effects of climate change.<sup>45</sup> Other existing or new

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44. For example, one insurance industry observer noted that “[i]t is somewhat surprising that there are not more lawsuits which can be found where the existence of insurance coverage for global warming claims is at issue. This is likely due to the fact that global warming litigation is in its infancy.” Robert Redfearn, Jr., *Global Warming Litigation Just Getting Started; Costs Will Be Significant*, *INS. J.* (Mar. 4, 2010), <http://www.insurancejournal.com/news/national/2010/03/04/107854.htm>.

45. Section 4(a)(1) of the ESA requires the agencies to:

determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.



conservation statutes conceivably could impose similar duties on agencies to identify “climate-threatened” resources such as habitat, water sources, wetlands, and so on. We concluded such claims are sufficiently distinct from the other categories, and sufficiently important, to warrant a separate category. These threatened resource identification programs are neither directly regulatory or particularly oriented toward mitigation or adaptation, nor are they merely monitoring or reporting programs. They also differ from impact evaluation programs in that there is no particular proposed action being assessed; rather, the agency assesses the condition of a species or other resource based on a wide variety of threats, including climate change, and designates it for some special status.<sup>46</sup> No rights or liabilities are imposed directly in connection with the resource identification step, though some could follow under the other statutory provisions once the resource is identified. At bottom, moreover, we felt that the potential for widespread litigation in this category was significant, particularly under the ESA, and thus did not want to lose its distinct focus by fitting it into another category.

### C. *The Dominant Litigation Prototypes*

As the foregoing shows, the overwhelming majority of climate change litigation matters are concentrated in claims involving substantive challenges to agency permits and rules and in claims challenging agency environmental impact assessments. This regulatory context for climate change litigation—what one observer has likened to “siege warfare with large armies that battle for decades”<sup>47</sup>—far overwhelms public nuisance and other forms of litigation in terms of volume and scope. This Section thus provides a more complete account

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16 U.S.C. § 1533(a)(1) (2006); see also J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 32 (2008) (“[Section 4(a)(1)(E)] could hardly be a more definitive mandate to consider the effects of greenhouse gas emissions and climate change on species. Greenhouse gas emissions are unquestionably a ‘manmade factor,’ and if as abundant evidence suggests they are contributing to climate change, they are potentially ‘affecting . . . [the] continued existence’ of climate-threatened species. Regardless of their causal agents, atmospheric warming, sea level rise, and other primary ecological effects of climate change involve ‘the destruction, modification, or curtailment of . . . [species]’ habitat or range,’ [and impacts on species and their habitats could exacerbate] ‘disease or predation.’”).

46. 16 U.S.C. § 1533(a)(1) (2006) (detailing the factors to be considered when assessing whether any species is endangered or threatened).

47. Alejandro de los Rios, *Public Nuisance Cases ‘Like a Knife Fight in a Dark Alley,’* LEGALNEWSLINE.COM (Feb. 14, 2011, 11:21 AM), <http://www.legalnewsline.com/news/231095-public-nuisance-cases-like-a-knife-fight-in-a-dark-alley> (“Where environmental law cases brought under regulatory actions are like ‘siege warfare with large armies that battle for decades,’ public nuisance claims are ‘like a knife fight in a dark alley’ . . . .” (quoting environmental attorney John Parker Sweeney)).

of the context and experience of these two dominant forms of climate litigation.

### 1. Climate Change in Agency Permits and Rules

One variant of climate change litigation involves substantive challenges to legislative action, or to agency rules and permits, which are based on the claim that climate change concerns require a different response. As Table I reflects, we identified ten possible claim types of such substantive challenges in our survey.<sup>48</sup> Six involve what we term “substantive *mitigation* regulation,” and the other four involve “substantive *adaptation* regulation.”

What does the world of climate change substantive litigation look like in the context of this typology? Table I shows that virtually all of the action to date qualifies as substantive *mitigation* regulation. Eighty-four cases fit into this category, or a total of 42% of the total of 201 climate change cases in our database. By contrast, zero cases qualify as substantive *adaptation* cases.<sup>49</sup>

Of substantive mitigation cases, most of the action to date (more than 90%) has been in three claim types: 1) case- or facility-specific cases intended to prevent approval for a direct or indirect source of GHG emissions, for example, actions to prevent permitting of a coal-fired power plant (33% of the mitigation cases and 14% of the total number of cases); 2) cases to require a legislature or agency to promulgate a statute, rule, or policy that establishes more stringent GHG emission limits, for example, a petition to force EPA to regulate GHG emissions, or a suit to force a local government to impose more stringent green building requirements (26% of substantive mitigation cases and 11% of the total number of cases); and 3) cases that challenge

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48. See *supra* Table I.1. As we noted in Section I.A, defining the concept of climate change litigation requires judgment calls. We have probably drawn the concept in narrower terms than some other commentators. As one commentator points out, EPA is using various “indirect” ways to “reduce the nation’s climate change footprint” beyond direct carbon regulation. Margaret Kriz Hobson, *As the Clean Air Act Turns 40*, ENVTL. F., Nov.–Dec. 2010, at 8. For example, EPA regulations intended to control coal ash, hazardous chemicals, and other pollutants are likely to lead utilities to shut down some coal-fired power plants that emit large amounts of carbon dioxide and other greenhouse gases. *Id.*

49. We have defined “adaptation” claims for purposes of this article to include only those claims that base the theory of liability on the defendant’s climate change adaptation behavior—for example, a government regulation requiring adaptation measures, or a private actor’s failure to adapt according to regulatory or common law standards. As noted, there were no such cases filed through 2010. Some claims have been filed seeking money damages to allow the plaintiff to adapt to climate change, but the theory of liability has been based on failure of the defendant to mitigate GHG emissions. See de los Rios, *supra* note 47 (discussing public nuisance cases). As our typology is based on the alleged basis for liability, we coded these cases as type 14. See *supra* Table I.1.

statutes or agency rules establishing more stringent limits on GHG emissions, for example, suits that seek to prevent EPA from regulating GHG emissions (35% of the mitigation cases and 14% of the total number of cases).<sup>50</sup>

What should we make of these numbers? The world of regulatory development and implementation includes at least three key stages.<sup>51</sup> First, legislation and regulation often set general norms or substantive requirements. Further, these general norms are frequently applied specifically to particular parties through issuance of permits or licenses. Finally, once permits are in place, or are supposed to be in place, the regulatory state shifts into compliance evaluation and enforcement, as needed.

Litigation is a mechanism for challenging activity (or inactivity) at each of these stages.<sup>52</sup> We reviewed the cases to learn whether the litigation so far is concentrated in any particular stage and if so, which one. Thus, we identified cases focusing on rules that set different types of norms or requirements. In a sense, these cases occur on the *ex ante* end of the regulatory continuum, in that their aim is to derail legislative and regulatory efforts, either because they are too stringent or not stringent enough, or to spur regulatory activity. Second, we identified cases at the opposite end of the regulatory spectrum, the *ex post* end, most notably, enforcement cases in which a party that emits GHG emissions is pursued for alleged violation of regulatory or permit limits. We further divided this set of cases into two categories: government enforcement cases and citizen enforcement actions.<sup>53</sup> Finally, we

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50. We did not identify any Type 5 cases—that is, cases involving a government enforcement action against a direct or indirect GHG emissions source that alleges violation of regulatory or permit limits. We did, however, identify one Type 6 case—that is, a citizen enforcement action against a direct or indirect GHG emissions source alleging violation of regulatory or permit limits. This case, *Nw. Env'tl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006), produced a successful substantive outcome for the plaintiffs through settlement. The plaintiffs claimed that the defendant was constructing a manufacturing facility with the potential to emit more than 250 tons per year of greenhouse gases without a required preconstruction permit. *Id.* at 959. While the defendant denied the allegations, it agreed to make contributions totaling \$300,000 to various projects, including a new “Solar Classroom Project” and a new “High Performance Classroom,” and to reimburse the plaintiffs for \$250,000 for attorney’s fees and costs. *See* Stipulated Order of Dismissal, *Nw. Env'tl. Def. Ctr. v. Owens Corning Corp.*, Civ. No. 04-CV-1727-JE (D. Or. June 8, 2006), *available at* <http://www.sierraclub.org/environmentallaw/lawsuits/docs/2006-06-08-corning-signed-stipulated-dismiss.pdf>.

51. As is the case with most typologies, this one oversimplifies, but for our purposes, it helps to describe key stages in the regulatory state.

52. In some circumstances, judicial review of agency action (or inaction) is unavailable. *See, e.g.,* *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding that the Food and Drug Administration’s refusal to initiate enforcement proceedings is not subject to judicial review).

53. Congress includes citizen suit provisions in many of the environmental laws, in part

identified cases situated at more of a midpoint of the regulatory process, most notably, cases involving the application of general norms to individual circumstances. Actions challenging the issuance of a permit that establishes GHG emission limitations are an example of this type of case.

Applying this typology, a significant majority of the substantive mitigation cases fit into the *ex ante* category—fifty-one cases out of eighty-four, or 61%. Of these, there is a rough equivalence between cases seeking to overturn regulations because they are too stringent (twenty-two thus far) and cases seeking to overturn regulations because they are too lax or to prompt new regulation for the same reason (twenty-nine to date).<sup>54</sup> The best known of the latter genre, of course, is *Massachusetts v. EPA*,<sup>55</sup> which we review in some depth later. Only one case so far is what we would characterize as an *ex post* case—that is, a case that alleges violations of regulatory or permit conditions. In that case, the plaintiff was an NGO which had success on the merits and also recovered its attorney’s fees.<sup>56</sup> Thirty-two cases (38% of the substantive mitigation cases) fit into the middle category. These cases involve the application of general norms to individual circumstances. As noted above, actions that challenge issuance or denial of a permit fit into this category.

As we will discuss in more detail below, intuitively, at least, it is unsurprising that litigation at the beginning of a regulatory regime would focus primarily on the legitimacy of the regime itself, rather than on its implementation.<sup>57</sup> It is reasonable to expect that the caseload distribution will change over time, as rules are promulgated, permits are issued, and operations subject to those permits begin.

#### a. Permit Challenges

With this 40,000-foot overview in mind for reviewing the substantive mitigation cases, we now turn to a more detailed review of our claim type 1 cases—challenges to individual permit decisions, such

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because of the widespread belief that citizen enforcers can help to bolster government enforcement capabilities. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61–62 (1987).

54. As we note elsewhere, many more cases that fit into these categories have been filed, but we generally treat consolidated cases as a single case. *See, e.g., supra* note 30.

55. *See supra* note 3.

56. *Owens Corning*, 434 F. Supp. 2d at 960; *see also* Stipulated Order of Dismissal, *Nw. Env’tl. Def. Ctr. v. Owens Corning Corp.*, Civil No. 04-CV-1727-JE (D. Or. June 8, 2006), available at <http://www.sierraclub.org/environmentallaw/lawsuits/docs/2006-06-08-cornings-signed-stipulated-dismiss.pdf>.

57. In drawing this distinction, we recognize that challenges during implementation (for example, permit challenges or challenges in enforcement cases) sometimes focus on the legality of the underlying regulatory scheme.

as actions to prevent a coal power plant.<sup>58</sup> Of the twenty-eight cases filed to date, seven (25%) are pending with no significant action. Of those challenges that have had significant action of one sort or another, the vast majority have been unsuccessful. Thus, the initial regulatory decision seems to have stuck in a significant majority of cases.<sup>59</sup>

Within this type of claim, there has been a substantial line of cases that involved whether proposed new facilities or facilities that undertook major modifications are subject to the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) program and its Best Available Control Technology (BACT) requirements.<sup>60</sup> The PSD program is a preconstruction review and permitting program that applies to new major stationary sources and to major modifications at existing major stationary sources in order to maintain air quality in regions of the country that are in attainment with National Ambient Air Quality Standards (NAAQS).<sup>61</sup> It does so in part by requiring covered sources to apply BACT, in order to limit their emissions.<sup>62</sup> Under the CAA's PSD program, only pollutants that are "subject to regulation" under the CAA must be controlled by potentially expensive BACT requirements.<sup>63</sup>

In a series of permit challenges and other proceedings,<sup>64</sup> NGOs and others claimed that EPA's imposition of various reporting requirements on GHG emissions was enough to make such emissions "subject to

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58. We have focused in the summaries below on matters or cases that have received a decision.

59. Some of these cases are initial agency permit decisions.

60. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 et al., 2009 WL 3126170, at \*2 (EAB Sept. 24, 2009); *Louisville Gas & Electric Co.*, Petition No. IV-2008-3, 2009 WL 7698409 (EPA Aug. 12, 2009) (rejecting petitioner's request that EPA object to the permit on the basis that the permit fails to include requirements for addressing greenhouse gases); *Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, 2008 WL 5572891, at \*37 (EAB Nov. 13, 2008), *available at* [http://ag.ca.gov/globalwarning/pdf/Desert\\_decision.pdf](http://ag.ca.gov/globalwarning/pdf/Desert_decision.pdf) (remanding the permit to reconsider whether to impose a CO<sub>2</sub> BACT limit); *Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 729–30 (Utah 2009) (upholding as reasonable the administrative board's interpretation that CO<sub>2</sub> emissions are not subject to regulation); *Appalachian Voices v. State Air Pollution Control Bd.*, 693 S.E.2d 295, 301 (Va. Ct. App. 2010) (holding that no provision of the CAA or Virginia law controlled or limited carbon dioxide emissions, therefore, carbon dioxide was not a pollutant subject to regulation by the Board); *Powder River Basin Res. Council v. Wyo. Dep't of Env'tl. Quality*, 226 P.3d 809, 826 (Wyo. 2010) (holding that carbon dioxide emissions were not subject to BACT analysis and control).

61. 42 U.S.C. § 7475 (2006); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,520–21 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (providing a brief overview of the requirements of the PSD program, as well as the Title V program).

62. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,520.

63. 42 U.S.C. § 7475.

64. *See supra* note 61.

regulation” and thereby trigger PSD and BACT requirements. Regulatory bodies and reviewing courts generally found this argument for extending PSD and BACT requirements to GHG emissions unpersuasive.<sup>65</sup> Instead, the judicial and administrative precedent to date has declined to impose BACT emission limits on new sources of GHG emissions by defining the concept of “subject to regulation” in 42 U.S.C. § 7479(3) narrowly, so that regulation does not include monitoring and reporting requirements; instead, it covers only regulations that impose actual emission limitations.<sup>66</sup>

This stream of cases in claim type 1 comprised a relatively significant volume of litigation during the time period we studied, but it seems to have come to an end for two reasons. First, EPA issued a rule in April 2010 in which the Agency concludes that the phrase “subject to regulation” includes regulation of only those pollutants for which EPA requires “actual control of emissions,” and does not include pollutants for which EPA regulations “only require monitoring or reporting.”<sup>67</sup> EPA’s Environmental Appeals Board (EAB) had identified the value of such a nationwide determination in its review of particular permit decisions, noting that the issue was one of “national scope.”<sup>68</sup> Second, EPA has now issued a rule in which it subjects carbon dioxide (CO<sub>2</sub>) emissions to regulation, notably new motor vehicle standards, as of January 2, 2011.<sup>69</sup> These regulations trigger the PSD program and

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65. *See id.*

66. *See id.*

67. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,004–05 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) (quoting Memorandum from Stephen L. Johnson, EPA Adm’r, to EPA Reg’l Adm’rs (Dec. 18, 2008), *available at* [http://www.epa.gov/NSR/documents/psd\\_interpretive\\_memo\\_12.18.08.pdf](http://www.epa.gov/NSR/documents/psd_interpretive_memo_12.18.08.pdf)) (internal quotation marks omitted). On December 31, 2008, EPA issued an interpretive memorandum that contained its “definitive interpretation” of regulated NSR pollutant to include pollutants that are subject to an EPA regulation that requires their actual control, but not pollutants that are only subject to regulations that require monitoring or reporting. Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, 73 Fed. Reg. 80,300, 80,301 (Dec. 31, 2008) (to be codified at 40 C.F.R. pt. 52). In a letter to a NGO lawyer in February 2009, the new EPA Administrator agreed to reconsider the interpretation of “regulated pollutant” and explained that EPA’s formal interpretation “does not bind States issuing permits under their own [SIP]” and that “other PSD permitting authorities should not assume that the [interpretation] is the final word on the appropriate interpretation of Clean Air Act requirements.” But the Administrator did not stay implementation of the interpretation contained in the December 2008 Memorandum. Letter from Lisa P. Jackson, EPA Adm’r, to David Bookbinder, Chief Climate Counsel, Sierra Club (Feb. 17, 2009), *available at* <http://www.epa.gov/NSR/documents/20090217LPJlettertosierraclub.pdf>.

68. Deseret Power Elec. Coop., PSD Appeal No. 07-03, 2008 WL 5572891, at \*7 (EAB Nov. 13, 2008).

69. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516, 31,522 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70,

BACT requirements for covered sources that emit GHGs.<sup>70</sup>

In addition to the “subject to regulation” cases, two other cases involving challenges to specific projects based on their contribution of GHG emissions are worth mentioning because each offers insights concerning judicial willingness to overturn agency permitting decisions because of climate change and GHG emissions. *Citizens Action Coalition v. PSI Energy, Inc.*<sup>71</sup> involved a challenge by various environmental groups to a permit for construction of a new power plant, on the ground that the permitting authority, the Indiana Utility Regulatory Commission, had failed to adequately consider future carbon regulations in approving the construction of the plant. The parties had presented extensive evidence to the Commission about various issues associated with future carbon regulations (for example, the options for future regulation, carbon capture, evidence concerning costs associated with compliance with carbon regulations, etc.). The NGOs had argued that the “facility should be delayed until future carbon regulations are known.”<sup>72</sup> The court rejected the challenge and approved the permit for the new plant. It “recognized that uncertainties exist regarding carbon capture and sequestration and ordered [the applicant] to continue its efforts to prepare for a future in which carbon is regulated,”<sup>73</sup> but declined to substitute its judgment for that of the Commission. It concluded that the record showed that the Commission had carefully considered the issue, including considering alternative, renewable sources of energy, but found that the proposed plant was reasonable because of its greater reliability.<sup>74</sup>

An even more forceful example of judicial restraint is found in *In re Otter Tail Power Company*.<sup>75</sup> NGOs intervened in a permit proceeding for a new coal-fired energy conversion facility, asserting that CO<sub>2</sub> emissions would contribute to global warming and opposing the permit on that basis. The South Dakota Public Utilities Commission (PUC) approved the facility, not only on the ground that CO<sub>2</sub> emissions are not currently regulated by the United States or South Dakota, but also

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71); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 and 49 C.F.R. pts. 531, 533, 536, 537, 538).

70. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,520, 31,522. This rule has been challenged. *See, e.g., Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2010 WL 5509187 (D.C. Cir. Dec. 10, 2010) (per curiam) (denying and granting various motions in an interim opinion regarding the plaintiffs’ petition for review of the rule).

71. 894 N.E.2d 1055 (Ind. Ct. App. 2008).

72. *Id.* at 1066.

73. *Id.* (citation omitted) (internal quotation marks omitted).

74. *Id.*

75. 744 N.W.2d 594, 604 (S.D. 2008).

because the CO<sub>2</sub> emissions from the proposed plant would not cause serious injury to the environment. The PUC found that emissions from the proposed facility “would [only] increase U.S. emissions of carbon dioxide by approximately .0007 [sic], or seven-hundredths of one percent[.]”<sup>76</sup> In upholding issuance of the permit, the South Dakota Supreme Court characterized its task as deciding the “narrow question of whether the PUC’s conclusion that [the plant] will not pose a threat of serious injury to the environment was clearly erroneous . . . .”<sup>77</sup> In upholding the PUC’s decision to grant the permit, the court focused extensively on the institutional challenge of climate change litigation for the courts:

While global warming and CO<sub>2</sub> emissions are considered harmful by the scientific community, what will pose a threat of *serious* injury to the environment under [the governing State statute] is a judgment call initially vested with the PUC by the Legislature. Nothing in [the state statute] so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat. Resolving what is acceptable for the people of South Dakota is not for this Court. The Legislature and Congress must balance the competing interests of economic development and protection of our environment. . . . [T]he PUC’s decision [that the plant should be approved because of a variety of factors, such as reliability concerns, availability of alternative sources of power, and the volume of emissions from the plant compared to nationwide emission levels] was not clearly erroneous.<sup>78</sup>

In these decisions, as in many others, the courts acknowledge the importance of the climate change issue and the need for attention to it. But they have proven reluctant to second-guess agency decisionmakers charged in the first instance with deciding the “jurisdictional boundaries” question of whether the CAA applies to GHG emissions and the question of how the risks that such emissions pose should be balanced with other policy concerns if jurisdiction attaches.

In contrast to *Citizen Action Coalition* and *Otter Tail*, in a handful of cases, applications for new plants that would emit GHGs have been denied because of issues relating to GHG emissions. In these cases, the

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76. *Id.* at 602 (noting that the PUC concluded that the plant “will not pose a threat of serious injury to the environment or to the social and economic conditions of the inhabitants or expected inhabitants in the siting area” (internal quotation marks omitted)).

77. *Id.* at 603.

78. *Id.* at 604.



permitting agency based its denial on factors beyond simply considering the risk that GHG emissions pose. For example, the Florida Public Service Commission (PSC) has used its broad discretion under the governing statute to deny an applicant's petition for an affirmative determination of need for two new proposed pulverized coal generating units.<sup>79</sup> In that case, the PSC noted that Florida law identifies several factors for the PSC to consider in making need determinations and does not "assign the weight that [the] Commission is to give each of these factors."<sup>80</sup> The factors include cost of electricity, cost-effectiveness of the proposed plant compared to other alternatives, conservation measures that might mitigate need, and other matters.<sup>81</sup> The applicant, Florida Power and Light, had acknowledged in its application that "various scenarios of future carbon allowance costs" could have a significant effect on the cost-effectiveness of the project.<sup>82</sup> The PSC justified its decision to deny the determination of need generally, based on the "uncertainty associated with . . . emerging energy policy decisions at the state and federal level," among a variety of other factors.<sup>83</sup> It appears that the PSC declined to find that there was a need for the plant, despite finding that the plant would bolster fuel diversity, at least in part because of the uncertainty associated with "regulatory factors" and the cost-effectiveness of the proposed plant in light of this uncertainty.<sup>84</sup>

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79. *In re* Petition for Determination of Need for Glades Power Park Units 1 and 2 Electrical Power Plants, 260 P.U.R. 4th 158, 2007 WL 2032916 (Fla. P.S.C. 2007).

80. *Id.* at 160.

81. *Id.*

82. *Id.*

83. *Id.* at 161.

84. *Id.*; see also *In re* Application of Wis. Power & Light Co., No. 6680-CE-170, 2008 WL 5273417, at \*1 (Wis. P.S.C. Dec. 12, 2008). The Public Service Commission of Wisconsin similarly denied a Wisconsin Power and Light plan to build a new 300-megawatt coal-fired facility because of concerns that the plant would be too costly when compared to alternatives, noting in its November 11, 2008 press release that "uncertainty over the costs of complying with future possible carbon dioxide regulations were all contributing factors to the denial." Press Release, Pub. Serv. Comm'n of Wis., PSC Rejects Wisconsin Power and Light's Proposed Coal Power Plant (Nov. 11, 2008), available at <http://psc.wi.gov/pdf/News%20Releases/2008/11%20November/NED%20Decision.pdf>. In another case, the Washington Energy Facility Site Evaluation Council denied an application to certify a site in Washington state for use as a combined cycle gasification facility because the application lacked an adequate carbon sequestration plan, despite the applicant's claims that compliance with the statute would be futile because it was impossible at present to develop a plan of the sort the statute contemplated due to the "technological and economical infeasibility of geological sequestration." *In re* Application No. 2006-01, Energy Nw. Pac. Mountain Energy Ctr. Power Project, Adjudicative Order No. 2, Council Order No. 833, at 2 (Wash. Energy Facility Site Evaluation Council 2007), <http://www.efsec.wa.gov/FILES/orders/833%20-%20PMEC%20stay%20adjud.pdf>. The Council indicated that even if the applicant were right about the futility of compliance, the Council "[would] not interpret the statute to disregard the plain meaning of the legislature." *Id.*

The actions to prevent authorization of a particular GHG emitting project that have had some resolution generally have not gone well for parties seeking to prevent approval because of the GHG emissions.<sup>85</sup> The proceedings based on the claim that monitoring and reporting requirements for GHGs subjected GHG emissions to regulation foundered at the project-specific and the national levels. While many decisionmaking bodies, administrative and judicial, have acknowledged the risks associated with GHG emissions, this concern has rarely led to rejection of projects. Courts in particular have been reluctant to second-guess permitting bodies, as those bodies have wrestled with how to incorporate GHG emissions and the risks they pose into permitting decisionmaking processes.

The decisions in Indiana and Florida provide an interesting contrast on the issue of regulatory uncertainty, with the Indiana Regulatory Commission allowing a project to go forward despite future regulatory uncertainty (and the reviewing court upholding that judgment), and the Florida PSC's decision that the applicant had failed to establish the need for new coal-generating units because of "uncertainty associated with . . . emerging energy policy decisions at the state and federal level." In Washington state, a statutory initiative that imposed new obligations on applicants, in the form of sequestration efforts, proved dispositive in one case in which the state's decisionmaking council declined to be influenced by the applicant's "[i]mpossibility of [c]ompliance" argument and instead applied the statutory language according to its terms. In short, during the stage of climate change litigation through December 2010 an important lesson seems to be that the regulatory requirements pertaining to emission of GHGs (or in many cases, the lack thereof) have had a significant effect on the outcome of permit proceedings and the reasoning of decisionmakers.

#### b. Rule Challenges

Claims involving agency rules have also been fertile ground for climate change litigation. There have been twenty-two claim type 3 cases to date, for example, actions to force EPA to regulate GHG emissions, to force local governments to impose green building requirements, etc. These cases fit into the *ex ante* category of litigation under the framework we describe above. Eight are pending with no significant action to date (36% of the claim type 3 cases). The Supreme Court's 2007 decision in *Massachusetts v. EPA*,<sup>86</sup> involving a challenge

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at 5.

85. Aside from the limited number of decisions to date, it is likely that opposition to certain projects because of GHG emissions has been successful for different reasons and in different ways. Our study is limited to the decisions in our database.

86. 549 U.S. 497, 534 (2007).

to EPA's 2003 denial of a petition asking EPA to regulate GHG emissions under the CAA,<sup>87</sup> is undoubtedly the most prominent case of this type.

Before the Court's decision in *Massachusetts v. EPA*, EPA had declined to regulate GHG emissions directly under the CAA.<sup>88</sup> EPA concluded in part that the CAA does not authorize EPA to issue mandatory regulations to address climate change, including regulations that cover GHG emissions, because Congress did not intend that carbon dioxide be treated as an "air pollutant."<sup>89</sup> The petitioners claimed that EPA was obligated to regulate GHG emissions from new motor vehicle sources under CAA § 202(a)(1) because: 1) GHG emissions qualify as "air pollutants," and 2) such emissions from new motor vehicles cause or contribute to air pollution that endangers public health or welfare.<sup>90</sup> While the U.S. Court of Appeals for the D.C. Circuit denied the petition for review, holding that "the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking,"<sup>91</sup> the Supreme Court disagreed.

The Court framed the issues as "whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute."<sup>92</sup> Applying CAA § 202(a)(1), the Court

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87. See Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions From New Motor Vehicles Under § 202 of the Clean Air Act (Oct. 20, 1999), available at <http://www.icta.org/doc/ghgpet2.pdf>; Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,933 (Sept. 8, 2003) (denying the petition).

88. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,933.

89. *Id.* As has been well-chronicled, EPA's legal views concerning whether the CAA empowered the agency to regulate GHG emissions have evolved over the years. In a 1998 memo, then General Counsel Jonathan Cannon concluded that EPA possessed such authority, while in 2003, the General Counsel at that time, Robert Fabricant, reached the opposite conclusion. Memorandum from Jonathan Z. Cannon, EPA Gen. Counsel, to Carol M. Browner, EPA Adm'r, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998), available at <http://www.law.umaryland.edu/faculty/bpercival/casebook/documents/epaco2memo1.pdf>; Memorandum from Robert E. Fabricant, EPA Gen. Counsel, to Marianne L. Horinko, EPA Acting Adm'r, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (Aug. 28, 2003), available at <http://www.icta.org/doc/FabricantMemoAug282003.pdf>.

90. Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act 9 (Oct. 20, 1999), available at <http://www.icta.org/doc/ghgpet2.pdf>.

91. *Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005). The appellate panel issued three separate opinions. Judge Randolph authored the language quoted in the text. Judge Sentelle concurred in this reasoning, although he also dissented in the case on the ground that the petitioners lacked standing. Judge Tatel dissented.

92. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007). Before reaching the merits, the

held that carbon dioxide and other GHGs easily fit “well within the Clean Air Act’s capacious definition of ‘air pollutant.’”<sup>93</sup> Further, the Court held that GHG emissions are a form of “air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>94</sup> The Court concluded that EPA “can avoid taking further action [that is, the agency can decline to regulate GHG emissions under § 202(a)(1)] only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”<sup>95</sup>

Since the Court’s opinion, EPA has initiated and completed several rulemakings. Directly responding to the Court, EPA issued its Endangerment Finding with respect to emissions of GHG air pollutants from new motor vehicles in December 2009.<sup>96</sup> The Agency observed that CAA § 202(a) establishes a two-part test for making such a finding: first, that an air pollutant must endanger public welfare; and second, that emissions of such pollutants from particular sources cause or contribute to this endangerment.<sup>97</sup> In its rule, EPA referred to this second finding as the “cause or contribute” finding.<sup>98</sup> EPA determined that emissions of GHGs provide the basis for a finding of endangerment to public welfare for a variety of reasons, including “risks to food production and agriculture, forestry, water resources, sea level rise and coastal areas,

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Court held that at least the State of Massachusetts had standing to challenge EPA’s petition denial. *Id.* While the Court’s standing analysis obviously has the possibility of influencing future litigation, we focus in the text on the Court’s treatment of the merits of the case. For reviews of the Court’s treatment of standing, see, e.g., Kevin M. Davis, *The Road to Clean Air Is Paved with Many Obstacles: The U.S. Environmental Protection Agency Should Grant a Waiver for California to Regulate Automobile Greenhouse Gas Emissions via Assembly Bill 1493*, 19 *FORDHAM ENVTL. L. REV.* 39 (2009); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 *J. LAND RESOURCES & ENVTL. L.* 273 (2007).

93. *Massachusetts*, 549 U.S. at 532. The Court held that the “sweeping definition” of “air pollutant” in the CAA includes greenhouse gas emissions because each of the greenhouse gases at issue in the petition is, “without a doubt,” a “physical [and] chemical . . . substance[] or matter which [is] emitted into . . . the ambient air.” *Id.* at 528–29 (internal quotation marks omitted). The CAA defines “air pollutant” to include “any air pollution agent . . . , including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g) (2006). It defines “welfare” to include “effects on . . . weather . . . and climate.” *Id.* § 7602(h).

94. *Massachusetts*, 549 U.S. at 528 (quoting 42 U.S.C. § 7521(a)(1)).

95. *Id.* at 533. While EPA had provided several reasons for its decision not to regulate GHG emissions, the Court found the Agency’s reasoning unpersuasive because in the Court’s view, the Agency’s reasoning was not based on the framework in CAA § 202(a)(1).

96. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

97. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,536.

98. *Id.*

energy, infrastructure, and settlements, and ecosystems and wildlife.”<sup>99</sup> Further, EPA found that the emission of GHG air pollutants emitted from motor vehicles “cause or contribute to this air pollution.”<sup>100</sup>

Seventeen petitioners challenged EPA’s Endangerment Finding in the D.C. Circuit, ranging from states, to proponents of small government, to the U.S. Chamber of Commerce and the National Association of Manufacturers.<sup>101</sup> The D.C. Circuit consolidated these challenges in February 2010, under the style *Coalition for Responsible Regulation v. Environmental Protection Agency*.<sup>102</sup> In addition to the seventeen petitions filed in the D.C. Circuit, ten petitions were filed with EPA asking the Agency to reconsider its Endangerment Finding.<sup>103</sup> In August 2010, EPA denied these petitions.<sup>104</sup> Several parties challenged the EPA denial and the D.C. Circuit consolidated these challenges with the pending challenges to the Endangerment Finding.<sup>105</sup>

While EPA’s Endangerment Finding did not impose requirements on GHG emitters, the Finding was a prerequisite for finalizing regulations that do impose such requirements. EPA has been extremely active in promulgating such regulations. The Agency launched a cascade of agency rulemaking initiatives, and it has finalized a series of regulations that will limit GHG emissions from a wide variety of mobile and stationary sources and impose monitoring and reporting obligations on GHG emitters, as well. Some participants in the litigation challenging these EPA rules have characterized the rules as posing “perhaps the most significant set of administrative law challenges [that the D.C. Circuit] has ever confronted.”<sup>106</sup> The rules, in the view of one

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99. *Id.* at 66,534.

100. *Id.* at 66,536.

101. *See* *Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2010 WL 5509187 (D.C. Cir. Dec. 10, 2010) (per curiam) (denying and granting various motions in an interim opinion regarding the plaintiffs’ petition for review of the rule).

102. *Id.*

103. *See, e.g.*, Petition for Reconsideration of Endangerment and Cause or Contribute Finding for Greenhouse Gases Under Section 202(a) of the Clean Air Act by Virginia *ex rel.* Cuccinelli, No. EPA-HQ-OAR 2009-0171 (Feb. 16, 2010), available at [http://epa.gov/climatechange/endangerment/downloads/Petition\\_for\\_Reconsideration\\_Commonwealth\\_of\\_Virginia.pdf](http://epa.gov/climatechange/endangerment/downloads/Petition_for_Reconsideration_Commonwealth_of_Virginia.pdf); *see also* EPA’s Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556, 49,557 (Aug. 13, 2010) (to be codified at 40 C.F.R. ch. 1) (denying the ten petitions).

104. EPA’s Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. at 49,556.

105. One observer suggests that the Endangerment Finding is “least vulnerable to attack” of EPA’s rules concerning GHG emission restrictions and is “swaddled in at least three layers of Kevlar-like legal protections.” Daniel A. Farber, *Litigating Clean Air Endangerment*, ENVTL. F., Nov.–Dec. 2010, at 12.

106. Motion for Coordination of Related Cases at 1, *Coal. for Responsible Regulation, Inc.*,

opponent, “achieve a stark result—the imposition of controls on carbon dioxide and other greenhouse gas (“GHG”) emissions on the national economy.”<sup>107</sup>

These rules include EPA’s “tailpipe rule,”<sup>108</sup> its “timing” or “triggering rule,”<sup>109</sup> and its “tailoring rule.”<sup>110</sup> This suite of rules is currently subject to a broad array of challenges in the D.C. Circuit. As one recent article puts it, “[o]ne striking fact about these suits is the pure number of claims: over eighty distinct claims” have been filed by thirty-five different petitioners to four EPA rules (including the challenges to EPA’s Endangerment Finding referenced above).<sup>111</sup> To many close observers, the level of legal activity is not surprising. In addition to the stakes involved, some have suggested that efforts to regulate GHG emissions from stationary sources, especially under the CAA, have a “square peg, round hole” character. Ann Klee, former EPA General Counsel, noted during an Environmental Law Institute (ELI) forum that “the agency is trying to do everything that it can with a statute that is clearly not intended to deal with the very complex world of major climate change.”<sup>112</sup>

EPA’s May 2010 Tailpipe Rule, which EPA issued jointly with the National Highway Traffic Safety Administration (NHTSA),<sup>113</sup> follows

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Nos. 09-1322 et al., 2010 WL 5509187, available at [http://www.eenews.net/assets/2010/09/13/document\\_gw\\_06.pdf](http://www.eenews.net/assets/2010/09/13/document_gw_06.pdf).

107. *Id.* The parties cited an Office of Management and Budget memorandum for the proposition that “[m]aking the decision to regulate CO<sub>2</sub> under the CAA for the first time is likely to have serious economic consequences for regulated entities throughout the U.S. economy, including small businesses and small communities.” *Id.* at 3 n.† (citing First (1st) Round of Office of Management and Budget (OMB) Comments to USEPA on Proposed Findings 2 (Apr. 22, 2009), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0171-0124>).

108. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533, 536, 537, 538).

109. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 40, 51, 70, 71).

110. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

111. Gregory E. Wannier, EPA’s Impending Greenhouse Gas Regulations: Digging through the Morass of Litigation (Nov. 23, 2010), [https://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file\\_id=542157](https://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=542157). A Deutsche Bank report indicates that 82 of the 108 lawsuits initiated in 2010 fit into this category. Fulton et al., *supra* note 31, at 6.

112. Ann Klee, former EPA Gen. Counsel, 2010 Environmental Law Institute Miriam Hamilton Keare Policy Forum: Can You Teach Old Tools New Tricks? Addressing 21st Century Problems with 20th Century Law (Oct. 19, 2010) (transcript available at [www.eenews.net/tv/transcript/1226](http://www.eenews.net/tv/transcript/1226)).

113. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. at 25,324. President Obama announced on May

up on EPA's Endangerment Finding (which found that GHG emissions from mobile sources contribute to endangering public health and welfare) by establishing GHG emission standards for "light duty vehicles" for model years 2012 through 2016.<sup>114</sup> EPA finalized GHG emissions standards under the CAA, while NHTSA finalized corporate average fuel economy (CAFE) standards under the Energy Policy and Conservation Act.<sup>115</sup> Seventeen petitions for review of the Tailpipe Rule have been filed with the D.C. Circuit, all of which have been consolidated.<sup>116</sup>

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19, 2009, that EPA and the NHTSA would work together on a rule that would integrate CAFE standards (NHTSA's function) with national GHG standards (EPA's function). ENVTL. PROT. AGENCY, EPA-420-F-09-028, REGULATORY ANNOUNCEMENT: EPA WILL PROPOSE HISTORIC GREENHOUSE GAS EMISSIONS STANDARDS FOR LIGHT-DUTY VEHICLES (2009), available at <http://www.epa.gov/oms/climate/regulations/420f09028.pdf>.

114. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. at 25,324. According to the agencies, the rules "will achieve substantial reductions of GHG emissions . . . from the light-duty vehicle part of the transportation sector, based on technology that is already being commercially applied in most cases and that can be incorporated at a reasonable cost." *Id.* at 25,326. EPA summarizes as follows the contribution of the mobile sources targeted in this rule:

Mobile sources emitted 31 percent of all U.S. GHGs in 2007 (transportation sources, which do not include certain off-highway sources, account for 28 percent) and have been the fastest-growing source of U.S. GHGs since 1990. Mobile sources addressed in the recent endangerment and contribution findings under CAA section 202(a)—light-duty vehicles, heavy-duty trucks, buses, and motorcycles—accounted for 23 percent of all U.S. GHG in 2007. Light-duty vehicles . . . are responsible for nearly 60 percent of all mobile source GHGs and over 70 percent of Section 202(a) mobile source GHGs.

*Id.* at 25,326 (footnotes omitted).

115. *Id.* at 25,324.

116. *Coal. for Responsible Regulation, Inc. v. EPA*, No. 10-1092 (D.C. Cir. filed May 7, 2010). There were several challenges to the Tailpipe Rule. On July 23, 2010, EPA filed a motion to consolidate the cases and on August 5, 2010, the court granted the motion to consolidate. Motion to Consolidate Cases, *Coal. for Responsible Regulation, Inc.*, No. 10-1092 (D.C. Cir. July 23, 2010); Order Granting Motion to Consolidate, *Coal. for Responsible Regulation, Inc.*, No. 10-1092 (D.C. Cir. Aug. 5, 2010). This is not the only administrative action concerning mobile sources that may see a courtroom. EPA and NHTSA are currently developing another rule to establish standards for model years 2017 through 2025. 2017–2025 Model Year Light-Duty Vehicle GHG Emissions and CAFE Standards: Supplemental Notice of Intent, 76 Fed. Reg. 48,758 (Aug. 9, 2011) (to be codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533). A May 4, 2010, Congressional Research Service report indicates that EPA has received ten petitions asking the Agency to regulate GHG emissions from other mobile sources, with all but one focused on mobile sources such as aircraft, ocean-going ships, locomotives, nonroad vehicles, and their fuels. JAMES E. MCCARTHY, CONG. RESEARCH SERV., R40506, CARS, TRUCKS, AND CLIMATE: EPA REGULATIONS OF GREENHOUSE GASES FROM MOBILE SOURCES 5–6 (2010). EPA's response to these petitions may well trigger more litigation—for example, litigation challenging EPA's denial of any petitions and litigation challenging any rules EPA issues. Thus, the nature of the litigation that is likely to ensue

EPA determined in a third rulemaking, known as the “timing rule,” the “triggering rule,” or the “reconsideration decision,”<sup>117</sup> that on January 2, 2011—that is, the first day of the first model year in which manufacturers would be required to meet the new motor vehicle standards EPA promulgated in May 2010—those mobile source emission control standards would trigger PSD controls on GHG emissions from stationary sources.<sup>118</sup> In this rulemaking, EPA upheld an earlier Agency interpretation that the PSD permit requirements apply only to pollutants that are subject to actual control of emissions under either a statutory or regulatory provision, and do not apply to pollutants that are merely subject to monitoring or reporting requirements but not to actual controls.<sup>119</sup> EPA further determined that the PSD permitting requirements “will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles . . . take effect. . . . [T]hose standards will take effect when the 2012 model year begins, which is no earlier than January 2, 2011.”<sup>120</sup>

Eighteen petitioners have sought review of this rule in the D.C. Circuit, including a mix of states, nonprofits, and industry groups.<sup>121</sup> The court has consolidated these challenges along with challenges to EPA’s Tailoring Rule.<sup>122</sup>

On June 3, 2010, EPA issued its Tailoring Rule, which limits GHG emissions from stationary sources.<sup>123</sup> EPA characterizes the Tailoring Rule as a “common sense approach” to regulating GHG emissions from stationary sources under the CAA permitting program.<sup>124</sup> EPA claims

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depends on the nature and extent of EPA’s regulatory treatment of mobile sources.

117. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

118. *Id.* at 17,004, 17,007, 17,019.

119. *See supra* note 68.

120. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. at 17,007. Further, EPA is deferring applying the PSD and Title V provisions for sources that are major based only on emissions of GHGs until a date that extends beyond January 2, 2011. *Id.* at 17,004.

121. Coal. for Responsible Regulation, Inc. v. EPA, No. 10-1073 (D.C. Cir. filed Apr. 2, 2010); Lawrence Hurley, *EPA: Court Consolidates 2 Challenges to Emission Regulations*, GREENWIRE, Nov. 17, 2010, <http://www.eenews.net/Greenwire/2010/11/17/7>.

122. Hurley, *supra* note 121; Se. Legal Found. v. EPA, No. 10-1131 (D.C. Cir. filed June 3, 2010). On November 16, 2010, the D.C. Circuit acceded to an EPA request that the Timing Rule and Tailoring Rule should be addressed together. Order Granting in Part and Denying in Part Motion for Coordination of Related Cases, *Se. Legal Found. v. EPA*, No. 10-1131 (D.C. Cir. Nov. 16, 2010).

123. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

124. Env’tl. Prot. Agency, Fact Sheet on the Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule 1, *available at* [http://www.epa.gov/nsr/documents/2010\\_0413fs.pdf](http://www.epa.gov/nsr/documents/2010_0413fs.pdf) (last visited Oct. 7, 2011).



that this tailoring approach is legally supportable based on three legal doctrines:

1) [T]he “absurd results” doctrine, which authorizes agencies to apply statutory requirements differently than a literal reading would indicate, as necessary to effectuate congressional intent and avoid absurd results, 2) the “administrative necessity” doctrine, which authorizes agencies to apply statutory requirements in a way that avoids impossible administrative burdens[,] and 3) the “one-step-at-a-time” doctrine, which authorizes agencies to implement statutory requirements a step at a time.<sup>125</sup>

Not surprisingly, the rule and its underlying tailoring rationales have been challenged.<sup>126</sup> The litigants are seeking to hoist EPA on the legal foundation it has constructed, notably that EPA should be able to deviate from the emission level requirements in the CAA under the PSD and Title V programs because adherence to those requirements for GHG emissions would produce “absurd results.” As of this writing, the outcomes of these legal challenges to this suite of four EPA rules remain uncertain. Their fate in the courts, and perhaps in Congress as well, will have a significant effect on the approaches the country takes to address GHG emissions.<sup>127</sup> In addition to these relatively broad-scale rulemaking initiatives, EPA has engaged in other, more targeted rulemaking in order to reduce climate change emissions, and these have attracted litigation, as well.<sup>128</sup> There has also been a variety of rules-

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125. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

126. In September 2010, all twenty-six cases were consolidated under *Southeastern Legal Foundation v. EPA*, No. 10-1131 (D.C. Cir. Sept. 3, 2010).

127. See, e.g., *21st Century Problems, 20th Century Laws*, ENVTL. F., Jan.–Feb. 2011, 42, 44 (quoting former EPA General Counsel Ann Klee as stating that “[w]hether the Tailoring Rule survives or not is critical to the success of the rest of EPA’s regulations. Without the Tailoring Rule, the [CAA] simply cannot manage the regulatory burdens that will be imposed if the agency uses it to address [GHG] emissions”); Dean Scott, *EPA’s Greenhouse Gas, Boiler Rules Top Regulatory Complaints in Letters to Issa*, DAILY ENVIROWIRE, Feb. 8, 2011, <http://events.awma.org/pressroom/index.html?id=2216> (Environmental rules governing greenhouse gases . . . got top billing by dozens of industry groups asked . . . to provide examples of overly burdensome regulations . . . .”); Elana Schor, *EPA: House GOP Ponders Blocking Funds for Emissions Regs*, ENV’T & ENERGY DAILY, Feb. 9, 2011, <http://www.eenews.net/EEDaily/print/2011/02/09/3> (noting that there has been discussion in Congress about limiting funding for enforcement of EPA’s GHG emission regulations).

128. In November 2010, for example, in the new source review context, cement manufacturers and environmental groups filed nineteen lawsuits to challenge an EPA rule that established new source performance standards (NSPS) and national emissions standards for hazardous air pollutants (NESHAPS) for cement kilns. *Portland Cement Ass’n v. EPA*, No. 10-1358 (D.C. Cir. filed Nov. 5, 2010). EPA also has recently entered into settlements with NGOs

related litigation matters involving state laws and regulations.<sup>129</sup>

Federalism issues were often wrapped into the rules challenges cases. For example, two *Texas v. EPA* cases<sup>130</sup> involve a Texas challenge to an EPA interim rule issued in December 2010, in which the Agency partially disapproved Texas' PSD program on the ground that Texas did not address the program's application to GHG emissions that would become subject to the program in early 2011.<sup>131</sup> As EPA and others grapple with how best to apply the CAA regulatory framework to

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that filed suit to require EPA to set GHG emission standards for the petroleum and electric generating unit industries. Proposed Settlement Agreement, 75 Fed. Reg. 82,390, 82,391 (Dec. 30, 2010). In some cases, this more targeted litigation has yielded commitments by the Agency to promulgate emission standards for GHGs by some date certain, though the precise standards remain in question. In other cases, EPA or another federal agency has agreed to decide whether to issue standards by a date certain. We view this latter category of cases to be "deadline suits," in that they seek a court order obligating an agency to take action by a date certain based on a non-discretionary duty.

129. See, e.g., *Citizens for Env'tl. Inquiry v. Dep't of Env'tl. Quality*, No. 286773, 2010 WL 446047 (Mich. Ct. App. Feb. 9, 2010) (involving an unsuccessful effort by citizens first to persuade the state environmental agency, the Department of Environmental Quality (DEQ), to promulgate a rule regulating CO<sub>2</sub> emissions and then to persuade the Michigan courts to require DEQ to do so). The court in *Citizens* held that the plaintiffs had failed to establish that they had "a clear legal right to the promulgation of specific rules regarding CO<sub>2</sub> emissions" because the plaintiffs had failed to allege a specific injury that warranted the mandamus relief they were seeking. *Id.* at \*1. The court also held that the plaintiffs could not bring a claim alleging that the Michigan Environmental Protection Act (MEPA) imposes a legal duty on the DEQ to determine the impacts of CO<sub>2</sub> emissions on the environment as part of the air permitting process because the MEPA authorizes private actions only "against regulated or regulable actors who are specifically engaged in 'wrongful conduct' that harms the environment," not against the DEQ for its determinations of permit eligibility. *Id.* at \*3; see also *New Energy Econ., Inc. v. Shoobridge*, 243 P.3d 746 (N.M. 2010) (involving an environmental group's request that the New Mexico Board promulgate regulations to control GHG emissions, the Board's decision to conduct a rulemaking proceeding, and a challenge to the Board's authority to regulate GHG emissions until the State first established a NAAQS for GHGs). The court in *New Energy Economy* allowed the Board to continue its administrative process without judicial intervention, reasoning that it "should not intervene to halt administrative hearings before rules or regulations are adopted." *New Energy Econ.*, 243 P.3d at 751. The court invoked "prudential considerations" in determining that "[j]udicial action that disrupts the administrative process before it has run its course intrudes on the power of another branch of government." *Id.* at 752; see also *In re Quantification of Env'tl. Costs*, 578 N.W.2d 794 (Minn Ct. App. 1998) (upholding the Minnesota Public Utilities Commission's (PUC) implementation of a Minnesota statute, which required the PUC to set "environmental cost values" for different methods of electricity generation, on the grounds that the PUC had the expertise to determine environmental cost values and that its decisions were defensible that CO<sub>2</sub> negatively affects the environment and on the values it set).

130. *Texas v. EPA*, No. 10-1425 (D.C. Cir. filed Dec. 30, 2010); *Texas v. EPA*, No. 10-60961 (5th Cir. filed Dec. 15, 2010).

131. *Texas*, No. 10-60961; Benjamin Thomas, *Texas and EPA Battle over Greenhouse Gas Regulations*, REG BLOG (May 9, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/05/texas-and-epa-battle-over-greenhouse-gas-regulations.html>.

limit GHG emissions from stationary sources, it is likely that there will be considerable tension between EPA and the states as they work through the sources to be covered, the approaches to be taken, and the division of responsibilities for the work that needs to be done.<sup>132</sup>

Several rule challenge cases have addressed another issue that arises with the federal system's effort to limit GHG emissions—that of preemption. In *Ass'n of Taxicab Operators USA v. City of Dallas*,<sup>133</sup> the City of Dallas adopted an ordinance that gave a preference to taxicabs that run on compressed natural gas to move to the front of the line in taxicab queues at Dallas Love Field Airport. The Taxicab Operators Association claimed that the ordinance was preempted by the CAA because it established an emissions standard. The court denied the request for a preliminary injunction, allowing the ordinance to stand, because it was not persuaded that the plaintiffs would prevail on the merits.<sup>134</sup>

In contrast, *Metropolitan Taxicab Board of Trade v. City of New York*<sup>135</sup> involved a successful preemption claim regarding a local ordinance. New York City's Taxicab & Limousine Commission (TLC) had amended its lease rates for taxicabs in order to increase incentives for fleet owners to use hybrid-engine and fuel-efficient vehicles. The City's rules increased the "lease caps" for these vehicles and reduced the lease caps for non-hybrid, non-clean diesel vehicles.<sup>136</sup> The district court had granted the taxicab board's request for a preliminary injunction, finding that the new lease caps were sufficiently likely to be preempted by the Energy Policy and Conservation Act (EPCA) and the CAA. The EPCA preemption clause provides:

[A] State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.<sup>137</sup>

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132. Beyond the Texas situation discussed above, EPA has had to issue several "friendly FIPS" (federal implementation plans) because some states are not yet prepared to integrate GHG emissions controls into their PSD programs. Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan, 75 Fed. Reg. 82,246 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

133. 760 F. Supp. 2d 693 (N.D. Tex. 2010).

134. *Id.* at 694.

135. 615 F.3d 152 (2nd Cir. 2010).

136. *Id.* at 155.

137. 49 U.S.C. § 32919(a) (2006).

The U.S. Court of Appeals for the Second Circuit affirmed, holding that the City's rules, which were "based expressly on the fuel economy of a leased vehicle, plainly fall within the scope of the EPCA preemption provision. The plaintiffs, therefore, have demonstrated . . . a certainty, of success on the merits."<sup>138</sup>

A challenge to regulatory action that would establish new or more stringent limits on GHG emissions was successful in *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*.<sup>139</sup> The case involved a challenge on federal preemption grounds to an Albuquerque City Council Energy Conservation Code provision which regulates the "designs and techniques to achieve the effective use of energy."<sup>140</sup> The court agreed for some of the challenged provisions of the Code, but not all, citing the broad preemption language in the National Appliance Energy Conservation Act<sup>141</sup> and the legislative history, which noted, among other things, that Congress recognized that the Act "preempt[s] State law under most circumstances."<sup>142</sup>

## 2. Climate Change in Agency Impact Assessments

Just as litigants have battled over the extent to which climate change issues must or must not be integrated into substantive decisionmaking under existing environmental laws, so too has the litigation front reached environmental law's extensive array of procedural requirements, particularly those requiring assessment of the environmental impacts of proposed actions. These climate change litigation matters fall into claim types 11 and 12. Most prominently, thirty-four cases—one-sixth of all climate change litigation matters—involved claims brought under the National Environmental Policy Act (NEPA), which requires all federal agencies to

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138. *Metro. Taxicab Bd. of Trade*, 615 F.3d at 158. See also *Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224, 237 (D.R.I. 2008) (dismissing on issue preclusion grounds a preemption case brought by automobile manufacturers challenging Rhode Island's GHG emission standards for new automobiles, but allowing the case to continue for other nonstate plaintiffs); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) (dismissing various automobile interests' challenge on preemption grounds to Vermont regulations that adopted the California motor vehicle emission standards and in so doing, explaining that its task was to evaluate the legitimacy of Vermont's regulations based on whether they conformed to Congress' wishes and that the significant "technical, political, and even moral" issues associated with the challenge of climate change were for the other branches of government).

139. *The Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. CIV-08-633 MV/RLP, 2008 WL 5586316 (D.N.M. 2008).

140. *Id.* at \*2.

141. *Id.*

142. *Id.* at \*6 (quoting H.R. REP No. 100-11, at 19 (1987)) (internal quotation marks omitted).

include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on[] (i) the environmental impact of the proposed action, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented . . . .<sup>143</sup>

The Council on Environmental Quality (CEQ), through regulations implementing this environmental impact statement (EIS) procedure for federal agencies, requires agencies to consider direct effects, indirect effects, and cumulative impacts on the environment.<sup>144</sup> It does not take much imagination to envision the NEPA climate connection and how a claimant would argue that an agency must include in its NEPA analysis an evaluation of how the proposed action, such as approval of an industrial source of GHG emissions, may contribute to climate change as a direct, indirect, or cumulative effect.<sup>145</sup> Indeed, in doing so, NEPA has provided the medium for the earliest of statute-based climate change litigation.<sup>146</sup>

Cases addressing NEPA compliance in the climate change context fell into three categories. First, over a dozen cases involved claims alleging that an agency improperly omitted *any* discussion of emissions and impacts from its NEPA assessment process. Another set of cases involved instances in which an agency had considered emissions or impacts, but concluded their effects were not sufficient to reach the “significantly affecting” threshold and thus did not warrant preparation of a full EIS,<sup>147</sup> the claim being that the agency instead should have

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143. 42 U.S.C. § 4332(2)(C) (2006). This provision also requires statements on alternative actions, short- and long-term implications, and “any irreversible and irretrievable commitments of resources.” *Id.* § 4332(2)(C)(iii)–(v).

144. The CEQ has defined “direct effects” as those “which are caused by the action and occur at the same time and place,” 40 C.F.R. § 1508.8(a) (2011), “indirect effects” as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” *id.* § 1508.8(b), and “cumulative impacts” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* § 1508.7.

145. *See generally* Madeline June Kass, *A NEPA-Climate Paradox: Taking Greenhouse Gases into Account in Threshold Significance Determinations*, 42 *IND. L. REV.* 47, 49 (2009) (examining aspects of “integrating climate considerations into NEPA’s procedural framework”).

146. *See* *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 481 (D.C. Cir. 1990) (finding that the city had standing to challenge the agency’s EIS for inadequate discussion of climate change, but ruling against the city on the merits).

147. In such instances, the Agency issues a “finding of no significant impact,” or FONSI,

done so. Lastly, a number of cases involved claims that the discussion of emissions or impacts in an EIS, while present, was insufficient to satisfy NEPA. These kinds of claims are typical of NEPA litigation,<sup>148</sup> so there is nothing unusual about climate change NEPA litigation in this sense.

The issue in the first set of cases—whether GHG emissions and climate change impacts need to be considered at all under NEPA—is an important threshold determination for any new kind of impact. For climate change in particular, the extended causal chain from emissions to impacts and the lack of certainty in predictive impact models could plausibly support the argument that climate change is simply too speculative for agencies to need to worry about, particularly for small-scale projects. Indeed, some courts have so ruled. For example, the U.S. Court of Appeals for the Ninth Circuit recently held that the Forest Service did not have to consider climate change in connection with a decision to thin portions of a national forest in order to control fire and pests.<sup>149</sup> The court agreed with that agency that because the project involved a small amount of land and thinning of only some trees, its climate impacts were “meaningless” and thus not required to be mentioned at all in the NEPA analysis.<sup>150</sup> Similarly, in a rather terse dismissal of a claim that federal agencies improperly omitted consideration of impacts of GHG emissions from vehicles using a proposed new highway, a federal district court emphasized the complete lack of evidence that the agency had considered the emissions, but ruled that “[t]he plaintiffs have not, however, pointed to any law or regulation showing that defendants’ failure to consider greenhouse gas emissions makes the FIES inadequate, or makes the decision . . . arbitrary or capricious.”<sup>151</sup>

In some cases, however, courts have ruled that GHG emissions and climate change impacts are squarely within the scope of NEPA, the question then being how to incorporate them into the assessment process. An example is *Border Power Plant Working Group v. Department of Energy*,<sup>152</sup> in which the court held that the agency’s NEPA analysis for a proposed power transmission line in the United States should have considered the effects of GHG emissions from

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based on a more truncated impact analysis known as an environmental assessment (EA). See 40 C.F.R. § 1501.4 (2011).

148. See generally THE NEPA LITIGATION GUIDE (Karin P. Sheldon & Mark Squillace eds., 1999).

149. See *Hapner v. Tidwell*, 621 F.3d 1239, 1245 (9th Cir. 2010).

150. *Id.* at 1245.

151. *Sierra Club v. Fed. Hwy. Admin.*, 715 F. Supp. 2d 721, 741 (S.D. Tex. 2010).

152. 260 F. Supp. 2d 997 (S.D. Cal. 2003).

power plants in Mexico delivering power through the line.<sup>153</sup> The court rejected the agency's arguments that the effects were too speculative and that because GHG emissions are unregulated, they are not within NEPA's scope.<sup>154</sup> Rather, "[b]ecause these emissions have potential environmental impacts and were indicated by the record, . . . failure to disclose and analyze their significance is counter to NEPA."<sup>155</sup>

This gateway issue of whether NEPA requires climate change analysis may be an example of how agency action is eclipsing, or at least influencing, the traditional judicial approach. Although the CEQ issued draft guidance in 1997 suggesting that NEPA "provides an excellent mechanism for consideration of ideas related to global climate change,"<sup>156</sup> that idea went dormant and remained so, even well after the climate change litigation wave geared up. In a 2010 draft guidance, however, CEQ reprised the theme by proposing "to advise [f]ederal agencies to consider, in scoping their NEPA analyses, whether analysis of the direct and indirect GHG emissions from their proposed actions may provide meaningful information to decision makers and the public."<sup>157</sup> CEQ also proposed to advise agencies to consider "the effects of climate change on the design of a proposed action and alternatives."<sup>158</sup> Although the draft guidance recognized that low emission levels usually do not warrant extensive analysis and that the

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153. *Id.* at 1029.

154. *Id.* at 1028–29.

155. *Id.* at 1029.

156. Draft Memorandum from Kathleen A. McGinty, Chairman, Council on Env'tl. Quality, to Heads of Federal Agencies, Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act 1 (Oct. 8, 1997), *available at* <http://www.boemre.gov/eppd/compliance/reports/ceqmemo.pdf>. As CEQ explained:

The available scientific evidence . . . indicates that climate change is "reasonably foreseeable" impacts of emissions of greenhouse gases, as that phrase is context of NEPA and CEQ regulations. . . .

Specifically, federal agencies must determine whether and to what extent their actions affect greenhouse gases. Further, federal agencies must consider whether the actions they take, *e.g.*, the planning and design of federal projects, may be affected by changes in the environment which might be caused by global climatic change.

*Id.* at 4.

157. Memorandum from Nancy H. Sutley, Chair, Council on Env'tl. Quality, to Heads of Federal Departments and Agencies, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions 1 (Feb. 18, 2010), *available at* [http://ceq.hss.doe.gov/nepa/regs/Consideration\\_of\\_Effects\\_of\\_GHG\\_Draft\\_NEPA\\_Guidance\\_FINAL\\_02182010.pdf](http://ceq.hss.doe.gov/nepa/regs/Consideration_of_Effects_of_GHG_Draft_NEPA_Guidance_FINAL_02182010.pdf).

158. *Id.* at 2.

effects of climate change are difficult to predict,<sup>159</sup> the gist of the guidance was that agencies should at least put emissions and impacts into play in their NEPA work. Courts might view this guidance as a strong signal from NEPA's chief agency that the real issue for NEPA and climate change is not whether emissions and impacts must be considered by agencies, but rather whether the agencies have prepared adequate assessments. At the very least, CEQ's guidance is likely to prompt agencies to include emissions and impacts at some level of discussion in their NEPA assessments, even if to say merely that they were considered and rejected from effects for further analysis. This approach would push most NEPA climate change litigation past the threshold omission issue to one of the two questions of adequacy—whether an EIS should have been prepared or, if one was prepared, whether the analysis is sufficiently thorough.

On those two fronts, there is nothing unusual about the outcomes of the climate change NEPA cases compared to NEPA litigation involving other alleged effects that a proposed action could have, such as habitat loss or water pollution. NEPA is a highly context-specific statute, making it difficult to draw hard and fast rules about what must be considered for a proposed action and at what depth of analysis.<sup>160</sup> So even though some courts have found that an agency improperly declined to prepare a full EIS,<sup>161</sup> several of the decided cases have found the agency's decision not to do so acceptable.<sup>162</sup> Even more telling, courts have yet to find that an agency's analysis of emissions or impacts in a full EIS has been inadequate. In other words, if an agency prepared a full EIS and put some analysis of emissions or impacts into it, the courts have been satisfied in every instance. This strong trend may reflect that courts appreciate the uncertain nature of climate change impact prediction. For example, one court rejected a claim that the EIS for a highway project inadequately assessed the GHG emission effects,

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159. *See id.* at 2–8.

160. This is a dominant theme of CEQ's 2010 draft guidance, *see id.* at 2–10, and is true of NEPA impact analysis in general. *See* John F. Shepherd, *Range of Proposals Covered by NEPA*, in *THE NEPA LITIGATION GUIDE*, *supra* note 148, at 20, 34–38.

161. *See, e.g.,* Ctr. for Biological Diversity v. Nat'l Highway Transp. Safety Admin., 508 F.3d 508, 553–55 (9th Cir. 2007) (rejecting the agency's rationale for not preparing an EIS to analyze GHG emission impacts of proposed fuel economy standards). This is the opposite outcome from that reached by the D.C. Circuit on the agency's set of fuel economy standards promulgated over 15 years earlier. *See* City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 481 (D.C. Cir. 1990) (finding that the city had standing to challenge the agency's EIS for inadequate discussion of climate change, but ruling against the city on the merits).

162. *See, e.g.,* N. Slope Borough v. Minerals Mgmt. Serv., No. 3:07-cv-0045-RRB, 2008 WL 110889, at \*3–4 (D. Alaska Jan. 8, 2008) (approving of the Agency's decision not to prepare a supplemental EIS to analyze effects of GHG emissions from oil and gas leasing).



agreeing with the agency that it was reasonable not to quantify emissions and calculate their impacts “because any determination of . . . impact on overall global climate change would have been highly speculative and thus not useful.”<sup>163</sup>

The CEQ guidance, which recognizes the difficulty of predicting climate impacts yet encourages agencies to try, may nonetheless over time lead to more rigorous agency analysis and thus possibly more contested litigation and deeper judicial review. Thus far, however, NEPA has simply not provided fertile ground for plaintiffs seeking to force agencies to do more with their climate change assessments. A summary of the three kinds of NEPA claims identified and the status of the claims that have been filed is provided in Table II. As Table II shows, of the nineteen NEPA climate change matters that have reached some final judicial disposition, plaintiffs have prevailed in only three and lost on procedural grounds or on the merits in the others.<sup>164</sup>

Table II: Status of NEPA Climate Change Litigation Matters

NEPA Claim	Total	Successful	Unsuccessful	Other	Pending
improperly omitted	14	2	4	3	5
failure to prepare EIS	4	1	3	0	0
inadequate EIS analysis	16	0	9	3	4

A more plaintiff-friendly story can be told of the cases arising under California’s state version of NEPA, the California Environmental Quality Act (CEQA),<sup>165</sup> which imposes a similar regime for preparation of environmental impact review (EIR) assessments.<sup>166</sup> California courts have generally made it clear that GHG emissions and climate change impacts are in the CEQA mix of effects that matter;<sup>167</sup> the state has adopted regulatory guidelines, much like those CEQ proposed, to guide

163. *N. Carolina Alliance for Transp. Reform, Inc., v. U.S. Dep’t of Transp.*, 713 F. Supp. 2d 491, 517 (M.D.N.C. 2010).

164. One case recorded in the “other” category was settled on terms clearly favorable to the plaintiff. Our focus in this particular tabulation of NEPA claim outcomes, however, is on judicial treatment of the NEPA claims.

165. CAL. PUB. RES. CODE §§ 21000–21177 (West 2010).

166. *Id.* § 21100.

167. *See, e.g., Cmty. for a Better Env’t v. City of Richmond*, 108 Cal. Rptr. 3d 478, 491–92 (Cal. Ct. App. 2010) (concluding that state legislation and policy acknowledge that GHGs have a significant environmental impact and requiring their consideration in CEQA analysis for a proposed refinery).

agency analysis of emission and impact effects.<sup>168</sup> From there, much like NEPA, the context of each proposed action has driven how far and deep the courts demand the agencies run with the assessment of emissions and impacts. Overall, however, the CEQA plaintiff win/loss rates are tilted more toward the win side than under NEPA. Of the thirty-three CEQA climate change litigation matters—like NEPA, one-sixth of the total matters in our study—plaintiffs have prevailed on the merits in nine and were unsuccessful in six; five cases were resolved through settlement or other means, two on terms clearly favorable to the plaintiff, and those remaining were pending as of the close of our study period.

Claims challenging agency impact assessments under state impact assessment statutes have been filed in only a few other states. Plaintiffs are zero for three in Minnesota, where the courts have, like the federal courts, generally deferred to agency effects analyses as adequate.<sup>169</sup> Matters in other states have not been resolved on the merits or are pending.

Other than NEPA and its state counterparts, the ESA includes an impact assessment requirement that is ripe for climate change litigation. Section 7(a)(2) of the ESA provides that federal agencies must consult with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), depending on the species, to

insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.<sup>170</sup>

The statute builds an elaborate procedure for carrying out these consultations under which the agency proposing the action must carry out a series of steps designed to predict the impact of the action on listed species, with the ultimate product in some instances being a “biological opinion” from the consulting agency “detailing how the agency action affects the species or its critical habitat.”<sup>171</sup>

One recent judicial opinion makes it clear that the assessment must at least address the effects of climate change on the species that are the subject of the consultation. In *Natural Resources Defense Council v.*

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168. 14 CAL. CODE REGS. tit. 14, § 15064.4 (2010); *see also* Cal. Natural Res. Agency, *CEQA Guidelines*, CA.GOV, <http://ceres.ca.gov/ceqa/guidelines> (last visited Nov. 11, 2011).

169. *See, e.g.*, Minn. Ctr. for Env'tl. Advocacy v. Holsten, No. A08-2171, 2009 WL 2998037, at \*7–10 (Minn. Ct. App. Sept. 22, 2009).

170. 16 U.S.C. § 1536(a)(2) (2006).

171. *Id.* § 1536(b)(3)(A).

*Kemphorne*,<sup>172</sup> FWS had prepared its consultation report regarding the effects of the Central Valley Project-State Water Project (CVP-SWP) in California on a small fish, the Delta smelt.<sup>173</sup> The biological opinion conclusions were based in part on the assumption that the hydrology of the water bodies affected by the project would follow historical patterns for the next twenty years.<sup>174</sup> Undercutting this assumption, a number of environmental groups directed the Agency's attention to several studies on the potential effects of climate change on water supply reliability, urging that the issue be considered in the assessment.<sup>175</sup> FWS attempted to defend its failure to consider climate change at all by appealing to what it described as inconclusive science, but the court evidenced little tolerance for the Agency's failure to address these issues openly in the consultation documents.<sup>176</sup> The court found that "the climate change issue was not meaningfully discussed in the biological opinion, making it impossible to determine whether the information was rationally discounted because of its inconclusive nature, or arbitrarily ignored,"<sup>177</sup> and hence, "FWS acted arbitrarily and capriciously by failing to address the issue of climate change in the BiOp."<sup>178</sup> As did the majority in *Massachusetts v. EPA*, however, the *Kemphorne* court made it clear that at this stage of the litigation, "[t]here is no basis to determine what weight FWS should ultimately give the climate change issue in its analysis."<sup>179</sup> The Agency's error, in other words, was in failing to address climate change *at all*.<sup>180</sup>

Overall, however, climate change litigation brought pursuant to statutory monitoring, impact assessment, and disclosure requirements has been dominated by NEPA and CEQA claims—they make up sixty-seven of the eighty-seven cases in the procedural monitoring, impact assessment, and information reporting category.<sup>181</sup> As Figure 1 shows, plaintiffs have prevailed in just over a quarter of the total cases in the category and lost in one-third of the cases, with 30% of all matters still pending at the time our study period closed. All indications are that this

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172. 506 F. Supp. 2d 322 (E.D. Cal. 2007).

173. *Id.* at 328.

174. *Id.* at 367.

175. *Id.* at 367–68.

176. *See id.* at 369.

177. *Id.*

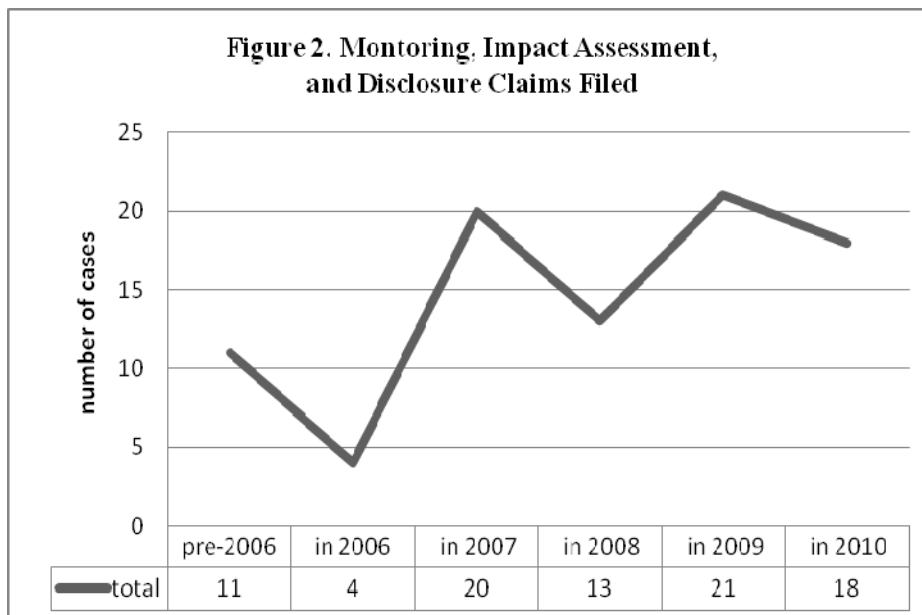
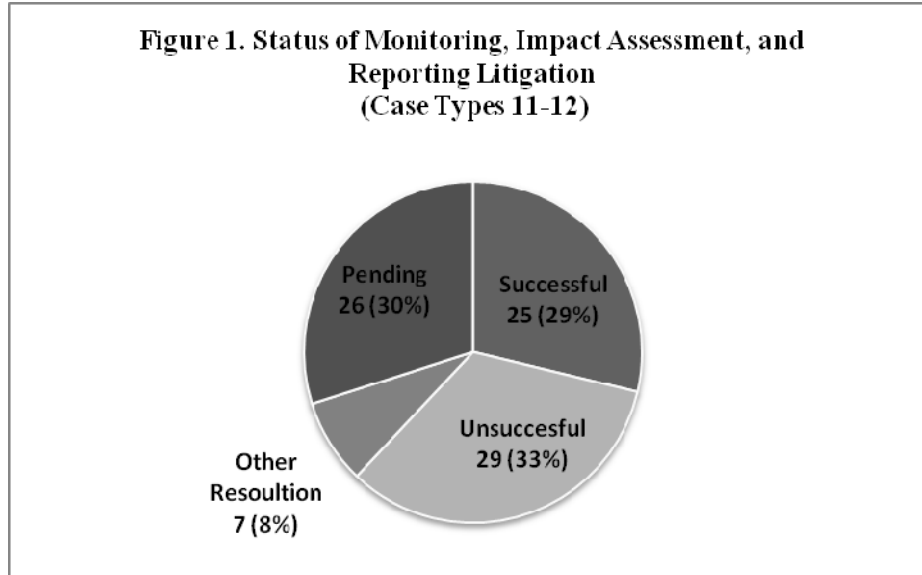
178. *Id.* at 370.

179. *Id.* at 370 n.28.

180. *See also* *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1274 (E.D. Cal. 2010) (biological opinion for operation of two dams inadequate because, among other defects, it did not consider the effects of global warming on river water temperature).

181. Other cases involved state impact assessment statutes other than CEQA, the ESA, or federal and state government and private and public information disclosure statutes.

category of litigation will remain active, as the trend line of annual filed cases shown in Figure 2 strongly suggests.



## II. SIEGE WARFARE IN “PRO” VERSUS “ANTI” CLIMATE CHANGE LITIGATION

Unlike the Gerrard and Howe inventory, our typology of climate change litigation allowed us to differentiate claims based not only on the plaintiff’s litigation objectives (for example, to stop government issuance of a permit), but also on the effect a suit’s success would have

on climate change law and regulation (for example, to increase regulatory standards). The latter parameter, built into the structure of the typology, allowed us to identify what we refer to as “pro” and “anti” cases, with “pro” cases having the objective of increasing regulation or liability associated with climate change and “anti” cases being aimed in the opposite direction.<sup>182</sup> Although pro litigation has dominated, accounting for 161 of the 201 litigation matters in the study, anti litigation has been steadily on the rise. The result has become an intensely contested, broadly cast field of litigation observers have likened to “siege warfare”<sup>183</sup> and a “food fight.”<sup>184</sup> They are not far off.

Indeed, within the substantive mitigation regulation category of litigation (claim types 1 through 6 in Table I), where anti litigation is concentrated, the thirty-three anti litigation matters account for 39% of the total of eighty-four matters, and the litigation filing history tracked in Figure 3 for anti litigation matters shows a clear upward trend. A summary of the outcomes of the cases in claim types 1 through 6 is provided in Table III. In terms of outcomes in that category, moreover, Table III shows that anti litigation has had at least as much traction in the courts as pro litigation, though neither thrust has seen much success. Of the fifty-one pro matters focused on substantive mitigation regulation issues, thirty-one have reached final resolution, with plaintiffs prevailing in ten cases and losing in twenty-one.<sup>185</sup> Those numbers for the thirty-three total anti litigation matters are eighteen matters in final resolution with eight wins and ten losses for plaintiffs. Anti litigation, in other words, is a significant component of climate change litigation involving agency permits and rules, though it has gone largely unnoticed in legal scholarship. Also largely neglected in the commentary is how unsuccessful climate change litigation has been in general. Here, therefore, we take a closer look at the content and experiences of pro and anti climate change litigation.

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182. “Pro” cases are Case Types 1, 3, 5, 6, 7, 9, 10, 11, 13, 14, 15, and 16 in our typology set out on Table I.1, and “anti” cases are Case Types 2, 4, 8, 12, and 17. If a case in Case Type 18, “other,” had a discernible pro or anti direction, we coded it appropriately.

183. de los Rios, *supra* note 47.

184. Elaine Spencer, *Food Fight! Greenhouse Gas Regulation in 2011*, GREENTECH (Jan. 11, 2011), <http://www.wagreentech.com/2011/01/food-fight-greenhouse-gas-regulation-in.html> (noting climate policy debate is “best described as an old fashioned food fight, with parties hurling lawsuits and investigations and threats”).

185. We include in final resolution cases the relatively small number of matters that have settled with a clear indication that the plaintiff obtained or failed to obtain all or a substantial portion of the relief sought in the complaint. Settlements with no clear “winner” were coded as neutral and are shown in the “other” category in Table I. Because of the difficulty in tracking and obtaining settlement documents, we cannot claim to have identified all settled climate change litigation matters.

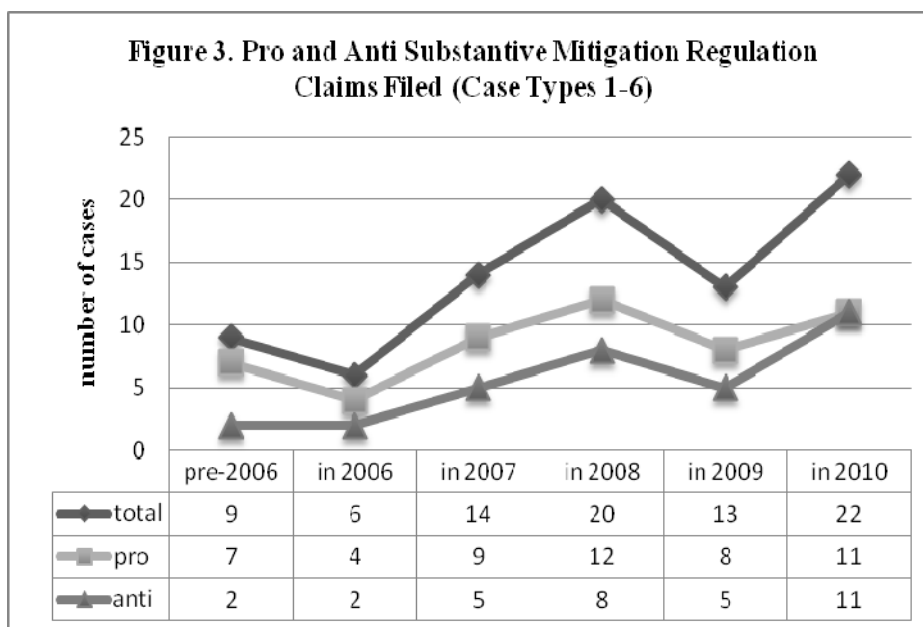


Table III: Outcomes of Substantive Mitigation Regulation Matters (Claim Types 1 through 6)

Claim Type	Total # of Cases	# of Cases with Successful Plaintiff	# of Cases with Unsuccessful Plaintiff	# of Cases Pending	Other
1 (pro)	28	3	16	7	2
2 (anti)	4	0	4	0	0
3 (pro)	22	7	4	8	3
4 (anti)	29	8	6	14	1
5 (pro)	0	0	0	0	0
6 (pro)	1	0	1	0	0

One of the more glaring differences between pro and anti climate change litigation is their respective scopes. As can be seen from Table I, pro litigation is distributed among the monitoring, impact assessment, and reporting category (claim types 11 and 12), where it comprises all but one of the cases, and cases involving agency permits and approvals (claim type 1), agency rules and standards (claim type 3), common law liabilities (claim type 14), and threatened resources (claim type 16). Anti litigation, by contrast, is highly concentrated in the agency rules category (claim type 4), in which the twenty-nine matters account for over 80% of all the anti litigation matters in our study.

This skewed concentration of anti litigation in the agency rules and standards category both explains and is explained by the filing date

history shown in Figure 3. Quite simply, until agencies, either on their own initiative or as a product of the surge of pro litigation, began promulgating substantive mitigation regulation rules and standards, there was little for anti litigation to shoot at. Consider, for example, the history and aftermath of *Massachusetts v. EPA*, covered in Subsection I.C.1. EPA had initially refused to grant the rulemaking petition, meaning that only pro litigation would be involved to move the agency's position. The Supreme Court issued its opinion in 2007, pushing the agency into decisionmaking mode, but even then it took EPA until 2009 to begin proposing its massive set of rules and not until late 2009 did the agency promulgate any final rules.<sup>186</sup> The pushback of anti litigation in response to EPA's rules thus could not have begun until late 2009, and even then would be confined to the agency rules and standards category for some time until the permits began to be issued under the new rules and challenged by both pro and anti interests. The double spike of pro and anti filings in 2010 shown in Figure 3 thus suggests that anti litigation is poised to become as active and diverse as pro litigation, as more federal and state rules and standards come on line, agencies begin issuing permits, and monitoring and reporting regulations become more prevalent.<sup>187</sup>

The scope and timing of pro and anti litigation matters also go a long way toward explaining a finding from our study that one would hardly have picked up by reading legal commentary on climate change litigation: climate change litigation, and pro litigation in particular, thus far has not registered much success in court. Pro litigation has been scattershot, exploring every potential avenue from common law to endangered species as a way to gain leverage on climate change policy. Many of the strategies seemed to have low probabilities of success from the start. The CAA PSD permit cases, for example, depended for any success on an agency or court agreeing that pollutants not regulated under the statute (at the time) nonetheless were required to be regulated in permits issued under the statute.<sup>188</sup> Similarly, many of the NEPA pro matters demanded that agencies provide more detail on climate change impacts than seems reasonable to demand under existing scientific capacity.<sup>189</sup> It should be no surprise, then, that success rates on those and similar claims have been low.

For its part, anti litigation, concentrated as it is in the agency rules

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186. See MELTZ, *supra* note 3, at 1–5.

187. That is, of course, unless legislative initiatives preclude further agency regulatory initiatives, thus foreclosing pro litigation on such matters and making anti litigation unnecessary. New legislation forcing agencies to regulate would, of course, prompt yet more pro and anti litigation.

188. See *supra* Subsection I.C.1.a.

189. See *supra* Subsection I.C.2.

and standards category, has been reactive and necessarily focused on finding dents in an agency's rulemaking process or substance. Anti litigation thus has relied on novel stretch claims such as constitutional defects (eleven matters), or on traditional uphill battles such as challenging rules as arbitrary and capricious (most anti cases in claim type 4). Even so, relative to the number of cases filed in the respective groups, anti litigation has been more successful than pro litigation in the substantive mitigation regulation category (24% success rate versus 19.5%). And relative to cases that have reached final resolution, anti litigation has been substantially more successful than pro litigation (44% success rate versus 32%).

One unifying theme for both thrusts is that the vast majority of climate change litigation—90% of all the cases in our study—has been advanced primarily through claims under statutes, most of which, like the CAA, NEPA, and the ESA, have been on the books and fodder for judicial interpretation for decades. These statutes have decades of built up jurisprudence that limits the latitude for courts to chart novel new interpretations favoring pro or anti climate change litigation interests. Even *Massachusetts v. EPA*, which unquestionably altered the path of climate change policy, was, on the merits, a rather vanilla statutory interpretation decision focused on the meaning of the term “air pollutant” in the CAA.<sup>190</sup>

To be sure, it does not take many wins such as *Massachusetts v. EPA* to advance the pro or anti interests behind the litigation, so success rates do not necessarily tell the whole story of the impact of pro or anti litigation. One big anti win (say, success in having a new EPA rule nullified or casting public nuisance claims as nonjusticiable) would be a major story, as well. For example, after our study cutoff date, the Court ruled in *American Electric Power v. Connecticut*<sup>191</sup> that EPA's then-fledgling implementation of the CAA to regulate greenhouse gases preempted federal common law claims alleging that major sources of greenhouse gases are public nuisances.

But the aggregate effects on climate change jurisprudence of many “small” losses across the spectrum of pro and anti litigation can also be

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190. See 549 U.S. at 528–32 (majority opinion); *id.* at 555–60 (Scalia, J., dissenting); see also Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1026 (2010); Kathryn Hurie, Case Note, *To Emit Is Human; To Regulate, Divine: Statutory Interpretation of the Clean Air Act in Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), 33 S. ILL. U. L.J. 527, 539–45 (2009).

191. 131 S. Ct. 2527 (2011). Noting that EPA had decided that greenhouse gases contribute to climate change, the Court on this occasion opened its decision with a reference to a well-known climate change “skeptic” and the caveat that “the Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change.” *Id.* at 2533 n.2.



profound. NEPA litigation, for example, has treated climate change just like any other issue—most courts say agencies should consider significant GHG emissions and climate change impacts in their NEPA process, but the courts (and CEQ) have devised no special rules for scope and depth of analysis. Although no one of these cases may be headline worthy, the aggregate effect can be to build up a general jurisprudential practice. It is this backdrop of pro and anti litigation losses under existing statutes that largely has been ignored in commentary on climate change litigation and which could only have been revealed through a comprehensive empirical study. Having shed light on it and the other specific findings of our study, we now turn to drawing some broader empirical and normative conclusions.

### III. EMPIRICAL AND NORMATIVE THEMES

Parts I and II of this Article delved into the details of climate change litigation at levels of scope and detail never before explored in legal commentary. As discussed in the Introduction, our reason for getting to this point has been to provide the foundation for informed and reasoned approaches to a number of empirically and normatively oriented questions about climate change litigation. The Sections that follow offer what we believe our study indicates those foundations to be.

#### A. *The Judicial Action on Climate Change: How Much, Where, and Who's Playing?*

Our study has caught climate change litigation at what is likely a turning point in many respects. On the one hand, with 201 matters, a growing number of which have been resolved through judicial decision or settlement, climate change litigation surely is “up and running” in the courts, with no indication of dying out. On the other hand, its composition is likely to diversify, and its pro versus anti siege-warfare component is likely to intensify. As noted above, EPA and other agencies are just now promulgating rules, and anti litigation is likely to surge as the new rules come on line and permits are issued. As climate change progresses, moreover, more threatened resources are likely to prompt more robust litigation in that category, and the rights and liabilities and adaptation categories are likely to come on line as well.

Of course, just as predictive models of climate change impacts are unreliable, so too are any predictions of future climate change policies. New legislation or a new Supreme Court decision could quickly unleash or corral climate change litigation on any or all fronts.<sup>192</sup> Nevertheless,

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192. One ongoing debate in legal scholarship, for example, is whether the Clean Air Act is an appropriate vehicle for climate change emissions regulation and whether Congress should enact legislation limiting its application. Compare Teresa B. Clemmer, *Staving Off the Climate*

the time is ripe for taking stock of the climate change litigation scene. We do so in this Section to gain a macro sense of its trend, locus, and participants at this important juncture.

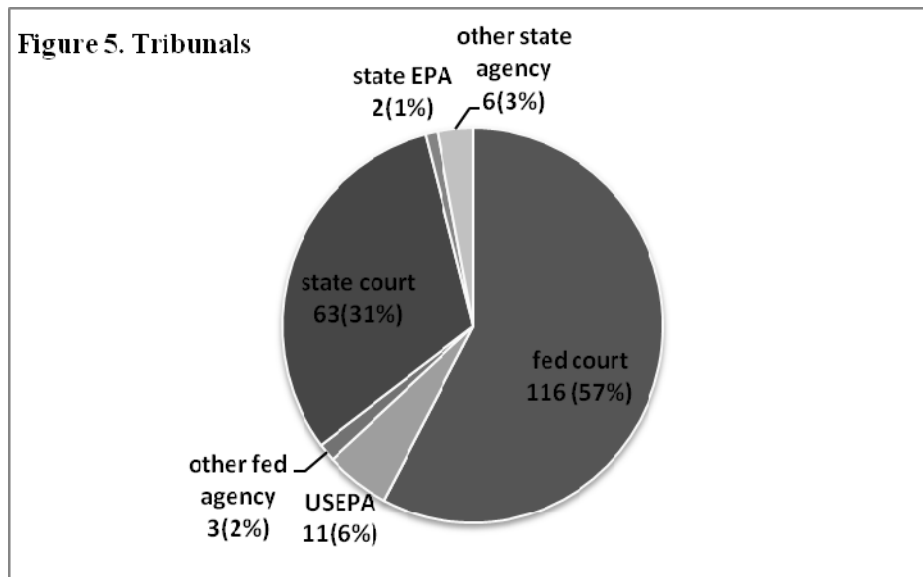
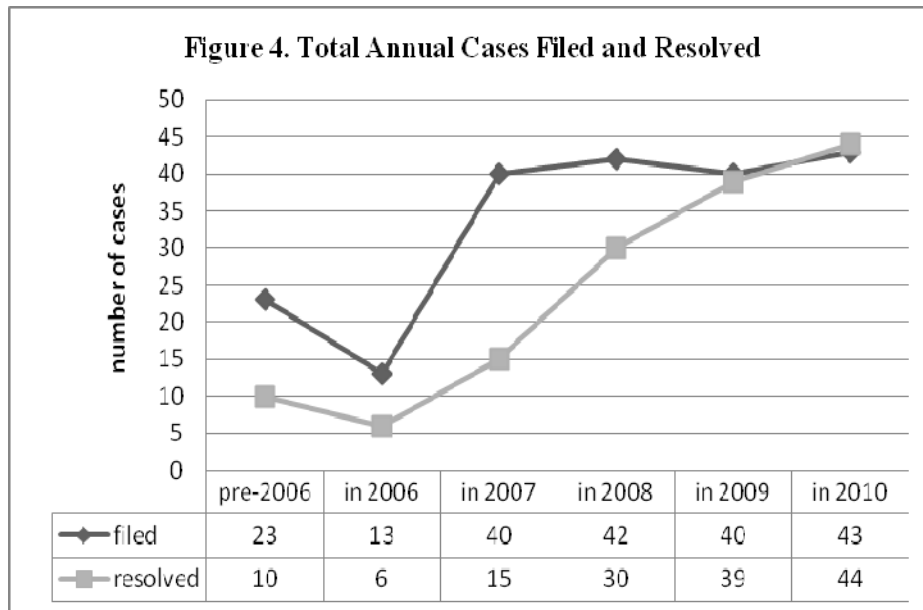
### 1. How Much Action Is There in the Court System?

One of the ironies of legal commentary on climate change litigation is that the predicted “wave” of litigation, if one can call it that, has already hit, but not for the reasons generally given. The predictions of massive volumes of litigation have largely focused on the small cohort of public nuisance cases, one of which surely could burst through to a full trial and make a splash if the plaintiffs prevail. Yet as Figure 4 shows, the wave of climate change litigation already hit in 2007 and has been rolling steadily along ever since. Its continued force is based on the pro/anti battle in the substantive mitigation regulation cases and the impact assessment claims brought under NEPA and CEQA. Actual hard law to apply in the form of resolved matters has built steadily as well, to the point that in 2010, more cases were resolved than were newly filed. And as Figure 5 shows, most of the action is in federal and state courts, in which 89% of the matters are pending or resolved. With 144 resolved pieces of litigation and 57 pending in courts and agencies around the nation as of the closing date of our study, it is our impression that climate change litigation is not just coming—it is here, and the courts are where the action is.<sup>193</sup>

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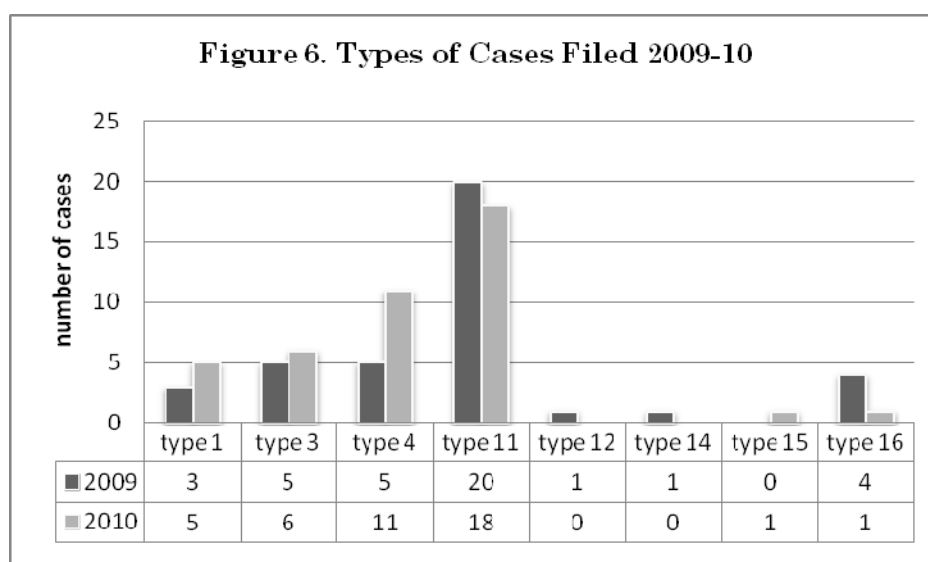
*Crisis: The Sectoral Approach Under the Clean Air Act*, 40 ENVTL. L. 1125, 1127 (2010) (arguing for using the Clean Air Act and against preemptive legislation), with Craig N. Oren, *Is the Clean Air Act at a Crossroads?*, 40 ENVTL L. 1231, 1232 (2010) (arguing that the Clean Air Act is a poor GHG emissions regulation mechanism).

193. To be sure, agency adjudication is likely to become more popular as the business of permit issuance becomes more active, and facial rules challenges are likely to be a diminishing percentage of the litigation as climate change regulation matures. But more agency permit adjudication will likely lead to more claims for judicial review by courts.



## 2. Where Is the Litigation Action Hot and Cold?

At this stage of climate change litigation, equally apparent as the tribunal focus of the claims is where the claim focus is hot and cold. As Figure 6 shows, in 2009 and 2010, cases were filed in only eight of our eighteen claim types. Pro litigation in the monitoring, impact assessment, and reporting category (claim type 11) dominated in both years, with 50% in 2009 and 40% in 2010. Its only real competition came from cases challenging agency rules and standards (claim types 3 and 4), which combined accounted for 27% in 2009 and 40% in 2010.



The spike of filings in these two groupings of claim types supports our earlier predictions that climate change litigation, barring game-changing new legislation with preemptive effects, is likely to bulge around pro and anti claims under existing federal and state statutes to challenge agency action. The other two categories with some presence in 2009 through 2010 filings—claims challenging agency permits (claim type 1) and claims involving identification of threatened resources (claim type 16)—also seem likely to remain fueled by continued pro litigation filings: more permits will be issued as new regulations take hold, and more species and habitats will be threatened as climate change gains traction at landscape levels. The question, therefore, is not whether these forms of climate change litigation will surge forward—they will unless new legislation stops them—but rather which other categories of litigation unrepresented thus far in the mix of filings will increase. We anticipate a significant volume of enforcement

cases over time, both those brought by government and citizen suits, in addition to rights and liabilities cases and adaptation suits.

### 3. Who Are the Players and What Is Their Game?

As for who is making the action, the story is largely what would be expected from the weight of where the action is—private plaintiffs are suing government defendants. A summary of the parties involved in climate change litigation by category is provided in Table IV. As Table IV shows, the most litigious plaintiffs by far are environmental NGOs followed far behind by industry NGOs and companies. The primary targets for all three have been federal and state governments, though environmental NGOs also include companies as defendants frequently. Of course, the fact that agency permits, rules, and impact assessments make up the substance of the vast majority of climate change litigation matters explains why the federal and state governments are in the bull’s eye of NGO and corporate plaintiff litigation claims.

Table IV: Parties in Climate Change Litigation

Category	Party	Fed.	State	Local	Tribe	Env. NGO	Ind. NGO	Co	P
substantive (1–10)	Pl.	0	15	4	0	51	18	19	6
	Def.	42	34	9	0	0	0	17	0
assessment (11–12)	Pl.	0	4	5	5	76	6	3	4
	Def.	48	27	19	0	0	0	21	0
rights (13–15)	Pl.	0	3	1	0	3	1	3	2
	Def.	4	2	1	0	0	0	6	0
resources (16–17)	Pl.	0	0	0	0	11	2	0	0
	Def.	12	1	0	0	0	0	0	0
other (18)	Pl.	0	0	0	0	0	0	3	2
	Def.	0	4	1	0	0	0	1	0
totals	Pl.	0	22	10	5	141	27	27	14
	Def.	106	68	30	0	0	0	45	0
	All	106	90	40	5	141	27	72	14

What Table IV does not reveal is what is behind the state, local, and tribal government plaintiff action. Who are they suing? We were surprised to find that in all cases in which a state, local, or tribal government was among the plaintiffs, another governmental entity was the target defendant. *Massachusetts v. EPA* was not the anomaly, but the rule. Indeed, all but one of the fifteen cases involving a state

government as plaintiff had the federal government as a defendant; the defendant in the other case was a local government. Also, states line up on both sides of the pro versus anti battle—eight of the state plaintiff cases were pro litigation and seven were anti. The same is true for the four local government plaintiff cases; all of them had the federal government as a defendant, three times in pro litigation and once in anti litigation. All five tribal plaintiff suits were pro litigation against the federal government, with one also having a state government defendant.

Intergovernmental litigation is by no means unusual in environmental law<sup>194</sup> or other fields<sup>195</sup>—governments can and do sue other governments—but it was striking to us to find that *all* climate change litigation through 2010 involving a government entity as a plaintiff involved a government entity, usually the federal government, as a defendant. Professor Hari Osofsky has suggested that climate change is fundamentally a multiscale governance challenge and that intergovernmental litigation is a medium in which to “debate the appropriateness and necessity of regulatory entities at different scales taking particular steps to address global climate change.”<sup>196</sup> Our findings suggest that she is on point and that governments have turned to litigation as a means of resolving governance scale disputes that are not being managed effectively through legislative institutions. To be sure, as federal and state agencies issue GHG emission permits and promulgate emission standards under existing and new legislation, government enforcement activity against private actors is likely to increase (as are citizen suits). But with no clear agenda coming out of Congress for what is federal and what is state in climate policy,<sup>197</sup> we anticipate intergovernmental litigation to serve as the medium for resolving many of the federalism issues pervading climate change

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194. See, e.g., Keith Laing, *Florida to Challenge Federal Water Standards*, DAILY REC. (Jacksonville), Dec. 8, 2010, available at [http://www.jaxdailyrecord.com/showstory.php?Story\\_id=532463](http://www.jaxdailyrecord.com/showstory.php?Story_id=532463).

195. See, e.g., M. Scott Carter, *AG Files Suit, Making Oklahoma 28th State to Challenge Health Care Law*, J. REC. LEGIS. REP. (Oklahoma City, Okla.), Jan. 24, 2011, available at EBSCOhost, Accession No. L54668554JROL.

196. Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 3, 15 (2010); see also Hari M. Osofsky, *Multidimensional Governance and the BP Deewater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1119 (2011) (“[S]cale forms a critical element of the governance complexities; . . . reform proposals consistently call for better inclusion of smaller scales in the top-down federal structure that dominates regulation . . .”).

197. See Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159, 1163 (2010) (“Despite the critical need for the development of adaptive responses to climate change, the federal government has done little to stake out its turf on adaptation policy or to coordinate the responses of lower levels of government.”); Ruhl, *supra* note 34, at 412 (“[T]he United States has compiled close to zero in the way of coordinated anticipatory adaptation policy for managing the risk in the United States of climate change catastrophe and crisis.”).

policies.

B. *The Impact of the Courts on Climate Change Policy: Lessons to Date and Areas for Further Research*

While climate change is a new issue that presents what may be many novel policy questions, an outstanding question involves the extent to which it has proved exceptional in spawning novel policy responses.<sup>198</sup> In jurisprudence, at least, thus far it has not been treated as exceptional. Whether climate change policy demands a new policy model for legislatures, for the most part, it is being channeled in the courts through a set of stale environmental laws and old common law doctrines, each of which has decades of its own judicial baggage. While we did not attempt to judge qualitatively how “far out there” a particular litigant’s claim may have asked a court to depart from the settled jurisprudence of these statutes and doctrines, it is our sense from cohorts of matters such as the CAA, NEPA, and CEQA cases that however far it was, in most cases it was too far for the court to take the leap. Climate change may be an exceptional problem for other institutions, but for the courts it has generally been business as usual. In this Section, we elaborate on that conclusion and identify some future fruitful research opportunities that could build on the empirical work we have done.

1. How Have Courts Responded as Agencies Address (or Decline to Address) Climate Change Through Discrete Regulatory Initiatives and Adjudicatory Decisions?

While it may have involved only a mundane application of statutory interpretation doctrine to decide the merits, gateway cases such as *Massachusetts v. EPA*, where a court’s decision either catalyzes or closes the door to agency regulation, are one test for climate exceptionalism in the courts. *Massachusetts v. EPA* forced open the door to agency regulation and triggered a cascade of agency rulemaking and judicial litigation. It is likely for this reason that the case has been deemed exceptional by at least one audience that watches climate change litigation closely—environmental lawyers. Respondents to a 2010 survey of environmental law practitioners and academics asking about the most important environmental law cases overwhelmingly characterized *Massachusetts v. EPA* as the most significant environmental law decision of all time.<sup>199</sup> Moreover, while some

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198. For a thoughtful overview of this question, see generally John Copeland Nagle, *Climate Exceptionalism*, 40 ENVTL. L. 53 (2010).

199. See James Salzman & J.B. Ruhl, *Who’s Number One?*, ENVTL. F., Nov.–Dec. 2009, at 36, 37.

consider *Massachusetts v. EPA* to be a traditional, narrow case of statutory interpretation, some, including the dissent, characterize it as exceptional for its standing analysis.<sup>200</sup>

Beyond *Massachusetts v. EPA*, however, the bottom line from our empirical study is that some pro climate change litigation challenging a discrete agency decision on permits and rules is successful at achieving its objective and some is not, some anti litigation is successful and some is not, and it is difficult to construct a story about the jurisprudential attitude other than it appears to involve nothing new or novel. It would be an unjustified stretch to suggest that there is some coherent pattern to the outcome and aftermath of climate change litigation that elevates climate change to any special jurisprudential status. If anything, a fair and complete reading of the case law on climate change tells a story of courts applying existing laws consistent with their settled interpretations, rather than embedding a new jurisprudence of climate change within the existing statutory frameworks.

## 2. To What Extent Have Courts Crafted a Distinct Climate Change Jurisprudence?

Stepping back from the statistics, when one reads all of the judicial opinions issued in climate change litigation matters, which we did, does anything in the form of a distinct jurisprudence of climate change materialize from the litigation fog? No. Our assessment is that, at this point at least, climate change litigation looks about the same as litigation over any other regulatory question that has ground its way through the courts. Nothing about adding climate change into the mix has appeared to trigger judicial responses leading to anything distinctly or exceptionally “climate change” in quality. In terms of actual litigation outcomes and aftermaths and of judicial tone and temperament, climate change in the courts has been a story of business as usual.

To begin with, there is nothing in the record of climate change jurisprudence that in any way sets climate change litigation aside as a special case warranting new judge-made law. As we have reviewed above in Section I.C and Part II, courts have not forged any new law of the CAA, NEPA, ESA, CEQA, or the other statutes that have been fodder for climate change litigation, and they have yet to even reach a common law claim *on the merits*. No court has stood up to say, “The legislature and agencies have dropped the ball, and the courts must now

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200. *Massachusetts v. EPA*, 549 U.S. 497, 535–36 (2007) (Roberts, C.J., dissenting); *see also, e.g.*, Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. ENVTL. AFF. L. REV. 317, 335 (2010) (noting that “[i]n *Massachusetts v. EPA*, for instance, the Court created generous standing rules for States”).



make climate change law!” Legal scholars could debate at length whether the courts *should* do so, a question we do not purport to address here. For our purposes, we can safely report that the reality is that the courts have *not* done so.

More deeply, this is not the same as saying courts do not think climate change is important. Many do and say so. *Massachusetts v. EPA*, for example, contains rhetorical flourishes to that effect.<sup>201</sup> But in the end, the case was about routine statutory interpretation. On the merits of whether EPA has authority to regulate GHGs under the CAA, the majority approached the statutory interpretation question with sterile, narrowly confined precision, devoid of commentary on climate change.

Climate change litigation is still in its early stages, however, and it is quite possible that future case law will include exceptional approaches or outcomes. Given the dynamic quality of the attention being paid to climate change throughout government, it is impossible to predict when and where the courts will be called in to referee or provide direction. With this caveat, it strikes us that the following three significant climate change issue arenas are among those that may bear watching for the opportunities they may provide for exceptional approaches and outcomes. First, the “square peg, round hole” challenge of addressing climate change under the CAA suggests that EPA is likely to need to apply the CAA creatively to make it workable. This need for extreme agency creativity has already manifested itself in the Agency’s Tailoring Rule, in which EPA straightforwardly acknowledged that its regulatory scheme for stationary sources of GHG emissions departs from the approach embodied in the text of the CAA.<sup>202</sup> While EPA has invoked long-established canons of statutory construction to justify this disconnect,<sup>203</sup> treatment of this issue may require special care by the judiciary, given the significant gap between legislative direction and agency capacity that provides the context for its decisionmaking.

Next, advocates on both sides of the nuisance cases are already arguing aggressively that the courts’ treatment of these cases has the potential to be exceptional, in terms of whether it allows the cases to be heard on the merits and if it reaches them, how it addresses the merits. In a forthcoming article, Professor Douglas Kysar argues, for example, that it would be a radical break from precedent to disallow nuisance

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201. But these pronouncements all played into the majority’s opinion on the question whether the plaintiffs had standing. See 549 U.S. at 519–26 (majority opinion).

202. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

203. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,533.

cases on justiciability grounds.<sup>204</sup> On the other hand, Professor Laurence Tribe refers to the “incompatibility of climate change and nuisance doctrine” and argues that “worldwide climate change is a systemic phenomenon that is intractable to anything but a systemic political solution, one that the adversarial and insulated model of nuisance litigation is structurally incapable of providing.”<sup>205</sup> The Supreme Court’s decision that EPA’s emerging regulation of GHG emissions preempts federal common law claims only complicates this debate—it leaves open the questions of what happens if EPA reverses course and what effect EPA’s regulatory position has on state common law claims.<sup>206</sup>

Finally, some of the challenges associated with climate change have stirred up strong discord between EPA and the states. It remains to be seen how this will work out. The courts have found themselves in the position, on many occasions, of resolving disputes between EPA and the states, and determining how authority under a cooperative federalism system should be allocated.<sup>207</sup> There have been few circumstances, however, in which EPA has withdrawn federal authorization of a state program, as it recently proposed for part of Texas’s CAA permitting program.<sup>208</sup> In the particular context of the CAA, there similarly have been very few instances in which EPA has felt compelled to issue a Federal Implementation Plan because a State was not prepared to implement a new permitting program, as EPA recently has done for several states because of their lack of preparedness to implement the PSD program for GHG emissions.<sup>209</sup>

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204. Ewing & Kysar, *supra* note 11, at 49.

205. Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, *Too Hot for Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine* 15–16 (Wash. Legal Found., Critical Legal Issues Working Paper No. 169, 2010), available at [http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe\\_WP.pdf](http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf).

206. See *Am. Elec. Power, Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

207. See, e.g., *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 215–16 (D.C. Cir. 1988) (approving EPA’s regulations for authorizing states to implement the Clean Water Act NPDES program).

208. *Texas v. EPA*, No. 10-1425 (D.C. Cir. filed Dec. 30, 2010); *Texas v. EPA*, No. 10-60614 (5th Cir. filed July 26, 2010); see also *Approval and Promulgation of Air Quality Implementation Plans; Maryland; Transportation Conformity Regulations; Withdrawal of Proposed Rule*, 75 Fed. Reg. 48,627 (Aug. 11, 2010) (withdrawing EPA’s approval of Maryland’s SIP). For discussions of the limited number of times EPA has withdrawn authorization, see, e.g., ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 953–54 (5th ed. 2006); CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 329–35 (2003).

209. *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure to Submit State Implementation Plan Revisions Required for Greenhouse Gases*, 75 Fed. Reg. 81,874

Our suggestion above in connection with the courts' role in assessing EPA's emerging regulatory scheme for addressing GHG emissions holds equally true here. Increasing workloads during a time of diminishing resources is a recipe for turbulent times for our cooperative federalism approach to regulation under the CAA. The courts may well find themselves in the middle of a difficult debate about allocation of responsibility for implementation of the CAA as capacity to meet legislative demands falls far short of the minimum needed to conform to the congressional design. The courts have faced such challenges before,<sup>210</sup> but may need to consider a broad range of rarely used canons of construction in directing how this gap between rhetoric and reality should be closed.

### 3. To What Extent Have Courts Prompted or Forced Legislative or Administrative Attention to Climate Change Policy?

If there were anything to the idea of climate change litigation jurisprudence exceptionalism, one would expect it to have registered in other institutions, agencies and legislatures. To be sure, some climate change pro litigation matters can reasonably be placed in the chain of causation leading to administrative agency action. Most famously, after a history of EPA vacillation on the question whether it has the authority to regulate emissions under the CAA,<sup>211</sup> the Supreme Court in *Massachusetts v. EPA* decided it does, and seemingly inexorably pushed the agency in the direction of regulating.<sup>212</sup> Still, putting aside its

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(Dec. 29, 2010) (finding that PSD permitting requirements in thirteen states do not meet CAA requirements because their programs do not cover GHG emissions).

210. See, e.g., *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (rejecting EPA's argument that it could exempt farms from water pollution laws because of the "administrative infeasibility" of issuing and administering millions of permits).

211. See Cannon, *supra* note 3, at 53–54 (former EPA General Counsel describes the agency history leading up to the litigation).

212. 549 U.S. 497 (2007). Having found that greenhouse gas emissions are pollutants under the Clean Air Act, the Court observed that the statute charges EPA with regulating greenhouse gas emissions from motor vehicles if, in EPA's "judgment[, the emissions] cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* at 528 (quoting 42 U.S.C. § 7521(a)(1) (2006)) (internal quotation marks omitted). Noting that the statute defines "welfare" to include "effects on . . . weather . . . and climate," the Court rejected all of EPA's proffered bases for its judgment not to regulate greenhouse gas emissions. *Id.* at 506 (quoting 42 U.S.C. § 7602(h)) (internal quotation marks omitted). Rather, the Court concluded, under the clear terms of the statute, EPA can avoid taking further action to regulate carbon emissions from motor vehicles "only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 533 (citation omitted). As its only example of a "reasonable explanation," the Court suggested that EPA might find "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming." *Id.* at 534.

controversial standing analysis, some scholars consider the case a resounding judicial *rejection* of climate exceptionalism in terms of how existing statutes are to be applied, as the Court employed basic statutory interpretation canons to conclude that a traditional pollution control statute covers GHG emissions.<sup>213</sup>

Whether endorsing exceptionalism or not, there are no other cases like *Massachusetts v. EPA* in which a court has so overtly nudged an agency toward a cascade of regulation, much less commanded it. Rather, some successful pro litigation efforts seem, at most, to have encouraged agency action or weakened agency resistance to regulate, though it is difficult to trace these effects in any direct sense. For example, the courts did not demand that CEQ issue its guidance on how to address climate change in NEPA analyses,<sup>214</sup> nor must CEQ issue such guidance for the courts to demand that agencies include climate change in environmental assessments under some conditions. After all, CEQ had thought of including climate change in NEPA analyses in 1997, well before courts got involved, and courts had thought of requiring integration of climate change in NEPA analyses well before CEQ followed through on its initial concepts in its 2010 guidance. So it is difficult to say whether the courts prompted, facilitated, or provided cover for CEQ's 2010 guidance; perhaps it was simply all about politics, and the change in administrations would have led to agency action regardless of judicial action. Both the 1997 and 2010 draft guidances, after all, were issued under Democratic administrations, with silence on the issue from the intervening Republican administration.

Indeed, a slate of recent settlements of pro litigation against the federal government suggests that politics and change in administration have much to do with how litigation plays into administrative action. To put it bluntly, of twenty matters we identified as settled on terms favorable to the plaintiff since the beginning of climate change litigation, eleven were pro litigation matters against the federal government settled after the Obama Administration took office.<sup>215</sup> This

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The Court thus left EPA little wiggle room, though it noted that “[w]e need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.” *Id.* at 534–35.

213. See Nagle, *supra* note 198, at 54 (“The Court thus rejected . . . ‘climate exceptionalism’—the belief that the problem presented by climate change is different from the air pollution problems that we have addressed in the past.”).

214. See *supra* text accompanying notes 159–63.

215. Again, we must caution that we cannot assure that we identified all settled cases, and that some judgment was involved in assessing whether the plaintiff prevailed through settlement. Several cases against the federal agencies involving missed decision deadlines—for example, failure to promulgate a rule by a statutorily mandated date—were settled on terms requiring the agency to meet a deadline. Although in this sense the plaintiff prevailed, we counted the outcome as neutral if the agency committed to no substantive decision. Our

experience, however, is by no means unique to climate change, as changes in presidential administrations have frequently led to settlement of litigation filed antagonistically against the prior administration or as friendly litigation against the incoming administration.<sup>216</sup>

Another problem with chalking up the pro litigation wave as having been a causal agent in broadly pushing administrative action on climate change toward regulation is that anti litigation must also be taken into account. Courts in the successful anti cases have directly and overtly snuffed regulatory change that would have ramped up substantive mitigation regulation and more rigorous impact assessment requirements. As discussed in Part II, anti litigation has had at least as much success as pro litigation, and neither has had resounding success rates in any case. Overall, therefore, the impact of climate change litigation on agency action has likely been moderate at best, and even at that has been a two-way street.

#### 4. What Has Been the Overall Impact of Climate Change Litigation on the Institutional Structures of the Administrative State?

To say that climate change litigation has not mandated that other branches act is different from concluding that its impact on other institutions has been insignificant. Clearly, had the Court in *Massachusetts v. EPA* ruled that GHG emissions are not subject to CAA regulation, Congress and EPA would have been on different paths than the ones taken. Similarly, the host of cases involving the applicability of PSD and BACT regulation to emissions of GHG cases led EPA to promulgate a rule that resolved this question.<sup>217</sup>

Beyond these relatively direct judicial interventions, there is some evidence that courts have tried to prod agencies and Congress to act. In a forthcoming article, Professor Douglas Kysar and attorney Benjamin Ewing stress the value of this judicial function, arguing that “[i]n the way that checks and balances correct against the tyrannical overreaching of any particular branch of government, prods and pleas [by the court system] counteract the oppressive underreaching of government institutions.”<sup>218</sup> There is evidence that the courts have sought to have this type of influence. By exercising judicial restraint and declining to act in an exceptional way themselves, courts have prodded the other branches to act. As the South Dakota Supreme Court

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rationale was that the settlement established no climate change law, but rather only forced an agency to make a decision about climate change law. Several additional settlements made after the beginning of the Obama Administration fall in this category.

216. See, e.g., Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1017 (2001).

217. See *supra* note 61.

218. Ewing & Kysar, *supra* note 11, at 11.

suggested in refusing to overturn the Public Utility Commission's (PUC) issuance of a power plant permit:

Global warming presents a momentous and complex threat to our planet. A resolution for this problem, critical though it is, cannot be made in the isolation of judicial proceedings. The social, economic, and environmental consequences of global warming implicate policy decisions constitutionally reserved for the executive and legislative branches. . . .

As members of the judiciary, we refrain from settling policy questions more properly left for the Governor, the Legislature, and Congress. No matter how grave our concerns on global warming, we cannot allow personal views to impair our role under the Constitution. In South Dakota, the Legislature designated the PUC as the responsible agency for this question of granting a permit.<sup>219</sup>

Thus, our study provides some evidence that courts are performing this “prods and pleas” function in the climate change arena.

Assessing the effectiveness of this prodding and pleading, however, is another matter. Our empirical study has focused on the action of the courts and in that sense only goes so far. There is the remaining challenge of connecting the dots between climate change litigation and responses by agencies and the legislature. This strikes us as an important area for future research. For example, where is the evidence that Congress or state and local legislatures have paid any attention to the courts on matters of legislative climate change policy? Superficially, it appears that while many members of Congress have probably paid attention to the ramifications of EPA's rule promulgations that *Massachusetts v. EPA* nudged into motion, Congress has done nothing about it either way. Legislation has been introduced in response to the case to remove GHGs from the scope of the CAA,<sup>220</sup> but there has not yet been any explicit congressional endorsement or override of the Court's opinion. The same is true with respect to congressional

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219. *In re Otter Tail Power Co.*, 744 N.W.2d 594, 603 (S.D. 2008). *See also* Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 398 (D. Vt. 2007) (highlighting the importance of legislative and regulatory action to address climate change while declining to address various issues itself, the court noted: “This Court's task is to determine whether the plaintiffs have carried their burden to show that Vermont's GHG regulation stands as an obstacle to the objectives of Congress. Many of the technical, political and even moral issues raised by this case are not, and should not be, resolved here, but may remain the subject of debate and policy-making in Congress, in state legislatures, and in federal and state agencies.”).

220. *See* Save Our Energy Jobs Act, H.R. 4396, 111th Cong. (2009).

responses to court decisions on climate change issues under the ESA, NEPA, and all the other federal statutes covered in the cases in our survey—Congress has been inert in response. A natural follow-up to our research on the action in the courts would be a thorough review of the legislative responses to this activity, including consideration of the impact of the judicial activity we have described and other factors on legislative efforts.

#### IV. SPECULATIONS ON THE FUTURE OF CLIMATE CHANGE LITIGATION

We were surprised by what our study revealed about the past and present of climate change litigation, so we are cautious in making predictions about its future and in suggesting what scholars might devote to climate change research. Nevertheless, we formed a strong impression that climate change litigation is a highly active and dynamic field about to take on new dimensions and magnitudes. And as we have the advantage, in retrospect (having read and analyzed every climate change matter, 201 in all, plus over 100 we excluded from the study), we do feel at least somewhat equipped to offer informed speculation about such matters. In this Part, we ask your indulgence in allowing us the liberty to do so.

As the discussion above unfolded, we noted seeming trends and how they might influence the future of climate change litigation. Although extrapolation from trends is dangerous in such a dynamic environment, we feel confident in making several predictions. First, unless derailed by preemptive litigation, regulatory developments under the Clean Air Act will trigger rounds of federal and state permitting, which will fuel a surge of pro and anti litigation in our permits and approvals categories (claim types 1 and 2). Second, anti litigation in general is likely to grow in magnitude and widen in scope as more federal and state agencies promulgate rules and engage in discrete decisions. This will be true not only for substantive mitigation regulation, but also for monitoring, impact assessment, and reporting procedures, and it will lead to industry NGOs and companies taking a larger share of the plaintiff side of litigation. Third, although intergovernmental litigation is likely to continue for as long as Congress remains silent on its federalism vision for climate policy, government enforcement of the newly minted standards and permits will put federal agencies finally on the plaintiff side of litigation, as well as broaden state governments into that role. We further expect the citizen suit component of pro litigation to expand dramatically, as permits are issued, compliance issues arise, and citizens initiate legal actions to complement government enforcement.

So far we have limited predictions to extrapolating from trends revealed in our study. Our study results also show, however, that while climate change litigation is broader in scope than has been covered in

legal scholarship, it has yet to encompass all that fits under climate change policy. For example, given the growing sense that the country faces very significant economic, social, and environmental adaptation challenges because of climate change, we wanted to explore the potential for and experience of public and private adaptation litigation. The same was true for our rights and liabilities categories, which encompass claims about civil rights, contract disputes, business losses, and so on. We wondered about the role of the courts to date in grappling with these challenges—to what extent have adaptation issues found their way to the courts, including not only through administrative actions but also in disputes over civil rights and economic relations. Yet we found very little of such litigation.

Nonetheless, it strikes us as inevitable that climate change litigation will soon creep into these yet-unrepresented claim categories. As inert as Congress has been on the mitigation legislation front, we see little prospect of it taking the bull by the horns on the adaptation and rights and liabilities fronts anytime soon. And in any event, courts will necessarily be the arbiters of contract disputes, civil rights claims, and other claims traditionally in the domain of the courts. Indeed, for that reason, it is here that courts may begin to forge a special jurisprudence for climate change, although they have not for regulatory claims.

Finally, we anticipate that before long, it will make sense to refer to climate change law for some statutes as being established and reasonably settled through the aggregation of judicial opinions. The courts and agencies have been busy, resolving 110 litigation matters in 2008–10, meaning it is possible for lawyers to research and synthesize bodies of case law. For example, there already is a fairly well defined case law under NEPA and CEQA establishing that GHG emissions and climate change impacts are fair game for impact assessment procedures, but that the normal rules apply for determining the level of analysis agencies must provide. While litigation under the CAA is about to enter a new phase and will be rocky for several years as EPA rolls out its rules, it too may stabilize into a coherent case law sooner than might be expected. The law of climate change, for long only a prospect, is now on the books in large part due to litigation. Its judicial contribution may not be an example of exceptionalism at work, but even business as usual in the courts has made for substantial development of climate change law. That is not likely to change anytime soon.

#### CONCLUSION

The story of climate change in the courts has not been one of forging a new jurisprudence, but rather one of operating under business as usual. It is also not the story one would pick up from media coverage or from legal scholarship, both of which have honed in on fewer than a



dozen of the 201 matters we classify as climate change litigation. The real story, in other words, is to be found in the other 190-plus cases that are winding or have wound their way through agency and judicial forums. That story is one of pro and anti interests locking horns with agencies in litigation concentrated under a few federal statutes, grinding away at fairly narrow factual and legal issues. Many unglamorous cases have been filed and decided, failing to get into the headlines. But the result is that the aggregate effect of all those “unimportant” cases has been lost in the commentary, completely crowded out by predictions of waves of common law nuisance claims and the next “big” regulatory case. The fact is that there have been few common law cases, none reaching the merits, and few “big” cases like *Massachusetts v. EPA* and *American Electric Power v. Connecticut*, while there have been scores of cases building up a case law under a variety of statutes.

One can tell the story of those cases, however, only if one looks for it, which is what our study was intended to do. Perhaps our big picture conclusion—that the courts have treated climate change as business as usual—is itself also not a hot story. But it should be. It speaks volumes about the judiciary and about litigation as institutions in our governance system. We hope, now that the story is out, it will lead scholars and commentators to broaden the focus of the questions they ask of climate change litigation and to refine the conclusions they draw.