



## Overview

- ❖ History of Climate Change Regulation in the U.S.
  - Lack of Federal GHG Legislation or Regulation
  - State Legislation and Regulation
  - Regional Agreements and Voluntary Initiatives
- ❖ Statutory Climate Change Litigation
  - *Massachusetts v. EPA* and Its Progeny
  - NEPA Challenges
  - Challenges under the ESA
- ❖ Tort-Based Climate Change Litigation
  - General Background
  - The Cases
  - On the Horizon

## Climate Change Regulation in the United States



## Climate Change Regulation in the U.S.

### ❖ Lack of Federal GHG Legislation or Regulation

- Significant Historical Milestones:
  - ❖ Late 1970s – Congress takes note of climate change issues.
  - ❖ 1992 – The international community signs the U.N. Framework Convention on Climate Change.
  - ❖ 1997 – Kyoto Protocol negotiated that would set binding emission reduction target levels for signatory countries.
  - ❖ 1998 - Clinton administration signs the Kyoto Protocol, but the U.S. Senate refuses to ratify the protocol and effectively bars EPA from implementing Kyoto.

## Climate Change Regulation in the U.S.

### ❖ Lack of Federal GHG Legislation or Regulation

- Current Status of federal legislation:

- ❖ No federal regulation of GHG emissions
- ❖ Kyoto Protocol set to expire in 2012
- ❖ Many bills to address climate change have been introduced in Congress this term
- ❖ May 2007 - Kyoto signatory nations discuss new treaty
- ❖ September 2007 – President’s Bush’s summit on post-2012 framework for climate change.
- ❖ End of 2008 – Bush deadline for new global climate change framework
- ❖ 2009 – Bush deadline for a global agreement under the UNFCCC



## Climate Change Regulation in the U.S.

### ❖ Environmental Protection Agency

- ❖ Has declined to attempt regulation of GHGs as pollutants under the Clean Air Act.
- ❖ 1999 – Petition filed with EPA seeking rulemaking for GHGs from new motor vehicles.
- ❖ EPA denies petition four years later in 2003 because (a) it did not have authority to regulate GHGs under the CAA and (b) it would not be effective or appropriate for EPA to regulate.
- ❖ Petitioners file suit.
- ❖ Supreme Court disagrees with EPA and holds that it does have the authority to regulate (discussed more later).
- Bottom Line: Still no regulation by EPA, but it is only a matter of time . . .

## Climate Change Regulation in the U.S.

### ❖ State Legislation and Regulation

#### California



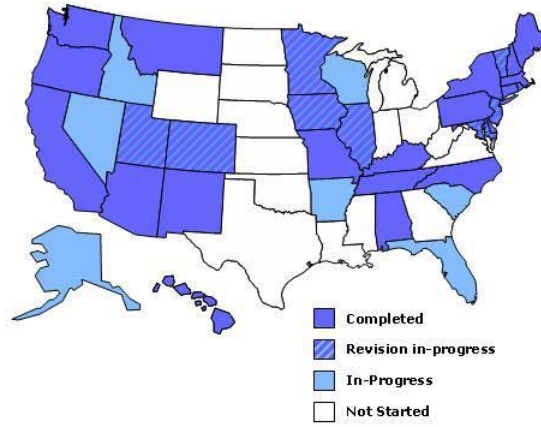
- ❖ 2004 – CARB adopts regulations addressing major motor vehicle emissions for certain GHGs (“clean cars program”)
  - Auto manufacturers file suit to enjoin enforcement
  - Major obstacle faced by California in enforcing its Clean Cars Program is preemption
- ❖ Recent California Legislation: Global Warming Solutions Act of 2006
  - Mandatory GHG reductions for a number of industries
  - Creation of GHG emission credit trading program

## Climate Change Regulation in the U.S.

### ❖ State Legislation and Regulation

- Other States
  - ❖ A number of other states have adopted California’s Clean Cars Program.
  - ❖ Many states have also implemented legislation designed to reduce GHG emissions to prevent climate change.

### States with Climate Action Plans



From the PEW Center on Global Climate Change

### States with Greenhouse Gas Emissions Targets



From the PEW Center on Global Climate Change

## Climate Change Regulation in the U.S.

### ❖ Regional Agreements and Voluntary Initiatives

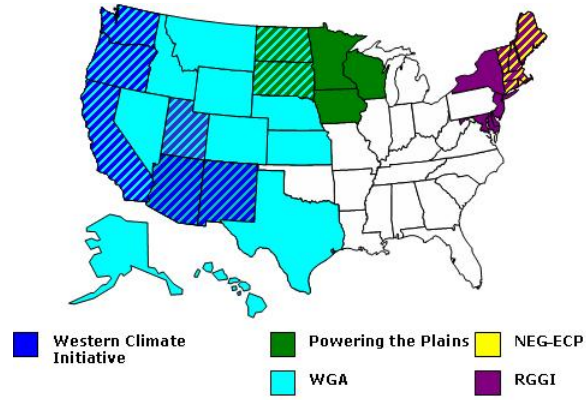
- Western Governors' Association
  - ❖ Texas is a member (along with 18 other states and 3 U.S.-Flag islands)
  - ❖ Goal: 30,000 MW of clean energy by 2015 and a 20% improvement in energy efficiency by 2020.
- Conference of New England Governors and Eastern Canadian Premiers (NEG-ECP)
  - ❖ Participation: New England States and Canadian provinces
  - ❖ Goal: Achieve 1990 emission levels by 2010 and 10% below 1990 levels by 2020.

## Climate Change Regulation in the U.S.

### ❖ Regional Agreements and Voluntary Initiatives

- RGGI – Regional Greenhouse Gas Initiative
  - ❖ Includes several northeast and mid-atlantic states
  - ❖ Goal: Regional cap-and-trade program for CO<sub>2</sub> emissions from power plants.
  - ❖ Program: Cap emissions at current levels in 2009, then reduce 10% by 2019.
- WCI – Western Regional Climate Action Initiative
  - ❖ Includes western states and parts of Canada
  - ❖ Goal: establish market-based system (like cap and trade) by this time next year.
  - ❖ GHG target: 15% below 2005 levels by 2020.

## Regional Initiatives



From the PEW Center on Global Climate Change

## Statutory Climate Change Litigation



## The Supreme Court Weighs In . . .

# Massachusetts v. EPA

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## *Massachusetts v. EPA*

- ❖ Greenhouse gases are “pollutants” as term is used in federal Clean Air Act
- ❖ Ordered EPA to reevaluated its prior decision not to regulate GHG emissions from new motor vehicles under the CAA

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## Leaves Unanswered Many Questions

- ❖ How much discretion to EPA when it reconsiders whether to regulate GHG emission from motor vehicles?
- ❖ What other types of GHG emission sources should EPA consider for regulation under the CAA?
- ❖ What types of GHG emission lawsuits will courts entertain?
- ❖ Who should be allowed to bring any viable lawsuits?
- ❖ What influence will *Mass.* have on federal, state and local legislative efforts related to GHG emissions?

## Section 202 of CAA

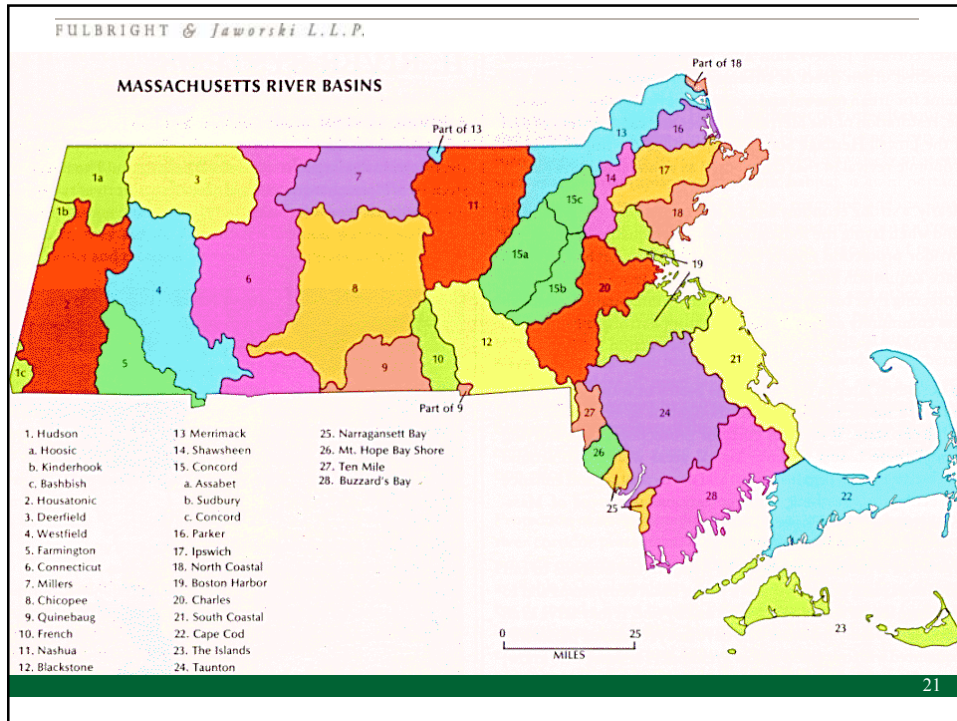
“[EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

## Background

- ❖ Petition for rulemaking filed in 1999, seeking to require EPA to regulate GHG emissions from new motor vehicles under Section 202 of CAA
- ❖ Wide-spread public interest
  - >50,000 public comments
- ❖ EPA denied in 2003

## EPA Findings in Response to Petition

- ❖ It had no authority to regulate GHG emissions from new motor vehicles under CAA
  - Corollary finding – GHGs are not pollutants within meaning of CAA
- ❖ Even if CAA provided authority, EPA would not regulate GHG emissions from new motor vehicles
  - Regulation would be neither effective nor appropriate
- ❖ Appeal to D.C. Circuit Court of Appeals and eventually Supreme Court



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## Threshold Issue of Standing

- ❖ Did Mass. and the other appellants have standing to assert their claims in federal court?
- ❖ Article III requires justiciable case or controversy
- ❖ Previous courts presented with GHG emission lawsuits have dismissed
  - Inherently involve political questions
  - No justiciable case or controversy presented

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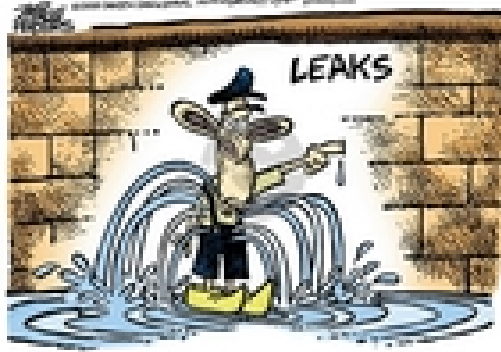
## Standing

- ❖ Mass. “satisfied the most demanding standards of the adversarial process”
  - Presented a question in the adversary context capable of resolution through the judicial process
- ❖ Risk of harm to Mass. was both “actual” and “imminent”
- ❖ Injury?
  - Court found that “rising seas have already begun to swallow Massachusetts’ coastal land”



## Standing

- ❖ EPA also attacked standing on causation grounds
  - Even accepting that man-made GHG emissions contribute to climate change, EPA argued “that its decision not to regulate greenhouse gas emissions contributed so insignificantly to [Mass.’s] injuries that [it] cannot be haled into federal court to answer for them.”



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## Review of Merits

- ❖ Extremely limited review
- ❖ Highly deferential
- ❖ Still, EPA actions be overturned if
  - Arbitrary
  - Capricious
  - Abuse of discretion
  - Otherwise not in accordance with law

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## Are GHGs Pollutants under CAA?

- ❖ EPA argued that post-CAA congressional actions and deliberations showed that congress did not intend for GHG emission regulation
- ❖ EPA argued that it had no authority to regulate GHG emissions from motor vehicles because DOT had responsibility for setting CAFÉ standards
- ❖ In essence . . .



## GHGs are Pollutants under CAA

- ❖ CAA defines “air pollutant” as “any air pollution agent or combination of agents, including any physical chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . .”
- ❖ “Capacious definition”
- ❖ Supreme Court had “little trouble concluding” that GHGs are air pollutants
  - Thus, EPA has statutory authority to regulate emission of GHGs from new motor vehicles under Section 202 of CAA

## Should EPA Have Issued GHG Regulations?

- ❖ EPA only required to issue regulations after it forms “judgment” that GHG emissions cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare
- ❖ EPA decided it was inappropriate to regulate GHGs
  - Voluntary executive branch programs
  - Undermine President’s ability to negotiate
  - Motor vehicles regulations would represent “inefficient, piecemeal approach”

## Supreme Court Rejected EPA's "Judgment"

- ❖ "Judgment" of EPA was nothing more than a "laundry list of reasons not to regulate"



- ❖ "Policy judgments" that had "nothing to do with whether greenhouse gas emissions contribute to climate change"

## EPA Can Avoid Regulation Only If

- ❖ EPA determines that GHGs do not contribute to climate change
- ❖ EPA provides "some reasonable explanation as to why it cannot or will not exercise its discretion"



## Implications of Decision

- ❖ What factors should EPA Consider on Remand?
  - Little to no guidance from court
- ❖ What other CAA provisions will support the regulation of GHG emissions
- ❖ Who will have standing
  - “Special solicitude” shown towards Mass.
- ❖ Will *Mass.* support standing in tort lawsuits
- ❖ What about state-CAA lawsuits?
- ❖ Legislative efforts (federal, state and local)

## Statutory Litigation Post-*Massachusetts v. EPA*

## Statutory Climate Change Litigation

### ❖ Pending CAA cases affected by the *Massachusetts v. EPA* decision

- *Central Valley Chrysler-Jeep v. Witherspoon*
  - ❖ Auto manufacturers sue CARB seeking to enjoin enforcement of its Clean Cars Program because of preemption, the Energy Policy and Conservation Act, and foreign policy.
  - ❖ Court ordered CARB regulations could not be enforced anyway without a waiver from EPA, so preemption moot.
  - ❖ Other issues stayed pending *Massachusetts v. EPA* decision
  - ❖ After *Massachusetts v. EPA*, court requested additional briefing on how the decision affects pending issues.
  - ❖ Hearing scheduled for October 2007.

## Statutory Climate Change Litigation

### ❖ Pending CAA cases affected by the *Massachusetts v. EPA* decision

- *Public Citizen v. NHTSA* (challenge to NHTSA tire pressure regulation)
  - ❖ Considers whether the leniency given to states to show standing in the *Massachusetts v. EPA* decision extends to non-state plaintiffs.
  - ❖ The court does not seem inclined to extend this “special solicitude” to non-state plaintiffs.
- *Coke Oven Environmental Task Force v. EPA*
  - ❖ Environmental groups sued EPA in 2006 to regulate GHG emissions from new stationary sources under NSPS rule.
  - ❖ Held in abeyance pending outcome of *Massachusetts v. EPA*
  - ❖ No decision has issued of yet, but additional briefing has been filed
  - ❖ Remand to EPA likely.

# Litigation under NEPA and ESA

## Statutory Climate Change Litigation

### ❖ NEPA Challenges

- *Friends of the Earth v. Mosbacher*
  - ❖ Various cities and environmental groups sued OPIC and Ex-Im for alleged failure to comply with NEPA for providing funding to international fossil fuel-burning projects that emit GHGs that result in damaging climate changes.
  - ❖ Motions for Summary Judgment filed by both Plaintiffs and Defendants were denied
  - ❖ Court made significant findings in its denial of these notions.
  - ❖ Both motions have been certified for interlocutory appeal

## Statutory Climate Change Litigation

### ❖ NEPA Challenges

- *CBD&PE v. Kempthorne*
  - ❖ Environmental group sued the U.S. Fish & Wildlife Service over rule authorizing incidental take of polar bears and Pacific walrus for five years resulting from oil and gas industry activities in the Beaufort Sea
  - ❖ Argue that USFWS failed to consider the effects of global warming on these species
  - ❖ Pending

## Statutory Climate Change Litigation

### ❖ NEPA Challenges



- *Montana Environmental Info. Ctr. v. Johanns*
  - ❖ U.S. Department of Agriculture Rural Utilities Service announced plans to participate in funding of certain coal-fired generating stations (including one in Montana)
  - ❖ Plaintiffs argue that RUS must consider these plants' contribution to GHG emissions under NEPA
  - ❖ Pending

## Statutory Climate Change Litigation

### ❖ State and Local Action Challenges

- California courts have seen an influx of challenges similar to the federal challenges under NEPA and ESA based on state or local laws that contain similar procedural requirements.

## Statutory Climate Change Litigation

### ❖ Challenges under the ESA

- *NRDC v. Kempthorne*
  - ❖ “Best scientific data available” for determining whether proposed action will jeopardize endangered species or habitat includes climate change.
- *Western Watersheds Project v. Servheen*
  - ❖ Appealing USFWS’ decision to remove the grizzly bear from the endangered species list
- *CBC v. Norton*
  - ❖ Suit to have the polar bear listed under the ESA as “threatened” due to the loss of habitat through melting Arctic ice caused by global warming.
  - ❖ In response, USFWS proposed polar bear be added to the list and opened the matter up for public comment.

## Tort Based Climate Change Litigation



## Tort-Based Climate Change Litigation

### ❖ Background

- Threshold Issue: Is tort law the appropriate vehicle to address climate change?
  - ❖ Substantial hurdles
- Potential tort claims
  - ❖ Public nuisance
  - ❖ Products liability
  - ❖ Private nuisance
  - ❖ Negligence
  - ❖ Fraud

## Tort-Based Climate Change Litigation

- ❖ Potential legal hurdles to successful assertion of climate change claims:
  - **Subject Matter Jurisdiction**
  - **Legal Standing**
  - **Demonstrating Harm**
  - **Proving Causation**
  - **Damages**

## Tort-Based Climate Change Litigation

- ❖ **Subject Matter Jurisdiction**
  - For any court to decide any controversy, it must have subject matter jurisdiction.
  - For tort claims based on GHG emissions, the primary reason for dismissing cases has been that the controversy is the province of the legislature and represents a non-justiciable political question.
  - Both the AEP and Comer cases (discussed in more detail shortly) were dismissed on these grounds.
    - ❖ The AEP Court opined: “Because resolution of the [climate change] issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, ‘an initial policy determination of a kind clearly for non-judicial determination’ is required.”)

## Tort-Based Climate Change Litigation

### ❖ Standing

- **In addition, plaintiffs must have standing to bring suit, which the Supreme Court in the *Lujan* case held requires a showing of:**
  - ❖ Injury in fact
    - Concrete and particularized injury that is not conjectural
  - ❖ Causation
    - Injury is fairly traceable to the actions of the defendant
  - ❖ Redressability
    - Likely that the injury can be redressed by a favorable decision

## Tort-Based Climate Change Litigation

### ❖ Harm

- Some of the types of harm cited as resulting from climate change:
  - ❖ Permafrost thawing
  - ❖ Glacier thawing
  - ❖ Rising water levels
  - ❖ Lengthening upper latitude growing seasons
  - ❖ Ocean acidification
  - ❖ Reduction in habitat
  - ❖ Increased hurricane strength



## Tort-Based Climate Change Litigation

- ❖ Causation – the primary stumbling block for plaintiffs
  - Plaintiffs must demonstrate proximate causation for most tort causes of action
  - Showing “remote possibilities” is not usually enough for a court to find causation.
- ❖ However, continual flurry of scientific studies on climate change may provide ammunition from which plaintiffs can pick and chose to overcome this barrier:
  - Intergovernmental Panel on Climate Change 4<sup>th</sup> Assessment Report
- ❖ Still, the possibility of tying a particular action to an injury that could have multiple causes will be difficult.

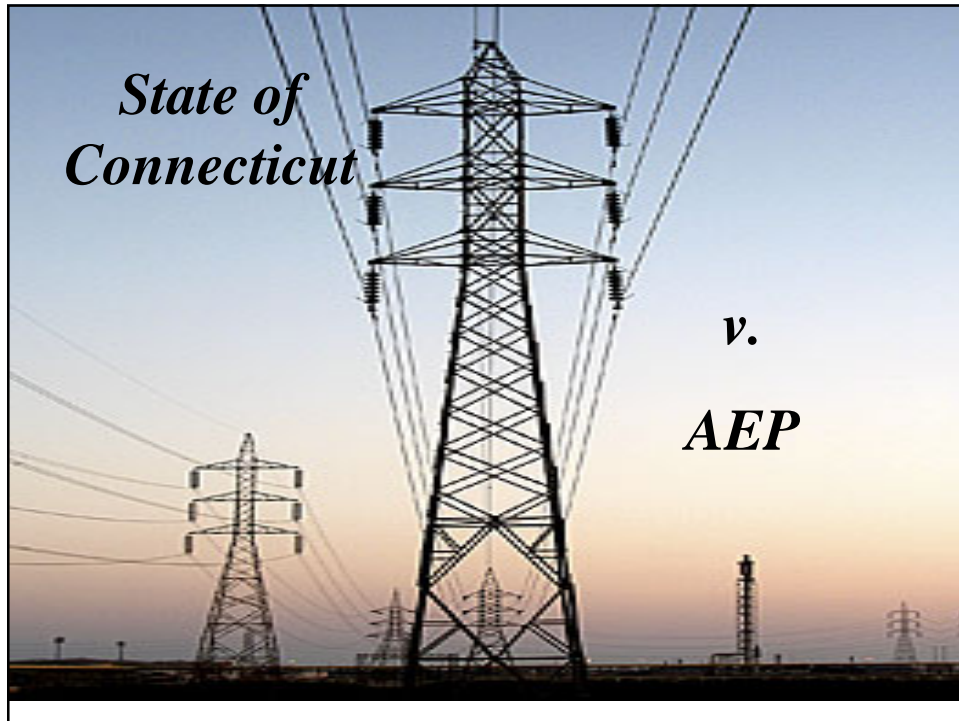


## Tort-Based Climate Change Litigation

- ❖ *Comer v. Murphy Oil* (f/n/a *Comer v. Nationwide*)
  - Owners of property damaged by Hurricane Katrina sued a number of oil and chemical companies (among others) using a number of tort theories for increasing the intensity of the storm by causing global warming.
  - In an order early in the case, the Court noted the following obstacles to plaintiff success in the case:
    - ❖ Proving by a preponderance of the evidence the degree to which global warming is caused by the emission of GHGs
    - ❖ The degree to which the actions of any individual oil company, any individual chemical company, or collective action contribute to global warming
    - ❖ The extent to which GHG emissions, through global warming, intensified or otherwise affected Hurricane Katrina

## Tort-Based Climate Change Litigation

- ❖ *Comer v. Murphy Oil* (f/n/a *Comer v. Nationwide*)
  - The defendants filed a number of motions to dismiss based on lack of subject matter jurisdiction (nonjusticiable political question); lack of standing; preemption; failure to state a claim for relief as a matter of law.
  - On August 30, 2007, the court dismissed the claims on the grounds of lack of subject matter jurisdiction (because the case presented nonjusticiable political questions).
  - No appeal has been filed yet, but it seems likely that an appeal will be filed.



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## Tort-Based Climate Change Litigation

### ❖ *Connecticut v. AEP*

- Plaintiffs sued 5 electric utility companies, alleging public nuisance for contributing to global warming through GHG emissions.
- Plaintiffs requested an injunction to abate GHG emissions via a cap then reduction by a set percentage each year.
- The court dismissed for lack of subject matter jurisdiction based on political question issues.



v.



## Tort-Based Climate Change Litigation

### ❖ *California v. General Motors*

- Attorney General sued a number of motor vehicle manufacturers for monetary damages for contributions to global warming.
- Claimed public nuisance.
- Seek monetary damages and an injunction.
- Defendants moved to dismiss for lack of subject matter jurisdiction.
- Case dismissed in September

# *Korinsky v. EPA*

## Tort-Based Climate Change Litigation

### ❖ *Korinsky v. EPA*

- Filed by a New York resident against EPA, the NYDEP and the NY City Dept. of Environmental Protection claiming contribution to the public nuisance of global warming through lack of regulation.
- Complaint asked the court to hold the defendants liable, enjoin them from emitting CO<sub>2</sub>, and require them to implement plaintiff's invention, which he claimed would "eliminate CO<sub>2</sub> emissions without significantly increasing the cost of process activities."

## Tort-Based Climate Change Litigation

### ❖ *Korinsky v. EPA*

- Case dismissed for lack of standing
  - ❖ Harm element not met
    - Plaintiff's claims that he faced a higher risk of illness from pollution than the general population was not an "actual or imminent" harm.
  - ❖ Redressability not met
    - If plaintiff's mental apprehension of danger, requested relief would not redress the alleged mental injury.

## Tort-Based Climate Change Litigation

### ❖ *Cases on the Horizon*

- Inuit Island Litigation
- Aftermath of Massachusetts v. EPA
- Ocean acidification

## Closing Remarks

### ❖ Concerns

- Disconnect between voluntary reduction measures and future mandatory compliance measures.
- Technical
- Legal
- Social and economic
- Foreign policy
- U.S. policy

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