

ENVIRONMENTAL

CLIMATE CHANGE: EVOLVING STRATEGIES AND REGULATORY UPHEAVAL



For years, environmental groups have been pursuing a variety of legal approaches in their fight against climate change. Now, their strategies may be changing again, as regulations are rolled back in the Trump administration.

A decade or so ago, many environmental groups, and even some states, felt that the federal government was not doing enough about climate change and so began filing climate change-related nuisance law suits against power companies under federal common law. However, in *American Electric Power Company v. Connecticut*, the U.S. Supreme Court said that those common-law cases were preempted by the Clean Air Act, which gave the Environmental Protection Agency the authority to manage greenhouse gases.

That case prompted plaintiffs to explore a number of other avenues, including the filing of nuisance cases looking for monetary damages. However, these have typically failed to gain traction. In *Comer v. Murphy Oil*, plaintiffs sued energy companies saying their emissions contributed to property damage from Hurricane Katrina. The district court dismissed the claims as nonjusticiable political questions and for lack of standing (and the Fifth Circuit ultimately let that ruling stand). In *Kivalina v. Exxon Mobil*, plaintiffs sued energy companies saying their emissions contributed to arctic ice melt and seeking damages for relocation of the Kivalina village. The district court likewise dismissed on standing and political question doctrine grounds (and the Ninth Circuit affirmed dismissal on the grounds that plaintiffs' claims were displaced by the Clean Air Act). In both cases, the Supreme Court denied further appeal.

"Those two cases made it fairly clear that environmental groups would not be successful pursuing a generalized grievance in such lawsuits," says [Tom Lorenzen](#), a partner in Crowell & Moring's [Environment & Natural Resources](#)

and Government Affairs groups, who was previously lead counsel in dozens of environmental cases at the U.S. Department of Justice.

But plaintiffs aren't giving up. Their next area of focus is likely to be corporate disclosures and climate risk, says Lorenzen. He notes that "the New York attorney general's office has announced actions against several companies alleging that they knew climate change was a problem but failed to disclose it as required by the securities laws. I think plaintiffs will be taking a very hard look at what the various state attorneys general and the SEC are doing in this area over the next few years to determine whether they can bring claims out of it."

PUSHBACK ON CUTTING BACK

Following the *American Electric Power* case in 2011, the EPA stepped up its regulation of greenhouse gases. Recently, the climate change discussion has been focused on one particular aspect of EPA regulation—the Clean Power Plan. The CPP calls for a 32 percent reduction in the power sector's carbon dioxide emissions by 2030, as compared with 2005 levels. "In essence, the CPP seeks to require the power industry to shift generation from fossil-fired fuels to renewables. So it's a very significant rule—and the first major attempt by the U.S. to go after stationary-source greenhouse gas emissions," says Lorenzen.

Now, however, the U.S. presidential election result—as well as a potential lawsuit filed by some 150 plaintiffs—is putting the CPP's future in doubt. Indeed, it seems likely that the CPP will be scaled back or scrapped entirely. But that does not mean the issue will disappear from the courts, says Lorenzen, who oversaw many similar cases during the transition from the Clinton White House to the Bush administration. "Back then, the new administration wanted to scale back the Clean Air Act regulations and cut down on EPA



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and DOJ civil enforcement efforts around environmental regulations,” he says. “And as those things happened, citizen suits skyrocketed in response.” With a similar situation unfolding, that history may well be repeated.

Such citizen suits could pursue a number of avenues. For example, environmental statutes give citizens the right to challenge the EPA if it fails to act to protect the environment. Citizens also have the right to sue companies, such as power generators, that are allegedly violating environmental emissions laws, providing that the EPA has been given advance notice of the suit and has declined to prosecute the case on its own.

In some ways, regulatory change may actually increase the pressure on companies. “Environmental groups may well choose to bring cases that the EPA would not ordinarily have brought,” says Lorenzen. “There are situations where the EPA would probably give a company that’s producing emissions the benefit of the doubt under the previous regulations.” Now, he says, “environmental groups are going to be looking at those sources with a magnifying glass.”

Lorenzen also points to the EPA’s Next Generation Compliance initiative, which has brought increased transparency and reporting to the monitoring of emissions sources. “It also puts powerful monitoring tools that weren’t previously available into the hands of the citizenry,” he says. For instance, people can now use small infrared cameras attached to smartphones to capture images of emissions that aren’t visible to the naked eye. “Those kinds of things can be used to support citizen suits,” he says.

The anticipated rollback of rules could also be targeted in court. “As the administration tries to scale back regulations, such efforts are likely to be attacked by environmental groups and more progressive states,” Lorenzen says. That means that the EPA is likely to find itself defending a more lenient regulatory regime. If so, he says, “there will be significant need for intervention in those lawsuits by the industries that are directly regulated in order to preserve the efforts to roll back the regulations.”

When regulations are being cut back, “environmental groups view that as a time where they have to step up,” Lorenzen continues. “They will probably keep pursuing all the avenues they can and looking for new legal theories to bring the issue to court. They are taking an all-in approach to this, pursuing both regulators and companies that are emitting greenhouse gases. That means that lots of companies can expect this to be a growing part of their litigation docket.”

KEY POINTS

Changing focus

Environmental groups are changing strategies.

New avenues

Corporate disclosures about climate risk may be the next target.

Expect more litigation

As EPA activity slows, citizen suits are likely to increase.

PUTTING A PRICE ON CARBON

Environmental groups that seek to prevent fossil fuels from being mined or extracted—and therefore not burned—may find new avenues in litigation, thanks to new federal guidelines.

The cost of climate change has been hard to pin down, so the White House Council on Environmental Quality recently released new “social cost of carbon” guidance. This guidance attempts to monetize the cost of carbon usage, so such costs can be weighed by federal and state governments when they are making decisions about the mining of natural resources or approving other large projects. While the guidance itself will probably not be challenged, the way it is used could be.

“When the government applies the guidelines, companies might say that the government is overestimating carbon costs,” says Crowell & Moring’s Tom Lorenzen. “On the other hand, environmental groups might argue that the guidance is not being used appropriately, or if it’s not being used at all, that it’s inappropriate not to consider it. So it could be a driver of more litigation and is worth keeping an eye on.”