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**Friends of the Earth, Inc. v. Watson, 2005 U.S. Dist. LEXIS 42335, 35 Env'tl. L. Rep. 20179 (N.D. Cal. 2005)**

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## **SHEPARD'S SUMMARY**

### **Unrestricted Shepard's Summary**

 **Subsequent appellate history contains possible negative analysis.**

#### **Citing References:**

Citing Decisions: Citing decisions with no analysis assigned (1)

Other Sources: Law Reviews (2), Court Documents (2)

#### **PRIOR HISTORY** ( 0 citing references )

##### **(CITATION YOU ENTERED):**

*Friends of the Earth, Inc. v. Watson*, 2005 U.S. Dist. LEXIS 42335, 35 Env'tl. L. Rep. 20179 (N.D. Cal. 2005)

#### **SUBSEQUENT APPELLATE HISTORY** ( 1 citing reference )

1. **Summary judgment denied by, Summary judgment granted, in part, summary judgment denied, in part by:**

*Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889, 2007 U.S. Dist. LEXIS 24268 (N.D. Cal. 2007)

#### **CITING DECISIONS** ( 1 citing decision )

#### **9TH CIRCUIT - U.S. DISTRICT COURTS**

2. **Cited by:**

*Ctr. for Biological Diversity v. United States HUD*, 241 F.R.D. 495, 2006 U.S. Dist. LEXIS 30029, 63 Env't Rep. Cas. (BNA) 1084 (D. Ariz. 2006)  
241 F.R.D. 495 p.502

#### **LAW REVIEWS AND PERIODICALS** ( 2 Citing References )

3. *COMMENT: Linking Global Warming to Inuit Human Rights\**, 8 San Diego Int'l L.J. 179 (2006)
4. *ARTICLE: THE RAPID EVOLUTION OF CLIMATE CHANGE LAW*, 20 Utah Bar J. 22 (2007)

**MOTIONS ( 2 Citing Motions )**

5. *CENTER FOR BIOLOGICAL DIVERSITY v. BRENNAN*, 2006 U.S. Dist. Ct. Motions 7062, 2007 U.S. Dist. Ct. Motions LEXIS 792 (N.D. Cal. Mar. 22, 2007)
6. *CENTER FOR BIOLOGICAL DIVERSITY v. BRENNAN*, 2006 U.S. Dist. Ct. Motions 7062, 2007 U.S. Dist. Ct. Motions LEXIS 790 (N.D. Cal. Jan. 22, 2007)

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ARTICLE: THE RAPID EVOLUTION OF CLIMATE CHANGE LAW

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**TEXT:**

[\*22] The scientific debate over the causes and consequences of global warming likely will continue for years to come, as scientists continue to explore a host of questions about how climate change affects different regions of the world, how current trends compare with historical patterns, and whether the steady increase in carbon dioxide emissions will translate into gradual warming or could, with the help of feedback mechanisms, produce cataclysmic changes. In contrast, the debate over whether to take some kind of action to begin reducing the threat of disruptive climate change is rapidly shifting from whether there will be a national climate change regulatory policy and associated energy policies to when those policies will be put in place and what form they will take. While there is still much uncertainty in climate change law and policy, the trajectory is clearly toward regulating greenhouse gas ("GHG") emissions.

As a result, the case is much stronger for governments and businesses to take aggressive action to manage their carbon emissions and related activities. Pressure is coming from the threat of litigation, the likelihood of national legislation within the next few years, and state and local climate policies that are already in place. Some companies are supporting national policies as a way to simplify the challenge of having to comply with a variety of state mandates. Shareholder and investment demands that companies disclose their carbon liabilities and develop programs to manage those liabilities effectively are growing. International pressure from European countries that are seeking to comply with the Kyoto Protocol and negotiations for a new global accord are also occurring. A wide range of U.S. and multinational companies have concluded that precautionary action to reduce the threat of climate change is in their self interest and have developed voluntary programs to cap and reduce GHG emissions. Michael Northrop, co-founder of the Climate Group, a coalition of companies and governments committed to reducing GHG emissions, said, "It's impossible to find a company that has acted and has not found benefits." n1

n1 John Carey, "Global Warming," *Business Week*, August 16, 2004, p. 62.

**Litigation**

Lawsuits are proliferating in the absence of federal regulatory action and as a result of growing evidence that the consequences of climate change are not just future calamities but are already adversely affecting people and property. Plaintiffs and others involved in these cases often liken them to the early tobacco cases, initially derided as improbable but eventually successful because of, among other factors, tobacco company officials' acknowledgment in internal documents of the health threat associated with smoking that conflicted with corporate policy statements. Climate change is beginning to surface in Utah litigation. In a 2006 Utah Supreme Court case, *Utah Chapter of the Sierra Club v. Utah*

*Air Quality Board*, the Court ruled that plaintiffs' affidavits alleging specific damages such as health, decreased visibility, soil damage, and property devaluation that would result from GHG and other emissions from a coal-fired power plant that had received a permit from state air quality officials was sufficient to grant standing to plaintiffs to challenge the permit. n2

n2 Utah Supreme Court No. 20050455 (November 21, 2006).

The list below, taken from a compilation of these cases by Peter Lehner of the New York state Attorney General's office, illustrates the growing number of cases and range of issues they raise. n3 Some climate cases have been dismissed for lack of standing on the basis that they raise political questions. Cases where plaintiffs have been successful seek to compel agencies to include climate change in assessing possible environmental consequences of agency actions. One key case to watch is the Supreme Court case concerning the EPA's decision not to regulate GHGs under the Clean Air Act, since a decision favoring the plaintiffs would compel the agency to begin developing climate change regulations. A second key set of cases are the nuisance cases brought by states against large corporations that emit high levels of GHGs. State officials have the resources to prepare these complex cases and there are significant precedents in other areas of environmental law for holding parties responsible for damages despite only being one of many sources of emissions, and precedents in other areas of law for dealing with complex issues of causality. At minimum, these cases will contribute to pressure for national climate legislation and for industries to take actions to reduce their potential exposure to legal action and to the accompanying negative publicity.

n3 Peter Lehner, presentation at the Second Annual Legal Dimensions of Climate Change Conference, American University, Washington, DC, November 8, 2006.

#### **Agency Action-Forcing Cases**

Action-forcing cases have been brought against federal agencies to compel them to address climate change and GHG emissions. [\*23] The most visible case is the one brought by states and environmental organizations aimed at compelling the EPA to regulate GHG emissions as pollutants under the Clean Air Act.

***Massachusetts, et al. v. Environmental Protection Agency***, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S.Ct. 2960 (June 26, 2006): Twelve states and several environmental organizations sued the EPA to compel it to regulate carbon dioxide from automobiles under Section 202 of the Clean Air Act, arguing that the agency was required to regulate carbon dioxide under the Act, since it is an air pollutant which "may reasonably be anticipated to endanger public health or welfare." The DC Circuit ruled 2-1 in favor of the EPA's position. One judge concluded that plaintiffs had standing, and that the EPA had the authority to regulate carbon dioxide under the Act, but that the EPA Administrator properly exercised his discretion when he decided not to regulate. A second judge argued that the case should be dismissed for lack of standing because global warming presents a generalized grievance. The dissenting judge found that the EPA had such authority. Certiorari was granted by the Supreme Court, and the case was heard on November 29, 2006. Oral arguments centered on whether the states actually had demonstrated imminent harm from global warming and, perhaps more importantly, whether EPA's regulation of motor vehicle emissions could possibly reduce significantly the likelihood of future harm. Some observers expect a 5-4 vote on whether to grant standing, with the swing vote difficult to predict. If standing is granted, the Court would likely only remand the case to the EPA.

***Coke Oven Environmental Task Force v. EPA***, 2006 U.S. App. LEXIS 23499 (D.C. Cir. 2006): Ten states, Washington, D.C. and New York City, and a number of environmental groups challenged EPA's failure, under Section 111 of the Clean Air Act, to establish a new source performance standard for carbon dioxide from new, modified, and reconstructed stationary sources. The case has been stayed pending the Supreme Court's decision in *Massachusetts v. EPA*.

***Northwest Environmental Defense Center, et al. v. Owens Corning***, 434 F. Supp.2d 957 (D.Or. 2006): Environmental

organizations sued the defendant for building a facility without a preconstruction permit required under the Clean Air Act, claiming that they had standing to sue because the facility would contribute to global warming and harm members of their organization. The court denied defendants' motion to dismiss, holding that plaintiffs did have standing, and stated that "issues such as global warming and ozone depletion may be of 'wide public significance' but they are neither 'abstract questions' nor mere 'generalized grievances.'" An injury is not beyond the reach of the courts simply because it is widespread." The court reasoned that while global warming may [\*24] affect everyone on earth, it will affect different areas in different ways, so that claims brought by those in Oregon would not necessarily be injuries shared by all or "generalized grievances."

Some cases have challenged Department of Energy and National Traffic Highway Safety Administration decisions that have failed to address climate implications of energy decisions, such as issuing environmental assessments that have not included GHG emissions or not implementing alternative energy policies.

***Border Power Plant Working Group v. Department of Energy***, 260 F. Supp. 2d 997 (S.D. Cal 2003):

Environmentalists challenged the DOE's findings of no significant impact for electric line permits to be granted within the United States and across the US-Mexican border. The court held that the agency's environmental analysis was inadequate because it failed to address the "potential environmental impacts" of carbon dioxide emissions, despite carbon dioxide not having been determined by the EPA to be a "criteria pollutant."

***Center for Biological Diversity v. Abraham***, 218 F. Supp. 2d 1143 (N.D. Cal. 2002): Three environmental organizations alleged that federal agencies had not complied with several Energy Policy Act requirements, such as ensuring that a specified portion of their automobile fleets were comprised of alternative fuel vehicles. The court granted the plaintiffs standing for other reasons, but held that plaintiffs' concerns about global warming were "too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing."

***Center for Biological Diversity v. National Highway Transportation Safety Administration***, No. 06-71891 (9th Cir. filed Apr. 6, 2006): California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, New York City, the District of Columbia and several environmental groups petitioned for review of the newly-revised federal fuel economy standards, issued on April 6, 2006, that would relax the corporate average fuel economy (CAFE) standards by 2.4 miles per gallon for light trucks by 2011. The claims of the various petitioners were consolidated. They argued that the NHTSA did not conduct environmental and safety analyses mandated by NEPA and other laws when promulgating these standards.

***City of Los Angeles v. National Highway Traffic Safety Administration***, 912 F.2d 478 (D.C. Cir. 1990), *overruled in part by Florida Audubon v. Bentsen*, 94 F.3d 658 (D.C. 1996): A group of cities, states, and environmental groups challenged a decision by NHTSA not to prepare an environmental impact statement addressing global warming impacts of its relaxation of the Corporate Average Fuel Economy (CAFE) standards for model years in the late 80s. The environmental groups were found to have standing based on their global warming claims, but the petition was denied on the merits. In finding that the small percentage increase in greenhouses gas emissions from the challenged action was sufficient to confer standing, the majority stated, "the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming." *Florida Audubon* held that the case was overruled to the extent it allowed standing to be established by showing that agency action would lead to a demonstrable increase in risk.

Several suits have been filed against other federal agencies as well for failing to take into account climate change in assessing environmental impacts.

***Center for Biological Diversity v. Norton***, No. 3-05-05191 (N.D. Cal filed Dec. 15, 2005): The Center for Biological Diversity, NRDC, and Greenpeace petitioned the U.S. Fish and Wildlife Service in February, 2005, to list the polar bear as "threatened" under the Endangered Species Act because the melting of the Arctic ice was impairing the bears' habitat.

After receiving no response well after the statutory deadline for responding to petitions, plaintiffs sued the agency to list polar bear as threatened. In July, 2006, the FWS agreed to respond to the petition by December 27, 2006, and the court retained jurisdiction to oversee compliance for a period of one year. If polar bears become listed as a result, they will be the first mammal found to be at risk because of global warming.

***Friends of the Earth v. Watson***, No. C-02-4106 JWS, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. Aug. 23, 2005): Several environmental groups sued the Overseas Private Investment Corporation and the Export-Import Bank, two independent government corporations, for failing to consider the global warming impacts under the National Environmental Policy Act (NEPA) when it decided to fund development projects that would lead to increased production and use of oil and thus to increased carbon dioxide emissions. The court denied defendants' motion for summary judgment, holding that plaintiffs have standing because, among other things, they could show that "it is reasonably probable that the challenged action will threaten their concrete interests."

***Foundation on Economic Trends, et al. v. Watkins***, 794 F. Supp. 395 (D.D.C. 1992): Information-disseminating organizations sued several federal agencies, alleging that defendants did not adequately address effects of some 42 federal actions, such as the energy conservation standards for new residential buildings, on global warming and thus failed to satisfy NEPA requirements. The court granted summary judgment for the defendants, stating that plaintiffs did not have standing because their claim of informational injury was indistinguishable from an ideological interest and insufficiently concrete. Plaintiffs sought to amend their complaint to include an individual plaintiff with environmental injuries. However, the court denied the motion, determining [\*25] that plaintiffs would still not have standing as the individual had not alleged an adequate causal connection. The court stated, "notwithstanding the seriousness of the phenomenon," there is no "global warming" exception to the standing requirements of Article III or the APA."

At least one case has been brought by groups seeking to compel local governments to take climate change into account in making land use policy decisions.

***Utsey v. Coos County***, 32 P.3d 933 (Or. Ct. App. 2001): The League of Women Voters petitioned for review of an Oregon county Land Use Board of Appeals' decision to grant a permit to an off-highway vehicle trail system and racetrack and asserted standing based on the global warming consequences of projected vehicle emissions. The court held that plaintiffs lacked standing, but one judge argued in dissent that because global warming is an issue that could potentially affect everyone living on the planet, a legislature could reasonably believe that everyone has a stake in energy facility siting and thus properly confer standing.

Conversely, some industry groups are challenging state climate policies such as California's regulation of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons that are aimed at reducing GHG emissions from automobiles and light trucks by 18% by 2020 and 27% by 2030, and the policies of other states that are adopting similar provisions.

***Central Valley Chrysler-Jeep, Inc. v. Witherspoon***, No. CV-F-04-0663, 2006 U.S. Dist. LEXIS 48892 (E.D. Cal. July 7, 2006): Chrysler, GM, and the Alliance of Automobile Manufacturers, together with several automobile dealers, challenged a California rule requiring all motor vehicles sold in the state to meet emission standards for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The international automobile manufacturers intervened as plaintiffs; the Sierra Club, NRDC, and Environmental Defense intervened as defendants; and eight states joined as amici supporting California. Plaintiffs seek declaratory and injunctive relief arguing preemption, Commerce Clause, and Sherman Act violations. In September, 2006, the court ruled in favor of defendants for claims brought under the Dormant Commerce Clause and the Sherman Act, but denied all other claims.

***Green Mountain Chrysler v. Torti***, No. 05-CV-302 (D. Vt. filed Nov. 18, 2005): Domestic automobile manufacturers and local dealers challenged Vermont's adoption of California's GHG automobile emission regulations. A parallel suit was brought by the international manufacturers, *Association of International Automobile Manufacturers v. Torti*, No. 2:05-CV-304 (D. Vt. filed Nov. 18, 2005), and has been consolidated.

***Association of International Automobile Manufacturers v. Sullivan***, No. 06-CV-69 (D. R.I. filed Feb. 13, 2006): Rhode Island's Department of Environmental Management adopted [\*26] California's regulations limiting motor vehicle GHG emissions. Plaintiffs challenged these regulations as violations of, among other things, preemption, Commerce Clause, and antitrust provisions. The companion case brought by automobile dealers and domestic manufacturers, *Lincoln Dodge, Inc. v. Sullivan*, No. 06-CV-70 (D.R.I. filed Feb. 13, 2006), was consolidated with this action. The Conservation Law Foundation, Sierra Club, NRDC, and Environmental Defense joined as defendants in June, 2006.

***In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Chapter 356, Section 3***, 578 N.W.2d 794 (Minn. Ct. App. 1998): The Minnesota Legislature asked the Minnesota Public Utilities Commission to determine the environmental costs associated with every method of electricity generation. The Commission set values for five pollutants, including carbon dioxide, and several power companies challenged the decision to set values for carbon dioxide. The court held that the Commission's interpretation of the statute was not contrary to the legislature's intent, that deference should be given to the agency's decision, and that there was substantial evidence for the carbon dioxide cost values determined by the agency.

#### **Nuisance Cases**

Climate nuisance suits seek damages from major sources of GHG for property damage resulting from the disruption of climate patterns. n4 For example:

***Comer v. Nationwide Mutual Insurance Co.***, 2006 U.S. Dist. LEXIS 33123; now *Comer v. Murphy Oil, U.S.A.*, Case No. 1:05cv436 LTS-RHW (S.D. Miss. Sept. 20, 2005): Property owners in Louisiana filed a class action suit against their insurance companies for failing to reimburse plaintiffs for property damage caused by Hurricane Katrina. The suit also included three chemical companies as defendants, alleging that damages sustained during the hurricane were partially a result of their emissions. The court discussed the difficulty of proving causality and decided that these claims could not be litigated in the same action as against their insurance companies. Plaintiffs then filed an amended complaint that asked for class action status to sue oil, chemical, and coal companies for emissions which allegedly have increased the frequency of hurricanes and other storms and were a proximate cause of Katrina's severity.

***Connecticut v. American Electric Power, Inc.***, 406 F.Supp. 2d 265 (S.D.N.Y. 2005): Eight states and New York City brought suit grounded in federal common law public nuisance and interstate harm to state sovereign interests against the five largest emitters of carbon dioxide among electricity generators. This case was consolidated with a suit filed by a group of land trusts, *Open Space v. American Electric Power Co.* Plaintiffs allege that defendants' carbon dioxide emissions contribute to global warming that causes present and inevitable future harm to the states and their citizens, including rising sea levels, more frequent and intense weather conditions, adverse impacts on state agriculture and on water supply, and harm to tourism and the very fabric of state ecology. The district court dismissed the complaint as a non-justiciable political question, finding that resolution of the issues requires "identification and balancing of economic, environmental, foreign policy, and national security interests." The plaintiffs appealed and argument before the Second Circuit was held on June 7, 2006.

***People of the State of California v. General Motors Corp.***, No. C06-05755, (N.D. Cal., filed Sept.20, 2006): California's Attorney General filed suit against the "Big Six" auto manufacturers, alleging that under federal and state common law (as was argued in *Connecticut v. American Electric Power*) the automakers have created a public nuisance by producing millions of vehicles that collectively emit massive quantities of carbon dioxide, and seeking damages, including future harm, caused by their ongoing, substantial contribution to the public nuisance of global warming.

n4 Some cases have already been dismissed. For example, in *Korsinsky v. Environmental Protection Agency*, No. 05-6802-cv, 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y., Sept. 28, 2005), a plaintiff brought a "public

nuisance" action against EPA and New York state and city departments for contributing to global warming. The court dismissed the case for lack of subject matter jurisdiction. The plaintiff's "enhanced risk" argument was not sufficient for standing, and his argument that he has a mental illness derived from knowledge about global warming could only be considered a generalized grievance. The Second Circuit affirmed. 2006 U.S. App. LEXIS 21024.

**Conclusion**

The legal environment in which companies operate is changing rapidly, and there are clear incentives for them to develop strategies for managing their carbon emissions. The increasing complexity of state climate policies is prompting many companies to call on Congress to develop a national policy to replace the fragmented state policies. States, led by California, are establishing registries so companies can document their emission reductions and ensure that they receive credit for early actions taken before regulatory programs are put in place. Companies that are early actors will have additional experience to draw upon as they seek to help shape climate policies, will be ahead of competitors in finding cost-effective ways to reduce energy use and GHG emissions and differentiating themselves as green companies. They also will be able to sell their GHG reductions as carbon credits in emerging carbon markets.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Civil Procedure  
Justiciability  
Standing  
General Overview  
Governments  
Federal Government  
Claims By & Against  
Governments  
Local Governments  
Claims By & Against

**GRAPHIC:**

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