

Wild Law 2007–8

Climate change in the courts: summary of cases

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Introduction**

Over the last few months, judgments against the Bush administration in two leading US climate change cases have seen the judicial acceptance of climate science. It has been known since 2001 that most global warming since 1950 has been due to greenhouse gas concentrations as a result of human activities, mainly the burning of fossil fuel. There was sufficient legally-relevant scientific certainty, assessed both quantitatively and qualitatively, about this even before the IPCC's 90 per cent confidence rating in February 2007. The need to reduce emissions promptly has been urged by the world's top scientists, and in June 2007 the G8 nations agreed that 'emissions must stop rising, followed by substantial global emission reductions'. Since 2001, the scientific evidence for human influence at sub-global levels, for example in Europe, North America and California, has also become stronger. In the face of an inadequate response from politicians and industry, about 20 legal actions related to climate change have begun around the world over the last few years, using a variety of legal theories under statutes, common law and international law, and including the first serious climate change damages case filed by the State of California.

There have been judgments in seven cases so far, four of which have been in the two major countries that rejected the Kyoto Protocol – the US and Australia.

Environmental impact assessment

*Australian Conservation Foundation v Minister for Planning*¹

Held: greenhouse gas (GHG) emissions from burning coal must be taken into account in a planning decision to approve a coal mine extension – ie the use to which the coal would be put must be taken into account in determining the environmental effects.

*Gray v The Minister for Planning*²

Held: that the GHG impacts of burning coal must be taken into account in the environmental impact assessment of new coal mines in New South Wales, under Part 3A of the Environmental Planning and Assessment Act 1979. The judge (Justice Pain) applied two common environmental law concepts which are receiving increased judicial attention: inter-generational equity (IGE) and the precautionary principle (PP).

Finding that IGE required assessment of cumulative impacts, Pain J approved a recent article³ in which:

[t]hree fundamental principles underpinning the principle of intergenerational equity are identified: (i) the conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations; (ii) the conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received; (iii) the conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth ...

In terms of environmental impact assessment which takes into account the principle of intergenerational equity, as set out above, one important consideration must be the assessment of cumulative impacts of proposed activities on the environment (paras 119 and 122).

She also set out how the PP shifts the burden of proof:

[t]he function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage

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** United Kingdom Environmental Law Association (UKELA) Wild Law workshop 'Wild law: a response to climate change' 21–23 September 2007.

1 [2004] VCAT 2029, judgment of Justice Stuart Morris, available at www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html.

2 [2006] NSWLEC 720, judgment of Justice Pain, available at www.lawlink.nsw.gov.au/lecjudgments/2006nswlec.nsf/2006nswlec.nsf/WebView2/DC4DF619DE3B3F02CA257228001DE798?OpenDocument.

3 J Preston 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' *Asia Pacific Journal of Environmental Law* 9 (2008) Issues 2 and 3, 109.

and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists or its extent. As identified in *Telstra v Hornsby* at [150], if the two conditions precedent or thresholds are satisfied so that there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty the principle will apply so that the shift in an evidentiary burden will occur meaning that the proponent for the development has to demonstrate that the threat does not exist or is negligible (para 127).

*Friends of the Earth et al. v Mosbascher and Merrill*⁴

Held: the US National Environmental Policy Act (NEPA) applies to major federal government projects that contribute to climate change. After noting recent developments the judge said that: 'it would be difficult for the Court to conclude that Defendants have created a genuine dispute that [greenhouse gases] do not contribute to global warming.'

The judgment was given in a case brought by Friends of the Earth USA, Greenpeace USA and the cities of Arcata, Boulder, Oakland and Santa Monica, against the US export credit agencies the Export-Import Bank and the Overseas Private Investment Corporation.

In an earlier judgment in the case,⁵ dismissing the export credit bodies' motion to dismiss, and granting standing, the judge said:

The Court concludes that Plaintiffs' evidence is sufficient to demonstrate it is reasonably probable that emissions from projects supported by OPIC and Ex-Im supported projects will threaten Plaintiffs' concrete interests.

In this case, the Department of Justice had argued that 'the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not been established'.⁶

Regulating GHG emissions from motor vehicles

*Commonwealth of Massachusetts et al v EPA*⁷

Held (5/4): the US Supreme Court has held that carbon dioxide is an air pollutant under s 202(a)(1) of the Clean Air Act which provides that the EPA:

shall by regulation prescribe ... standards applicable to the emission of any air pollutant from ... new motor vehicles ... which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

This ruling was made in a case brought by 12 US states, four local authorities and 13 NGOs and overruled the US Court of Appeals' decision of 15 July 2005.⁸

Giving the majority judgment, in a major blow to the Bush administration's position on climate change, Justice Stevens noted that: '[t]he harms associated with climate change are serious and well recognised', that the 'EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming', and that the 'EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change'.

Fourteen scientists had filed an *amicus curiae* brief with the Supreme Court, stating that:

[t]he Earth's climate is changing in ways that are significantly increasing the risk of adverse impacts on public welfare. Time is of the essence because delay in greenhouse gas regulation will only accelerate global climate change. EPA must begin regulating greenhouse gas emissions from motor vehicles now to slow climate change in time to reduce the risk of adverse impacts.⁹

They also said that the Court of Appeals' majority judgment given by Judge Randolph 'significantly misrepresented the findings' of the 2001 National Academies' report, 'emphasising uncertainties in climate change science while failing even to mention the existence of fundamental areas of certainty or consensus'.

In April 2006, 12 US states and cities and three NGOs sued the EPA for not regulating carbon dioxide from power plants under the Clean Air Act, in an attempt to determine definitively whether the EPA has authority to regulate global warming.¹⁰

Suing power companies in public nuisance

*State of Connecticut, et al v American Electric Power Company, Inc., et al; Open Space Institute, Inc. et al v American Electric Power Company Inc., et al*¹¹

4 US District Court for the Northern District of California, 30 March 2007, judgment of Judge Jeffrey S White, Case No. C 02-04106 JSW. Judgment at www.climatelaw.org/media/OPIC%20NEPA%20S%20decision%20March%2007.

5 US District Court for the Northern District of California, 23 August 2005, summary judgment of Judge Jeffrey S White, Case No. C 02-04106 JSW. Judgment at www.climatelawsuit.org/documents/ruling82305.pdf.

6 Motion for Summary Judgment and Memorandum in Support (3 November 2004) s 2 p 15.

7 Judgment of 2 April 2007 available at www.climatelaw.org/media/Mass.v.EPA.USSC. See A Kimbrell pp 62–68.

8 Court of Appeals for the District of Columbia Circuit, Judges Randolph, Sentelle and Tatel, Case No. 03-1361. Judgment and other documents available at www.icta.org/global/actions.cfm?page_id=2§ion_title=Global%20Warming%20&%20Air%20Pollution.

9 Pages 6–7 of the 38-page Brief available at www.climate-science-watch.org/index.php/csw/details/amici-curiae-climate-scientists/.

10 www.oag.state.ny.us/press/2006/apr/apr27a_06.html.

11 US District Court for the Southern District of New York, 15 September 2005, Judge Loretta A Preska, Cases Nos. 04 Civ. 5669 (LAP) and 04 Civ. 5670 (LAP). Judgment at www.nysd.uscourts.gov/rulings/04cv5669_04cv5670_091505.pdf; other documents at www.pawalaw.com/html/cases2.htm.

Held: cases brought on the basis of the common law tort of public nuisance, by eight US states, New York City and three NGOs against the five biggest US power companies (and one subsidiary), were dismissed as raising 'non-justiciable political questions'. The plaintiffs' appeal hearing took place in June 2006 and the outcome is awaited. On 21 June 2007, the Court of Appeals ordered the parties to make submissions on the implications of the Supreme Court judgment in *Massachusetts et al v EPA* for the case. These submissions were filed on 6 July 2007.

The plaintiffs argued that the huge emissions from the defendants' power plants – some 650 million tons of carbon dioxide annually, making them the five largest emitters of carbon dioxide in the US, and responsible for approximately 10 per cent of all carbon dioxide emissions from human activities in the United States – are a public nuisance, in that:

- they are causing injury and a significant threat of injury to the plaintiffs by their emissions of carbon dioxide from burning fossil fuel in their power stations, and are knowingly, intentionally or negligently creating, maintaining or contributing to a public nuisance – global warming – injurious to the plaintiffs and their citizens and residents
- these emissions, by contributing to global warming, are a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including, inter alia, the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world.

The plaintiffs argued that each defendant is jointly and severally liable for creating, contributing to and/or maintaining a public nuisance, and asked the court for an order requiring each defendant to abate its contribution to the nuisance by requiring it to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade. No damages were claimed.

In her judgment, the judge accepted that:

Congress has recognised that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts in the United States, but it has declined to impose any formal limits on such emissions.

However, she considered that the case involved non-justiciable political questions, particularly, in her view, because of 'the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion'.

She said:

Plaintiffs advance a number of arguments why theirs is a simple nuisance claim of the kind courts have adjudicated in the past, but none of the pollution-as-public-nuisance cases cited by Plaintiffs has

touched on so many areas of national and international policy. The scope and magnitude of the relief Plaintiffs seek reveals the transcendently legislative nature of this litigation. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an 'initial policy determination' having been made by the elected branches. (refs omitted)

Violations of rights to life and dignity

*Gbemre v Shell Petroleum Development Company of Nigeria Ltd et al*¹²

Held: the flaring of gas in a Niger Delta community by Shell Nigeria is a 'gross violation' of the constitutionally-guaranteed rights to life and dignity of Mr Jonah Gbemre and the Iwherekan community in Delta State.

Nigerian flaring contains a toxic cocktail which exposes residents to an increased risk of premature death, child respiratory illnesses, asthma and cancer. It has contributed more greenhouse gases than all other sub-Saharan sources combined, and lost the country US \$2.5 billion annually.

This was the first time a Nigerian court applied the rights to life and dignity in an environmental case. Shell Nigeria was ordered to stop flaring in the community immediately. Justice C V Nwokorie found the gas flaring laws to be 'unconstitutional, null and void', and ordered the Attorney General to meet President Obasanjo and others to set in motion the necessary processes for new gas flaring legislation that is consistent with the constitution.

Contempt of court proceedings were filed in December 2005, as the flaring was continuing 32 days after the judgment without a stay of execution in place. In April 2006, in determining the stay of application, the Federal High Court granted a stay on ending the flaring until the end of April 2007, and ordered the CEOs of Shell Nigeria, the Nigerian National Petroleum Corporation and the Petroleum Minister to appear personally before him on 31 May 2006 with a detailed, clear plan for putting out the flares within 12 months. On 23 May 2006, the

12 Federal High Court of Nigeria, Benin City (14 November 2005) Justice C V Nwokorie, Suit No FHC/B/CS/53/05, judgment at www.climatelaw.org/media/media/gas.flaring.suit.nov2005/ni.shell.nov05.judgment.pdf.

Court of Appeal overturned the first instance court's order in respect of the personal appearances of the CEOs and minister.

In a further gas flaring case, brought by four individuals and communities against Shell, Chevron, Agip and Total, a judge in the Federal High Court of Nigeria in Port Harcourt in September 2006 declined to follow Justice Nwokorie's judgment, and dismissed the action. This is being appealed.

Access to information

*Bundes für Umwelt und Naturschutz Deutschland e.V. & Germanwatch e.V., v Bundesrepublik Deutschland, vertreten durch Bundesminister für Wirtschaft und Arbeit*¹³ In June 2004, Germanwatch and BUND (Friends of the Earth Germany) began a legal action to require the German Economic Ministry to disclose the contribution to climate change made by energy production projects supported by the German taxpayer through its export credit agency Euler Hermes AG. In a legal judgment as part of the court settlement in January 2006, the Berlin Administrative Court rejected the German Government's arguments that it was not subject to the freedom of environmental information laws (derived from the EU and the Aarhus Convention) and that it did not affect climate change and the environment.

Two administrative determinations

Threatened species – coral and polar bears

*Listing of Elkhorn and Staghorn Coral as threatened species under the US Endangered Species Act*¹⁴

On 9 May 2006, the US National Marine Fisheries Service (NMFS) published its decision to list two Caribbean coral species, elkhorn and staghorn coral, as threatened under the Endangered Species Act,¹⁵ following a petition in March 2004 from the Center for Biological Diversity. These are the first species listed under the ESA for which global warming is recognised as a primary threat: in its determination, the NMFS identified disease, hurricanes and elevated sea surface temperature as the three 'major threats' to these species, which were 'severe, unpredictable, likely to increase in the foreseeable future, and, at current levels of knowledge, unmanageable'.

The ESA requires all federal agencies to ensure that their actions do not jeopardise any listed species or adversely modify its critical habitat.

Proposed listing of the polar bear as a threatened species under the ESA

On 9 January 2007, the US Department of the Interior's Fish and Wildlife Service published in the Federal Register its finding that listing the polar bear as a threatened species under the ESA is 'warranted', and its proposal to list the species throughout its range.¹⁶ After an extensive analysis of the evidence, the service concluded that polar bears are 'threatened by ongoing and projected changes in their sea ice habitat', and by 'inadequate regulatory mechanisms to address sea ice recession'. This proposed listing was the result of a petition filed in February 2005 by the Center for Biological Diversity,¹⁷ subsequently joined by Greenpeace and the Natural Resource Defense Council.

Other initiatives

Human rights

In December 2005, Sheila Watt-Cloutier, on behalf of all Inuit of the Arctic regions of the US and Canada and with the support of the Inuit Circumpolar Conference, filed a petition to the Inter-American Commission on Human Rights seeking relief from human rights violations resulting from global warming caused by acts and omissions of the US. Global warming violates the Inuit's culture, life, food and health by melting ice, snow and permafrost, changing the weather, and radically altering every aspect of the Arctic environment on which Inuit lives and culture depend.¹⁸ The Commission is reported to have dismissed the petition technically in December 2006, but held a hearing in Washington DC at which the petitioners made their case on 1 March 2007.

World heritage

Parties to the UNESCO World Heritage Convention have a legal duty to protect and transmit world heritage sites to future generations. This duty is placed primarily on the host states and extends to all state parties whose activities are damaging or could damage sites situated in other countries. The main GHG emitting states are parties to the convention and will not fulfil this duty without significant cuts in their emissions.

Since 2004, about 40 organisations and individuals have drawn attention to this legal duty as it relates to some of the most outstanding mountain areas and coral reefs facing climate damage. Six petitions have been submitted to the World Heritage Committee requesting the addition of Mount Everest, the Peruvian Andes, the Blue Mountains, US and Canadian glaciers, and the Great Barrier and Belize Barrier Reefs to the list of world heritage sites in danger

13 Verwaltungsgericht Berlin (10 January 2006) Judge Gaudernack, Ref VG 10 A 215.04. Judgment in German and unofficial English translation available at www.climatelaw.org/media/Germany.

14 Federal Register / Vol. 71, No. 89 / Tuesday, May 9, 2006 / Rules and Regulations, p 26852.

15 Under the ESA, a 'threatened species' means any species or subspecies likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The term 'endangered species' means any species that is in danger of extinction throughout all or a significant part of its range.

16 Federal Register / Vol. 72, No. 5 / Tuesday 9 January 2007, p 1064, 50 CFR Part 17. According to the proposed rule document, there are about 20,000–25,000 polar bears in 19 populations in the US, Canada, Russia, Greenland and Norway.

17 www.biologicaldiversity.org/swcbd/species/polarbear/index.html.

18 175-page petition available at www.climatelaw.org/media/inuit.iachr.

because of climate change. The committee decides whether to give a site extra protection by adding it to the danger list, and allocates funding.

In Lithuania in July 2006, the committee adopted a world heritage and climate change strategy focusing on adaptation. This was followed in July 2007 in New Zealand by the committee calling for states parties to participate in the UN Climate Change conferences with a view to achieving a comprehensive post-Kyoto agreement. The committee endorsed a policy document on the impacts of climate change on world heritage for presentation at the General Assembly of States Parties in autumn 2007.

Damages in California

On 20 September 2006, the state of California sued General Motors, Toyota, Ford, Honda, Chrysler and Nissan for damages for contributing to a public nuisance, namely global warming, citing particularly the reduced Sierra snowpack which contributes 35 per cent of California's water supply and re-building levees protecting the Sacramento Bay-Delta area from salt water infiltration and other sea level rise impacts.¹⁹ Judgment is awaited on the defendants' motion to dismiss.

Canada

In May 2007, Friends of the Earth Canada, with Sierra Legal, filed a case against the environment and health ministers alleging that the federal government has a duty to take action to control greenhouse gas emissions under s 166 of the Canadian Environmental Protection Act 1999.²⁰ Under s 166, if ministers have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be expected to contribute to, air pollution in a country other than Canada, or to air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution, then a duty to act to control the releases arises.

The Canadian Commissioner of the Environment and Sustainable Development reported in September 2006²¹ that the gap between Canada's GHG emissions and its Kyoto commitments is growing: Canada's GHG emissions in 2004 were 26.6 per cent above 1990 levels, resulting in a gap of 34.6 per cent from Canada's Kyoto target of a 6 per cent reduction by 2008–2012.

In October 2006, an international legal opinion²² had been presented to the Canadian Government indicating, inter alia, that it was in breach of the 1992 UN Framework Convention on Climate Change (UNFCCC) obligations, by not having established measures that would lead to a reversal of the long-term trend of increasing GHG

emissions in order to stabilise atmospheric concentrations, contrary to Article 4.2(a) and (b), in conjunction with Article 2; and was in breach of the Kyoto Protocol obligation to demonstrate progress in achieving its 6 per cent reduction target by 2005 and is likely to violate that 6 per cent reduction target by 2012.

A submission was also made in October 2006 to the facilitative branch of the Compliance Committee in respect of the Kyoto Protocol.²³ No response has been received.

Car companies and the OECD Guidelines for Multinational Enterprises

NGOs in Europe have begun initiatives against car companies in the light of the failure of the industry to live up to its voluntary agreements with the European Commission to reduce average CO₂ emissions from new cars to 140g/km by 2008/9.²⁴

In May 2007, Germanwatch filed a complaint against Volkswagen with the German OECD National Focal Point, arguing several violations of the OECD Guidelines for Multinational Enterprises.²⁵ Although these guidelines are not legally binding, there is a complaints mechanism hosted by governmental bodies, and the manner in which complaints are dealt with has legal implications.

Under the guidelines, companies are requested:

[w]ithin the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, [to] take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development (s V).

They are also requested to comply with other detailed provisions, such as evaluating the environmental impacts of their products and conducting life cycle assessments.²⁶

In July 2007, Friends of the Earth wrote to the top six UK car manufacturers (Nissan, Toyota, Honda, Ford, BMW and Vauxhall), investigating compliance with essentially the same provisions.²⁷

19 Complaint at www.climatelaw.org/media/CA%20auto%20companies/california.complaint.pdf.

20 Application for judicial review available at www.foecanada.org/index.php?option=content&task=view&id=318&Itemid=135.

21 www.oag-bvg.gc.ca/domino/reports.nsf/html/c2006menu_e.html.

22 www.climatelaw.org/media/Canada.

23 The submission, made pursuant to s VIII para 4 of the procedures and mechanisms relating to compliance under the Kyoto Protocol, is at www.climatelaw.org/media/Canada/canada.compliance.pdf.

24 There are three voluntary agreements, with the European, Japanese and Korean trade bodies. See http://ec.europa.eu/environment/co2/co2_agreements.htm. For information on the industry's CO₂ performance see www.transportenvironment.org/Article250.html.

25 www.germanwatch.org/corp/vw.htm.

26 www.berr.gov.uk/europeandtrade/trade-policy/oecd-multinat-guidelines/page10203.html.

27 www.foe.co.uk/campaigns/transport/news/car_letters.html#letters.