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WHAT LITIGATION OF A CLIMATE NUISANCE SUIT MIGHT LOOK LIKE

by Michael B . Gerrard*

In *American Electric Power Co. v. Connecticut (AEP)*,¹ the Supreme Court explicitly left ajar the door to litigation under state (as opposed to federal) common law for greenhouse gas (GHG) emissions. Some plaintiffs' lawyers are also arguing that the decision leaves room for seeking money damages (rather than injunctive relief) even in a federal common law case.

For purposes of this Article, let's imagine a world in which the courthouse doors are swung open to common law claims for damages for GHG emissions, and the courts have rejected all defenses based on displacement, preemption, political question, and standing. In other words, the plaintiffs finally are able to litigate the merits. What would that litigation look like?

Because I have spent thirty years as a practicing environmental litigator (sometimes acting for plaintiffs, sometimes for defendants)² prior to entering academia, my head swims with the challenges such a case would pose. Most of the voluminous commentary on the common law GHG cases looks at the threshold issues; let's now peer across the threshold and see what's on the other side. What we'll find is an extraordinary number of open questions that would face the parties and the courts; in this Article I attempt to enumerate them, without undertaking the daunting task of answering them.

SELECTION OF DEFENDANTS

It is well recognized that these cases pose unique difficulties because current atmospheric levels of GHGs result from the cumulative emissions of millions or billions of emitters since the onset of the industrial revolution. Adverse impacts result from this global cumulative load; no specific injury can be attributed to any specific polluter. Thus one early question in any suit for money damages is whether liability is joint and several or whether liability is proportional.

If the joint and several prong prevails, the inevitable result is third-party litigation. The defendants who are named in the complaint will sue numerous other GHG emitters who were not named, and those new defendants will in turn sue still more. That is what happened in the litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980³ over liability for cleaning up contaminated sites. The courts ruled that in some circumstances CERCLA imposes joint and several liability,⁴ and it was common in large sites—especially landfills that had accepted waste from entire regions—to see concentric circles of third-, fourth- and fifth-party defendants, ultimately sometimes reaching into the hundreds. At least one CERCLA case grew so large that no existing courtroom could accommodate the hundreds of lawyers, and a special courtroom had to be built in another building.⁵

Stories abounded about how large chemical companies were impleading donut shops and nursing homes to spread the pain, to achieve coercive settlements, and to drag out the cases.⁶ The number of potential defendants in a GHG case is staggering, and the consequent case management challenges are immense.

Determining which parties are liable in turn raises several questions:

1. PERSONAL JURISDICTION.

It's not clear whether a state court would find it has jurisdiction over GHG sources in distant states. Moreover, only approximately 18 percent of today's carbon dioxide emissions come from the United States.⁷ Of the remainder, some are from multinational companies with sufficient contacts in the U.S. to be susceptible to service of process here. How will a U.S. court assert jurisdiction over the rest, and then enforce judgments against them?

2. REASONABLENESS OF CONDUCT.

Public nuisance liability is generally imposed only on those who engaged in unreasonable conduct.⁸ There has been no statutory or regulatory limitation on carbon dioxide emissions, at least before the Environmental Protection Agency (EPA) began regulating GHGs in January 2011.⁹ Thus the emissions that are the basis for the assertion of liability were for the most part lawful. How will unreasonableness be defined? What is the effect of the absence of any commercial technology for controlling GHG emissions from fossil fuel combustion (other than using non-fossil energy, or using less energy)? Since one of the factors in determining reasonableness may be the social value of the conduct,¹⁰ what is the social value of fossil fuel use? Is use of fossil fuels intrinsically unreasonable? What is the relevance of more than a century of U.S. policy encouraging fossil fuel use and the historical dependence of the U.S. economy on fossil fuel use? Does it matter whether the fossil fuels were used to support a very comfortable lifestyle (e.g., United States, Canada, Europe, Japan, Australia) or to lift a population out of poverty (e.g., China, India)?

3. PERMITS.

As some decisions have suggested,¹¹ is the fact that a facility has operated under governmental permits a complete defense to a nuisance claim? Does it matter that the permits are silent as to GHG emissions?

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4. STATUTE OF LIMITATIONS.

Many states bar claims for money damages for nuisance that were incurred more than a set period before the filing of the complaint; in New York, for example, that time is three years.¹² Does that mean that, for a suit brought in 2011, damages could only be sought for emissions from 2008 and later?

5. CHOICE OF LAW.

Which state's laws apply to determinations of reasonableness, statutes of limitations, and other issues? If a defendant company has emitting facilities in twenty states, do twenty different sets of rules apply to the litigation? What about emissions outside of the United States?

6. SUCCESSORSHIP.

Many emissions may be attributable to facilities that closed or companies that dissolved decades ago. What principles of successor liability might apply? Where no successor exists, who pays for the orphan shares?

7. SUPPLY CHAINS.

Many GHG emissions come from automobile tailpipes. In order for that to happen, oil is extracted from wells, transported to refineries, refined into gasoline, transported to filling stations, and pumped into vehicles that are assembled by various manufacturers (from parts fabricated by numerous companies) and then driven by motorists. Who along this supply chain is liable—the oil producers, the refiners, the fuel transporters, the filling stations, the vehicle manufacturers, the motorists? (The same sort of question could be asked, for example, about coal that is mined from the ground, sent by rail to a power plant, and burned there, generating electricity that travels by wire to homes, where it runs lights and appliances.) What principle is used in selecting the point(s) along the chain where liability attaches? How does a court assess the reasonableness of the conduct at each step in this chain?

8. GOVERNMENTAL LIABILITY.

If a national or state government affirmatively encouraged fossil fuel use or other GHG-generating activities, such as through subsidies, leasing of publicly owned resources (e.g., offshore lands), provision of facilities for the use of the fuels (e.g., interstate highways), use of governmental powers (e.g., eminent domain), technological mandates, or direct purchases, does it share in the liability? What if the government knew of a risk but failed to take steps to protect its population, such as by building or enlarging flood protection levees? Is sovereign immunity a total bar to such claims, or have there been waivers? If the government would be liable but for sovereign immunity, is private defendants' liability reduced proportionately?

9. NON-INDUSTRIAL EMISSIONS.

Approximately 61.4 percent of global GHG emissions result from energy use, and about 18.3 percent are attributed to deforestation.¹³ Much of this deforestation occurs on governmentally owned land. Are the entities that engaged in or allowed this deforestation liable? If so, would that include, for example, the

governments of countries in South America and Africa, where the highest annual loss of forests is occurring?¹⁴

OTHER ISSUES

GHG tort litigation would raise many other issues:

1. CAUSATION.

It has become a truism in climate policy circles that specific weather events cannot be attributed to GHG emissions.¹⁵ We can say that hurricanes, droughts, and heat waves will be more frequent and severe on a warmer planet, but such events occurred long before the industrial era; there has always been natural variability. How would the victims of one such event establish that it specifically was caused by climate change? Would they have to? What burden of proof would they have to bear? (This problem might be somewhat eased for injuries resulting from longer trends, such as coastal erosion and snowpack melt, and for expenses for reasonable adaptation efforts.)

2. CLASS ACTIONS.

If causation can be established and defendants can be found who are potentially culpable, subject to the court's jurisdiction, and sufficiently wealthy to be worth suing, the number of potential plaintiffs may be very large. A class action would be the natural way to proceed. The same day that the Supreme Court issued its decision in *AEP v. Connecticut*, it also announced *Wal-Mart Stores, Inc. v. Dukes*,¹⁶ which evinced skepticism toward sprawling class actions.¹⁷ Will the courts now be receptive toward class actions against GHG emitters?

3. ISSUE PRECLUSION.

If this kind of litigation succeeds, any entity deemed to be a major emitter (e.g., a large electric utility) is likely to find itself the subject of multiple lawsuits. If it litigates its liability in one case and loses, is that holding binding against it in subsequent cases under doctrines such as res judicata? What if it litigates and wins one—can it use that victory in subsequent cases?

4. MEASURE OF DAMAGES.

If a neighborhood is wiped out by an event that a court finds was caused by climate change, are only purely economic losses recoverable? What about the loss of community and other less tangible losses? Can anyone recover for loss of biodiversity and other ecological impacts? Can recovery be obtained for losses that are inevitable (as a result of the GHGs already in the atmosphere) but that will not be incurred for another generation or two?

5. ASSUMPTION OF RISK.

If someone builds, or remains in, a house in an area now known to be vulnerable to flooding as a result of sea-level rise, and that house is in fact flooded, can the owner fully recover damages for the loss? Is there any obligation to avoid (or abandon) the area, or to mitigate damages in the face of newly understood perils?

6. INSURANCE COVERAGE.

Much of the litigation under CERCLA concerned insurance coverage for cleanup liability; the transaction costs were enormous.¹⁸

Would the same pattern recur, with many or most GHG emitters seeking insurance coverage?

7. NON-EMISSIONS CONDUCT.

In assessing the liability of a GHG emitter, are its quantified emissions the only factor? What if, as some of the pending suits allege, certain defendants misrepresented the science of climate change? Or what if some defendants offset their emissions by, for example, helping pay for a wind farm? Does any of this count in terms of imposing liability?

8. VENUE AND CONSOLIDATION.

If joint and several liability is the rule, and virtually every large GHG emitter in the world is ultimately brought in, there may be multiple litigations raising the same issues of liability (as opposed to damages) against many of the same parties. Where will these cases be brought? Will all the federal cases be consolidated before one district judge under the multidistrict litigation rules?¹⁹ What becomes of the state cases? What happens if similar cases proceed in another common law country?

9. DISCOVERY.

What is the scope of discovery in these cases? May plaintiffs probe into corporate defendants' industrial processes (to see whether there were opportunities to operate more efficiently), their public statements and private communications about climate change (to see whether there are inconsistencies), and their lists of suppliers and customers (in search of additional defendants)? May defendants explore whether the plaintiffs were

themselves profligate energy users and whether they should have known not to live on a beach?

10. ALIEN TORTS.

If a U.S. GHG emitter's conduct is found to be tortious, may a resident of another country use the U.S. courts to claim damages?²⁰ Would high GHG emissions rise to the level of extreme breach of long- accepted norms that is needed to trigger such claims? If so, what are the limits on how many foreigners may bring such cases?

CONCLUSION

As this Article shows, if any plaintiffs successfully make their way through the keyholes that may have been left by the Supreme Court in *AEP*, they and the courts in which they seek redress will still face extraordinary difficulties.

At its core, *AEP* is a separation of powers decision. Even those participating members of the Court who are presumably most enthusiastic about controlling GHGs agreed that the job of setting emissions limitations is beyond the competence of the courts and that Congress has assigned it to the EPA. If any trial court does eventually approach the merits of a suit seeking money damages for GHG emissions, it may find it is embarking down a wormhole, and upon comprehending the journey it may recoil. Interpreting and enforcing congressional and regulatory mandates is an important and proper role for the courts in confronting climate change; erecting a new liability scheme to redress the impacts of our economic system is an entirely different and perilous voyage.



Endnotes: What Litigation of a Climate Nuisance Suit Might Look Like

¹ 131 S. Ct. 2527 (2011).

² The author's law firm, Arnold & Porter LLP, represents a defendant in Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 873-76 (N.D. Cal. 2009), *appeal docketed*, No. 09-17490 (9th Cir. Nov. 5, 2009), which is now under appeal to the U.S. Court of Appeals for the Ninth Circuit, and a defendant in Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010), which was recently refiled in the U.S. District Court in Mississippi. The author writes this Article, however, purely in his academic capacity.

³ Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. § 9607 (2006)).

⁴ E.g. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

⁵ See Jack Hitt, Toxic Dreams: A California Town Finds Meaning in an Acid Pit, HARPER'S, July 1995, at 57 (describing the litigation surrounding the Stringfellow Acid Pits in Riverside County, California).

⁶ See, e.g., Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way To Share Bill*, WALL ST. J., Apr. 2, 1991, at A1 (reporting efforts by Special Metals Corp. and USA Co. to subject hundreds of small businesses, school districts, and municipalities to litigation in an attempt to diffuse the companies' financial liability).

⁷ See U.N. Statistics Div., *Indicator 7.2: Carbon Dioxide Emissions, Total, Per Capita and Per \$1 GDP (PPP)*, MILLENNIUM DEV. GOALS INDICATORS (Last visited Mar. 9, 2012), <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srld=749&crld=> (listing US carbon dioxide emissions in 2008 as 5,461,014 thousand metric tons, 18% of the 29,862,261 metric tons of carbon dioxide emitted that year).

⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 821B, 826 (1965) (listing and commenting on the elements of public nuisance).

⁹ A minor exception is the Regional Greenhouse Gas Initiative (RGGI), a program of ten northeastern and Mid-Atlantic States that has imposed a cap on carbon dioxide emissions from electric power generating stations as of January 2009. However, RGGI is overallocated, meaning that available allowances have exceeded emissions, so that the carbon dioxide emissions fell within permissible levels. See Carbon Offset Research & Educ., *Regional Greenhouse Gas Initiative*, STOCKHOLM ENVTL. INST. & GHG MGMT. INST. (Jan. 2011), <http://www.co2offsetresearch.org/policy/RGGI.html>.

¹⁰ RESTATEMENT (SECOND) OF TORTS § 827(c).

¹¹ E.g., North Carolina v. Tenn. Valley Auth., 615 F.3d 291 (4th Cir. 2010).

¹² N.Y. C.P.L.R. 214 (McKinney 2011).

¹³ KEVIN A. BAUMERT, TIMOTHY HERZOG & JONATHAN PERSHING, NAVIGATING THE NUMBERS: GREENHOUSE GAS DATA AND INTERNATIONAL CLIMATE POLICY 5 fig.1.3 (2005), http://pdf.wri.org/navigating_numbers.pdf.

¹⁴ See FOOD & AGRIC. ORG. OF THE U.N., GLOBAL FOREST RESOURCES ASSESSMENT 2010: MAIN REPORT 17 (2010), <http://www.fao.org/docrep/013/i1757e/i1757e.pdf>.

¹⁵ See, e.g., Paul Krugman, Op-Ed., *Droughts, Floods and Food*, N.Y. TIMES (Feb. 7, 2011), <http://www.nytimes.com/2011/02/07/opinion/07krugman.html> (while no one weather event can be attributed to greenhouse gas, patterns of extreme highs and extreme weather is expected from climate change).

¹⁶ 131 S. Ct. 2541 (2011).

¹⁷ See also Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (finding that a "sprawling class" originally authorized by the District Court as not meeting the requirements of Fed. R. Civ. P. 23).

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¹⁴⁷ Morgan & Cameron, *supra* note 139 (giving an optimistic report of COP 17, saying that while there was much work to be done, things are moving in the right direction).

¹⁴⁸ *Territorial Approach to Climate Change*, *supra* note 146 (“Climate change mitigation and adaptation requires concerted action at multiple levels and by different actors.”).

¹⁴⁹ CENTER FOR AMERICAN PROGRESS, BREAKING THROUGH ON TECHNOLOGY: OVERCOMING THE BARRIERS TO THE DEVELOPMENT AND WIDE DEPLOYMENT OF LOW CARBON TECHNOLOGY 19 (2009), http://www.americanprogress.org/issues/2009/07/pdf/gcn_report.pdf (discussing the private sector as the solution to innovation barriers).

¹⁵⁰ *Id.*

¹⁵¹ Morgan & Cameron, *supra* note 139 (“Tackling climate change will be a multi-generational effort requiring sustained political engagement and a complete transition to a low-carbon economy.”).

¹⁵² See generally DANIEL BODANSKY, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, MULTILATERAL CLIMATE EFFORTS BEYOND THE UNFCCC (2011), <http://www.c2es.org/publications/multilateral-climate-efforts-beyond-unfccc> (setting forth a series of regimes touching on the subject of climate change).

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¹⁸ See JAN PAUL ACTON & LLOYD S. DIXON, INST. FOR CIV. JUSTICE, RAND CORP., SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (2002), <http://www.rand.org/content/dam/rand/pubs/reports/2007/R4132.pdf> (finding on average that transaction costs were 88% of total expenditures; individual expenditures ranged from 80% to 96%).

¹⁹ 28 U.S.C. § 1407 (2006) (codifying the establishment of multidistrict litigation).

²⁰ Alien Tort Statute, 28 U.S.C. § 1330 (2006). But see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that, in establishing a valid Alien Tort Statute,

“courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (imposing liability on corporations for violations of customary international law “has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*” and would therefore not meet the requirements of *Sosa*).

Endnotes: AN UN-CONVENTIONAL APPROACH: ECUADOR’S YASUNÍ-ITT INITIATIVE IS IN DISCORD WITH THE UNFCCC

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⁶³ COAL. FOR RAINFOREST NATIONS, <http://www.rainforestcoalition.org> (last visited Apr. 20, 2012).

⁶⁴ Abate, *supra* note 60, at 97 (citing *About REDD+, UN-REDD Programme*, UN-REDD.org, <http://www.un-redd.org/AboutREDD/tabid/582/language/en-US/Default.aspx> (last visited Apr. 20, 2012)).

⁶⁵ Bali Delegates Agree to Support Forests-for-climate (REDD) Plan, MONGABAY.COM (Dec. 16, 2007), <http://news.mongabay.com/2007/1215-redd.html>.

⁶⁶ *Id.*

⁶⁷ See generally, United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries Sixth Policy Board Meeting, Mar. 21-22, *National Programme Document – Ecuador*, U.N.R.E.D.D./PB6/2011/V/1 (Feb. 28, 2011).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 69-74.

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 41.

⁷² *Id.* at 43.

⁷³ See *infra*, notes 14 – 17. (The proposal does not mention REDD+, and proposes a compensation system predicated on the market value of the foregone oil, rather than the benefits of deforestation and reduction in greenhouse gas emissions.).

⁷⁴ Davis, *supra* note 8, at 247 (citing Lucas, *supra* note 6).

⁷⁵ See PAUL VARGHESE, THE ENERGY AND RES. INST., AN OVERVIEW OF REDD, REDD PLUS AND REDD READINESS AT INTERNATIONAL CONFERENCE ON COMMUNITY RIGHTS, FORESTS AND CLIMATE CHANGE (2009).

Endnotes: THE EAST AFRICAN COMMUNITY AND THE CLIMATE CHANGE AGENDA: AN INVENTORY OF THE PROGRESS, HURDLES, AND PROSPECTS

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⁶ See generally Rene N’Guettia Kouassi, *The Itinerary of the African Integration Progress: an Overview of the Historical Landmarks*, 1(2) AFR. INTEGRATION REV. 1 (2007), <http://www.africa-union.org/root/ua/Newsletter/EA/Vol.%201,%20No.%202/Kouassi.pdf>.

⁷ See EAC Treaty, *supra* note 5, art. 2.

⁸ EAC Treaty, *supra* note 5, art. 5(2)(a),(c),(g).

⁹ *Id.* art. 3.

¹⁰ See generally East African Community Protocol on Environment and Natural Resources Management, Nov. 30, 2006, (not in force), http://www.eac.int/environment/index.php?option=com_content&view=article&id=122:ecac-gender-a-community-development-framework&catid=3:key-documents (The Protocol has been ratified by all EAC Partner States, save for Tanzania) [hereinafter *Environment & NRM Protocol*].

¹¹ See generally EAST AFRICAN COMMUNITY [EAC], DEEPENING AND ACCELERATING INTEGRATION, EAC DEV. STRATEGY (2011/2012 – 2015/2016) (Aug. 2011), http://www.eac.int/advisory-opinions/doc_download/650-4th-eac-development-strategy.html.

¹² EAC, EAC DEVELOPMENT STRATEGY (2011/12 – 2015/16) 17 (2011), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.eac.int%2Fadvisory-opinions%2Fdoc_download%2F650-4th-eac-development-strategy.

[html&ei=pVFqT4ODDqGQ0gG_nv2fDw&usg=AFQjCNHg29isyEL68ZU NY0GuVzTKNoxBkA&sig2=5TrZInAjPA0Xi6gxZ5g_Jg](http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf) [hereinafter EAC DEVELOPMENT STRATEGY].

¹³ DIODORUS BUBERWA KAMALA, THE ACHIEVEMENTS AND CHALLENGES OF THE NEW EAST AFRICAN COMMUNITY CO-OPERATION 3 (2006), <http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf>.

¹⁴ See generally PETER COOPER, WALKER INST., EVIDENCE-BASED ADAPTATION TO CLIMATE CHANGE IN EAST AFRICA: COMPLEXITIES, CHALLENGES AND OPPORTUNITIES (2012), [http://www.walker-institute.ac.uk/events/seminars/Cooper%20Reading%20Seminar%20\(febr.%201st\).pdf](http://www.walker-institute.ac.uk/events/seminars/Cooper%20Reading%20Seminar%20(febr.%201st).pdf).

¹⁵ Baruti Katembo, *Pan Africanism and Development: The EAC Model*, 2 PAN Afr. STUDIES no. 4 107, 109 (2008), http://www.jpanafrican.com/docs/vol2no4/2.4_Pan_Africanism.pdf.

¹⁶ Mothae Maruping, *Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence & Monetary Coordination*, in AFRICA IN THE WORLD ECONOMY - THE NATIONAL, REGIONAL AND INTERNATIONAL CHALLENGES 137 (2005), <http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf>.

¹⁷ History of the EAC, EAC, <http://www.eac.int/about-eac/eac-history.html?showall=1> (last visited March 23, 2012).

¹⁸ *Id.*