

# Significant Climate Issues Likely to Be Raised in the Federal Courts

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## Editors' Summary

Climate change legislation and rulemaking will present fertile ground for judicial inquiry. Specifically, the courts can expect to field challenges to the scope of EPA authority to regulate greenhouse gas emissions under the Clean Air Act, the scope of state authority to regulate greenhouse gas emissions, and citizen access to the courts to seek damages, challenge projects, or enforce climate regulations. Ideally, Congress will decide many of these issues in forthcoming legislation, but one can expect many more to fall to the federal courts to resolve.

Following the U.S. Supreme Court decision in *Massachusetts v. EPA*<sup>1</sup> in 2007 and the election of President Barack Obama, the political landscape has changed materially. The congressional leadership has committed to bring comprehensive climate change legislation to the floors of both houses this year. This legislation will include not only a robust cap-and-trade program that will cover large stationary sources and confirm an emerging national motor vehicle greenhouse gas (GHG) program, but almost certainly will also establish new national renewable energy and efficiency standards and require states to evaluate land use and transportation strategies to reduce carbon emissions. If enacted, the legislation will initiate several new national and state regulatory programs and trigger the expected suite of both rulemaking and permitting challenges and government and citizen enforcement actions typical of major environmental statutes. By establishing new tradable GHG emission allowances, emission reduction credits, i.e., offsets, and renewable energy credits, the new legislation will inevitably prompt litigation related to these new assets. The more explicit congressional recognition contained in legislation also may influence the extent to which plaintiffs seek federal judicial remedies for damages alleged to be caused by climate change. As a result, over the next several years, the federal courts are very likely to witness an even greater explosion of litigation than it already has seen in recent years as climate change has figured prominently in the public's consciousness as our most serious environmental challenge.

Even if the U.S. Congress fails to enact comprehensive climate legislation, it is highly likely that the U.S. Environmental Protection Agency (EPA) would step into the breach and develop comprehensive GHG regulations of its own. In response to *Massachusetts*, EPA has issued a voluminous and thoughtful advance notice of proposed regulation (ANPR), in which it outlines the various ways in which it may regulate GHG emissions. Earlier this year, EPA undertook the first step toward such regulation by proposing to find under the Clean Air Act (CAA)<sup>2</sup> that GHG emissions endanger public health and welfare. It is expected later this year to finalize one or both of those findings. When it does, it will trigger a duty to regulate at least certain motor vehicle emissions and almost certainly will set in motion a duty to regulate several other emission sources. Depending upon the nature of EPA's regulatory actions, many if not all of the types of claims that would be made possible by comprehensive congressional action could arise as a result of EPA regulation. In addition, comprehensive EPA regulation would raise a number of other issues regarding the scope of agency discretion to deviate from the plain language of the CAA, given that

1. 549 U.S. 497, 37 ELR 20075 (2007).

2. 42 U.S.C. §§7401-7671q (2007), ELR STAT. CAA §§101-618.