For several years now, large law firms have sought work related to climate change, though prior to President Obama's election the work was relatively thin. Sure there were challenges to California's legislation to regulate greenhouse gas emissions (GHG) from cars; defenses to claims under the National Environmental Policy Act and California Environmental Quality Act; and an occasional nuisance suit against large GHG emitters to defend. There was even action at the U.S. Supreme Court when the justices took up the question of whether the Clean Air Act requires the EPA to regulate GHGs in the landmark Massachusetts v. EPA case. But those cases were relatively few and far between. Now, however? It's a litigation bonanza out there. The Obama Administration's rule making under the Clean Air Act in the wake of Mass v. EPA has led to a stampede of challenges to the rules.

The Administration has issued four important rules related to climate change and the Clean Air Act. In the first significant rule, the EPA ordered large emitters of GHGs (more than 25,000 tons per year) to report their emissions. Interestingly, though, the EPA was required to issue the rule under 2007 legislation rather than directly under the Clean Air Act. The rule was initially challenged by six separate plaintiffs; those claims have been settled. But five new cases have been filed and are pending in the D.C. Circuit. All of the petitions in all of the cases described in this post can be found here.
The second major rule, the so-called "endangerment finding," includes an EPA determination — as statutorily required, according to the U.S. Supreme Court — that greenhouse gases endanger public health and welfare. So far, lawyers have filed a mere **27** (!) cases challenging the finding. Defendants include not only the usual suspects like the U.S. Chamber of Commerce and the Competitive Enterprise Institute but also three states (Texas, Alabama and Montana). Holly has a great explanation of the cast of characters here. The D.C. Circuit has consolidated all of the cases under the title *Coalition for Responsible Regulation v. EPA.* Here's an example of one of the petitions challenging the rule. In its first significant decision in the case the court has denied a motion to stay the endangerment finding (in other words the court has refused to order the EPA to put the finding on hold pending the outcome of the case).

In the third significant rule, the EPA, along with the National Highway Transportation Safety Administration, issued combined fuel economy/GHG emissions standards for cars. Although the automobile manufacturers agreed to the rules and agreed not to challenge them in court, the agreement did not bind auto dealers, nor did it bind the U.S. Chamber of Commerce or the Coalition for Responsible Regulation. In all, 17 cases have been filed, and once again consolidated in the D.C. Circuit and named *Coalition for Responsible Regulation v. EPA.*

In the fourth significant rule, the so-called "tailoring" rule, the EPA has determined that it will subject new, large sources of GHGs to regulation under the Prevention of Significant Deterioration (PSD) portion of the Clean Air Act. The tailoring rule may be the most legally vulnerable of the EPA's GHG rules, ironically because it exempts relatively small sources from regulation even though the language of the statute may not give the EPA such regulatory flexibility. For a nice explanation of the tailoring rule and whether it may be inconsistent with the Act, see Dan's post here. For a detailed explanation of the history of the EPA rule making see Sean and Cara's posts here and here. A mere 18 cases have challenged the tailoring rule, and those cases, too, have been consolidated and named? you guessed it, *Coalition for Responsible Regulation v. EPA*.

Who, might you ask, is the Coalition for Responsible Regulation? (I'm already envisioning the confusion that will ensue among environmental law students when casebooks include the decisions in *Coalition for Responsible Regulation I, II and III*). According to the Guardian,

> Court documents filed in Texas identify Richard Hogan, chief executive of Solvay's wholly owned US subsidiary, as one of three directors of the CRR, the lead petitioner on the legal challenge to the EPA's authority to act on greenhouse gas emissions. The filings give Solvay's Houston office as Hogan's address. The coalition was apparently created to block Obama's efforts to deal with climate change.

Solvay is a leading chemical manufacturer headquartered in Belgium, though as the Guardian notes one of the directors of CRR is the president of the U.S. subsidiary of Solvay.

In a victory for industry groups, the D.C. Circuit has agreed to consolidate the endangerment, tailoring and automobile rules and refer them to one panel of the court.

Finally, in a related action, the EPA has issued a rule called the "SIP Call," letting 13 states know that plans the states are required to prepare under the Clean Air Act, called State Implementation Plans, are inadequate because they fail to address the regulation of GHGs under the Prevention of Significant Deterioration rule described above. A number of the states responded by allowing for federal implementation; several other states have agreed to amend their plans to comply with the SIP Call. Texas, however, has sued the EPA on the grounds that the SIP call rule is illegal. For an excellent discussion of the status of the litigation, see here.

Of course there's far more climate litigation action than challenges to the EPA's rule making. After challenges to the EPA (from both industry and environmental groups), the largest number of cases involve challenges to new permits for coal fired power plants, typically for failing to include controls under the PSD program for carbon dioxide and other GHGs. According to the Climate Litigation Chart maintained and updated by Columbia professor Michael Gerard and lawyers at Arnold and Porter, there are 90 actions involving permits for new or modified coal plants. Here's what the world of climate litigation looks like numerically, again courtesy of Gerard:

Types of Climate Cases Filed (393 total cases as of March 11, 2011)

Coal Cases 90, 23%

NEPA 44, 11%

Regulate Private Conduct 6, 2%

Climate Protests 6, 1%

International Law Petitions 3, 1%

Common Law Claims 5, 1%

Challenges to State Vehicle Standards 11, 3%

Challenges to State Enactments 15, 4%

State NEPAs 35, 9%

Endangered Species Act 26, 7%

Other Statutes 20, 5%

Challenges to Federal Action 115, 29%

The Climate Change Litigation Chart is a terrific resource for those interested in the current state of any case involving climate change and now includes international litigation. You can find it here: http://www.climatecasechart.com/

Though in some ways climate litigation is probably in its infancy, the Clean Air Act litigation

is following a pattern that is completely familiar in federal environmental law: the EPA is challenged for failing to implement a provision of one of the statutes (in this case the motor vehicle provisions of the CAA at issue in Mass v. EPA); the agency then issues rules in response to the litigation; and those rules are then challenged, usually by industry but sometimes by environmental groups. The outcome of the challenges remains to be seen, of course, but in the meantime climate change law is a booming practice area.