

The New Climate Litigation How about if we sue you for breathing?

Fresh from the fiasco in Copenhagen and with a failure in the U.S. Senate looming this coming year, the climate-change lobby is already shifting to Plan B, or is it already Plan D? Meet the carbon tort.

Across the country, trial lawyers and green pressure groups if that's not redundant are teaming up to sue electric utilities for carbon emissions under "nuisance" laws.

A group of 12 Gulf Coast residents whose homes were damaged by Katrina are suing 33 energy companies for greenhouse gas emissions that allegedly contributed to the global warming that allegedly made the hurricane worse. Connecticut Attorney General Richard Blumenthal and seven state AG allies plus New York City are suing American Electric Power and other utilities for a host of supposed eco-maladies. A native village in Alaska is suing Exxon and 23 oil and energy companies for coastal erosion.

What unites these cases is the creativity of their legal chain of causation and their naked attempts at political intimidation. "My hope is that the court case will provide a powerful incentive for polluters to be reasonable and come to the table and seek affordable and reasonable reductions," Mr. Blumenthal told the trade publication Carbon Control News. ***"We're trying to compel measures that will stem global warming regardless of what happens in the legislature."*** ***Mull over that one for a moment. Mr. Blumenthal isn't suing to right a wrong. He admits that he's suing to coerce a change in policy no matter what the public's elected representatives choose.***

Cap and trade or a global treaty like the one that collapsed in Copenhagen would be destructive but at least either would need the assent of a politically accountable Congress. The Obama Administration's antidemocratic decision to impose carbon regulation via the Environmental Protection Agency would be even more destructive but at least it would be grounded in an existing law, the 1977 Clean Air Act, however misinterpreted. The nuisance suits ask the courts to make such fundamentally political decisions themselves, with judges substituting their views for those of the elected branches.

And now that you mention it, the U.S. appeals courts seem more than ready to arrogate to themselves this power. In September, the Second Circuit allowed Mr. Blumenthal's suit to proceed, while a three-judge panel of the Fifth Circuit reversed a lower court's dismissal of the Katrina case in October. An en banc hearing is now under consideration.

But global warming is, well, global: It doesn't matter whether ubiquitous CO₂ emissions come from American Electric Power or Exxon or China. "There is no logical reason to draw the line at 30 defendants as opposed to 150, or 500, or even 10,000 defendants," says David Rivkin, an attorney at Baker Hostetler and a contributor to our pages, in an amicus brief in the Katrina case. "These plaintiffs and any others alleging injury by climatic phenomenon would have standing to assert a damages claim against virtually every entity and individual on the planet, since each 'contributes' to global concentrations of carbon dioxide."

In other words, the courts would become a venue for a carbon war of all against all. Not only might businesses sue to shackle their competitors could we sue the New York Times for deforestation? but judges would decide the remedies against specific defendants. In practice this would mean ad hoc command-and-control regulation against any industries that happen to catch the green lobby's eye. Carbon litigation without legislation is one more way to harm the economy, and the rule of law. We hope the Fifth Circuit will have the good sense to deflect this damaging legal theory before it crash-lands at the Supreme Court.