

# Special Report

## Climate Policy

### Climate Change Law Remains Undefined Despite Boost From Paris Agreement

Attorney Adam Riedel's clients don't come to him with specific climate change questions, but climate policy is increasingly part of the conversation as the global push to limit greenhouse gases gives it a larger place in environmental law.

"When the Clean Power Plan was proceeding along before the Supreme Court issued their stay, we did have some clients say, 'I need some help with the Clean Power Plan,'" Riedel, an associate at Manatt, Phelps & Phillips LLP, told Bloomberg BNA. "Usually [climate change] comes up in ancillary issues on some other matter."

Fueled by a U.S. Supreme Court decision that spurred the Environmental Protection Agency to regulate greenhouse gases under the Clean Air Act and a global accord reached in Paris late last year, climate change is poised between examination under existing statutes and evolving into its own field of legal expertise. Colleges are founding climate law centers to raise the next generation of lawyers, but what it means to practice climate law—which can touch on federal regulation, land use and planning, energy planning and transactional law—remains an area of debate, with some disputing that it constitutes its own field of practice yet.

"What does climate law get you? Does it give you a different vantage? Does it allow you to make different types of analyses? Does it make different types of connections?" James Salzman, a professor of environmental law at the University of California, Santa Barbara, told Bloomberg BNA. "We thought the answer was no."

**Climate Change Like Horse Law?** Some who are skeptical climate law has or will become its own field of expertise draw on an analogy made in the mid-1990s credited to U.S. Court of Appeals for the Seventh Circuit Judge Frank Easterbrook, who at the time was arguing that cyberspace law did not constitute its own field. Cyberspace, like horses, he had said, can be subject to various statutes and pulling those laws together isn't sufficient to create a cohesive field unto itself. No law of the horse exists, and some legal scholars make the same case about climate change, arguing that it is another law of the horse.

"Clients don't come and say, 'I've got climate law problem,'" Salzman said. "They'll say, 'I've got a Clean Air Act issue because I need a permit for this.' If you think of a field as the push-pull of are there specific jobs out there you're being trained to do, there's an intellectual property law field, there's a labor law field."

Salzman, along with Vanderbilt Law School Professor J.B. Ruhl, wrote a paper for the Duke Law Journal

in 2012 questioning whether climate change, particularly on the adaptation and mitigation fronts, would be yet another Law of the Horse.

"What is it about climate change that is going to throw environmental law something it has never seen, something completely outside the box, something it just cannot handle?" they said in the paper. "We think the answer is, nothing. To be sure, climate change will change the environment in many ways: sea-level rise will inundate coastal wetlands and erode beaches, fire regimes will change, some areas will have more water and some less, species will migrate, people will migrate, it will grow warmer everywhere. But so what? In particular, so what for environmental law? Environmental law has been operating for decades in all of those contexts."

Instead, of a field of law, Salzman said it is more useful to view climate change as a growing policy field as governments respond to the challenge.

"I do think as a policy field it is quite useful," he said.

**Paris Agreement Provides Spark.** The Paris Agreement

### Is Climate Change a Distinct Field of Law?

**Victor Flatt of the University of North Carolina:** "It is conceptually now emerging as a concept of law and a different kind of law."

**James Salzman of the University of California, Santa Barbara:** "Climate as a field—a professional field—really has emerged as something that students view as a coherent field to go into. Whether there are jobs in the field is another issue."

**Michael Burger of Columbia Law School:** "What we have with climate change law right now in the U.S. is a specialized practice in environmental law, natural resources law and energy law all addressed toward the problems of climate change as an environmental, natural resources and energy problem."

**Adam Riedel of Manatt, Phelps & Phillips LLP:** "Even though it's an outgrowth and attachment of existing law, it's such a fundamental change in a way that I think it constitutes its own unique area of law."

**Vicki Arroyo of Georgetown Law:** "I don't know how important it is to define it. I've worked on this for 20 years. I did come out of a traditional air pollution and client counselor background."

could prove a boon to the nascent climate law field as nations look for opportunities to reduce their carbon dioxide emissions in accordance with their international pledges.

International climate talks could be viewed as the birth of climate change law, argued Manatt, Phelps & Phillips's Riedel, who previously served as associate director of what became the Sabin Center for Climate Change Law at Columbia Law School. He attributes the birth of the climate law movement to the 1992 United Nations summit in Rio de Janeiro and subsequently the Kyoto Protocol.

"Fast forward where we are today and we have a lot more action on the domestic front or individual countries just because that's the way the international frameworks panned out," he said.

Implementing the United Nations Framework on Climate Change has already spun off its own unique branch of international climate law, Michael Burger, executive director of the Sabin Center, told Bloomberg BNA.

"The lawyers working in that area are working in a very specific area of international climate law," he said.

**Failed Bill a Missed Opportunity.** While the Paris Agreement may prove to be a boost to the climate law profession, the U.S. missed an opportunity to establish its own climate law in 2010 when the cap-and-trade bill co-authored by then-Reps. Henry Waxman (D-Calif.) and Edward Markey (D-Mass.) died in the Senate.

Some law firms had set up climate change practices in anticipation of the bill becoming law. Since its demise, those divisions have been re-absorbed into traditional environmental practices, Riedel said.

"When Waxman-Markey didn't pass, these groups slowly withered away. I can't think of any firms that have a distinct climate practice group," he said.

One of the arguments against climate change being separate legal practice is that there are no statutes that directly address the issue. Instead, climate change has typically been addressed using existing legal authorities in laws like the Clean Air Act and National Environmental Policy Act, building on existing and familiar environmental practices.

"Everybody talks about adapting to climate change which is important, but the law and the policies have to adapt as well," Victor Flatt, director of the Center for Climate, Energy, Environment & Economics at the University of North Carolina School of Law, told Bloomberg BNA.

The Obama administration, particularly the EPA, has had to adapt existing statutes that were not intended to address a global pollutant like greenhouse gases through the mechanisms of existing laws and that has limited the tools available, legal experts said.

"There's activity going on across the federal government, but in all instances there's activity under existing environmental and natural resources statutes," Burger said.

**Court Decisions Accumulating in Absence of Laws.** In the absence of legislation, President Barack Obama has ordered his administration to utilize existing statutes to address climate change, driving new interpretations of old laws and, in the process, developing a body of court decisions that have started to delineate the contours of acceptable action.

The EPA's push was spurred by a pair of Supreme Court decisions that found greenhouse gases were a pollutant for the purposes of the Clean Air Act and that the very existence of regulatory authority displaces states' common law nuisance claims. Taken together,

those decisions put the EPA at the center of climate change regulation and could usher in a new era of climate change law.

Salzman said the decisions rendered so far are still insufficient to form a cannon of climate law.

"I don't think you can identify a large body of climate law," he said. "Mike Gerrard at Columbia has done a great job of pulling together everything going on out there, but if you compare it to other fields it's pretty small."

While the Supreme Court has upheld the EPA's finding that greenhouse gases pose a danger to the environment and public health and should be regulated, judges are still determining the limits of the agency's authority in the climate arena. The Supreme Court has limited the scope of the EPA's greenhouse gas permitting program to only those large industrial sources that already require to obtain greenhouse gas permits for their emissions of conventional pollutants such as particulate matter and nitrogen oxides and upcoming litigation over the EPA's Clean Power Plan (RIN:2060-AR33), which sets carbon dioxide emissions limits for the existing fleet of power plants, could give judges another opportunity to define the limits of the agency's authority to address climate change.

With congressional action looking unlikely, the slow accretion of court decisions could eventually coalesce into a body of climate law, Burger said.

"It will be one of two things," he said. "It will be legislative action in the U.S., or it could be decade or two of court decisions that ultimately add up to something distinct."

### Key Court Cases on Climate Change

*Massachusetts v. EPA*, 549 U.S. 49763 ERC 2057 (2007): Held that greenhouse gases are air pollutants for the purposes of the Clean Air Act.

*Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2011 BL 161239, 72 ERC 1609 (2011): Found that the existence of the EPA's Clean Air Act authority to regulate greenhouse gases displaces common law nuisance claims brought by states.

*Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2014 BL 172973, 78 ERC 1585 (2014): Limited the scope of the EPA's greenhouse gas permitting program to only those industrial sources already required to obtain permits for emissions of conventional air pollutants.

*West Virginia v. EPA*, D.C. Circuit, No. 15-1363, oral argument 6/2/16: Litigation over the EPA's Clean Power Plan could offer new limits on the agency's ability to adapt existing statutes to address climate change.

**Climate Centers Drive Transition.** While positioning climate change as a distinct legal field remains murky, several law schools have founded climate change centers that are raising the next crop of environmental lawyers who could define the field even if that's not their top priority.

"When I was in law school in the early part of this millennium, the environmental law students had a view which was this is a litigation-based field and the impor-

tant thing is to know how to sue the polluters, or if you're on the other side, defend the polluters," Burger said. "Now students think of it much more broadly. They think about social entrepreneurialism. They think about the energy transition. It's kind of a different mindset than what came before. They see possibilities for being part of the solution, but I don't know that they're thinking of the question of is this a field of law."

Because the Supreme Court determined greenhouse gases are pollutants, several law schools have founded climate centers exploring various niches of climate change law. For example, the Sabin Center for Climate Change Law at Columbia has developed a reputation for its focus on international and domestic climate policy while the Georgetown Climate Center at the Georgetown University Law Center works with states and local governments on adaptation issues. The Center for Climate, Energy, Environment & Economics in North Carolina explores the intersection of climate change with energy and economic policies. In California, the Emmett Institute on Climate Change and the Environment at the University of California, Santa Barbara, focuses on that state's ongoing initiatives to address climate change.

"This is not by accident," Flatt said. "Each of us has really staked out what we can do and where we can give the most impact."

**Law Students Change Thinking on Climate.** The breadth of topics addressed by the climate centers reflects how upcoming law students view climate change, educators said.

"Students are looking at it as the defining environmental problem of our time," Burger said. "The students that come to us and that we work with are interested in finding solutions to this problem. They're not necessarily thinking of it as a field unto itself. They don't always have the long view of its relationship to the statutes."

The first wave of climate law experts is peopled by lawyers who cut their teeth on conventional pollution issues, Vicki Arroyo, executive director of the Georgetown Climate Center of the Georgetown University Law Center, told Bloomberg BNA. But the next generation of students could take the expertise in new directions, offering new insights and opportunities to address greenhouse gases.

"There seems to be an increasing appetite for students to study energy classes and go to work at places

like [the Federal Energy Regulatory Commission] or the states," she said.

Part of growing a field as broad as climate law is forging links with other legal specialties such as banking and finance professionals to understand how they view climate change and its impacts on their professions, Flatt said.

"As environmental law professors we could do a better job to get our message out to other disciplines," Flatt said. "We're kind of a tight knit group. There's 300 of us around the nation; we know each other. We should do more of educating other disciplines, particularly compared to our international colleagues."

**Coealescing into Climate Law.** While it may not be its own field yet, Riedel views climate law as series of concentric rings.

"You have this core that's directly related to climate change and you can take steps out from there," he said.

At the center are efforts to directly address climate change such as the EPA's Clean Power Plan or California's A.B. 32. Next come programs such as state renewable portfolio standards that have climate benefits without making that the central objective. Finally, further out come efforts to address climate change through Securities and Exchange Commission filings and corporate sustainability disclosures.

What climate law ultimately means will be in the hands of upcoming law students. But many of the students who are entering the climate centers are more concerned about tackling the global issue rather than existential debates on what that particular field means in the broader context of the law.

"Climate change is definitely what they were interested in, but there may be another area of law that was their route to get there," Riedel said.

Ultimately, climate change may force the law to adapt in response to changing global conditions driven by warming temperatures, Flatt said.

"Law as it is set up tries to get to a settled ending, very defined rights and responsibilities. That notion is not as functional in a rapidly changing world," he said.

By ANDREW CHILDERS

To contact the reporter on this story: Andrew Childers in Washington at [achilders@bna.com](mailto:achilders@bna.com)

To contact the editor responsible for this story: Larry Pearl at [lpearl@bna.com](mailto:lpearl@bna.com)