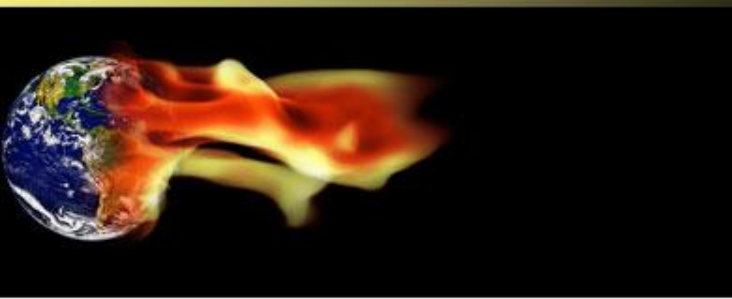


# Getting Hot and Bothered About Climate Change

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Part I

# Fundamentals of the Law on Climate Change

**THE  
COMPLETE  
IDIOT'S  
GUIDE TO**

**Global  
Warming**

US\$18.95

★ The quick and easy way to make anyone feel guilty simply for being alive

★ Idiot-proof steps for destroying world's economy

★ Down-to-earth advice on suppressing dissent by pulling "scientific facts" out of your ass

**ThePeoplesCube.com**



# GHGEs, Climate Change → Response



- United Nations Framework Convention on Climate Change (UNFCCC) (1992) voluntary goal of reducing GHGEs from developed countries to 1990 levels by 2000
- Kyoto Protocol (1997) binding targets to reduce GHGEs 5.2% below 1990 levels by 2012 (not US)
- Copenhagen Accord (no binding successor to Kyoto)
- U.S. Response
  - Case law
  - No legally-binding cap on GHGEs
- Regional / State / Local Government Responses (Planning, preparing and analyzing.....)





# Where does Climate Change Show Up?

- ESA
- NEPA
- CAA
- CWA
- MMPA
- FOIA/1<sup>st</sup> Amendment
- Energy Policy Act
- Global Climate Change Research Act
- Corporate Reporting/Securities Disclosure
- FTC

**527 total cases as of  
October 3, 2012**

- “Cap-and-trade” regulation where GHG’s are capped and trading a
- Regulate activities (public and private), failing to regulate or regulating too much
- Green & Energy Building/Codes (New Mexico case)
- Money damages and insurance coverage (common law claims)
- Protestors and scientists



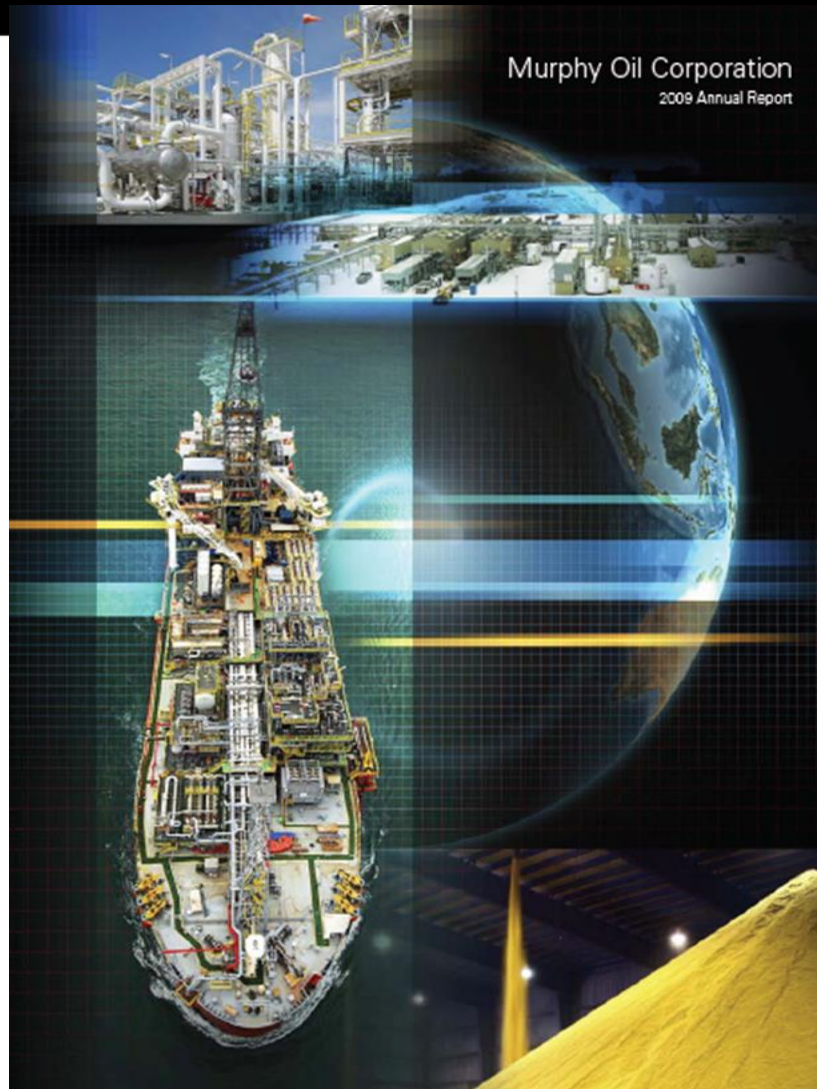
# The Changing Landscape: Cases and Regulation

- Massachusetts v. EPA
- Private organizations petitioned the EPA to begin regulating GHGEs, including CO<sub>2</sub>, under §202(a)(1) of the CAA
- EPA declined
- Supreme Court held that as to mobile sources of emissions (cars, trucks), EPA has authority to regulate GHGEs





# Comer v. Murphy Oil I & II



- Companies produced fossil fuels, causing GHGEs, contributed to climate change and added to the ferocity of Hurricane Katrina, causing damages to their property (nuisance, trespass and negligence)
- First filed in 2007 (dismissed), Partially reversed 2009 (standing)
- En banc review granted 2010 (grants hearing and loses quorum)
- Floating (writ of mandamus filed U.S. Supreme Court)- denied
- Refiled 2011, dismissed March 2012 (lacked standing because claims not fairly traceable to the companies' conduct, lawsuit presented a non-justiciable political question (Appeal filed 2012))





## **Kivalina & Steadfast- Liability for Damages to the Native Alaskan Tribe and Defending the Insurance Claim**

- Sea ice diminished and resulted in erosion requiring relocation of residents \$95 and \$400 million (Inupiat Native Alaskans)
- 9<sup>th</sup> Circuit affirmed dismissal (CAA trumps all) & rehearing denied (petition for certiorari with the U.S. Supreme Court seeking a review in 2013)
- Steadfast policies only provide coverage against claims for damages caused by an *accident or occurrence*, and the release of GHGs did not qualify as either
- Claims against energy companies were “intentional actions”



Kivalina, Alaska



# Liability for Government

- *In re Katrina Canal Breaches Consolidated Litigation* (Robinson), 647 F. Supp.2d 644 (E.D. La. 2009) (400+ plaintiffs sued to recover Katrina-related damages from the Corps' mismanagement of the MRGO)
- MRGO + the Intercoastal Canal, created a high pressure funnel that pushed water into the city, MRGO's widening with time weakened the flood control levees (who knew?) and the combination lead the levees to fail.
- 7 of these plaintiffs (the "Robinson plaintiffs") went to trial. Trial court finds Corps screwed up and no immunity- (think about that: damages to people)
- After review, Court finds Corps has immunity and reverses \$720,000 damages award to plaintiffs



A man wearing glasses and a light-colored t-shirt is standing in a flooded chicken coop. He is holding several chickens, including a large brown one and a black one. The coop is made of wire mesh and wooden frames, and the water is murky. The text "Why should you care?" is overlaid in red on the image.

**Why should you  
care?**



# Florida Laws

- Reduction of emissions to 2000 levels by 2017, to 1990 levels by 2025, and by 80% of 1990 levels by 2050.
- Florida adopted the California motor vehicle emission standards (22% reduction in vehicle emissions by 2012 and a 30% reduction by 2016).
- Building Efficiencies/Code, Chapter 553, F.S. increasing standards
- HB 7123: Model Green Building Code (2007)
- HB 697 (GHG reduction strategies in local government's Comprehensive Plan. Some requirements recently eliminated.
- HB 7135 (State and Local Government Buildings "greener")
- HB 7179 (PACE)
- HB 7117 (New Energy Bill- 2012)
- 2013: Multi-state insurance pool? Water supply funds for adaptation? Planning assistance?



# Florida's Law: How Far Does it Go?

- “Appropriate” and “professionally accepted” data (science on GHG emissions and climate change?)
- “Use ecological planning principles and assumptions in the determination of the suitability of permitted development.”
- Sprawl (VIII) plan or plan amendment allows for land use patterns or timing which disproportionately increase the cost in time, money, and energy of providing and maintaining facilities and services, including roads, potable water?
- ... discourage the proliferation of sprawl if it incorporates a development pattern or urban form that achieves four (4) or more of the following.... (IV) promotes conservation of water and energy.
- Conservation element must contain principles, guidelines and standards for conservation that provide long term goals to protect air quality ...
- CHHAs and AAAs?





# Local Government Liability

- Duty to maintain roads? (Jordan et al v. St. Johns County)
- Is an “energy sucking” desalination plant okay or should we conserve water (Surfrider Foundation v. California Coastal Commission)
- Should we keep renourishing beaches and what is obligation to property owner? (Stop the Beach Renourishment, Inc. v. FDEP-no taking when renourishment occurred)
- Panther litigation – ESA and habitat protection (Sierra v. USFWS)



# Issues on the Rise

- Water rights and scarcity
- Sea level rise and “extreme” precipitation
- Insurance liability and coverage
- The solutions: armoring and renourishment
- Retreat and property rights issues
- Responding and rebuilding
- Immigration and refugee issues
- Casitas Municipal Water Dist. v. United States
- Bollay v. California Office of Administrative Law
- AES Corp. v. Steadfast Ins. Co.
- City of El Paso v. Ramirez
- McQueen v. South Carolina Coastal Council
- *In re Katrina Canal Breaches* Litigation & Jordan v. St. Johns County
- Immigration and Nationality Act



# On the Horizon

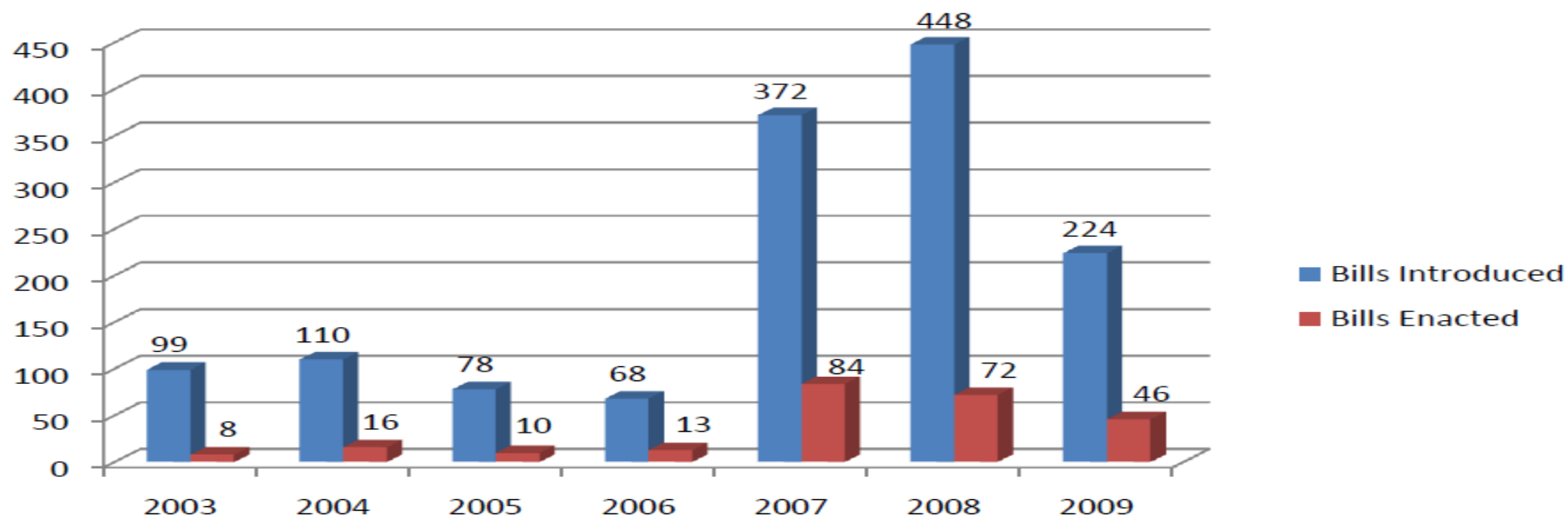
- Executive Branch powers
- Energy Security Trust
- Federal Agency Adaptation and Sustainability Plans
- EPA rulemaking on further curbing emissions
- Sanders-Boxer Climate Legislation (pricing carbon, fracking, energy efficiency and sustainable energy sources, energy rebates, fossil fuel subsidies and renewable incentives)
- New appointees (EPA, DOE)
- Local government outreach?
- Use of RESTORE Act funds
- PACE





# State Efforts at GHG Policy

## GHG Regulating Bills in the States



Source: American Legislative Exchange Council, *Greenhouse Gas Regulation in the States*. The 2009 data does not include subsidies for carbon capture and sequestration.

Thru 2012:

- CA, OR & WA = specific legislative actions to control GHGs
- AZ, FL, IL, MI, MO and NC have articulated actionable policies
- 27 States have general policy statements acknowledging the need to address the contribution of land use and buildings to GHG emissions.
- 15 States = No Action yet.

