

## Second Circuit Reinstates Lawsuit Claiming GHG Emissions from Six Utilities Constitute Public Nuisance Under Federal Common Law

### INTRODUCTION

The United States Court of Appeals for the Second Circuit has reinstated a suit against six of the nation's largest electric utilities, claiming that their emissions of greenhouse gases (GHGs) from coal-fired generating plants are causing harmful climate change and should be enjoined as a public nuisance under federal common law. The case was filed by a coalition of State and local governments and private land trusts. The court's 139-page decision was issued Sept. 21, 2009 in *Connecticut v. American Electric Power Corp. et al.*, Nos. 05-5104-cv, 05-5119-cv (2d Cir. 2009). The opinion was signed by only two of the three-judge panel that heard argument, because the third member, then-Circuit Judge Sonia Sotomayor, is now a Justice of the Supreme Court.

Issued over three years after the Second Circuit held oral argument, the long-awaited opinion contains potentially significant rulings with respect to whether (1) climate change is a political rather than a judicial question, (2) states, local governments and private litigants have standing to bring climate changes issues before the courts, and (3) whether the federal common law of nuisance has been displaced by the Clean Air Act. All of these rulings could have significant implications for the future of climate change litigation if the two-judge ruling is not modified on rehearing by the entire Second Circuit or by the Supreme Court, and is not overtaken by pending climate change legislation.

### BACKGROUND OF THE CASE

This case commenced in July 2004, when two groups of plaintiffs filed separate complaints against six major utilities in different parts of the country. One group of plaintiffs consisted of eight states and New York City, and the other comprised three private land trusts. Both complaints alleged that the defendants' coal-fired power plants collectively emit approximately 650 million tons of carbon dioxide (CO<sub>2</sub>) per year, and contribute substantially to global climate change. The coalitions claim that the utilities' CO<sub>2</sub> emissions constitute a "public nuisance" under federal common law or, alternatively, state common law. They seek an injunction requiring emissions from the defendants' facilities to be reduced over a period of at least ten years.

The United States District Court for the Southern District of New York dismissed the case in 2005, reasoning that the claims presented a "political question" that the court lacked jurisdiction to decide. *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Because the court determined the case was non-justiciable, it did not reach the questions of plaintiffs' standing to sue or the viability of a common law claim premised on climate change impacts.



## THE SECOND CIRCUIT'S OPINION

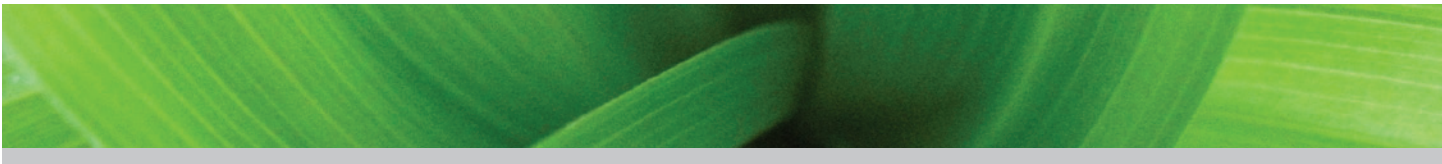
The Second Circuit panel first held that the case presents a question that can be resolved by federal judges under Article III of the Constitution, rather than a political question committed exclusively to the political branches of government. Then, turning to four other issues not decided by the district court, it ruled: (1) the plaintiffs have standing to bring their claims; (2) plaintiffs properly stated claims under the federal common law of nuisance; (3) plaintiffs' claims were not "displaced" by federal statutes; and (4) the Tennessee Valley Authority (TVA)'s quasi-governmental status did not immunize it from this suit.

1. *Political Question.* Noting that courts rarely dismiss a case on political question grounds, the panel applied the six-factor analysis set forth in the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962). The panel rejected the district court's conclusion that plaintiffs' claims would require courts to make an "initial policy decision" that properly rests with Congress or the Executive. In the panel's view, judicial resolution of the case would not interfere with domestic or foreign policymaking, contradict any established national policies, or require the court to make a decision constitutionally committed to the elected branches. Citing *Baker*, the panel concluded that a federal court "cannot decline to decide matters within its jurisdiction simply because such matters may have political ramifications."

2. *Standing.* Relying extensively on the landmark Supreme Court cases of *Massachusetts v. EPA*, 549 U.S. 497 (2007) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the court determined that (a) the State plaintiffs had standing by virtue of their sovereign interests in the welfare of their citizens, as well as their proprietary interests as property owners, and (b) New York City and the land trusts had standing as a result of the threat that climate change posed to their proprietary interests. The panel concluded that the current and future harms alleged by plaintiffs were sufficiently certain to constitute injury, and that defendants' contribution to global warming (even as a globally minor GHG source) satisfied the causation and redressability elements of standing analysis.

3. *Whether Plaintiffs Stated a Cause of Action.* The panel held that the complaints were supported by a long string of precedents recognizing federal public nuisance claims (most of them dealing with interstate water pollution). It disagreed with defendants' arguments that federal nuisance law recognizes only "simple" nuisances with a single cause, or nuisances that cause immediate or localized harm. The court also held that federal nuisance law protects private and municipal plaintiffs in addition to States, noting that other branches of federal common law permit non-state parties to bring suit "in a circumstance invoking an overriding federal interest or where the controversy touches issues of federalism."

4. *Displacement.* The court disagreed with defendants' argument that federal statutes – including the Clean Air Act and the Global Climate Protection Act of 1987 – "displaced" the federal common law of nuisance and barred plaintiffs claims. With an eye toward potential Congressional activity, the court noted that these statutes have not resulted in the control of GHG emissions from stationary sources, and therefore do not "directly speak" to plaintiffs' injuries. The court drew an analogy to the nuisance case of *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), in which the Supreme Court determined that sewage discharges were actionable at federal common law because existing clean water statutes had not provided a remedy for such nuisances. After that decision, however, the Supreme Court held, 451 U.S. 304 (1981) that the newly enacted Clean Water Act displaced the federal common law it had applied in 1972. The panel carefully noted this possibility in the field of climate change:



“It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases.”

5. *TVA Immunity*. Lastly, the court determined that TVA was not entitled to governmental immunity from plaintiffs’ claims, because TVA was being sued in its capacity as a quasi-commercial operator of electric utilities.

## IMPLICATIONS

*Connecticut* is the first case in which a federal court has determined that emitters of GHGs may be liable at federal common law for contributing to climate change. Importantly, the Second Circuit’s opinion does not resolve the merits of the case. It merely reinstates the plaintiffs’ claims, and remands to the district court for further proceedings.

The panel’s opinion, however, may nevertheless influence the disposition of other pending tort cases premised on climate change-related harms. One such case that is procedurally akin to *Connecticut* is *Comer v. Murphy Oil*, No. 07-60756 (5th Cir.). Like *Connecticut*, the *Comer* case – in which Hurricane Katrina survivors claimed damages on the theory that GHG emissions exacerbated the strength of the storm – was dismissed in district court on political question grounds. More broadly, *Connecticut* may prompt additional common law suits by public and private parties against a variety of GHG sources. The Second Circuit’s reasoning particularly strengthens the position of private parties, such as land trusts, that are in a position to claim unique injuries from climate change; *Massachusetts v. EPA* concluded that states could claim standing in climate change cases on the basis of sovereign interests, but left the standing of private parties uncertain. *Connecticut* may also open the door to lawsuits premised on the state common law of nuisance, which in many jurisdictions draws on the same principles as federal common law.

*Connecticut* has important implications for the political debate surrounding climate change legislation. The prospect of potentially significant tort liability and a proliferation of nuisance litigation may provide additional impetus for Congress and EPA to move forward with a comprehensive scheme for the control of GHGs. Because *Connecticut* held that only a GHG program directly addressing plaintiffs’ injuries would “displace” a common law claim, *Connecticut* may spur Congress to ensure a broader program covering more GHG sources than would otherwise be the case. On the other hand, Congress may respond by statutorily barring claims such as those brought by the *Connecticut* plaintiffs.

In the meantime, the defendant utilities have the option of seeking rehearing by the ten active judges on the Second Circuit, or petitioning the Supreme Court to review the case.

## FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Stephen Fotis, Doug Smith, or any member of the firm’s Climate Change practice at (202) 298-1800.

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