

## ENVIRONMENTAL LAW

## Expert Analysis

## 'American Electric Power' Leaves Open Many Questions for Climate Litigation

On June 20, 2011, the U.S. Supreme Court issued its much-anticipated decision in *American Electric Power v. Connecticut*,<sup>1</sup> the second climate change case to be decided by that Court and the first to concern common law claims. The decision resolves a few issues but leaves many others open.

By way of background, in 2004, at a time when environmentalists were frustrated at the refusal of Congress and President George W. Bush to regulate greenhouse gases (GHGs), two suits were brought against six electric power companies that run fossil fuel plants in a total of 20 states. One suit was brought by eight states and New York City; the other suit was brought by three land trusts. The plaintiffs in both cases claimed that the GHGs from the power plants constitute a common law nuisance, and they asked the U.S. District Court for the Southern District of New York to issue an injunction requiring the plants to reduce their emissions.

In 2005, Judge Loretta A. Preska dismissed the cases on the grounds that they raise non-justiciable political questions.<sup>2</sup> The U.S. Court of Appeals for the Second Circuit heard oral argument in June 2006. As the third anniversary of that argument passed, the Second Circuit's long delay in deciding became one of the great mysteries in climate change law. Meanwhile, the Supreme Court issued the landmark decision in *Massachusetts v. Environmental Protection Agency*,<sup>3</sup> which held that states have standing to challenge the refusal by the U.S. Environmental Protection Agency (EPA) to regulate GHGs, that GHGs are "air pollutants" within the meaning of the Clean Air Act, and that EPA has the authority to regulate them. Later, one of the three members of the panel that heard the arguments in the *AEP* case was elevated to the Supreme Court—Judge Sonia Sotomayor. Finally, in September 2009, the two remaining members of the panel issued the decision<sup>4</sup>—Judge Joseph McLaughlin, an appointee of the first President George H.W. Bush, and Judge Peter W. Hall, appointed by the second President Bush.

The Second Circuit decision was a major win for the plaintiffs. First, the panel found that the case

By  
**Michael B.  
Gerrard**



was perfectly justiciable and did not raise political questions as that concept has been interpreted by the Supreme Court. Second, though it did not need to, the panel found not only that the states had standing to sue—which might have been foreshadowed by the *Massachusetts* decision—but also that the private land trusts had standing because they alleged that their property was being harmed by climate change. This would potentially open the courthouse doors to broad classes of people and entities beyond states. Third, the panel found that the federal common law of nuisance applied, and that it had not been displaced by the Clean Air Act and Environmental Protection Agency actions under that statute. Thus, the Second Circuit remanded the case to the district court for further proceedings.

The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed.

### Supreme Court Decision

The Supreme Court granted certiorari. It heard argument on April 19. On June 20 the justices issued their decision. Eight justices participated; Justice Sotomayor was recused. The decision was unanimous, 8-0, and was written by Justice Ruth Bader Ginsburg. The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed. The sole reason was that the Clean Air Act, as interpreted in *Massachusetts*, gave EPA the authority to regulate greenhouse gases, and EPA was exercising that authority. This displaced the federal common law of nuisance. The Court declared, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." Thus, it is not for the federal courts to issue their own rules.

This may be the most intriguing paragraph in the opinion: "The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review. Four members of the court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits."<sup>5</sup>

Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are Justices Ginsburg, Stephen Breyer, Elena Kagan and Anthony Kennedy. The four who disagree are Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito. The Ginsburg group thus apparently rejects the political question defense as well as the standing argument.

Should another case come up on which Justice Sotomayor is not recused, there might be a 5-4 majority to allow climate change nuisance litigation, but for the Clean Air Act displacement. So this aspect of the Supreme Court decision did not set precedent in the technical sense, but it may give an indication of how the Supreme Court as presently constituted would rule in another case where states sued on public nuisance grounds about GHGs, but where displacement was not operating.

On the other hand, the paragraph quoted above (when considered in conjunction with *Massachusetts*) may hint that Justice Kennedy believes that only states would have standing. Thus, there might be a 5-4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.

### State Claims Left Unresolved

The Court explicitly did not decide whether the Clean Air Act preempts state public nuisance litigation over GHGs. The Court remanded the case for consideration of this issue. The defendants would certainly argue that the Clean Air Act displaces state common law nuisance claims as well. The plaintiffs would no doubt counter that the Clean Air Act has provisions that explicitly say that common law claims are not preempted, at least by certain parts of the Clean Air Act.<sup>6</sup>

MICHAEL B. GERRARD is Andrew Sabin Professor of Professional Practice and Director of the Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter LLP. His latest book, "The Law of Clean Energy: Efficiency and Renewables," was published in May by the American Bar Association.

In the next volley, the defendants would quote Justice Ginsburg's statement in *AEP* that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order...Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures."<sup>7</sup> Where this ball stops, only time can tell.

It is also possible that plaintiffs will forum shop—they will look for the federal district or circuit, or state court system, where they are most likely to prevail in their non-preemption argument.

Pressing state common law nuisance claims will raise several additional complications. One of them is which state's law will apply. If relief is sought against a particular facility, it might well be the law of the state where the facility is located. The U.S. Court of Appeals for the Fourth Circuit recently considered common law nuisance claims against facilities in several states in a case concerning conventional air pollutants, not GHGs.<sup>8</sup> The court found that the laws of the states where the plants were located specifically allowed the activities—in other words, the facilities were operating pursuant to and in compliance with state permits—and therefore nuisance actions were precluded. If the same doctrine applied to the defendants' facilities in a new case about GHGs, the plaintiffs would face a tough burden in proving that the plants were not operating in accordance with state law.

Another complication with state common law nuisance claims is that some states would act to bar such claims. On June 17, 2011, Governor Rick Perry of Texas signed a bill providing that companies sued for nuisance or trespass for GHG emissions would have an affirmative defense if those companies were in substantial compliance with their environmental permits.<sup>9</sup>

Since the *AEP* opinion was based entirely on displacement by congressional designation of EPA as the decision-maker on GHG regulation, if Congress takes away EPA's authority to regulate GHGs but does not explicitly bar federal common law nuisance claims, these cases will come back. Thus, this interestingly changes the political dynamic a bit—success by opponents of GHG regulation in their efforts to take away EPA's authority could swiftly bring back the common law claims, unless they are also able to muster enough votes to go further and explicitly preempt the federal and state common law claims.

### Damages vs. Injunctive Relief

Another question left open is whether the Supreme Court's decision bars all federal common law nuisance claims, or only those like *AEP* that sought injunctive relief. This particular question may be litigated very soon, perhaps in two different cases—the two other public nuisance cases for GHGs that are currently pending. One of them is *Village of Kivalina v. Exxon Mobil*. That case was dismissed by the district court and is now on appeal to the U.S. Court of Appeals for the Ninth Circuit.<sup>10</sup> The case was put on hold pending the decision in *AEP*. Now that the case is off hold, the plaintiffs are arguing that *AEP* affects only suits for injunctive relief, not suits for money damages, like *Kivalina*.

The other case is *Comer v. Murphy Oil*, a suit brought by Mississippi landowners saying that Hurricane Katrina was made more intense as a result of climate change. That suit was dismissed by the district court; reversed by the Fifth Circuit; and then undone through a bizarre procedural sequence in which the court granted en banc review and vacated the panel decision, and then lost a quorum for en banc review but left the panel decision vacated.<sup>11</sup> On May 27, 2011, the plaintiffs in *Comer* re-filed the case. It, too, is seeking money damages, not an injunction. (The author's firm represents a defendant in the *Kivalina* and *Comer* cases.)

The complaints in both *Kivalina* and *Comer* also raised the claim that some of the defendant companies have aggressively misrepresented and concealed scientific information about climate change, and alleged that this amounted to an actionable civil conspiracy. This claim was not raised in *AEP*, and it was not decided in either *Kivalina* or *Comer* (or any other U.S. case). Thus, it is likely to be raised again.

---

Since the 'AEP' opinion was based entirely on displacement by congressional designation of EPA as the decision-maker on GHG regulation, if Congress takes away EPA's authority to regulate GHGs but does not explicitly bar federal common law nuisance claims, these cases will come back.

None of these cases has come close to the merits. There has been no discovery in any of them, or litigation of such difficult issues as how a district court would determine what is a reasonable level of GHG emissions from a myriad of industrial facilities, or (in the cases seeking money damages) what defendants would be liable, what plaintiffs would be entitled to awards, what defendants would have to pay what share of the award, and what plaintiffs would enjoy what share of the award. Among the other issues that would have to be addressed are extraterritorial jurisdiction over foreign entities, whether there are limits to how many third-party defendants can be brought in, the impossibility of attributing particular injuries to particular defendants, and the effect of the fact that most of the relevant emitting facilities were presumably operating in accordance with their governmentally issued emissions permits.

Everything else aside, *AEP* appears to be a reaffirmation of EPA authority. That is shown by two things. First, the language of the decision itself is quite strong on EPA's power under the Clean Air Act. For example, the Court stated, "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."<sup>12</sup> Second, Justices Alito and Thomas wrote a concurring decision saying the opinion assumed that *Massachusetts* governed and could not be distinguished; they did not necessarily agree with it, but no party had raised that issue.

But, perhaps significantly, Chief Justice Roberts and Justice Scalia did not join in that concurrence. Therefore, it seems that there may now be a 7-2 majority in favor of keeping *Massachusetts* and its finding that EPA has strong authority to regulate GHGs under the Clean Air Act. This, in turn, may have somewhat strengthened EPA's hand in the multiple litigations brought by various industries and states that are resisting GHG regulation. These cases are now pending in the U.S. Court of Appeals for the District of Columbia and are based on various procedural arguments and on alleged inconsistencies between some of EPA's rules and the text of the Clean Air Act.<sup>13</sup>

Thus we have a very interesting situation. All four of the district courts that have ruled in common law nuisance cases on GHGs—*AEP*, *Kivalina*, *Comer*, and a case called *California v. General Motors*<sup>14</sup>—have dismissed the cases based on political question grounds, and, in some instances, on standing grounds. But all three of the appellate courts that have ruled in these cases—the Second Circuit in *AEP*, the Fifth Circuit in *Comer* (until the panel decision was undone on procedural grounds), and now the Supreme Court in *AEP*—have found that political question and standing are not obstacles.

These U.S. cases (plus a series of cases filed in several different states in May 2011 on a public trust theory) were the only cases brought anywhere in the world using common law theories to seek either injunctive relief or money damages for greenhouse gas emissions. The victories by plaintiffs in the Second Circuit in *AEP* and, for a while, in the Fifth Circuit in *Comer*, excited pro-plaintiff environmental lawyers around the world, and the Supreme Court was being watched with keen interest. Now the Supreme Court has ruled, but the decision is rather narrow, and it might not have much bearing in a common law country that has not enacted a statute like the Clean Air Act that could be seen as displacing the common law through its allocation of governmental power over GHGs to an administrative agency. So the reaction in other such countries is yet another question left open by *AEP*.

- 
1. No. 10-174, 2011 WL 2437011 (US June 20, 2011).
  2. *Connecticut v. American Electric Power*, 406 F. Supp.2d 265 (SDNY 2005).
  3. 549 U.S. 497 (2007).
  4. *Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009).
  5. *Connecticut v. American Electric Power*, 2011 WL 2437011 at \*7.
  6. 42 USC §§7604(e), 7416. See *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 342 (6th Cir. 1989); *Gutierrez v. Mobil Oil Corp.*, 798 F.Supp. 1280, 1282 (W.D. Tex. 1992).
  7. *American Electric Power*, 2011 WL 2437011 at \*11.
  8. *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010).
  9. SB 875, to be codified at Tex. Water Code Ann. §7.257.
  10. *Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (ND Cal. 2009).
  11. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).
  12. *Connecticut v. American Electric Power*, 2011 WL 2437011 at \*11.
  13. The principal cases are consolidated as *Coalition for Responsible Regulation v. EPA* (D.C. Cir. Index Nos. 09-1322, 10-1073, 10-1092), and *Southeastern Legal Foundation v. EPA* (D.C. Cir. Index No. 10-1131).
  14. 2007 WL 2726871 (ND Cal. Sept. 17, 2007).