

## U.S. Court of Appeals Upholds Suits to Abate Contributions to Global Warming that Constitute a Public Nuisance

The U.S. Court of Appeals for the Second Circuit, in a long-awaited decision, has ruled that the states, municipalities, and other quasi-public entities have the right to sue polluters under a “public nuisance” theory — in this case, the owners of power plants accused of emitting excess carbon dioxide, which allegedly contributes to global warming and causes specific injuries. The plaintiffs requested an injunction requiring named power companies to implement caps on carbon emissions, a step that has been widely debated in the political sphere, but that has been the subject of executive and legislative inaction. The decision allows these lawsuits to proceed, and would seem to open the door to lawsuits against any entity that emits significant amounts of carbon dioxide into the atmosphere.

The Court of Appeals opinion, *State of Connecticut et al. v. American Electric Power Co., Inc.*, Docket #05-5104, 05-5119 (2d Cir., Sept. 21, 2009), reversed a 2006 District Court decision that had dismissed the cases brought by various states and non-profit institutions against American Electric Power, Xcel Energy, Cinergy Corp., Southern Co., and the TVA. The District Court had concluded that the complaints raised a “non-justiciable” political question, in light of the complexities and uncertainties surrounding carbon dioxide emissions and global warming, and the failure of the U.S. government to regulate carbon dioxide emissions. The Court of Appeals held that even though the case may touch on issues that are the subject of political discussion, that did not create a non-justiciable political controversy. As long as the suit is directed at sufficiently specific pollution targets (here, specific power plants allegedly emitting excessive carbon dioxide), as opposed to seeking a general change in government policy towards global warming, the case is justiciable, and the litigation may proceed. As the Court stated: “Nowhere in their complaints do Plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing, and will continue to cause them injury.”

The Court further held that congressional and regulatory inaction in this field does not lead to pre-emption or preclusion of suits to remedy a public nuisance. While the EPA has proposed findings that greenhouse gases endanger public health and welfare, it has not made a formal finding, and has not implemented regulations in this area. According to the Court of Appeals, this is therefore the type of case that is “constitutionally committed” to the judicial branch.

In addition, the Court of Appeals upheld the standing of states, municipalities, and affected private organizations to sue to remedy this type of alleged public nuisance. As the Court stated: “Private parties and governmental entities that are not states may well have an equally strong claim to relief in a circumstance involving an overriding federal interest or where the controversy touches issues of federalism.” In this case, the City of New York was allowed to pursue its claims, as was a group of non-profit land trusts that had “legally recognized missions to preserve ecologically sensitive land areas, and [that] own land threatened with significant harm (as a result of global warming).”

In effect, the Court of Appeals treated these otherwise controversial complaints as if they were relatively routine tort claims alleging a federal common law public nuisance — which, as long as they are directed at specific targets and seek specific remedies, may proceed in the federal courts. The allegations must satisfy normal pleading standards relating to injury, causation, and redressability. The complexity of the facts will not undermine the ability of the courts to adjudicate the cases. In response to defendants' arguments that carbon dioxide is not "inherently harmful" and that the plaintiffs therefore could not prove that carbon dioxide emissions from particular power plants caused global warming and the alleged injury to plaintiffs, the Court of Appeals held that plaintiffs had sufficiently alleged that the defendants' continued emissions contribute to global warming, and that their current and future injuries are "fairly traceable" to excessive carbon dioxide emissions. They may, accordingly, proceed with the case and seek to prove their claims. Moreover, plaintiffs are not required to show that defendants' emissions alone caused their injuries; it is sufficient for them to have alleged that these emissions contributed to their injuries.

This precedent-setting decision comes hot on the heels of pending legislation in the U.S. to regulate carbon emissions. The House passed the American Clean Energy and Security Act of 2009 and a Senate companion bill is expected shortly. Any legislation passed in the U.S. is expected to impose significant constraints on emissions by utilities, manufacturers and even corporations that emit large quantities of greenhouse gases. It is imperative to understand what new legislation is likely to impose on businesses in the near future. Such legislation may raise new questions of legislative pre-emption of federal common law nuisance claims respecting emissions.

The full decision of the Court of Appeals can be found [here](#).

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