
# Climate Change and Clean Technology Blog

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## 2nd Circuit Allows Public Nuisance Suit Against Greenhouse Gas Emitters

*Connecticut v. American Electric Power Company Inc.*, ____F.3d ____, No. 05-5104 (2nd Cir. 2009)

by James Rusk

States and private plaintiffs may sue utility operators under the federal common law of nuisance to abate carbon dioxide ("$CO_2$") emissions that contribute to global warming, the Second Circuit Court of Appeals held this month. Although the 139-page opinion appears to open a new front in the fight over climate change, its full import is uncertain. The court held only that plaintiffs had standing, that they had stated public nuisance claims under the federal common law and that those claims were justiceable. It did not reach the merits of plaintiffs' claims, and it expressly noted that those common law claims could yet be displaced by federal legislative or rulemaking action. With that in mind, the case could prove more significant as an additional impetus for national greenhouse gas regulation than as a tool for judicial control of emissions.

**Background**

*"There is hardly a political question in the United States which does not sooner or later turn into a judicial one."* –Alexis De Tocqueville, *Democracy In America*

California and seven other states, as well as New York City, filed suit in 2004 against a group of electric power companies that collectively own and operate fossil-fuel-fired power plants in twenty states. Three private land trusts separately sued the same defendants, which allegedly are the five largest emitters of $CO_2$in the United States and account for approximately 10 percent of all U.S. $CO_2$ emissions. The plaintiffs alleged that defendants' $CO_2$ emissions contribute to a public nuisance under federal common law, resulting in various current and future injuries to plaintiffs' residents and property. They sought injunctive relief requiring defendants to abate the nuisance by first capping their $CO_2$ emissions and then reducing those emissions by a fixed

percentage each year.

**Justiceability**

In a consolidated action, the district court dismissed all the plaintiffs' claims on the ground that they presented a non-justiceable political question. *Connecticut v. American Electric Power Co.*, 406 F.Supp. 2d 265, 268 (S.D.N.Y. 2005). In the district court's view, deciding plaintiffs' complaints would require a balancing of the environmental and social costs of greenhouse gas emissions against the economic and social costs of reducing those emissions. According to the court, that balancing was impossible to perform without first making an "initial policy determination" of a type that was clearly reserved to the elected branches of government and which those branches had so far refused to make. Second Circuit slip op. at 13, 31.

The Court of Appeals reversed, holding that although the issue of climate change "may have political implications," plaintiffs' claims did not present a nonjusticeable political *question*. Plaintiffs sought to limit emissions from specific power plants to redress alleged injuries caused by those emissions, not to "establish a *national* or *international* emissions policy." *Id.* at 22-23 (emphasis in original). Therefore, the case was essentially just a complex common law nuisance action, which the federal courts "have successfully adjudicated . . . for over a century." *Id.* at 24. Seen in this light, the resolution of plaintiffs' claims would not require the judiciary to overstep its constitutional boundaries. *Id.* at 22-23. Nor did the failure of the political branches to make an "initial policy determination" regarding $CO_2$ emissions mean that the federal courts lacked the competence to decide the case or that plaintiffs should be denied any relief. *Id.* at 32-34.

**Standing**

Having decided that the district court dismissed the case in error, the Court of Appeals went on to determine that both the states and the trusts had made allegations sufficient to establish standing, at least at the pleading stage. The defendants had argued that plaintiffs could not establish either causation or redressability because global warming is caused by the aggregate effects of emissions around the world, most of which would not be reached by any remedy the court could provide. Significantly, the court rejected this argument. Second Circuit slip op. at 57-64. As the court noted, however, standing is relatively easy to establish at the pleading stage, where the court presumes that the plaintiffs' general allegations embrace the specific facts necessary to support a claim. But plaintiffs eventually must allege and prove specific facts sufficient to support injury, causation and redressability, to survive a motion for summary judgment and prevail at trial. *Id.* at 37.

**Claims Under Federal Common Law**

In the third and longest portion of its opinion, the Second Circuit considered whether plaintiffs could state a valid claim for public nuisance under the federal common law. The court looked to the Restatement to define a public nuisance under federal common law as "an unreasonable interference with a right common to the public." The court concluded that the states had stated a valid claim under this standard, based on their allegations of ongoing and future injury to public

comfort and safety, natural resources and public property, and ecological values. Second Circuit slip op. at 67-70. The court also held that the trusts had stated a "private" claim for public nuisance, by alleging a harm sufficiently different from that suffered by the public at large. In the process, the court rejected the argument that only a state (or the federal government) may bring a public nuisance claim. *Id.* at 80-101.

Finally, the court held that plaintiffs' claims under federal common law had not been displaced by federal legislation or regulation. The federal Clean Air Act does give the Environmental Protection Agency ("EPA") the authority to regulate $CO_2$ emissions as an "air pollutant," as the Supreme Court recently held in *Massachusetts v. EPA*, 549 U.S. 497 (2007). However, the EPA has not yet made the necessary findings to exercise that authority with respect to emissions from defendants' power plants. The EPA has *proposed* to make findings that would allow it to regulate greenhouse gas emissions from mobile sources such as automobiles. But those proposed findings would not, by themselves, impose any legal requirements on $CO_2$ emissions, nor would they apply to stationary sources such as power plants. Accordingly, the Clean Air Act, at least currently, does not "actually regulate" $CO_2$ emissions or "speak directly" to the issue raised by plaintiffs, so as to displace the federal common law that otherwise applies. Second Circuit *slip op.* at 114-117.

**Conclusion**

The Second Circuit allowed the plaintiffs' suit to proceed, remanding to the district court for further proceedings. However, the court disclaimed any opinion as to whether regulation of greenhouse gases by EPA under the Clean Air Act would displace plaintiffs' federal common law claims, "if and when such regulation should come to pass." *Id.* at 119. Moreover, the opinion necessarily omits any discussion of the climate change bills currently under consideration by Congress. With those limits in mind, it is possible that non-judicial events soon will limit the legal significance of the court's holding. As the court stated in conclusion, "'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." *Id.* at 139 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972).

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