Federal Courts Rule on the Viability of Climate Change Litigation

Environmental Law Alert — November 2009

By Jeff Wolf

Since September 2009, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, and the U.S. District Court for the Northern District of California have issued opinions addressing fundamental questions affecting the viability of climate change litigation. All three decisions focused on two prevailing issues:

1) Whether global warming claims are nonjusticiable because they involve political questions reserved to the legislative and executive branches?

2) What plaintiffs have standing to bring climate change claims against emitters of greenhouse gases?

I. *Connecticut v. American Elec. Power Co., Inc.*

In *Connecticut v. American Elec. Power Co., Inc*., 2009 WL 2996729 (2d Cir. Sept. 21, 2009), the U.S. Court of Appeals, Second Circuit issued a 139 page decision reversing the District Court's dismissal of plaintiffs' climate change claims.

In 2004, plaintiffs consisting of eight States and New York City sued six electric power corporations which own and operate fossil-fuel-fired power plants in twenty states.[1] Plaintiffs claim that defendants' emissions, which total 650 million tons of carbon dioxide per year, constitute the five largest emitters of carbon dioxide in the United States and [are] . . among the largest in the world." The Complaint further alleges that a clear scientific consensus exists that carbon dioxide traps heat in the earth's atmosphere, causing a greenhouse effect, warming temperatures world-wide. Plaintiffs state that global warming has already begun to alter the Earth's natural environment. Plaintiffs bring their actions under the legal theory that defendants' emissions constitute a nuisance under federal, or in the alternative state law, and contribute to global warming. Plaintiffs seek an order requiring the "abatement of defendants' ongoing contribution to a public nuisance."

On September 19, 2005, the District Court dismissed plaintiff's claims, holding that these claims exceed the scope of nuisance claims traditionally adjudicated by the judicial branch. Rather, these claims focus on political questions not yet addressed by members in the legislative or executive branches. The District Court cannot proceed in adjudicating these claims without a predetermination on these political questions by these elected officials. Plaintiffs appealed the District Court's decision to the Second Circuit.

The Second Circuit reviewed the District Court's dismissal using the de novo standard, assuming that all allegations are true as plead and drawing all reasonable inferences in favor of the non-moving party. Justice Sonia Sotomayor sat as a member of the original panel, but was elevated to the Supreme Court on August 8, 2009 before a decision was rendered. The two remaining members of the panel were in agreement and Circuit Judge Peter Hall authored the Opinion.

a. Political Question:

In its review, the Second Circuit made several preliminary findings of its own which guided its analysis in determining whether the case involved nonjusticiable political questions. The court found that decisions affecting carbon dioxide emissions were not reserved exclusively

[1] Similar claims were brought by three land trusts and were evaluated by the Second Circuit with a similar analysis and holding.

for legislative or executive branches. Existing federal tort and public nuisance law provided sufficient guidance to aptly address the issues before the court. And finally, by adjudicating these claims, the judicial branch will not embarrass the nation, or contravene a relevant political decision already made. From these initial findings, the Second Circuit concluded that the District Court erred in dismissing plaintiffs' claims on the grounds that the facts presented nonjusticiable political questions.

b. Standing:

The Second Circuit also addressed defendants' objections that plaintiffs did not have standing to bring a climate change suit. The Second Circuit found that an ancient common law prerogative parens patriae, allowed states to pursue legal action to protect their interests, which include natural resources and the health of its citizens. In this instance, the Court found that plaintiffs are more than nominal parties. Their allegations that injuries resulting from carbon dioxide emissions will affect virtually their entire population is a sufficient basis to constitute Article III standing as an actual controversy between the State and the defendant.

On September 21, 2009, the Second Circuit vacated the District Court's order of dismissal and remanded the matter for further proceedings. On November 5, 2009, defendants filed a petition for an *en banc* rehearing.

II. *Comer v. Murphy Oil USA*, 2009

In *Comer v. Murphy Oil USA*, 2009, WL 3321493 (5th Cir. 2009), owners of lands and property along Mississippi Gulf coast brought putative class action claims against oil companies and energy companies in District Court alleging that facility operations released greenhouse gasses, which contributed to global warming and conditions including a rise in sea levels and sea temperatures that contributed to the ferocity of Hurricane Katrina. Plaintiffs further allege that defendants breached a duty to conduct their businesses without endangering plaintiffs' property. The putative class seeks monetary and punitive damages under Mississippi state law including nuisance, private nuisance, trespass and negligence.

Defendants moved to dismiss plaintiffs' claim, contending that 1) plaintiffs lacked standing to bring their claims, and 2) plaintiff's claims amounted to nonjusticiable political questions. District Court Judge Louis Guirola, Jr., in an oral decision from the bench, granted defendants' motions, dismissing plaintiffs' Complaint. The court characterized global warming as a debate that has no place in court until the legislature enacts laws setting appropriate standards for adjudicating claims. *Comer v. Murphy Oil USA*, 2009 WL 3321493 (5th Cir. 2009). Plaintiffs appealed Judge Guirola, Jr.'s decision to the United States Court of Appeals for the Fifth Circuit.

Fifth Circuit Judge Dennis wrote the Opinion addressing two of the same issues addressed by the Second Circuit in *Connecticut*, i.e. plaintiffs' standing and whether this case presents a nonjusticiable political question. Under the Court's analysis, the Fifth Circuit Judges accepted as true all material allegations averred in Plaintiffs' Complaint.

a. Standing:

The court analyzed standing under a three prong analysis, which requires plaintiffs to demonstrate that: 1) they have suffered an "injury in fact"; 2) the injury can be traced to defendants' actions; 3) the injury will likely be redressed by a favorable decision. On appeal,

defendants did not dispute prongs one and three of the test, but instead argued that plaintiffs' theory tracing their damages to defendants' action was too attenuated. However, the Court found that plaintiffs need not show an association amounting to the tort standard of proximate causation. The traceability requirement can be met by the showing of an indirect causal relationship so long as there is a connection between the alleged injuries in fact and the alleged conduct of the defendants.

In support of its holding on this issue, the Fifth Circuit cited the U.S. Supreme Court's findings in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), where the Supreme Court accepted as plausible the link between man-made greenhouse gas emissions, global warming, and the rise in ocean levels causing the ongoing demise of the Massachusetts' coastline. In *Massachusetts*, the EPA contended that its regulations of domestic new car emissions would have insignificant, if any beneficial effect on global warming. The Supreme Court rejected this argument, stating that ". . . EPA's refusal to regulate [greenhouse gas] emissions 'contributes' to Massachusetts' injuries." The Fifth Circuit found that the term "contributes" as referred to by the Supreme Court described a sufficient nexus to meet the traceability requirement for standing. A plaintiff need not show that defendants' actions were the sole or primary cause of the alleged harm. Nor does the traceability requirement necessitate that plaintiffs prove a connection to a degree of scientific certainty.

Having determined that plaintiffs met the second prong of the three part test, the Fifth Circuit judges determined that plaintiffs had standing to pursue claims arising out of common law nuisance, trespass and negligence.

b. <u>Political Question:</u>

In determining whether plaintiffs' claims are barred because they amount to a political question, the Fifth Circuit examined the separation of powers, other applicable constitutional provisions, or federal law or regulations prohibited the Court from deciding the issues presented by plaintiffs' claims. The Court specifically stated that whether a claim frames a question that is inherently difficult, complex or novel is not pertinent to the analysis of justiciability. With regard to plaintiffs' common law claims of nuisance, trespass, and negligence, the Court found that defendants articulated no federal constitutional or statutory provision committing these issues exclusively to a federal political branch. Similar to the Second Circuit's analysis of federal common law, the Fifth Circuit found that Mississippi's state common law tort rules provided long established standards for adjudicating these common law claims.

On October 16, 2009 the Fifth Circuit reversed the District Court's dismissal of plaintiffs' common law claims of nuisance, trespass and negligence and remanded them back to the District Court for further proceedings consistent with its decision. In making its ruling in this case, the Fifth Circuit became the second federal appellate court to reverse a trial court decision and to allow a climate change-action to proceed on common law claims. It is unknown at this time whether defendants will file a petition to have the appeal heard en banc. The deadline is November 30, 2009.

III. *Kivalina v. Exxon*

On February 26, 2008, the Native Village of Kivalina and the City of Kivalina, Alaska filed suit in the U.S. District Court for the Northern District of California against twenty-four oil, energy and utility companies. Plaintiffs alleged, that as a result of global warming, the Arctic sea ice that protects Kivalina from winter storm waves and surges has diminished, causing

erosion and other destruction. Plaintiffs claim that the resulting erosion has become so pervasive as to make their land uninhabitable. Plaintiffs' Complaint alleges four claims for relief: 1) federal common law: public nuisance; 2) state law: private and public nuisance; 3) civil conspiracy; and 4) concert of action. Plaintiffs did not seek a specific amount of monetary damages, but they estimated the cost of relocating at $95-$400 million.

Similar to *Connecticut* and *Comer*, the defendants moved to dismiss, arguing that plaintiffs' claims presented nonjusticiable political questions and that plaintiffs lacked standing.

On September 30, 2009, District Court Judge Sandra Brown Armstrong issued a detailed Opinion dismissing plaintiffs' federal claims on the grounds that plaintiffs' claims were non-judiciable because they required the executive or legislative branch to make a policy decision on carbon emissions and who should bear the costs associated with these emissions. Further, she dismissed plaintiffs' claims for lack of standing on the grounds that the causal link between plaintiffs' claims and defendants' damages are too tenuous to merit standing and that the plaintiffs, as private citizens, do not have standing to bring an action traditionally delegated to sovereigns. Judge Brown Armstrong declined to exercise supplemental jurisdiction over the state law claims and dismissed them without prejudice, permitting plaintiffs to refile those claims in state court.

On November, 9, 2009, plaintiffs filed a Notice of Appeal to the Ninth Circuit. Many eyes will be on the Ninth Circuit as it reviews this case. If the Ninth Circuit agrees with the Second and Fifth Circuits in allowing climate change claims to proceed as plead, it will be the third federal appellate court to remove the first of several barriers preventing plaintiffs from recovering in such actions. While remaining barriers to recovery are significant, and possibly insurmountable, a third decision consistent with the Second and Fifth Circuit Courts may indicate a willingness by the judicial branch to explore difficult questions, which to date, have been skirted by the legislative and executive branches.