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September 2009

ENVIRONMENTAL UPDATE

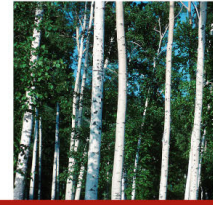
**Climate Change Regulation May Be Decided in the Courtroom:
*Connecticut v. AEP***

On September 21, in a decision that New York Attorney General Andrew Cuomo called “game-changing,” the Second Circuit Court of Appeals cleared the way for claims by a consortium of states and land trusts against five of the largest U.S. utilities arising from carbon dioxide emissions. The plaintiffs have alleged that emissions from defendant power companies constitute a nuisance that is contributing to global warming and harming the environment as well as each state’s economy and public health. The plaintiffs’ lawsuit seeks to force the power companies to cap their carbon dioxide emissions and subsequently reduce them 3 percent annually over the next 10 years.

The district court dismissed the case in October 2005 on the basis that the question of greenhouse gas emissions and their effect on the environment are political questions, best left to the judgment of the legislative branch. A two-judge panel (minus newly appointed Supreme Court Justice Sonia Sotomayor) issued the opinion on September 21, holding “[c]ertainly the political implications of any decision involving possible limits on carbon emissions are important in the context of global warming, but not every case with political overtones is non-justiciable. It is error to equate a political question with a political case.” *Connecticut v. American Electric Power Company, Inc.*, 2009 U.S. App. LEXIS 20873 at *53-54 (2d Cir. Sept. 21, 2009).

This decision marks the latest development in an ongoing struggle over climate change regulation. Both Congress and the U.S. EPA have made strides toward establishing greenhouse gas emission controls, but this decision heralds the entrée of the judicial system into climate change regulation. While the Second Circuit indicated its recognition that legislated controls would be preferable, the court found that the issue of greenhouse gas emissions is addressable through the judicial system since it is not currently specifically regulated. “[T]he fact that the Clean Air Act or other air pollution statutes, as they now exist, do not provide Plaintiffs with the remedy they seek does not mean that Plaintiffs cannot bring an action and must wait for the political branches to craft a ‘comprehensive’ global solution to global warming. Rather, Plaintiffs here may seek their remedies under the federal common law.” *Id.* at *49. Thus, the Second Circuit reversed the District Court’s finding that the plaintiffs’ claims are barred by the political question doctrine and remanded the case.

This 139-page decision is also significant in that it confers standing on states, municipalities, nonprofits and others to bring very broad nuisance claims to address climate change goals, finding that the alleged impacts to global warming are an “interference with a public right in protecting natural resources.” *Id.* at *160. This expansive ruling regarding standing may open the proverbial floodgates for litigation in this area, especially as interested parties try to beat Congress to the punch in limiting these types of emissions.



The *Connecticut v. AEP* decision could have a significant impact on similar pending claims, such as *Village of Kivalina v. Exxon Mobil Corp., et al.*, currently before the Northern District of California. In *Village of Kivalina*, a small Alaskan coastal village is suing 20 oil, coal and electric utility companies for nuisance and conspiracy, alleging that the companies' greenhouse gas emissions have caused thinning seas and storm surges, and seeking \$400 million in damages to relocate the entire village. Similar claims had recently been dismissed as non-justiciable political questions. The *Connecticut v. AEP* decision, however, may provide some precedent for permitting such claims, with the next step potentially allowing the recovery of monetary damages rather than just injunctive relief.

In the wake of this decision, Congress is likely to feel even more pressure to pass a climate change bill, even if it is not the Waxman-Markey Bill, which has made its way through the House. In the interim, the federal common law of public nuisance may be used by interested parties as the vehicle to force utilities, power companies, automakers and other manufacturers to limit emissions, and these potential targets will need to decide to fight the battle in Congress or the courtroom.

FOR MORE INFORMATION

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