

# Connecticut v. AEP Decision

Nancy G. Milburn\*

I. Background.....	2
II. Discussion .....	4
A. Plaintiffs’ Claims Can Be Heard and Decided by the Court .....	4
B. Plaintiffs Have Standing.....	5
C. Federal Common Law Nuisance Is a Valid Tort .....	6
D. Federal Common Law Nuisance Is Not Displaced .....	8
III. Conclusion .....	9

In the fall of 2009, the Second Circuit issued its long-awaited decision in *Connecticut v. American Electric Power Company*,<sup>1</sup> a case alleging a federal common law nuisance claim based on the effects of greenhouse gases. The Second Circuit Court of Appeals reversed a lower court dismissal of the case. In a lengthy opinion, the Second Circuit held that plaintiffs—eight states, the City of New York, and three nonprofit entities—had standing to seek an injunction against six electrical utility companies to restrict their greenhouse gas emissions based on a public nuisance claim. The Court also held that the claims were not barred by the political question doctrine, which forecloses courts from deciding questions that have been committed for decision to the executive and legislative branches. Finally, the Court held that plaintiffs had stated a viable federal common law nuisance claim, which had not been displaced by congressional or regulatory action.<sup>2</sup>

\*Nancy G. Milburn is a partner in Arnold & Porter LLP’s New York office. Katherine E. Ghilain, an associate at the firm, assisted in the preparation of this article. Arnold & Porter represents a defendant in the *Comer* and *Kivalina* climate change tort suits which are discussed in note 2 *infra*.

1. 582 F.3d 309 (2d Cir. 2009).

2. In addition to *Connecticut v AEP*, last fall, in the space of less than a month, a federal appeals court and a federal district court issued two other significant climate change decisions. In *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855 (5th Cir. 2009), in a decision that was subsequently vacated by the Fifth Circuit Court of Appeals’ grant of *en banc* review, a panel of that Court allowed a suit by an alleged class of Mississippi homeowners to proceed under state common law trespass, nuisance and negligence theories against coal, energy, petroleum and chemical company defendants. Plaintiffs claimed that defendants’ greenhouse gas emissions worsened the effects of Hurricane Katrina and increased the

The *AEP* decision represents a significant departure for climate-change-related tort litigation. Courts have traditionally dismissed at the pleadings stage suits by private or governmental litigants alleging nuisance or other common law claims based on global climate change. Courts have held that these suits present national and international policy issues that are more properly addressed by the legislative or executive branch and that courts are therefore foreclosed from exercising jurisdiction. Courts have also held that plaintiffs are not constitutionally entitled to sue when they allege generalized injuries from global warming where the conduct at issue—emission of carbon dioxide—is not limited to the named defendants but is engaged in by every emitting entity in the world.<sup>3</sup> The *AEP* Court, however, took a fundamentally different view. It found that the issues presented, including what level of emissions was allegedly “unreasonable” and whether contributions to a worldwide phenomenon satisfy causation, did not present obstacles to the adjudication of plaintiffs’ claims.<sup>4</sup> It found that the case presented “discrete domestic nuisance issues” that courts were well equipped to decide.<sup>5</sup>

## I. BACKGROUND

In 2004, two sets of plaintiffs filed companion suits in the United States District Court for the Southern District of New York against electric utility companies, which plaintiffs claimed were “the five

damage to their homes. Defendants filed a petition for rehearing *en banc* in the Fifth Circuit requesting that the full Court rehear the cases, and on February 26, 2010, the Fifth Circuit granted the petition. 585 F.3d 855, *reh’g en banc granted*, No. 07-60756, 2010 WL 685796 (5th Cir. Feb. 26, 2010). The case will now be re-briefed and reargued before the full Court.

In *Native Village of Kivalina v. ExxonMobil Corp.*, No. C 08-1138 SBA, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009), a district court in the Northern District of California dismissed a state and federal common law nuisance suit by an Alaskan village against energy and oil companies alleging that defendants’ emissions caused a loss of sea ice which threatened the stability of land on which the Village was located. The court held that plaintiffs lacked standing and the case presented a non-justiciable political question. Plaintiffs have appealed the dismissal to the Ninth Circuit.

3. See *Kivalina*, 2009 WL 3326113, at \*8 (N.D. Cal. Oct. 15, 2009), *appeal pending*, No. 09-17490 (9th Cir.); *California v. General Motors Corp.*, 2007 WL 2726871, at \*8 (N.D. Cal. Sept. 17, 2007), *appeal dismissed voluntarily*, No. 07-16908 (June 24, 2008 9th Cir. 2008); *Comer v. Murphy Oil USA, Inc.*, No. CIV 1:05-CV436LGRHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007).

4. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 328–29, 345–57.

5. *Id.* at 325.

largest emitters of carbon dioxide in the United States.”<sup>6</sup> Plaintiffs alleged that greenhouse gas emissions from the utilities’ operations were causing harm to human health and the environment by contributing to global warming and therefore constituted a public nuisance for which plaintiffs sought abatement. The harms that plaintiffs alleged included melting California snowpacks, which in turn caused increased flooding and a reduction in the state’s water supply. Plaintiffs asserted that global warming will increase heat waves and smog, cause more droughts and wildfires which will damage property, and contribute to lower water levels in the Great Lakes, which will impair shipping and other commercial and recreational activities.<sup>7</sup> According to plaintiffs’ complaints, the defendant companies contribute approximately one quarter of the U.S. electric power sector’s carbon dioxide emissions, and U.S. electric power plants constitute “ten percent of worldwide carbon dioxide emissions from human activities.”<sup>8</sup>

In 2005, District Judge Loretta Preska granted defendants’ motion to dismiss the complaints, finding that the cases presented non-justiciable political questions.<sup>9</sup> The District Court found that it could not enjoin defendants’ emissions because the cases touched on areas of national and international policy.<sup>10</sup> Judge Preska found that resolving the issues would require the “identification and balancing of economic, environmental, foreign policy, and national security interests”,<sup>11</sup> and she was therefore faced with the “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>12</sup>

Plaintiffs appealed. After reviewing the case for more than three years, on September 21, 2009 the Second Circuit vacated the District Court’s decision, finding that the case did not present non-justiciable political questions beyond the jurisdiction of the federal

6. The first set of plaintiffs consisted of eight states (Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin) and the City of New York. The second set of plaintiffs consisted of the Open Space Institute, Inc., the Open Space Conservancy, Inc., and the Audubon Society of New Hampshire. Defendants were American Electric Power Company, Inc., American Electric Power Service Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation.

7. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 317–18.

8. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

9. *Id.* at 274.

10. *Id.* at 272.

11. *Id.* at 274.

12. *Id.* at 272.

courts.<sup>13</sup> The Second Circuit then decided issues the district court had not reached, namely that all of the plaintiffs had standing to sue and that federal common law nuisance applied to plaintiffs' claims.<sup>14</sup>

## II. DISCUSSION

### A. Plaintiffs' Claims Can Be Heard and Decided by the Court

The Second Circuit addressed the political question doctrine first and held that plaintiffs' claims did not present non-justiciable political questions over which federal courts could not assert jurisdiction. The Court analyzed the political question issue under the test set forth by the United States Supreme Court in *Baker v. Carr*<sup>15</sup> and concluded that the district court was incorrect in finding that the abatement of the defendants' emissions presented a non-justiciable political question. The Second Circuit found that the scope of the suit was limited to the parties involved, such that any injunction would be limited to restricting the emissions of the five named utility companies, and that the relief requested by plaintiffs "applie[d] in only the most tangential and attenuated way to the expansive domestic and foreign policy issues raised by Defendants."<sup>16</sup> The Court suggested that defendants' characterization of the suit as involving "complex, inter-related and far-reaching policy questions about the causes of global climate change," was an exaggeration and found instead that the suit more appropriately presented "discrete domestic nuisance issues."<sup>17</sup> The Court took the view that the case fell squarely within the pattern of air and water pollution cases that courts have long successfully adjudicated. The Court stated, "[a] decision by a single federal court concerning a common law of nuisance cause of action, brought by domestic plaintiffs against domestic companies for domestic conduct, does not establish a *national* or *international* emissions policy."<sup>18</sup> Finding that existing tort law principles provided workable standards for resolving the discrete nuisance

13. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 315, 332 (2d Cir. 2009).

14. *Id.* at 349, 364–66.

15. 369 U.S. 186 (1962).

16. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 325.

17. *Id.*

18. *Id.*

claim at issue, the court accepted plaintiffs' contention that the fact "[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean Defendants' contribution to that problem cannot be addressed through principled adjudication."<sup>19</sup> The court's finding in this regard is significant because under its analysis any common law tort claim would arguably be found to be justiciable. Such an overbroad reading of the *Baker* test would vitiate the political question doctrine for common law claims.

The Second Circuit also rejected Judge Preska's finding that a court would be unable to adjudicate plaintiffs' nuisance claim without making an initial policy determination of a type that should be made by one of the other branches of government.<sup>20</sup> Citing the absence of a unified federal policy on greenhouse gas emissions, the Court rejected the notion that a finding of justiciability would in some way contravene Congress' intent only to "study" the issue of domestic emissions, demonstrate a "lack of respect" for the political branches, or create the potential for "embarrassment from multifarious pronouncements by various departments on one question."<sup>21</sup>

#### B. Plaintiffs Have Standing

After holding that the case did not present a non-justiciable political question, the Second Circuit next addressed standing, which it measured against a lower standard since the case was only at the pleading stage.<sup>22</sup> The court found that the states had *parens patriae*<sup>23</sup> standing to sue, based on the notion that "a state's interests in protecting both its natural resources and the health of its citizens have been recognized as legitimate quasi-sovereign interests."<sup>24</sup> The states met the test for *parens patriae* standing, since they articulated an interest apart from the interests of particular private parties, expressed a quasi-sovereign interest in protecting the health and well-being of their residents, and alleged an injury to virtually their entire population that would not likely be resolved

19. *Id.* at 329.

20. *Id.* at 331.

21. *Id.* at 331–32.

22. *Id.* at 333.

23. *Parens patriae* refers to a state's standing to sue on behalf of its people.

24. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 334–35 (2d Cir. 2009).

by individuals in private suits.<sup>25</sup>

The Court also found that plaintiffs met the three-part test for Article III standing set forth in *Lujan v. Defenders of Wildlife*.<sup>26</sup> First, plaintiffs had sufficiently demonstrated “injury in fact” by alleging that global warming was causing current and imminent future injury. Second, plaintiffs satisfied the causation requirement, as the injury was “fairly traceable” to defendants’ actions. Plaintiffs asserted that defendants’ carbon dioxide emissions contribute to global warming, which in turn causes them harm in specific ways. The court found this allegation to be sufficient, stating that plaintiffs are not required to “pinpoint” which harms are caused by particular defendants, nor are they required to show that defendants’ emissions alone cause their injuries; rather, it was enough that plaintiffs allege that defendants’ emissions “contributed” to their harm.<sup>27</sup> The court’s relaxed traceability standard based on “contribution” alone has potentially significant implications for climate change suits because every entity on the planet is a “contributor” of greenhouse gases and thus potentially subject to suit by these or other plaintiffs allegedly injured by global warming. Third, citing *Massachusetts v. EPA*,<sup>28</sup> the Second Circuit found that plaintiffs had shown that their requested remedy of restricting defendants’ emissions would slow or reduce the injury, which was sufficient to establish “redressability.”<sup>29</sup>

### C. Federal Common Law Nuisance Is a Valid Tort

In a significant departure from settled case law, the Second Circuit broadened the scope of federal common law by finding that federal nuisance claims apply to global climate change. Courts have traditionally been unwilling to apply federal common law nuisance concepts except in the narrowest circumstances, such as disputes between sovereign states. In other instances, courts have taken the view that federal causes of action should be created by statute and not by common law. The Second Circuit, however, allowed the federal common law of nuisance to fill the “gap” left by what it viewed as Congress’ and EPA’s failure to regulate carbon

25. *Id.* at 335–36, 38.

26. 504 U.S. 555 (1992).

27. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 340–49.

28. 549 U.S. 497, 525 (2007).

29. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 348.

dioxide emissions.<sup>30</sup> Thus, the Second Circuit adopted the Restatement's definition of public nuisance: "an unreasonable interference with a right common to the general public."<sup>31</sup> The court then addressed the question of whether plaintiffs stated a claim under the federal common law of nuisance, addressing the states and non-states separately.

The court found that the states, "in their *parens patriae* and proprietary capacities," properly alleged a public nuisance under section 821B of the *Restatement (Second) of Torts*.<sup>32</sup> The states alleged that defendants' emissions constitute a "substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including . . . the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."<sup>33</sup>

Defendants argued that "constitutional necessity" limits the scope of the interstate nuisance cause of action to disputes between states and that the federal common law of nuisance is available only for simple nuisances that are "immediately and severely harmful" and "readily traced to an out-of-state source."<sup>34</sup> The Second Circuit disagreed, finding that a state raising a claim based on "quasi-sovereign interests" is "somewhat more certainly entitled to specific relief than a private party might be."<sup>35</sup> The court rejected defendants' attempt to limit the definition of public nuisance and asserted that the existence of other contributors does not eliminate one contributor's liability.<sup>36</sup> It clarified that the Supreme Court's only qualification on a nuisance action between two states is that "the case should be of serious magnitude, clearly and fully proved."<sup>37</sup> The Court thus stated that the alleged nuisance caused by climate change is of "serious magnitude" and held that the states properly asserted *parens patriae* standing for a public nuisance.<sup>38</sup>

With regard to the non-state plaintiffs, the Court rejected

30. *Id.* at 374, 379–80, 385, 387–88.

31. RESTATEMENT (SECOND) OF TORTS §821B (1979).

32. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 352–53.

33. *Id.* at 352.

34. *Id.* at 353.

35. *Id.* at 354–55 (quoting *Georgia v. Tenn. Cooper Co.*, 206 U.S. 230, 237 (1907)).

36. *Id.* at 356–57.

37. *Id.* at 357 (quoting *Missouri v. Illinois*, 200 U.S. 496, 521 (1906)).

38. *Id.* at 358.

defendants' argument that "private plaintiffs cannot invoke any federal common law cause of action to abate interstate nuisances" because it is an action reserved only for the states. Looking to the *Restatement* and federal nuisance cases, the Court determined that non-state entities may bring federal common law nuisance claims.<sup>39</sup>

The court also concluded that the City and trusts demonstrated "an unreasonable interference with a right common to the general public," pursuant to the requirements under Section 821B(2) of the *Restatement (Second) of Torts*.<sup>40</sup> New York City pleaded an unreasonable interference with public health, safety, and comfort and convenience. The court found that the trusts were correct that "significant interference with the public right to be free from widespread environmental harm caused by the effects of global warming satisfies §821B(2)(a)'s requirement."<sup>41</sup> The allegations that defendants knew or should have known that their emissions contribute to global warming and thus injure the public were sufficient to establish a claim for public nuisance under Section 821B(2)(c).<sup>42</sup>

#### D. Federal Common Law Nuisance Is Not Displaced

The Second Circuit next turned to the issue of whether the federal common law nuisance claim had been displaced by federal legislation. In order to determine whether a federal statute has displaced federal common law, the court must determine whether the federal law "speaks directly to the question."<sup>43</sup> Concluding that "Congress has not acted to regulate greenhouse gas emissions in any real way," the Second Circuit rejected defendants' argument that a federal common law nuisance claim had been displaced by the Clean Air Act or other statutes that address greenhouse gas emissions.<sup>44</sup> Since EPA has only issued *proposed* findings regarding greenhouse gases and has not yet regulated greenhouse gases from stationary sources, the Court found that the Clean Air Act does not address plaintiffs' problem.<sup>45</sup> The Court left open the possibility

39. *Id.* at 358–59.

40. RESTATEMENT (SECOND) OF TORTS §821B (1979).

41. *Connecticut v. Am. Elec. Power Co., Inc.*, F.3d 309, 370 (2d Cir. 2009).

42. *Id.*

43. *Id.* at 374 (citing *County of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 236–37 (1985)).

44. *Id.* at 375, 385.

45. *Id.* at 379, 381. The Clean Air Act does not require that EPA regulate greenhouse gas

that the actual regulation of greenhouse gas emissions under the Clean Air Act by EPA would displace plaintiffs' federal nuisance claim.<sup>46</sup>

The Court found that the other statutes cited by the defendants were all research-oriented and fell short of meaningful regulation. The Court concluded that it is not enough for Congress merely to touch on greenhouse gas emissions in legislation; rather, the question is whether Congress has "spoken to a particular issue"—here, whether Congress had regulated greenhouse gas emissions and legislated a remedy for the injuries that the emissions cause.<sup>47</sup> The Court found that displacement occurs only when Congress "actually regulates" the nuisance at issue, and Congress has not yet done so.<sup>48</sup>

### III. CONCLUSION

The Second Circuit stands alone among federal district courts and appellate courts in allowing a climate change tort suit to proceed beyond the pleadings stage.<sup>49</sup> Every district court that has considered plaintiffs' injury claims based on greenhouse gas emissions has dismissed them as constitutionally defective. In addition, the Fifth Circuit in *Comer* has now vacated a decision of a panel of that Court which had reversed a dismissal and allowed a purported class of Mississippi homeowners to go forward on trespass, nuisance and negligence claims against various energy companies; the Fifth Circuit will rehear the case *en banc* in May 2010.<sup>50</sup> The Second Circuit has thus taken a fundamentally

emissions from stationary sources unless it finds that the emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare", 42 U.S.C. § 7521(a)(1) (2006), and that "the presence of [greenhouse gases] in the ambient air results from numerous or diverse mobile or stationary sources", 42 U.S.C. § 7408(a)(1)(B) (2006). Because EPA has only made a *proposed* finding that has no effect in law, it does not "speak directly" to plaintiffs' problems. 582 F.3d at 379.

46. *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d at 381.

47. *Id.* at 386.

48. *Id.* at 386–87. The court also found that federal common law nuisance had not been displaced by the President's conduct of foreign affairs, based on similar reasoning to that applied in its political question analysis. *Id.* at 388.

49. On November 5, 2009, defendants in *AEP* filed a petition for rehearing *en banc* in the Second Circuit requesting that the full Court rehear the cases. The Court denied the petition for rehearing *en banc* on March 5, 2010.

50. 585 F.3d 855, *reh'g en banc granted*, No. 07-60756, 2010 WL 685796 (5th Cir. Feb. 26, 2010).

different view of climate change nuisance cases than that of other federal courts.

Rather than recognizing that emissions and energy policy disputes lie at the heart of these cases, the Second Circuit instead viewed the *AEP* case as an ordinary nuisance action that the judicial branch could readily handle. In the absence of EPA regulation, the Second Circuit took on the expanded role of determining such fundamental policy questions as what is the “proper” or “reasonable” level of emissions for each defendant in the face of emissions from every other entity in the world, how reductions in defendants’ emission levels should be implemented, what is the allocation of fault among emitters, and which entities will bear the costs associated with global warming. Unlike other courts that have adjudicated similar claims, the Second Circuit declined to find that the complex, policy-laden issues associated with climate change were more appropriately addressed by the political branches.