‘American Electric Power’ Leaves Open Many Questions for Climate Litigation

On June 20, 2011, the U.S. Supreme Court issued its much-anticipated decision in American Electric Power v. Connecticut, the second climate change case to be decided by that Court and the first to concern common law claims. The decision resolves a few issues but leaves many others open.

By way of background, in 2004, at a time when environmentalists were frustrated at the refusal of Congress and President George W. Bush to regulate greenhouse gases (GHGs), two suits were brought against six electric power companies that run fossil fuel plants in a total of 20 states. One suit was brought by eight states and New York City; the other suit was brought by three land trusts.

The plaintiffs in both cases claimed that the GHGs from the power plants constitute a common law nuisance, and they asked the U.S. District Court for the Southern District of New York to issue an injunction requiring the plants to reduce their emissions.

In 2005, Judge Loretta A. Preska dismissed the cases on the grounds that they raise non-justiciable political questions. The U.S. Court of Appeals for the Second Circuit heard oral argument in June 2006. As the third anniversary of that argument passed, the Second Circuit’s long delay in deciding became one of the great mysteries in climate change law. Meanwhile, the Supreme Court issued the landmark decision in Massachusetts v. Environmental Protection Agency, which held that states have standing to challenge the federal common law of nuisance. The Court declared, “Congress intended the Clean Air Act and Environmental Protection Agency actions under that statute. Thus, the Second Circuit remanded the case to the district court for further proceedings.

The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed.

Supreme Court Decision

The Supreme Court granted certiorari. It heard argument on April 19. On June 20 the justices issued their decision. Eight justices participated; Justice Sotomayor was recused. The decision was unanimous, 8-0, and was written by Justice Ruth Bader Ginsburg. The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed. The sole reason was that the Clean Air Act, as interpreted in Massachusetts, gave EPA the authority to regulate greenhouse gases, and EPA was exercising that authority. This displaced the federal common law of nuisance. The Court declared, “Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law.” Thus, it is not for the federal courts to issue their own rules.

This may be the most intriguing paragraph in the opinion: “The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in Massachusetts, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.”

Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are Justices Ginsburg, Stephen Breyer, Elena Kagan and Anthony Kennedy. The four who disagree are Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito. The Ginsburg group thus apparently rejects the political question defense as well as the standing argument.

Should another case come up on which Justice Sotomayor is not recused, there might be a 5-4 majority to allow climate change nuisance litigation, but for the Clean Air Act displacement. So this aspect of the Supreme Court decision did not set precedent in the technical sense, but it may give an indication of how the Supreme Court as presently constituted would rule in another case where states sued on public nuisance grounds about GHGs, but where displacement was not operating.

On the other hand, the paragraph quoted above (when considered in conjunction with Massachusetts) may hint that Justice Kennedy believes that only states would have standing. Thus, there might be a 5-4 majority against any kind of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.

State Claims Left Unresolved

The Court explicitly did not decide whether the Clean Air Act preempts state public nuisance litigation over GHGs. The Court Remanded the case for consideration of this issue. The defendants would certainly argue that the Clean Air Act displaces state common law nuisance claims as well. The plaintiffs would no doubt counter that the Clean Air Act has provisions that explicitly say that common law claims are not preempted, at least by certain parts of the Clean Air Act.
In the next volley, the defendants would quote Justice Ginsburg’s statement in,AEP, that “judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order...Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures.” Where this ball stops, only time can tell.

It is also possible that plaintiffs will forum-shop—they will look for the federal district or circuit, or state court system, where they are most likely to prevail in their non-preemption argument. Pursuing state common law nuisance claims will raise several additional complications. One of them is which state’s law will apply. If relief is sought against a particular facility, it might well be the law of the state where the facility is located. The U.S. Court of Appeals for the Fourth Circuit recently considered common law nuisance claims against facilities in several states in a case concerning conventional air pollutants, not GHGs. The court found that the laws of the states where the plants were located specifically allowed the activities—in other words, the facilities were operating pursuant to and in compliance with state permits—and therefore nuisance actions were precluded. If the same doctrine applied to the defendants’ facilities in a new case about GHGs, the plaintiffs would face a tough burden in proving that the plants were not operating in accordance with state law.

Another complication with state common law nuisance claims is that some states would act to bar such claims. On June 17, 2011, Governor Rick Perry of Texas signed a bill providing that companies sued for nuisance or trespass for GHG emissions would have an affirmative defense if those companies were in substantial compliance with their environmental permits.

Since the AEP opinion was based entirely on displacement by congressional designation of EPA as the decision-maker on GHG regulation, if Congress takes away EPA’s authority to regulate GHGs but does not explicitly bar federal common law nuisance claims, these cases will come back.

None of these cases has come close to the merits. There has been no discovery in any of them, or litigation of such difficult issues as factual or scientific change, and alleged that this amounted to an actionable civil conspiracy. This claim was not raised in AEP, and it was not decided in either Kivalina or Comer (or any other U.S. case). Thus, it is likely to be raised again.

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The other case is Comer v. Murphy Oil, a suit brought by Mississippi landowners saying that Hurricane Katrina was made more intense as a result of climate change. That suit was dismissed by the district court; reversed by the Fifth Circuit; and then undone through a bizarre procedural sequence in which the court granted en banc review and vacated the panel decision, and then left a quorum for en banc review but left the panel decision vacated. On May 27, 2011, the plaintiffs in Comer re-filed the case. It, too, is seeking money damages, not an injunction. (The author’s firm represents a defendant in the Kivalina and Comer cases.)

The complaints in both Kivalina and Comer also raised the claim that some of the defendant companies have aggressively misrepresented and concealed scientific information about climate change, and alleged that this amounted to an actionable civil conspiracy. This claim was not raised in AEP, and it was not decided in either Kivalina or Comer (or any other U.S. case). Thus, it is likely to be raised again.

But, perhaps significantly, Chief Justice Roberts and Justice Scalia did not join in that concurrence. Therefore, it seems that there may now be a 7-2 majority in favor of keeping Massachusetts and its finding that EPA has strong authority to regulate GHGs under the Clean Air Act. This, in turn, may have somewhat strengthened EPA’s hand in the multiple litigations brought by various industries and states that are resisting GHG regulation. These cases are now pending in the U.S. Court of Appeals for the District of Columbia and are based on various procedural arguments and on alleged inconsistencies between some of EPA’s rules and the text of the Clean Air Act.

Thus we have a very interesting situation. All four of the district courts that have ruled in common law nuisance cases on GHGs—AEP, Kivalina, Comer, and a case called California v. General Motors—have dismissed the cases based on political question grounds, and, in some instances, on standing grounds. But all three of the appellate courts that have ruled in these cases—the Second Circuit in AEP, the Fifth Circuit in Comer (until the panel decision was undone on procedural grounds), and now the Supreme Court in AEP—have found that political question and standing are not obstacles.

These U.S. cases (plus a series of cases filed in several countries—Japan, Germany, and Canada, perhaps in other countries) are testing the boundaries of what GHGs and the Clean Air Act can mean around the world. The victories by plaintiffs in the Second Circuit in AEP and, for a while, in the Fifth Circuit in Comer, excited pro-plaintiff environmental lawyers around the world, and the Supreme Court was being watched with keen interest. Now the Supreme Court has ruled, but the decision is rather narrow, and it might not have much bearing in a common law country that has not enacted a statute like the Clean Air Act that could be seen as displacing the common law through its allocation of governmental power over GHGs to an administrative agency. So the reaction in other such countries is yet another question left open by AEP.