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Circuit Revives Suit Targeting Power Plant CO_2 Emissions

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Global warming lawsuits brought by New York State and others who challenged major utilities on carbon-dioxide emissions from coal-burning power plants were reinstated yesterday by the U.S. Court of Appeals for the Second Circuit.

Southern District Judge Loretta A. Preska had dismissed the suits against American Electric Power Company and five other operators of fossil-fuel-fired power plants in 2005, finding that the plaintiffs — eight states in all, New York City and three private land trusts—had pleaded a federal common law of nuisance action that was non-justiciable under the political questions doctrine.

But Second Circuit Judges Joseph M. McLaughlin and Peter W. Hall disagreed, finding there was no need for the trial court to defer to the political branches and refrain from hearing the suit until there is a definitive policy statement on global warming from Congress and the president. Judge Hall wrote the 139-page opinion for the court.

Former Second Circuit Judge Sonia Sotomayor was on the panel that heard oral arguments in the case in June 2006, but was elevated to the U.S. Supreme Court before the case was decided.

Attorney General Andrew Cuomo released a statement yesterday saying, "This is a game-changing decision for New York and other states, reaffirming our right to take direct action against global warming pollution from power plants. Today's decision allows us to press this crucial case forward and address the dangers posed by these coal-burning power plants."

The case of *State of Connecticut v. American Electric Power Co. Inc.*, 05-5104-cv, is an attempt by the plaintiffs to force the utilities to cap and ultimately reduce their carbon dioxide emissions. A companion case—brought by the land trusts, the Open Space Institute, the Open Space Conservancy and the Audubon Society of New Hampshire—is *Open Space Institute v. American Electric Power Co.*, 05-5119-cv.

In addition to ruling on the political question doctrine and the issue of standing, Judges McLaughlin and Hall found the federal common law of nuisance governs the plaintiffs' claims, that they had succeeded in stating claims under that law, that the claims were not displaced by federal legislation such as the Clean Air Act and that the Tennessee Valley Authority's alternate grounds for dismissal (that it qualified

for the discretionary function exception because it was created by an act of Congress) was "without merit."

New York was joined by Connecticut, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin as well as New York City in alleging the defendants are "substantial contributors to elevated levels of carbon dioxide and global warming" whose emissions in 20 states are "approximately one quarter of the U.S. electric power sector's carbon dioxide emissions."

They argue the companies have "practical, feasible and economically viable options for reducing emissions without significantly increasing the costs of electricity for their customers."

In addition to American Electric Power Co. Inc., and the Tennessee Valley Authority, the defendants are American Electric Power Service Corp., Southern Company, Xcel Energy, inc. and Cinergy Corp.

The states' complaint warns the earth's climate could undergo "an abrupt and dramatic change when a 'radiative forcing agent' causes the Earth's climate to reach a tipping point." The states allege that these changes will have a severe impact on their environments, residents and property.

They forecast increased illnesses and death, dangerous levels of smog, a rise in the sea level, widespread flooding and a host of other problems if the nuisance is not ordered abated.

While similar in its forecast of the fallout from global warming, the land trusts' complaint focuses on a different claim of injury: that global warming would "diminish or destroy the particular ecological and aesthetic values" that prompted them to acquire, maintain and hold in trust their property.

No Need to Wait for Policy

The Second Circuit panel disagreed with Judge Preska's statement that an "initial policy determination" from the elected branches of government was needed before she could adjudicate the global warming nuisance claim. The court, Judge Hall said, would not be setting policy on global warming by allowing the suit.

"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 (assuming that emissions caps are even put into place)," Judge Hall said. "Nor could a court set across-the-board domestic emissions standards or require any unilateral, mandatory emissions reductions over entities not party to the suit."

He said federal courts have "successfully adjudicated complex common law nuisance cases for over a century," that the court did not "agree that there are no judicially discoverable and manageable standards for resolving this case," and that there was no need to wait for "an initial policy determination" from Congress and the White House.

Judge Hall said the states had standing to sue as parens patriae because, "They are more than 'nominal parties.' Their interest in safeguarding the public health and their resources is an interest apart from any interest held by individual private entities."

And the states, New York City and the land trusts, he said, also have "proprietary" standing as

property owners.

The defendants had argued that none of the plaintiffs had adequately alleged current injury, but Judge Hall said the plaintiffs had pleaded "concrete" injury when they said global warming was causing melting of the California mountain snowpack, which has caused increased flooding and property damage.

They also, he said, properly alleged future injury: the lowering of the water level of the great lakes, the threat to agriculture in Wisconsin and Iowa, the intrusion of salt water into groundwater acquifers and other problems.

And he said the plaintiffs had sufficiently alleged that their injuries "are fairly traceable" to the defendants' emissions.

Judge Hall rejected the defendants' argument that principles of constitutional necessity should limit the scope of "transboundary nuisance disputes between the states" and their argument that federal common law nuisance is available only to abate nuisances of "the simple type" that are "so immediately harmful and so readily traced to an out-of-state source that they would have justified war at the time of the founding."

Judge Hall also turned aside the defendants' contention that private parties cannot bring federal nuisance common law actions.

"Private parties and governmental entities that are not states may well have an equally strong claim to relief in circumstances invoking an overriding federal interest or where the controversy touches on federalism" he said.

So New York City and the trusts can sue, the court found, and they have also stated a claim for public nuisance — both have "alleged an interference with rights common to the general public."

Pat Hemlepp, a spokesman for American Electric Power Co., said the company's legal department was reviewing the opinion. "Since this suit was filed, we have said that litigation is not the best way to address climate concerns," Mr. Hemlepp said. "It's a public policy issue and we have said there needs to be legislation. Congress is doing that now and we fully support the legislative approach."

Assistant Attorney General Michael Myers is the lead lawyer for New York State and the city in the case.

The land trusts were represented by Matthew F. Pawa and Benjamin A. Krass of Newton Centre, Mass. and Mitchell S. Bernard, Nancy S. Marks and Amelia E. Toledo of the Natural Resources Defense Council.

Attorneys with Sidley Austin, Jones Day, and Hunton & Williams represented the utilities, with the exception of The Tennessee Valley Authority, which was represented by Assistant General Counsel Edwin W. Small, General Counsel Maureen H. Dunn and Assistant General Counsel Harriet A. Cooper.

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