



DECEMBER 2010

Supreme Court to Review Climate Change "Public Nuisance" Case

On December 6, 2010, the U.S. Supreme Court agreed to hear an appeal of the Second Circuit Court of Appeal's decision in *Connecticut v. American Electric Power Co. (AEP)*. The high court's ruling may conclusively determine whether states, environmental groups, and private citizens have standing to bring suit against large emitters of greenhouse gases (GHGs) so as to curb their emissions. The Court's decision will impact other global warming cases in which plaintiffs have alleged the common law tort of public nuisance and could result in either a groundswell or death knell of climate change nuisance litigation. *AEP* will be the most significant climate change case since the Court's 2007 ruling in *Massachusetts v. EPA*, where it determined that EPA must regulate carbon dioxide and other GHGs under the Clean Air Act.

BACKGROUND OF *CONNECTICUT V. AEP*

In 2004, eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin), three land trusts (Open Space Institute Inc., Open Space Conservancy Inc., and the Audubon Society of New Hampshire), and the City of New York sued five large utility companies (American Electric Power Co., Duke Energy, Southern Co., Xcel Energy Inc., and the Tennessee Valley Authority) in the Southern District of New York, claiming that the defendants created a public nuisance by emitting GHGs (particularly carbon dioxide) that contribute significantly to global warming. The plaintiffs alleged that the defendants' GHG emissions thereby cause various harms to the plaintiffs, in the form of injuries to the environment, public health, and the states' economies. Consequently, the plaintiffs sought a permanent injunction to cap the defendants' GHG emissions.

In 2005, the trial court dismissed the lawsuit on the grounds that it presented nonjusticiable political questions that should be decided by the legislative or executive branches. Four years later, however, the Second Circuit Court of Appeals reversed the lower court on the standing issue. In a ruling that surprised many industry watchers, the appeals court determined that the plaintiffs met standing requirements and that their claims were rightly brought under the doctrine of public nuisance.

SUPREME COURT REVIEW OF *CONNECTICUT V. AEP*

On appeal, the Supreme Court will consider all of the following:

- Whether states and private parties have standing to seek judicially fashioned emissions caps for alleged contribution to harms claimed to arise from global warming
- Whether a cause of action to cap carbon dioxide emissions can be implied under federal common law
- Whether claims seeking to cap defendants' carbon dioxide emissions at "reasonable" levels, based on a court's weighing of the potential risks of climate change against the socioeconomic utility of defendants' conduct, can be governed by judicially discoverable and manageable standards or only through a nonjudicial political process

Oral argument in the *AEP* case will likely be held in March 2011, with a decision expected by midsummer. Justice Sonia Sotomayor recused herself from the case because she participated in the appeal while she served on the Second Circuit. The resulting panel of only eight justices raises the possibility of a 4-4 split, in which case the Second Circuit's ruling would stand.

FOR MORE INFORMATION

Robinson & Cole LLP's Environmental and Utilities Practice Group is assisting a number of clients in identifying risks and opportunities in emerging climate change law. For questions regarding greenhouse gas issues or climate change litigation, please contact one of the following attorneys:

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