

Greenhouse Gas Regulation: Move Over Congress and EPA - Here Comes the Judge!

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In a surprising new development, yet another venue has weighed in on the regulation of greenhouse gases (GHGs). A two-judge federal circuit court panel (2nd Circuit in New York) ruled on September 21, 2009 that States can sue big power companies claiming public nuisance due to their greenhouse gas emissions. In [The State of Connecticut v. American Electric Power Company](#), eight states (CT, NY, CA, IA, NJ, RI, VT, and WI) and other parties brought nuisance claims against six of the nation's largest coal-burning electric utility companies (including American Electric Power, Southern Corporation and the TVA) seeking abatement of the defendants' ongoing contributions to the public nuisance of global warming.

The suit claims that the defendants collectively are the largest emitters of carbon dioxide in the United States (about 25% of total US emissions), emitting 650 million tons per year, which is causing and will continue to cause serious harm affecting human health and natural resources, including increased fatalities due to intensified heat waves, increased respiratory problems due to smog, inundation of coastal land, and increased droughts and floods resulting in property damage and threats to human safety. The plaintiffs claim that the power companies have practical, feasible and economically viable options for reducing CO₂ emissions. The suit, brought under the federal common law of nuisance, seeks to force defendants to cap and then reduce their carbon

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dioxide emissions. The district court had dismissed the case in 2005, holding that the plaintiffs' claims presented a non-justiciable political question. Almost five years later, the two-judge panel disagreed¹.

The 2nd Circuit reversed the district court and remanded the case back for trial. The Court held that other federal law does not displace the common law of nuisance unless and until either Congress or EPA acts to regulate greenhouse gas emissions. The court further rejected the defendants' arguments that the common law of nuisance exists on the "simple-type" nuisances involving substances that cause immediate, localized harm directly traceable to out-of-state sources. The court concluded by paraphrasing from a similar case decided more than 35 years ago regarding water pollution in Lake Michigan,² "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases." It is expected that the power companies will appeal this decision to the US Supreme Court.

How will this decision affect the various legislative and regulatory efforts to reduce global warming? Certainly this adds further pressure for Congress to pass climate change legislation, building upon the pressure that started with the US Supreme Court's 2007 [Massachusetts v. EPA](#) decision. That decision gave EPA the authority to regulate GHG emissions under the Clean Air Act if EPA determined that GHG presents a threat to public health or the environment. Based on that authority, EPA recently has made several moves to advance its regulatory control over GHG, moving farther and faster than anyone would have predicted:

- In a [proposed rule](#) released April 17, 2009, EPA declared that GHGs endanger public health and welfare, a move that laid the groundwork for EPA regulation of the emissions unless Congress takes action first.
- On September 9, 2009, EPA sent to the White House Office of Management and Budget (OMB) a proposal that would reverse the agency's policy established under the Bush administration that new and modified sources are not required to limit greenhouse gas emissions, thus making carbon dioxide a pollutant regulated by the prevention-of-significant-deterioration (PSD) provisions of the Clean Air Act.

¹ The Honorable Sonia Sotomayor was a member of the 3-member panel that heard the oral argument, but was elevated to the US Supreme Court on August 8, 2009.

² [Illinois v. City of Milwaukee](#), 406 U.S. 91 (1972) ("Milwaukee I").

- On September 15, 2009, EPA and the Department of Transportation's National Highway Safety Administration (NHTSA) proposed a new [National Program](#) to dramatically reduce greenhouse gas emissions and improve fuel economy. EPA proposed the first-ever national GHG emissions standards under the Clean Air Act, and NHTSA proposed Corporate Average Fuel Economy (CAFE) standards under the Energy Policy and Conservation Act. The combined EPA and NHTSA standards would apply to cars and light trucks covering model years 2012 through 2016. These vehicles must meet an average emissions level of 250 grams of carbon dioxide per mile, equivalent to 35.5 miles per gallon.
- On September 22, 2009 EPA issued its [Final Mandatory Reporting of Greenhouse Gases Rule](#). The rule requires reporting of GHG emissions from large sources and suppliers, and is intended to collect accurate and timely emissions data to inform future policy decisions. Under the rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA. Monitoring must commence January 1, 2010, with reports due in 2011.
- EPA is also expected soon to propose a 25,000-ton carbon dioxide emissions threshold for triggering PSD requirements. However, EPA cannot simply say it will *not* regulate GHG stationary source emissions below 25,000 tons per year when the CAA applies to all pollutant emissions above 250 tons per year (and in some cases 100 tons). EPA has suggested that it could address the 250-ton threshold by issuing general permits, under which small sources would not have to go through the more rigorous PSD permitting process. According to the US Chamber of Commerce, if there was no exemption to the 250-ton threshold, PSD would apply to over a million new sources such as schools, hospitals and small businesses. If EPA used a general permit approach similar to its stormwater permit program under the Clean Water Act, a general permit would be issued after an applicant sent in the equivalent of a postcard confirming that it is in compliance with generic requirements issued by EPA.

Once EPA starts applying PSD to greenhouse gases, it would require companies to have best available control technology to curb GHG emissions. Some have suggested that the program could become so stringent and costly that industry will prefer an emissions cap-and-trade system, such as that proposed in the House-passed version of the Waxman-Markey bill. President Obama has repeatedly emphasized that he prefers that Congress act to pass comprehensive legislation to address climate change rather than address it through regulatory action by EPA.

But the future of that legislation remains uncertain. The Waxman-Markey Bill that passed the House on June 26th establishes a cap on emissions and a market system to buy and sell CO₂ credits. It would also prevent EPA from regulating GHG as pollutants under the CAA, thereby preempting the field. The Senate's efforts have been delayed while healthcare reform takes center stage, but recently Senator Barbara Boxer (D-CA) announced that her Committee is scheduled to begin discussions and a mark-up of the legislation in October.

If Congress does not act, EPA Administrator Lisa Jackson will likely continue her march toward regulating GHG under the CAA. In the meantime, Senator Lisa Murkowski (R-AK) has introduced an amendment to EPA's 2010 fiscal spending bill that would impose a one-year moratorium on EPA's authority to regulate GHG emissions from stationary sources, leaving only mobile sources subject to EPA's regulation. This measure, which responds to industry's concerns about the impacts of EPA's regulatory efforts in this arena, has been rejected by Democratic and Republican leaders in the Senate. It remains to be seen whether this effort to impose a regulatory moratorium may appear in other legislation.

Behind this legislative and regulatory beehive of activity, the 2nd District Court has cleared the way to address the effects of greenhouse gas emissions and climate change through lawsuits brought under the common law of nuisance. Given the slow pace and significant costs of a judicial solution, and the less than ideal solution of EPA regulation under the current CAA, it is far preferable that Congress find a legislative solution to the regulation of GHG. Should Congress fail to act, EPA has shown a willingness to jump into the breach, despite the fact that it has repeatedly indicated it would prefer a legislative solution. The backdrop of a potential outbreak of public nuisance lawsuits brought against large CO₂ emitters across the country should certainly create more pressure on Washington to find a legislative or regulatory solution soon.