

Can I Sue My Neighbor Under Nuisance Law for Contributing to Climate Change?

The Supreme Court's AEP vs. Connecticut: A Case of "What Will Kennedy Decide"?

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Yet again, climate law watchers – those who want greenhouse gas ("GHG") emissions further reduced, as well as those who would be most affected by additional air regulations – are holding their breath, waiting for the Supreme Court to issue its decree. Four years ago, such watchers waited with bated breath as the high court considered the issue of whether GHG emissions from vehicles could be regulated under the Clean Air Act. The result? The seminal April 2, 2007 *Massachusetts v. EPA* decision, which shifted the regulatory landscape in the U.S. by paving the way for greenhouse gas emissions to be regulated for the first time. Because of the *Massachusetts* decision, vehicle manufacturers and large utilities and manufacturers – including entities who never have been subjected to air restrictions before – now face regulation of their GHG emissions. The regulatory landscape has vastly changed.

Now pending before the Court, in a case styled *American Electric Power Company v. Connecticut* that originated with eight states, one city and three private trusts suing several power companies, is another question that can significantly change the way entities that have any sort of combustion process – and thus produce GHGs – do business and manage their liability risks. The precise question before the Court is whether those who emit GHGs can be sued by states, municipalities and private entities under the federal common law of nuisance. The Second Circuit – the federal appellate court overseeing federal district courts in New York, Connecticut and Vermont – found that, yes, such lawsuits are allowed. If the Supreme Court agrees, the consequences would be far-reaching and complex.

The Supreme Court heard oral argument in this case on April 19th but has not yet issued its decision; that decision is expected by the end of June. As we await the Court outcome, this article offers some food for thought: Just what did the Second Circuit panel decide, and has anything changed since that decision? What predictions can be made about how the Court might rule – will it be up to Justice Kennedy, who frequently casts the swing vote? And if the Second Circuit decision is allowed to stand, what might the real-world consequences be, especially considering some of the unique and particularly-complicating aspects of climate change? But first, for anyone not well-steeped in environmental law or well-versed in the complications of the climate change phenomenon, this article offers a primer on climate change regulation to date.

Primer on Climate Change Regulation to Date

The primary federal law directed at air emissions is the Clean Air Act ("CAA"), initially passed in 1970 though since amended several times. For an emission to be regulated under that Act, it must meet the Act's definition of "air pollutant" *and*, generally, the emission must cause or contribute to air pollution that is reasonably anticipated to endanger public health or welfare.

In 1999, a group of 19 private organizations petitioned EPA to regulate GHG emissions from new motor vehicles under the Clean Air Act. Among other things, they argued that 1998 was the warmest year on

record; that climate change would result in serious effects on human health and the environment; and that GHG emissions were accelerating this climate change. EPA sought public comments on all the issues implicated by the petition, and in 2003, denied the petition for two reasons. First, EPA stated that GHGs were *not* "air pollutants" under the Clean Air Act – they were not local like the other emissions regulated under the Act, and had Congress wanted to include GHGs, they would have amended the Act to do so. Thus EPA had no authority to regulate GHGs under the Act. And second, even if EPA *did* have authority to regulate GHGs, the EPA Administrator had the discretion not to do so. This decision was appealed to the federal appellate court – in this case, the D.C. Circuit – and that court found in favor of EPA, specifically finding that the EPA Administrator had the policy discretion to decide whether or not to regulate GHGs; that is, he was not compelled to regulate them under the Act.

The decision was appealed to the Supreme Court, as *Massachusetts v. EPA* (Massachusetts had been a state to step in and argue its coastlines had suffered irreparable harm due to climate change). And then, in April 2007, the landscape radically changed – the United States Supreme Court, based on what it found to be indisputable science supporting the theory of climate change and real harm, held that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant', [such] that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." Accordingly, the EPA had to answer the "endangerment question" – the question of whether GHGs cause or contribute to air pollution reasonably anticipated to endanger public health or welfare.

The question is more complicated than face value might suggest. The *Massachusetts* lawsuit was solely about GHGs from automobiles. However, the way the Clean Air Act is structured and the way the "endangerment question" is worded throughout the Act, if GHGs from cars were found to "endanger" and therefore had to be regulated, once that moment of regulation occurred, other types of sources – such as industrial facilities – would instantly be subject to emissions restrictions as well. The Act had been structured such that only larger sources of air pollutants would be required to obtain air permits; typically, those emitting 100 tons per year (or in some cases, 250 tons per year). But just about any source that has a combustion process could easily meet that 100 tons-per-year limit; if read literally, once cars were regulated for GHGs, then manufacturing facilities would be regulated as well – but it would not stop there. Grocery stores, apartment buildings, shopping malls – anything with a sizable HVAC system – would suddenly be required to obtain air permits (technically called Prevention of Significant Deterioration, or "PSD", permits), making them subject to "best available control technology" requirements.

In response to the Supreme Court's *Massachusetts* decision, EPA issued an "Advance Notice of Proposed Rulemaking" ("ANPR") in July 2008 – a type of document that tends to be issued by an agency when it is still gathering information and determining the best pathway to pursue. In that document, EPA questioned whether the endangerment question was met and, if so, how the complexities of the Clean Air Act should be addressed and handled. After analyzing the hundreds of thousands of comments received on the ANPR, in April 2009, EPA issued a proposed positive endangerment finding. (Note that a significant federal rule is usually issued in two steps – first a proposal on which the public is invited to comment, and then, ultimately, a final rule.) The EPA's final rule determining that, yes, GHG emissions – the "air pollution" at issue – endanger the public health and welfare, and that GHG emissions from new motor vehicles contribute to that pollution, was issued in December 2009.

In May 2010, EPA, along with the National Highway Traffic Safety Administration, jointly issued GHG emission standards for light-duty vehicles (cars and light trucks). NHTSA comes into play because its Corporate Average Fuel Economy Standards are directly connected to reducing GHG emissions; if you make a car more fuel efficient, you automatically reduce its CO₂ emissions. In other words, as stated by car manufacturer executive Dave McCurdy (in a March 2010 letter sent on behalf of the Alliance of Automobile Manufacturers to Capitol Hill), "greenhouse gas standards are the functional equivalent of fuel economy standards." The new light-duty vehicle standards went into effect January 2, 2011, starting with Model Year 2012 vehicles.

This means that beginning January 2nd of this year, GHGs became "regulated pollutants" under the Clean

Air Act – and that has implications beyond cars and light trucks. As noted above, because of the structure of the CAA, once a pollutant is regulated from one source, it automatically must be regulated from other sources. And because the low 100 tons-per-year threshold could have catapulted small "sources" – such as apartment buildings and the like – into the world of air permits, in anticipation of the impending arrival of the regulated world, in June 2010 EPA issued a "Tailoring Rule". In that rule, EPA established that instead of the 100 ton-per-year threshold, for greenhouse gases, the threshold for obtaining an air permit should be 75,000 tons-per-year (at least initially); otherwise, according to EPA, the results would be "absurd" and regulators would be too burdened.

And EPA has opted to phase in the new requirements. For the period January 2 through June 30, 2011, only a facility that undertakes a project that both increases net GHG emissions by at least 75,000 tons per year of "carbon-dioxide equivalents" *and* increases non-GHG pollutants significantly will face GHG limitations when they seek a new air permit or renew an existing permit. (The "carbon dioxide equivalent" unit of measurement takes into account the fact that the heat-trapping potential of the six GHGs targeted by the new regulations varies; for example, by weight, methane is approximately 21 times more powerful than carbon dioxide at warming the atmosphere. Based on this, 1 ton of methane would equal 21 tons of CO₂e.) This means that essentially only large facilities that emit large amounts of other air pollutants will face GHG consequences, at least for the initial six-month period. However, beginning July 1, 2011, GHG limitations will apply to new and existing sources with 100,000 tpy of CO₂e *regardless* of the quantity of any other air pollutant emissions. Thus July 1st marks the date when sources that previously have not required air permits could, for the first time, require such permits solely because of their GHG emissions.

Once the federal EPA has acted by issuing regulations, generally it is up to the state environmental agencies to implement the federal requirement through their own EPA-approved "state implementation plans" (or else a one-size-fits-all federal implementation plan applies). This means that, as of January 2nd, state agencies had to have in place state rules enabling them to regulate GHGs in the fashion prescribed by U.S. EPA. And it will be up to the states to determine, in issuing air permits, what the "best available control technology" should look like (although the U.S. EPA has issued guidance documents emphasizing that ways to increase overall energy efficiency should factor heavily into any analysis of what control technology to apply).

It's worth noting that the Clean Air Act is not the only statute bearing on regulation of climate change effects. For example, EPA has received petitions under the Clean Water Act requesting that water quality standards be established to address "ocean acidification" (from CO₂ deposition); EPA has developed, under the Safe Drinking Water Act, its "Underground Injection Control" program to regulate the underground injection of CO₂, to ensure such injections do not harm underground sources of water; federal agencies' review of large projects under the National Environmental Policy Act requires them to consider a project's environmental impacts, which necessarily now includes climate-related impacts; the Endangered Species Act (and the relatively recent listing of the polar bear as a "threatened" species) has been used to consider GHG effects on certain species; and even an appropriations bill for 2008 required the establishment of a mandatory reporting program of GHG emissions. But this by no means is an exhaustive list. The Clean Air Act is the statute most relevant to the issues presented by the AEP case, and, accordingly, this article is limited to discussing the reach of the CAA as relevant to a claim of nuisance.

The Second Circuit's AEP Decision (Including Errors in the Decision and Changed Circumstances Since)

The *Connecticut v. AEP* case has been percolating for a while. It began in July 2004 when eight states, New York City and three land trusts – claiming to represent the interests of more than 77 million people and their related environments and economies – sued six electric power corporations, seeking abatement of the corporations' contributions to the public nuisance of global warming. Among other things, plaintiffs alleged that defendants' emissions accounted for approximately ten percent of all carbon dioxide emissions in the U.S., that temperatures have risen and snowfall decreased since 1900 because of global warming, and if the defendants' CO₂ emissions were left unchecked, the consequences of global warming would continue to accrue and intensify.

In September 2005, a federal district judge sitting in the Southern District of New York dismissed the complaints, finding that the court lacked jurisdiction because the question presented was a “non-justiciable political question”. In other words, the district court did not have the authority to address the question because it was essentially reserved for the other branches of government; that is, the court could not entertain the plaintiffs’ suit without deciding complex policy questions reserved by the U.S. Constitution for the legislative and executive branches. Specifically, the issue of global climate change and any unilateral regulation of CO2 emissions would require the “identification and balancing of economic, environmental, foreign policy, and national security interests” that “are consigned to the political branches, not the Judiciary.”

Not surprisingly, that decision was appealed to the Second Circuit. And in September 2009, a two-judge panel (which originally has been a three-judge panel at the time of oral argument that included then-Judge Sotomayor, but she subsequently was nominated to the Supreme Court) issued its decision reversing the district court finding that, at heart, the case was an “ordinary tort action”, and although the case had political overtones, it did not arise to the level of presenting a non-justiciable political question. But because the issue was not limited to individual states, federal common law should apply and indeed could be applied. The Second Circuit panel then went on to address standing; in other words, whether the plaintiffs could demonstrate sufficient injuries from and connections to the alleged activities, to justify their participation in the case. The panel easily found that the states, New York City and private trusts all had standing based on the allegations of the defendants’ contributions to climate change. Defendants’ requests for rehearing and rehearing en banc (essentially, requests that the court rehear the case, with all Second Circuit judges present) were denied.

One troubling aspect of the Second Circuit panel’s decision is that it suggests a misunderstanding of the CAA’s structure. The panel makes much ado about carbon dioxide not being subject to a national ambient air quality standard (or a “NAAQS”, which is a standard set for each of six of the more ubiquitous air pollutants). The decision states, “[I]n the stationary source context, EPA must additionally find that ‘the presence of [greenhouse gases] in the ambient air results from numerous or diverse mobile or stationary sources.’” Sure, EPA can choose to do this if it makes the policy decision to establish GHGs as “criteria pollutants” subject to NAAQS. But the panel’s view suggests that it is *only* through establishment of NAAQS that stationary sources become regulated under the CAA. Such a constrained view ignores the other avenues of regulation under the CAA; indeed, it ignores the very avenue of regulation in place now – the regulation of stationary sources through the PSD program and Title V permits.

Note also that the Second Circuit panel’s decision – issued in September 2009 – predated the EPA’s final endangerment finding (December 2009), and also predated regulation under the CAA of emissions from cars, light trucks and certain stationary sources (January 2011). In light of these changed circumstances, several statements in the Second Circuit’s *AEP* decision suggest that *today* – now that endangerment has been established, and now that GHGs are being regulated under the CAA – the court would reach a different decision. For example, at one point the decision reads, “We express no opinion at this time as to whether the actual regulation of greenhouse gas emissions under the CAA by EPA, if and when such regulation should come to pass, would displace Plaintiffs’ cause of action under the federal common law.” Elsewhere the panel observed, “If and when a statute or administrative regulation ‘speaks directly’ to the question of whether stationary sources are required to control greenhouse gas emissions, then the parties may very well find themselves in circumstances similar to those of the parties in *Milwaukee II*” (In other words, the parties could find themselves in the situation akin to *Milwaukee II*, a 1981 Supreme Court case that found that the federal Clean Water Act and the regulatory regime it established were so comprehensive that a claim based on the federal common law of nuisance could not be made regarding certain sewage overflows from treatment plants.) And the Second Circuit panel noted that any action by EPA to “regulate emissions, assuming its reasoning is not ‘divorced from statutory text’”, “would override any decision made by the district court under the federal common law.” Hence the Second Circuit itself has admitted its conclusion could be starkly different today (although it is unclear since the panel did not seem to understand that stationary sources can be regulated by means other than through NAAQS).

Finally, the Fourth Circuit cites to the federal district court decision in *North Carolina v. Tennessee Valley Authority*, 593 F. Supp. 2d 812, 829-34 (W.D. N.C. 2009), as making the Restatement of Torts' definition of nuisance workable in the context of air emissions, yet that decision was reversed by the Fourth Circuit in July 2010. Thus yet another change in circumstances undermines the reasoning in the Second Circuit's *AEP* decision.

Predicting the Supreme Court Outcome

The fate of the *AEP* case now rests in the hands of eight Supreme Court justices; Justice Sotomayor has recused herself, as she was part of the original panel that heard the case at the Second Circuit. What this leaves is the set of four typically conservative justices (Chief Justice Roberts and Justices Scalia, Thomas and Alito), three typically liberal justices (Justices Breyer, Ginsburg and Kagan), and one "swing voter" who dictates the outcome in the more controversial cases – moderate-conservative Justice Kennedy.

The *Massachusetts* decision is case in point: It is Justice Kennedy's vote that resulted in a more liberal majority having the five votes necessary to find that GHGs are indeed "air pollutants" under the CAA. But in *National Association of Home Builders v. Defenders of Wildlife*, a 5-4 decision issued in June 2007 addressing the factors EPA should consider in transferring certain permitting authority to a state, Justice Kennedy sided with the conservatives, giving them the narrow majority. Essentially the same breakdown of votes occurred in *Riverkeeper*, an April 2009 Supreme Court decision with a 5-vote majority finding that EPA may undertake a cost-benefit analysis in determining the standards to apply to cooling water intake structures, structures that are typically part of power plant complexes (although that was not a clean 5-4 decision, as Justice Breyer added his own partially concurring and partially dissenting opinion).

And don't forget *Rapanos*. In 2006's *Rapanos v. U.S.*, Justice Kennedy did not "swing" one way or the other – he marched to his own tune, issuing a concurring opinion that established a separate standard for determining jurisdictional wetlands, such that to apply the fracture *Rapanos* decision, EPA now considers whether the standard set forth in the four-Justice plurality is met or whether Kennedy's standard is met. The real-world consequence is that permit-writers and those planning projects have been a bit puzzled by *Rapanos*, attempting to analyze whether a surface connection or "significant nexus" suffices to establish jurisdiction over a water body (and doing more technical analyses to determine if Kennedy's standard is satisfied). And guidance documents jointly issued by the EPA and Army Corps of Engineers have done little to clear up the confusion, since – because of Kennedy – multiple tests apply. Thus Kennedy's vote is powerful – swaying a decision one way or another, or even adding layers of complication to the real-world application of a decision.

In short, in *AEP*, Justice Kennedy's vote very well may carry the day. And what will his vote be? We can surmise all we want, and a logical starting point would be his past statements. But it's not as though Supreme Court jurisprudence is replete with his statements regarding the law of nuisance or the comprehensiveness of environmental regulatory schemes. However, one clue might be found in 2010's *Stop the Beach Renourishment v. Florida Department of Environmental Protection*. In that case, Justice Kennedy authored a concurring opinion where he expressed reluctance for the judiciary to decide property interests in the context of takings, urging that was a power reserved for the political branches. And the plurality of justices in that decision labels Kennedy's musings and examples to be about "nuisance". So does this mean that Kennedy, when confronted with such a choice -- between having the judiciary decide the confines of a nuisance versus having the political branches determine the competing interests -- is inclined to choose the political branches?

But arguably it might not be that close of a decision resting on Kennedy's vote. The Supreme Court has not previously addressed the intersection of the federal common law of nuisance and the regulation promulgated under the Clean Air Act. Yet the Court has addressed a similar question with respect to the Clean Water Act. In April 1981, in *City of Milwaukee v. Illinois* (also known as "*Milwaukee II*"), by a 6-3 decision the Supreme Court found that Illinois could not seek abatement of a nuisance caused by interstate water pollution under

federal common law, because Congress had occupied the field by establishing a complex regulatory program through the Clean Water Act, a program that was supervised by an expert administrative agency, the EPA. The Supreme Court affirmed this principle, by a 7-2 decision, just two months later in *Middlesex County Sewerage Authority v. National Sea Clammers Association*. And in 1992, in the unanimous *Arkansas v. Oklahoma*, the Supreme Court found that both the federal common law of nuisance and an affected state's common law were pre-empted by the Clean Water Act.

None of these cases was a "close" one; that is, not one was a 5-4 decision or plurality opinion. Does this mean that, to the extent the current Court views the Clean Air Act as establishing a comprehensive regulatory regime analogous to the Clean Water Act's occupation of the field (albeit directed at a different environmental resource), the case is an easy case boding in favor of reversing the Second Circuit decision?

And of course Court followers look for clues from the oral argument itself. The caveat, of course, is that a justice's mode of questioning might say very little about how he or she may ultimately decide. Indeed, some just play devil's advocate; some may just be attempting to flesh out the scope of a line of argument (perhaps attempting to find out if counsel can convincingly address pitfalls); and some justices are known for being silent during oral argument (at least one justice in particular has such a reputation!). All that said, of the more liberal justices – and thus those considered more likely to affirm the Second Circuit – Justice Ginsburg asked at oral argument about the propriety of a court setting emissions limits when the EPA is regulating in that area, and Justice Kagan too voiced skepticism, noting that the factual determination the states were requesting courts to make was the very type of determination for an expert agency such as EPA. Do these voiced doubts from even the liberal justices point to an outcome equivalent to what the Court decided years ago with respect to the Clean Water Act – that a nuisance claim under federal common law has no business being brought when EPA is leading the way under a comprehensive statutory scheme?

Complexities If the Second Circuit Decision Stands

Nuisance – the core issue of the *AEP* case – typically involves the proverbial complaining neighbor, unhappy about someone else nearby whose activities are so unreasonable or unlawful that they injure the complaining neighbor. A small-scale example of a nuisance case directed at air emissions might involve local citizens complaining about the sulfur smell emitted by a nearby paper mill.

But because of the nature of climate change, the issue is not limited to one of troubled neighbors. If a molecule of CO₂ is emitted in, say, Illinois, the impact of that emission is *global*. The molecule goes up into the atmosphere and, together with the other GHG molecules in the atmosphere, creates the heat-trapping effect felt globally. Consequently, what the United States emits affects climate impacts felt by China, and vice versa. (It is this issue that led President George W. Bush not to sign the Kyoto Protocol, because only industrialized nations were bound to reduce their GHG emissions. This meant that China and India – signatories to the treaty but categorized as *developing* nations – had no obligation under that treaty to reduce their emissions. And as of 2009, the largest emitter of GHGs – at 19% – was China.) Thus it's not as though greenhouse gas molecules obey country boundaries, let alone state lines. Their disrespect of country boundaries explains why the issue is such a priority topic of international discussions, as countries attempt to fashion international agreements to control the impacts.

Another unique aspect of greenhouse gas emissions – or at least the six GHGs under the most consistent focus, which are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride – is that they are long-lived. (Although six GHGs face the most scrutiny, this article refers most often to CO₂, as it is the most ubiquitous, and it is the pollutant of focus in the *AEP* case.) Their "lifetimes" – or the time it takes for an initial amount in the atmosphere to be reduced by two-thirds – are relatively lengthy compared to other air emissions. For example, carbon dioxide in the atmosphere generally has a lifetime of 100 years (though some fraction of any atmospheric increase in CO₂ is absorbed by oceans and terrestrial vegetation). Methane's atmospheric lifetime is approximately a decade, and sulfur hexafluoride lasts over 3,000 years in the atmosphere. Contrast that to black carbon (technically considered an aerosol rather than a greenhouse gas), which stays in the atmosphere for about a week. (Black carbon does also

impact climate, but many uncertainties exist about the exact magnitude and nature of its impact; the same uncertainties apply to aerosols in general, as they have some cooling influences along with warming potential.) Accordingly, the climate change phenomenon has intensified since the advent of the industrial revolution, as long-lived greenhouse gases have accumulated in the atmosphere over time.

And all GHGs are not created equal in terms of their intensity. As noted above in discussing EPA's current approach, methane is approximately 21 times more powerful than carbon dioxide at warming the atmosphere, and because of this, EPA has developed a "CO₂-equivalent" unit of measure.

Even for non-climate cases, nuisance is not necessarily a clear-cut area of law; as the Supreme Court observed in *Milwaukee II*, for a court to decide a question of nuisance often requires applying "often vague and indeterminate . . . concepts." But because of the unique aspects of climate change, more complexities than the vagueness of ordinary nuisance law would come into play. For example, if the Supreme Court permits the AEP-variety of nuisance suits to go forward, the very real consequence is that a manufacturing facility in Illinois could be sued by a private citizens group in Alaska for climate change effects – such as changes in coastlines, sea ice, climate-sensitive species – on the environment that the citizens group uniquely enjoys. And if an Illinois manufacturing facility could be sued by an Alaska group, would each potential defendant – in order to rein in liability – seek to force all potential plaintiffs across the country into one giant class-action suit, so that the defendant only faces litigation one time for its purported nuisance? In turn, how would this affect the plaintiffs' bar; would they be shopping around, hoarding defendants for giant class actions?

And would the small emitters – say, apartment buildings – who have, to date, remained lawsuit-free and (relatively) unregulated, suddenly find themselves mired in litigation they never expected, simply because they have an HVAC system that contributes some amount of GHGs to the global climate change phenomenon? And based on the Second Circuit's reasoning in *AEP*, if a large emitter's status as "regulated" by EPA somehow shields it from nuisance suits (a logical conclusion suggested by the Second Circuit's logic), does this mean that smaller sources – whose emissions are too low to trigger CAA regulation – now have a bulls-eye on them, since a nuisance suit against them would be appropriate due to their unregulated status?

And how far back do the damages go, if the molecules a facility has emitted are long-lived? Would emitters of longer-lived GHGs be more liable than others, since they have been contributing to the nuisance longer? For example, would large emitters of sulfur hexafluoride be more liable than those emitting mostly methane? Or would the heat-trapping effect – the fact that some GHGs have more heat-trapping potential than others (for example, by weight, methane is approximately 21 times more powerful than carbon dioxide at warming the atmosphere) – come into play in determining liability? Will the CO₂-equivalent standard of measure be used, or will all GHG molecules be treated as equal? And just which source's emissions are responsible for which degree of elevation in global temperature – the largest emitter, the earliest emitter? Does it matter? And would a facility's GHG life-cycle – *i.e.*, its GHG usage throughout all its processes – factor in as a defense?

And would each of these questions be up to the individual federal district judge? Would a district judge in the Southern District of New York be able fashion one set of answers and emissions caps for a large emitter in New Mexico, while a district judge in Montana crafts a completely different set of answers for a large emitter located in southern Florida? As the power corporations stated in their Supreme Court petition, "A single judge could set emissions standards for regulated utilities across the country – or, as here, for just that subset of utilities that the plaintiffs have arbitrarily chosen to sue. Judges in subsequent cases could set standards for other utilities or industries, or conflicting standards for these same utilities." And what added layer of complexity would this add to sources already subjected to regulatory emission controls?

Suffice it to say, if the Second Circuit decision stands, complexities will abound. And potential liability – and thus the cost of doing business – for any facility with a combustion process will rise drastically. Years ago, in the midst of the California electric power crisis, the *Wall Street Journal* attributed part of California's power shortage to what it labeled the "B-A-N-A-N-A" phenomenon: Build absolutely nothing anywhere near

anybody. (In California's case, no new power generation had been built for several years, and thus increasing demand could not be met.) If nuisance suits under federal common law can be brought against facilities for their contributions to climate change – the result if the Supreme Court does not reverse the course of the Second Circuit – then the unfortunate consequence will likely be something more extreme: B-A-N, or “build absolutely nothing”. That is, because of the global nature of climate change, it will not matter where and near whom a facility is built; the risks and uncertainties of potential nuisance liability would be sure to prevent it from being built at all.

Whether we are headed for a B-A-N reality is anyone's guess, although those within the hallowed walls of the Supreme Court – especially Justice Kennedy – likely already know that fate. Anyone outside the courthouse should know the outcome by the end of the June. Stay tuned.