

Client Alert.

June 20, 2011

Supreme Court Rejects States' Nuisance Claims But Leaves Door Open to Future Climate Change Lawsuits

By Michael Steel, Peter Hsiao, Jennifer Jeffers, and William Sloan

Today, the U.S. Supreme Court ruled in *American Electric Power v. Connecticut* that federal common law nuisance claims cannot be used to address harms arising from climate change.¹ In 2004, eight states, New York City, and three nonprofit land trusts filed public nuisance complaints in federal district court against the nation's largest emitters of carbon dioxide, seeking to slash power-plant greenhouse gas ("GHG") emissions in 20 states. The district court dismissed the suits, claiming that they presented nonjusticiable political questions. However, last year the Second Circuit reversed and ruled that the case could proceed. Justice Sonia Sotomayor did not take part in today's decision because she wrote the Second Circuit opinion that rejected the defendants' political question defense.

In a much-anticipated decision, the Court reversed the Second Circuit and unanimously held that the federal common law of nuisance is "displaced" by the Clean Air Act's ("CAA") grant of jurisdiction to the U.S. Environmental Protection Agency ("EPA") to regulate GHGs. Such displacement occurs when a federal statute "speaks directly" to the issue raised by the federal common law claims. The Court stressed that the standard for displacement of federal common law is less rigorous than the standard for preemption of state law claims.

Although the Court unequivocally rejected federal common law claims for GHG harms, the Court's split decision as to the jurisdictional issues of standing and the political question doctrine may still permit future state lawsuits challenging environmental impacts of GHG emissions. The Court remanded to the Second Circuit so that it might evaluate whether state law claims are preempted by the Clean Air Act, an issue not addressed by the parties.

While the Court's 8-0 decision was clearly foreshadowed by oral arguments this spring, the Court surprisingly split 4-4 on the critical issue of whether federal courts indeed have jurisdiction to hear the issue. With the Court resolving the lawsuit in the narrowest way possible, environmentalists see today's decision as at least a partial win, since it does not disturb the Second Circuit's rejection of defendants' defenses that plaintiffs lack standing and that the litigation invokes the political question doctrine. As a result, the Second Circuit's finding of jurisdiction remains intact, though it does not apply to other federal circuits.

Given that at least five Justices rejected the political question doctrine and found standing, lower courts may look upon today's decision as a signal to expand standing to climate change cases beyond the specific parameters discussed in *Massachusetts v. EPA*. Should Congress eliminate EPA's ability to regulate GHGs, something that may be closer to reality than not, the Court's holding leaves the door open to future federal climate change litigation. The Second Circuit is currently deciding whether to reject the Obama administration's climate rules and there has been movement by

¹ To read our previous client alert on this case, please [click here](#).

Client Alert.

Republican members in Congress to amend the CAA to eliminate GHG provisions in order to repeal EPA's jurisdiction—the House passed a bill earlier this year to limit EPA's ability to regulate GHGs and several similar bills were recently narrowly defeated in the Senate.

Today's ruling does not affect the viability of bringing public nuisance claims under state law—an option the Court did not address, since the issues were not briefed or argued. However, many believe action will soon be taken to place limits on just how far future federal claims may advance. Although the Court's decision did not decide whether federal common law could mandate GHG reductions, given Congress's recent posture on the issue of GHG regulation, Congress may decide to introduce language into prospective legislation explicitly precluding federal GHG actions based on public nuisance.

The Supreme Court's decision, although not a complete win for the utilities industry, affects all economic sectors and industries that create GHG emissions. Another case currently before the Ninth Circuit on the same issue of federal nuisance claims, *Kivalina v. Exxon Mobile Corp.*, in which plaintiffs allege harms caused by climate change caused by major oil companies, will also likely be affected by today's outcome.

Morrison & Foerster LLP is widely recognized as a leader among law firms on issues related to climate change and greenhouse gas emissions, and maintains a full-service environmental law practice.

For further information about this and other important climate change developments, please contact:

Michael Steel

(415) 268-7350

msteel@mofo.com

Peter Hsiao

(213) 892-5731

p hsiao@mofo.com

William Sloan

(415) 268-7209

wsloan@mofo.com

Jennifer Jeffers

(415) 268-6113

jjeffers@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for seven straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.