



# Climate Change Litigation After Supreme Court Ruling in *American Electric Power v. Connecticut*

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## Overview

- On June 20, 2011 the U.S. Supreme Court issued its much-anticipated decision in *American Electric Power v. Connecticut*. This is the second climate change case to be decided by that court and the first to concern common law claims, where the plaintiffs claimed that the greenhouse gases (GHGs) from power plants constitute a common law nuisance, and asked the court to issue an injunction requiring the plants to reduce their emissions.
- A DBCCA research report of December 2010 indicated that three kinds of outcomes of this case are easily foreseeable.
  - At one end, the Court could rule for the plaintiffs and say these lawsuits are a viable way to fight climate change; that would no doubt lead to a flood of new suits.
  - At the other end, the Court could find that these kinds of disputes do not belong in the courts, and that the problems of climate change are so diffuse and nonspecific that no one has standing to go to court to challenge any governmental failure to act.
  - A middle position, where the Court could rule that EPA action to regulate GHG emissions has displaced any need for federal common law remedies, but leaving untouched the rights of environmental plaintiffs to sue on statutory grounds.
- This middle position is in fact what the Supreme Court did. As detailed below, the decision resolves a few issues but leaves many others open. One line of climate change litigation has been blocked, but many others remain.
- In a nutshell, the Supreme Court cut off the ability of private parties to ask federal judges to set their own emission standards for GHGs.
  - It left the door slightly ajar for plaintiffs to ask judges to set such standards under state law theories, and conceivably to award money damages, but the decision's strong language affirming that EPA has special powers and technical expertise -- and judges do not -- regarding GHGs makes such claims a very long shot.
  - On the other hand, the decision leaves undisturbed, and may strengthen, the ability of states and maybe citizens and companies to go to court to challenge any EPA failures to follow through on the dictates of the federal Clean Air Act in regulating GHGs.
  - The decision also leaves basically untouched litigation against specific projects, whether they involve fossil fuels or renewables.

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### Background

By way of background, in 2004, at a time when environmentalists were frustrated at the refusal of Congress and President George W. Bush to regulate GHGs, two suits were brought against six electric power companies that run fossil fuel plants in a total of 20 states. One suit was brought by eight states and New York City; the other suit was brought by three land trusts. The plaintiffs in both cases claimed that the GHGs from the power plants constitute a common law nuisance, and they asked the court to issue an injunction requiring the plants to reduce their emissions.

In 2005, Judge Preska of the U.S. District Court for the Southern District of New York dismissed the cases on the grounds that they raise non-justiciable political questions. The Second Circuit heard oral argument in June 2006. As the third anniversary of that argument passed, the Second Circuit's long delay in deciding became one of the great mysteries in climate change law. Meanwhile, the Supreme Court issued the landmark decision in *Massachusetts v. Environmental Protection Agency*, and later one of the three members of the panel that heard the arguments in the *Connecticut* case was elevated to the Supreme Court -- Judge Sotomayor. Finally in September 2009 the two remaining members of the panel issued the decision -- Judge McLaughlin, an appointee of the first President Bush, and Judge Hall, appointed by the second President Bush.

The Second Circuit decision was a major win for the plaintiffs. First, the panel found that the case was perfectly justiciable and did not raise political questions as that concept has been interpreted by the Supreme Court. Second, though it did not need to, the panel found not only that the States had standing to sue -- which was foretold by the *Massachusetts* decision -- but also that the private land trusts had standing because they alleged that their property was being harmed by climate change. This would potentially open the courthouse doors to broad classes of people and entities beyond states. Third, the panel found that the federal common law of nuisance applied, and that it had not been displaced by the Clean Air Act and EPA actions under that statute. Thus the Second Circuit remanded the case to the district court for further proceedings.

### Supreme Court Decision

The Supreme Court granted certiorari. They heard argument in April 19. On June 20 they decided. Eight justices participated; Justice Sotomayor was recused. The decision was unanimous, 8-0, and was written by Justice Ginsburg. The decision reversed the Second Circuit and found that the federal common law nuisance claims could not proceed. The sole reason was that the Clean Air Act, as interpreted in *Massachusetts*, gave EPA the authority to regulate greenhouse gases, and EPA was exercising that authority. This displaced the federal common law of nuisance. The Court declared, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." Thus it is not for the federal courts to issue their own rules.

This may be the most intriguing paragraph in the opinion: "The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions; and further, that no other threshold obstacle bars review. Four members of the court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits."

Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are Justices Ginsburg, Breyer, Kagan and Kennedy. The four who disagree are Chief Justice Roberts and Justices Scalia,

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Thomas and Alito. The Ginsburg group thus apparently rejects the political question defense as well as the standing argument. Should another case come up on which Justice Sotomayor was not recused, there might be a 5-4 majority to allow climate change nuisance litigation, but for the Clean Air Act displacement. So this aspect of the Supreme Court decision did not set precedent in the technical sense, but it may give an indication of how the Supreme Court as presently constituted would rule in another case where states sued on public nuisance grounds about GHGs, but where displacement was not operating.

On the other hand, the paragraph quoted above (when considered in conjunction with *Massachusetts*) may hint that Justice Kennedy believes that only states would have standing. Thus there might be a 5-4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.

### State Claims Left Unresolved

The Court explicitly did not decide whether the Clean Air Act preempts state public nuisance litigation over GHGs. Thus some plaintiff group will probably press state common law claims, perhaps on the remand in *AEP v. Connecticut*. The defendants would certainly argue that the Clean Air Act displaced state common law nuisance claims as well. The plaintiffs would no doubt counter that the Clean Air Act has provisions that explicitly say that common law claims are not preempted, at least by certain parts of the Clean Air Act. In the next volley, the defendants would quote Justice Ginsburg's statement in *AEP* that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order ... Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures." Where this ball stops, only time can tell. It is also possible that plaintiffs will forum shop -- they will look for the district or the circuit where they are most likely to prevail in their non-preemption argument.

Pressing state common law nuisance claims will raise several additional complications. One of them is which state's law will apply. If relief is sought against a particular facility, it might well be the law of the state where the facility is located. The Fourth Circuit recently considered common law nuisance claims against facilities in several states in a case concerning conventional air pollutants, not GHGs. The court found that the laws of the states where the plants were located specifically allowed the activities -- in other words, the facilities were operating pursuant to and in compliance with state permits -- and therefore nuisance actions were precluded. If the same doctrine applied to the defendants' facilities in a new case about GHGs, the plaintiffs would face a tough burden in proving that the plants were not operating in accordance with state law.

Another complication with state common law nuisance claims is that some states would act to bar such claims. On June 17, 2011, Governor Rick Perry of Texas signed a bill providing that companies sued for nuisance or trespass for GHG emissions would have an affirmative defense if those companies were in substantial compliance with their environmental permits.

Since the *AEP* opinion was based entirely on displacement by Congressional designation of EPA as the decision-maker on GHG regulation, if Congress takes away EPA's authority to regulate GHGs but does not explicitly bar federal common law nuisance claims, these cases will come back. Thus this interestingly changes the political dynamic a bit -- success by opponents of GHG regulation in their efforts to take away EPA's authority could swiftly bring back the common law claims, unless they are also able to muster enough votes to go further and explicitly preempt the federal and state common law claims.

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### Damages vs. Injunctive Relief

Another question left open is whether the Supreme Court's decision bars all federal common law nuisance claims, or only those like *AEP* that sought injunctive relief. This particular question may be litigated very soon, perhaps in two different cases -- the two other public nuisance cases for GHGs that are currently pending. One of them is *Village of Kivalina v. Exxon Mobil*. That case was dismissed by the district court and is now on appeal to the Ninth Circuit. The case was put on hold pending the decision in *AEP*. Now that the case is off hold, the plaintiffs are arguing that *AEP* affects only suits for injunctive relief, not suits for money damages, like *Kivalina*. The other case is *Comer v. Murphy Oil*, a suit brought by Mississippi landowners saying that Hurricane Katrina was made more intense as a result of climate change. That suit was dismissed by the district court; reversed by the Fifth Circuit; and then undone through a bizarre procedural sequence in which the court granted en banc review and vacated the panel decision, and then lost a quorum for en banc review but left the panel decision vacated. On May 27, 2011, the plaintiffs in *Comer* re-filed the case. It, too, is seeking money damages, not an injunction.

The complaints in both *Kivalina* and *Comer* also raised the claim that some of the defendant companies have aggressively misrepresented and concealed scientific information about climate change, and alleged that this amounted to an actionable civil conspiracy. This claim was not raised in *AEP*, and it was not decided in either *Kivalina* or *Comer* (or any other U.S. case). Thus it is likely to be raised again.

None of these cases has come close to the merits. There has been no discovery in any of them, or litigation of such difficult issues as how a district court would determine what is a reasonable level of GHG emissions from a myriad of industrial facilities, or (in the cases seeking money damages) what defendants would be liable, what plaintiffs would be entitled to awards, what defendants would have to pay what share of the award, and what plaintiffs would enjoy what share of the award. Among the other issues that would have to be addressed are extraterritorial jurisdiction over foreign entities; the impossibility of attributing particular injuries to particular defendants; and the effect of the fact that most of the relevant emitting facilities were presumably operating in accordance with their governmentally-issued emissions permits.

Everything else aside, *AEP* appears to be a reaffirmation of EPA authority. That is shown by two things. First, the language of the decision itself is quite strong on EPA's power under the Clean Air Act. For example, the Court stated, "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions." Second, Justices Alito and Thomas wrote a concurring decision saying the opinion assumed that *Massachusetts* governed and could not be distinguished; they did not necessarily agree with it, but no party had raised that issue. But, perhaps significantly, Chief Justice Roberts and Justice Scalia did not join in that concurrence. Therefore it seems that there may now be a 7 to 2 majority in favor of keeping *Massachusetts* and its finding that EPA has strong authority to regulate GHGs under the Clean Air Act. This, in turn, may have somewhat strengthened EPA's hand in the multiple litigations now pending in the U.S. Court of Appeals for the District of Columbia Circuit challenging the EPA regulations.

Thus we have a very interesting situation. All four of the district courts that have ruled in common law nuisance cases -- *AEP*, *Kivalina*, *Comer*, and a case called *California v. General Motors* -- have dismissed the cases based on political question grounds, and, in some instances, on standing grounds. But all three of the appellate courts that have ruled in these cases -- the Second Circuit in *AEP*, the Fifth Circuit in *Comer* (until the panel decision was undone on procedural grounds), and now the Supreme Court in *AEP* -- have found that political question and standing are not obstacles.

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### Future Climate Litigation

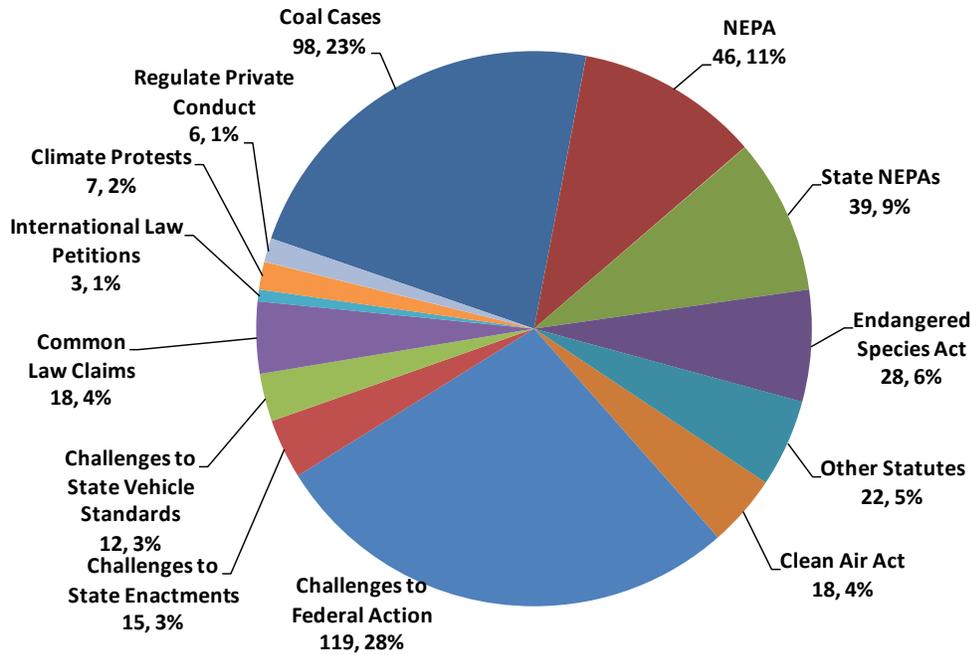
These U.S. cases (plus a series of cases filed in several different states in May 2011 on a public trust theory) were the only cases brought anywhere in the world using common law theories to seek either injunctive relief or money damages for greenhouse gas emissions. The victories by plaintiffs in the Second Circuit in *AEP* and, for a while, in the Fifth Circuit in *Comer*, excited pro-plaintiff environmental lawyers around the world, and the Supreme Court was being watched with keen interest. Now the Supreme Court has ruled, but the decision is rather narrow, and it might not have much bearing in a common law country that has not enacted a statute like the Clean Air Act that could be seen as displacing the common law through its allocation of governmental power over GHGs to an administrative agency. So the reaction in other such countries is yet another question left open by *AEP*.

Meanwhile, several other kinds of climate litigation are going forward in the U.S. The DBCCA research report of November 3, 2010, "Growth of U.S. Climate Change Litigation: Trends & Consequences," included graphics showing 340 climate cases through October 8, 2010. Attached to this report are updated graphics showing 431 cases as of June 14, 2011. These are the most common kinds of cases:

- **Challenges to federal regulations** -- A total of 119 lawsuits have been filed challenging federal action to regulate GHGs. The great bulk of these have been filed by industry and by anti-GHG regulation states, challenging EPA's regulations under the Clean Air Act. Most of these are pending before the U.S. Court of Appeals for the District of Columbia Circuit, and will be heard together. The briefs are now being filed; all will be filed by the end of 2011. Oral arguments will most likely be heard in the second or third quarter of 2012, with decision several months later. The first of the EPA regulations took effect on January 2, 2011; the court refused motions to enjoin them, and as a result, judicial interference with these regulations is likely out of the picture until at least late 2012. (The threat that Congress will delay or abolish some of these regulations is much more real.)
- **Challenges to state regulations** -- In the absence of new federal legislation, many states are going forward with GHG regulations of their own (though fewer than before the November 2010 elections, when several Democratic governors were replaced by Republican governors who were typically hostile to such regulations). The leader (as is often the case in environmental regulation) is California. It is establishing its own cap-and-trade program. The program was stalled by litigation brought by environmental groups that believed minority communities were being unfairly treated, but that roadblock has been lifted, at least for now. Other litigation challenges to the actions of states, and of multi-state groups such as the Regional Greenhouse Gas Initiative, are pending or anticipated.
- **Coal plant challenges** -- A concerted national campaign has challenged virtually every proposed coal-fired power plant in the United States. It has been extremely successful; the combination of such litigation, low natural gas prices, and a sluggish economy has virtually halted new starts of such plants. The environmental community's attention is now shifting to attempts to shut down existing coal-fired power plants, and a new round of litigation can be expected. It is likely to raise a wide variety of issues -- GHG emissions; conventional air pollutants; discharges of heated cooling water into rivers and lakes; disposal of coal ash; the environmental impacts of surface coal mines; utility rates; and anything else the plants' opponents can devise.
- **Environmental impact reviews** -- The National Environmental Policy Act and its equivalents in about twenty states require the preparation of environmental impact statements (EISs) for many kinds of actions. The law has developed that GHG emissions must be disclosed in the EISs for many kinds of projects. The adequacy of these disclosures are a fertile ground for litigation challenging projects that are disliked by neighbors or environmental groups.

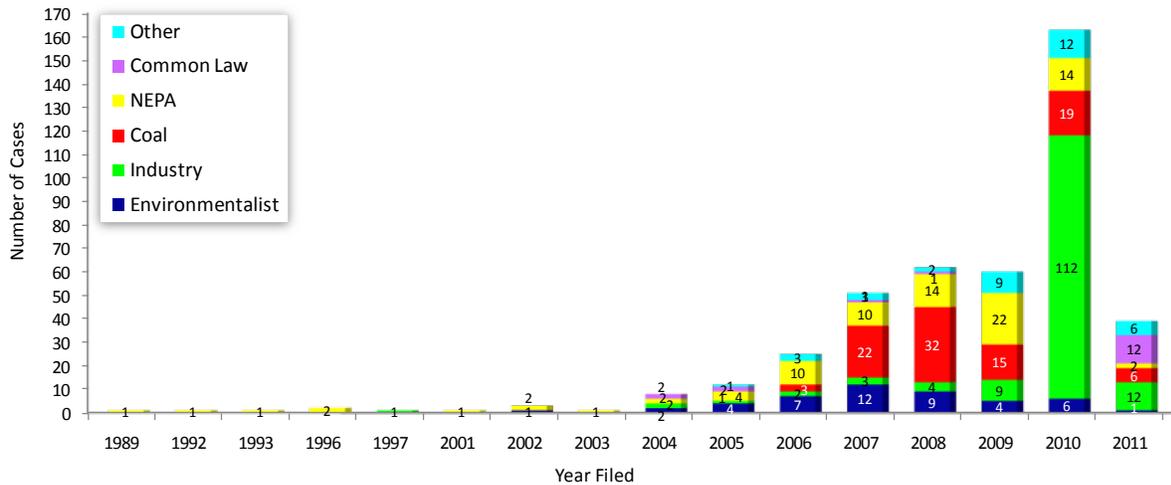
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Exhibit 1: Types of Climate Cases Filed (431 total cases as of June 14, 2011)



Source: Arnold & Porter LLP

Exhibit 2: Climate Litigation -- Filings



Source: Arnold & Porter LLP



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