Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Limits GHG Nuisance Claims In AEP Ruling

By **Martin Bricketto**

Law360, New York (June 20, 2011, 11:43 AM EDT) -- The U.S. Supreme Court on Monday dealt a blow to parties suing power companies over greenhouse gas emissions, finding that the Clean Air Act and the U.S. Environmental Protection Agency's authority displace federal common law claims over the pollution, but experts say the narrow opinion won't mean an end to nuisance claims over climate change.

Ruling in American Electric Power Co. v. Connecticut, the high court reversed a Second Circuit decision in 2009 in favor of states and land trusts suing AEP and other power plant operators that found that the CAA did not displace their public nuisance claims under federal common law. However, the Supreme Court declined to rule on whether the parties could bring public nuisance claims under state law, leaving that issue open on remand.

Steven Napolitano, a partner at Skadden Arps Slate Meagher & Flom LLP, said Monday's ruling was undoubtedly a positive one for the defendants who litigated the case, “but there are a lot of questions that the court leaves open.”

One key issue is whether public nuisance claims can proceed under state law or if they are trumped by federal laws and regulations.

Richard O. Faulk, a partner in the environmental practice at Gardere Wynne Sewell LLP who represented several groups including the American Chemistry Council and National Association of Manufacturers as part of an amicus brief in the AEP case, called the state law question “a live and dangerous issue that remains outstanding.”

”I think right now we're in a period of uncertainty, and in my view uncertainty is never a good thing when it comes to business planning,” Faulk said.

He pointed to state law claims in a climate change suit brought by the village of Kivalina, Alaska, whose inhabitants allege that greenhouse gas emissions from 24 energy and utility giants have left their town uninhabitable by eroding the sea ice that protected it from fall and winter storms. The Kivalina case is pending in the Ninth Circuit.

Kivalina had already tried to distinguish its appeal from the AEP case, noting in court documents that it was bringing a federal common law public nuisance claim, among others, for damages, while the AEP

plaintiffs sought injunctive relief. The village has also said the CAA can't displace a federal common law action for damages.

“Based on what I've seen in the Kivalina case and the record there, I don't think there's really much of a chance that the plaintiffs in that case are going to go away based on the ruling,” Napolitano said.

In her 21-page opinion in the AEP case, Justice Ruth Bader Ginsburg said the court's 2007 ruling in Massachusetts v. EPA made it clear that carbon dioxide emissions qualified as air pollution subject to regulation under the CAA — a law that she also said spoke directly to such emissions from the defendants' plants.

Justice Ginsburg further noted that the EPA was currently conducting a rulemaking to set standards for greenhouse gas emissions from fossil fuel-fired power plants.

“The act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants — the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track,” the opinion said.

Justice Ginsburg said Congress delegated the regulation of carbon dioxide emissions from power plants to the EPA, and that the delegation displaced federal common law. If the plaintiffs are dissatisfied with the results of the EPA's rulemaking, their recourse under federal law would be to seek appellate review and ultimately to petition the high court for certiorari, according to the opinion.

Also, it was fitting that Congress designated an expert agency to serve as the primary regulator of greenhouse gas emissions, Justice Ginsburg said.

The high court was divided in affirming the Second Circuit exercise of jurisdiction in the case, however.

Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Stephen Breyer and Elena Kagan joined in Justice Ginsburg's opinion. Justice Samuel Alito filed an opinion concurring in part and concurring in the judgment, in which Justice Clarence Thomas joined. Justice Sonia Sotomayor did not participate in the case.

T. Sky Woodward, a product liability attorney at Womble Carlyle Sandridge & Rice PLLC who represented the defense attorney organization DRI as part of an amicus brief in the case, said the use of the judicial system to pursue such climate change issues had been slowed, if not all together thwarted.

“It's a very narrow ruling, but it's one that reinforces process, and it should give comfort to the business community and industry,” Woodward said.

Jim Smith, an environmental litigation partner at Porter Hedges LLP, said the reach of the EPA program could also preempt state common law claims.

“The fact that there's a program on its way is enough for preemption of federal common law, and that may also be viewed as enough for preemption of state common law as well,” Smith said.

The AEP case goes back to 2004, when several states and New York City sued AEP, the Tennessee Valley Authority, Xcel Energy Inc., Southern Co. and Cinergy Corp., which is now part of Duke Energy Corp., demanding that they first cap their emissions and then reduce them over a period of time.

Three land trusts — Open Space Institute Inc., Open Space Conservancy Inc. and the Audubon Society of New Hampshire — filed a similar suit, and the two cases were consolidated.

The suits, brought under a federal common law claim of nuisance, alleged that by contributing to global warming, the power company defendants were harming the environment, the states' economies and public health.

In 2005, a federal judge dismissed the complaint, saying it presented political questions that should be handled by the legislative or executive branches and not by the courts.

The suit was revived in September 2009 by the Second Circuit, which said the district court had wrongly read the plaintiffs' claims as seeking a change in national policy rather than protection from immediate harm.

The AEP case has often been mentioned along with Comer et al. v. Murphy Oil USA et al., in which a proposed class of property owners alleged that dozens of oil and chemical companies made Hurricane Katrina worse through their contributions to global warming and that they were therefore liable for damages from the storm.

Plaintiffs in the Comer case refiled their suit May 27 in Mississippi federal court following its defeat for procedural reasons before the Fifth Circuit.

“Whether the allegations are sufficient to raise state law claims is going to be anyone's guess, but one would think they're going to shift very quickly into Mississippi state law if they're not there already,” Faulk said regarding Comer.

“We haven't seen the end of climate change litigation yet. It seems the remaining cases are still standing, although a little wobbly,” he added.

The utilities are represented by Peter D. Keisler, Carter G. Phillips, David T. Buente Jr., Roger R. Martella Jr., Quin M. Sorenson and James W. Coleman of Sidley Austin LLP and Martin H. Redish of the Northwestern University School of Law.

Southern Co. is represented by F. William Brownell, Norman W. Fichthorn, Allison D. Wood and Shawn Patrick Regan of Hunton & Williams LLP. Xcel is represented by Donald B. Ayer, Kevin P. Holewinski, Thomas E. Fennell and Michael L. Rice of Jones Day.

The case is American Electric Power Co. et al. v. Connecticut et al., case number 10-174, in the U.S. Supreme Court.

--Editing by Pamela Wilkinson and Chris Giganti.