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Green Report

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FEDERAL COURTS PERMIT SUITS AGAINST GREENHOUSE GAS EMITTERS FOR CONTRIBUTING TO CLIMATE CHANGE UNDER FEDERAL COMMON LAW AND STATE LAW

A question currently being posed in legal settings is which branch of government is in the best position to address the reduction of greenhouse gases that contribute to climate change. The United States Courts of Appeals for the Second Circuit and Fifth Circuit have responded by deciding that public and private entities have standing under Article III of the U.S. Constitution to sue emitters of greenhouse gases in federal court on the theories of federal and state common law nuisance.

State of Connecticut et al. v. American Electric Power, et al.

In State of Connecticut v. American Electric Power, 582 F.3d 309 (2nd Cir. 2009), the Second Circuit overturned a district court's dismissal of complaints for public nuisance brought by eight states, New York City and land trusts against emitters of greenhouse gases for contributing to climate change. The district court dismissed the plaintiffs' complaints on the basis that those complaints presented a non-justiciable political question. The Second Circuit explained that the non-justiciable political question is a legal "restraint" that prohibits federal courts from interfering with the business of other branches of government or where the controversy involves public policy choices better resolved by other branches. Notwithstanding ample litigation on this issue, the Supreme Court has rarely found that a political question bars the adjudication of an issue. The Second Circuit commented that simply because an issue may have political implications does not make it non-justiciable.

The Second Circuit addressed this issue by looking to the six factors set forth in the Supreme Court case of Baker v. Carr, 369 U.S. 186 (1962). The factors aid in determining whether a case would require a federal court to decide a question is committed to a political branch. The Baker factors are as follows: "[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

In applying the Baker factors, the Second Circuit first decided that the questions presented did not, under the separation of powers, commit the decisions regarding greenhouse gas emissions to the legislative or executive branches. Although climate change poses serious ecological and economic problems that impact domestic politics and international relations, the plaintiffs' claims boil down to a common law nuisance case brought by domestic plaintiffs against domestic defendants for domestic conduct. Adjudication of nuisance claims by a court would not establish a national or international emission policy. Second, federal courts do have available standards for deciding this type of case. Even though this case may involve complex scientific principles, federal courts have long adjudicated complex common law public nuisance cases, dealing with developing scientific principles. Third, this case can be decided without an initial policy determination by the political branches. The Second Circuit concluded that factors four through six were not relevant because a judicial resolution would not contradict prior decisions made by a political branch. For these reasons, the Second Circuit decided that this case does not present a non-justiciable political question and it reversed the district court's ruling.

The Second Circuit next considered whether plaintiffs have standing, or the right to bring the case, noting first that plaintiffs need not present scientific evidence early in the case to prove their claims present current and future injuries. The plaintiffs satisfied the standing requirements of Article III of the U.S. Constitution which requires: an injury in fact; the injury is fairly traceable to the defendants; and the injury will be redressed by a favorable decision. The Second Circuit concluded that: plaintiffs would suffer injury in the form of declining water supplies, reduced coast lines, and diminished ecological value of property; the injuries were fairly traceable to defendants because defendants are five large emitters of greenhouse gases; and the courts could provide some measure of relief by slowing or reducing emissions. The court also relied on the 2007 ruling by the Supreme Court in Massachusetts v. EPA, 549 U.S. 497 (2007). In that case, the Supreme Court said that providing some measure of relief is adequate when, if not reversing climate change, limiting greenhouse gas emissions will slow or reduce it. For all of these reasons, plaintiffs had standing to bring the suit.

The plaintiffs also adequately plead claims for federal common law nuisance by alleging defendants' emissions, in contributing to climate change, constitute an unreasonable interference with the public's rights. The Second Circuit rejected defendants' arguments that the Clean Air Act, and its comprehensive nature, and five federal statutes that address climate change and greenhouse gas emissions - the National Climate Program Act of 1978,

the Global Protection Act of 1987, the Global Climate Change Act of 1990, the Energy Policy Act of 1992 and the Energy Policy Act of 2005 - displace federal common law upon which plaintiffs base their claims. Instead, the Second Circuit concluded that the federal government has not yet regulated greenhouse gas emissions, leaving intact the federal common law of nuisance regarding this issue.

Comer v. Murphy Oil USA

The Fifth Circuit in Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), allowed a class action by owners of property along the Mississippi coast for claims regarding public and private nuisance, trespass and negligence against energy companies that emit greenhouse gases. The complaint alleged that defendants' emissions contributed to climate change and to rising sea levels that added to the ferocity of Hurricane Katrina. The plaintiffs originally sought relief on the theories of private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy. The district court held that plaintiffs lacked standing and that their claims involved non-justiciable political questions. The Fifth Circuit reversed the district court's holding on the claims for public and private nuisance, trespass and negligence, but affirmed the district court's holding on the remaining claims.

The Fifth Circuit first acknowledged a responsibility to determine whether it had jurisdiction and whether federal courts have authority to entertain plaintiffs' claims. Since this is a diversity case involving state common-law rights of action, plaintiffs were required to satisfy both state and federal standing requirements. The Mississippi standing requirement was easily satisfied because Mississippi only requires plaintiffs to have a colorable interest in the matter or experience an adverse effect from defendants' conduct. Federal courts follow a more rigorous standing standard, based on the Constitution's case or controversy requirement. The Fifth Circuit found that plaintiffs alleged actual and concrete injuries to their particular property that could be redressed by compensatory and punitive damages. In addressing the "traceability" requirement, defendants' main arguments were similar to those rejected by the United States Supreme Court in Massachusetts v. EPA, 549 U.S. 497 (2007), where the Supreme Court accepted as plausible the link between man-made greenhouse gas emissions and climate change. The "traceability" requirement was satisfied, for the purpose of pleading a complaint, by showing an indirect causal connection between the alleged injury and the defendants' pollutants. For standing purposes, the defendants' pollutants need not be the sole cause of the injury but rather the pollutants need only contribute to the kinds of injuries alleged by the plaintiffs.

The Fifth Circuit next addressed the issue of whether the plaintiffs' claims presented a non-justiciable political question. Rather than undertaking an analysis of the Baker factors, the Fifth Circuit placed the burden on the defendants, the parties moving to dismiss, to first identify a constitutional provision or federal law that arguably commits a material issue in the case exclusively to a political branch. Having found the defendants could not satisfy this burden, the Fifth Circuit held that this case did not represent a non-justiciable political question.

Native Village of Kivalina v. Exxonmobil Corp

The Northern District Court of California, however, was not as optimistic as the Circuit Courts that the judiciary could resolve problems relating to climate change. In Native Village of Kivalina v. Exxonmobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), a remote Eskimo-Alaskan village sued oil, energy and utility companies under the federal common law of nuisance for emitting greenhouse gases which plaintiffs' claim contribute to climate change and to flooding of the village.

In analyzing the Baker factors, the district court found that there was no textual demonstrable constitutional commitment of the issue to a political branch. Accordingly, the first Baker factor was not implicated. As to the second and third Baker factors, however, the district court found that the judiciary did not have the legal tools needed to reach a ruling in the case that is principled, rational and based upon reasoned distinctions. The plaintiffs did not articulate any standard that the court could use in order to weigh, under a theory of public nuisance, the benefits derived from the use of the energy sources versus the risk of increasing greenhouse gases. The district court also rejected the plaintiffs' reliance on American Electric Power and rejected the Second Circuit's reliance on water and air pollution cases where the injury was geographically limited and the excess discharge was presumed harmful. Instead, when it comes to greenhouse gases, the problem is global, it affects the entire planet and climate change involves a series of events disconnected from the discharge itself. Equally problematic for the district court was that the plaintiffs were asking the court to make a political judgment to allocate the fault and cost of climate change to the two dozen defendants named in the lawsuit.

The district court also found that the plaintiffs could not satisfy the traceability and redressability requirements necessary for standing. The plaintiffs argued they only needed to show that defendants "contributed" to their injuries to satisfy the traceability requirement for standing. The district court rejected this argument. It noted that the "contribution" theory expounded by the plaintiffs and in American Electric Company was applied in cases decided under the Clean Water Act, where a statute limited the amount of pollutants and created a presumption that a discharge in excess of federal limits caused harm. In contrast, there is no federal standard limiting the discharge of greenhouse gases. The district court also stated that, even if the contribution theory was applicable, plaintiffs have not alleged that the seed of their injuries could be traced to the defendants. The plaintiffs were not within the discharge zone of the polluters, and, as described by the plaintiffs, it would be impossible to trace the pathway of any particular greenhouse gas emission to the defendants. The district court found that the plaintiffs' federal nuisance claim is barred by the political question doctrine and for lack of standing.

COURT'S DECISION PROMPTS SETTLEMENT BETWEEN WIND FARM AND ENVIRONMENTAL GROUP TO ALLOW FOR ADDITIONAL CONSTRUCTION AND OPERATION OF WIND TURBINES

In Animal Welfare Institute, et al. v. Beech Ridge Energy LLC, et al, Case No. 09cv1519 (D. Md. Dec. 8, 2009),

the federal district court enjoined the defendants from building additional wind turbines at a wind farm project in West Virginia until they obtained an incidental take permit under the Endangered Species Act for the Indiana bat.

Congress enacted the Endangered Species Act ("ESA") in 1973 in response to growing concern over the extinction of animal and plant species. Courts have found that Congress' intention with respect to the ESA was to afford endangered species the highest of priorities and that Congress' purpose was to halt and reverse the trend toward species extinction, whatever the cost.

Section 9 of the ESA makes it unlawful for any person to "take" any endangered species within the United States. The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Anyone who knowingly "takes" an endangered species in violation of Section 9 is subject to significant civil and criminal penalties. Congress has enacted a safe harbor from these penalties with the establishment of the incidental take permit ("ITP") process that allows a person or other entity to obtain a permit to lawfully take an endangered species without fear of incurring civil or criminal penalties, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Further, under Section 11 of the ESA, any person may bring a citizen suit in federal district court to enjoin anyone who is alleged to be in violation of the ESA or its implementing regulations.

The Indiana Bat was originally designated as in danger of extinction in 1967. The current range of the Indiana bat includes twenty states in the mid-western and eastern United States, including West Virginia. Research shows that wind energy facilities cause bat mortality and injuries through both turbine collisions and barotrauma. (Barotrauma is damage caused to enclosed air-containing cavities, such as lungs and eardrums, as a result of a rapid change in external pressure.)

A few years ago, Beech Ridge Energy LLC ("Beech Ridge Energy") intended to construct and operate 122 wind turbines along 23 miles of Appalachian mountain ridgelines in West Virginia. The project would cost over $300 million to build and would produce 186 megawatts of electricity. The project would operate for a minimum of twenty years. On February 13, 2009, the West Virginia Public Service Commission authorized construction at the Beech Ridge Project site.

On June 10, 2009, the Animal Welfare Institute ("AWI"), Mountain Communities for Responsible Energy ("MCRE") and David G. Cowan (collectively the "Plaintiffs") brought an action seeking declaratory and injunctive relief against Beech Ridge Energy and Invenergy Wind LLC ("Invenergy") (collectively the "Defendants"). The Plaintiffs alleged that the Defendants' construction and future operation of the Beech Ridge wind energy project would "take" endangered Indiana bats, in violation of Section 9 of the ESA.

The Defendants in part argued that the ESA's citizen-suit provisions bars actions alleging "wholly-future" violations of Section 9 of the statute, where there is no past, current or continuing "take." However, the Court found that the citizen-suit provision does include wholly-future violations of the statute given the text of Section 9 and its legislative history. By prohibiting any "attempt" to harm, wound, kill, or harass a listed species, the Court found that Congress clearly manifested an intent that Section 9 was designed to include claims of future injury.

The Court also held that, in an action brought under Section 9 of the ESA, a plaintiff must establish by a preponderance of the evidence that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species. Therefore, in order to determine whether to grant the requested injunctive relief, the Court had to determine whether, by a preponderance of the evidence, there is a virtual certainty that Indiana bats are present at the Beech Ridge Project during the spring, summer and fall. The Court ultimately found, after considering all of the evidence, that Indiana bats are present. The Court based this finding on the close proximity of Indiana bat hibernacula (bat migration to caves) to the project site, the fact that the physical characteristics of the site make the presence of Indiana bats more likely and that the acoustic data confirmed to a virtual certainty the presence of Indiana bats. The Court went on to state that, based on the fact that discretionary adaptive management will not eliminate the risk to the Indiana bat, the Court had no choice but to award injunctive relief.

However, the Court did allow the Defendants to complete construction of the forty turbines already under construction, but stated that the defendants could not construct any additional turbines unless and until an incidental take permit had been obtained. The Court went on to

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state that the turbines already under construction could only be operated during the periods when the Indiana bats are in hibernation.

The Defendants filed a Notice of Appeal on January 7, 2010. However, the Notice of Appeal was ultimately dismissed because of a Stipulation agreed to by the parties and granted by the Court on January 26, 2010. The Stipulation allows the Defendants, pending receipt of an ITP, to operate the turbines during additional time periods and allows them to construct and operate additional wind turbines subject to specified time restrictions. Further, the Plaintiffs agree not to challenge the issuance of the ITP or to pursue any legislative proposal blocking or delaying completion of the wind turbine project.

THE SECURITIES AND EXCHANGE COMMISSION ISSUES INTERPRETATIVE GUIDANCE REGARDING CLIMATE CHANGE DISCLOSURE

On February 2, 2010, the Securities and Exchange Commission ("SEC") published an interpretative release that provides guidance to public companies regarding disclosure related to climate change ("Guidance"). The Guidance does not place any additional requirements on public companies, but provides guidance regarding the SEC's existing disclosure requirements as they apply to climate change matters.

The Guidance begins by noting that in recent years climate change has become a topic of intense public discussion. In fact, many have expressed a heightened interest in climate change. The Guidance also notes that, in the last several years, numerous state and local governments have enacted legislation and regulations that result in greater regulation of greenhouse gas emissions. There is even climate change related legislation currently pending in Congress. Moreover, on January 1, 2010, the EPA began, for the first time, to require large emitters of greenhouse gases to collect as well as report data with respect to their greenhouse gas emissions. The EPA also recently found that greenhouse gas emissions endanger health and welfare, thereby triggering their regulation under the Clean Air Act. The international community has also taken actions to address climate change issues.

The Guidance recognizes that the legislation and regulations could have a significant effect on a company's operating and financial decisions. Even companies not directly affected could be indirectly affected by changing prices for goods and services provided by companies that are directly affected. Further, there may be physical effects of climate change that have the potential to have a material effect on a company's business and operations.

The Guidance then turns its discussion to the existing rules that may require disclosure regarding climate change issues. The Guidance notes four non-financial statement disclosure rules that may require disclosure related to climate change. First, Item 101 of Regulation S-K requires a description of the business. However, in addition to a description of the business and its subsidiaries, this rule also expressly requires disclosure regarding certain costs of complying with environmental laws. Second, Item 103 of Regulation S-K requires a registrant (a company subject to the reporting requirements of the Securities Exchange Act of 1934) to briefly describe any material pending legal proceeding to which it or any of its subsidiaries is a party. It also requires that the registrant disclose certain environmental litigation. Third, Item 503(c) of Regulation S-K requires a registrant to provide, under the heading "Risk Factors," a discussion of the most significant factors that make an investment in the registrant speculative or risky. Finally, the fourth rule is Item 303 of Regulation S-K, which requires disclosure known as the Management's Discussion and Analysis of Financial Condition and Results of Operations. Item 303 includes a broad range of disclosure items that address the registrant's liquidity, capital resources and results of operations. Some of these provisions clearly specify the disclosure required for compliance.

The Guidance then discusses the four key ways in which climate change may trigger disclosure required by the existing SEC rules noted above.

(1) Impact of Legislation and Regulation

Federal and state legislation and

regulation may require disclosure in multiple areas, including when registrants must disclose estimated capital expenditures for environmental control facilities. In addition, registrants will have to determine whether enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant's financial condition or results of operation. Moreover, registrants should consider specific risks they face as a result of climate change legislation or regulation.

(2) International Accords

Registrants must disclose material impacts of treaties or international accords relating to climate change. The Guidance advises registrants whose businesses are reasonably likely to be affected by such agreements to monitor the progress of any potential agreements and consider the possible impact in satisfying their disclosure obligations.

(3) Indirect Consequence of Regulation or Business Trends

The Guidance recognizes that legal, technological, political and scientific developments regarding climate change may create new risks or opportunities for registrants and therefore notes the following indirect consequences or opportunities:

SEC Issues Guidance continued from page 5

- Decreased demand for goods that produce significant greenhouse gas emissions;
- Increased demand for goods that result in lower emissions than competing products;
- Increased competition to develop innovative new products;
- Increased demand for generation and transmission of energy from alternative energy sources; and
- Decreased demand for services related to carbon based energy sources, such as drilling services or equipment maintenance services.

These business risks or trends may be required to be disclosed as risk factors or, in some cases, may need to be disclosed if they have a significant impact on a registrant's business. In addition, the Guidance notes that a registrant may have to consider whether the public's perception of any publicly available data relating to greenhouse gas emissions could expose the registrant to reputational damage.

(4) Physical Impacts of Climate Change

Finally, the Guidance notes the potential significant physical effects of climate change, such as effects on the severity of weather, sea levels, the arability of farmland, and water availability and quality and whether this potential could affect a registrant's operations. In fact, severe weather can have devastating effects on the financial condition of affected businesses. The Guidance advises that Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed documents.

For more information regarding the Guidance or to view the entire text please visit http://www.sec.gov/rules/interp/2010/33-9106.pdf

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