



# LEGAL ALERT

December 2010

## **U.S. Supreme Court Grants Certiorari in Key Climate Change Public Nuisance Lawsuit**

On December 6, 2010, the United States Supreme Court granted certiorari in *American Elec. Power Co., Inc. v. Connecticut*, No. 10/174, a case in which eight states, one city and three land trusts seek an order directing four power companies to reduce their greenhouse gas (GHG) emissions on the ground that the emissions constitute a public nuisance. The Supreme Court is expected to hear arguments in early 2011 and issue a ruling in the middle of the year. The fundamental question at stake is whether federal climate change public nuisance cases will be barred at the courthouse door.

### **Background**

*Connecticut* was dismissed by the United States District Court for the Southern District of New York in 2005 on justiciability grounds since the political branches of government had yet to enact legislation or regulation that limited GHG emissions or provided standards that judges could use to make reasoned decisions. The Second Circuit reversed in 2009, holding that plaintiffs had standing to sue, federal common law governed in the absence of political action, and the lack of political action meant that plaintiffs' claims had not been displaced by a legislative or regulatory scheme. The Supreme Court will be asked to consider a wide range of topics when it hears the case, including the appropriateness of court-imposed GHG emissions caps, the degree to which plaintiffs must demonstrate a right to sue by connecting their alleged injuries to the defendants' conduct, and the effect of recent efforts by the United States Environmental Protection Agency (EPA) to control GHG emissions on the justiciability and displacement analyses.

### **Certiorari Granted Despite an Evolving Backdrop**

There are two other climate change public nuisance suits pending in federal court that address many of the same issues as *Connecticut*. Those cases are currently the subject of a mandamus petition in the U.S. Supreme Court and a fully-briefed appeal in the Ninth Circuit. See *Comer v. Murphy Oil USA, Inc.*, No. 05-CV-00436 (S.D. Miss.) (private citizens whose property was damaged by Hurricane Katrina seek money damages from oil and energy companies whose GHG emissions allegedly strengthened the storm); and *Native Village of Kivalina v. ExxonMobile Corp.*, No. 08-CV-02095 (N.D. Cal.) (city and tribal village claim they have to relocate due to the effects of global warming and seek the costs of doing so from GHG-emitting oil, energy and utility companies). It was thought the Court would refrain from hearing *Connecticut* until those matters developed further since the outcome of these cases could present circuit splits on some of the key legal issues.

In addition, the EPA is currently under attack for its response to the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which directed the agency to take action on a rulemaking petition seeking GHG-

reducing regulations under the Clean Air Act. That response, which has come in the form of GHG-controlling regulations for mobile emissions sources as well as other rules aimed at extending the controls to stationary emitters, is now the subject of litigation challenging the agency's authority to act. The relevance of this litigation to the justiciability and displacement issues was also considered to be something that would dissuade the Court from granting certiorari in *Connecticut*. Indeed, the Solicitor General, who represents the defendant Tennessee Valley Authority, argued in favor of a remand for hearings regarding the impact of the new EPA regulations.

### **Importance of Appeal**

*Connecticut* may be the most important environmental case of the October 2010 term. A reversal would have a devastating effect on all pending and future federal climate change public nuisance suits, while an order affirming the Second Circuit decision would validate the claims, open the courthouse door to additional suits, require the parties to re-litigate the current issues when/if the political landscape changes, and expose the defendants to costly discovery and/or causation battles. In a broader sense, an affirmance would allow the judiciary to consider whether individual defendants' GHG emissions unreasonably interfere with a public right, thereby empowering judges to decide some of the most important and sensitive economic, energy and social policy issues facing the nation. This could result in a myriad of inconsistent proclamations and suggest to the international community that the political branches of the American government have abdicated their authority to make such decisions at the same time they are negotiating a climate pact to replace the Kyoto Protocol.

### **Outcome Uncertain**

Some have speculated that the Court's decision to hear *Connecticut* indicates that at least four justices want to reverse, but this logic is based upon the assumption that the justices will vote consistently with their positions in the 5-4 *Massachusetts* opinion. However, two of the more liberal justices – Souter and Stephens – have since retired and one of their replacements – Justice Sotomayor – recused herself from hearing *Connecticut* because she sat on the Second Circuit panel whose decision is being appealed. If the rest of the justices vote consistently with *Massachusetts*, the result would be a 4-4 split that permits *Connecticut* to proceed but has no precedential effect outside of the Second Circuit. However, if one of the justices who voted with the liberal wing in *Massachusetts* votes with the conservative wing in *Connecticut*, the result would be a 5-3 reversal in favor of the defendants that carries full precedential weight. There are, of course, other potential outcomes given the fact that *Massachusetts* and *Connecticut* are fundamentally different cases (*i.e.*, the former addressed an agency rulemaking petition while the latter raises questions about the separation of powers and federal common law).

Given the importance of this case and the uncertainty surrounding its outcome, entities that view themselves as potential defendants in this type of litigation are encouraged to seek further advice from attorneys experienced in mass tort/industry-wide litigation and/or environmental/energy law. For more information, please contact Brian A. Bender at (212) 313-5405/bbender@harrisbeach.com, William M. Flynn at (518) 701-2711/wflynn@harrisbeach.com, any member of the Energy Industry Team, or the Harris Beach attorney with whom you usually consult.

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