

# Clean Air Act Litigation Developments

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# Clean Air Act Litigation Developments 2009

## Global Warming

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### *Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309 (2nd Cir. 2009)

On September 21, 2009, the U.S. Court of Appeals for the Second Circuit reinstated two lawsuits filed by eight states, New York City, and three environmental groups that allege that carbon dioxide emissions from six electric power generation companies contribute to climate change and constitute a public nuisance under federal common law. In *State of Connecticut, et al. v. American Electric Power Company Inc.*, 582 F.3d 309 (2d Cir. 2009), the appeals court vacated the district court decision that dismissed the lawsuits on the grounds that the plaintiffs' public nuisance claims were non-justiciable under the political question doctrine. The ruling represents a novel and potentially far-reaching expansion of the law, and could spur new climate change claims and lawsuits.

#### Background

In 2004, California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin and New York City sued six electric power generation companies (including a company that provides management and professional services to its affiliated generation company) that own and operate fossil fuel-fired power plants in twenty states. Three land trusts also filed a parallel lawsuit against the companies, which was consolidated with the States' action. The plaintiffs allege that the ongoing carbon dioxide emissions from the companies' power plants contribute to global warming, and have caused, and will continue to cause, serious harm to human health and the environment. Relying on the federal common law of public nuisance, the plaintiffs seek injunctive relief to compel the defendants to cap and reduce their carbon dioxide emissions.

In 2005, the district court dismissed the lawsuits, holding that the claims asserted in the complaints were barred under the political question doctrine. As the U.S. Supreme Court has explained, the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." The district court concluded that, before the court could adjudicate a climate change nuisance claim, the elected branches of government must make an "initial policy determination" on climate change and greenhouse gas (GHG) emissions, primarily because only the political branches of government are empowered to balance the relevant environmental, economic, and national security interests associated with climate change.

## **The Second Circuit's Decision**

On appeal, the Second Circuit held that the district court erred in dismissing the lawsuits under the political question doctrine. Acknowledging that a judicial decision imposing limits on GHG emissions may have political implications, the court nevertheless concluded that, given what it characterized as an absence of national policy on climate change and GHG emissions, a public nuisance suit could appropriately proceed. In support of its conclusion, the court noted that federal courts have often adjudicated public nuisance claims in the absence of policy actions by the political branches, including in the environmental context. Furthermore, the court stated that federal courts are well-equipped to assess complex scientific evidence and render a decision, even on an issue as novel and complex as climate change. In doing so, the court gave little weight to the role the Executive Branch plays in negotiating international aspects of climate change controls or to the fact that Congress has so far declined to enact sweeping GHG emission limitations.

The Second Circuit also held that all of the plaintiffs have standing to maintain their public nuisance actions, and that the plaintiffs asserted a cognizable claim under the federal common law of nuisance. The Restatement (Second) of Torts, upon which the court relied to supply the legal framework to analyze the plaintiffs' claims, defines a public nuisance as the "unreasonable interference with a right common to the general public."

The court also rejected the defendants' argument that plaintiffs' common law public nuisance claim is "displaced" by the Clean Air Act and other environmental statutes that already address global climate change and carbon dioxide emissions. Instead, the court concluded that "neither Congress nor EPA has regulated greenhouse gas emissions from stationary sources in such a way as to 'speak directly'" to the plaintiffs' allegations. Nonetheless, in its lengthy discussion of the displacement standard, the court made it clear that plaintiffs' public nuisance claims may well be pre-empted in the future should either Congress decide to legislate or EPA decide to regulate carbon dioxide emissions. Although it did not indicate how extensive regulation would need to be in order to create such pre-emption, in the concluding paragraph to its 139-page decision, the court opined: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by greenhouse gases."

## **Impact of the Second Circuit's Decision**

Although the Second Circuit's decision directly addresses only the claims against the specific electric power generation companies named as defendants in the lawsuits, the decision may have far-reaching implications on the energy industry and regulated community in general. The court's decision to allow climate change litigation to proceed based on a common law public nuisance theory may prompt environmental organizations and state and local public entities to pursue similar actions against additional fossil fuel-fired power generators and other GHG-emitting industries. To ultimately prevail, plaintiffs still have significant hurdles to overcome, such as showing causation between the emissions and their particular injuries and in justifying any particular set of limits. If they remain successful in getting past the threshold pleading stage and into discovery, however, the cost of defending against such claims will expand exponentially. So, while we are a long way from a final judgment on such claims, we can nevertheless expect the Second Circuit's decision to be frequently cited, and it will likely embolden at least some plaintiffs to file new, similar actions.

Additionally, the court's decision may also influence Congressional and agency debate on whether, and how, to act with respect to pending climate change legislative proposals. This decision will likely be cited by some as a further indication of the need for legislative action. In the absence of such legislative action, EPA may cite the court's statement that traditional regulation may pre-empt tort suits as a further justification for EPA's using its traditional Clean Air Act authorities to regulate greenhouse gases.

## Justiciability

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*See Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309 (2nd Cir. 2009) (Global Warming)

## NAAQS

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*American Farm Bureau Federation v. EPA*, 559 F.3d 512 (D.C. Cir. 2009)

In *American Farm Bureau Federation v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit rejected EPA's most recent revisions to the primary and secondary National Ambient Air Quality Standards ("NAAQSs") for fine particulate matter ("PM<sub>2.5</sub>"). In 2006, EPA revised the NAAQSs for two categories of particulate matter: fine particles (PM<sub>2.5</sub>), which are 2.5 micrometers in diameter and smaller; and inhalable coarse particles (PM<sub>10</sub>), which are larger than 2.5 micrometers but smaller than 10 micrometers. Specifically, the 2006 standards tightened the 24-hour primary NAAQS for PM<sub>2.5</sub> from 65 micrograms per cubic meter ("µg/m<sup>3</sup>") to 35 µg/m<sup>3</sup>, and retained the current annual NAAQS for PM<sub>2.5</sub> at 15 µg/m<sup>3</sup>. Further, EPA decided to set the secondary NAAQS to be identical to the primary NAAQS. With respect to coarse particulate matter, EPA decided to retain the existing 24-hour primary NAAQS for PM<sub>10</sub> at 150 µg/m<sup>3</sup>, and revoke the annual NAAQS for PM<sub>10</sub>. EPA had concluded that the available evidence did not suggest a link between long-term exposure to PM<sub>10</sub> and health problems.

The 2006 revisions to the PM NAAQS were challenged on various grounds by industry groups, states, and environmental groups. On February 24, 2009, the D.C. Circuit issued its decision. Most significantly, the court agreed with the environmental groups and state petitioners that EPA had failed to "adequately explain" why setting the primary annual NAAQS for PM<sub>2.5</sub> at 15 µg/m<sup>3</sup> was sufficient "to protect the public health" while providing "an adequate margin of safety." The court focused on EPA's apparent rejection of the recommendations and advice provided by its own staff and the Clean Air Scientific Advisory Committee, along with medical and public health groups, who urged EPA to reduce the standard to somewhere between 12 µg/m<sup>3</sup> and 14 µg/m<sup>3</sup>. The court decided not to vacate the PM<sub>2.5</sub> standard, but rather remand it for further review by EPA.

Additionally, the court agreed with the environmental groups that EPA unreasonably concluded that setting the secondary NAAQS for PM<sub>2.5</sub> identical to the primary NAAQS was

“adequate to protect the public welfare from adverse effects on visibility.” The court also remanded for reconsideration the secondary NAAQS for fine PM.

With respect to PM<sub>10</sub>, the court rejected the petitions to review EPA’s standards, finding that the standards for coarse PM were not arbitrary, capricious, or otherwise contrary to law. Specifically, the court rejected a challenge brought by industry groups to EPA’s decision to maintain the primary daily NAAQS for PM<sub>10</sub>, and also a challenge brought by environmental groups to EPA’s decision to revoke the primary annual NAAQS for PM<sub>10</sub>.

***Natural Resources Defense Council v. Environmental Protection Agency*, 559 F.3d 561 (D.C. Cir. 2009)**

On March 20, the D.C. Circuit decided *NRDC v. EPA*, 559 F.3d 561 (D.C. Cir. 2009), a case that will impact the drafting of comments challenging agency rulemaking for industry and environmental groups alike. The court held that NRDC could not bring a challenge under Section 307 of the Clean Air Act because it did not specifically identify in its comments the particular section it was challenging. As a result, those submitting comments will need to take particular care to be specific in their comments on agency rulemakings.

NRDC brought a challenge to EPA’s promulgation of a regulation governing the exclusion of emissions data during exceptional events such as natural disasters. It argued that the proposed definition of “natural event” to include events in which human activities play “little” role was inconsistent with the statutory language, which required no human involvement. NRDC had previously filed public comments broadly discussing its concerns that “natural events” should not include human clean-up activities.

The court looked to Section 307(d)(7)(B) of the Clean Air Act, which states: “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” The court held that NRDC’s broad discussion of the issue did not put EPA on notice of NRDC’s concern about the agency’s proposed definition of “natural event.”

The court noted that NRDC did not quote the objectionable portion of the definition, and that it did not identify the rule by section number or placement in the proposed rulemaking. It held that Section 307 “bars litigants from arguing against a particular section of a rule on judicial review if they failed to identify the particular section in their comments during the rulemaking.” The court wrote further: “It is not too much to expect interested persons to point to the particular portion of the proposed rule they are arguing against.”

Judge Rogers dissented in part, writing that the agency was on notice that NRDC was challenging its proposed statutory definition. She found that the comment “A natural event is one that is not the result of human activity” was “close enough” to put EPA on notice. Judge Rogers concurred in part, though, upholding EPA’s interpretation on the merits.

***See Longleaf Energy Associates, LLC v. Friends of the Chattahoochie, Inc.*, 681 S.E.2d 203 (Ga. App. 2009) (NSR/PSD Requirements)**

## NSR/PSD Requirements

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### *United States v. Cinergy Corporation*, 618 F. Supp. 2d 942 (S.D. Ind. 2009)

On May 29, 2009, the United States District Court for the Southern District of Indiana issued a significant opinion related to “remedies” available to the government after a violation is established regarding the Clean Air Act’s New Source Review provisions. The case involved Cinergy Energy Corp. and certain utility modifications that had occurred, largely in the late 1980s and early 1990s, as well as certain other smaller alleged violations occurring in 2000 associated with a test burn of alternative fuel that resulted in excess particulate matter emissions. At the time of the most recent decision, the presiding judge (for some violations) and a jury (for others) had already concluded that the early projects violated NSR because the company had not secured at the time proper pre-construction permits. The court had also earlier concluded that for those violations (as opposed to the 2000 PM violations) the statute of limitations prevented the court from imposing civil penalties, i.e. a financial fine, because the government had waited too long to bring its suit. The court had also earlier concluded, however, that the statute of limitations did not prevent the court from ordering injunctive relief, designed to “mitigate” or “remediate” for the excess emissions that occurred. Thus, the primary question before the trial court in its most recent decision was whether it would order injunctive relief and, if so, what.

At the government’s urging, and over Cinergy’s objection, the court did agree to order injunctive relief. In doing so, it went through the following analysis... First, the court considered competing testimony and reached a decision on what control technology Cinergy would have been required to install at the time, i.e., what was the best available control technology (“BACT”) or Lowest Achievable Emissions Rate (“LAER”), in 1989-1990 for the emissions in question... In doing so, it heard from various government-sponsored and Cinergy-sponsored experts and made findings about which experts it credited and why, often accepting the government’s view but sometimes accepting Cinergy’s. Second, the court, again relying on testimony from the parties, computed the total emissions of various types (e.g. SO<sub>x</sub> and NO<sub>x</sub>) that actually occurred. Third, the court computed the emissions that would have occurred had BACT/LAER been installed. Finally, it compared the two in order to determine the amount of emissions that it felt had occurred that were in excess of what should have occurred.

Having made findings on the “excess emissions” levels, the court then considered whether those emissions had caused “irreparable harm” warranting further relief. The court concluded irreparable harm had occurred, pointing especially to expert testimony on the role that the excess SO<sub>x</sub> and NO<sub>x</sub> emissions had in contributing to secondary PM<sub>2.5</sub> formation and, in turn, what the court described as the significant human health effect that PM<sub>2.5</sub> would have had across six states. The court rejected Cinergy’s claim that because Cinergy was in compliance with its acid rain program emissions obligations, no excess emissions occurred. The court also concluded the government had failed to prove its additional claims of injury due to acidic deposition impacts and mercury impacts.

As to the actual remedy, the court concluded that it would order three significant steps. First, it ordered certain of the units involved (the so-called Wabash Units) to completely shut down no later than September 30, 2009. This appeared to be, based on the testimony the court cited, about three

years earlier than Cinergy was itself contemplating shutting down the units. Second, in the roughly five months it was given to shut down the units, the court ordered Cinergy to run those units at emissions levels no higher than the emissions levels occurring before the modifications that occurred in the late-1980s (the so-called “baseline”). Finally, it ordered Cinergy to surrender SO<sub>x</sub> emissions allowances connected with the acid rain program in an amount equal to the SO<sub>x</sub> emissions that will have occurred in the roughly sixteen months that will pass between the jury’s verdict finding a violation (May 2008) and the September 30, 2009 shut-down. The court indicated it believed these three steps were necessary to remediate the excess emissions that had occurred through the failure to install BACT/LAER. The court refused to order an immediate shut-down, indicating it was concerned about the effect this could have on serving certain load pockets during the peak-demand summer months in 2009. Finally, as to certain violations at other facilities and where the government had brought suit within the statute of limitations, the court ordered a fine of nearly \$700,000, computed based on the maximum daily CAA fine of \$27,500 per day, times the number of violation days. It also ordered the installation of emissions monitoring equipment at the subject facility.

This decision is significant for several reasons. First, because no NSR cases brought in connection with EPA’s NSR enforcement initiative until now had actually proceeded to a decision on remedy, there has been significant uncertainty about what a court would do if forced to consider remedy issues. Although other courts would not be required to follow the reasoning here, the opinion is likely to be heavily cited, especially on issues such as how to compute “excess emissions” and the use of such “excess emissions” to configure remedies. In addition, the court was willing to itself determine questions such as what BACT/LAER would have been at the time, a highly technical subject. Finally, the court was willing to take the fairly bold step of ordering that units be shut down, albeit units that the company appeared to concede were likely to be shut down in future years rather than have emissions controls installed, well in advance of the company’s proposed time-line, and even in the face of some evidence that the shut-down might affect service reliability.

***Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.*, 681 S.E.2d 203 (Ga. App. 2009)**

In *Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.*, 681 S.E.2d 203 (Ga. App. 2009)), several environmental groups challenged the Georgia Department of Natural Resources Environmental Protection Division’s (“EPD”) issuance of a preconstruction permit under the Clean Air Act’s PSD program to Longleaf Energy Associates, LLC (“Longleaf”). Longleaf applied for the PSD permit in connection with construction of a pulverized coal-fired electric power plant. In January 2008, a state administrative law judge (“ALJ”) affirmed EPD’s issuance of the PSD permit, and the environmental groups sought judicial review of the ALJ’s decision. The Fulton County Superior Court sided with the environmental groups, and held that the ALJ had erred on a number of substantive and procedural grounds in affirming EPD’s issuance of the permit. Longleaf and EPD appealed the Superior Court’s decision to the Georgia Court of Appeals.

On July 7, 2009, the Appeals Court issued its decision, vacating the Superior Court’s decision. Most notably, the Appeals Court held that EPD was not required to include an emissions limitation for carbon dioxide (“CO<sub>2</sub>”) in the facility’s PSD permit because CO<sub>2</sub> currently is not a pollutant “subject to regulation” under the Act. The court’s decision is consistent with former EPA Administrator Stephen Johnson’s December 18, 2008 memorandum, which concluded that CO<sub>2</sub> is

not a pollutant “subject to regulation” under the PSD program because there are no regulations that limit or otherwise control CO<sub>2</sub> emissions (the “Johnson Memorandum”).

The Appeals Court also held that the use of PM<sub>10</sub> air dispersion modeling as a surrogate for PM<sub>2.5</sub> modeling to demonstrate compliance with the PM<sub>2.5</sub> National Ambient Air Quality Standard (“NAAQS”) was acceptable because at the time EPD issued the permit, this surrogate approach was the only approved method of conducting PM<sub>2.5</sub> modeling for purposes of PSD permitting.

Further, the Appeals Court held that EPD was not required to consider integrated gasification combined cycle (“IGCC”), which converts coal into a synthetic gas that is then burned in a combustion turbine to produce electricity, as part of the best available control technology (“BACT”) analysis for the proposed facility. The court concluded that a BACT analysis does not need to consider pollution control technologies that would redefine a facility’s design, and IGCC technology would redefine the design of Longleaf’s proposed facility.

Procedurally, the Appeals Court agreed with the Superior Court that the ALJ had applied an incorrect standard of review when it evaluated EPD’s issuance of the PSD permit. Specifically, the court held that the ALJ had improperly deferred to EPD, but it was required to apply a de novo standard of review. As such, the Appeals Court remanded the case back to the ALJ to reconsider the matter under the correct standard of review.

On September 28, 2009, the Georgia Supreme Court denied a petition for a writ of certiorari filed by the Sierra Club, one of the environmental groups that initially challenged EPD’s issuance of the PSD permit.

*See Sierra Club v. EPA*, 558 F.3d 401 (6th Cir. 2009) (Title V Permit Program)

## Standing

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*See Connecticut v. American Electric Power Company, Inc.*, 582 F.3d 309 (2nd Cir. 2009) (Global Warming)

## Statute of Limitations

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*See United States v. Cinergy Corporation*, 618 F. Supp. 2d 942 (S.D. Ind. 2009) (NSR/PSD Requirements)

## Title V Permit Program

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***Sierra Club v. EPA*, 558 F.3d 401 (6th Cir. 2009)**

On February 26, the Sixth Circuit issued a decision holding that EPA was not required to object to (veto) a Title V permit that did not include a compliance schedule addressing a PSD NOV that EPA had issued to the permit applicant. *Sierra Club v. EPA*, 558 F.3d 401 (6th Cir. 2009). This is the third federal appellate court decision addressing this issue. In the two prior decisions, the courts split over whether a PSD NOV must be addressed in a Title V permit compliance schedule.

In this case, the East Kentucky Power Cooperative obtained the initial Title V permit for its Spurlock Station power plant in 1999. Subsequent to issuance of the permit, EPA issued a NOV alleging PSD violations and brought an enforcement action in federal court. The plant's permit was renewed in 2006 by the Kentucky Division of Air Quality without addressing the PSD NOV in a compliance schedule.

After EPA denied the Sierra Club's objection petition, the environmental group challenged the Title V permit, arguing that EPA was required to reject the permit because it failed to address the NOV and the federal court complaint. The Sixth Circuit rejected Sierra Club's argument, holding that section 7661d(b)(2) – which requires EPA to object to Title V permits “if the petitioner demonstrates to the Administrator that the permit is not in compliance” with requirements of the Act – does not require issuance of an objection based upon “a prior notice of violation and enforcement action by themselves.”

The Court applied the traditional *Chevron* approach, finding the language of section 7661d(b)(2) to be ambiguous, particularly with regard to the standard for what a petitioner must “demonstrate.” The Court then found reasonable EPA's statutory interpretation that a prior NOV and enforcement action were “relevant factors,” but that the agency also needed to consider the (1) quality of information underlying the NOV; (2) petitioner's additional information; (3) issues remaining in dispute; (4) lapse of time from the NOV; and (5) likelihood that a pending enforcement case could resolve some of the issues. Agreeing with EPA, the Court ruled that the NOV and complaint were merely initial findings. It wrote: “The EPA is no more bound by a prior violation finding than by a prior no-violation finding.”

The Sixth Circuit also found persuasive the Eleventh Circuit's decision in *Sierra Club v. Johnson* (*Sierra Club II*), 541 F.3d 1257 (11th Cir. 2008). In that case, the Eleventh Circuit reached the same conclusion when faced with a Sierra Club challenge to a Title V permit, holding that the EPA's construction of the statute was reasonable and finding that the NOV and complaint “were merely initial steps in the enforcement process that did not prove the facts alleged.”

Sierra Club relied strongly on the Second Circuit's decision in *New York Public Interest Research Group, Inc. v. Johnson* (*NYPIRG II*), 427 F.3d 172 (2d Cir. 2005), where that court accepted a challenge to a state-issued permit where the only evidence was a prior NOV and enforcement lawsuit issued by the state permitting agency. It acknowledged that its decision may conflict with *NYPIRG II*, but suggested two possible reasons why the Second Circuit may have reached a different conclusion: (1) that the state regulation may have required a more robust initial determination; and (2) that the petition was filed in the same month as the enforcement action, as opposed to several years later.

The Court was unpersuaded by Sierra Club's arguments based on the NOV statutory language, noting that the statutory authorization for any available information to be sufficient to

make an NOV finding “suggests a low evidentiary standard,” and that the context for issuing NOVs was one of a preliminary finding, rather than one intended to bind EPA.

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