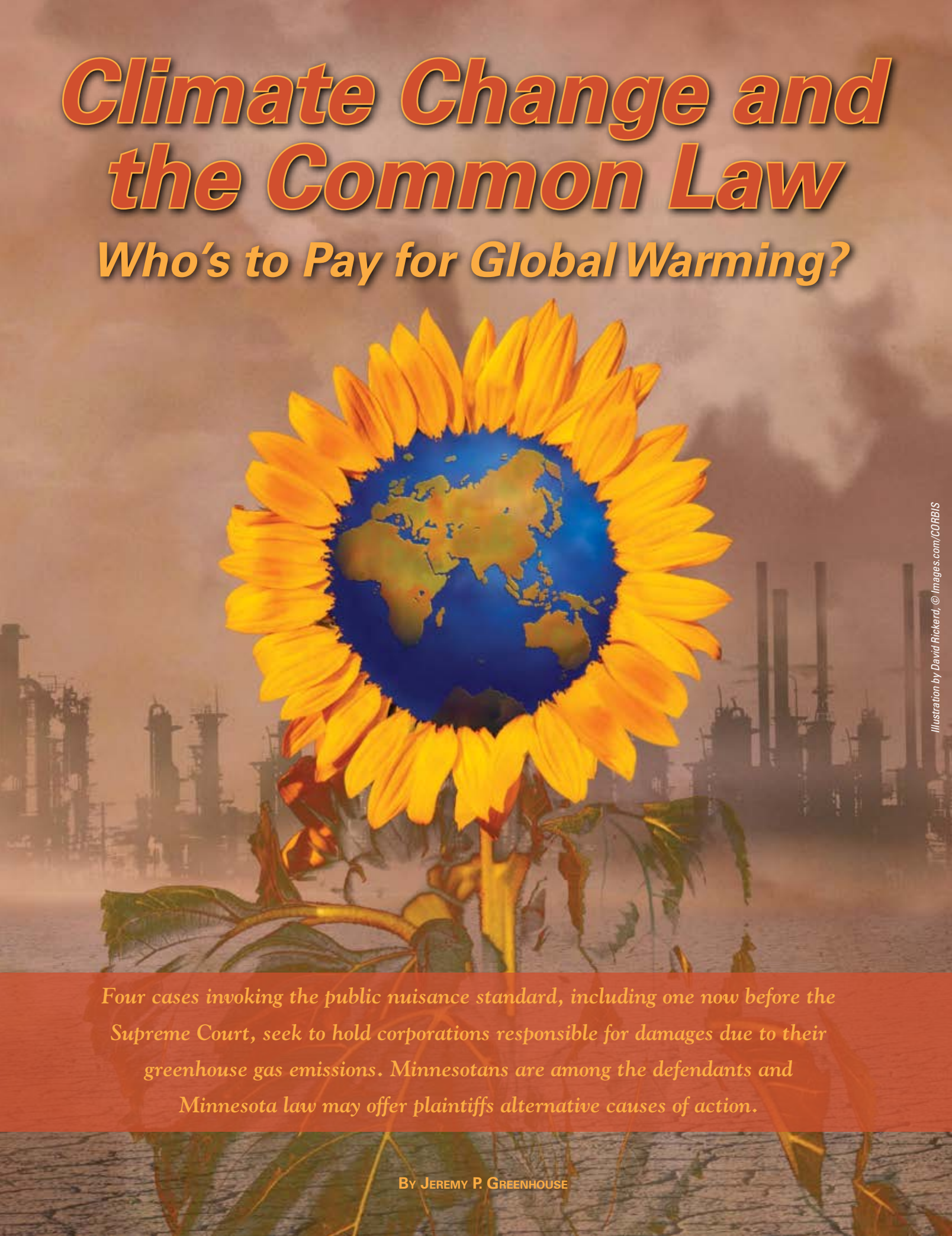
Climate Change and the Common Law

Who's to Pay for Global Warming?



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Four cases invoking the public nuisance standard, including one now before the Supreme Court, seek to hold corporations responsible for damages due to their greenhouse gas emissions. Minnesotans are among the defendants and Minnesota law may offer plaintiffs alternative causes of action.

By Jeremy P. Greenhouse

> The question is no longer if or when, but only how we will tackle global warming…
>
> —Carl Pope, Executive Director, The Sierra Club

With congressional efforts to address climate change at a standstill and greenhouse gas (GHG) regulations still in their infancy, the frontline in the climate fight has shifted to the judicial branch. Plaintiffs in four high-profile lawsuits have asked courts to hold energy companies (including, in three of the four cases, Minneapolis-based Xcel Energy, Inc.) and other large emitters of GHGs directly responsible for harms allegedly caused by climate change. These actions seek injunctive relief and monetary damages—which some commentators claim will "make the tobacco pay-outs look like peanuts"[1]—under the age-old common law tort of public nuisance. One of these cases, *American Electric Power v. Connecticut*, is scheduled to be heard by the Supreme Court later this term. The threshold legal issues in dispute—standing, the political question doctrine, and displacement—speak to fundamental questions sure to loom large as the United States and the rest of the world come to terms with the implications of a hotter planet, including who should bear the cost of harms resulting from climate change.

Global Warming

The basics of global warming[2] are by now familiar. Certain gases in the earth's atmosphere function as the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. This naturally occurring "greenhouse effect" moderates temperatures at the earth's surface and enables life as we know it.[3] Adding more of a "greenhouse gas," such as carbon dioxide (CO_2), to the atmosphere intensifies the greenhouse effect, warming earth's climate. Scientists conclude this is precisely what has happened over the last half century, when a significant increase in atmospheric CO_2 concentrations coincided with a well-documented rise of average global temperature of about 1.5 degrees Fahrenheit. In 2007, the Intergovernmental Panel on Climate Change (IPCC) found this temperature increase was almost certainly the result of GHG emissions from human activities, which between 1970 and 2004 increased by 70 percent.[4] Anthropogenic emissions of CO_2 alone grew by about 80 percent, primarily from the burning of fossil fuels and land use change.[5]

Increasing the earth's temperature by even a degree or two has enormous—literally world-changing—ramifications. From melting polar ice and glaciers, rising sea levels, and extreme weather to food and water shortages, disappearing species, and alarming human health risks, the impacts of global warming are far-reaching and, most would agree, well underway. The IPCC concluded that without a dramatic reduction in man-made CO_2 emissions, the effects of climate change may be irreversible. IPCC chairman Rajendra Pachauri, speaking to reporters in 2007, said that "if there's no action before 2012, that's too late. What we do in the next two to three years will determine our future. This is the defining moment."[6]

Congressional Inaction

The United States Congress has hardly seized the moment. In June 2009 the House of Representatives passed sweeping legislation that would have established an emissions-trading program for GHGs and mandated reduction of American GHGs by 17 percent by 2020 and 83 percent by 2050. However, the controversial bill died in the Senate and the chances of further congressional action to address climate change in the near future appear slim. In the absence of legislation, the Environmental Protection Agency (EPA) has moved unilaterally to regulate GHGs. The agency acted swiftly, passing GHG standards for vehicle emissions, mandatory GHG reporting for large industrial facilities, and a "tailoring rule" to define which sources (starting January 2011) must have a federal air emissions permit for GHGs. EPA also agreed, under a December 2010 settlement with states and environmental groups, to promulgate GHG performance standards for fossil-fuel-fired power plants and refineries. Still, the future of EPA climate change regulations is far from certain. Newly elected Republican members of Congress have already introduced bills that would block or delay EPA's GHG regulations and overturn *Massachusetts v. EPA*, 549 U.S. 497 (2007) (*Massachusetts*), the landmark Supreme Court ruling establishing that GHGs are subject to the Clean Air Act.

A Public Nuisance

Faced with political gridlock on climate change, interested citizens are increasingly turning to the courts. Most climate change litigation has sought to compel government action under environmental statutes such as the Clean Air Act, the National Environmental Policy Act (as well as state law equivalents), and the Marine Mammal Protection Act. However, in the four public nuisance lawsuits discussed in this article, plaintiffs have gone a step further and asked the courts to hold energy companies and other large emitters of GHGs *directly responsible* for harms allegedly caused by climate change. These plaintiffs are not only asking the courts to award them financial compensation—the mind boggles at the potential scope of such damages—but also to impose limits on the corporations' GHG emissions.

The diverse circumstances behind the nuisance lawsuits are representative of the multifarious impacts of climate change. In *American Electric Power v. Connecticut*[7] (*AEP*), eight states, New York City, and several private land trusts brought a public nuisance action against six electric power companies operating fossil-fuel-fired power plants in 20 states, seeking an injunction to cap and then gradually reduce the defendants' CO_2 emissions. The *AEP* plaintiffs alleged that the defendants collectively emit 10 percent of America's anthropogenic GHGs, that these emissions contribute to climate change, and that climate change has caused injuries to plaintiffs and will continue to do so if not abated. Among the injuries alleged in the complaint is the reduction of California's mountain snowpack, the state's single largest source of freshwater, caused by warmer average temperatures. In 2009, the 2nd Circuit Court of Appeals reversed the district court and held the *AEP* plaintiffs' claims could go forward. The court found the action did not present nonjusticiable political questions, that the plaintiffs had standing, and that the claims had not been displaced by EPA regulation or congressional legislation. On December 6, 2010, the Supreme Court granted the defendant utilities' petition for certiorari, with Justice Sotomayor—who sat on the panel for the 2nd Circuit's decision—taking no part in the consideration of the petition.

California's melting snowpack was also at issue in *California v. General Motors Corp.*[8] (GM), a public nuisance action seeking only monetary damages brought by the state of California against several automobile manufacturers for

***Jeremy P. Greenhouse** is a founding partner of Greenhouse & Gram LLC in Minneapolis. He advises clients on a wide variety of environmental, energy and natural resources legal matters, including climate change and the Clean Air Act.*

the alleged contributions of their vehicles' CO_2 emissions to climate change impacts in the state. The U.S. District Court for the Northern District of California dismissed the suit on political-question grounds. California appealed to the 9th Circuit but dropped the appeal in June 2009.

The plaintiff in the third climate change nuisance case, *Native Village of Kivalina v. ExxonMobil Corp.*[9] (*Kivalina*), is a community of approximately 400 Inupiat Eskimos located some 70 miles north of the Arctic Circle on the southern tip of a razor-thin, six-mile-long barrier reef delineating the Northwest coast of Alaska. With rising global temperatures, the ice barrier insulating the village of Kivalina from coastal storm waves has been steadily shrinking. The resulting erosion, the plaintiff claims, has rendered the village uninhabitable, requiring its relocation to the Alaskan mainland at a cost of $95 million to $400 million. The village sued 24 oil, energy, and utility companies for these costs, alleging the defendants' excessive emission of GHGs contributed to global warming, caused the village's protective ice wall to melt, and forced the village to relocate. Under state and federal common law, the village argued, the defendants' actions constitute a private and public nuisance. As it did in the GM case, the U.S. District Court for the Northern District of California dismissed Kivalina's claims as presenting nonjusticiable political questions. It also concluded the village lacked standing. Kivalina's appeal to the 9th Circuit is pending.

Finally, in *Comer v. Murphy Oil USA*[10] (*Comer*), Mississippi property owners brought a putative class action against dozens of oil, coal, chemical, and utility companies for damages to their properties caused by Hurricane Katrina. The plaintiffs asserted state-law claims of public and private nuisance, alleging that Katrina was "fueled and intensified" by higher temperatures attributable to global warming, to which the defendants had contributed through their GHG emissions. As a result, plaintiffs alleged, the defendants should pay for the plaintiffs' Katrina-related damages. The district court dismissed the diversity action on political-question and standing grounds. In October 2009, a three-judge panel of the 5th Circuit reversed, holding that plaintiffs had standing and that the case did not present nonjusticiable political questions. However, in an odd procedural twist, after agreeing to hear en banc an appeal of the panel's ruling, the full 5th Circuit ended up dismissing the appeal altogether because one of the nine judges who granted the en banc review had since recused himself, depriving the court of a quorum and leaving the district court ruling intact. On January 10, 2011, the Supreme Court denied the plainitffs' petition for a writ of mandamus that would have required the 5th Circuit to hear the case.[11]

Key Issues

To be successful, the plaintiff in a climate change public nuisance case must ultimately prove that the defendants' GHG emissions constitute a public nuisance, which is defined as an "unreasonable interference with a right common to the general public."[12] However, the focus of the four lawsuits to date has not been on the merits of the nuisance claims but on three threshold legal issues regarding whether the claims may go forward: standing, the political question doctrine, and displacement.

Standing. The Supreme Court has explained that standing "is an essential and unchanging part of the case-or-controversy requirement of Article III,"[13] which asks whether the litigant is entitled to have the court decide the merits of the dispute. To establish standing, a plaintiff must demonstrate that (1) it has suffered an injury that is both "concrete and particularized" and "actual or imminent," (2) the injury is "fairly traceable" to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[14]

The climate change nuisance cases have focused on the second of these elements—whether the plaintiffs' alleged injuries can be "fairly traced" to the GHG emissions of the defendants. Whereas environmental harms in prior public nuisance cases could generally be directly traced to a discrete number of polluters, the chain of causation for climate change is far more attenuated. As the U.S. District Court for the Northern District of California in *Kivalina* put it: "emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders Kivalina vulnerable to erosion and deterioration resulting from winter storms."[15] The GHG emissions also come from literally innumerable sources. Under these circumstances, the *Kivalina* court concluded it was unfair to allow lawsuits against individual GHG emitters for damages that result from global climate change.

By contrast, the 2nd Circuit in *AEP* held that for purposes of standing, at the pleading stage of litigation, it was sufficient for the plaintiffs simply to allege a chain of causation. Although the defendants' GHG emissions may play only a small role in creating global warming, that alone does not defeat standing. Borrowing the "contribution" approach to standing causation associated with citizen suits under the Clean Water Act,[16] the *AEP* court held that the injuries may be "fairly traceable" to actions that simply *contribute* to global warming; such as defendants' GHG emissions. By finding that the climate change nuisance plaintiffs had standing and could proceed with their claims, *AEP*, in effect, concluded an individual emitter of GHG emissions could be found liable for harms caused by global warming.

Political Question. If standing addresses the question of who should pay the cost of harms resulting from climate change, the second threshold issue in the climate change nuisance cases addresses a related question: Who gets to decide? Under the "political question" doctrine, federal courts will refuse to hear a case if they find it presents an issue that the Constitution makes the sole responsibility of the legislative or executive branches. In *Baker v Carr*, 369 U.S. 186 (1962), the Supreme Court set out six indicators which "may describe a political question." The climate change nuisance cases have focused on two of these indicators: (1) whether it would be impossible for the court to resolve the cases without making "an initial policy determination of a kind clearly for nonjudicial discretion"; and (2) whether there is a "lack of judicially discoverable and manageable standards" for resolving the relevant issues.

A court must be able to resolve a dispute through legal and factual analysis without making a policy judgment of a legislative nature. In the *Kivalina* and GM cases, the U.S. District Court for the Northern District of California con-

cluded that nuisance claims based on climate change present political questions. According to the district court, the claims inherently require a fact-finder to balance the harm caused to plaintiffs by GHG emissions against the social utility of the defendant's conduct, introducing a plethora of policy decisions more appropriately made by Congress or the president. Unless and until these policy determinations are made, the court held that it could not adjudicate the plaintiffs' claims.

The *AEP* court, in contrast, saw no reason to invoke the political-question doctrine; resolution of the case before it would not require an initial policy determination. At their core, the 2nd Circuit held, the climate change nuisance cases are ordinary tort claims, which are rarely if ever thought to present political questions. Policy determinations underlying the well-settled principles of tort law and public nuisance obviate the need for any initial policy determination.

Inherent in the second *Baker* indicator of a political question—whether there is a "lack of judicially discoverable and manageable standards"—is the general principle that judicial action of federal courts must be governed by rule. "Judicially discoverable and manageable standards" provide a court the legal tools it needs to reach a principled, rational decision based upon reasoned distinctions. In finding that acceptable standards existed, the 2nd Circuit in *AEP* noted that for over a century federal courts have found suitable legal tools to adjudicate myriad complex and novel public nuisance cases involving environmental harm. Federal courts could apply the same tools to climate change nuisance cases. Furthermore, the court determined that the formulation of public nuisance in the *Restatement (Second) of Torts* provides sufficiently clear and well-settled rules to allow district courts make principled adjudications.

The U.S. District Court for the Northern District of California in *Kivalina* and GM sharply disagreed. It determined that the prior public nuisance decisions present such categorically different circumstances from climate change nuisance cases, on a scale unlike any prior environmental pollution dispute, that they cannot guide a court in reaching a rational resolution. Nor can the general equitable maxims of the *Restatement*'s "public nuisance" definition guide the court; the *Restatement*'s call for balancing the utility of GHG emissions against the plaintiffs' harm puts the court right back to making initial policy determinations better left for other branches of government.

Environmental Claims Under Minnesota Law

Although the court decisions in the four climate change nuisance cases focus on federal claims, all four actions also involved claims under state law, including state law nuisance, fraudulent enrichment, civil conspiracy, and others. In certain situations, state law—both common law and statutory—may offer global warming plaintiffs alternative paths to relief without some of the thorny threshold issues inherent in a public nuisance claim under federal common law. In Minnesota, for example, plaintiffs could consider asserting a claim for injunctive relief from injuries arising from climate change under the Minnesota Environmental Rights Act (MERA) in chapter 116B of the Minnesota Statutes.

Signed into law on June 7, 1971, by Gov. Wendell Anderson, the primary purpose of MERA is "to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction." MERA broadly and expressly provides standing to "any person residing in Minnesota" and authorizes a civil action to enjoin conduct that "materially adversely affects the environment." (emphasis added) The district court may grant declaratory and equitable relief, and impose conditions "necessary to protect natural resources." Notably, the act includes a long-arm statute, which gives the district court jurisdiction over any out-of-state corporation or individual that commits or threatens to commit any act, within or outside of the state, that would impair, pollute, or destroy natural resources located in Minnesota.

A Minnesota plaintiff asserting a MERA claim for adverse effects of climate change may be able to avoid some of the threshold issues proving so difficult for plaintiffs in the federal public nuisance cases. For example, the plaintiff would have standing under MERA merely by being a resident of Minnesota. The political question doctrine, to the extent it even applies, should not be an issue given that the legislature created MERA's causes of action. And displacement is not applicable to state law. A MERA plaintiff would still face the daunting task of actually proving the merits of its claim. And other problems could also emerge, including the possibility of preemption. Nonetheless, for Minnesota-based plaintiffs, MERA may present a path worth considering.

Displacement. The climate change nuisance cases have wrestled with a third threshold issue: whether the plaintiffs' public nuisance claims have been "displaced" by federal legislation. Displacement refers to a situation in which federal statutory law governs a question that was previously the subject of federal common law.[17] Federal common law is valid only to the extent it has not been usurped by federal legislative schemes that "speak directly" to a question and displace preexisting federal common law on the question. The availability of a federal common law cause of action, such as public nuisance, may change depending upon the federal laws in place at the time of the action.

For example, in 1972, the Supreme Court held that federal common law governed Illinois' public nuisance claim against the City of Milwaukee and other Wisconsin entities to stop them from discharging raw sewage into Lake Michigan.[18] Nine years later, after Congress amended the Clean Water Act and directed EPA to establish the comprehensive NPDES[19] permit program, the Court determined Congress had "occupied the field."[20] In so doing, Congress left "no room for courts to attempt to improve on that program with federal common law" and held that no common law remedy was available to Illinois.[21]

In the *AEP* case, the 2nd Circuit determined that federal statutory law had not yet displaced plaintiffs' federal common law public nuisance cause of action but made clear that, as in the *Milwaukee* cases, this situation could quickly change. The court noted that although *Massachusetts v. EPA* established EPA's authority to regulate GHGs as "pollutants" under the Clean Air Act, the agency had not yet done so. The court declined to speculate whether the hypothetical regulation of GHGs would "speak directly to the particular issue" raised by the plaintiffs.[22]

Of course, much has changed since the *AEP* decision. In response to *Massachusetts*, EPA introduced a flurry of regulations aimed at curbing GHG emissions from mobile and stationary sources. These regulations currently lack the comprehensive nature of the NPDES program discussed in the *Milwaukee* cases. Nonetheless, a court could well determine that EPA's emerging GHG regulations "speak directly" to the issues raised by the plaintiffs in the climate change nuisance cases and displace the underlying federal common law public nuisance cause of action.

Conclusion

When the Supreme Court takes up the *AEP* case this term, it will have the opportunity to answer the important question of whether individual GHG emitters may be sued directly in tort for damages resulting from climate change. A decision affirming the 2nd Circuit in *AEP* would have significant ramifications for utilities, auto manufacturers, and other large sources of GHGs, potentially opening the door for the type of mass tort actions associated with tobacco and asbestos litigation. By affirming the 2nd Circuit, the Supreme Court could also motivate Congress to enact comprehensive climate legislation, if for no other reason than to displace common law nuisance actions. And if the Court reaches the political-question issue, it could set important precedents regarding the division of authority between the courts and other branches of government on matters pertaining to climate change. In sum, resolution of the legal issues at stake in the public nuisance suits will provide fundamental guidance as the United States goes about deciding how to address what is likely to be the defining issue of the 21st Century: our changing climate. ▲

Notes

[1] "Climate Change Could Be Next Legal Battlefield," *The Financial Times* (07/14/2003) (quoting Peter Roderick, The Climate Justice Programme).

[2] Although the two terms are often used synonymously, "climate change" is broader than "global warming," referring to long-term changes in climate, including average temperature and precipitation.

[3] *See generally*, Intergovernmental Panel on Climate Change, "Summary for Policymakers," in *Climate Change 2007: The Physical Science Basis* (2007).

[4] Intergovernmental Panel on Climate Change, "Summary for Policymakers," in *Climate Change 2007: Synthesis Report* 5 (2007).

[5] *Id.*

[6] Thomas Friedman, *Hot, Flat and Crowded* (New York: Farrar, Straus & Giroux, 2008), p. 43.

[7] 582 F.3d 309 (2nd Cir. 2009).

[8] 2007 WL 2726871 (N.D. Cal. 2007).

[9] 663 F.Supp.2d 863 (N.D. Cal. 2009).

[10] *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009), *opinion vacated pending reh'g en banc*, 598 F.3d 208, *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

[11] *In re Comer, et al.*, No. 10-294 (docketed 08/30/2010).

[12] *Restatement (Second) of Torts* § 821(b)(1) (1979).

[13] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[14] *Id.* at 560-61.

[15] *Kivalina* at 876 (emphasis in original).

[16] *See, e.g., P.I.R.G. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).

[17] Displacement should not be confused with preemption, which addresses a situation where a federal statute supersedes state law.

[18] *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*).

[19] Section 402 of the CWA specifically requires EPA to develop and implement the "National Pollutant Discharge Elimination System" permit program, a comprehensive system of regulation making it illegal to discharge pollutants into the nation's waters without a permit.

[20] *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (*Milwaukee II*).

[21] *Id.* at 319. *See also Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding, shortly after *Milwaukee II*, that the Clean Water Act had displaced federal common law in the entire area of water pollution).

[22] *AEP* at 380.