Portfolio Media. Inc.| 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Regulating The Environment Through The Courts

Law360, New York (June 7, 2011) -- The recent Supreme Court argument in American Electric Power Company Inc., et al., v. Connecticut, et al. (AEP), has put the spotlight on the use of common-law public nuisance to regulate greenhouse gas emissions. But the case raises the much broader issue of whether setting environmental standards should be left to the expert agency, or whether courts should take on the responsibility of standard-setting in the context of common-law tort suits.

The proliferation of such lawsuits raises a number of concerns, such as whether lay judges are competent to set appropriate emissions standards taking into account all of the scientific and public policy concerns, and if so, whether regulated parties may be subject to conflicting standards imposed by different courts. While there is a place for litigation, the preferable route is to allow expert agencies to set regulations and enforce them.

Common Law as a Substitute for Environmental Regulation

Common-law torts, such as trespass and public or private nuisance, have been tools for addressing environmental concerns for well over a century. However, private and public parties are increasingly using them not only to obtain monetary damages for direct harms caused by the activities of others, but also to obtain injunctive relief mandating that the defendants comply with an environmental standard to be set by the court.

In April, the United States Supreme Court heard arguments in AEP. In that case, eight states and two private land trusts brought a nuisance suit against American Electric Power Company and other electricity generators, and asked the district court "to enjoin each Defendant to abate that nuisance first by capping carbon dioxide emissions and then by reducing emissions by a specified percentage each year for at least 10 years." Connecticut v. American Electric Power, 582 F.3d 309, 318 (2nd Cir. 2009), cert. granted, 2010 WL 4922905 (Dec. 6, 2010).

If the plaintiffs were to be successful in the lawsuit, the district court would be required to determine what the initial carbon dioxide emission cap should be for each defendant and how much emissions should be reduced thereafter.

This is not the only case employing the common-law tort of nuisance in asking a court to establish an environmental standard to which the defendants must adhere. Other recent examples include Tucker v. Southwestern Energy Co., E.D. Ark., No. 1:11-cv-00044, filed 5/17/11, North Carolina ex rel. Cooper v. TVA, 615 F.3d 291, 302 (4th Cir. 2010) and Holiday Shores Sanitary District v. Syngenta Crop Protection Inc., et al., Ill. Cir. Court, Madison County, No. 2004-L-000710, filed 2004.

The Tucker case is a putative class action that alleges hydraulic fracturing has caused water, air and noise pollution, which has devalued nearby properties. The lawsuit asserts several causes of action including nuisance, trespass and negligence. In Cooper, the state of North Carolina sought to mandate installation of emission controls at four power plants in Alabama, Kentucky and Tennessee on the theory of public nuisance. Likewise, Holiday Shores is a putative class action against Syngenta, manufacturer of the herbicide, atrazine, which alleges that runoff containing the herbicide creates a nuisance by contaminating nearby water sources, among other theories.

The Role of Courts

Before the advent of environmental regulatory programs, a common-law action based on nuisance was the primary tool by which a private party could seek redress for an environmental harm caused by another. A classic example is presented in Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904), which involved the release of smoke and soot from a smelter that landed on neighboring properties.

In this case, the neighboring property owners brought suit against the smelter to obtain an injunction against further operations. In general, to recover on theories of common-law private nuisance, a plaintiff must show that the defendant's conduct causes an unreasonable nontrespassory invasion of his interest in the private use and enjoyment of his land. Restatement (Second) of Torts § 821D. In such an action, a court's role is to decide if the plaintiff has proved his case, and if so to craft the proper remedy, which may consist of monetary damages or some form of injunctive relief.

The problem with addressing environmental harms through litigation, however, is that litigation often pushes courts into areas of inquiry for which they are ill-suited and ill-prepared as a whole. Environmental cases based on common-law torts are seldom simple when the cause of the alleged harm is readily identifiable and the liability can be easily allocated. Rather, they involve complex questions of law and fact requiring scientific evidence and the testimony of experts to rebut or make the necessary showing of causation.

These complex cases force judges, in the words of the late Chief Justice Rehnquist in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 601 (1993), to become "amateur scientists." Moreover, determining whether the environmental impacts of a certain activity constitute a nuisance will often require a court to make a policy decision concerning the proper balance between economic activity and environmental stewardship.

Balancing science and public policy does not necessarily fall within a court's core competence, which is to apply general laws to specific facts. Scientific inquiry, for instance, seeks "to discover the universals hiding among the particulars, [while] trial courts attempt to discover the particulars hiding among the universals." David L. Faigman, Legal Alchemy: The Use and Misuse of Science in the Law 69 (1999).

These problems are compounded by the increasingly complex scientific and policy-laden questions raised by modern environmental disputes. For instance, if a court were to decide the merits of the dispute raised in AEP, it would first have to determine the extent to which the defendants' emissions have contributed to global climate change.

This would require an evaluation of hundreds of studies from numerous scientific disciplines — meteorology, geology, biology, astronomy, chemistry, physics and statistics. Next, the court would have to determine what the optimum level of carbon dioxide emissions from these defendants are, given the nation's indisputable need for reliable sources of energy.

The Role of Regulatory Agencies

The establishment of environmental regulatory agencies at the federal and state level has given rise to bodies with the institutional competence to answer these questions. These expert agencies have been delegated the tasks of making scientific determinations concerning the environmental impacts caused by human activities, and making policy choices concerning how much those activities should be regulated in light of those impacts.

To ensure that executive branch regulatory agencies have all relevant information, and to provide a check on executive branch power, all federal environmental statutes provide for public participation in the regulatory process. For example, section 7004(b) of the federal Resource Conservation and Recovery Act (RCRA) requires the U.S.Environmental Protection Agency to provide for, encourage and assist public participation in the development of programs under the act. 42 U.S.C. 6974(b).

Federal statutes also provide for expert scientific bodies that can assist the agencies in their understanding of the scientific issues presented by a particular action. For instance, Section 109(d)(2) of the Clean Air Act establishes the Clean Air Scientific Advisory Committee, which provides independent advice to the EPA administrator on the technical bases for the EPA's national ambient air quality standards. 42 U.S.C. § 7409(d)(2).

Consequently, federal agencies are institutionally equipped to determine what an appropriate environmental standard is in light of all of the scientific and policy considerations. To the extent that a private party believes it is being harmed by another's violation of these standards, federal statutes have citizen-suit provisions.

RCRA section 7002, for instance, authorizes citizens to bring enforcement actions against potential or actual violators and against EPA in the federal district court system. 42 U.S.C. § 6972. Likewise, Section 505 of the federal Clean Water Act provides that any person who either is or might be adversely affected by any violation of the act has the right to file a citizen suit against the violator.

These citizen-suit provisions allow a plaintiff to seek injunctive relief against a violator, and require the violator to pay statutorily defined penalties to the United States government. Although these provisions would not provide a party with monetary compensation for any damage caused by a violation of an environmental standard (that would have to be obtained through a common-law tort action), the standard by which the allegedly violating party's actions are to be judged are set by the competent expert agency and not the courts.

Conclusion

Expert federal agencies are much better equipped to address the increasingly complex scientific and policy questions being raised in environmental law than are common-law courts, which must rely on the inherently "vague and indeterminate" standard found in nuisance law. City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

Nowhere is this more evident than in the AEP case, which would have a court decide the scientific validity of the plaintiffs' claims that the defendants' carbon dioxide emissions cause a nuisance by contributing to global climate change, and then determine what the appropriate level of each defendant's emissions should be. Such questions are best left to the competent federal agencies.

--By Charles H. Haake and Karyn B. Marsh, Gibson Dunn & Crutcher LLP

Charles Haake is of counsel with Gibson Dunn in the firm's Washington, D.C., office and a member of the firm's environmental litigation and mass tort practice group. He represents various segments of the automobile industry in litigation concerning greenhouse gas emissions and global warming issues, and submitted a brief on behalf of such clients in support of the petitioners in AEP.

Karyn Marsh is a staff attorney with the firm in the Washington office and a member of the environmental litigation and mass tort practice group, focusing on transactional matters and regulatory compliance.