Clearing the Air on Public Nuisance and Preemption: A Look at Climate-Change Litigation in Pa. and Beyond

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According to the United Nations, climate change "is the defining issue of our time." *https://www.un.org/en/global-issues/climate-change* (last visited July 28, 2025). Yet views diverge over precisely what the solutions to the issue should be—and who is authorized to pursue them. Over the years, efforts to address climate change have taken many forms, from international agreements to federal statutes to interstate compacts. As policies evolve, some state and local governments have begun exploring novel theories through existing doctrine—including the law of public nuisance—for a pathway to seek relief, through individual courts, for alleged climate?related harms. Several recent decisions, however, reveal that the legal landscape remains in flux, with courts charting different courses through the crosswinds of federal law.

Federal Common Law and the Displacement Doctrine

Despite the proclaimed extinction of "federal general common law" in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal common law still exists today in certain areas of national concern. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 410–421 (2011). One such area is the general subject of environmental law and, specifically, ambient or interstate air and water pollution. *Id.* Thus, federal common law can apply to transboundary pollution suits, and they are often based on a theory of public nuisance. Under federal common law, a public nuisance is defined as "unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1) (1979).

The right to assert a federal common-law public nuisance claim is not without limits, however. Where Congress has addressed a particular federal issue by statute, "there is no gap for federal common law to fill," and the federal common law—and any implied right of action arising thereunder—are displaced. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012). The test for whether congressional legislation displaces federal common law is "whether the statute speak[s] directly to [the] question at issue." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

In *American Electric Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410 (2011), the U.S. Supreme Court applied these displacement principles in the climate-litigation context. The *AEP* Court held that the Clean Air Act ("CAA"), and the Environmental Protection Agency ("EPA") action it authorizes, displace any federal-common law public nuisance abatement action involving greenhouse gas emissions, adding: "federal judges may [not] set limits on greenhouse gas emissions in [the] face of a law empowering [the] EPA to [do] the same." *Id.* at 424, 429. Similarly, in *Kivalina*, the Ninth Circuit Court of Appeals held that the CAA displaces any federal common-law public nuisance damage action concerning greenhouse gas emissions on field preemption grounds. In doing so, the Ninth Circuit determined that displacement of federal common law does not turn on the nature of the remedy, but on the cause of action itself. Notably, however, neither decision addresses whether the CAA preempts *state* common-law public nuisance claims.

State-Law Climate Claims in the Shadow of Federal Preemption

In the wake of *AEP*, several state and local governments have filed suits against fossil-fuel companies under state tort law seeking damages for the effects of global climate change, including, among others, the State of California, *People ex rel. Bonta v. ExxonMobil Corp.*, No. CGC-23-609134 (Cal. Super. Ct. S.F. Cnty.); the State of Delaware,

State ex rel. Jennings v. BP Am. Inc., No. N20C-09-097 MMJ CCLD, 2024 WL 98888 (Del. Super. Ct.); the State of Rhode Island, *State v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct.); the City of Baltimore, *Mayor & City Council of Balt. v. B.P. P.L.C.*, No. 24-C-18-004219 (Balt. Cir. Ct.); the City of New York, *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); the City and County of Honolulu, *City & County of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380-LWC (Haw. 1st Cir.); Boulder County, Colorado, *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 2018CV30349 (Colo. Dist. Ct.); and the New Jersey Attorney General, *Platkin v. ExxonMobil Corp.*, No. MER-L-001797-22 (N.J. Super. Ct.). Two distinct lines of authority have emerged from these efforts.

On one front are the courts that have rebuffed state-law tort claims as being preempted by federal law. In *City of New York*, the City instituted a state-law tort suit against five oil companies to recover damages caused by their production and sale of fossil fuels around the world. The Second Circuit Court of Appeals held that the CAA displaces the City's claims, concluding that "[a]rtful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions," and that "[s]uch a sprawling case is simply beyond the limits of state law." 993 F.3d at 91, 92, 96.

Several state courts have reached the same result. In *Jennings*, for example, the State of Delaware filed a state-law tort action against several fossil-fuel companies seeking damages, due to out-of-state or global greenhouse emissions and interstate pollution. The Delaware Superior Court held that the claims were preempted by the CAA and thus "beyond the limits of Delaware law." 2024 WL 98888, at *9. And in *Mayor & City Council of Baltimore*, the Circuit Court for Baltimore City rebuffed a similar suit against 25 national and international fossil-fuel companies, holding that "the Constitution's federal structure does not allow the application of state law claims like those presented by Baltimore," and that "[g]lobal pollution-based complaints were never intended by Congress to be handled by individual states." *Baltimore*, No. 24-C-18-004219, Mem. Op. & Order, *slip op.* at 11, 12.

A second set of decisions follow a different path. In *City & County of Honolulu v. Sunoco LP*, 537 P.3d 1173 (Haw. 2023), for instance, the Hawaii Supreme Court concluded that while the CAA had displaced federal common law, it did not preempt state-law tort claims, so the plaintiffs' public nuisance and other state-law tort claims against fossil-fuel producers could proceed. 537 P.3d at 1203, 1208. And just two months ago, the Colorado Supreme Court echoed that holding in allowing similar claims to proceed. *Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy USA, Inc.*, No. 24SA206, ___ P.3d ___, 2025 WL 1363355, at *6–8 (Colo. May 12, 2025). In reaching their decisions, both courts rejected the defendants' characterization of plaintiffs' claims as targeting emissions-producing activities, instead agreeing with the plaintiffs that, at bottom, their claims concerned deceptive marketing and failure to warn.

Climate-Change Litigation in Pennsylvania

That current of climate-change litigation has now found its way to Pennsylvania. In 2024, Bucks County filed suit against several fossil-fuel companies and a trade association, asserting claims for public nuisance, among others. Bucks County alleged that the defendants engaged in a decades-long campaign to "discredit the scientific consensus on climate change; create doubt in the numbers of consumers, the media, teachers, and the public about the climate change impacts of burning fossil fuels; and delay the energy economy's transition to a lower-carbon future." *Bucks County v. BP P.L.C.*, No. 2024-01836, Compl. ¶ 1 (Bucks Cnty. Ct. Com. Pl.). Per the complaint, this purported campaign "drove up greenhouse gas emissions, accelerated global warming, and brought about devastating climate change impacts to Bucks County." *Id.* The defendants responded by filing preliminary objections on various grounds, including federal preemption.

The trial court sustained the preliminary objections, holding "today we join a growing chorus of state and federal courts across the United States, singing from the same hymnal, in concluding that the claims raised by Bucks County are not judiciable by any state court in Pennsylvania" and are "solely within the province of federal law." *Bucks County*, No. 2024-0183, Decision & Order, *slip op.* at 11, 15. In reaching that conclusion, the court relied upon the holding in *AEP*, even though the Supreme Court had expressly acknowledged that none of the parties briefed preemption or otherwise addressed the availability of state-law nuisance claims. The trial court thus found that the CAA "preempts Pennsylvania State law in this case." *Id.* at 13.

The trial court rejected Bucks County's argument that its case "does not seek to regulate or abate [greenhouse gas] emissions" but instead involves "Defendants' deceptive marketing campaign." *Bucks County*, No. 2024-0183, Pl.'s Br. in Resp. to Defs.' Joint Opening Br. at 1–2. The court noted that Bucks County's complaint used the word "emissions" more than 100 times; its counsel conceded at oral argument that advertising, production, transportation, and sale of the defendants' fossil fuel products did not harm the County; and according to its counsel, it is the combination of current emissions and emissions from many years ago that caused the alleged damages to Bucks

County. Citing *City of New York*, the court reasoned that "artful pleading cannot transform [Bucks County's] Complaint into anything other than a suit over global greenhouse gas emissions." *Bucks County*, No. 2024-0183, Decision & Order, *slip op.* at 14.

The trial court concluded by writing: "[O]ur federal structure does not allow Pennsylvania law, or any State's law, to address the claims raised in Bucks County's Complaint. … Thus, this court lacks subject matter jurisdiction because the claims raised by Bucks County are preempted by federal law." *Id.* at 16.

What's Next?

Bucks County appealed to the Pennsylvania Superior Court on June 13, 2025. Although a briefing schedule has not yet been issued, it is anticipated that merits briefing will conclude before the end of the year, with oral argument to follow. However the Superior Court rules, its decision may help to clear the air on what role state law has to play—if any—in climate-related nuisance litigation.

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