No. 09-17490
Calendared for Oral Argument on November 28, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA; CITY OF KIVALINA,

Plaintiffs-Appellants,

v.

EXXONMOBILE CORPORATION; BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A., INC.; CONOCOPHILLIPS CORPORATION; THE AES CORPORATION; AMERICAN ELECTRIC POWER COMPANY, INC.; AMERICAN ELECTRIC POWER SERVICES CORPORATION; DUKE ENERGY CORPORATION; DTE ENERGY COMPANY; EDISON INTERNATIONAL; MIDAMERICAN ENERGY HOLDINGS COMPANY; PINNACLE WEST CAPITAL CORPORATION; THE SOUTHERN COMPANY; DYNEGY HOLDINGS, INC.; RELIANT ENERGY, INC.; XCEL ENERGY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
The Honorable Saundra Brown Armstrong
District Court Case No. 08-cv-01138 SBA

APPELLANTS' SUPPLEMENTAL BRIEF ON *AEP v. CONNECTICUT*

Brent Newell
CENTER ON RACE, POVERTY & THE ENVIRONMENT
47 Kearny Street, Suite 804
San Francisco, CA 94108
Telephone: (415) 346-4179

Matthew F. Pawa
PAWA LAW GROUP, P.C.
1280 Centre Street, Suite 230
Newton Centre, MA 02459
Telephone: (617) 641-9550

Attorneys for Plaintiffs-Appellants (add'l counsel listed in signature block)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Other Authorities

Kivalina files this supplemental brief to address *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*").[1]

Kivalina first addresses how *AEP* affects issues in this appeal other than displacement. It then addresses the question *AEP* left open – whether the Clean Air Act ("CAA") and the EPA actions it authorizes displace a federal common law nuisance suit for damages.[2]

I. The Supreme Court's Decision in *AEP*.

AEP left intact much of the Second Circuit's analysis of issues raised in this appeal: political question, standing (by an equally divided Court), 131 S. Ct. at 2535 & n.6, and whether interstate pollution can give rise to a federal nuisance claim, *id.* at 2535-38.

Additionally, in an implicit rejection of defendants' argument here that the

---

[1] The abbreviations referencing appellees' briefs are the same as in Kivalina's prior briefs.

[2] *AEP* also left open the question of *state* common-law nuisance suits addressing greenhouse gas ("GHG") emissions. *AEP*, 131 S. Ct. at 2540. As defendants recognize, OCB at 19, Kivalina's state common law nuisance claims are not before this Court because the district court dismissed them without prejudice to re-filing in state court. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863, 882-83 (N.D. Cal. 2009). Under *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), Kivalina pled its state law claims in the alternative in order to preserve them against a *res judicata* argument in any subsequent state court proceedings.

federal common law of nuisance applies only to "simple," "discrete," or "nearby" nuisances (*see, e.g.*, UB at 45, OCB at 27, 69), the Supreme Court stated:

> [W]e have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances, *Missouri* [*v. Illinois*], 200 U.S. [496] at 522 [1906] (adjudicating claim though it did not concern "nuisance of the simple kind that was known to the older common law"); *see also D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("federal courts are free to apply the traditional common-law technique of decision" when fashioning federal common law.).

131 S. Ct. at 2536-37.

Further, although *AEP* did not decide whether the plaintiffs had a claim under the federal common law of nuisance, it declined the petitioners' invitation to disavow *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"):

> Environmental protection is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law. As the Court stated in *Milwaukee I*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law."

AEP, 131 S. Ct. at 2535 (internal quotation marks and citations omitted). Defendants' similar attempt here to question whether *Milwaukee I* remains good law, *see* UB at 45, thus fails in light of *AEP*.

Finally, the Court observed that, in order to give content to federal law in this area, the federal courts should refrain from devising new rules of decision *ab*

initio when there is a ready-made body of state-law decisional rules at hand:

> Recognition that a subject is meet for federal law governance, however, does not necessarily mean that federal courts should create the controlling law. Absent a demonstrated need for a federal rule of decision, the Court has taken the prudent course of adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.

Id. at 2536 (internal quotation marks and citations omitted). Kivalina has urged that this Court do just that by drawing upon on state law decisions and the Restatement.

II. *AEP's* Displacement Holding Does Not Extend to a Federal Common Law Nuisance Claim for Damages.

The *AEP* displacement holding was expressly limited to injunctive relief claims seeking abatement of the nuisance. "We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right *to seek abatement of carbon-dioxide emissions* from fossil-fuel fired power plants." 131 S. Ct. at 2537 (emphasis added). *AEP* emphasized the critical fact that the CAA empowered EPA to grant exactly the relief plaintiffs sought. "The Second Circuit erred, we hold, in ruling that federal judges may *set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits*. . . ." *Id*. at 2540 (emphasis added). "The [CAA] itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants – *the same relief the*

plaintiffs seek by invoking federal common law. We see no room for a parallel track." *Id.* at 2538 (emphases added).

The *AEP* displacement analysis by its own terms does not apply here. Kivalina does not seek to set emissions caps. It seeks damages. This is a distinction with a difference for two reasons. First, the CAA lacks any parallel damages remedy for air pollution victims. The *AEP* court recognized that remedies are at the heart of the displacement inquiry: it cites *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985), for the basic proposition that the "reach of remedial provisions is important to [the] determination [of] whether [a] statute displaces federal common law." *AEP*, 131 S. Ct. at 2538.[3]

Second, as set forth in Kivalina's prior briefs, *see* Br. at 24-26, the substance of a public nuisance claim for damages fundamentally differs from the substance of a public nuisance claim for injunctive relief. As the Restatement points out:

> There are numerous differences between an action for tort damages and an action for injunction or abatement, and precedents for the two are by no means interchangeable. In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to

[3] In *Oneida,* the Supreme Court found no displacement because, although the statute provided for Executive Branch action to remove illegal occupants of native lands, it did "not speak directly to the question of *remedies* for unlawful conveyances of Indian land." 470 U.S. at 237 (emphasis added).

> inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

Restatement (Second) of Torts § 821(B) cmt. i (1979). Similarly:

> The process of comparing the general utility of the activity with the harm suffered as a result is adequate if the suit is for an injunction prohibiting the activity. But it may sometimes be incomplete and therefore inappropriate when the suit is for compensation for the harm imposed. The action for damages does not seek to stop the activity; it seeks instead to place on the activity the cost of compensating for the harm it causes.

Id. § 826 cmt. f (1979).[4]

Thus, in a public nuisance claim, the difference in the remedy affects the nature of the claim itself. In an injunction case like *AEP*, the question is whether the activity is so unreasonable that it must be stopped or curtailed, which, as the Supreme Court noted in *AEP*, would require federal judges to "determine, in the first instance, what amount of carbon-dioxide emissions is 'unreasonable,' and then decide what level of reduction is 'practical, feasible, and economically viable.'" *AEP*, 131 S. Ct. at 2540 (citations omitted). Kivalina's suit requires no such

[4] Kivalina is thus not seeking to "sever remedies from their causes of action" for displacement purposes, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008). Rather, the cause of action Kivalina pursues is substantively different from the cause of action in *AEP*.

inquiry. In a damages case like Kivalina's, the question is whether the *harm* is of sufficient severity that – even if it has great social utility – the defendant must still compensate the plaintiff. *See* Br. at 50-51; Reply Br. at 3-4; Restatement (Second) of Torts § 829A (1979). A court need not engage in the sort of inquiry that so troubled the Supreme Court in *AEP*; it will adjudicate this case under a different set of principles.

In *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 n.7 (2008), the Supreme Court recently affirmed that "private claims for economic injury" under federal law survive a statute that displaces injunctive claims. The *Exxon Shipping* defendants, relying on *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II")*, and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), argued that plaintiffs' punitive damages claims were displaced. The Supreme Court disagreed, expressly limiting *Milwaukee II* and *Sea Clammers* to situations where the plaintiffs sought different effluent standards from those set by the CWA, which threatened the attainment of the CWA's regulatory goals:

> [T]his case differs from [*Sea Clammers* and *Milwaukee II*] where plaintiffs' common law nuisance claims amounted to *arguments for effluent-discharge standards different from those provided by the CWA*. Here, [plaintiff's] *private claims for economic injury* do not

> threaten *similar interference* with federal regulatory goals with respect to "water," "shorelines," or "natural resources."

Exxon Shipping, 554 U.S. at 489 n.7 (emphases added). The Supreme Court thus held federal maritime law claims for punitive damages were not displaced; there was "no clear indication of congressional intent to occupy the entire field of pollution remedies . . . nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme." *Id.* at 2619.[5]

AEP analyzed the displacement question in the same terms. The *AEP* plaintiffs were effectively asking federal judges to make the very same decisions EPA could make under the CAA. "The [CAA] itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants – the same relief the plaintiffs seek by invoking federal common law," *AEP*, 131 S. Ct. at 2538. That is not the situation here: the CAA has no parallel remedy of damages for economic injury, nor would pollution victims' ability to sue for damages disrupt EPA's ability to set emissions caps.

---

[5] Defendants cannot distinguish *Exxon Shipping* on the ground that it involved federal maritime law. *See United States v. Texas*, 507 U.S. 529, 534 (1993) (rejecting "a distinction between general federal common law and federal maritime law" with respect to presumption against preemption and in favor of retaining existing federal common law); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (maritime law is "a species of judge-made federal common law").

At bottom, the displacement analysis is one of congressional intent. *See* Br. at 38-39. Defendants cannot identify anything in the CAA that suggests Congress intended to eliminate the common law rights of interstate air pollution victims to sue for damages under federal nuisance law. Now that *Exxon Shipping* has limited *Sea Clammers*, there is no basis for arguing that all damages claims are displaced just because certain injunction claims are. As the Supreme Court stated in *Exxon Shipping*: "we find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals." *Exxon Shipping*, 554 U.S. at 488-89. Substitute "air" for "water" and "shorelines" and we have this case. It is absurd to think that Congress intended the CAA to eliminate air pollution victims' common-law right to sue for damages.

Dated: November 4, 2011

Respectfully submitted,

PAWA LAW GROUP, P.C.

/S/ Matthew F. Pawa
Matthew F. Pawa
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550 · (617) 641-9551 (fax)
E-mail: mp@pawalaw.com

CENTER ON RACE, POVERTY & THE ENVIRONMENT

/S/ Brent Newell
Brent Newell
47 Kearny Street, Suite 804
San Francisco, CA 94108
(415) 346-4179 · (415) 346-4179 (fax)
E-mail: bnewell@crpe-ej.org

/S/ Steve Berman

Steve W. Berman
Barbara Mahoney
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
(206) 623-7292 · (206) 623-0594 (fax)
E-mail: steve@hbsslaw.com

/S/ Gary Mason

Gary E. Mason
Khushi Desai
THE MASON LAW FIRM LLP
1225 19th Street, NW, Suite 500
Washington, DC 20036
(202) 429-2290 · (202) 429-2294 (fax)
E-mail: gmason@masonlawdc.com

/S/ Reed R. Kathrein

Reed R. Kathrein (State Bar No. 139304)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
(510) 725-3000 · (510) 725-3001 (fax)
E-mail: reed@hbsslaw.com

/S/ Heather Kendall-Miller

Heather Kendall-Miller
NATIVE AMERICAN RIGHTS FUND
801 B Street Suite 401
Anchorage, AK 99501
(907) 257-0505

/S/ Dennis Reich

Dennis Reich
REICH & BINSTOCK
4625 San Felipe, Suite 1000
Houston, TX 77027
E-mail: dreich@reichandbinstock.com

/S/ Christopher A. Seeger

Christopher A. Seeger
Stephen A. Weiss
James A. O'Brien, III
SEEGER WEISS LLP
One William Street
New York, NY 10004
(212) 584-0700 · (212) 584-0799 (fax)
E-mail: sweiss@seegerweiss.com

/S/ Steve Susman

Stephen D. Susman
H. Lee Godfrey
Eric J. Mayer
SUSMAN GODFREY L.L.P.
1000 Louisiana St., Suite 5100
Houston, Texas 77002
(713) 651-9366 · (713) 654-6666 (fax)

/S/ Drew D. Hansen

Drew D. Hansen
SUSMAN GODFREY L.L.P.
1201 Third Ave., Suite 3800
Seattle, Washington 98101
(206) 516-3880 · (206) 516-3883 (fax)

Attorneys for Plaintiffs
NATIVE VILLAGE OF KIVALINA
And CITY OF KIVALINA

/S/ Terrell W. Oxford

Terrell W. Oxford
SUSMAN GODFREY L.L.P.
901 Main St., Suite 5100
Dallas, Texas 75202
(214) 754-1900 · (214) 754-1950 (fax)

/S/ Marc M. Seltzer

Marc M. Seltzer
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
(310) 789-3100 · (310) 789-3150 (fax)

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD LIMIT REQUIREMENTS

The foregoing supplemental brief is proportionately spaced, has a typeface of 14-point plain, roman style font, and is 1,935 words, including footnotes, headings and quotations.

/s/ Matthew F. Pawa
Matthew F. Pawa

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 4, 2011, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. The following counsel has agreed to accept service through his co-counsel, who are registered CM/ECF users: Paul E. Gutermann.

/s/ Matthew F. Pawa
Matthew F. Pawa