March 24, 2020

VIA ECF

Catherine O’Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re:   City of New York v. BP P.L.C., et al., No. 18-2188

Dear Ms. Wolfe:

Defendant-Appellee Chevron writes in response to Plaintiff-Appellant’s March 6, 2020 letter regarding the Supreme Court’s decision in Rodriguez v. FDIC, 140 S. Ct. 713 (2020). Contrary to Plaintiff’s assertions, Rodriguez supports the district court’s conclusion that federal common law governs this dispute.

In Rodriguez, the Supreme Court acknowledged that “areas exist in which federal judges may appropriately craft the rule of decision,” but declined to “claim a new area for common lawmaking” with respect to tax refund allocation. Id. at 717. As the Court explained, a new area of federal common law will be recognized only where “necessary to protect uniquely federal interests,” id., and no such interests exist concerning “how a consolidated corporate tax refund … is distributed among group members,” id. at 718.

Unlike Rodriguez, this case does not ask the Court to recognize a “new area” for federal common lawmaking. Rather, it is well established that federal common law governs cases concerning “air and water in their ambient or interstate aspects.” Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972); see also Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 421 (2011) (“Environmental protection is undoubtedly an area … in which federal courts may … fashion federal law.”); Int’l Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987) (“[I]nterstate water pollution is a matter of federal, not state, law.”). And while Plaintiff contends “there is no uniquely federal interest in the specific topic” here, Dkt. 248 at 2 (emphasis added)—namely, “local harms resulting from fossil-fuel production,” id.—the district court rightly rejected this argument. “[R]egardless of the manner in which the City frames its claims,” the district court correctly reasoned, it “is seeking damages for global-
warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants’ fossil fuels,” Dkt. 153 at 12. If such conduct could be regulated by a patchwork of 50 states’ laws, the federal government would be effectively precluded from speaking with one voice on the inherently global issue of climate change.

Sincerely,

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous Jr.
GIBSON, DUNN & CRUTCHER LLP
Counsel for Defendant-Appellee Chevron Corporation

cc: All counsel of record (via ECF)