



Ayres Law Group

Air & Energy Policy Alert

July 6, 2011

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The Supreme Court: Clean Air Act Displaces Federal Nuisance Law

In *American Electric Power Co. v. Connecticut*, the Supreme Court held that the Clean Air Act supplanted federal nuisance law as the authority for regulating greenhouse gas (GHG) emissions. The Court reasoned that a federal common law claim does not lie where, as here, a federal statute “speaks directly” to the issue in question. The June 20, 2011 ruling was consistent with the tenor of the Justices’ questions at the case’s oral argument earlier this spring (analyzed in our [April policy alert](#)). The opinion reaffirms EPA’s authority to regulate GHG emissions under the Clean Air Act (CAA), but leaves the door open for future litigation over damages from climate change-induced harms.

Background

In 2004, before the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and prior to EPA’s 2009 endangerment finding and subsequent GHG rulemakings, the plaintiffs (several states, New York City, and three nonprofit land trusts) brought this case in the Federal District Court for the Southern District of New York against five large electric generating companies (Petitioners here). *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The defendant companies are the nation’s largest industrial emitters of GHGs, with collective annual emissions of 650 million metric tons of CO₂, constituting 25% of the emissions from the domestic electric power sector.

In the case before the district court, the plaintiffs alleged that the companies’ emissions gave rise to a nuisance tort claim under federal—or, in the alternative, state—common law. Plaintiffs requested an injunction to place a cap on carbon dioxide emissions—to be reduced annually—for each company.



The district court dismissed the claims as non-justiciable political questions. On appeal, the Second Circuit reversed, reasoning in part that federal common law was not displaced in this instance because no federal statute or administrative regulation spoke directly to the particular issue raised by the plaintiffs: whether stationary sources are required to control greenhouse gas emissions.

Federal Common Law Displaced

The Supreme Court rejected the Second Circuit’s reasoning in an 8-0 ruling. Citing *Mobil Oil Corp v. Higginbotham*, 436 U. S. 618, 625 (1978), the Court articulated the test for determining whether legislation displaces federal common law as “simply whether a statute ‘speak[s] directly to [the] question’ at issue.” The Court held that Congress, through the CAA, clearly directed EPA to regulate GHG emissions from coal-fired power plants, and therefore that the CAA—and the EPA actions it authorizes with respect to GHG emissions—precludes the plaintiffs’ federal common law claims.

Furthermore, the Court supported its position with the argument that the CAA provided the redress sought by the plaintiffs. This line of reasoning could leave open the possibility of a federal court entertaining a nuisance suit for damages—a remedy a plaintiff could not obtain through the CAA. On this point, one case to watch is [Kivalina v. ExxonMobil Corp.](#), which involves a lawsuit brought by an Alaskan village against a number of companies for monetary damages due to the effects of climate change on their village. An appeal in *Kivalina* was filed with the Ninth Circuit Court of Appeals in November 2009.

As additional support for its position, the Court also emphasized that the CAA directs EPA to set limits on carbon dioxide emissions from power plants under 42 U.S.C. §7411 (CAA §111). The Court indicated that if plaintiffs are unsatisfied with EPA’s performance of its duties under the CAA, they may seek review in the D.C. Circuit, and, ultimately, in the Supreme Court. By hinging its ruling on EPA’s regulation of GHGs, the Court went well beyond *Massachusetts v. EPA*, which held merely that GHGs were “air pollutants” potentially subject to the CAA.

Implications

Effect On Current and Future GHG Litigation

EPA Rule Challenges



The Supreme Court's clear restatement of EPA's authority to regulate GHGs under the CAA will undoubtedly bear upon the pending suits against EPA's GHG rules (*see, e.g., Coalition for Responsible Regulation, Inc., et al. v. EPA*, D.C. Circuit, No. 10-1092 and consolidated cases). The challenges currently before the D.C. Circuit rest on claims that EPA overstepped the bounds of the CAA when it adopted various GHG-related regulations. But given the Supreme Court's emphatic reiteration of EPA's authority to regulate GHG emissions under the CAA, the D.C. Circuit will be hard-pressed to strike down EPA's rules on those grounds.

Standing

The Court also affirmed (albeit by a 4-4 vote) the Second Circuit's holding that all of the plaintiffs had standing. The Second Circuit held that not just states, but also private landowners, had standing to bring a federal nuisance claim to abate greenhouse gas emissions. This appears to open the courthouse door to private landowners in a way that *Massachusetts v. EPA*, which highlighted Massachusetts's quasi-sovereign interests, did not.

State Law Nuisance Claims

The Court left open for consideration on remand the availability of a state nuisance lawsuit. The Court stated that, in light of its holding that "the Clean Air Act displaces federal common law," the availability of a state tort lawsuit "depends, inter alia, on the preemptive effect of the federal act"—an issue that was not before the Supreme Court in this case.

Supreme Court review of state nuisance claims involves an entirely different slate of issues than those addressed in *AEP v. Connecticut*. In the latter, the central issue was whether federal court jurisdiction is removed by a statute that covers the same subject. By contrast, in a case involving state nuisance law, the issue is federalism—the distribution of power between the federal and state governments. With respect to federal preemption, the Supreme Court has more often than not protected the rights of states. The Supreme Court has upheld state nuisance law cases against out-of-state defendants, if properly plead based on the nuisance law of the defendant's state.

International Paper Co. v. Ouellette, 479 U.S. 481 (1987).

In federalism cases, the Supreme Court has tended to require very clear preemption by Congress—and in the Clean Air Act, Congress stated plainly that it did not intend to preempt state laws that were more stringent than the CAA, or any other causes of action not included in the CAA (Section 116).



Effect on Prospective Legislation Regarding EPA's CAA Authority

The Court's decision does not address whether the possibility of a federal common law remedy would be revived if Congress were to pass legislation repealing or severely limiting EPA's CAA authority to regulate GHGs. Ironically, as we noted in April, some of the companies arguing that CAA regulation has displaced federal common law are deeply involved in efforts to pass legislation that would repeal the CAA's authority to regulate GHGs.

The opinion in this case stands squarely on the shoulders of the CAA's clear language directing EPA to regulate "any air pollutant," which the Court has said includes GHG emissions. Should Congress decide to modify that language in a way that removes EPA's authority, the Court's decision would appear to leave the door open to federal nuisance claims for GHG emissions.

To view and download the Court's opinion, [click here](#).