



Ayres Law Group

Air & Energy Policy Alert

April 28, 2011

www.ayreslawgroup.com

Richard Ayres
ayresr@ayreslawgroup.com
202 452 9200

Jessica Olson
olsonj@ayreslawgroup.com
202 452 9211

Kristin Hines
hinesk@ayreslawgroup.com
202 452 9222

AEP v. Connecticut

The Supreme Court Hears Argument on Whether Federal Nuisance Law Can be Used to Cut Emissions of Greenhouse Gases

Nuisance, that hoary medieval cause of action, could accurately be described as the first environmental law. The question before the Supreme Court on April 21st was whether the oldest environmental law could be used to address the newest – and perhaps greatest – threat to the biosphere. We attended the oral argument of the case before the Supreme Court last week and have some first-hand observations.

Background

Impatient with the inaction of the federal government on climate change, a number of states, including Connecticut, brought a case in federal court in 2004 against six large electric generating companies, the nation's largest industrial emitters of greenhouse gases (GHG). The states' legal theory was that the power companies were creating a federal common law nuisance in the states by the unreasonable emissions of GHGs from their generating plants. The states asked only for an injunction, not damages or other relief.

The U.S. District Court for the Southern District of New York granted the power companies' motion to dismiss on the grounds that the states' nuisance claims presented a non-justiciable political question. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

But in 2009, the U.S. Court of Appeals for the Second Circuit reversed. *Am. Elec. Power Co. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009). The Second Circuit held that a federal common law remedy in nuisance was



available to address emissions responsible for global warming. Citing *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Second Circuit said that, since Congress had adopted no law to regulate such emissions, a state could still avail itself of federal common law as a remedy. *AEP*, 582 F.3d at 119.

Oral Argument

Before the Court, the power companies were joined by the Obama Administration in arguing that federal statutory law had displaced federal common law in the area. The government and the power companies also argued that the Court should use the prudential standing doctrine to bar the courthouse door against a federal nuisance claim.

In support of their position that federal nuisance had been displaced, the government and the power companies pointed to *Massachusetts v. EPA*, the Supreme Court's own 2007 decision that held that GHG emissions were "air pollutants" subject to regulation under the Clean Air Act (CAA). *Massachusetts v. EPA*, 549 U.S. 497 (2007). In addition, they argued that EPA had in fact exercised its authority to regulate GHGs: since the Obama Administration came to power, EPA has issued the "endangerment" finding that triggers regulation, and promulgated regulations that (1) require reporting of GHG emissions by industries; (2) identify the size of industrial units subject to "New Source Review" for emissions of GHGs; and (3) regulate GHG emissions from motor vehicles.

At oral argument, the Supreme Court divided its attention about equally between the standing and nuisance arguments. Justice Scalia, leading the conservative wing of the Court, pressed the government and power company lawyers on why the court should not decide the case on constitutional standing, rather than the prudential standing doctrine. Scalia's point was a direct challenge to Justice Kennedy's view, expressed in the *Massachusetts v. EPA* case, that states have special interests and may have standing to raise issues such as the damages they would suffer from global warming that might not be available to private litigants. Perhaps in deference to Justice Kennedy, U.S. Solicitor General Neal Katyal did not agree with Justice Scalia, although the power company's advocate took Justice Scalia's invitation to argue that the Court could decide the case on constitutional, as well as prudential, standing.

At times the argument over standing took a turn towards a different doctrine used by the district court below and often used by the Supreme Court to avoid far-reaching decisions: the political question doctrine. Prior to *Baker v. Carr*, 369 U.S. 186 (1962), the Court routinely characterized issues of voting rights and civil rights as "political questions" outside the purview of the Court. This nuisance case could potentially revive that disfavored doctrine if Justice Kennedy's view on standing is maintained and the Court chooses to avoid deciding the nuisance issue.



Based on the oral argument, however, that does not seem likely. The Court's conservative wing (Justices Roberts, Scalia, Alito, and Thomas) seemed to have little sympathy for either of the states' arguments on nuisance: (1) that if the federal courts were closed to nuisance claims plaintiffs would be forced to resort to nuisance litigation in state courts; and (2) that a nuisance action in federal court should not be foreclosed when the federal Executive Branch has not moved to regulate emissions of GHGs from industrial sources such as electric power generators.

The remaining four justices (Justice Sotomayor recused herself because of her participation in the decision below) showed much less interest the standing question, but were only slightly more receptive to the argument offered by Barbara Underwood, the New York Solicitor General, that the Clean Air Act had not displaced the federal common law cause of action. Justice Ginsburg seemed to accept the argument that a court was ill-suited to carry out the balancing exercise required to determine what level of emissions was "reasonable," as required in a common law nuisance action. Justice Breyer expressed similar skepticism, questioning Ms. Underwood whether a federal court sitting in equity could impose a tax of \$20/ton of carbon if it felt such a tax was the most efficient, least expensive means to address the nuisance. Only Justice Kagan seemed to come to the argument with an open mind.

In light of the actions EPA has undertaken since the Obama Administration came into power, the states were forced to argue that Congress could not displace federal common law merely by granting authority to a federal agency to regulate in an area, or even by the exercise of that authority, so long as EPA had not actually taken steps to regulate the air pollution sources that were the subject of the nuisance litigation. Thus, EPA's regulations on GHG emissions from motor vehicles did not, in the states' view, displace the courts' jurisdiction to implement federal common law remedies against electric power producers.

Stakes Ignored

Perhaps the most striking thing about the argument before the Supreme Court was the way the Justices treated the issue: as another rather dry and tedious argument about standing and the displacement of federal nuisance law by statute. None acknowledged even indirectly the dire predictions of the effects of global warming that issue regularly from the world's scientific community. And none even alluded to the effect their decision would almost certainly have on whether Congress considers legislation on global warming in the foreseeable future.

Also ignored by the Justices and the parties, though hanging over the argument, was the irony that some of the same companies arguing that CAA regulation had displaced federal common law are deeply involved in trying to pass legislation that would repeal the CAA's authority to regulate GHGs.



Should the Justices agree with them and rule that the CAA has displaced federal common law in this area, it is an interesting question whether, if the power companies were to succeed in having Congress repeal EPA's CAA authority to regulate GHGs, a common law remedy would be revived.

FOR ADDITIONAL INFORMATION

The Ayres Law Group represents a broad array of clients in the public and private sectors in high-stakes clean air law and policy matters. ALG uses its extensive experience in the legislative, administrative, and federal judicial process to solve clients' problems. We closely monitor developments in Congress and the Executive Branch with respect to air pollution control, climate change, and energy. If you would like more information about how we can help your organization in any of these areas, please contact us at (202) 452-9200 or ayresr@ayreslawgroup.com.