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## Supreme Court Rejects Nuisance Suits under Federal Law for Greenhouse Gas Emissions

In a much-anticipated decision, the U.S. Supreme Court has dealt a major blow to those seeking to regulate greenhouse gas emissions through lawsuits claiming "public nuisance" under federal tort law. In an 8-0 decision in *American Electric Power Co. v. Connecticut (AEP)* (June 20, 2011), the Court held that the Clean Air Act displaces federal common law suits concerning greenhouse gasses (GHGs). In doing so, the Court widely credits the scientific, economic, and technological resources of the Environmental Protection Agency (EPA) and other federal authorities to better evaluate and determine the complex issues presented by global warming.

### BACKGROUND: NUISANCE SUIT AGAINST GHG EMITTERS

The *AEP* case began in 2004 when several states, a city, and three private land trusts sued five large electric power companies in federal district court in New York. According to the plaintiffs, the defendants' collective annual emissions of 650 million tons of carbon dioxide constitute 2.5 percent of global anthropogenic GHG emissions and 25 percent of GHG emissions from the electric power sector in the United States. Plaintiffs alleged that defendants' emissions have contributed to climate change, which poses a risk to public lands, infrastructure, public health, and wildlife habitat. The plaintiffs did not seek money damages but rather sought an injunction requiring each defendant to "cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." Importantly, the complaint predated the Supreme Court's 2007 ruling in *Massachusetts v. EPA*, in which the Court held that GHGs are "air pollutants" under the meaning of the Clean Air Act and subject to regulation by EPA.

Nonetheless, the District Court dismissed the suits, holding that the issues presented are political questions that must be decided by the executive and legislative branches, not the courts. In a ruling that surprised many industry analysts, the Second Circuit Court of Appeals reversed in 2009, relying primarily on case law that allows one state to sue another for transboundary pollution. Further, the Second Circuit held that the plaintiffs had stated a claim under the "federal common law of nuisance." In the Second Circuit's view, the federal common law of nuisance had *not* been displaced by federal regulatory action, because, while EPA had

been authorized to regulate GHGs as pollutants under the CAA, the agency had not yet issued any rule pursuant to this authority.

## **EPA GHG RULEMAKINGS**

Following the Second Circuit's ruling, EPA concluded in late 2009 that GHG emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare," triggering EPA's obligation to regulate GHGs under the Clean Air Act. EPA subsequently has initiated and in some cases finalized several rulemaking efforts to address GHGs, including New Source Performance Standards (NSPS) for power plants. The status of this rulemaking effort, with a final rule due in May 2012, was an important consideration for the Court.

## **THE SUPREME COURT SPEAKS**

Although the Court's reversal of the Second Circuit was widely anticipated, many commentators predicted that the case would be decided on standing grounds (*i.e.*, the Court would hold that the plaintiffs did not meet threshold criteria for access to the courts due to insufficient connection between the defendants' emissions and the plaintiffs' alleged injuries). On the standing question, however, the Court was divided, with four justices holding that *Massachusetts v. EPA* provided the plaintiffs with standing and the other four disagreeing with this view or questioning the ruling in that case. Under Court rules, the 4-4 split means that the lower court is affirmed on this issue, and the Court proceeded to the merits of the case without further discussion of the standing issue.

On the merits, the Court held that the federal common law on which the plaintiffs' claims were based is displaced by the EPA's authority to regulate GHGs under the Clean Air Act. *Massachusetts v. EPA* instructed the agency to treat GHGs as pollutants, and EPA has taken the first of several steps to determine whether and how they should be regulated. The Court rejected the Second Circuit's conclusion that, because EPA had not yet issued those regulations, federal common law is not yet preempted. In other words, the lag between Congress's grant of authority and agency action does not create a space for the courts to fill with federal common law. Even if EPA had declined to regulate GHG emissions, Congress "delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants; the delegation is what displaces federal common law." EPA's regulation of GHGs is subject to judicial review, but there is "no room for a parallel track" of federal common law. As the plaintiffs sought injunctive relief in the form of emissions limits, the Court directed them to participate in the regulatory process.

In reaching this conclusion, the opinion broadly endorses the mission of the regulatory agencies that constitute the so-called "fourth branch" of government and may signal a general unwillingness by the Court to examine technical questions for which agencies have particular expertise. In the Court's words, EPA "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."

## **IMPLICATIONS FOR GHG CLAIMS AND POLICY**

The Court's unanimous decision in *AEP*, while decisive, does not necessarily mean an immediate end to nuisance law claims against GHG emission sources. For example, the Court

noted the potential for bringing such claims under state rather than federal law and left this issue to be addressed by the lower court on remand; however, the Court's opinion likely does not brighten the outlook for such claims. Beyond state law issues, and given the lack of recent Congressional action on GHGs, the opinion increases the spotlight on EPA's various efforts to develop and implement GHG regulations, as well as on the various pending legal and legislative challenges to such efforts.

Click here to read the [AEP v. Connecticut opinion](#).

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## FOR MORE INFORMATION

Robinson & Cole LLP's Environmental and Utilities Practice Group is assisting a number of clients in identifying risks and opportunities in emerging climate change law. For questions regarding the *AEP v. Connecticut* decision or other GHG issues, please contact one of the following attorneys:

<a href="#">Earl W. Phillips, Jr.</a> (860) 275-8220 <a href="mailto:ephillips@rc.com">ephillips@rc.com</a>	<a href="#">Pamela K. Elkow</a> (203) 462-7548 <a href="mailto:pelkow@rc.com">pelkow@rc.com</a>
<a href="#">Peter R. Knight</a> (860) 275-8387 <a href="mailto:pknight@rc.com">pknight@rc.com</a>	<a href="#">Brian C. Freeman</a> (860) 275-8310 <a href="mailto:bfreeman@rc.com">bfreeman@rc.com</a>

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