

## Environmental Alert

### Supreme Court Fails to Shut Door on Greenhouse Gas Nuisance Litigation

June 21, 2011

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#### INTRODUCTION

On June 20, 2011, the U.S. Supreme Court resoundingly reversed the decision of the 2nd Circuit in *American Electric Power Co., Inc. v. Connecticut* (No 10-174) (“*AEP*”), concluding that the Clean Air Act displaces the federal court’s authority to enjoin emissions of greenhouse gases from coal-fired power plants using federal common law causes of action.<sup>1</sup> But the Court remanded to the 2nd Circuit the issue of whether the Clean Air Act preempted state common-law nuisance actions. The decision also left unanswered the extent to which actions for damages—as opposed to the injunctive relief sought in *AEP*—may remain viable. Finally, the Court affirmed by an equally divided court the issues concerning standing to sue and whether the “political question” doctrine deprived the courts of jurisdiction, likely reflecting four strong votes for jurisdiction. Justice Sotomayor, who heard oral argument on *AEP* in the 2nd Circuit, did not participate in the decision.

#### The Plaintiffs’ Claims

The plaintiffs, including six states, one city and three nonprofit land trusts, sued four private U.S. energy companies and a federally owned energy corporation, asserting that their collective emissions constituted a public nuisance under federal and state common law. To remedy the public nuisance, the plaintiffs sought to impose caps on carbon emissions from each source, as well as periodic reductions over 10 years.

#### The Decisions Below

The district court dismissed the suits for lack of justiciability, holding that “determining causation and redressibility in the context of alleged global warming would require [the court] to make judgments that could have an impact on the other branches’ responses to what is plainly a political question.” On appeal, however, a 2nd Circuit panel (on which then-Judge Sonia Sotomayor participated for oral argument) reversed, rejecting the jurisdictional challenges, as well as defendants’ arguments that federal common law of nuisance did not cover claims based on GHG emissions.

#### THE SUPREME COURT DECISION IN *AEP*

The Supreme Court, in an 8-0 vote, reversed the 2nd Circuit’s judgment, holding that the Clean Air Act displaced the lower courts’ authority under federal common law to set GHG emissions limits. The Court remanded to the 2nd Circuit the issues of whether the Clean Air Act preempted causes of action for GHG emissions under state common law of nuisance.

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<sup>1</sup> <http://www.supremecourt.gov/opinions/10pdf/10-174.pdf>.



The Court first addressed jurisdictional issues of standing and the political question doctrine, which had garnered considerable attention among legal scholars and academics. By an “equally divided Court,” the Court affirmed the 2nd Circuit’s ruling that the plaintiffs satisfied constitutional requirements for standing and that the political question doctrine did not apply.<sup>2</sup>

Turning to the merits, the Court first determined that environmental issues are “undoubtedly an area ‘within national legislative power,’” authorizing courts to “fill ‘statutory interstices’” or “fashion federal law.”<sup>3</sup> The Court held, however, that the “Clean Air Act and the EPA [regulatory] actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”<sup>4</sup> The Court then expanded the ruling in *Massachusetts v. EPA*, which involved GHG emissions from mobile sources, to hold that the Clean Air Act “speaks directly” to the emissions of carbon dioxide” from stationary sources such as power plants.<sup>5</sup>

The plaintiffs in *AEP* sought only injunctive relief from the defendant power plants, i.e., an injunction requiring emissions reductions. The Court summarized the provisions of the Clean Air Act authorizing EPA to establish such emissions limitations and the rights of the states and private parties to seek judicial review compelling EPA to establish limits in the first instance and to impose more stringent limits. The Court described this statutory scheme and federal common law nuisance actions as a “parallel track.”<sup>6</sup>

## POTENTIAL IMPLICATIONS OF *AEP*

The *AEP* decision seems to have important implications for both the viability of common-law actions for damages arising from emissions of GHGs, as well as for the actions pending in the court of appeals challenging the scope of EPA’s regulatory authority under the Clean Air Act.

### State Common-Law Actions for Damages

The *AEP* decision does not mention anywhere the potential for common-law damage actions based on any connection between GHG emissions and climate change. But, in describing the regulatory and enforcement tools available under the Clean Air Act to address GHG emissions, the Court focused on statutory provisions to establish or revise emissions limits, i.e., the relief sought by the *AEP* plaintiffs. The Court concluded that “[t]he Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief plaintiffs seek by invoking federal common law.”

By contrast, there are no parallel provisions on the Clean Air Act authorizing the award of damages for injury to persons or property. In terms of the doctrine of displacement, however, the Court characterized the issue as “whether the field has been occupied, not whether it has been occupied in a particular manner.”<sup>7</sup> Future plaintiffs are likely to focus on the distinction between the tests for displacement versus preemption and the lack of any language in *AEP* discussing claims for damages.

### EPA’s Regulatory Actions Under the Clean Air Act

The legal validity of EPA’s various regulatory actions to control GHG emissions are currently subject to numerous petitions for review pending in the U.S. Court of Appeals for the District of Columbia Circuit. The *AEP* decision, joined in full by six members of the Court (Justices Alito and Thomas joined in the judgment and in the displacement analysis “on the assumption” that the *Massachusetts* decision “is correct”), contains several strongly worded passages that can be read to endorse the scope of EPA’s statutory authority. For example, the Court noted that “EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be ‘arbitrary, capricious, an

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<sup>2</sup> Slip op. at 6.

<sup>3</sup> *Id.* at 7 (citations omitted).

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 12. (citation omitted).

abuse of discretion, or otherwise not in accordance with law.”<sup>8</sup> No doubt, EPA and intervenors supporting its positions will seek to use these passages to support the agency’s claims to authority to regulate GHG emissions.

On the other hand, the Court emphasized that regulatory action by EPA is not required to justify displacement. Thus, “were EPA to decline to regulate carbon dioxide emissions altogether, ... the federal courts would have no warrant to apply the federal common law of nuisance.”<sup>9</sup>

## CONCLUSION

*AEP* left unanswered as many questions as it resolved. For the time being, therefore, litigation over GHG emissions and climate change will continue.

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## CONTACT INFORMATION

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<sup>8</sup> *Id.* (citation omitted).

<sup>9</sup> *Id.*