866.502.9814 | 115 Sansome Street, Suite 700 San Francisco, California 94104

United States Supreme Court Holds that the Clean Air Act Displaces Federal Common Law Public Nuisance Law and Prohibits Nuisance Claims Against Carbon-Dioxide Emitters

Posted by David Chapman, Esq. in Clean Air, Emerging Issues, Environmental Litigation on June 30, 2011

On June 20, 2011, the United States Supreme Court held in an 8-0 decision that the Clean Air Act (Act) 42 U.S.C. §7401 et seq., and the Environmental Protection Agency action it authorizes, displace federal common law public nuisance claims against carbon-dioxide emitters. (*American Electric Power Co., Inc., et al. v. Connecticut et al*., 564 U.S. (2011) 13 (*AEP*)).

The underlying lawsuits considered by the *AEP* Court began well before EPA initiated efforts to regulate greenhouse gases under the Act. In July 2004, two groups of plaintiffs filed separate complaints in the Southern District of New York against the same five defendants, each of which was a major electric power generator using fossil-fuels. The first group of plaintiffs included eight States and New York City, the second joined three nonprofit land trusts. The defendants/petitioners are four private power generating companies and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several states. According to the complaints, the defendants "are the five largest emitters of carbon dioxide in the United States." The plaintiffs asserted that by contributing to global warming, the defendants' carbon-dioxide emissions created a "substantial and unreasonable interference with public rights," in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law. Plaintiffs sought injunctive relief requiring each defendant "to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade." The District Court dismissed both suits as presenting non-justiciable political questions, but the Second Circuit reversed. On the threshold questions, the Court of Appeals held that the suits were not barred by the political question doctrine, and that the plaintiffs had adequately alleged Article III standing. Turning to the merits, the Second Circuit (1) held that all plaintiffs had stated a claim under the "federal common law of nuisance" by relying on a series of United States Supreme Court decisions holding that states may maintain suits to abate air and water pollution produced by other states or by out-of-state industry, and (2) determined that the Act did not "displace" federal common law. At the time of the Second Circuit's decision, EPA had not yet promulgated any rule regulating greenhouse gases, a fact the court thought dispositive.

Relying on the decision in *Massachusetts v. EPA*, 549 U. S. 497 (2007)(*Massachusetts*), which held that the Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases, the *AEP* Court rejected plaintiffs' federal common law nuisance claims "…hold[ing] that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." Per the Court, *Massachusetts* made plain that (1) emissions of carbon dioxide qualify as air pollution subject to regulation under the Act and, (2) the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants. In *Massachusetts*, the Court held that the Environmental Protection Agency (EPA) had misread the Act when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles, since the Court had determined that greenhouse gases qualify as "air pollutants" within the meaning of the governing Act provision. In response to the *Massachusetts* decision, EPA undertook greenhouse gas regulation and concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases, and determined that consequent dangers of greenhouse gas emissions included increases in heat-related deaths; coastal inundation and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infra-structure; drought due to reductions in mountain snow-pack and shifting precipitation patterns; destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production. In a footnote, the Supreme Court cautioned in *AEP* that it endorses no particular view of the complicated factual issues related to carbon-dioxide emissions and climate change.

As a result of the *Massachusetts* decision, EPA also began phasing in requirements that new or modified "[m]ajor [greenhouse gas] emitting facilities" use the "best available control technology." §7475(a)(4) and commenced a rulemaking under §111 of the Act, 42 U. S. C. §7411, to set limits on greenhouse gas emissions from new, modified, and existing fossil-fuel fired power plants. The *AEP* Court noted that under the Act, if EPA does not set emissions limits for a particular pollutant or source of pollution, states and private parties may petition for a rulemaking on the matter, and EPA's response will be reviewable in federal court. Indeed, to settle litigation brought under §7607(b) by a group that included the majority of the plaintiffs in this very case, the agency agreed to complete that rulemaking by May 2012. Because the Act itself provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs sought by invoking federal common law, the Court saw no room for a parallel track.

In the Court's view, *the critical point is that 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*. Indeed, were EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its ongoing §7411 rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.

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The Court added that EPA's judgment would not escape judicial review, since Federal courts can review agency action (or a final rule declining to take action) to ensure compliance with the statute Congress enacted. The Court also acknowledged that EPA may not decline to regulate carbon-dioxide emissions from power plants if refusal to act would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and stated that if the plaintiffs in this case are dissatisfied with the outcome of EPA's forthcoming rulemaking, their recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition the Supreme Court for certiorari.

The Court deferred to Congress' designation of an expert agency, the EPA, as best suited to serve as primary regulator of greenhouse gas emissions, since it better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Per the Court, "Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." Finally, the Court noted that the judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision making scheme Congress enacted under the Act. Accordingly, the Court held that the Second Circuit erred in ruling that federal judges may set limits on greenhouse gas emissions in the face of the Act, which empowers EPA to set the same limits, subject to judicial review only to ensure against action (or inaction) that is "arbitrary, capricious, . . . or otherwise not in accordance with law." §7607(d)(9).

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