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CARBON DIOXIDE EMISSIONS NOT SUBJECT TO FEDERAL COMMON LAW NUISANCE CLAIMS

American Electric Power Co., Inc. v. Connecticut (June 20, 2011, No. 10-174) __ U.S. __

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By Robyn Christo & Micah Bobo

In the battle over climate change, the Supreme Court once again set an important precedent in *American Electric Power Co., Inc. v. Connecticut* ("American Electric Power"). In an 8-0 decision written by Justice Ginsburg (Justice Sotomayor recused herself, presumably because she heard the matter while sitting on the Second Circuit), the Court held that Congress's delegation of the power to regulate greenhouse gasses to the Environmental Protection Agency ("EPA"), "displaces federal common law" relating to the abatement of carbon dioxide ("CO2") emissions.

Plaintiffs (eight states, a city, and three land trusts) brought federal common law public nuisance claims seeking injunctive relief against five of the largest carbon emitters in the United States (four private power companies and the federal Tennessee Valley Authority). Plaintiffs alleged that by collectively providing 2.5% of anthropogenic carbon emissions worldwide, defendants were contributing to global warming, which, in turn, resulted in a "substantial and unreasonable interference with public rights." Plaintiffs argued that federal common law could

not be displaced by the Clean Air Act ("CAA") because the EPA had yet to create rules regulating CO2 emissions.

The Supreme Court disagreed. Relying on its decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007) ("*Massachusetts*"), the Court found that the federal common law of nuisance was preempted by the CAA, which gave the EPA the authority and responsibility to regulate greenhouse gas emissions. It was not material that the EPA had yet to create rules, only that it had been delegated the power to do so by Congress. Consequently, CO2 emitters will not have to deal with costly litigation to determine whether federal tort law requires them to curtail output. (Although the Supreme Court remanded the case to the Second Circuit to decide whether the plaintiffs can sue under state nuisance laws, those prospects are dimmed due to possible preemption by both state and federal regulatory agencies.)

While *American Electric Power* can be seen as a major victory for greenhouse gas emitting industries, it is simultaneously only a minor defeat for environmental groups since defendants will likely be required to reduce emissions under forthcoming EPA regulations pertaining to greenhouse gas emissions. Pursuant to a March 2011 settlement agreement resulting from subsequent litigation based on the *Massachusetts* ruling, the EPA has committed to issuing a final rule regarding CO2 emissions (namely those in existing power plants and refineries) by May 2012. Given that the EPA recently promulgated greenhouse gas emissions standards for new or upgraded plants, including factories, power stations and refineries, it is likely that the May 2012 CO2 rules will require some reductions from existing high output industries.

Despite the upcoming rulemaking, the Supreme Court's decision in *American Electric Power* allows industry to breath a sigh of relief: even if it is required to lower emissions under EPA regulations, that prospect will likely be much less burdensome than having to litigate the requisite level of CO2 reductions.

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