Sustainability & Climate Change Reporter

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U.S. Supreme Court Tosses Federal Nuisance Claims in Climate Change Lawsuits

The U.S. Supreme Court threaded the needle in its 8-0 decision in *AEP v. Connecticut.* The Court unanimously ruled that the Environmental Protection Agency's greenhouse gas rulemaking under authority of the Clean Air Act has displaced federal common law nuisance claims by states and private parties, but the Court also let stand the lower court's decision that at least some of the plaintiffs would have standing to bring the case, and that the viability of state common law claims would have to be determined by the lower courts first.

The decision written by Justice Ruth Bader Ginsberg, together with a one-paragraph concurrence by Justices Alito and Thomas, recognizes that "Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district court judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technical resources an agency can utilize in coping with issues of this order."

The Court did not rule that the states and private parties lacked standing to bring their claims or that the political question doctrine precluded those claims. Indeed, that portion of the Second Circuit decision stands because the justices split evenly, with Justice Sotomayor recused. Dan Farber at the Berkley/UCLA Legal Planet blog notes that the Court's punting of the jurisdictional question and then decision on the merits was unusual and that the Court should simply have dismissed certiorari as improvidently granted rather than rule on the merits.

Issues Unanswered

The Court's ruling leaves some intriguing issues for further debate. First, the majority did not say how far EPA must go in regulating greenhouse gas emissions. It simply held that the Clean Air Act gives EPA the authority to consider GHG regulations,and the Court's earlier ruling in *Massachusetts v. EPA* said the agency should decide one way or another. By issuing rules, such as the cause and contribute/endangerment finding, medium- and heavy-duty light vehicle emissions and fossil-fuel power plant emissions, the Court said that EPA actions "displace any

federal common law right to seek abatement of carbon-dioxide emissions from fossil fuel power plants."

According to the Court, if EPA does not set emissions limits for a particular pollutant or source, the remedy for states and private parties is to petition the agency for rulemaking and have a federal court review that decision under the statute, not common law nuisance. In the Court's words, "The [Clean Air] Act itself thus provides a means to seek limits on emissions of carbon dioxide from domestic power plants -- the same relief the plaintiffs seek by invoking federal common law. We see no room for a parallel track." But that leaves unanswered what would happen if a different administration comes in and pulls EPA out of the regulation of greenhouse gases entirely? The Green Blawg concludes that this might strengthen state-level efforts to regulate greenhouse gases, for example through the RGGI and Western Climate Initiative programs.

State Common Law Claims

A second question that the *AEP* decision raises is whether state common law nuisance claims are preempted by the Clean Air Act. The Second Circuit decision did not reach that issue because it held that federal common law governed. The Court's ruling sends the state claims back to the lower courts to decide. Michael Gerrard in the Columbia Law School Climate Blog suggests that some plaintiff group probably will test that on remand and they'll have to survive what's likely to be a vigorous preemption battle in the lower courts.

***Massachusetts* Lives**

A third issue *AEP* raises is whether there is a majority on the Court that still supports *Massachusetts*. The Court's decision in *AEP* said that the viability of *Massachusetts* was not in question because it had not been raised by any of the parties. The concurrence by Justices Alito and Thomas said they agreed with the judgment and the displacement analysis on the assumption for the sake of argument that the majority decision in *Massachusetts* was correct. When the Court decided that case in 2007, Justice Stevens wrote the majority opinion and Justice Souter participated in the majority. Justices Roberts, Scalia, Thomas and Alito dissented in *Massachusetts*. Stephens and and Souter from the 2007 majority retired and have been replaced by Justices Sotomayor and Kagan. Although it would appear still that there are five justices who would uphold *Massachusetts*, the decision in *AEP* indicates that even with *Massachusetts* the EPA might have considerable room to act or not act.

Congressional Action

Fourth, the *AEP* decision comes amid a high visibility effort in Congress to eliminate EPA's ability to regulate greenhouse gas emissions. Republicans and some coal-state Democrats have been making various forays to try to block the EPA -- from outright bans on its authority to issue climate change regulations to restricting the agency's budget. While none of those have been successful yet, a report out today indicates that even without direct attacks on the agency, proposals to implement spending caps could hamper climate change regulation for a decade or more. If EPA can't occupy the greenhouse gas regulation field due to Congressional restraints,

would that revive the common law nuisance claims? Michael Gerrard's blog post indicates that could be the case, but it's unclear just what action by Congress might free up those claims. Would it be through general spending caps, the effect of which might make it impossible to institute cap-and-trade or a carbon tax, along with a host of other non-climate-related measures; or would it take actual prohibitions preventing the EPA from regulation?

Effect on *Kivalina*

Finally, it's unclear what effect the decision will have on the *Kivalina* case pending in the Ninth Circuit. A lower court dismissed the native village's public nuisance claims on the grounds of standing and jurisdiction, but the limited ruling in *AEP* sidestepping those issues means the Ninth Circuit does not have any guidance. Could the Ninth Circuit do as the Supreme Court did and decide the substantive legal issue using *AEP* as justification, or would it issue a decision on the standing and jurisdictional grounds alone that could set up another Supreme Court case?

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