



## US Supreme Court Removes a Weapon From Activists' Greenhouse Gas Arsenal: Federal Common Law Nuisance Claims Are Out

On June 20, 2011 the US Supreme Court issued its long-awaited decision in *American Electric Power Co., Inc. v. Connecticut*,<sup>1</sup> holding that the Clean Air Act's scheme for US EPA regulation of carbon dioxide and other greenhouse gases (GHGs) displaces federal common law nuisance claims seeking reduction of GHGs to address global warming. The decision reinforces the Court's prior decision in *Massachusetts v. EPA*<sup>2</sup> that the Clean Air Act authorizes federal regulation of GHGs and places US EPA, as opposed to the courts, front and center in the debate over control of GHG emissions.

In 2004 eight states, New York City and several private land trusts filed suits in the US District Court for the Southern District of New York against five major electric power companies alleging that the defendants were the "largest emitters of carbon dioxide in the United States," and their emissions substantially and unreasonably interfered with public rights in violation of the federal common law of interstate nuisance or, alternatively, state nuisance law. The plaintiffs alleged that these emissions were a public nuisance for contributing to global warming and sought injunctive relief requiring the defendants to cap and reduce GHG emissions by specific percentages each year for at least a decade.

The district court dismissed both suits as involving non-

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justiciable political questions.<sup>3</sup> On appeal the Second Circuit reversed and found that plaintiffs had stated a claim under the federal common law of nuisance because US EPA had not promulgated any rule regulating GHGs. The Second Circuit found that until US EPA exercised its authority to regulate GHGs, displacement of the claim by the Clean Air Act could not occur.

The US Supreme Court was divided on whether the plaintiffs had standing to bring this claim and affirmed the lower court's exercise of jurisdiction by default. The Court was united, however, in its conclusion 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." In *Massachusetts v. EPA*, the US Supreme Court clearly identified carbon dioxide as "air pollution." The Clean Air Act directs US EPA to identify categories of sources that contribute significantly to air pollution and are reasonably expected to endanger public health or welfare. Once US EPA identifies those categories, it must regulate the existing sources and establish performance standards for emissions from new and modified sources in each category. The Court found that these provisions of the Act provide an adequate avenue for the plaintiffs to petition US EPA to initiate rulemaking and to seek judicial review of US EPA's regulatory decisions. Under this framework, the Clean Air Act "speaks directly" to the issue of carbon dioxide emissions from power plants, displacing federal common law public nuisance suits and leaving no room for courts to issue *ad hoc* decisions through common law suits.

The Court disagreed with the Second Circuit's conclusion that federal common law could not be displaced until US EPA had actually exercised its jurisdiction over carbon dioxide emissions by issuing regulations. The Court found that it was Congress's delegation of authority to US EPA that displaces federal common law, not US EPA's exercise of that delegation. Citing the *Massachusetts* decision, the Court concluded such a delegation had occurred here for GHG emissions, thus placing the burden of balancing regulatory policies on US EPA, not the courts. If US EPA decides against regulating a particular source category in making these policy choices, the courts may not step in and force regulation under common law theories.

While the Supreme Court's decision removes federal nuisance law as a mechanism for plaintiffs to seek to impose emission controls on GHG emitters, the decision leaves open the possibility for that relief under state

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nuisance law. The Court indicated that the availability of state law claims would depend upon the preemptive effect of the Clean Air Act, an issue that remains open on remand. Disposition of these issues will provide yet another important indication of the role courts will play in the continuing regulation of greenhouse gas emissions, if any.

For additional information regarding this decision and its broader implications, please contact one of the Squire Sanders lawyers listed in this *Alert* or one of the Squire Sanders lawyers with whom you routinely work.

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<sup>1</sup> No. 10-174.

<sup>2</sup> 549 U.S. 497 (2007)

<sup>3</sup> *Connecticut v. American Electric Power Co., Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005)

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