



Supreme Court Rules Clean Air Act Displaces Federal Common Law in AEP Greenhouse Gas Case

June 2011

On June 20, 2011, the Supreme Court issued its second major decision in four years on the topic of global warming, holding in American Electric Power Co., Inc. v. Connecticut, No. 10-174 (AEP), that the Clean Air Act displaces the federal common law. The suit began in 2004 when eight states, New York City, and three nonprofit land trusts brought nuisance claims against five electric utilities asking for a judicial decree capping and gradually reducing the amount of carbon dioxide that can be emitted by each of the defendants' fossil-fuel fired power plants. The District Court dismissed the plaintiffs' claims as presenting a non-justiciable political question. The Second Circuit Court of Appeals reversed. The Supreme Court then granted certiorari on three questions: (1) whether the plaintiffs had standing to bring the suit, (2) whether the Clean Air Act displaced the federal common law, and (3) whether the issue of global warming was a political question beyond the reach of the federal courts.

Justice Ginsburg's decision briefly addressed the first and third questions, upon which the court was divided, before focusing on the second question, where there was unanimity. Justice Ginsburg wrote that four justices would follow the Court's first global warming decision Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007), and hold that at least some of the plaintiffs had standing and "no other obstacle bars review." However, she also stated that four members of the Court would adhere to the dissent in Massachusetts, in which Justice Roberts reasoned that the state plaintiffs in that case lacked standing and that global warming was an issue reserved for policy-makers in the legislative and executive branches of the Government. With Justice Sotomayor not participating, the divided Court affirmed the Second Circuit's decision to exercise jurisdiction.

Putting the question of standing and the political aspects of the dispute aside, all of the eight participating justices were in agreement that the Clean Air Act trumped the federal common law, and that the plaintiffs must therefore seek their relief through the administrative process. Under the Clean Air Act, the EPA is directed to establish standards for the emissions of greenhouse gases from the very plants operated by the defendants. If the plaintiffs are not satisfied with the regulations developed by the EPA, the plaintiffs may seek review of those regulations by the Court of Appeals and ultimately the Supreme Court. The Clean Air Act also provides the EPA and the plaintiffs with the ability to enforce the regulations. Both the substance and tone of Justice Ginsburg's opinion recognized the deference that should be afforded to administrative agencies acting within their areas of technical expertise. "The expert agency [EPA] is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."

About MBT

MBT is a leading litigation firm with over 100 attorneys and offices in Chicago, Dallas, Phoenix and San Francisco. In addition to environmental law, our attorneys focus on commercial litigation, insurance coverage, professional liability defense, labor and employment law and attorney fee disputes.

For more information, please visit www.mbtlaw.com.

While the [AEP](#) decision should end any direct federal actions seeking damages caused by global warming, the Court did leave the door open for state common law claims, noting that none of the parties had briefed the Court on the availability of relief under state law and on whether state law claims were preempted by the federal statute. It remains to be seen whether state common law claims will suffer the same fate as federal common law claims.

Moreover, the Court's decision is especially significant in light of recent EPA rulemaking and contemplated legislation by the United States Congress. Since 2009, the EPA has advanced several regulatory initiatives to control the emissions of greenhouse gases. In response, there have been legislative proposals to effectively overturn the Court's [Massachusetts](#) decision and take away the federal agency's authority to regulate greenhouse gases. Stripping the EPA of its greenhouse gas regulatory authority is a double-edged sword. It is this very authority that the Court relied on in concluding that federal judges may not decide common law greenhouse gas claims. If the EPA's authority to regulate greenhouse gases is taken away, common law global warming claims like those brought by the plaintiffs in [AEP](#) will likely return to the federal courts.

Finally, the Court continued its practice of choosing not to intervene in environmental policy disputes and allowing statutorily authorized federal administrative agencies to fulfill their roles without interference. In its landmark decision on both administrative law and separation of powers, [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837 (1984), the Supreme Court explained that federal judges have a duty to respect the legitimate policy choices made by administrative agencies. The [Chevron](#) court deferred to the EPA's regulatory interpretation of a complicated Clean Air Act permitting matter. For reasons consistent with its analysis in [Chevron](#), each time the Supreme Court has been presented with a global warming dispute, the Court has avoided making a policy decision and has affirmed the significant and important role of the EPA. It can be expected that in future litigation concerning global warming and other technically complex environmental issues, the federal courts will generally stay away from policy questions and show maximum deference to the EPA or any other statutorily authorized federal agency.

For more information, please contact Brett Heinrich or Matthew Cohn in MBT's Environmental Law Group.

This article contains general information only; this information should not be construed as legal advice.