

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



## Supreme Court Holds That the Clean Air Act and EPA Actions Authorized Thereunder Displace Federal Common Law Public Nuisance Claims

On June 20, 2011, the U.S. Supreme Court, in an 8-0 decision, held that the Clean Air Act and U.S. EPA actions authorized by the Clean Air Act displace federal common law public nuisance claims. *American Electric Power Co., Inc., et al v. Connecticut, et al*, 564 U.S. \_\_\_\_ (2011). The Court reversed and remanded the decision of the Court of Appeals for the Second Circuit which allowed several states and other plaintiffs to maintain federal common law public nuisance claims against coal-fired power plants emitting carbon dioxide.

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Relying on *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Supreme Court reiterated the test for determining whether federal common law was displaced by congressional legislation as simply whether the statute spoke directly to the question at issue. The Court held that Congress delegated the decisions of whether and how to regulate carbon dioxide emissions to the U.S. EPA and that such delegation displaced federal common law. The Court further explained that the U.S. EPA is better equipped to determine what levels of carbon dioxide emissions were unreasonable rather than federal judges, who lack the resources to deal with such issues. The Court did not rule on whether state common law nuisance claims were preempted, but left that issue open for consideration on remand.

The Court's decision precludes federal public nuisance claims, but leaves several other causes of action unaffected including state public nuisance claims as well as private nuisance claims. The Court's decision is premised on the U.S. EPA's authority to regulate greenhouse gases under the Clean Air Act which reinforces the Court's earlier decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that held that the U.S. EPA was authorized to regulate carbon dioxide under the Clean Air Act. Nonetheless, various legal challenges to the U.S. EPA rulemaking efforts regarding the regulation of greenhouse gases remain to be decided by lower courts.

For more information regarding the *American Electric Power* decision and issues relating to climate change regulation and/or litigation, contact Michael H. Winek at (412) 394-6538 or [mwinek@babstcalland.com](mailto:mwinek@babstcalland.com) or Timothy S. Bytner at (412) 394-6504 or [tbytner@babstcalland.com](mailto:tbytner@babstcalland.com).