

June 30, 2011

Link: <http://www.supremecourt.gov/opinions/10pdf/10-174.pdf>

On June 20, 2011, the U.S. Supreme Court ruled unanimously in *AEP v. Connecticut*¹ that the authority to regulate large stationary sources of greenhouse gas ("GHG") emissions granted to the U.S. Environmental Protection Agency ("EPA") under the federal Clean Air Act displaces federal common law public nuisance claims against those sources. The Court reversed the 2009 decision of the U.S. Court of Appeals for the Second Circuit.²

Background and Summary

In 2004, eight states,³ three land trusts, and the City of New York filed suit in the Southern District of New York against five electric power generation companies that own several coal-fired electric generating units in the United States.⁴ The plaintiffs sought court-imposed limits on carbon dioxide emissions from the defendants' facilities, claiming that these emissions caused a nuisance to the public health and welfare by contributing to global climate change.

The *AEP* decision follows the Court's 2007 decision in *Massachusetts v. EPA*⁵ in which the Court ruled that GHGs are "air pollutants" within the scope of the Clean Air Act, opening the door for EPA to regulate GHG emissions directly. When the Second Circuit considered the *AEP* case on appeal in 2009, EPA had not yet issued findings or regulations for large stationary sources of GHGs. Because EPA had so far failed to act, the Second Circuit decided that the plaintiffs' federal common law public nuisance claims could proceed. In December 2009, EPA issued a finding that GHGs endangered the public health and welfare,⁶ initiating the agency's process for developing regulations to address GHG emissions.

In *AEP*, the Court was asked to decide whether public nuisance claims could proceed under federal common law against electric utilities that, on the basis of the aggregated emissions from the power plants owned by the utilities, allegedly were the five largest U.S. sources of carbon dioxide emissions. Overturning the Second Circuit, the Court established in a unanimous opinion that they could not. The Court explained that a federal statute displaces federal common law when the statute speaks directly to the question at issue.⁷ In this case, displacement of federal common law occurred when Congress delegated to EPA the authority to regulate large stationary sources of GHGs under the Clean Air Act.

The plaintiffs' complaints also sought relief under state common law. Because the parties did not brief the issue of preemption of these claims before the Court, the decision allows the plaintiffs to proceed on remand with state public nuisance claims.⁸

Recent and Pending Federal Regulatory Action on Greenhouse Gases

Since 2009, EPA has proceeded under authority confirmed in *Massachusetts v. EPA* to develop regulations that address emissions from large stationary sources of GHGs, such as coal-fired electric generating units, cement plants, petroleum refineries, and other major sources of GHG emissions. Certain of EPA's significant regulatory actions include:

- On May 13, 2010, EPA issued its final GHG tailoring rule to establish the emissions thresholds for determining applicability of the Prevention of Significant Deterioration and Title V permitting program requirements as applied to GHG emissions.⁹ The final tailoring rule provides a phased approach for addressing GHG emissions from large industrial sources under existing EPA permitting programs. Without this change, the then-existing thresholds would have subjected numerous smaller

emissions sources to regulation.

- In December 2010, EPA issued a series of final rules to further implement the requirements set forth in the final tailoring rule.¹⁰
- The first phase of these regulations, as implemented under EPA's PSD construction and Title V operating permit programs, took effect in January 2011, and the second phase is scheduled to take effect in July 2011.
- Several additional EPA rulemakings are expected to be forthcoming to address sector-specific requirements for control of GHG emissions.¹¹

NOTES

1 564 U.S. ____ (2011).

2 582 F. 3d 309 (2d Cir. 2009).

3 California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. New Jersey and Wisconsin subsequently dropped out of the lawsuit.

4 *AEP v. Conn.*, 564 U.S. ____ (2011) at 4.

5 549 U.S. 497 (2007).

6 Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, <http://www.epa.gov/climatechange/endangerment.html>.

7 *AEP v. Conn.*, 564 U.S. ____ (2011) at 10.

8 *Id.* at 16.

9 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010)

10 EPA, *Clean Air Act Permitting for Greenhouse Gas Emissions – Final Rules*, (Dec. 23, 2010), <http://www.epa.gov/nsr/ghgdocs/20101223factsheet.pdf>.

11 For additional information on EPA GHG rulemakings, see *Clean Air Act Permitting for Greenhouse Gases*, <http://www.epa.gov/nsr/ghgpermitting.html>.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Tom Coll San Diego	collta@cooley.com +1 858 550 6013
-----------------------	--------------------------------------

Kathleen Goodhart San Francisco	kgoodhart@cooley.com +1 415 693 2012
Jim Fulton New York	fultonjf@cooley.com +1 212 479 6103
Gordon Ho Palo Alto	gho@cooley.com +1 650 843 5190
Craig Jacoby San Francisco	cjacoby@cooley.com +1 415 693 2147
Ryan Naftulin Washington, DC	rnaftulin@cooley.com +44 (0) 20 7556 4540
Andrew Lustig Reston	alustig@cooley.com +1 703 456 8134

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.