

Alerts

U.S. Supreme Court Puts Carbon Dioxide Control Issues in EPA's Hands

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Hinshaw Alert

The U.S. Supreme Court has issued its ruling in *American Electric Power Co., Inc. v. Connecticut* (No. 10-174 June 20, 2011), making federal public nuisance lawsuits against emitters of carbon dioxide and other so-called “greenhouse gasses” no longer viable. The Court determined that the formal finding in December 2009 by the U.S. Environmental Protection Agency (EPA) that carbon dioxide is a pollutant, coupled with the agency’s pursuit of active rulemaking activity on the regulation of emissions of carbon dioxide from power plants and other sources, preempts common law complaints under federal common law. The ruling was not unexpected, and the Court cited to similar holdings in other cases, including the landmark case of *Illinois v. City of Milwaukee*, 406 U. S. 91 (1972), where a previously successful common law action was derailed because Congress had enacted the Clean Water Act’s national permitting system.

A number of serious science-based criticisms have been leveled at what the EPA repeatedly insists is “scientific consensus” on the dangers of carbon dioxide. In addition to the controversy involving manipulation of key temperature data by a small group of researchers (a.k.a. “Climategate”), the real-world measurements of phenomena such as sea level, ambient temperature and tropospheric heat appear to diverge from the predictions made by computer models and the United Nations Intergovernmental Panel on Climate Change. Meanwhile, recent unexpected decreases in solar “sunspot” activity are leading some climate scientists to foresee the Earth’s more likely climate change ahead as a new Little Ice Age, rather than a warmer future. Cf. e.g. <http://icecap.us/index.php/go/climate-library>

Because carbon dioxide is inevitably produced by fossil fuel and other forms of combustion, the regulation of carbon dioxide emission rates and tonnages puts the government basically in charge of the vitality of American businesses and transportation methods that depend on fossil energy. Courts’ willingness to defer to what they deem “agency expertise” puts the public, the workforce and business at risk of unnecessary costs if officials of federal agencies have ideological agendas of any particular “stripe” that may trump careful science or common sense.

The importance of the Supreme Court’s holding in *American Electric Power* is that the controversial subject of whether carbon dioxide should be deemed a

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pollutant is more or less in the hands of an EPA that has wholly dedicated itself to the concept that emissions of this naturally occurring trace element in the atmosphere threaten the Earth's climate with significant global temperature increases, and that such increases elevate public health concerns. Appeal of the original "finding" is still ongoing in the U.S. Court of Appeals for the District of Columbia Circuit. Other rules are also being challenged, including: (1) a March 2010 so-called "triggering rule," proposing to be selective on when greenhouse gasses would be subject to regulation under the Clean Air Act; (2) April 2010's "auto rule," setting greenhouse gas emissions standards for cars and light-duty trucks; and (3) the "tailoring rule" issued in May 2010, limiting the newly triggered rules for stationary sources to the largest emitters.

Unless the District of Columbia Circuit reverses the finding and related rules, administrative determinations by EPA are likely to continue and become more robust, absent a political change at the top. EPA's greenhouse gas control agenda is described on the agency's website. Also, many American businesses are already faced with the task of determining and reporting the amounts of greenhouse gasses they emit annually, and pressures from the U.S. Securities and Exchange Commission and elsewhere have caused most public companies to be concerned with the "sustainability" of their respective enterprise and business-operating plans.

For further information, please contact Harvey M. Sheldon or your regular [Hinshaw attorney](#).

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