TRENDS
ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

Supreme Court decides that Clean Air Act displaces federal common law claims for climate change

By James May

On June 20, 2011, the U.S. Supreme Court decided the closely watched case of *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), in which eight states, the City of New York, and several land trust organizations sued the nation's five largest fossil-fuel-burning electric utility companies to reduce their emissions of greenhouse gases, arguing that these emissions constitute a public nuisance under federal common law. The Supreme Court rejected this claim, reasoning that the Clean Air Act (CAA), when coupled with the Environmental Protection Agency's (EPA's) authority and the actions EPA has taken in the last two years to regulate greenhouse gas (GHG) emissions, displaces federal common law nuisance causes of action for injunctive action addressing climate change.

Background to the Court's decision

The action in *AEP* commenced in 2004 in an entirely different judicial, administrative, and legislative landscape. In *Connecticut v. AEP*, a collection of states representing 77 million citizens and private conservation organizations sued the nation's five largest emitters of carbon dioxide in the United States under federal common and state public nuisance law. Plaintiffs asked the court for injunctive relief to "cap" defendants' emissions, develop a schedule for reducing defendants' emissions on a percentage basis over time, assess and measure available alternative energy resources, and reconcile its relief with U.S. foreign and domestic policy.

The utility defendants argued that the political question doctrine, which holds that federal courts should not consider certain matters reserved for the representative branches, prevented federal courts from hearing the plaintiffs' federal common law for public nuisance based on climate change.

The U.S. District Court for the Southern District of New York agreed with the defendants and dismissed the case as a nonjusticiable political question. The court concluded that it was impossible for it to make the "initial policy determination" "that must be made by the elected branches before a non-elected court can properly adjudicate a global warming nuisance claim." It concluded that plaintiffs' allegations were "extraordinary," "patently political," and "transcendently legislative." *Connecticut v. AEP*, 406 F. Supp. 265, 274 (S.D.N.Y. 2005).

In 2009, the U.S. Court of Appeals for the Second Circuit reversed, finding climate claims in tort law to be justiciable. The Second Circuit held that no aspect of the political question doctrine applied to enjoin judicial review. In particular, the circuit court found that climate change is neither constitutionally consigned to the elected branches, nor prudentially left to them. *Connecticut v. AEP*, 582 F.3d 309 (2d Cir. 2009).

In December 2010, the U.S. Supreme Court granted American Electric Power and the other utility defendants' petition for certiorari on the issues of whether (1) the states and other plaintiffs lack standing, (2) federal law displaces the plaintiffs' claims, and (3) the case raises nonjusticiable political questions. Justice Sotomayor, who was a member of the Second Circuit panel in the case below, recused herself.

The Obama administration filed a brief on behalf of defendant Tennessee Valley Authority—on the same side as the utility defendants—arguing that the plaintiffs lack prudential standing, and that federal law displaces the need for common law causes of action for climate change. In particular, the Solicitor General argued that various EPA activities displace the need for federal common law causes of action under the standards set in the Court's decisions in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n* and *Milwaukee v. Illinois*.

Oral argument was held on April 19, 2011. During oral argument, none of the justices seriously questioned that climate change is occurring, that human activity is playing a role in that dynamic, that the CAA bestows upon EPA the authority to regulate GHGs as a "pollutant" under *Massachusetts v. EPA*, that at least the states possess both constitutional and prudential standing, or that federal courts have authority to consider cases concerning climate change.

Nonetheless, several Justices expressed skepticism about the propriety of using federal common law in this context, including the more "liberal" wing of the Court—Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. For example, Justice Breyer asked, "if the courts can set emission standards, why can't they also set carbon taxes, which are likely to be more effective? What's the end of it?" Justice Kagan inquired, "this sounds like the paradigmatic thing that administrative agencies do rather than courts." Justice Ginsburg remarked to the respondents' attorney: "Congress set up the EPA to promulgate standards for emissions, and . . . the relief you're seeking seems to me to set up a district judge, who does not have the resources, the expertise, as a kind of super EPA."

The Court's ruling

Justice Ginsburg's concern about implicitly designating district judges as "a kind of super EPA" proved a harbinger of the Court's final opinion. Writing for an 8–0 majority of the

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Service to members and society

As I write this first column as chair of the ABA Section of Environment, Energy, and Resources, I reflect on the impact the Section has had in my practice and my life in law over three decades. The people I have gotten to know in the Section stand as models of service, and my life has been enriched by knowing them. I have learned from them both the substance of law in our practice areas and, additionally, the importance of relationships to the practice of law. The areas of the law we practice focus on protecting public health and safety. I can imagine no greater service to members and to society.

The theme I have chosen for the 2011–2012 year, "Service to Members and Society," is not innovative. In fact, it gives me pleasure to note that rather than introducing a new concept, this theme highlights the Section's core values and long-standing commitment to its members and to the public.

Examples of the Section's service to its members abound. The Section offers educational programming throughout the year—both in person and by teleconference—covering the waterfront from basic introductory legal information to the analysis of cutting-edge issues. The Section also provides publications that members consistently rank very highly. *The Year in Review*, *Natural Resources & Environment*, committee newsletters, and this publication (*Trends*) provide members with summaries of judicial decisions, and information on current developments and Section news, as well as practical and informative articles. And to better serve our future and new practitioners of environmental, energy, and resources law, the Section has created law student and young lawyer task forces.

Many examples of the Section's service to society come to mind. Importantly, the Section's substantive committee chairs are each asked to appoint a vice chair to encourage public service efforts. These can include participation in one of the Section's current public service initiatives.

One of these initiatives is the ABA-EPA Law Office Climate Challenge which encourages law offices and organizations to take simple, practical steps to become better environmental and energy stewards. To date, there are over 200 Climate Challenge Partners or Leaders.

Another is the Section's "One Million Trees Project—Right Tree for the Right Place at the Right Time," which since 2009 has called upon ABA members to contribute to the goal of planting one million trees across the United States by 2014. Over the past few years, tree planting activities at the Section's three major annual conferences have provided participants an opportunity to help reach our goal.

Recognizing the carbon footprint of participating in a Section conference, the Section is offering 19th Section Fall Meeting registrants the option to purchase a carbon credit and help fund a local tree planting activity in Indianapolis. Carbon credits purchased will support a wind farm project in Iowa.

The Section's service has expanded to international projects as well. In June, I joined Section leaders and over 450 multidisciplinary, global leaders at the World Justice Forum (WJP) III in Barcelona to study projects and methods to advance and institutionalize global respect for the rule of law. Section members have attended the two prior WJP sessions over the past three years. Through tireless efforts, Claudia Rast and Howard Kenison were successful in convincing WJP organizers to include an environmental index as part of the work of the forum.

By focusing on the Section's accomplishments and tradition of service to members and society, we further our tradition and enhance our effectiveness. I look forward to new opportunities for the Section to provide service to our members and society.

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Section Spotlight

Section announces award recipients

The Section is pleased to announce the recipients of three awards that were presented during the 2011 ABA Annual Meeting in Toronto.

Bruce Gelber, deputy assistant attorney general of the Environment and Natural Resource Division, U.S. Department of Justice, was selected as the recipient of the Environment, Energy, and Resources Government Attorney of the Year Award. Mr. Gelber is a recognized expert on environmental litigation and holds a high degree of public confidence and trust. He has worked for DOJ since 1985 and was appointed to the position of deputy assistant attorney general in 2011.

The Public Interest Environmental Law Conference (PIELC) at the University of Oregon Law School was selected as the recipient of the Law Student Environment, Energy, and Resources Program of the Year Award. The 2010 annual environmental law conference featured many of the most prominent community activists, public interest attorneys, law students, and scientists from over fifty countries to share their experience and expertise.

The State of California Environmental Law Conference at Yosemite was selected as the recipient of the State or Local Bar Environment, Energy, and Resources Program of the Year Award. The Yosemite Conference is nationally recognized as the largest gathering in California of leaders in environmental, land use, and natural resource law. Its 19th Annual Environmental Law Conference in 2010 had an attendance of 793 people.

Membership Diversity Enhancement Program now open to government lawyers and solo practitioners!

As an ABA Section of Environment, Energy, and Resources member, you understand the value of your membership. Share that knowledge firsthand with your colleagues by spreading the word about the Section's 2011–2012 Membership Diversity Enhancement Program. The program is designed to facilitate the active engagement and integration into Section activities of lawyers who traditionally have been underrepresented in our Section's membership. The program's principal goal is to have the Section's programs, publications, and other activities reflect the diverse perspectives and interests of all lawyers practicing in the environment, energy, and resources areas. The 2011–2012 program is open to up to forty minority lawyers, young lawyers, government lawyers, and solo practitioners who have not held an ABA lawyer membership within the last two years. Interested individuals must submit an application to the Section on or before **Friday, October 28, 2011**. For full details, please visit http://ambar.org/EnvironMDEP.

Section announces Diversity Fellowship recipients

The ABA Diversity Fellowship in Environmental Law is designed to encourage disadvantaged or traditionally underrepresented law students to study and pursue careers in environmental law.

We are pleased to recognize the students that were selected to participate in the program during summer 2011. **California:** Angelica Salceda (University of California Berkeley Law); Henry Steinberg (University of California Hastings College of Law); **District of Columbia:** Casey Sullivan (The George Washington University Law School); Daphne A. Rubin-Vega (Howard University School of Law); **Florida:** Alexander Seraphin (University of California, Los Angeles School of Law); Heather Culp (Barry University School of Law); **New York:** Letecia Whetstone (SUNY at Buffalo Law School); Noelle Diaz (Pace University School of Law); **North Carolina:** Christine M. Deaver (University of North Carolina School of Law); Rebecca Yang (University of North Carolina School of Law); **Oregon:** Lauren K. Siller (University of Oregon School of Law); **Puerto Rico:** Estrella Santiago-Perez (University of Puerto Rico School of Law); **Rhode Island:** William J. Giacofci (Roger Williams University School of Law).

Details about the Diversity Fellowship in Environmental Law are available on the Section Web site, www.americanbar.org/environ/.

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Trends endeavors to provide important current developments pertaining to environmental, energy, and natural resources issues, as well as Section news and activities of professional interest to members and associates. Please direct editorial inquiries to the Editor-in-Chief, Norman A. Dupont at ndupont@rwglaw.com.

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Eleventh Circuit decides key issue in three-state water basin dispute

BY R. TODD SILLIMAN

The Eleventh Circuit recently issued a significant decision in the long-running litigation among Alabama, Florida, Georgia, and the U.S. Army Corps of Engineers (Corps) concerning the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin). *In Re: MDL – 1824 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011). The court of appeals ruled that water supply is an authorized purpose of Lake Lanier, a Corps reservoir located above Atlanta that supplies water to 3 million people in the greater Atlanta metropolitan area. The court vacated a lower court injunction that threatened to severely limit water supply from Lake Lanier beginning in July 2012.

Lake Lanier sits near the headwaters of the Chattahoochee River in northern Georgia. Water released from Lake Lanier flows 40 miles south to Atlanta, then southwest to form the border with Alabama. It flows farther south to join the Flint River (which also originates in Georgia) to form the Apalachicola River at the Florida border. The Apalachicola River runs for approximately 100 miles to the Gulf of Mexico. While small, the Chattahoochee River is Atlanta's best source of municipal and industrial water. Over 700,000 people receive water via direct withdrawals from Lake Lanier. More than 2 million other water users rely on releases from Lake Lanier to augment the downstream flow in the Chattahoochee River.

History of Lake Lanier and the water wars

The River and Harbor Act of 1946 (RHA), Pub. L. No. 79-525, 60 Stat. 634, approved construction of the Buford Dam that created Lake Lanier, along with hundreds of other projects throughout the United States. The text of the statute did not include any detail regarding Lake Lanier, and instead approved the project "in accordance with the report of the Chief of Engineers dated May 13, 1946." The Chief of Engineers' Report, in turn, incorporated the report of the Corps' Division Engineer, General Newman (the Newman Report), which contained a detailed discussion of the various benefits of the proposed multipurpose reservoir. The Corps constructed Lake Lanier between 1950 and 1957 in accordance with the RHA and these referenced Corps reports.

Twelve years after authorizing Lake Lanier, Congress passed the Water Supply Act of 1958 (WSA) to "participate and cooperate with States and local interests" in the development of "water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." The WSA authorizes the Corps to reallocate storage in any federal reservoir to supply drinking water, provided that doing so will not "seriously effect" other authorized purposes or "involve major structural or operational changes."

Legal challenges to the Corps' operation of Lake Lanier for water supply began in 1990, when Alabama sued the Corps in federal court in Alabama to block the implementation of a draft plan to reallocate storage in Lake Lanier from hydropower usage to water supply. The case was stayed and remained inactive for the next thirteen years while the three states attempted to negotiate an allocation of the waters of the ACF Basin. Meanwhile, in 2000, the Southeastern Federal Power Customers (SeFPC), an organization of electric power cooperatives and local governments that purchase hydropower from Lake Lanier, sued the Corps in Washington, D.C., claiming that the Corps was not authorized to operate Lake Lanier for water supply unless the hydropower customers received greater compensation for lost hydropower benefits. In 2001, Georgia filed its own suit to challenge the Corps' denial of a request to reallocate storage in Lake Lanier to meet Georgia's year 2030 forecasted water demands. The Corps rejected Georgia's request in large part because it concluded that the RHA did not authorize the Corps to operate for water supply to the detriment of other project purposes.

The parties in the SeFPC case attempted a settlement that would have involved a reallocation of storage in Lake Lanier to water supply, but the D.C. Circuit held that the Corps lacked authority to enter into it. This left the parties to litigate their claims over the Corps' authority to operate Lake Lanier for water supply. Alabama amended its complaint to challenge the Corps' alleged "de facto" reallocation of storage over the past three decades. The Judicial Panel on Multi-District Litigation consolidated the cases and assigned them to Judge Paul Magnuson of Minnesota, who previously handled the multi-district litigation concerning the Missouri River Basin. The consolidated cases had in common the issue of whether the RHA authorized the Corps to operate Lake Lanier for water supply and whether the WSA provided the Corps with additional authority (beyond whatever the RHA granted) to reallocate storage in Lake Lanier for water supply.

Judge Magnuson's "draconian" order and the Eleventh Circuit appeal

In July 2009, Judge Magnuson entered summary judgment in the consolidated cases. First, he ruled that water supply was not an authorized purpose of Lake Lanier under the RHA. Second, he held that the allocation of storage to water supply has had a "serious effect" on other project

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purposes and constituted a "major operational change." Judge Magnuson made this finding based on his own calculations concerning water demands and the conversion of those demands to storage allocations. Third, Judge Magnuson entered the following remedy, which he himself described as "draconian": By July 17, 2012, nearly all water withdrawals directly from Lake Lanier would have to cease, and the Corps would have to reduce the amount of water available to downstream users to levels provided in the 1970s or before; and before July 2012 water withdrawals from Lake Lanier and the Chattahoochee River could not increase without the consent of all the parties.

In its review of Judge Magnuson's order, the Eleventh Circuit first addressed the basis for appellate jurisdiction. The Eleventh Circuit held that it had jurisdiction over all of the consolidated cases, because the district court had entered final judgment in Georgia's action challenging the denial of its water supply request, and pendent jurisdiction was appropriate over the other cases, which shared with the Georgia action the central issue of whether water supply is an authorized purpose of Lake Lanier under the RHA. It also held that the district court's remedy constituted an injunction, rendering it subject to immediate appeal.

The Eleventh Circuit concluded that the Corps must reexamine Georgia's request for a reallocation of storage in Lake Lanier from hydropower usage to water supply.

The Eleventh Circuit next addressed the arguments of Georgia and the Corps that the district court lacked jurisdiction over the lawsuits by Alabama, Florida, and SeFPC challenging the gradually increasing withdrawals of water from Lake Lanier and downstream. Relying on the two-pronged test from *Bennett v. Spear*, 520 U.S. 154 (1997), the Eleventh Circuit ruled that the Corps' allowing increasing withdrawals and adjusting releases from the reservoir for water supply did not constitute final agency action under the Administrative Procedure Act (APA) because the operations did not constitute the "consummation" of the agency's decision-making process or determine the rights and obligations of any parties. Therefore, the district court lacked jurisdiction over those challenges, and the cases should be remanded to the agency to give it the opportunity in the first instance "to make final determinations pertaining to its current policy for water supply storage allocations." The Eleventh Circuit further ruled that, even if there were final agency action in the Alabama, Florida, and SeFPC cases, the district court's decision would have to be reversed, because, among other reasons, the district court overstepped its role as an appellate tribunal under the APA in making its own findings, some of them clearly erroneous, on matters such as the amount of storage needed to meet levels of current water demand. The vacatur of the decision on challenges to the Corps' current operations voided the district court's injunction.

The Eleventh Circuit then took up the merits of Georgia's request for a formal reallocation of storage to meet future needs, which the Corps had denied on the basis that it lacked statutory authority to grant it. The Eleventh Circuit concluded, contrary to the Corps' position, that "water supply was an authorized purpose of the RHA and that the RHA authorized the Corps to allocate storage in Lake Lanier for water supply." The appeals court based this on the earlier Corps reports that the RHA incorporates by reference, most notably the Newman Report. The Eleventh Circuit held that these reports showed that the original design and operational scheme for Lake Lanier were "designed with water supply in mind" and that the reports "expressly contemplated a very substantial increase" in the operation of the project "to satisfy the water supply needs of the Atlanta area." The court further agreed with Georgia that the Corps' authority under the WSA is supplemental to its authority under the RHA.

The Eleventh Circuit concluded that the Corps must reexamine Georgia's request for a reallocation of storage in Lake Lanier from hydropower usage to water supply. The court instructed the Corps on remand to "consider several important factors" related to its authority under the RHA: first, that water supply, like hydropower, flood control, and navigation, is an authorized purpose of Lake Lanier; second, that Congress intended for the Corps to "calibrate" its operations to balance water supply and hydropower; third, that water supply is not "subordinate" to hydropower; and fourth, that "Congress contemplated that water supply may have to be increased over time as the Atlanta area grows." The Eleventh Circuit further instructed that once the Corps determines the extent of its authority under the RHA, it should determine its additional authority under the WSA. The Eleventh Circuit held that in determining its authority under the WSA, the Corps was not bound by the D.C. Circuit's decision in the SeFPC case, because the D.C. Circuit did not have an opportunity to address whether the Corps had a foundation of authority to operate for water supply under the RHA. The Eleventh Circuit gave the Corps one year to arrive "at a well-reasoned, definitive, and final judgment" as to its authority and retained jurisdiction to monitor compliance with its order.

As a result of the decision, Georgia no longer is under the immediate threat that the primary source of water for 3 million of its people will be eliminated. In addition, the statutory authorization for water supply usage from Lake Lanier has been confirmed. The Corps now must undertake its analysis of the amount of water that it can make available to meet future water supply needs. In the meantime, the governors of the three states can continue their discussions towards an interstate allocation agreement.

R. Todd Silliman *is a partner in the Environment, Energy, and Product Regulation Practice of McKenna Long & Aldridge LLP and can be reached at tsilliman@mckennalong.com. For the past twelve years, he has been a member of the legal team representing the State of Georgia in the interstate water disputes among Alabama, Florida, Georgia, and the United States government.*

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The Clean Water Act: Nutrient discharges and New Jersey's comprehensive new fertilizer law

BY SEAN DIXON

The federal Clean Water Act and implementing state law, together with local discharge permits, regulate water discharges from both discrete point and less specific non-point sources into federal and state regulated waters. The non-point source discharge of nutrients contained in lawn fertilizers into water systems, however, has been largely unregulated. In New Jersey, a new fertilizer law seeks to limit the environmental impact of lawn fertilizer use. New Jersey's new law may be a harbinger of things to come in other states.

Lawn fertilizers containing concentrated nitrogen and phosphorus can present a danger to aquatic and coastal ecosystems. When applied in large quantities, too frequently, on compacted soils (that cannot absorb them), or to other impervious surfaces (e.g., sidewalks, pavement), the chemicals in fertilizers can run off into nearby waterways, become airborne, or leach directly into groundwater.

In many parts of the nation, turfgrass (a grassy lawn) is the single most omnipresent land-use cover, and associated fertilizer is devastating local water quality. New Jersey, the most densely populated state in the nation, is inundated with water quality problems. The Delaware and Hudson Rivers and the New York Harbor are sources of commerce, recreation, and drinking water that suffer from phosphorus and nutrient runoff. To the east, the Atlantic Ocean abuts over 120 miles of the Jersey Shore, where brackish and saltwater estuaries, including the Barnegat Bay ecosystem, are impacted by excess nitrogen.

To address this significant non-point source pollution, New Jersey passed one of the most comprehensive fertilizer laws in the nation (P.L. 2010, c.112). The law regulates the content, use, and sale of turfgrass fertilizers in the state (except for agriculture and on golf courses). Although initially envisioned as a permissible local ordinance, it was later expanded to be statewide and binding.

The requirements vary depending on whether the fertilizer user is an ordinary consumer or a landscaping professional (defined as "any individual who applies fertilizer for hire [or] within the scope of employment").

For consumers, there are significant limitations on use of lawn fertilizers. Fertilizer can only be applied from March 1 to November 15 and not before heavy rainfall or onto impervious surfaces or frozen ground. Consumers are limited to 3.2 pounds of nitrogen per 1,000 square feet of lawn annually, and they cannot apply fertilizer within 25 feet of any waterbody unless specific application equipment is used (e.g., drop spreaders, targeted sprays).

Additionally, the content of fertilizers sold in the state is now subject to strict standards. At least 20 percent of the nitrogen in all retail fertilizer products must be "slow release" nitrogen—a more ecologically-safe class of water-insoluble nitrogen chemicals. Products sold at retail can only be mixed and labeled for use up to 0.7 pounds of "fast release" (water soluble) nitrogen and 0.9 pounds of total nitrogen per application. Phosphorus-containing fertilizers are banned, with certain exceptions. Even within these exceptions, phosphorus is limited to 0.25 pounds per application.

Professional landscapers are afforded some added flexibility. First, professionals can apply fertilizers to lawns for an additional two weeks after November 15. Second, professionals can apply up to 4.25 pounds of nitrogen per 1,000 square feet of lawn annually, and can use up to 1.0 pounds of total nitrogen per application (but they are still limited to 0.7 pounds of water-soluble nitrogen per application). Third, professionals can violate the 25-foot (but not a 10-foot) buffer requirement for one "lawn rescue" treatment per year.

While consumers are not subject to penalties, landscaping professionals and retail stores that violate the law are subject to a $500 fine for the first offense and up to $1,000 for the second and each subsequent offense. Professionals must also pass a certification examination administered by Rutgers University's Agricultural Experiment Station. This certification program involves mandatory environmental, ecological, and lawn best management practice training, and continuing education. Fertilizer use prohibitions are immediately effective. Landscaping professionals, however, do not have be certified until 2012 and manufacturers and retail stores have until 2013 to fully convert product inventories to meet the new content standards.

The New Jersey fertilizer law was based on models found in Florida (on nitrogen restrictions), and in New York and Minnesota (limiting phosphorus) and has, in turn, been used as a model by other nearby states. These early state laws may be examples of a future wave of state regulation. In April, Maryland passed a fertilizer law almost identical to New Jersey's that the Chesapeake Bay Commission estimates will result in a 15 percent reduction of urban phosphorus runoff compared to 2009 urban loads. Phosphorus has also been banned in Virginia recently, and a broad fertilizer bill is pending in Pennsylvania.

Sean Dixon *is the coastal policy attorney at Clean Ocean Action, a New Jersey/New York-based ocean pollution prevention non-profit advocacy group. He can be reached at policy@cleanoceanaction.org.*

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Get the most out of your Section membership by joining committees

The Section of Environment, Energy, and Resources recently kicked off the start of the 2011–2012 ABA Bar Year and we want to help you maximize your Section membership by joining up to five substantive committees. The Section has thirty-eight substantive committees, and by joining you will open up a new world of possibilities for networking, professional growth, and career opportunities while serving your profession. You choose your level of involvement!

Benefits of committee membership

- Stay current with emerging issues relating to your area of practice
- Receive e-mail notification of new committee newsletters and communications geared towards your specific areas of interest
- Updates on cases and developments in your professional area
- Network with leaders in your field
- List serve access to communicate with colleagues in your profession
- Opportunity for leadership in the Section
- Opportunity to publish articles

It's easier than ever to join a committee. Join today by completing the form below or by visiting the Section's Web site at http://ambar.org/EnvironCommittees. For a list of Section committees, please turn to page 8 and select from environmental, energy and resources, or cross-practice committees. For a detailed list of committee descriptions and related information, see http://ambar.org/EnvironCommittees.

Section organizational overview

The Section of Environment, Energy, and Resources' organizational overview on the following pages outlines the leadership structure for the 2011–2012 ABA Bar Year. The Section leadership is made up of a Council, which is the governing body, service area groups, and working and substantive committees composed of members dedicated to making the Section the "premier forum for strategies and information for environment, energy, and resource lawyers."

The Council consists of twelve officers who form the Executive Committee and fourteen Council members who represent many years of experience in the Section and who are responsible for making decisions on Section priorities, budgets, and policies.

The service area groups are charged with providing relevant products and services in the areas of education, membership, and publications.

Additionally, the Section is supported by seven professional staff members working at the ABA headquarters in Chicago.

SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES
COMMITTEE PREFERENCE FORM
You must be a Section member to be enrolled as a committee member

ABA I.D. (required) ____________________ Date ____________________

Name ____________________ Firm/Agency ____________________

Address ____________________

City/State/ZIP ____________________

Telephone ____________ Fax ____________ E-mail (To receive committee information and announcements) ____________

Choose up to five committees. For a list of Section committees, please turn to page 8 and select from environmental, energy and resources, or cross-practice committees.

(1)____

(2)____

(3)____

(4)____

(5)____

Mail or fax this form to: American Bar Association, Section of Environment, Energy, and Resources, 321 N. Clark St., Chicago, IL 60654, Fax: (312) 988-5572

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Section of Environment, Energy, and Resources 2011–2012

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New proposed guidance on the jurisdictional reach of the Clean Water Act

By Jonathan Simon

In the wake of the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), perhaps no environmental issue has proven as vexing to judges, regulators, regulated entities, and others as the scope of jurisdictional waters under the Clean Water Act (CWA), 33 U.S.C. § 1251, et seq. To help clarify this issue for their field staff and others, on April 27, 2011, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) jointly issued proposed guidance describing their current understandings of the jurisdictional reach of the CWA. *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, 76 Fed. Reg. 24,479 (Draft Guidance).

If adopted in its current form, the Draft Guidance will expand the scope of waters subject to CWA jurisdiction beyond those waters over which jurisdiction has been asserted under existing guidance. As proposed, the Draft Guidance will not impact previous jurisdictional determinations made by the Agencies. However, the Agencies make clear that the Draft Guidance should be applied to all programs authorized under the CWA, not only the section 404 dredge and fill permit program. As such, the Draft Guidance has potentially important implications for any activity that may be regulated under the CWA.

Supreme Court interpretations

The CWA generally was designed to restore and maintain the quality and integrity of, and eliminate or minimize the discharge of pollutants into, the nation's "navigable waters." Defined as "the waters of the United States," the scope of waters covered by the CWA has been hotly debated, mostly in connection with when activities undertaken in wetlands are subject to regulation under the act.

The U.S. Supreme Court has addressed the scope of "waters of the United States" on three occasions. First, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Bayview*), the Court unanimously concluded that wetlands adjacent to traditional navigable waterways were "inseparably bound up with the 'waters' of the United States" and, therefore, subject to federal protection under the CWA.

Next, in *SWANCC*, the Court declined to extend its *Bayview* holding to non-adjacent, isolated waters based solely upon their seasonal use by migratory birds. According to the Court, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the CWA" in *Bayview*. In *SWANCC*, by asserting CWA jurisdiction over isolated waters, the Corps was effectively reading the term "navigable" out of the CWA.

In *Rapanos*, the Court vacated and remanded two appellate court decisions that had upheld jurisdiction over wetlands connected to traditional navigable waters by a series of drainage ditches and non-navigable creeks, as well as wetlands separated from a drainage ditch by a berm. The Justices produced a 4–1–4 decision, effectively establishing two separate jurisdictional tests. Four Justices, in a plurality opinion written by Justice Scalia, concluded that the CWA authorizes federal jurisdiction only over "relatively permanent, standing or continuously flowing" waters connected to traditional interstate navigable waters and wetlands that have a "continuous surface connection" with such waters such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." In a concurring opinion, Justice Kennedy, took a different and potentially broader view, suggesting that the CWA applies to wetlands that have a "significant nexus" to waters that are commonly understood as navigable. Since *Rapanos*, courts have either applied Justice Kennedy's "significant nexus" standard or examined whether the waters would be within the CWA's jurisdictional scope under the plurality standard.

Draft Guidance

The Draft Guidance proposes specific instructions to field staff regarding the findings necessary to identify waters that (1) are clearly subject to CWA jurisdiction as either navigable or interstate waters; (2) may be covered by the CWA under the "significant nexus" test; or (3) are generally not subject to CWA jurisdiction. It also provides general guidance regarding the "significant nexus" standard, as well as instructional guidance to field staff on the documentation needed to support a jurisdictional determination.

The Draft Guidance identifies the following waters as categorically protected by the CWA: traditional navigable waters; interstate waters; wetlands adjacent to either traditional navigable waters or interstate waters; non-navigable tributaries to traditional navigable waters that are relatively permanent, meaning they contain water at least seasonally; and wetlands that directly abut relatively permanent waters. The latter two categories, the Draft Guidance explains, are within the jurisdictional scope of the CWA under the *Rapanos* plurality standard.

The Draft Guidance states that the certain other waters or wetlands are protected by the CWA, but only if a fact-specific analysis determines they have a "significant nexus" to a traditional navigable water or interstate water. The category of "conditionally protected" waters includes tributaries to traditional navigable waters or interstate waters, wetlands

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adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters, and waters that fall under the "other waters" category of the regulations. Under the Draft Guidance, waters generally will be considered to have a "significant nexus" if "they alone or in combination with other similarly situated waters in the same watershed have an effect on the chemical, physical, or biological integrity of traditional navigable waters or interstate waters that is more than 'speculative or insubstantial.'"

Finally, the Draft Guidance defines certain aquatic areas as presumptively not protected by the CWA. These non-jurisdictional waters include wet areas that are not tributaries or open waters and do not meet the Agencies' regulatory definition of "wetlands"; waters excluded from coverage under the CWA by existing regulations; waters that lack a "significant nexus" where one is required for a water to be protected by the CWA; artificially irrigated areas that would revert to upland should irrigation cease; artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; water-filled depressions created incidental to construction activity; groundwater drained through subsurface drainage systems; and erosional features (gullies and rills), swales, and ditches that are not tributaries or wetlands.

The Draft Guidance appears to make it more likely that certain wetlands and waters will be found to be jurisdictional.

Key changes from existing guidance

The Draft Guidance differs from the existing guidance (which it would replace) in several key respects. First, the Draft Guidance arguably extends the reach of CWA jurisdiction beyond the scope defined in existing guidance. For example, the Draft Guidance's increased emphasis on the "significant nexus" test and the broad reach of its interpretation of this test appears to make it more likely that certain wetlands and waters will be found to be jurisdictional. In addition, although existing regulations state that the Agencies will assert jurisdiction over interstate waters themselves, the Draft Guidance appears to go even further by providing that other waters or wetlands may be deemed jurisdictional by virtue of their relationship to such interstate waters, i.e., if a water or wetland has a significant nexus to such interstate waters, or a water contributes flow to an interstate water. Moreover, the Draft Guidance appears to expand the definition of "traditional navigable waters" by allowing a trip taken solely for the purpose of demonstrating that a waterbody can be navigated to constitute sufficient evidence to support a determination that the water is susceptible to future commercial navigation and, therefore, is a traditional navigable water. In addition to clarifying that tidal ditches are, by definition, waters of the United States, the Draft Guidance suggests that many non-tidal ditches will also be considered jurisdictional when they: have a bed, bank, and ordinary high water mark; connect to a traditional navigable or interstate water; and have certain other specified characteristics.

The Draft Guidance also takes a novel approach to addressing the controversial issue of jurisdiction over so-called "(a)(3) waters," such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, wet meadows, and natural ponds. 33 C.F.R. § 328.3(a)(3). Recognizing that *SWANCC* and *Rapanos* identified limitations on the scope of jurisdiction over such waters, the Draft Guidance states that the Agencies expect to further clarify this issue as part of a notice-and-comment rulemaking. In the meantime, the Agencies will make case-by-case, fact-specific jurisdictional determinations with respect to (a)(3) waters that are in close physical proximity to traditional navigable waters, interstate waters, or their jurisdictional tributaries, by evaluating significant nexus in the same manner as for adjacent wetlands. For other waters that are not physically proximate to jurisdictional waters—i.e., "isolated, intrastate, non-navigable waters and wetlands that would not meet the regulatory definition of 'adjacent' with respect to jurisdictional waters"—the Agencies passed on providing specific guidance and instead directed field staff to continue to refer jurisdictional determinations to headquarters for "formal project-specific approval."

Finally, in contrast to the existing guidance, which explicitly addressed only which waters are subject to CWA section 404 jurisdiction, the Draft Guidance expressly addresses the scope of the CWA's definition of "waters of the United States" for all CWA provisions that use the term. This includes the section 402 National Pollutant Discharge Elimination System permit program, section 311 oil spill program, section 303 water quality standards and total maximum daily load programs, and section 401 state water quality certification process.

What's next?

Although the Agencies solicited public comment on the Draft Guidance, the Guidance is not intended to be a binding regulation with the force of law. Instead, the Agencies announced that once the Guidance is finalized, they intend to initiate a formal rulemaking process to clarify further in regulations the extent of CWA jurisdiction. This decision not to initiate a rulemaking proceeding in the first instance has proven controversial, with a bipartisan coalition of 170 House lawmakers calling for EPA to reconsider its approach.

In the interim, the proposed Guidance's focus on case-by-case evaluations to determine whether a particular wetland or stream has a "significant nexus" with traditional navigable waters under the standard espoused by Justice Kennedy can be expected to continue to contribute to the significant cost and time associated with obtaining section 404 permits. As a result, landowners and project developers will likely continue to call for the Agencies to quickly undertake a formal rulemaking with the goal of developing uniform, enforceable standards for establishing the scope of CWA jurisdiction.

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By Theodore L. Garrett

Constitutional law

The U.S. Court of Federal Claims denied cross-motions for summary judgment in a Fifth Amendment takings claim arising from various Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remediation actions that prevented access to portions of a mine. *Placer Mining Co. v. United States*, 2011 WL 2039623 (Fed. Cl. May 25, 2011). The government relied on a nuisance exception, namely that the company's development of its property caused a health hazard, but the court stated that the company's mining interest is not an inherent nuisance. Because there are factual issues as to whether the government's physical invasion eliminated all feasible access to the property for mining, summary judgment was denied.

CERCLA

A company holding a permit from the City of Los Angeles to use a ship repair berth was held not liable as an owner under CERCLA for costs to clean up contamination on the property. *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011). The court rejected the city's argument that the company, which did not operate the boatworks facility, was a "de facto" owner and held, based on California law, that the holder of a permit for a specific use of real property is not the owner of that real property.

The Ninth Circuit upheld the dismissal of a citizen suit seeking CERCLA civil penalties for a company's alleged noncompliance with an EPA administrative order. *Pakootas v. Teck Cominco Metals*, Ltd., 641 F.3d 1178 (9th Cir. 2011). Because cleanup actions were still ongoing, the court viewed the suit for penalties as a challenge to an EPA-response action that is precluded by the pre-enforcement bar of CERCLA section 113(h). The exception in section 113(h)(2) for actions to recover penalties was held not applicable because citizens are not entitled to recover penalties for violations of EPA orders.

Air quality

The U.S. Supreme Court held that the Clean Air Act (CAA) displaces any federal common-law nuisance right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants that allegedly contribute to global warming. *American Electric Power Co., Inc., et al. v. Connecticut et al.*, 131 S. Ct. 2527 (2011). Plaintiffs, eight states, the City of New York, and three land trusts, sought a decree establishing carbon dioxide emissions for five major electric power companies alleged to be America's largest emitters of carbon dioxide. The CAA meets the test for displacement, the Court held, because it speaks directly to the question at issue and *Massachusetts v. EPA*, 549 U.S. 497 (2007), made plain that emissions of carbon dioxide are subject to regulation under the CAA. The Court also stated that EPA is better equipped to make the required decisions than federal judges, who lack the scientific and economic resources an agency can utilize. Because none of the parties briefed the availability of a claim under state nuisance law, that issue was left for consideration on remand.

A federal district court ordered EPA to issue a final decision on an air permit, pending since 2008, for a natural gas power plant in California. *Avenal Power Center LLC v. EPA*, 2011 WL 2133660 (D.D.C. May 26, 2011). The court ruled that EPA violated the requirement in section 165(c) of the CAA to grant or deny a permit application within twelve months. The court rejected EPA's argument that the permit once issued should be subject to Environmental Appeals Board review, stating that the unambiguous requirement of act of Congress "cannot be overridden by a regulatory process created for the convenience of an Administrator."

The Tax Injunction Act does not bar the owner of a power plant from challenging a county levy on carbon dioxide emissions in federal court, the Fourth Circuit held. *GenOn Mid-Atlantic, LLC v. Montgomery County, Maryland*, 2011 WL 2438524 (4th Cir. June 20, 2011). The fact that only one power plant is expected to be subject to the levy indicates that it serves punitive or regulatory rather than revenue purposes. Applying the Tax Injunction Act might encourage punitive local exactions for which the federal courts would be unavailable.

Water quality

A federal district court denied a motion to enter a proposed consent decree concerning a municipality's alleged permit violations due to sewer overflows. *United States v. City of Akron*, 2011 WL 1045553 (N.D. Ohio Mar. 17, 2011). "There is little doubt in the Court's mind that the Decree will not *best* serve society and the affected waterways," the court concluded, noting that the consent decree gave the municipality nineteen years to reduce its overflows. "Giving due deference

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to the EPA's expertise,' the court found that "the timeline in the Decree is too lengthy, too uncertain, and too dependent upon future agreement amongst the parties."

The Supreme Court will hear a lawsuit challenging the constitutionality of EPA compliance orders under the Clean Water Act. *Sackett v. EPA*, 2011 WL 675769 (U.S. Sup. Ct. June 28, 2011). The petition for a writ of certiorari was granted to consider: (1) whether petitioners may seek pre-enforcement judicial review of the order pursuant and (2) if not does the unavailability of such review violate petitioners' rights under the Due Process Clause? Stay tuned.

FIFRA

An EPA order requiring a company to cease selling unregistered products used to disinfect wastewater treatment systems in the paper industry was enjoined and remanded for reconsideration. *Nalco Co. v. EPA*, 2011 WL 1882397 (D.D.C. May 18, 2011). EPA had previously issued an order allowing the company to continue sales of the products to existing customers while it pursued registration, and the court found EPA's subsequent order, barring sales of the products in order to level the marketplace for competitors, to be arbitrary and unlawful.

Resources

The U.S. Court of Appeals for the Federal Circuit vacated and remanded a Court of Federal Claims decision that rejected takings and contract claims by water users and irrigation districts in the Klamath Basin for losses arising from the government's 2001 decision to cease delivery of irrigation water for agriculture and use the available water for fish listed under the Endangered Species Act. *Klamath Irrigation District v. United States*, 635 F.3d 505 (Fed. Cir. 2011). On remand, the Court of Federal Claims should address whether contractual agreements have altered or clarified water rights acquired for plaintiffs' benefit and whether the government can show that the performance of the various contracts at issue was impossible.

The U.S. Supreme Court held that Wyoming did not breach its 1951 water-sharing compact with Montana when its farmers changed their irrigation practices to consume more water, reducing the amount of water returning to the Yellowstone River. *Montana v. Wyoming, et al.*, 131 S. Ct. 1765 (2011). The compact preserves existing appropriative rights and does not prohibit Wyoming farmers from improving their irrigation systems, even to the detriment of downstream appropriators.

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Compliance challenges under the Clean Air Act's General Duty Clause

By Ben Snowden

Last September, BP paid a $15 million civil penalty to resolve Clean Air Act (CAA) violations arising from a series of fires and explosions at its Texas City refinery that killed fifteen people and injured 170 in 2005. The CAA fine was based not on emissions violations, but on violations by BP of the General Duty Clause (GDC) and Risk Management Program (RMP) requirements of CAA section 112(r). In late 2009, the Environmental Protection Agency (EPA) settled GDC enforcement cases arising from accidental releases at chemical manufacturing facilities in Kentucky and Mississippi for penalties of $600,000 and $731,000, respectively. These substantial penalties are consistent with the Obama administration's emphasis on public safety as an enforcement priority and are indicative of the significant enforcement problem that GDC violations pose for stationary sources. This problem is compounded by the fact that GDC compliance is almost impossible to verify.

The goal of CAA section 112(r), 42 U.S.C. § 7412(r), is "to prevent the accidental release and to minimize the consequences of any such release" of specified "extremely hazardous substances" (EHSs), as well as any other substance that the agency concludes (even in hindsight) is "extremely hazardous." The GDC, as codified in section 112(r)(1), requires any stationary source that handles EHSs to: (1) identify the hazards posed by accidental releases of those substances, (2) design and maintain its facility to prevent such releases, and (3) make preparations to mitigate the off-site consequences of any releases that do occur. Like the RMP of section 112(r)(7), the GDC was modeled on a parallel provision of the Occupational Safety and Health Act, but both CAA provisions focus on the off-site consequences of accidental releases rather than workplace hazards.

The GDC has neither implementing regulations nor clear limits on its application. Whereas RMP requirements apply only to sources and processes that handle listed EHSs in excess of specified threshold quantities, the GDC applies where any quantity of any EHS, listed or not, is present. And in contrast to the specific RMP requirements codified in 40 C.F.R. Part 68, the GDC's mandate is vague and measured solely by performance. As the agency acknowledges, "the General Duty Clause is not a regulation and compliance cannot be checked against a regulation or submission of data." EPA Office of Emergency Management, The General Duty Clause, EPA 550-F-09-002 (Mar. 2009) at 2 (*available at* www.epa.gov/oem/docs/chem/gdc-fact.pdf).

The results-driven nature of the GDC suggests that any time an accidental release of EHSs results in off-site injury, the source of the release is likely to have violated at least one component of the duty. This is consistent with EPA's enforcement of the GDC, which generally occurs only after a release resulting in offsite injury or death. Unfortunately, stationary sources that handle potential EHSs have difficulty verifying compliance with the GDC, because there is no clear guide as to how much hazard prevention is enough. This is especially alarming, as GDC violations may (in theory) be criminally prosecuted under CAA section 113(c), as EPA's implementation policy indicates. EPA, Guidance for Implementation of the General Duty Clause: Clean Air Act Section 112(r)(1), EPA 550-B00-002 (May 2000) at 6. EPA's limited guidance indicates that compliance begins, but does not end, with following industry standards for identifying hazards, designing and maintaining a safe facility, and minimizing the consequences of accidental releases. Compliance with industry standards, however, may be insufficient both because unique conditions at a facility may make certain standards inapplicable and because "there may be situations in which an existing standard or practice is simply inadequate to prevent accidents." *Id.* at 2.

How, then, does a regulated party bridge the gap between industry standards and GDC compliance? The first step is to identify unique facts about the facility that may require additional hazard identification and prevention. For example, the hazard analysis for a storage vessel should consider current industry standards applicable not only to the vessel and its contents, but also to the process in which it is located and adjacent processes that might trigger an accidental release. To recognize when industry standards are inadequate or outdated, a source must keep up with the "state of practice" in its industry. EPA holds owners and operators responsible for following both industry publications and also safety and enforcement alerts published by EPA and the Occupational Safety and Health Administration. Sources also must stay abreast of published incident investigations (particularly those conducted by the U.S. Chemical Safety Board) that identify hazards relevant to their industry.

In the current regulatory climate, GDC compliance is more important than ever. Although only absolute accident prevention can guarantee compliance, observing industry standards and keeping current on the state of the art in hazard identification and prevention will help to prevent GDC violations—and, more importantly, protect the public.

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Continued from page 1

CAA displaces common law claims

Court (Justice Sotomayor, recused), Justice Ginsburg was unwilling to vest federal judges with the task of performing what it viewed to be primarily regulatory roles subject to democratic processes:

"The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decisionmaking scheme Congress enacted. The Second Circuit erred, we hold, in ruling that federal judges may set limits on greenhouse gas emissions in face of a law empowering EPA to set the same limits, subject to judicial review only to ensure against action 'arbitrary, capricious, . . . or otherwise not in accordance with law.'"

The Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007) that the Clean Air Act provides EPA with discretionary authority to regulate greenhouse gases as "air pollutants" loomed large: "We hold 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. *Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. And we think it equally plain that the Act "speaks directly" to emissions of carbon dioxide from the defendants' plants." *AEP*, 131 S. Ct. at 2537.

The Court was unconvinced that federal courts in common law nuisance suits should play a role in competing with EPA's regulatory authority: "It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency 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." 131 S. Ct. at 2539–40.

Indeed, the regulatory goalposts have shifted significantly since the initial case was filed in 2004. Since then, EPA has, among other climate regulatory activities, determined that GHGs "endanger" public health and welfare and are thus a "pollutant" subject to regulation under the CAA, issued rules requiring utilities and others to report their GHG emissions, said that new or modified major sources of GHGs may be subject to new source review, and said that other new sources may be subject to new source performance standards for GHG emissions.

The Court's reasoning may boil down to a certain imperfect syllogistic zeitgeist:

(1) Federal common law claims are displaced by federal statutory authority, whether exercised or not; and, (2) the CAA, as the Supreme Court has held, provides EPA with the discretionary authority to regulate greenhouse gases;
(3) therefore, the CAA displaces the respondents' federal common law claims.

On the other hand, the picture could change if EPA loses the authority to regulate GHGs. The 112th Congress and several presidential candidates have made blocking EPA action on climate change a priority, which informs the cases and actions above. If, for example, Congress suspends or terminates EPA's authority to regulate GHGs, then the displacement issue discussed above would seem once again to be on the table.

Moreover, the common law is still alive for addressing climate change claims. The Court explained that its ruling does not affect state common law causes of action. To be sure, state common law actions would be subject to a more exacting demonstration of congressional intent to preempt such claims under the CAA (or other federal legislation). As Justice Ginsburg put it for the Court, "In light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [Clean Air] Act." 131 S. Ct. at 2540. The Court clearly left the preemption issue as to state nuisance claims to another day: "None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand." *Id.*

Justices Alito (joined by Justice Thomas) issued a brief concurrence that seems to question *Massachusetts v. EPA*. As Justice Alito wrote in somewhat stilted prose: "I agree with the Court's displacement analysis on the assumption (which I make for the sake of argument because no party contends otherwise) that the interpretation of the CAA, adopted by the majority in *Massachusetts v. EPA*, is correct." *Id.* at 2540–41 (Alito, JJ., with whom Thomas, JJ. joins, concurring).

In *AEP*, the Court was receptive to the notion that the federal common law claims raised by the plaintiffs involve items already within EPA's regulatory grasp under the CAA, and that's that. Four Justices—including Justice Kennedy—accepted that the states possess constitutional standing under *Massachusetts v. EPA*. Justice Sotomayor, who recused herself from the *AEP* case, has never questioned whether states have standing to sue concerning climate change. This suggests that five members of the Court (including Justice Sotomayor) accept that states possess constitutional standing in this context. No Justices engaged either the political question or prudential standing arguments. This suggests that eight Justices do not believe that these issues are salient in the climate context under federal common law.

AEP is an important decision in the field of environmental law: It stands astride several junctures: public and private law; environmental, constitutional, and international law; injunctive and legal relief; state and federal action; and judicially, legislatively, and administratively fashioned responses. With its cornucopian issues extraordinaire—separation of powers, federalism, standing, displacement, political question, tort, and prudence—it has something for nearly all legal tastes, temperaments, and talent.

AEP is sure to rock the foundation of climate law and policy for many years, perhaps generations, to come.

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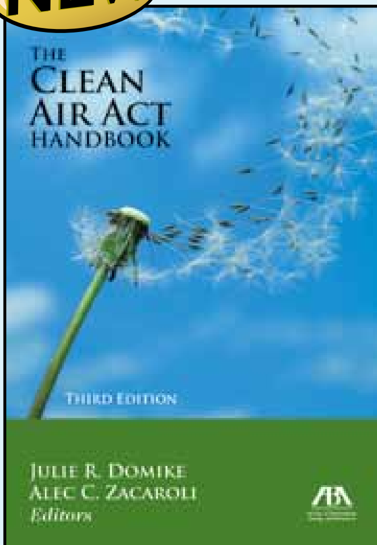

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