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End of a Long Road for Greenhouse Gas Public Nuisance Claims

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In a long-awaited but not unexpected decision, the United States Supreme Court dismissed public nuisance claims against five power companies, ruling that the Clean Air Act and ongoing efforts by the United States Environmental Protection Agency (EPA) to regulate greenhouse gas (GHG) emissions displace federal common law of nuisance. *American Electric Power Co., Inc., et al. v. Connecticut, et al.*, 564 U.S. __ (2011). In a unanimous ruling written by Justice Ruth Bader Ginsberg and issued on June 20th, the Court noted that the two lawsuits at issue were filed well before EPA had initiated efforts to regulate GHGs.

The public nuisance suits were filed in 2004, and since that time, a number of intervening developments set the stage for the Court's decision. In 2007, the Supreme Court ruled in *Massachusetts v. EPA* that the Clean Air Act authorizes the EPA to regulate GHGs. 549 U.S. 497 (2007). Subsequently, in 2009, the EPA made its "endangerment finding," concluding that GHG emissions from motor vehicles "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." That trigger allowed EPA to begin regulating GHGs from all sources. Since that time, EPA has promulgated regulations applicable to motor vehicles, and has issued its "Tailoring Rule," which became effective this year and imposes "Best Available Control Technology" requirements on major new and modified sources of GHGs (including power plants). In addition, EPA is also in the process of drafting another rule, to be finalized in May 2012, that would establish GHG "New Source Performance Standards" for new, modified and existing power plants and petroleum refineries. The NSPS rules are expected to have a more significant impact on these industries

than the Tailoring Rule.

Given all that has transpired since 2004, the Court held 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." The Court also noted that the Clean Air Act provides multiple avenues for enforcement, including the ability of states and private parties to petition for rulemaking if EPA does not set emissions limits for a particular pollutant or source of pollution.

For further information about today's decision and EPA's efforts to regulate greenhouse gases, contact John Rousakis of our environmental team at jrousakis@omm.com.

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