Professor Hester discussed the potential implications of yesterday’s Supreme Court ruling in Connecticut v. AEP in the Cypress Times.

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ENVIRONMENTAL LAW EXPERT WEIGHTS IN ON SUPREME COURT GREENHOUSE GAS RULING
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HOUSTON, TX - Six states went before the U.S. Supreme Court earlier this year to argue that they have the right to sue energy companies under public nuisance laws for failing to control emissions. Monday, the Supreme Court issued its ruling in the case of Connecticut v. AEP.

On June 20 Tracy Hester, visiting assistant professor at the University of Houston Law Center and director of UHLC's Environment, Energy and Natural Resource Center, discussed the potential implications of the Supreme Court’s ruling in this case:

"For nearly seven years, states, environmental groups and private claimants have gone to federal court seeking to declare greenhouse gas emissions as a public nuisance under federal common law. The claims, if they succeeded, could have led to federal court orders restricting greenhouse gas emissions and created open-ended liabilities for climate change caused – at least in part – by industrial emissions.

The U.S. Supreme Court Monday closed the federal courts to this approach. In short, the Court ruled that Congress effectively took over this area by passing the Clean Air Act and authorizing Environmental Protection Agency (EPA) to regulate greenhouse gas emissions. Where Congress has spoken through such legislation, the Court noted, federal courts cannot craft their own remedies under federal common law.

As usual with U.S. Supreme Court decisions, some of the most interesting aspects of the ruling lie in what the Court did not decide. First, the Court reaffirmed the federal courts’ ability to hear these cases in the first place. The defendants had claimed that the plaintiffs lacked standing and that the cases posed a political question which the federal courts can’t address. In a tie decision, the Court effectively confirmed its earlier ruling in Massachusetts v. EPA that the federal courts can hear some of these climate change claims (particularly lawsuits by states).

Second, the Court did not rule that EPA had to actually implement greenhouse gas regulations to displace federal common law claims. As a result, federal common law nuisance claims are now dead even if EPA theoretically declined to regulate greenhouse gas emissions under the Clean Air Act in the future (although, of course, such regulations are already underway). If Congress chose to pass a statute that exempted greenhouse gases from regulation under the Clean Air Act, however, it may revive federal common law actions unless the new law expressly bars those claims as well.

Last, and perhaps more important, the Court’s decision may simply throw open the door to a
broader and more complicated arena. While it ruled that the Clean Air Act displaced federal common law nuisance claims, the Court pointedly noted that this conclusion did not apply to public nuisance lawsuits under state law. Climate plaintiffs have already picked up on this important distinction: plaintiffs in Mississippi who had their federal claims dismissed last year have filed a new complaint under state law for many of the same damages. If the climate change nuisance battle shifts to the state courts, companies may find themselves facing a patchwork array of state laws and conflicting orders while plaintiffs in turn wrestle with new questions of jurisdiction and enforcement against defendants outside the state. The historically complex and challenging federal litigation could, in effect, be multiplied many times over through a complicated phalanx of multiple state court actions."

-Tracey Hester, Director, Environment, Energy & Natural Resources Center, University of Houston Law Center