



SIDLEY AUSTIN LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 839 5300
(212) 839 5599 FAX

sbierman@sidley.com
(212) 839-5510

BEIJING	GENEVA	SAN FRANCISCO
BRUSSELS	HONG KONG	SHANGHAI
CHICAGO	LONDON	SINGAPORE
DALLAS	LOS ANGELES	TOKYO
FRANKFURT	NEW YORK	WASHINGTON, D.C.

FOUNDED 1866

April 4, 2007

BY HAND DELIVERY

Thomas Asreen
Acting Clerk of the Court
United States Court of Appeals for the Second Circuit
40 Foley Square, Room 1803
New York, NY 10007

Re: State of Connecticut, et al. v. American Electric Power, No. 05-5104-CV

Dear Mr. Asreen:

I write pursuant to Rule 28(j) regarding the decision in *Massachusetts v. EPA*, No. 05-1120 (U.S. Apr. 2, 2007), which supports defendants' separation-of-power arguments.

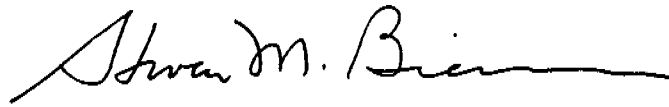
Massachusetts holds that the States' sovereign prerogatives to force reductions in greenhouse gas emissions are "now lodged in the Federal Government," and that "Congress has ordered EPA to protect" States from any harms associated with those emissions. Slip Op. at 16. This confirms that whatever remains of the narrow federal common law cause of action to abate "simple type" nuisances is not a remedy for complex environmental issues, and cannot be expanded given Congress's authority to protect the environment and the modern recognition that federal common law cannot be used to resolve high policy questions. Br. at 16-26. *Massachusetts* also holds that courts "have neither the expertise nor the authority to evaluate" the very "policy judgments," Slip Op. at 31, defendants cited to support this argument and their justiciability arguments. Br. at 31, 48-58.

Massachusetts also confirms defendants' displacement argument. Federal common law is displaced when Congress legislates on the subject. *Id.* at 37. Plaintiffs argued that "the Clean Air Act does not authorize any regulation of carbon dioxide," States Br. at 57, and displacement cannot occur "as long as carbon dioxide falls outside the scope of the Clean Air Act," *id.* at 58 n.24. *Massachusetts* holds that greenhouse gases, including carbon dioxide, are "air pollutants" under the Clean Air Act. Slip Op. at 26. Thus, in addition to the enactments defendants previously cited, Br. at 38-40, EPA's regulatory authority displaces a federal common law cause of action to regulate the very same substance.

Thomas Asreen
April 4, 2007
Page 2

Finally, the Court's ruling that Massachusetts had standing to challenge EPA's refusal to exercise this authority does not undermine defendants' standing arguments. The statutory right to challenge EPA's action was "of critical importance to the standing inquiry," because that right can be asserted "without meeting all the normal standards for redressability and immediacy"; only a showing of "some possibility" the agency will reconsider its decision is needed. Slip Op. at 13-14. Because no such statutory right exists here, the normal standards apply.

Sincerely,



Steven M. Bierman

cc: Simon Wynn, Esq. (per email)
Matthew Pawa, Esq. (per email)



SIDLEY AUSTIN LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 839 5300
(212) 839 5599 FAX

sbierman@sidley.com
(212) 839-5510

BEIJING	GENEVA	SAN FRANCISCO
BRUSSELS	HONG KONG	SHANGHAI
CHICAGO	LONDON	SINGAPORE
DALLAS	LOS ANGELES	TOKYO
FRANKFURT	NEW YORK	WASHINGTON, D.C.

FOUNDED 1866

April 4, 2007

BY HAND DELIVERY

Thomas Asreen
Acting Clerk of the Court
United States Court of Appeals for the Second Circuit
40 Foley Square, Room 1803
New York, NY 10007

Re: Open Space Institute, et al. v. American Electric power, No. 05-5119-CV

Dear Mr. Asreen:

I write pursuant to Rule 28(j) regarding the decision in *Massachusetts v. EPA*, No. 05-1120 (U.S. Apr. 2, 2007), which supports defendants' separation-of-power arguments.

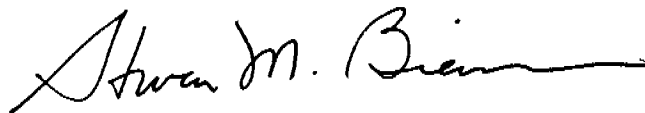
Massachusetts holds that the States' sovereign prerogatives to force reductions in greenhouse gas emissions are "now lodged in the Federal Government," and that "Congress has ordered EPA to protect" States from any harms associated with those emissions. Slip Op. at 16. This confirms that whatever remains of the narrow federal common law cause of action to abate "simple type" nuisances is not a remedy for complex environmental issues, and cannot be expanded given Congress's authority to protect the environment and the modern recognition that federal common law cannot be used to resolve high policy questions. Br. at 16-26. *Massachusetts* also holds that courts "have neither the expertise nor the authority to evaluate" the very "policy judgments," Slip Op. at 31, defendants cited to support this argument and their justiciability arguments. Br. at 31, 48-58.

Massachusetts also confirms defendants' displacement argument. Federal common law is displaced when Congress legislates on the subject. *Id.* at 37. Plaintiffs argued that "the Clean Air Act does not authorize any regulation of carbon dioxide," States Br. at 57, and displacement cannot occur "as long as carbon dioxide falls outside the scope of the Clean Air Act," *id.* at 58 n.24. *Massachusetts* holds that greenhouse gases, including carbon dioxide, are "air pollutants" under the Clean Air Act. Slip Op. at 26. Thus, in addition to the enactments defendants previously cited, Br. at 38-40, EPA's regulatory authority displaces a federal common law cause of action to regulate the very same substance.

Thomas Asreen
April 4, 2007
Page 2

Finally, the Court's ruling that Massachusetts had standing to challenge EPA's refusal to exercise this authority does not undermine defendants' standing arguments. The statutory right to challenge EPA's action was "of critical importance to the standing inquiry," because that right can be asserted "without meeting all the normal standards for redressability and immediacy"; only a show of "some possibility" the agency will reconsider its decision is needed. Slip Op. at 13-14. Because no such statutory right exists here, the normal standards apply.

Sincerely,



Steven M. Bierman

cc: Simon Wynn, Esq. (per email)
Matthew Pawa, Esq. (per email)