



Tort Liability and Climate Intervention

Environmental Law
Oct. 23, 2019

Exciting times...

(ORDER LIST: 589 U.S.)

TUESDAY, OCTOBER 22, 2019

ORDER IN PENDING CASE

19A368 BP P.L.C., ET AL. V. MAYOR AND CITY COUNCIL BALTIMORE

The application for stay presented to The Chief Justice and by him referred to the Court is denied. Justice Alito took no part in the consideration or decision of this application.

Climate Change Tort Litigation: A quick look

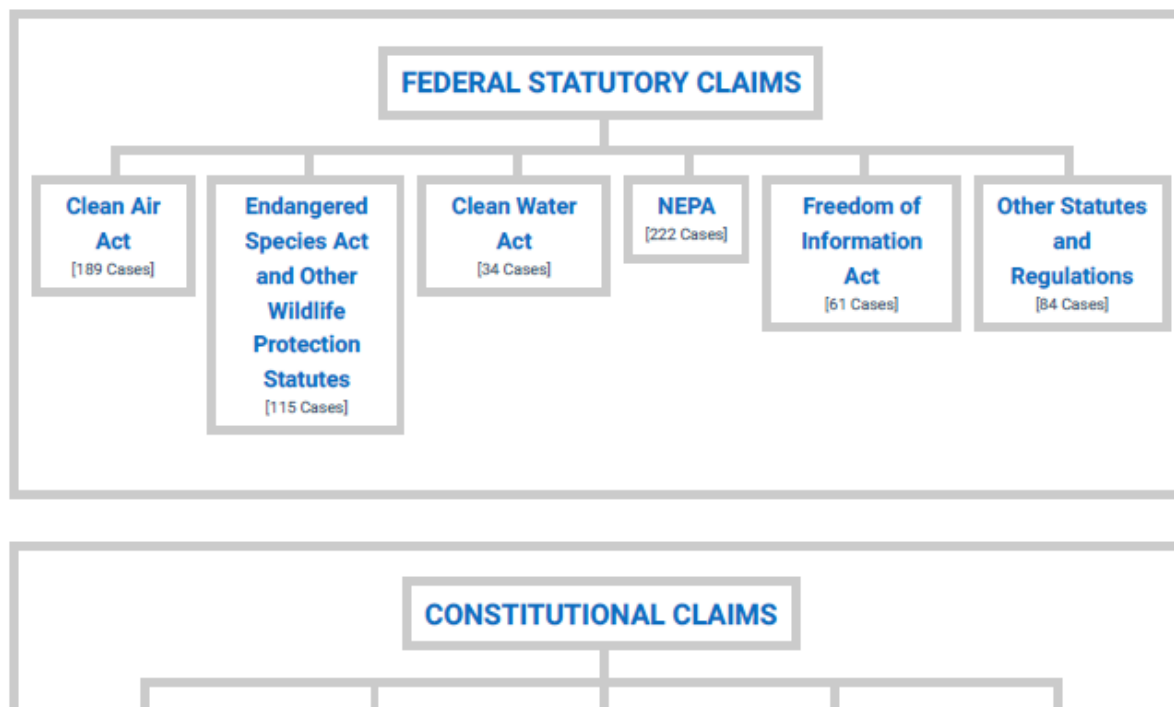
- Active trial docket – 14 governments, one trade association, multiple states
- Prior history – fate of federal common law tort actions
- Immediately ahead – status of trials and appeals
- Application to climate intervention projects

U.S. Climate Change Litigation

A collaboration of:



Cases in the U.S. database are organized by type of claim and may be [filtered](#) by the principal laws they address, their filing years, and their jurisdictions. The database is also [searchable](#) by keyword. In many cases, the database includes links to decisions, complaints, motions, and other administrative and litigation documents. To browse by claim type, click on categories below. To filter cases or search by keyword, [click here](#).



The Big Three Federal Common Law Tort Lawsuits

- **Connecticut v. AEP (2d Cir.)**
 - Eight AGs sued five power companies
 - **U.S. Supreme Court ruled that federal common law nuisance claims were displaced by Clean Air Act**
- **Comer v. Murphy Oil Co. (5th Cir.)**
 - Class action suit for Katrina property damages
 - Targets oil, coal, chemical and insurance companies
 - Fifth Circuit has dismissed in very odd fashion; district court just dismissed re-filed complaint and on appeal again
- **Native Village of Kivalina v. Exxon Mobil (9th Cir.)**
 - District court in California dismissed as political question
 - Ninth Circuit dismissed on displacement grounds as well

The second wave: State Law Torts Claims

- New wave of lawsuits in 2018 premised on state law claims, usually in state courts.
- Thirteen counties and cities, one state (Rhode Island), one trade group (Pacific Coast Federation of Fisherman's Association)
- Claims: public/private nuisance, strict liability for failure to warn/design defect, negligent failure to warn, unjust enrichment, and trespass
- Relief sought: compensatory damages, attorney's fees, punitive damages, disgorgement, and (for some) injunctions and adaptation program funding

Exciting times (with details)...

- Removal and remand petitions:
 - 1st Circuit denied stay of remand; emergency petition to SCOTUS
 - 10th Circuit reviewing Colorado district court's denial of stay; second emergency petition to SCOTUS
- Court unanimously refused to stay trial during appellate review of remand rulings (8-0; Alito abstaining)

No. 19A-

IN THE
Supreme Court of the United States

BP P.L.C., ET AL.,
Applicants,

v.

STATE OF RHODE ISLAND,
Respondent.

**APPLICATION TO STAY REMAND ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND PENDING
APPEAL**

AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

Directed to the Honorable Stephen G. Breyer,
Associate Justice of the Supreme Court
And Circuit Justice for the First Circuit

JOSHUA S. LIPSHUTZ

THEODORE J. BOUTROUS, JR.



Future Directions in Climate Change Litigation

- Continued scorched earth battles over procedural barriers to trial
 - Political question, standing, preemption
 - Trial tactics: expert admissibility, remedies, MDL complex litigation models
 - Tort reform (including Texas affirmative defense for greenhouse gas nuisance torts)
- Legislative interventions: Warren plan; OGCI suggestion of preemption (and response)

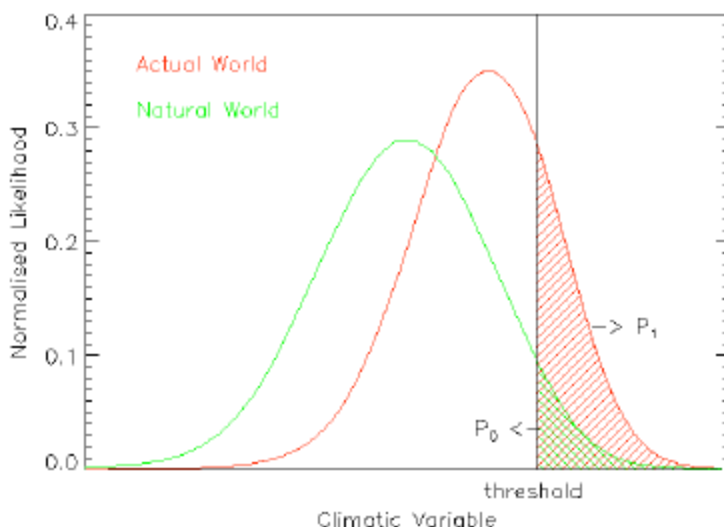


Met Office
Hadley Centre

Fraction of Attributable Risk

Fractional change in the likelihood of exceeding a temperature threshold attributable to a particular causal factor

(Allen, Nature, 2003)



P_0 : Probability of exceeding a threshold in the “world that might have been” (without that causal factor).

P_1 : Probability of exceeding a threshold in the actual world.

$$FAR = 1 - (P_0 / P_1)$$

Application to Climate Intervention Tort Actions

- Reversing the Polarity of Defense Strategies
 - Standing
 - Causation
 - Remedy (particularly injunctive)
 - Political Question
 - Public trust doctrines and duties
 - *Juliana v. United States* – awaiting 9th Circuit review of interlocutory appeal
 - *Bonser-Lain v. TCEQ*, 201st Dist. Ct., Travis Co., July 22, 2011
- Permit shield defenses – CO₂ status?
- Displacement and Preemption: Fate of the Endangerment Finding and designation of CO₂ as pollutant



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