Climate Change Public Nuisance Tort Litigation

Prof. Tracy Hester
University of Houston Law Center

Houston, Texas
Sept. 5, 2018
Texas – Direct GHG Emissions of Selected Gases Reported By Sector in Million Metric Tons of CO₂e

- Power Plants: 220 (56.8%)
- Refineries: 56 (14.5%)
- Chemicals: 55 (14.2%)
- Petroleum and Natural Gas Systems: 25 (6.5%)
- Minerals: 12 (3.1%)
- Waste: 11 (2.8%)
- Other: 6 (1.6%)
- Metals: 1 (0.3%)
- Pulp and Paper: 1 (0.3%)

Data reported to EPA as of 08/05/2017

2016 GHG Emissions (Million Metric Tons CO₂e)

- Power Plants: 220
- Petroleum and Natural Gas Systems: 24
- Refineries: 56
- Chemicals: 55
- Other: 5.7
- Minerals: 12
- Waste: 11
- Metals: 1.5
- Pulp and Paper: 0.7
- Total Reported Emissions: 386

# of Reporting Facilities

- 129
- 270
- 31
- 103
- 73
- 38
- 111
- 15
- 5
- 761
## 2016 – Texas – Total Reported Emissions by Facility in Metric Tons of CO₂e

<table>
<thead>
<tr>
<th>Facility</th>
<th>City</th>
<th>State</th>
<th>Total Reported Emissions</th>
<th>Sectors</th>
</tr>
</thead>
<tbody>
<tr>
<td>W A Parish</td>
<td>THOMPSONS</td>
<td>TX</td>
<td>13,424,438</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Martin Lake</td>
<td>Tatum</td>
<td>TX</td>
<td>12,205,754</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Oak Grove</td>
<td>FRANKLIN</td>
<td>TX</td>
<td>12,047,247</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Sam Seymour</td>
<td>LA CRANGE</td>
<td>TX</td>
<td>10,995,596</td>
<td>Power Plants</td>
</tr>
<tr>
<td>EXXONMOBIL Bt Site</td>
<td>BAYTOWN</td>
<td>TX</td>
<td>10,077,901</td>
<td>Refineries, Chemicals</td>
</tr>
<tr>
<td>Limestone</td>
<td>JEWETT</td>
<td>TX</td>
<td>8,914,572</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Sandow Station</td>
<td>ROCKDALE</td>
<td>TX</td>
<td>8,604,097</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Monticello</td>
<td>MOUNT PLEASANT</td>
<td>TX</td>
<td>8,364,408</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Blanchard Refining Company LLC</td>
<td>TEXAS CITY</td>
<td>TX</td>
<td>7,195,194</td>
<td>Power Plants, Refineries</td>
</tr>
<tr>
<td>Big Brown</td>
<td>FAIRFIELD</td>
<td>TX</td>
<td>6,857,758</td>
<td>Power Plants</td>
</tr>
<tr>
<td>Exxonmobil Beaumont Refinery</td>
<td>BEAUMONT</td>
<td>TX</td>
<td>5,940,916</td>
<td>Power Plants, Refineries, Chemicals</td>
</tr>
</tbody>
</table>

The table lists the total reported emissions of greenhouse gases for various facilities in Texas for the year 2016, measured in metric tons of CO₂e, along with the corresponding city, state, and primary sectors for emissions.
<table>
<thead>
<tr>
<th>Facility Name/Location</th>
<th>2016 Emissions (metric tons CO₂e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AES Deepwater, Inc.</td>
<td>N/A</td>
</tr>
<tr>
<td>PASADENA, TX, 77506</td>
<td></td>
</tr>
<tr>
<td>AES Western Power, LLC</td>
<td>N/A</td>
</tr>
<tr>
<td>PASADENA, TX, 77506</td>
<td></td>
</tr>
<tr>
<td>Air Products La Porta</td>
<td>97,517</td>
</tr>
<tr>
<td>Facility</td>
<td></td>
</tr>
<tr>
<td>La Porta, TX, 77571</td>
<td></td>
</tr>
<tr>
<td>Alex Ty Cooke Generating Station</td>
<td>16,931</td>
</tr>
<tr>
<td>LUBBOCK, TX, 79404</td>
<td></td>
</tr>
<tr>
<td>Antelope Station</td>
<td>25,149</td>
</tr>
<tr>
<td>ABERNATHY, TX, 79111</td>
<td></td>
</tr>
<tr>
<td>Baytown Energy Center</td>
<td>1,939,317</td>
</tr>
<tr>
<td>BAYTOWN, TX, 77523</td>
<td></td>
</tr>
<tr>
<td>Blackhawk Station</td>
<td>1,159,273</td>
</tr>
<tr>
<td>BORGER, TX, 79007</td>
<td></td>
</tr>
<tr>
<td>Bosqua County Power Plant</td>
<td>1,746,692</td>
</tr>
<tr>
<td>Laguna Park, TX, 76644</td>
<td></td>
</tr>
<tr>
<td>Brazos Valley Energy, LP</td>
<td>1,126,769</td>
</tr>
</tbody>
</table>

Texas - Power Plants - Power Plants - Direct GHG Emissions of Selected Cases Reported by Facility in Metric Tons of CO₂e

- Limestone: 4.0%
- Sam Seymour: 5.0%
- Oak Grove: 5.5%
- Martin Lake: 5.5%
- W A Parish: 6.1%
- Panda Temp: 0.8%
- Gibbons Cr: 0.8%
- Cottonwood: 0.9%

Data reported to EPA as of 08/05/2017
U.S. Climate Change Litigation

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.
Erosion of the shoreline in Kivalina, Alaska, has led to a closely watched climate-change lawsuit.

By JOHN SCHWARTZ
Published: January 26, 2010
AEP AMERICAN ELECTRIC POWER

VS.

CONNECTICUT

Ned Comer vs. MURPHY OIL CORPORATION

REJECTED
The Big Three Federal Common Law Tort Actions

• **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 dismissed in very odd fashion; district court dismissed re-filed complaint and Fifth Circuit has upheld the second dismissal

• **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
Climate Change Liability -- Key Thoughts and Themes

• Should fate of nuisance suits differ?
  – Relief sought (injunctions vs. damages)?
  – Claims and harms alleged?
  – Types of plaintiffs bringing claims?

• The battle to get into court is different than the battle within the court
  – Causation
  – Effectiveness of remedy
The Challenge of Causation – Proving the Link
Fraction of Attributable Risk

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


$P_0$: 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.

$\text{FAR} = 1 - \left( \frac{P_0}{P_1} \right)$
Extreme weather events that arose partially from anthropogenic climate change:

- European heat wave of 2003
- The cold US of 2008
- Moscow heatwave of 2010
- Cold European winter 2009/2010
- UK flooding in 2000
The Critical Translation Point – Attribution of Harm

• Tallies emissions back to 1882

• Claims about 5 percent of historical global carbon emissions from Exxon

• Alleges most releases occurred after climate concerns first raised
a) Contribution of emissions traced to carbon producers to rise in atmospheric carbon dioxide, 1880-2010 (%)

- Saudi Aramco, Saudi Arabia
- Chevron, USA
- ExxonMobil, USA
- BP, UK
- Gazprom, Russia
- National Iranian Oil Company (NIOC)
- Royal Dutch Shell, The Netherlands
- Petroleos Mexicanos (PEMEX), Mexico
- Petroleos de Venezuela, Venezuela
- Coal India, India
- ConocoPhillips, USA
- British Coal Corporation, UK
- Peabody Energy
- PetroChina, China
- Total, France
- Kuwait Petroleum Corp., Kuwait
- Abu Dhabi, United Arab Emirates
- Sonatrach, Algeria
- CONSOL Energy, USA
- BHP Billiton, Australia

1880-2010 % of historical rise in CO₂

- Investor-owned
- Majority state-owned

b) Contribution of recent (1980-2010) emissions traced to carbon producers to rise in atmospheric carbon dioxide, 1880-2010 (%)

- Saudi Aramco, Saudi Arabia
- Gazprom, Russia
- ExxonMobil, USA
- National Iranian Oil Company (NIOC)
- Petroleos Mexicanos (PEMEX), Mexico
- BP, UK
- Chevron, USA
- Coal India, India
- Royal Dutch Shell, The Netherlands
- Petroleos de Venezuela, Venezuela
- PetroChina, China
- Peabody Energy
- Abu Dhabi, United Arab Emirates
- ConocoPhillips, USA
- Sonatrach, Algeria
- Total, France
- Kuwait Petroleum Corp., Kuwait
- BHP Billiton, Australia
- Rio Tinto, UK
- Nigerian National Petroleum, Nigeria

1980-2010 % of historical rise in CO₂

- Investor-owned
- Majority state-owned
Current Directions and Next Steps in Climate Change Litigation

- State law claims and lawsuits
- Public trust doctrine lawsuits
- Transnational litigation claims
State law tort actions

• Currently have tort actions underway in California, New York, Colorado, Washington state, and Rhode Island

• Conflicting district court opinions in California
  – *City of Oakland v. BP*: claims governed by federal common law, but federal common law displaced
  – *County of San Mateo v. Chevron Corp.*: claims governed by state law because federal law

• *City of New York v. Exxon Corp.* – dismissed on grounds similar to *Oakland*.

• Appeals underway to Ninth Circuit and Second Circuits; U.S. Supreme Court review possible
Public Trust Litigation

- Public trust doctrine – government holds certain responsibilities in trust to the public that are inalienable
  - Deep roots in common law
  - Typically applied to water bodies, but extended to air in some states

- Our Children’s Trust project

Transnational Torts: The Chevron Ecuador Saga
Questions?

Professor Tracy Hester
University of Houston Law Center

tdheste2@central.uh.edu
713-743-1152 (office)