Climate Change Litigation

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IT’S GLOBAL WARMING, STUPID
Atmospheric CO₂ at Mauna Loa Observatory

Scripps Institution of Oceanography
NOAA Earth System Research Laboratory

PARTS PER MILLION


YEAR

October 2010
Top Emitters of Greenhouse Gases in California, 2008
(in metric tons)

1. Chevron Refinery, Richmond: 4,792,052
2. Shell Oil Refinery, Martinez: 4,570,475
3. BP Refinery, Carson: 4,504,286
4. Chevron Refinery, El Segundo: 3,603,446
5. Dynegy Power Plant, Moss Landing: 2,962,149
6. Exxon Refinery, Torrance: 2,852,374
7. Valero Refinery, Benicia: 2,796,057
8. Tesoro Refinery, Martinez: 2,703,145
10. La Paloma Power Plant, McKittrick: 2,544,398

Source: California Air Resources Board
Identifying specific sources of GHGs – and potential defendants

http://ghgdata.epa.gov/ghgp/main.do
Texas - Direct GHG Emissions Reported by Sector in Million Metric Tons of CO₂e

Power Plants: 236 (61.9%)
Refineries: 56 (14.5%)
Chemicals: 51 (13.3%)
Other Industrial: 19 (4.9%)
Landfills: 9 (2.3%)
Minerals: 10 (2.6%)
Other Industrial: 15 (3.7%)
Pulp and Paper: 1 (0.3%)

2010 GHG Emissions (million metric tons CO₂e)
- Power Plants: 236
- Refineries: 56
- Chemicals: 51
- Other Industrial: 19
- Landfills: 9
- Metals: 1.9
- Minerals: 10
- Pulp and Paper: 0.7
- Government and Commercial: 0.3

# of Reporting Facilities
- Power Plants: 128
- Refineries: 29
- Chemicals: 119
- Other Industrial: 252
- Landfills: 96
- Metals: 13
- Minerals: 35
- Pulp and Paper: 5
- Government and Commercial: 6

This data set does not reflect total U.S. GHG emissions. Learn more about related EPA GHG data sources. Data reported to EPA as of 08/15/2012.
Climate Change Litigation: It’s already here

• Already active trial docket nationally
  – Over 200 active matters and prior decisions
  – Types: broader, more various than expected
    • NEPA, Endangered Species
    • Insurance coverage disputes

• Most notable actions: federal common law nuisance actions
CLIMATE CHANGE LITIGATION IN THE U.S.

Statutory Claims

Force Government to Act
- Clean Air Act
- Other Statutes
  - Massachusetts v. EPA
  127 S. Ct. 1438 (2007)

Stop Government Action
- Protest Challenges
- NEPA
- State NEPA
- Coal-Related Power Plant Challenges

Regulate Private Conduct
- Industry Lawsuits
- Challenges to EPA Vehicle Standards
- Challenges to EPA Enforcement

Common Law Claims
- Injunctive Relief
- Money Damages

Public International Law Claims

Climate Protests

Climate Legislation Resources Center
(Links to climate bills pending in Congress, plus hearings, markup and other materials)

1-U.S. Climate Litigation Chart

For detailed legal analysis, see
Global Climate Change and U.S. Law
(AAPA 2007)

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Climate Change Nuisance Lawsuits: Many Causes, Many Claims

Courts as Battlefields in Climate Fights

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

By JOHN SCHWARTZ
Published: January 26, 2010
The Big Three

- **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 just 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

- Massachusetts v. EPA will continue to bear fruit

- 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
Future Directions in Climate Change Litigation

- State law claims and lawsuits?
- Adaptation of tactics and strategy from tobacco and asbestos litigation
  - Collateral effects of certain claims (conspiracy)
- Focus on legislative solution
• 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
Public Trust Litigation

• Public trust doctrine
  – Limits on state’s ability to alienate resources
  – Analogous to fiduciary duty
  – Used in water, submerged property cases

• Is the atmosphere a public trust?

• *Bonser-Lain v. TCEQ*, 201st Dist. Ct., Travis Co., filed July 22, 2011
Climate Attribution Science and Litigation?
Fraction of Attributable Risk

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


\[ \text{P}_0: \text{Probability of exceeding a threshold in the "world that might have been" (without that causal factor).} \]

\[ \text{P}_1: \text{Probability of exceeding a threshold in the actual world.} \]

\[ \text{FAR} = 1 - \left( \frac{\text{P}_0}{\text{P}_1} \right) \]
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
Questions?

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