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ENVIRONMENTAL LAW

Expert Analysis

Patterns of Climate Change Litigation During Trump Era

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Litigation about climate change took off in the early 2000s. Its focus has varied with the occupant of the White House. Under George W. Bush, most suits were brought by environmental groups and blue states, frustrated by the lack of federal action, seeking to push regulations or impede fossil fuel projects. Under Barack Obama, climate litigation was mostly industry and red states seeking to block regulations. And now under Donald Trump, it is largely about environmental groups and blue states trying to preserve the rules adopted under President Obama, and to seek novel remedies to get around federal hostility to action on climate change.

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Challenging Obama-Era Regulations

The Clean Power Plan, the Obama Administration's premier climate rule, was aimed chiefly at reducing the burning of coal to generate electricity. The Supreme Court stayed the rule in February 2016 pending the final conclusion of legal challenges. The U.S. Court of Appeals for the District of Columbia Circuit heard argument en banc in September 2016. But President Trump campaigned on a pledge to repeal the rule, the Environmental Protection Agency (EPA) has begun the necessary rulemaking process to do so, and meanwhile the D.C. Circuit is holding the case in abeyance.

Industry has filed several lawsuits challenging standards for energy efficiency, refrigeration, vehicular emissions, and renewable fuels. One notable case was *Mexichem Fluor v. EPA*, a challenge to an EPA rule prohibiting certain uses of hydroflourocarbons (a group of chemicals that are powerful greenhouse gases). In August 2017, the D.C. Circuit partially vacated the rule on the grounds that it exceeded EPA's statutory authority. 866 F.3d 451 (D.C. Cir. 2017). In January 2018, the court denied reconsideration and rehearing, which had been sought by several manufacturers of substitute chemicals, and by environmental groups.

Both sides of the climate fight have launched suits under the

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Freedom of Information Act and its state counterparts seeking documents held by public entities.

Environmental groups have filed several lawsuits seeking action on various petitions that were filed with the Obama Administration but never finally acted upon.

Challenging Trump-Era Deregulation

The Trump Administration is seeking to revoke virtually all Obama-era climate-related rules. Most of these actions are being challenged in court as soon as they become ripe for litigation. The principal issues being raised in these cases are:

- Were proper procedure followed, especially for public input?
- Was sufficient reason given for changing policy?
- Was the change consistent with underlying statutes?

Several cases challenge stays and postponement of compliance dates for Obama Administration rules, or the withdrawal, delay or failure to publish rules that were in process when President Trump effectively imposed a freeze on new environmental rules.

A few of these cases have been decided. In *Clean Air Council v. Pruitt*, concerning an EPA rule on methane leaks from oil and gas operations, the D.C. Circuit found that the administration could not delay the effective date of the rule without going back through the Administrative Procedure Act process. 862 F.3d 1 (D.C. Cir. 2017). In *State of California v. Bureau of Land Management*, the court enjoined BLM's suspension of a rule concerning the venting, flaring and leakage of natural gas, finding that BLM's reasoning behind the suspension "is untethered to evidence contradicting the reasons for implementing the rule." No. 17-cv-07186 (N.D. Cal. Feb. 22, 2018). Another decision (not explicitly about climate change, but involving a key program aimed at reducing energy use) found that the Department of Energy was improperly delaying energy efficiency standards for certain home appliances and industrial equipment. *Natural Resources Defense Council v. Perry*, No. 17-cv-03404 (N.D. Cal. Feb. 15, 2018).

Most of these challenges are procedural; if they succeed they will slow down deregulation efforts but not necessarily stop them entirely, though of course if there is a change in control of Congress after this November's midterm elections, deregulation could be further impeded.

Challenging Fossil Fuel

Multiple suits challenge fossil fuel projects, such as natural gas pipelines and liquefied natural gas facilities. The most common claim is that climate change was not sufficiently considered in violation of the National Environmental Policy Act (NEPA).

Especially significant in this category is *Sierra Club v. Federal Energy Regulatory Commission*, which held that FERC's consideration of a natural gas pipeline running through Alabama, Georgia and Florida needed to consider the greenhouse gases that would be emitted downstream when the gas is burned. 867 F.3d 1357 (D.C. Cir. 2017). Several other cases are pending that raise this issues of downstream emissions and cumulative analysis.

Challenges have also been filed to the leasing of onshore and offshore lands and National Monument lands for fossil fuel development.

On the other hand, several project applicants have sued states for denying permits for natural gas pipelines and coal export terminals.

Failure to Adapt To Climate Change

Litigation is beginning to emerge challenging the failure to adapt to the climate change that is coming. Most notable is *Conservation Law Foundation v. Exxon Mobil*, which alleges that an oil terminal near Boston Harbor has not taken sufficient action to protect against oil spills that might be caused by coastal storms. No. 16-cv-11950 (D. Mass.). The suit has survived a motion to dismiss and is now being further litigated. The same plaintiffs have also filed a similar suit against Shell Oil in Rhode Island.

Claims are also being asserted in NEPA lawsuits about failure to consider climate impacts in environmental impact statements for infrastructure projects.

Money Damages Against Fossil Fuel Companies

Several suits were brought in the late 2000s and early 2010s based on the federal common law of nuisance,

seeking money damages from fossil fuel companies for injuries allegedly cause by climate change. All these cases were dismissed, primarily on the grounds that the federal common law of nuisance was displaced by the Clean Air Act. However, whether state common law claims are preempted or otherwise available remain open questions. Since July 2017 a rash of new cases have been filed under state common law nuisance and other doctrines—eight brought by California counties and cities, plus one by the City of New York.

Some of these suits seek general money damages; some seek compensation for building sea walls and other protections against sea level rise. All of them are in their early stages. On February 27, the U.S. District Court for the Northern District of California ruled that the cases brought by San Francisco and Oakland should stay in federal court, and suggested that the federal common law of nuisance applies to them because of the global nature of the challenged actions.

The Exxon Litigation Industry

In 2015, following several journalistic investigations, New York Attorney General Eric Schneiderman announced he was investigating Exxon Mobil under the Martin Act, New York's blue sky securities law. This law had been used by his predecessors Eliot Spitzer against several Wall Street firms, and Andrew Cuomo against electric utilities and Peabody Energy, a big coal company. Massachusetts Attorney General Maura Healey launched a similar investigation. The two states subpoenaed extensive records from Exxon and its accountants, PricewaterhouseCoopers (PwC). The New York Court of Appeals declined to hear PwC's claims that its papers enjoyed an accountant-client privilege. No. 2017-862 (N.Y. Sept. 12, 2017).

Exxon has fought back on multiple fronts. It sued Attorneys General Schneiderman and Healey in federal court in Texas saying the investigations were politically motivated and improper. That suit was transferred to the U.S. District Court for the Southern District of New York, where it is now pending. Exxon is also challenging Ms. Healey's investigation in Massachusetts state court.

Exxon has also started a proceeding in Texas seeking pre-lawsuit discovery against the lawyers representing the California cities and counties in the public nuisance litigation mentioned above. This too seems to be aimed at establishing that the lawsuits are politically motivated. Exxon also complained that while the cities and counties that are suing them said they are threatened by sea level rise, some of their municipal bond disclosures were silent about this threat.

Constitutional and Public Trust Litigation

Our Children's Trust, a group based in Oregon, helped organize several lawsuits around the country asserting that the ancient public trust doctrine applies to the atmosphere and requires governments to take steps to protect against climate change. Most of these suits were dismissed, but one has gotten traction. In *Juliana v. United States*, the U.S. District Court in Oregon denied a motion to dismiss, found that the public trust doctrine may have a constitutional basis in substantive due process, allowed discovery to proceed, and set a trial for February 5, 2018. *See* 217 F. Supp. 3d 1224 (D. Or. 2016). When the District Court denied defendants leave to appeal, they started a mandamus proceeding in the Ninth Circuit, which stayed the litigation and heard oral argument on December 11. A decision is now awaited.

Several other constitutional suits have also been filed around the United States. Decisions have been rendered by courts in the Netherlands, Norway, Pakistan, South Africa, and Colombia and the Inter-American Court of Human Rights finding that various constitutional, human rights, international law, and other doctrines may apply to climate change; some but not all of these decisions have granted substantive relief.