



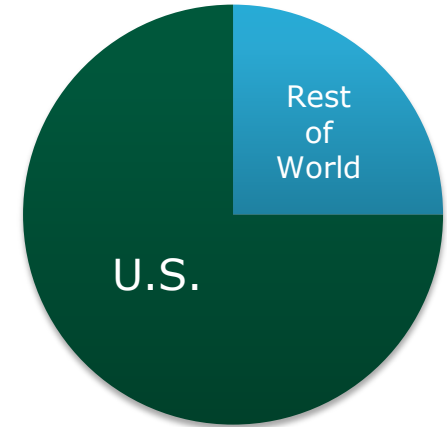
Turning Up the Heat: Recent Developments in Climate Change Legal Liability

Michael F. Vitris

Why Should You Care?

- U.S. has nearly 700 climate change-related lawsuits
- 3x the rest of the world combined
- Plaintiffs are testing new/creative theories of liability.

Climate-Change-Related Lawsuits



Purpose

Provide a high-level overview of recent developments in climate change litigation.





Agenda

- East Coast Cases
- West Coast Cases
- What's Next?

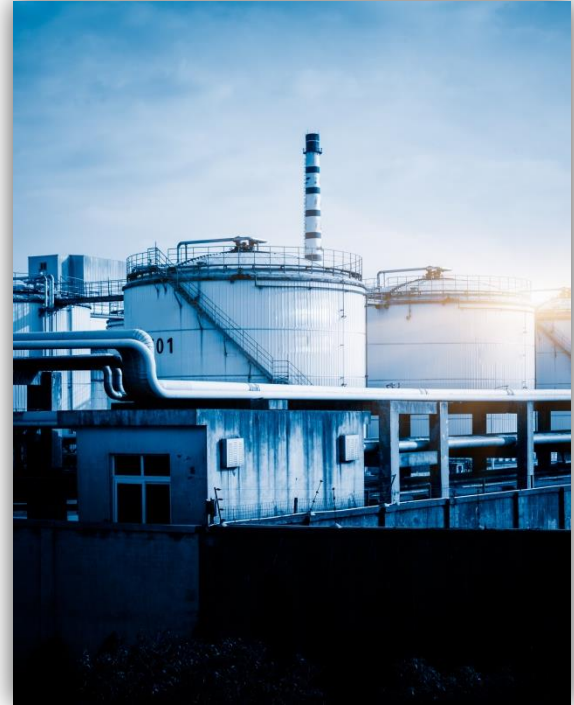
East Coast Cases

- Citizen suit cases brought by same plaintiff, Conservation Law Foundation.
- Adaptation Theme – Entity has (or will) cause harm by its failure to adequately prepare for the effects of climate change.

Two Cases: CLF v. ExxonMobil/Shell

Factual Background:

- Bulk fuel storage and distribution terminals
- Coastal New England Facilities (Mass.; R.I.)
- NPDES Permits with SWPPP Plans



The Complaint

- Harm to CLF members
- Alleged knowledge of climate change by defendants
- Evidence of current and forecast climate change impacts

Conservation Law Foundation, Inc.,)
)
Plaintiff,)
)
)
v.)
)
ExxonMobil Corporation,)
ExxonMobil Oil Corporation, and)
ExxonMobil Pipeline Company,)
)
Defendants.)
)

Legal Theory #1: RCRA

Imminent & Substantial Endangerment – 42 U.S.C. § 6972(a)(1)(B)

- RCRA Citizen Suit Provision
- Storm surge + sea level rise are “imminent”
- Facility not modified to adapt to climate change risks

HAZARDOUS WASTE

FEDERAL LAW PROHIBITS IMPROPER DISPOSAL

IF FOUND, CONTACT THE NEAREST POLICE OR PUBLIC SAFETY AUTHORITY OR THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

GENERATOR INFORMATION:

NAME _____

ADDRESS _____ PHONE _____

CITY _____ STATE _____ ZIP _____

EPA / MANIFEST ID NO _____ DOCUMENT NO. _____

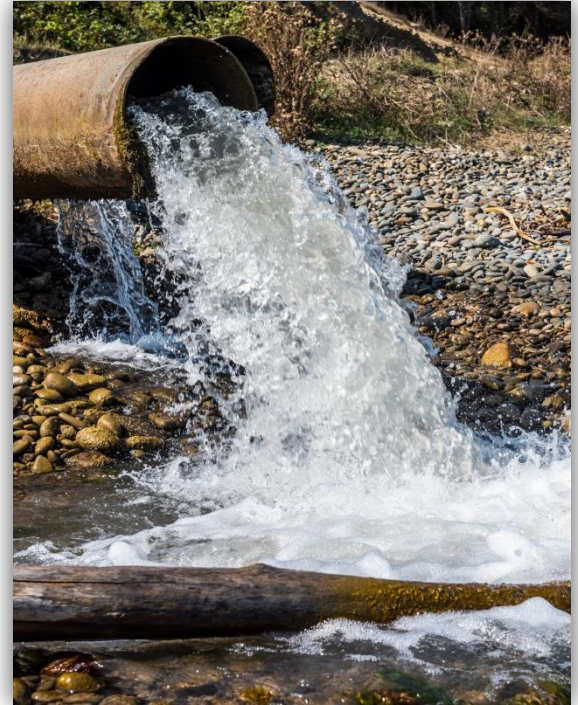
ACCUMULATION START DATE _____ EPA WASTE NO. _____

HANDLE WITH CARE!

Legal Theory #2: Clean Water Act

Citizen Suit Provision – § 505

- Enforce Violations of NPDES Permits
- Stormwater Pollution Prevention Plan (SWPPP)
- SWPPP failed to account for climate change impacts



Defenses on Motion to Dismiss

- CLF lacks standing for its climate change claims
- Failure to meet basic elements of RCRA citizen suit claim
- No obligation to consider climate change impacts in SWPPP
- CWA Permit Shield

***ExxonMobil* MTD Ruling**

5 Hour Oral Argument

- Doesn't want case to turn into "Scopes Monkey Trial of the 21st century"
- Pressed CLF on whether they can show harm "imminent"

ExxonMobil MTD Ruling

- Plaintiffs alleged standing for harms “in the near future and while the permit is in effect.”
- Granted MTD with respect to more distant harms:

the near future. In particular, plaintiff does not have standing for injuries that allegedly will result from rises in sea level, or increases in the severity and frequency of storms and flooding, that will occur in the far future, such as in 2050 or 2100. See,



West Coast Cases

- Cases by California coastal counties and cities
 - Defendants are major energy companies
 - Compared to '90s tobacco litigation
- Millennials Suing the Government!

California Cases: Group #1

- San Mateo and Marin Counties + Imperial Beach Municipality
- 30+ Energy company defendants
- 100+ page complaints highly detailed
- “Kitchen Sink” Approach
 - Public/private nuisance, negligence, failure to warn, design defect, etc.



California Cases: Group #2

- San Francisco and Oakland
- Much more narrow:
 - 5 Energy company defendants
 - Only public nuisance claims
- Seeking funding for sea level rise abatement program (sea wall)

Juliana v. United States

- 21 plaintiffs age 19 and under
- Government violated constitutional rights by failing to protect them from climate change
- Requested remedy includes national plan to phase out fossil fuel emissions
- MTD denied; interlocutory appeal denied



What's Next?

- East Coast CLF Cases: MTD Briefing Continues
- West Coast CA Cases: Jurisdictional Battle
- *Juliana v. U.S.*: 9th Circuit Considering Mandamus Request





Takeaways

- Climate change litigation is just beginning.
- Plaintiffs using novel and creative approaches
- Liability: Causing Climate Change vs. Failure to Adapt/Prepare



Takeaways

- Public statements on climate change
- Resiliency of infrastructure
- Permitting

Questions?



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