



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

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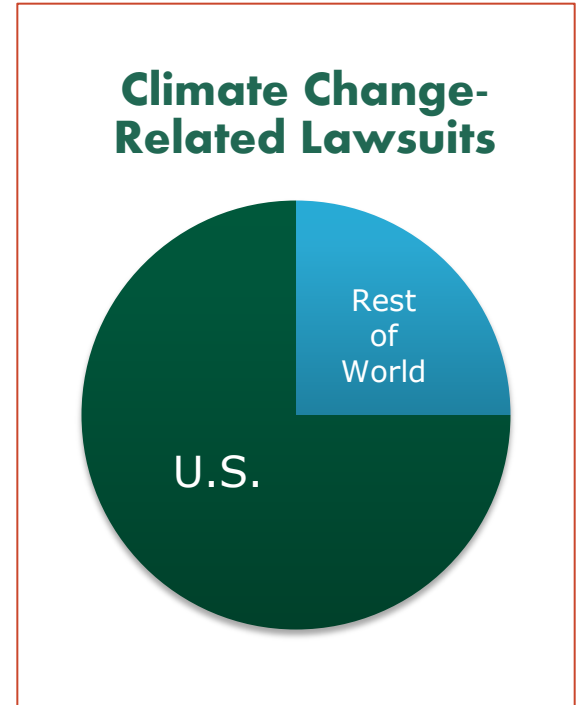
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# Why Should You Care?

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



# Purpose

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





# Agenda

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



# West Coast Cases

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- Cases by California coastal counties and cities
  - Defendants are major oil and gas companies
  - Compared to '90s tobacco litigation
- Millennials suing the government!

# California Cases: Group #1

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- Six CA counties + cities
- 30+ O & G company defendants
- “Kitchen Sink” approach
  - Public/private nuisance, negligence, failure to warn, design defect, etc.





# California Cases: Group #1

- 100+ page complaints highly detailed, e.g.:

128. In 1972, API members, including Defendants, received a status report on all environmental research projects funded by API. The report summarized the 1968 SRI report describing the impact of Defendants' fossil fuel products on the environment, including global warming and attendant consequences. Industry participants who received this report include:

- Attribute specific % of CO<sub>2</sub> to defendants:

7. Defendants are directly responsible for 215.9 gigatons of CO<sub>2</sub> emissions between 1965 and 2015, representing 17.5% of total emissions of that potent greenhouse gas during that period. Accordingly, Defendants are directly responsible for a substantial portion of the physical and environmental changes attributable to anthropogenic global warming because of the consumption of their fossil fuel products.



# California Cases: Group #1

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- Represented by Sher Edling LLP
- Broad relief requested
  - Compensatory/punitive damages
  - Abatement of nuisances
  - Disgorgement of profits

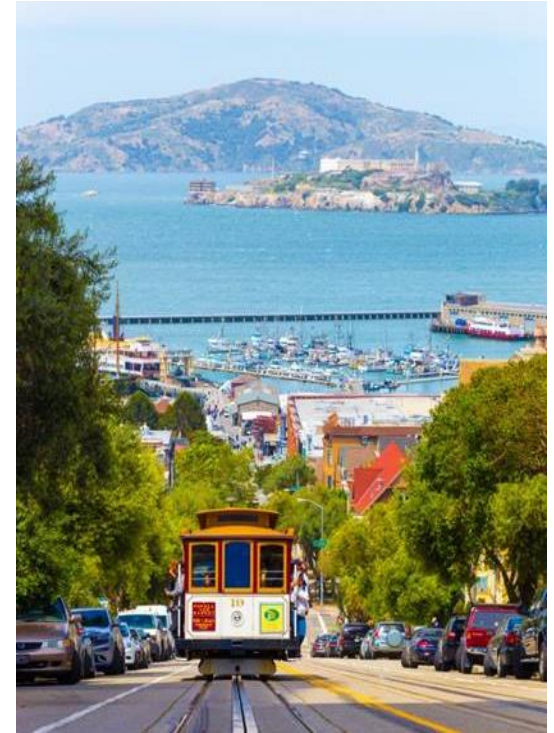




# California Cases: Group #2

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- San Francisco and Oakland
- Much narrower:
  - 5 O & G company defendants
  - Only public nuisance claims
- Seeking funding for sea level rise abatement program (sea wall)



# \$1.15 Billion Lead Paint Abatement Case

- California lead paint public nuisance case:

WESTLAW NEWS FEBRUARY 15, 2018 / 6:51 PM / 5 DAYS AGO

## California top court won't review lead paint makers' liability

Reuters Staff

1 MIN READ



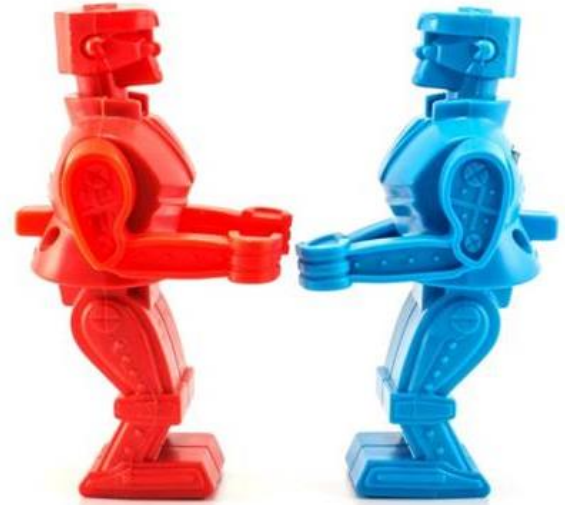
- Plaintiffs trying to draw parallels:

Nuisance claims for wrongful promotion of products, as distinct from nuisance claims based on emissions, are well-recognized under California law. For example, the California Court of Appeal recently affirmed a judgment in a public nuisance action in the name of the People against lead paint manufacturers for “*their affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards.*” *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, \_\_\_, 2017 WL 5437485, at \*18 (2017)

# Jurisdictional Battle

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- Both sets of cases removed to federal court
- Remember *Kivalina*?
- “Arising under,” federal questions, CAA preemption . . .



# Additional Developments

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- Third-party complaint filed
  - Indemnity/contribution; procedural tactic
- Suing the plaintiffs . . . in TX state court:
  1. A collection of special interests and opportunistic politicians are abusing law enforcement authority and legal process to impose their viewpoint on climate change. This conspiracy emerged out of frustration in New York, Massachusetts, and California with voters in other parts of the country and with the federal government for failing to adopt their preferred policies on climate change. But rather than focusing their efforts in the marketplace of ideas and

# *Juliana v. United States*

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- 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



# East Coast Cases

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- 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.

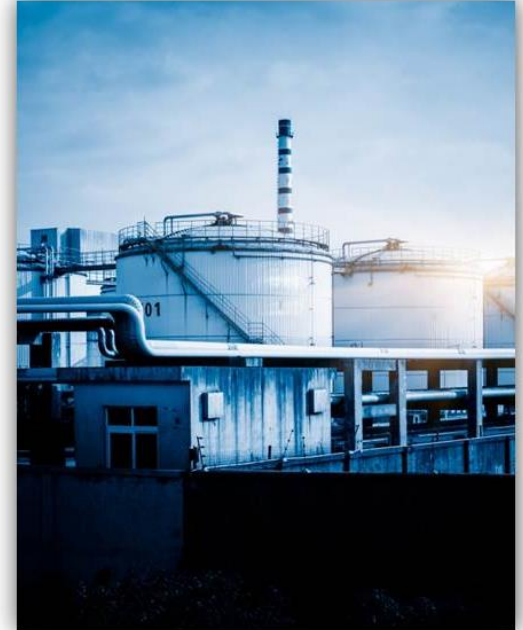




# CLF – CWA/RCRA Citizen Suit

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- Factual background:
  - Bulk fuel storage and distribution terminal
  - Massachusetts facility
  - NPDES permit with SWPPP Plan



# The Complaint

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

# 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

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## 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

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- CLF lacks standing for its climate change claims
- Failure to allege RCRA “imminent and substantial endangerment”
- No obligation to consider climate change impacts in SWPPP
- CWA Permit Shield

# MTD Ruling

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## 5 Hour Oral Argument

- Judge doesn't want case to turn into "Scopes Monkey Trial of the 21<sup>st</sup> century"
- Pressed CLF on whether they can show harm "imminent"





# MTD Ruling

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- 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,

# Not just O & G facilities . . .

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- 140-acre ash landfill adjacent to waste-to-energy facility
- CLF issued a Notice of Intent to Sue (RCRA)
- Storm surge/sea level rise





# What's Next?

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- East Coast CLF Cases: MTD briefing continues
- West Coast CA Cases: Jurisdictional battle
- *Juliana v. U.S.*: 9<sup>th</sup> Circuit considering mandamus request



# Takeaways

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- Climate change litigation is just beginning
- Plaintiffs using novel and creative approaches
- Liability: Causing climate change vs. failure to adapt/prepare



# Takeaways

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- Public statements on climate change
- Monitor developments in climate change litigation
- Resiliency of infrastructure
- Permitting

# Questions?

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