2022

Panel: Climate Change and Climate Justice

Alice Kaswan
University of San Francisco School of Law

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

Monica Esparza

J.B. Ruhl
Vanderbilt University Law School

CHAPTER 2

Climate Change Litigation in the United States: High Volume of Cases, Mostly About Statutes

*Michael B Gerrard**

I Introduction

The United States has more climate change litigation than the rest of the world combined. For the purpose of this chapter, climate change litigation refers to litigation where climate change or greenhouse gases are an explicit subject of the case, though not necessarily the only subject. Not included are cases that may have been motivated by climate change but do not explicitly talk about it, such as an effort to stop a coal-fired power plant on non-climate legal grounds. According to a database of the world's climate change litigation maintained by Columbia Law School's Sabin Center for Climate Change Law,[1] as of 31 December 2019, a total of 1,452 climate cases had been filed in courts or other tribunals worldwide. Of these, 1,134 (78 per cent) were from the United States, Australia was a distant second, with 95, followed by the United Kingdom with 56. No other country had more than 20. The cases were filed in 37 countries and eight international tribunals, led by the Court of Justice of the European Union, which had 48.

This chapter organizes the US cases it discusses according to the following five topics: federal statutory litigation (II); common law cases (III); public trust doctrine cases (IV); securities cases (V); and failure to adapt cases (VI).

* Andrew Sabin Professor of Professional Practice, Columbia Law School; founder and Faculty Director, Sabin Center for Climate Change Law, email: MGerra@law.columbia.edu.

1 'Non-US Climate Change Litigation' (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/non-us-climate-change-litigation/> accessed 31 December 2019.

II Federal Statutory Litigations

In the United States, according to another Sabin Center database,[2] the largest number of cases (163) were brought under the National Environmental Policy Act (NEPA),[3] the statute that requires environmental impact statements for federal actions that could have a significant impact on the environment. Similarly, there were 139 cases brought under state equivalents of NEPA.[4] The great bulk of these were brought under the California Environmental Quality Act[5] and challenged the environmental review[6] for specific projects on the grounds that they had insufficiently studied the project's impacts on climate change, or climate change's impacts on the project. One prominent climate change decision under NEPA held that before the National Highway Traffic Safety Administration may set fuel economy standards for passenger automobiles, it must prepare an environmental impact statement that discloses the greenhouse gas (GHG) emissions and would result from several possible standards.[7] Another case held that before approving a natural gas pipeline, the Federal Energy Regulatory Commission must consider the greenhouse gas emissions that will result when power generating plants burn the gas carried by the pipeline.[8]

Another large category of cases (151 cases) were those brought under the Clean Air Act,[9] which is the principal federal statute that can be used to regulate GHGs. In *Massachusetts v EPA*,[10] the most important US climate change decision to date, the Supreme Court ruled by a 5-4 vote that the Clean Air Act gives the US Environmental Protection Agency (EPA) the authority to regulate GHGs, if it first makes an 'endangerment finding' that GHGs pose a threat to

2 'US Climate Change Litigation' (*Sabin Center for Climate Change Law*) <http://climatecasechart.com/us-climate-change-litigation/> accessed 31 December 2019.

3 42 USC §§ 4321–70h.

4 'US Climate Litigation' (n 2).

5 Cal Pub Res Code §§ 21000–177.

6 Environmental review under NEPA, the California Environmental Quality Act, and most other similar law consists of the preparation of detailed documents, called environmental impact statements or reviews, that describe the governmental actions under consideration; their environmental impacts; ways to mitigate any negative impacts; and alternatives to the proposed action. These statements are subject to public review and comment and are intended to inform governmental decision-making.

7 *Center for Biological Diversity v National Highway Traffic Administration*, 538 F 3d 1172 (9th Cir 2008).

8 *Sierra Club v Federal Energy Regulatory Commission* (*Sabal Trail*), 867 F 3d 1357 (DC Cir 2017).

9 42 USC §§ 7401–671q.

10 549 US 497 (2007).

public health and welfare. The decision was issued during the presidency of George W Bush, whose administration did little to act under this authority. But when Barack Obama took office in January 2009, he directed the EPA to begin regulating GHGs. Within a few months the EPA issued the required endangerment finding.[11] It was challenged in court by several industry groups and by states that oppose climate regulation, led by Texas and West Virginia. They argued that the scientific evidence supporting the finding was flawed. The US Court of Appeals for the District of Columbia Circuit, in a strongly worded opinion, upheld the Endangerment Finding and found that EPA had ample support in the administrative record for having issued it.[12]

Having issued the Endangerment Finding, the EPA issued regulations under the Clean Air Act's New Source Review Program,[13] which requires permits for the construction or major modification of major new sources of air pollution. Most but not all of these regulations were upheld by the courts.[14] The EPA and the National Highway Traffic Safety Administration also issued regulations limiting the GHGs that could be emitted from passenger vehicles. These too were upheld by the courts.[15] The Trump administration weakened those standards,[16] and the Biden administration is moving to reverse its predecessor's actions and adopt stronger standards.

The EPA's next major move after adopting the motor vehicle standards was the issuance of the Clean Power Plan[17] which aimed to reduce emissions from coal-fired power plants, which were then the largest source of GHGs in the US[18] The Clean Power Plan was issued under an obscure provision of the

11 US Environmental Protection Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: Final Rule, 74 Fed Reg 66496 (December 15, 2009).

12 *Coalition for Responsible Regulation v EPA* 684 F 3d 102 (DC Cir 2012), aff'd in part, rev'd in part sub nom *Utility Air Regulatory Group v EPA* 573 US 302 (2014).

13 42 USC §§ 7470–514a.

14 *Utility Air Regulatory Group v EPA* 574 US 302 (2014).

15 *Coalition for Responsible Regulation v EPA* 684 F 3d 102 (DC Cir 2012), aff'd in part, rev'd in part sub nom *Utility Air Regulatory Group v EPA* 573 US 302 (2014).

16 J Goffman, J McCabe and W Niebling, 'EPA's Attack on New Source Review and Other Air Quality Protection Rules' (Harvard Law School Environmental & Energy Law Program 2019) <http://eelp.law.harvard.edu/wp-content/uploads/NSR-paper-EELP.pdf> accessed 31 May 2020.

17 'Fact Sheet: Overview of the Clean Power Plan' (*US Environmental Protection* Agency) <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html> accessed 31 May 2020.

18 These emissions have since declined, largely due to the substitution of natural gas for coal in many markets, owing mostly to the inexpensive natural gas that was made available by hydraulic fracturing.

Clean Air Act, Section 111(d), which allowed controls over existing sources of air pollution under very limited conditions. Using that provision's complicated requirements, the EPA set emission reduction targets for each state, and directed the states to devise binding plans to meet those targets. For many states, this would require electric utilities not only to improve the efficiency of their power plants, but also to go 'beyond the fenceline' and act on matters outside the power plants, such as the construction of new renewable energy facilities, and improving customers' energy efficiency. The Clean Power Plan was widely attacked as exceeding the EPA's authority under the statute. In February 2016, the Supreme Court by a 5-4 vote but without explanation stayed the implementation of the Clean Power Plan until litigation over it was complete.[19] The US Court of Appeals heard oral argument on the case in September 2016 but had not issued a decision before the inauguration of Donald Trump, who had campaigned for the presidency on a pledge that he would revoke the Clean Power Plan. The EPA under President Trump carried out that pledge and replaced the Clean Power Plan with a far weaker regulation,[20] which was in turn vacated by the US Court of Appeals in January 2021.[21]

The next largest subject matter of US climate change litigation, with 75 cases, is species protection, mostly under the Endangered Species Act.[22] Most of these cases concerned federal decisions to list (or not to list) certain species as threatened or endangered, as well as federal decisions to designate (or not designate) certain geographic areas as 'critical habitat areas' for listed species. Many of these cases have led to orders that the Fish and Wildlife Service or the National Marine Fisheries Service move forward with actions to protect species whose habitat is threatened by climate change.[23]

The nature of the federal statutory litigation varies depending on the party in power. During the presidency of George W Bush (2001–09), a Republican, most of the cases were brought by environmental groups and by those states that favoured climate regulation (typically led by New York, California and

19 *West Virginia v EPA* 136 S Ct 1000 (2016).

20 US Environmental Protection Agency, Repeal of the Clean Power Plan; emission Guidelines for Greenhouse Gas Emisisons from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed Reg 32520 (July 8, 2019).

21 *American Lung Association v US Environmental Protection Agency*, No 19-1140 (DC Cir January 19, 2021).

22 16 USC §§ 1531–44.

23 For example, *In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F 3d 1 (DC Cir, 2013); *Alaska Oil and Gas Ass'n v Pritzker*, 840 F 2d 671 (DC Cir 2016).

Massachusetts), challenging the failure of the federal government to act. During the presidency of Barack Obama (2009–17), a Democrat, most of the cases were brought by corporations and industry groups and by those states that opposed climate regulation (typically led by Texas and West Virginia), saying the EPA and other federal agencies had gone too far in regulating climate change. With the inauguration of Donald Trump, a Republican, in January 2017, the administration moved to repeal or weaken almost all of the climate regulations that had been adopted during the Obama administration, and virtually all of these actions were challenged in court by the same coalition that had opposed President Bush.[24] When Joe Biden, a Democrat, was inaugurated in January 2021, the policy of the executive branch reversed once again, and it may be anticipated that most of his administration's actions on climate change will be challenged in court by many of the same groups that sued the Obama administration.

Much of the litigation challenging the Trump administration was successful. This is primarily because courts have found that the administration has often failed to observe the procedural requirements of the Administrative Procedure Act,[25] the National Environmental Policy Act,[26] and other laws that require detailed analyses and explanations, public consultation, and other procedures before regulations can be repealed or significantly altered.[27]

As a result of this litigation, many of the efforts by the Trump administration were halted by the courts. These include a delay in the EPA's methane standards for the oil and gas sector,[28] delay in the effective date of a Bureau of Land Management rule on methane waste,[29] repeal of a rule on the valuation of coal, oil and gas under federal lands,[30] weakening of the protections

24 J Wentz and MB Gerrard, 'Persistent Regulations: A Detailed Assessment of the Trump Administration's Efforts to Repeal Federal Climate Protections' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Wentz-and-Gerrard-2019-06-Persistent-Regulations.pdf> accessed 31 May 2020.

25 5 USC §§ 551–9.

26 42 USC §§ 4321–70h.

27 DP Adler, 'U.S. Climate Change Litigation in the Age of Trump: Year Two' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Adler-2019-06-US-Climate-Change-Litigation-in-Age-of-Trump-Year-2-Report.pdf> accessed 28 February 2021; J Wentz and MB Gerrard, 'Persistent Regulations: A Detailed Assessment of the Trump Administration's Efforts to Repeal Federal Climate Protections' (Sabin Center for Climate Change Law, June 2019) <http://columbiaclimatelaw.com/files/2019/06/Wentz-and-Gerrard-2019-06-Persistent-Regulations.pdf> accessed 31 May 2020.

28 *Clean Air Council v Pruitt* 862 F 3d 1 (DC Cir 2017).

29 *California v BLM* 277 F Supp 3d 1106 (ND Cal 2017).

30 *California v US Department of the Interior* 381 F Supp 3d 1153 (ND Cal 2017).

given to the sage-grouse (an endangered bird) that inhibited fossil fuel production,[31] revisions to procedures for oil and gas leasing,[32] delays in the issuance of energy efficiency standards,[33] allowance of oil and gas drilling in the Arctic and Atlantic oceans,[34] the lifting of a moratorium on the leasing of federal lands for coal development,[35] the weakening of hydrofluorocarbon regulations,[36] and the removal from EPA scientific advisory boards of scientists who had received EPA grants.[37] In many of these cases, the government was given an opportunity to go back and follow the proper procedures. That is usually very time-consuming, and in many instances the process was not completed before the end of President Trump's term in January 2021. Joe Biden, who took office in January 2021, has vowed to revoke most of the deregulatory actions of the Trump administration—though that, too, will probably be met with considerable litigation.

At the end of the Trump presidency, litigation was pending against several of the most important acts of environmental deregulation by the Trump administration, including the repeal of the Clean Power Plan;[38] the weakening of standards for greenhouse gas emissions from motor vehicles;[39] reductions in regulatory coverage of the Clean Water Act (the 'Waters of the United States Rule');[40] and weakening of the rules under the Endangered Species Act.[41] The Biden administration is moving to put most or all of these cases on hold as it reconsiders the challenged rules.

III Common Law Cases

A smaller but very prominent set of cases were brought under the common law, in particular the public nuisance doctrine, under which a person can be

31 *Western Watersheds Project v Schneider* 417 F Supp 3d 1319 (D Idaho 2019).
32 *Western Watersheds Project v Zinke* 2020 WL 959242 (D Idaho February 27, 2020).
33 *NRDC v Perry* 940 F 3d 1072 (9th Cir 2019).
34 *League of Conservation Voters v Trump* 363 F Supp 3d 1013 (D Alaska 2019).
35 *Citizens for Clean Energy v US Department of the Interior* 384 F Supp 3d 1264 (D Mont 2019).
36 *NRDC v Wheeler* 955 F 3d 68 (DC Cir 2020).
37 *Physicians for Social Responsibility v Wheeler* 956 F 3d 634 (DC Cir 2020); *NRDC v EPA* 2020 WL 615072 (SDNY Feb 10, 2020).
38 *American Lung Association v US Environmental Protection Agency*, No 19-1140 (DC Cir No 19-1140). 16 USC §§ 1531–44.
39 *State of California v Chao*, No 1:19-cv-2826=KBJ (DDC).
40 *State of California v Wheeler*, No 3:20-cv-03005 (ND Cal).
41 *Center for Biological Diversity v Bernhardt*, No 19-cv-05206-JST (ND Cal).

liable for unreasonable actions that cause injury to the public. One of those cases, *American Electric Power v Connecticut,* sought an order that the coal-fired power plants of six electric utilities reduce their GHG emissions. The other cases sought money damages. The most prominent of these, *Native Village of Kivalina v Exxon Mobil,* sought the costs of relocating an Alaska village that was threatened by melting ice. In 2011, the Supreme Court ruled in *American Electric Power* that the Clean Air Act gave the EPA exclusive federal control over GHG emissions, leaving no room for action under the federal common law.[42] With this, the *Kivalina* lawsuit was also dismissed, on the same theory.[43]

The Supreme Court left open the question of whether state common law cases could be brought over climate change. No case raised this question until 2017, when several suits were brought against the major energy companies by a number of counties, cities, the State of Rhode Island, and a fishermen's association, seeking money damages. At latest count, there were 18 such suits. All of the governmental plaintiffs are situated along the Atlantic or Pacific oceans (except for Boulder, Colorado). Their cases claim that they will need to undertake major expenditures to protect against sea level rise and coastal storms. Almost all of the cases are against Exxon Mobil, Chevron, BP, Shell and Conoco Phillips and some of the cases name other energy companies. Almost all are based on public nuisance theories, and some also have claims arising under the common law theories of trespass, product defect, negligence, and failure to warm.[44] Several also claim that some or all of the defendants engaged in deceptive behaviour by denying or minimizing the risks of anthropogenic climate change, while having actual knowledge of such risks.

In attempting to allocate damages among the energy companies, most of these cases rely on a series of studies that have examined the quantities of coal, oil and natural gas extracted by the world's major fossil fuel companies and their predecessors, and translated that into estimates of the percentage of greenhouse gases now in the atmosphere as a result of the fuels extracted by these companies.[45]

---

42 564 US 410 (2011).

43 696 F 3d 849 (9th Cir 2012).

44 Trespass is entering a person's land or property without their permission. Product defect liability arises when a person designs or manufactures a defective product that causes injury. Negligence is a failure to take proper care in doing something, resulting in injury. Failure to warn liability arises from failure to provide adequate warnings or instructions about a product's proper use, leading to injury.

45 For example, R Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010' (2014) 122 Climatic Change 229.

Two of these cases were dismissed by the trial courts;[46] a Court of Appeals ruling reinstated one of them, and the other case is still under appeal before a different Court of Appeals.[47] In most of the rest, litigation is now pending over whether the cases should be heard in federal court or in state court. The defendants tend to prefer federal court, in part because this would make it more likely that the displacement doctrine[48] announced in *American Electric Power v Connecticut* applies, while the plaintiffs would rather be in state court, where this doctrine might not apply. In January 2021, the Supreme Court heard argument in one of the cases, but only on a very narrow issue of appellate procedure.[49] It is possible that the Supreme Court's decision in this case will have major implications for the other pending cases; it is also possible that the Court will rule narrowly and leave the other cases untouched.

If any of these cases do survive the motions to dismiss and other preliminary litigation matters, the plaintiffs will no doubt seek extensive discovery (documents, interrogatories and possibly depositions) from the defendants. The plaintiffs will also have to deal with serious unresolved issues concerning the attribution of particular climate injuries to climate change, and to the actions of particular companies.[50]

IV Public Trust Doctrine Cases

Another small but prominent number of cases were brought under the public trust doctrine, a legal doctrine stemming from the Justinian Code providing that the State has an obligation to hold certain aspects of the natural environment in trust for the public.[51] Utilizing this theory, a nonprofit group formed in Oregon called Our Children's Trust. It organized efforts to bring lawsuits all around the United States that claimed that the public trust doctrine applies to the atmosphere, and not just rivers, parks and other more conventional targets. The suits argued that state or federal governments were thereby compelled to reduce GHG emissions within their jurisdictions. A total of 20 such

46 *City of New York v BP plc* 325 F Supp 3d 466 (SDNY 2018); *City of Oakland v BP plc* 325 F Supp 3d 1017 (ND Cal 2018).

47 *City of Oakland v BP plc* 2020 WL 2702680 (9th Cir May 26 2020).

48 Displacement of federal common law occurs when the relevant field has been occupied by an Act of Congress.

49 *Mayor and City Council of Baltimore v BP plc*, No 19-1644 (4th Cir 2020).

50 M Burger, J Wentz and R Horton, 'The Law and Science of Climate Change Attribution' (2020) 45 Columbia Journal of Environmental Law 57.

51 See MC Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (CUP 2013).

suits were brought in federal and state courts, and several more proceedings were launched in administrative agencies. Almost all of these suits were ultimately dismissed, primarily on the grounds that the public trust doctrine does not apply to the atmosphere; the plaintiffs are not affected by climate change differently than the general public, and do not have standing to sue; the case raises political questions that are not suitable for judicial resolution; or the courts do not have the power to issue the requested relief.

However, one of these cases survived, and became quite celebrated in the United States and around the world—*Juliana v United States*. It was brought against several federal agencies and officials in federal district court in Oregon. Its complaint asked the court to '[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.'

The suit was filed in September 2015. On 10 November 2016 (two days after Donald Trump was elected), Judge Ann Aiken denied the federal government's motion to dismiss.[52] She held not only that the public trust doctrine could apply to GHG emissions, but also that it was grounded in the Due Process Clause of the US Constitution. This finding surprised many legal scholars, as no previous federal court had found there to be a federal constitutional right to a clean environment (several state constitutions do have such provisions, including Pennsylvania, Montana, Illinois, Massachusetts, Hawaii and Rhode Island). On 13 January 2017, a week before President Trump was inaugurated, the Department of Justice answered the complaint and admitted many of its factual allegations about the causes and negative consequences of climate change (though not admitting federal government responsibility). The court scheduled a trial. The US Department of Justice made several efforts at the Court of Appeals for the Ninth Circuit and the Supreme Court to prevent the trial from going forward.[53] The Ninth Circuit ultimately accepted an interlocutory appeal of the case—an unusual procedure for a civil case on the verge of trial.

On 17 January 2020, the Ninth Circuit issued its decision and dismissed the lawsuit by a vote of 2-1.[54] The two judges in the majority declared:

52 *Juliana v United States* 217 F Supp 3d 1224 (D Or 2016). See also *Juliana v United States* 339 F Supp 3d 1062 (D Or 2018).

53 The key documents in this litigation can be found at this site: <http://climatecasechart.com/case/juliana-v-united-states/> accessed 31 May 2020.

54 *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).

> The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action … We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

The dissenting judge stated:

> Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies,* prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?
>
> I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

The plaintiffs filed for en banc review—in other words, a hearing before all the active judges of the Ninth Circuit, not just the three judges who heard the appeal. The Ninth Circuit denied this request in February 2021. The plaintiffs' counsel have indicated that they plan to seek review by the Supreme Court. However, many of their allies are urging them not to seek such review, out of concern that the Supreme Court, as currently constituted, might issue a decision that not only affirms the dismissal but also restricts the scope of climate litigation more generally.

V Securities Litigation

Yet another prominent set of cases concerns investigations by several state attorneys general, led by New York, into whether Exxon Mobil Corp misled

investors and regulators by publicly claiming that climate change is not a severe problem, while internally being advised otherwise by its own scientists. Exxon made various efforts in state and federal courts to halt such investigations, all without success.[55] In 2018, the New York Attorney General finally brought the long-anticipated lawsuit. After extensive document discovery and depositions, the case went to trial in October 2019.

After a 12-day trial, the court found that the New York Office of the Attorney General failed to establish by a preponderance of the evidence that Exxon Mobil made any material misstatements or omissions that misled any reasonable investor about its practices or procedures for accounting for climate risk. The court therefore denied claims asserted under the Martin Act—New York's securities fraud statute—and a state law—Executive Law § 63(12)—which prohibits repeated or persistent fraudulent acts. Although the court granted the attorney general's request to discontinue its common law and equitable fraud claims with prejudice, the court also said its decision established that Exxon would not have been held liable on any fraud-related claims since the attorney general failed to establish Exxon's liability even for causes of action that did not require proof of the scienter and reliance elements of fraud. The court found that Exxon's public disclosures in the 2013 to 2016 time period at issue in the case—including Form 10-K disclosures and March 2014 reports specifically addressing climate change risk and regulations that were prepared in consideration for withdrawal of shareholder proposals—were not misleading. The court said one of the March 2014 reports identified proxy costs of carbon and GHG costs as 'distinct and separate metrics', one of the factors leading the court to reject the premise of the attorney general's case that Exxon's disclosures 'led the public to believe that its GHG cost assumptions for future projects had the same values assigned to its proxy cost of carbon.' The court also found that an analyst's testimony undercut the attorney general's assertion that information in the March 2014 reports was material to investors and found the attorney general's expert testimony on materiality to be unpersuasive, 'flatly contradicted by the weight of the evidence', and 'fundamentally flawed.'[56]

While the New York trial was underway, the Attorney General of Massachusetts brought another lawsuit against Exxon. The suit claims that Exxon committed deceptive practices against Massachusetts investors and consumers by failing to disclose climate change risks, misrepresenting its

55 For example, *Exxon Mobil Corp v Schneiderman* 316 F Supp 3d 679 (SDNY 2018); *Exxon Mobil Corp v Attorney General* 94 NE 3d 786 (2018), cert denied, 139 S Ct 794 (2019).

56 *People v Exxon Mobil Corp* 119 NYS 3d 829 (NY Sup Ct 2019).

business practices related to use of proxy costs of carbon, misleadingly advertising its products, failing to disclose its products' impacts on climate change, and engaging in greenwashing campaigns. The complaint said Exxon's actions and practices violated the Massachusetts Consumer Protection Act.[57] Exxon's attempt to remove the case from state to federal court on the grounds that it presented federal issues was rejected by the federal district court in Boston.[58] This suit is pending in state court.

Several other lawsuits are pending against Exxon alleging that the company issued misleading statements about climate change.[59]

The Biden administration has indicated that it will strengthen the requirements for disclosure of climate issues under the federal securities laws.

VI Failure to Adapt

An emerging category of cases concerns alleged failure to adapt to climate change—to prepare for the extreme weather events and other impacts that are coming. Most prominent of these is *Conservation Law Foundation v Exxon Mobil*.[60] This case alleges that defendants violated the National Pollutant Discharge Elimination System (NPDES)[61] permit under the Clean Water Act for their 110-acre petroleum storage and distribution terminal in Everett, Massachusetts, including by failing to consider flooding and severe storms caused by climate change in their maintenance of the terminal. The plaintiff also asserted that the permit violations posed an imminent and substantial endangerment to human health and the environment in violation of the Resource Conservation and Recovery Act.[62]

Citing the doctrine of primary jurisdiction,[63] the federal district court for the District of Massachusetts stayed the lawsuit in March 2020. The terminal has

57 *Commonwealth v Exxon Mobil Corp*, No 19-3333 (Mass Super Ct).

58 *Commonwealth v Exxon Mobil Corp*, No 19-12430 (D MA May 28, 2020).

59 *In re: Exxon Mobil Corp Derivative Litigation*, No 2:19-cv-16380 (DNJ); *Ramirez v Exxon Mobil Corp*, No 3:16-cv-3111 (ND Tex).

60 *Conservation Law Foundation v ExxonMobil Corp* 2020 WL 1332949 (D Mass Mar 21, 2020).

61 40 CFR Part 122.

62 42 USC §§ 6901–92k.

63 'The doctrine of primary jurisdiction applies where a claim can originally be addressed in a court but would be better addressed first by an administrative body. It is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction

a NPDES permit issued by the EPA that expired in 2014 but which the EPA has administratively continued so that its terms remain in effect. The EPA informed the court that the agency is working in good faith to renew the permit by 2022. The court found that the precedent against applying primary jurisdiction in citizen suits was 'not overwhelming', and that, in any event, this case was not a 'typical' citizen suit, both because it involved 'ambiguous, narrative permit conditions' and would require the court to determine to what extent weather patterns were changing in the Boston area, an inquiry implicating scientific and policy issues. Although the court acknowledged that the doctrine of primary jurisdiction should be applied 'sparingly' in citizen suits, it concluded that this case 'involves a rare set of circumstances in which deferring to the primary jurisdiction of the EPA is justified and appropriate.' Considering the factors for applying primary jurisdiction, the court first said that 'determining permit conditions' was 'at the heart of the EPA's authority' under the Clean Water Act. Second, the court noted again that the question of how Exxon should consider 'predictable weather patterns' raised 'scientific and policy issues that the EPA is better equipped to decide than the court.' Third, the court noted that the EPA's issuance of the renewed permit would 'generate a fuller administrative record' to which the court could refer to interpret the permit and could moot the plaintiff's request for injunctive relief. Fourth, the court said that allowing the EPA the opportunity to issue the permit would further regulatory uniformity. The court also concluded that the potential for delay did not outweigh other factors. It noted that resolving the case on the merits could require as much time as the EPA had estimated for the permit's renewal. The court therefore stayed the case, directing the parties to confer within 30 days of issuance of a new permit regarding whether the stay should be lifted and, if so, how the case should proceed. The court further directed that if a new permit was not issued by 1 November 2021, the parties should confer and report to the court on the status of the permitting process and on whether the stay should be lifted.[64]

The Conservation Law Foundation also sued Shell Oil Products on similar grounds related to its oil terminal in Providence, Rhode Island. That suit is pending.

---

doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.' ('Primary Jurisdiction Doctrine' (*US Legal*) <https://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/primary-jurisdiction-doctrine/> accessed 31 May 2020).

64 *Conservation Law Foundation v ExxonMobil Corp* 2020 WL 1332949 (D Mass Mar 21, 2020).

VII Conclusion

The United States has a litigious culture. In the great majority of cases, each side bears its own costs of litigation, so a party that files a lawsuit has little risk of having to pay the defendants' lawyers' fees if it loses. Most important government actions concerning climate change are challenged in court by those interests that feel they would be harmed by the actions.

To date, climate change litigation in the United States has spurred the federal government to take some actions against climate change and held back many efforts by the Trump administration to revoke or weaken the climate regulations adopted by previous administrations. Litigation has also impeded the construction of many facilities that would extract, transport or burn fossil fuels. Litigation has so far not led to money damages against fossil fuel producers or greenhouse gas emitters related to the impacts of climate change or led to overarching orders that the government do more to combat climate change. It is certain, however, that litigation will continue to be an important tool used by those supporting and opposing vigorous action on climate change.