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Legal Mechanisms for Protecting the Earth from Climate Change: An Analysis of Limitations, Current Trends and Emerging Alternatives

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Legal Mechanisms for Protecting the Earth from Climate Change: An Analysis of Limitations,
Current Trends and Emerging Alternatives

Senior Project Submitted to
The Division of Social Studies
of Bard College

By
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Annandale-on-Hudson, New York

May 2023

Dedication & Acknowledgements

This project is dedicated to my father, whose unwavering belief in my abilities has always been a constant source of guidance. Though he's no longer with me, his words and teachings are forever ingrained in me. Thank you, Dad, for teaching me to embrace life's challenges with love and perseverance (and not to take life too seriously).

To my mom, who supports me in every way possible. You are the embodiment of strength, intelligence, and beauty, and I am incredibly fortunate to have you as my mom. With your countless sacrifices, I hope to make you proud in all I do.

My siblings, Riley and Luka. My best friends and the two people I look up to the most. Thank you for always being there for me.

To my friends, I feel incredibly grateful to have spent the past four years of college with such genuine people. I'm excited to see all of your future accomplishments.

Finally, thank you to my mentor and advisor, Beate Liepert. Your passion for your work and persistent dedication to your students will leave a lasting mark on me, and I am grateful for the privilege of working with you.

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“If its harmful, the government wouldn’t allow it”

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Abstract

This thesis examines the obstacles that make environmental protection challenging to litigate, particularly in the context of climate change, and identifies the underlying reasons for these obstacles. I emphasize the significance of preserving nature and provide a historical overview of environmental conservation. Despite the pressing nature of climate change and environmental degradation, legal efforts to combat these issues have often yielded unsatisfying results due to a lack of transparency, accountability, and fair power dynamics. This study examines four U.S. climate litigation cases under the Freedom of Information Act, revealing a consistent pattern of inadequate transparency and accountability that creates an uneven balance of power. Additionally, it highlights the manipulation of climate science and the prioritization of the interests of big oil and gas companies by government agencies and politicians. Maintaining funding to these industries is often rationalized by citing economic disruption and political support loss as justifications or excuses. I contend that environmental protection is a fundamental right and demands greater attention. This research utilizes a wide range of external sources, such as journal articles, government websites, and books, to thoroughly examine the topic. Keywords are used to analyze the narrative of each case, recognize common themes, and compare cases to identify trends in U.S. climate litigation.

Prologue

I chose this topic for my senior project for several compelling reasons. I firmly believe that the federal government and large corporations must be held accountable for their repetitive actions. While it is often stated that there is protection under the Constitution, the reality is that our environment is continuously being damaged. It is time to change how our government and other systems operate and to address the root cause of environmental destruction resulting from unproductive legislation. Through my senior project, I aim to raise awareness and shed light on the ongoing environmental issues we face and the challenges we encounter in protecting our environment through the legal system. My ultimate goal is to inspire meaningful actions that contribute to a more sustainable future. The current state of affairs directly results from past decisions, and it is time to demand change. It is clear that more than setting ambitious climate goals is required.

Chapter 1

History of the Climate Movement

1.1 The Environmental Movement

The environmental movement in the United States has played a critical role in shaping the nation's attitudes and policies toward protecting the planet. While the 1970s are often seen as the era when environmentalism became mainstream, the movement had its roots in the 1950s and 1960s. At its core, environmentalism involves protecting the environment and taking action to prevent harm to our planet.¹ Despite this, the current legal framework in the United States does not explicitly provide for the protection of environmental rights, raising concerns about how we can effectively safeguard the environment. This issue has been highlighted by David R. Boyd, a writer for the *Politique*, who argues that constitutional protections should extend to the environment.² In this context, it is worth exploring the key moments and events that led to the rise of the environmental movement in the 1950s and 1960s and how it has evolved.

The inclusion of environmental rights in the constitution would have significant implications for the ability of individuals and communities to demand legislation that limits threats to the health of our environment and society. This would empower individuals to advocate for environmental protection and make it easier for their voices to be heard in the political process. Recognizing environmental rights as a fundamental aspect of constitutional law would mark a significant step forward in the fight to protect our planet and ensure a sustainable future for generations to come. One scholar, Richard J. Lazarus states that the framework of the Constitution is not a useful framework for environmental law, so when we are looking to the

¹ Christopher Rootes, "Environmental Movements", in *The Blackwell Companion to Social Movements*. (Blackwell Publishing, 2004), 608.

² David R. Boyd, et al. "Should Environmental Rights Be in the Constitution?" *Policy Options*, (2014).

Constitutions for the support of our legislation, we often lack the stability we need to be successful.³

To begin, the first environmental law introduced in the postwar period of 1948 protected water quality.⁴ Congress passed the Federal Water Pollution Control Act (FWPCA) to broaden the government's ability to control pollution in water. Following this, in 1951, the Nature Conservancy was established in Washington, DC. It started as a non-profit organization to protect important lands and water. “The Nature Conservancy was founded as a citizen’s environmental organization dedicated to purchasing and protecting the habitats of plants, animals, and natural communities that represent the diversity of life on Earth.”⁵ As early as the 1950s, we can see the evolution of environmental laws beginning.

The release of the Resources for Freedom by the Paley Commission in 1952 marked a pivotal moment in history. It was astonishing because the report recognized the United States' growing dependence on foreign natural resources and called for a shift toward renewable energy sources.⁶ At that time, the idea of renewable energy seemed unfathomable, but the report laid the foundation for discussions around the need to reduce reliance on oil and gas. The report was a landmark achievement, as it was the first time the U.S. government acknowledged the urgent need to take action and move towards sustainable energy practices.

The early 1950s marked a turning point in public awareness of environmental issues with a series of events that brought attention to the state of the planet.⁷ In 1953, Jacques Cousteau's

³Richard J. Lazarus, “The Challenges for U.S. Law Making Institutions and Processes of Environmental Protection Law”, in *The Making of Environmental Law* (The University of Chicago, 2004), 30.

⁴American Experience, “The Environmental Movement”, *PBS*, 2022.

⁵Carolyn Merchant. “Chronology: An Environmental History Timeline.” In *The Columbia Guide to American Environmental History*, 249–68.

⁶American Experience, “The Environmental Movement”, *PBS*, 2022.

⁷Carolyn Merchant, *The Columbia Guide to American Environmental History*, (2002), 249–68.

Academy Award-winning documentary on aquatic life opened viewers' eyes to the beauty and fragility of the natural world. The following year, President Eisenhower's State of the Union address called for action on air pollution. The Air Pollution Control Act was passed by Congress in 1955, marking the first legislation to address this issue. This act granted individual states control over air pollution regulations, sparking a debate that would continue throughout the thesis regarding the merits of state versus federal control. These events highlight a growing concern for the environment that was gaining momentum in the United States.

In the mid-1950s, the environmental movement gained significant momentum. One of the most meaningful victories during this period was the successful protest by the Sierra Club against the Echo Park Dam construction in Utah's Dinosaur National Monument.⁸ This success was followed by the release of Rachel Carson's book "Silent Spring" in 1962. The book advocated for national pesticide policies and the banning of DDT for agricultural purposes and was an environmental success. It eventually led to the creation of the U.S. Environmental Protection Agency (EPA). Carson's book was particularly impactful due to her reputation as a respected author and scientist.⁹

At the same time, industrialization was booming, and more people owned cars than at any other time.¹⁰ An estimated 83 million Americans owned cars in 1963, and together with industrial smoke stacks emissions resulted in high smog. Following this was the Clean Air Act (CAA), passed in December of 1963 to hopefully dissolve air pollution issues. The CAA allowed the federal government to regulate air pollution and emissions standards for stationary pollution sources. Then in 1965, the Water Quality Act was passed, giving the federal government authority to regulate.

⁸ Carolyn Merchant, *The Columbia Guide to American Environmental History*, (2002), 249–68.

⁹ Ibid.

¹⁰ American Experience, "The Environmental Movement", *PBS*, 2022.

In 1968, the Wild and Scenic Rivers Act protected free-flowing, undammed rivers with outstanding scenic, geologic, historical, recreational, or wildlife features. In the same year, the Indian Civil Rights Act was passed, mandating tribal consent in civil and criminal juridical matters that concerned Indian lands.

In 1969 there were two significant events: The Santa Barbara oil spill off the Californian coast that spewed oil for ten days into the ocean, and the International Organization Friends of the Earth (FOE) was founded, which was to protect the planet from environmental disaster. The Santa Barbara oil spill was undoubtedly a wake-up call for most.

In 1969 the National Environmental Policy Act (NEPA) was created. This act was signed into law under the Nixon administration on January 1, 1970.¹¹ The enactment ensured specific implementation procedures to enforce laws on federal agencies under the Council of Environmental Quality (CEQ). Under this policy, federal action must be assessed through a detailed statement of environmental impacts that are significantly affecting the environment called the environmental impact statement (EIS).¹² NEPA serves two leading roles, “requiring agencies to consider the environmental impacts of their actions and inform the public that they considered environmental concerns in their decision-making process.”¹³ It allows for active public participation in decision-making that can impact life and health. Although NEPA falls under the category of law, it draws some confusion because it is an action-forcing piece of legislation and does not carry any criminal or civil sanctions. In the writing of the act itself, it says:

Section 102 of NEPA establishes procedural requirements, applying that national policy to proposals for major Federal actions significantly

¹¹ Linda Luther, “The National Environmental Policy Act: Background and Implementation” *Research, Science, and Industry Division*. (Congressional Research Service, 2008) Intro.

¹² Ibid.

¹³ Ibid.

*affecting the quality of the human environment by requiring Federal agencies to prepare a detailed statement on: (1) the environmental impact of the proposed action; (2) any adverse effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action.*¹⁴

Overall, NEPA is purely procedural and could be improved if it included substantive statutes. Substantive statutes establish rights and obligations for individuals such as standards for air pollution and emissions. NEPA was created with ambitious goals and was less successful than people had hoped. After NEPA, the 1970s were some of the most critical years of the environmental movement.

The 1970s left a mark in history with more people being aware of the environment and many other social justice movements underway. The founding of the Environmental Protection Agency, Earth Day, the Clean Air Act, and the National Resources Defense Council came around the same time.¹⁵

In December 1970, the Environmental Protection Agency (EPA) was created to regulate air and water quality along with radiation, pesticide hazards, and solid-waste disposal under the federal government's executive branch.¹⁶ Presently, the work of the EPA has been expanded but becoming more ambiguous. The role of the EPA under the federal government has played an essential part in many regulations, acts, and policies. However, in many ways it has also created much controversy in its authority.

¹⁴ *NEPA* | *National Environmental Policy Act*. <https://ceq.doe.gov/>. Accessed 18 Mar. 2022.

¹⁵Carolyn Merchant, *The Columbia Guide to American Environmental History*, (2002), 249–68.

¹⁶*Ibid*.

Moreover, in 1970, Wisconsin Senator Gaylord Nelson initiated the first Earth Day, urging students to vigorously fight environmental degradation and support environmental causes similar to their opposition to the Vietnam War.¹⁷ The Clean Air Act (CAA) followed, which regulates air emissions under the EPA and establishes National Ambient Air Quality Standards (NAAQS). Finally, the National Resources Defense Council (NRDC) was founded to draft environmental laws, lobby, and litigate. The NRDC was among the first non-profit organizations to function outside the federal government, strive to improve environmental laws and fight for the well-being of our planet, people, and animals.¹⁸

The Federal Water Pollution Act, the Coastal Zone Management Act, and the Endangered Species Act were passed in the following years. Skipping ahead to 1982, the Environmental Justice Movement began when a group of African Americans protested in Warren County, North Carolina, due to the disposal of toxic PCBs in landfills in predominately African American neighborhoods. Although they failed in their protesting to stop it, they were successful in inspiring others to continue with the environmental justice movement, which is a significant aspect of environmental law (or *should be* a major part).¹⁹

In 1986, the government started requiring industries to report their toxic releases. In addition, communities were to create emergency response programs for these situations. The act was known as the Emergency Planning and Community Right-to-Know Act and did not seem like it had much to do with regulation but rather civil suits. In 1987, Congress enacted the Water Quality Act that defined industrial stormwater discharges and municipal sewer systems. Part of this act required states to record toxic hot spots.²⁰

¹⁷ Carolyn Merchant, *The Columbia Guide to American Environmental History*, (2002), 249–68.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

Two protocols within ten years should be recognized because this was when countries came together to figure out how to fight climate change – beginning with the Montreal Protocol in 1987, signed by twenty-four countries, including the United States. The goal of this protocol was to eliminate chlorofluorocarbons (CFCs). Ten years later, the Kyoto Protocol introduced during the Climate Change Conference in Japan set legally binding limits on greenhouse gas emissions and for nations to reduce the 1990 emission levels by 2012.²¹

In November of 2021, the U.S. Department of State released the government's long-term strategy for dealing with climate change. Long-term strategies include:

- Net-zero carbon emissions by 2050.
- Reducing non-CO2 emissions.
- Transforming the new energy system.

Ultimately the role of this document is to lay out the path for reaching the U.S. climate goals. This also included the U.S. rejoining the Paris Agreement in 2021, the Global Methane Pledge, and taking action domestically and internationally.²² The Paris Agreement is a landmark agreement that works on pledges, which is different from that of the Kyoto Agreement, which includes binding contracts. In the Paris Agreement, the pledges are called Nationally Determined Contributions (NDC's), which embody each country's efforts that outline their climate actions. . These NDCs are submitted every five years to ensure the successful implementation of these pledges.²³

²¹ Ibid.

²² The White House, "United States Long-Term Strategy Against COVID-19," (Washington, D.C.: The White House, October 2021),

²³ United Nations Framework Convention on Climate Change. "Nationally Determined Contributions (NDCs)." Accessed March 10, 2023.

Exploring the history of our nation's involvement in the environmental movement can reveal important insights. For instance, it highlights that our society has long grappled with the challenges of climate change and has made significant strides over time. However, despite these efforts, we must question why we fail to achieve our climate goals.

Chapter 2

Science of Climate Change

2.1 The Enhanced Greenhouse Effect and Global Warming

Understanding the science of climate change is crucial in developing effective policies and regulations to address the issue. The Earth's climate has been in a state of constant change for millions of years, but human activity has accelerated this process in recent history. The industrial revolution, with its technological advancements and explosion of population growth, has led to a significant increase in human-induced climate change. While this thesis delves into environmentalism's legal and policy aspects, it is important to acknowledge the scientific basis for these efforts. Without a solid foundation in science, the policies and regulations developed to combat climate change may be ineffective or even counterproductive.

Burning fossil fuels, coal, oil, and gas, used when driving, flying, and riding trains, emit carbon dioxide (CO₂) into the atmosphere. Carbon dioxide absorbs and traps heat, creating a blanket over the Earth's surface and increasing the Earth's temperature. The other notable gas for this discussion is methane released in agriculture and mining, adding to the “blanket” of heat alongside carbon dioxide. This process is what we call the *natural* greenhouse gas effect.²⁴ Scientists now describe our current climate as the *enhanced* greenhouse effect.²⁵

With the enhanced greenhouse effect, carbon dioxide is different because the amount has changed by almost 40% since the industrial revolution.²⁶ The concentration of CO₂ will continue to accumulate for the next 100 years, causing the Earth's surface to warm. The warming leads to

²⁴John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015), 23.

²⁵ Ibid.

²⁶John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015), 27.

what we are seeing today regarding the climate, which will be explained further. Climate scientists measure a net imbalance in the Earth's budget as 4 watts per square meter today in comparison to preindustrial times. This means that more energy is coming in than going out.²⁷

The speed at which the greenhouse gas (GHG) effect is occurring is faster than any temperature change over the past 10,000 years.²⁸ The GHG effect concerns our near and far future, with a predicted rising average temperature of 3 degrees celsius by 2050. In terms of infrared radiation, it is normal for a particular portion of the radiation to be absorbed by the Earth's surface because that keeps it warm.²⁹ However, because of the world's rapid and growing industry of burning fossil fuels and agriculture, the Earth's natural resources cannot keep up with how much CO₂ is being sequestered and man-made CO₂ is increasingly warming the planet.

2.2 Carbon Dioxide and Methane

The increase in average temperatures, even by a few degrees, will have detrimental effects on the environment, human health, and animals. Adapting to the rapid changes in climate is an immense challenge we are currently facing. Unfortunately, the consequences of climate change are already being felt, and many will struggle in the face of these changes. Extreme temperatures, severe weather events, sea-level rise, agricultural failure, droughts, floods, and biodiversity loss are just a few of the impacts we will have to endure.

Carbon dioxide is the main greenhouse gas that has been increasing in the atmosphere due to human activities. It has contributed to 76% of the enhanced greenhouse effect, and methane is about 16%.³⁰ The Earth goes through the carbon cycle to which we all contribute. Every time we eat, breathe and burn fires using organic materials, carbon is released into carbon

²⁷ John Houghton, "Global Warming: The Complete Briefing", (Cambridge University Press, 2015), page 27

²⁸ Ibid.

²⁹ Ibid.

³⁰ Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2015 (EPA, 2017)

dioxide. Photosynthesis happens to offset this process with plants and trees by absorbing CO₂ and returning them into the atmosphere as oxygen. This process also occurs in the ocean.³¹

The other greenhouse gas that is released into the atmosphere that contributes heavily to global warming is methane. Methane is mainly released from the agricultural sector such as wetland areas where they arise in anaerobic conditions. There are several other areas such as permafrost caused by rising temperatures and nitrous oxide that can be caused by the use of nitrogen fertilizers in agriculture.³² See figure one from *Global Warming the complete briefing, 2015*.

³¹ John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015), 27.

³² IPCC 2021, European Union (2019)/IEA (2018)/UNEP (2019).

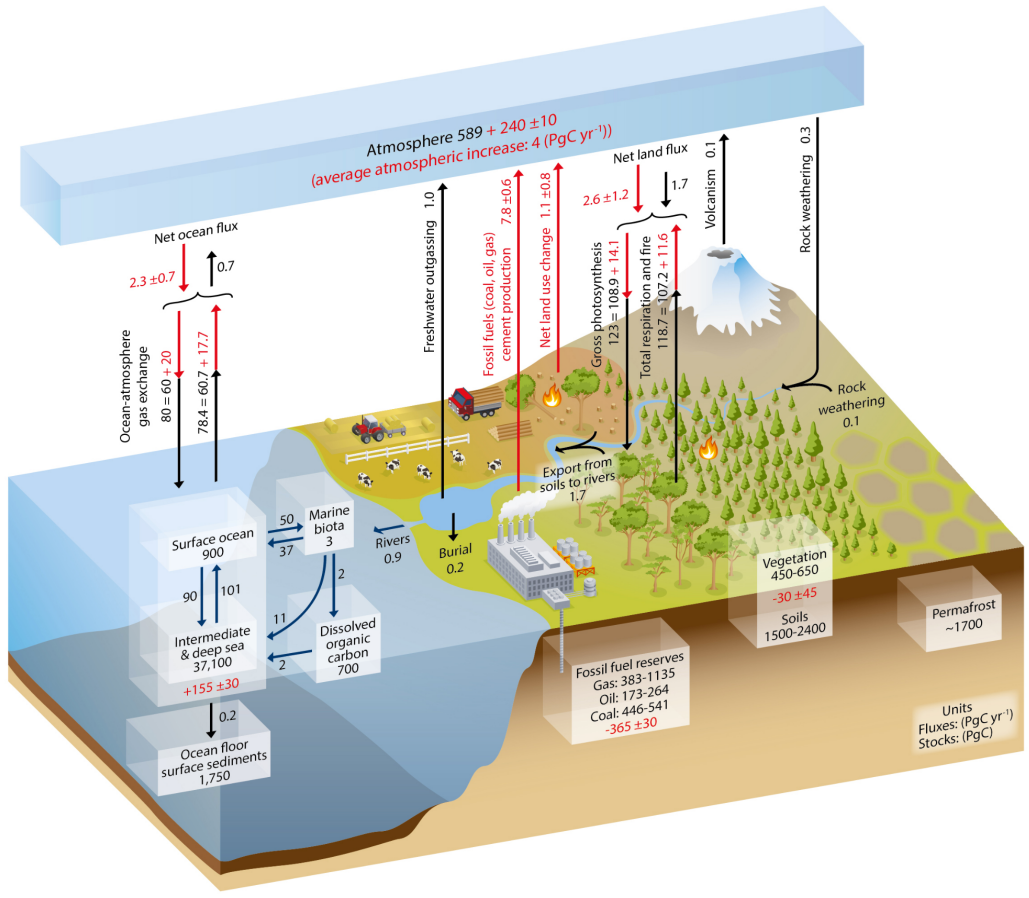


Figure 1: Simplified schematic of the global carbon cycle³³

Figure one shows the carbon cycle processes and all the elements. The black arrows represent reservoir mass and exchange fluxes before the industrial era (1750). In comparison, the red arrows represent the fluxes from 2000 to 2009. The red arrows also represent the ‘CO₂ growth rate’ (Fossil fuel and cement emissions of CO₂, Net land use change, and Average atmospheric increase of CO₂ in the atmosphere). The ocean and land are known as carbon sinks showing the Net land and Net ocean flux. The red numbers give the cumulative changes of anthropogenic carbon over the industrial period of 1750-2011.

³³ John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015), 27.

2.3 Anthropogenic Causes of Climate Change

The three leading causes of global warming are energy production, manufacturing of goods, and burning forests. According to the Intergovernmental Panel for Climate Change (IPCC), global warming is due to the emissions of the burning of fossil fuels such as oil, gas, and coal and human land use, which is attributable to humans.³⁴ The climate change we are experiencing is entirely human-induced; due to the industrial age. The extreme demand in the last 50 years during the industrial revolution had overwhelmingly increased the concentration of CO₂ in the atmosphere.³⁵

This can be explained through lifetimes showing concentrations such as CO₂ and Methane. The lifetime of CO₂ and methane is important to note because it is the length of time they remain in the atmosphere. Methane, for example, is much more potent than CO₂, so although its lifetime is shorter than CO₂, it absorbs higher amounts of energy while it is in the atmosphere. So, in terms of the present effects of climate change, methane has more immediate impacts, even with a shorter life span. Different radiative forcings are generated by different greenhouse gasses, meaning they each have different lifetimes. Climate scientists use GWP (Global Warming potentials), which “Takes the ratio of the time-integrated radiative forcing from the instantaneous release of 1 kg of given gas to that from the release of 1kg of carbon dioxide.”³⁶

³⁴ IPCC 2021, European Union (2019)/IEA (2018)/UNEP (2019).

³⁵ Ibid.

³⁶ John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015), 27.

2.4 Past

From the 1980's to 1990's and early 21st century, the Earth experienced unusually warm temperatures. See figure 2 from the Global time series³⁷:

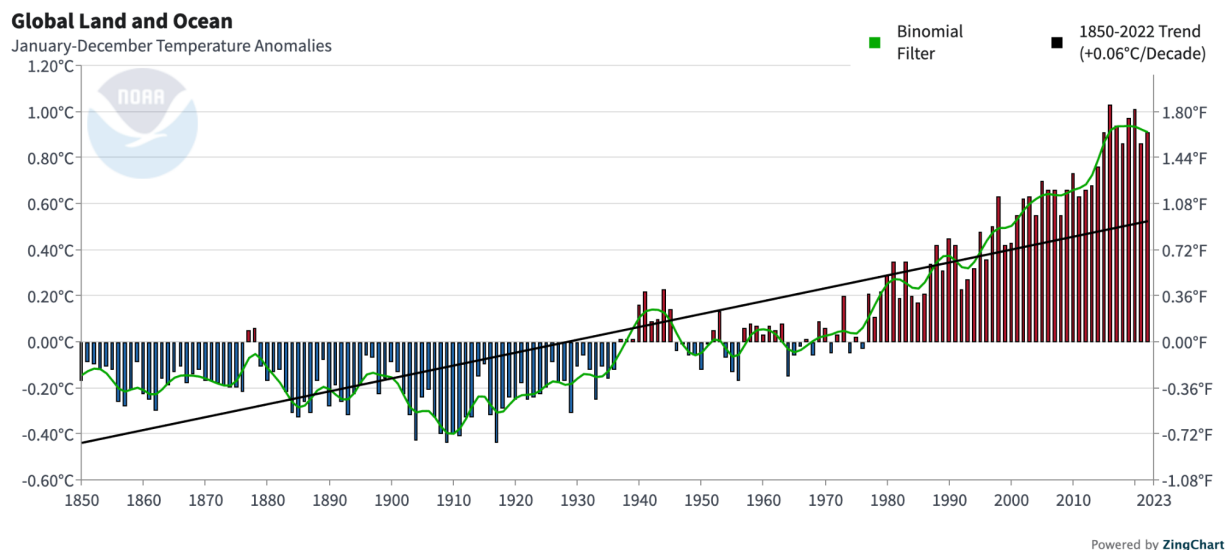


Figure 2: Global Land and Ocean Average Temperature Anomalies³⁸

This graph shows the time series on average global temperature rise from 1850 to 2023. As shown, the average temperature fluctuates slightly but has primarily gone up through the years. The green line shows the binomial filter of the temperature over time, and the black line indicates the overall trend from 1850-2022.

Since then, the warmest years on record have been 2015, 2016, 2019, and 2020. Nevertheless, each year has been warmer than the previous.³⁹ In the last one thousand years, scientists have been able to document and build the climate story based on ice caves, tree rings,

³⁷National Centers for Environmental Information. "Climate at a Glance: Global Time Series." National Oceanic and Atmospheric Administration.

³⁸ Ibid.

³⁹ WMO, "2021 one of the seven warmest years on record, WMO consolidated data shows" (2022)

lake lands, glaciers, and pollen distribution.⁴⁰ Going back to records before humans existed, scientists can use paleoclimate methods to figure out the climate of the past. For example, looking at the different ice cores can provide information about prevailing conditions at different times.⁴¹ An analysis of these ice cores showed air bubbles which indicates that carbon dioxide or methane existed in the atmosphere at the time. Another way of finding information is by looking at the composition of ocean sediments.⁴²

2.5 Future (Global warming potential of methane and carbon dioxide / Projections – future climate)

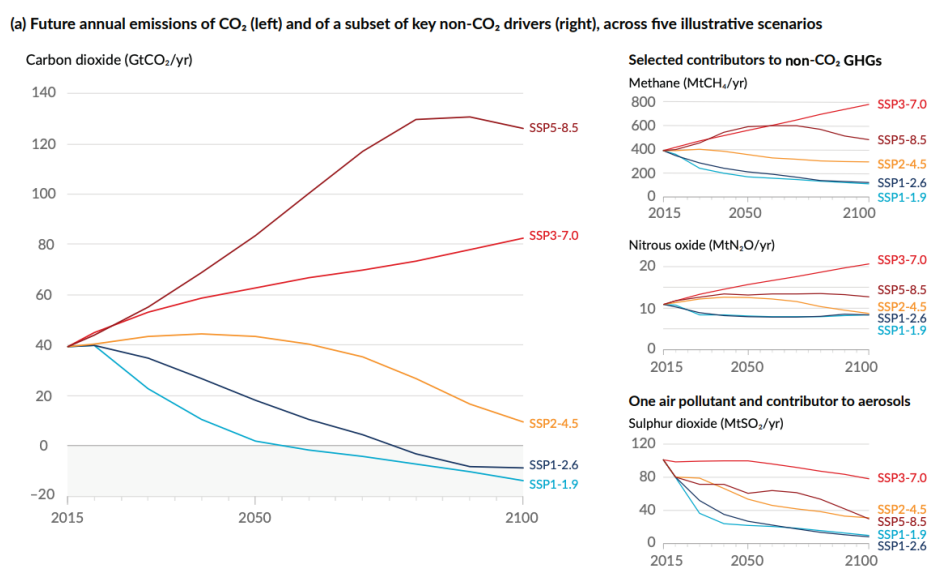


Figure 3: Future Annual Emissions of CO₂ and other drivers (methane, nitrous oxide, sulfur dioxide) of five emission scenarios with various degrees of mitigation pathways for the 21st century. CO₂ Emissions from Fossil Fuels and Industry: RCP Scenarios vs. Historical. This graph shows just the emissions from fossil fuels and industry with the comparison of RCP scenarios and history.

This figure shows the total anthropogenic CO₂ emissions from 2015 to 2100. Starting from the left side with the larger graph, this figure shows the future emissions of Carbon

⁴⁰ John Houghton, “Global Warming: The Complete Briefing”, (Cambridge University Press, 2015)

⁴¹Ibid.

⁴² Ibid.

Dioxide. Moving to the right shows methane, nitrous oxide, and then one air pollutant and contributor to aerosols, which contribute to the greenhouse effect in the atmosphere in the given scenarios. Each scenario holds a different outcome (i.e., SSP1-1.9, SSP1-2.6, SSP2-4.5, etc.). In the best-case scenario, the level of each gas decreases as years go by, and in the less preferred scenarios, the gas emissions increase.

2.6 IPCC Scenarios

The Intergovernmental Panel on Climate Change (IPCC) has developed emission scenarios that offer alternative visions of how the future may unfold in terms of climate change. By understanding the driving forces of emissions and climate change increases, climate scientists can use these scenarios to develop adaptation and mitigation strategies. The IPCC has identified carbon dioxide (CO₂) as one of the most significant contributors to anthropogenic climate change:

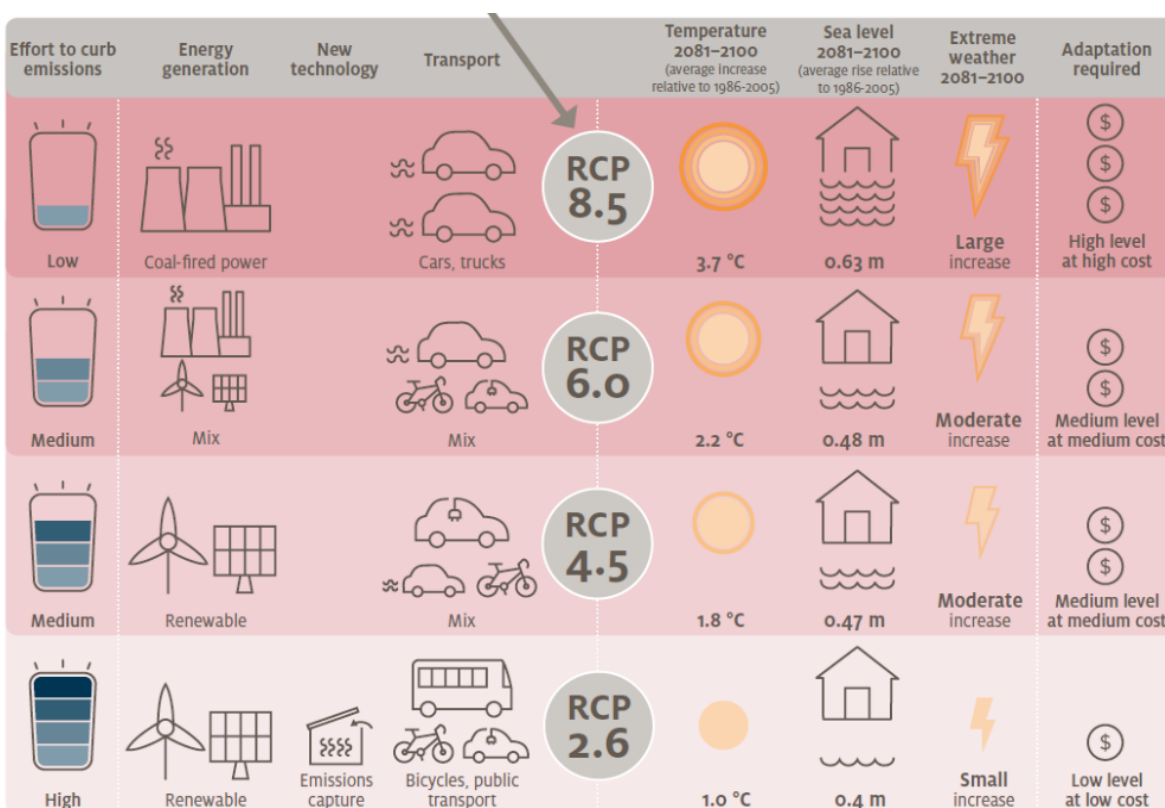


Figure 4: Business as usual scenario is the top row, best case scenario with many policy intervention bottom row and middle of the road scenario middle rows.⁴³

The image above depicts four contrasting scenarios: one (RCP8.5), in which we continue with business as usual, relying on fossil fuels and unsustainable transportation; two (RCP6.0),

⁴³ IPCC 2021, European Union (2019)/IEA (2018)/UNEP (2019).

where there is a mix of fossil fuels and renewable energy; three (RCP 4.5) primarily renewable energy and a combination of gas and electric cars, and four (RCP2.6) in which we shift towards renewable energy and sustainable transportation, while also capturing emissions. The Representative Concentration Pathway (RCP) captures future trends in greenhouse gas emissions with radiative forcing as the metric.

If we choose the first scenario and continue with high-emission activities like using coal-fired power and driving gas-guzzling vehicles, the forcing would be 8.5. This would result in alarming consequences for our planet: an average temperature increase of 3.7 degrees Celsius, a sea level rise of 0.63 meters, and an increase in extreme weather events, all of which would come with a high cost of adaptation.

Alternatively, we can choose a different path that prioritizes sustainability and reducing emissions. By shifting towards renewable energy and sustainable transportation, we can significantly lower the radiative forcing and mitigate the worst effects of climate change. In summary, the IPCC's emission scenarios and understanding of the causes and impacts of emissions play a critical role in informing efforts to mitigate and adapt to the effects of climate change.

Total cumulative CO₂ emissions **taken up by land and ocean** (colours) and remaining in the atmosphere (grey) under the five illustrative scenarios from 1850 to 2100

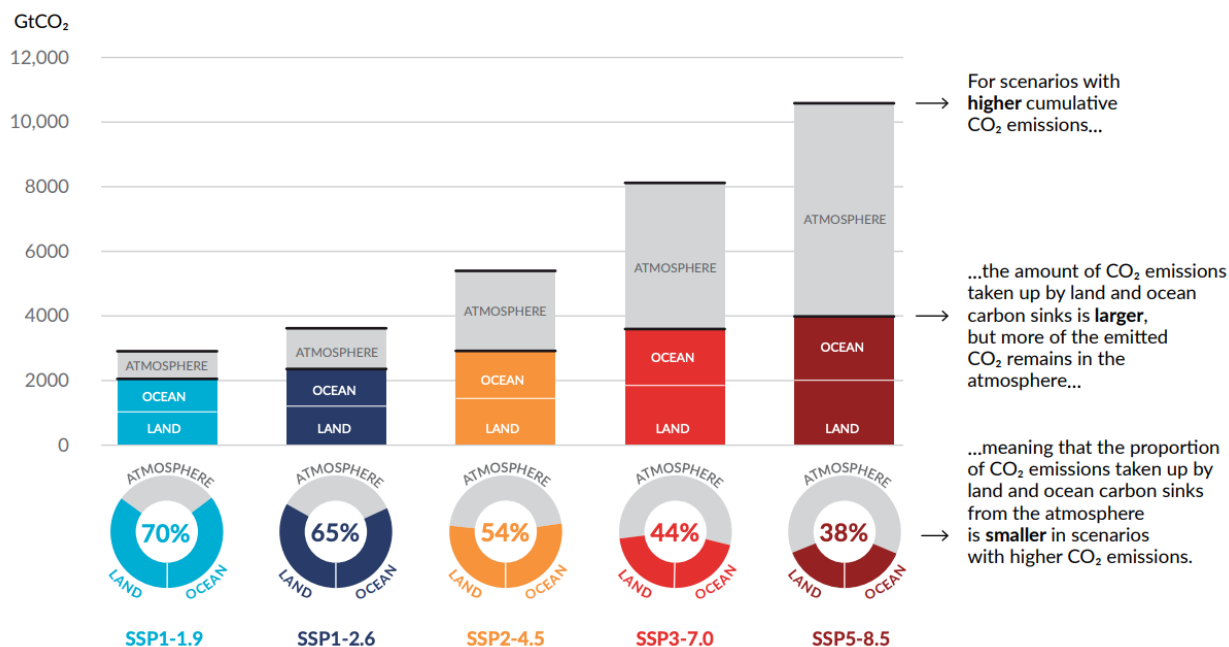


Figure 5: Global Cumulative Carbon Dioxide Emissions taken up by land and ocean under various scenarios from 1850 to 2100.⁴⁴

Figure 5 shows the ratio of CO₂ emissions taken up by land and oceans and the emissions remaining in the atmosphere. The proportion of CO₂ emissions sequestered in land and sea is less when the scenario has higher CO₂ emissions. As emissions increase and we reach a scenario with high emissions, we will see the most concentration of emissions in the atmosphere, increasing the risk of all adverse effects of climate change.

⁴⁴ IPCC 2021, European Union (2019)/IEA (2018)/UNEP (2019).

Chapter 3

Valuing Nature in a Changing Climate

Surprisingly, for more than a century, the value of nature and its abundant gifts has been a topic of fervent discussion among presidents and citizens alike. However, as our society has advanced and become more industrialized, our connection to nature has steadily eroded. It is important to acknowledge the efforts of individuals like Theodore Roosevelt, Bill McKibben, Henry David Thoreau, Al Gore, and John Burroughs, who have long been defending the importance of nature and advocating for its preservation. In the words of John Burroughs:

If I were to name the three most precious resources of life, I should say books, friends, and nature; and the greatest of these, at least the most constant and always at hand, is nature. Nature we have always with us, an inexhaustible storehouse of that which moves the heart, appeals to the mind, and fires the imagination, – health to the body, a stimulus to the intellect, and joy to the soul. To the scientist Nature is a storehouse of facts, laws, processes; to the artist she is a storehouse of pictures; to the poet she is a storehouse of images, fancies, a source of inspiration; to the moralist she is a storehouse of precepts and parables; to all she may be a source of knowledge and joy.⁴⁵

This piece of writing is simple yet shows that this idea is lacking from most Americans in this century. We need to understand the purpose of nature in coexistence with humans, how nature can nurture us, the art it offers, and what it means to take care of things that we love so deeply.

When we consider environmental law, what do we think of? It covers protection for the environment, humans, and animals, as well as regulating emissions that contribute to climate change and global warming. These aspects are governed globally and at the federal, state level through laws, regulations, policies, and treaties. Ultimately, our connection with nature is the most crucial factor within environmental law. Richard J. Lazarus, in his book on

⁴⁵ Bill McKibben, “The Art of Seeing Things”, in *American Earth: Environmental Writing Since Thoreau*, (The Library of America, 2008), 147.

environmental law, emphasizes that it must operate within constitutional and political limitations. These limitations were recognized during the creation of environmental laws: “Environmental protection law, like any area of law, must work within the constraints and exploit the opportunities provided by this constitutional design for lawmaking, as well as by related political processes.”⁴⁶

Environmental laws were first introduced in the 1950s and have since shaped our policymaking. However, this senior project asserts that despite environmental laws, we still lack concrete protection for our environment, society, animals, and future generations. The question arises, why is this protection still lacking? The answer lies in the flawed process of environmental law and the tendency of agencies to maintain the status quo. Our current laws and regulations have contributed to the inadequate monitoring and control of environmental issues.

After reading the previous chapters, one may argue that the failure of environmental law can be attributed to denial and inaction by the public. The attributions include but are not limited to the denial of climate change, scientific evidence, and the possibility that humans are responsible for environmental destruction, coupled with insufficient regulation, laws, and policies. However, the problem runs deeper than what is commonly believed, as it is intertwined with the very structure of law-making systems.

Humans have the power to affect a vast ecosystem filled with diverse species, as well as the Earth's natural systems that sustain us. The real question is not if humans can cause phenomena such as global warming, but why we allow it to happen. Theodore Roosevelt once stated in a letter to Frank Michler Chapman in 1899, "I do not understand how any man or

⁴⁶ Richard J. Lazarus, *The Making of Environmental Law* (2004), 29.

woman who truly loves nature can fail to exert all their influence in support of organizations such as the Audubon Society."⁴⁷ It is futile to blame laws for failing us without addressing the root of the issue. The environment cannot defend itself, and animals cannot communicate their needs. We hold the responsibility of protecting the Earth, which remains the sole constant and reliable entity in our lives. Mother nature offers us everything; the air we breathe, the food we consume, the ocean we swim and vacation on, the mountains we hike, cultures, art, and beauty. When the world saw natural sources as an opportunity to exploit rather than cherish, our future fell short.

In the following chapters, I will provide an introduction and delve deeply into four cases. These cases will support the argument presented earlier and highlight the shortcomings of our government, agencies, and legal system.

⁴⁷ Bill McKibben, "The Art of Seeing Things", in *American Earth: Environmental Writing Since Thoreau*, (The Library of America, 2008), 147.

Chapter 4

Disclosure in Climate Litigation: Four Cases Examined

4.1 Citizens For Responsibility and Ethics in Washington (Plaintiff) v. Council on Environmental Quality (Defendant)

When answering why litigation is complex, we must first identify the following: What are we trying to litigate? Who is responsible? What are the critical barriers to litigation? Litigation often gets lost in translation because it resembles regulation or policy. The following defines climate change litigation, "The term 'climate change litigation' is shorthand for a range of different proceedings connected to climate change matters. It can be directed at public and private companies, federal governments, city administrations, and insurance companies."⁴⁸ Within this definition, climate change litigation can be divided into two parts. The first is any public law actions against governments and public authorities. The second is private law actions based on tort, fraud, planning, and company law categories.⁴⁹ The focus of the following cases is in the Freedom of Information Act which falls in the first part.

The Freedom of Information Act, enacted in 1966, was created to give any person or agency the statutory right to retain access to government information, specifically the executive branch. The government defines "any person" as a private individual, foreign citizen, partnership, corporation, association, university, business, state, local, or foreign government. Even more specifically, the phrase "any person" also includes an attorney or other representative

⁴⁸ Tallat Hussain, "Climate Change Litigation: A new class of action", in *White and Case*, 2018.

⁴⁹ *Ibid.*

seeking records on behalf of any person.⁵⁰ The statutory framework for the Freedom of Information Act is as follows:

1. *“The FOIA, 5 U.S.C & 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.*
2. *An agency must respond to a party making an FOIA request within 20 working days, notifying the party of at least the agency’s determination whether or not to fulfill the request, and of the requester’s right to appeal the agency’s determination to the agency head. 5 U.S.C & 552(a)(6)(A)(I). CEQ regulations set a shorter response time, requiring CEQ to respond to FOIA requests within 10 working days of receipt. 40 C.F.R & 1515.5(b)(4).*
3. *In “unusual circumstances”, an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide “the date on which a determination is expected to be dispatched.” 5 U.S.C & 552(a)(6)(B).*
4. *This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. 5 U.S.C & 552(a)(4)(B).*
5. *The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the Court makes a written finding that “the circumstances surrounding the withholding raise questions whether agency personnel*

⁵⁰U.S. Drug Enforcement Administration, "Freedom of Information Act," accessed March 14, 2023.

*acted arbitrarily or capriciously," a disciplinary investigation is triggered. 5 U.S.C & 552(a)(4)(F)."*⁵¹

The Freedom of Information Act (FOIA) is a multifaceted law that provides a framework for identifying violations. The first case examined will be the Citizens for Responsibility and Ethics in Washington (CREW) v. Council on Environmental Quality (CEQ). CREW's mission is to protect citizens' right to be informed about government officials' activities through research, litigation, advocacy, and public education. By closely adhering to the statutory guidelines and analyzing this case, we can identify where the CEQ went wrong and how it was addressed through the FOIA.

In 2014, the non-profit organization Citizens for Responsibility and Ethics in Washington (CREW) filed a case against the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) for their failure to disclose records related to proposed renewable fuel standards. Despite CREW's initial request for records in May 2006, CEQ and the EPA did not comply. While attempting to fulfill this mission, CREW discovered that the CEQ, under the executive branch, had been misleading and misinforming the public regarding climate change. CREW therefore requested access to records that included information on temperature rise causes, climate change, global warming, science, and policy reports dating back to 2001. The reason for the request was that the information was "of particular interest and importance to the public in light of the revelations that CEQ officials edited conclusions made by government climate experts based on political expediency rather than sound science." The failure to retrieve these records harmed CREW's ability to provide the public with accurate, complete, and current information.

⁵¹ Citizens For Responsibility and Ethics in Washington (Plaintiff) v. Council on Environmental Quality (Defendant), United States District Court for the District of Columbia, 2007. (5)

The role of the defendant, CEQ, is that it “must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken .” From the first request made by CREW in 2006, CEQ failed to follow its role as a government entity. The request includes having documented scientific information that is true and accurate. Again, the CEQ has violated this in part of the FOIA. Most concerning of all is this piece of information written in the case:

Notwithstanding CEQ’s mandate to present the best scientific information to the public, in recent years political appointees at CEQ have edited many of these reports in ways that distorted scientific conclusions and deprived Congress and the American public of the government’s scientific conclusions, warnings, and predictions on climate change.⁵²

CEQ's failure to timely disclose the requested information was not the only issue at hand. There was also a concern that the information provided was inaccurate and had been altered under government supervision. While CEQ did provide some documentation, it was not enough to fully satisfy CREW's requests. This issue was highlighted by Andrew C. Revkin, an American science and environmental journalist during the Bush administration, where a White House official known for opposing greenhouse gas emission regulation had edited critical government reports on climate change. Although the changes made were subtle, they had a significant impact on the interpretation of the reports.⁵³ Many of these individuals who are in charge of climate documents are in fact far from scientists. A clear example is Philip A. Coony, who is an economist that edited the documents mentioned above.

The time it took for the CEQ to provide information must be adequately addressed in these cases according to FOIA. It is concerning that it took eight years for the CEQ to barely

⁵²Citizens For Responsibility and Ethics in Washington (Plaintiff) v. Council on Environmental Quality (Defendant), United States District Court for the District of Columbia, 2007. (6)

⁵³ Ibid. (6)

fulfill the requests made by CREW, highlighting the government's inability to be held accountable through the litigation process. In the realm of environmental protection, James Salzman a Professor of Law points out that "typically, industrial opponents of environmental laws are well organized and can afford to invest substantial resources to defeat or weaken legislation."⁵⁴ For far too long, the government has been slow to release information on climate change, promoting the need for action but failing to follow through with concrete measures. The failure to comply with FOIA requests has implications beyond just delaying transparency; it also raises ethical concerns, distorts scientific conclusions, downplays the certainty of climate change, and justifies actions the government takes that continually harms the environment. The current status of this case remains to be that the complaint was filed but since then there has still been nothing further than as explained above.

From this analysis, it is evident that there is a broader narrative that needs to be addressed beyond just the legal proceedings. In these cases, the plaintiffs filed against companies or government entities for not following the law, and the evidence shows their guilt. However, the question remains: what happens when they are found guilty? Does it simply mean they get more time to try and fix the issue when we know they probably will not? In what ways are the people who have been harmed compensated for the actions of the defendants? While the government can provide the plaintiffs with money as relief, more is needed to solve the root issue. The world is still burning, climate change is occurring at a faster rate than usual, and those disproportionately impacted by climate change are still experiencing these extreme events just as frequently as before. These cases show that we cannot go back and fix what we have done, especially when government agencies like the CEQ take eight years to follow requests. In

⁵⁴ James Salzman and Barton H. Thompson, Jr., "The Practice of Environmental Protection" in *Environmental Law and Policy*, (Foundation Press, 2003), 69.

perspective, within just 2006 and 2010, 2,000 people died each year from climate change-related events.⁵⁵ Additionally, the ten warmest years have occurred since 2005.⁵⁶

Redressability, or the ability to address and rectify harm, is an important factor in these cases. In the case of environmental issues, there is no question that the stakes are high for everyone affected by climate change. However, the reality is that the government's climate committee is lacking in scientific expertise and instead often caters to lobbyists and government officials who prioritize their own interests over the well-being of the planet.

⁵⁵National Center for Health Statistics, "Variation in Estimates of Prescription Opioid Use Disorder Prevalence by Demographic Characteristics and Health Care Utilization Among US Adults, 2015-2018," National Health Statistics Reports 2021, no. 176 (2021): 1-11.

⁵⁶National Centers for Environmental Information, "Global Climate Report - May 2020," last modified June 2020.

4.2 The Protect Democracy Project (Plaintiff) v. U.S. Department of Energy (Defendant)

The transition from one president to another involves critical decisions to the foundation of the incoming administration. For one, future policymaking, new appointees, and federal functions are reviewed and changed if the new administration calls for it. The ‘transition team’ is a vital part of this transition of power. The transition team is responsible for many parts of the government, including the decisions made about the climate committee. The climate committee is responsible for holding and dispersing information on climate change actions within the government, whether physical action or spreading information. This position is significant because it requires knowledgeable and qualified individuals handling climate documents that pass information to those in a higher power within the government. The following case discussed in this chapter will include the introduction to the ‘transition team’ along with its implications in the case. The official definition of the transition team is that the “Presidential transition teams lay the groundwork for governing well in advance of Election Day by building a policy agenda for the new administration, gathering information about federal agencies, vetting potential political appointees and developing a management agenda.”⁵⁷ Ultimately deciding what will be the goals of the next presidential administration.

The transition between presidents has a significant impact on the federal climate committee, as the people appointed to these positions can greatly influence important decisions that shape U.S. climate goals. However, the assumption that these positions are filled by qualified individuals is not always the case, as demonstrated during the Trump administration when several non-scientists were appointed to the climate committee. This was concerning given the committee's important role and the potential influence of presidential guidance. For instance,

⁵⁷ Presidential Transition Act Summary, *Partnership for public service*.

Trump's anti-environment stance led him to prioritize funding for oil and gas, ultimately resulting in the U.S. withdrawal from the Paris Agreement in 2017. Trump argued that this decision was necessary to prevent economic harm to the U.S. and avoid being placed at a permanent disadvantage.⁵⁸

In February 2017, Protect Democracy requested files and documents from a questionnaire the DOE gave to the presidential transition team regarding climate change. The requests were given directly to the Department of Energy (DOE), a federal agent responsible for the communications between the DOE and government officials.⁵⁹ What happened was that the DOE filled these requests on December 1, 2017. Nevertheless, Protect Democracy still ended up filing a lawsuit against DOE. Why?

Although the DOE handled the request, Protect Democracy believed that the research to complete the questionnaire request lacked crucial elements. The crucial elements included topics like climate change and the environment. This civil action stated, “The parties dispute whether DOE conducted an adequate search in response to the first request (relating to the Questionnaire) and whether DOE properly invoked the deliberative-process privilege under Exemption 5.”⁶⁰ What we can gather from this statement is that the research was not substantial enough to satisfy the requests by Protect Democracy. The terms climate change, questionnaire, and transition were stated in the request. However, in the search done by a government official that is part of the DOE, they used only the words “transition,” “questionnaire,” “questions,” and “personnel.” The implications of this search process impacted the files and documents that Protect Democracy

⁵⁸ U.S. Department of State, "On the U.S. Withdrawal from the Paris Agreement," last modified January 20, 2021.

⁵⁹ The Protect Democracy Project (Plaintiff) v. U.S. Department of Energy (Defendant), The United States District Court for the District of Columbia, 2017.

⁶⁰ Ibid.

received. So, a thought to keep in mind is why the terms climate change and global warming are heavily avoided in government work.

The court, under federal rule, discussed the idea of granting summary judgment. Summary judgment is only granted through the FOIA if an agency can show that their search for the records was in good faith and the methods they searched can produce the requested information. DOE supposedly did their respective search for documents and responsive materials, but Ingrid Kolbs, the person who had done the research, still needed to have their research reviewed. Hence this is why Protect Democracy still filed a lawsuit for insubstantial documents. What the court was looking for with this lawsuit is if there is any substantial doubt or if there are what they called “positive indications of overlooked materials.”⁶¹ Protect Democracy challenges the adequacy of DOE’s search given that they are only from one government official within DOE, Ingrid Kolb, and did not undertake all of the requests submitted.

This case chosen discusses and tells a direct story of how some of the legal processes happen. It seems simple; causes and effects create a lawsuit and then the act of redressability. In this case, we can see that Protect Democracy is trying to readdress a flaw they see in DOE’s research of documents from a questionnaire that involves climate change and the transition from one president to another. In cases like this, it is straightforward for the court to side with both of the entities because they can say that DOE has substantial evidence yet may have slightly missed the mark on the requests given to Protect Democracy. The DOE is slightly off the hook even though, as a reader, we can see the larger picture. It is not a matter of providing the documents or filling the requests. How we choose to incorporate climate change science into a political realm like the federal government matters. Even with a small case like this, there are clear

⁶¹The Protect Democracy Project (Plaintiff) v. U.S. Department of Energy (Defendant), The United States District Court for the District of Columbia, 2017.

entanglements of information and the people involved. The DOE is a department that is part of the federal government, which the current administration influences. These points will be paramount as we sift through the rest of the cases and then onto the cross-analysis. In 2018, the parties' motion for summary judgment was partially granted and partially denied, marking the last known update on this case.

4.3 Public Employees For Environmental Responsibility (Plaintiff) v. United States Environmental Protection Agency (Defendant)

PEER is a non-profit organization based in Washington, D.C., with a headquarters in Maryland and field offices in California, Colorado, Florida, Massachusetts, and Tennessee. The purpose of PEER is to engage in works of advocacy, research, education, and litigation. Within this work, they play a significant role in helping the public to understand and debate critical public policy issues. More specifically, PEER focuses on environmental issues, including regulation and remediation of toxic substances, public lands, and natural resource management. Furthermore, they work on public funding of environmental and natural resource agencies and ethics in government. In this case, PEER is the plaintiff, while the EPA is the defendant.

The typical procedure for an action under the Freedom of Information Act is giving the defendant 20 days to complete a request given by the plaintiff. If this request needs to be extended, the defendant will get ten more days to complete the request. On December 4, 2017, the Public Employees for Environmental Responsibility (PEER) requested that the Environmental Protection Agency provide information and documents related to two presentations that were supposed to occur in October 2017. The presentations were canceled for unknown reasons, which triggered the request in the first place. PEER wanted to know the reasoning behind the cancellation to hold the EPA and those who represented them accountable. The presentations were canceled by two EPA scientists and a contractor at a Narragansett Bay workshop in Providence, R.I. Below is a list of what PEER requested electronically:

1. *Documents reflecting the referenced “Procedures [that] have been put in place to prevent such an occurrence in the future.*
2. *Records indicating that EPA Administrator Scott Pruitt assured the Office of Research and Development (“ORD”) that “political and career senior leadership has the authority to make decisions about event participation going forward.*
3. *Copies of these communications between Mr. Pruitt and ORD staff on this topic.*
4. *Documents that summarize or enumerate research ORD is, or is slated, to undertake as Mr. Pruitt claims is “outlined in our Strategic Research Action Plans reflecting Congressional appropriations.*
5. *Any records reflecting any internal communications from Mr. Pruitt concerning “EPA’s Scientific Integrity Policy”, including any documents reflecting steps Mr. Pruitt is taking to uphold that policy.*

These records are essential for the following reasons: It allows the plaintiff to educate the public about the quality and integrity of scientific work at EPA and how the agency will facilitate scientific freedom for its professional staff. Because the EPA failed to disclose the following requests, the plaintiff had exhausted its administrative remedies and is now asking the Court to require the defendant to produce the records in the original FOIA request. This also includes any relief, such as the attorneys’ fees and costs.

As stated above, this all happened because of the cancellation of two presentations of two EPA scientists and one consultant at a conference on climate change. Senator Sheldon Whitehouse asked Mr. Pruitt (the one who canceled it) for a reason behind this. These are the direct words from Mr. Pruitt:

Procedures have been put in place to prevent such an occurrence in the future. I have assured the Office of Research and Development (ORD) political and career senior leadership that they have the authority to make decisions about event participation going forward. This has been communicated to all ORD staff throughout the country, and ORD will continue to conduct research outlined in our Strategic REsearch Action Plans reflecting Congressional appropriations. Additionally, I am committed to upholding EPA's Scientific Integrity Policy, which ensures that the Agency's scientific word is of the highest quality, is presented openly and with integrity, and is free from political interference.⁶²

Right off the bat, this response does not answer the question nor give reasoning behind the cancellation. In this case, the defendant violated the FOIA. Due to this, PEER requests from the Court that they: (1) Enter an order declaring that defendant wrongfully withheld requested agency records, (2) Issue a permanent injunction directing defendant to disclose to plaintiff all wrongfully withheld records, (3) Maintain jurisdiction over this action until defendant is in compliance with the FOIA and every order of this Court, (4) Award plaintiff attorney fees and costs pursuant to 5 U.S.C. 552(a)(4)(E), and (5) Grant such additional and further relief to which plaintiff may be entitled.⁶³

Some questions to ponder after hearing this case is why did they fail to disclose records and satisfy the request? Why did they avoid giving clear reasons for canceling the climate change presentations? Moreover, what will be the outcome of this lawsuit, and will this outcome be beneficial? The current state of this lawsuit was in 2018 when summary judgment was granted. This means that the court decided there is no reason to take this case to trial.

⁶² Public Employees For Environmental Responsibility (Plaintiff) v. United States Environmental Protection Agency (Defendant), The United States District of Columbia, 2017. (5)

⁶³Ibid. (8)

4.4 Natural Resources Defense Council, INC., (Plaintiff) v. U.S. Environmental Protection Agency (Defendant)

The final case we'll examine is the Natural Resource Defence Council (NRDC) v. the U.S. Environmental Protection Agency, which pits the NRDC, a non-profit environmental and public health membership organization with a national presence⁶⁴, against the EPA. The NRDC's mission is to engage in research, advocacy, public education, and litigation, and it leverages online and print media channels to disseminate information to the public.

This case involves several defendants aside from the EPA. The U.S. Food and Drug Administration (FDA), The National Oceanic and Atmospheric Administration (NOAA), the White House Office of Management and Budget (OMB), U.S. Department of the Interior (DOI), Bureau of Land Management (BLM), Bureau of Reclamation (Reclamation), the U.S. Fish and Wildlife Service (Wildlife Service), Office of Surface Mining Reclamation and Enforcement (Surface mining), U.S. Forest Service Service (Forest Service), and the U.S. Department of Justice (DOJ) are all included. These are all government agencies, and the one to note is Reclamation because they have possession or control of the documents NRDC seeks.

Case number four highlights an important narrative surrounding the transition of power from one president to another. In January 2017, during President Trump's inauguration, the administration communicated with federal agencies to discuss their policy priorities. As part of this process, the Department of Energy (DOE) was asked to provide a list of employees who participated in international climate talks or worked on domestic efforts to reduce carbon emissions. It was later revealed that private individuals, including known climate change denier Steve Milloy, helped define the priorities of the new administration and produce an action plan

⁶⁴ Refer back to chapter 1

for the EPA.⁶⁵ However, the identities of most members of this team remain undisclosed. This case underscores the potential influence of outside actors on government policies and raises questions about transparency and accountability in the transition of power.

In light of these events, the NRDC requested FOIA documents from all of the agencies stated above. Each of the government agencies involved with the case were required to produce and submit necessary documents directly to the NRDC. The documents include records of the communication between the federal agencies and Trump's transition team. The exact words used in the request were “records in each agency’s possession, custody, or control that are, include, or reflect communications between agency staff and any member of the transition team of the President-elect Donald Trump or Vice-president-elect Mike Pence.”⁶⁶ The “staff” refers to those described in the Presidential Transition Act of 1963 and all amendments.⁶⁷ The reasoning behind these requests is as follows: the federal agencies and the Trump administration have been charged with withholding environmental and public health information. It is stated in the case that “failure to release responsive records violates the Freedom of Information Act and deprives the public of critical information regarding the administration’s policies with respect to implementation and enforcement of bedrock health and environmental laws.”⁶⁸

The FOIA request for these documents was initiated on December 22, 2016, and the federal agencies were expected to respond within 20 days. However, as has been the case in previous examples, the agencies failed to comply with the request made by the NRDC. Despite the EPA filing for an extension, they failed to provide a final response even after two months.

⁶⁵ Natural Resources Defense Council, INC., (Plaintiff) v. U.S. Environmental Protection Agency (Defendant), In the United States District Court for the Southern District of New York, 2017.

⁶⁶ Natural Resources Defense Council, INC., (Plaintiff) v. U.S. Environmental Protection Agency (Defendant), In the United States District Court for the Southern District of New York, 2017. (7)

⁶⁷ Presidential Transition Act Summary, *Partnership for public service*.

⁶⁸ Natural Resources Defense Council, INC., (Plaintiff) v. U.S. Environmental Protection Agency (Defendant), In the United States District Court for the Southern District of New York, 2017. (1)

This pattern persisted across all other agencies, with extensions, lack of response, or failure to produce any records. The NRDC was left with no choice but to seek relief, which included the right to obtain the records without any fees being charged. Additionally, the NRDC asked the court to declare that the agencies violated the FOIA and missed every statutory deadline. The current state of this lawsuit was in 2017, stating that the complaint was filed but there is no court case or trial recorded or scheduled for dispute.

Chapter 5

Decoding the Climate Legal Landscape: A Cross-Analytical Study

“Given the urgency, not enough time exists to rewrite all of environmental law. And we don’t have to. The problem rarely resides in the individual laws themselves but rather, in the paradigm that frames those laws.” - Gus Speth, An American Environmental lawyer and Advocate

5.1 Difficulty Confronting Greed

Accountability, transparency, and access to information are what make up a functioning democracy. When the government lacks these key factors, it becomes faulty and inadequate. In the four cases above, there are examples of key factors presented through the lens of environmental and government issues.

Beginning with the first case, *CREW vs. CEQ: Citizens for Responsibility and Ethics in Washington (CREW)* showcases failures to disclose records for proposed renewable fuel standards, which is a violation of the FOIA. The second case, *The Protect Democracy Project (Plaintiff) v. U.S. Department of Energy (Defendant)*, introduced us to the importance of the transition team in the change of administration, the significance of the climate committee and its handling of climate documents, the impact of presidential influence on the committee's decisions, and the legal processes involved in requesting and receiving government documents related to climate change. The case discussed highlights the challenges and implications of incorporating climate change science into a political realm and the potential for conflicts between government officials and organizations seeking access to relevant information. It emphasizes the need for transparency, accountability, and a comprehensive understanding of the relationships between government agencies and the current administration.

The third case, Public Employees For Environmental Responsibility (Plaintiff) v. United States Environmental Protection Agency (Defendant), is another representation of failing to disclose crucial documents. The EPA violated FOIA by failing to disclose documents related to the canceled presentations of a climate change conference, and their response to Senator Sheldon Whitehouse's question about the cancellation did not provide a clear answer. The outcome of the lawsuit is uncertain, but PEER is requesting that the EPA be ordered to disclose all wrongfully withheld records and for attorney fees and costs to be awarded to PEER. The potential benefit of this outcome is increased transparency and accountability from the EPA regarding their actions related to environmental issues.

The fourth and final case is the involvement of multiple government agencies, including the U.S. Environmental Protection Agency (EPA), the U.S. Food and Drug Administration (FDA), and the U.S. Department of the Interior (DOI). In this case the NRDC requested documents related to the communication between federal agencies and the Trump administration's transition team. The failure of the defendant agencies to respond to the NRDC's request for documents in a timely manner and their violation of FOIA are issues raised in this case. This case also shows the significance of the transition from one president to another and the policy priorities of the new administration in shaping the actions of federal agencies.

In any legal dispute, there are several key individuals who play pivotal roles in the proceedings. These individuals are often referred to as the 'actors' of the lawsuit and include the plaintiff, defendant, and any attorneys involved in the case. By examining these actors and the groups they belong to, we can gain insights into their agendas and motivations. For example, understanding the government's agenda in a legal case can be critical to predicting the outcome of the dispute. By examining the actions and statements of government officials, we can discern

their priorities and the desired outcome of the case. This knowledge can be especially important in cases involving environmental regulation or public health, where the government's actions can have far-reaching consequences.

Although the public is not directly involved in legal cases, they play a vital role through their representation by plaintiffs and advocacy by non-profit organizations. These organizations are dedicated to protecting the public's interests, making them crucial stakeholders in legal proceedings. Furthermore, the public includes non-governmental scientists who hold significant importance in cases involving complex scientific issues, such as environmental regulation. As legal cases progress, the role of these scientists becomes increasingly apparent as they provide critical expertise and insight into the underlying scientific principles at stake.

Unfortunately, qualified climate scientists are often underrepresented or not represented in legal cases, as shown in this thesis. Without the representations of scientists in climate litigation, cases lack accurate and complete scientific reports. This not only harms the public but also damages the credibility and reputation of the scientists striving to produce reliable research. In sum, the public's indirect involvement in legal cases through plaintiffs, non-profit organizations, and non-governmental scientists underscores the importance of ensuring that their interests are adequately represented and protected.

Non-profit organizations and scientists who represent the public play an indispensable role in climate-related legal disputes, both in and out of the courtroom. They are the direct representatives of the public and actively engage with government agencies, who are often the defendants in such cases. Non-profit organizations act as the public's advocates, bridging the gap between them and government agencies by fighting for the public's interests and litigating on

their behalf. They ensure that the public's voice is heard in climate-related legal disputes, thereby fulfilling their critical role in these proceedings.

In addition, scientists who represent the public in climate cases bring their valuable expertise and scientific evidence to support their clients' claims. They act as expert witnesses, providing testimony and evidence to support the plaintiff's case, which is often central to climate-related legal disputes. Their involvement is crucial as they strive to produce reliable scientific reports, and their underrepresentation or absence can be detrimental to both the public and the scientific community.

In climate-related legal disputes, government agencies serve as the defendants and often have significant resources, including legal expertise, to defend themselves against the public and plaintiff. Despite this, non-profit organizations and scientists representing plaintiffs have succeeded in many cases, demonstrating their crucial role in advocating for the public interest. The challenge lies in the ultimate outcome of these cases and whether they result in tangible benefits for the public and the environment. The success of these cases is not just about winning in court but also about influencing policy change and holding powerful entities accountable for their actions. The true impact of these cases is measured in the long-term effects they have on promoting environmental justice and protecting the planet for future generations.

5.2 Agendas

“If its harmful, the government wouldn’t allow it”

There is much to say about the agendas of government agencies that question their roles. Take, for example, the EPA's failure to address communities' concerns about pollution, hazardous waste, and toxic waste disposal has caused shock and dismay among citizens in Alabama, Missouri, Kentucky, and Colorado, according to Craig Collins in his book *Toxic Loopholes*.⁶⁹ As the agency responsible for protecting citizens, the EPA's condescending, indifferent, or openly antagonistic response to these pleas for help and justice raises questions about its effectiveness.

When the EPA was first established, it played a crucial role in safeguarding the environment and the people living in it. However, as the public voiced their concerns less frequently, the agency began to relax its standards. This has led to doubts about whether the EPA is fulfilling its original purpose. Can we still trust the EPA to prioritize the health and safety of communities, or has it lost sight of its core mission?

Craig Collins stated that the creation of the EPA was not primarily motivated by a concern for the environment, but rather a political strategy to consolidate various environmental regulations under a single agency.⁷⁰ The Nixon administration saw the EPA as a way to demonstrate their commitment to environmental issues and appeal to a wider audience. However, this idealistic vision was soon overshadowed by the influence of powerful oil and gas companies, which exerted a costly hold over the government.

As a result, the legislature was reluctant to impose regulations and reduce pollution and emissions, fearing economic and energy crises that could harm the interests of big oil. This has

⁶⁹ Craig Collins, “Toxic Loopholes: Failures and Future Prospects for Environmental Law”, in *Cambridge University Press*, 2010.

⁷⁰ *Ibid.*

created a regulatory environment where environmental protection takes a backseat to economic concerns. Collins argues that this situation is unsustainable and calls for greater accountability and transparency to ensure that the EPA fulfills its original purpose of safeguarding the environment and public health.

In the early 2000s, the nation marked the 30th anniversary of Earth Day, a momentous occasion to celebrate environmental achievements such as clean air, clean water, and clean soil. However, Stephany Romanow questions whether these successes are worthy of applause, given the persistent failures of government agencies to fully complete their tasks.⁷¹ While agencies like the EPA have made progress toward environmental goals, their actions can often appear politically motivated rather than genuinely committed to protecting the environment.

This raises important questions about how the public perceives the agendas of agencies like the EPA. For example, during the Bush administration, the EPA faced criticism for its perceived failure to regulate polluting industries, despite evidence of the harms they inflicted on communities and the environment. In light of these issues, it is crucial for agencies to prioritize transparency, accountability, and public engagement to ensure that their actions align with their stated goals of environmental protection.

The use of legal frameworks by government agencies to circumvent laws is a complex issue. For example, the EPA has been criticized for failing to address regulation despite having a legal mandate to do so. Kristen E. Boon and Hugh C. Hansen have written extensively on this topic, highlighting several factors that contribute to the agency's struggles.⁷² Boon and Hansen argue that the EPA must balance competing interests, such as economic growth and

⁷¹ Stephany Romanow, "Environmental - Goal or Agenda" in *Hydroprocessing Carbon*, (Editorial, 2001).

⁷² "The EPA's Regulatory Authority and Climate Change: Navigating the Intersection of Administrative Law and Environmental Law" by Kristen E. Boon and Hugh C. Hansen, published in the *Columbia Journal of Environmental Law* in 2011.

environmental protection, as well as navigate complex legal frameworks, such as administrative and environmental law. These challenges can make it difficult for the agency to effectively address regulatory issues, leading to inaction or delayed action. Additionally, they acknowledge that political factors can also influence the agency's decision-making process.⁷³ This can include pressure from industry lobbyists and other external actors who may have conflicting interests. As a result, the EPA may struggle to make decisions that prioritize the environment over other interests.

There are several factors that influence the decisions made by government agencies. Lack of political will, inadequate funding, lack of coordination, limited scope, and political interference is a start. Of these factors, the lack of political will is particularly problematic. Many politicians prioritize short-term goals over long-term ones, which can lead to insufficient action on climate change. This, in turn, exacerbates the other factors and slows progress on environmental issues. It is worth noting that the agendas of government agencies are often influenced by external factors, such as large oil and gas companies with significant leverage over decision-makers. This can lead to politically and socially based priorities that may not align with the best interests of the environment and the public.

5.3 Cross Analysis

By leveraging our understanding of the key concepts covered in the previous chapters, we can extract common themes that will aid in comprehending the intricacies of these cases. It becomes evident that all cases share a commonality, namely, a violation of the Freedom of Information Act (FOIA). While the nature of the information requested by the

⁷³Kristen E. Boon and Hugh C. Hansen, "The EPA's Regulatory Authority and Climate Change: Navigating the Intersection of Administrative Law and Environmental Law", in the *Columbia Journal of Environmental Law*, 2011.

plaintiffs differs in each case, every defendant has one thing in common, that is, withholding information.

In the first case, the plaintiffs requested records related to the proposed renewable fuel standard, whereas in the third case, the focus was on the failure of the Environmental Protection Agency (EPA) to disclose information related to the cancellation of a climate change presentation. Although the specifics of these cases differ, they can be cross-analyzed because they both illustrate an agenda by the defendants. Despite repeated requests for crucial climate-related documents, the defendants continued to ignore these requests, revealing their different priorities from those of the plaintiffs. Such actions pose significant challenges to implementing regulations and litigating cases related to environmental issues.

One of the most notable aspects of these cases, including the two previously mentioned, is that government agencies consistently violate the FOIA without any significant consequences. As government entities, they are held to a higher standard, and such actions are unacceptable. For instance, the EPA, whose primary responsibility is to serve the public, should not be allowed to withhold information. Additionally, it is crucial to question why the CEQ is using legal loopholes to evade accountability. Such inquiries are crucial in cross-analyzing these cases since they all reveal a failure to serve the public. When government agencies fail to do their job, non-profit organizations such as CREW cannot advocate, litigate, and fight for the public.

An area that warrants further attention is the scientific aspect of these cases. Unfortunately, it seems that the science involved is often overlooked, despite being essential to shaping our decision-making process. The climate committees mentioned in these cases raise concerns about the quality of both the scientists involved and the science itself. This issue is not limited to a single case, making it even more worrying. The committees often lack qualified

scientists and are run by highly politicized individuals who may have intentions that do not align with truly helping environmental issues. Furthermore, it is concerning that these individuals may have been hired to support specific decisions rather than provide unbiased scientific evidence.

It is worth noting that in all of these cases, the defendants seem to be evasive in their responses. Rather than addressing the issues at hand, they often resort to justifying their actions or using language that avoids the crux of the matter. This kind of behavior is concerning as it reveals a desire to conceal information and be perceived as blameless. What's more, it allows them to exploit loopholes and evade responsibility. Unfortunately, this behavior often goes unchecked by the courts, further reinforcing the need for greater transparency and accountability in government agencies.

Upon closer examination of these cases, it becomes evident that government agencies have a tendency to withhold information from the public and keep it to themselves. This trend is not new, as previous incidents reveal how the government has attempted to manipulate climate documents and media to downplay the severity of climate change. Such efforts were aimed at reducing public concern and discouraging them from taking action. In the process, the government was able to prioritize maintaining good relationships with oil and gas companies while neglecting environmental issues.

Government agencies have a tendency to act according to their own interests. This was particularly evident in four instances when they sought deadline extensions, but were denied due to previous extensions. Despite being denied extensions, the agencies still chose to flout the law and acted as they saw fit. Consequently, they refused to provide the requested documents without facing any consequences. While it may seem clear-cut, the outcomes of these cases are often far from satisfactory. For example, in the first case, the plaintiff requested relief and remediation, but

it is unclear whether these actions address the root of the problem. Sure, suing and receiving compensation for the defendant's unlawful actions may provide some form of justice, but does this really help the environment in the long-term? Is there any tangible change that will be made to prevent such issues from happening again? The discussion at hand is concerning, as it reveals a troubling pattern. The narratives under analysis share striking similarities such as lack of transparency, climate science, and following legal requests of the plaintiff and court, telling almost identical stories each time. If we consider the odds and evaluate the outcomes, it is evident that the process of litigation is fraught with flaws that are concerning and disheartening. The point of this is to uncover and articulate the neglect of responsibility by the government.

Many of the laws and regulations we rely on today were established more than 40 years ago, and in retrospect, they may no longer be as effective as we need them to be. As I highlighted in the opening chapter, while we have laws in place, they often fall short when it comes to providing concrete protection of the environment. Outdated and missing regulations may be a contributing factor to the numerous flaws we see in litigation and environmental law as a whole. The Freedom of Information Act (FOIA) has not been updated since 1996, meaning it has remained unchanged for over 27 years.⁷⁴ Unfortunately, this is not an isolated issue, as many laws, including those not related to environmental concerns, have been left untouched for extended periods. From this analysis, we can conclude two key points: first, outdated laws cannot always be repurposed for modern challenges, and second, governments often struggle to enforce even the regulations they do have in place.

So what's the next step? It is time to consider whether the environment should have legal rights. While it may not be a person, it is a living organism that relies on our care and protection

⁷⁴ U.S. Department of Justice, Office of Information Policy, "FOIA Legislative Materials," accessed March 21, 2023,

for its survival. Just as we need the Earth to sustain us, we must also take care to tread lightly on its delicate balance. As I, alongside many scholars and environmentalists, argue, it is time for environmental protection to become a constitutional right. With this recognition, we could establish more effective laws and regulations, hold industries accountable, and take stronger action to protect natural resources and limit harmful emissions. By ensuring that the environment is protected under our constitution, we would be obliged to consider its needs when making decisions about the future.

Constitutional protection for the environment would provide legal recognition of the inherent value of the natural world and our collective responsibility to protect it. Such protection would establish a legal framework that would make it more difficult for governments or corporations to make decisions that are harmful to the environment, as they would be held accountable to the highest legal authority in the country. It would also require government agencies to take a more holistic approach to decision-making that considers the environment alongside economic considerations. Additionally, constitutional protection for the environment could help shift societal attitudes and values towards greater environmental stewardship, promoting public engagement in environmental issues and a broader recognition of the importance of sustainability and conservation. While implementing constitutional protection for the environment would require significant political effort, it is an idea worth considering, given the urgency of the climate crisis and the importance of preserving our planet for future generations.

Conclusion

Our world faces an existential crisis: the threat of environmental collapse. Yet, despite the urgent need for action, environmental protection is often difficult to litigate. How have industries managed to take over and find loopholes in our governmental processes? These questions were the focus of my senior thesis, which drew on a range of approaches, including scientific research, communication between governmental and non-governmental entities, lawsuits, and historical evidence. My meticulous research uncovered a disturbing truth: our government's failure to act on climate change and environmental protection is not a result of incompetence or lack of knowledge but rather the result of powerful interests at play.

Despite the evidence staring us in the face, the government continues to overlook these issues, putting our planet's future in grave danger. The most unsettling aspect of my findings is the realization that the fate of our world hangs in the balance. Yet, powerful forces prioritize their interests over the greater good. We are at a critical moment in history, and we must take action to protect our environment before it is too late. My thesis provides valuable insights into the challenges we face and the urgent need for change.

It is easy to wonder why environmental protection matters, but the truth is that the stakes could not be higher. Imagine if we had taken action to resolve these issues forty years ago. We would not be in the midst of a climate crisis, with large corporations responsible for emitting massive amounts of carbon dioxide into the atmosphere. Perhaps we would not struggle to keep global temperatures from rising more than 1.5 degrees Celsius. Maybe the ice caps would not melt, or the United States would have cleaner air and water. Perhaps we would not be witnessing so many catastrophic environmental disasters or seeing countless species go extinct each year.

Environmental protection matters because these issues matter. We must take care of the earth and each other because, ultimately, these are the things that truly matter. No amount of money or power can bring back the beauty of a lost ecosystem, and when the world is burning, there is nothing left to hold on to. We owe it to the kids playing on the streets and future generations to ensure they can live in a healthy and safe world. We have a responsibility to take care of our planet and to take care of each other.

Although my research has limitations, the resources at my disposal have helped me uncover a wealth of compelling and convincing information. It is clear that our current environmental protection methods are not concrete, and we have a long way to go if we want to safeguard our planet for future generations. Of course, as an environmental major, my research may be biased. However, my passion for this issue has driven me to present the most honest and accurate information possible. I want nothing more than to create positive change and inspire others to join me in the fight for a better world. Unfortunately, those in power often use their voices to their advantage, creating an imbalance in our political system that has a negative impact on a wide range of areas, including environmental issues. It is time for us to take action and demand that our elected officials prioritize the protection of our planet and our society.

As we contemplate the path forward, the insights of David R. Boyd, as outlined in his article, are particularly instructive. Boyd rightly asserts that environmental protection is an urgent issue and a fundamental human right that deserves to be enshrined in the Constitution. We must therefore make it a policy priority to ensure that lawmakers prioritize environmental protection in their decision-making processes. In conclusion, recognizing and protecting the environment under the Constitution would provide legal recognition of its inherent value and our collective responsibility to protect it. Such protection would establish a legal framework that

would make it more difficult for decisions harmful to the environment, require government agencies to consider the environment alongside economic considerations, and promote public engagement in environmental issues.

To this end, we need to adopt stricter climate committee rules and ensure that government agencies only hire qualified climate scientists to produce accurate and reliable data. We cannot allow ourselves to be intimidated by the big oil and gas companies, and we must demand that the government increase its environmental investments while decreasing those in other areas, such as defense. We must resist the passage of harmful policies such as the Willow project in Alaska and work towards a future where protecting our planet and its inhabitants is of the utmost importance. As the famous climatologist, Friederike Otto said in one of her climate speeches, “We are not doomed — we have all the agencies to address climate change.”⁷⁵

⁷⁵ Sarah Kaplan, “World is on brink of catastrophic warming, U.N. climate change report says”, in *Washington Post*, 2023.

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