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**California Climate Change Lawsuits:
Can the Courts Help with Sea-Level Rise, and Who Knew What When?**

Robin Kundis Craig*

Between 1900 and 2005, sea level along the extensive California coast rose seven inches (17.8 centimeters), and sea level rise there is still accelerating.¹ Indeed, as the U.S. Global Change Research Program reported in 2014, the California coast faces a multitude of economic and ecological challenges as a result of climate change:

- Coastal storm surges are expected to be higher due to increases in sea level alone, and more intense persistent storm tracks (atmospheric river systems) will increase coastal flooding risks from inland runoff.
- Expensive coastal development, critical infrastructure, and valuable coastal wetlands are at growing risk from coastal erosion, temporary flooding, and permanent inundation.
- The San Francisco Bay and San Joaquin/Sacramento River Delta are particularly vulnerable to sea level rise and changes in salinity, temperature, and runoff; endangering one of the ecological “jewels” of the West Coast, as well as growing development, and crucial water infrastructure.²

Small wonder, then, that the State of California and several California communities—especially those in the San Francisco Bay area—have brought a series of lawsuits against some of the biggest sources of greenhouse gas (GHG) emissions, seeking both to slow the pace of climate change and to secure financial judgments that compensate for ongoing damages and help to finance adaptation measures. Revelations in 2015 that ExxonMobil had long ago recognized the danger that its fossil fuels posed a danger to the world has undergirded both the moral outrage and legal proof that are helping to drive these lawsuits,³ which mainly target oil and gas companies.

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¹ U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: HIGHLIGHTS 92 (2014).

² *Id.*

³ David Hasemyer, “Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today,” *Inside Climate News*, <https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general> (July 30, 2018).

To date, eight cities and counties in California have brought sea level rise-related climate change lawsuits. Perhaps unsurprisingly, these cases have generated some both expected and unusual procedural moves. In addition, an interesting public relations battle is brewing over relative climate change moral culpability, very much raising issues of who knew what when and whether the defendant oil, gas, and coastal companies are significantly more at fault than the plaintiff cities for failure to act in response to known climate change risks.

On July 17, 2017, San Mateo County and Marin County, both in the San Francisco area, and the City of Imperial Beach, south of San Diego, filed three separate lawsuits (since consolidated) in California Superior Court (the state trial courts in California) against ExxonMobil, Shell, and 35 other companies that produce oil, gas, and coal—companies that the lawsuits allege were collectively responsible for 20% of GHG emissions between 1965 and 2015.⁴ The plaintiff municipalities claim that these companies knew about the dangers of their products for five decades and failed to warn the public, making them liable under public nuisance, negligence, design defect, and failure to warn causes of action.⁵ The defendants removed⁶ these three cases to the U.S. District Court for the Northern District of California (federal court), but the plaintiffs asked the federal court to remand to state court. On March 16, 2018, U.S. District Judge Vince Chhabria granted the plaintiffs' motion.⁷ He emphasized that federal common law does not govern the claims⁸ and that federal statutes probably do not preempt the state tort claims involved.⁹ Thus, even though “these state law claims raise national and perhaps global questions,” the defendants had no basis for being in federal court.¹⁰ On May 22, 2018, the U.S. Court of Appeals for the Ninth Circuit denied the defendants' request for an interlocutory appeal challenging the remand decision,¹¹ and the case is now proceeding as a state court case based on California tort law.

⁴ Georgina Gustin, “Coastal Communities Sue 37 Oil, Gas and Coal Companies Over Climate Change,” *Inside Climate News*, <https://insideclimatenews.org/news/04042018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general> (July 18, 2017).

⁵ *Id.*

⁶ Federal law allows defendants sued in state court to transfer—“remove”—the case to federal court if the case could have been filed in federal court originally. 28 U.S.C. § 1441(a) (2012).

⁷ *County of San Mateo v. Chevron*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018). NOTE: The ruling consolidates all three cases.

⁸ *Id.* (relying on *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857–58 (9th Cir. 2012)).

⁹ *Id.* at 937-38.

¹⁰ *Id.* at 939.

¹¹ *County of San Mateo v. Chevron Corp.*, D.C. Nos. 3:17-cv-04929-VC, 3:17-cv-04934-VC, & 3:17-cv-04935-VC, *Order* 1 (9th Cir. May 22, 2018), *available at* http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180522_docket-18-80049_order.pdf.

San Francisco and Oakland have had a completely different legal experience. These cities filed their own lawsuits in California Superior Court on September 19, 2017, against five oil and gas companies (ExxonMobil, BP, Royal Dutch Shell, ConocoPhillips, and Chevron), arguing that the companies' actions constitute nuisance and hence that they should "pay what could become billions of dollars into a fund for the coastal infrastructure necessary to protect property and neighborhoods against sea level rise in the sister cities, which face each other across San Francisco Bay."¹² The defendants again removed these cases to federal court, but this time U.S. District Judge Alsup let the cases—consolidated as *California v. BP*—remain, largely on the grounds that the claims *had* to be federal common law, not state tort law, claims.¹³ Judge Alsup then immediately had the parties give him a tutorial on climate change.¹⁴ On June 25, 2018, he granted the defendants' motion to dismiss the case.¹⁵ According to this decision, "The scope of plaintiffs' theory is breathtaking. It would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming. While these actions are brought against the first, second, fourth, sixth and ninth largest producers of fossil fuels, anyone who supplied fossil fuels with knowledge of the problem would be liable."¹⁶ Relying on *The Restatement of Torts*, the judge strongly suggested that the defendants had not acted unreasonably, as is required for a successful nuisance claim:

With respect to balancing the social utility against the gravity of the anticipated harm, it is true that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming. But against that negative, we must weigh this positive: our industrial revolution and the development of our modern world has

¹² Staff, "San Francisco, Oakland Sue Oil Giants Over Climate Change," *Inside Climate News*, <https://insideclimatenews.org/news/20092017/san-francisco-oakland-sue-oil-giants-over-climate-change> (Sept. 20, 2017). Oakland's complaint is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170919_docket-RG17875889_complaint.pdf; San Francisco's complaint is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170919_docket-CGC-17-561370_complaint.pdf

¹³ *California v. BP* P.L.C., No. C 17-06011 WHA & No. C 17-06012 WHA, *Order Denying Motions to Remand* 3-7 (N.D. Cal. Feb. 27, 2018), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180227_docket-317-cv-06011_order-1.pdf.

¹⁴ John H. Cushman Jr., "8 Answers to the Judge's Climate Change Questions in Cities vs. Fossil Fuels Case," <https://insideclimatenews.org/news/20032018/judge-questions-climate-change-answers-fossil-fuels-lawsuit-california-cities-sea-level-rise-global-warming> (March 20, 2018).

¹⁵ *Oakland & California v. BP* P.L.C., No. C 17-06011 WHA & No. C 17-06012 WHA, *Order Granting Motion to Dismiss Amended Complaints* (N.D. Cal. June 25, 2018), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180625_docket-317-cv-06011_order-2.pdf.

¹⁶ *Id.* at 6.

literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted. Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded? Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable?¹⁷

Nevertheless, the judge declined to decide the nuisance issue, dismissing instead on grounds of claim displacement and separation of powers concerns with respect to foreign policy.¹⁸

On December 20, 2017, the City of Santa Cruz and Santa Cruz County filed their lawsuits in California Superior Court against 29 fossil fuel companies, alleging public nuisance, private nuisance, strict liability for failure to warn, strict liability for design defect, negligence, and trespass.¹⁹ The City of Richmond, located just north of Berkeley, followed with an almost identical lawsuit on January 20, 2018,²⁰ and the lawsuits have been consolidated. The defendants again removed to the federal district court, where the plaintiffs have moved to remand to state court. Judge Chhabria is again deciding the motion but has yet to rule.

So, at the moment, judges in California disagree over whether these lawsuits are based on state tort law or federal common law, whether the lawsuits should be in state or federal court, and whether the lawsuits can proceed. However, the breadth of legal controversy does not end there. In a collateral move in support of the defendants in all eight cases, in April 2018 the Competitive Enterprise Institute (CEI) and National Association of Manufacturers (NAM) asked the federal Securities and Exchange Commission (SEC) to investigate the plaintiff municipalities for violations of federal securities laws.²¹ In February 2010, the SEC issued a formal interpretation of its regulations, essentially concluding that entities subject to the federal securities laws have a duty to report on how climate change affects them, especially in terms of their financial well-being.²² The CEI and NAM suggested that the municipalities may be engaged in securities fraud,

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 8-15.

¹⁹ The City of Santa Cruz's complaint is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171220_docket-17CV03243-_complaint.pdf. The County of Santa Cruz's complaint is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171220_docket-17CV03243-_complaint.pdf.

²⁰ The City of Richmond's complaint is available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180122_docket-C18-00055_complaint.pdf.

²¹ David Hasemyer, "In Cities vs. Fossil Fuels, Exxon's Allies Want the Accusers Investigated," <https://insideclimatenews.org/news/30042018/exxon-california-cities-climate-lawsuit-bond-fraud-allegations-sec-investigation-competitive-enterprise-institute> (April 30, 2018).

²² Securities & Exchange Comm'n, *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (Feb. 8, 2010).

alleging that “in selling municipal bonds, the local governments may have withheld critical information from buyers about their vulnerability to sea level rise.”²³ Five of the plaintiffs are actively opposing these claims.²⁴

Stay tuned.

²³ David Hasemyer, “In Cities vs. Fossil Fuels, Exxon’s Allies Want the Accusers Investigated,” <https://insideclimatenews.org/news/30042018/exxon-california-cities-climate-lawsuit-bond-fraud-allegations-sec-investigation-competitive-enterprise-institute> (April 30, 2018).

²⁴ *Id.*