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Environmental Litigation — Trends and Coming Threats: The West Coast

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Topics

- Municipalities' Climate Change Lawsuits
- Climate Change Citizen Suits
- PCB Lawsuits
- Questions

Municipalities' Climate Change Lawsuits

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Climate Change Lawsuits

- Overview
- San Francisco and Oakland lawsuits
- Marin, San Mateo, and Imperial Beach lawsuits
- Colorado Lawsuit

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Climate Change Lawsuits: Overview

- Lawsuits by municipalities against oil and gas companies
 - Seven California cities and three counties have sued oil and gas companies
- Premise
 - Public Nuisance claim: An unreasonable interference with a right common to the general public
 - Companies have produced fossil fuels for decades knowing about climate risk created by fossil fuels and have attempted to undermine climate science and deceive consumers about the dangers
 - Causing “global-warming induced sea level rise”
 - Plaintiffs want defendant oil companies to pay cost of constructing seawalls and rebuilding submerged roads and infrastructure

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Climate Change Lawsuits: San Francisco and Oakland Lawsuits

- Background
 - Filed parallel lawsuits on Sept. 19, 2017
 - *San Francisco v. BP P.L.C. et al.*, CGC-17-561370 (Cal. Super. Ct.)
 - *Oakland v. BP P.L.C. et al.*, RG17875889 (Cal. Super. Ct.)
 - State court
 - Cases filed in California Superior Court
 - Seeking damages from five fossil fuel companies over sea level rise caused by fossil fuels produced by defendants

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Climate Change Lawsuits: San Francisco and Oakland Lawsuits

- Allegations
 - Fossil fuels are primary cause of global warming
 - Defendants produced and continue to produce massive quantities of fossil fuels
 - Defendants had full knowledge that fossil fuels cause global warming
 - Defendants promoted fossil fuels despite knowledge
 - Cities will incur climate change injuries through expenditures to abate global warming nuisance (i.e., sea level rise)

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Climate Change Lawsuits: San Francisco and Oakland Lawsuits

- Cause of Action: Public Nuisance on behalf of the people
 - Defendants (ExxonMobil, BP, Chevron, ConocoPhillips, and Royal Dutch Shell) created the public nuisance of climate change impacts—primarily sea level rise—by producing fossil fuels that are the principal cause of global warming
- Relief Requested
 - Abatement fund
 - Seeking order to compel defendants to pay for the coastal infrastructure necessary to protect against sea level rise caused by global warming

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Climate Change Lawsuits: San Francisco and Oakland Lawsuits

- Recent Developments
 - Removal
 - Both cases removed to federal court by defendants
 - Judge Alsup denied cities' motions to remand
 - Cities argued that public nuisance under state law
 - Judge held the cities' nuisance claims are "necessarily governed by federal common law" because they "address the national and international geophysical phenomenon of global warming"
 - Climate science tutorial
 - Judge Alsup ordered a climate science tutorial on the following:
 - (1) history of the scientific study of climate change
 - (2) best science now available on global warming

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Climate Change Lawsuits: San Francisco and Oakland Lawsuits

- Recent Developments
 - Amicus Brief
 - U.S. DOJ invited to file amicus brief on question of "whether (and the extent to which) federal common law should afford relief of the type requested by the complaints."
 - DOJ's amicus brief says that the cities' claims should not be governed by federal common law.
 - (1) Claims are precluded by the Clean Air Act
 - (2) Congress and the executive branch have authority over foreign relations, including the authority to negotiate international climate change deals, and federal laws allow fossil fuel production on public lands
 - Motions to Dismiss
 - All defendants filed motions to dismiss for lack of jurisdiction on April 19, 2018; replies filed on May 10, 2018

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Climate Change Lawsuits: Marin, San Mateo, and Imperial Beach

- Overview
 - Counties of Marin and San Mateo and city of Imperial Beach filed separate lawsuits in state court, all with Sher Edling LLP as outside counsel
 - Claims premised on sea level rise and include public nuisance, trespass, and negligent failure to warn
- Remand and interlocutory appeal
 - Cases removed to federal court by defendants
 - Disagreeing with Judge Alsup's decision in the San Francisco and Oakland lawsuits, Judge Chhabria remanded the cases to state court
 - Judge Chhabria agreed to stay his remand order while jurisdiction question is appealed to the Ninth Circuit

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Climate Change Lawsuits: Colorado Lawsuit

- Overview
 - Colorado communities of Boulder County, San Miguel County, and the City of Boulder filed a lawsuit against Suncor and ExxonMobil on April 17, 2018 in state court
 - First climate change lawsuit brought in the interior
- Claims
 - Public and private nuisance, trespass, unjust enrichment, violation of Colorado consumer protection law
 - Seeking past and future damages and costs to mitigate climate impacts
- Injury
 - Drought, increased wildfires, heat waves, floods

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Climate Change Citizen Suits

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Climate Change Citizen Suits

- Overview
- Recent Activity

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Climate Change Citizen Suits: Overview

- Citizen suits
 - Major environmental statutes provide a cause of action for individuals and groups to act as private attorneys general by suing for alleged environmental violations
- Waves of climate change citizen suits across the country in response to Trump Administration
 - EPA's funding slashed
 - Enforcement not prioritized
 - Sue and settle ended
 - Sharp increase in donations to environmental non-profit groups

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Climate Change Citizen Suits: Recent Activity

- *Juliana v. United States*, 6:15-cv-01517-TC (D. Or.)
 - 21 youths filed lawsuit seeking declaratory and injunctive relief claiming that government violated their constitutional rights to life and liberty by failing to take action against global warming and that the government has violated the public trust doctrine
 - Trial date set for February 2018
- 9th Circuit rejected writ of mandamus
 - Defendants petitioned for writ of mandamus to reverse District Court's decision not to dismiss the case
 - Defendants argued that the Ninth Circuit should direct the District Court to dismiss the case because it lacked merit
 - The Ninth Circuit held that plaintiffs' theories are unprecedented and thus "the absence of controlling precedent in this case weighs strongly against a finding of clear error."

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PCB Lawsuits

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PCB Lawsuits

- Overview
- Recent Developments

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PCB Lawsuits:

Overview

- Lawsuits against Monsanto Co. over PCB contamination
 - Cities: Oregon: Portland, Port of Portland*; California: Oakland, Berkeley, San Jose, Long Beach, San Diego; Washington: Spokane, Seattle
 - States: Washington, Oregon, Ohio
- Premise
 - Monsanto (exclusively) produced and sold PCBs knowing that PCBs were toxic and that discharge of PCBs was “inevitable”
 - Public nuisance theory: An unreasonable interference with a right common to the general public
 - Public right = use and enjoyment of waterways
 - Special injury = municipalities operate stormwater and water conveyance systems that PCBs enter through runoff and that is discharged into, and thereby contaminates, waterways

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PCB Lawsuits:

Recent Developments

- Stays until cities exhaust administrative remedies
 - Northern District of California cases (Berkeley, Oakland, San Jose): stayed
 - Central District of California case (Long Beach): motion to stay pending before the court
 - Southern District of California (San Diego): declined to stay
- Motions to dismiss on statute of limitations
 - Cities were aware or should have been aware of PCB contamination decades ago
 - No dismissals on this basis
- Jurisdiction
 - Washington case: federal district court remanded to state court; Monsanto petitioned 9th Circuit to reverse and return to district court

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Questions?

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