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Outlook for Environmental Litigation: Kids, Climate, and Infrastructure

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Agenda

- Quick update: Clean Power Plan
- Overview: scope of climate litigation
- Case example: *Juliana v. United States*
- Coda: a word on infrastructure

Clean Power Plan: quick update



Clean Power Plan: Timeline

- Aug. 2015: Final rule
 - National standards limiting carbon emissions from existing coal and natural gas-fired power plants under Clean Air Act § 111(d)
- Feb. 2016: U.S. Supreme Court issues stay pending legal challenges brought by industry groups and >25 states
- Sept. 2016: DC Circuit hears argument, sitting *en banc*
- Apr. 2017: EPA initiates review
- Apr. 28: Court grants 60-day stay; asks whether to remand
- May 15: Supplemental briefs filed
- July 20: EPA submits proposal to OMB
- Aug. 8: Court grants EPA 60 more days (2 judges drop hint)
- Sept. 7: EPA informs Court proposed rule due Fall 2017

CPP: Questions and Implications

- “Repeal” or “Repeal and Replace”?
- Several different directions
- Endangerment Finding
- Standard of review for changes in agency position
- *Chevron* deference
- Supreme Court stay
- Practical effect of withdrawing CPP -- unclear

Overview: Scope of Climate Litigation

Universe of Climate Litigation is Expanding

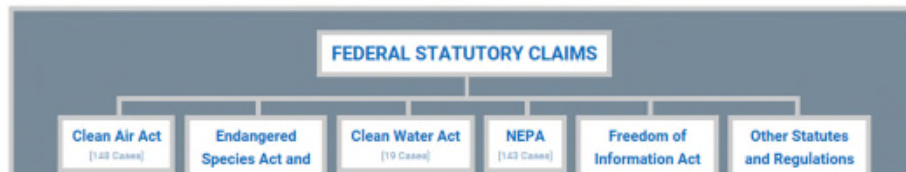
U.S. Climate Change Litigation

A collaboration of:

 COLUMBIA LAW SCHOOL
Sabin Center for Climate Change Law

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Cases in the U.S. database are organized by type of claim and may be [filtered](#) by the principal laws they address, their filing years, and their jurisdictions. The database is also [searchable](#) by keyword. In many cases, the database includes links to decisions, complaints, motions, and other administrative and litigation documents. To browse by claim type, click on categories below. To filter cases or search by keyword, [click here](#).



<http://climatecasechart.com/us-climate-change-litigation/>

Litigation tracking

- APKS/Sabin Center have collected more than 750 U.S. cases
- Sabin Center's international climate litigation database includes more than 250 cases
- Databases are updated monthly
- Subscribe to receive monthly updates at <http://climatecasechart.com/contact>

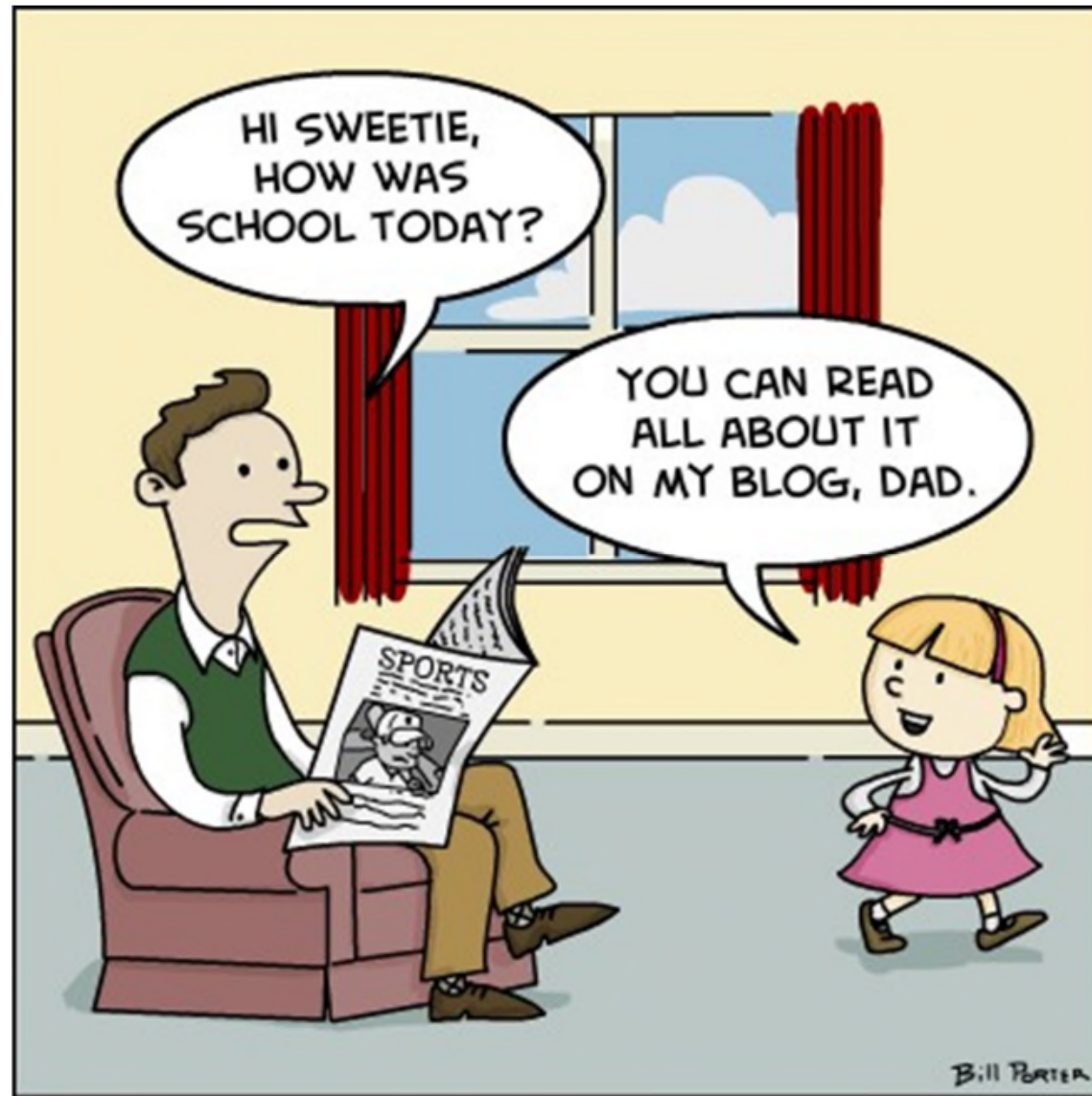
Types of Climate Cases

- **Federal and state statutory cases**
 - Challenges to regulations
 - Challenges to agency actions under NEPA or state equivalents
 - Lawsuits seeking to compel regulatory action
 - Enforcement actions (only a few of these, at this point)
- **Common law cases**
 - First generation: *American Electric Power Co. v. Connecticut*, *Comer v. Murphy Oil*, *Native Village of Kivalina v. ExxonMobil*
 - New generation: San Mateo & Marin Counties and Imperial Beach v. fossil fuel companies (filed in July 2017); San Francisco & Oakland cases (filed in Sept. 2017)
- **Adaptation lawsuits**
 - Challenges to adaptation measures
 - Actions seeking adaptation measures
 - Actions seeking money damages for losses
 - Insurance cases
- **Constitutional claims**
 - Preemption and dormant Commerce Clause cases (challenges to state programs)
 - Due process and public trust doctrine (*Juliana*)

For more information: <http://climatecasechart.com/us-climate-change-litigation>

Case Example:
Juliana v. United States

Kids Know Best



Generation Gap Comic, by **Bill Porter**

Juliana v. United States: Venue & Parties

- U.S. District Court for District of Oregon (No. 6:15-cv-01517)
- Plaintiffs
 - 21 individuals, 19 or younger
 - Earth Guardian, “a tribe of young activists, artists and musicians from across the globe”
 - “Future Generations,” by and through their guardian, climate scientist James Hansen
- Defendants
 - The U.S., “the sovereign trustee of national natural resources, including air, water, sea, shores of the sea, and wildlife”
 - The President; CEQ, OSTP, and OMB; other federal agencies



By Lorie Shain from Washington, United States (Kids Want Climate Justice) (CC BY-SA 2.0) via Wikimedia Commons

Juliana v. United States: Kids vs. the Federal Government

Plaintiffs claim federal government knowingly allowed, facilitated, and failed to prevent build-up of greenhouse gases in atmosphere

increase in the atmospheric concentration of CO₂. Through its policies and practices, the Federal Government bears a higher degree of responsibility than any other individual, entity, or country for exposing Plaintiffs to the present dangerous atmospheric CO₂ concentration. In fact, the United States is responsible for more than a quarter of global historic cumulative CO₂ emissions.

Plaintiffs claim fundamental rights to a stable climate system

279. Our nation's climate system, including the atmosphere and oceans, is critical to Plaintiffs' rights to life, liberty, and property. Our nation's climate system has been, and continues to be, harmed by Defendants. Defendants harmed our nation's climate system with full appreciation of the results of their acts. Plaintiffs' substantive Fifth Amendment rights have been

Juliana v. United States: Claims

- Claims
 - Due Process
 - Public Trust Doctrine
- Relief sought includes:
 - Setting aside authorization of LNG exports from planned Oregon terminal as unconstitutional
 - Preparation of a “consumption-based inventory of U.S. CO₂ emissions”
 - Preparation and implementation of an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂ to stabilize the climate system

Juliana v. United States: Timeline

- Starting in 2011: Our Children's Trust pursues cases against state and federal gov'ts to compel action to reduce GHG emissions
- June 2014: D.C. Cir. rejects public trust claim against federal gov't
- Aug. 2015: *Juliana* complaint filed
- Nov. 2015: Obama administration moves to dismiss
- Jan. 2016: Trade groups intervene as defendants
- Apr. 2016: Magistrate recommends against dismissal
- Nov. 2016: District court denies motions to dismiss
- Jan. 2017: Obama administration files answer
- June 8, 2017: District court rejects interlocutory appeal
- June 9, 2017: Trump administration seeks writ of mandamus
- June 28, 2017: Trade groups withdraw
- July 2017: 9th Cir. issues temporary stay
- Sept. 2017: Briefing on mandamus completed

Juliana v. United States: Motion to Dismiss Denied

- Claims do not raise nonjusticiable political questions
- Plaintiffs have standing
- Plaintiffs state a “danger-creation” due process claim
 - Plaintiffs assert a fundamental right “to a climate system capable of sustaining human life”
- Plaintiffs state a public trust claim
 - Not necessary to determine if atmosphere is a public trust asset due to plaintiff’s allegations related to the territorial sea
 - Rejects arguments that public trust doctrine does not apply to U.S. gov’t and is displaced by federal environmental statutes
 - Cause of action for enforcing public trust obligations is available under Fifth Amendment

Will Ninth Circuit Step In?

- District court proceedings stayed as 9th Cir. considers petition for writ of mandamus
- Federal government arguments include:
 - Standing
 - Failure to state a claim
 - Separation of powers
 - “Onerous and disruptive discovery”
- Plaintiffs’ responses include:
 - Discovery does not warrant extraordinary remedy of mandamus
 - No clear error
 - Delay causes irreparable harms

Juliana v. United States: Implications

- Potential for extensive discovery
 - Depositions of federal officials and extensive document requests: impinging on executive privilege?
 - Expert reports and testimony on climate change: courts ruling on the science of climate change?
- Shift of power to the judicial branch
 - Environmental constitutional rights
 - Applicability of public trust doctrine to federal agencies
 - Judicial oversight of remedies
- Takeaways for electric power industry

Clean Power Plan Sidenote

Juliana plaintiffs' view of the Clean Power Plan:

126. EPA abrogated its duty to implement its 1990 Plan, entitled “Policy Options for Stabilizing Global Climate,” to reduce CO₂ emissions (a pollutant under its jurisdiction) in line with the best available science, and continues to allow CO₂ emissions in excess of what is necessary for climate stability.

127. That failure is not allayed by EPA’s August 3, 2015 final “Clean Power Plan” because CO₂ emissions reductions projected under the “Clean Power Plan” do not even approach the rate required to preserve a habitable climate system. First, the “Clean Power Plan” affects

Coda:

Infrastructure and Climate Litigation

Recent Climate Litigation Developments

Climate change and NEPA

- Sept. 2017: 10th Cir. said BLM arbitrarily and capriciously concluded that issuing **coal leases** would not result in higher CO2 emissions (*WildEarth Guardians v. BLM*, No. 15-8109)
- Aug. 2017: D.C. Cir. said FERC must consider **natural gas pipelines'** downstream GHG emissions (*Sierra Club v. FERC*, No. 16-1329)
- Aug. 2017: Montana federal court said downstream GHG emissions associated with **coal mine expansion** must be considered (*Mont. Env'tl. Info. Ctr. v. OSM*, No. 9:15-cv-00106)
- Aug. 2017: D.C. Circuit said FERC adequately considered GHG emissions resulting from **LNG exports** (*Sierra Club v. DOE*, No. 15-1489)



"Surface coal mine detail, Gillette, Wyoming" by Greg Goebel is licensed under [CC BY-SA 2.0](#) via Wikimedia Commons



"Shale gas pipes, Pennsylvania USA" by Max Phillips (Jeremy Buckingham MLC) is licensed under [CC BY 2.0](#)

Recent Climate Litigation Developments



["Providence Harbor"](#) by Marc N. Belanger, via Wikimedia Commons

Adaptation

- Aug. 2017: citizen suit filed alleging Shell violated Clean Water Act by failing to prepare Providence **fuel terminal** for climate change (*Conservation Law Found. v. Shell Oil Products US*, No. 1:17-cv-00396)
- Sept. 2017: in similar suit concerning **fuel terminal** in Everett, Mass., a federal court said no standing for alleged injuries due to sea level rise or increase in severity/frequency of storms in “far future,” but upheld standing for risks in “near future” due to severe weather events (*Conservation Law Found. v. ExxonMobil Corp.*, No. 16-11950)

For More Information...



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9 Things to Know About Trump's Paris Agreement Decision
<https://www.apks.com/en/perspectives/publications/2017/06/9-things-to-know-about-trumps-paris-agreement>

Trump's Environmental Agenda: The 1st 100 Days
<https://www.apks.com/en/perspectives/publications/2017/04/trumps-environmental-agenda-the-1st-100-days>

President Trump Takes His Turn at Expediting Environmental Reviews and Permitting of Infrastructure Projects
<https://www.apks.com/en/perspectives/publications/2017/08/president-trump-takes-his-turn-at-expediting>