Charting the Future of Regulatory Takings, and Municipal Liability in a Changing Climate and a Shifting Legal Landscape

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With the advent of climate change, local government entities and corporations are being forced to deal with changes in weather events. These changes require clients to navigate new regulatory risks as well as innovative litigation theories designed to pass along the costs of these events to allegedly "responsible parties." As a result, attorneys representing both public and private entities must understand the risks and the evolution of legal tactics being used.

This presentation is not intended to delve into the human-made climate change debate. The actual impact of human activity on climate change is the focus of reasoned debate (*see generally*, Steven Koonin, Unsettled? Updated and Expanded Edition (2024)) and beyond the scope of this presentation. Here we are focused on the state of regulations and litigation that stems from that debate.

In analyzing climate change and its effect on the law, it is critical to note that "climate change" is not necessarily "weather change." As explained by Steven Koonin, "[c]limate is what you expect, weather is what you get." *Id.* at 28. In analyzing legal causation, the focus is on whether a party's action or inaction resulted in the flood or the fire or the storm. Unfortunately, parsing through the scientific papers and studies, causation evidence is less conclusive than what is discussed in the popular media.

When breaking down how the legal system in the United States attempts to deal with climate change, it is apparent that much of the effort to date has focused on greenhouse gases. Most of the regulatory effort has been designed to impact climate change with the long term hope to impact weather change. Litigation on the other hand is driven primarily by redressing alleged wrongs – with any impact on changing habits, being secondary.

REGULATIONS

The federal government has been predictably on both sides of the need to regulate potential causes of greenhouse gases. By way of example, in 2009, the EPA instituted emission standards for light-duty, medium-duty and heavy-duty vehicles using the Clean Air Act as the basis. In 2025, the EPA proposed new rules effectively undoing the 2009 standards due to bureaucratic overreach. 90 Fed. Reg. 36288 (Aug. 1, 2025). While there has been much posturing on climate change in Washington, the substance has been lacking. This has resulted in attempts by federal agencies to use existing federal provisions to develop and implement rules and regulations to address the topic.

One of the clearest attempts by a federal agency to use administrative tools to address the issue is *West Virginia v EPA*, 597 U.S. 697 (2022). In *West Virginia*, the EPA developed a new set of rules and regulations to effectively create a cap and trade emissions system based upon a creative reading of the Clean Air Act. *id*. at 732. After noting that Congress had failed to pass just that type of system in prior attempts to amend the Clean Air Act, *id*. at 731-32, the Supreme Court ultimately concluded that such a process implicated the major questions doctrine and that Congress would have to clearly answer the question. *id*, at 735.

In response to no clear guidance or action from the federal government, a number of states have adopted some form of regulation for greenhouse gas emissions.[1] The approaches used range anywhere to focusing on public entities contribution to the problem, see, Md. Public Utilities Code 7-220-228; N.C. Gen. Stat. 62-133.8, to a more comprehensive oversight of greenhouse gas emissions from whatever source. See, Colo. Rev. Stat. 25-7-101 to 147. Where they regulations are more comprehensive, the impact on businesses is predictably greater.

Most likely due to the clearer statutory provisions, claims made against these state claims based upon regulatory overreach generally have not been effective. In *California Chamber of Commerce v State Air Resources Board*, 10 Cal. App. 5th 604 (3rd Dist. Ct. App. 2017), the state chamber of commerce challenged the Board's implementation of an auction system for emissions allowances under a cap and trade system, claiming it exceeded the Board's authority. The appellate court upheld the system giving deference to the administrative entity. *id*. at 620-21. When a challenge was brought by environmental groups claiming the Board didn't go far enough, the actions of the Board were found to be sufficient based in large part of a deferential analysis of their actions. *Association of Irritated Residents v California Air Resources*, 206 Cal. App. 4th 1487 (1st Dist. Ct. App. 2012).

While deference is given to administrative agencies, that doesn't mean the agency can shirk their responsibility. In *Kain v Dept. of Environmental Protection*, 49 N.E. 3d 1124 (Mass. 2016), the Massachusetts Supreme Court addressed a suit filed by individuals and environmental groups claiming that the state Department of Environmental Protection was not properly implementing the Global Warming Solutions Act of 2008. *id*. at 279. While recognizing the court should give deference to administrative interpretation of the Act, the court recognized it could not abdicate its duty to interpret the Act. *id*. at 286. In ultimately overruling the agency' interpretation, the court concluded that the statutes use of the term "limits" was not aspirational targets or goals. The Agency was going to have to establish limits as required by the Act. *id*. at 287-88.

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[1] Cal Health & Safety Code 38500-38599; Colo. Rev. Stat. 25-7-101 to 147; Conn. Gen. Stat. 22a-200 to 201e; Del. Code Ann. 7, 10000 -10006 ; Haw. Rev. Stat. 342B-71 to 73; 415 ILL. Comp. Stat. 5/9.15; Md. Code Ann., [envir.] 2-1204.2; Mass. Ann. Laws ch. 21N 1 to 12; Minn. Stat. 216H.01-216H.077 ; Nev. Rev. Stat. 445B.380 ; N.J. Stat. Ann. 26:2C-37 to 68; N.Y. Envtl. Conserv. Law 75-0101 to 0119; OR. REV. STAT. 469A.400 to .475; R.I. Gen. Laws 42-6.2-1 to 42-6.2-12; Vt. Stat. Ann. tit. 10, 578.

While the federal government has been ineffective in adopting and implementing climate change statutes and related regulations, many states have developed greenhouse gas limitations which impact business and industry.

LITIGATION

I. Update on Climate-Related Litigation

A. *Suncor Energy (U.S.A.) Inc. v. County Commissioners of Boulder County*, No. 25-170 (U.S. Feb. 23, 2026)

On February 23, 2026, the U.S. Supreme Court granted certiorari seeking review of the Colorado Supreme Court's opinion allowing the County Commissioners of Boulder County and the City of Boulder to proceed with state-law claims that several companies are liable for climate change-related injuries. The 2018 suit asserts causes of action for public nuisance, private nuisance, trespass, and unjust enrichment alleging that the defendants "knowingly caused and contributed to the alteration of the climate by producing, promoting, refining, marketing and selling fossil fuels at levels that have caused and continue to cause climate change, while concealing and/or misrepresenting the dangers associated with fossil fuels' intended use." In their petition to the High Court, the defendants, Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Exxon Mobil Corporation, sought consideration of "[w]hether federal law precludes state-law claims seeking relief for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions on the global climate." In granting cert, the Court asked the parties to brief the question presented as well as whether the Court has statutory and Article III jurisdiction to hear the case. A motion to extend the time to file the briefs on the merits was granted, and the time for respondents to file their brief on the merits was extended to July 27, 2026.

B. Representative state court actions

1. *Mayor & City Council of Baltimore v. BP p.l.c., No. 11 (Md. Mar. 19, 2026)*

On March 24, 2026, the Supreme Court of Maryland dismissed climate change lawsuits filed by Baltimore, Annapolis and Anne Arundel County. The plaintiffs argued that their suits against 26 companies were focused on the defendants "deceptive marketing practices about climate change" under

state law. The Maryland Supreme Court disagreed. The Court held that the local governments were effectively trying to regulate interstate emissions, which is the purview of the federal government, under the federal Clean Air Act. "No amount of creative pleading," the court noted, "can masquerade the fact that the local governments are attempting to utilize state law to regulate global conduct that is purportedly causing global harm."

2. *Town of Carrboro v. Duke Energy Corp., No. 24CV003385-670 (N.C. Super. Ct. Feb. 12, 2026)*

The Town of Carrboro's climate lawsuit against a public utility company (Duke Energy Corporation) was dismissed by a North Carolina Superior Court because the claims were nonjusticiable under the North Carolina Supreme Court's three-factor test for the political question doctrine. dismissed. Carrboro's suit alleged that Duke Energy "misled the American public for decades about the effects of fossil fuel consumption on the environment" and that "as a result, the public transition to alternative forms of energy was delayed," which materially contributed to climate change harms suffered by the Town. The court concluded that Carrboro had standing but held that "[t]he very nature of carbon emissions existing as gases that are diffused throughout the atmosphere across the globe makes any attempt to attribute a specific source of emissions to a specific climate change-related impact a futile endeavor." The North Carolina court found the application of the political question doctrine in three climate cases in other jurisdictions persuasive: *Native Village of Kivalina v. ExxonMobil Corp*., *California v. General Motors Corp*., and *City of Charleston v. Brabham Oil Co*. While the action was dismissed under the political question doctrine, the court also found that it was likely "some portion" of the claims were preempted by federal law.

II. State court actions or wildfires, floods, and environmental contamination

A. Growth of nuisance and trespass claims

State common law claims for nuisance and trespass are increasingly used in climate-related litigation, including cases involving air pollution from wildfires and groundwater contamination.

1. Nuisance: These claims typically involve an "unreasonable interference" with the use and enjoyment of property. They are frequently used in environmental contamination cases where pollutants migrate onto private land.

2. Trespass: This involves a physical invasion of property. In flooding and fire contexts, courts may look at whether a government project or a private entity's actions directly caused the entry of water or debris onto the plaintiff's land.

B. Inverse condemnation

Inverse condemnation occurs when a property owner initiates an action for compensation because the government (or a utility with eminent domain power) has "taken" or damaged property for public use without following formal condemnation procedures.

1. Strict Liability Standard: In states like California, inverse condemnation often carries a strict liability standard, meaning the utility or government can be held liable even if they weren't negligent.

2. Wildfires: This is a major factor in California wildfire litigation against utilities like PG&E, as damage caused by public utility equipment is often considered a "taking".

3. Flooding: Courts have ruled that even temporary flooding caused by government actions (e.g., dam releases or levee failures) can constitute a taking under the Takings Clause.

C. Negligence and strict liability

1. Negligence: Plaintiffs must prove that a defendant (like a municipality or a private company) failed to exercise reasonable care—for example, by failing to maintain a dam or clear dry brush near power lines.

2. Strict Liability: This standard applies when a defendant is held liable regardless of fault. Beyond inverse condemnation, strict liability is often applied in cases involving "abnormally dangerous activities" or specific statutory requirements for utilities in certain states.

3. Non-preemption: The United States Supreme Court held in *Atlantic Richfield Co. v. Christian* that the Comprehensive Environmental

Response, Compensation and Liability Act (CERCLA) does not prevent state courts from hearing state law claims by landowners seeking property damages and additional environmental remediation at federal Superfund sites beyond an EPA-approved remedy. The landowners' common law nuisance, trespass, and strict liability claims arise under Montana law and not under the Act.

THE TECHNOLOGY RISK

Modern reliability risk is changing as inverter-based resources (IBRs)—utility-scale wind, solar, and batteries—expand on the bulk power system. IBRs are challenging traditional reliability metrics and planning assumptions, prompting increased scrutiny by FERC and NERC following multiple disturbance events involving widespread IBR output reductions (loss of generation). Those working with IRBs and in considering the power grid must distinguish between resilience (the ability to withstand and recover from disruptive events) and reliability (system behavior once resilience is broken). Extreme weather and other high-impact/low-frequency "Black Sky" events increasingly test both.

Two technical reliability stressors are accelerated by the energy transition: loss of system inertia as conventional rotating generation retires, and reactive power (VAR) needs that support voltage stability. Thus, grid operators resort to load shedding—including rolling blackouts—as a last-resort measure to prevent cascading failures and system collapse, and load shedding decisions ultimately blend engineering constraints with policy choices. Reliability planning tools such as LOLP/LOLE and "1 day in 10 years" criteria remain common, but these metrics can miss multi-day, correlated events where weather simultaneously affects demand and intermittent generation output.

During Winter Storm Uri, Texas narrowly avoided a system-wide blackout through substantial load shedding and emphasizes interdependencies—especially between wind and natural gas—including fuel supply constraints and feedback loops when power loss disrupts fuel production. The key takeaway for regulators, utilities, and risk stakeholders: reliability must be re-evaluated and re-priced as generation geography, intermittency, and correlated operational risks evolve, requiring coordinated action across federal, state, and local authorities. While the aspirational goal of "carbon neutral" is being pushed by states mandating either carbon output totals below those that were experienced decades ago (1990 seems popular) or "carbon zero", the increase in energy consumption coupled with less reliable energy systems is increasing to potential for energy system failure. This failure can manifest itself in system shut-down, or in certain instances in serious catastrophic events.

UK Example: *ClientEarth v Shell Plc*[2] (English High Court) — "directors' duties" climate case

In *ClientEarth v Shell Plc* & its directors, an environmental NGO shareholder tried to bring a derivative claim (i.e., a shareholder suing on behalf of the company) alleging the directors breached their statutory duties by how they managed climate-change risk and the company's transition strategy. The High Court refused permission for the claim to proceed (at the "permission"/filter stage under the Companies Act 2006).

The case is, for US practitioners, most similar to what we might see against a corporate client - a UK court challenge aimed at corporate accountability for climate-related decision making and risk management, rather than a public-law challenge against government. For those of us that are worried about risk management, where the Corporate Counsel is really focused, it's frequently cited as a UK pathway for climate litigation against companies: corporate governance / directors' duties as the hook.

England & Wales still has few direct tort damages cases squarely seeking compensation from companies *for climate-change harm itself*. A senior UK Supreme Court justice has explicitly observed an "absence of tort law cases concerning climate change in England & Wales," with much of the action historically showing up via public law and planning challenges.[3]

Lord Sales lays it out:

> Tort law, on a conventional view, is primarily backwards looking, focusing on apportioning liability for events that have already occurred. In contrast, regulatory legislation is more readily able to look to the future, with the Climate Change Act 2008 creating a legally binding obligation for the government to achieve net zero by 2050 and introducing a system of carbon budgeting to give effect to this objective. This statutory framework has provided fertile ground for public law climate change challenges, with many claimants seeking, with some success, to compel the government to strengthen measures reducing emissions.

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[2] ClientEarth -v- Shell judgment

[3] Microsoft Word - Speech - Lord Sales - 09052025

He goes on to reference a New Zealand case, *Smith v. Fonterra*[4], challenging 6 of New Zealand's largest greenhouse gas emitters on a public nuisance theory, dismissed at the lower court level but upheld at the New Zealand Supreme Court and ultimately allowed the challenge to proceed to trial. Holding there isn't a bar to a tort claim. Lord Sales also refers to the UK Supreme Court's reasoning in *Manchester Ship Canal*[5], which considered whether the Water Industry Act 1991 excluded claims in nuisance and negligence against statutory sewerage undertakers. The UK Supreme Court, like that in New Zealand, unanimously held that, given the presumption against statute interfering with common law rights, there was nothing in the Act which provided a basis to exclude the claims.

Why Does the UK Matter: **UK Emissions Trading Scheme (UK ETS) — cap-and-trade compliance for covered sectors**

The UK ETS regulation is a clean "GHG regulation" example that is directly emissions-control, and most importantly a not a toothless requirement for disclosure. It is widely accepted as the flagship for cap-and-trade programs. UK ETS is a cap-and-trade scheme established after the UK left the EU ETS. The program sets a cap on emissions by sector and requires covered participants to surrender allowances for emissions. It provides measurable obligations that are subject to mandatory reporting which can easily be tracked by both the government and NGOs. A perfect mix for tort litigation.

EU Example (Member-state due diligence regime enabling climate litigation): France "Duty of Vigilance" vs TotalEnergies[6]

A coalition of NGOs and local authorities sued TotalEnergies seeking to force changes to its vigilance plan to better address risks tied to its activities, including contribution to greenhouse gas emissions, and to align with Paris-Agreement-type objectives.

The regulatory scheme that enables the challenge is France's Corporate Duty of Vigilance Law (codified in the French Commercial Code, including Article L. 225-102-4), which:

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[4] Smith v Fonterra (NZCA)

[5] Manchester Ship Canal Company Ltd v United Utilities Water Ltd [2024] UKSC 22, [2024] 3 WLR 356.

[6] N° RG 23/14348 – 35L7-V-B7H-CIFBK

- Requires large French companies to prepare and implement a vigilance plan aimed at identifying and preventing serious impacts, including environmental harms.
- Provides an injunction mechanism: after a required formal notice period, "any person with an interest" can ask the competent court to enjoin compliance - potentially with a penalty, although the penalty amounts are relatively small given the size of the companies.

Unlike pure tort theories, this is a statutory compliance regime that creates a litigation pathway (formal notice → court application → potential injunction) and is being actively used in climate-related disputes.

As special note about sustainability and shareholder derivative litigation:

From the beginning, Europe has led the way, globally, for increased attention on sustainability in business practices and responsible investing. The term "ESG" was, itself, coined on an international stage before it became commonplace vernacular for American policymakers and corporate leaders.[8] In 2021, the European Parliament was the first to propose sustainability reporting requirements which obligate businesses to regularly disclose information on their societal and environmental impacts. The proposal was overwhelmingly adopted in November 2022. As early as 2017, the International Task Force on Climate-Related Financial Disclosures issued practical guidance concerning accurate and timely disclosure of the potential impacts of climate-related risks and opportunities. In January 2022, the United Kingdom became the first European Union country to enact nation-specific laws mandating certain ESG disclosures.

This historical trend supports utilizing European ESG activities as a leading indicator of what is to come for ESG in the United States. In terms of climate-related litigation, May 2021 was a watershed moment for prospective plaintiffs as a Dutch court held Europe's largest private oil company, Royal Dutch Shell, civilly liable for its contributions to climate change.[9] Filed in 2019, *Milieudefensie v. Royal Dutch Shell* alleged that Shell's oil and natural gas production violated a duty of care and the company's human rights obligations. Instead of demanding damages, the nonprofit plaintiffs asked that Shell be ordered to reduce its carbon emissions. Shell defended that climate change is a broader social issue and that it was not appropriate to hold an individual defendant responsible. The court disagreed, finding that the applicable standard of care necessitated emissions reduction in line with United Nations guidance for member states. The court ruled that Shell's existing plan to lower emissions by 20% by 2030 was "not concrete and is full of conditions […] that's not

enough.” Shell was ordered to cut emissions by 45% by 2030. The court also extended Shell’s responsibility to include a “significant best-efforts obligation” with respect to its suppliers’ emissions.

Shell appealed the decision and mostly won.. The appellate court found that Shell could not be held to the 45% emission reduction standard. The outcome was largely because of how the case was originally pled, and the appellate court acknowledged that Shell still has the obligation to protect human rights. Despite the appellate court’s ruling, the underlying finding at the trial court level that companies must comply with global climate policy in addition to applicable emissions limits has already begun to usher in the filing of other private civil lawsuits in Europe aimed at forcing corporate responsibility for climate change.

Volkswagen is facing a similar shareholder lawsuit in Sweden. In an action filed in October 2022, shareholders demand a change to the company’s articles of incorporation to require the board to provide more extensive information about direct and indirect climate change lobbying activities. According to the claimants, membership in various associations that run counter to Volkswagen’s public commitment to a green transition may result in reputational damage and endanger the security of shareholder investments.