

Sea level suits are the next frontier in climate change litigation

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Recently, three California local governments filed lawsuits against 37 major energy companies, seeking damages for the companies' alleged contributions to global greenhouse gas emissions that have, in turn, caused sea level rise, more intense coastal storms, and flooding that are threatening the municipalities' coastlines.

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This litigation is thoroughly documented, sweeping in its allegations and ambitious in its objectives. The lawsuits nevertheless face considerable obstacles before the local governments can hope to prevail. One thing is certain, however: Those local governments — and the attorneys representing them — are relying heavily on some of the most consequential public health and environmental law court victories from the past several decades in launching this latest chapter in America's cutting-edge climate litigation.

On July 17, San Mateo County, Marin County and the Southern California city of Imperial Beach filed nearly identical lawsuits (in San Mateo, Marin and Contra Costa County Superior Courts, respectively) against a Who's Who of American and foreign oil, natural gas and coal companies. All three local governments are represented — on a contingent fee basis — by the San Francisco boutique environmental law firm Sher Edling LLP.

The gist of the three complaints is that the defendant oil companies “are directly responsible” for over 20 percent of global greenhouse gas emissions over the past half-century; that the companies have profited immensely from the production and sale of the fossil fuels that have caused this pollution; that the companies have known for years of the causal connection between their products' greenhouse gas emissions and global warming; that they have nonetheless systematically concealed and denied those facts to the public; and that defendant companies' actions have “substantially contributed to a wide array of dire climate-related effects” that pose a clear and present danger to the plaintiff local governments' coastal resources.

The lawsuits seek monetary compensation and unspecified equitable relief based on a number of state common law theories: public and private nuisance; negligence; trespass; and strict liability based on defendants' alleged failure to warn of the environmental dangers of their energy products and design defects of those products — all of which have led to the claimed current and projected damage to the municipalities' coastal resources.

The complaints are extraordinarily detailed, each extending to approximately 100 pages and filled with extensive citations to climate science findings, numerous graphs, tables, etc.

To be sure, these lawsuits will have to surmount some formidable legal obstacles before the plaintiff local governments can win their cases. The defendants include many of the world's wealthiest and most powerful corporations; they will retain some of America's top corporate law firms to mount a vigorous and multifaceted defense of these cases.

The energy defendants can be expected to focus their efforts on at least a couple of threshold legal vulnerabilities in plaintiffs' cases:

First, the local governments may have difficulty demonstrating the requisite causation between their business activities and the environmental harms the local governments allege. The companies will doubtless argue that there's no direct and provable link between the petroleum, natural gas and coal products they extract and market and the precise damage plaintiffs project to their coastal resources as a result of sea level rise, intensified coastal storms and the resulting damage to their coastal areas.

Second, the energy defendants will no doubt contend that they have simply introduced their essential products into the stream of commerce, and that it is the billions of intervening institutional and individual actors who have used those products to generate energy, manufacture products, power their motor vehicles and heat their homes that are responsible for the greenhouse gas emissions at issue.

Nevertheless, it would be a mistake to dismiss this newly filed climate change litigation out of hand. That's true for several reasons:

For one thing, the plaintiff counties and city also have solid legal counsel on their side as well: Sher Edling is a well-respected, experienced public interest law firm based in San Francisco. In particular, lead partner Vic Sher practiced with Earthjustice (then the Sierra Club Legal Defense Fund) for over a decade, including a stint as president and CEO of that formidable legal organization. More recently, Sher has successfully litigated on behalf of public agencies for 15 years, bringing lawsuits throughout the nation against numerous manufacturers of toxic chemicals polluting drinking water sources. The targets of those earlier litigation efforts include many of the same corporations named in the current climate change lawsuits.

Additionally, Sher and his local government clients have well-developed climate science on their side. Much of that science is reflected in the factual allegations recited in the just-filed lawsuits. And there will be no shortage of climate scientists available and willing to serve the plaintiffs as consultants and expert witnesses in these cases as they go forward. The defendants, by contrast, will have difficulty recruiting experts with comparable credibility in climate science.

Furthermore, in bringing these lawsuits the local governments are standing on the shoulders of some major public health and environmental litigation victories achieved over the past 30 years that — like these cases — seemingly faced long legal odds when they were launched: The tobacco litigation filed and successfully pursued by state attorneys general (including California's) in the 1980s and '90s against the tobacco industry is one prominent example. In 2014, the Santa Clara County obtained a formidable trial court judgment against the former manufacturers and marketers of lead paint to compensate for the adverse public health impacts associated with that product. (The judgment in the 17-year-old lead paint case is currently on appeal.) And plaintiffs attorneys — including Sher Edling — have recovered hundreds of millions of dollars in tort actions filed against oil and gas companies responsible for MTBE contamination of public groundwater supplies across the U.S.

And these are not the only innovative climate change lawsuits currently pending. In 2015, for example, a group of children brought suit against the federal government in federal court in Oregon, arguing that the government's failure to limit greenhouse gas emissions endangers the health and wellbeing of the children and future generations, in violation of the public trust doctrine and the plaintiffs' due process rights. (The district court has rejected the government's efforts to obtain dismissal of the lawsuit and has set the case for trial in 2018 — although this week the 9th U.S. Circuit Court of Appeals issued an order temporarily staying the case.)

So, the San Mateo County, Marin County and Imperial Beach lawsuits can be viewed as the latest chapter in cutting-edge climate change litigation being brought in our nation's courts.

Two final points: One, these lawsuits build on previous investigations launched by attorneys general in New York, Massachusetts and other jurisdictions into allegations that ExxonMobil and other energy companies have known for years about the environmental, social and economic dangers of climate change while simultaneously misleading both the public and their shareholders by attempting to discredit and trivialize those dangers in the companies' public statements. Those same allegations form a key theme of the just-filed climate change lawsuits.

And two, these lawsuits will play out not just in the superior courts where they were filed, but also in the court of public opinion. *Brown v. Board of Education* and the other iconic civil rights litigation of the last half of the 20th century prompted a difficult but long-overdue national conversation about racial equality and social justice. Similarly, the aforementioned environmental and public health "impact" litigation involving tobacco products, MTBE

contamination, and toxic lead paint prompted sweeping legislative and regulatory reforms. So too the newly filed climate change litigation should spark increased media and public debate over the long-range, adverse environmental and economic consequences of our carbon-based economy on California's spectacular coastal resources.
