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presents

Confronting Climate Change:

In California And Beyond

Assessing Key Patterns in U.S. Climate Change Litigation

Friday, April 7, 2023
2:15 - 3:30 pm

Speakers:

Elaine Meckenstock, Deputy Attorney General
CA Department of Justice

Vic Sher, Sher Edling LLP

Kassie Siegel, Director
Climate Law Institute, Center for Biological Diversity

Conference Reference Materials

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Defending Climate Change Regulations

M. Elaine Meckenstock
Deputy Attorney General
California Attorney General's Office

Why So Many “Novel” Arguments?

- Innovative Regulations
- Emerging Precedents

Major Questions & Climate Change

- US EPA Adopts PSD Tailoring Rule
 - *UARG v. EPA*, 573 U.S. 302, 324 (2014): “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”
- US EPA Adopts Clean Power Plan
 - *West Virginia v. EPA*, 142 S. Ct. 2587 (2022)
- US EPA Strengthens Vehicular GHG Standards
 - *Texas v. EPA*, D.C. Cir. Case No. 22-1031

Major Questions & Climate Change

- Is Every Climate Change Regulation a Major Question?
 - Social Cost of Greenhouse Gases
 - Restoration of Waiver for California's GHG and ZEV Standards
 - *Ohio v. EPA*, D.C. Cir. Case No. 22-1081

Accounting for “Upstream” Emissions

- Low Carbon Fuel Standards and Lifecycle Analysis
- Is this extraterritorial regulation of out-of-state emissions?
- Does this discriminate against out-of-state producers with higher emissions?
- *Rocky Mountain Farmers Union I*, 730 F.3d 1070
 - *Rocky Mountain Farmers Union II*, 913 F.3d 940
 - *AFPM v. O’Keefe*, 903 F.3d 903

Accounting for “Upstream” Emissions

- *EELI v. Epel*, 793 F.3d 1169
- *But see North Dakota v. Heydinger*, 825 F.3d 912
- See also *National Pork Producers Council v. Ross*
 - Supreme Court Dkt. 21-468

Market-Based Mechanisms

- Are the costs of compliance instruments a tax?
 - *Cal. Chamber of Commerce v. CARB*, 10 Cal. App. 5th 604
- Do links between market-based regulations infringe on the federal government's authority?
 - *United States v. California*
 - 444 F. Supp. 3d 1181
 - 2020 WL 4043034

Market-Based Mechanisms

- Who determines the nature and use of tradable credits?
 - *E.g., Allco Finance Ltd. v. Klee*, 861 F.3d 82

Local Ordinances

- Local prohibition against natural gas connections for new construction
 - *California Restaurant Association v. City of Berkeley*, Ninth Circuit Case No. 21-16278

Changes in Precedent

- “Equal footing doctrine” re: admission to the Union
- “Equal sovereignty doctrine” re: voting laws in *Shelby County*
- *Ohio v. EPA* (Clean Air Act waiver for California vehicle emission standards)
 - D.C. Cir. Case No. 22-1081

CLIMATE DECEPTION LITIGATION IN STATE AND FEDERAL COURTS



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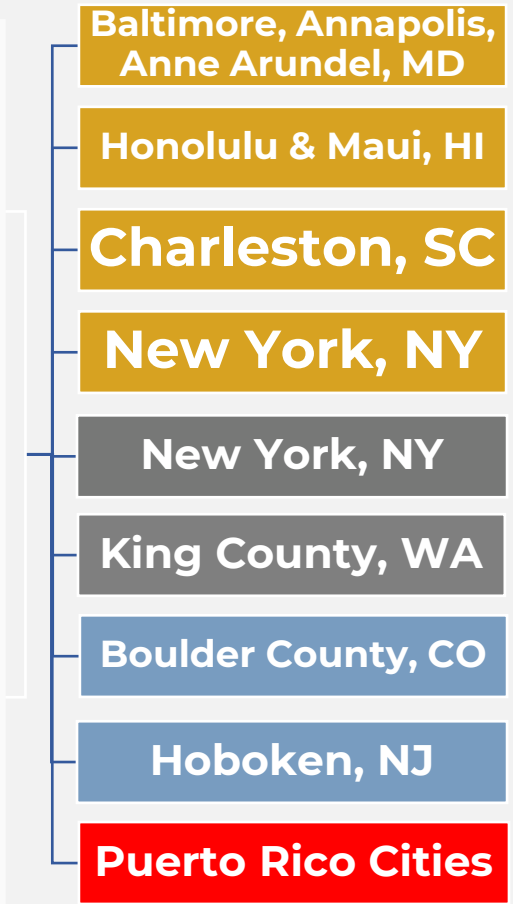
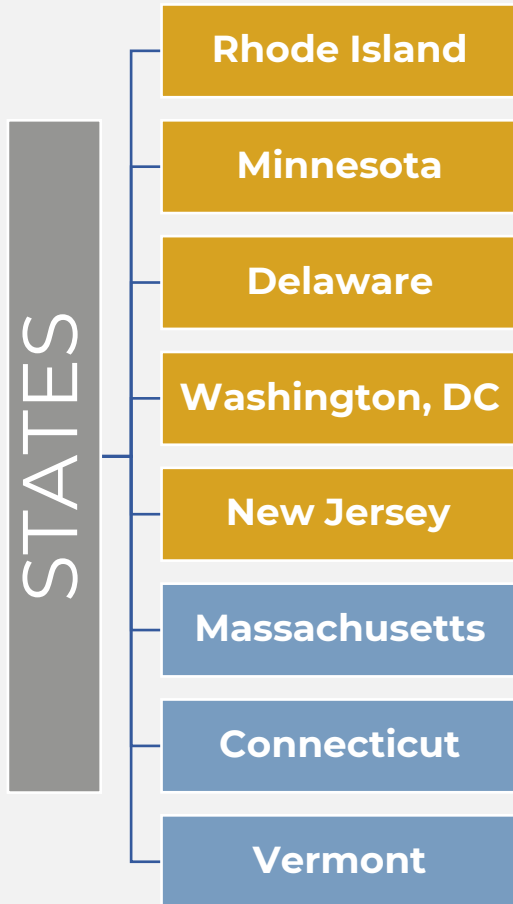


Vic Sher
Partner
Sher Edling LLP

UNDERLYING THEME: ALL CASES, ALL CLAIMS

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CURRENT CASES



WHERE THE ACTION IS NOW

SCOTUS

- *Oakland* (9th Cir. 2020)
- *Boulder* (10th Cir.) / CVSG
- *Baltimore* (4th Cir.)
- *San Mateo* (9th Cir.)
- *Rhode Island* (1st Cir.)
- *Delaware / Hoboken* (3rd Cir.)
- *Honolulu / Maui* (9th Cir.)

STILL COMING

- *Minnesota* (8th Cir.)
- *Connecticut* (2nd Cir.)
- *Oakland* (9th Cir.)
- DC (DC Cir.)
- *Annapolis / Anne Arundel* (4th Cir.)
- *Charleston* (DSC)
- *New Jersey* (DNJ)
- *NYC* (SDNY)
- *Vermont* (DVt)

STATE COURTS

- *Honolulu / Maui*
- *Hoboken*
- *Delaware*
- *Massachusetts*
- *Rhode Island*
- *Baltimore*
- *Boulder*

CLIMATE DECEPTION LITIGATION IN STATE AND FEDERAL COURTS



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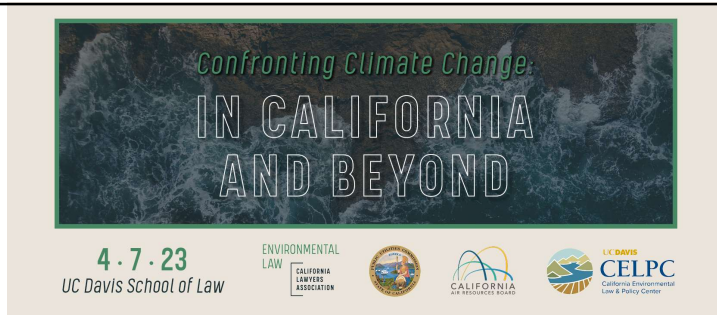
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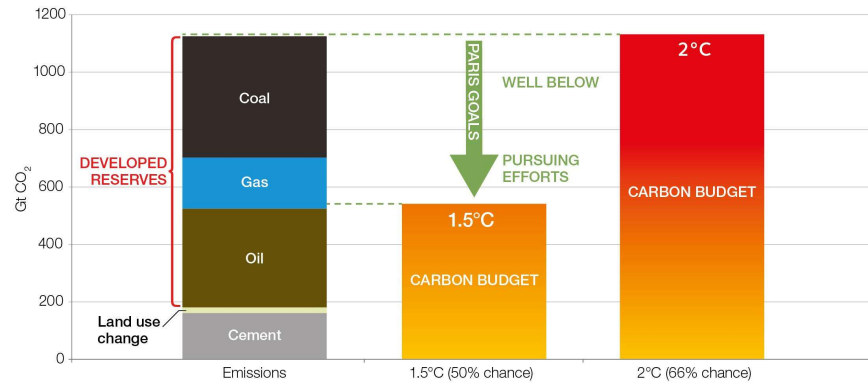
Key Patterns in U.S. Climate Change Litigation:
The National Environmental Policy Act, Endangered Species Act, and
Federal Project Permitting
Kassie Siegel, Center for Biological Diversity
ksiegel@biologicaldiversity.org

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CO₂ from developed fossil fuel reserves vs. Paris goals carbon budgets



Oil Change International; <http://priceofoil.org/2019/01/16/report-drilling-towards-disaster/>

3

ANTÓNIO GUTERRES

United Nations Secretary-General

“

Investing in new **fossil fuels** infrastructure is moral and economic madness.”

4 APRIL 2022

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“If humanity wishes to preserve a planet similar to that on which civilization developed and to which life on Earth is adapted, paleoclimate evidence and ongoing climate change suggest that CO₂ will need to be reduced from its current 385 ppm to at most 350 ppm, but likely less than that.”

J. Hansen et al., *Target Atmospheric CO₂: Where Should Humanity Aim?*, 2 *Open Atmospheric Sci. J.* 217, 218 (2008).

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In the Matter of the Application of Hawai‘i Electric Company, Inc., SCOT-22-0000418
(March 13, 2023)

“the Hawai‘i Constitution’s article XI, section 9 right to a clean and healthful environment”
“encompasses the right to a life-sustaining climate system,” Op. at 16.

“The target for emissions reductions must instead [of 1.5 degrees C] be based on the level of atmospheric CO₂ that ensures a life-sustaining climate system....” Concurrence at 9.

“Current scientific consensus, as opposed to political consensus in the Paris Agreement regarding an acceptable increase in global average temperature, suggests that mitigation strategies must be consistent with achieving global atmospheric CO₂ concentrations below 350 parts per million (‘ppm’) by 2100.” Concurrence at 10.

“With the destruction of our life-sustaining biosphere underway, the State of Hawai‘i is constitutionally mandated to urgently reduce its greenhouse gas emissions in order to reduce atmospheric CO₂ concentrations to below 350 ppm.” Concurrence at 38.

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City of Los Angeles et al., v. National Highway Traffic Safety Administration,
912 F.2d 478 (D.C. Cir. 1990)

Judge D.H. Ginsburg: No Standing

"as to redressability: because the increase in greenhouse gases that the NHTSA's decision can be expected to generate is so small a contribution to the quantum necessary to produce the projected catastrophe, I cannot conclude, on the basis of the NRDC's allegations, that the injury asserted is 'likely to be redressed by a favorable decision' on its petition."

Judge R.B. Ginsburg: Standing; Lose on Merits

"Turning to the merits of NRDC's challenge, I call the close question... in the agency's favor. I do so mindful of the deferential 'abuse of discretion' standard governing judicial review of NHTSA's decision. I further include in the calculus considerations Judge D. H. Ginsburg places under a 'standing' headline, particularly (1) NRDC's apparent acceptance of NHTSA's finding that the 1.0 mpg CAFE rollback at issue would yield 'a maximum theoretical increase of less than one percent in greenhouse gases,' EA Supplement at 8, and (2) NRDC's failure even to allege that such an increase 'would produce any *marginal* effect on the probability, the severity, or the imminence' of the global warming disaster petitioners project."

Chief Judge Wald: Standing; Win on Merits

"This case presents a new and potentially catastrophic environmental phenomenon that fits squarely within the broad NEPA framework"

"Although the effects of a change in global atmosphere would obviously be felt throughout this country, and indeed the world, NRDC has satisfied the geographical nexus requirement of NEPA standing by showing the likelihood of particularly devastating consequences to NRDC members in California."

"No one disputes the causal link between carbon dioxide and global warming. Our dispute with the dissent centers only on whether NRDC must establish, for standing purposes, that the incremental impact of those emissions resulting from the CAFE rollback has a significant effect on global warming."

"NRDC need only show – and it did – that an EIS would redress its asserted injury, *i.e.*, that any serious effects in global warming will not be overlooked. It need not show that canceling the rollback will alleviate global warming."

But En Banc D.C. Circuit Panel Later Explicitly Overrules Wald's Standing Analysis and Adopts J.D.H. Ginsburg's Position in Florida Audubon Society v. Bentsen, 94 F.3d 658, 667 (D.C. Cir. 1996) (en banc)

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Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538
F.3d 1172, 1217 (9th Cir. 2008)

"The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct. Any given rule setting a CAFE standard might have an "individually minor" effect on the environment, but these rules are "collectively significant actions taking place over a period of time." (citations omitted) [538 F.3d at 1217](#)

"The procedures included in § 102 of NEPA are not ends in [*1215] themselves. They are intended to be 'action forcing.' The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives." *Env'tl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 470 F.2d 289, 298 (8th Cir. 1972) (citation omitted). [538 F.3d at 1214-15](#)

"In light of the emergent consensus on global warming, Chief Judge Wald's reasoning in her dissent in *City of Los Angeles* is not only prescient but persuasive" [538 F.3d at 1224](#)

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Trends in NEPA Caselaw: “Perfect Substitution”

Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 549-50 (8th Cir. 2003) – rejected as “illogical”

WildEarth Guardians v. U.S. Bureau of Land Mgmt., 870 F.3d 1222, 1236 (10th Cir. 2017) – rejected as “contrary to basic supply and demand principles”; “this perfect substitution assumption [is] arbitrary and capricious because the assumption itself is irrational.”

Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 739 (9th Cir. 2020) (“Liberty”) – rejected use of model that held foreign oil consumption constant despite project approval

Sierra Club v. Clinton, 689 F. Supp. 2d 1123, 1134 (D. Minn. 2010) – upheld a project approval that relied on perfect substitution argument by deferring to agency’s approach without analyzing it

High Country Conservation Advocates, 52 F. Supp. 3d at 1198 (D. Colorado 2014) – rejected, following the 8th Circuit

Montana Env’tl. Info. Ctr., 274 F. Supp. 3d at 1098 (D. Montana 2017) – rejected as “[i]naccurate economic information.”

Sovereign Inūpiat for a Living Arctic v. Bureau of Land Mgmt., F. Supp. 3d 739, 767 (D. Alaska 2021) (“Willow I”) Followed 9th Circuit in Liberty case; should have examined effect on foreign oil consumption.

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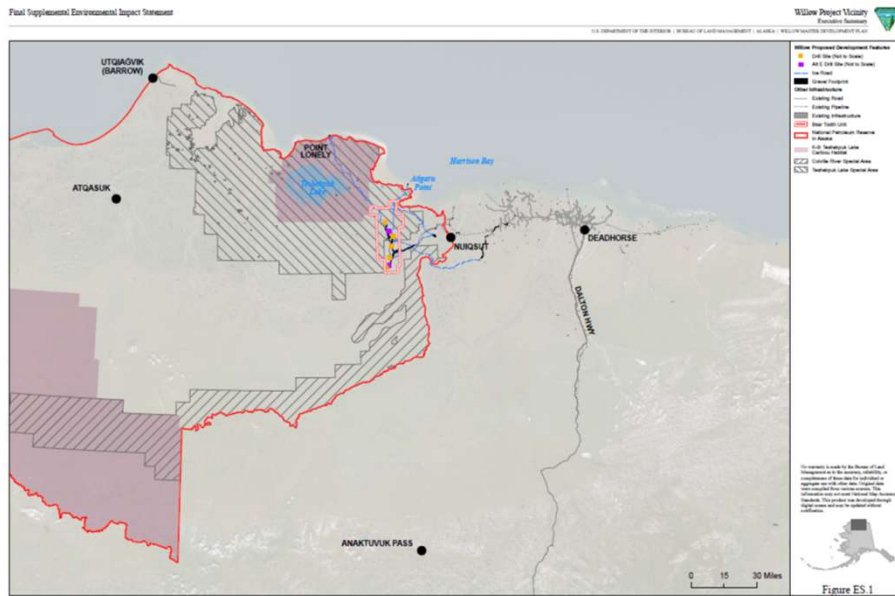
Further Reading on “Perfect Substitution”

Peter H. Howard, Ph.D., and Max Sarinsky, Best Practices for Energy Substitution Analysis, New York University School of Law Institute for Policy Integrity, December 2022
https://policyintegrity.org/files/publications/Best_Practices_for_Substitution_Policy_Brief_v3.pdf

Hasselman, J. & Erickson, P. *NEPA review of fossil fuels projects – principles for applying a “climate test” for new production and infrastructure*. Earthjustice working paper.
https://earthjustice.org/sites/default/files/files/climate_test_-_hasselman_erickson.pdf

10

Willow Project: 586 million barrels of oil, 258 million metric tons CO₂e



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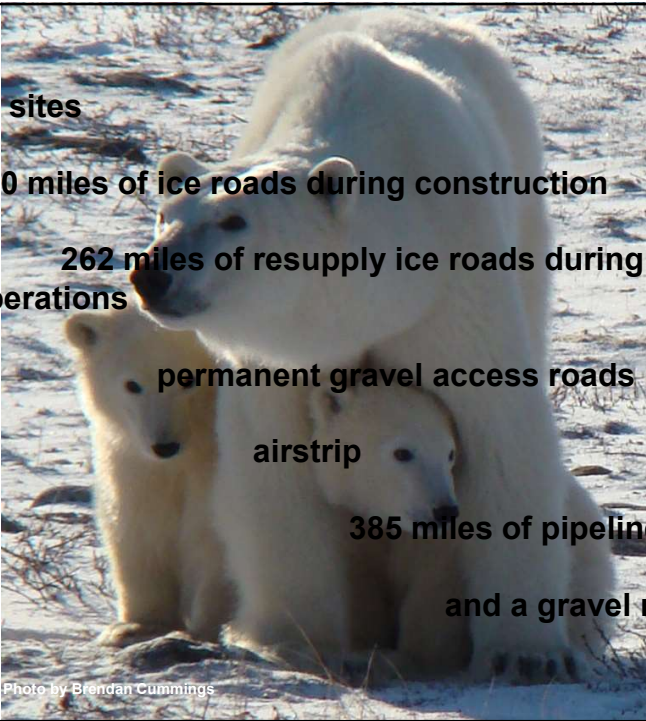
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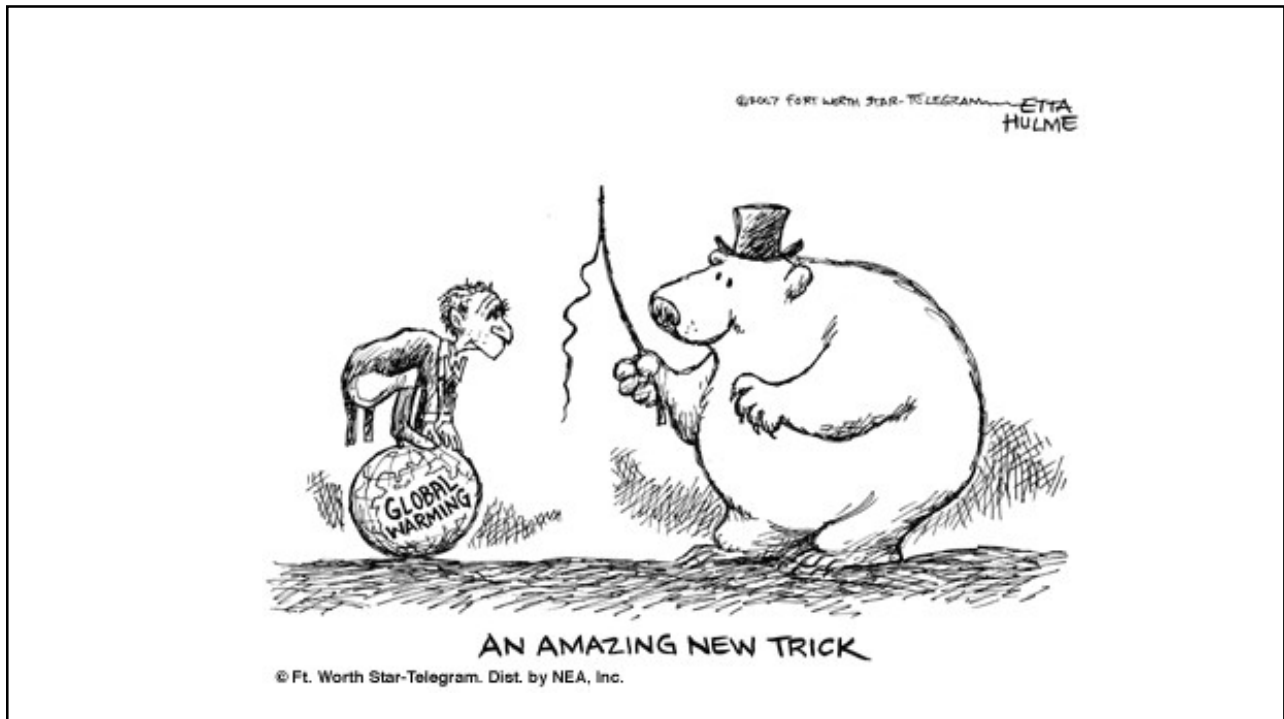
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Five drill sites
700 miles of ice roads during construction
262 miles of resupply ice roads during operations
permanent gravel access roads
airstrip
385 miles of pipelines
and a gravel mine

Photo by Brendan Cummings

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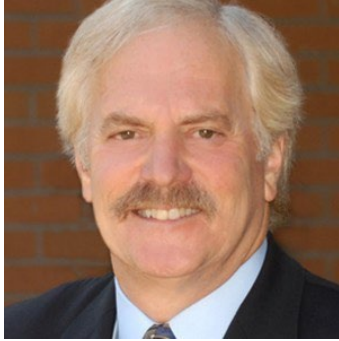
SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, Case 3:23-cv-00058-SLG (filed March 14, 2023).

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, Case No. 3:23-cv-00061-SLG (filed March 14, 2023).

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Moderator

Rick Frank, Professor of Environmental Practice and Director, California Environmental Law & Policy Center, School of Law, University of California Davis



Richard Frank is Professor of Environmental Practice and Director of the California Environmental Law & Policy Center at the University of California, Davis School of Law. There he teaches courses in water law, environmental law, natural resources law, ocean and coastal law, comparative environmental law and related topics. From 2006-2010, Frank served as Executive Director of the Center for Law, Energy & the Environment and as a Lecturer in Residence at the U.C. Berkeley School of Law.

From 1977-2006, he served in various legal capacities with the California Department of Justice, culminating as Chief Deputy Attorney General for Legal Affairs (2003-06). During most of his career with the Department, Frank focused on constitutional, environmental, land use, water and public land management issues. Since leaving the California Department of Justice in 2006, Frank has served on a number of California state policymaking and advisory bodies. He served on the Board of Directors of the California High Speed Rail Authority from 2013-15. Mr. Frank received his law degree from the University of California at Davis in 1974.

Panelists

Elaine Meckenstock, Deputy Attorney General, CA Department of Justice



Elaine Meckenstock has been a Deputy Attorney General in the Natural Resources Law Section of the California Department of Justice since 2010. Elaine has defended numerous state regulatory programs—from the Low Carbon Fuel Standard and cap-and-trade to commercial fishing regulations—in cases raising novel questions of constitutional law under the dormant Commerce Clause, Treaty Clause, Compact Clause, and Privileges and Immunities Clause of Article IV. She has also been on both sides of litigation over federal agency actions on GHG emissions and other pollution from mobile and stationary sources, including

challenging the ACE rule in what became *West Virginia v. EPA*. For the past five years or so, Elaine has been the lead line attorney for the California Attorney General Office's work on vehicle emissions. She currently leads the teams defending EPA's revised GHG standards for light-duty vehicles (*Texas v. EPA*) and EPA's restoration of a preemption waiver for California's GHG and zero-emission-vehicle (or ZEV) standards (*Ohio v. EPA*).

Elaine attended law school at UC Berkeley, and, before joining the California Department of Justice, clerked for Judge William Fletcher on the Ninth Circuit Court of Appeals.

Vic Sher, Sher Edling LLP



Vic Sher, one of the founding partners of Sher Edling LLP, represents public agencies as plaintiffs in high impact environmental lawsuits. He is currently the lead outside lawyer for twenty public agencies in climate change damages cases brought by cities, counties, and states, as well as an association of commercial fishermen, against the fossil fuel industry. For much of the last two decades, Vic's practice focused solely on representing public water suppliers and other public agencies in lawsuits against the manufacturers of toxic chemicals polluting drinking water sources; his non-climate docket continues these kinds of cases. In 2009, Vic served as New York City's lead trial counsel in *City of New York v. ExxonMobil*, a federal jury trial over MTBE contamination that resulted in a verdict for the City of \$104.7 million. Before entering private practice in 1998 Vic practiced with the public interest law firm Earthjustice from 1986 until 1997, including as its President from 1994 to 1997. Vic was named one of the top lawyers in America in 2011 by LawDragon, and a Northern California Super Lawyer since 2005. He is a 1980 graduate of Stanford Law School, where he was a member of the Law Review.

Kassie Siegel, Director, Climate Law Institute, Center for Biological Diversity



Kassie Siegel is senior counsel and director of the Center for Biological Diversity's Climate Law Institute. She develops and implements campaigns for the reduction of GHGs and for the protection of wildlife and communities threatened by climate disruption. She authored the petition and litigated the cases leading to U.S. Endangered Species Act protection for the polar bear, and has been a leader in campaigns to keep fossil fuels in the ground. She was named one of the ten most influential California lawyers of the decade by the Daily Journal in 2010, and California Lawyer of the Year by California Lawyer Magazine in 2007 for her work in climate change and environmental law. She is a graduate of UC Berkeley School of Law and has spent her entire career in the developing climate law field.