

# **Climate change litigation in the Anthropocene: new pathways or dead-end streets?**

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# **1) ACTING ON BEHALF OF FUTURE GENERATIONS**

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- What time-frame (next generation or children that haven't been born?)
- We cannot know the moral and non-moral value preferences of future generations since they cannot communicate with us
- How to deal with uncertainties – are we capable of quantifying our impact on a longer time-scale (variables, different scenarios', intervening events,...)
- Our actions fundamentally shape the future generations, how can we then act on behalf of them?
- Standing in the legal sense of the word – immediate nexus, causality, ...

# Arguments contra

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| THE PEOPLE V. CLIMATE CHANGE |

## 'Biggest Case on the Planet' Pits Kids vs. Climate Change

A pioneering lawsuit against the U.S. government on global warming won the right to a trial. Now Trump wants an appeals court to cancel it.



- **Public trust doctrine:** it suggests that certain natural resources are shared property of all citizens, stewarded in perpetuity by the state; the government has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust (*Joseph Sax*)
- **Foster v Washington Department of Ecology (2015):** *The navigable waters and the atmosphere are intertwined and to argue a separation of the two, or to argue that GHG emissions do not affect navigable waters is nonsensical. Therefore, the Public Trust Doctrine mandates that the State act through its designated agency to protect what it holds in trust. The Department of Ecology is the agency authorized both to recommend changes in statutory emission standards and to establish limits that are responsible.*

# Way out?

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- **Juliana vs United States (2016):** *Exercising my reasoned judgment (...), I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and order society. Just as marriage is the ‘foundation of the family’, a stable climate system is quite literally the ‘foundation of the family’, a stable climate system is quite literally the foundation of society, without which there would be neither civilisation, nor process’.*
  - scope: acidification
  - applicability: not legislated away
  - political question: effective judicial protection
  - enforceability: national sovereignty – due process

# Way out (II)?

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## **2) CONSTITUTIONAL DUTIES TO THE RESCUE?**

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- **inherent vagueness**: constitutional right to a healthy environment leaves too broad margin to the competent authorities in order to be enforceable in court – more fleshed out at decision-making level
- **political question-doctrine** (separation of powers) – not capable of thwarting political discretion in matters of primary national importance (balancing exercise + marginal discretion for the courts)

# Arguments contra

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# Norwegian campaigners lose court case against Arctic oil drilling

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Oslo district court told Greenpeace and co-plaintiffs exploration for new reserves did not violate citizens' constitutional right to a healthy environment



- **Article 112 of the Norwegian Constitution**
- “Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
- In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
- The authorities of the state shall take measures for the implementation of these principles.”

# Way out?

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- The organisations won a partial victory in January, when the Oslo District Court recognized the citizens and future generations constitutional right to a healthy environment.
- However the Court deferred from scrutinizing the balancing exercise to be carried out by the Norwegian government (broad margin of appreciation)
- In its ruling, the court dismissed the environmentalists' arguments that Norway should be responsible for greenhouse gas emissions from oil and gas exported to other nations, rather than just from exploration and drilling off Norway.
- The court also said the risks of Arctic drilling were limited.

# Way out (II)?

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# **3) SUING PRIVATE OIL COMPANIES FOR DAMAGES?**

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- **standing:** *‘In view of the plaintiff’s allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their world-wide accumulation over long periods of time, the pleading make clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time’ (Kivalina)*
- **causality – attribution:** *‘The Court is left without any guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the Earth’s atmosphere, or in determining who should bear the costs associated with the global climate change that admittedly results from multiple sources around the globe’ (California vs General Motors)*

# Arguments contra

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# Ninth U.S. city sues big oil firms over climate change

Sebastien Malo

3 MIN READ

NEW YORK (Thomson Reuters Foundation) - A California city has filed a lawsuit against 29 oil companies seeking damages to pay for the costs of rising sea levels it blames on climate change, the ninth U.S. community to take the fossil fuel industry to court.

The San Francisco suburb of Richmond filed a civil case in a California court on Monday against the energy giant Chevron, its biggest employer, and other oil companies for planet-warming carbon dioxide emissions dating back to 1965.

“Defendants have known for nearly 50 years that greenhouse gas pollution from their fossil fuel products has a significant impact on the Earth’s climate and sea levels,” the complaint said.

## Just 100 companies responsible for 71% of global emissions, study says

A relatively small number of fossil fuel producers and their investors could hold the key to tackling climate change



▲ An oil rig exploring for oil and gas. A new report says more than 50% of global industrial emissions since 1988 can be traced to just 25 companies. Photograph: Dazman/Getty Images/Stockphoto

Just 100 companies have been the source of more than 70% of the world's greenhouse gas emissions since 1988, according to a new report.

The [Carbon Majors Report \(pdf\)](#) “pinpoints how a relatively small set of fossil fuel producers may hold the key to systemic change on carbon emissions,” says Pedro Faria, technical director at environmental non-profit CDP, which published the report in collaboration with the Climate Accountability Institute.

# Way out?

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- **science of attribution:** 15 percent of the sea-level rise can be attributed to the 20 largest fossil fuel producers and 6 percent can be linked to Exxon Mobil, BP and Chevron
- **preemption:** does the Clean Air Act blocks claims based upon public nuisance grounds?
- **permit defence:** permitted activities & ‘everybody adds to warming’ <> companies knew about the adverse effects of their activities yet still decided to proceed (cf. Tobacco-cases)

# Way out (II)?

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# **4) PROJECT REVIEW AND CLIMATE CHANGE CONSIDERATIONS?**

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- **EIA/SEA:** focus on localized effects – global effects of climate change are not to be taken into account
- **legal uncertainty** – global impacts better regulated by global instruments (quid aviation...) – no real mitigation possibilities at project level
- **airports:** only emissions produced during landing and take-off (LTO-emissions), and not the “cruise-emissions”, are legitimate scientific grounds for the case in question.
- **impact evaluations often not binding** (mere procedural tool)– can easily be set aside by the permit issuing agencies

# Arguments contra

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## Climate change can't halt Vienna third runway: court

June 29, 2017



A key travel hub between western and eastern Europe, Vienna airport handled 23 million passengers last year and has been wanting to construct the runway for a decade

A key travel hub between western and eastern Europe, Vienna airport handled 23 million passengers last year and has been wanting to construct the runway for a decade.

Austria's constitutional court on Thursday overturned a landmark ruling that had blocked Vienna airport's plans to build a third runway because of climate change worries.

- **Directive 2014/52/EU:** ‘*Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change.*’
- **combined with constitutional provisions:** short-term gains in form of commerce or jobs are outweighed by the likely economic consequences of a destabilized climate
- analogy with recent case-law developments before CJEU – *effet utile* of the climate change legislation
- **bottom up approach mandatory** in view of limited progress at international level (cf. aviation)

# Way out

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# Tourism is four times worse for the climate than we thought



## Coal mine planning permission refused due to climate concerns

Catherine Harte | 23rd March 2018



*Druridge Bay*

Source: Wikimedia commons

Plans for an open-cast coal mine beside a stretch of coast in Northumberland have been overturned. Local councillors had previously approved the controversial plans for the site at Druridge Bay despite protests from environmentalists. CATHERINE HARTE reports