Anthropocene Accountability Litigation: Confronting Common Enemies to Promote a Just Transition





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Roadmap

- What Is “Anthropocene Accountability Litigation”?
- The Concept of “Common Enemies”
- The U.S. Government as “Enabler-in-Chief”
- Suits Against the Fossil Fuel Industry
- Suits Against Factory Farms
- Proposals for Reform
  - ✓Leverage Public Health and Welfare Angle
  - ✓Mandatory Phaseouts to Sustainable Alternatives
  - ✓Role of COVID-19 in Propelling this Strategy
  - ✓Strategies for a Shared Path to a Just Transition



The Anthropocene Context: “We Are the Virus”



What Is Anthropocene Accountability Litigation?

- Starting Premise: Existing regulation of climate impacts is insufficient or nonexistent
- Types of Climate Accountability Lawsuits
  - ✓Suits against government that seek to raise regulatory ambition
  - ✓Suits against private sector entities for damages to ensure that entities responsible for widespread harms pay their fair share
- These accountability lawsuits are not limited to climate change context
- Focus of presentation: lawsuits against fossil fuel industry and industrial animal agriculture as "common enemies" impeding efforts toward a "just transition"
- Just Transition involves many facets – this presentation focuses only on the need to transition away from fossil fuels and industrial animal agriculture

The Concept of “Common Enemies”

- Both industries cause massive climate change impacts
- Federal gov’t enables climate change impacts from these industries
  - ✓Regulatory gaps and exclusions
  - ✓Subsidies
- Both industries disregarded knowledge of these impacts
  - ✓Proceeded with business as usual
  - ✓Actively campaigned against efforts to regulate their activities
    - Climate denial science
    - Right-to-farm laws

The U.S. Government as “Enabler-in-Chief”

Regulatory Gaps and Exclusions for Fossil Fuel Industry

- Trump administration’s withdrawal from Paris Agreement
- Executive Order 13783 (2017) – protects fossil fuel industry from regulation
- Where is our climate change regulation even under Biden?

Regulatory Gaps and Exclusions for Animal Agriculture Industry

- Factory farms are largely exempt from regulation under CAA and CWA
- EPA has not exercised its authority to use CAA to regulate animal agriculture industry’s GHG emissions, which is shocking given the dangerous levels of methane emissions

Federal Subsidies

- Both industries are drowning in them
- $20 billion annually for fossil fuel industry; $38 billion for animal agriculture

Suits Against the Fossil Fuel Industry

- These cases have exploded in the U.S. in the past four years
- About 20 states, counties, and cities have sued a common set of "carbon major" fossil fuel defendants (Marin County filed one of the first suits)
- From one local official in one of these cases: The focus is on *"what they knew, when they knew it, and what they did with that information."*
- Procedural History of the Cases
  - ✓Industry defendants sought to remove cases to federal court
  - ✓Circuit courts concluded that these cases should proceed in state court
  - ✓U.S. Supreme Court issued narrow procedural decision on Baltimore City's case in May '21
  - ✓"Jury still out" on disposition of merits of federal vs. state court issue

Five Reasons for Cases to Succeed on Merits

1. Extent of **contribution** (88 companies account for 2/3 of global emissions)
2. Increasing strength of the **climate attribution science**, which has become more conclusive since the first line of cases was filed
3. Extensive evidence of **what the fossil fuel industry defendants knew** and how they tried to deceive public with campaign seeking to dilute the certainty behind the science
4. If these cases remain in state court, the outcomes will not be bound by the unfavorable **federal displacement** reasoning from *American Electric Power* and *Kivalina*
5. Dismissal for lack of **standing** not an issue because the gov't plaintiffs (states, counties, and cities) have standing to sue on behalf of citizens to address climate change impacts based on "special solicitude" reasoning in *Mass v. EPA*.

Suits Against Factory Farms

- Involve mostly suits against CAFOs; some recent ones against gov't
- Typically focus on public nuisance and impacts to health, property, environment, and marginalized communities
- Emerging lines of cases on impacts to animals and CAFO workers
- Major Obstacle: Right-to-Farm laws (constitutionality of these laws upheld in October '20 in U.S. Supreme Court's denial of review)
- Lost Opportunity: These cases can (but haven't yet) focused on public nuisance based on climate impacts, primarily from methane

Proposals for Reform



Proposal #1:
Leverage Public Health and Welfare Angle

- U.S. federal environmental legislation as a model
- Tobacco and opioids litigation as a model
- To see results, the need to transition has to be framed as an imminent threat to human health, welfare, and economic interests







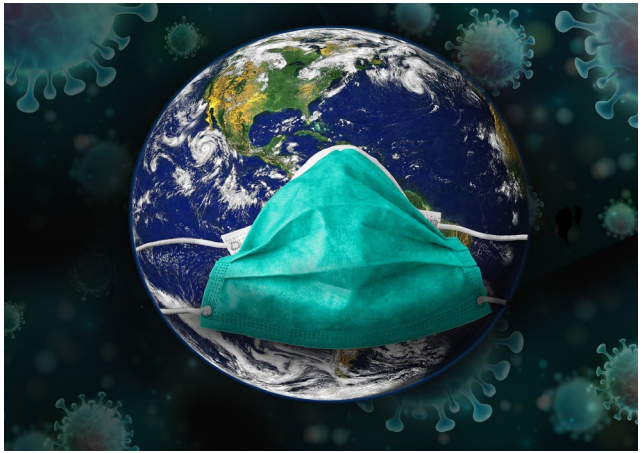
Proposal #2:
Mandatory Phaseouts to Sustainable Alternatives

- Montreal Protocol phaseout regime as model
- Phaseout of lead in gasoline under CAA
- Transition to renewables and plant-based foods needs to be compelled to comply with ticking clock of IPCC projections
- The market is facilitating these transitions, but it's not happening fast enough
- COP 26 "phasedown" language insufficient



Proposal #3:
Leverage COVID-19 Pandemic to Propel Transition

- Short-term lockdowns across U.S. and the world yielded significant GHG reductions and many tangible local benefits
- Massive financial setbacks for both industries
  - ✓ Both industries already retooling and scrambling to remain viable prior to 2020 / pandemic was knockout blow for some
  - ✓ Surprising pivots by BP and Shell toward renewables
  - ✓ Plant-based food industry and factory farm impacts
- Challenges remain in seeking to capitalize on these encouraging developments
  - ✓ Human tendency to cling to status quo during times of upheaval
  - ✓ Trump administration responded by propping up the fossil fuel and animal agriculture industries during pandemic
  - ✓ Problem of “revenge pollution”



Proposal #4:
Strategies for a Shared Path to a Just Transition

- Disable destructive **subsidies** and provide subsidies that promote transitions to clean and renewable energy and plant-based foods
- Implement **carrots and sticks** to promote positive activities and punish destructive activities on path toward just transition
- Follow the **model of coal to promote just transition** for oil and gas and animal agriculture
- Scale up California's **regulation of methane** on dairy farms to federal level and, ultimately, implement legislation to phase out factory farms
- Sen. Booker (D-NJ) proposed moratorium on large CAFOs, https://cutt.ly/7PUrkBH

Closing Thoughts:
In the Midst of a Massive Legal and Social Revolution

1. First they ignore you
2. Then they laugh at you
3. Then they fight you (we are here)
4. Then you win

- The fossil fuel and factory farm industries are facing the fight of their lives now and their demise is written on the wall.
- Imagine the possibilities of a more just and sustainable society when massive corporations aren't running and ruining our lives.

Thank You! Questions?

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