

# Science and Environmental Litigation



By *Chuck Dinerstein* — August 21, 2018



Courtesy of Jena Fuller [1]

The judiciary frequently acts in its role as a counterbalance to executive and legislative action and non-action. A new article in *Nature Climate Change* finds patterns of climate change litigation identified in the Sabin Center for Climate Change database, a part of Columbia's School of Law. As it turns out, there are some instructive patterns, and we begin to see the role of Science – with a capital S.

## **The Who and Why of Litigation**

Who files these cases? - Environmental non-government organizations were the largest plaintiff, initiating 42% of cases, industry followed at 30%, with city, state and federal government involved in about 11%. The Sabin database contained 838 cases from 1990 to 2016.

- 46% dealt with atmospheric environmental issues especially coal-fired power plants
- 8.5% dealt with energy efficiency or renewables
- 4% addressed water quality
- 8% raised concerns about biodiversity

The courts were asked to address the reduction in greenhouse gases, to assess responsibility for environmental impacts and as a way to change both corporate behavior and public debate (the latter presumably through policy).

For those interested in keeping some form of score, in those cases involving atmospheric environmental issues, the courts more often sided with the “anti-regulators.” On the other hand, “pro-regulatory” litigants won more often when the cases involved issues of energy. And whether it was an NGO or an industrial group acting as plaintiff, they were generally less successful than the defendants. The authors felt that this might reflect both weaker cases and the courts more often

deferring to the judgment of state officials.

## **The Who and the Where**

To file a court case, the plaintiff must have “standing,” a legal term that establishes that the plaintiff has suffered some injury [1] or that there is a causal relationship between the defendant’s actions and those injuries. In establishing standing, NGOs often found that collaborating with local stakeholders was helpful. If the NGO could not demonstrate “their” injury, then an alliance with a local community group who had suffered injury got them a seat at the plaintiff’s table. These collaborations were not limited to the NGOs; industrial litigants found that joining forces with other large business within the sector with also in their interest. The authors suggest that these collaborations helped to demonstrate a larger group of concerned citizens, helped to mask disagreements among the stakeholders and in some cases gain otherwise unavailable legitimacy.

The where of litigation is referred to as venue - the jurisdiction in which the case is heard. The plaintiff’s goal is to identify the most favorable court for hearing their case. Delaware is home to many corporations because its corporate laws frequently favor their concerns, which has resulted to more corporate litigation in that state which in turn creates a large body of case law to serve as precedence. California is a more favored venue when statutory concerns are pivotal, because of their strict environmental rulings and the case laws that have flowed from those decision. And in both instances, prior case law often provides a sense of how the courts may act.

## **The role of science**

Unsurprisingly, both NGOs and industry felt that scientific evidence was an essential factor in the court’s ruling. Equally unsurprising was that the litigants offered differing evidence and used it in differing ways. The “pro-regulatory” litigants, the NGOs, used their scientific evidence to establish a causal link between the defendants and the injury. This could serve two purposes, first to warrant their standing before the court and then to substantiate the environmental effects causing the injury. The “anti-regulatory” litigants also found the same two uses; using the “dismal science” of economics to demonstrate their economic injury, and the environmental science to refute the claims of the plaintiffs.

The researchers did not review the court transcripts, so what science and how it was presented remains unknown, but from studying the Court’s written judgments they found that scientific evidence was cited in roughly half the cases; it made no difference whether it was for or against regulation.

So what can we conclude? Everyone brings their own “scientific evidence” to the table; that their evidence differs is not a flaw in the scientific method, it is a feature. Scientific theory and evidence represent are a best current approximation, and there is always an unknown element. So our evidence will differ, only time and further replication will push us towards the “right” answer. As the authors write:

“The results turn on factors such as the roles courts think are appropriate for the judiciary in influencing important environmental, social and economic policy questions, how they react to scientific evidence that relates to climate change presented before agencies or during civil trials

and what remedies they are willing to impose.”

The question we need to ask is whether a courtroom is the best venue for that discussion. The courts act on these matters because the other branches of the government are unable or unwilling to have this discussion; I think that those other branches are as able as the courts so that just leaves unwilling.

[1] Injury does not have to be physical, it can be emotional or anything that reflects a form of damage.

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