New York City v. Big Oil

A New Opportunity to Address Climate Change in the Trump Era?

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February 2018
1. Introduction

On January 9, 2018, the City of New York presented a lawsuit against the five largest oil and gas corporations active within its boundaries: British Petroleum (BP), ExxonMobil, Chevron, ConocoPhillips, and Shell. The plaintiff is claiming that these corporations knowingly discharged massive quantities of greenhouse gases (GHG) into the atmosphere and that, under the widely established ‘polluter pays’ principle, they should be deemed responsible for the costs of remediation. The plaintiff is also asserting that the defendants orchestrated a long-standing campaign of misinformation and doubt-creation to delay regulation of the fossil fuel industry.¹

*City of New York v. BP p.l.c.* is only the latest case whereby an American city has brought fossil fuel companies to court for their active role in furthering climate change. Similar lawsuits proliferated in California in 2017, when separate cases were presented by the Cities of San Francisco, Oakland, and Imperial Beach, and by the Counties of Marin and San Mateo.² While the merits of these lawsuits are varied – and it will not be easy for the plaintiffs to provide sufficient proof that clear violations of the law were perpetrated – these legal cases carry political weight, and as a result may even exceed their legal significance. In a period that has seen the greatest federal rollback of climate change litigation, cities standing up to the fossil fuel giants represent another important milestone in a transition towards multi-level climate change governance, where local governments are increasingly taking the lead in combating climate change.

The aim of this article is to provide both a legal and political analysis of *City of New York v. BP p.l.c.*, which is today the most significant case of its kind given the sophistication of the plaintiff’s claim and the importance of the forum in which the lawsuit is being brought – namely New York, the largest city in the United States. Finally, this article will argue that – despite the fact that the Federal Government’s agenda continues to neglect climate change – significant progress is being made at the municipal level, with cities increasingly stepping up their efforts to address the issue.

¹ *The Climate Institute | New York City v. Big Oil: A New Opportunity to Address Climate Change in the Trump Era?*
2. **City of New York v. BP p.l.c.: A Legal Analysis**

In recent years, cases of climate change litigation worldwide have increased exponentially in both number and success rates, to the extent that they have become a major legal phenomenon. Increasingly, when governments demonstrate a lack of political will to take regulatory action on climate change, other actors – such as private citizens or non-governmental organizations – are stepping in to fill this regulatory gap by challenging the agents responsible in court.

However, while climate change litigation has emerged as a powerful instrument for holding governments and public bodies to account for their policy decisions, no lawsuit has ever successfully obtained compensation from a private corporation for the latter’s alleged contributions to climate change. Rather, several high-profile cases such as *Kivalina v. ExxonMobil* and *Comer v. Murphy Oil USA* were dismissed in US courts according to the rationale that climate change regulation is an inherently political task.

Nevertheless, much has changed since the aforementioned cases were litigated, and courts today are beginning to rule more frequently on climate change laws worldwide. In this vein, *City of New York v. BP p.l.c.* may represent the ideal means – given the public forum in question and political context – by which the prior trend might finally be reversed. To better understand this case, as well as its prospects, the following section will analyze the main legal arguments proposed by the lawsuit.

### 2.1 Causes for Action: Public Nuisance, Private Nuisance, and Trespass

In bringing the lawsuit to court, *City of New York v. BP p.l.c.* relies on three main causes for action. First, the plaintiffs are claiming – by rather traditional means – that fossil fuel companies’ continued activities have resulted in the torts of public negligence, private negligence, and trespass against the City of New York.

The common law concept of public nuisance is used whenever the collectivity is damaged by the actions of a third party. In the present case, this signifies that the defendants’ actions – namely promoting and commercializing fossil fuels – are unduly threatening or harming the City’s public areas and inhabitants. These impacts are visible in the form of sea level rise and extreme weather events such as floods, storms, and high temperatures. To support this argument, the lawsuit catalogs the damages that New York suffered from Hurricane Sandy, along with the rebuilding costs subsequently borne by the City administration. If these arguments are proven, it would follow that under the ‘polluter pays’ principle, the defendants should cover all of the costs for remediation and reparation deriving from the stated climate change-related incidents. The
concept of public nuisance is powerful and well established, and it was successfully employed on multiple occasions in US legal history. These included high-profile public interest litigations, such as those targeting tobacco, asbestos, and lead paint.10

Similarly, the concept of private nuisance applies the reasoning outlined above to the property that uniquely belongs to the City of New York. Indeed, the damages resulting from climate change-related incidents not only endanger public areas, but would also threaten private property in the City. Rounding off this argument is the third – and similar – cause for action: namely, trespass. The plaintiff is claiming that – through extreme weather events, associated cases of flooding, and heat waves – the defendants are illegally infringing on the City’s property, and should therefore be held responsible for trespass.

Evidently, these three arguments rely on the assumption that the defendants’ actions are demonstrably – and directly – contributing to anthropogenic climate change. Today, these claims are admissible in court thanks to the significant advancements that have been made in climate science. Indeed, the relationship between GHG emissions and sea level rise or other extreme weather events has repeatedly been recognized with high levels of confidence both inside and outside the courtroom, providing the City of New York with solid grounds for its lawsuit.11 To further strengthen this argument, the plaintiff is claiming that the five defendants are – according to peer-reviewed literature – responsible for over 11 percent of all carbon and methane pollution from industrial sources since the industrial revolution.12

2.2 The Accusation of Intentionally Misleading the Public on Climate Change

While the concepts of public nuisance, private nuisance, and trespass make up the legal core of the current lawsuit, the truly innovative element of this case is the allegation that – over the last four decades – the defendants have orchestrated misinformation campaigns aimed at delaying regulation of the fossil fuel industry, allowing them to protect their businesses and assets. Interestingly, the allegation is not presented as a cause for action, but it nevertheless permeates the lawsuit and appears as its de facto central argument. Indeed, 19 of the case document’s 65 pages are devoted to this contention, while only 5 pages are dedicated to analyzing the three causes of action.

The City’s allegation is grounded in the vast body of peer-reviewed literature that has explored the fossil fuel industry’s systematic attempts to discredit climate science. In particular, the case document references a seminal paper by Supran and Oreskes analyzing ExxonMobil’s climate change communications between 1977 and 2014, which concludes that – while ExxonMobil has long been aware of the negative implications of GHG emissions – the firm proactively spread doubt regarding climate science through public outlets such as advertisements and supporting newspaper articles.13
The City of New York’s contention that the fossil fuel companies in question have misled the public on climate change derives from two key accusations. Firstly, the plaintiffs are claiming that the defendants have for decades known about the adverse consequences of burning fossil fuels. Among the evidence provided, we find an analysis of the external communications of API – the national trade association for the oil and gas industries, of which the defendants are a part – showing that it launched the first investigation into the adverse consequences of fossil fuel use back in 1950, and that by 1968 it had already recognized the fact that carbon dioxide emissions were ‘almost certain’ to cause increases in temperature.\(^4\)

The second accusation is that, while the defendants were aware of their contributions to climate change, they engaged in campaigns designed to cast doubt on climate science. These campaigns relied on a number of lobbyists and think tanks with close relations to the fossil fuel sector – such as the Global Climate Coalition and the Global Climate Science Communications Team (GCSCCT) – to channel millions of dollars into doubt creation. As part of this strategy, the fossil fuel industry funded a number of scientists to discredit accepted climate science, as in the case of Dr. Wei Hock Soon, who between 2001 and 2012 received over $1.2 million from fossil fuel interests, including API. Dr. Soon published several papers denying the existence of climate change, going so far as to attribute climate change to solar activity; one of these articles alone earned Soon a payment of $76,000 from ExxonMobil.\(^5\) In addition, the defendants have further published numerous newspaper articles with the aim of spreading doubt. A prominent example of this was an ExxonMobil advertorial that appeared in the New York Times in 2000. Entitled ‘Unsettled Science,’ it claimed that not enough was known about climate change to justify regulatory action. What renders these accusations particularly relevant is the fact that, as revealed by Supra and Oreskes, internal documents of ExxonMobil – both peer-reviewed and non-peer-reviewed – acknowledged the fossil fuel industry’s contributions to climate change at the same time that the company was publicly denying the phenomenon’s existence, hence suggesting malicious intent on the part of the company and industry.

### 3. Cities versus the Federal Government:

**A Political Analysis**

Even though the lawsuit’s outcome remains in doubt, it nevertheless has significant political ramifications that exceed its legal significance. The ensuing section is dedicated to a political analysis of the case, with the aim of understanding its implications for the future of climate change regulation.
3.1 Political Background: A Year of Great Environmental Achievements for America?

January 20 marked the end of the first year of Donald Trump’s presidency, defined by the administration as a “year of great environmental achievements for America.”16 The year has, from the outset, been dominated by anti-climate change discourses, with the president repeatedly questioning the validity of climate science while arguing in favor of mass repeals of climate legislation.17

One year in, the Trump administration has already rolled back several Obama-era milestones of climate change protection. In particular, the ‘Promoting Energy Independence and Economic Growth’ executive order of March 2017 proposed rescinding a number of prior presidential regulatory actions targeting climate change, and called for a review of the Clean Power Plan – a piece of legislation that is considered crucial for the US, and in turn the international community, to meet the 2° Celsius target.18 Furthermore, numerous measures were adopted to undermine the diffusion of renewable energy, including the approval of the Keystone XL Pipeline conveying oil sands from Alberta, Canada into the US, and a controversial 30 percent import tariff on solar panels.19

At the international level, meanwhile, the US has announced its intention to withdraw from the Paris Agreement – which President Trump described as a “bad deal for America”20 – thereby forfeiting the country’s leadership on climate change. Contrasting accounts have since emerged from the Executive Branch, with Trump recently stating in an interview with Britain’s ITV that the US could eventually re-enter the agreement under more favorable conditions.21 These statements remain unclear, however – particularly given the voluntary nature of the Paris Agreement, which utilizes a bottom-up approach that provides ratifying countries with the freedom to establish their own targets through ‘Nationally Determined Contributions’ (NDCs).

3.2 The Growing Role of Cities in Addressing Climate Change

While this type of hostile regulatory environment is clearly detrimental to the United States’ environmental protection standards, it may be argued that this has also proven instrumental in bringing to life new models of governance aimed at decentralizing climate change leadership. Indeed, as Washington’s leadership on climate change fades, the federal government’s former role in this area is increasingly being filled by progressive local governments intent on stepping up efforts to combat climate change. City of New York v. BP p.l.c. is perhaps the most-high profile case within this growing movement, and its political implications may therefore be significant.
Prior to the emergence of this lawsuit, several other initiatives at the municipal level drew attention to the growing conflict between the federal and local governments regarding climate change. Among the first wave of initiatives were five separate lawsuits targeting fossil fuel companies that were filed in California in July 2017, including cases representing the cities of San Francisco and Oakland. Although smaller in scale, these lawsuits are similar to the one presented in New York City. Shortly thereafter, during COP23, California Governor Jerry Brown launched ‘America’s Pledge on Climate Change’ – a network of US cities, states, and businesses united to combat climate change in an attempt to show that, despite the Executive Branch’s stance on climate change, the United States would still seek to remain a leader in addressing this phenomenon on the local level. Both New York City and San Francisco are a part of this coalition. While these initiatives hinted that a transition was underway, City of New York v. BP p.l.c. represents a new peak for this movement – whereby the largest city in the country, as well as one of the most influential cities in the world, is claiming that fossil fuel companies are causing climate change and should therefore take responsibility for their role in furthering it.

The lawsuit conveys a powerful political message, particularly by shining the public spotlight onto a range of arguments regarding climate science and the behavior of fossil fuel companies. The case is also perceived as sending a strong message of resistance, with a city standing up to the federal government and demonstrating that it not only refuses to stop addressing climate change but intends to intensify its efforts as well. This may serve to inspire other cities increasingly affected by climate change to follow New York’s example. In the meantime, Mayor Bill De Blasio further announced that the City intends to divest $5 billion from pension funds with investments in fossil fuels. This action – announced in parallel to City of New York v. BP p.l.c. – is highly significant, as a large number of US cities have invested major sums of money in the fossil fuel industry. It is quite conceivable, therefore, that ripple effects from this other decision in New York may likewise have important consequences further afield.

Ultimately, it can be expected that City of New York v. BP p.l.c. will have potentially major political implications irrespective of the case’s outcome. It is also worth noting that should the lawsuit succeed – either in trial or via settlement – it may open the gates to a whole new wave of climate change litigation in the United States. Indeed, the case closely resembles the lawsuits previously brought against tobacco firms, which led to the highest settlements in legal history. Should the City of New York triumph in holding fossil fuels companies to account for their collective role in furthering climate change, this may launch a trend that not even the most climate skeptic government will be able to hold back.

3.2 The Political Implications of the Doubt-Creation Argument
One last political implication that deserves further attention stems from the argument regarding doubt-creation. While it has often been claimed that fossil fuel companies have repeatedly misled the public on climate change, this allegation has never actually appeared in court prior to the latest wave of climate change litigation.

Claiming that fossil fuel companies are responsible for misleading the public on climate change is particularly relevant in the United States – a country with especially high rates of climate skepticism, and where a study by Leiserowitz et al. recently demonstrated that only 58 percent of the population understand that global warming is primarily anthropogenic. A primary explanation for this lack of popular awareness lies, it has been argued, in the massive disinformation campaigns that have been launched by the fossil fuel industry over the preceding decades, which have successfully convinced large sections of the general public that the debate on the existence and causation of climate change remains unsettled.

Climate change misinformation extends to top officials of the current administration, from President Donald Trump to EPA head Scott Pruitt. For example, in his interview with ITV, Donald Trump claimed that the earth is in fact cooling, and that this is why the term ‘global warming’ is being substituted by ‘climate change’ – a claim that is evidently false. A week later, Scott Pruitt claimed in an interview that civilizations flourished under warm climates, and that the fear of climate change is based on a mistaken assumption that scientists are able to determine what temperatures are desirable in the long run. Such statements – along with many others emerging from these and similar interviews – are clearly contradicted by scientific evidence.

In this context, City of New York v. BP p.l.c. has an even greater political importance, as the lawsuit is likely to direct public attention towards the issue of climate change misinformation. Indeed, the case document relies heavily on current science to prove that the debate on climate change is indeed settled within the scientific community, and that the consensus among climate scientists is around 97 percent. Furthermore, the plaintiffs demonstrate – through a detailed presentation of peer-reviewed literature – that the so-called ‘consensus gap’ was only a false narrative orchestrated by misinformation campaigns, for which the defendants are deemed responsible.

Until recently, the accusations that the fossil fuel industry had misled the public on climate change were mainly confined to academic circles. Now, however, they are finally beginning to appear in court. Should such a court of law acknowledge the evidence supporting these claims, and rule that fossil fuel companies and lobbyists did in fact mislead the public in this area, it is possible that the debates regarding climate science may finally be – at least in part – settled, and numerous climate change myths that have plagued public perceptions for years debunked.

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7 The Climate Institute | New York City v. Big Oil: A New Opportunity to Address Climate Change in the Trump Era
4. Final Remarks

As the US federal government continues to roll back climate change legislation, cities are not standing idly by. Indeed, cities around the globe are increasingly assuming leadership in the fight against climate change. In this context, *City of New York v. BP p.l.c.* represents an apical moment to date. This article has endeavored to highlight and analyze the case’s significance, with a particular focus on its legal and political implications.

From a legal point of view, the lawsuit resorts to traditional argumentation regarding public negligence, private negligence, and trespass. These arguments are, however, complemented by a novel and potentially powerful new one – namely, the assertion that the companies in question knowingly misled the public about climate change. This argument was not utilized in the past cases that ultimately failed and may therefore represent a significant legal innovation.

On a different level, the case will likely have two major political implications. Firstly, it represents a climax in the internal conflict between cities and the US federal government. Having the largest city in the country sue five fossil fuel giants sends a clear message that, despite any type of regulatory rollback on the part of the federal government, cities will continue to combat climate change. Secondly, seeing the argument regarding the fossil fuel industry’s attempts to mislead people on climate change finally appear and play out in a prominent legal case may act as a means of mass debunking, particularly if the court in question recognizes and rules that the defendants did indeed intentionally mislead the public.

Finally, given the current political and environmental context, it is of paramount importance that every layer of governance participates in addressing climate change. In this vein, *City of New York v. BP p.l.c.* represents a welcome step in the right direction – whatever the lawsuit’s ultimate resolution.

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Notes


4. Ibid.


6. Comer v. Murphy Oil USA, 585 F.3d 855, 879-80 (5th Cir. 2009).

7. See supra, no. 1.

8. For the Legal Definition of Public Nuisance, see: Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 539 (3d Cir.2001).

9. Ibid.


12. See supra, no. 1.


14. See supra, no. 1.

15. Ibid.


