Climate Change:
Giving Legal Advice Without Statutory Guidance

By Jim Blackburn, Bryan French and Mary Q. Kelly

Today, we live in a world where our climate is changing. The change portends to be among the most significant environmental issues in history, yet we have no master climate change statute in the United States. Without overall statutory guidance, there is a wide array of legal actions from many different directions arising around issues, impacts, and harms of climate change. In this paper, the authors will try to make sense of this jumble of legal action and offer some practical tips on how to advise clients.

The Science of Climate Change

One of the foremost climate scientists, Katharine Hayhoe, Ph.D., is also an evangelical Christian. She often starts her scientific talks about climate by saying that she doesn't believe in climate change. She goes on to state that she does believe in her Christian faith. But climate change, she continues, is not a belief, it is a fact – a scientific fact.

Indeed, climate change is an accepted fact among almost all scientists with knowledge of the subject. In 1988, global climate experts formed the Intergovernmental Panel on Climate Change (IPCC), which has become the repository of global expertise on climate change. The IPCC issues science-backed reports on climate changes. As shown in *Figure 1*, the IPCC's 5th Annual Report, issued in 2017, stated that our average global temperature has increased by almost 1 degree Centigrade from 1901 to 2012, with some areas already exhibiting average increases during that period of over 2 degrees Centigrade. (One degree Centigrade is equal to 1.8 degrees Fahrenheit.) And the global temperature continues to rise.

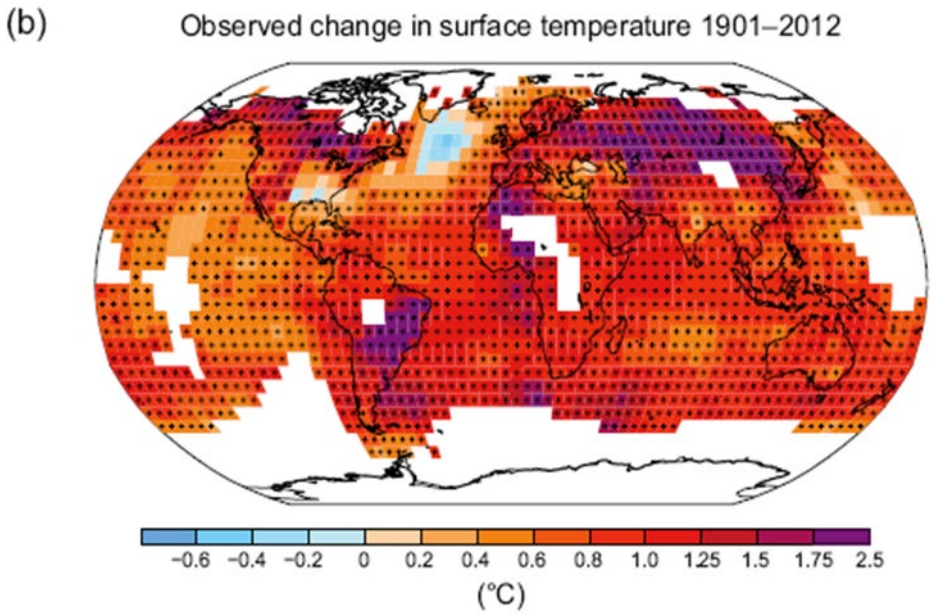

Figure 1. IPCC 5th Assessment Report, summary for Policy Makers showing average global temperatures in 2011-2020 reaching 1.1C above 1850-1900 average temperatures.[1] Source: IPCC.

Figure 2 is an excerpt from the IPCC Summary Report from 2023 on global warming and its causes. In the strongest statement on this issue to date, the IPCC has found that human activities have unequivocally caused global warming. This is an entity that chooses its wording carefully, and unequivocal is – well – unequivocal. I

Observed Warming and its Causes

A.1 **Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (*high confidence*). {*2.1, Figure 2.1, Figure 2.2*}**

Figure 2. Finding from IPCC 2023 Summary Report stating humans have unequivocally caused global warming.[2]

The science behind the IPCC's findings is solid. The findings demonstrate the current situation: that the effects of climate change are already being felt in the

[11] IPCC 5th Assessment Report, Summary for Policy Makers. https://archive.ipcc.ch/report/ar5/index.shtml Last Visited 1/27/2025.

[2] Finding from IPCC 2023 Summary Report stating humans have unequivocally caused global warming. https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf

increased severity of storms and droughts, in increased temperatures year after year, and in sea level rise. Less discussed, but equivalently serious, are the potential health effects of climate change. The effects on human health will be substantial, as are demonstrated in the lists in *Figure 3.*

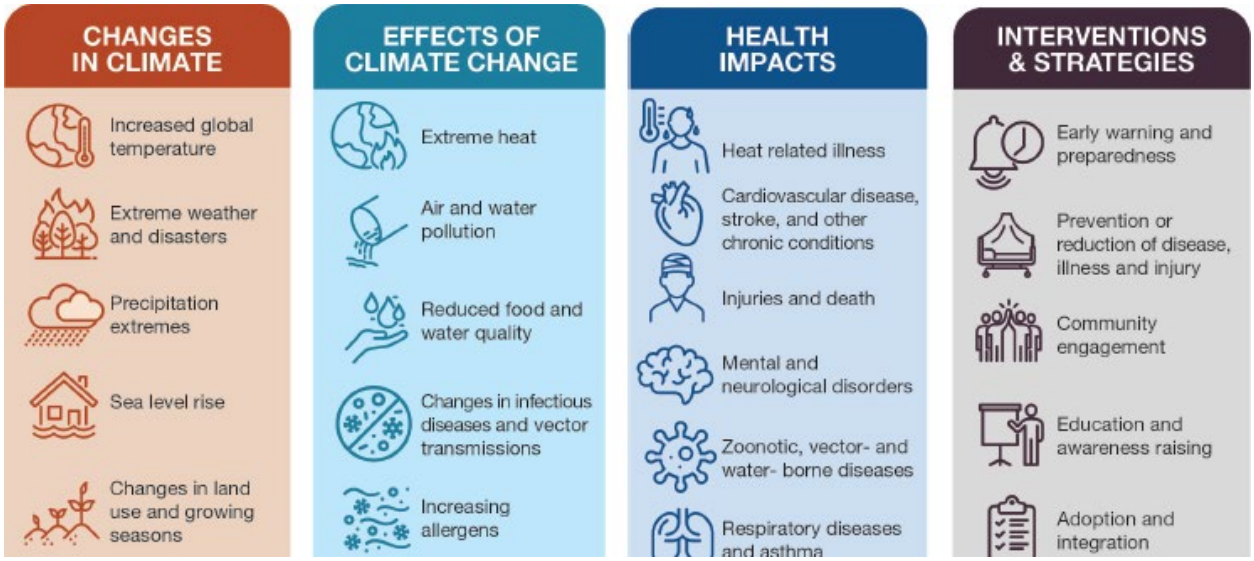

Figure 3. Image describing the causal relationship between climate changes and health impacts.[3] Source: National Institute of Environmental Health Sciences. https://www.niehs.nih.gov/research/programs/climatechange/health_impacts

The point here is that climate change will be one of the most disruptive environmental phenomena experienced by humans, and we and our activities are the sources of the disruption.

No Master Climate Statute

Those of us who practice environmental law are familiar with U.S. environmental statutes, including the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and other subject matter statutes that set out U.S. policies on air, water, waste discharges, and manufacturing processes.

With climate change, however, there is no overall master statute. There is no comprehensive statement of overriding climate policy set out in statute or regulation, and there are no reliable controlling definitions of the terms used to describe the

[3] Source: National Institute of Environmental Health Sciences (NIEHS), https://www.niehs.nih.gov/research/programs/climatechange/health_impacts

applicable risk-avoidance policies set out in various piecemeal statutes and agency regulations that address single aspects of contributing human activities. Instead, compliance with overall climate goals remains voluntary, except in California, which has enacted its own climate disclosure laws, SB 253 (Climate Corporate Data Accountability Act) and SB 261 (Climate-Related Financial Risk Act) in 2023.[4] Several other states, Illinois, Minnesota, New York, and Washington, are considering their own versions of California's laws.[5]

Important U.S. Supreme Court decisions are likely to affect holdings in climate cases. For example, the decision in *Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)* struck down what had been referred to in federal legal discussions as "Chevron deference." In the 1984 *Chevron* case, the Supreme Court ruled that the courts should defer to the agency interpretation when a statute was intentionally ambiguous or not clear. The *Loper* holding, almost 50 years later, eliminated such deference. The Supreme Court contended that a definition in an act of Congress must be strictly applied. In turn, *Loper* will likely increase the number of challenges to agency interpretations where an agency tries to bring climate change under that agency's regulatory structure. Similarly, after *Loper*, agencies can and likely will argue that they cannot expand the scope of their jurisdiction where statutory language is vague or unclear.

The impact of that decision can be seen in *Figure 4* which identifies the types of lawsuits that have been filed over climate change. As can be seen, the majority of these lawsuits concern expanding existing federal statutes to climate change issues. These cases are among those to be scrutinized under the *Loper* case which can be used to limit the expansion of agency jurisdiction into areas such as climate change that were likely not specifically called out in the legislation.

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[4] California Senate Bill 253 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253 and California Senate Bill 261 https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261 Last visited 1/27/2025.

[5] Ongoing Legal Battle Over California's Climate-Related Disclosure Laws: District Court Denies Motion for Summary Judgement, Vinson & Elkins Climate Change Update, Nov. 7, 2024. https://www.velaw.com/insights/ongoing-legal-battle-over-californias-climate-related-disclosure-laws-district-court-denies-motion-for-summary-judgment/ Last visited 1/27/2025.

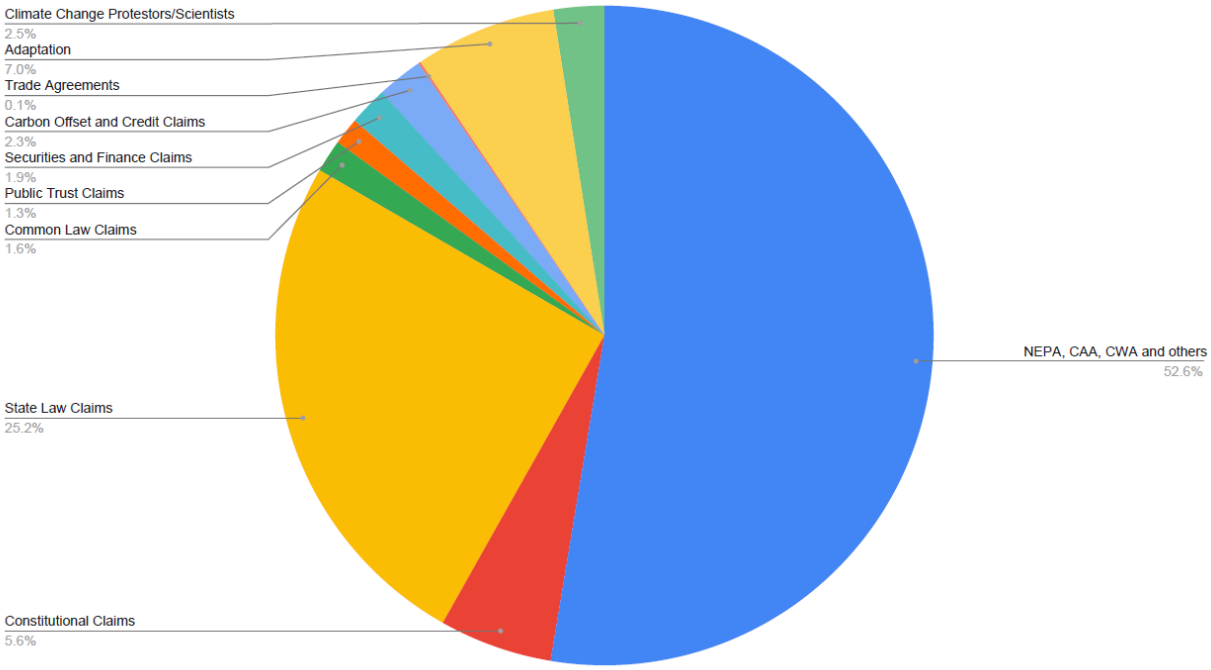

Figure 4. Graphic presentation of the subject matter of 2,433 cases pending in early 2025 in the United States. Graphic by Bryan French and Anna Stravato.

Although there are few environmental statutes in the United States at the federal level, there has been extensive action at the international level. The IPCC, the authority on climate change, has been issuing reports since 1990, as shown in the chart in *Figure 5*. Three major international treaties have been signed by most nations of the world. The original treaty is the Framework Convention on Climate Change from 1992 that set up the global community's institutional structure to address climate change. The second treaty, the 1997 Kyoto Protocol, was an ambitious, but ultimately unsuccessful, attempt to freeze emissions at 1990 levels. And in 2015, the International Paris Accords were signed in an attempt to limit the increase in the Earth's temperature to between 1.5 to 2.0 degrees Centigrade.[6] President Trump, however, upon his 2016 inauguration signed an executive Order to remove the United States from the Paris Accords,[7] rejoined by President Biden in

[6] United Nations Framework Convention of the Parties, December, 12, 2015 Twenty-First Session Paris Agreement 2015 https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf Last visited 1/27/2025.

[7] Press Release Michael R. Pompeo, Secretary of State "On the U.S. Withdrawal from the Paris Agreement, November 4, 2019 https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ Last visited 2/5/2025.

2021,[8] only to be rescinded again by President Trump on day one of his second term in office.[9] As discussed below, the net result of these executive actions diametrically opposed between different administrations creates market uncertainty.

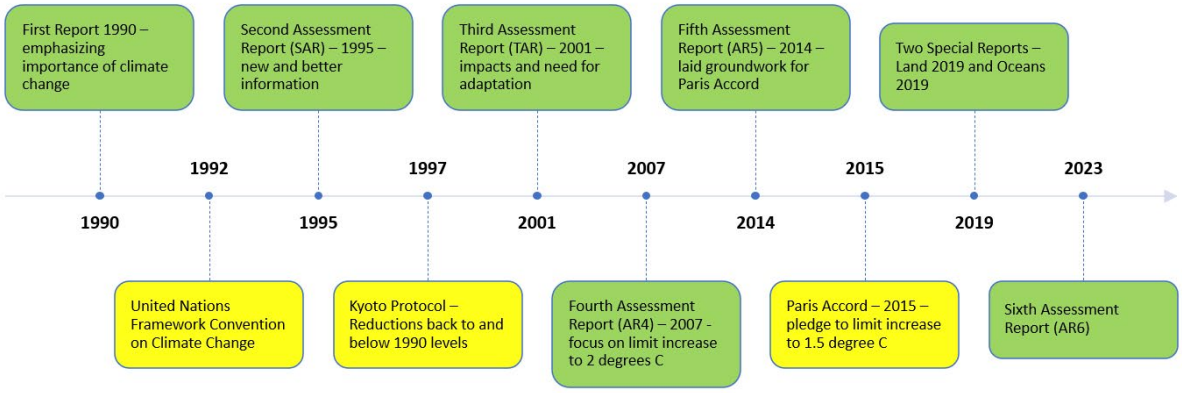

Figure 5. Chart showing the dates of various reports being issued by the IPCC in green and the dates of the three major international treaties on climate change in yellow. Figure by author.

After the signing of the 2015 Paris Accords, the attention of climate control experts turned to the practices that were needed to keep our global temperature from exceeding 1.5 to 2.0 degrees Centigrade. The IPCC conducted extensive research, and developed a striking image showing that we needed to reach net zero emissions by 2050 if we were to have a chance of limiting our global temperature rise to the desired range. That image, shown in *Figure 6*, has become the iconic graphic manifestation of the challenge facing the global community.

[8] UN Welcomes US Announcement to Rejoin Paris Agreement. United Nations Climate Change Jan. 21, 2021. https://unfccc.int/news/un-welcomes-us-announcement-to-rejoin-paris-agreement. Last visited 02/01/2025.

[9] Putting America First in International Environmental Agreements Executive Order Sec. 3, January 20, 2025 https://www.whitehouse.gov/presidential-actions/2025/01/putting-america-first-in-international-environmental-agreements/ Last visited 1/22/2025.

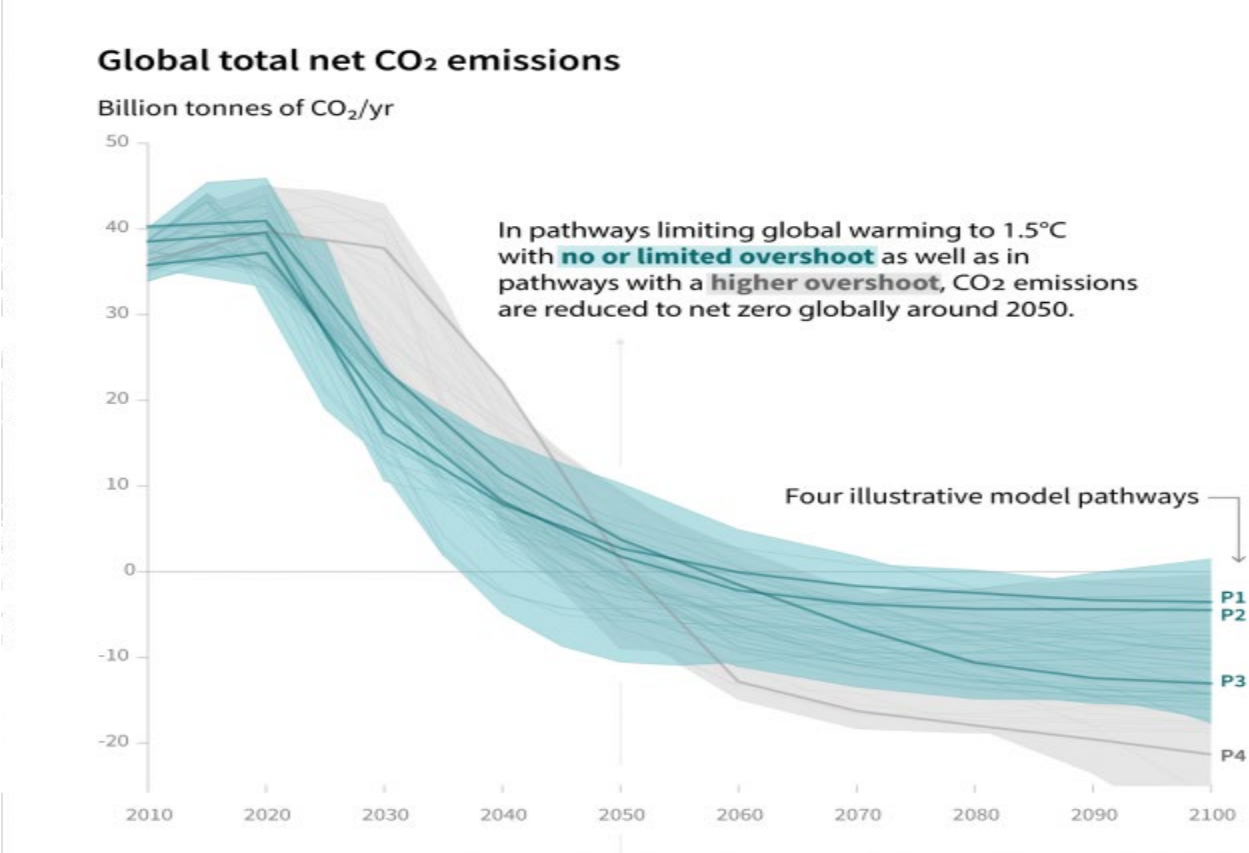

Figure 6. IPCC image depicting reductions necessary to keep global warming around 1.5 to 2.0 degrees Centigrade. Source: IPCC[10]

The Why of Climate Action

Significant actions have occurred in the United States to address climate change despite there being no major federal environmental law requiring such actions. Indeed, all corporate decisions in the U. S., outside of California, are being made without the push of regulation. Stated otherwise, the market is responding in the absence of any meaningful regulation and each emitter of greenhouse gases, such as carbon dioxide, methane, nitrous oxide, and various chlorofluorocarbons, must make its own internal decisions about what, if anything, it intends to do about climate change. Now, the emitter's decisions are not made in a vacuum. Indeed, there are multiple forces working on companies that have led many, if not most, U.S. corporations to establish goals relative to reaching the 2050 goal of net zero emissions as well as interim goals for 2030.

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[10] IPCC Special Report, 2018 Global warming of 1.5º, IPCC *Summary for Policy Makers,* Figure: 5PM.3A; Global Emission Pathway Characteristics. https://www.ipcc.ch/reports/ Last Visited 2/27/25.

As can be seen in *Figure 7*, in addition to the strong scientific consensus regarding human responsibility for climate change, there are at least four different forces working on carbon emitters that have led many corporations to voluntarily adopt policies to address carbon emissions.

The first force is **public opinion**: Concerned individuals, environmental organizations, insurance underwriters, and other entities raise their collective voices demanding transparency and accountability. In other words, they want change in the status quo.

The second force is **moral and ethical opposition**: Moral concerns have been led by Pope Francis and his papal encyclical, *Laudato Si'*, among others, which include very strong environmental interpretations of *the Bible*, emphasizing stewardship, rather than dominion, of the earth.

The third force is **financial concern**: There are economic consequences to climate change, both in terms of costs of greenhouse gas emission reduction but also costs of adaptation, and the financial industry is focusing on full disclosure and understanding of both existing and future risks, liabilities, and opportunities.

The fourth force is **legal actions**: Over 2,400 lawsuits associated with climate change have been filed in the United States alone, and shareholder and stakeholders have been very vocal in their opinions.[11]

The bottom line is that climate goals and policies are now a reality for most companies to some extent, and this has largely occurred outside of the requirements of any law or regulation.

[11] U.S. Climate Change Litigation Columbia Law School/Columbia Climate School Sabin Center for Climate Change Law https://climatecasechart.com/us-climate-change-litigation/ Last Visited 1/22/2025.

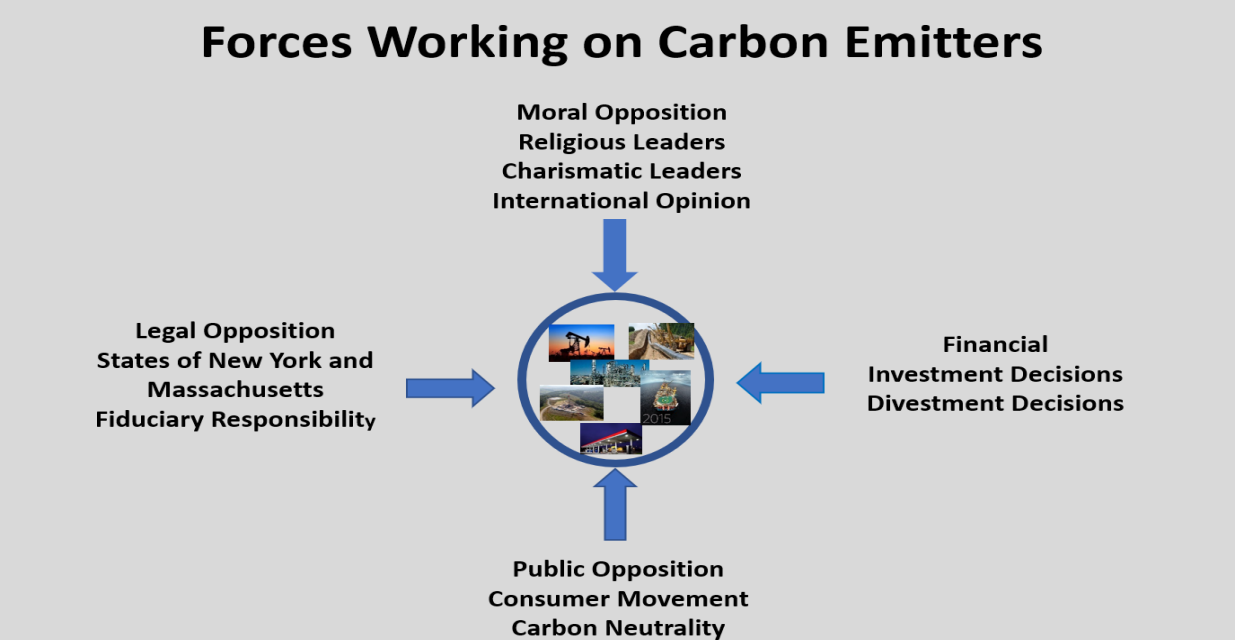

Figure 7. Diagram showing the various types of forces – some legal, some financial, some ethical, some practical – encouraging action by corporate emitters. Diagram by Jim Blackburn.

Companies and Climate Action

When an entity (corporation, company. institution, individual) has made the decision to take steps to meet climate goals, such as net zero emissions by 2050, a series of actions must be taken. First, the entity must calculate its carbon footprint, which is the amount of carbon dioxide (or other greenhouse gases expressed as carbon dioxide equivalents) it emits. Here, the entity must account for three types of emissions – Scope 1, Scope 2, and Scope 3, described as follows:

> **Scope 1** emissions are direct emissions from sources owned or directly used by a company (such as furnaces and trucks.).[12]
>
> **Scope 2** emissions are those from purchased electricity (for example, from the power grid).[13]
>
> **Scope 3** emissions are indirect emissions from the supply chain, from product use, from investments related to a company's operations, and from travel.[14]

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[12] The Greenhouse Gas Protocol World Business Council for Sustainable Development, scope 1 Emissions. Revised Edition pg. 27. https://ghgprotocol.org/ Last visited 1/27/2025.

[13] Id.

[14] Id. Pg. 29.

Of these types of emission sources, the Scope 3 sources can often be the largest emission sources, but not all companies volunteer to address Scope 3 emissions. In *Figure 8*, a conceptual image if these three scopes of emissions is set forth.

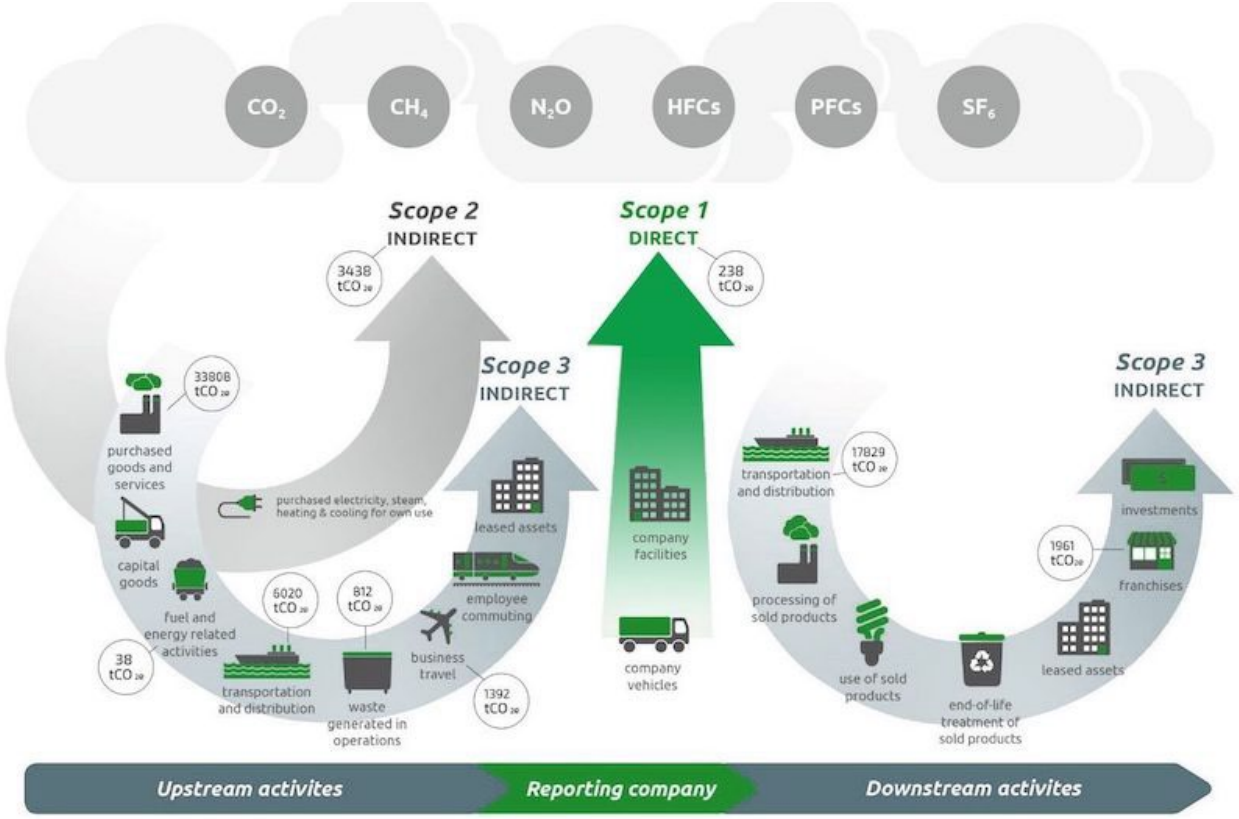

Figure 8. Conceptual diagram of the three scopes of emissions. Source: https://sustainlab.co/blog/what-are-scope-1-2-3-emissions

Once the footprint of the total emissions of all three scopes is calculated and understood, an entity's next step is to identify an emissions reduction plan. Scope 1 emissions can be addressed by efficiencies to reduce carbon emissions by the use of renewables, where possible, and by pollution control to capture emissions and store them. Scope 2 emissions can be addressed by substituting renewables for purchased electricity and by efficiencies resulting in less electrical usage. Relative to Scope 3, the range of currently existing options includes supply chain controls accomplished through contractual provisions, repositioning of investments, and divestment of certain sources, along with many other creative emerging concepts.

When an emitter has achieved the reduction of its footprint as much as possible, there will likely still be a shortfall between its then reduced emissions and the emitter's goal of net zero. Whenever a shortfall is determined, the emitter will likely seek to trade in the voluntary carbon market where it can reach net zero by purchasing carbon reductions provided by technological removal of carbon from the

atmosphere or from natural solutions.[15] A conceptual diagram of the carbon credit is shown in *Figure 9.*

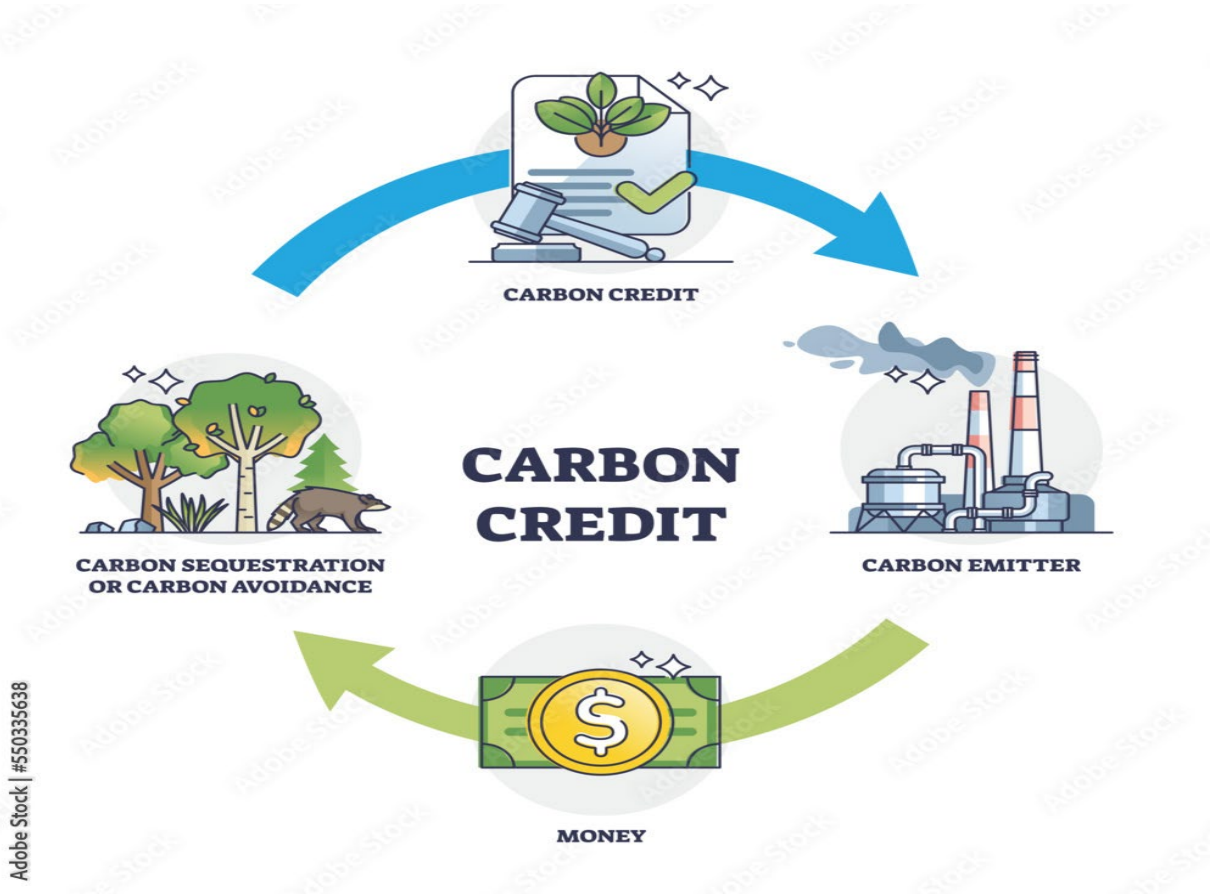

Figure 9. Conceptual diagram explaining a carbon credit. Source: https://www.abposters.com/carbon-credit-practice-cycle-with-greenhouse-gas-control-outline-diagram-f550335638

The point here is that many companies have gone down the pathway of making commitments. Some commit to reach net zero by 2050. Others commit to a percentage reduction of emissions by 2030. A number of companies promise to become net negative carbon emitters and some even promise to address historic emissions as well as current emissions. Corporate representations are found in many different places, such as in corporate sustainability reports and in corporate press releases issued over the last five years or so. But are the commitments real? Will they happen? In short, a company's representations may implicate real legal consequences.

[15] Id. 64-69.

The ESG (Environment, Social, and Governance) Movement

In 1992, the Rio Principles for Sustainable Development were signed by almost every country in the world, and sustainable development has been a major interest of corporations since that time. Sustainable development involves three subject areas – environment, society, and economics, the so-called triple bottom line.[16] Since the signing of the Rio Principles, many companies have been reporting on sustainable development in one form or another. Some companies incorporate it into their planning and policies about Corporate Social Responsibility. Others combine the three areas under the topical heading of "environment, social and governance," or ESG.

Until January of 2020, each company undertook its own reporting and record-keeping without much concern for either regulation or oversight. Then, in January of 2020, BlackRock, a huge multi-enterprise investment corporation, announced that it was changing its climate policy and would start voting its corporate holdings (which were substantial) in support of climate goals, would divest some of its shares in coal and coal-fueled operations, and would create new green investment funds. Suddenly, the financial community was filled with interest on climate issues, commitments, and progress, which was heralded under the ESG banner.[17] At the same time, Bobby Tudor, then-chair of the Houston Partnership, announced publicly that Houston would become the center of the energy transition as well as energy production.

Almost overnight, lenders began requesting ESG reports as part of their due diligence on loan applications. Climate emerged as a major element in risk evaluation. Companies that had not shown interest in climate issues were suddenly preparing ESG and climate reports. Lawyers began getting phone calls asking, "What is ESG--- and what do I do about it?"

Suddenly, legal interest turned to environmental topics, such as:

> *carbon footprint,* which is the total of Scope 1, Scope 2, and for some companies, Scope 3 carbon emissions;

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[16] Report of the United Nations Conference on Environment and Development Annex I *Rio Declaration on Environment and Development* June 1992 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf Last visited 02/05/2025.

[17] BlackRock 2020 Letter to Clients, "Sustainability as BlackRock's New Standard for Investing," https://www.blackrock.com/corporate/investor-relations/2020-blackrock-clientletter#:~:text=By%20the%20end%20of%202020,considerations%20have%20affected%20investment%20decisions. Last Visited 1/27/25.

carbon neutrality, which means no net release of carbon emissions to the atmosphere by a company's operations;

net zero emissions, which means the total of all of the emissions by a company's operations are balanced by removals of that quantity from the atmosphere;

net negative emissions, which means more emissions are removed by a company's operations than are emitted by that company;

and *balanced historic emissions,* which is the net total of emissions put into the atmosphere since a company began operations.

Of course, no uniform definitions exist because there is no master statute with applicable controlling definitions.

A company's reports on ESG, Sustainable Development, and Corporate Social Responsibility are very important. Those reports represent what the company intends to do in the future. Some of the representations are modest. Some are quite grand, such as the representation by Microsoft that it would be carbon negative by 2030 and remove its historic carbon emissions form the atmosphere by 2050, as set out in *Figure 10.*

Microsoft President Brad Smith, Chief Financial Officer Amy Hood and CEO Satya Nadella preparing to announce Microsoft's plan to be carbon negative by 2030. (Jan. 15, 2020/Photo by Brian Smale)

Figure 10. Public representation by Microsoft. From Microsoft.

The public representations by companies can, however, result in legal action against them. Consider the case of *Berrin v. Delta Airlines, Inc*. This case, still pending after surviving the Defendant's motion to dismiss, involved a California consumer who filed a class action lawsuit against Delta Airlines, alleging that Delta had "grossly misrepresented the total environmental impact of its business operations" by marketing itself as a carbon neutral airline. The Plaintiff alleged Delta's representation that carbon offsets purchased by Delta had entirely offset Delta's carbon emissions was "manifestly and provably false." Significantly, the Plaintiff alleged she would not have purchased Delta's tickets or would have paid much less for them if she understood that Delta's representations of carbon neutrality were false. Subsequently, Delta's motion to dismiss was granted in part and denied in part. The court granted dismissal of claims under California's False Advertising Law with leave to amend, but found the Plaintiff had adequately stated a claim under California's Consumers Legal Remedies Act.[18] Subsequently, the plaintiffs amended their litigation and reinstated the California False Advertising claim.

Legal actions, however, have not been limited to representations made to customers and shareholders. In both the United States and globally, there has been a spate of litigation over the last several years. As can be seen in *Figure 11*, an estimate of the number of suits in 2022 indicates that there were almost 2200 climate-related lawsuits filed in both the U.S. and the rest of world, with 30% of those cases being outside the U.S. This total is a significant increase of the number of cases filed in 2017, which totaled only 884 cases, with 26% of those being litigated outside the

[18] *Berrin v. Delta Airlines, Inc*., Docket number 2:23 -cv-04150, Central District California (federal).

United States. It is expected tha in the future the numbers will likely grow.

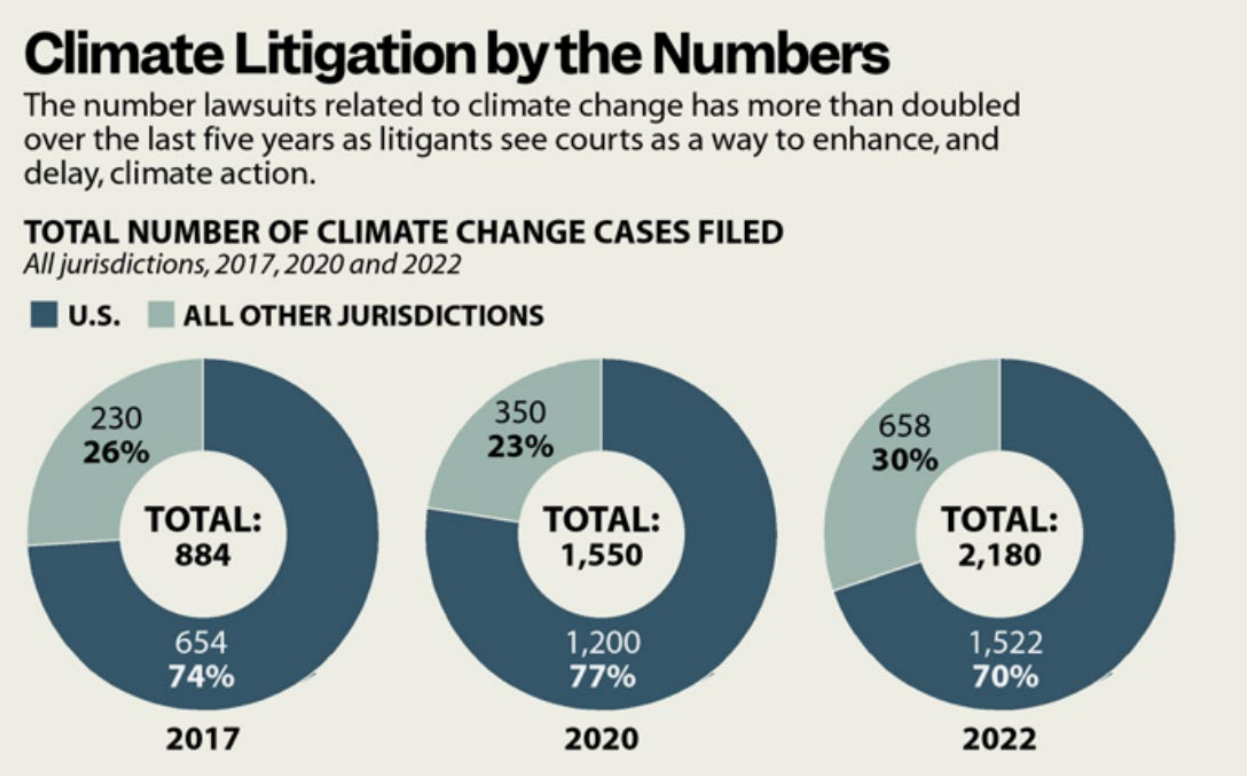

Figure 11. An estimate of the number of lawsuits filed over climate-related issues in 2017, 2020, and 2022. Source: https://insideclimatenews.org/news/27072023/climate-change-litigation-explosion/

Regulatory Uncertainty, and Legal Issues that Currently are or Will Likely Be Litigated

For over the last decade, whipsaw U.S. executive actions based on deep philosophical differences between politically divided administrations have led to heightened market place uncertainty regarding environmental laws and regulation. As a result, market place investors are reluctant to make capital expenditures when they cannot fully evaluate the risk and expense associated with a given project. This is best exemplified by the February 4th announcement by Lee Zeldin, Administrator of EPA, titled "Powering the American Comeback."[19] With it Zeldin promised to enact sweeping changes in order to "restore energy dominance" and implement permitting reform among other actions including a review of the definition of the

[19] U.S. Environmental Protection Agency "ICYMI" Administrator Zeldin's ""Powering the Great American Comeback" Unveiled at the EPA: February 4, 2025 EPA Press Office https://www.epa.gov/newsreleases/icymi-administrator-zeldins-powering-great-american-comeback-unveiled-epa Last visited 04021/25.

"Waters of the United States." Shortly thereafter on March 12, 2025 the EPA announced 31 intended actions including, but not limited to: reconsideration of the 2009 Greenhouse Gas Endangerment finding and related actions[20] and reconsideration of applicable air and wastewater regulations for oil and gas entities. This abrupt departure from over half a century of regulatory policy is a significant realignment of regulatory agencies and their goals that may portend big changes for regulated industries.

These recent regulatory changes, however, do not reflect the litigation underway today involving climate change. Rather, the regulatory changes complicate it. Currently, a host of legal causes of action and challenges exist as indicated by the number of court cases that have been filed. These cases are and will continue to be creative, raising new challenges in both old and new settings.

Litigation Over Shareholder Petitions

Shareholders have been more active than ever as the climate issue has heated up. As can be seen from *Figure 12*, shareholder petitions concerning climate change have been increasing steadily to now reaching unprecedented levels. A company has a duty to respond to these shareholder petitions. Among these duties are the need to carefully consider, and respond to, the petition; to make a thoughtful explanation of any decisions made; to provide information on and openly discuss the issue; and to be transparent in addressing the petition. The duties often require significant time and must be performed in a procedurally responsive manner.

[2020] U.S. Environmental Protection Agency, "Trump EPA Kicks of Formal Reconsideration of Endangerment Finding with Agency Partners," March 12, 2025. https://www.epa.gov/newsreleases/epa-administrator-lee-zeldin-announces-epas-powering-great-american-comeback Last visited 04/21/2025.

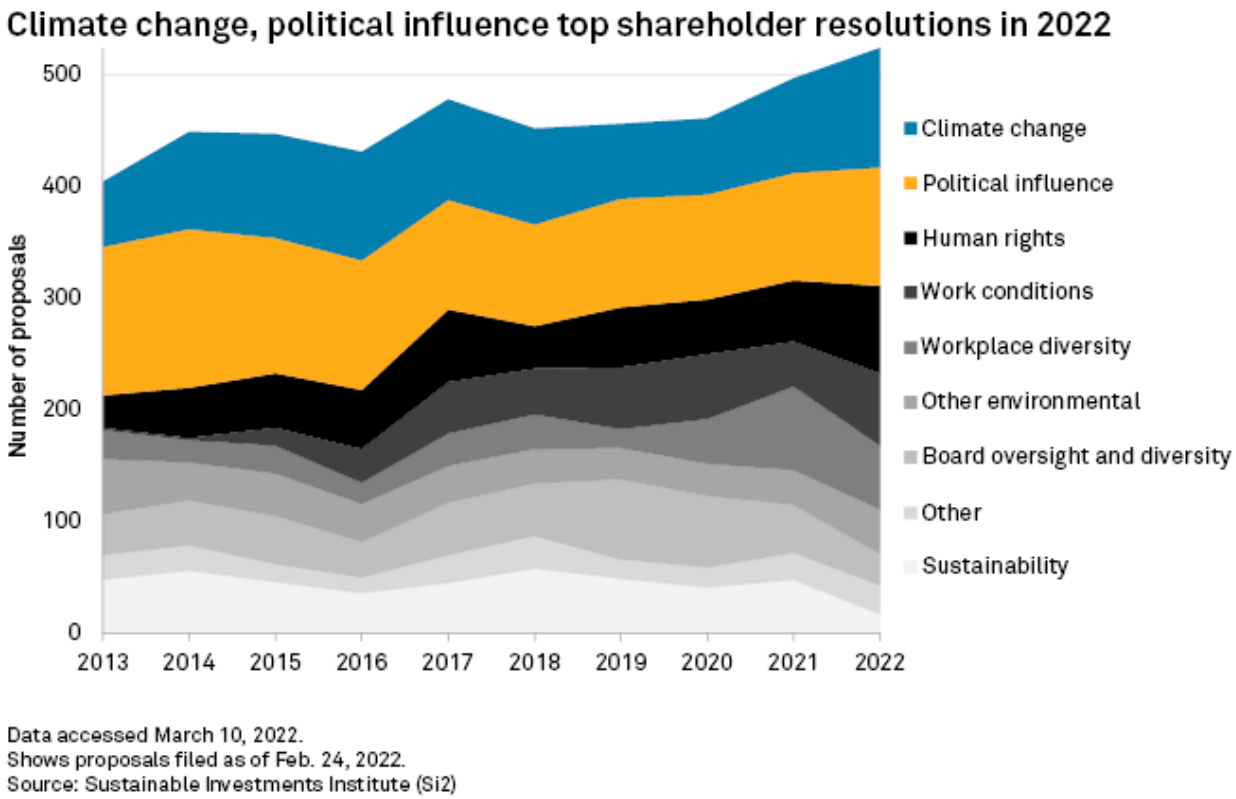

Figure 12. Graphic showing the increase in climate-related shareholder petitions from 2013 to 2022. Source: https://www.spglobal.com/market-intelligence/en/news-insights/articles/2022/4/climate-resolutions-top-unprecedented-number-of-shareholder-proposals-in-2022-69641049.

Litigation over shareholder petitions has generated much publicity in recent years. Take for instance, *Exxon Mobile Corp. v. Arjuna Capital,* LLC (2024). This case involved a defendant shareholder's suit over the shareholder's proposal that supported an accelerated reduction of Exxon's GHG emissions that in turn compelled Exxon to seek a declaratory judgment that permitted Exxon Mobil to exclude a particular shareholder's proposal regarding climate change from Exxon Mobil's proxy statement. A complaint was filed by Exxon in January 2024 and dismissed in June 2024, without prejudice, not on the merits of the claim but rather, because the case was made moot by a letter from the shareholder that unconditionally made clear the shareholder would not submit another similar proposal. Due to the delivery of the letter, the Court found that ruling on the claim would be improper.

Compliance with New Security and Exchange Commission Disclosure Regulations

On March 6, 2024, the United States Securities and Exchange Commission (SEC)–– long after issuing a proposed rule on May 9, 2022—issued the Commission's final climate-related disclosure rule that amended the Securities Act of 1933 and the Securities Exchange act of 1934.[21] This rule was immediately attacked in federal court, consolidated in the 8th Circuit Court of Appeals *Nat'l Legal & Pol'y Ctr.* v. *SEC,* No. 24-1685 (8th Cir. docketed Apr. 1, 2024), and stayed. At this time, the rule's implementation remains stayed and is unlikely to be implanted by the Trump Administration.

Although this SEC rule is not in effect, there are some very interesting and insightful provisions that were included in the rule that should be of interest to practitioners. Among other things, this rule required corporate disclosure of the risk to their operations posed by severe weather, how the corporation addresses climate risk, strategic implications of climate risk, risk management processes, climate targets and goals, and disclosure of Scope 1 and 2 greenhouse gas emissions. Interestingly, the proposed requirement for disclosure of Scope 3 emissions was dropped from the final rule.

Although the SEC disclosure requirements are currently stayed, there is no question that each company will be discussing internally what it should voluntarily disclose and how such disclosures should be worded. The disclosure requirements will only become more intense and important over time.

Compliance with Current and Potential Commodity Futures Trading Commission Regulation (CFTC)

An administrative cousin of the SEC, the CFTC regulates financial instruments, specifically derivatives markets, by promoting the "integrity, resilience and vibrancy of the U.S. derivatives markets through sound regulation."[22] Generally speaking, derivatives or derivative instruments are financial instruments whose value depends on or is derived from the performance of a secondary source such as an underlying U.S. Treasury Bonds, foreign or U.S. currency, commodity and even interest rates. Because carbon credits are essentially a commodity, the CFTC possesses the

[21] SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors, U.S. Securities and Exchange Commission March 6, 2024. https://www.sec.gov/newsroom/press-releases/2024-31 Last Visited 2/3/2025

[22] Commodity Futures Trading Commission, About the Commission Mission Statement, https://www.cftc.gov/About/AboutTheCommission Last Visited 2/4/2025.

authority to fine, seek injunctions prohibiting people and companies from participating in commodity trading.

The CFTC clearly has jurisdiction over derivatives. In *Commodity Futures Trading Commission v. Newcombe,* Docket No. 24-cv-07477 *S.D. NY (2024)* the CFTC filed a complaint and civil action in October 2024 against a carbon credit company executive for allegedly engaging in fraud in connection with contracts for sale of voluntary carbon credits. A criminal indictment was unsealed that same month against the same defendant. The CFTC complaint alleged that the CEO of a carbon credit company engaged in fraudulent conduct in connection with the sales contracts of voluntary carbon credits. Specifically, the conduct included reporting false, misleading, or inaccurate information to a carbon credit registry, as well as to the relevant validation and verification bodies and others, including data regarding energy saved and emissions reduced achieved by offset projects under the Commodity Exchange Act and CFTC regulations. Civil penalties in such cases can become enormous as illustrated by the case below.

As the defendants discovered in *Commodity Futures Trading Commission v. Ikkurty,* incurring the CFTC's ire with violations of the Commodities Exchange Act can become expensive. This case involved the CFTC's legal action alleging civil violations of Commodities Exchange Act by defendants who operated "crypto hedge funds" whose investments included "carbon offset bonds." The Court found the defendants liable in a previous Summary Judgment Motion by the CFTC, and the Court's Final Judgment included permanent injunctions, restitution of over 83 million dollars, disgorgement of proceeds, fines of over 110 million dollars, and contempt sanctions of over 13 million dollars.[23] Not all legal action is regulatory however, and some climate related litigation involves old fashioned common law torts.

Of importance, there is the carbon credit market itself – understanding the market and acting to prevent this carbon credit—itself a commodity—from becoming a derivative. The carbon market is based on carbon credits, which represent one tonne of carbon dioxide removed from the atmosphere and stored in the soil or otherwise prevented from being released into the atmosphere. As shown in *Figure 13* below, the world of carbon credits has many pieces. Given that the market is—except in California—not regulated, carbon credit registries, such as BCarbon in the example below, establish rules for issuing credits. These rules allow project developers to prepare applications for carbon credits from nature or from technology. The project developer often must work with the landowner to prepare an application. Once submitted, the registry submits the application to review, including third party

[23] *Commodities Future Trading Commission v. Ikkurty*, Judgement 2-6 N.D Ill. (7/22/2024).

verification and validation. Once compliance with the protocol is determined, credits are issued and transferred to the project developer who sells them to the emitter in exchange for money which is shared with the landowner. And of course, the corporation that bought the credits must justify such purchase to shareholders and stakeholders.

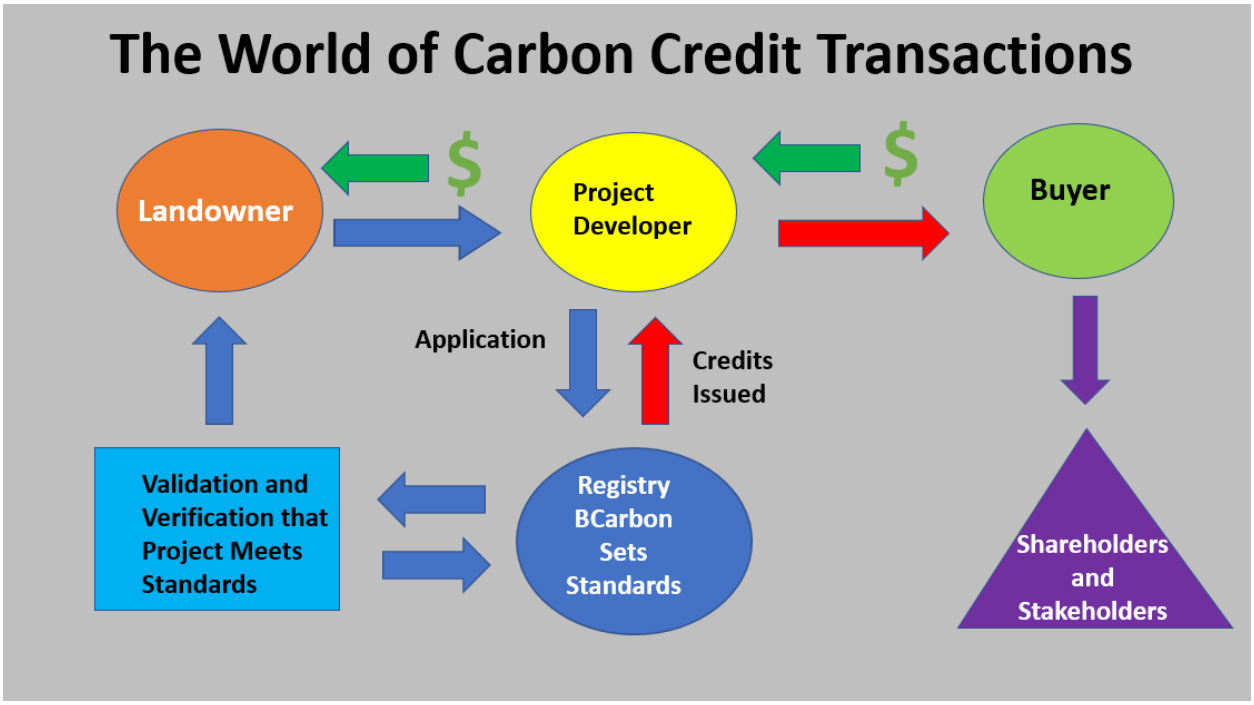

Figure 13. The world of carbon credit transactions includes the registry that sets standards, the project developer who submits an application, often in partnership with the landowner, with the additional step that the application must be verified and validated prior to credits being issued and sold the buyer who must justify such action to shareholders and stakeholders. Image by Jim Blackburn.

It is possible that many practicing attorneys will become exposed to carbon credits through representation of landowners. An extensive network of contracts are at play within *Figure 13*, with the project developer and the registry having contractual commitments and the project developer and the landowner having a contractual relationship, as does the buyer and the project developer.

The obligations of the landowner and the project developer vary depending upon the type of credit being created and the rules of the registry. Soil carbon credits may require either measurement or monitoring, as might forest credits. Coastal blue carbon credits might well require the construction of a living shoreline. Credits from plugging methane-leaking oil and gas wells may require before and after testing to prove that there is no further leakage. All of these actions likely will involve contractual commitments of various types.

Litigation Over Tort (Common Law) Claims for Damages from Climate Change

Tort litigation has been tried extensively in the United States Court system and has failed time and again, mainly because the federal court system considers the issues to be sufficiently serious that Congress should legislate on these matters. Basically, the federal courts have had various reasons for ruling against tort litigation, including pre-emption by the federal Clean Air Act, or claiming that this is a political question to be determined by Congress, or by finding that the plaintiffs lacked standing to pursue such litigation. State tort suits have also been thwarted, at least to date, by a finding that federal common law preempts state common law. *City of New York v. BP*, 2nd Circuit, 2021.

Recently, however, the U. S. Supreme Court indicated that SCOTUS is not interested in intervening in state common law claims based on the oil industry's representations and responsibility related to climate change. On January 13, 2025 SCOTUS refused to reconsider a 2023 Hawaii Supreme Court ruling that advanced claims from Honolulu officials that fossil fuel producers knowingly lied to the public regarding the danger of their products and as such, share liability for the costs of climate change related impacts like wildfires and flooding.[24] This decision by SCOTUS will likely have wide ranging effects, as over 40 States, municipalities and counties have brought nearly identical litigation in state courts across the country against major oil producers.[25]

One of the more interesting issues, however, is tort litigation brought in another country. As can be seen from *Figure 14*, this graphic from 2020 emphasizes the number of international court cases that have been filed, with more coming every year. Under such a scenario, a farmer injured in Peru could file a claim against a German company that emitted 0.47 of the greenhouse gases that led to harm on his property, leading to that company paying 0.47 of the damages proved in court. That scenario playing out in countries around the world is certainly a potential prospect laying ahead for international companies.

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[24] *City and County of Honolulu v. Sunoco LP*, Docket Number(s): 23-947, (2020). https://climatecasechart.com/case/city-county-of-honolulu-v-sunoco-lp/ Last visited 4/21/25.

[25] Supreme Court rejects climate, lands, wind and air battles, E &E Leslie Clark, Scott Streater, Pamela King, Jan. 13, 2025 https://www.eenews.net/articles/supreme-court-rejects-climate-lands-wind-air-battles/ Last visited 4/21/25

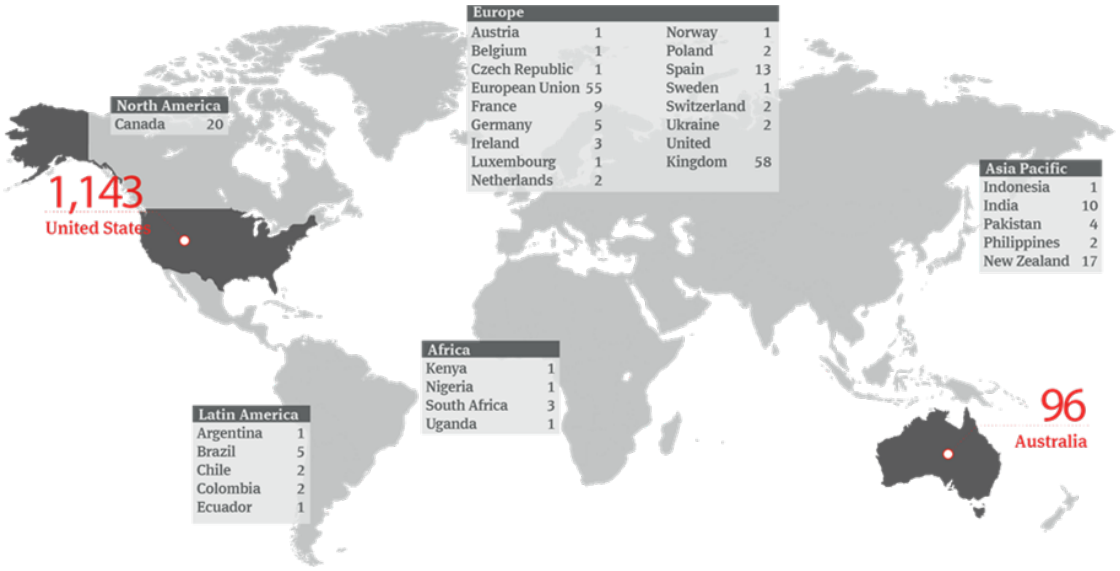

Figure 14. Map noting climate change litigation by country worldwide. Source: Norton Rose Fulbright, https://www.nortonrosefulbright.com/en/knowledge/publications/7d58ae66/climate-change-litigation-update

Conclusory remarks and advice

Remember—climate change is a fact. Without overarching, applicable controlling U.S. statutes, but with affected parties' lawsuits and court decisions on all sides of all issues, and with little if any, national guidance, American markets and citizens who yearn to rely on the law are left to fend for themselves. Climate change issues will likely become more complicated given President Trump's 10-1 Deregulation Initiative of January 31, 2025, that is designed to "Halt the Regulatory Onslaught."[26] Yet, honesty, transparency, due diligence, integrity, and vision can go a long way toward ameliorating the increased risks of climate change. International markets have recognized what we have not, that guidance based on science—not wishful thinking and denial— in conjunction with strong national policies--is effective.

Several recommendations are worth mentioning, in closing:

1) Always stress reasonable care and due diligence

2) Watch representations, both written and oral, as they may well be enforceable. Use care to check the representations of others that your client or firm relies on.

[26] White House Fact Sheet: President Donald J. Trump Launches Massive 10-to-1 Deregulation Initiative, January 31, 2025 https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-launches-massive-10-to-1-deregulation-initiative/ Last Visited02/05/2025.

3) Know the science and use it. Facts, not hyperbole, will determine outcomes.

4) Stay updated and be aware of legal changes and requirements, such as new privacy laws and State climate regulations, that may include enhanced building codes and setback requirements.

5) Recognize and stress that you cannot remove all risk, but the client should take steps to minimize where feasible.

6) Watch the European Market for predictions and trends as well as the trends of our North American neighbors.

7) Stay informed.