

Climate Judiciary Project

Climate Litigation Overview – Vermont¹

As of 3/28/2023, searching ‘Vermont’ on the Sabin database returns 13 results (not all are in Vermont courts, however).

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General

- The state of Vermont has one of the cases in the high-profile city/county/state v. fossil fuel company cases.
 - In these cases, cities and states are arguing that the corporations engaged in deceptive sales and marketing campaigns that have violated state consumer protection laws. These cases have ping-ponged between state and federal court, but all federal courts that have weighed in have sent them back to the state court where they were originally filed. A decision on whether the Supreme Court will hear the cases (for a second time!) is pending. The U.S. Solicitor General recently filed a brief arguing that the cases belong in state courts (where they were originally filed). It's important to note that these cases are still in their procedural phases, and no opinions have yet been issued on the merits. If (when?) procedural hurdles are overcome, issues of causation and attribution will be relevant in these cases.
- Vermont judges are encountering cases where climate change is a material issue of law or fact.
 - The Sabin Center for Climate Change Law's database (the best place to look up climate cases) lists many cases (see below). While some cases are from more than a decade ago, most are recent.
- Climate change is reshaping society, and that includes judges and their dockets. So, even if there aren't cases where climate change (or climate science specifically) arises, the connections between sea level rise and more closed coastal businesses or more extreme heat and criminal violence and family law

¹ These notes were prepared for Judge Thomas S. Durkin by the Climate Judiciary Project for a presentation to Vermont judges on March 31, 2023.

issues, are important for judges to understand. I.e., **more impacts from climate change means more opportunities for litigation.**

- context/statistics about trends in climate litigation generally
 - Increasing at a rapid pace. From a few in the early 2000s, to a couple hundred filed every year for the past several years.
 - There are currently more than 2,200 climate cases in the U.S. and internationally, with the majority filed in U.S. federal court. The U.S. itself has 1,500+ climate cases, more than the rest of the world combined.
 - Most federal cases involve federal statutes such as the Endangered Species Act and the National Environmental Policy Act.
 - Most state cases involve state impact assessment laws and utility regulation.

Automobile Emissions

- Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, No. 05-302, 05-304 (D. Vt. 2007)
 - Challenge to Vermont's adoption of California's greenhouse gas regulations for automobiles.
 - court relied on expert testimony on the nature and risks of global warming in upholding Vermont's adoption of CA motor vehicle emissions standards

Land Use

- 835 Hinesburg Road, LLC v. City of South Burlington, No. 22-00058 (D. Vt. 2022)
 - A City of South Burlington property owner filed a lawsuit in federal court in Vermont **asserting that the designation of its land as a "Habitat Block" constituted an illegal taking** under the U.S. and Vermont Constitutions and violated the plaintiff's equal protection and due process rights, the Vermont Constitution's Common Benefit Clause, and Vermont statutes. The **plaintiff alleged that the City's amendments of its Land Development Regulations to prohibit development of and other actions in Habitat Blocks would have negative environmental consequences, including increases in greenhouse gas emissions due to increased distances that employees would have to travel to the center of Chittenden County because housing would not be available closer to their places of employment.** The plaintiff contended that the "Habitat Blocks" did not promote the public good but instead decreased it.
 - No decision has issued according to the Sabin database.

Renewable Energy

- In re Acorn Energy Solar 2, LLC, No. 2019-0398 (Vt. 2021)

- The **Vermont Supreme Court upheld the Vermont Public Utility Commission’s decision granting a certificate of public good for construction and operation of a solar net-metering system.** The arguments of the neighbors challenging the project included that the Commission erred in finding that the project would not have an undue adverse effect on greenhouse gases. The court concluded the neighbors had standing to make this argument, but **found that the Commission’s finding that the project would not have an undue effect on greenhouse gas emissions was not clearly erroneous even though only “minimal evidence”—the project manager’s testimony that construction emissions would be similar to emission of projects of comparable size—supported the finding.** Because the neighbors produced no other testimony and relied “merely on speculation that the excavation, regrading, and moving of materials would produce undue impacts,” the court upheld the Commission’s findings.
- In re Petition of Apple Hill Solar LLC, No. 2020-232 (Vt. 2021)
 - The Vermont Supreme Court **reversed and remanded the Vermont Public Utility Commission’s (PUC’s) denial of a certificate of public good** for construction of a 2.0 megawatt solar facility in the Town of Bennington. The court rejected “significant portions” of the PUC’s rationale for denial—including the PUC’s conclusions that the project would violate “clear community standards”—but **rejected the argument that Vermont law required the PUC to balance beneficial greenhouse gas impacts against other factors in the analysis of aesthetic effects.**

Consumer Protection

- Vermont v. Exxon Mobil Corp.
 - On September 14, 2021, Vermont filed a lawsuit against oil and gas companies under its **Consumer Protection Act (VCPA)**. The lawsuit was filed in Vermont Superior Court and asserts that the defendants have misled Vermont consumers about the risks posed by their products, including the causal connection between their products and climate change, and have thereby denied Vermont consumers of the opportunity to make informed decisions about their fossil fuel purchases and consumption. The complaint alleges that the defendants took “extraordinary steps” to keep information about the connection between use of their products and climate change secret despite being “fully aware for decades of the causal link.” The state also contends that the defendants have in more recent years “sought to adjust to shifting public perception through their ‘greenwashing’ campaigns” in which they “falsely hold themselves out as responsible stewards of the environment.” Vermont seeks a **permanent injunction** prohibiting the companies from engaging in unfair or deceptive acts and practices and requiring

disclosure of fossil fuels' role in climate change at every point of sale in the state. The state also seeks **disgorgement of funds** acquired or retained as a result of any unlawful practices, civil penalties of \$10,000 for each violation of the VCPA, and investigative and litigation costs and fees.

- Currently in D. Vt. No. 21-cv-00260

Public Records

- Energy Policy Advocates v. Attorney General's Office (Vt. Super. Ct. 2021)
 - In a lawsuit brought by Energy Policy Advocates, a **Vermont Superior Court ordered the Vermont Attorney General to produce seven common interest agreements concerning “the general subject of combatting global warming in some fashion,” but concluded that communications related to the common interest agreements were attorney work product that was shielded from disclosure under Vermont’s Public Records Act.** The common interest agreements were with other state attorneys general (and, in one case, with auto manufacturers) and related to automobile greenhouse gas standards, California’s cap-and-trade policy, climate change public nuisance litigation, potential litigation to compel action concerning greenhouse gas emissions, NEPA regulations, and oil and gas development in the Arctic. The **court concluded that the agreements themselves had to be produced so that the State could use them to document the refusal to produce subsequent communications within the scope of the agreements. The court rejected the argument that the communications were not protected because the lawsuits might have a political component or motivation.**
- Energy & Environment Legal Institute v. Attorney General of Vermont, No. 558-9-16 (Vt. Super. Ct. 2017)
 - A Vermont state court ordered the Vermont attorney general to deliver documents to the Energy & Environment Legal Institute (EELI) in response to EELI’s request under the **Public Records Act** for certain documents related to the Climate Change Coalition Common Interest Agreement (Agreement), which the attorney general had entered into with the attorneys general of several other states. EELI limited the scope of documents it sought to documents reflecting requests by parties to the Agreement to share records and parties’ responses to such requests. The court said the Public Records Act’s professional ethics confidentiality exemption did not cover all attorney general records, “particularly those of an administrative or operational nature.” The court also declined to allow the attorney general to withhold documents from disclosure based on privilege grounded in a “common interest doctrine.” The court said that even if such a privilege existed, it would not apply to the documents sought by EELI, which were not attorney work product or attorney-client

communications but “documents related to administrative implementation of the Common Interest Agreement, which is itself a public document.”

- Energy & Environment Legal Institute v. Attorney General of Vermont, No. 349-6-16WNCV (Vt. Super. Ct. 2016)
 - In a case brought under **Vermont’s Public Records Law** by Energy & Environment Legal Institute seeking communications of the Vermont attorney general regarding potential climate change-related investigations [The organizations asked for emails of the Vermont attorney general and an assistant attorney general that included the terms “climate denial” or “climate denier” or the names or email addresses of certain lawyers at environmental nongovernmental organizations or the names or email addresses of the New York State Attorney General (NYAG) or the chief of the NYAG’s Environmental Protection Bureau], a Vermont state court ruled that former Attorney General William Sorrell could be deposed on the extent to which he had documents and correspondence on a private email account that related to the plaintiff’s records request. The court said the plaintiff had presented an exhibit that showed Sorrell conducted public business on a private account to at least some extent. The court said paper work kept “in a desk drawer at home rather than at the government office” would not be exempt from public access, “no matter whether that happened unintentionally, negligently, or deliberately”—and indicated that the electronic format of documents would not alter the treatment of documents.