

EDITORIAL

Since it was filed in 2015, we have been watching the progress of a case in US Federal Court in the State of Oregon known as *Kelsey Cascadia Rose Juliana, et al. v. United States* (Case No. 6:15-cv-01517-TC-AA (D. Or.)), notable because its plaintiffs are 21 children between the ages of 11 and 22 years from ten states around the country, and because it seeks action from a broad range of high-level entities (the United States, the President, and 20 other executive branch departments, agencies, offices, cabinet secretaries, directors and officers), arguing that they “have allowed cumulative CO2 emissions to increase ... by enabling and permitting fossil fuel production and combustion, ... by subsidizing the fossil fuel industry, ... and by allowing interstate and international transport of fossil fuels”. The specific action that they challenge is the US Department of Energy’s 2011 authorisation of the export of liquefied natural gas from the Jordan Cove, Oregon Terminal, which they challenged as unconstitutional as a violation of the plaintiffs’ “fundamental rights to life, liberty, and property”.

The case has withstood the government’s first onslaught – a motion to dismiss. In that decision, the district court stated, *inter alia*, that “the Due Process Clause [of the US Constitution] guarantees American citizens an ‘unenumerated fundamental right’ to ‘a climate system capable of sustaining human life’”. Predictably, the government defendants have filed both an appeal of the refusal to dismiss and a motion for a stay of the entire proceeding. They characterise the district court’s decision as incorrect, claiming that it was based on “multiple and clear errors of law”. They repudiate the whole action by declaring that it “seeks wholesale changes in federal government policy based on utterly unprecedented legal theories”. They add that “[i]mmediate review [of the denial of the dismissal] is needed to prevent the district court from the unlawful exercise of its jurisdiction and to avoid the staggering burden imposed on the federal government by the ongoing discovery directed at the entire course of federal decision-making relating to the broad issues raised by these unprecedented claims”. Among other things, the plaintiffs are seeking discovery of a range of documents that can reasonably be expected to amount to tens, if not hundreds, of thousands of pages (specifically “All Documents related to climate change since the Federal Defendants... became aware of the possible existence of climate change; all Documents related to national energy policies or systems, including fossil fuels and alternative energy sources and transportation; all Documents related to federal public lands, navigable waters, territorial waters, navigable air space or atmosphere; [and] all Documents related to greenhouse gas emissions or carbon sequestration as those terms apply to agriculture, forestry, or oceans”), as well as deposition of a large number of the country’s highest officials. The public’s access to this ocean of information alone will be of unprecedented value in providing in-depth awareness of the government’s actions in connection with energy and pollution issues, alternatives and the bases of decision making.

The case is currently on appeal to the Ninth Circuit of the Federal Court of Appeals. Although we intend to cover the appeals court’s decision and any further appeal to the US Supreme Court, we have been contacting colleagues in the hope that attorneys or policy experts participating in either side of the case might be persuaded to share their perspectives on it, in the meantime. If you are or know of such a person, please contact *EPL* to help bring us up to date on the matter.

As it has been everywhere, climate change is a highly emotional and controversial topic in the US, where the current President is one of the few heads of State around the world who continues to be an unrepentant “climate-denier”, openly calling climate change “a hoax” and offering a range of off-the-cuff non-scientific explanations of climate statistics. On the other hand, there are a range of other “sides” of the climate issue that are not well publicised. Most notably, a vocal faction, both in the US and internationally, while not denying climate change, has claimed that the burning of fossil fuels is only one of many sources of the increase in the atmospheric greenhouse

gases (GHGs) that are generally recognised as causes of climate change. In terms of volume of contribution to the problem, it is not the primary one, nor even close. They point to undisputed statistical information about the increase in GHGs, which suggests that agricultural activities contribute a much greater percentage, and have changed both in volume and in the extent and manner of GHG production in a manner that has greatly increased that contribution.

According to this argument, by characterising petrochemicals as the “climate ogre”, climate activists are actually causing harm. Currently, there are few alternatives to many kinds of petrochemical use, and those that exist are not yet capable of operating consistently to fill the role of petrochemicals. Few if any studies have fully enumerated the environmental costs of these alternatives, in terms of rare metal mining, additional impacts of construction, and the effect of inconsistent operation on their value as an alternative. This latter point resonates with us – a side-by-side analysis between petrochemical uses and these alternatives appears warranted, if the goal is actually to reduce GHGs and climate impact. By contrast, agricultural practices that could significantly decrease the climate impact of global agricultural practices already exist as do proven analyses in support of these options.

While we are not willing to go so far as to defend a long-term plan of maintaining the fossil fuel *status quo*, we have been moved by these arguments to reconsider our own views on climate change action. We have come to accept the suggestion that a narrow focus that sees the reduction or elimination of fossil fuel use as *the* “climate solution” may not produce a positive climate result, if a switch to alternative sources results in side-effects such as (i) an increase in the generation of coal-fired power to cover alternative energy down-time (winds, rain, darkness, *etc.*) or (ii) massive environmental damage from increased dependence on rare metals mined in environmentally unsound ways or other factors not as obvious.

As noted in prior editorials, we generally rue the fact that nearly all environmental problems have been recast as part of an overall global “climate change problem” for which no hard standards and goals are yet in force. As a result of this catch-all approach, the mandate for current action on many critical environmental problems is delayed, perhaps increasing the harms caused. We favour concurrent action involving both the development of a climate strategy and progress on basic existing environmental protection frameworks. We cannot underestimate the importance of the latter in individually addressing the various challenges of environmental pollution in particular media (air, water, land, oceans, *etc.*) and sectors (agriculture, forests, industry, *etc.*). We strongly believe that climate strategy efforts should seek balance and perspective, as well as realism in our discussion of alternatives and solutions, focusing less on political affiliations and narratives than on the true impacts of each on the factors causing climate change (*i.e.*, GHGs). Such an approach could result in cooperating with (rather than demonising) the fossil fuel sector, along with other major contributing sectors such as agriculture, to effect real change in a reasonable time, rather than turning a major facilitator of the entire energy sector into the climate-change scapegoat. All this can be done without accepting the scurrilous anti-scientific statements coming out of the White House.

Shouldn't the goal of our efforts be a protected, safe and beneficial environment rather than promotion of particular political agendas?