



# Climate Litigation Primer

ELAW presents this brief primer on climate litigation to help lawyers defending the rights of communities and protecting the climate quickly understand the framework of a potential climate case. The term “climate litigation” defies ready identification or definition. Not every case designed to remedy, reduce, or prevent impacts of climate change will focus on climate arguments or even mention climate change. This climate litigation primer and ELAW’s climate litigation strategies website are intended to help advocates develop prospective cases that specifically raise climate change and its effects as an issue.

What do you hope to accomplish by bringing climate litigation? The problem you want to address and the outcome you hope to achieve will shape the overall construction of a climate case.

Climate-related claims can be divided into at least four broad categories:

- 1) Claims seeking to mitigate or reverse the damage (“**mitigation claims**”);
- 2) Claims aimed at improving resiliency or adapting to climate impacts (“**adaptation claims**”);
- 3) Claims designed to recover money or other compensation for losses suffered (“**damages claims**”); and
- 4) Claims intended to strengthen consideration of climate-related issues in decision making (“**informed decision making claims**”).

Of course, a single case could include claims from some or all of these categories. There may also be claims that don’t fit neatly in any of these categories, but this framework is a good starting point for assembling a climate case.

The table on the next page provides possible goals, defendants, and legal basis for claims in each of these four categories. This is not an exhaustive list, but it includes some general concepts to help lawyers think about potential claims.

	Mitigation	Adaptation	Damages	Decision making
Goals	<ul style="list-style-type: none"> <li>• Stop or reduce specific emissions</li> <li>• Force government to take bolder action to reduce emissions</li> <li>• Support non-GHG emitting alternatives</li> </ul>	<ul style="list-style-type: none"> <li>• Improve infrastructure</li> <li>• Protect vulnerable areas</li> <li>• Relocate communities</li> <li>• Protect threatened resources</li> <li>• Protect resources important for resiliency</li> </ul>	<ul style="list-style-type: none"> <li>• Compensation for impacts suffered</li> <li>• Recover costs of adaptation</li> </ul>	<ul style="list-style-type: none"> <li>• Ensure climate impacts of projects and policies are considered</li> <li>• Consider impacts of changing climate on proposed projects and policies</li> <li>• Ensure costs of climate change are considered</li> </ul>
Defendants	<ul style="list-style-type: none"> <li>• Government bodies</li> <li>• Private project developers</li> <li>• Utilities</li> <li>• Fossil fuel companies</li> </ul>	<ul style="list-style-type: none"> <li>• Government bodies</li> <li>• Private project developers</li> </ul>	<ul style="list-style-type: none"> <li>• Emitting states</li> <li>• Private entities including fossil fuel producers</li> </ul>	<ul style="list-style-type: none"> <li>• Government decision makers</li> </ul>
Legal basis	<ul style="list-style-type: none"> <li>• Constitution</li> <li>• Pollution laws</li> <li>• Tort</li> <li>• Energy planning laws</li> <li>• Precautionary principle</li> <li>• Public trust doctrine</li> <li>• UNFCCC and NDCs</li> </ul>	<ul style="list-style-type: none"> <li>• Constitution</li> <li>• Energy planning laws</li> <li>• Land use/zoning</li> <li>• UNFCCC and NDCs</li> <li>• Forest laws</li> </ul>	<ul style="list-style-type: none"> <li>• Constitution</li> <li>• Tort</li> <li>• Civil code</li> <li>• Polluter pays principle</li> </ul>	<ul style="list-style-type: none"> <li>• Constitution</li> <li>• EIA laws</li> <li>• Energy planning laws</li> <li>• NDCs</li> <li>• Endangered species laws</li> <li>• Land use laws</li> <li>• Precautionary principle</li> </ul>

## Climate Science

For any climate case, it is important to understand climate science. Eventually, scientific experts will be needed for most cases. Before calling on experts, lawyers can tap resources to gain a good understanding of the science. Studies published by

the [Intergovernmental Panel on Climate Change \(IPCC\)](#) are a good starting place. The IPCC was set up by the World Meteorological Organization and the United Nations Environment Programme (UNEP) to inform government policy makers. However, IPCC assessments undergo many rounds of drafting and review so they may not capture most recent scientific data. Organizations such as the [Union of Concerned Scientists \(UCS\)](#) regularly publish up-to-date information about climate change and its impacts. These and other resources will help lawyers gain at least a preliminary understanding of climate science.

Depending on the case, it may be important to determine which impacts can be attributed to *anthropogenic climate change*.

Lawyers may need to consult with an [attribution scientist](#).

One attribution resource is: B. Ekwurzel, B., J. Boneham, M. W. Dalton, R. Heede, R. J. Mera, M. R. Allen, P. C. Frumhoff. 2017. The rise in global atmospheric CO<sub>2</sub>, surface temperature, and sea level from emissions traced to major carbon producers. [Climatic Change online version of this article doi:10.1007/s10584-017-1978-0](#).

## Defendants

The purpose for bringing a climate case will determine the defendants. Mitigation cases are likely to be brought against government decision makers who are enacting laws, promulgating regulations, or approving individual projects that will contribute emissions, or government bodies that should be doing more to curb emissions.

Recovering damages from entities responsible for climate change became more possible because the Climate Accountability Institute (CAI) studied historic carbon emissions and has been able to apportion responsibility for the emissions among those responsible for the production of the fossil fuels. The CAI report, [Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010](#), found the majority of historic emissions can be attributed to 90 fossil fuel companies and cement manufacturers. These entities are often referred to as the *Carbon Majors*. The group of entities identified in the [Carbon Majors study](#) is one set of potential defendants in cases seeking damages.