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For more information,  
contact:

John C. Richter  
+1 202 626 5617  
[jrichter@kslaw.com](mailto:jrichter@kslaw.com)

Brandt Leibe  
+1 713 751 3235  
[bleibe@kslaw.com](mailto:bleibe@kslaw.com)

Dan Lungren  
+1 415 318 1233  
[dlungren@kslaw.com](mailto:dlungren@kslaw.com)

William S. McClintock  
+1 202 626 2922  
[wmclintock@kslaw.com](mailto:wmclintock@kslaw.com)

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**King & Spalding**

Washington, D.C.  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4707  
Tel: +1 202 737 0500

Houston  
1100 Louisiana Street  
Suite 4000  
Houston, Texas 77002-5213  
Tel: +1 713 751 3200

## Climate Change AG Investigations and Municipal Litigation

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### Increasing Challenges for Energy Producers

Several state attorneys general (“state AGs”) recently have undertaken high-profile investigations into energy producers’ research and public statements about the potential effects of climate change. Thus far, energy companies like ExxonMobil (“Exxon”) have encountered limited success challenging these investigations. In addition, a number of cities and municipalities have filed lawsuits against major energy producers, alleging that these companies knowingly contributed to the harmful effects of climate change.

This article surveys recent developments in these state AG investigations and municipal lawsuits against energy companies. Although these investigative and litigation trends remain in their early stages, it appears that energy producers may continue to face increasing climate-change government investigations and related litigation.

#### STATE AG INVESTIGATIONS INTO EXXONMOBIL

In late March 2016, a coalition of state AGs from California, Connecticut, the District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, Washington State, and the U.S. Virgin Islands publicly announced that they were forming a coalition of “AGs United for Clean Power.”<sup>1</sup> As part of that announcement, Eric Schneiderman, who at the time was serving as New York Attorney General, explained that the coalition was formed so that state AGs could coordinate to combat climate change, including participating in “ongoing and potential investigations into whether fossil fuel companies misled investors and the public on the impact of climate change on their businesses.”<sup>2</sup> By publicly announcing a coalition to “aggressively protect[] and build[] upon the recent progress the United States has made in combatting climate change,” the state AGs demonstrated their collective resolve to involve their offices in a high-profile national public policy debate.<sup>3</sup>



Underscoring this commitment, the state AGs for New York, Massachusetts, and the U.S. Virgin Islands launched formal investigations against Exxon during this same time period. In November 2015, the New York AG's office issued a subpoena to Exxon, requesting documents—some going back as far as 1977—that were related to the company's research into climate change and its impact on the company's business, as well as the company's advertisements and disclosures relating to climate change and its support for any organizations engaged in climate change research or advocacy.<sup>4</sup> In March 2016—at the same press conference announcing the “AGs United for Clean Power” coalition—Massachusetts AG Maura Healey and U.S. Virgin Islands AG Claude Earl Walker announced that they had launched similar investigations against ExxonMobil.<sup>5</sup> Similar to the New York subpoena, the Virgin Islands subpoena and Massachusetts Civil Investigative Demand (CID) also sought documents related to Exxon's climate change research, its relationship with outside research and advocacy organizations, and its public statements, advertisements, and securities disclosures about climate change.<sup>6</sup> Although each of the AGs predicated their respective investigations on different state statutes—for example, the New York AG asserted in part that Exxon may have violated New York's Martin Act prohibiting false or misleading statements in securities disclosure, and the Virgin Islands AG alleged that the company may have violated the territory's anti-racketeering statute—all three investigations were rooted in the theory that Exxon may have committed fraud in its public statements, advertisements, and securities disclosures about climate change and its predicted effects.<sup>7</sup>

In response, Exxon quickly filed lawsuits to stop or restrict the AGs' investigations. Although Exxon's claims varied slightly in each lawsuit, the company generally argued that the investigations should be halted or restricted because the AGs' document demands were overbroad and unduly burdensome “fishing expeditions,” and because the state AGs lacked jurisdiction over the company's out-of-state activities. In addition, Exxon argued that the investigations amounted to politically biased, unconstitutional viewpoint discrimination aimed at chilling Exxon's speech about a contentious public policy issue.<sup>8</sup> To support this argument, Exxon noted that the state AGs forming the “AGs United for Clean Power” coalition met with prominent climate change activists, including plaintiff's lawyer Matthew Pawa, on the day that they announced their coalition (and that Healey and Walker publicly announced their investigations into Exxon). Pawa, who had previously sued Exxon in an attempt to hold it liable for allegedly causing global warming, gave a presentation to the assembled AGs on climate change litigation.<sup>9</sup>

In June 2016, Exxon appeared to score an early victory against the investigations when the U.S. Virgin Islands AG withdrew its subpoena and agreed to entry of a joint stipulation dismissing Exxon's suit challenging the investigation.<sup>10</sup> New York and Massachusetts, however, continued to pursue their investigations and moved to dismiss Exxon's lawsuits. In August 2016, the New York AG also subpoenaed documents from Exxon's outside auditor, and in May and July 2017, he issued supplemental subpoenas to Exxon, seeking documents related to a theory that Exxon may have overstated the value of its oil and gas reserves by failing to disclose internal predictions about the impact that increased climate regulation would have on the future profitability of those reserves.<sup>11</sup>

In early 2018, both the U.S. District Court for the Southern District of New York and the Massachusetts Supreme Judicial Court dealt setbacks to Exxon and its efforts to restrict the AG investigations. On March 29, 2018, U.S. District Judge Valerie Caproni dismissed Exxon's complaint, which had sought an injunction halting or restricting the investigations and a declaratory judgment that the investigations were unconstitutional.<sup>12</sup> The Court's opinion held that Exxon's allegations were implausible and failed to state a claim.<sup>13</sup> In their pleadings, Exxon had argued that Schneiderman's and Healey's public statements about Exxon at the March 2016 press conference announcing the “AGs United for Clean Power,” and their communications with prominent climate change activists, demonstrated that the investigations were a pretextual and unconstitutional effort to stifle climate change debate on a high profile policy issue. The Court rejected these arguments and held that Exxon's allegations failed to plausibly allege that Schneiderman and Healey were acting



in bad faith or pursuing an improper motive.<sup>14</sup> On April 20, 2018, Exxon filed a notice of appeal with the Second Circuit Court of Appeals, challenging the District Court's dismissal of its complaint.<sup>15</sup> That appeal remains pending.

In related litigation, the Supreme Judicial Court of Massachusetts on April 13, 2018, affirmed a January 2017 Massachusetts Superior Court decision compelling Exxon's compliance with the Massachusetts CID. In its decision, the Supreme Judicial Court held that the Massachusetts courts had specific personal jurisdiction over Exxon, on the grounds that the company operates a franchise network of 300 Exxon- or Mobil-branded gas stations in the state, exercises control over their branding and marketing, and the AG's investigation into whether Exxon violated its consumer protection statute arises from those same contacts.<sup>16</sup> The Court also held that the CID described with reasonable particularity the material being sought, and that the Attorney General's public comments about climate change demonstrated no bias or political pretext, thereby rejecting the company's argument that the CID was unreasonably broad or that the investigation was driven by improper motive.<sup>17</sup>

### GOVERNMENTAL LITIGATION AGAINST ENERGY COMPANIES

In 2017 and 2018, the focus on energy companies and climate change moved beyond state AG investigations and into the realm of civil litigation. Perhaps emboldened by these state AGs' efforts, certain cities and counties filed lawsuits against a handful of major fossil fuel producers, alleging that the energy companies knowingly contributed to the harmful effects of climate change and seeking an abatement fund for anticipated climate change mitigation efforts. For example, the city attorneys for Oakland and San Francisco, California filed suit in September 2017 against several energy producers.<sup>18</sup> In the complaint, the plaintiffs alleged that the companies knew about the purportedly harmful effects of combustion of fossil fuels on climate change, yet continued to produce and sell fossil fuels and engaged in a campaign to downplay and obscure climate science on the role of carbon emissions.<sup>19</sup> As a result, plaintiffs asserted that Oakland, San Francisco, and the California coast will suffer harmful environmental consequences such as sea level rise, increased storms, and more frequent flooding that constitutes a public nuisance caused by the defendants.<sup>20</sup> They therefore sought an order requiring the defendants to fund abatement and remediation efforts that they claim will be required as a result of these alleged environmental harms.<sup>21</sup> In early 2018, a number of other local governments, including New York City and Boulder County, Colorado filed similar suits, alleging that energy companies continued to produce and sell fossil fuels despite knowing that they would contribute to global warming, and seeking damages to pay for their climate-change related remediation efforts and infrastructure improvements.<sup>22</sup>

Although these municipal lawsuits are separate and procedurally distinct from the state AG investigations, they demonstrate the degree of coordination between state AGs and civil litigation plaintiffs in the climate change arena. For example, Matthew Pawa, the plaintiff's attorney who briefed the "State AGs United for Clean Power" coalition about climate change in March 2016, serves as an attorney of record for Oakland in the suit described above.<sup>23</sup> Perhaps more important, though, is the fact that a significant number of state AGs' offices around the country publicly weighed in on the merits of the Oakland-San Francisco litigation. In April 2018, a collection of state AGs filed an amicus curiae brief in support of the energy producers' motion to dismiss the complaint.<sup>24</sup> The brief—joined by the AGs from Indiana, Alabama, Arkansas, Colorado, Georgia, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, and Wyoming—argued that the plaintiffs' suit presented non-justiciable political questions about the proper regulatory balance for regulating emissions, and that plaintiffs' federal common law claims were preempted by federal statutes that delegate the power to regulate carbon emissions to the EPA.<sup>25</sup> In early May, California and Washington State—both members of the "AGs United for Clean Power" coalition—joined with New Jersey to file an opposing amicus brief in support of Oakland and San Francisco, which argued that their public nuisance claims were justiciable even if they intersected with public policy questions, were not preempted by the Clean Air Act or other federal statutes, and did not run afoul of the dormant Commerce Clause.<sup>26</sup>



In late June 2018, U.S. District Judge William Alsup dismissed the amended complaints filed by Oakland and San Francisco in the California climate change litigation.<sup>27</sup> In his order granting the energy producers' motions to dismiss, Judge Alsup explained that the plaintiffs' theory sought to impose liability on energy companies for their global (and legal) production and sale of fossil fuels, and would "effectively allow plaintiffs to govern conduct and control energy policy on foreign soil."<sup>28</sup> Explaining that "there are sound reasons why regulation of the worldwide problem of global warming should be determined by our political branches, not by our judiciary," Judge Alsup held that plaintiffs had failed to state federal common law claims and dismissed their complaints.<sup>29</sup>

## CONCLUSION

The Massachusetts and New York AG probes are ongoing, and it remains to be seen whether other state AGs will pursue similar investigations. Furthermore, it seems likely that certain local governments will pursue climate change lawsuits, at least until there are sufficient judicial decisions to develop a legal consensus about these novel theories of liability or alternative strategies against these companies prove more successful. Regardless, the continued debate about climate change, coupled with more assertive roles by state AGs and local governments, suggest that energy companies will continue to face complex legal challenges in this sphere for years to come.

King & Spalding has extensive experience representing major energy companies in complex state and federal investigations and litigation, and also has specific experience representing companies in litigation related to climate change.

With more than 250 dedicated energy lawyers located in the world's primary energy centers, our energy practice combines deep sector knowledge and experience to help clients enter new markets, advance innovative projects and transactions, navigate challenging investigations and regulatory matters, and find favorable paths through high-stakes disputes.

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<sup>1</sup> Press Release, New York Attorney General's Office, A.G. Schneiderman, Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change (March 29, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Justin Gillis and Clifford Krauss, Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General, N.Y. TIMES, Nov. 5, 2015, <https://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html>; see also Subpoena for Production of Documents, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 101-6 at App. 251.

<sup>5</sup> John Schwartz, ExxonMobil Climate Change Inquiry in New York Gains Allies, N.Y. TIMES, March 29, 2016,

<https://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html>.

<sup>6</sup> Civil Investigative Demand, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 101-7 at App. 286; Subpoena, *Exxon Mobil Corp. v. Walker*, No. 4:16-cv-00364 (N.D. Tex. May 18, 2016), ECF No. 1-5.

<sup>7</sup> Subpoena for Production of Documents, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 101-6 at App. 251; Subpoena, *Exxon Mobil Corp. v. Walker*, No. 4:16-cv-00364 (N.D. Tex. May 18, 2016), ECF No. 1-5; Civil Investigative Demand, *Exxon Mobil Corp. v. Healey*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 101-7 at App. 286.

<sup>8</sup> See, e.g., Pl.'s Original Pet. for Decl. Relief, ¶¶ 64–67, *Exxon Mobil Corp. v. Walker*, No. 4:16-cv-00364 (N.D. Tex. May 18, 2016), ECF No. 1-5; ExxonMobil's First Am. Compl., ¶¶ 88–96, 109–121, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 100.

<sup>9</sup> See, e.g. First Am. Compl. ¶¶ 41–50, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 100.

<sup>10</sup> Joint Stipulation of Dismissal, *Exxon Mobil Corp. v. Walker*, No. 4:16-cv-00364 (N.D. Tex. May 18, 2016), ECF No. 40.

<sup>11</sup> Opinion and Order at 34, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 265.

<sup>12</sup> Proposed Second Am. Compl. at 58–59, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 252.

<sup>13</sup> Opinion and Order at 2, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 265. The Court also held that Exxon's suit against Massachusetts AG Maura Healey was precluded by *res judicata*, on the grounds that an earlier Massachusetts Superior Court decision enforcing the Massachusetts subpoena precluded Exxon's claims from being re-litigated in federal court. *Id.* at 25–32.

<sup>14</sup> *Id.* at 32–45.

<sup>15</sup> Notice of Appeal, *Exxon Mobil Corp. v. Healey et al.*, No. 17-cv-02301 (S.D.N.Y. Nov. 10, 2016), ECF No. 267.

<sup>16</sup> Opinion at 3–21, *Exxon Mobil Corp. v. Attorney General*, SJ-12376 (Mass. April 13, 2018),.

<sup>17</sup> *Id.* at 21–28.

<sup>18</sup> See Complaint, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. 2018), ECF No. 1-2.

<sup>19</sup> First Am. Compl. for Public Nuisance, ¶¶ 92–123, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. 2018), ECF No. 199.

<sup>20</sup> *Id.* at ¶¶ 124–148.

<sup>21</sup> *Id.* at ¶ X.2.

<sup>22</sup> Complaint, *Board of County Commissioners of Boulder County et al. v. Suncor Energy et al.*, No. 2018CV030349 (Co. District Ct. 2018); Complaint, *City of New York v. BP P.L.C. et al.*, No. 18-cv-0182, ECF No. 1.

<sup>23</sup> Order Granting Application for Admission Pro Hac Vice of Attorney Matthew Pawa, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. 2018), ECF No. 150.

<sup>24</sup> Amicus Brief of Indiana and Fourteen Other States in Support of Dismissal at 8–20, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. April 19, 2018), ECF No. 224-1

<sup>25</sup> *Id.*

<sup>26</sup> Amicus Brief of California, New Jersey and Washington in Support of Pls.' Opp'n to Mot. to Dismiss at 2–16, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. May 3, 2018), ECF No. 236-1.

<sup>27</sup> Order Granting Motion to Dismiss, *California v. BP P.L.C. et al.*, No. 3:17-cv-6011 (N.D. Cal. June 25, 2018), ECF No. 283.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 15.