

SPLG – CLIMATE EMERGENCY EVENT

EDINBURGH LAW SCHOOL, 28.10.19

Transnational Climate Litigation

NS Ghaleigh, Edinburgh Law School

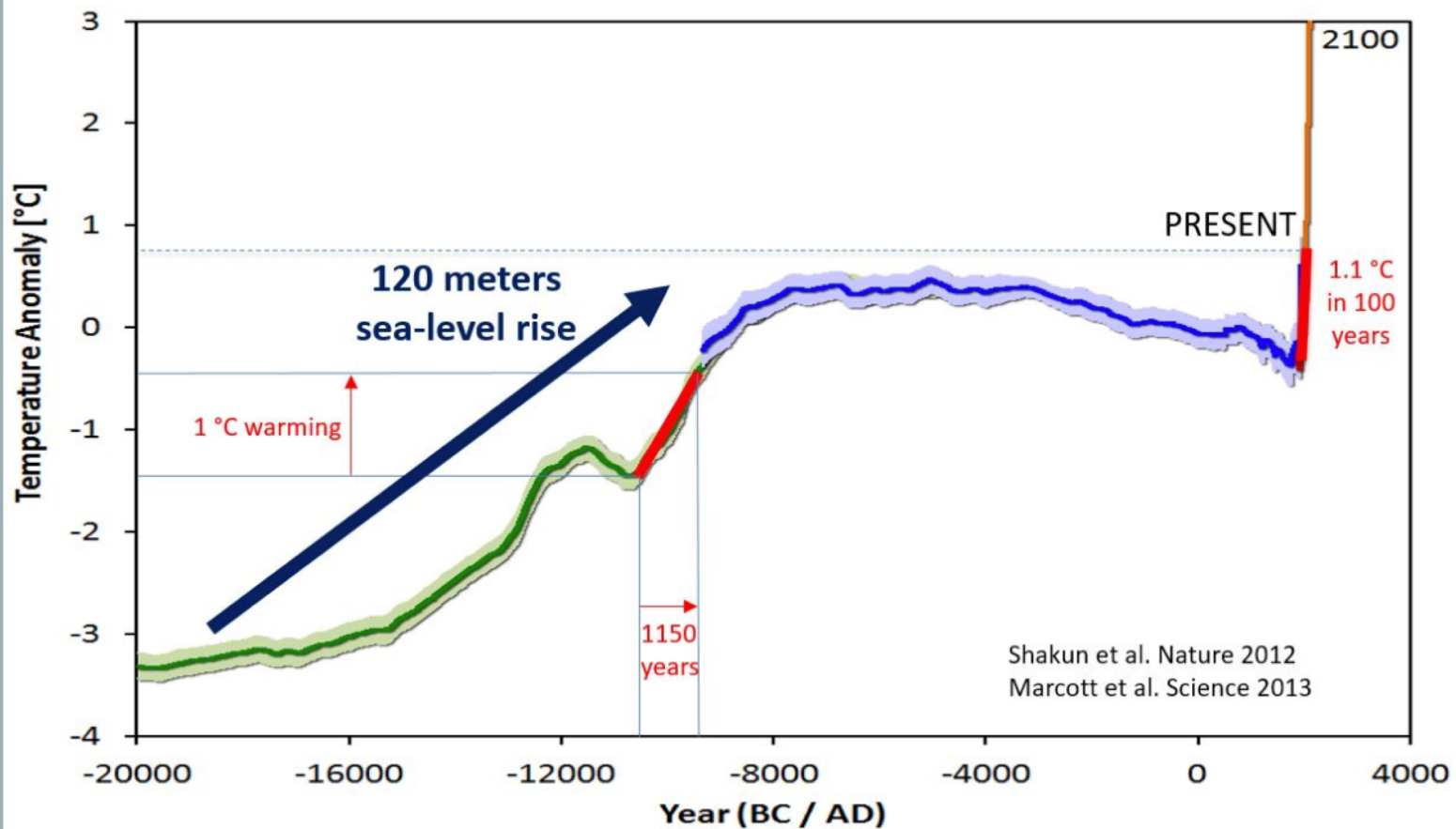
OUTLINE

Basic Data

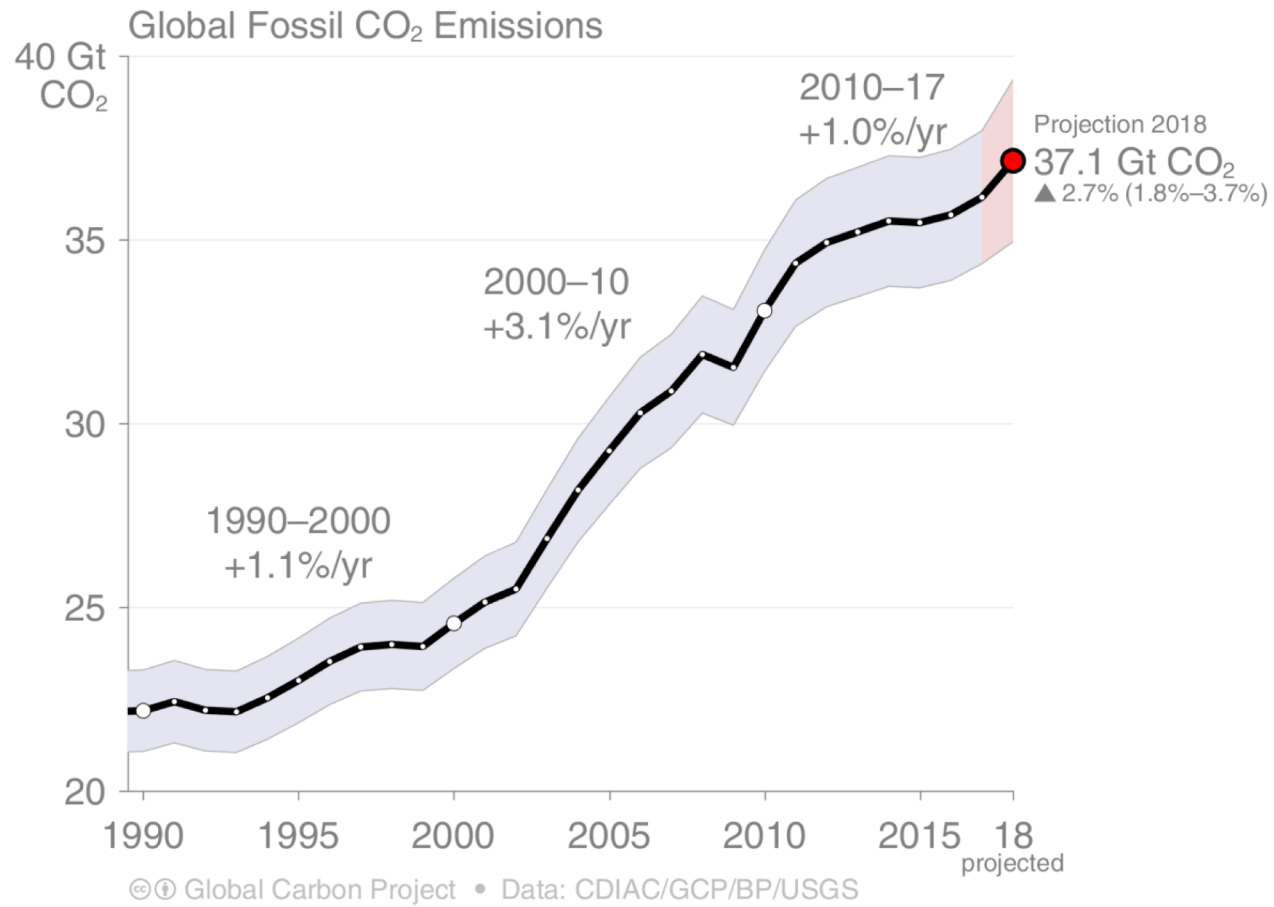
Climate Litigation – Past and Future

Coming of Age of ‘Constrained Carbon’ Argument

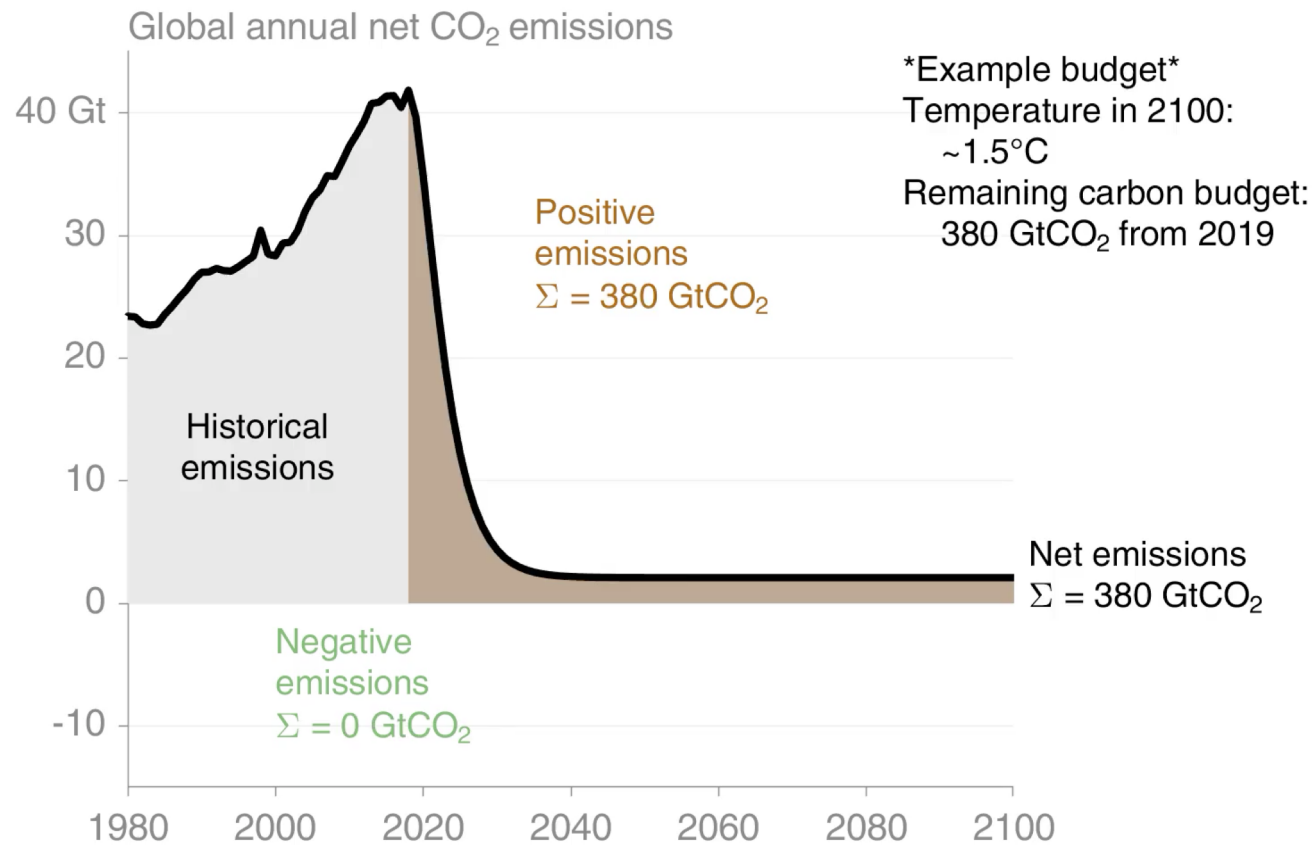
GLOBAL TEMP SINCE LAST ICE AGE



EMISSIONS PROFILE (GLOBAL)



EMISSION TRAJECTORIES @ 1.5C



MAJOR, MINOR, AND MICRO EMITTERS

Rank	GtCO ₂ e	% of Total	Ave.	States
1-10 (major)	23,768.48	66%	7%	China, USA*, India, Russian Fed*, Japan, Germany, Iran*, Saudi Arabia, South Korea, Canada
11-20 (minor)	4,197.82	12%	1%	Mexico, Indonesia, Brazil, S Africa, Turkey*, Australia, UK, France, Italy, Thailand
21-220 (micro)	8,186.70	23%	0.1%	RoW

Sources: Boden, TA, Marland, G and Andres, RJ 2017. Global, Regional, and National Fossil-Fuel CO₂ Emissions, Carbon Dioxide Information Analysis Center, Oak Ridge National Laboratory, U.S. Department of Energy, Oak Ridge, Tenn., USA; UNFCCC, 2017. National Inventory Submissions 2017. United Nations Framework Convention on Climate Change; BP, 2017. Statistical Review of World Energy

CLIMATE LITIGATION, PAST

Successes in public/corporate awareness i.e. Urgenda

Often working with the grain of the market, ie US coal cases

Focus on L+D, HRs (Philippines Commission v 'backlash')

Overwhelming jurisdictional bias/limited interest in Top Ten

CLIMATE LITIGATION, FUTURE

Key players :

NGOs – traditional and new; Activist firms – ClientEarth

Philanthropies

'CONSTRAINED CARBON', COMING OF AGE?

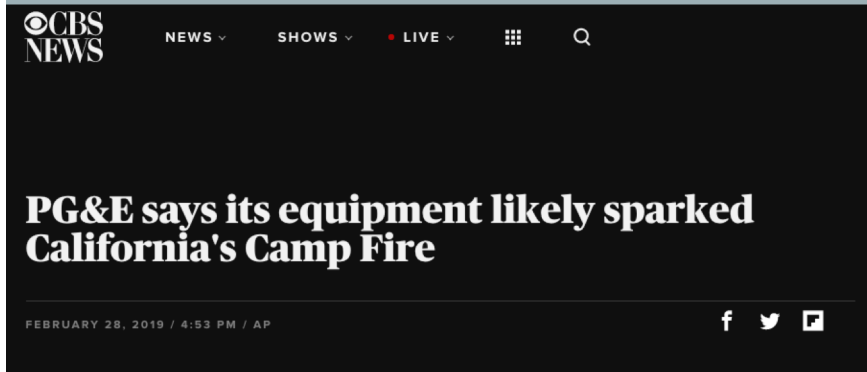
Investment risk

Disclosure / TCFD (increasing take up, i.e. UKEF)

CLIMATE RISKS



IMPACT EXAMPLES



Bankrupt Pacific Gas & Electric Corp. inched closer to taking responsibility for the deadliest U.S. wildfire in a century, saying Thursday it's "probable" that one of its transmission lines sparked the blaze last year that killed 86 people and destroyed most of the city of Paradise.

The embattled utility company, which filed for bankruptcy protection in January, said it's taking a \$10.5 billion charge for claims connected to the so-called Camp Fire in its fourth quarter earnings. The fire destroyed 14,000 homes in and around Paradise -- a city of 27,000 people in the Sierra Nevada foothills.



IMPACT EXAMPLES

Risk type	Climate-related risk	Potential financial impacts	Example
Transition	Policy and legal The risk from exiting and emerging regulation aimed at addressing climate change. This might include: <ul style="list-style-type: none"> Increased pricing of GHG emissions. Enhanced reporting obligations. Exposure to litigation. Limits on a licence to operate. 	<ul style="list-style-type: none"> Compliance costs. Limitations on use of carbon-intensive assets. Write-offs, asset impairment, and early retirement of existing assets due to policy changes. 	Jurisdictions may impose a carbon pricing scheme or a carbon tax, which will have cost implications especially for carbon-intensive companies.
	Technology The risk from emerging technologies aimed at supporting the global low carbon transition. This might include: <ul style="list-style-type: none"> Substitution of existing products and services with lower emissions options. Upfront costs to transition to lower emissions technology. 	<ul style="list-style-type: none"> Write-offs of investments and early retirement of existing technologies. Capital investment in new technologies. Operational costs associated with adopting and deploying new technologies and practices. 	The growth of electric vehicles will have implications for many companies involved in the development of transportation, including increasing R&D expenditure. For example the changes to engines will have a knock on effect down the supply chain, impacting on turbine manufacturers for example.
	Market The risk from shifting supply and demand as economies react to climate change. This might include: <ul style="list-style-type: none"> Changing customer behaviour. Uncertainty in market signals. Increased cost of raw materials. 	<ul style="list-style-type: none"> Reduced revenue from change in demand for goods and services. Abrupt and unexpected shifts in energy costs. Change in company valuations. 	As consumers grow increasingly aware of the environmental impact of the goods and services they buy, their shopping habits shift. This may lead to reduced revenue for companies that don't respond quickly.
	Reputation The risks of damage to brand value and loss of customer base from shifting public sentiment about climate change. This might include: <ul style="list-style-type: none"> Shifts in consumer preferences. Stigmatisation of sector. Increased stakeholder concern. 	<ul style="list-style-type: none"> Reduced revenue from decreased demand for goods and services. Reduction in capital availability. Increased expenditure in marketing. 	Growing commitments and pledges from investors to divest from fossil fuel companies, reducing the availability of capital available.
Physical	Acute The risk of increasing severity of weather events.	<ul style="list-style-type: none"> Disruption to operations, transportation, supply chains, and distribution chains. Damage to physical assets (factories, equipment, infrastructure). 	Increasingly severe storms in the Caribbean sea have led to increased insurance claims.
	Chronic The risk of longer term changes in weather patterns.	<ul style="list-style-type: none"> Impact on insurance liabilities. Limitations on ability to obtain 	Changes in weather patterns leading to long-term water shortages that may effect a companies ability to

COMPANY LAW LITIGATION

Possible Intervention Points:

Institutional Investors

Corporate Reporting & Directors' Duties

Shareholder Resolutions

INSTITUTIONAL INVESTORS - ENDS

Investors recognise that CC presents a material financial risk

New policies implemented & then full integration of risks of CC into portfolio management

Reduced carbon intensity of portfolios

More investment in low carbon solutions / less investment in fossil fuels

Investors act as 'Forceful Stewards'

Climate management required in mandates

INSTITUTIONAL INVESTORS - MEANS

Correct misconception of 'fiduciary duty'

Members demand that their funds manage the risks and opportunities of climate change

Court orders that investors have a legal duty to manage the risks and opportunities of climate change

CORPORATE REPORTING AND DIRECTORS DUTIES - ENDS

Increased reporting of climate risks as 'principal risks and uncertainties'
including on stranded assets

Directors recognise that CC presents a material financial risk

Directors have legal duties to manage CC risks & opportunities (new
policies, improved reporting, full integration in management)

Publish low carbon compliant business plans

More investment in low carbon solutions / less investment in fossil fuels

CORPORATE REPORTING AND DIRECTORS DUTIES - MEANS

Correct misconception of 'fiduciary duty'

Members demand that their funds manage the risks and opportunities of climate change

Court orders that investors have a legal duty to manage the risks and opportunities of climate change

CORPORATE REPORTING AND DIRECTORS DUTIES - MEANS

CA, s172:

172

Duty to promote the success of the company

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
 - (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
- (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

CORPORATE REPORTING AND DIRECTORS DUTIES - MEANS

CA, s414CB:

414CB Contents of non-financial information statement

(1) The non-financial information statement must contain information, to the extent necessary for an understanding of the company's development, performance and position and the impact of its activity, relating to, as a minimum—

- (a) environmental matters (including the impact of the company's business on the environment),
- (b) the company's employees,
- (c) social matters,
- (d) respect for human rights, and
- (e) anti-corruption and anti-bribery matters.

(2) The information must include—

- (a) a brief description of the company's business model,
- (b) a description of the policies pursued by the company in relation to the matters mentioned in subsection (1)(a) to (e) and any due diligence processes implemented by the company in pursuance of those policies,
- (c) a description of the outcome of those policies,
- (d) a description of the principal risks relating to the matters mentioned in subsection (1)(a) to (e) arising in connection with the company's operations and, where relevant and proportionate—
 - (i) a description of its business relationships, products and services which are likely to cause adverse impacts in those areas of risk, and
 - (ii) a description of how it manages the principal risks, and
- (e) a description of the non-financial key performance indicators relevant to the company's business.

CLIENTEARTH V ENEA

Major court win shows power of corporate law to fight climate change

News / 1 August 2019

ClientEarth has scored a major win in Poland, which puts the future of planned coal-fired power plant Ostrołęka C in question.

The plant was set to be Poland's last, a €1.2bn, 1GW coal project. Polish energy and financial market experts have been expressing deep concern over the plant for a long time. We took a novel shareholder lawsuit against the project's co-owner Enea, on the basis that the investment posed major financial risks to the company and its shareholders.

Coal in Poland is a financial risk

The project still lacks over PLN 3bn in financing, but Enea and its joint venture partner Energa have been doggedly pushing ahead regardless. The companies had even set a date to lay the foundation stone for the plant.

But the District Court in Poznań has held that the company resolution authorising construction of the power plant was legally invalid. We believe this should prompt a major rethink by the companies and their boards, and could spell the end for Ostrołęka C.

“Companies and their directors are legally responsible for managing climate-related risks and face potential liability if they fail to do so.”

MCVEIGH V RETAIL EMPLOYEES TRUST

[Write to us](#)

McVeigh v. Retail Employees Superannuation Trust

Year opened:	2018
Status:	Open
Jurisdiction:	Australia
Principle law(s):	Corporations Act of 2001
Mitigation/adaptation:	Mitigation

Summary

An Australian pension fund member filed suit against the Retail Employees Superannuation Trust (REST) alleging that the fund violated the Corporations Act 2001 by failing to provide information related to climate change business risks and any plans to address those risks. The case was filed in the Federal Court of Australia.

MASS. V EXXON

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OFFERED BY [Office of Attorney General Maura Healey](#)

PRESS RELEASE

AG Healey Sues Exxon for Deceiving Massachusetts Consumers and Investors

Massachusetts Becomes First State to Challenge Company's Ongoing Campaign to Mislead Both Consumers and Investors About the Climate-Driven Risks Posed by its Fossil Fuel Products

FOR IMMEDIATE RELEASE:
10/24/2019

Office of Attorney General Maura Healey

BOSTON — Massachusetts Attorney General Maura Healey today sued Exxon Mobil Corporation (Exxon), the world's largest publicly traded oil and gas company, for deceptive advertising to Massachusetts consumers and for misleading Massachusetts investors about the risks to Exxon's business posed by fossil fuel-driven climate change—including systemic financial risk.

MEDIA CONTACT

Chloe Gotsis

 **Phone**
(617) 727-2543

 **Online**
Chloe.Gotsis@mass.gov

CLIMATE RISK

European coal plants forecast to lose €6.6bn in 2019

Report says coal-fired power struggling to compete with cheap renewables and gas

Wind power has capacity to meet world's entire electricity demands

International Energy Agency says cost of offshore electricity will drop 40% by 2030



The IEA report says that offshore wind has the potential to meet the world's electricity demand 11 times over by 2040 © PA

Leslie Hook in London OCTOBER 25 2019

Bloomberg

Climate Changed

IMF Will Include Climate in Country Analysis, Georgieva Says

By [Jill Ward](#)

16 October 2019, 22:01 BST

- ▶ Georgieva hopes to make climate-related analysis 'routine'
- ▶ IMF chief speaks on panel on central banks and climate change

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The IMF's new managing director, Kristalina Georgieva, put climate change high up on the agenda at this year's annual meetings in Washington, saying the fund is getting ready to incorporate environmental risk into its economic analysis.

Opinion **FT Magazine**

The myth of green growth

'Can democracy survive without carbon? We are not going to find out'

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CONCLUSIONS

Climate Litigation is afoot...

...often in unusual places

...and spaces

...with unexpected friends