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CURBING CARBON DIOXIDE EMISSIONS THROUGH THE REBIRTH OF PUBLIC NUISANCE LAWS— ENVIRONMENTAL LEGISLATION BY THE COURTS

DANIEL V. MUMFORD*

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INTRODUCTION AND BACKGROUND

On July 21, 2004, attorneys general from eight states filed a class action lawsuit in the U.S. District Court for the Southern District of New York against five of the largest electric utility companies in the country.¹ The suit claims that the carbon dioxide ("CO₂") emissions from the companies' plants constitute a public nuisance because CO₂ contributes to global warming.² The suit does not seek monetary compensation from the utility companies, but it does demand that the court order the companies to reduce their CO₂ emissions by a recommended amount of three percent annually for the next ten years.³

The suit claims that the named utility companies have "practical, feasible, and economically viable options for reducing CO₂ emissions without *significantly* increasing the cost of electricity to their customers."⁴ These options include "changing fuels, improving efficiency, increasing generation from zero- or low-carbon energy sources such as wind, solar, and gasified coal with emissions capture, co-firing wood or other biomass in coal plants, employing demand-side management techniques, altering the dispatch order of their plants, and other measures."⁵

¹ See Press Release, Office of the State of California Attorney General, Attorney General Lockyer Files Lawsuit to Reduce Global Warming Emissions from Five Largest Polluters (July 21, 2004) [hereinafter Press Release], <http://ag.ca.gov/newsalerts/2004/04-076.htm>. The Attorneys General filing suit were: Bill Lockyer of California, Richard Blumenthal of Connecticut, Tom Miller of Iowa, Peter C. Harvey of New Jersey, Eliot Spitzer of New York, Patrick C. Lynch of Rhode Island, William H. Sorrell of Vermont, and Peg Lautenschlager of Wisconsin. *Id.* The suit also was joined by New York City. *Id.* The utility companies named in the complaint were: American Electric Power Company, Inc. ("AEP"), AEP Service Corporation (a wholly owned AEP subsidiary), Southern Company, Xcel Energy, Cinergy Corporation, and the Tennessee Valley Authority ("TVA"). *Id.*

² Jonathan A. Lesser, *The AGs' Global Warming Suits: Regulation by Litigation*, 142 PUB. UTILS. FORTNIGHTLY 24 (2004).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

The utility companies have responded with a motion to dismiss the case.⁶ However, the attorneys general are not discouraged by a motion to dismiss which they already had expected.⁷ The plaintiffs intend to proceed with a lawsuit that they feel “makes clear and compelling claims under well-established federal law.”⁸

This Note argues that the courts are not the proper forum for resolving the complex question of CO₂ regulation.⁹ Part I addresses the ongoing debate over the actual impact of CO₂ on the environment—specifically, the impact that emissions by the named power companies are having on global temperatures.¹⁰ There is sufficient scientific evidence to support the theory that CO₂ emissions more likely than not cause global warming;¹¹ however, it is doubtful that limiting the emissions of these five utility companies would even slow the current warming trend.¹²

Part III of this Note covers the impact that the regulation proposed in the lawsuit would have on the industry, labor, and financial development of the states that rely on power from the defendant power companies.¹³ In effect, the law suit would shift the costs of transforming coal-based industry to a few states and a small group of investors.¹⁴

Whether to regulate CO₂ emissions by the utility companies named in the suit is a complex question that requires a determination of the actual harms caused by emissions from these

⁶ Suzanna Strangmeier, *Pollution Debate Heating Up over NSR Rules*, NAT. GAS WK., Oct. 18, 2004; see also *Cinergy Fights Emissions Suits*, ATLANTA J.-CONST., Oct. 1, 2004, at 2F (stating that Cinergy has attacked the plaintiffs' case as lacking harms “immediate enough to merit litigation”).

⁷ *Climate Change; Utilities Seek to Dismiss CO₂ Lawsuit*, GREENWIRE, Oct. 1, 2004, <http://www.eenews.net/subscriber/search/swishe-search.cgi> (subscription required for access).

⁸ *Id.* (quoting Connecticut Attorney General Richard Blumenthal).

⁹ See discussion *infra* Part IV.A.

¹⁰ See discussion *infra* Part I.B.

¹¹ See discussion *infra* notes 22-23 and accompanying text.

¹² See discussion *infra* Part I.D.

¹³ See discussion *infra* Part III.A.

¹⁴ See Lesser, *supra* note 2, at 24.

companies. Additionally, the policy considerations must include weighing the benefits of limiting the emissions against the costs that such regulation will place on the companies and on the affected states. The complexity of the issue, the differing interests of all the states involved, and the international policy implications make this a topic that is too broad for resolution in the courtroom;¹⁵ the debate belongs in the legislative arena.

I. CARBON DIOXIDE AND GLOBAL WARMING

The lawsuit alleges that emissions by the named utility companies must be regulated to prevent harm to public health and welfare.¹⁶ However, the utility companies contend that they have not operated their power plants in any way that is unlawful.¹⁷ Power plant CO₂ emissions are not regulated by the 1990 Clean Air Act or any other legislation.¹⁸ The utilities further contend that the alleged hazards of CO₂ emissions by the utility companies are undermined by the fact that all animals, including humans, emit CO₂ when they exhale.¹⁹

A. *The Alleged Harms of Carbon Dioxide*

Plaintiffs do not claim that CO₂ is itself directly hazardous to the population, but rather that its uncontrolled emission leads to global warming.²⁰ The buildup of CO₂ gases in the atmosphere

¹⁵ See discussion *infra* Part IV.A.

¹⁶ See Press Release, *supra* note 1.

¹⁷ See Lesser, *supra* note 2, at 24.

¹⁸ *Id.*; see also 42 U.S.C. § 7412 (2000). But see Miguel Bustillo, *States to Sue over Global Warming; California and Seven Others, Unhappy with U.S. Policies, Say the Carbon Dioxide from Five Energy Producers Is a 'Public Nuisance,'* L.A. TIMES, July 21, 2004, at B8 (noting that eleven states and fourteen environmental groups are challenging in federal court the non-pollutant classification of CO₂ in 2003 by the U.S. Environmental Protection Agency).

¹⁹ David J. Owsiany, *Suits Against Utility Companies Are Politics Hiding Behind Health Issues*, COLUMBUS DISPATCH, Aug. 23, 2004, at 11A.

²⁰ Press Release, *supra* note 1.

trap some of the sun's radiation reflected by the Earth in the same way that glass panels do in a greenhouse.²¹ The "speed and magnitude of global warming" have been linked to the "level of carbon dioxide emissions."²²

Climate researchers claim that there is a global warming trend and that this is due to human activity.²³ The average surface temperature has increased by one degree Fahrenheit over the past century, and it is predicted to rise between 2.2 and ten degrees in the next one hundred years if left unchecked.²⁴ The difference between current temperatures and those during the last ice age is only seven to eleven degrees.²⁵

According to the suit, the one degree rise in average temperature already has caused shrinking of the Arctic Sea ice, the loss of two-thirds of the glaciers in Glacier National Park in Montana, and the death of coral reefs.²⁶ Some also blame the one degree rise

²¹ Chris Bowman, *Landmark Emissions Lawsuit; California, 7 Other States Wield Nuisance Laws*, SACRAMENTO BEE, July 22, 2004, at A3.

²² Press Release, *supra* note 1; see also Bustillo, *supra* note 18 (noting that the National Academy of Sciences, the American Meteorological Society, and "numerous other scientific organizations" have supported the position); NASA: 2005 Could Be Warmest Year Recorded, REUTERS, Feb. 10, 2005 (quoting James Hansen of NASA's Goddard Institute for Space studies who claims that the warming trend over the last thirty years is "due primarily to increasing greenhouse gases in the atmosphere" and that carbon dioxide is the most common of the greenhouse gases in the atmosphere), available at http://www.publicbroadcasting.net/wrvo/news.newsmain?action=article&ARTICLE_ID=737855.

²³ Mark Clayton, *In Hot Pursuit of Polluters*, CHRISTIAN SCI. MONITOR, Aug. 19, 2004, at 15 (citing a statement by Anthony Broccoli, a climate researcher at Rutgers University's Cook College in New Brunswick, New Jersey), available at 2004 WL 58696320.

²⁴ *Id.*; see also William H. Sorrell, Commentary, *Stepping in to Curb Pollution when U.S. Government Won't: N.J. Joins 7 States, N.Y. City in Suit Seeking Reduced CO2 Emissions*, 178 N.J. L.J. 23 (2004) (citing the Intergovernmental Panel on Climate Change as projecting an average temperature rise as large as ten degrees by the end of the century).

²⁵ Dan Shapley, 8 States, NYC Sue Power Plants over Carbon Dioxide, POUGHKEEPSIE J., July 22, 2004, at A1.

²⁶ Leonard Post, *Power Companies Feel the Heat: Eight States and NYC Sue Power Companies over Global Warming*, 26 NAT'L L.J. 4, (2004).

in temperature for the global sea level rise of four to eight inches over the past century,²⁷ and for the fact that 1998 was "the hottest year [on record] . . . since thermometer records began in 1861 . . . with 2002 and 2003 tied for second warmest."²⁸ But the complaint is not limited to the current harms of global warming;²⁹ it also states that the eventual impacts of global warming will be "increasing asthma and heat-related illnesses, eroding shorelines, floods and other natural disasters, loss of forests and other precious resources."³⁰

²⁷ Clayton, *supra* note 23.

²⁸ Sorrell, *supra* note 24 (adding that the "five hottest years have all occurred since 1997 and the 10 hottest since 1990"); *see also* NASA, *supra* note 22 (stating that 2004 was the fourth warmest recorded year and that 2005 is expected by some to be warmer than 2004, "and perhaps even warmer than 1998, which had stood out as far hotter than any year in the preceding century").

²⁹ The global ills claimed by the attorneys general include

- (1) a rise in deaths directly attributable to intensified and prolonged heat waves; (2) increased levels of smog, and the resulting upsurge in respiratory problems such as asthma; (3) rising sea levels, which can cause beach erosion, inundation of coastal land, and salinization of water supplies; (4) water shortages associated with a reduction of snow pack in the mountains of California; (5) lowered water levels in the Great Lakes, which negatively impacts commercial shipping, recreational harbors and marinas, and hydropower generation; (6) an increase in droughts and floods nationwide, which may result in property damage and pose a hazard to human safety; and (7) a widespread loss of species and biodiversity.

Eight States and New York City Sue Five Power Producers over Greenhouse Gas Emissions, FOSTER ELEC. REP., July 28, 2004, at 10; *see also* Chris Bowman, *California Joins 8-State Lawsuit to Fight Utilities' Global Warming Gasses*, SACRAMENTO BEE, July 21, 2004, at A1 (noting specific harms for California, which include more frequent wildfires and contamination of water delivered to twenty million Californians); Shapley, *supra* note 25 (citing harms specifically claimed by the state of New York based on a recent study conducted by Columbia University's Mailman School of Public Health and its Earth Institute).

³⁰ Robert Samuelson, Editorial, *Attorney Generals' Hot Air*, WASH. POST, Aug. 11, 2004, at A21.

B. *Global Impact of Defendants' Emissions*

Plaintiffs allege that the five utility companies targeted in the lawsuit control twenty-five operating companies and 174 power plants in twenty states.³¹ Those 174 plants emit nearly 650 million tons of CO₂ each year.³² The five companies account for one fourth of all U.S. power plant CO₂ emissions, or ten percent of the country's total CO₂ production.³³ Even at the levels of CO₂ emissions that are alleged by the plaintiffs, the named utility companies only account for two percent of all global CO₂ emissions.³⁴

C. *Mitigation of Harms by Defendants*

Despite the seemingly large quantities of CO₂ emissions alleged by the plaintiffs, the U.S. Department of Energy reports that the level of energy-related emissions for 2003 only increased by 0.9% and that it was still below the amount registered for 2000.³⁵ This stabilization of the CO₂ output is due in part to the power industry's self-imposed caps on emissions and programs to reduce CO₂ production.³⁶

³¹ *Greenhouse Polluters Face the Law: Top Cops Bring the Fight Against Global Warming to a New Battleground*, ONEARTH, Sept. 22, 2004, at 42; see also *States Sue over CO₂*, PLATT'S COAL OUTLOOK, July 26, 2004, at 13 (noting that the suit charges that AEP's plants emitted 226 million tons of CO₂; Southern emitted 171 million tons; TVA, 171 million; Xcel, 75 million; and Cinergy, 70 million).

³² Sorrell, *supra* note 24.

³³ *Id.*

³⁴ See Lesser, *supra* note 2, at 26.

³⁵ Op-Ed., *Politics Drives Emissions Lawsuit; It's Ludicrous to Prosecute your Local Power Company for Causing Global Climate Change*, WIS. ST. J., July 22, 2004, at A18; see also John Woolfolk, *States Use Public Nuisance Law to Sue Companies over Emissions*, SAN JOSE MERCURY NEWS, July 22, 2004 (noting that AEP claims that its emissions were overstated at 220 million annual tons instead of 170).

³⁶ See Woolfolk, *supra* note 35.

AEP has agreed to cap greenhouse gas emissions in Chicago and to reduce those gases ten percent by 2006;³⁷ Xcel is working towards developing alternative power sources;³⁸ and Cinergy has pledged that it will spend \$21 million to return its greenhouse gas emissions to five percent below 2000 levels for 2010 through 2012.³⁹ All five utility companies are involved in self-imposed programs to reduce or offset emissions.⁴⁰

Utility companies do not believe that it is necessary to impose outside requirements for emission reduction because efficiency and cost reduction already provide the necessary incentive to control the emissions. A chief executive of British Petroleum ("BP"), John Browne, noted that his company saved \$50 million through cutting emissions by ten percent through the elimination of leaks and waste.⁴¹ The companies sued by the attorneys general claim that such actions detract resources and attention from voluntary activities that are already undertaken by

³⁷ *Id.*; see also Pam Kasey, *Lawsuit Targets Utilities, Alleges Global Warming*, 20 STATE J., Aug. 13, 2004, at 4.

³⁸ *Politics Drives Emissions Lawsuit*, *supra* note 35.

³⁹ Bruce Geiselman, *Eyes on the Five; States File Lawsuit Against 5 Utilities*, WASTE NEWS, Aug. 2, 2004, at 1; see also Anthony Schoettle, *Cinergy Named in Federal Suit*, INDIANAPOLIS BUS. J., Aug. 2, 2004, at 3, 39 (noting that Cinergy has undertaken three planting projects in three states and that it has spent \$200 million to convert one power plant from coal to a combined-cycle technology, which provides power more efficiently by recapturing the exhaust).

⁴⁰ See Woolfolk, *supra* note 35 (stating that Southern is involved in developing technology to reduce coal-burning emissions; that Xcel, the nation's second largest wind-power generator, plans to triple its windpower generation by 2012, and has spent \$1.2 billion to reduce emissions from a number of its power plants; and that the TVA is purchasing wind-power and modernizing its hydroelectric power plants to reduce emissions); see also *Eight States and New York City Sue*, *supra* note 29 (explaining that electric utilities and the U.S. Department of Energy have created a voluntary program, Climate Challenge, to avoid or sequester the equivalent of 281 million tons of CO₂ in 2002 alone, and that many of the companies have also agreed to reduce carbon intensity by three to five percent in their power plants over the next decade); Chris Serres, *Eight States, NYC Sue Xcel, 4 Others*, STAR TRIB., July 22, 2004, at 1D (claiming that Xcel has committed to reduce CO₂ emissions by twelve million tons by 2009).

⁴¹ *War Between the States on Climate*, TAMPA TRIB., Aug. 3, 2004, at 10.

the utility companies.⁴² Steve Brash, a spokesman for Cinergy, has stated that the efforts of the attorneys general should be redirected towards "other industries that aren't making commitments."⁴³

However, New York Attorney General Eliot Spitzer has stated that "[v]oluntary actions so far have been inadequate, inconsequential."⁴⁴ In fact, Spitzer has characterized power utilities as inactive toward emission reduction when compared to the efforts being made by the international community and by individual U.S. states.⁴⁵ The voluntary reductions of three to five percent over the next decade certainly pale in comparison to the lawsuit's demand for three percent annual reductions over the next ten years, which will amount to a twenty-six percent reduction in emissions in the next decade.

D. *Impact of Emission Reduction by Defendants*

In addition to contesting that the harms of global warming can be attributed to CO₂ emissions, the utility companies claim that regulating their emissions will not remedy the situation.⁴⁶ Despite their own efforts to reduce CO₂ emissions, the utility companies point out that scientific data has not conclusively linked CO₂ emissions to global warming.⁴⁷ Although CO₂ concentration rapidly increased after 1940, there was a decrease in the temperature record for thirty-seven years until 1997, when it slowly

⁴² See Kasey, *supra* note 37 (quoting Melissa McHenry, an AEP spokeswoman).

⁴³ Brian Stempeck, *Climate Change; State Attorneys to File CO₂ Emissions Suit Today*, GREENWIRE, July 21, 2004, <http://www.eenews.net/subscriber/search/swishe-search.cgi> (subscription required for access).

⁴⁴ Brian Stempeck, *Climate Change; States' Lawsuit Demands Utilities Reduce CO₂ Emissions 3 Percent Per Year*, GREENWIRE, July 22, 2004 (quoting Eliot Spitzer, New York Attorney General), <http://www.eenews.net/subscriber/search/swishe-search.cgi> (subscription required for access).

⁴⁵ *Id.*

⁴⁶ See Joe Truini, *Utilities Move to Dismiss Suit*, 10 WASTE NEWS 3 (2004).

⁴⁷ Owsiany, *supra* note 19; see also *New York's Greenhouse Gasbags*, N.Y. POST, Aug. 2, 2004, at 30 (pointing to significant evidence that climate change is driven by sunspot activity).

recovered.⁴⁸ Additionally, other studies claim that CO₂ is only a minor greenhouse gas.⁴⁹

Even if CO₂ emissions can be shown to cause global warming, plaintiffs also must show that the utility companies contribute to the problem. The defendants can point to the fact that CO₂ is naturally emitted by all animals and even volcanoes.⁵⁰ Planetary deforestation has been blamed for twenty-five percent of total CO₂ emissions and motor vehicles for an additional thirty-three percent.⁵¹ The Ohio Attorney General, Jim Petro, refused to join the lawsuit which included two companies based in Ohio. Attorney General Petro cited 1999 data reflecting that California motor vehicles emitted eighty percent more CO₂ than Ohio's entire utility industry.⁵² A significant change in CO₂ emissions would require "a larger social and political solution, not a narrow legal one."⁵³

If upheld, the recommendation of the lawsuit against the power companies would be insignificant. With a contribution of two percent of the global emissions, an annual reduction of three percent would decrease worldwide emissions of CO₂ by less than one-tenth of one percent.⁵⁴ Even if the companies completely eliminate all CO₂ emissions, the current global emission rate rise of two percent annually would offset the entire cut.⁵⁵

⁴⁸ John McClaughry, *Another Carbon Dioxide Lawsuit Travesty*, BURLINGTON FREE PRESS, Aug. 7, 2004, at 9 (claiming that tropospheric, satellite temperature readings reflect a one degree increase by 2100 at most).

⁴⁹ "The main absorbers of infrared in the atmosphere are water vapor and clouds. Even if all other greenhouse gases (such as carbon dioxide and methane) were to disappear, we would still be left with over 98 percent of the current greenhouse effect." *Id.* (quoting Richard Lindzen, Sloan Professor of Meteorological Science at the Massachusetts Institute of Technology).

⁵⁰ Owsiany, *supra* note 19.

⁵¹ *Ohio's Attorney General Says State Will Not Join Global Warming Suit Against Utilities*, FOSTER ELEC. REP., Aug. 4, 2004, at 14.

⁵² *Id.* (citing an additional report by traffic engineers at Texas A&M University, which concluded that traffic gridlock in Los Angeles and New York City produced 7.5 million tons of CO₂ emissions in 1996).

⁵³ Editorial, *Global Warming Lawsuit Is a Long Shot; The Real Solution Is Social, Not Legal*, SAN JOSE MERCURY NEWS, July 22, 2004, at 8B.

⁵⁴ Lesser, *supra* note 2, at 26.

⁵⁵ Samuelson, *supra* 30; *see also* Lesser, *supra* note 2, at 26.

The utility companies emphasize the growth in developing countries which will soon drive those countries' greenhouse gas emissions above those of the U.S. and other industrialized nations.⁵⁶ The Intergovernmental Panel on Climate Change, which has projected that greenhouse emissions will more than triple during this century, attributes virtually all of the increase to developing countries.⁵⁷

For these reasons, the utility companies have emphasized that any action must be international and include developing countries.⁵⁸ One such proposed global cooperative plan is the Kyoto Protocol. However, the unwillingness of developing countries, such as China and India, to join will undermine the Protocol's effectiveness.⁵⁹ The failure to incorporate developing countries would have led to rising emissions even if the U.S. had adopted the Protocol.⁶⁰

Despite all this, the attorneys general contend that the recommended reduction by the defendants would "achieve [defendants'] share of the carbon dioxide emission reductions necessary to significantly slow the rate and magnitude of warming."⁶¹ Policy director of the Natural Resources Defense Council ("NRDC"),

⁵⁶ *Eight States and New York City Sue*, *supra* note 29; see also *Applying the Heat*, NEWS & OBSERVER, Aug. 23, 2004, at A10 (singling out China and India as growing polluters).

⁵⁷ Samuelson, *supra* note 30 (explaining that emissions by developing countries would offset even tough anti-global warming policies by the U.S. and other industrial countries).

⁵⁸ Dan Fagin, *New York City, 8 States Sue Power Firms in Bid to Cut Pollution*, NEWSDAY, July 22, 2004, at A18. Pat Hemlipp, an AEP spokesman said "[A]ny effort on climate change has to be global and has to include developing nations, so that any economic pain is shared globally." *Id.*; see also *Eight States and New York City Sue*, *supra* note 29 (quoting the president of the Edison Electric Institute ("EEI"), Thomas Kuhn, as stating that "any response . . . must allow time for the development of technologies capable of reducing greenhouses gases and . . . ensure that these technologies are deployed globally").

⁵⁹ Samuelson, *supra* note 30 (emphasizing that mass poverty forces those countries to focus more on increasing economic growth than on slowing global warming).

⁶⁰ *Id.* (noting that the shortcoming led to the Senate passing a completely unanimous resolution in 1997 against the Kyoto Protocol).

⁶¹ *Eight States and New York City Sue*, *supra* note 29.

David Doniger, explains that, although it is true that a significant solution requires international action, such a resolution could be effected if the defendants' companies "supported real limits on global warming pollution."⁶²

Although the attorneys general appear content with bringing publicity to the issue of global warming,⁶³ even this goal of the litigation has been widely criticized as misguided. The action by the eight Democratic attorneys general has been characterized as an election-year "publicity stunt."⁶⁴ This has not discouraged the attorneys general from pursuing regulation of the defendants through the doctrine of public nuisance.

II. DEFINING GLOBAL WARMING AS A PUBLIC NUISANCE

A. *Public Nuisance Defined*

In order to constitute a public nuisance, the alleged harms must constitute an "'unreasonable' interference with rights common to all members of a community."⁶⁵ The 'unreasonable interference'

⁶² *Greenhouse Polluters Face the Law*, *supra* note 31 (referring to NRDC's parallel suit against the five utility companies and on behalf of the Audubon Society of New Hampshire and the New York-based Open Space Institute).

⁶³ Schoettle, *supra* note 39, at 39 (quoting Marc Violette, a spokesman for the New York Attorney General). Violette said, "This suit will for the first time put global warming on the litigation map." *Id.*

⁶⁴ Truini, *supra* note 46 (quoting the characterization of the lawsuit by Cinergy's chief legal officer, Marc E. Manly).

⁶⁵ Robert A. Levy, *Public Nuisance*, N.Y. SUN, Aug. 24, 2004, available at 2004 WL 82589951; see also *Eight States and New York City Sue*, *supra* note 29 (defining public nuisance doctrine as a prohibition from "engaging in a course of conduct that interferes with the legal rights of others by causing damage, annoyance, or inconvenience"); Jonathan Martel et al., *Power Plants, Particulates, and the Uncertain Science of Public Health*, 18 NAT. RESOURCES & ENV'T 31, 37 (2004) (emphasizing the requirement that the defendants' conduct must be shown to be unreasonable); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 99 (2004) (noting that a public nuisance "arises from an invasion of a public right").

may consist of a lawful activity "but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm which, in due course, results in injury to another."⁶⁶

The invasion of another's interests "in the use and enjoyment of land" is considered unreasonable if "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."⁶⁷ This common law rule specifically applies to conduct that constitutes a private nuisance. However, statutes governing public nuisances "usually have been interpreted to carry over this rule from the common law."⁶⁸ For a public nuisance to be actionable under common law, it also is necessary for the "interference with the public interest" to be unreasonable.⁶⁹ The mere fact that the invasion is intentional does not make it unreasonable;⁷⁰ a policy analysis of benefits versus harms is needed to determine the reasonableness of the interference.⁷¹

A plaintiff in a public nuisance action may seek injunctive relief or monetary compensation for damages.⁷² Generally, a court will grant an injunction only "if damages could not adequately

⁶⁶ Parchomovsky, *supra* note 65, at 100.

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 826 (1979); *see also* § 829 (defining an intentional invasion of "another's interest in the use and enjoyment of land" as unreasonable "if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation").

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 826 cmt. a (1979).

⁶⁹ *Id.*

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 826 cmt. b (1979).

⁷¹ *Id.* (noting that "[m]any invasions . . . can be justified as reasonable although the actor knows that they are resulting or are substantially certain to result from his conduct [T]he unreasonableness of intentional invasions is a problem of relative values"); § 826 cmt. a (explaining that an interference with the public interest is unreasonable, and therefore a public nuisance, when "its utility is outweighed by the gravity of the interference with the public right").

⁷² Parchomovsky, *supra* note 65, at 102.

redress the injury.”⁷³ However, courts are more likely to enjoin the interfering activity when a nuisance affects public “health and comfort,”⁷⁴ as is allegedly the case in the present action.

B. Historical Application of the Public Nuisance Doctrine

The doctrine of public nuisance provides that “if an entity’s activities in one state are causing harm in another, the state suffering harm may sue to halt the injurious conduct.”⁷⁵ States have used this law to resolve local and interstate pollution disputes involving sewage, acid rain, and tobacco smoke.⁷⁶ The California Supreme Court upheld an injunction against a hydraulic mining company in 1884, when farmers complained that the silt sent downstream by the mine “ruined water quality, impeded navigation and raised flood danger.”⁷⁷ More recently, California public nuisance law enabled the South Tahoe Public Utility to force oil companies to clean up contamination of Lake Tahoe caused by the gasoline additive MTBE.⁷⁸

In 2003, land owners sued the companies that had operated a federal plant for the manufacture of nuclear weapons.⁷⁹ The plaintiffs claimed that violations of federal nuclear regulatory provisions were actionable under a private nuisance claim, and the federal district court agreed.⁸⁰

The U.S. Supreme Court has also enforced the common law doctrine of public and private nuisance. In 1909, the Court upheld the state of Georgia’s claim of damages and injunctive relief arising from air pollution from a smelting plant in Tennessee.⁸¹

⁷³ *Id.* at 103 (noting that the damages are determined by “the impaired value of the use of the premises”).

⁷⁴ *Id.*

⁷⁵ Sorrell, *supra* note 24.

⁷⁶ Bowman, *supra* note 21.

⁷⁷ Woolfolk, *supra* note 35.

⁷⁸ Bustillo, *supra* note 18.

⁷⁹ Cook v. Rockwell Int’l. Corp., 273 F. Supp. 2d 1175 (D. Colo. 2003).

⁸⁰ *Id.*

⁸¹ Woolfolk, *supra* note 35.

C. *Global Warming as a Public Nuisance*

The CO₂ suit will be the first to attempt to extend the public nuisance doctrine to a global environmental issue.⁸² However, the theory behind the claims is no different in principle. Connecticut Attorney General Richard Blumenthal has likened this case to the claims made by several states against tobacco companies, based on the burden placed on public health care systems by tobacco-related illnesses.⁸³

Specifically, the suit claims that the defendants' contributions to global warming "constitute a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including . . . the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."⁸⁴

D. *Proof of Public Nuisance Harms*

Although there are difficulties in proving that the defendants' actions significantly contribute to global warming and the alleged harms,⁸⁵ the plaintiffs will be aided by the relatively low required burden of proof: the preponderance of the evidence standard. All the attorneys general need to establish is that there is a greater than fifty percent chance that the emissions of the defendants constitute harmful public nuisances.⁸⁶ One of the NRDC lawyers, Matt Pawa, believes that the evidence certainly is conclusive enough to establish a preponderance of the evidence and

⁸² Bowman, *supra* note 21.

⁸³ "As in tobacco, we have here a uniquely dangerous and urgent health threat,' . . . giving states 'an opportunity to shake up and reshape the way an industry does business.'" Stempeck, *supra* note 44 (quoting Blumenthal).

⁸⁴ *Eight States and New York City Sue*, *supra* note 29; see also Bowman, *supra* note 21.

⁸⁵ See discussion *supra* Part I.D.

⁸⁶ Clayton, *supra* note 23 (noting that the vast majority of scientists agree that carbon dioxide is the main cause of a genuine global warming trend).

that "[s]cientists are well beyond 50 percent certain that CO₂ emissions cause global warming."⁸⁷

The difficulty in establishing damages for the plaintiffs is that the suit claims that average temperature rises due to global warming in their respective areas are two to four degrees, instead of the global average of one degree. This will not be an easy claim to prove because current computer models of climate change are not as accurate for predicting regional or state-wide warming impacts.⁸⁸ The case for harms of global warming becomes more vulnerable when the plaintiffs attempt to demonstrate the actual harms to their specific state.⁸⁹ However, plaintiffs are confident that some of the harms, such as the recorded sea level rise in and around New York City, will not be difficult to prove.⁹⁰

The second hurdle for the plaintiffs will be to prove that the substantial harm to the public welfare and health was caused by the utilities either negligently or knowingly.⁹¹ This will focus the debate on whether the actions of the defendants were unreasonable.⁹² To determine the reasonableness of the alleged interference by the power companies, it will be necessary to consider the impact of imposing limits on the utility companies, and to weigh that cost against the harm to public interests.⁹³

E. Use of the Public Nuisance Doctrine to Address Global Warming

Prior to passage of the Clean Air Act⁹⁴ and the Clean Water Act,⁹⁵ the environmental movement made frequent use of the public

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (explaining that models are relatively good for large areas like Northern or Southern Europe but not for smaller areas).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See discussion *supra* Part I.D.

⁹³ See *supra* note 71 and accompanying text.

⁹⁴ 42 U.S.C. § 7401 (2000).

⁹⁵ 42 U.S.C. § 1251 (2000).

nuisance doctrine developed through common law.⁹⁶ Although nuisance claims decreased drastically with passage of these acts, the mid-1980s witnessed a rebirth of the attacks when businesses and administration officials found loopholes in the regulations.⁹⁷

Although it is hard to establish a case against CO₂ emissions by utility companies when the federal government chooses not to regulate the gas,⁹⁸ supporters of the lawsuit claim that the common law remedy of public nuisance is "strongest when the laws enacted by government are either nonexistent or ineffectively enforced."⁹⁹ The doctrine is not evoked as often as it was in the 1960s, but it still is a powerful tool "to fill the gaps in statutory protection."¹⁰⁰

Proponents of the lawsuit justify legal action with an attack on the Bush administration for catering to "big dirty-power" companies and for failing to take action to reduce CO₂ emissions.¹⁰¹ Although President Bush promised during his first campaign that he would regulate CO₂ releases, he cited the potential economic impact of such regulation to defend his inaction shortly after taking office.¹⁰²

⁹⁶ *Greenhouse Polluters Face the Law*, *supra* note 31; *see also* Stempeck, *supra* note 43 (quoting New York Attorney General Eliot Spitzer). "Nuisance law is the traditional law governments use to make polluters clean up." *Id.*; Shapley, *supra* note 25 (quoting Paul M. Bray, a professor in the Government Law Center of Albany Law School as saying that "it is the traditional legal way of resolving conflicts based on infringement of one's property or environmental health").

⁹⁷ Stempeck, *supra* note 43 (citing analysis by David Guest, a managing attorney with Earthjustice).

⁹⁸ Emily Lambert, *Spitzer Strikes Again*, FORBES, July 21, 2004.

⁹⁹ Bowman, *supra* note 21 (quoting Clifford Rechtschaffen, co-director of the Environmental Law and Justice Clinic at Golden Gate University).

¹⁰⁰ *Id.* (also quoting Prof. Rechtschaffen, who claims that the filing of the suit is an example of "people resorting to common law because of an egregious gap"); *see also* Bustillo, *supra* note 18; Post, *supra* note 26 (noting the argument by deputy attorney general in California, William Brieger that "[e]ither the Clean Air Act covers CO₂ emissions or the states have a right to bring nuisance claims").

¹⁰¹ Bustillo, *supra* note 18 (quoting Frank O'Donnell, the executive director of the Clean Air Trust in Washington, D.C., an air pollution watchdog group).

¹⁰² *Id.* (also noting President Bush's withdrawal from the Kyoto Protocol due to the "incomplete state of scientific knowledge").

Connecticut Attorney General Richard Blumenthal explains that legal action is needed because "the federal government has abdicated its responsibilities."¹⁰³ However, the federal government has not ignored the problem; Congress repeatedly has considered the regulation of CO₂ and has found it to be undesirable.¹⁰⁴

III. IMPACTS OF REGULATING CARBON DIOXIDE EMISSIONS

A. *Harms of Proposed Regulation*

The test for the reasonableness of the interference with public rights under a theory of public nuisance requires a consideration of the impact that the proposed mandatory reductions of CO₂ will have on the utility companies and their customers. In order to comply with the proposed injunctions, the power producers would be forced to switch to more costly natural gas instead of coal, which would in turn affect other industries.¹⁰⁵ Any new generating units, even if more efficient, would increase utility costs for consumers.¹⁰⁶

The switch to other fuels such as natural gas and the subsequent increase in energy prices could drive more manufacturing jobs overseas.¹⁰⁷ In the Midwest, which derives sixty-six

¹⁰³ *Spitzer vs. Xcel: Playing at Lawmaking; Regulating Carbon Dioxide Isn't an AG's Role*, ROCKY MTN. NEWS, July 28, 2004, at 34A.

¹⁰⁴ *Id.*; see also discussion *infra* Part IV.B.

¹⁰⁵ *War Between the States on Climate*, *supra* note 41 (stating that natural gas produces less CO₂ but is more costly); see also Bob Downing, *Utility Balks at Blame for Climate Change; Ohio's AEP Says Problem Bigger than Single Firm, Carbon Dioxide Reduction Efforts Should Be Global*, AKRON BEACON J., July 22, 2004, at 4 (noting that there are currently no effective technologies to control carbon dioxide).

¹⁰⁶ Lesser, *supra* note 2, at 28 (finding that the proposed alternatives in the complaint "either cost too much or cannot be supplied in sufficient quantities to provide a viable and economic alternative"); see also Geiselman, *supra* note 39 (citing the impact on energy prices and the economy feared by the National Association of Manufacturers); *War Between the States on Climate*, *supra* note 41 (claiming that Southern Company will have to raise rates by fifty percent if they lose the suit).

¹⁰⁷ Post, *supra* note 26, at 4 (citing statements by Pat Hemlepp, AEP's director of corporate media relations).

percent of its power from coal, the transition would make it difficult for states to offer competitive energy prices to businesses.¹⁰⁸ The initial cost to Michigan alone is estimated to be nearly one hundred thousand jobs.¹⁰⁹

Indiana has a ninety-eight percent reliance on coal-generated energy, as opposed to the national average of fifty percent.¹¹⁰ The competitive edge of the state's businesses would be lost if Indiana had to replace coal-generated power.¹¹¹ The repercussions within the state would extend beyond the coal industry to others, "including automotive, steel mills, foundries and agricultural"¹¹² Reduction of greenhouse emissions in 2010 to 2000 levels is estimated to cost between \$700 and \$1,500 to the average Indiana household, and the state is expected to lose nine thousand jobs as a result of companies' financial hardship or migration.¹¹³

The burden of addressing the alleged environmental problem would be shifted to a small group of investors and businesses who would be required to bear a disproportionate share of the costs.¹¹⁴ Raising the investment costs for regulated and non-regulated power generators would have a "chilling effect on the financial community."¹¹⁵

¹⁰⁸ Editorial, *Pollution Lawsuits Put Michigan's Economy at Risk*, DETROIT NEWS, Sept. 13, 2004, at 8A.

¹⁰⁹ *Id.* (noting also that the drive to classify CO₂ as a pollutant could lead to raised automobile prices and further job losses for the Midwest); see also Truini, *supra* note 46, at 3 (pointing out that the Unions for Jobs and the Environment has filed an amicus brief in support of the utility companies on behalf of 3.2 million workers).

¹¹⁰ Schoettle, *supra* note 39, at 39.

¹¹¹ *Id.* (citing findings by Purdue University's Coal Research Technology Center demonstrating that coal efficiency and Indiana's four-hundred-year supply have made Indiana the third cheapest power-generating state).

¹¹² *Id.* (quoting Vince Griffin, Indiana Chamber of Commerce Vice President of Energy and Environmental Policy).

¹¹³ *Id.* (citing a study by Charles River Associates).

¹¹⁴ Lesser, *supra* note 2, at 28.

¹¹⁵ *Id.* at 29.

The lawsuit has been described as "slightly perverse" by the Pew Center on Global Climate Control Change.¹¹⁶ The Pew Center is a nonprofit and nonpartisan organization based in Alexandria, Virginia, which works in conjunction with several power companies to reduce greenhouse gases.¹¹⁷ Officials at the Pew Center do not believe that the lawsuit is "a constructive step toward solving global warming."¹¹⁸

Proponents of the lawsuit contend that the United States is the only country in the developed world that is taking no action to reduce greenhouse gasses.¹¹⁹ In defending their lawsuit, the attorneys general claim that increases in energy prices would be only marginal.¹²⁰ The state officials point out that any expense is merely "but a fraction of the cost of coping with the devastation that could be wrought by global warming."¹²¹ However, this argument does not address the problems of shifting the cost of trying to resolve a global issue onto a limited number of states and investors.¹²²

B. *Dispute Between States*

The lawsuit has been characterized as an attack by states that rely on natural gas or other fuels against the states that primarily use coal for energy production.¹²³ Generally, none of the defendant companies own plants in the states that have filed suit.¹²⁴ The attorneys general filing suit have been criticized for being more concerned with "regional economic competition than real environmental improvement."¹²⁵

¹¹⁶ Schoettle, *supra* note 39, at 39.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (referring to comments by Eileen Claussen, President of the Pew Center).

¹¹⁹ Post, *supra* note 26, at 4 (quoting statements of Tom Miller, Iowa Attorney General).

¹²⁰ *Id.*

¹²¹ *Applying the Heat*, *supra* note 56 (citing reports by *The Wall Street Journal*).

¹²² See *supra* notes 113-15 and accompanying text.

¹²³ See *Pollution Lawsuits Put Michigan's Economy at Risk*, *supra* note 108.

¹²⁴ Shapley, *supra* note 25 (citing one exception: Xcel with one plant in Wisconsin).

¹²⁵ Bowman, *supra* note 29 (quoting Scott Segal, the director of an advocacy

The success of the lawsuit could cripple states that rely on coal for energy and would devastate the economy of the Midwest.¹²⁶ The action of the attorneys general appears even more one-sided in light of the fact that California, one of the states filing the action, does not regulate global warming emissions from electric plants or other businesses within its borders.¹²⁷ For these reasons, states like Ohio, where two of the named utilities are based, have declined to join in the lawsuit.¹²⁸

This does not mean that all midwestern states are unconcerned about the environmental impact of the emissions. In fact, Minnesota Attorney General Mike Hatch met for several hours with attorneys general of the states filing suit to discuss the possibility of joining in their action.¹²⁹ However, Hatch decided not to join the suit because of the progress that Xcel has made in Minnesota toward reducing power plant emissions while still increasing energy output.¹³⁰ Hatch is concerned that a suit at this point would undermine Minnesota's ability to reach future resolutions with the power companies.¹³¹

While Hatch has not totally ruled out the possibility of a future lawsuit by Minnesota, he is concerned by the differing

group, the Electric Reliability Coordinating Council, which opposes restrictions by the government on power plant emissions); see also *War Between the States on Climate*, *supra* note 41 (claiming that the action might arise from jealousy by states which have higher energy costs and more frequent blackouts).

¹²⁶ See *supra* notes 108-09 and accompanying text.

¹²⁷ Bowman, *supra* note 29 (noting, however, that California has led the nation in efforts to decrease tailpipe exhaust with legislation in 2002 requiring that auto manufacturers limit the emissions from passenger vehicles sold in the state; the restrictions will become effective in 2009 and will gradually increase the reductions through 2015).

¹²⁸ *Ohio's Attorney General*, *supra* note 51 (listing AEP and Cinergy as the two Ohio-based utilities).

¹²⁹ Serres, *supra* note 40.

¹³⁰ *Id.* (citing Xcel's plan to spend \$1 billion to convert two Twin Cities coal-fired plants to natural gas and to add pollution control equipment to another of its plants in the Twin Cities).

¹³¹ "[Y]ou don't negotiate a resolution [to reduce emissions] with a utility, and then turn right around and sue the company. That would have undermined our credibility" *Id.* (quoting Attorney General Hatch).

interests of the states currently involved. During their discussion of possible remedies, Hatch became alarmed at the possibility of a demand for full-scale conversion of coal to natural gas, which would cost billions of dollars and increase energy prices for Minnesotans.¹³²

IV. LEGISLATION THROUGH THE COURT SYSTEM

Robert Reich, former Clinton administration secretary of labor, declared in 1999 that "regulation is out, litigation is in [T]he era of big government may be over, but the era of regulation through litigation has just begun."¹³³ Beyond the debate of whether power plant emissions of carbon dioxide should be limited lies the question of whether such should be left to legislation or propounded by the courts.

A. *Policymaking by the Court*

This lawsuit has been characterized as a "blatant attempt to legislate through lawsuits It's putting an issue that would normally be considered by all of Congress in one judge's hands."¹³⁴ It is not only the defendant utility companies that are criticizing the courtroom-driven climate policy;¹³⁵ even the United States Chamber of Commerce has attacked the attempt to circumvent federal legislation and policymaking as a misguided shift of energy and environmental policies to lawyers and judges instead of elected

¹³² *Id.* (quoting Hatch as stating that one cannot "jump into a lawsuit" without first considering the impacts "down the line").

¹³³ Owsiany, *supra* note 19.

¹³⁴ Schoettle, *supra* note 39, at 39 (quoting Angeline Protogere, spokeswoman in the Indianapolis office of Cincinnati-based Cinergy).

¹³⁵ See *Eight States and New York City Sue*, *supra* note 29 (referring to statements by Thomas Kuhn, president of the Edison Electric Institute); see also *States Sue over CO₂*, *supra* note 31 (quoting comments by the National Mining Association president and CEO, Jack Gerard, who emphasizes the importance of relying on Congress' ability to consider "a broad and diverse range of public interests").

officials.¹³⁶ The Pew Center on Global Climate Change, which normally is sympathetic to tighter regulations,¹³⁷ also has stated that this is an issue that should be reserved for Congress, and not the courts.¹³⁸

The courts are not the right forum to determine what constitutes a pollutant and to carry out the cost-benefit analysis necessary to determine how much of the “pollutant” to allow.¹³⁹ Regulations are best when enacted by lawmakers because legislators are in the best position to measure regulatory burdens against competing priorities.¹⁴⁰ The courts are neutral arbiters of the law; they are not intended to be super-regulatory bodies, a role that this lawsuit calls on them to assume.¹⁴¹ The traditional process also ensures accountability by directing such decisions to the policy-makers who ultimately are elected by the voters.¹⁴²

¹³⁶ *US States Open Legal Front in Battle on Global Warming*, AGENCE FR.-PRESSE, July 21, 2004, available at 2004 WL 87621911 (quoting Thomas Donohue, president of the chamber of commerce, who described the lawsuit as a “blatant end-run around the Congress and federal and state regulatory agencies”); see also Geiselman, *supra* note 39 (quoting the director of the Electric Reliability Coordinating Council, Scott Segal, in his criticism of the attempt to “transform a serious court into a debating society for political bluster”); *New York’s Greenhouse Gasbags*, *supra* note 47, at 30 (describing the “cynical use of litigation” in this case as “the height of irresponsibility”); *Politics Drives Emissions Lawsuit*, *supra* note 35 (arguing that if the public really wants regulation of “greenhouse gases” it should rely on standards set by knowledgeable regulators, not judges).

¹³⁷ *Pollution Lawsuits Put Michigan’s Economy at Risk*, *supra* note 108.

¹³⁸ *Id.* (referring to statements by Eileen Claussen, president of the Pew Center).

¹³⁹ *Spitzer vs. Xcel: Playing at Lawmaking*, *supra* note 103.

¹⁴⁰ *Id.* (citing the findings of a panel of the most distinguished economists in the world, including Nobel laureates such as Robert Fogel, Douglass North and Vernon Smith, which ranked seventeen government investments based on their likely worldwide impact on welfare; the three investments for climate change ranked at the bottom).

¹⁴¹ Owsiany, *supra* note 19 (criticizing the attorneys general for seeking to enact political agendas through the courts and by circumventing a legislative process which adopts laws after “consideration of competing interests and weighing the costs and benefits”).

¹⁴² *Id.* (arguing that these checks and balances are fundamental to a democratic process).

The inappropriateness of the lawsuit is most apparent in light of the minimal impact that it will have on global warming even if successful. In order to affect global climate change, there must be support by Congress and enforcement by the President "through international dialogue and federal legislation."¹⁴³

B. Legislative Finding That Carbon Dioxide Is Non-Hazardous

Supporters of the action against the power companies contend that states should not be barred by federal preemption even if carbon dioxide is legislatively determined to not violate the nation's environmental laws.¹⁴⁴ The common law approach under the public nuisance doctrine, however, is not appropriate when federal legislation has resolved the issue.¹⁴⁵ The Clean Water Act's requirement of "discharge permits for all types of releases into the nation's waterways"¹⁴⁶ already has displaced nuisance law in that area for some judges.¹⁴⁷

Midwestern states that will be heavily impacted due to their reliance on coal-based energy are preparing a brief for a consortium of states to oppose the lawsuits against the EPA.¹⁴⁸ Michigan

¹⁴³ Truini, *supra* note 46, at 3 (quoting statements by Michael G. Morris, chairman, president and CEO of AEP, that addressing global climate change requires "coordinated and meaningful international action that includes developing nations, not a lawsuit against five companies that generate electricity"); *see also* discussion *supra* Part I.D.

¹⁴⁴ Bustillo, *supra* note 18.

¹⁴⁵ *See* Levy, *supra* note 65 (noting that federal government domination of "the legal landscape" makes inappropriate the common law solutions favored by conservatives and libertarians, despite the fact that common law may be better tailored to the "unique problems of individual litigants" than legislative solutions which are "based on an inflexible, command-and-control regime"); *see also* Schoettle, *supra* note 39, at 39 (citing efforts to address cutting of greenhouse gas emissions by power companies through the Lieberman-McCain Climate Stewardship Act).

¹⁴⁶ Stempeck, *supra* note 43.

¹⁴⁷ *Id.* (quoting David Doniger, attorney with the NRDC and policy director of NRDC's climate center).

¹⁴⁸ *Id.* (describing opposition to suits which demand that the EPA include carbon dioxide in the list of controlled pollutants).

Attorney General Mike Cox has described the actions by the attorneys general initiating the suits as "sheer audacity" in attempting to force courts to do something that Congress repeatedly has rejected.¹⁴⁹ Once the federal government has established that CO₂ limitations are not appropriate, it is not up to the courts to trump the decision by enacting secondary pollution regulations.¹⁵⁰

In its 1990 amendment to the Clean Air Act, Congress does not label carbon dioxide as a hazardous air pollutant.¹⁵¹ Therefore, although the utility companies do meet the threshold emission

¹⁴⁹ *Id.* (noting that, in its 1990 amendment to the Clean Air Act, Congress declined to add carbon dioxide to the list, and that Congress has also adopted a law named after Rep. Joe Knollenberg which bars the EPA from circumventing the Act to regulate carbon dioxide); see also *Ohio's Attorney General*, *supra* note 51 (pointing out that an attempt to regulate CO₂ in the fall of 2003 through the Climate Stewardship Act failed by a 43-55 vote in the Senate); *States Sue over CO₂*, *supra* note 31 (citing findings by the National Center for Policy Analysis that Congress has repeatedly established a record of rejecting greenhouse gas regulation); Stempeck, *supra* note 44 (quoting statements by the director of air quality for the National Association of Manufacturers, Jeffrey Marks, that Congress would have required the EPA to regulate CO₂ if it had found it to be necessary).

¹⁵⁰ Levy, *supra* note 65 (adding that it is in the public's best interest to avoid duplication or conflict between state and federal regulations).

¹⁵¹ 42 U.S.C. § 7412(b) (2000); see also § 7408(a), which describes the issuance of the air pollutant list and the air quality criteria:

(1) For the purpose of establishing national policy and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

42 U.S.C. § 7408(a) (2000). The 'Administrator' is defined as the Administrator of the Environmental Protection Agency. 42 U.S.C. § 7602(a) (2000).

quantities governed by the Act,¹⁵² they are not limited by the Act as long as CO₂ is not classified as a *hazardous air pollutant*.

The national ambient air quality standards are established by the EPA administrator to "protect the public health."¹⁵³ The administrator must review the list periodically and "where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or *adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.*"¹⁵⁴

Additionally, any individual can petition the administrator to consider a pollutant for addition to the list of hazardous air pollutants.¹⁵⁵ The guidelines for this process require that any such

¹⁵² 42 U.S.C. § 7412(a)(1) (2000).

The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity . . . for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

Id.

¹⁵³ 42 U.S.C. § 7409(b)(1) (2000); *see also* § 7409(b)(2) which states that Any national secondary ambient air quality standard . . . shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.

42 U.S.C. § 7409(b)(2) (2000).

¹⁵⁴ 42 U.S.C. § 7412(b)(2) (2000) (emphasis added).

¹⁵⁵ The petition guidelines are enumerated in § 7412(b)(3):

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance Within 18 months after receipt of

petition "shall include a showing by the petitioner that there is adequate data on the health or environmental defects of the pollutant or other evidence adequate to support the petition."¹⁵⁶ Additionally, the administrator cannot add a pollutant to the list unless the alleged pollutant is "known to cause or may reasonably be anticipated to cause adverse effects."¹⁵⁷

The EPA has concluded as recently as 2003 that CO₂ does not constitute an air pollutant under the Clean Air Act.¹⁵⁸ The plaintiffs in this suit, who see the EPA as a political extension of the current administration, consider this an example of the Bush administration's "bur[ying] its head in the sand" on global warming.¹⁵⁹ Any individual, however, may commence civil action against the administrator of the EPA if that plaintiff can allege a failure of the administrator to perform an act or duty under the Clean Air Act.¹⁶⁰ In fact, the EPA's determination that CO₂ is not a pollutant already is being challenged by eleven states and fourteen environmental groups.¹⁶¹

Although this lawsuit also will have to deal with the likelihood that CO₂ leads to the asserted harms, it will not be as broad in scope as a public nuisance suit, and therefore more

petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. . . .

(B) The Administrator shall add a substance to the list upon a showing by petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects

42 U.S.C. § 7412(b)(3) (2000).

¹⁵⁶ 42 U.S.C. § 7412(b)(3)(A) (2000).

¹⁵⁷ 42 U.S.C. § 7412(b)(3)(B) (2000).

¹⁵⁸ Bustillo, *supra* note 18.

¹⁵⁹ *Id.*

¹⁶⁰ 42 U.S.C. § 7604(a) (2000) (stating that "district courts shall have jurisdiction without regard to the amount in controversy or the citizenship of the parties . . . to order the Administrator to perform such act or duty").

¹⁶¹ See discussion *supra* note 18.

appropriate for a courtroom. Unlike a public nuisance law suit, a challenge to the EPA's non-classification of CO₂ as a pollutant will merely focus on whether the administrator has given proper consideration to the known or reasonably likely effects of CO₂ emissions and their accumulation in the atmosphere.¹⁶² On the other hand, the public nuisance claim will entail much broader policy considerations such as: (1) the impact on the power companies and on the population of the states which rely on them for electricity; (2) the benefits, if any, of reducing the global emissions of CO₂ by one-tenth to two percent; and (3) a balancing of the benefits against the harms.¹⁶³

C. *Congressional Preemption*

The power companies contend that the policy question belongs in the legislative arena rather than in the courtroom.¹⁶⁴ Additionally, the power companies contest the arguments by the plaintiffs that inaction by the federal government has opened the door for civil actions based on principles of state common law.¹⁶⁵ The utility companies claim that the affirmative decision by the EPA to not classify CO₂ as a hazardous pollutant is not equivalent to government inaction;¹⁶⁶ it is a legislative determination which preempts state law.

Federal preemption of state law is a principle founded on the Supremacy Clause of Article VI of the United States Constitution, which provides that "[l]aws of the United States" made in support of the Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."¹⁶⁷ However, the initial presumption by the courts is that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless

¹⁶² See *supra* note 153 and accompanying text.

¹⁶³ See discussion *supra* Part IV.A.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* notes 100-02 and accompanying text.

¹⁶⁶ See discussion *supra* note 103 and accompanying text.

¹⁶⁷ U.S. CONST. art. VI, § 2; see also *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1096 (10th Cir. 2002).

that [is] the clear and manifest purpose of Congress.”¹⁶⁸ Therefore, the “purpose of Congress is the ultimate touchstone in every preemption case.”¹⁶⁹

The primary determination of Congressional intent is the language of the statute.¹⁷⁰ In *Cook v. Rockwell International Corp.*, 273 F. Supp. 2d 1175 (D. Colo. 2003), the court was faced with a public liability action for nuisance under state common law that was brought against a private party under the Price-Anderson Act, a federal statute governing nuclear energy.¹⁷¹ In its finding that Congressional legislation did not preempt state tort law, the court found that Congress had indicated its intent not to preempt state law by providing in the Act that “the substantive rules for decision in [public liability] actions shall be derived from state law”¹⁷²

The language of the Clean Air Act, like the language considered in the Price-Anderson Act, does not restrict private rights under state common law.¹⁷³ Power companies can attempt to differentiate the exclusion of CO₂ from the Clean Air Act from cases like *Cook* by claiming that the holdings in such cases were

¹⁶⁸ *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁶⁹ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

¹⁷⁰ *Cipollone*, 505 U.S. at 516; *Medtronic*, 518 U.S. at 486 (noting that other factors for consideration are “the structure and purpose of the statute as a whole as revealed not only in the text but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law”) (citation omitted).

¹⁷¹ *Cook*, 273 F. Supp. 2d at 1178-79.

¹⁷² *Id.* at 1188. The Court held that:

If Congress had intended to change this law and preempt state law relating to nuclear safety issues, it could have omitted the direction to apply state law . . . , employed standard preemption language barring resort to state standards of care or at least provided that state law would govern unless inconsistent with “federal law.” It did none of these things.

Id. at 1189.

¹⁷³ 42 U.S.C. § 7604(e) (2000) states that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement . . . or to seek any other relief”

only that individuals can claim damages under state common tort law against a party which violates a federal regulation; the cases do not provide states with the power to declare something hazardous that Congress specifically has declined to regulate as such. Courts, however, have specifically noted that states are presumed to have the power to enforce liability through common law unless Congress specifically demonstrates the intent to preempt the state law.¹⁷⁴

The Clean Air Act is more indicative of Congress' intent not to preempt state law than the Price-Anderson Act. Section 7416 of the Clean Air Act states that, with the exception of certain state regulation of moving sources:

[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan . . . , such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.¹⁷⁵

Therefore, the case for non-preemption of the presumed right of states to enforce damages for a public nuisance is even stronger in the present case than it was in other cases where the courts found that plaintiffs were not precluded by federal legislation from seeking common law remedies.¹⁷⁶ This is bolstered by the Congressional findings and declaration of purpose in Section 7401 of the Act which state that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants

¹⁷⁴ See *supra* note 168 and accompanying text.

¹⁷⁵ 42 U.S.C. § 7416 (2000).

¹⁷⁶ See generally *Cook*, 273 F. Supp. 2d. at 1185-87, 1190-96 (discussing preemption, the states' roles, and common law remedies).

produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.”¹⁷⁷

Even if the statute does not explicitly reflect Congressional intent to preempt state law, such an intent “may also be implied if state law actually conflicts with federal law because ‘it is impossible for a private party to comply with both state and federal requirements’ or ‘state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁷⁸ The Supreme Court addressed this question directly in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), with facts very similar to those in *Cook*. In *Silkwood*, the Court held that there was no conflict or frustration of Congressional purpose in the application of state tort law to award punitive damages in a public liability action brought under the Price-Anderson Act.¹⁷⁹ As in *Cook*, the Court found that the language of the Act maintains the intent to allow state tort law to coexist with federal legislation, but the Court also found that, absent Congressional language to the contrary, there is nothing to suggest that it is physically impossible for a private party to comply with both federal nuclear safety requirements and state common laws standards of care.¹⁸⁰

In *Cook*, the court did address the “tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability.”¹⁸¹ Citing the Supreme Court’s decision in *Silkwood*, the court held that Congress’ decision

¹⁷⁷ 42 U.S.C. § 7416(a)(3).

¹⁷⁸ *Cook*, 273 F. Supp. 2d at 1192 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

¹⁷⁹ *Silkwood*, 464 U.S. at 256.

¹⁸⁰ *Id.* at 257; see also *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444-45 (finding that there is no conflict between common law enforcement and federal law, especially where Congress says that it does not intend to bar states from imposing more stringent standards).

¹⁸¹ *Cook*, 273 F. Supp. 2d at 1190.

not to explicitly preempt state law of negligence or torts is a regulatory consequence that Congress has the power to elect.¹⁸²

D. The Clean Air Act—A Model Solution

Although the 1990 amendments to the Clean Air Act intentionally did not impose regulation of CO₂, the Act provides a model for regulating gases through legislation, rather than through litigation.¹⁸³ The Act establishes a “cap-and-trade” system which allows the government to set an overall national emission limit.¹⁸⁴ Potential polluters have the option of reducing their emissions to comply with the guidelines, or they can purchase credits from others who can achieve the lower emissions more efficiently;¹⁸⁵ the market forces, therefore, produce the benefit sought by the regulators at the lowest cost to the industry, the consumer, and society. The ability and incentives to find the “lowest cost sources of pollution reductions” does not exist in command-and-control regulation which doesn’t provide the credit allocation allowed by the Clean Air Act.¹⁸⁶

The main criticism of such a system is that, while it may curb national emissions, it does not prevent localized contamination by an industry that purchases credits from others.¹⁸⁷ However, CO₂ emissions do not have a local impact, and could be reduced through a national program which focuses on the reduction of aggregate emissions.¹⁸⁸

¹⁸² *Id.*

¹⁸³ Lesser, *supra* note 2, at 24 (arguing that historically environmental litigation leads to “unnecessarily costly and ineffective policies, no matter how noble the underlying cause” and that “[t]here are better ways to achieve environmental goals—in this case reducing CO₂ emissions—than by ill-conceived lawsuits”).

¹⁸⁴ *Id.* at 26 (focusing on two major air pollutants: sulfur dioxide and oxides of nitrogen).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing the controversy over a proposal to use the cap-and-trade system to reduce mercury emissions).

¹⁸⁸ *Id.*

CONCLUSION

The complex policy question of whether to regulate CO₂ must be addressed in a legislative forum, rather than in a single courtroom. The myriad factors involved, as well as the different interests and competing priorities throughout the country, are best addressed by lawmakers.

There is historical precedent for the use of public nuisance law to resolve environmental problems.¹⁸⁹ Nuisance law has been extended to allow one state to sue a party in another state to enjoin them from causing the plaintiff further harm.¹⁹⁰ While there are numerous historical examples of the use of public nuisance common law for the enforcement of such goals,¹⁹¹ most cases involve clear interference with pollutants that hinder the enjoyment of one's land. Additionally, the doctrine has not been used previously to address a global environmental issue; rather, it has focused on regional disputes.¹⁹²

The first element to be proven by the plaintiffs is that the CO₂ emissions of the named power companies interfere with the public rights of the citizens in the states which have initiated the action.¹⁹³ The plaintiffs likely will be able to meet the burden of proof—preponderance of the evidence—that CO₂ emissions are reasonably likely to cause global warming.¹⁹⁴

The plaintiffs, however, also must prove that the emissions of the defendant are significant enough to cause the alleged harms, and that the impacts of global warming would not take place absent the actions of the named power companies.¹⁹⁵ The plaintiffs most likely will not be able to prove causation in light of the increasing alternate sources of CO₂ emissions, such as natural emissions, emissions from automobiles, and the industrial growth

¹⁸⁹ See *supra* Part II.B.

¹⁹⁰ See *supra* note 75 and accompanying text.

¹⁹¹ See discussion *supra* Part II.B.

¹⁹² See *supra* notes 76, 82 and accompanying text.

¹⁹³ See *supra* note 65 and accompanying text.

¹⁹⁴ See *supra* notes 86-87 and accompanying text.

¹⁹⁵ See discussion *supra* Part I.A.

of third-world nations.¹⁹⁶ Additionally, the power companies can show that any benefit is immediately negated by the growth of developing countries.¹⁹⁷

The plaintiffs contend that even a partial solution is a step in the right direction, and that any reduction in emissions will help to mitigate the harms of global warming.¹⁹⁸ However, this argument would not be enough for plaintiffs to prevail when the court assesses the final element of the claim.

Ultimately, the plaintiffs must prove more than an interference with the public rights of their states' citizens; they must also prove that the defendant utility companies are acting unreasonably.¹⁹⁹ To prevail, the plaintiffs must demonstrate that the potential environmental impact of the emissions by the utility companies is not outweighed by the concrete benefits of their activity.²⁰⁰

The harms of limiting emissions to the extent requested in the claim will have an immediate financial impact on the named utility companies and on the citizens of those states which rely on power from said defendants.²⁰¹ This indirectly would affect the states' industries and their labor force as costs of business increase and jobs are sent outside of the affected states.²⁰²

The impacts on the national economy and on the varying regional priorities are better addressed by Congress than by a court. This is not to say, however, that the plaintiffs lack a remedy when the EPA does not concur with plaintiffs' determination that CO₂ is a hazardous air pollutant. Any individual can petition the EPA to consider incorporating CO₂ as a hazardous air pollutant.²⁰³ If that fails, an individual can initiate a civil action against the

¹⁹⁶ See discussion *supra* Part I.B.

¹⁹⁷ See *supra* notes 55-57 and accompanying text.

¹⁹⁸ See *supra* notes 61-62 and accompanying text.

¹⁹⁹ See discussion *supra* Part II.A.

²⁰⁰ See *supra* note 71 and accompanying text.

²⁰¹ See *supra* Part I.D.

²⁰² See discussion *supra* Part I.D.

²⁰³ See *supra* notes 155-57 and accompanying text.

administrator of the EPA for failure to amend the list of air pollutants in accordance with the Clean Air Act.²⁰⁴

If CO₂ is found to be reasonably likely to cause the alleged harms, Congress will be better suited than a court to consider what level of emissions will maximize the benefits provided by the utility companies while minimizing the harms of the emissions. The Clean Air Act's 'cap-and-trade' system has already proven a successful model for the use of market forces to achieve lower emissions more efficiently.²⁰⁵

²⁰⁴ See *supra* note 160 and accompanying text.

²⁰⁵ See discussion *supra* Part IV.D.