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Private Public Nuisance and Climate Change Working within, and around, the Special Injury Rule

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NOTE

“PRIVATE” PUBLIC NUISANCE AND CLIMATE CHANGE: WORKING WITHIN, AND AROUND, THE SPECIAL INJURY RULE

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I. INTRODUCTION

Law students learn early on in their environmental law curriculum that common law remedies have taken a backseat over the past thirty years to the complex statutory environmental law framework. With the passage of the Clean Air Act¹ in 1970, President Nixon and the 91st Congress ushered in an era of environmental law-making of unprecedented production and breadth.² Environmental concerns that previously had been addressed only in the common law garnered Congressional attention. Within a decade, Congress enacted an array of statutes, addressing a broad range of environmental issues, including air quality, water quality,³ endangered species,⁴ and

* J.D. Candidate, Georgetown University Law Center, Class of 2006. I would like to thank Georgetown University Law Center professors Lisa Heinzerling and Richard Lazarus for their insightful comments and suggestions. I would also like to thank Robyn Neff and the rest of the staff at the Fordham Environmental Law Review for their excellent editorial assistance. Finally, I would like to thank the attorneys at the Environmental Law & Policy Center in Chicago for inadvertently inspiring this Note topic by assigning me a research project on Illinois standing law while I served as a legal intern during the summer of 2004.

1. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

2. *See generally* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

3. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972).

4. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).

hazardous wastes,⁵ among others. With time, administrative regulations, congressional amendments, and new statutes enhanced these original protections, filling the gaps that arose both within and among the statutes.⁶ Today, despite continued wrangling within, and between, the legislative, executive, and judicial branches of the federal government over the implementation and interpretation of the statutes,⁷ they provide almost comprehensive coverage over the environmental affairs of the nation. With respect to climate change, however, “almost” is the operative word.

Climate change, also known as global warming, poses a unique problem in today’s environmental law framework. While scientists attribute increased greenhouse gas emissions as the “likely” cause of “most of” the observed warming that has occurred over the last 50 years,⁸ the United States federal government has yet to take meaningful steps, either within the existing statutory law framework or via new statutes, to address greenhouse gas emissions. The federal government has thus far refused to characterize carbon dioxide, the most prominent of the greenhouse gases emitted in the United States, as a pollutant under the Clean Air Act.⁹ Similarly, Congress has refused to adopt any statutory limitations on the emission of greenhouse gases.¹⁰ Instead, and in stark contrast to the

5. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

6. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

7. For example, EPA promulgation of its final Equipment Replacement Provision Rule under the Clean Air Act has generated considerable debate, and was stayed by the D.C. Circuit Court of Appeals on December 24, 2003. *New York v. Environmental Protection Agency*, No. 02-1387 (D.C. Cir. Dec. 24, 2003).

8. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2001: MITIGATION, A REPORT OF WORKING GROUP III OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 5 (2001).

9. *See* Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

10. The Senate has twice voted down a bill that would have created a national cap-and-trade program for carbon dioxide

actions of many other industrialized nations,¹¹ the federal government has limited its actions to continued funding for scientific research and a voluntary greenhouse gas reductions program.¹²

In the face of such federal inaction, several states and cities proactively have attempted to fill the void. Groups of governors in both western states and eastern states have taken steps to collectively address climate change and to reduce greenhouse gas emissions.¹³ At the state level, for example, New Hampshire has adopted a statutory restriction on carbon dioxide emission increases from power plants,¹⁴ while California is currently in the process of adopting carbon dioxide restrictions for automobiles and has set

emissions. In late 2003, the measure, sponsored by Senators John McCain (R-Ariz.) and Joseph Lieberman (D-Conn.), was voted down 55-43, and in 2005 the measure was voted down 60-38. *See* Jeff Nesmith, *Greenhouse Gas Limits Voted Down; Amendment Sponsors Still Hopeful*, ATLANTA JOURNAL-CONSTITUTION, June 23, 2005, at 9A.

11. *See, e.g.*, Press Release, United Nations Framework Convention on Climate Change, Kyoto Protocol to Enter into Force 16 February 2003 (Nov. 18, 2004), *available at* http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/press041118_eng.pdf.

12. *See* Budget Tables, Climate Change Science Program (2004), *available at* <http://www.usgcrp.gov/usgcrp/Library/ocp2004-5/ocp2004-5-budget.pdf>; U.S. Env'tl. Protection Agency, Climate Leaders, <http://www.epa.gov/climateleaders/> (last visited Jan. 15, 2005).

13. In the west, the governors of California, Oregon, and Washington have launched a "West Coast Governors' Global Warming Initiative," while in the east the governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont have joined the Premiers of the Eastern Canadian provinces to create a "Climate Action Plan." *See, e.g.*, NEW ENGLAND GOVERNORS/EASTERN CANADIAN PREMIERS, CLIMATE ACTION PLAN 2001 (2001); Press Release, Cal. Env'tl. Protection Agency, West Coast States Strengthen Joint Climate Protection Strategy (Nov. 18, 2004).

14. NH Clean Power Act, 2002 N.H. Laws HB284.

greenhouse gas emissions reduction targets for the state.¹⁵ Similarly, at the local level, over 500 cities have joined the “Cities for Climate Protection” program,¹⁶ with some cities, such as Boulder, Colorado, going so far as to enact higher taxes on trash disposal to fund emissions reduction programs.¹⁷ In many of these instances, the governmental entity taking action has attributed lack of federal action as a motivating factor.¹⁸

Regulatory actions, however, are not the only manner in which state and local governments are attempting to force the federal government’s hand. In part of what is arguably a broader resurgence in environmental law,¹⁹ several states are returning to the common law to address climate change. On July 31, 2004, attorneys general

15. See Press Release, Cal. Air Res. Bd., ARB Approves Greenhouse Gas Rule (Sept. 24, 2004), <http://www.arb.ca.gov/newsrel/nr092404.htm>. In June, 2005, California Governor Arnold Schwarzenegger signed Executive Order S-3-05, setting greenhouse gas emissions reduction targets of 2000 levels by 2010; 1990 levels by 2020; and 80 percent below 1990 levels by 2050. Press Release, Office of the Governor, Governor Schwarzenegger Establishes Green House Gas Emission Reduction Targets, (June 1, 2005), http://www.governor.ca.gov/state/govsite/gov_homepage.jsp (follow “Press Room” hyperlink; then follow “Press Releases” hyperlink; then follow “June 2005” hyperlink).

16. See Int’l Council for Local Envtl. Initiatives, Cities for Climate Protection, <http://www.iclei.org/co2/> (last visited Jan. 17, 2005).

17. See Berny Morson, *Trash Tax Increase to Fight Global Warming*, ROCKY MOUNTAIN NEWS, Dec. 1, 2004, available at http://www.rockymountainnews.com/drmn/local/article/0,1299,DR_MN_15_3365872,00.html.

18. See *id.* (“Taking the initiative on global warming is a way ‘to meet that leadership void in the country,’ said [Boulder] Mayor Mark Ruzzin.”).

19. See Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 *FORDHAM ENVTL. L.J.* 55, 63 (2002) (“[I]f anything, [common law actions have] gained in popularity in recent decades, with heightened public concern over environmental issues.”) (quoting P. Weinberg & K.A. Reilly, *UNDERSTANDING ENVIRONMENTAL LAW* § 3.01 (1998)).

from eight states and the city of New York filed a suit against the country's five largest electric utilities, alleging public nuisance.²⁰ The same day, two non-profit corporations filed a similar public nuisance suit against the same five utilities, adding a separate allegation of private nuisance.²¹ The suits sought to enjoin the utilities from increasing their carbon dioxide emissions, and moreover, sought to require them to decrease their carbon dioxide emissions by a small percentage annually.²²

Initial responses to the suits were mixed. Not surprisingly, the utilities, which include American Electric Power (AEP), Cinergy Corp., Southern Co., the Tennessee Valley Authority, and Xcel Energy Co., objected to the suits, both legally and publicly. As of January 2005, four of the five utilities had moved to dismiss the suit on either personal jurisdiction²³ or federal discretionary function²⁴

20. Complaint, *Connecticut v. American Electric Power Co.*, (No. 04 CV 05669) (S.D.N.Y. July 21, 2004). The states include California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.

21. Complaint, *Open Space Institute, Inc. v. American Electric Power Co.*, (No. 04 CV 05670) (S.D.N.Y. July 21, 2004).

22. *See id.*

23. Both suits were filed in Federal District Court for the Southern District of New York. Four of the utilities (Southern Co., TVA, Xcel Energy Co., and Cinergy Corp.) are not incorporated in New York, and moved to dismiss the suit for lack of personal jurisdiction, claiming first that the utilities cannot be deemed to be "doing business" in New York and second, that granting personal jurisdiction would violate the utilities' constitutional due process protections. *See Memorandum of Law in Support of the Motions of Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction, Connecticut v. American Electric Power Co.*, (No. 04 CV 05669) (S.D.N.Y. Sept. 30, 2004).

24. TVA also moved to dismiss individually on separate grounds, claiming that "[p]laintiff's effort to have this Court sit as a common law regulator of TVA's statutory activities is legally precluded because the TVA Act vests authority and discretion in TVA's Board of Directors to conduct TVA's statutory activities to accomplish the purposes of the TVA Act." *See Memorandum of Law in Support of Tennessee Valley Authority's Motions to Dismiss on Federal*

grounds. In explaining AEP's motion to dismiss, Michael G. Morris, AEP's chairman, president, and CEO, commented that "[t]he environment would be better served if the attorneys general worked with AEP and others seeking solutions to the climate change issue instead of wasting resources on litigation."²⁵ Hypothesizing as to the plaintiffs' motivation, Marc E. Manly, Cinergy's chief legal officer, added that "[t]his lawsuit [is] a publicity stunt by the plaintiffs, and the issues raised are not ones to be resolved through litigation."²⁶ Moreover, two of the utilities involved in the lawsuits recently have agreed to set emissions reduction goals as part of the Environmental Protection Agency's (EPA) Climate Leaders Initiative and accordingly view the lawsuits as counterproductive.²⁷

Newspapers similarly decried the lawsuit as a "cheap shot,"²⁸ claiming that if successful, the action could cost states such as Michigan thousands of jobs and could compromise power generation throughout the United States.²⁹ Somewhat surprisingly, Eileen Claussen, President of the Pew Center on Global Climate Change, stated that she found the suits "[s]lightly perverse Of course, we need a national program and of course, we need some legislation. The real question is, does this help you get there? It's not clear to me that this lawsuit will help."³⁰ Indicating a difference of opinion even among the ranks of similarly situated state officials,

Discretionary Function Grounds, *Connecticut v. American Electric Power Co.*, (No. 04 CV 05669) (S.D.N.Y. Sept. 30, 2004).

25. See Joe Truini, *Utilities Move to Dismiss Suit*, WASTE NEWS, Oct. 11, 2004, at 3.

26. See *id.*

27. American Electric Power aims to reduce total U.S. greenhouse gas emissions by 4 percent below an average 1998-2001 base year by 2006 and Cinergy, Corp., aims to reduce total U.S. greenhouse gas emissions by 5 percent from 2000 to 2010. See U.S. Env'tl. Protection Agency, Climate Leaders, <http://www.epa.gov/climateleaders/partners.html> (last visited Jan. 15, 2005).

28. See Editorial, *Global Warming Lawsuit is a Long Shot*, SAN JOSE MERCURY NEWS, July 22, 2004, at B8.

29. See Editorial, *Pollution Lawsuits Put Michigan's Economy at Risk*, THE DETROIT NEWS, Sept. 13, 2004.

30. See Julia Preston & Andrew C. Revkin, *City Joins Suit Against 5 Power Companies*, N.Y. TIMES, July 22, 2004, at B2.

Virginia Attorney General Jerry Kilgore added that "[w]e have to be careful and take a more reasoned approach."³¹

The question becomes, what exactly *was* driving these attorneys general and non-profit organizations to bring the suits? Connecticut Attorney General Richard Blumenthal answered that question with the following: "Some may say that the states have no role in this kind of fight or that there's no chance of success. To them I would say think tobacco We're here because the federal government has abdicated its responsibility as it also did with tobacco."³² In other words, the suits reflected an effort to fill the gap that exists in statutory environmental law at the federal level with respect to climate change. The plaintiffs agree with Eileen Claussen that federal legislation *is* needed to address climate change; but they believe, conversely, that forcing the government's hand by suing the largest emitters is advantageous, rather than unhelpful or counterproductive. Utilities are not politically powerless, they argue, and should they be held liable, or even *potentially* be held liable, for their greenhouse gas emissions, the utilities will spur political action in Washington, D.C. As every student of environmental law learns, industry prefers strict regulation, as long as it is applied even handedly, to uncertain and potentially unequal regulation developed by the courts.

To this end, the plaintiffs appropriately did not seek monetary damages in their public nuisance suits. Instead, the plaintiffs hoped to achieve via equitable remedy that which the federal government has thus far avoided: emissions caps and emissions reductions for the nation's largest emitters of greenhouse gases. As stated in their complaint, the plaintiffs contended that the utilities "have available to them practical, feasible, and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers."³³ The plaintiffs did not seek to run the utilities out of business; rather, they attempted to

31. See Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST, Jan. 12, 2005, at A1.

32. See *8 States, New York City Sue Power Companies over Global Warming*, USA TODAY, July 21, 2004, available at http://www.usatoday.com/weather/resources/climate/2004-07-21-greenhosue-suit_x.htm (last visited Jan. 15, 2005).

33. See Complaint, *Connecticut v. American Electric Power Co.*, (No. 04 CV 05669) (S.D.N.Y. July 21, 2004).

force their hand, and in turn the federal government's hand, in achieving the emissions reductions that are readily available today.

Attorneys general are not the only parties who can attempt to fill the statutory void with respect to climate change. As this note will explore, private citizens who similarly believe that there is a need for greenhouse gas emissions reductions can also attempt to bring public nuisance suits seeking equitable remedies, thus participating in the gap-filling and effectively becoming private attorneys general. Such "private" public nuisance suits share the same fundamental basis for relief as those public nuisance suits traditionally brought by public officials: unreasonable interference with a right common to the general public.³⁴ "Private" public nuisance suits, however, differ from their public counterpart in that they are restrained by the Special Injury Rule. Based on a King's Bench ruling from 1535,³⁵ the rule requires that a private citizen bringing suit have suffered an injury different-in-kind than that suffered by the public generally.³⁶ Despite continued scholarly criticism, including an attempted modification by the American Law Institute via the Restatements, the rule remains steadfastly intact in most jurisdictions.³⁷

Notwithstanding the recent dismissal of the attorneys general suit on political question grounds,³⁸ determining whether the Special Injury Rule can be overcome, and in some jurisdictions, avoided,

34. Restatement (Second) of Torts § 821B (1977).

35. See Y.B. Mich. 27 Hen. 8, Mich., f. 27, pl. 10 (1535); see also Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755, 790 (2001); David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 *ECOLOGY L.Q.* 883, 884 (1989).

36. Restatement (Second) of Torts § 821C (1977).

37. See Antolini, *supra* note 35, at 759.

38. *Connecticut v. American Electric Power Co.*, No. 04 Civ. 5669 (S.D.N.Y. Sept. 16, 2005). Judge Preska dismissed the case on political question grounds, finding that striking the difficult balance between eliminating pollution and industrial development that the case presented "is impossible without an 'initial policy determination' first having been made by the elected branches to which our system commits such policy decisions." *Id.* at 14. For more discussion of this dismissal, see *infra* notes 85-86, 98-99 and accompanying text.

with respect to injuries from climate change is the goal of this note. For private citizens who wish to bring "private" public nuisance actions, this note concludes that they face three options: 1) bring suit in a jurisdiction other than Hawaii and Illinois, in which the Special Injury Rule would likely require physical injuries associated with climate change; 2) bring suit in Hawaii state court, a jurisdiction that has adopted the Restatement's approach, looking past the Special Injury Rule if concerns over multiplicity of suits can be quelled; or 3) bring suit in Illinois state court, which has withdrawn the Special Injury Rule for suits involving an infringement upon a "healthful environment." These latter two options, by enabling citizens who have not suffered different-in-kind injuries to bring public nuisance suits for public wrongs, are more favorable than the first option. Practically, however, because they involve only two jurisdictions, they have limited impact, and finding ways to work within the Special Injury Rule may accordingly be the only method available to the majority of citizens.

To reach the three aforementioned conclusions, this note begins in Part II with an overview of the science and expected impacts of climate change, particularly the expected public health and public land impacts in the United States. Part III outlines the elements of a public nuisance suit and the manner in which a *prima facie* public nuisance suit would be made with respect to climate change. Part IV discusses the operation of, and the history and rationale behind, the Special Injury Rule for 'private' public nuisance suits. Part V draws together the preceding sections and explores the three types of potential "private" public nuisance suits listed above. Finally, a short conclusion follows in Part VI.

II. THE PUBLIC IMPACTS OF CLIMATE CHANGE

Despite the cries of a few skeptics,³⁹ there is a consensus among a majority of the scientific community on the subject of climate change: increases in greenhouse gases, primarily due to human actions, including, but not limited to, the burning of fossil fuels, are affecting the global climate system. Greenhouse gases perform the

39. For an enthusiastic account of the skeptics' views, *see, e.g.*, Senator James Inhofe, Climate Change Update, U.S. Senate Floor Speech (Jan. 4, 2005), *available at* <http://inhofe.senate.gov/pressreleases/climateupdate.htm>.

climatic function that their name implies. By providing a heat-trapping blanket at the atmospheric level, greenhouse gases keep the earth warm enough for human survival.⁴⁰ Predictably, scientists have found that increasing concentrations of these gases, as has occurred continuously over the last hundred years, is causing increases in global annual average temperatures. These increasing temperatures are in turn driving wide-ranging climatic changes throughout the planet. The Intergovernmental Panel on Climate Change, an international collaboration of scientists committed to understanding the scientific basis of risk of human-induced climate change, stated in its third assessment report, “most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations.”⁴¹ Similarly, the United States federal government, despite its inaction, does not deny the legitimate scientific basis for the climatic changes underway. “North American temperature changes from 1950 to 1999 were unlikely to be due only to natural climate variations,” stated a report released in August, 2004, by the U.S. Climate Change Science Program, signed by the Secretaries of Energy and Commerce.⁴² Accordingly, scientific debate no longer focuses on whether climate change is real, but rather it focuses on determining how and when climate change will affect our global, regional, and local ecological and human systems.

The effects of climate change in the United States will be wide-ranging and diverse. A short list of some of the potential impacts, according to the EPA’s “Impacts” website, include rising sea levels; more intense rainstorms; drier soils; altered forests, crop yields, and

40. See LEE R. KUMP ET AL., *THE EARTH SYSTEM 2* (1999). The full list of greenhouse gases includes water vapor, carbon dioxide, methane, nitrous oxide, and certain chlorofluorocarbon compounds. *Id.* at 5.

41. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 8. “Likely” is an IPCC term of art meaning that there is a confidence level of 66-90 percent. *Id.*

42. See U.S. CLIMATE CHANGE SCIENCE PROGRAM, *OUR CHANGING PLANET: THE U.S. CLIMATE CHANGE SCIENCE PROGRAM FOR FISCAL YEARS 2004 AND 2005* (2004); Juliet Eilperin, *Administration Shifts on Global Warming*, WASH. POST (Aug. 27, 2004), at A19.

water supplies; and harm to human health.⁴³ While it should be noted that precise predictions about the impacts of climate change are "extremely difficult" to make,⁴⁴ the impacts of climate change are not just a matter for future generations. Impacts occur today. For example, in November 2004, the results of a four-year impacts assessment revealed that increasing average temperatures have caused, *inter alia*, significant melting of ice and permafrost in the Arctic region that jeopardizes coastal villages in Alaska through increased erosion and rising seawater.⁴⁵ Similarly, according to the World Health Organization (WHO), climate change is currently responsible for 2.4 percent of worldwide diarrhea cases,⁴⁶ a statistic that is only expected to increase with time. These documented impacts of climate change underscore the increasing importance of taking climate change seriously, and accordingly, of reigning in the greenhouse gas emissions that are at least in part to blame.

Public nuisance law necessitates that this note focus on climate change's impacts in the following two areas: 1) public health, as impacted via disease distribution, temperature extremes, extreme weather events, and exacerbated air pollution; and 2) public lands, particularly those abutting oceans and other large bodies of water, such as the Great Lakes. Both of these areas—public health and public lands—encompass rights common to the general public, and

43. See U.S. Env'tl. Protection Agency, Global Warming Impacts, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/impacts.html> (last visited Jan. 15, 2005).

44. See U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE 102 (2000), available at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/overview.htm>.

45. See ARCTIC CLIMATE IMPACT ASSESSMENT, IMPACTS OF A WARMING ARCTIC (2004); *Climate Change Devours Arctic Ice*, ANCHORAGE DAILY NEWS (Nov. 9, 2004), <http://www.adn.com/front/story/5761865p-5695798c.html>.

46. See WORLD HEALTH ORGANIZATION, CLIMATE CHANGE AND HUMAN HEALTH – RISKS AND RESPONSES, SUMMARY 7 (2003), available at <http://www.who.int/globalchange/publications/cchhsummary/en/>.

thus are classically within the realm of public nuisance law.⁴⁷ Additionally, in each of these areas climate change is expected to interfere with the status quo, both by increasing the marginal risk levels of injury and by contributing to an increased frequency of extreme events that can cause discrete and significant injuries.

Four aspects of the expected impacts of climate change are important to the discussion of public health: 1) changing distributions of infectious disease vectors, 2) temperature extremes, 3) increased frequency of extreme weather events, and 4) exacerbated air pollution due to higher average temperatures.⁴⁸ Taking each in turn, changing climatic conditions are expected to cause increases in the populations of disease-carrying organisms in some regions, as well as to introduce foreign disease vectors into new geographic regions.⁴⁹ One study has found striking patterns of climate warming and spread of disease, such that the time it takes for the population of a disease-carrying organism to double might decrease by half with a single degree or half degree of warming.⁵⁰ To this end, the WHO claims that the first detectable public health impacts of climate change will be the changing geographic ranges of infectious diseases.⁵¹ In the United States, according to the EPA, field studies suggest that a three to five degree Celsius increase in

47. See Restatement (Second) of Torts § 821B cmt. b (“[P]ublic nuisances include[] interference[s] with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; ... [and] with the public convenience, as by the obstruction of a public highway or a navigable stream.”); *id.* cmt. g (“[if] pollution prevents the use of a public bathing beach ... it becomes a public nuisance.”).

48. For a more comprehensive look at the expected public health impacts, see U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 44.

49. See UNION OF CONCERNED SCIENTISTS, *CONFRONTING CLIMATE CHANGE IN THE GREAT LAKES REGION: IMPACTS ON OUR COMMUNITIES AND ECOSYSTEMS* 64 (2003) (“St. Louis encephalitis outbreaks in the Great Lakes region, for example, have been associated with extended periods of temperatures above 85°F (29°C) and little rainfall.”).

50. See Beth Daley, *Disease Threat Cited in Global Warming*, *BOSTON GLOBE*, June 21, 2002, at A3.

51. See WORLD HEALTH ORGANIZATION, *supra* note 46, at 7.

temperature could cause a significant northern shift in two types of encephalitis.⁵² In sum, the risk of catching an infectious disease likely will increase in the United States as a result of climate change.

Temperature extremes present a similarly disconcerting situation. Episodes of extreme heat already pose a significant threat to public health, as evidenced by several recent heat waves. For example, a 1995 heat wave in Chicago, Illinois, caused 514 heat-related deaths, an increase of 85 percent above the normal heat-related death rate for the city.⁵³ Similarly, over 20,000 people died in Europe during the summer of 2003 due to abnormally high temperatures.⁵⁴ As global average temperatures increase, so too will the prevalence—and deadliness—of these types of heat waves. In December, 2004, scientists from the U.K.'s Hadley Center for Climate Prediction and Research and the University of Oxford estimated that it is very likely that human influence has at least doubled the risk of a heat wave in Europe of the magnitude experienced in 2003.⁵⁵ In the United States, the cities and regions most sensitive to increases in heat waves are those that currently experience high temperatures irregularly, such as Philadelphia, New York, Chicago, and St. Louis.⁵⁶ Within these higher risk areas, the elderly, young and poor are at particularly high risks of experiencing severe adverse effects due to heat waves.⁵⁷

Increased frequency of extreme weather events provides a third way in which climate change is expected to compromise the United States' public health generally and potentially affect many individuals severely. Climate change is expected to increase the frequency, and potentially the severity, of extreme weather events around the globe, such as floods and hurricanes.⁵⁸ The effects of

52. See U.S. ENVTL. PROTECTION AGENCY, CLIMATE CHANGE AND PUBLIC HEALTH 3 (1997).

53. See U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 44, at 102-03.

54. See Peter A. Stott et al., *Human Contribution to the European Heatwave of 2003*, 432 NATURE 610, 610 (2004).

55. See *id.*

56. See U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 44, at 103.

57. See *id.*

58. See *id.* at 104-05.

such events on property are well known,⁵⁹ and the effects on public health can be equally as disastrous. For example, in 1993 heavy rainfall and runoff contributed to the infection of Milwaukee's drinking water supply with *cryptosporidiosis*, which caused the death of 54 people and illness in 400,000.⁶⁰ Similar events are expected in the future as a result of climate change. In the Great Lakes Region, for example, water supplies may experience increases in nitrate pollution, algal blooms, pesticide residues, and other toxins, as well as the spread of parasitic and pathogenic microorganisms, all of which can have adverse effects upon human health.⁶¹ More recently, the horrific impacts of Hurricane Katrina on the gulf coast of the United States have awakened the American public to the expected impacts of climate change.⁶² While no hurricane, Katrina included, can be directly linked to climate change, many scientists believe that hurricanes of Katrina's magnitude will increase in frequency in the future.⁶³

59. For example, "[t]he disruptions and losses society faces were dramatically demonstrated during the record-breaking 24-hour rainstorm that occurred on July 17–18, 1996, in south Chicago. Chicago and 21 suburbs experienced flash flooding that broke regional records and killed six people, damaged 35,000 homes, and caused evacuation of more than 4,300 people. Losses and recovery costs reached \$645 million (US), making that single storm Illinois' second most costly weather disaster on record after the 1993 Mississippi River flood. In adjacent rural areas, flood damage to crops cost farmers \$67 million (US)." UNION OF CONCERNED SCIENTISTS, *supra* note 49, at 63.

60. See U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 44, at 105. *Cryptosporidiosis* is an infection caused by the protozoa of the genus *Cryptosporidium* and is characterized by chronic diarrhea.

61. See UNION OF CONCERNED SCIENTISTS, *supra* note 49, at 73.

62. In the wake of Hurricane Katrina, the cover of October 3, 2005 issue of Time Magazine stated flatly, and almost rhetorically, "Are We Making Hurricanes Worse?" The issue contained several articles on the expected impacts of climate change, particularly those associated with hurricanes. See, e.g., Jeffrey Kluger, *Global Warming: The Culprit?*, TIME, Oct. 3, 2005, at 42.

63. See *id.*; U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 44, at 103.

Finally, increasing average temperatures can affect public health via the exacerbation of existing air pollution problems. In addition to the air pollutants that are discharged in conjunction with greenhouse gases during power production,⁶⁴ ground level ozone will likely increase as a result of climate change. Commonly known as smog, ground level ozone is expected to increase in urban areas with rising temperatures, causing greater incidence and severity of asthma and other respiratory problems among the public.⁶⁵ A recent study found that as a result of climate change, fifteen cities in the eastern United States may experience, on average, a 60 percent increase in the number of days when ozone levels exceed the health-based air quality standard set by the EPA.⁶⁶

In sum, the public health risks posed by climate change are real and frightening, not only as individual risks, but also due to the fact that in conjunction they can serve to exacerbate one another. For example, as temperatures rise, so too does air conditioner use, causing higher electricity use and increases in the combustion of fossil fuels, which cause increases in air pollution and smog. Moreover, while as a general matter climate change may pose health risks of only background concern for many adults, it can, and is likely to, cause significant adverse health events among discrete sectors of the population. Adverse impacts on water supplies and increased frequencies of heat waves and smog-ridden days can cause both illness and death among high-risk groups, such as the elderly, young, and poor. But these groups are not the only ones at risk; while the affluent may be able to purchase bottled water and stay near an air conditioner, increases in the incidence of an infectious disease can affect the population indiscriminately.

Climate change is similarly expected to have significant impacts upon many of the nation's unique and invaluable public lands. Approximately 30 percent of the country's land is owned by the public. As climate change intensifies, a range of impacts, including shifting eco-systems, expanding deserts, species migration, and

64. E.g., volatile organic compounds, nitrogen oxides, sulfur dioxides, and particulate matter.

65. See UNION OF CONCERNED SCIENTISTS, *supra* note 49, at 73.

66. Press Release, Natural Res. Def. Council, Cities' Air Quality Takes a Big Hit as Climate Warms (Aug. 4, 2004), <http://www.nrdc.org/media/pressReleases/040804.asp>.

altered water distribution systems, are expected.⁶⁷ One particular expected impact of climate change on public lands is of importance to this note: sea-level rise. As annual average temperatures increase, water locked up in glaciers in places such as Greenland will make its way into the world's oceans. Unlike the melting of sea ice, which does not affect sea levels, the addition of waters previously locked up in glaciers will have the effect of raising sea levels around the globe. For countries like Bangladesh, sea-level rise could have truly disastrous effects, as a majority of the country may submerge.⁶⁸ In the United States, studies performed by the EPA and others have estimated that along the Gulf Coast and the Atlantic coast, a one foot rise in sea level is likely by 2050.⁶⁹ Such sea-level rise could inundate wetlands and other low-lying lands, intensify flooding, and increase the salinity of rivers, bays, and groundwater tables.⁷⁰ With respect to one of the nation's classic forms of public land, sea-level rise could cause significant beach erosion in the coastal states.⁷¹ Accordingly, just as in the public health context, the impacts of climate change are not only expected to be significant, but are expected to affect areas classically considered within the public domain, and thus ripe for action under public nuisance law.

III. PUBLIC NUISANCE AND CLIMATE CHANGE

The law of public nuisance aims to protect public values from tortious injuries.⁷² Like the citizen suit provisions incorporated into a majority of the federal environmental statutes, the common law action for public nuisance provides a valuable interstitial tool for addressing the environmental externalities inherent in an

67. See U.S. Env'tl. Protection Agency, *supra* note 43.

68. See Roland Buerck, *Flooded Future Looms for Bangladesh*, BBC NEWS UK EDITION (Dec. 7, 2004), <http://news.bbc.co.uk/1/hi/sci/tech/4056755.stm>.

69. See U.S. Env'tl. Protection Agency, *Global Warming Impacts, Coastal Zones*, <http://yosemite.epa.gov/OAR/globalwarming.nsf/content/ImpactsCoastalZones.html> (last visited Jan. 15, 2005).

70. See *id.*

71. See *id.*

72. See Antolini, *supra* note 35, at 762.

industrialized world.⁷³ While federal environmental statutes cover many of the environmental externalities that infringe upon public values in health, safety, comfort, and convenience, they are not comprehensive, and that is where public nuisance finds its niche role. Despite the ever-increasing comprehensiveness of the statutory framework, public nuisance law provides public officials and private citizens with a method for filling the gaps in environmental law, a role that it has been asked to play with increasing regularity in recent decades.⁷⁴

The general requirements of a public nuisance claim are embodied in the Restatement (Second) of Torts, which defines a public nuisance as "an unreasonable interference with a right common to the general public."⁷⁵ Activities that constitute such an unreasonable interference, according to the Restatement (Second), include those that involve significant interferences with the public health, among other public values, and those that are of a continuing nature or have produced a permanent or long-lasting effect that the actor knew or had reason to know had a significant effect upon a public right.⁷⁶ In

73. Public nuisance can fulfill both statutory gaps and gaps in enforcement due to scarce resources or political aversion. *See id.* at 858. *But see* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001) (arguing that despite the theoretical claim that citizens suits improve regulatory enforcement, in reality they may actually exacerbate the failings of the environmental regulatory scheme).

74. In the 1960s, 57 public nuisance suits were brought nationwide to remedy environmental harms. That number increased to 150 in the 1970s, 252 in the 1980s, and a whopping 362 in the 1990s. *See* Boudreaux, *supra* note 19, at 64.

75. *See* Restatement (Second) of Torts § 821B(1) (1977); *see, e.g.*, *Commonwealth v. S. Covington & Cincinnati St. Ry. Co.*, 205 S.W. 581, 583 (Ky. 1918) ("A common or public nuisance is the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public.").

76. *See* Restatement (Second) of Torts § 821B(2)(a),(c) (1977). A public right, according to the Restatement (Second), "is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or

the environmental context, air pollution has been considered actionable under public nuisance as far back as 1611,⁷⁷ and public nuisance law has been used in the modern era to challenge leather tanning operations, parks in disrepair, noisy campers, shopping centers, helicopters, buildings, polluting vehicles, plants, airports, dumps, and interferences with viewplanes and sunlight.⁷⁸ To this end, a more specific look at a handful of successful public nuisance cases in the environmental context proves illuminating.

Public nuisance cases often involve contrasting values, namely, the societal gains arising from the allegedly tortious activity and the externality costs suffered by the public as a result of the activity. For example, in *Board of Commissioners of Ohio County v. Elm Grove Mining Co.*, the Supreme Court of West Virginia was faced with a public nuisance in the form of air pollution caused by a mining company.⁷⁹ The company had been dumping combustible mining refuse on a burning "gob pile" 200 feet wide and 1000 feet long, which was filling the air with sulfur dioxide. The court recognized this as a nuisance affecting public health, but likewise recognized that granting the sought-after relief, an injunction against the refuse dumping, could potentially eliminate coal mining from the state.⁸⁰ The court granted the equitable relief, concluding that "public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby."⁸¹ Accordingly, while public nuisance can often pit one form of societal gain over another, for those parties wishing to protect public rights in the environmental context first and foremost, public nuisance can be a powerful tool.

defamed or defrauded or negligently injured. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance." *Id.* § 821B cmt. g.

77. See Antolini, *supra* note 35, at 769.

78. See *id.*

79. 9 S.E.2d 813 (W. Va. 1940).

80. *Id.* at 817.

81. *Id.*

The role of public nuisance law as a gap-filler is likewise established. In *Commonwealth v. Barnes & Tucker Co.*, Pennsylvania state officials sought equitable relief in the form of forcing a mine owner to undertake treatment efforts at a closed and sealed mine that was discharging acid mine drainage as a result of water inundation.⁸² The state officials first alleged that the defendant had violated the state's Clean Streams Law, thus authorizing the equitable relief, and second, alleged public nuisance. Finding the first allegation lacking, because the statute did not authorize injunctive relief, Pennsylvania's Supreme Court determined that an injunction only could be obtained via public nuisance law, returning the case to the trial court for factual determinations.⁸³ Upon remand, the trial court found that the discharge was a public nuisance,⁸⁴ thus reinforcing the gap-filling role that public nuisance law can play in the environmental context. Where the Clean Streams Law could not provide relief for an environmental harm, it stepped the common law of public nuisance.

Both of these aspects of public nuisance law—the ability to address competing societal values and to perform a gap-filling role—are at issue in the climate change context. The public nuisance suits filed on behalf of eight states, New York City, and two non-profit organizations, were the first public nuisance cases to address greenhouse gas emissions. Such emissions are primarily the result of electricity generation and automobile use. Accordingly, suits seeking equitable relief in the form of forced caps and/or reductions of greenhouse gas emissions are asking judges to address highly valuable social activities in light of their external effects on public health and public lands, and on other public rights. Moreover, such suits ask the courts to make determinations in the face of a statutory vacuum at the federal level. This latter request proved too much of the Southern District of New York to handle, as it dismissed the aforementioned suits on political question grounds.⁸⁵ The court held that the *lack* of a prior federal determination that greenhouse gas emissions should be curtailed prohibited the court from hearing

82. 319 A.2d 871, 873 (Pa. 1976).

83. *Id.* at 879.

84. 353 A.2d 471, 512-13 (Pa. Commw. Ct. 1976).

85. *Connecticut v. American Electric Power Co.*, No. 04 Civ. 5669, (S.D.N.Y. Sept. 16, 2005).

the suit on the merits.⁸⁶ Regardless of whether that decision was correct, this section hereinafter provides an overview of the manner in which the attorneys general would have made their prima facie public nuisance case against the utilities.

A close reading of the plaintiffs' complaint provides a basic understanding of how the attorneys general had planned to make their argument. To prove public nuisance they must establish 1) an unreasonable interference with 2) a right common to the general public.⁸⁷ To do so, they made the following claims in their complaint: there is clear scientific evidence that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide;⁸⁸ the defendant utilities are the five largest carbon dioxide emitters in the United States, accounting for 25 percent of the emissions from the utility sector and 10 percent of the nation's total emissions;⁸⁹ and the consequences of the low-end scientific projection of a 2.5 degree Fahrenheit increase in global average temperature over the next one hundred years will include an increase in heat-related deaths, an increase in ground-level smog, disruption of water supplies, more numerous and more severe floods, and reduction in water levels in the Great Lakes.⁹⁰

The basic argument seems clear: scientific evidence establishes that human-based carbon dioxide emissions are causing, and will

86. *See id.* at 14-16.

87. *See* Restatement (Second) of Torts § 821B(1) (1977). The AG's complaint states the following in its 'Claims for Relief' section: "Defendants' emissions of carbon dioxide, by contributing to global warming, constitute a substantial and unreasonable interference with public rights in the plaintiffs' jurisdictions, including, *inter alia*, 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," and "defendants know, or should know, that their emissions of carbon dioxide contribute to global warming and to the resulting injuries...." Complaint, Connecticut v. American Electric Power Co., (No. 04 CV 05669) (S.D.N.Y. July 21, 2004).

88. Complaint, Connecticut v. American Electric Power Co., (No. 04 CV 05669) (S.D.N.Y. July 21, 2004).

89. *Id.*

90. *Id.*

continue to cause, increasing global average temperatures. In turn, rising temperatures are having, and will continue to have, significant impacts upon public rights in health, water supplies, and public lands, and thus establish a public nuisance. As noted in Part I of this note, the attorneys general sought not to enjoin the production of all carbon dioxide emissions at the utilities, as that would undoubtedly run the utilities out of business, but rather sought an equitable remedy capping the utilities' greenhouse gas emissions and requiring them to decrease emissions by given percentages over time.⁹¹

Integral to the plaintiffs' argument would be a showing that the utilities' actions are causing an "unreasonable interference." To do so, the plaintiffs have two options. They can argue that the impacts noted in their complaint constitute a "significant interference" upon public health or public safety, or alternatively, they can argue that the defendants knew, or should have known, that their actions were creating a long-lasting effect that was injurious to a public right. In making either of these threshold arguments, the complex scientific nature of climate change pose two major interrelated problems for the plaintiffs. First, any plaintiff seeking redress for harms associated with climate change will have to overcome the current lack of judicial comprehension and knowledge in this area.⁹² While this is true for any new area of the law, and thus has been a problem faced by plaintiffs in the past, climate change is unique in that it deals with present and past emissions that are destined to cause injuries not only in other geographic regions, but significantly later in time. This time and space quality of the climate change issue leads to the second difficulty that will likely plague climate change plaintiffs in the foreseeable future: the issue of causation.

Defendants are likely to claim that lawsuits involving the impacts of climate change should fail because plaintiffs cannot prove conclusively either that the defendants' emissions are the cause of the observed climatic changes, or that such human-induced climatic changes, and not natural variability, are the cause of the observed impacts and associated injuries.⁹³ Few scientists would deny that the

91. *Id.*

92. See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 5-6 (2003).

93. For general discussions of the obstacles facing climate change-plaintiffs, see Grossman, *supra* note 92; David R. Hodas,

science of climate change is exceedingly complex and subject to uncertainties. Thus, a facially persuasive argument can be made that the uncertain nature of the science of climate change prohibits a plaintiff from showing that a defendant's emissions are responsible for any adverse effects upon public health or public lands, in turn defeating the potential existence of an unreasonable interference. Nevertheless, plaintiffs arguably can rely on theories of general causation, using statistics and probabilities as provided by the scientific community, to show that "it is more likely than not" that humans' emission of excess carbon dioxide emissions is causing climate change and its associated impacts.⁹⁴ The analogy made to tobacco litigation by Connecticut Attorney General Blumenthal in Part I rings true in this context. Scientists admit that human-induced climate change could likely never be deemed the absolute "but-for" cause of a particular climatic event or climate-related injury, just as they cannot do so in the context of obtaining lung cancer and smoking cigarettes. Nevertheless, increasingly conclusive scientific evidence, such as that recently revealed about the incidence of heat waves,⁹⁵ can play a role in convincing judges that human actions are an effective cause, and thus deserve a legal remedy.⁹⁶ Accordingly, while this matter is likely to challenge the courts' competence in a new and unique way, as they will be forced to understand complex scientific ideas surrounding cause-and-effect, the willingness of the courts to embrace general causation is encouraging.

Standing and Climate Change: Can Anyone Complain About the Weather?, 15 J. LAND USE & ENVTL. L. 451 (2000).

94. See Grossman, *supra* note 92, at 22-25.

95. See notes 53-57, *supra*, and accompanying text.

96. See Myles R. Allen & Richard Lord, *The Blame Game: Who Will Pay for the Damaging Consequences of Climate Change?*, 432 NATURE 551 (2004); see also Richard Black, *Emissions Double Heat Wave Risk*, BBC NEWS UK EDITION (Dec. 1, 2004), <http://212.58.226.16/1/hi/sci/tech/405497.stm> ("People have always got lung cancer, before they started smoking," [said Prof. Myles Allen of Oxford University], "but obviously smoking significantly increases the risk of lung cancer; and on those grounds courts have, in a number of jurisdictions, decided that smoking was therefore an effective cause."); see also Grossman, *supra* note 92, at 22 (making an analogy to agent orange mass exposure cases).

A final obstacle of note will face climate change plaintiffs in the future: overcoming the fact that greenhouse gas emissions are the byproduct not just of electric utilities, but of the activities of almost every American. In response, plaintiffs can argue that while every American plays an albeit limited role in contributing to climate change, the utilities and other potential defendants such as auto manufacturers, are the "substantial" contributors to the growth in carbon dioxide levels in the atmosphere. Moreover, plaintiffs can point out that the common citizen, while contributing to climate change via automobile use and electricity consumption, have limited, if any, choice in the matter, while the utilities and auto manufacturers have significant control over the levels of those emissions.⁹⁷

To date, the merits of these issues have yet to play out in the courts. The suits brought on public nuisance grounds against the nation's five largest utilities did not reach the trial stage, nor did the court, in dismissing the suits, even go so far as to discuss the plaintiffs' standing.⁹⁸ The court dismissed the suits purely on political question grounds, finding that unless, or until, the federal government makes a concrete initial policy determination about how the United States intends to address greenhouse gas emissions, the court cannot adjudicate public nuisance claims on the issue.⁹⁹ Paradoxically, the ruling thus deflates one of the primary rationales

97. See Grossman, *supra* note 92, at 25.

98. See *Connecticut v. American Electric Power Co.*, No. 04 Civ. 5669, slip op. at 12 n.6 (S.D.N.Y. Sept. 16, 2005).

The extraordinary allegations and relief sought in this case render it one in which an analysis of Plaintiffs' standing would involve an analysis of the merits of Plaintiffs' claims. For example, determining causation and redressibility in the context of alleged global warming would require me to make judgments that could have an impact on the other branches' responses to what is plainly a political question. Accordingly, because the issue of Plaintiffs' standing is so intertwined with the merits and because the federal courts lack jurisdiction over this patently political question, I do not address the question of Plaintiffs' standing.

Id.

99. See *id.* at 14.

behind the public nuisance suit—to force the federal government to take action—by stating that the suit cannot go forward without a prior federal action.

Nevertheless, while the ruling is a definite setback for public nuisance claims at the moment, the theoretical foundation for a public nuisance suit to address the causes of climate change arguably remains an open issue. Public nuisance law has long been utilized in environmental and public health contexts to ensure the protection of rights common to the public despite competing social values and gaps in statutory law. Climate change, given its expected impacts and the lack, thus far, of meaningful federal action, fits within this mold. Accordingly, if and when the federal government makes an initial policy determination on the issue of greenhouse gas emissions, public nuisance law may be able to provide a footing for public officials, and as the rest of this note argues, private citizens, to ensure that greenhouse gas emissions are addressed either in keeping with, or above and beyond, the contours of that initial policy determination.

IV. “PRIVATE” PUBLIC NUISANCE AND THE SPECIAL INJURY RULE

Public nuisance claims brought by private citizens who seek to enjoin actions interfering with a public right have traditionally faced a significant barrier: the Special Injury Rule. Disparaged as an “anachronistic and overinclusive bar to public nuisance actions,”¹⁰⁰ this rule has been attacked in the academic community for its continued existence in the face of debased justifications.¹⁰¹ Nevertheless, the rule remains firmly entrenched, at least facially, in the majority of jurisdictions in the United States.

The Special Injury Rule requires that a private citizen wishing to bring a public nuisance action has suffered an injury that is different-in-kind to that which has befallen the public generally.¹⁰² For

100. See Hodas, *supra* note 35, at 888.

101. For a discussion of the 1535 King’s Bench case within which the Special Injury Rule first occurred, its misinterpretation over time, and its shortcomings as a rule for modern interferences with public rights, see generally Antolini, *supra* note 35.

102. See Restatement (Second) of Torts § 821C(1) (1977). Note that the Restatement (Second) states that the Special Injury Rule is only applicable for public nuisance actions seeking damages. As

example, a boater's injury resulting from a collision with a dock that is blocking a navigable waterway would constitute a different-in-kind injury, because it is an injury unlike the injury of the blocked waterway suffered by the public generally.¹⁰³ An injury that is different-in-degree does not suffice. Accordingly, if a person suffers an injury that is similar-in-kind to the injuries suffered by the public generally, regardless of the injury's relative severity, that person cannot bring a public nuisance claim. For example, in *Venuto v. Owens-Corning Fiberglas Corp.*, a California court of appeals dismissed one such "private" public nuisance suit for failing to meet the Special Injury Rule.¹⁰⁴ The plaintiff's alleged injury, an aggravation of their allergies and respiratory disorders as a result of the emission of air pollutants, was deemed only different-in-degree to that suffered by the public generally, not different-in-kind, as other people also suffered similar adverse effects.¹⁰⁵ As such, the person could not seek damages nor seek to enjoin the party interfering with public health.¹⁰⁶

United States Steel Corp. v. Save Sand Key, Inc. exemplifies the entrenchment of the Special Injury Rule in state jurisprudence. In that case, the Florida Supreme Court overruled a lower court's rejection of the Special Injury Rule where a planned development allegedly would have interfered with access to a public beach.¹⁰⁷ While the lower court found that the Special Injury Rule "serves no valid purpose,"¹⁰⁸ and accordingly allowed the private individuals who had not suffered an injury different-in-kind to bring suit, the state's supreme court disagreed, and expressed its resolute adherence

discussed *infra*, every jurisdiction except Hawaii has refused to accept the Restatement's use of the Special Injury Rule only for damages actions, instead continuing to apply the rule to both damages and equitable actions.

103. See *Overcash v. South Carolina Elec. & Gas Co.*, 588 S.E. 2d 116 (S.C. Ct. App. 2003).

104. See 22 Cal. App. 3d 116 (Cal. Ct. App. 1971).

105. See *id.*

106. See *id.*

107. See 303 So. 2d 9 (Fla. 1974).

108. See *Save Sand Key, Inc. v. United States Steel Corp.*, 281 So. 2d 572, 575 (Fla. App. 1973).

to the traditional doctrine.¹⁰⁹ This form of facial adherence to the Special Injury Rule is endemic to almost all state jurisdictions.¹¹⁰

Despite, and perhaps because of, this entrenchment, the Special Injury Rule has come under significant scholarly attack. Three rationales are historically given for the rule, each of which holds little validity today: 1) to preserve the role of the sovereign in enforcing the law, 2) to prevent multiplicity of actions, and 3) to discourage trivial lawsuits.¹¹¹ First, while perhaps in 1535 the sole authority of the sovereign to enforce the law was strictly protected, the embrace of citizen suit provisions in almost all of the major federal environmental laws indicates Congress's support for citizen enforcement.¹¹² Second, with respect to suits seeking equitable remedies, such as an injunction, the potential for multiple suits is quelled as soon as one suit is successful.¹¹³ Third, the ambiguity inherent in the terms "significant interference" and "unreasonable" enable judges to use their discretion, albeit within the constraints of *stare decisis*, to balance a community's values against the progressive march of industrialized civilization.¹¹⁴ Such discretion

109. See 303 So. 2d at 13 ("We adhere resolutely to our [prior] holding[s] relative to the concept of special injury in determining standing.").

110. See, e.g., *Indiana Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1384 (Ind. Ct. App. 1996); *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984); *Hartford v. Womens Services, P.C.*, 477 N.W.2d 161 (Neb. 1991); *Spring-Gar Community Civic Ass'n v. Homes of the Homeless, Inc.*, 516 N.Y.S.2d 399 (N.Y. Sup. Ct. 1987); *Odette's, Inc. v. Pennsylvania*, 699 A.2d 775, 778 (Pa. Commw. Ct. 1997); *Overcash v. S.C. Elec. & Gas Co.*, 588 S.E.2d 116, 122 (S.C. Ct. App. 2003) ("[M]ost jurisdictions, including South Carolina, adhere to the view that the plaintiff in such an action must establish damages different in kind, not degree, from the damage shared by the general public stemming from the exercise of the same rights.").

111. See Antolini, *supra* note 35, at 766.

112. See, e.g., Clean Water Act Citizen Suit Provision, 33 U.S.C. § 1365 (2004).

113. See Antolini, *supra* note 35, at 888.

114. See, e.g., *Bd. of Comm'r v. Elm Grove Mining Co.*, 9 S.E.2d 813, 817 (W. Va. 1940); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. Ct. App. 1970).

is one of public nuisance law's greatest assets because it enables judges to dismiss suits complaining of only mere annoyances, trifles, or disturbances of daily life, thus combating and disincentivizing trivial lawsuits.¹¹⁵ From an external perspective, it can also be argued that because state officials cannot avoid resource limitations and political aversions, the Special Injury Rule unjustifiably limits the protection afforded citizens from public nuisances.¹¹⁶ Finally, as a general matter, critics also add that it is paradoxical and illogical to have a rule that produces less liability as the interference becomes greater.¹¹⁷

These criticisms fueled the general sentiment at the 1972 American Law Institute conference that the Special Injury Rule unduly hindered the ability of citizens to protect the values closest to their community, specifically those involving environmental interests.¹¹⁸ In response, the Restaters modified the Special Injury Rule with respect to suits seeking to enjoin a public nuisance, allowing private citizens to bring suit if they either satisfied the Special Injury Rule¹¹⁹ or had "standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action."¹²⁰ When created, this modified rule was immediately embraced by some scholars as an appropriate and useful new way for citizens to address environmental concerns.¹²¹ Moreover, the modification was seen as a way to breathe new life into private actions for public nuisance.¹²²

The modified rule, however, failed to become widely accepted. Every state jurisdiction except Hawaii has thus far failed to adopt

115. See *Boomer*, 257 N.E.2d at 890-91 (providing five ways that trivial suits will be weeded out).

116. See *Bordeaux*, *supra* note 19, at 86-87.

117. See *id.* at 788-89.

118. See *Antolini*, *supra* note 35, at 828-49.

119. Restatement (Second) of Torts § 821C(2)(a) (1977).

120. *Id.* § 821C(2)(c). Important to note, this modified view applies only to "private" public nuisance suits seeking equitable remedies. Those seeking damages must still adhere to the Special Injury Rule according to the Restatement.

121. See generally John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 *ECOLOGY L.Q.* 241 (1972).

122. See *Hodas*, *supra* note 35, at 885.

this modified rule for suits seeking equitable remedies, instead continuing to embrace the traditional Special Injury Rule for both damages and equity suits. Professor Denise E. Antolini credits this rejection of the Restatement approach in part to the sixth edition of Prosser on Torts, which rejects public nuisance almost outright, and fails to give credence to the Restatements updated view.¹²³ Other justifications for the continued entrenchment include the tendency for judges to favor formalism and *stare decisis* and to avoid enabling litigation that engenders social change, as well as the free-rider and litigation cost problems associated with private plaintiffs suing only for equitable remedies.¹²⁴

However, despite the Restatements' lack of success, the Special Injury Rule may be softening its hard line, according to Professor David Hodas. Hodas argues that despite giving explicit support for the Special Injury Rule, courts have started to implicitly reject the rule, instead requiring that private plaintiffs alleging a public nuisance only show a serious injury-in-fact.¹²⁵ A look at some sample case law buttresses this view, leading to the conclusion that despite continued facial acceptance of the Special Injury Rule, the courts are sometimes willing to apply it in a lenient manner. Hodas cites *Connerty v. Metropolitan District Commission* as an example, a case in which a Massachusetts court facially reaffirmed the Special Injury Rule, but applied it in a manner that significantly altered its harsh requirements.¹²⁶ In allowing clam diggers to sue for public nuisance after the defendant discharged raw sewage into a public bay, the court stated that the plaintiff need "only show that the public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares."¹²⁷ In this instance, that "special injury" was satisfied by the clam diggers' business losses.¹²⁸ Similarly, in *Hoover v. Durkee*, a New York court enjoined a race track from operating after private plaintiffs who lived nearby brought a public nuisance suit.¹²⁹ The court affirmed the application of the Special Injury Rule, but stated that it

123. See Antolini, *supra* note 35, at 855.

124. See *id.* at 875-86.

125. See Hodas, *supra* note 35, at 892.

126. 495 N.E.2d 840 (Mass. 1986).

127. See *id.* at 845.

128. See *id.*

129. 622 N.Y.S.2d 348, 350 (N.Y. Sup. Ct. 1995).

was met if "private persons [show] that they suffered injury beyond that suffered by the community at large."¹³⁰ While the court did not focus on the issue of how this standard had been satisfied, it is arguable that living near a noisy racetrack is merely an injury different-in-degree rather than different-in-kind than that suffered by the public generally. Accordingly, Hodas's argument that courts, while facially affirming the Special Injury Rule, are from time-to-time implicitly overlooking its harsh requirements, seems to hold some weight.

In sum, the Special Injury Rule remains facially intact in the vast majority of American jurisdictions, despite some judicial "activism" to subvert its strict requirements in cases involving significant injuries. Accordingly, private citizens seeking equitable remedies that require abatement of greenhouse gas emissions will have to overcome the hurdle of the different-in-kind injury requirement, which was purposely created several centuries ago, under different circumstances, to keep private individuals out of the courts. The remainder of this note aims to determine what, if any, expected impacts of climate change may be able to provide a means for meeting the Special Injury Rule, and alternatively, what ways there may be around the rule in Hawaii and Illinois.

V. "PRIVATE" PUBLIC NUISANCE AND CLIMATE CHANGE: THREE OPTIONS

Having provided an overview of the expected impacts resulting from climate change in Part II and outlined the basic requirements of a "private" public nuisance suit in Parts III and IV, this section examines their nexus. Specifically, this section attempts to answer the following questions: will the impacts of climate change on public health and public lands, should they occur as expected, satisfy the Special Injury Rule? If not, are there any jurisdictions in which a citizen could avoid the Special Injury Rule requirement and thus still bring a "private" public nuisance action seeking an equitable remedy? This note first concludes that satisfying the Special Injury Rule in order to attain standing for a public nuisance suit would be difficult, but is possible. Second, this note concludes that subverting the Special Injury Rule can be done in two jurisdictions: Hawaii, which has embraced the Restatement's exception to the Special

130. *Id.* at 349.

Injury Rule, and Illinois, which has adopted a constitutional Right to a Healthy Environment that supplants the Special Injury Rule for injuries involving public health. However, because such suits could readily be brought in only two jurisdictions, these ways around the Special Injury Rule can only provide a limited means for reducing the nation's greenhouse gas emissions.

The first option, bringing a "private" public nuisance claim in a jurisdiction that embraces the Special Injury Rule, presents a difficult challenge, but one that is potentially surmountable. As noted in Part IV, the Special Injury Rule requires that a plaintiff have suffered an injury different-in-kind than that suffered by the public generally.¹³¹ However, as also noted in Part IV, some courts have been willing to interpret the requirements of the Special Injury Rule with greater leniency if the injury suffered is significant.¹³² To that end, satisfying the Special Injury Rule in the climate change context may be achievable under all of the public health impact scenarios outlined in Part II, should the suffered injury be of a significant nature and the case be heard by an amenable judge.

Relying on judicial leniency, however, could be a costly risk, and may not actually be necessary. Many jurisdictions have adopted a per se rule that physical injuries at the hands of an alleged public nuisance satisfy the Special Injury Rule outright.¹³³ For example, in *Anderson v. W.R. Grace & Co.*, a federal district court granted standing to private individuals to bring a public nuisance suit as a result of their allegations of illness caused by contaminated well water.¹³⁴ In doing so the court stated that "injuries to a person's health are by their nature 'special and peculiar' and cannot properly be said to be common or public."¹³⁵ Similarly, in *Stock v. Ronan*, a New York court granted standing to an individual alleging that a city's buses were a public nuisance on the ground that the fumes were physically harmful to his diseased lung.¹³⁶

Armed with this precedent, an individual who suffers a discrete injury to his or her health as a result of climate change may be able to satisfy the Special Injury Rule, and thus bring suit in the majority

131. See *infra* Part IV.

132. See *id.*.

133. See Restatement (Second) of Torts § 821C cmt. d (1977).

134. See 628 F. Supp. 1219 (Mass. Dist. Ct. 1986).

135. *Id.* at 1233.

136. See 313 N.Y.S.2d 508, 511 (N.Y. Sup. Ct. 1970).

of U.S. jurisdictions. For example, the contraction of an infectious disease that had previously not inhabited a given region of the United States would arguably satisfy the Special Injury Rule, as would the loss of a life due to either a heat wave or an extreme weather event. This form of meeting the Special Injury Rule, however, is of use only for those individuals who suffer actual physical injuries, and thus does little for citizens who are merely subject to higher levels of risk of injury to their health as a result of climate change. To this end, while there does exist a potential means for working within the Special Injury Rule and bringing suit to enjoin greenhouse gas emitters, the Special Injury Rule continues to serve as a significant bar in most instances.

Moreover, while the Special Injury Rule may be met in some limited circumstances, those injuries that would be sufficient would raise the causation issue in the new context of individualized injury. For example, if a severe heat wave hit New York City, and John Doe died from heat exhaustion as a result, his injury would arguably meet the different-in-kind test required by the Special Injury Rule. However, the causation problem noted in Part III with respect to climate change actions would probably be raised by any defendant charged with public nuisance, because showing that it is "more likely than not" that John Doe's death was the result of climate change would be exceedingly more difficult than showing that an increase in the number of average deaths resulting from heat waves was due to climate change. This causation issue adds a new twist to the paradox of the Special Injury Rule. As more people succumb to injuries at the hands of climate change, the less likely it is that any of them will be able to meet the Special Injury Rule, yet the fewer injuries that occur, the harder the causation element will be to meet. Because the Special Injury Rule disallows those injuries that are only different-in-degree, only the worst injuries of those expected to occur as a result of climate change, such as death or contraction of an infectious disease, would be potentially actionable. Exacerbation of asthma or other respiratory diseases as a result of increasing annual average temperatures likely would not be satisfactory. In sum, the Special Injury Rule creates a high bar for plaintiffs seeking to "fill the gap" in federal environmental law and enjoin the continued emission of greenhouse gas emissions at levels higher than technologically required.

Two outlier jurisdictions in the United States, however, provide options for subverting the Special Injury Rule: Hawaii and Illinois.

Each state has adopted an alternative to the Special Injury Rule that potentially provides private citizens a means with which to bring public nuisance suits similar to the suit brought by the attorneys general. While no such suits have yet been brought, the manner in which they could be brought provides a better option, albeit limited, than the method outlined above for trying to work within the Special Injury Rule.

As noted in the Part IV, the 1972 American Law Institute session on public nuisance resulted in a change in the Restatement (Second) of Torts. That change has been rejected in all jurisdictions thus far, save one: Hawaii. In 1982, Hawaii's Supreme Court in *Akau v. Olohana Corp.* acknowledged a "trend in the law" away from focusing upon whether an injury is shared by the public and towards focusing on whether the plaintiff is in fact injured.¹³⁷ The case involved a class action brought by a group of private citizens alleging an obstruction of the public's right to beach access—a public nuisance. The court rejected the Special Injury Rule traditionally required for a "private" public nuisance action, instead adopting the new approach outlined in the Restatement. That approach, as stated by the court, was the following: "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different-in-kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including class action."¹³⁸ Accordingly, the court granted standing to the private plaintiffs in the suit, despite their failure to allege special, different-in-kind injuries. The court found two of the classic rationales for the Special Injury Rule inapplicable, namely, that of reserving for the sovereign the right to protect the public's rights and that of preventing trivial lawsuits. Although the court accepted the validity of the third rationale—protecting against multiplicity of suits—it did so by enabling judges to determine, in their discretion, that the multiplicity issue was resolved in any given case.

Accordingly, a private plaintiff wishing to bring suit for injuries to public health or public lands in Hawaii could subvert the Special Injury Rule by merely alleging an injury-in-fact caused by human-induced climate change and bringing the suit in a manner that satisfied the court's concern that multiplicity of suits would not pose

137. See 652 P.2d 1130 (Haw. 1982).

138. See *id.*

a problem. The *Akau* court defined an "injury-in-fact" as a personal "injury to a recognized interest such as economic or aesthetic ... and not merely [an] airing [of] a political or intellectual grievance."¹³⁹ Given some of the expected impacts on Hawaii's public lands, this arguably could be achieved. In Honolulu, Nawiliwili, and Hilo, Hawaii, for example, sea levels are already rising 6-14 inches per century, according to the EPA.¹⁴⁰ By 2100, sea levels in Hawaii are expected to rise 17-25 inches.¹⁴¹ Such sea-level rise will have significant impacts on beach erosion and beach access, thus constituting a classic public nuisance.¹⁴² The EPA estimates that the cumulative cost of sand replenishment to protect the coast of Hawaii from a 20-inch sea-level rise by 2100 is \$340 million to \$6 billion.¹⁴³ Moreover, the other expected impacts of sea-level rise, such as inundated wetlands and other low-lying lands, intensified flooding, and increases in the salinity of rivers, bays, and groundwater tables,¹⁴⁴ could likewise provide grounds for the common citizen to bring a public nuisance suit without having to show a different-in-kind injury. Finally, from a public health perspective, a plaintiff could still satisfy injury-in-fact under Hawaii's approach in all the same circumstances as under the traditional Special Injury Rule for all physical injuries.¹⁴⁵

A plaintiff could meet the second requirement, persuading the court that multiplicity of suits would not be a problem, in a variety of ways. First, a plaintiff could pursue one of the two traditional routes: presenting his claim as a class action or bringing his suit as a representative of the general public.¹⁴⁶ Under either approach, however, defendants and critics may raise an objection due to the

139. *See id.* at 1135.

140. *See* U.S. ENVTL. PROTECTION AGENCY, CLIMATE CHANGE AND HAWAII (1998), available at [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUNQM/\\$File/hi_impct.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BUNQM/$File/hi_impct.pdf).

141. *See id.*

142. *See* Restatement (Second) of Torts §821B cmt. g (1977); *see, e.g.,* U.S. Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974).

143. *See* U.S. ENVTL. PROTECTION AGENCY, *supra* note 140, at 3.

144. *See* U.S. Env'tl Protection Agency, *supra* note 43.

145. *See infra* notes 120-30 and accompanying text.

146. *See* Restatement (Second) of Torts § 821C(2)(c) (1977).

unique nature of climate change. Because human-induced climate change operates over long time horizons, present-day injuries resulting from climate change will not cease with a favorable ruling against greenhouse gas emitters. Rather, climate change presents an ongoing threat of injury that will only abate with the passage of a significant amount of time, on the magnitude of decadal to centurial scale. Accordingly, defendants are likely to argue that “private” public nuisance suits, even if brought as a class action by private individuals, suffer from an inability to protect against multiplicity of suits.

In response, “private” public nuisance plaintiffs can adopt a more novel approach to quelling a court’s concern about multiplicity of suits. Just as the attorneys general are not seeking to enjoin the operations of greenhouse gas emitting utilities, but rather are seeking only to cap their emissions and require gradual decreases over time, private plaintiffs similarly should seek equitable remedies that balance the benefits of the defendants’ actions against the costs of their emissions levels. By seeking such a remedy, such as a cap on emissions growth or an injunction requiring gradual decreases in emissions, the plaintiffs could argue that a judicial grant of such a remedy would eliminate the nuisance aspect of the defendants’ actions, thus protecting the defendant from future suits. In other words, a utility that has capped its emissions has remedied its status as a public nuisance, requiring that a court reject all future suits on the merits, thus satisfying the court’s concern over multiplicity of claims. While novel, this approach is arguably a logical extension of the result in *Boomer v. Atlantic Cement Co.*, in which the court used its discretion to deny an injunction in favor of permanent damages, thus attempting to balance the needs of society and the injuries suffered by the plaintiffs.¹⁴⁷ Should private plaintiffs be able to adequately quell a court’s concern over multiplicity of suits, Hawaii, by adopting the Restatement approach to “private” public nuisance, provides an alternative to the high bar set by the Special Injury Rule.

The second option available for subverting the Special Injury Rule is available in Illinois via the state’s constitutional Right to a Healthy Environment. This right was enacted as part of Illinois’s rewritten Constitution in 1970 and has two parts: a public policy declaration and a self-executing right for private citizens to protect their right to

147. See *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. Ct. App. 1970).

a healthful environment.¹⁴⁸ While section one has no real bite, section two states the following: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."¹⁴⁹ While not creating any new causes of action, this right has been interpreted as abrogating the Special Injury Rule for private citizens who suffer public health injuries at the hands of pollution, making it unique among its peers¹⁵⁰ and highly applicable to this discussion. Just as in Hawaii, Illinois potentially provides a substantially more viable opportunity to bring a "private" public nuisance action without having to satisfy the high bar of the Special Injury Rule.

A plain meaning reading of Illinois's Right to a Healthy Environment does not clearly establish what impact it has upon private individuals wishing to bring public nuisance suits. Tellingly, in *Glisson v. Marion* the Illinois Supreme Court was unsure as to what the state's Right to a Healthy Environment established and included.¹⁵¹ In that case, a private citizen brought suit challenging a state permit for a proposed dam, claiming that it would violate the state's Endangered Species Protection Act (ESPA). Because ESPA did not include a provision granting standing to citizens to bring a private cause of action, the plaintiff claimed that the state's Right to a Healthy Environment granted him standing.

To adjudicate the standing issue, the court looked to the legislative history of the article establishing the right. The court found that the

148. See Ill. Const. 1970, art. XI §§ 1-2. Section 1 states "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy." *Id.*

149. See *id.* § 2.

150. Illinois's Right to a Healthy Environment is the only one of its kind that has been interpreted to abrogate the Special Injury Rule for environmental causes of action, thus making it the only such right that is applicable to our discussion. For a general discussion of the other states' rights to a healthy environment, see Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993).

151. See 720 N.E.2d 1034, 1042 (Ill. 1999).

drafters of the article intended that the right would enable citizens to protect themselves from the effects of pollution upon public health, and second, would achieve this goal by abolishing the Special Injury Rule for private citizens wishing to establish a violation of the public's rights with respect to public health.¹⁵² Accordingly, the court concluded that "[i]t was the intent of the committee to broaden the law of standing by eliminating the traditional special injury prerequisite for standing to bring an environmental action."¹⁵³ That elimination of the special injury prerequisite, however, only applied to environmental actions that involved "environmental pollution and its effect on human health,"¹⁵⁴ which meant that the plaintiff in *Glisson* did not have standing based upon the impacts the dam would have on endangered species.¹⁵⁵

While the plaintiff in *Glisson* unsuccessfully invoked Illinois's Right to a Healthy Environment, the court's interpretation arguably offers private citizens an opportunity to bypass the Special Injury Rule in the climate change context. The right does not create a new cause of action; rather, it enables private citizens seeking to bring a public nuisance action with respect to the public health impacts of climate change to subvert the different-in-kind injury requirement. Injuries suffered by private individuals that are similarly suffered by the public generally, such as the exacerbation of asthma due to smog accumulation, would be actionable under public nuisance law. Given the expected public health impacts of climate change in the

152. Specifically, the General Government Committee's report stated the following: "The Committee selects the word 'healthful' as best describing the kind of environment which ought to obtain. 'Healthful' is chosen rather than 'clean', 'free of dirt, noise, noxious and toxic materials' and other suggested adjectives because 'healthful' describes the environment in terms of its *direct effect on human life* while the other suggestions describe the environment more in terms of its physical characteristics [T]he Committee is of the view that the 'special injury' requirement for standing is particularly inappropriate and ought to be waived. Section [2], therefore, allows the individual the opportunity to prove a violation of his right even though that violation may be a public wrong, or one common to the public generally." *See id.* at 1042-43.

153. *See id.* at 1043.

154. *See id.* at 1044.

155. *See id.*

Midwest, this could be of great significance. For example, the WHO expects that by 2050, Detroit, Michigan, will have an increased summertime mortality of 100 to 250 deaths,¹⁵⁶ and the Union of Concerned Scientists predicts that the Great Lakes Region as a whole will experience 40 or more days exceeding 90 degrees Fahrenheit (32.2 degrees Celsius) by the last few decades of the century, with accompanying increases in the number of days reaching 104 degrees (40 degrees Celsius).¹⁵⁷ Water supplies, as mentioned in Part II, may experience increases in nitrate pollution, algal blooms, pesticide residues, and other toxins, as well as the spread of parasitic and pathogenic microorganisms, all of which can have adverse effects upon human health.¹⁵⁸ On the air pollution side, the number of hot days conducive to high ozone might increase by five to one hundred times present levels for Detroit.¹⁵⁹ For each of these expected impacts, the abrogation of the Special Injury Rule arguably enables private citizens to bring "private" public nuisance suits for merely suffering the same general form of injury that these impacts will engender. Accordingly, just as in Hawaii, Illinois's jurisprudence arguably enables a result significantly different than would otherwise occur in a jurisdiction that adhered to the traditional Special Injury Rule.¹⁶⁰

Yet while these latter two options are appealing because they seem to enable a subversion of the Special Injury Rule, their practical impact is limited by their jurisdictional reach. While a plaintiff who is willing to bring suit in a jurisdiction that employs the Special Injury Rule could bring suit in an emitter's home state, those bringing suit in Hawaii and Illinois are likely to suffer from the

156. See WORLD HEALTH ORGANIZATION, *supra* note 46, at 15.

157. See UNION OF CONCERNED SCIENTISTS, *supra* note 49, at 73.

158. *See id.*

159. *See id.*

160. Further supporting the conclusion that Illinois's Right to a Healthy Environment provides a potential home for "private" public nuisance suits with respect to climate change is a statement the constitutional committee made in its report. In explaining why the committee chose the word "healthful," the committee stated that "a description in terms of physical characteristics may not be flexible enough to apply to new kinds of pollutants which may be discovered the future." See *Glisson v. Marion*, 720 N.E.2d 1034, 1042 (Ill. 1999).

problems associated with obtaining personal jurisdiction over potential defendants. As noted in Part I, four of the utilities involved in the suit brought by the attorneys general filed a motion to dismiss for lack of personal jurisdiction. The utilities first argued that because they are not incorporated in New York, the state in which the suit has been brought, they could not be deemed to be “doing business” in New York, and thus the suit should be dismissed.¹⁶¹ Second, the utilities contended that granting personal jurisdiction would violate their constitutional due process protections.¹⁶² While the trial court did not rule specifically on these issues, it is certain that similar motions to dismiss would be filed in any “private” public nuisance suit brought in either Hawaii or Illinois if the defendant(s) were not clearly “doing business” in that state. Accordingly, these latter two options heretofore discussed might be a severely limited means for private citizens to bring public nuisance suits against greenhouse gas emitters. To this end, while bringing suit in a jurisdiction that still embraces the Special Injury Rule would require finding what might be termed “the perfect plaintiff,” i.e., one that suffered a discrete physical injury, this option might be preferred.

VI. CONCLUSION

That eight attorneys general, New York City, and two non-profit organizations felt the need to bring a public nuisance suit against the country’s five largest emitters of carbon dioxide speaks loudly about the state of federal environmental law with respect to climate change. While the federal statutes in place provide broad protections for the United States citizens against most environmental harms, some people believe they are not quite broad enough. This note has sought to show that if public nuisance suits addressing greenhouse gas emissions can overcome the recently created political question hurdle, three different options may exist for private citizens to utilize the common law to force greenhouse gas emissions reductions.

161. See Memorandum of Law in Support of the Motions of the Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corp. to Dismiss for Lack of Personal Jurisdiction, *Connecticut v. American Elec. Power Co.*, (No. 04 CV 05669) (S.D.N.Y. Sept. 30, 2004).

162. See *id.*

The major bar to such "private" public nuisance suits has historically been the Special Injury Rule. Despite continued criticism, the rule remains entrenched in the majority of jurisdictions and creates a very high bar for private citizens wishing to protect their public health and public lands from the effects of climate change. Two jurisdictions, however, have taken a different approach: Hawaii, by embracing the Restatement's exception to the Special Injury Rule, and Illinois, by adopting a constitutional Right to a Healthy Environment that abrogates the Special Injury Rule for actions involving pollution's effects upon public health. From a citizen's standpoint, these latter options are favorable. Legally, however, their practical impact may be limited to their jurisdictional reach, thus requiring citizens to work within the Special Injury Rule, and look for the perfect plaintiff.

Despite the paradoxical current requirement of an initial policy determination by the federal government, the goal for such plaintiffs, as Eileen Claussen has stated, is meaningful federal legislation addressing greenhouse gas emissions. To that end, the suit brought by the attorneys general arguably played a role in forcing federal action already. Soon after the suit was filed, two major utilities made calls for national approaches to greenhouse gas emissions reductions.¹⁶³ The wheels of political influence seem to be moving in a new direction, a process that "private" public nuisance suits would only serve to encourage.

163. See Matthew Dalton, *Cinergy Voices Support for Greenhouse Gas Cap*, DOW JONES NEWSWIRES (Dec. 1, 2004); Press Release, Edison Int'l, Edison Int'l Asks Regulators to Address Global Warming on a Nat'l Level (Dec. 7, 2004), available at http://www.edison.com/media/indiv_pr.asp?id=5365.

