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Mackenzie Schoonmaker

James Simpson

NINETEENTH ANNUAL
PACE NATIONAL ENVIRONMENTAL LAW
MOOT COURT COMPETITION
2007 Judges' Edition Bench Memorandum*

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

CA No. 06-2006; CA No. 06-2007

PROVINCE OF INUKSUK and
VILLAGE OF AKULI, Appellants,
v.
GENERGY CORP., ATOMIC ENERGY, INC.,
CENTENNIAL POWER CO., POWER SUPPLIERS
CO., and FIRST ENERGY, LTD.,
Appellees.
PROVINCE OF INUKSUK , Appellant,
v.
STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection
Agency, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW UNION

Mackenzie Schoonmaker,
James Simpson
Pace University School of Law
78 North Broadway
White Plains, NY 10603

* This document is provided to the Judges of the Pace National Environmental Law Moot Court Competition

SUMMARY

This consolidated case involves two actions:

(i) The Canadian Province of Inuksuk and the Village of Akuli, Canada, plaintiffs below and appellants here, brought a public nuisance suit against five coal-fired power plants in the State of New Union, United States, defendants below and appellees here, alleging that pollution from appellees' plants contributes to global warming, imperiling the property and livelihood of appellants' citizens.

(ii) The Province of Inuksuk brought a citizen's suit under the Clean Air Act (CAA), 42 U.S.C. § 7604 (2006), against the Administrator of the U.S. Environmental Protection Agency (EPA) arguing that the EPA has a mandatory duty under section 115 of the CAA, 42 U.S.C. § 7415 (2006), to take certain actions to reduce the appellees' carbon dioxide emissions. Appellants added a claim to this action under the *Trail Smelter* doctrine that the United States, through the EPA, has an obligation under customary international law to regulate carbon dioxide emissions from coal-fired power plants.

The parties were asked to brief six issues related to these two actions:

1. After *Illinois v. City of Milwaukee* does there remain a federal common law of nuisance that could be applied to carbon dioxide emissions from power plants in New Union?

2. If a public nuisance exists related to CO_2 under either federal or state law, is it appropriate to apply the *Landers v. East Texas Salt Water Disposal Co.* rule on indivisible harm to the circumstances in this case?

3. Should the precautionary principle, a principle of international law, be a consideration in balancing benefits versus harm in a nuisance analysis?

4. Is the harm to plaintiffs Province of Inuksuk and Village of Akuli sufficiently concrete to provide standing to bring the nuisance action?

5. Is U.S. Environmental Protection Agency required by section 115 of the Clean Air Act to notify the Governor of New Union that the State must amend its State Implementation Plan to reduce emissions from the defendant power plants to a level consistent with emissions that can be achieved using the currently available control technology?

6. Is the United States government, acting through the EPA, required under the *Trail Smelter* doctrine to reduce CO_2 emissions to levels that can be achieved through the application of currently available control technology so as to minimize harm to a neighboring country?

This bench brief discusses each of these six issues in turn. For each issue, the positions of the parties and law are discussed. The bench brief does not apply the facts to the law and leaves conclusions to the strength of the oral arguments and each judge's discretion. Sample questions are presented for each issue.

ISSUE I:

After *Illinois v. City of Milwaukee* does there remain a federal common law of nuisance that could be applied to carbon dioxide emissions from power plants in New Union?

A. Positions of the Parties

Plaintiffs argue that there is a federal common law of nuisance for air pollution. In the alternative, plaintiffs base their suit on the public nuisance law of the State of New Union.

Defendant companies assert that there is no federal common law of nuisance for air pollution.

EPA supports the companies' position that there is no federal common law of nuisance for air pollution.

B. Discussion

While there is not extensive case law regarding a federal common law of nuisance for air pollution, the Supreme Court has found that the Clean Water Act ("CWA") preempts the federal common law of nuisance when the action relates to a permitted CWA discharge. *See Milwaukee v. Illinois*, 451, U.S. 304 (1981) ("*Milwaukee II*"). The Court stated that the test to determine "whether a previously available federal common law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 315 n.8.

Illinois alleged that four Wisconsin cities were discharging 200 million gallons per day of raw or inadequately treated sewage into Lake Michigan. *See Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*"). Illinois sought an order from the Supreme

Court to abate the nuisance. *Id.* The Court noted that the "application of federal law to abate a public nuisance in interstate or navigable waters is not inconsistent with [existing federal legislation]." *Id.* at 104. The Court pre-saged, however, that

> [i]t may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

Id. at 107.

Subsequently, Illinois again filed suit against the City of Milwaukee and other Wisconsin cities in United States District Court, this time seeking abatement under federal common law of the alleged nuisance created by the cities' sewerage discharges. *See Illinois ex rel. Scott v. Milwaukee*, 366 F. Supp. 298 (N.D. Ill. 1973). Five months later, Congress passed the Federal Water Pollution Control Act Amendments of 1972, which established a new system of regulations that prohibited the unpermitted discharge of pollutants into navigable waters. *See* CWA §§ 301, 402, 33 U.S.C. §§ 1311, 1342.

The District Court found that Illinois had proven the existence of a nuisance under federal common law and ordered the defendant Wisconsin cities to abate their discharges. *See Illinois v. Milwaukee*, 8 Envtl. L. Rep. 20503 (N.D. Ill. 1978). On appeal, the Seventh Circuit held that the Clean Water Act had not preempted the federal common law of nuisance, but that "[in] applying the federal common law of nuisance in a water pollution case, a court should not ignore the [CWA] but should look to its policies and principles for guidance." *Milwaukee v. Illinois*, 599 F.2d 151, 164 (7th Cir. 1979). The defendant Wisconsin cities sought review of the Seventh Circuit's decision by the Supreme Court. *Milwaukee v. Illinois*, 445 U.S. 926 (1980).

The Court held that the Clean Water Act pre-empts the federal common law of nuisance in interstate water pollution cases that involve the discharge of a pollutant from a point source. *See Milwaukee II*, 451 U.S. at 317. The Court premised its holding on a separation of powers argument:

> Congress has not left the formulation of appropriate Federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurispru-

> dence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency . . . the Amendments were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in [*Milwaukee I*] . . . Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.

Id. at 317-18 (footnote omitted).

In his opinion for the Court in *Milwaukee II*, Justice Rehnquist conceded that "the Court has found it necessary, in a 'few and restricted' instances . . . to develop federal common law." *Milwaukee II*, 451 U.S. at 313. However, because of the importance of the separation of powers, the judiciary should employ federal common law only when it is compelled to answer federal questions that cannot be answered by federal statutes alone. *Id.* at 313-14. The Court applied the *Milwaukee II* test to Illinois' nuisance complaints against the defendants' discharges to Lake Michigan and found that the Clean Water Act had created a permit scheme that addressed the very concerns raised by Illinois. *Id.* at 305. As a result, the *Milwaukee II* facts fell precisely within the rubric of the NPDES permitting scheme. *Id.* at 305.

Two months later, the Supreme Court drew from its *Milwaukee II* holding to find that the Clean Water Act's pre-emption of the federal common law of nuisance extends to "the area of ocean pollution." *See Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 11 (1981). The *Middlesex* Court stated that "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of [the Clean Water Act], which was completely revised after the decision in [*Milwaukee I*]." *Id.* at 22; *see also Nat'l Audubon Soc'y v. Dep't. of Water*, 869 F.2d 1196, 1200 (9th Cir. 1988) (finding the Court's statement in *Middlesex* that "federal common law nuisance claims for water pollution are preempted" is "unequivocal").

Apart from the *Milwaukee* litigation, other significant cases touch upon the issue. In terms of water pollution originating in one state and affecting another state, the Court has held that the Clean Water Act taken "as a whole, its purposes and its history"

pre-empted an action based on the law of the affected state and that the only state law applicable to an interstate discharge is the law of the state where the point source is located. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

In *Michie v. Great Lakes Steel Div., Nat'l Steel Corp.*, 496 F.2d 213 (6th Cir. 1974), thirty-seven Canadian residents sued three defendants that operated seven plants immediately across the Detroit River from Canada, claiming that the pollutants emitted from them created a nuisance. *See id.* at 215. While all parties agreed that Michigan law alone controlled, the court noted that "[a]rguably there may be a federal common law of nuisance applicable to injuries by pollution of water or air across state boundaries." *Id.* at 216 n. 2. However, the court cited *Milwaukee I* as authority for this proposition; *Michie* was decided before *Milwaukee II*.

There are only a few precedents that address the issue of a federal common law of nuisance claim for air pollution. In the Mono Lake litigation the Ninth Circuit declined to find a federal common law of nuisance to resolve the air pollution issue in that case. *See Audubon Soc'y*, 869 F.2d at 1200. In *Audubon Society* one of plaintiff's claims was based on federal common law of nuisance for air pollution resulting from alkali dust storms from the newly exposed bed of Mono Lake. The district court had concluded that the federal common law nuisance action based on air pollution was proper. However, the *Audubon Society* court noted that since Congress had not authorized the courts to develop substantive law of air pollution, "if federal common law can be fashioned at all, it will be because a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Id.* at 1202 (quoting *Texas Industries, Inc. v. Radclife Materials, Inc.*, 451 U.S. 630, 640 (1981). Further, a "'uniquely federal interest' exists 'only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases.'" *Id.* (quoting *Texas Industries*, 451 U.S. at 641). The court reasoned that under the Clean Air Act states have the primary responsibility for assuring air quality within each state and that the prevention of air pollution at its source is the primary responsibility of local government. *See id.* at 1203 (citing Clean Air Act §§ 101(a)(3), 107(a), 42 U.S.C. §§ 7407(a), 7401(a)(3)). Further, the court found that California law was more appropriate because there was no conflict between

federal policies and the use of California nuisance law, the plaintiff sought protection of state law in state court, and the State of California had a substantial interest since the claims were primarily state law claims. *See id.*

Lastly, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), the State of Georgia sought to enjoin the Tennessee Copper Company from discharging noxious gas from their Tennessee plant over Georgia's territory. *See id.* at 236. The Court, while not explicitly finding a federal common law nuisance basis, enjoined defendant's continued pollution of Georgia's air and focused on the fact that defendant was a state and the injury interstate rather than domestic. *See id.* at 238.

C. Questions

1. For the Plaintiffs: Doesn't *Milwaukee II* definitively rule out the existence of a federal common law of nuisance in environmental cases involving comprehensive regulatory schemes such as those found in the Clean Water Act or the Clean Air Act?

2. For the Defendants: Doesn't the fact that EPA has determined not to regulate CO_2 as a pollutant under the Clean Air Act indicate that the Clean Air Act has not occupied the field and that room therefore remains for a federal nuisance action to address the adverse effects caused by these emissions?

ISSUE II:

If a public nuisance exists related to CO_2 under either federal or state law, is it appropriate to apply the *Landers v. East Texas Salt Water Disposal Co.* rule on indivisible harm to the circumstances in this case?

A. Positions of the Parties

Plaintiffs argue that joint and several liability should apply.

Defendant companies argue that joint and several liability should not apply and that the plaintiffs must prove the individual contributions of each defendant to the harm.

EPA agrees with the plaintiffs on this issue.

B. Discussion

In *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952), a seminal case regarding joint and several liability, the court held that:

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.

Id. at 256, 248 S.W.2d at 734. In *Landers* the plaintiff sued both a salt-water disposal company and an oil company for independently polluting his lake with salt water when both of their pipelines broke on the same day.

Several jurisdictions have since followed *Landers*. In one case with similar facts to the case at bar thirty-seven Canadian residents filed a nuisance action against three companies located in the United States, claiming that pollutants emitted from their plants were causing damage. *See Michie v. Great Lakes Steel Div., National Steel Corp.*, 495 F.2d 213 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974). The court found *Landers* to be "the better" rule and pointed out the "injustice of old rule" by citing a case where a pedestrian was struck by an automobile, thrown in the path of a street car, and struck again. *Id.* at 216, 218. Since his widow could not establish which impact killed him, a verdict was directed against her. *Id.* at 218 (citing *Frye v. City of Detroit*, 239 N.W. 886 (Mich. 1932)). The court noted that "the net effect of Michigan's new rule is to shift the burden of proof as to which one was responsible and to what degree from the injured party to the wrongdoers." *Id.*

The Supreme Court of Tennessee relied upon *Landers* and *Michie* for a similar result. *See Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337 (Tenn. 1976).Here, plaintiffs sued Velsicol for damages from air and water pollution allegedly coming from its plant. Velsicol then filed a third-party complaint against five third-party defendants, alleging that each had emitted air and water pollution and were liable to Velsicol for contribution or indemnity. The court found that the *Landers* rule is "consonant

with modern legal thought and pragmatic concepts of justice." *Velsicol*, 543 S.W.2d at 343.

Similarly, Pennsylvania followed the *Landers* rule when the Pennsylvania Department of Environmental Resources sued two coal-mining companies for polluting wells supplying water to seven homes and a dairy farm, in violation of two specific statutes. *See Penn. Dep't of Envtl. Res. v. PBS Coals, Inc.*, 534 A.2d 1130 (1987).

Other jurisdictions have been reluctant to follow *Landers* precisely. For example, Maine allows plaintiffs to sue jointly certain defendants who, although acting independently, cause an indivisible injury. But, state courts require that each defendant's individual actions be sufficient to have caused some injury. *See, e.g., Kinnet v. Mass. Gas & Elec. Supply Co.*, 716 F. Supp. 695 (D.N.H. 1989) (applying Maine law and stating that "Maine Supreme Court has never adopted the theory of alternative liability"). The Massachusetts Supreme Judicial Court has maintained traditional "substantial factor" causation requirements. *See, e.g., Spencer v. Baxter Intl., Inc.*, 163 F. Supp. 2d 74 (D. Mass 2001) (rejecting alternative liability as not firmly established in Massachusetts).

The Restatement of Torts evidences an evolution in legal thought. The rule in RESTATEMENT (SECOND) OF TORTS § 879 (1979) states that "[I]f the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm irrespective of whether their conduct is concurring or consecutive." *Id.* Whereas THE RESTATEMENT (FIRST) OF TORTS § 881 (1939) provides that:

> Where two or more persons, each acting independently, create or maintain a situation which is a tortuous invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm.

Id.

Additionally, THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 10 (2000) (Effect of Joint and Several Liability) provides: "When . . . some persons are jointly and severally liable to an injured person, the injured can sue for and recover the full

amount of recoverable damages from any jointly and severally liable person."

Further, THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 17 (2000) (Joint and Several or Several Liability for Independent Tortfeasors) provides:

> If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, *the law of the applicable jurisdiction determines whether those persons are jointly and severally liable*, severally liable, or liable under some hybrid of joint and several and several liability.

Id. (emphasis added). The reason for leaving the matter to the law of the applicable jurisdiction is the lack of majority rule. *See* THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 10 cmt. a (2000). Further, to provide assistance on these "thorny issues," THE RESTATEMENT (THIRD) details five separate "tracks" for joint and several liability: Track A is a pure system of joint and several liability; Track B is a pure system of several liability; Track C is a pure system of joint and several liability, but places the risk of one party's insolvency on all parties; Track D imposes joint and several liability on those whose percentage fault exceeds a certain threshold; and Track E imposes joint and several liability only for economic harm, and several liability for the remainder of the harm. *See* THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 17 cmt. a (2000).

C. Questions

1. For the Plaintiffs: If the emissions from the defendants' power plants alone are not sufficient to cause the damage the plaintiff's allege should the court apply joint and several liability to the facts in this case? Is this a fair result?

2. For the Defendants: If the *Landers* rule is not followed in this case, isn't impossible for the plaintiff's to make the showing needed to hold the power plants liable for the damage that they may be causing? Is this a fair result?

ISSUE III:

Should the precautionary principle, a principle of customary international law, be a consideration in balancing benefits versus harm in a nuisance analysis?

A. Positions of the Parties

Plaintiffs argue that the precautionary principle, a principle of customary international environmental law, should be considered in the balancing test for public nuisance cases when CO_2 damage occurs to property outside of the United States.

Defendants assert that the precautionary principle cannot be used to support the nuisance claim.

EPA supports the companies' position that the precautionary principle is inapplicable in balancing a nuisance claim.

B. Discussion

When a public nuisance is found, the propriety of an injunction depends upon a showing of the likelihood of substantial injury to the plaintiff. Even when this is shown, courts balance the harm to those injured by the nuisance with the overall harm that would occur if the injunction were granted. *See United States v. Reserve Mining*, 380 F.Supp. 11, 56 (D. Minn. 1974). However, injunctions have been denied upon a finding that the harm caused by enjoining a nuisance would be great and that the plaintiffs may be compensated for their injury with monetary damages. *See id.* (citing *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

The precautionary principle is about decision-making, and has never been referred to explicitly by the United States Supreme Court, no federal statute refers to it directly, and only one decision of a federal appellate court even mentions it as a principle of international law. *See* Stephen G. Wood, *Whither the Precautionary Principle? An American Assessment from an Administrative Law Perspective*, 54 Am. J. Comp. L. 581, 583 (2006). Nevertheless, it has become a widely embraced concept of environmental law throughout the world. *See* Robert Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21 (Winter 2005-06). Principle 15 of the Rio Declaration states "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreparable damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." United Nations Conference on Environment and Development: Rio Declaration on Environment and Development princ. 15, June 14, 1992, 31 I.L.M. 874, 979 (The Rio Declaration). .

In the *Reserve Mining* litigation, the Eighth Circuit heard Reserve Mining's appeal *en banc* and upheld the district court's injunction requiring abatement of discharges of asbestos-like fibers into Lake Superior; but rather than requiring them to stop immediately as the District court had required, the Court of Appeals gave Reserve Mining "reasonable time" to abate the discharges. *Reserve Mining Co. v. EPA*, 514 F.2d 492, 500 (8th Cir. 1975). There was substantial scientific study conducted in this case, with results that were less than crystal clear. The court, however, summarized its key rulings, which included that: "No harm to the public has been shown to have occurred to this date and the danger to health is not imminent. The evidence calls for preventive and precautionary steps." *Id.* The ruling thus may serve as precedent for applying the precautionary principle. *See* Percival, 23 PACE ENVTL. L. REV. at 54.

Another strong endorsement of the precautionary principle can be seen in Judge Skelly Wright's opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). Judge Wright upheld EPA's decision to regulate lead in gasoline and acknowledged the high degree of scientific uncertainty in this case. His lengthy opinion provides a strong endorsement of a precautionary approach to regulating "in the face of danger" and stated that "[a]waiting certainty will often allow for only reactive, not preventive regulation." *Id.* at 25. While the decision interprets an agency's determination, it can be seen as a strong example of courts using precaution in their reasoning. The first sentence of that opinion provides a good example and sets the context: "Man's ability to alter his environment has developed far more rapidly than his ability to foresee with certainty the effects of his alterations." *Id.* at 6.

C. Questions

1. For the Defendants: Given courts utilization of precaution in risk cases like *Reserve Mining* and *Ethyl Corp.*, why shouldn't a judge be able to at least take judicial notice of the precautionary principle as a factor in balancing harm versus benefit?

2. For the Plaintiffs: Should courts of the United States apply international law?

3. For the Plaintiffs: Following *Boomer Cement*, should the court order defendants to reduce CO_2 emissions by 50 percent through control if monetary damages will compensate plaintiffs?

ISSUE IV:

Is the harm to plaintiffs Province of Inuksuk and Village of Akuli sufficiently concrete to provide standing to bring the nuisance action?

A. Positions of the Parties

Plaintiffs, of course, argue that they have standing.

Defendants plants argue that plaintiffs lack standing, and may also argue that the court should dismiss the action under the political question doctrine.

EPA supports the defendant companies.

B. Discussion

To satisfy standing requirements under Article III of the Constitution, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181.

Recently, in *Massachusetts v. EPA*, 415 F.3d 50 (2005), where plaintiffs asked EPA to regulate a greenhouse gas, Judge Sentelle in a separate opinion concurring in the judgment, reasoned that the injury Massachusetts sought to redress was general in nature and the injury did not affect Massachusetts "in a personal and individual way," but rather was harmful to humanity at large and better addressed by legislatures and the executive. *Massachusetts*, 415 F. 3d at 59-60 (quoting Lujan, 504 U.S. at 560, n. 1). [**NOTE**: The U.S. Supreme Court has heard oral arguments in the *Massachusetts* case. Competition participants have been instructed not to cite any decisions issued after September 1, 2006 to avoid any problems that might arise were the *Massachusetts* case to be decided prior to the competition.]

In another global warming case the court dismissed the case based upon the political question doctrine. *See Connecticut v. Am.*

Elec. Power Co., Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005). Here, eight U.S. states and several organizations brought a case against six U.S. electric power plants under federal common law, or in the alternative, state law, to abate the public nuisance of global warming. *See id.* at 267. The complaints alleged that defendants emitted 650 million tons of a greenhouse gas, CO_2, annually; that greenhouse gases cause global warming; that global warming will cause irreparable harm to property in New York State and elsewhere; that defendants are the five largest emitters of CO2 in the U.S., constituting 25% of the U.S. power sector's emissions; that U.S. electric power plants are responsible for ten percent of worldwide CO_2 emissions; and that there is a clear scientific consensus that global warming has begun. *See id.* at 268. The plaintiffs sought a broad remedy, however, and asked the court to not only hold the defendants jointly and severally liable for contributing to an ongoing public nuisance, but to enjoin each defendant to abate the nuisance by capping its CO_2 emissions and then reducing those emissions each year. *See id.* at 270. The court, while not addressing standing, dismissed the case as a non-justiciable political question and stated that "[b]ecause resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required." *Id.* at 274 (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (*quoting Baker v. Carr*, 369 U.S. 186 (1962))). The court therefore held that the questions presented were non-justiciable political questions consigned to the political branches. *See id.*

C. Questions

1. For the Plaintiffs: Isn't the Province arguing on behalf of its citizenry at large? How is this threat of harm, even assuming it's imminent, particularize to the Province and not the same as, say, Alaska?

2. For the Plaintiffs: Is the fact that the expectation is that the village will have to be relocated but the conditions requiring relocation have not yet occurred sufficient to warrant standing for the Plaintiffs?

3. For the Defendants: How is forcing a Village to relocate not affecting Akuli in a personal and individual way?

4. For the Defendants: Unlike *Connecticut v. American Electric,* this case is for damages, not an injunction asking the court to impose a legislative-type remedy. Isn't this distinction critical?

5. For the Defendants: Isn't the fact that significant funding has already been allocated for relocation a sufficient basis for standing?

ISSUE V:

Is the U.S. Environmental Protection Agency required by section 115 of the Clean Air Act to notify the Governor of New Union that the State must amend its State Implementation Plan to reduce emissions from the defendant power plants to a level consistent with emissions that can be achieved using the currently available control technology?

A. Positions of the Parties

Plaintiffs argue that CO_2 emissions contribute to atmospheric warming and have resulted in the melting of seasonal ice cover in Nunavik, Canada. Plaintiffs claim that, in declining to make an endangerment finding, EPA failed to carry out a mandatory duty pursuant to § 115.

EPA asserts that it was a matter of discretion for it to determine whether CO_2 could be reasonably anticipated to endanger the public welfare in a foreign country.

The company owners agree with EPA.

B. Discussion

Section 115(a) of the Clean Air Act provides in relevant part that:

> Whenever the Administrator, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country . . ., the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

42 U.S.C. § 7415(a). Such formal notification is referred to as an "endangerment finding." *The Queen ex. rel Ontario v. EPA*, 912 F.2d 1525, 1528 (D.C. Cir. 1990).

Pursuant to § 115(b), the Administrator's endangerment finding is deemed to be a finding by the governor of the specific state emitting the pollution that its State Implementation Plan ("SIP")[1] is inadequate and must be revised to the extent necessary "to prevent or eliminate the endangerment." 42 U.S.C. § 7415(b); *see* 42 U.S.C. § 7410(a)(2)(H)(ii). This process is referred to as the "SIP revision" procedure. *The Queen ex. rel Ontario*, 912 F.2d at 1528.

Courts have consistently interpreted the words "whenever" the Administrator "has reason to believe" in § 115(a) to indicate that Congress intended the EPA to have at least some discretion in determining whether or not to make an endangerment finding. *The Queen ex. rel Ontario*, 912 F.2d at 1533; *N.Y. Pub. Interest Research Group v. Whitman,* 321 F.3d 316, 330 (2d Cir. 2003). "Once that finding is made, however, the remedial action that follows is both specific and mandatory – the Administrator 'shall' notify the Governor of the specific State emitting the pollutionand require it to revise its SIP." *The Queen ex. rel Ontario*, 912 F.2d at 1533. The District Court agreed with the analysis regarding the §115 endangerment finding, and found that EPA's interpretation of § 115 was permissible under the statute.

The District Court correctly noted, however, that this determination does not end the inquiry. A court must next address whether, under that interpretation, the Agency's refusal to initiate rulemaking proceedings was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A recent D.C. Circuit case involving the Clean Air Act, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), is directly relevant to this issue. [As noted above, this case is now before the Supreme Court.] The dispute in that case involved § 202 of the Act, which, similar to § 115, directs the Administrator to regulate emissions that "in his judgment" "may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C. § 7521. The D.C. Circuit rejected petitioners' argument that EPA improperly declined to regulate greenhouse gas emissions based solely on alleged scientific uncertainty, and held that EPA properly exercised its discretion in concluding that regulation of greenhouse gas emissions from motor vehicles was not warranted. *Massachusetts v. EPA*, 415 F.3d at 57-58. In making its determination, the court agreed with EPA that rulemaking was premature until more was understood con-

1. "SIPs impose controls upon individual polluters within each State sufficient to ensure that national ambient air quality standards are met." *Her Majesty the Queen in Right of Ontario*, 912 F.2d at 1528.

cerning climate change and the potential options for addressing it, finding that the evidence indicated considerable uncertainty in the current understanding of climate change in relation to greenhouse gas emissions. *Id.* at 57. Moreover, the court found another point raised by EPA persuasive – namely that motor vehicles are only one of several sources of greenhouse gas emissions and that "promulgating regulations under § 202 would 'result in an inefficient, piecemeal approach to the climate change issue.'" *Id.* at 58. The court also agreed with EPA that other policy considerations, such as the Administration's establishment of programs to address climate change, were relevant in determining whether to regulate greenhouse gas emissions from motor vehicles. *Id.*; *see also Environmental Defense Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978) (a reviewing court "will uphold agency conclusions based on policy judgments" "when an agency must resolve issues 'on the frontiers of scientific knowledge.'").

Plaintiffs, however, urge the Court to reject the majority's reasoning in *Massachusetts v. EPA* and to adopt the logic in Judge Tatel's dissent. Judge Tatel maintained that the plain language of the § 202 standard,—the "Administrator shall by regulation prescribe. . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,"— establishes limits to EPA's discretion. *Id.* at 74-75 (quoting 42 U.S.C. § 7521(a)(1)). Based on this, he found that EPA was given authority only to weigh conflicting evidence or to determine that more research is needed to determine whether the emissions at issue may be reasonably anticipated to endanger public health or welfare. He asserted that the Agency, therefore, could not base its judgment on policy reasons unrelated to the statutory standard. *Id.*

Plaintiffs argue that EPA's authority is similarly limited under § 115, and that EPA has already concluded that the evidence provided by the Province and the Conference demonstrates that the lack of ice cover was more likely than not due to atmospheric warming. Plaintiffs rely on a D.C. Circuit case, *The Queen ex. rel Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990), for the proposition that for EPA to decline to make an endangerment finding pursuant to § 115, it must have a statutorily based reason for doing so. In that case, the court reasoned that EPA reasonably withheld an endangerment finding as to acid rain since it needed more information to determine whether the statutory standard has

been met. *Id.* at 1533. Plaintiffs argue that, unlike the situation in *The Queen ex. rel Ontario*, here EPA has not based its failure to act on such scientific uncertainty. Rather, they contend that the Agency based its decision on an unrelated policy consideration – namely, that regulating U.S. power plants would be ineffective as they are only one type of source among many types of sources across various countries that emit CO_2. Plaintiffs maintain that an agency may not "avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy." *Engine Mfrs. Ass'n, ex. rel. Certain of its Members v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1976).

The District Court considered these arguments, but was persuaded by the majority reasoning in *Massachusetts v. EPA*, and found that the court's position in *The Queen ex. rel Ontario*, if anything, belied plaintiffs' claims. In *The Queen ex. rel Ontario*, the court found that it was legitimate for EPA to withhold making an endangerment finding because the Agency still lacked information as to which states were causing the harmful acid rain. 912 F.2d at 1533. The court explained that it was "pointless" for the Agency to make an endangerment finding given the "specific [statutory] linkage between the endangerment finding and the remedial procedures," i.e. the EPA needed to know what states to provide with notice. *Id.* The District Court found that a similar reasoning is applicable here – specifically, that EPA has expressed considerable uncertainty as to the causal relationship between greenhouse gas emissions from U.S. power plants and atmospheric warming in Nunavik, Canada. The Court reasoned that in that way, it would be futile for EPA to carry through with the remedial procedure under § 115, as there is no indication that it would remedy the problems in Nunavik. Accordingly, the District Court held that the Administrator properly exercised his discretion under § 115 in declining to make an endangerment finding.

On appeal, EPA might also cite *Thomas v. New York, 802 F.2d 1443 (D.C. Cir. 1986), in further support of the proposition that* the Agency's conclusion that the evidence provided by the Province and the Conference demonstrates that the lack of ice cover was more likely than not due to atmospheric warming is not a basis for judicial relief. In *Thomas*, outgoing EPA Administrator Costle had written letters to then Secretary of State Muskie and Senator George Mitchell of Maine and issued a press release expressing his belief that pollution emitted in the United States was

at least partially responsible for acid deposition endangering public welfare in Canada. *Id.* at 1445. EPA did not issue advance notice of Administrator Costle's actions, no comments were solicited, and neither the letters nor the findings were published in the Federal Register. *Id.* Administrator Costle's successors at the EPA did not regard his actions as sufficient to trigger any mandatory action under § 115. *Id.* Consequently, several eastern states, national environmental groups, Americancitizens who own property in eastern Canada, and a congressman sued the EPA for its failure to issue an endangerment finding. *Id.* On appeal, the D.C. Circuit found that the letter could not serve as a basis for administrative relief because the findings were issued without notice and comment as required pursuant to the definition of "rule" under the Administrative Procedure Act, 5 U.S.C. § 551(4). *Id.* at 1447-48. The court went on to say that even if the prior Administrator's findings had been published only after notice and comment, they would be insufficient to support judicial intervention. *Id.* The court concluded that how and when the EPA chooses to proceed is within the Agency's discretion and not subject to judicial compulsion. *Id.* at 1448.

Pursuant to the *Thomas* decision, EPA could argue here that its acknowledgement that the evidence provided by the Province and the Conference demonstrated that the absence of seasonal ice cover was more likely than not due to atmospheric warming does not in any way limit its discretion under § 115. In contrast, Plaintiffs will argue that *Thomas* is inapposite as the issue in this case is not whether EPA has a duty to act based on a letter. Rather, the issue here is whether EPA can base its failure to act on policy considerations rather than on scientific uncertainty. Therefore, Plaintiffs will likely assert that the Court should follow *The Queen ex. rel Ontario*, 912 F.2d 1525, and Judge Tatel's dissent in *Massachusetts v. EPA, 415 F.3d at 61-82*, and hold that EPA cannot avoid the congressional intent clearly expressed in the statutory text by asserting that its preferred approach would be better policy.[2]

2. One commentator, citing *The Queen ex rel. Ontario v. EPA*, and *Thomas v. New York*, has written that "The international transboundary pollution provision of [the Clean Air Act] has. . . proven to be a dead letter. For example, Canada has complained for years about acid rain which it contends is predominantly caused by transboundary pollution emanating from the United States. In early 1981, it looked as though Canada might obtain relief. The IJC, concededly a 'duly constituted international agency,' found that pollutants emitted in the United States were causing acid rain in Canada. Douglas Costle, Administrator of the EPA in the outgoing

C. Questions

1. For EPA: In *The Queen ex. rel Ontario*, the court based its decision on scientific uncertainty. Why should this court consider policy considerations?

2. For EPA: EPA has acknowledged that the evidence provided by the Province and the Conference demonstrated that the absence of seasonal ice cover was more likely than not due to atmospheric warming. Doesn't this acknowledgement trigger EPA's duty under § 115?

3. For both Defendants: How do you respond to Judge Tatel's reasoning in the *Massachusetts v. EPA* dissent?

4. For the Plaintiffs: In *The Queen ex. rel Ontario*, the court found that it was legitimate for EPA to withhold making an endangerment finding because the agency still lacked information as to which states were causing the harmful acid rain. How do you distinguish this case given that EPA has also expressed considerable uncertainty as to the causal relationship between greenhouse gas emissions from U.S. power plants and atmospheric warming in Nunavik, Canada?

5. For the Plaintiffs: How do you reconcile the majority position in *Massachusetts v. EPA* with your argument?

6. For the Plaintiffs: Since climate change is global in nature, is it futile for EPA to carry through with the remedial procedure under § 115, as there is no indication that it would remedy the problems in Nunavik?

ISSUE VI

Is the United States government, acting through the EPA, required under the *Trail Smelter* doctrine to reduce CO_2 emissions to levels that can be achieved through the appli-

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Carter Administration, responded by issuing a letter pursuant to section 115 concluding that acid rain from United States sources was endangering health and welfare in Canada. However, Administrator Costle's successors, who were appointed by President Reagan, did not believe that this letter bound them to take any further action. Their inaction was sustained by the D.C. Circuit, which ruled that the Costle letter was procedurally defective. *See Thomas*, 802 F.2d at 1446. Canada subsequently filed a formal petition requesting the institution of a rulemaking proceeding to implement the findings in Costle's letter. The EPA rejected the petition, on the ground that the Clean Air Act did not require that any action be taken until the precise sources of the pollution in the United States could be identified. The D.C. Circuit then upheld this narrow interpretation of the Act as a permissible exercise of agency discretion. *See The Queen*, 912 F.2d at 1534." Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 959-60 (1997).

cation of currently available control technology so as to minimize harm to a neighboring country?

A. Positions of the Parties

Plaintiff Inuksuk claims that under customary international law EPA, as the agency in charge of air pollution control in the United States, has an obligation to regulate CO_2 emissions from the defendant power plants under the principle articulated in the *Trail Smelter* arbitration because of the damage occurring to Inuksuk coastal villages.

EPA asserts that, while CO_2 emissions were more likely than not related to the short ice season, these facts did not create the kind of obligation to regulate to prevent harm to another country under the *Trail Smelter* formulation since the U.S. was only one of many countries which emitted CO_2 and because U.S. CO_2 emissions could not be proven to cause harm to plaintiffs.

The companies support the Agency.

B. Discussion

Plaintiff Inuksuk added a claim against the Administrator, that the United States has an obligation under customary international law to regulate CO_2 emissions from coal-fired power plants in the United States because the power plants are a major source of CO_2 emissions that are causing damage to Canadian coastal villages. In support of its claim Inuksuk relies upon the *Trail Smelter Arbitration*, (U.S. v. Canada), Arbitral Tribunal, 3 R. INT'L ARB. AWARDS 1905 (1949), *reprinted in* 35 AM. J. INT'L L. 684 (1941), in which the government of Canada was found liable to the United States for damage that the Trail Smelter had caused to the State of Washington. The Tribunal found "that under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Under *Trail Smelter* Inuksuk could argue that the U.S., through the EPA, is "permit[ing] the use of its territory in such a manner as to cause injury" to the plaintiffs.

As the District Court noted, the *Trail Smelter* decision is often cited in law reviews, but almost no subsequent cases have found a

country liable for transboundary harm.[3] However, principles from *Trial Smelter* are found in international law such as the 1972 Stockholm Declaration, the United Nations Law of the Sea Convention (UNCLOS) and the Restatement of Foreign Relations Law of the U.S., and are considered customary international law. Principle 2 of the Rio Declaration provides "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Rio Declaration princ. 2, 1992, 31 I.L.M. 874, 876.

The only significant international case similar to *Trail Smelter* appears to be the dispute at the International Court of Justice regarding French atomic testing in waters off of Australia. One commentator described it as follows:

> "The most prominent attempt since *Trail Smelter* to adjudicate a transboundary pollution dispute under international law occurred in 1973, when New Zealand and Australia filed complaints with the International Court of Justice (ICJ) asking it to declare that French nuclear-weapons testing in the Pacific unlawfully threatened downwind populations with radioactive fallout. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20)."

France, however, refused to appear in response to the complaint, ignored an interim order, and the court declared the controversy moot when France completed its tests.

An additional case sometimes cited is *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment of Apr. 9, 1949) (affirming "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"). The case in-

3. *See* Daniel Bodansky, *Customary (and not so Customary) International Environmental Law*, 3 IND. J. GLOBAL L. STUD. 105, 110-11 (1995) (*Trail Smelter* "[s] till the only case in which a state was held internationally responsible for causing transboundary harm."); Note, *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1492, 1496-1501 (1991) (noting the scarcity of noteworthy decisions since *Trail Smelter*, their limited precedential value, and the resultant stifling of doctrinal development); Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259 (1971) (observing that *Trail Smelter* is the only precedent cited in Restatement (Second) of the Foreign Relations of the United States on a state's liability to another in connection with pollution).

volved two British destroyers which struck mines in Albanian waters and suffered damage, including serious loss of life. Many commentators interpret *Corfu Channel* as establishing a principle of state responsibility for transfrontier pollution. Merrill, *supra*, at 958; *see, e.g.*, J. BARROS & D. JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION 75 (1974).

The *Trail Smelter* holding is reflected in a number of national and international documents. Principle 21 of the Stockholm Declaration of the United Nations, June 16, 1972, Conference on the Human Environment, 11 I.L.M. 1416 (1972), provides that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." This is widely viewed as reflecting the Trail Smelter precedent. *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 952 (1997).

Article 194(2) of the United Nations Law of the Sea Convention provides:

> "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

United Nations Convention on the Law of the Sea, opened for signature Dec. 20, 1982, U.N. Doc. A/CONF.62/122, art. 194(2), reprinted in 21 I.L.M. 1261, 1308.

THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601(1) (1987) discusses the issue, concluding that a state "is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control. . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction."

C. Questions

1. For the Plaintiffs: Although a principle of customary international law, doesn't the absence of precedent following *Trail*

Smelter in domestic decisions indicate that this court should not apply the doctrine in this case?

2. For the Plaintiffs: Isn't the decision about how to deal with transboundary environmental issues really a political decision that should be left to the Congress and the Executive?

3. For the Defendants: The *Trail Smelter* principles appear to incorporate standard concepts of common law nuisance. Why shouldn't this court hold the federal government responsible through the EPA for taking steps to remedy these conditions using authority granted to the Executive Branch by Congress in the Clean Air Act?