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MEASURING BRIEF*

Civ. App. No. 06-2006
Civ. App. No. 06-2007

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Province of Inuksuk
and
Village of Akuli,
Appellants,
v.
Genergy Corp., Atomic Energy, Inc.,
Centennial Power Co., Power Suppliers Co., and
First Energy, Ltd.,
and
Stephen Johnson, Administrator,
U.S. Environmental Protection Agency,
Appellees.

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

BRIEF FOR THE APPELLEES
GENERGY CORP., ATOMIC ENERGY, INC.,
CENTENNIAL POWER CO., POWER SUPPLIERS CO., and
FIRST ENERGY, LTD.

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* This brief has been reprinted in its original form.

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JURISDICTIONAL STATEMENT

This case arises under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604 (2006) and the federal common law of nuisance. The CAA is federal statutes. Federal courts have juris-

diction over all cases arising from federal statutes. 28 U.S.C. § 1331 (2004).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

3. 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?

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

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?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of New Union granting the motions for summary judgment of Genergy Corp., Atomic Energy, Inc., Centennial Power Co., Power Suppliers Co., and First Energy, Ltd. ("Corporations") and the Administrator of the Environmental Protection Agency ("EPA"). R. at 3. The Province of Inuksuk, and the Village of Akuli, Canada ("Plaintiffs") against the Corporations on federal common law of nuisance and alternatively on the public nuisance law of the State of New Union, United States, where the defendant companies are located, seeking monetary damages dollars

and an injunction requiring the Corporations to reduce carbon dioxide (CO_2) emissions. R. at 1. The Province of Inuksuk also brought suit under the citizen suit provisions of the Clean Air Act (CAA), 42 U.S.C. § 7604 (2006), against the EPA for (1) failing to require the Corporations to lower emissions and (2) to impose a duty under international law to regulate CO_2 emissions from coal-fired power plants. R. at 1-2.

The EPA and the Corporations filed motions for summary judgment in both cases. R. at 2. In the first action, the Corporations and the EPA argued that that there is no federal common law of nuisance for air pollution, and that even if there were, the Plaintiffs lacked standing and the precautionary principle could not be used to support such a claim. R at 2. The Corporations further argued that joint and several liability would not apply, either under federal or state law, while the EPA agreed with the Plaintiffs on that issue. R. at 2. Both Defendants opposed the remedies sought by the Plaintiffs. In the second action, the EPA argued that the Administrator has no mandatory duty to undertake the actions sought by the Plaintiff Inuksuk, and is not obligated under international law to regulate to prevent harm in a foreign state. R. at 2. These arguments are supported by the Corporations, who also contend the claims involve political questions outside the jurisdiction of the court. R at 2.

The two cases were consolidated by order of the Chief Judge of the District Court for the State of New Union. R. at 4. The District Court granted the Corporations' motion on all counts (R. at 12). The Plaintiffs filed this timely appeal, contesting each of the District Court's rulings.

STATEMENT OF THE FACTS

Plaintiffs are the Canadian province of Inuksuk and the Inuit village of Akuli. Akuli, a village typical of those found in Inuksuk, is a small, primitive fishing community situated on frozen tundra and bordered by the Hudson Bay and Hudson Strait. Over the past decade, Akuli has documented increased erosion and flooding within their borders, and noticed that sea ice has begun to form later in the year and melt away earlier.

Concerned by these observations, Akuli commissioned the Inuit Commission—a duly constituted international agency—to study the causes. The resulting "Inuksuk Study" found that the loss of sea ice was due to rising temperatures in the region. Further, the Study predicted that if flooding and erosion were to con-

tinue at its current rate, a major portion of the village could be damaged in approximately three years.

Another international study, the Arctic Climate Impact Assessment, found that temperatures in the Arctic region are rising at twice the rate of the rest of the world. The Assessment attributed this temperature change to the accumulation of greenhouse gases in the atmosphere, causing a phenomenon known as "global warming." One of the gases, CO_2, is a common and natural by-product of energy production, and has therefore risen steadily worldwide since the Industrial Revolution.

Although both of these studies were based on highly controversial climate modeling techniques, leading to some of the most famously disputed predictions in modern history, Akuli decided to take the drastic step of relocating their entire village several miles inland, at a staggering cost of 260 million dollars. To finance this move, Akuli selected some defendants for a nuisance suit by merely naming the five most successful energy companies in the neighboring United States. The Province of Inuksuk also sued the EPA, alleging that the federal CAA provides a mandatory duty for the EPA to regulate any pollutant that it reasonably anticipates will endanger public welfare in another country. The suit claims that the EPA had knowledge to create that reasonable anticipation, and that they failed to act. The cases were consolidated, and the District Court of the District of New Union granted summary judgment to the Defendants. Judge Remus held that the Plaintiffs' common law claims were preempted by the CAA, and that they lacked standing anyway because they suffered no injury-in-fact as required by the U.S. Constitution. As to the claims against the EPA, the court held that the agency was well within their discretion in declining harsh restrictions on CO_2, citing the uncertainty of global warming science and the delicate political questions involved in the issue. This case is now on appeal to the Twelfth Circuit of the United States Court of Appeals.

SUMMARY OF THE ARGUMENT

Plaintiffs' claims under the federal common law must fail because there exists no common law of nuisance for air-based pollutants. The Plaintiffs' first obstacle is that their claim is preempted by the federal CAA. This is evident because of the comprehensiveness of the CAA (as evidenced through its language, legislative history, and similarity to other Acts which have been deemed preemptive), and also because to apply the common law of nuisance

would be a judicial regulation that would create actual, direct conflict with the policies of the two other branches of government. Plaintiff's second obstacle is that global warming cases are unjusticiable by the courts, because they present a "political question" inappropriate for judicial activism.

But even if the Court decides that a common law claim can survive, these Plaintiffs lack standing for such a suit. To create standing, a plaintiff must establish that: (1) They suffered an "injury in fact," not merely a speculative or hypothetical injury; (2) There is a causal connection between that injury and the alleged misconduct, and the injury was not caused by some third party; and (3) It is likely, not just possible, that the injury will be redressed by a favorable court decision. These Plaintiffs will have difficulty satisfying any of those elements, but will find it impossible to establish that they suffered an "injury in fact," because their alleged injury has not yet occurred, and is not "imminent" as required by courts. Because of the uncertainty of climate modeling predictions, and Supreme Court precedent requiring "substantial certainty" of future injury before standing can be granted, Plaintiffs cannot even qualify for the first step of a federal lawsuit.

And even if standing were granted to Plaintiffs, the Corporations are not appropriate defendants in this case. Although Plaintiffs have crudely selected five major "deep pocket" energy companies who emit carbon dioxide from their power plants, and joined them through the theory of "joint and several liability," this strategy is deficient in two respects. First, most modern courts have de-emphasized or abolished the doctrine of joint and several liability entirely, because of the rise of comparative fault theory. Second, joint and several liability, even if viable, is only applicable if the injury cannot be apportioned with reasonable certainty among the individual defendants. But here, undisputed market share statistics show to fine degree how the injury may be apportioned. Applying the popular "market share" theory of liability, each Corporation would be responsible for only about one percent of the damage in Plaintiffs claim.

However, if the Plaintiffs successfully demonstrate a nuisance claim, the precautionary principle is of no avail to them. The principle has not been adopted by the U.S. federal government, and there is no case law supporting its application. Furthermore, the principle is inapplicable in public nuisance actions, because such actions seek to correct injuries that have already occurred. Conversely, the precautionary principle advocates knowledge-gather-

ing about adverse health or environmental consequences *before* actions are taken or new technologies adopted. Thus, the principle should play no role in the in balancing of benefits versus harm in a nuisance analysis.

The Plaintiffs statutory claim will be similarly unsuccessful. The EPA has neither the obligation nor the authority under CAA § 115 to issue an endangerment finding with respect to CO_2 emissions from the Corporations that requires a reduction in emissions to a level achievable using the currently available control technology for two primary reasons. First, the CAA § 115 does not give the EPA regulatory authority over CO_2 emissions. Second, even if the EPA is found to have regulatory powers over CO_2 emissions under CAA § 115, the statute gives the EPA broad discretionary authority to make regulatory determinations.

Finally, the Plaintiffs international law claim raised presents a clearly nonjusticiable political question, because a determination is not judicially manageable, requires initial policy determinations to be made by the elected branches of government, and would express a profound a lack of respect for Congressional policy decisions on a matter that calls for unquestioning adherence by the courts.

STANDARD OF REVIEW

The district court granted Genergy Corp., Atomic Energy, Inc., Centennial Power Co., Power Suppliers Co., and First Energy, Ltd.'s motions for summary judgment. The appropriate standard of review for a grant of summary judgment is de novo. *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 P.3d 1263, 1273 (9th Cir. 2004). A district court's summary judgment order must be upheld if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Because this Court reviews the district court's judgment, not its reasoning, it may affirm on any ground supported by the record. *EEOC v. Aramark Corp.*, 208 F.3d 266, 268 (D.C. Cir. 2000); see also *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58, 62 (1st Cir. 2004).

ARGUMENT

I. THERE EXISTS NO FEDERAL COMMON LAW OF NUISANCE FOR AIR-BASED POLLUTANTS.

Plaintiffs claim that the Corporations' carbon dioxide emissions constitute a public nuisance under the federal common law. However, this claim must fail because there is no federal common law that can be applied to cases involving air-based pollutants.

Generally speaking, federal courts, unlike their state counterparts, are not courts of common law. It has therefore been said that "there is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However, there still exist a few pockets of federal common law, "resorted to in the absence of an applicable act by Congress, and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone." *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (hereinafter *Milwaukee II)* (internal quotations and citations omitted). These remnants of federal common law are fragile, however, and "subject to the paramount authority of Congress." *New Jersey v. New York*, 283 U.S. 336, 348 (1931). "When Congress addresses a question previously governed by a decision rested on federal common law, the need for such an unusual exercise by federal courts disappears," and the common law yields and vanishes. *Milwaukee II*, 451 U.S. at 314. Such a situation has occurred in the field of air and ozone pollution, as both Congress and the Executive branch have addressed the issue repeatedly.

A. Federal common law of air pollution nuisance is preempted by the federal Clean Air Act.

A federal regulatory scheme preempts the common law if it is "comprehensive" and leaves "no room for courts to attempt to improve on that program with federal common law." *Milwaukee II.* The CAA is such a legislative scheme. As a consequence, it preempts the common law claims that Plaintiffs attempt.

1. The language and legislative history of the CAA express a Congressional intent of comprehensiveness.

In determining whether a federal regulatory scheme is comprehensive, courts look primarily to the intent of Congress and ask whether it meant to "[leave] the formulation of appropriate federal standards to the courts." *Milwaukee II*, 451 U.S. at 317.

Here, the CAA indicates a strong intent of comprehensiveness on the part of Congress. Introducing amendments to the Act on the House floor, Rep. Henry Waxman announced, "We have laid out a comprehensive program initiated by the Congress seven years ago." U.S. GOV. PRINTING OFFICE, A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, 334. The Executive branch agreed; when President Carter signed the amendments into law, he remarked that "Congress has adopted a sound and comprehensive program for achieving and preserving healthy air in our Nation."[1] *Id.* at 303.

The language of the CAA also illustrates a comprehensive scheme. The "declaration of purpose" announces that the first goal of the Act is to "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.A. § 7401(b)(1). Such ambitious, sweeping language indicates that Congress has assumed the responsibility of regulating all situations in which air pollution affects the public welfare. Consequently, "there is no room for courts to attempt to improve on that program with federal common law," and Plaintiffs' nuisance claims are preempted.[2]

2. The Clean Air Act's similarity to the Clean Water Act supports a claim of comprehensiveness.

The Clean Water Act (CWA) was passed by Congress in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2006). It addressed concerns that had previously only been resolvable through the common law of public nuisance. In *Milwaukee II*, a plaintiff attempted such a claim under the federal common law against an out-of-state polluter of Lake Michigan. The Court held that the previously-recognized common law remedy was no longer available, *id.* at 333, reasoning that "Congress . . . has occupied the field

1. Although by 1977 both Congress and the President already viewed the CAA as comprehensive, the Act has subsequently undergone several major amendments, making its scope even larger. The 1990 amendments addressed several ozone concerns, changing stratospheric ozone provisions to phase out the most damaging chemicals, and implementing a program to control acid rain. *See* Clean Air Act, Amendments, P.L. 101-549; Mark L. Manewitz, "Clean Air Act Overview," 459 PLI/Lit 99 (1993).

2. Courts have agreed in finding the CAA to be "comprehensive." *See for example Reeger v. Mill Service, Inc.*, 593 F. Supp. 360, 361-62 (W.D. Penn. 1984) (also noting the comprehensiveness of the Clean Water Act).

through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," *Id.* at 317. In a later case, the Supreme Court reiterated that "the federal common law of nuisance in the area of water pollution is *entirely preempted*" by the CWA. *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 21-22 (1981).

Because of its similarity to the CWA, the CAA should also be seen as entirely preempting the common law of nuisance for air pollution. This similarity was analyzed by the District Court of New Jersey, which held that like the CWA, the CAA "occupied the field" of air-based pollutants by establishing "a complete regulatory procedure whereby various pollutants are identified, air quality standards are set, and procedures for strict enforcement are created." *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (holding a plaintiff's common law nuisance claims preempted under the CAA).

Despite the similarities, it has been noted that an important difference between the two Acts is that "[w]hile the [CWA] regulates every point source of water pollution, the CAA regulates only those stationary sources of air pollution that are found to threaten national ambient air quality standards." *Kin-Buc, Inc.*, 532 F. Supp. at 701. In other words, while the CWA regulates virtually all pollution of waterways, the CAA is allegedly less comprehensive because it is only "concerned with ensuring that air is healthy to breath." David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 36 (2003). As a result, some scholars argue, courts should hold that ozone-depletion claims are not preempted because they have nothing to do with whether the air is breathable. *Id.*

However, this argument is flawed in two respects. First, The CWA also leaves large sources of water pollution (all non-point sources) almost entirely unregulated.[3] Second, amendments to the

3. Because of this lack of non-point source regulation, the losing side in *Milwaukee II* unsuccessfully argued that the Clean Water Act was not "comprehensive" either. The Supreme Court dismissed the argument: "Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324. Here, Plaintiffs make a similar argument that the CAA lacks comprehensiveness just because it declines to regulate some atmospheric emissions. But the Supreme Court made clear in *Milwaukee II* that just because a party believes that a specific type of pollution has been *inadequately* considered and addressed, it doesn't mean that it hasn't in *fact* been considered and addressed. With

CAA in 1990 significantly added to the CAA, making it much more similar in scope to its Clean Water counterpart. *See* Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future, in* THE CLEAN AIR HANDBOOK 1, 7 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004). As mentioned earlier, these amendments added regulation for certain ozone-depleting chemicals and implemented an acid rain control program, expanding the scope of the Act to cover issues quite similar to the ones faced by the Plaintiffs. Especially in light of these recent additions, the CAA should now be viewed as *at least* as comprehensive as the CWA. And like the CWA, the preemptive reach of the CAA is total.

B. Plaintiff's common law claims are also preempted because they are in actual conflict with federal legislative policy.

Common law can also be preempted if it is in direct conflict with federal statutory law. *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 204 (1982) (noting that this conflict is found where state common law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Plaintiffs in this case ask for judicial regulation of carbon dioxide emissions into the atmosphere. But to do so would be in direct conflict with numerous Acts and pronouncements of Congress.

A number of pieces of legislation have ordered research and negotiation of global warming issues, while declining or prohibiting any regulation. *See* The Global Climate Protection Act of 1987, 15 U.S.C. § 2901; National Climate Program Act of 1978, 15 U.S.C. §§ 2901 et seq., Energy Security Act of 1980, Pub.L. No. 96-294, tit. VII, § 711; Global Climate Protection Act of 1987, 15 U.S.C. §§ 2901 and 2952; Global Change Research Act of 1990, 15 U.S.C. §§ 2931-2938; Energy Policy Act of 1992, Pub.L. No. 102-486, § 1604. After President Clinton initially committed the United States to the Kyoto Protocol – an international treaty that forced industrial nations to reduce carbon dioxide emissions – the Senate unanimously issued a resolution urging the President to withdraw because of the adverse economic impact that carbon dioxide regulation might have on the country. S. Res. 98, 105th

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carbon dioxide emissions, Congress addressed the issue in the CAA by declining regulation.

Cong. (1997). Subsequently, Congress passed a number of laws blocking the enforcement of the Protocol. *See* Pub.L. No. 105-276 (1998); Pub.L. No. 106-74 (1999); Pub.L. No. 106-377 (2000). Congress was finally appeased when President George W. Bush withdrew the United States as a signatory in 2001. To impose regulations on carbon dioxide emissions from the judicial bench – when Congress has expressly established a policy of non-regulation – would create an intolerable conflict of law. As such, Plaintiff's common law remedies must be seen as preempted.

In addition to the affirmative undertakings of Congress in relation to global warming, it is also important to note the conspicuous instances in which Congress has *declined* to act. As noted by the Southern District of New York, "Congress has recognized that carbon dioxide emissions cause global warming and that global warming will have severe adverse impacts on the United States, but it has declined to impose any formal limits on such emissions." *Connecticut v. American Electric Power Company*, 406 F. Supp. 265, 268-69 (S.D.N.Y 2006). The silence on this issue does not mean that Congress wants carbon dioxide regulation to be enacted by the *courts*, but rather that they don't want it regulated at all, until further research has been completed.

The CAA and other legislation are comprehensive not only because of what they regulate, but also because of what they *decline* to regulate. As Justice Frankfurter once noted, in interpreting a statute, "one must . . . listen attentively to what it does not say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536-36 (1947). Reading what the various acts of Congress say, and understanding what they *don't* say, it is clear that judicial regulation of carbon dioxide emissions is in direct conflict with legislative policy, and therefore preempted.

II. EVEN IF A COMMON LAW CLAIM CAN BE MADE, THE PLAINTIFFS LACK STANDING BECAUSE THEY CANNOT ARTICULATE A SUFFICIENTLY CONCRETE INJURY.

Article III of the U.S. Constitution grants jurisdiction to the federal courts only for "cases and controversies." U.S. Const. Art. III. As a practical matter, this means that in order for a plaintiff to have standing to sue in federal court, they are constitutionally required to satisfy three elements: (1) They suffered an "injury in fact," not merely a speculative or hypothetical injury; (2) There is a causal connection between that injury and the alleged miscon-

duct, and the injury was not caused by some third party; and (3) It is likely, not just possible, that the injury will be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

There is some debate as to the second and third elements of standing in this case. Because of conflicting scientific research on the issue of global warming, it is impossible to prove with certainty the existence of global warming, much less its causes and effects. *See generally* Blake R. Bertagna, *"Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 B.Y.U. L. REV. 415 (2006). And even assuming the problem is real, harmful, and caused by human activity, causation is difficult to establish because of the countless contributors to carbon dioxide emissions worldwide. Bertagna, 2006 B.Y.U L. REV. at 455. Further, since some scientists have published opinions that global warming has advanced too far to be reversed, it is uncertain whether government regulation on any level will redress the problem. *See Controversial Scientist Predicts Planetary Wipeout*, THE EVENING STANDARD ONLINE, Nov. 28 2006, *available at* http://www.thisislondon.co.uk/news/article-23376247details/Controversial§cientist¶redicts¶lanetary+wipeout/article.do. But the main deficiency in Plaintiffs' standing is that they have failed to establish that they will suffer an imminent future injury sufficient to constitute an "injury in fact."

A. Plaintiffs' predicted future injury does not create standing because it is not "substantially probable" to occur.

Under general federal law, Plaintiffs can create standing by claiming a future (rather than present) injury, but only if that injury is "substantially probable" to occur in the "imminent" future. *National Resources Defense Council v. EPA*, 464 F.3d 1, 12-13 (D.C. Cir. 2006); *Lujan*, 504 U.S. at 560-61. The Supreme Court has defined "imminent" to mean "certainly impending."[4] *Lujan*, 504 U.S. at 564, n.2.

4. In cases involving "procedural injuries" – where an administrative regulation or action will allegedly cause a future private harm – the standards of imminence are relaxed, and courts require only a "reasonable" or "realistic" probability of injury for standing to be created. *Lujan*, 504 U.S. at 573, n.7. But this is not the case for the common law claims.

As scholars have noted, future global warming injuries are anything but "certain" because the "claims are based entirely on conjectural, complex systems of climate modeling." Bertagna, 2006 B.Y.U. L. REV. at 444. Although these complex scientific models are almost certainly useful, Bertagna's recent article points out that the science is frequently exaggerated or inaccurate:

> How sure can climate scientists be about the predictions produced by their models? In a recent paper by an anthropologist who studied several years at the National Center for Atmospheric Research, [the anthropologist] admitted that even climate modelers may be uncertain about their findings. She actually quoted one climate modeler as saying, "It's easy to get caught up in it; you start to believe that what happens in your model must be what happens in the real world. And often that is not true." Some scientists argue that the standard climate models upon which [a] plaintiff's claim would be based assume that carbon dioxide concentration follows a perfectly linear growth rate of one percent per year, yet studies show the actual growth rate over the last fifteen years to be about 0.58 percent. The use of such an exaggerated figure demonstrates that the models may ignore reality and "run way too fast, predicting warming coming almost twice as fast . . . or predicting much more warming in a given time."

Bertagna, 2006 B.Y.U. L. REV. at 445 (internal citations and footnotes omitted) (quoting Hollman W. Jenkins, Jr., *A Global Warming Worksheet*, WALL ST. J., Feb. 1, 2006, at A15). Like the research discussed by Bertagna, the claims by the Plaintiffs in the instant case are dependent on predictions, which in turn are dependent on controversial climate models. Though such predictions have their usefulness, they are insufficient to create the "substantial probability" required for standing, because the data are too speculative for Article III purposes.

The federal appellate court for the District of Columbia Circuit has agreed that projections based on climate modeling fail to meet the requirement of an imminent injury-in-fact. In *National Resources Defense Council v. EPA*, 440 F.3d 476 (D.C. Cir. 2006) (*NRDC I*), the court noted the flaws and inaccurate tendencies of climate models, and held that they were incapable of establishing "imminence." Although a re-hearing of the case granted standing for those particular Plaintiffs, the opinion was careful to note that it was not deciding whether climate modeling data could always

be used to establish an imminent future injury. *National Resources Defense Council v. EPA*, 461 F.3d 1, 7 (D.C. Cir. 2006) (*NRDC II*). Further, because *NRDC* was a suit against the EPA for an alleged "procedural injury," and not a tort claim against a private corporation, the standards for establishing imminence were relaxed. *See supra*, at Note 4. It is unlikely that under the more stringent standard of "substantial probability" of imminent injury, the D.C. Circuit would have been willing to reconsider their initial opinion.

III. EVEN IF THE PLAINTIFFS HAVE STANDING TO SUE, THE CORPORATIONS ARE NOT PROPER DEFENDANTS BECAUSE THE DOCTRINE OF "JOINT AND SEVERAL LIABILITY" IS NOT APPLICABLE.

Under the rule of joint and several liability, "Where the tortuous 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." *Landers v. East Texas Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) (emphasis added). Plaintiffs attempt to apply this doctrine to hold each of the Corporations entirely responsible for the whole amount of damage suffered by the Plaintiffs from global warming. This is an incredibly brash demand, considering that under the undisputed facts found by the lower court, each of the Corporations contributes less than one percent of the world's emissions.[5] *Inuksuk*, Civ. Action No. 05-5240 at 6. To hold any civil defendant liable for at least 100 times the amount of damage that they actually caused (especially when the federal government has expressly declined to regulate their activity) would be an appalling miscarriage of justice. *See* Grossman, 28 COLUMB. J. ENVTL. L. at 32 ("Holding . . . potential defendants . . . jointly and severally liable for the entire harm of climate change could understandably be

5. According to those undisputed facts, United States power plants are responsible for 10% of the world's carbon dioxide emissions. The five defendant Corporations account for roughly half of that 10%. With that 5% divided equally between each Corporation, each entity is left with about a 1% share of worldwide emissions.

seen as unfair.").[6] As will be discussed below, other courts have recognized this injustice, and have fashioned alternative approaches.

A. Joint and several liability is disfavored in the modern era of comparative fault, and should not be used.

The doctrine of joint and several liability gained almost universal use in state courts after the *Landers* decision, but has lost relevance since the "comparative fault" revolution in the 1980's and 1990's. Jacob A. Stein, 3 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 19:18 (3rd Edition 2006) (noting that "all but four states have adopted some form of comparative responsibility"). According to Stein, "The shift to comparative responsibility usually results in reconsideration and adjustment of a number of interrelated doctrines. One of these is the common law of joint and several liability . . . Thirty-seven jurisdictions have adopted some alterations to [that] common-law rule." *Id.*

Although most of these alterations and abolitions have come through the statutory process, sometimes the doctrine has been eliminated judicially. Shortly after the Tennessee legislature adopted a scheme of comparative fault, that state's Supreme Court ruled that the new regime "render[ed] the doctrine of joint and several liability obsolete." *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992). The Court continued: "Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to retain a rule, joint and several liability, which may fortuitously impose a liability that is out of all proportion to fault." *Id.* In order to avoid such disproportionate "justice," this Court should recognize, in keeping with the majority of state jurisdictions, that the doctrine of joint and several liability has no further general applicability.

6. *See also* Restatement (Second) of Torts § 433(B)(2) cmt. e: "If a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust."

B. Even if the doctrine of joint and several liability lives, it should be disregarded here in favor of the "market share" theory of liability.

Fortunately, creative, superior replacements have been fashioned to the old doctrine of joint and several liability. In his 2003 article on the subject, Daniel Grossman suggested an alternative:

> To avoid . . . inequity, courts may require apportionment even where harms seem indivisible, if some means of fair and rational apportionment is possible without causing injustice to any of the parties. In pollution cases, for instance, a seemingly indivisible harm can be treated as divisible and apportioned among defendants on the basis of evidence of their respective quantities of pollution discharged. In the climate change context, this division could involve apportioning damages (appropriately reduced to account for past emissions) based on a combination of defendants' market shares and the greenhouse gas emissions of their products, to correspond as much as possible to each defendant's contributions to global warming.

Grossman, 28 COLUM. J. ENVTL. L. at 32-33.

Initially developed by the California Supreme Court to apportion liability in the DES class action cases, *see Sindell v. Abbott Labratories*, 607 P.2d 924 (Cal. 1990), the "market share" theory of liability was later used in "Agent Orange" litigation and was applied to the pollution context this year in *Re: Methyl Tertiary Butyl Ether Products Liability Litigation*, 447 F. Supp. 2d 289 (S.D.N.Y 2006) *("MTBE")*. Although some federal courts had already generally recognized the separability of liability in the air pollution public nuisance realm, *see for example Michie v. Great Lakes Steel Division*, 495 F. 2d 213, 216-17 (6th Cir. 1974), this was apparently the first time a federal court had utilized the *market share* theory as a specific strategy for doing so.

In *MTBE*, a New York county sued several corporations that manufactured MTBE, a pollutant found in certain gasolines. Because the doctrine of joint and several liability was no longer available, the court outlined the alternative: "New York has unequivocally adopted the market share theory of liability when the [pollutant] in question is fungible, and as a result, the plaintiff cannot identify which defendant caused her harm." *MTBE*, 447 F. Supp. 2d at 299. Under that rule, "each defendant is severally liable for the portion of the judgment that represented its share of the market at the time of the injury, unless it proves that it could

not have made the product that caused the plaintiff's harm."[7] *Id.* at 299-300. The court applied this theory to the corporate defendants: "Plaintiffs have named almost fifty defendants who participated in the national gasoline market during a twenty-five year period . . . It is likely that each defendant's contribution to the total volume of MTBE-containing gasoline . . . was very small. Under these circumstances, it would be fundamentally unfair to hold these defendants jointly and severally liable."[8] *Id.* at 303.

Here too there are multiple corporate defendants who contributed a measurably small amount to a pollution injury. Each Corporation's market share has already been calculated and noted by the District Court – somewhere near one percent. With such undisputed quantification, Plaintiffs' injury is *not* "indivisible." Rather, it is easily divisible, and readily able to be "apportioned with reasonable certainty to the individual wrongdoers," should liability be established.

IV. EVEN IF THE PLAINTIFFS' COMMON LAW CLAIMS WERE EXAMINED ON THE MERITS, THE PRECAUTIONARY PRINCIPLE SHOULD PLAY NO ROLE IN THE TRADITIONAL BALANCING TEST.

There is no universally accepted definition of the precautionary principle. One analysis identified 14 different formulations of the principle in treaties and nontreaty declarations. Kenneth R. Foster, et. al, *Science and the Precautionary Principle* (May 12, 2000), at http://www.biotech-info.net/science_and_PP.html. One of the most frequently cited articulations is found in the Wing-

7. This approach is recognized by the Restatement (Third) of Torts, which states regarding product liability cases:

> In deciding whether to adopt a rule of [market share] liability, courts have considered the following factors: 1) the generic nature of the defective product; 2) the long latency period of the harm; 3) the inability of Plaintiffs to discover which defendant's product caused plaintiff's harm, even after exhaustive discovery; 4) the clarity of the causal connection between the defective product and the harm suffered by Plaintiffs; 5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and 6) the availability of sufficient 'market share' data to support a reasonable apportionment of liability.

8. The *MTBE* court also acknowledged the plaintiff's argument that federal CERCLA law regularly imposes joint and several liability when there are multiple polluting defendants. But the court distinguished those cases, noting that the language in the CERCLA act itself authorizes such liability. *MTBE*, 447 F. Supp. 2d at 303, n. 61.

spread Statement, produced in 1998 by a gathering of scientists, philosophers, lawyers and environmental activists in the United States, which pronounced that: "When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically." Science and Environmental Health Network, *Wingspread Conference on the Precautionary Principle*, *at* http://www.sehn.org/wing.html.

The Plaintiffs argue that this principle of 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. Even if the Plaintiffs succeed in proving that a law of nuisance exists under which they can bring their claims *and* that they have legal standing, the precautionary principle is of no avail to them. The principle has not been adopted, formally or informally, by the U.S. federal government, and there is no case law supporting its application. Furthermore, the principle is irrelevant in public nuisance actions, because nuisance actions seek to correct an injury that has already occurred. The precautionary principle is a policy that instructs the scientific and technical community to generate knowledge about adverse health or environmental consequences *before* actions are taken or new technologies adopted. Thus, the principle should play no role in the in balancing of benefits versus harm in a nuisance analysis.

A. The precautionary principle not an accepted tenant of U.S. law, domestic policy, or international relations.

The precautionary principle is a controversial risk management policy that has not been indoctrinated into U.S. law or domestic policy. H. Rajan Sharma, *Precaution as Principle: Law, Science & Catastrophe in Bhopal*(2004), *at* http://www.iitk.ac.in/che/jpg/papersb/full%20papers/S%20%201-31.doc; see also Zygmunt J.B. Plater et al., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1268 (4th ed. 2004). No federal statute or federal administrative regulation refers to the precautionary principle. Stephen G. Wood, et. al., WHITHER THE PRECAUTIONARY PRINCIPLE? AN AMERICAN ASSESSMENT FROM AN ADMINISTRATIVE LAW PERSPECTIVE, 54 Am. J. Comp. L. 581, 583 (Fall 2006). Furthermore, few U.S. court decisions have even referenced the principle by name, and none have relied on it in any meaningful way in reaching their decision. *Id.*

Additionally, while the principle appears in more than a dozen international instruments, nearly all adopt different articulations of the principle, and none are binding on the United States. Stephen G. Wood, 54 Am. J. Comp. L. at 589-598. Moreover, the varying formulations are "not compatible with one another, incoherent, cost-blind, and are hopelessly vague providing no guidance." Stephen G. Wood, 54 Am. J. Comp. L. at 609.

B. The precautionary principle is inapplicable in nuisance actions, because the principle applies to future, not past conduct.

A public nuisance has been defined as 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 generally." U.S. v. COUNTY BD. OF ARLINGTON COUNTY, 487 F.Supp. 137, 143 (D.C. Va., 1979). When injury is shown, courts traditionally undertake a balancing of the harm or inconvenience to those injured by the nuisance with the overall harm which would occur if the injunction is granted is undertaken by the courts. *See United States v. Reserve Mining Company*, 380 F.Supp. 11 (D.C.Minn.1974). The precautionary principle is inapplicable in that analysis, because the principle deals with actions or policies that *might* cause harm to the public, not those shown to have harmed. The principle urges *pre*caution to *prevent* harm, instructing advocates to generate knowledge about adverse health or environmental consequences before actions are taken or new technologies adopted. H. Rajan Sharma, *Precaution as Principle: Law, Science & Catastrophe in Bhopal*(2004).[9]

Although the wording of the principle may differ, the aforementioned interpretation has been adopted in the U.S. The City of San Francisco passed a Precautionary Principle Policy which among other things, requires the city to weigh the environmental and health costs of its annual purchases and to take a preventative rather reactive approach to governance. City and County of San Francisco Environmental Code, PRECAUTIONARY PRINCIPLE POLICY STATEMENT (2005), *available at* http://www.municode.com/Resources/gateway.asp?pid=14134&sid=5.

In sum, the principle's intent is to influence environmentally responsible behavior *before* actions are taken or new technologies

9. Full citation purposely omitted for formatting, see page 20.

adopted, which makes it irrelevant in a public nuisance balancing test. In addition, neither the federal government nor the federal judiciary has endorsed its use in this context.

V. THE EPA HAS NEITHER THE OBLIGATION NOR THE AUTHORITY UNDER CAA § 115 TO ISSUE AN ENDANGERMENT FINDING TO THE GOVERNOR OF NEW UNION WITH RESPECT TO THE CORPORATIONS CARBON DIOXIDE EMISSIONS.

The central purpose of the CAA is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Sections 108 and 109 of the Act authorize the EPA to create a list of air pollutants that "in the Administrator's judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and to establish National Ambient Air Quality Standards ("NAAQS") for those pollutants. States have "primary responsibility" for preventing and controlling air pollution at its source, which is accomplished through EPA-approved state implementation plans ("SIPs") that implement, maintain, and enforce the NAAQS. 42 U.S.C. §§ 7401(a)(3), 7409(a), (b), 7410(a).

The provision at issue here is CAA § 115, which allows the Administrator of the EPA to issue an endangerment finding to a State emitting pollution affecting the public health or welfare of a foreign country. 42 U.S.C. § 7415. Under § 115, the Administrator shall issue such a finding whenever he has "reason to believe" a U.S. polluter is harming a foreign country with which the U.S. has a similar pollution control agreement. *Id.* However, the EPA has neither the obligation nor the authority under CAA § 115 to issue an endangerment finding with respect to CO_2 emissions from the Corporations that requires a reduction in emissions to a level achievable using the currently available control technology for two primary reasons: (1) CAA § 115 does not give the EPA regulatory authority over CO_2 emissions; (2) even if the EPA is found to have regulatory powers over CO_2 emissions under CAA § 115, the statute gives the EPA broad discretionary authority to make regulatory determinations.

A. CAA § 115 does not give the EPA regulatory authority over carbon dioxide emissions.

The EPA has express authority under the CAA to regulate numerous substances specifically identified in the statute.[10] However, nowhere in Congress's extensive regulatory scheme is CO_2 mentioned, except in the context of provisions that authorize its study, monitoring, and the evaluation of nonregulatory strategies.[11] A search for CAA regulations on global warming is equally illustrative of Congressional intent. The one and only provision in the CAA that references global warming also contains an express disclaimer that it "shall not be construed to be the basis of any additional regulation under [the CAA]." 42 U.S.C. § 7671a(e). Thus, Congress has had ample opportunity to regulate CO_2 emissions and has affirmatively chosen to limit the EPA's endeavors on CO_2 to nonregulatory activities under the CAA.

In determining the meaning of a statute, the inquiry involves not only the statute itself but also the larger statutory context. IN RE BDT FARMS, INC., 21 F.3d 1019, 1021 (10th Cir. 1994). The intent of Congress may be ascertained through the statutory language *and* the legislative history. *See Train v. Colorado Pub. Int. Research Group, Inc.*, 426 U.S. 1, 10 (1976). The 1990 Amendments to the CAA, which introduced the nonregulatory provisions citing CO_2, were the subject of much Congressional debate. Senate bill 1630, the Clean Air Restoration and Standards Attainment Act of 1989, was introduced in the Environment and Public Works Committee containing language that would have arguably given the EPA wide-ranging authority to regulate CO_2 and other greenhouse gases. S. Rep. No. 228, 101st Cong., 1st Sess. (1989) at 1. Title VII of the bill dealt with ozone and climate protection and found that emissions such as CO_2 imperiled health and the environment worldwide and should be controlled. S. 1630 § 501, 101st Cong., 1st Sess., 135 Cong. Rec. 20521 (1989). Conversely,

10. For example, CAA § 112(b) lists 190 hazardous air pollutants ("HAPs") that Congress has determined require regulation. 42 U.S.C. § 7412. Similarly, Title VI of the CAA authorizes EPA to list and regulate any substance that "is known or may reasonably be anticipated to cause or contribute to harmful effects on the stratospheric ozone layer." 42 U.S.C. § 7671a. Fifty-two substances are listed in that provision. *Id.*

11. For instance, CAA § 103(g), which authorizes the Administrator to establish a research and development program for prevention and control of air pollution, lists CO_2 as one of several items to be considered in EPA's performance of a "basic engineering research and technology program to develop, evaluate and demonstrate nonregulatory strategies and technologies." 42 U.S.C. § 7403.

the House version contained no language addressing stratospheric ozone depletion or global warming. H. Rep. No. 101-490, 101st Cong., 2d Sess., Parts 1-2 (1990). The Congressional legislation that ultimately emerged as the 1990 Amendments to the CAA contained none of the Senate's provisions regarding global warming and CO_2. As the Supreme Court has noted, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987).

Despite Congress's consistency in rejecting measures to restrict greenhouse gas emissions such as CO_2, the Plaintiffs contend that the EPA has a duty to regulate CO_2 under CAA § 115. Section 115 addresses the issue of international air pollution and 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 or whenever the Secretary of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such nature, the Administrator shall give formal notification thereof to the Governor of the state in which such emissions originate." 42 U.S.C. § 7415(a).

Under § 115(b), the notice of the Administrator to the State Governor is "deemed to be a finding" under § 115(a) that the SIP "is inadequate to prevent or eliminate the endangerment referred to in subsection (a) of this section" and must be revised. 42 U.S.C. § 7415(b). This process is known as the "SIP revision" procedure. *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1528 (D.C. Cir. 1990). This regulatory mechanism was not designed or intended to regulate greenhouse gases like CO_2. Because of the unique nature of greenhouse gases like CO_2, regulating such emissions under § 115's SIP revision and if allowed, would broaden the statutory provision well beyond its intended scope.

Carbon dioxide is a clear, odorless gas that is emitted into the earth's atmosphere naturally through the carbon cycle and through human activities like the burning of oil, coal and gas, and deforestation. *See* National Research Council's report, *Climate*

Change Science: An Analysis of Some of the Key Questions (National Academy Press, 2001). Once CO_2 is released it can remain in the atmosphere for roughly 50-200 years. *Id.* The pervasive nature of CO_2 along with the natural processes of atmospheric circulation and air movement results in a vast globalatmospheric pool of CO_2. *Id.* Thus, unlike pollutants on the EPA's NAAQS list such as carbon monoxide and particulate matter, which vary from place to place as a result of differences in local or regional emissions and other factors (e.g., topography), CO_2 is fairly consistent in concentration throughout the world's atmosphere. *Id.*

In *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), a group of organizations petitioned the EPA to regulate emissions of CO_2 and other greenhouse gases from motor vehicles under CAA § 202. In its notice denying the petition for rulemaking, the EPA stated the "nature of the global pool would mean that any CO_2 standard that might be established would in effect be a worldwide ambient air quality standard, not a national standard—the entire world would be either in compliance or out of compliance." 69 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003). The EPA went on to note that such a situation "would be inconsistent with a basic underlying premise of the CAA regime. . .—that actions taken by individual states and by the EPA can generally" lead to the attainment of a NAAQS. *Id.* at 52,927. In light of the homogenous concentrations of CO_2 throughout the atmosphere and the substantial emissions of CO_2 from foreign sources, including Canada, if the EPA was forced to revise New Union's SIP to include air quality measures for CO_2 emissions, the EPA would be imposing a standard on New Union that would be impossible for them to meet. Such a regulatory scheme could not have been intended by Congress.

B. Even if the EPA is found to have regulatory powers over CO_2 emissions under CAA § 115, the statute gives the EPA broad discretionary authority to make regulatory determinations.

Under CAA § 155, the Administrator's formal finding that pollution emanating from the United States may endanger public health or welfare in a foreign country is referred to as an "endangerment finding." *Her Majesty the* Queen, 912 F.2d at 1528. Once that determination is made, certain statutorily mandated consequences, including the issuance of notice to the State in which the emissions originate and SIP revision, follow; but the decision whether to make that determination as an initial matter is a dis-

cretionary one. 42 U.S.C. § 7415(b); *Her Majesty the Queen*, 912 F.2d at 1528.

As the district court noted, *Her Majesty the Queen in Right of Ontario v. EPA* speaks directly to the EPA's discretion in deciding whether to make a threshold regulatory determination under CAA § 115. In *Her Majesty the Queen*, the Province of Ontario and a number of States and environmental groups petitioned the EPA for an endangerment finding with respect to U.S. emissions that allegedly result in harmful levels of acid deposition in Canada. 912 F.2d at 1527-1528. The EPA argued that because it lacked sufficient information to trace the pollutants from the point of deposition back to their sources, the agency was not obligated to make an endangerment finding. In denying the Plaintiffs' petition, the court stated, "[t]he words 'whenever' the Administrator 'has reason to believe' imply a degree of discretion underlying the endangerment finding." *Id.* at 1533.

Courts have consistently interpreted similar statutory provisions in the CAA and other environmental statutes as leaving the decision whether to investigate or initiate enforcement proceedings to agency discretion. For example, in *Sierra Club v. Whitman,* 268 F.3d 898, 900-903 (9th Cir. 2001), the court rejected the Sierra Club's argument that § 1319(a)(3) of the Clean Water Act—which provides that "[w]henever on the basis of any information available to him the Administrator finds" a violation of certain §s of the CWA, the Administrator "shall issue an order requiring such person to comply" with the statute or "shall bring a civil action"—imposed an obligation on the EPA to make findings when provided with information suggesting a violation. Similarly, in *New York Public Interest Research Group v. Whitman,* 321 F.3d 316, 330 (2d Cir. 2003), the court stated that the "key phrase of [CAA] § 502(i)(1) is the opening one, '[w]henever the Administrator makes a determination,' and this language grants discretion" to the EPA regarding deficiencies in state operating permit programs under.

The EPA's refusal to initiate action against the Corporations should be reversed only upon a finding that the Administrator's failure to act was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *American Horse Protection Ass'n v. Lyng,* 812 F.2d 1, 4 (D.C. Cir. 1987). As the court in *American Horse Protection Ass'n v. Lyng*, noted an examination of a decision under the "arbitrary and capricious" standard encompasses "a range of levels of deference to the agency," with an agency's

refusal to initiate rulemaking proceedings at "the high end of the range." *Id.* at 5. "Only in the rarest and most compelling of circumstances" should such a refusal be overturned. *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C.Cir.1981). The main inquiry is weather the agency's decision-making was "reasoned." *American Horse Protection Ass'n v. Lyng*, 812 F.2d at 5.

As in *Her Majesty the Queen*, the EPA denied the petition to regulate the Corporations' CO_2 emissions in this instance on the grounds that it lacks sufficient information to establish causation. R. at 8. Since there are an untold number of other sources of CO_2, the EPA is unable to definitively link the Corporations' CO_2 emissions and those of the U.S. as a whole to the injury complained of. *Id.* That conclusion reflects a reasonable exercise of the Agency's discretion, and is in keeping with the court's

Although the EPA asserted that CO_2 emissions were more likely than not related to the short ice season, our earlier discussion of the unique nature of greenhouse gas emissions demonstrates the futility of EPA action against the Corporations because, as noted by the district court, there is no indication that it would remedy the problems in Inuksuk. R. at 11. In *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), the D.C. Circuit Court upheld the Administrator's decision not to regulate greenhouse gas emissions from motor vehicles, because, among other things, promulgating such regulations would "result in an inefficient, piecemeal approach to the climate change issue." *Id.* at 58.

Like motor vehicles, the Corporations represent only one of many sources of greenhouse gas emissions in the United States. Mandating an endangerment finding under CAA § 155 would arbitrarily and unfairly single out the Corporations and ask the EPA to make scientific findings with respect to CO_2 emission levels that it is unauthorized and unprepared to make. Moreover, courts have recognized that the EPA may properly defer making an endangerment determination while it waits for additional scientific and technical studies to be completed. *Her Majesty the Queen,* 912 F.2d at 1533-1534. Any rulemaking with respect to CO_2 emissions is premature until, as the court in *Massachusetts*, noted more information is known concerning climate change and the potential options for addressing global warming. *Id.* at 57.

VI. THE PLAINTIFFS' CLAIM IMPLICATES POLICY DECISIONS THAT MAKE THIS ISSUE NONJUSTICIABLE UNDER THE BAKER TESTS.

Courts have long acknowledged that certain "political questions" are meant to be addressed by the legislative and executive branches of government. *See*, e.g., *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978). The genesis of the political question doctrine is the "constitutional separation and dispersement of powers among the branches of government," and the "limitation of the judiciary as a decisional body." *Id.*; *see* also, *Coleman v. Miller*, 307 U.S. 433 (1939). As the Supreme Court has held, "[t]he judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." JAPAN WHALING ASS'N v. AMERICAN CETACEAN SOC., 478 U.S. 221, 230 (1986).

In the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six alternative tests for finding an issue nonjusticiable as a political question:

> (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> (2) a lack of judicially discoverable and manageable standards for resolving it; or
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or
> (4) the impossibility of a court's undertaking independent resolution without expressing the lack of respect due coordinate branches of government; or
> (5) an unusual need for unquestioning adherence to a political decision already made; or
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." .

Id. at 217. If any one of the six *Baker* tests is met, the court must dismiss the case. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

The court need not decide whether the *Trail Smelter* doctrine applies to this controversy, because application of the *Baker* tests demonstrates that the claim is nonjusticiable. The Plaintiffs' requests have touched on numerous areas of national and international policy regulated by the executive and legislative branches of

government, which present issues substantially similar to those reviewed in *Connecticut v. American Electric Power Company*. 406 F.Supp.2d 265 (S.D. NY 2005). In *Connecticut*, the Plaintiffs asked the court to cap CO_2 emissions of five large power companies and to mandate annual reductions in CO_2 emissions. *Id.* at 272. As in *Connecticut*, resolution of this claim by the judiciary would require this court to, at the very least:

> "determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security—all without an 'initial policy determination' having been made by the elected branches."

Id. at 272.

As will be shown, the overarching issue presents a clearly nonjusticiable political question, because a determination is not judicially manageable. In addition, the issue cannot be resolved without formulating and balancing complex national energy, commercial, and environmental policies that are the subject of both congressional and executive decision-making. Moreover, a judicial resolution would involve a piecemeal adjudication of claims that would subvert those national policies.

A. The Court lacks judicially discoverable and manageable standards.

If there are no legal tools allowing a court to reach a ruling that is "principled, rational, and based upon reasoned distinctions," the claim is not justiciable. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Consideration of the critical policy issues implicated and the considerable involvement in addressing those issues, it would be impossible for the court to formulate a principled, rational, and manageable basis for adjudication at this time.

Primarily, this is no judicially manageable standards for determining whether and to what extent the alleged effects of the Corporations support the Plaintiffs' assertion that they should be

held liable for the emissions that has led to the global warming which is causing damage to Canadian coastal villages. Moreover, the Court would have to determine how to implement the relief. There is simply no judicially discoverable or manageable standard for making such a far-reaching policy judgment that implicates numerous political determinations by the federal government, especially since, as the district court noted, "there are almost no other cases in which a state was held internationally responsible for causing transboundary harm" and no cases involving the CAA. In light of the aforementioned discussion of the difficulty controlling and measuring greenhouse gas emissions like CO_2, the untold number of sources, and the court's lack of both the necessary resources and expertise available to the political branches, such a determination would be unmanageable and should be left to those with a "special expertise" at the "frontiers of [environmental] science." *Her Majesty the Queen*, 912. F.2d 1525, 1534. R. at 12.

B. The claim requires initial policy determinations to be made by the elected branches.

The issues raised by Plaintiffs' claim also require "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Judicial resolution of this claim would require the court to devise national policies for, among other things, the transboundary air pollution and would disrupt the government's ability to set a single coordinated plan to address global warming. Such determinations clearly rest with the political branches of government, not the judiciary.

In *Connecticut*, the court dismissed the Plaintiffs' public nuisance claims against U.S. power companies based on emissions allegedly responsible for global warming as presenting a nonjusticiable political question. 406 F. Supp. 2d at 265. Finding 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 (internal citations and quotation marks omitted). The court reasoned that the political branches have already taken extensive steps to address global warming issues and that "Congress has vested administrative authority" over the "technically complex area of environmental law." Id. at 268-273.

C. Judicial resolution of this issue is impossible and would express a profound a lack of respect for Congressional policy decisions on a matter that calls for unquestioning adherence by the courts.

As set forth above, the political branches have aggressively debated the issue of global warming and the regulation of CO_2 and other greenhouse gases. Instead of implementing specific regulations, Congress has chosen to authorize the Administrator to establish programs for prevention and control of global air pollution, including CO_2 emissions. 42 U.S.C. § 7403.

In seeking a judicial determination on the regulation of CO_2, the Plaintiffs ask this court to exhibit a profound lack of respect for the prior determinations of the political branches. Granting the relief they request would disrupt decades of Congressional and executive branch policy choices and would intrude into the ongoing and enormously complex political debate concerning the appropriate means to address global warming. Environmental policy, in particular, presents an "unusual need for unquestioning adherence," *Baker*, 369 U.S. at 217, to the decisions of the political branches because, as here, "contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

CONCLUSION

For the foregoing reasons, Genergy Corp., Atomic Energy, Inc., Centennial Power Co., Power Suppliers Co., and First Energy, Ltd., respectfully request that this Court affirm the district court's grant of summary judgment.