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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

NATIVE VILLAGE OF KIVALINA, and
CITY OF KIVALINA,

Plaintiffs,

vs.

EXXONMOBIL CORPORATION, et al.,

Defendants.

Case No: C 08-1138 SBA

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION**

(Docket 171, 172, 175, 176, 177)

Plaintiff Native Village of Kivalina (the Village) is the governing body of an Inupiat Eskimo village of approximately 400 people who reside in the City of Kivalina (Kivalina), which also is a plaintiff in this action. The Complaint alleges that as a result of global warming, the Arctic sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of Kivalina's residents. As defendants, the Village and Kivalina (collectively, Plaintiffs) have named twenty-four oil, energy and utility companies¹ from whom they seek damages under a federal common law claim of nuisance, based on their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming.

¹ Defendants are: (1) ExxonMobil Corporation; (2) BP P.L.C.; (3) BP America, Inc.; (4) BP Products North America, Inc.; (5) Chevron Corporation; (6) Chevron U.S.A., Inc.; (7) ConocoPhillips Company; (8) Royal Dutch Shell P.L.C.; (9) Shell Oil Company; (10) Peabody Energy Corporation; (11) The AES Corporation; (12) American Electric Power Corporation; (13) American Electric Power Services Corporation; (14) DTE Energy Company; (15) Duke Energy Corporation; (16) Dynergy Holdings, Inc.; (17) Edison International; (18) MidAmerican Energy Holdings Company; (19) Mirant Corporation; (20) NRG Energy; (21) Pinnacle West Capital Corporation; (22) Reliant Energy, Inc.; (23) The Southern Company; and (24) Xcel Energy, Inc.

1 The parties are presently before the Court on various Defendants' motions to dismiss for
2 lack of subject matter jurisdiction, pursuant to Federal Rules of Civil Procedure 12(b)(1) and
3 12(b)(6). In their Rule 12(b)(1) motions, Defendants contend that Plaintiffs' claims are not
4 justiciable under the political question doctrine, and that Plaintiffs otherwise lack standing
5 under Article III of the United States Constitution. Having read and considered the papers filed
6 in connection with this matter, and being fully informed, the Court hereby GRANTS
7 Defendants' motions to dismiss for lack of jurisdiction. The Court, in its discretion, finds this
8 matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b).

9 **I. BACKGROUND**

10 **A. OVERVIEW**

11 The Village is a self-governing, federally-recognized Tribe of Inupiat Eskimos
12 established pursuant to the provisions of the Indian Reorganization Act of 1934, as amended in
13 1936. Compl. ¶ 12. Members of the Village reside in Kivalina, which is a unified municipality
14 incorporated under Alaska law in 1969 with a population of approximately 400 persons. Id.
15 ¶ 1, 13, 15. Kivalina is located at the tip of a six-mile long barrier reef, approximately seventy
16 miles north of the Arctic Circle, between the Chukchi Sea and the Kivalina and Wulik Rivers
17 on the Northwest coast of Alaska. Id. ¶ 1.

18 The Kivalina coast is protected by Arctic sea ice that is present during the fall, winter
19 and spring. Id. ¶¶ 4, 16. The sea ice, which attaches to the Kivalina coast, acts as a barrier
20 against the coastal storms and waves that affect the coast of the Chukchi Sea. Id. ¶ 16. As a
21 result of global warming, however, the sea ice now attaches to the Kivalina coast later in the
22 year and breaks up earlier and is thinner and less extensive than before, thus subjecting
23 Kivalina to coastal storm waves and surges. Id. The resulting erosion has now reached the
24 point where Kivalina is becoming uninhabitable. Id. ¶ 17. Plaintiffs allege that as a result, the
25 Village will have to be relocated, at a cost estimated to range from \$95 to \$400 million. Id.
26 ¶¶ 1, 17.

1 **B. GLOBAL WARMING**

2 In recent years, much attention has been focused on the issue of global warming, which
3 is not itself an event so much as it is a sequence of events. Generally speaking, global warming
4 refers to the build-up of carbon dioxide and methane (commonly referred to as “greenhouse
5 gases”) in the atmosphere which, in turn, causes the temperature of the planet to increase. Id.
6 ¶ 123. Both carbon dioxide and methane are products of human activity. Id. ¶¶ 124, 133.
7 Plaintiffs attribute the build-up of atmospheric carbon dioxide and methane to increases in the
8 combustion of fossil fuels as well as fuel harvesting activities, such as coal mining and oil
9 drilling. Id. ¶¶ 124, 126, 167-69, 173, 180.

10 According to Plaintiffs, carbon dioxide and other greenhouse gas levels have been
11 increasing steadily since the beginning of the industrial revolution in the 18th century, with
12 more than a one-third increase having occurred since 1980. Id. ¶ 125. The emitted gases
13 “rapidly mix in the atmosphere and cause the increase in the atmospheric concentration of
14 carbon dioxide levels and other greenhouse gases worldwide.” Id. ¶ 254. These gases remain
15 in the atmosphere for centuries and “thus have a lasting effect on [the] climate.” Id. ¶ 124.
16 The carbon dioxide traps heat emitted by the sun which, in turn, increases the climactic
17 temperature on Earth. Id. As the planet heats, the oceans become less efficient at removing
18 carbon dioxide from the atmosphere. Id. ¶ 127. Likewise, the planet reflects less energy back
19 into space which then causes “white, snowy, or icy areas” to darken and absorb more heat. Id.
20 The increase in the surface temperature causes seawater to expand and sea levels to rise. Id.
21 ¶ 130. In addition, sea levels are rising due to the melting of ice caps and glaciers resulting
22 from increased temperatures. Id. ¶ 131. Plaintiffs allege that these events have, in turn, led to
23 the loss of the Arctic sea ice that serves to protect Kivalina from winter storms. Id. ¶ 4.

24 **C. PROCEDURAL HISTORY**

25 Plaintiffs filed their Complaint on February 26, 2008. The Complaint alleges four
26 claims for relief: (1) Federal Common Law: Public Nuisance; (2) State Law: Private and
27 Public Nuisance; (3) Civil Conspiracy; and (4) Concert of Action. Compl. ¶¶ 249-282. As
28 Defendants, Plaintiffs have named various oil companies, power companies and utility

1 providers, all of whom are alleged to be jointly and severally liable for causing damage to
2 Plaintiffs. The Complaint does not seek injunctive relief nor does it specify a particular
3 amount of monetary damages. However, Plaintiffs claim that the effects of global warming
4 mean that they will have to relocate the inhabitants of Kivalina at an estimated cost of \$95
5 million to \$400 million. *Id.* ¶ 1.

6 Pursuant to the parties' stipulated scheduling order, Defendants filed various motions to
7 dismiss pursuant to Rules 12(b)(1) and 12(b)(6). These motions are: (a) Motion of Certain Oil
8 Company Defendants to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(1);
9 (b) Motion to Dismiss of Defendant Peabody Energy Corporation for lack of Subject Matter
10 Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) and for Failure to State a Claim Upon Which
11 Relief May be Granted Pursuant to Fed. R. Civ. P. 12(b)(6); (c) Motion of Certain Oil
12 Company Defendants to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(1);
13 (d) Motion of Certain Utility Defendants to Dismiss Plaintiffs' Civil Conspiracy Claim; and
14 (e) Utility Defendants' Motion to Dismiss.²

15 The threshold question presented by Defendants' motions is whether the Court has
16 subject matter jurisdiction over Plaintiffs' federal claim for common law nuisance. In
17 particular, Defendants argue that under the political question doctrine, the Court lacks
18 jurisdiction to consider the merits of Plaintiffs' nuisance claim because its resolution will
19 require the Court to make policy determinations relating to the use of fossil fuels and other
20 energy sources and consider their value in relation to the environmental, economic and social
21 consequences of such use. Defendants argue that such questions are inherently political and
22 that there are no judicially manageable standards available to adjudicate these issues. As a
23 secondary basis for dismissal, Defendants argue that Plaintiffs lack standing under Article III to
24 pursue their global warming claims under a nuisance theory on the ground that their injury is
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27 ² Certain groups of Defendants also filed Rule 12(b)(2) motions to dismiss for lack of
28 personal jurisdiction. Docket 138, 141. The parties agreed that adjudication of such motions
would occur, if necessary, after the Court resolves the motions under Rules 12(b)(1) and 12(b)(6).
See Docket 126 at 3.

1 not “fairly traceable” to the conduct of Defendants. The Court analyzes each of these
2 contentions below.

3 **II. LEGAL STANDARD**

4 “Federal courts are courts of limited jurisdiction. They possess only that power
5 authorized by Constitution and statute, which is not to be expanded by judicial decree.” Rasul
6 v. Bush, 542 U.S. 466, 489 (2004) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511
7 U.S. 375, 377 (1994)). The court is presumed to lack jurisdiction unless the contrary appears
8 affirmatively from the record. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 n.3 (2006).
9 Consistent with these basic jurisdictional precepts, the Ninth Circuit has articulated the
10 standard for surviving a motion to dismiss for lack of jurisdiction as follows: “When subject
11 matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the
12 burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal
13 court must show in his pleading, affirmatively and distinctly, the existence of whatever is
14 essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called
15 to its attention or on discovering the same, must dismiss the case, unless the defect be corrected
16 by amendment.” Tosco Corp. v. Communities for a Better Env’t, 236 F.3d 495, 499 (9th Cir.
17 2001) (citations and internal quotations omitted).

18 A Rule 12(b)(1) challenge to subject matter jurisdiction can be “facial,” in which case
19 the Court assumes the plaintiff’s factual allegations to be true and draws all reasonable
20 inferences in its favor. Doe v. See, 557 F.3d 1066, 1073 (9th Cir. 2009); Castaneda v. United
21 States, 546 F.3d 682, 684 n. 1 (9th Cir. 2008). Or, the motion may be a “factual” or “speaking”
22 motion, where the movant may submit materials outside the pleadings to support its motion. In
23 that case, “[i]t then becomes necessary for the party opposing the motion to present affidavits
24 or any other evidence necessary to satisfy its burden of establishing that the court, in fact,
25 possesses subject matter jurisdiction.” Colwell v. Dep’t of Health and Human Servs., 558
26 F.3d 1112, 1121 (9th Cir. 2009) (quoting St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.
27 1989)). “If the court determines at any time that it lacks subject-matter jurisdiction, the court
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1 must dismiss the action.” Fed.R.Civ.P 12(h)(3). The instant motions present a facial challenge
2 only.

3 **III. DISCUSSION**

4 **A. THE POLITICAL QUESTION DOCTRINE**

5 Federal courts are courts of limited jurisdiction. The power to hear a particular case is
6 circumscribed by Article III of the Constitution, which extends federal judicial power only to
7 actual “Cases” and “Controversies.” U.S. Const., art. III, § 2, cl. 1. The Supreme Court “has
8 recognized that the case-or-controversy limitation is crucial in maintaining the ‘tripartite
9 allocation of power’ set forth in the Constitution.” DaimlerChrysler Corp. v. Cuno, 547 U.S.
10 332, 341 (2006) (internal quotations omitted). Article III standing is thus a threshold
11 requirement for federal court jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-
12 60 (1992).

13 “The Supreme Court has indicated that disputes involving political questions lie outside
14 of the Article III jurisdiction of federal courts.” Corrie v. Caterpillar, Inc., 503 F.3d 974, 980
15 (9th Cir. 2007) (citing cases); Summers v. Earth Island Inst., --- U.S. ---, 129 S.Ct. 1142, 1148
16 (2009) (“courts have no charter to review and revise legislative and executive action”); Vieth v.
17 Jubelirer, 541 U.S. 267, 277 (2004) (“the judicial department has no business entertaining the
18 claim ... because the question is entrusted to one of the political branches or involves no
19 judicially enforceable rights.”); see also United States v. Mandel, 914 F.2d 1215, 1222 (9th Cir.
20 1990) (“certain political questions are by their nature committed to the political branches to the
21 exclusion of the judiciary.”).

22 The political question doctrine is a species of the separation of powers doctrine and
23 provides that certain questions are political as opposed to legal, and thus, must be resolved by
24 the political branches rather than by the judiciary. Corrie, 503 F.3d at 980. “The political
25 question doctrine serves to prevent the federal courts from intruding unduly on certain policy
26 choices and value judgments that are constitutionally committed to Congress or the executive
27 branch.” Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992). “A nonjusticiable
28 political question exists when, to resolve a dispute, the court must make a policy judgment of a

1 legislative nature, rather than resolving the dispute through legal and factual analysis.”

2 E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 785 (9th Cir. 2005).

3 In Baker v. Carr, 369 U.S. 186, 210 (1962), the Supreme Court set forth six independent
4 factors, any one of which demonstrates the presence of a non-justiciable political question:

5 [1] a textually demonstrable constitutional commitment of the
6 issue to a coordinate political department; or [2] a lack of
7 judicially discoverable and manageable standards for resolving it;
8 or [3] the impossibility of deciding without an initial policy
9 determination of a kind clearly for nonjudicial discretion; or [4]
10 the impossibility of a court's undertaking independent resolution
without expressing lack of the 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.

11 “[T]he first three Baker factors focus on the constitutional limitations of a court’s jurisdiction,
12 while the final three are ‘prudential considerations [that] counsel against judicial
13 intervention.’” Corrie, 574 F.3d at 981 (quoting Wang v. Masaitis, 416 F.3d 992, 996 (9th Cir.
14 2005)).

15 The six Baker factors have been grouped into three general inquiries: “(i) Does the
16 issue involve resolution of questions committed by the text of the Constitution to a coordinate
17 branch of Government? (ii) Would resolution of the question demand that a court move
18 beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial
19 intervention?” Wang, 416 F.3d at 995 (citing Goldwater v. Carter, 444 U.S. 996, 997 (1979)
20 (Powell, J., concurring)). Under this distilled approach, the first inquiry covers Baker factor
21 one; the second inquiry covers Baker factors two and three; and the third covers Baker factor
22 four through six. Id. at 995-996. Any one of the Baker factors may be dispositive. Alperin v.
23 Vatican Bank, 410 F.3d 532, 547 (9th Cir. 2005); United States v. Mandel, 914 F.2d 1215,
24 1222 (9th Cir. 1990).

25 1. Textual Commitment

26 The first Baker factor examines whether there is “a textually demonstrable
27 constitutional commitment of the issue to a coordinate political department.” Baker, 369 U.S.
28 at 217. “This factor recognizes that, under the separation of powers, certain decisions have

1 been exclusively committed to the legislative and executive branches of the federal
2 government, and are therefore not subject to judicial review.” McMahon v. Presidential
3 Airways, Inc., 502 F.3d 1331, 1358-59 (11th Cir. 2007). The existence of “a textually
4 demonstrable constitutional commitment of the issue to a coordinate political department”
5 turns on an examination of the constitutional provisions governing the exercise of the power in
6 question. See Powell v. McCormack, 395 U.S. 486, 519-520 (1969); Consejo de Desarrollo
7 Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1172 (9th Cir. 2007) (“the
8 courts must, in the first instance, interpret the text in question and determine whether and to
9 what extent the issue is textually committed.”). Though there are few instances of “this sort of
10 textual commitment,” courts may “infer the presence of a political question from the text and
11 structure of the Constitution.” Nixon v. United States, 506 U.S. 224, 240 (1993). That being
12 said, a mandate to regulate a certain area is not the equivalent of delegating the exclusive
13 power to resolve that issue to another branch. Id. Rather, the issue is whether the Constitution
14 has given one of the political branches final responsibility for interpreting the scope and nature
15 of such a power. Id.

16 Defendants argue that allowing Plaintiffs to proceed with their global warming claim
17 would run afoul of the first Baker factor “because it would intrude upon the political branches’
18 constitutionally committed authority over foreign policy.” Oil Defs.’ Mot. at 22. In particular,
19 Defendants maintain that Congress and the President have declined to adopt emission caps
20 absent an agreement from developing nations. Id. They further claim that the rationale for the
21 United States’ position is two-fold: (1) that a successful approach to global warming requires a
22 “global” approach that includes cooperation from both industrialized and developing nations;
23 and (2) this country could “find itself in an inferior bargaining position” with respect to future
24 diplomatic attempts to address this issue. Id. at 22-23. In view of these considerations,
25 Defendants contend that the Court’s retroactive establishment of greenhouse gas emission caps
26 would “override the considered foreign policy judgment of the political branches....” Id. at 23;
27 see also Utilities Defs.’ Mot. at 8; Peabody Mot. at 11-12.

28

1 It is true, as a general matter, that “foreign policy [is] the province and responsibility of
2 the Executive.” Dep’t of Navy v. Egan, 484 U.S. 518, 529 (1988). “[T]he very nature of
3 executive decisions as to foreign policy is political, not judicial.” Chicago & S. Air Lines, Inc.
4 v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). “But the mere fact that foreign affairs may
5 be affected by a judicial decision does not implicate abstention.” Khouzam v. Attorney Gen. of
6 United States, 549 F.3d 235, 250 (3rd Cir. 2008). In fact, “it is error to suppose that every case
7 or controversy which touches foreign relations lies beyond judicial cognizance[.]” Baker, 369
8 U.S. at 211. “This over-inclusive approach threatens to sweep all cases touching foreign
9 relations beyond the purview of the courts—a practice warned against in Baker.” See Alperin,
10 410 F.3d at 547. In fact, “Baker cautioned against ‘sweeping statements’ that imply all
11 questions involving foreign relations are political ones.” Id. at 544-45.

12 The indisputably international dimension of this particular environmental problem does
13 not render the instant controversy a non-justiciable one. While Defendants have shown that
14 global warming issues may implicate foreign policy and related economic issues, the fact that
15 this case “touches foreign relations” does not ipso facto place it beyond the reach of the
16 judiciary. See Corrie, 503 F.3d at 982. Tellingly, none of the Defendants cite to any express
17 provision of the Constitution or provision from which it can be inferred that the power to make
18 the final determination regarding air pollution or global warming has been vested in either the
19 executive or legislative branch of the government. Given their failure to do so, the Court must
20 presume that no such limitation exists. See Davis v. Passman, 442 U.S. 228, 242 (1979) (“At
21 least in the absence of ‘a textually demonstrable constitutional commitment of [an] issue to a
22 coordinate political department,’ ... we presume that justiciable constitutional rights are to be
23 enforced through the courts.”). Accordingly, the first Baker factor is not implicated.

24 2. Scope of Judicial Expertise

25 “The second Goldwater factor lumps together the second and third Baker inquiries—
26 whether there is ‘a lack of judicially discoverable and manageable standards’ and whether a
27 decision is impossible ‘without an initial policy determination of a kind clearly for nonjudicial
28 discretion.” Wang, 416 F.3d at 996. As noted, the common inquiry presented by these two

1 factors is whether “resolution of the question demand[s] that a court move beyond areas of
2 judicial expertise[.]” Id. at 995.

3
4 **a) Judicially Discoverable and Manageable Standards**

5 In Alperin, the Ninth Circuit explained that focus of the second Baker factor is “not
6 whether the case is unmanageable in the sense of being large, complicated, or otherwise
7 difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the
8 legal tools to reach a ruling that is ‘principled, rational, and based upon reasoned distinctions.’”
9 410 F.3d at 552. Thus, “[i]nstead of focusing on the logistical obstacles,” the relevant inquiry
10 is whether the judiciary is *granting relief in a reasoned fashion* versus allowing the claims to
11 proceed such that they “merely provide ‘hope’ without a substantive legal basis for a ruling.”
12 Id. (emphasis added).

13 Plaintiffs contend that “[t]he judicially discoverable and manageable standards here are
14 the same as they are in all nuisance cases.” Pls.’ Opp’n at 63. They assert that the salient
15 inquiry underlying their federal nuisance claim is whether Defendants contributed to “an
16 unreasonable interference with public rights[.]” Id. Resolution of what is “reasonable,”
17 Plaintiffs assert, is to be determined by examining whether the conduct involves a “significant
18 interference with the public health, the public safety, the public peace, the public comfort or the
19 public convenience” and whether the conduct is “of a continuing nature” or has produced a
20 “permanent or long lasting effect[.]” Id. However, the flaw in Plaintiffs’ argument is that it
21 overlooks that the evaluation of a nuisance claim is not focused entirely on the
22 unreasonableness of the harm. Rather, the factfinder must also balance the utility and benefit
23 of the alleged nuisance against the harm caused.

24 A public nuisance is defined as an “unreasonable interference with a right common to
25 the general public.” Restatement (Second) of Torts § 821(b)(1) (1979). Whether the
26 interference is unreasonable turns on weighing “the gravity of the harm against the utility of the
27 conduct.” Id. § 821 cmt. e. “The unreasonableness of a given interference represents a
28 judgment reached by comparing the social utility of an activity against the gravity of the harm

1 it inflicts, taking into account a handful of relevant factors.” People ex rel. Gallo v. Acuna, 14
2 Cal. 4th 1090, 1105 (1997) (citing Restatement (Second) of Torts, §§ 826-831). Stated another
3 way, resolution of a nuisance claim is not based on whether the plaintiff finds the invasion
4 unreasonable, but rather, “whether reasonable persons generally, *looking at the whole situation*
5 impartially and objectively, would consider it unreasonable.” Id. (quotations and citation
6 omitted and emphasis added); see also Florida East Coast Props., Inc. v. Metropolitan Dade
7 County, 572 F.2d 1108, 1112 (5th Cir. 1978) (“In every case, the court must make a
8 comparative evaluation of the conflicting interests according to objective legal standards, and
9 the gravity of harm to the plaintiff must be weighed against the utility of the defendant’s
10 conduct.”).

11 Applying the above-discussed principles here, the factfinder will have to weigh, inter
12 alia, the energy-producing alternatives that were available in the past and consider their
13 respective impact on far ranging issues such as their reliability as an energy source, safety
14 considerations and the impact of the different alternatives on consumers and business at every
15 level. See People of the State of Calif. v. Gen. Motors Corp., 2007 WL 2726871 at *8 (N.D.
16 Cal., Sept. 17, 2007) (“Plaintiff’s claim would require the Court to balance the competing
17 interests of reducing global warming emissions and the interests of advancing and preserving
18 economic and industrial development”); see also Cook v. Rockwell Int’l. Corp., 580 F. Supp.
19 2d 1071, 1166 (D. Colo. 2006) (“To assess the utility of Defendants’ conduct, the jury must
20 consider several factors, including the primary purpose of Defendants’ conduct and the social
21 value of that purpose”) (citing Restatement (Second) of Torts § 828 & cmt. e). The factfinder
22 would then have to weigh the benefits derived from those choices against the risk that
23 increasing greenhouse gases would in turn increase the risk of causing flooding along the coast
24 of a remote Alaskan locale. Plaintiffs ignore this aspect of their claim and otherwise fail to
25 articulate any particular judicially discoverable and manageable standards that would guide a
26 factfinder in rendering a decision that is principled, rational, and based upon reasoned
27 distinctions. See Alperin, 410 F.3d at 552.

28

1 Plaintiffs next argue that the existence of judicially discoverable or manageable
2 standards is exemplified by the long, prior history of air and water pollution cases. Pls.' Opp'n
3 at 61-63. The Second Circuit in Connecticut v. Am. Elec. Power Co. Inc., –F.3d –, 2009 WL
4 2996729 (2d Cir. Sept. 21, 2009) (AEP) agreed with this reasoning in holding that the political
5 question doctrine did not bar a nuisance lawsuit brought by eight states, a city and three land
6 trusts against six electric power corporations “to cap and then reduce their carbon monoxide
7 emissions.” Id. at *1. With regard to the second Baker factor, the AEP court rejected the
8 defendants’ reliance on “uncertainties” regarding the precise effect of greenhouse gas
9 emissions and noted that “federal courts have successfully adjudicated complex common law
10 nuisance cases for over a century.” Id. at *10. Based on the judiciary’s history of addressing
11 “new and complex problems,” including those concerning environmental pollution, the court
12 concluded that “[w]ell-settled principles of tort and public nuisance law provide appropriate
13 guidance to the district court in assessing Plaintiffs’ claims and federal courts are competent to
14 deal with these issues” such that their global warming concerns can “be addressed through
15 principled adjudication.” Id. at *13. This Court is not so sanguine. While such principles may
16 provide sufficient guidance in some novel cases, this is not one of them.

17 The cases cited by Plaintiffs as well as the AEP court involved nuisance claims founded
18 on environmental injuries far different than those alleged in the instant case.³ The common
19 thread running through each of those cases is that they involved a discrete number of
20 “polluters” that were identified as causing a specific injury to a specific area. Yet, Plaintiffs
21 themselves concede that considerations involved in the emission of greenhouse gases and the
22 resulting effects of global warming are “entirely different” than those germane to water or air
23 pollution cases. Pls.’ Opp’n at 105. While a water pollution claim typically involves a
24 discrete, geographically definable waterway, Plaintiffs’ global warming claim is based on the

25
26 ³ For example, AEP cites two companion cases, Missouri v. Illinois, 180 U.S. 208 (1901)
27 and Missouri v. Illinois, 200 U.S. 496 (1906), both of which involved suits by the State of Missouri
28 and against the State of Illinois based on the latter’s discharge of sewage into a channel that
emptied into the Mississippi River. See AEP, 2009 WL 2996729 at *10. The next set of cases
discussed by the AEP court involved claims brought against copper producers whose noxious
emissions were destroying forests, orchards and crops in Georgia. Id. at *11.

1 emission of greenhouse gases from innumerable sources located throughout the world and
2 *affecting the entire planet and its atmosphere*. Pls.’ Opp’n at 105. Notably, Plaintiffs
3 acknowledge that the global warming process involves “common pollutants that are mixed
4 together in the atmosphere [that] cannot be similarly geographically circumscribed.” Id.

5 The sequence of events leading to the claimed injury also is distinguishable. In a water
6 pollution case, the discharge in excess of the amount permitted is presumed harmful. See Tex.
7 Indep. Producers and Royalty Owners Ass’n v. E.P.A., 410 F.3d 964, 974 (5th Cir. 2005)
8 (Texas Indep. Producers). In contrast, the harm from global warming involves a series of
9 events disconnected from the discharge itself. In a global warming scenario, emitted
10 greenhouse gases combine with other gases in the atmosphere which *in turn* results in the
11 planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in*
12 *turn* causes the Arctic sea ice to melt, which *in turn* allegedly renders Kivalina vulnerable to
13 erosion and deterioration resulting from winter storms. See Compl. ¶¶ 1, 4, 123-127, 254; Pls.’
14 Opp’n at 105.

15 Despite the admitted and significant distinctions between a nuisance claim based on
16 water or air pollution and one, such as the present, based on global warming, neither Plaintiffs
17 nor AEP offers any guidance as to precisely what judicially discoverable and manageable
18 standards are to be employed in resolving the claims at issue. Although federal courts
19 undoubtedly are well suited to resolve new and complex issues and cases, the Court is not
20 persuaded that this is such a case. Plaintiffs’ global warming nuisance claim seeks to impose
21 liability and damages on a scale unlike any prior environmental pollution case cited by
22 Plaintiffs. Those cases do not provide guidance that would enable the Court to reach a
23 resolution of this case in any “reasoned” manner. See Alperin, 410 F.3d at 552. Consequently,
24 the Court concludes that application of the second Baker factor precludes judicial consideration
25 of Plaintiff’s federal nuisance claim.

26 **b) Initial Policy Determination**

27 Equally problematic for Plaintiffs is the third Baker factor, which requires the Court to
28 determine whether it would be impossible for the judiciary to decide the case “without an

1 initial policy determination of a kind clearly for nonjudicial discretion.” Baker, 369 U.S. at
2 217. A political question under this factor “exists when, to resolve a dispute, the court must
3 make a policy judgment of a legislative nature, rather than resolving the dispute through legal
4 and factual analysis.” EEOC v. Peabody W. Coal Co., 400 F.3d 774, 784 (9th Cir. 2005). This
5 factor is aimed at preventing a court from “removing an important policy determination from
6 the Legislature.” In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 438 F. Supp.
7 2d 291, 297 (S.D.N.Y. 2006).

8 Plaintiffs emphasize that because they are not seeking injunctive relief, there is no need
9 for the Court to delve into the task of retroactively determining what emission limits *should*
10 *have* been imposed. Pls.’ Opp’n at 64-69. This argument rests on the same faulty logic
11 discussed above; to wit, that Plaintiffs’ nuisance claim can be resolved solely by examining the
12 reasonableness of the harm, while avoiding any consideration of the conduct causing the
13 nuisance. As noted, Plaintiffs’ federal nuisance claim inherently requires the factfinder to
14 consider both the harm experienced by Plaintiff as well as the utility or value of Defendants’
15 actions. The fact that plaintiff is seeking damages as opposed to injunctive relief does not
16 counsel a different result. Regardless of the relief sought, the resolution of Plaintiffs’ nuisance
17 claim requires balancing the social utility of Defendants’ conduct with the harm it inflicts.
18 That process, by definition, entails a determination of what would have been an acceptable
19 limit on the level of greenhouse gases emitted by Defendants. See GM, 2007 WL 2726871 at
20 *8 (“regardless of the relief sought, the Court is left to make an initial decision as to what is
21 unreasonable in the context of carbon dioxide emissions.”)

22 Plaintiffs also fail to confront the fact that resolution of their nuisance claim requires the
23 judiciary to make a policy decision about *who* should bear the cost of global warming. Though
24 alleging that Defendants are responsible for a “substantial portion” of greenhouse gas
25 emissions, Compl. ¶ 3, Plaintiffs also acknowledge that virtually everyone on Earth is
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1 responsible on some level for contributing to such emissions.⁴ Yet, by pressing this lawsuit,
 2 Plaintiffs are in effect asking this Court to make a political judgment that the two dozen
 3 Defendants named in this action should be the only ones to bear the cost of contributing to
 4 global warming. Plaintiffs respond that Defendants *should be* the ones held responsible for
 5 damaging Kivalina allegedly because “they are responsible for more of the problem than
 6 anyone else in the nation....” Pls.’ Opp’n at 68. But even if that were true, Plaintiffs ignore
 7 that the allocation of fault—and cost—of global warming is a matter appropriately left for
 8 determination by the executive or legislative branch in the first instance. The Court thus
 9 concludes that the third Baker factor also militates in favor of dismissal.⁵

10 **B. ARTICLE III STANDING**

11 Article III standing is a threshold requirement for federal court jurisdiction. Lujan v.
 12 Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). Under Article III of the Constitution,
 13 federal judicial power extends only to “Cases” and “Controversies.” U.S. Const., art. III, § 2,
 14 cl. 1. “[I]n order to have Article III standing, a plaintiff must adequately establish: (1) *an*
 15 *injury in fact* (i.e., a concrete and particularized invasion of a legally protected interest); (2)
 16 *causation* (i.e., a fairly traceable connection between the alleged injury in fact and the alleged
 17 conduct of the defendant); and (3) *redressability* (i.e., it is likely and not merely speculative
 18 that the plaintiff’s injury will be remedied by the relief plaintiff seeks in bringing suit).” Sprint
 19 Comm’n Co., L.P. v. APCC Servs., Inc., --- U.S. ---, 128 S.Ct. 2531, 2535 (2008) (citing
 20 Lujan, 504 U.S. at 560-561) (internal quotations and alterations omitted); Stormans, Inc. v.
 21 Selecky, 571 F.3d 960, 970 (9th Cir. 2009). The party invoking federal jurisdiction bears the

22 _____
 23 ⁴ To the extent that the combustion of fossil fuels is causing global warming, it is evident
 24 that any person, entity or industry which uses or consumes such fuels bears at least some
 25 responsibility for Plaintiffs’ harm. Plaintiffs readily acknowledge that the “transportation sector” is
 26 responsible for an “enormous quantity” of greenhouse gas emissions. Pls.’ Opp’n at 98.
 Nonetheless, Plaintiffs have chosen not to include any members of the transportation sector in this
 lawsuit. The seemingly arbitrary selection of Defendants, coupled with the gravity and extent of
 the harm alleged in this case, underscores the conclusion that the allocation of responsibility for
 global warming is best left to the executive or legislative branch.

27 ⁵ Given the Court’s conclusions regarding the second and third Baker factors, the Court
 28 does not reach the parties arguments regarding the remaining Baker factors which, in any event,
 largely mirror the argument analyzed above.

1 burden of establishing these elements which are the “irreducible constitutional minimum”
2 requirements of standing. Lujan, 504 U.S. at 560-61.

3 The standing dispute in this case centers on what the Supreme Court has defined as “the
4 causation requirement” of standing, i.e., fair traceability. Bennett v. Spear, 520 U.S. 154, 167
5 (1997). “To show causation, the plaintiff must demonstrate a causal connection between the
6 injury and the conduct complained of—the injury has to be fairly traceable to the challenged
7 action of the defendant, and not the result of the independent action of some third party not
8 before the court.” Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1227
9 (9th Cir. 2008); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir.
10 2000). “Although the “traceability” of a plaintiff’s harm to the defendant’s actions need not
11 rise to the level of proximate causation, Article III *does* require proof of a substantial likelihood
12 that the defendant’s conduct caused plaintiff’s injury in fact.” Habecker v. Town of Estes Park,
13 Colo., 518 F.3d 1217, 1225 (10th Cir. 2008) (citations and internal quotations omitted and
14 emphasis added).

15 1. Contribution to the Injury

16 Plaintiffs concede they are unable to trace their alleged injuries to any particular
17 Defendant but instead claim that they need not do so. According to Plaintiffs, for purposes of
18 establishing standing, they need only allege that Defendants “contributed” to their injuries.
19 Pls.’ Opp’n at 97-98. Their “contribution” approach to Article III causation derives from cases
20 involving claims brought under the Clean Water Act, such as P.I.R.G. v. Powell Duffryn
21 Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990) (Powell Duffryn). In that case, a public interest
22 group and others brought a citizen suit under the Clean Water Act accusing the defendant of
23 violating its discharge permit by discharging industrial waste into a local waterway. In its
24 motion for summary judgment, Defendant argued that plaintiff could not establish to “a
25 reasonable scientific certainty” that defendant’s operations harmed the waterway. Id. at 71-72.
26 The district court denied summary judgment on the ground that defendant’s violation of the
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1 discharge permits, standing alone, was sufficient to demonstrate that plaintiff's injury was
2 fairly traceable to defendant's conduct. Id.⁶

3 On appeal, the Fourth Circuit agreed with defendant that "a permit exceedance alone" is
4 insufficient to meet the causation prong of the test for standing, but concluded that there
5 nonetheless were sufficient facts to establish causation. Id. at 72. The court explained: "The
6 requirement that plaintiffs' injuries be 'fairly traceable' to the defendant's conduct does not
7 mean that plaintiffs must show to a scientific certainty that defendant's effluent, and
8 defendant's effluent alone, caused the precise harm suffered by the plaintiffs." Id. According
9 to the court, the "fairly traceable" requirement "is not equivalent to a requirement of tort
10 causation," and as such, the plaintiffs "need only show that there is a '*substantial likelihood*'
11 that defendant's conduct caused plaintiffs' harm." Id. (emphasis added). "In a Clean Water
12 Act case, *this likelihood* may be established by showing that a defendant has 1) discharged
13 some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which
14 the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3)
15 this pollutant causes or *contributes* to the kinds of injuries alleged by the plaintiffs." Id.
16 (emphasis added). With regard to the last element, the court noted that water pollution cases
17 often involve "several parties discharging into the affected waterway," and as such, "[i]n order
18 to obtain standing, plaintiffs need not sue every discharger in one action, since the pollution of
19 any one may be shown to cause some part of the injury suffered." Id. n.8.

20 Subsequently, in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d
21 149 (4th Cir. 2000) (Gaston Copper), the court adopted similar reasoning in holding that
22 various environmental organizations had standing to bring a citizens suit under the Clean Water
23 Act against a smelting operator accused of illegally discharging a variety of pollutants into a
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25 ⁶ The purpose of the Federal Water Pollution Control Act (referred to as the Clean Water
26 Act) is to restore and maintain the nation's waters and to eliminate the discharge of pollutants into
27 waterways. See 33 U.S.C. § 1251(a). Under the Act, corporations may not discharge pollutants
28 into navigable waterways, unless they obtain a National Pollution Discharge Elimination System
permit, which limits the amount of effluent (pollution) that may be discharged. See 33 U.S.C.
§§ 1311(a), 1342. Compliance with the terms and conditions of the permit constitutes compliance
with the Act. Id. § 1342(k).

1 South Carolina waterway. The district court had dismissed the case on the ground that
2 plaintiffs failed to present evidence showing that the chemical content of the waterways were
3 affected by the defendant's facility or that plaintiffs were negatively affected by the
4 defendants' conduct. Id. at 159. In reversing the district court, the court of appeal rejected the
5 suggestion that it must be shown to a "scientific certainty" that defendant's act of discharging
6 effluent beyond the scope of its permit caused the precise harm suffered by the plaintiffs. Id. at
7 161. "Rather than pinpointing the origins of particular molecules, a plaintiff must merely show
8 that a defendant discharges a pollutant that causes or contributes to the kinds of injuries
9 alleged." Id. "Where a plaintiff has pointed to a polluting source as the *seed of his injury*, and
10 the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable'
11 requirement can be said to be fairly met." Id. at 162 (emphasis added). However, the court
12 also cautioned that to be "fairly traceable," the plaintiff must lie in the "discharge zone of a
13 polluter" and not "so far downstream that their injuries cannot be fairly traced to that
14 defendant." Id.

15 In contrast to Powell Duffryn and Gaston Copper, the Fifth Circuit in Tex. Indep.
16 Producers rejected, in part, an action brought by the Natural Resources Defense Council
17 (NRDC) seeking to challenge proposed regulations promulgated by the EPA as violative of the
18 Clean Water Act. Citing Gaston Copper, the court noted the now well-established principle
19 that the plaintiff need not establish a nexus between the defendants' discharge of pollutants and
20 plaintiffs' injury with "scientific certainty." Tex. Indep. Producers, 410 F.3d at 973. At the
21 same time, the court recognized that the "contribution" approach to standing is dependent upon
22 the plaintiffs' ability to plead and prove the defendant's "'polluting source as the seed of his
23 injury, and [that] the owner of the polluting source has supplied no alternative culprit...'" Id.
24 at 974 (quoting in part Gaston Copper, 204 F.3d at 162). Ultimately, the court held that the
25 NRDC had failed to show that defendants were the "seed" of its injury, finding the "existing
26 polluted condition" of at least three of the water bodies involved that had previously resulted
27 from the discharge of raw billions of gallons of raw sewage from various sources flowing into
28 those rivers annually. Id.

1 Here, Plaintiffs acknowledge that the contribution principles upon which they rely have
2 arisen in the context of Clean Water Act cases, but insist that “there is no reason to assume that
3 the presence of a statutory scheme in those cases limits the rule that plaintiffs need only show
4 contribution in CWA actions alone.” Pls.’ Opp’n at 98. The Court disagrees. There is a
5 critical distinction between a statutory water pollution claim versus a common law nuisance
6 claim. Under the Clean Water Act, the amount of effluent that may be legally discharged is
7 strictly regulated “to protect the designated uses of the receiving waterways.” Gaston Copper,
8 204 F.3d at 157. Thus, where the plaintiff shows that a defendant’s discharge *exceeds*
9 Congressionally-prescribed federal limits, it is presumed for purposes of standing that “there is
10 a ‘substantial likelihood’ that defendant’s conduct caused plaintiffs’ harm,” even if other
11 parties have also made similar discharges. Id. at 72-73. Only then is it permissible for the
12 plaintiff to rely on the notion that the defendant “contributed” to plaintiff’s injury on the
13 ground that it may not be possible to trace the injury to a particular entity. Sierra Club, Lone
14 Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546, 558 (5th Cir. 1996) (“Given the number
15 of entities discharging chemicals into Galveston Bay, it would be virtually impossible for any
16 of Sierra Club’s members to trace his injuries to Cedar Point’s discharge in particular.”). In
17 contrast, there are no federal standards limiting the discharge of greenhouse gases. As a result,
18 no presumption arises that there is a substantial likelihood that any defendant’s conduct harmed
19 plaintiffs. Without that presumption, and especially given the extremely attenuated causation
20 scenario alleged in Plaintiffs’ Complaint, is it entirely irrelevant whether any defendant
21 “contributed” to the harm because a discharge, standing alone, is insufficient to establish
22 injury. See Texas Indep. Producers, 410 F.3d at 974 (“[e]stablishing a discharge does not also
23 establish an injury.”).⁷

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25 ⁷ In AEP, the court noted that the contribution prong of the Powell Duffryn test is not
26 dependent upon a showing that the discharge exceeded any federal limits because no such limits
27 exist as to carbon dioxide emissions. 2009 WL 2996729 at *29. This reasoning is circular. Powell
28 Duffryn held that to show fair traceability, the plaintiff must show a “substantial likelihood” that
defendant’s conduct caused plaintiff’s injury. The tripartite test articulated in Powell Duffryn to
demonstrate the requisite “substantial likelihood” is stated in the conjunctive, not the disjunctive as
concluded by the AEP court. C.f., Gaston Copper, 204 F.3d at 162 (finding that plaintiff had met
the Powell Duffryn test by showing that defendant exceeded its discharge permit limits and that the

1 2. **“Seed” of the Injury**

2 Even if the contribution theory were applicable outside the context of a statutory water
3 pollution claim, it is simply inapposite where, as here, Plaintiffs have not alleged that the
4 “seed” of their injury can be traced to any of the Defendants. See Texas Indep. Producers, 410
5 F.3d at 974; Gaston Copper, 204 F.3d at 162. Plaintiffs allege that the genesis of the global
6 warming phenomenon dates back centuries and is a result of the emission of greenhouse gases
7 by a multitude of sources *other than* the Defendants. Compl. ¶¶ 124-25. The Complaint
8 further alleges that the level of atmospheric carbon dioxide, “the most significant greenhouse
9 gas emitted by human activity,” has been increasing steadily “since the dawn of the industrial
10 revolution in the 18th century, and more than one-third of the increase has occurred since
11 1980.” Id. Significantly, the source of the greenhouse gases are undifferentiated and cannot be
12 traced to any particular source, let alone defendant, given that they “rapidly mix in the
13 atmosphere” and “inevitably merge[] with the accumulation of emissions in California and the
14 rest of the world.” Id. ¶¶ 254, 10.

15 In view of the Plaintiffs’ allegations as to the undifferentiated nature of greenhouse gas
16 emissions from all global sources and their worldwide accumulation over long periods of time,
17 the pleadings makes clear that there is no realistic possibility of tracing any particular alleged
18 effect of global warming to any particular emissions by any specific person, entity, group at
19 any particular point in time. See Pls.’ Opp’n at 105. Plaintiffs essentially concede that the
20 genesis of global warming is attributable to numerous entities which individually and
21 cumulatively over the span of centuries created the effects they now are experiencing. Even
22 accepting the allegations of the Complaint as true and construing them in the light most
23 favorable to Plaintiffs, it is not plausible to state which emissions—emitted by whom and at
24 what time in the last several centuries and at what place in the world—“caused” Plaintiffs’
25 alleged global warming related injuries. Thus, Plaintiffs have not and cannot show that

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waterway in dispute was within the range of the discharge). As such, it is illogical to conclude that
the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a
plaintiff’s injury is fairly traceable to a defendant’s conduct.

1 Defendants' conduct is the "seed of [their] injury." To the contrary, there are, in fact, a
2 multitude of "alternative culprit[s]" allegedly responsible for the various chain of events
3 allegedly leading to the erosion of Kivalina. See Texas Indep. Producers, 410 F.3d at 974.

4 3. Zone of Discharge

5 The above notwithstanding, the Powell Duffryn test simply has no application in this
6 case given the remoteness of the injury claim. "[T]o satisfy the 'fairly traceable' causation
7 requirement, there must be a distinction between 'the plaintiffs who lie within the discharge
8 zone of a polluter and those who are so far downstream that their injuries cannot fairly be
9 traced to that defendant.'" Id. at 973 (quoting in part Gaston Copper, 204 F.3d at 162); Friends
10 of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361 (5th Cir. 1996) ("some
11 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate
12 a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable'
13 element of standing."). Thus, for example, an eighteen mile distance between the point of
14 discharge and the area of plaintiff's use of the body of water would be considered "too large to
15 infer causation." Id. (citation omitted). Likewise, in Texas Indep. Producers, the Fifth Circuit
16 held that "where the specific water bodies used by NRDC members run a great distance [i.e.,
17 hundreds of miles], ... discharges in those water bodies [are] insufficient to establish the
18 discharges are within the zone to infer causation." 410 F.3d at 973.

19 Here, the allegations of the Complaint demonstrate that Plaintiffs are not within the
20 zone of discharge. This is not an instance in which Plaintiffs' use of their property is
21 negatively impacted affected by virtue of their proximity to the discharge, similar to discharges
22 of effluent into waterways. Indeed, Plaintiffs concede that "[i]t would be *impossible* to trace
23 the pathway of any particular greenhouse gas emission, as each combines in the atmosphere
24 with other emissions, to create the effects described in plaintiffs' Complaint." Pls.' Opp'n at
25 105 (emphasis added). Plaintiffs' only response is that the relevant geographical area should
26 be "the entire world, given the inherent nature of global warming." Pls.' Opp'n at 98. That
27 reasoning, however, suggests that every inhabitant on this Earth is within the zone of discharge,
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1 thereby effectively eliminating the issue of geographic proximity in any case involving harms
2 caused by global warming.

3 The tenuousness of Plaintiffs' standing is further exemplified by their theory of
4 causation. Unlike water pollution cases in which the discharges of effluent in excess of the
5 permitted amount are deemed harmful, Plaintiffs' arguments depend on an attenuated sequence
6 of events that purportedly follow from the Defendants' alleged "excessive" discharge of
7 greenhouse gases. *Id.* ¶ 4, 123-125, 127, 130, 131. As succinctly stated by the Supreme Court
8 in *Allen v. Wright*, "The links in the chain of causation between the challenged ... conduct and
9 the asserted injury are far too weak for the chain as a whole to sustain [Plaintiffs'] standing."
10 468 U.S. 737, 759 (1984). That observation is especially apropos in the instant case where the
11 Plaintiffs' claim for damages is dependent on a series of events far removed both in space and
12 time from the Defendants' alleged discharge of greenhouse gases. *See Center for Biological*
13 *Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (causal link between
14 government approval of offshore leases for gas and oil development and climate change was
15 "too tenuous" to demonstrate standing); *c.f.*, *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807 (9th
16 Cir. 1992) (holding that the aftereffects of a massive oil spill were too remote to establish
17 causation for increased gasoline prices).

18 C. **SPECIAL SOLITUDE**

19 Finally, Plaintiffs contend that they are entitled to relaxed standing requirements based
20 upon the "special solitude" generally afforded to sovereigns. Pls.' Opp'n at 106-109. This
21 argument derives from *Massachusetts v. EPA*, 549 U.S. 497 (2007), a case where the State of
22 Massachusetts along with private environmental organizations filed a rulemaking petition
23 requesting the EPA to regulate carbon dioxide emissions from new motor vehicles. *Id.* at 518.
24 In finding that plaintiffs had standing, the Supreme Court acknowledged "the special position
25 and interest of Massachusetts" and noted that it "is of considerable relevance that the party
26 seeking review here is a sovereign State and not ... a private individual." *Id.* at 518. The
27 Court explained that "[w]hen a State enters the Union, it surrenders certain sovereign
28 prerogatives," such as those relating to "exercise of its police powers to reduce in-state motor-

1 vehicle emissions....” *Id.* at 519. Such “sovereign prerogatives,” the Court noted, are now
2 vested in the federal government, which has charged the EPA with the responsibility of
3 protecting states by prescribing standards applicable to motor vehicle pollution. *Id.* at 519-520.
4 States, nonetheless, retain the procedural right to challenge rulemaking by the EPA “as
5 arbitrary and capricious.” *Id.* at 520. The Supreme Court concluded that “[g]iven that
6 procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the
7 Commonwealth is entitled to special solicitude in our standing analysis.” *Id.*

8 Plaintiffs are not entitled to any “special solitude” under the circumstances presented.
9 Unlike Massachusetts, Plaintiffs are not seeking to enforce any procedural rights concerning an
10 agency’s rulemaking authority. Rather, Plaintiffs claim is one for damages directed against a
11 variety of private entities. Nor may Plaintiffs rely on the “quasi sovereign interests” referenced
12 by the Supreme Court. The special solitude recognized by the Court is predicated on the rights
13 *a State* relinquishes to the federal government when it “enters the Union.” *Id.* at 519. This
14 rationale does not apply to Plaintiffs, which did not surrender its sovereignty as the price for
15 acceding to the Union. Even if the special solitude mentioned in Massachusetts applied to
16 Plaintiffs, they still would lack standing. As discussed above, Plaintiffs lack standing on the
17 basis of the political question doctrine and based on their inability to establish causation under
18 Article III. Even a relaxed application of the requisite standing requirements would not
19 overcome these fatal flaws in Plaintiffs’ case.

20 **D. SUPPLEMENTAL STATE LAW CLAIMS**

21 Aside from their first claim for common law nuisance, all of Plaintiffs’ remaining
22 claims are based upon state law. A district court may decline to exercise supplemental
23 jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction.
24 28 U.S.C. § 1367(c)(3); Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1309 (9th Cir.
25 1992). Therefore, the Court declines to assert supplemental jurisdiction over the remaining
26 state law claims which are dismissed without prejudice to their presentation in a state court
27 action.

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1 **IV. CONCLUSION**

2 The Court concludes that Plaintiffs' federal claim for nuisance is barred by the political
3 question doctrine and for lack of standing under Article III. Accordingly,

4 IT IS HEREBY ORDERED THAT Defendants' motions to dismiss for lack of
5 jurisdiction are GRANTED. The remaining motions to dismiss are DENIED as moot.
6 Plaintiffs' state law claims are dismissed without prejudice to refile in state court. The Clerk
7 shall close the file and terminate all pending matters.

8 IT IS SO ORDERED.

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10 Dated: September 30, 2009


SAUNDRA BROWN ARMSTRONG
United States District Judge

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