PRODUCTIVE PUBLIC NUISANCE: HOW PRIVATE INDIVIDUALS CAN USE PUBLIC NUISANCE TO ACHIEVE ENVIRONMENTAL OBJECTIVES

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From removing foul smelling pigsties from urban areas to preventing the dumping of toxic waste into local water supplies, the law has long been used to address environmental issues of all kinds. Threats to public health and the environment remain some of the most urgent challenges facing society today and far outweigh the resources of the governmental institutions charged with protecting our environment. Therefore, it is increasingly incumbent upon concerned private citizens to address the environmental issues that matter most to their local communities. This Note explores how public nuisance lawsuits may be a powerful mechanism for private individuals to achieve such environmental objectives. It reviews the historical development of public nuisance law, analyzes each element of the cause of action to identify major questions that arise in the environmental context, and offers solutions to those questions. The Note concludes by applying the cause of action to an environmental issue of particular concern to residents of Central Illinois: the ongoing polluting of Illinois's only National Scenic River by coal ash depositories located along its banks. Illinois residents may be especially well-placed to utilize public nuisance suits to achieve environmental objectives due to a provision in the Illinois Constitution that grants its citizens a right to a healthful environment.

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I. INTRODUCTION

The proliferation of environmental issues in today's world, including climate change,[1] rising sea levels,[2] and pollution from coal-burning power plants,[3] to name just a few, means society is faced with a plethora of serious and time-sensitive environmental challenges. Indeed, hardly a day goes by in which an environmental issue is not a headline story in the news.[4] Moreover, governments and other public institutions charged with addressing these issues are often unable to do so due to a lack of funding,[5] the hostile political climate,[6] and limitations on management.[7]

The election of Donald J. Trump as the forty-fifth president of the United States[8] suggests that substantial barriers to achieving environmental objectives are likely to increase.[9] For example, Scott Pruitt, Trump's appointment to Administrator of the Environmental Protection Agency (EPA), was an outspoken critic of the very agency that he now leads.[10] In his former position as Oklaho-

1. Patrick Lynch, *2016 Climate Trends Continue to Break Records*, NASA (July 19, 2016), http://www.nasa.gov/feature/goddard/2016/climate-trends-continue-to-break-records.

2. *Is Sea Level Rising? Yes, Sea Level Is Rising at an Increasing Rate*., NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://oceanservice.noaa.gov/facts/sealevel.html (last visited Aug. 29, 2018).

3. *Learn About Carbon Pollution from Power Plants*, EPA (Jan. 19, 2017), https://19january2017snapshot.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants_.html.

4. *See, e.g.*, Damien Cave & Justin Gillis, *Large Sections of Australia's Great Reef Are Now Dead, Scientists Find*, N.Y. TIMES (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/science/great-barrier-reef-coral-climate-change-dieoff.html; Michael Hawthorne, *Petcoke Piles Gone, but Another Dangerous Pollutant Discovered in the Air*, CHI. TRIB. (Feb. 21, 2017, 7:03 AM), http://www.chicagotribune.com/news/local/breaking/ct-manganese-pollution-chicago-met-20170218-story.html; Adam Nagourney, Jack Healy & Nelson D. Schwartz, *California Drought Tests History of Endless Growth*, N.Y. TIMES (Apr. 4, 2015), https://www.nytimes.com/2015/04/05/us/california-drought-tests-history-of-endless-growth.html.

5. *See, e.g.*, John O'Connor, *Illinois Budget Crisis Affecting Fuel Cleanup*, ASSOCIATED PRESS (Apr. 8, 2016), http://bigstory.ap.org/article/860b771d41e84c4dade4c5eb83609225/illinois-budget-crisis-affecting-fuel-cleanup.

6. *See, e.g.*, Sylvia Mathews Burwell, *Impacts and Costs of the Government Shutdown*, WHITE HOUSE (Nov. 7, 2013, 3:38 PM), https://obamawhitehouse.archives.gov/blog/2013/11/07/impacts-and-costs-government-shutdown.

7. *See, e.g.*, Brady Dennis, *Trump Taps Climate-Change Skeptic to Oversee EPA Transition*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/11/meet-the-man-trump-is-relying-on-to-unravel-obamas-environmental-legacy/?utm_term=.c640648b8370; Wes Enzinna, *Army Halts Construction of Dakota Access Pipeline—for Now*, MOTHER JONES (Nov. 15, 2016), http://www.motherjones.com/environment/2016/11/army-corps-dakota-access-pipeline-trump ("One of Trump's key energy advisers is North Dakota Rep. Kevin Cramer, who has encouraged him to dismantle key aspects of the Clean Water Act, which gives the Army Corps and the Environmental Protection Agency authority to regulate the nation's waterways and wetlands.").

8. Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), http://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html.

9. Steven Mufson & Brady Dennis, *Trump Victory Reverses U.S. Energy & Environmental Priorities*, WASH. POST (Nov. 9, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/09/trump-victory-reverses-u-s-energy-and-environmental-priorities/?utm_term=.696d4a04a220.

10. Scott Detrow, *Scott Pruitt Confirmed to Lead Environmental Protection Agency*, NPR (Feb. 17, 2017, 1:22 PM), http://www.npr.org/2017/02/17/515802629/scott-pruitt-confirmed-to-lead-environmental-protection-agency.

ma's attorney general, Pruitt shared close ties with major oil and gas producers[11] and "led legal challenge after legal challenge against EPA regulations, even describing himself in his official biography as 'a leading advocate against the EPA's activist agenda.'"[12] Other senior Trump advisors have also advocated scaling back important environmental legislation, such as the Clean Water Act.[13] Moreover, Trump himself has called climate change a "hoax" and declared his intention to dismantle the EPA "in almost every form."[14] Indeed, in his first weeks in office, Trump signed an executive order aimed at rolling back the "Waters of the United States" rule designed to curb the flow of pollution into major bodies of water,[15] and plans to unravel a number of Obama-era climate change initiatives in a similar manner.[16] In addition, his initial 2018 budget proposal calls for cutting the EPA's overall budget by at least 25% and staffing by around 20%.[17] Novel and creative strategies to combat pressing environmental issues are essential in such a hostile political environment.

One particular environmental issue that warrants immediate attention is pollution from coal burning power plants in the state of Illinois. Ash from coal-burning power plants in the Midwest is often deposited in coal ash pits located near vital bodies of water, including the Middle Fork of the Vermilion River,[18] the only river in Illinois to be designated a National Scenic River.[19] This coal ash contains numerous heavy metals, such as mercury, arsenic, selenium, chromium, iron, lead, manganese and cadmium, all of which are toxic to both humans and wildlife.[20] Although in decline, coal continues to be a significant

11. Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was in Arm with Industry*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.
html?_r=0.

12. Detrow, *supra* note 10.

13. Tiffany Stecker, *Cramer to Trump: 'Tackle the Clean Water Act'*, ENV'T & ENERGY PUB. (May 24, 2016), http://www.eenews.net/stories/1060037749.

14. Coral Davenport, *Donald Trump Could Put Climate Change on Course for 'Danger Zone'*, N.Y. TIMES (Nov. 10, 2016), http://www.nytimes.com/2016/11/11/us/politics/donald-trump-climate-change.html.

15. Sabrina Siddiqui, *Latest Trump Executive Order Aims to Dismantle Obama's Clean Water Rule*, GUARDIAN (Feb. 28, 2017, 4:14 PM), https://www.theguardian.com/us-news/2017/feb/28/clean-water-rule-trump-executive-order-hbcus.

16. Coral Davenport, *E.P.A. Head Stacks Agency with Climate Change Skeptics*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/us/politics/scott-pruitt-environmental-protection-agency.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

17. Timothy Gardner & Valerie Volcovici, *Trump's EPA Budget Proposal Targets Climate, Lead Cleanup Programs*, REUTERS (Mar. 2, 2017, 3:53 PM), http://www.reuters.com/article/us-usa-trump-epa-budget-idUSKB
N1692XA.

18. Michael Hawthorne, *Toxic Waste from Coal Ash Pits Leaching into Illinois' Only National Scenic River*, CHI. TRIB. (Jan. 31, 2018, 12:40 PM), http://www.chicagotribune.com/news/ct-met-illinois-scenic-river-coal-pollution-20180130-story.html [hereinafter Hawthorne, *Toxic Waste from Coal Ash Pits*].

19. *Designated Rivers: Illinois*, NAT'L WILD & SCENIC RIVERS SYS., https://www.rivers.gov/illinois.php (last visited Aug. 29, 2018).

20. Hawthorne, *Toxic Waste from Coal Ash Pits*, *supra* note 18.

energy source both nationally and internationally.[21] In Illinois alone, coal-burning industries generate 4.4 million tons of coal ash every year, and as recently as 2009, twenty-two of the twenty-four coal-burning power plants in the state have caused groundwater contamination due to coal ash.[22] Illinois also leads the nation in coal ash damage cases.[23]

Public nuisance suits are a powerful remedy for dealing with environmental issues, but they are poorly understood.[24] Public nuisance suits brought by private individuals, rather than governmental entities, may be an especially potent mechanism in the environmental context.[25] Illinois residents seem particularly well-placed to use public nuisance suits in this way because of Article XI of the Illinois Constitution, which provides individuals with a broad "right to a healthful environment."[26]

This Note examines the elements of a public nuisance cause of action and explores how it can be used by private individuals to achieve environmental objectives. Part II reviews the historical development of public nuisance law, why it is poorly understood, and how it has been applied in the environmental context in the past. Part III analyzes the elements of the public nuisance cause of action, clearly identifying the major questions that arise in the environmental context while taking note of significant decisions. Part IV offers solutions to the major questions identified in the analysis and demonstrates how public nuisance suits may be used by private individuals to effectively address a specific environmental issue: the presence of coal ash depositories along the Middle Fork of the Vermilion River in Illinois.

II. BACKGROUND

Part II of this Note presents an overview of public nuisance law. First, it introduces the cause of action in Section II.A. Next, in Section II.B, it briefly describes the historical development of public nuisance, including its medieval origins and its evolution into the hybrid criminal/civil tort that it is today. Section II.C explores the relationship between the related although distinct public nuisance and private nuisance causes of action, and Section II.D examines how public nuisance has been applied in the environmental context in the past. Finally, Section II.E provides a summary of Article XI of the Illinois Constitution.

21. Jill U. Adams, *Energy and Climate Change: Can U.S., Nations Meet Emissions Goals?*, CQ RESEARCHER (June 15, 2016), http://library.cqpress.com/cqresearcher/document.php?id=cqr_ht_climate_change_2016&abstract=false.

22. *Coal Ash*, PRAIRIERIVERSNETWORK, https://prairierivers.org/priorities/coal-ash/ (last visited Aug. 29, 2018).

23. *Id.*

24. Laura King, *Narrative, Nuisance, and Environmental Law*, 29 J. ENVTL. L. & LITIG. 331, 331–32 (2014).

25. *See id.* at 357.

26. ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

A. The Cause of Action

In the landmark Supreme Court decision *Village of Euclid v. Ambler Realty Co.*, Justice George Sutherland famously stated that "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[27] Justice Sutherland's witty observation provides a good platform to begin an exploration of the public nuisance cause of action because it introduces the more general concept of nuisance. A nuisance is generally defined as "[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property[.]"[28] Thus, something (a condition, activity, or situation) is not a nuisance in and of itself; it must interfere with some other thing.[29] To use Justice Sutherland's analogy, a pig may be a nuisance if it is found in a parlor, a classroom, or a plethora of other locations where one would not expect or desire to encounter a pig.[30] Nevertheless, a pig is likely not a nuisance if it is found in a barnyard, a forest, or, perhaps, a petting zoo.[31] Whether something is a nuisance, in other words, depends on the surrounding circumstances with which it interacts, and it can be either an action or an inaction.[32] Even then, it only becomes a nuisance when someone, after evaluating its interaction with those surrounding circumstances, deems it to be undesirable or inappropriate.[33] Historically, the surrounding circumstances which determined whether or not something was a nuisance were typically defined as property rights.[34] Therefore, the law of public nuisance is essentially a common law property rule.[35] Public nuisance law, however, is not limited to disputes arising out of property and land use.[36] Over time, the law acknowledged that a nuisance may interfere with a variety of nonproprietary rights or interests,[37] and these can be either private or public in nature. Thus, for a *public* nuisance to exist, there must be an interference with a *public* right or interest.[38]

The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."[39] The Restatement then presents circumstances in which an interference with a public

27. 272 U.S. 365, 388 (1926).

28. *Nuisance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

29. *Id.* ("Liability might or might not arise from the condition or situation.").

30. *Vill. of Euclid*, 272 U.S. at 388.

31. *See id.*

32. *Nuisance*, *supra* note 28.

33. *Id.*

34. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966).

35. ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 197 (2012).

36. *Id.* at 219.

37. Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 50 (1979) ("The first step in the inquiry is the identification of the plaintiff's protected interest."); Prosser, *supra* note 34, at 1004 ("Nuisance, in short, is not conduct, nor is it even a condition. It is the invasion of an interest, a type of harm or damage, through any conduct which falls within the three traditional categories of liability.").

38. *Public Nuisance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

39. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979).

right may be unreasonable,[40] including the following: conduct that causes a significant interference with the public health, safety, peace, comfort, or convenience;[41] conduct that is proscribed by a statute, ordinance, or administrative regulation;[42] and conduct of a continuing nature that affects or that has produced a permanent or long-lasting effect, which the actor knows or has reason to know interferes with the public right.[43] For example, the release of pollutants that threaten the public health may rise to the level of an actionable public nuisance.[44] Likewise, the conduct of business that emits unpleasant odors may disturb the public comfort and be deemed a public nuisance.[45] Indeed, public nuisance has covered disputes ranging from the keeping of diseased animals to waging unlicensed prizefights to using profanity in a public place.[46]

Public nuisance differs from private nuisance in that the alleged unlawful conduct does not interfere with a right exclusive to an individual but with a right common to the general public.[47] To illustrate, consider the following situations in which a tree falls across a roadway. If a tree on one property falls across the driveway of a neighboring property, thereby blocking access to that property, it is an example of a private nuisance.[48] The fallen tree interferes with the neighboring property owner's right to use and enjoy his or her property—a right that is enjoyed exclusively by that particular property owner.[49] If, on the other hand, the tree falls across a public road, thereby blocking travelers from passing, it would be an example of a public nuisance.[50] In this instance, the fallen tree interferes with the public right of way: a right that is enjoyed by all members of the public generally.[51] Therefore, what determines whether a nuisance is private or public is ultimately whether the right with which it interferes is private or public in nature. A nuisance may be both private and public at the same time depending on the interests with which it interferes.[52]

40. *Id.* § 821B(2).

41. *Id.* § 821B(2)(a).

42. *Id.* § 821B(2)(b).

43. *Id.* § 821B(2)(c).

44. *See, e.g.*, United States v. Colgate-Palmolive Co., 375 F. Supp. 962, 967 (D. Kans. 1974).

45. *See, e.g.*, City of Ft. Smith v. W. Hide & Fur Co., 239 S.W. 724, 726 (Ark. 1922).

46. Prosser, *supra* note 34, at 1000–01.

47. Matthew Hoffman, Abbey Hudson & Sheldon Evans, *Recent Trends in Environmental Nuisance Law*, LAW 360, https://www.gibsondunn.com/wp-content/uploads/documents/publications/Hoffman-Hudson-Evans-Recent-Trends-In-Environmental-Nuisance-Law-Law360-11-17-2015.pdf (last visited Aug. 29, 2018) ("Whereas a private nuisance interferes with rights exclusive to an individual, a public nuisance is an 'unreasonable interference with a right common to the general public.'").

48. KATHLEEN HOKE & MATHEW R. SWINBURNE, NETWORK FOR PUB. HEALTH LAW, OVERVIEW OF NUISANCE LAW 1, https://www.apha.org/~/media/files/pdf/factsheets/overview_of_nuisance_law_factsheet.ashx (last visited Aug. 29, 2018).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id. See, e.g.*, Taylor v. Culloden Pub. Serv. Dist., 591 S.E.2d 197, 206 (W. Va. 2003) (holding that downstream landowners may maintain actions for both private and public nuisance where pollution discharges interfere with plaintiffs' use and enjoyment of land and with public's right to clean water).

Public nuisance is a matter of state law,[53] although there have been efforts to bring claims under federal common law.[54] Traditional formulations of public nuisance included amorphous descriptions, such as any unreasonable interference with a right held in common by the public "in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."[55] In Illinois, a public nuisance is 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."[56] Definitions like these demonstrate the cause of action's "vague" and "indeterminate" standards,[57] and may explain why the cause of action is not well understood to this day. Indeed, as Justice Blackmun once commented, "one searches in vain . . . for anything resembling a principle in the common law of nuisance."[58]

Today, courts often apply the cause of action in a formulaic manner, often as containing a variable number of common elements.[59] In Illinois, for example, a "pleading must allege facts in support of the following four distinct elements of a public nuisance claim: (1) the existence of a public right; (2) a substantial and unreasonable interference with that right by the defendant; (3) proximate cause; and (4) injury."[60] This Note will utilize the Illinois formulation, which incorporates the requirements common to all jurisdictions,[61] in order to explore each element in greater detail in Part III. Before doing so, however, this Note will examine the historical development of the cause of action into its current form.

B. A Brief History of Public Nuisance Law

In order to understand public nuisance law, it is essential to examine the historical context from which it developed. "Public nuisance emerged . . . in an 'unpoliced and unregulated society, in which local government was rudimentary or non-existent', taking on a regulatory aspect long before regulation was

53. Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2001).

54. *See, e.g.*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 415, 423 (2011) (holding that the Clean Air Act and the Environmental Protection Agency action the Act authorizes displace the plaintiffs' common law public nuisance claims); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012) (holding that the Clean Air Act and the Environmental Protection Agency action the Act authorizes displace Kivalina's common law public nuisance claims).

55. Copart Indus. v. Consol. Edison Co. of N.Y., 362 N.E.2d 968, 971 (N.Y. 1977) (internal citations omitted) (citing N.Y. Trap Rock Corp. v. Clarkstown, 85 N.E.2d 873, 875 (N.Y. 1949); Melker v. City of New York, 83 N.E. 565, 567 (N.Y. 1908)).

56. City of Chi. v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1133 (Ill. 2004) (quoting Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 834 (Ill. 1981).

57. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987).

58. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

59. *See, e.g.*, State v. Lead Indus., Ass'n, 951 A.2d 428, 446–47 (R.I. 2008).

60. Burns v. Simon Props. Grp., LLP, 996 N.E.2d 1208, 1212 (Ill. App. Ct. 2013).

61. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

assumed to be an important and proactive government responsibility."[62] Indeed, many offenses that would have previously been prosecuted as a public nuisance are now criminal offenses.[63] Nevertheless, a public nuisance may also be a tort, providing plaintiffs with a civil action to address offenses not codified in a statute.[64]

1. The Origins of Nuisance

The word "nuisance" is key to much of the history behind the common law public nuisance cause of action.[65] "Nuisance" has both a general and a technical meaning, depending on the context in which it is used.[66] In common parlance, it retains its original meaning of "no more than 'harm.'"[67] It developed, however, a technical meaning in the earliest days of English common law beginning with the Writ of Right, a remedy for a freeholder dispossessed from his land.[68] The Writ of Right eventually transformed into the more efficient Assize of Novel Disseisin which still provided a remedy for a freeholder dispossessed from his land but did nothing for one prevented from using his land.[69] To address this issue, the Assize of Nuisance—so named due to the use of *nocumentum*, the dog-Latin word from which "nuisance" is derived[70]—developed as a variant of the Assize of Novel Disseisin.[71] At this point, the word "nuisance" began to mean a particular type of harm, namely an interference with occupation of land short of actual dispossession.[72] In other words, a "nuisance" was "an interference with the use or enjoyment of land . . . distinguished from disseisin in that the plaintiff was not dispossessed, and from trespass in that

62. Maria Lee, *Personal Injury, Public Nuisance, and Environmental Regulation*, 20 KING'S L. J. 129, 131 (2009) (U.K.).

63. *Id.*

64. Prosser, *supra* note 34, at 997.

65. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 56 (1989) (U.K.).

66. *Id.*

67. *Id.* ("The word originally meant no more than 'harm.' In a sense it was the antithesis of 'trespass.' Trespass originally meant wrongdoing, and nuisance meant the same thing, but viewed from the receiving end.").

68. *Id.*

69. *Id.*

> A person might block his entrance and stop him getting in, or stop him using the right of way he must use to get to it; or he might dam a nearby river to get water-power and accidentally flood him out—a recurrent situation before the birth of the steam age.

Id.

70. *Nocumentum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

71. Spencer, *supra* note 65, at 56–57.

> Whereas in the case of dispossession the legal form in which the complaint was cast was "*Questus est mihi N. quod R. iniuste et sine iudicio desaisivit eum de libero tenemento suo . . .*"—"N. has complained to me that R. unjustly and without a judgment has disseised him of his freehold . . .", the formula where the defendant had merely prevented the plaintiff from using his land was this: "*Questus est mihi N. quod R. iniuste at sine iudicio exaltavit stagnum molendi sui in illa villa ad nocumentum liberi tenementi sui in eadem villa . . .*"—"N. has complained to me that R. unjustly and without a judgment has raised the level of his mill-pond in such a vill to the nuisance (i.e. harm) of his freehold in the same vill . . .".

Id.

72. *Id.* at 57.

there was no entry, the defendant's acts occurring outside of the land."[73] The Assize of Nuisance "was a criminal writ, affording incidental civil relief."[74]

Matters covered by the Assize of Nuisance expanded over the following centuries until it was replaced altogether with the "action on the case for nuisance."[75] At this point, not only was behavior which made an individual's land uninhabitable subject to the cause of action, but also behavior that merely rendered it less convenient, such as blocking the light to windows.[76] By the seventeenth century, the word "nuisance" had come to mean an "interference with an occupier's use and enjoyment of land, or his rights over or in connection with it."[77] Because it was limited to interference with the use or enjoyment of rights in land, the "action on the case for nuisance" became the predecessor of modern private nuisance law.[78] While these developments clearly addressed interference with *private* rights, what mechanisms developed to address interference with *public* rights?[79]

2. The Birth of Public Nuisance

Fundamentally, the concept of public nuisance was "a judicial response to community conflicts caused by changing land use patterns and social conditions."[80] As the concept of private nuisance developed, much of the conduct it targeted naturally offended the community in general in addition to individual private landowners, and the concept of "common nuisance" was born.[81] The terminology changed to "public nuisance" when the word "common" began to mean "ordinary" rather than "of the community."[82] At this point in history, acts that were considered to have been committed against the community in general, such as blocking the highways or waterways, were criminal matters for the King's local criminal courts.[83] Therefore, when first introduced, public nuisance was an infringement of the rights of the Crown and typically involved encroachments upon the royal domain or the public highway.[84] These cases

73. Prosser, *supra* note 34, at 997.

74. *Id.* at 997–98.

75. Spencer, *supra* note 65, at 57.

76. *Id.*

77. *Id.*

78. Prosser, *supra* note 34, at 998.

79. Spencer, *supra* note 65, at 58.

> When Bracton thought of *nocumenta*, the stopping up of private rights of way was in the forefront of his mind. This inevitably led him to think what the legal position was where a *public* right of way was stopped. This he describes as "*nocumentum iniuriosum propter communem et publicam utilitatem*"—a legal nuisance by reason of the common and public welfare . . . .

Id.

80. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767 (2001).

81. Spencer, *supra* note 65, at 58 ("When the concept of private nuisance later grew to include stinking neighbours [sic] out with pigs as well as flooding them and blocking up their access, the writers naturally added to their discussion of obstructing the highway a sentence or two on depasturing [sic] pigs in city streets . . . .").

82. *Id.*

83. *Id.*

84. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST. 1979).

were redressed in criminal suits, known as "purprestures,"[85] brought by the King.[86] Thus, public nuisance was essentially "a police-power based remedy for interference with rights of the sovereign."[87]

Over time, common law public nuisance expanded to cover a wide range of minor criminal offenses involving some degree of interference with the interests of the general public.[88] For example, keeping diseased animals or maintaining ponds where mosquitos breed interfere with the public health.[89] Storing explosives in heavily populated areas or shooting fireworks in public streets interferes with the public safety.[90] Houses of prostitution or indecent exhibitions interfere with the public morals.[91] Loud and disturbing noises interfere with the public comfort.[92] Bad odors, dust, and smoke interfere with the public peace.[93] Finally, obstructing the public highways or waterways, perhaps the original public nuisance,[94] interferes with the public convenience.[95]

It is important to note that these interferences with the interests of the community at large were not criminal in and of themselves but were unreasonable enough to be considered a criminal offense.[96] Indeed, "[p]ublic nuisance has a 'catch all' character that criminalises [sic] behaviour [sic] not explicitly dealt with in statute or discrete common law offences [sic]."[97] Thus, at this time, public nuisance essentially referred to the power of the courts to punish behavior deemed to be harmful to the public regardless of whether such behavior was previously thought to be criminal.[98] While conduct that affected an individual was a matter for the common law courts, conduct that affected the entire community was exclusively a matter for the local criminal courts.[99] The remedy remained a criminal one in the hands of the Crown[100] or, in other words, the governmental public plaintiff.[101]

3. Private Action for Public Nuisance

By the sixteenth century, an individual who had suffered a special damage from a common nuisance was allowed to bring an action on the case for nui-

85. Antolini, *supra* note 80, at 762.
86. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST. 1979).
87. Antolini, *supra* note 80, at 767.
88. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. LAW INST. 1979).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. Lee, *supra* note 62, at 131.
98. Spencer, *supra* note 65, at 63.
99. *Id.* at 59.
100. RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (AM. LAW INST. 1979).
101. Antolini, *supra* note 80, at 768–69.

sance,[102] thus recognizing a separate civil or common law public nuisance tort "enforceable both by the government and qualified private plaintiffs."[103] While initially restricted to recovering damages, by the late eighteenth and early nineteenth centuries, private citizens were afforded the opportunity to obtain an injunction to halt a public nuisance, heretofore a remedy only available to the attorney general in criminal public nuisance proceedings.[104] This partial sharing of the right of the sovereign with private citizens accelerated as "conflicts among land uses and adverse external effects that impinged on the property rights of nearby residents and on the basic quality-of-life 'rights' (e.g., open waterways, clear roads, wholesome air, and civil society) enjoyed by neighbors and the general public" increased with the dawn of urbanization and the Industrial Revolution.[105] Indeed, it was during this time period that prosecutions in criminal courts were replaced by injunctions issued in civil courts as the primary means of dealing with public nuisance, due in large part to the increasing role of industry in spreading pollution.[106]

To address industrial activity that threatened public health, public safety, and public enjoyment, plaintiffs frequently sought prevention of repeat performance rather than punishment of the defendant's conduct.[107] An injunction against a public nuisance was not only usually a plaintiff's desired relief but also allowed plaintiffs to address the activity of corporations, at that time regarded as incapable of committing a criminal offense.[108] Thus, "[n]uisance provided a flexible judicial remedy to address these conflicts between land use and social welfare, and, surprisingly, plaintiffs often won their individual legal battles against the relentless march of social and economic progress."[109]

Public nuisance, in both its criminal and civil forms, was eventually incorporated by the American states through common law and by statute.[110] Thus, broad statutes that criminalized activities deemed offensive to public health, safety, welfare, and morals, such as houses of ill-repute, unsanitary housing, and fireworks, were enforced by the governmental public plaintiff.[111] Civil public nuisance suits, on the other hand, were enforceable by both the government and qualified private plaintiffs, namely victims of a public nuisance that had suffered a "special" or "peculiar" injury.[112] "Most early statutes simply codified the common law proscription against maintaining a public nuisance without attempting to define public nuisance, or at best defined it in very general terms."[113] In addition to incorporating conduct that had been deemed a

102. Spencer, *supra* note 65, at 59.
103. Antolini, *supra* note 80, at 769.
104. Spencer, *supra* note 65, at 68–69.
105. Antolini, *supra* note 80, at 767–68.
106. Spencer, *supra* note 65, at 70.
107. *Id.*
108. *Id.*
109. Antolini, *supra* note 80, at 768.
110. *Id.*
111. *Id.* at 768–69.
112. *Id.* at 769.
113. FREYFOGLE & KARKKAINEN, *supra* note 35, at 221.

public nuisance in English common law, these statutes declared additional categories of activities to be public nuisances.[114] When activity violates a statutory public nuisance, liability is absolute, and the violator has few defenses.[115]

Beyond such statutory proscriptions, however, "*any* activity that unreasonably interferes with a right held in common by the public generally may be held to be a public nuisance. Thus, the contemporary common law tort of public nuisance is open-ended, as indeed are most torts."[116] To summarize, the modern cause of action may address conduct that violates a criminal statute as well as nonstatutory conduct that is determined through common law judicial principles to interfere with any right shared by the general public.[117] In other words, public nuisance retains the criminal/civil hybrid character that was key to much of its historical development.[118] This Note will focus primarily on the civil or common law form of public nuisance, as it advocates the use of public nuisance by private individuals.

C. Public Nuisance vs. Private Nuisance in Modern Society

Although already introduced briefly,[119] it is worthwhile to explore in greater detail the distinction between public nuisance and private nuisance, particularly with respect to how the causes of action are viewed in modern times. While public and private nuisance are similar in that both may limit how one uses land, each is a distinct cause of action, available to differently situated parties.[120] Indeed, in *Prosser and Keeton on Torts*, the authors went so far as to say that public and private nuisance "have almost nothing in common."[121]

As noted previously, public nuisance primarily differs from private nuisance in that the alleged unlawful conduct does not interfere with a right exclusive to an individual, but with a right common to the general public.[122] Whereas a tree that blocks access to a private driveway—a right exclusive to the property owner—may be deemed a *private* nuisance, a tree that blocks a public high-

114. *Id.*

> Over the years, state (and sometimes municipal) legislative enactments declared additional categories of noxious land uses or other activities to be public nuisances, such as bawdy houses, drug dens, hogpens in urban areas, the keeping of diseased animals, malarial ponds, unsafe storage of explosives or fireworks, illegal liquor establishments, gaming houses, unlicensed prizefights, public profanity, disruption of the public peace by loud and disturbing noises, and so on.

Id.

115. *Id.*

116. *Id.*

117. Prosser, *supra* note 34, at 1000 ("Apart from such specific designation, the crime comprehends a very miscellaneous and diversified group of petty offenses, all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public.").

118. Antolini, *supra* note 80, at 776.

119. *See supra* Section II.A.

120. FREYFOGLE & KARKKAINEN, *supra* note 35, at 198.

121. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 618 (5th ed. 1984).

122. Hoffman, Hudson & Evans, *supra* note 47 ("Whereas a private nuisance interferes with rights exclusive to an individual, a public nuisance is an 'unreasonable interference with a right common to the general public.'").

way—a right common to any member of the public that uses the highway—may be deemed a *public* nuisance.[123] Similarly, the pollution of a stream which only affects riparian owners and their private interests in the stream is a private nuisance, but it becomes a public nuisance once it kills any fish, the ownership of which is enjoyed by the public generally.[124]

Public and private nuisance also differ in who may bring each cause of action.[125] While a private nuisance may be brought by individual landowners based on an unreasonable interference with *their* right to enjoy *their* land, a public nuisance may be brought by anyone who can show a special injury arising from an unreasonable interference with a public right, regardless of whether that person is a landowner or has the legal right to occupancy of land.[126] Moreover, public officials, such as an attorney general, may bring a public nuisance claim on behalf of the public.[127] In fact, the majority of public nuisance lawsuits were historically brought by governmental officials exercising sovereign police power authority,[128] be it the city attorney, the county attorney, or the state's attorney general.[129] This tendency to rely on enforcement of public nuisance by public officials may be one reason why public nuisance law is generally not well understood.[130]

Nevertheless, private citizens may also bring a public nuisance claim, essentially allowing them to act as a "quasi-private attorney general" to redress an injury that is shared by the community.[131] This ability, however, is constrained by the requirement that the plaintiff must suffer "special or peculiar injuries different in kind, not merely in degree, from the injury to the public at large."[132] Known as the "special injury rule," this doctrine limits who can bring an action to redress an injury suffered by all members of the public by requiring the plaintiff to show that he or she has suffered a "special" or "peculiar" injury, defined as "different-in-kind" and not just "different-in-degree" from the general public who might also be affected.[133] The special injury rule and its paradoxical relationship with the enforcement of public nuisance, indeed public rights in general, will be discussed in greater detail in Subsection III.D.1.

To summarize, "[t]he key element to a *public* nuisance claim, in contrast to a *private* nuisance claim, then, is that the annoyance, inconvenience, or injury must be to a *public* right or interest (*e.g.*, a public road or beach), not just a

123. *Id.*

124. Prosser, *supra* note 34, at 1001.

125. FREYFOGLE & KARKKAINEN, *supra* note 35, at 198.

126. *Id.*

127. *Id.*

128. F. William Brownell, *State Common Law of Public Nuisance in the Modern Administrative State*, 24 NAT. RESOURCES & ENV'T, Spring 2010, at 34.

129. HOKE & SWINBURNE, *supra* note 48.

130. *Id.*

131. James B. Witkin, *Common Law Causes of Action for Environmental Claims*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS 35 (James B. Witkin ed., 4th ed. 2011).

132. *Id.*

133. Antolini, *supra* note 80, at 761.

private one."[134] Moreover, a public nuisance action may be brought by either a public official or a private citizen, whereas a private nuisance action is only available to a private landowner or someone who has a legal right to occupancy of land.[135]

D. Public Nuisance Law in the Environmental Context

Nuisance has been described as "the 'tort of choice' for plaintiffs in environmental and toxic tort litigation."[136] Indeed, air pollution was considered a nuisance as early as 1611, when a hog sty was determined to have "corrupt[ed]" and "infect[ed]" the air.[137] Moreover, the local criminal courts that originally dealt with "common nuisances," known as "the court leet," were limited to punishing misconduct harmful to the community, much of which included pollution from noxious trades.[138] While public nuisance has historically been used in the environmental context,[139] most nuisance actions that arise in environmental litigation today are private nuisance claims.[140] Nevertheless, public nuisance remains a potent mechanism for dealing with environmental issues and "has experienced a renaissance in the area of environmental law" in recent years.[141]

As noted previously, public nuisance has undergone a significant evolution over a long period of time.[142] Traditional formulations, such as "obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law,"[143] were extended over time to cover other invasions of general public rights highly valued in modern society, such as public decency, quiet neighborhoods, pollution-free air, and clean waterways.[144] Much of this change occurred during the Industrial Revolution, when enormous population and industry growth "necessarily jeopardized the unencumbered use of property," and the legal system struggled to "satisfy the needs of society and justify the curtailment of property owners' and possessors' rights."[145] Natural re-

134. *Id.* at 771.

135. FREYFOGLE & KARKKAINEN, *supra* note 35, at 198.

136. Hoffman, Hudson & Evans, *supra* note 47 ("Nuisance has increasingly become the 'tort of choice' for plaintiffs in environmental and toxic tort litigation.").

137. William Aldred's Case (1611) 77 Eng. Rep. 816, 817; 9 Coke 57b, 58b.

138. Spencer, *supra* note 65, at 60.

> The leet [] dealt with pollution from noxious trades: for example, washing hemp or flax in streams or ponds used for watering cattle. It also fined those who let animals wander suffering from the scab, and victuallers who sold unwholesome food; fine purveyors who sold short measure or broke the assize of bread and ale; punished those who caught immature fish or hunted out of season; and put down bawdy-houses, disorderly ale-houses, night-walkers, eavesdroppers and common scolds.

Id.

139. *See, e.g.*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 410 (2011).

140. Witkin, *supra* note 131, at 31.

141. Brownell, *supra* note 128.

142. *See supra* Subsection II.B.1.

143. Prosser, *supra* note 34, at 31.

144. Antolini, *supra* note 80, at 770.

145. Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 764 (1979).

sources and a healthy environment, in other words, became scarcer and thus more valuable at this time, and public nuisance was one of the primary mechanisms the legal system provided for resolving conflicts among competing interests regarding their use and enjoyment.[146]

Many of the invasions of public rights covered by public nuisance law are evidently environmental in nature.[147] From air pollution caused by emissions from coal-fired power plants,[148] to the contamination of groundwater due to the operation of a factory or plant,[149] environmental issues almost inevitably involve public rights.[150] Thus, these issues are prime subjects to be dealt with through public nuisance litigation. Indeed, the very concept of pollution necessitates a violation of, or interference with, the rights of another.[151] If an actor "pollutes" but the activity does not interfere with any rights or interests other than his or her own, then the "polluting" activity cannot be said to be "pollution."[152] While pollution may interfere with a private interest by impinging on another's private land, for example, it will often interfere with a public interest, such as the public health, safety, or comfort. In the modern environmental context, public nuisance has been used to challenge a variety of activities that interfere with public rights in much the same way, including "leather tanning operations, parks in disrepair, noisy campers, shopping centers, helicopters, buildings, polluting vehicles, plants, airports, dumps, and interference with viewplanes [sic] and sunlight."[153]

Furthermore, public nuisance law is widely regarded as the precursor to the enactment of federal environmental statutory regimes,[154] such as the Clean Air Act,[155] the Clean Water Act,[156] and the Endangered Species Act,[157] in the 1970s.[158] Prior to the modern era of social legislation, public nuisance played an important role in protecting the public against injury, including injuries of an environmental nature.[159] Indeed, "[n]uisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation . . . ."[160] While comprehensive statutory

146. Antolini, *supra* note 80, at 767–68.

147. *Id.* at 770.

148. N.C., *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (4th Cir. 2010).

149. Phil. Elec. Co. v. Hercules, Inc., 762 F.3d 303, 316 (3d Cir. 1985).

150. *See, e.g.*, *N.C.*, ex rel. *Cooper*, 615 F.3d at 296; *Phil. Elec. Co.*, 762 F.3d at 316.

151. Antolini, *supra* note 80, at 768.

152. *See* Prosser, *supra* note 34, at 1001–02.

153. Antolini, *supra* note 80, at 770.

154. *See, e.g.*, E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 315 (1985).

155. Clean Air Act, 42 U.S.C. § 7401 (2012).

156. Clean Water Act, 33 U.S.C. § 1251 (2012).

157. Endangered Species Act, 16 U.S.C. § 1531 (2012).

158. J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 753 (2008).

159. Brownell, *supra* note 128, at 34.

160. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 112–13 (2d ed. 1994).

> [T]here is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions reach pollution of all physical media—air, water,

regimes have largely supplanted its use in combatting certain environmental harms, public nuisance has recently enjoyed a renaissance of sorts by performing a gap-filling function to supplement statutory environmental controls.[161] In fact, in recent years, plaintiffs have utilized public nuisance as a basis for argument over environmental issues ranging from climate change[162] and interstate air pollution[163] to environmental cleanups[164] and exposure to airborne contaminants.[165]

Environmental issues are prevalent in today's world, much like they were during the Industrial Revolution. Therefore, examining how public nuisance was used to confront such issues in the past is useful for predicting how it may be used in the future. In short, many environmental issues seem tailor-made for resolution by public nuisance, and the public nuisance cause of action may prove to be a powerful mechanism for private plaintiffs that wish to use it in such a way.[166]

E. Article XI of the Illinois Constitution

The current version of the Illinois Constitution became effective on July 1, 1971,[167] and it includes a novel provision granting all citizens "a right to a healthful environment."[168] Section One of Article XI provides that the "public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."[169] Section Two provides that "[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."[170] A brief examination of Article XI's drafting history reveals why this unique provision was included in the constitution.

land groundwater—by a wide variety of means. Nuisance actions have challenged virtually every major industrial and municipal activity that today is the subject of comprehensive environmental regulation . . . . *Id.*

161. Antolini, *supra* note 80, at 758.

162. Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 415 (2011).

163. N.C., *ex rel.* Cooper v. Tenn. Valley Auth., 615 F.3d 291, 296 (4th Cir. 2010).

164. N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., No. UNN-L-3026-04, 2008 WL 4177038 (N.J. Super. Ct. Law Div. Aug. 29, 2008).

165. Gates v. Rohm & Haas Co., No. 06-1743, 2008 WL 2977867, at *2 (E.D. Pa. July 31, 2008).

166. Antolini, *supra* note 80, at 776.

167. Ann Lousin, *The 1970 Illinois Constitution: Has It Made a Difference*, 8 N. ILL. U. L. REV. 571, 571 (1988).

168. *Id.* at 606.

169. ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.").

170. *Id.* § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

Drafted during the height of the environmental movement in the 1960s and 70s,[171] Article XI was designed to address the problem of environmental pollution by creating constitutional rights and duties concerning the environment.[172] The right to a "healthful environment" was determined to be "fundamental," and the constitutional expression of this right "provides the vehicle for the individual to prosecute a violator."[173] The drafters also intended that the provision "add practical significance" to the constitutional expression of the individual's right to a "healthful environment."[174] Furthermore, it was believed that individuals should "not be denied the opportunity to seek relief when so fundamental a right as that to a healthful environment is involved."[175] Thus, Article XI was drafted to address environmental pollution and encourage an environment conducive to human health.[176] It achieves these goals by providing individuals with the opportunity to combat environmental pollution[177] with existing legal mechanisms, such as public nuisance.

The Illinois Supreme Court has held that although it does not create any new causes of action, Article XI does away with the special injury standing requirement for environmental nuisance cases.[178] The Illinois Supreme Court has also held that the term "healthful environment" used in Article XI refers to the relationship between the environment and human health.[179] Thus, Illinois citizens appear to be particularly well-placed to bring public nuisance suits to address environmental issues that affect human health because they need not meet the special injury standing requirement,[180] one of the most substantial barriers that a private public-nuisance plaintiff must face.[181] In other words, Article XI provides Illinois citizens with a powerful and unique tool to protect public rights that have been injured by nuisance. Indeed, Article XI has been described as "striking, even daring, in [its] potential."[182] Nevertheless, despite becoming effective over forty years ago, Article XI has been underutilized, and its impact remains to be seen.[183]

171. *Earth Day Across America,* PBS, http://www.pbs.org/wgbh/americanexperience/features/earthdays/ (last visited Aug. 29, 2018).

172. Glisson v. City of Marion, 720 N.E.2d 1034, 1042 (Ill. 1999); RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 693, 695 (1969–1970).

173. RECORD OF PROCEEDINGS, *supra* note 172, at 693, 700.

174. *Id.* at 702.

175. *Id.*

176. *Glisson*, 720 N.E.2d at 1043.

177. *Id.*

178. City of Elgin v. Cty. of Cook, 660 N.E.2d 875, 891 (Ill. 1995).

179. *Glisson*, 720 N.E.2d at 1042.

180. *City of Elgin*, 660 N.E.2d at 891.

181. Antolini, *supra* note 80, at 759.

182. Lousin, *supra* note 167, at 607.

183. *Id.* at 606–07.

III. ANALYSIS

A private individual that brings an environmental public nuisance claim (a "private public-nuisance plaintiff") will inevitably encounter a number of complex and challenging issues.[184] These issues can generally be attributed to either uncertainty surrounding the use of public nuisance by private individuals or the unique nature of environmental nuisances.[185] Part III of this Note analyzes the common elements of a public nuisance cause of action in turn, clearly identifying the major issues that arise in the environmental context, while taking note of significant decisions.

First, a private public-nuisance plaintiff must prove both the existence of a public right and a substantial and unreasonable interference with that right by the defendant.[186] These closely related elements are considered in Section III.A and Section III.B, respectively. Section III.C discusses the challenges private public-nuisance plaintiffs face in establishing the element of proximate causation. The final element of the cause of action, harm, is analyzed in Section III.D. Special consideration is given to the questions of how one establishes individual standing when enforcing a public right and how courts deal with allegations of future injuries, both of which are especially pertinent to environmental nuisance suits. Because public nuisance provides successful plaintiffs with a variety of remedies—including injunctive relief, damages, and self-help—Section III.E explores these remedies and their associated strategic advantages. To conclude, Section III.F evaluates Article XI of the Illinois Constitution which may facilitate the use of environmental public nuisance suits by Illinois residents given its past treatment in courts.

A. The Existence of a Public Right

The first element that a plaintiff must establish when alleging a public nuisance is the existence of a public right.[187] A number of specific rights shared by the members of a community have long been recognized as public rights for the purposes of public nuisance.[188] Most of these rights are closely related to maintaining a safe and healthy environment.[189] Before exploring these rights and their relation to environmental nuisances, however, it is instructive to consider what may appear to constitute a public right but, in fact, does not.

"Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right . . . common to all members of the general public."[190] Accordingly, it is not necessary that an entire community be

184. Antolini, *supra* note 80, at 757–58.
185. *Id.* at 774.
186. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).
187. *Id.*
188. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4(2) J. TORT L., 1, 9 (2011).
189. *Id.*
190. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).

affected by a public nuisance or even a substantial number of people.[191] Instead, it may only affect those who exercise the public right with which it interferes or otherwise some interest of the community at large.[192] In the previous example of the fallen tree,[193] the tree that has fallen across a public highway may inconvenience only those who are travelling upon it.[194] Nevertheless, the right with which it interferes, the public right of way to travel on such a public road, is common to the public. Thus, despite affecting a relatively small number of persons, it is still considered a public nuisance.[195] Likewise, "the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic; and a fire hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration."[196] If not determined by the number of persons affected, then what exactly determines whether a right is common to the general public?

1. General Public Rights

The answer to this question is centuries of legislative and judicial determinations.[197] Fortunately, a number of specific rights can be identified as protected under both statutory and common law forms of public nuisance.[198] These rights have long been deemed public in nature and are therefore protected from unreasonable interference by nuisance.[199] They include: a right to public health, safety, morals, peace, comfort, and convenience.[200]

Conditions, activities, and situations that have been held to interfere with the public health include hog pens, the keeping of diseased animals, a malarial pond, and carrying a child with smallpox along the highway.[201] Public safety has been interfered with through the storage of explosives, the shooting of fireworks in the streets, and the practice of medicine by a nonqualified person.[202] Houses of prostitution, illegal liquor establishments, gaming houses, indecent exhibitions, bullfights, unlicensed prizefights, and public profanity have all been determined to interfere with public morals.[203] Disruptions of the peace have included loud and disturbing noises and an opera performance that threatened to cause a riot.[204] Bad odors, smoke, dust, and vibrations may interfere with the public comfort.[205] Finally, the public convenience may be interfered

191. *Id.*
192. *Id.*
193. *See supra* Section II.A.
194. Prosser, *supra* note 34, at 1002.
195. *Id.* at 1001–02.
196. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. LAW INST. 1979).
197. Brownell, *supra* note 128.
198. *Id.*
199. *Id.*
200. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. LAW INST. 1979).
201. Prosser, *supra* note 34, at 1000.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

with by obstructing a highway or navigable stream, by creating a condition that makes travel unsafe or highly disagreeable, or by the collection of an inconvenient crowd.[206]

It is evident that many of these well-established public rights have a decidedly environmental bent. For example, the rights to public health and public safety may protect the public from dangerous air and water pollution.[207] Similarly, the right to public comfort may protect the public from noxious odors.[208] Indeed, prior to statutory codification, public nuisance was essentially a common law criminalization of unreasonable or harmful conduct, much of which would be deemed as environmental in nature today.[209] While these general public rights may be used for environmental purposes, two specific environmental public interests are also worth noting: public ownership of wildlife and public use rights in navigable waterways.

2. Environmental Public Interests

a. The Wildlife Trust Doctrine

First, "[a]ccording to courts, animals are owned by the people collectively, with the state acting as managerial trustee."[210] The original source of this concept, known as the "state ownership" or "wildlife trust" doctrine, was sovereign ownership of wildlife by the King in medieval England.[211] Sovereign ownership of wildlife was transferred to the states after the American Revolution but in such a way that they "owned [wild animals] in trust for the people generally and with a duty to manage them for the benefit of the many rather than the few."[212] Thus, there exists a distinct public interest in wildlife.[213] This public interest in wildlife, combined with the already recognized power of states to not only protect wildlife but also seek legal remedies when wildlife is unlawfully harmed,[214] could plausibly provide private public-nuisance plaintiffs the opportunity to establish a public right in the enjoyment of wildlife—much like a property owner has the right to enjoy his or her property.[215] If successful, the plaintiff could use such a right to address environmental issues that harm wildlife. Whether courts would treat the public interest in wildlife as amounting to a public right, however, is unclear.[216] Indeed, courts have had little or no occasion to struggle with such an issue and have expressed doubt about the extent

206. *Id.* at 1000–01.
207. Lee, *supra* note 62, at 130–31
208. Prosser, *supra* note 34, at 1000.
209. Lee, *supra* note 62, at 131.
210. ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 21 (2009).
211. *Id.* at 22, 25–33.
212. *Id.* at 25.
213. *Id.* at 21.
214. *Id.* at 31.
215. Lee, *supra* note 62, at 133.
216. *Id.* at 34.

of the doctrine.[217] Nevertheless, public ownership of wildlife presents an intriguing opportunity to establish a distinctly environmental public right.

b. Navigable Waterways and Other Limited Public Use Rights

Second, in the United States, the public enjoys limited use rights in waterways that are deemed navigable.[218] While definitions of which bodies of water are "navigable," and thus subject to public use rights, vary from state to state, generally—once navigability is established—waterways are open to public travel and recreation.[219] Certain lands, such as the foreshore, typically defined as the land between the low and high tide lines, provide similar limited public use rights.[220] Again, how these rights are defined and treated varies from state to state.[221] Nevertheless, it may be possible for an environmental public nuisance plaintiff to establish one of these public use rights, in either water or land, as the public right with which an alleged nuisance interferes.[222]

The widely-recognized, general public rights identified earlier (public health, safety, morals, peace, comfort, and convenience) provide the initial basis for crafting an environmental public nuisance argument. Fortunately, these rights are broad and well suited for such a purpose.[223] In addition, environmental public interests, such as public ownership of wildlife and public use rights in certain waters and lands, provide supplemental means for an environmental public nuisance plaintiff to establish the existence of a public right.

B. A Substantial and Unreasonable Interference with the Public Right

After a private public-nuisance plaintiff has established the existence of a public right, he or she must next establish a substantial and unreasonable interference with that right by the defendant.[224] A public nuisance typically takes one of two forms. First, it may be a violation of a statutory provision, including municipal ordinances and regulations, which amounts to a preemptive legislative determination that the conduct or activity is unreasonable per se and thus a nuisance.[225] Second, it may be a common law allegation subject to a judicial finding of unreasonableness before it is deemed a nuisance.[226] The former violations are criminal, while the latter are civil.[227]

217. *Id.* at 34.

218. ERIC T. FREYFOGLE, MICHAEL C. BLUMM & BLAKE HUDSON, NATURAL RESOURCES LAW: PRIVATE RIGHTS AND THE PUBLIC INTEREST 152 (2015).

219. *Id.*

220. *Id.* at 132–33.

221. *Id.* at 133.

222. *See id.*

223. *See supra* note 41 and accompanying text.

224. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (AM. LAW INST. 1979).

225. *Id.*

226. *Id.*

227. *Id.*

1. Statutory Violations

As noted previously, public nuisance developed in England as a common law crime and was adopted as such in early American law.[228] Over time, public nuisance crimes were incorporated into criminal statutes.[229] These statutes were typically general in nature with vague definitions of what constituted a public nuisance.[230] Indeed, "[s]uch statutes have quite uniformly been construed to include anything that would have been a public nuisance at common law."[231] In other cases, statutes declared very specific conduct as public nuisances, such as the establishment of bawdy houses, black currant plants, buildings in which narcotics are sold, mosquito-breeding water, or unhealthy multiple-dwelling units.[232] Whether general or specific, statutes such as these amount to a legislative declaration that the proscribed behavior is an unreasonable interference with a public right.[233] No criminal statutory scheme, however, could encompass all interferences with all public rights. Therefore, the common law origins of the cause of action remain. Conduct not covered by a criminal statute that nevertheless interferes with a public right may be determined to be a public nuisance through common law judicial principles.[234]

2. Common Law Violations

a. Intent

Before getting to the central question of reasonableness, it is important to note that intent is generally an element of nuisance law, both public and private.[235] The vast majority of environmental nuisances, however, involve ongoing conduct.[236] The mere fact that the alleged nuisance is ongoing is evidence that the defendant intends to continue the activity.[237] This mental state is adequate to satisfy the intent requirement of nuisance.[238] Thus, it makes sense that intent does not get much attention from courts.[239] Nevertheless, a plaintiff may be required to show intent in the rare nuisance case involving a one-time event, such as overturned trucks or railroad cars that emit gases.[240] Environmental ex-

228. Prosser, *supra* note 34, at 999.

229. *Id.* ("Public nuisance was a common-law crime, and as such it passed over into the early American law. When crimes became a matter of statute only, all of the states enacted broad criminal statutes covering such nuisances.").

230. *Id.*

231. *Id.*

232. *Id.* at 1000.

233. RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (AM. LAW INST. 1979).

234. Prosser, *supra* note 34, at 1000 ("Apart from such specific designation, the crime comprehends a very miscellaneous and diversified group of petty offenses, all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public.").

235. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 67.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

amples include oil spills such as the 1989 *Exxon Valdez* spill in Alaska or the more recent *Deepwater Horizon* spill in the Gulf of Mexico.[241] In these cases, courts typically require that the plaintiff show negligence on the part of the defendant.[242] Nevertheless, courts may determine intent by default if the harm arises out of a dangerous condition maintained by the defendant and was clearly foreseeable.[243]

b. Reasonableness and the Restatement (Second) of Torts

Although vague, courts frequently refer to the Restatement (Second) of Torts for guidance on the issue of unreasonableness.[244] The Restatement essentially blends the two requirements of substantial harm and unreasonableness into a comprehensive definition of "reasonableness" which includes several key elements.[245] First, conduct is unreasonable "if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation."[246] Second, conduct is unreasonable if the harm is significant and the actor's conduct is "contrary to common standards of decency."[247] Third, conduct is unreasonable "if the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship."[248] Fourth, conduct is unreasonable if the harm is significant and "the particular use or enjoyment interfered with is well suited to the character of the locality" and "the actor's conduct is unsuited to the character of the locality."[249] Fifth, conduct is unreasonable if "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."[250] Finally, while considering "the social value that the law attaches to the primary purpose of the conduct," "the suitability of the conduct to the character of the locality," and "the impracticability of preventing or avoiding the harm,"[251] conduct is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct."[252] In this final element, the Restatement appears to promote a balance-of-harm test which incorporates a cost/benefit utility assessment.

Unreasonableness is essentially a judicial limitation on nuisance which "requires balancing clashing individual and societal interests, using 'the famil-

241. *In re* Exxon Valdez, 104 F.3d 1196, 1198 (9th Cir. 1997); Chad Bray, *BP to Take $1.7 Billion Charge Over Deepwater Horizon Spill*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/business/dealbook/bp-oil-spill-deepwater-horizon.html.

242. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 67.

243. *See, e.g.*, *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. App. 2003); FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 67.

244. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 68.

245. *Id.*

246. RESTATEMENT (SECOND) OF TORTS § 829A (AM. LAW INST. 1979).

247. *Id.* § 829.

248. *Id.* § 830.

249. *Id.* § 831.

250. *Id.* § 826.

251. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 69.

252. RESTATEMENT (SECOND) OF TORTS § 826 (AM. LAW INST. 1979).

iar process of weighing the gravity and probability of the risk against the utility' of the activity."[253] This balancing test may prove problematic in the environmental context where the challenged activity may often be socially or economically desirable in certain respects.[254] For example, a coal-burning power plant may pollute in ways that cause significant harm to the environment. Its purpose, however, of generating electricity is such a highly valued activity that it may outweigh its negative impact on the environment. Thus, in such cases, it is important for public nuisance plaintiffs to frame the environmental interests they are attempting to protect in terms of equally desirable public interests. Generally, this can be achieved by highlighting the activity's detrimental impact on human health or safety rather than on the environment alone.[255] Demonstrating that the activity has a negative economic impact can also be persuasive.[256]

In any event, "[u]nlike most torts, where a key issue is the nature of defendant's mental state, the core issue in many, if not most, public . . . nuisance cases is the substantiality of the interference caused by the invasion of plaintiff's interest, which naturally involves the 'ultimate question of reasonable use.'"[257] Because this reasonableness standard is inherently vague, judicial discretion over the contours of nuisance lawsuits is broad.[258] Environmental public nuisance plaintiffs would be wise to keep this in mind when crafting their arguments concerning the unreasonableness of an alleged nuisance.

C. Proximate Causation

Causation can be one of the most difficult hurdles a plaintiff must overcome in order to succeed in a public nuisance suit, particularly an environmental one.[259] This is in large part due to the cause of action's inherent focus on harm to the general public rather than to a specific individual.[260] Difficulty establishing causation, however, can also be attributed to the unique nature of environmental nuisances.[261]

1. Incongruity with Traditional Causation Standards

In determining causation, courts may consider the Restatement's causation standards with respect to liability for intentional harms and negligent conduct.[262] These standards, however, are incongruous with public nuisance be-

253. Antolini, *supra* note 80, at 772.
254. *Id.*
255. *Id.* at 774.
256. *Id.* at 786.
257. *Id.* at 772.
258. *Id.* at 772–73.
259. *Id.* at 883.
260. Steven Sarno, Comment, *In Search of a Cause: Addressing the Confusion in Proving Causation of a Public Nuisance*, 26 PACE ENVT'L L. REV. 225, 246 (2009).
261. *Id.*
262. RESTATEMENT (SECOND) OF TORTS § 834, cmt. f (AM. LAW INST. 1979).

cause they are concerned with causation of injury to an individual rather than causation of the nuisance itself.[263] Indeed, public nuisance rarely requires a showing of negligence, much less any wrongdoing,[264] except in the narrow set of cases discussed previously in which a one-time event, such as an overturned vehicle emitting gas, is challenged.[265] Thus, how courts determine causation in public nuisance cases usually involves a consideration of two factors.[266] First, whether the defendant created or assisted in the creation of the nuisance, and second, whether the defendant had "control of the instrumentality."[267]

2. Issues Specific to Environmental Nuisances

Causation may be difficult for a public nuisance plaintiff to prove in the environmental context due to the nature of the nuisance causing activity. This is especially true "in cases involving diffuse and low-level environmental harms, even though such harms may turn out to be more serious than dangers that are more salient at the moment."[268] For example, long-term contamination of groundwater may be invisible, but an equal or even graver environmental threat to public health than a clearly visible and short-term threat, like air pollution.[269]

Additionally, the amalgamation of several polluters necessarily implicates issues with traceability. Whereas point source pollution—like wastewater discharge from a sewage treatment plant into a river—is relatively straightforward, more ambitious suits—such as a suit against a factory for contributing to global warming—are much more difficult to prove since the defendant will argue that it cannot be held responsible for "causing" the nuisance due to its relatively small contribution to overall greenhouse gas emissions.[270] Moreover, the fact that an alleged injury in an environmental suit may often be a mere threat of some future harm to a public right or interest can prove troublesome.[271] Therefore, there may be no harm to be caused at all. Instead, it is the threat of harm that must be traced to some actor. This concept of future harm will be considered in greater depth in the following section.

D. Harm

The final element of public nuisance, harm,[272] involves some of the cause of action's most intriguing issues. First, how may a private public-nuisance

263. Sarno, *supra* note 260, at 226–27.
264. Antolini, *supra* note 80, at 772.
265. *See* discussion *supra* Subsection III.B.2.a.
266. Sarno, *supra* note 260, at 246–47.
267. *Id.*
268. Stuart Buck, *The Common Law and the Environment in the Courts*, 58 CASE W. RES. L. REV. 621, 640 (2008).
269. *Id.*
270. Thomas W. Merill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVT'L. L. 293, 297 (2005).
271. Sarno, *supra* note 260, at 249.
272. FREYFOGLE & KARKKAINEN, *supra* note 35, at 217.

plaintiff establish standing to enforce a public right as an individual? Second, how do courts define harm in environmental suits which frequently involve allegations of future injuries?

1. Standing and the Paradox of the Special Injury Rule

In order to have standing, private parties bringing public nuisance claims have been required to demonstrate that they have suffered a harm different from the harm suffered by the public generally since the creation of the private right of action for public nuisance.[273] This is known as the "special injury rule."[274] "Most American jurisdictions have interpreted the rule to mean a 'difference in kind' and not merely a 'difference in degree.'"[275] Thus, "[t]he fact that a riparian owner uses the public waters more often than anyone else for boating, fishing, and bathing does not give him an action when they are polluted . . . ."[276] The "special injury rule" as well as its strict "different-in-kind" application have proved significant procedural barriers to private enforcement of public rights generally.[277] Indeed, many commentators consider it to be a paradox in such a context.[278]

To illustrate its paradoxical nature, consider a public nuisance suit asserted by a private individual.[279] The special injury and different-in-kind doctrines require the private plaintiff to show that he or she is *not* representative of the public whose common right is being interfered with by the alleged nuisance, insofar as he or she has suffered a special injury, different from that of the injured class.[280] The private plaintiff is required to distinguish him or herself in this way despite asserting the claim for the very purpose of protecting a common interest shared by the public.[281] Effectively, the most unrepresentative plaintiff has a better chance of making a representative public nuisance claim despite the plaintiff having a cause of action only due to an actual or threatened injury to a public interest.[282] In other words, "the broader the injury to the community and the more the plaintiff's injury resembles an injury also suffered

273. *Id.* at 219. *See, e.g.*, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104 (N.Y. 2001).

> A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large. This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public.

532 Madison Ave. Gourmet Foods, Inc., 750 N.E.2d at 1104 (internal citations omitted).

274. FREYFOGLE & KARKKAINEN, *supra* note 35, at 219.

275. *Id.*; *see, e.g.*, David M. Swain & Son v. Chi., B. & Q. R. Co., 97 N.E. 247, 248 (Ill. 1911) ("Where the proceedings are instituted by a private individual for an injury from a public nuisance, the gist of his action is the private injury, and he must allege and prove some special damage, different in kind from that suffered by the general public.").

276. Prosser, *supra* note 34, at 1009.

277. FREYFOGLE & KARKKAINEN, *supra* note 35, at 219.

278. *Id.* at 220.

279. Antolini, *supra* note 80, at 761.

280. FREYFOGLE & KARKKAINEN, *supra* note 35, at 220.

281. *Id.*

282. Antolini, *supra* note 80, at 789.

by other members of the public, the *less* likely that the plaintiff can bring a public nuisance lawsuit."[283] In contrast, a "violator of a public right who causes only modest harm to the broader community but special injury to a few, or even to a single individual, may find him or herself the defendant in a public nuisance lawsuit."[284]

Thus, the special injury rule effectively limits the type of plaintiff who can bring a public nuisance suit by not only "widening the gap between the plaintiff's personal stake and that of the public's, but also directly undermining a plaintiff's ability to be a 'representative' of the threatened public interests."[285] The original justification for the rule—dating back to medieval sixteenth century society—was to preserve the role of the sovereign to enforce the law, to prevent a multiplicity of claims, and to protect defendants against frivolous claims.[286] Despite substantial criticism of its role in modern society, the rule has remained entrenched in case law and poses a real obstacle to the purpose of public nuisance law: to protect and preserve public values.[287]

Because of its paradoxical nature, the special injury rule has proved particularly problematic in the environmental context. For example, in response to the massive *Exxon Valdez* oil spill in Prince William Sound, Alaska, in 1989, sport fishers and Alaska Natives pursued claims for injuries apart from governmental litigation by using public nuisance theory.[288] The sport fishers' claims for damage to their recreational activities were dismissed because they were "common to the general public" and did not allege unique harm, such as damaged fishing equipment or expenses incurred because of cancelled fishing trips.[289] Likewise, the Alaska Natives' claims for loss of cultural subsistence fishing rights were dismissed because subsistence rights were "shared by all Alaskans" and damage to those rights did not constitute a "special injury."[290] In both cases, the special injury rule barred claims of community injury, effectively preventing the merits of the claims from ever being considered "for the ironic reason that the broader community was also similarly injured."[291]

The special injury rule can also be problematic in public nuisance cases addressing environmental problems that arise on a much smaller scale than the *Exxon Valdez* disaster.[292] In *U.S. Steel Corp. v. Save Sand Key, Inc.*, the Florida Supreme Court applied the strict different-in-kind test to prevent community

283. *Id.* at 761.

284. FREYFOGLE & KARKKAINEN, *supra* note 35, at 220.

285. Antolini, *supra* note 80, at 761–62.

286. *Id.* at 762.

287. *Id.*

288. *Id.* at 776–77.

289. *In re* Exxon Valdez, No. A89-095 CIV, 1993 WL 735037, at *2 (D. Alaska July 8, 1993), *aff'd on other grounds*, Alaska Sports Fishing Ass'n v. Exxon Corp., 34 F.2d 769 (9th Cir. 1994).

290. *In re* Exxon Valdez, 104 F.3d 1196, 1198 (9th Cir. 1997) ("While the oil spill may have affected Alaska Natives more severely than other members of the public, 'the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings' is shared by all Alaskans.").

291. Antolini, *supra* note 80, at 780.

292. *Id.* at 781–82.

groups' public nuisance claim challenging a private corporation's plans to build condominiums on the island of Sand Key.[293] The Save Sand Key community groups alleged that fences erected by U.S. Steel during construction of the condominiums interfered with the public's rights to use the beach.[294] But, similar to the sport fishers and Alaska Natives in the *Exxon Valdez* case, the special injury rule prevented the merits of the community groups' claims from ever being heard.[295]

Evidently, the special injury standing requirement is probably the most substantial barrier for a would-be private public-nuisance plaintiff. Indeed, a private public-nuisance plaintiff wishing to protect some environmental public interest may be discouraged at the thought of maneuvering past this "unduly strict gatekeeper,"[296] and this is likely the paramount reason why public nuisance is underutilized and not well understood.[297] The special injury rule has effectively fulfilled its role of reserving enforcement of public rights to "sovereign" government officials.[298] It poses a significant barrier, both strategically and economically, for private practitioners.[299] Additionally, public interest environmental practitioners facing similar strategic and economic barriers have little incentive to shift their almost exclusive focus on federal statutory approaches.[300]

Nevertheless, the special injury rule is far from an absolute bar to public nuisance claims, and despite its strict different-in-kind application, a "special injury" does not mean damage suffered exclusively or uniquely by the plaintiff.[301] Indeed, "[a] plaintiff may recover even if other people suffer the same sort of damage and even if others suffer greater harm."[302] A close examination of case law reveals some guiding principles that may help potential plaintiffs determine whether they have a good chance of overcoming this barrier.

First, damage may be considered sufficiently particular to overcome the special injury rule where a public nuisance causes physical harm to a plaintiff's person or property.[303] For example, physical harm to the plaintiff's health caused by noxious fumes from gasoline has been considered particular damage.[304] Even mental distress caused by obscene words spoken in public but di-

293. 303 So.2d 9, 13 (Fla. 1974).

294. *Id.* at 9–10.

295. Antolini, *supra* note 80, at 784.

296. *Id.* at 762.

297. *Id.* at 879.

298. *Id.* at 886 ("The conservative position taken by Chief Justice Baldwin in the 1535 case—that redress for public nuisances should reside only in the power of the sovereign—continues to have vigorous and powerful adherents today.").

299. *Id.* at 879–81.

300. *Id.* at 881–84.

301. *Id.* at 823.

302. Jon K. Wactor, *Self-Help: A Viable Remedy for Nuisance? A Guide for the Common Man's Lawyer*, 24 ARIZ. L. REV. 83, 86 (1982).

303. Prosser, *supra* note 34, at 1011–13.

304. *Id.* at 1012.

rected at the plaintiff was held to be sufficiently particular.[305] Similarly, physical harm to property, such as a horse that was injured by falling into a trench, may also be sufficient.[306]

Second, the presence of pecuniary loss is generally sufficient to overcome the special injury rule.[307] This is true in cases where a business makes commercial use of the public right with which the defendant interferes.[308] For example, a business operating boats upon a river that is blocked has been permitted to maintain an action.[309] This also holds true when the defendant's interference with a public right causes harm to a business not itself founded upon the exercise of the public right, such as depriving a business of customers by blocking access to a shop.[310] Indeed, "[c]ourts . . . often consider loss of time resulting in financial loss as particular damage."[311] It must be pointed out, however, that "[i]nterference with business activities . . . has been held to be actionable particular damage as long as the damage is not so widespread as to include the entire community or industry or even a very large part of it."[312]

Third, when a public nuisance interferes with the plaintiff's rights in land, such as the right of access to land, it may amount to sufficient particular damage for which a public nuisance action can be maintained.[313] Evidently, if a public nuisance interferes with private property rights, it is a private nuisance to the owner of those property rights and could be dealt with accordingly.[314] Nevertheless, an action against such a nuisance may be maintained upon either a public or private basis, and since nuisances often share this concurrent nature, the victims of a concurrent public/private nuisance may often be some of the best placed individuals to bring a public nuisance action on behalf of the public, as they have suffered a particular harm sufficient to overcome the special injury rule.[315]

Finally, as will be examined in greater detail in Section III.F, Article XI of the Illinois Constitution appears to provide a novel and incredibly powerful solution to the special injury paradox for Illinois residents.[316] While the special injury rule poses a substantial obstacle for private public-nuisance plaintiffs, it is by no means insurmountable.[317]

305. *Id.*
306. *Id.*
307. *Id.* at 1013.
308. *Id.* at 1013–14.
309. *Id.* at 1014.
310. *Id.*
311. Wactor, *supra* note 302, at 86.
312. *Id.*
313. Prosser, *supra* note 34, at 1018.
314. *Id.*
315. *Id.*
316. Lousin, *supra* note 167, at 607.
317. *See* Prosser, *supra* note 34, at 1001.

2. Definition of Harm

In the environmental context, harm is often the result of competing land or natural resource uses.[318] One approach is to assign harm to the land use that began later in time.[319] Another approach is to hold accountable the land use that is more intensive.[320] By and large, lawmakers have settled on the reasonableness legal standard that was discussed previously.[321] This approach is viewed as the most equitable because it takes into account all relevant facts and is flexible and attentive to unique circumstances.[322] Due to its flexibility, however, it is inherently vague and unpredictable making it difficult to know when one has the right to complain.[323] Therefore, it is necessary to explore some of the issues that may arise with regard to how harm is defined in the environmental context.

Environmental suits frequently allege injuries that will happen in the future.[324] Indeed, some of the environmental nuisances alleged in public nuisances suits "have not yet materialized, may not materialize for many decades, and conceivably will not materialize at all."[325] Courts, however, may only adjudicate actual injuries which are either presently existing or "imminent."[326] This begs the question, then, of how courts treat claims for future injuries and whether or not they consider such injuries as imminent. One prominent environmental case that addressed the possibility of future injury was decided by the Illinois Supreme Court in *Village of Wilsonville v. SCA Services, Inc*.[327] This case is interesting because it involved both immediate harm, a present nuisance, as well as future harm, a prospective nuisance.[328]

In *Wilsonville*, the defendant operator of a chemical waste disposal site—located both within and adjacent to the village limits of Wilsonville, Illinois—was enjoined from continuing operation of its site because it was determined to be both a present and prospective nuisance.[329] The trial court's determination that spillage from improperly contained chemical waste, odors, and dust constituted a present nuisance was not challenged.[330] The more contentious issue of future harm, however, was challenged by the defendant and discussed by the court at length.[331] The condition that was alleged to be a prospective nuisance was primarily a possible explosive interaction due to the improper storage and

318. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 67.
319. *Id.*
320. *Id.*
321. *See supra* Subsection III.B.2.b.
322. FREYFOGLE, BLUMM & HUDSON, *supra* note 218, at 68.
323. *Id.*
324. Buck, *supra* note 268, at 623–24.
325. Merill, *supra* note 270, at 296.
326. *Id.* at 295.
327. 426 N.E.2d 824, 827 (Ill. 1981).
328. *Id.* at 831.
329. *Id.* at 827.
330. *Id.* at 831.
331. *Id.* at 836.

maintenance of the various chemical wastes disposed at the site.[332] Additionally, it was alleged that chemical waste materials could seep into and contaminate groundwater both in and around the site because containers would not contain the materials forever due to leaking and spilling, inadequate separation, and improper placement (rolling into trenches).[333] This threat of future harm, it was argued, could also constitute a prospective nuisance.[334]

The court applied the "dangerous probability test" by which a court may order an injunction to prevent a threatened or potential injury if it is both likely to occur and its consequences are sufficiently substantial and dangerous.[335] In this case, the court determined that it was highly probable that toxic chemical waste would either mix and cause an explosive reaction or escape and contaminate the air, water, or ground around the site.[336] In fact, it was only a matter of time before either would occur.[337] The court's reasoning was based on the idea that "if a court can prevent any damage from occurring it should do so."[338] The fact that an existing nuisance was already present at the site meant that only the damage was prospective in nature, and this was viewed as further support in favor of enjoining the prospective nuisance.[339]

Of particular note in this case is Justice Howard C. Ryan's concurring opinion.[340] Although agreeing with the reasoning and result of the majority, Justice Ryan expressed concern that the court's rule for dealing with future harms, the "dangerous probability test," might be too narrow.[341] He conceived of situations "where the harm that is potential is so devastating that equity should afford relief even though the possibility of the harmful result occurring is uncertain or contingent."[342] He advocated tweaking the "dangerous probability test" by incorporating a balancing element.[343] "If the harm that may result is severe, a lesser possibility of it occurring should be required . . . . Conversely, if the potential harm is less severe, a greater possibility that it will happen should be required."[344]

It appears that the "dangerous probability" test applied in *Wilsonville* is the dominant means by which courts consider the possibility of future harm.[345] Justice Ryan's addition of a balancing element, however, hints that courts may be willing to relax the strict application of this test to accommodate cases which involve particularly dangerous harms. Furthermore, *Wilsonville* demon-

332. *Id.* at 830.
333. *Id.* at 827.
334. *Id.* at 830.
335. *Id.* at 836.
336. *Id.* at 837.
337. *Id.*
338. *Id.*
339. *Id.* at 836.
340. *Id.* at 841–42 (Ryan, J., concurring).
341. *Id.* at 842.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*

strates that establishing a present or ongoing nuisance may aid a public nuisance plaintiff in arguing a future harm, regardless of its perceived imminence. These trends bode well for the future use of public nuisance in the environmental context.

E. Remedies

Remedies for public nuisance suits include both injunctive relief and monetary damages.[346] Additionally, public nuisance suits allow for the unique remedy of self-help abatement.[347] All three possible remedies provide public nuisance plaintiffs with certain strategic advantages, and each will be examined in the following discussion in turn.

1. Injunctive Relief

Injunctive relief is an equitable remedy used to prevent future conduct that is harmful.[348] Whereas monetary damages apply retroactively to past conduct, injunctive relief prevents conduct from taking place in the future.[349] Instead of asking the court to determine that it is unreasonable for an activity to inflict harm without compensation, a plaintiff asks the court to declare the activity so unreasonable that it must be stopped.[350] If a court determines that an activity or conduct substantially interferes with a public right and is thus a public nuisance, it may order an injunction as a long-standing remedy.[351]

Because they are often aimed at stopping some sort of harmful activity or conduct, most environmental public nuisance suits request injunctive relief.[352] Indeed, "the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damage."[353] Moreover, the fact that harm need only be threatened and not actually sustained for injunctive relief to be awarded[354] provides ample opportunity for environmental suits to address issues that involve merely the threat of future injury, such as climate change.[355]

Injunctive relief can prevent future damage not only by halting a nuisance, but, in certain instances, by compelling the abatement of a nuisance.[356] For instance, in *Becker v. State*, a trial court ordered the demolition of a building where illicit drug activities were taking place.[357] Although reversing the or-

346. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. LAW INST. 1979).
347. Wactor, *supra* note 302, at 87.
348. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. LAW INST. 1979).
349. *Id.*
350. *Id.*
351. Antolini, *supra* note 80, at 773.
352. *Id.* at 774.
353. *Id.* (quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 71 555 (1st ed. 1941)).
354. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. LAW INST. 1979).
355. *Id*. at cmt. g.
356. *Id*. at cmt. i.
357. Becker v. State, 767 A.2d 816, 817 (Md. 2001).

der on the facts, the appellate court agreed that such a remedy was sometimes appropriate.[358] It reasoned that if something is a nuisance based not on its use but on its mere existence, the court may compel remedial action for the purpose of abating the nuisance.[359] Thus, courts "have considerable latitude in fashioning injunctive orders to abate nuisances," particularly when dealing with situations where something is a nuisance in and of itself.[360]

Evidently, this can be an especially useful tool in the environmental context where the halting of a nuisance alone is often insufficient for repairing the damage that it has already caused.[361] For example, halting the discharge of pollutants into a lake or stream after years of discharge will not sufficiently abate the nuisance of contaminated water interfering with the public's right to enjoy the water by boating or swimming. It is the contaminated water itself which is the nuisance, not just the discharge of pollutants. In this case, injunctive relief could plausibly include compelled remedial action, such as cleaning the contaminated body of water, to abate the nuisance.

2. Monetary Damages

For monetary damages to be awarded, a public nuisance must have caused significant harm to the public.[362] Damages recovered in public nuisance cases have included lost value attached to use or enjoyment of land, property loss, and injury to health.[363] Public nuisance damages may also include economic loss.[364] Additionally, public nuisance provides the unique opportunity for private environmental plaintiffs to obtain punitive damages.[365] Although most environmental public nuisance suits will seek injunctive relief, monetary damages can be useful in the environmental context in a number of ways.

Unlike federal environmental statutes which only result in civil penalties to be paid to the government, public nuisance offers direct compensation to the injured community.[366] These funds can be used by the community to mitigate the impact of the nuisance or address future issues.[367] In addition, the threat of monetary damages alone can be used to gain leverage during negotiations/bargaining or to deter ongoing activity. For example, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the Fourth Circuit reversed a district court's ruling that four coal-fired power plants located in Tennessee and Alabama represented a public nuisance by significantly contributing to North Carolina's air pollution.[368] While a petition for certiorari to the United States

358. *Id.* at 821–22.
359. *Id.*
360. *Id.* at 821.
361. *Id.* at 823.
362. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (AM. LAW INST. 1979).
363. Antolini, *supra* note 80, at 773.
364. *Id.*
365. *Id.* at 884.
366. *Id.*
367. *Id.*
368. 615 F.3d 291, 296 (4th Cir. 2010).

Supreme Court was pending, the parties reached a settlement under which the defendant agreed to clean up its coal-fired power plants by investing in new, state-of-the-art pollution controls as well as funding environmental mitigation projects to address the impacts of past emissions.[369] The defendant also agreed to pay a total of ten million dollars in civil penalties.[370] Had the suit been brought by private individuals rather than the State of North Carolina, these civil penalties could have been paid directly to the plaintiffs as damages.[371]

3. Self-Help

A final and more unorthodox remedy available to the victims of a public nuisance is "the little known and evidently much feared doctrine of self-help."[372] Self-help, otherwise known as "abating the nuisance," was accepted as an alternative to the formal legal process to enjoin a nuisance at common law.[373] Indeed, self-help abatement is an established right with regard to both public and private nuisances.[374] Generally, "whenever a person has a bona-fide cause of action for nuisance, he or she has a right to summary abatement."[375] Self-help essentially acts as a legal defense for the abator who acts at his or her own peril.[376] This remedy is especially appropriate when the victim lacks an effective judicial remedy, often due to financial or time constraints.[377] Before resorting to self-help, an abator must provide the nuisance maintainer with notice and an opportunity to abate the nuisance.[378]

One limitation that courts impose on the self-help remedy is an economic balance between the competing interests.[379] Often environmental nuisances are caused by large industrial factories or plants, and the economic value of those plants will likely outweigh any attempt to abate a nuisance through self-help.[380] Closely related are prohibitions against causing unnecessary damage and "breach[ing] of the peace."[381] A self-help attempt to abate a nuisance caused by a large industrial plant worth hundreds of millions of dollars will likely cause considerably more damage (at least more easily calculated damage) than the nuisance may be causing, and it may involve conflict with security or other personnel.[382] These limitations suggest that the use of the self-help remedy in the realm of environmental nuisances may be restricted, especially from those that

369. *Tennessee Valley Authority Clean Air Act Settlement*, U.S. EPA, (Apr. 14, 2011) https://www.epa.gov/enforcement/tennessee-valley-authority-clean-air-act-settlement.

370. *Id.*

371. Antolini, *supra* note 80, at 884.

372. Wactor, *supra* note 302, at 83.

373. *Id.*

374. *Id.* at 87.

375. *Id.* at 94.

376. *Id.*

377. *Id.* at 85–86.

378. *Id.* at 94.

379. *Id.* at 95–96.

380. *Id.* at 96.

381. *Id.*

382. *Id.*

involve large-scale operations, such as an industrial factory or plant.[383] Nevertheless, self-help may be effective in combatting small-scale nuisances, such as a fence blocking the public right of way in the foreshore of a beach.

F. Article XI of the Illinois Constitution

Illinois residents seem to be particularly well-placed to use private public nuisance suits to achieve environmental objectives due to Article XI of the Illinois Constitution which provides citizens a broad right to a healthful environment.[384] Specifically, Article XI establishes that it is the "public policy of the State and the duty of each person" to maintain "a healthful environment."[385] Moreover, it grants each person "the right to a healthful environment" and allows individuals to enforce this right in court.[386]

Although it has been held to not create any new causes of action, Article XI does away with the special injury standing requirement for environmental nuisance cases.[387] Thus, a plaintiff need not allege a special injury to bring an environmental claim as long as a cognizable cause of action, such as a public nuisance, exists.[388] A private public-nuisance plaintiff who can prove he has been injured by a polluter, for example, is not required to prove that he suffered an injury different in kind from that suffered by the general public to bring a civil suit for either monetary damages or an injunction compelling the defendant to stop polluting.[389] The ability to avoid the special injury rule makes Article XI an attractive tool for environmentally concerned private citizens. Indeed, the special injury rule was identified earlier as one of the most difficult obstacles facing private public-nuisance plaintiffs.[390] Despite this tremendous advantage, "few plaintiffs have brought actions even tangentially related to environmental protection, and those [who have] have been unsuccessful."[391]

One case in which Article XI was considered by the Illinois Supreme Court sheds light on how the use of the constitutional provision by environmentally concerned citizens is limited to a certain degree. In *Glisson v. City of Marion*,[392] Glisson, a resident of Marion, Illinois, attempted to block the city's plans to construct a dam and reservoir on a creek by alleging that the project would destroy the habitat of two endangered species of fish, thereby violating

383. *Id.* at 98.

384. Lousin, *supra* note 167, at 606–07.

385. ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.").

386. *Id.* § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

387. City of Elgin v. Cty. of Cook, 660 N.E. 875, 891 (Ill. 1995).

388. *Id.*

389. Lousin, *supra* note 167, at 606–07.

390. *See supra* Subsection III.D.1.

391. Lousin, *supra* note 167, at 606–07.

392. 720 N.E.2d 1034, 1042 (Ill. 1999).

the Illinois Endangered Species Protection Act.[393] Typically, a private individual would not bring a complaint for a violation of such a statute; the state would do so. In this case, however, the plaintiff relied on Article XI's right to a healthful environment to establish standing and alleged a statute violation.[394] Essentially, this private citizen attempted to assume the role of a state's attorney to enforce a law or regulation. Ultimately, the court held that Glisson did not have standing to maintain his cause of action.[395] After an extensive analysis of the legislative history surrounding the drafting of Article XI, the court concluded that the primary concern of the drafters was the effect of pollution on the environment and public health.[396] Thus, "healthful environment" refers to the relationship between the environment and human health.[397]

Although this interpretation of "healthful environment" by the Illinois Supreme Court prevented Glisson from maintaining a cause of action concerning the protection of endangered and threatened species, it leaves ample room for use by suits concerning pollution and public health. Indeed, a great number of environmental public nuisance suits address threats to human health both directly and indirectly, including most suits concerning air and water pollution.[398] Moreover, environmental suits addressing threats to public health are arguably more important and are likely to receive greater popular and political support.[399]

To summarize, Article XI affords Illinois citizens the unique opportunity to avoid the incredibly burdensome special injury rule while bringing environmental public nuisance claims. Nevertheless, despite becoming effective over forty years ago, Article XI has not had much effect, and its impact remains to be seen.[400] It is not clear whether its underutilization is due to poor publicity, innocent ignorance, or, as one commentator has suggested, "[t]he lack of will and imagination on the part of plaintiffs' lawyers . . . ."[401] In any event, "[t]he novel rights, particularly those combatting . . . pollution, are striking, even daring, in their potential. They could become extremely useful tools for social change in the next decades."[402]

393. *Id.* at 1036.
394. *Id.* at 1038.
395. *Id.* at 1037.
396. *Id.* at 1042.
397. *Id.*
398. *See supra* Part I.
399. *See, e.g.*, Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016, 6:39 PM), http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis.
400. Lousin, *supra* note 167, at 607.
401. *Id.*
402. *Id.*

IV. RECOMMENDATION

Part IV offers solutions to the major issues identified in the analysis by demonstrating how a private Illinois citizen may use a public nuisance suit to address the presence of coal ash pits located along the Middle Fork of the Vermilion River in central Illinois. After applying the cause of action in Section IV.A, Section IV.B outlines the advantages of using public nuisance in this manner and recommends that private individuals use the cause of action to achieve environmental objectives in similar contexts in the future.

A. Public Nuisance Applied to Coal Ash Pits Located Along the Middle Fork of the Vermilion River

Having considered some of the most prominent issues concerning environmental public nuisance suits brought by private individuals, it is now appropriate to apply the cause of action to a particular environmental situation: coal ash pits located along the Middle Fork of the Vermilion River in central Illinois. For years, Houston-based energy company, Dynegy Incorporated, has dumped coal ash, a toxic by-product of burning coal, in three ash pits located in the western floodplain of the Middle Fork of the Vermilion River, Illinois's only National Scenic River.[403] Also known as "ash ponds" or "ash impoundments," these ash pits contain high concentrations of a number of heavy metals, including mercury, arsenic, selenium, chromium, and cadmium, which can cause cancer and brain damage in humans and are harmful to fish and wildlife.[404] Two of the pits were built without liners to protect underlying groundwater, and leakage of coal ash pollutants has already been detected in recent years.[405] Intermittent discharges of polluted wastewater and flooding has resulted in further contamination of the surrounding hydrologic system.[406] Additionally, river bank erosion threatens the stability of all three pits, a risk that is compounded by the location of one of the pits over old coal mine voids.[407] In sum, the ash pits present three major issues: (1) ongoing pollution of groundwater; (2) pollution of the Middle Fork through seeps and hydrologically connected waters; and (3) the risk of a catastrophic breach, "where massive amounts of coal ash could inundate the Middle Fork."[408]

These pits threaten not only the home of "24 State threatened or endangered species, . . . 57 types of fish, 45 kinds of mammals, and 190 different birds," but also the vibrant recreation economy that the river provides as a key destination for local residents and visitors to Vermilion County.[409] Despite the-

403. *Middle Fork at Risk—Dynegy/Vistra's Coal Ash*, PRAIRIE RIVERS NETWORK, https://prairierivers.org/dynegyvermilion/#contents (last visited Aug, 29, 2018).

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

se substantial risks, Dynegy has proposed to simply "cap" the pits to prevent rain and flood waters from spreading contaminants from the pits.[410] This is merely a short-term solution to only one of the threats that the pits currently pose and would absolve Dynegy from any future liability.[411] Many believe that removing the ash to a location with modern pollution controls and monitoring away from the river's floodplain and out of contact with groundwater is the only viable long-term solution.[412] But "the absence of existing rules to regulate the comprehensive closure of sites like Dynegy Vermilion" means concerned citizens must find some other way to achieve their objective of removing these hazardous ash pits.[413] Public nuisance may provide a novel solution to this problem.

1. The Existence of a Public Right

A private public-nuisance plaintiff must first establish the existence of a public right.[414] In this case, the plaintiff would likely establish the general public rights of public health and public safety. Contamination of the Middle Fork by coal ash leaching affects the enjoyment of these rights by anyone that uses the river for a recreational activity, such as boating or fishing. Furthermore, the plaintiff may attempt to establish the existence of the two distinct environmental public interests discussed in Subsection III.A.2.[415] Both are available in this case, because the Middle Fork is a navigable waterway subject to public use rights,[416] and the wildlife that reside in and around the river are owned by the public according to the wildlife trust doctrine.[417] Finally, the designation of the Middle Fork as a National Scenic River would likely aid in establishing any of these public rights.[418]

2. A Substantial and Unreasonable Interference with the Public Right

Next, the plaintiff must establish that there is a substantial and unreasonable interference with the established public rights.[419] The plaintiff should be confident of succeeding should a court apply the *Restatement*'s balance-of-harm test, as the coal ash pits serve no socially or economically desirable pur-

410. Tracy Crane, *Dynegy Awaits OK to Stabilize River Bank near Coal Ash Ponds*, NEWS-GAZETTE (June 21, 2016, 7:00 AM), http://www.news-gazette.com/news/local/2016-06-21/dynegy-awaits-ok-stabilize-river-bank-near-coal-ash-ponds.html.

411. *Middle Fork at Risk*, *supra* note 403.

412. *Id.*

413. *Id.*

414. Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10292, 10293 (1986).

415. *See infra* Subsection III.A.2.

416. *See infra* Subsection III.B.2.

417. State v. Dickerson, 345 P.3d 447, 455 (Or. 2015).

418. *Middle Fork at Risk*, *supra* note 403.

419. *See, e.g.*, Olden v. LaFarge Corp., 203 F.R.D. 254, 266, *aff'd*, 383 F.3d 495 (6th Cir. 2004).

pose other than to store a dangerous material.[420] Clearly, the pits fail to serve this purpose adequately. Therefore, it is likely that the leaching of dangerous coal ash from these pits would be deemed a substantial and unreasonable interference with not only public health and public safety but also public use rights in the river and public ownership of wildlife.

3. Proximate Causation

The third step, proving proximate causation, would normally be problematic for a private public-nuisance plaintiff.[421] In this case, however, causation is relatively straightforward: Dynegy's coal-fired Vermilion Power Plant operated from 1955 through 2011 and coal ash from the plant has been dumped for over fifty years into the three ash pits that are currently leaking into groundwater and are in danger of collapse.[422] Thus, Dynegy satisfies both factors that courts consider with regard to causation because it created the nuisance by operating the power plant and because the company maintains control over the nuisance but has done nothing to abate it.[423]

4. Harm

Overcoming the special injury rule and establishing standing would typically be the most substantial barrier facing a private individual bringing a public nuisance action.[424] As noted in Section III.F, however, an Illinois citizen could avoid this burden via Article XI of the Illinois Constitution as long as the suit concerns the relationship between the environment and human health.[425] In this case, the leaching of heavy metals from the ash pits into the groundwater and river water establishes such a relationship because such leaching is harmful to human health through consumption and recreational use.[426]

After establishing standing, the plaintiff has two options with regard to the final element of harm and would likely utilize both. First, the plaintiff could allege that the ash pits pose a present nuisance due to the ongoing contamination of both groundwater and river water through the leaching of coal ash. Once established, a present nuisance would likely bolster the plaintiff's second argument, the threat of future harm caused by the total collapse of the ash pits due to erosion. The threat of this future harm would certainly satisfy the balancing test outlined in the concurring opinion in *Wilsonville*.[427] In fact, it would likely satisfy the more rigid "dangerous probability" test applied by the majori-

420. *Cf.* Michigan v. U.S. Army Corps of Engineers, 667 F.3d 765, 790 (7th Cir. 2011) ("The balance of harms favors the defendants and the public interests they represent to such an extent that we conclude that the district court's decision to deny preliminary relief was not an abuse of discretion.").

421. *See, e.g.*, Pesty v. Cushman, 788 A.2d 496, 504 (Conn. 2002).

422. *Middle Fork at Risk*, *supra* note 403.

423. *Id.*

424. *See* Antolini, *supra* note 80, at 759 n.7 (describing the special injury rule).

425. *See infra* Section III.F.

426. *Middle Fork at Risk*, *supra* note 403.

427. Vill. of Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 842 (Ill. 1981).

ty in *Wilsonville* as well.[428] A total collapse of the ash pits presents a substantial danger, and the probability of this happening at some point in the future is nearly certain due to the inevitable meandering of the Middle Fork.[429] Demonstrating imminence might pose a challenge, but the gravity and probability of the future harm make this less problematic.

5. Remedy

The likelihood that a public nuisance suit could successfully address the threats posed by coal ash pits located along the Middle Fork appears promising. At this point, the plaintiff must decide which remedy to pursue. Like many environmental nuisance cases, the purpose of this suit is to halt the nuisance. Thus, injunctive relief seems to be the most useful. Similar to *Becker*, the plaintiff could argue for a mandatory injunction compelling the removal of the pits altogether, since the pits themselves constitute the nuisance and not an activity that can be halted.[430] This type of equitable relief, however, is considered extraordinary and is rarely granted.[431] Therefore, damages may be the more attractive option to provide funds for mitigating the nuisance. Whether this is feasible, though, depends on the cost of mitigation and the amount the plaintiff is likely to recover. Ironically, having successfully executed the lawsuit, the private public-nuisance plaintiff in this case may encounter the most difficulties when selecting a remedy.

B. Advantages and Future Use

Having analyzed each of the disparate elements of the cause of action and examined how it can be applied to address coal ash pits that threaten the ecosystem and recreational economy of the Middle Fork of the Vermilion River in central Illinois, it is worthwhile to briefly review the advantages of using private public nuisance in the environmental context.

First, public nuisance appears to be uniquely equipped for dealing with environmental issues since many natural resources and other environmental interests are inherently public in nature. Indeed, it "offers several important strategic advantages," primarily a more direct focus on the merits of the claim.[432] Second, public nuisance suits brought by private individuals can be more effective than government enforcement in many instances. In fact, the original purpose of public nuisance suits was to regulate before governments were capable of doing so.[433] Private individuals, "frustrate[ed] with the lack of legislative solutions to persistent environmental crises," may be the best equipped plaintiffs

428. *Id.* at 836.

429. *Middle Fork at Risk*, *supra* note 403.

430. *See* Becker v. State, 767 A.2d 816, 818 (Md. 2001).

431. *See Equitable Remedies and Injunctive Relief*, USLEGAL, https://nuisances.uslegal.com/equitable-remedies-and-injunctive-relief/ (last visited Aug. 29, 2018).

432. Antolini, *supra* note 80, at 774.

433. Lee, *supra* note 62.

for dealing with these issues given the current political climate.[434] In the modern environmental context, public nuisance can play an important practical role in "plugging the holes" left by a nonseamless web of environmental statutes and regulations.[435] Third, public nuisance is most effective when focusing on local issues because of its "unique ability . . . to be a flexible community-based remedy for community-based problems in state courts"[436] Fourth, public nuisance can be used as a catalyst for policy change by drawing attention to the most pressing environmental issues as determined by the most interested parties.[437] Finally, Illinois residents seem particularly well-placed to use public nuisance suits in this manner because of Article XI of the Illinois Constitution.[438]

To conclude, it is essential to recognize that public nuisance can and should be used in a wide variety of environmental contexts. The environmental issues currently facing modern society are numerous, myriad, and ever-increasing. Moreover, concern over these issues is compounded by the recent election of an administration that is uniquely hostile towards the environment.[439] Thus, it is imperative that environmentally concerned citizens assume the responsibility of confronting environmental issues and taking affirmative steps to achieve environmental objectives independent from government action. Public nuisance may prove to be a potent mechanism for doing so and should be used accordingly.

V. CONCLUSION

Public nuisance law, though generally not well understood, can be a powerful mechanism for challenging threats to the environment. The use of public nuisance by private individuals to achieve environmental objectives is especially important in modern society given the prevalence of environmental issues and the apparent lack of political will to address them. Public nuisance should be used in this manner because it is uniquely equipped for dealing with environmental issues, is often more effective than governmental enforcement, and is able to focus attention on issues that are most crucial at the local community level. Citizens of Illinois seem particularly well-positioned to utilize public nuisance suits in such a way due to Article XI of the Illinois Constitution.

This Note provides a blueprint for environmentally concerned citizens to use public nuisance to achieve significant and substantive environmental objec-

434. Denise Antolini, *Attacking Bananas and Defending Environmental Common Law*, 58 CASE W. RES. L. REV. 663, 665 (2008).

435. Antolini, *supra* note 80, at 775.

436. *Id.* at 763.

437. Antolini, *supra* note 434, at 664.

438. ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").

439. *See* Nadja Popovich et al., *67 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (Jan 31, 2018), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html.

tives. Public nuisance allows individuals to achieve environmental objectives on their own rather than relying on underfunded and ill-equipped government institutions to do so. Innovative strategies such as this will ensure environmental objectives are achieved even in an era of political hostility.