

**“ENDANGERMENT” OF THE COMMON LAW:  
DO RULEMAKINGS AS TO GREENHOUSE GASES  
UNDER THE CLEAN AIR ACT DISPLACE FEDERAL  
COMMON-LAW CLAIMS FOR THE PUBLIC NUISANCE  
OF GLOBAL WARMING?**

*Kyle G. Grimm*\*

I. INTRODUCTION

As technology has continued to develop over the past century, global air pollution has also increased.<sup>1</sup> Yet it was not until the later part of the twentieth century that legislation was adopted to address this issue.<sup>2</sup> With the recent increase in global air pollution, environmental activists started to press for action to protect our natural resources and to minimize the negative effects caused by this pollution.<sup>3</sup> Lately, particular attention has been placed on global climate change. One method of addressing this issue has been through the initiation of public-nuisance lawsuits seeking redress for the effects of global warming.<sup>4</sup> Now that the Environmental Protection Agency (EPA) has taken regulatory action to address the emission of greenhouse gases (GHGs) into the atmosphere, the question of whether these administrative rulemakings displace public-nuisance-as-global-warming causes of action must be addressed.

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\* J.D. Candidate, May 2011, Seton Hall University School of Law; B.S., Union College. Thanks to Professor Marc Poirier, Professor Catherine McCauliff, and all of my editors on the *Seton Hall Law Review* for their insightful comments throughout the writing process.

<sup>1</sup> See generally *The History of Air Quality*, ENVTL. INS. OF HOUSTON, <http://prtl.uhcl.edu/portal/page/portal/EIH/outreach/tfors/history> (last visited Dec. 30, 2010) (noting major events throughout the history of air pollution, as well as governmental and private responses to the growing concern over the consequences of air pollution).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See, e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. GMC*, No. 06-05755, 2007 U.S. Dist. LEXIS 68547, at \*1 (N.D. Cal. Sept. 27, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

In the past few decades the effects of GHGs in the atmosphere—most importantly carbon dioxide (CO<sub>2</sub>)<sup>5</sup>—have taken center stage in the air-pollution debate as global climate change is becoming more and more apparent.<sup>6</sup> A general consensus now exists in the scientific community that the release of carbon dioxide and other GHGs into the atmosphere, due in part to human activity, contributes to global warming.<sup>7</sup> Global warming leads to changes in weather patterns, rising sea levels, a decrease in snow cover, and poses a risk of extreme weather, among other effects.<sup>8</sup> Arctic ice, for example, has decreased in thickness by forty percent since the 1960s.<sup>9</sup> In turn, this has led some to predict that global sea levels will rise between ten to twenty-three inches by 2100.<sup>10</sup> Similarly, as ocean temperature has risen over the last thirty-five years, the number of category four and five hurricanes has increased.<sup>11</sup> Furthermore, the wildland fire season saw a record-breaking year in 2006 for both the number of acres burned

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<sup>5</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,895 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1) (“[C]arbon dioxide is the most important greenhouse gas directly emitted by human activities in terms of its total additional heating effects being exerted on the climate.”); Herve Le Treut et al., *Historical Overview of Climate Change Science*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 93, 97 (2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter1.pdf>.

<sup>6</sup> See Le Treut et al., *supra* note 5, at 100.

<sup>7</sup> See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 18,888 (“The heating effect caused by human-induced buildup of greenhouse gases in the atmosphere is *very likely* the cause of most of the observed global warming over the last 50 years.” (emphasis added)). The term “very likely” is a word of art used by the Intergovernmental Panel on Climate Change (IPCC)—the body charged with researching global climate change by the United Nations—which means that there is a 90 to 99 percent probability of its occurrence. See *id.* at 18,888 n.2. IPCC shared the Nobel Peace Prize with Al Gore in 2007 “for [its] efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change.” Press Release, Norwegian Nobel Committee, The Nobel Peace Prize for 2007 (Oct. 12, 2007), available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/2007/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2007/press.html).

<sup>8</sup> Morgan McCue Sport, Comment, *An Inconvenient Suit: California v. General Motors Corporation and a Look at Whether Global Warming Constitutes an Actionable Public Nuisance or a Nonjusticiable Political Question*, 38 CUMB. L. REV. 583, 591–93 (2007).

<sup>9</sup> *The Consequences of Global Warming on Glaciers and Sea Level*, NATURAL RES. DEF. COUNCIL, <http://www.nrdc.org/globalWarming/fcons/fcons4.asp> (last visited Dec. 30, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> *The Consequences of Global Warming on Weather Patterns*, NATURAL RES. DEF. COUNCIL, <http://www.nrdc.org/globalWarming/fcons/fcons1.asp> (last visited Dec. 30, 2010).

and the number of fires reported.<sup>12</sup> These changes indicate the urgent need for action to address global climate change and, consequently, the emission of GHGs into the atmosphere.

Starting in the early part of the past decade, several plaintiffs—perhaps unhappy with a lack of legislative action to address global climate change—initiated common law public nuisance actions against producers of GHGs.<sup>13</sup> These plaintiffs have pointed to the contribution of GHGs to global climate change and to the negative effects of this change to argue that there is sufficient harm to impart standing. Plaintiffs have sought both damages and injunctions against polluting activity in these cases. District courts, however, have refused to decide these issues on the merits by holding that the causes and effects of global warming present a nonjusticiable political question.<sup>14</sup> These courts have held that at least one of several *Baker* factors<sup>15</sup> is “inextricably linked” to this question, and thus the questions that these cases pose are nonjusticiable.<sup>16</sup>

District courts located in the Second, Fifth, and Ninth Circuits have used the political-question doctrine to dismiss global-warming-

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<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. GMC*, No. 06-05755, 2007 U.S. Dist. LEXIS 68547, at \*1 (N.D. Cal. Sept. 27, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>14</sup> See *Native Village of Kivalina*, 663 F. Supp. 2d at 883; *GMC*, 2007 U.S. Dist. LEXIS 68547, at \*48; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

<sup>15</sup> “*Baker* factors” refers to the case *Baker v. Carr*, the landmark case in which the Supreme Court laid down the current framework of the political-question doctrine. *Baker v. Carr*, 369 U.S. 186 (1962). Specifically, the Court stated that the justiciability of a claim depends on “whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Id.* at 198. The Court then announced six different instances, referred to as the “*Baker* factors,” in which a political question is presented and a claim is therefore nonjusticiable. These tests include the following:

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

*Id.* at 217.

<sup>16</sup> See *GMC*, 2007 U.S. Dist. LEXIS 68547, at \*38–48 (holding that the first three *Baker* factors are indicated in a global-warming-as-public-nuisance action).

as-public-nuisance claims. The first such case to be dismissed on political-question grounds was *Connecticut v. American Electric Power Company (AEP)*.<sup>17</sup> The Second Circuit Court of Appeals, however, recently vacated the district court's ruling and held that global-warming-as-public-nuisance claims do in fact present justiciable questions over which district courts can exercise jurisdiction.<sup>18</sup> Similar to the Second Circuit, the Fifth Circuit Court of Appeals, in *Comer v. Murphy Oil USA*, also reversed a district court ruling that held global-warming-as-public-nuisance claims present nonjusticiable political questions.<sup>19</sup> Thus, the two circuit courts to decide this issue have held in favor of the plaintiffs and allowed these suits to move forward.

Notably, however, this is not a settled question. In December 2010, the Supreme Court of the United States granted a writ of certiorari to decide this question, among others presented in *AEP*.<sup>20</sup> Moreover, subsequent to the panel decision in *Comer*, the Fifth Circuit granted a rehearing en banc, which temporarily vacated the panel decision.<sup>21</sup> Several months later, the Fifth Circuit dismissed the appeal for a lack of quorum because too many judges were forced to recuse themselves from the case.<sup>22</sup> This action had the effect of permanently vacating the panel decision and reinstating the district court opinion.<sup>23</sup> Therefore, neither the Second nor Fifth Circuit opi-

<sup>17</sup> 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

<sup>18</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>19</sup> 585 F.3d 855, 880 (5th Cir. 2009), *reh'g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

<sup>20</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>21</sup> *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010).

<sup>22</sup> *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

<sup>23</sup> *Id.* at 1055. The Fifth Circuit explicitly rejected the argument that because of the procedural posture of the case, the circuit should be "dis-enbanced" and the panel decision reinstated. *Id.* at 1054

This case was properly voted en banc. The panel opinion and the judgment of the panel were lawfully vacated. Without a quorum to conduct any judicial business, this en banc court has no authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, 'dis-enbanced.' Moreover, we have no authority to interpret a plainly applicable rule as simply a blank, on grounds that 'it was not designed to apply' to a situation where its terms have undisputed application.

*Id.* Similarly, the court refused to hold the case in abeyance until a properly constituted quorum could be achieved. *Id.*

It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting

nions addressing this issue are dispositive for purposes of each particular case and are not binding precedent, although they continue to be persuasive authority. Furthermore, not all district courts have agreed with the Second and Fifth Circuit decisions. The Northern District of California recently held—subsequent to the Second Circuit’s decision in *AEP*—that the court was without subject matter jurisdiction in a case where a native tribe of Inupiat Eskimos sued twenty-four oil, energy, and utility companies for their contribution to global warming because the case presented nonjusticiable political questions.<sup>24</sup> Although these circuit court rulings are not the last word on the matter, these decisions send a clear message that courts should no longer look for cover in this hotly debated area by relying on the political-question doctrine. As Matt Pawa, lead attorney for the plaintiffs in *AEP*, recently said, “Global Warming polluters everywhere: you are on notice that you are committing a tort and we will sue you.”<sup>25</sup>

Now that plaintiffs can potentially move forward with their global-warming-as-public-nuisance actions, another important issue arises: are federal public-nuisance claims for global warming displaced by federal statutory and regulatory law? The Second Circuit held in *AEP* that at the time the case was decided no federal scheme “spoke directly” to the plaintiffs’ question in global-warming-as-public-nuisance actions and that such claims therefore were not displaced.<sup>26</sup> Thus, further development of the federal statutory and regulatory law concerning the emission of GHGs needs to occur before federal-public-nuisance actions in this context are no longer viable, at least in the Second Circuit.

The judiciary is not the only place in which opponents to GHG emissions have sought to exert their agenda; debate about limiting GHG emissions has also taken place in the legislative arena. Recent-

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judge in regular active service of the Court may become ‘undisqualified’ or indeed whether another judge of this en banc court may become disqualified to sit further.

*Id.* Three judges dissented in two vigorous opinions, which both argued that the majority deprived the litigants of their right to a direct appeal in violation of their statutory rights on the basis of a local rule. *See id.* at 1055–56 (Davis, J., dissenting); *id.* at 1056–66 (Dennis, J., dissenting).

<sup>24</sup> *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009).

<sup>25</sup> Oregonem, *Sue a Polluter—New Green Light from the Courts*, DAILY KOS (Sept. 22, 2009, 3:55 AM), <http://www.dailykos.com/story/2009/9/22/785080/-Sue-a-PolluterNew-Green-Light-from-the-Courts>.

<sup>26</sup> *Am. Elec. Power Co.*, 582 F.3d at 381. The Fifth Circuit in *Comer* did not address this issue.

ly, a cap-and-trade bill<sup>27</sup> has been passed by the House of Representatives.<sup>28</sup> This bill, however, stalled in the Senate, and such a bill seems unlikely to pass in either legislative chamber during the 112th Congress.<sup>29</sup>

A more promising development concerning GHG regulation has come directly from the EPA. In April 2009, Lisa Jackson, the new Administrator of the EPA, released a proposed endangerment and cause or contribute finding for greenhouse gases pursuant to the Clean Air Act (CAA or “the Act”) § 202(a) (the “proposed endangerment and cause or contribute finding”).<sup>30</sup> Then, in December 2009, Administrator Jackson released a final ruling in accordance with the proposed endangerment and cause or contribute finding (the “final endangerment and cause or contribute finding”).<sup>31</sup> As part of the EPA’s administrative authority under the CAA, the Administrator may promulgate regulations for certain “criteria pollutants” that are deemed a “danger to human health and welfare.”<sup>32</sup> Pursuant to this final endangerment and cause or contribute finding, the EPA will regulate GHG emissions from new motor vehicles and new motor vehicle engines under the CAA.<sup>33</sup> Such regulations have already been adopted for light-duty vehicles,<sup>34</sup> and regulations have also been pro-

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<sup>27</sup> Editorial, *The Cap and Tax Fiction*, WALL ST. J., June 25, 2009, at A14 (“Under a cap-and-trade system, government sets a cap on the total amount of carbon that can be emitted nationally; companies then buy or sell permits to emit CO<sub>2</sub>. The cap gets cranked down over time to reduce total carbon emissions.”).

<sup>28</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

<sup>29</sup> See, e.g., Kate Galbraith, *Next Year Offers Little Cheer for Those Battling Climate Change*, N.Y. TIMES, Dec. 26, 2010, [http://www.nytimes.com/2010/12/27/business/energy-environment/27green.html?\\_r=1&scp=4&sq=cap%20and%20trade&st=cse](http://www.nytimes.com/2010/12/27/business/energy-environment/27green.html?_r=1&scp=4&sq=cap%20and%20trade&st=cse).

<sup>30</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>31</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>32</sup> See 42 U.S.C. § 7408(a)(1)(A) (2006); *id.* § 7521(a)(1).

<sup>33</sup> See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86, 600; 49 C.F.R. pts. 531, 533, 537, 538).

<sup>34</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536–38). “Light-duty vehicles” refer to passenger cars and light trucks including, among others, minivans, passenger vans, pickup trucks, and sport-utility vehicles. *Emission Standards Reference*

posed for medium- and heavy-duty vehicles.<sup>35</sup> Similarly, the EPA is also seeking to regulate the GHG emissions from large stationary sources pursuant to the Prevention of Significant Deterioration (PSD) program and Title V of the CAA.<sup>36</sup> These sections of the CAA set up a permitting program for stationary sources during the pre-construction phase and operational phase, respectively.<sup>37</sup>

Although the Second Circuit clearly held in *AEP* that no federal statutory scheme displaced federal public-nuisance claims at the time that case was decided, the court did indicate that future displacement<sup>38</sup> of federal global-warming-as-public-nuisance actions was possible through administrative rulemaking.<sup>39</sup> Therefore, we are presented with the question of whether regulation of GHGs under the CAA would displace the federal common law of public nuisance for claims seeking relief for the effects of global climate change and, if so, what the scope of this displacement would look like.

Part II of this Comment will briefly outline the law of public nuisance and the development of displacement jurisprudence. It will also summarize key aspects of the CAA, including the ways in which the Act treats stationary, mobile, and fuel sources. Part III will explain the final endangerment and cause or contribute finding, the “light-duty vehicle” rule, and the “tailoring” rule. Part IV will ex-

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*Guide: Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/otaq/standards/basicinfo.htm#1> (last visited Dec. 30, 2010).

<sup>35</sup> See Greenhouse Gas Emission Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152 (proposed Nov. 30, 2010) (to be codified at C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068).

<sup>36</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). Although the EPA is not currently seeking to regulate stationary sources through the adoption of an endangerment finding under § 108 of the CAA and subsequent administrative rulemakings, the EPA considers the regulation of GHGs under the “light-duty vehicle” rule as triggering the PSD and Title V permitting programs. See discussion *infra* note 173.

<sup>37</sup> See 42 U.S.C. §§ 7470–7492, 7501–7515, 7661–7661f (2006).

<sup>38</sup> Displacement is often confused with pre-emption, but pre-emption is a substantively different concept. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 371 n.37 (2d Cir. 2009) (citing *Milwaukee II*, 451 U.S. 304, 317 n.9 (1981)), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174); *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 719 F.2d 525, 530 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985); see also discussion *infra* Part II.B.

<sup>39</sup> See *Am. Elec. Power Co.*, 582 F.3d at 392–93 (“It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance’ by greenhouse gases.” (emphasis added) (quoting *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 106 (1971))).

amine what the contours of federal displacement should look like with these rulemakings officially adopted. Lastly, Part V will briefly posit what the consequences of this possible displacement scheme may be in regard to federal action in both the legislative and executive branches, as well as opine on what the best future course of action is moving forward.

## II. THE LAW OF PUBLIC NUISANCE, DISPLACEMENT, AND THE CLEAN AIR ACT

### A. *Public Nuisance*

Although the tort of public nuisance was originally considered a crime, a cause of action for public nuisance serves only as a basis for civil liability in modern jurisprudence.<sup>40</sup> The *Restatement (Second) of Torts* defines a public nuisance as “an unreasonable interference with a right common to the general public.”<sup>41</sup> This definition, which a majority of states have adopted, has also been used in the context of federal common law.<sup>42</sup> In fact, the court in *AEP* explicitly adopted the *Restatement* standard for public nuisance when discussing whether the plaintiffs had pled a valid cause of action.<sup>43</sup>

Generally, a public nuisance is an interference with rights common to the general public such as public health, safety, morals, peace, comfort, or convenience.<sup>44</sup> The *Restatement* also provides that interference with a public right is unreasonable if “the conduct is proscribed by a statute, ordinance, or administrative regulation, or . . . is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”<sup>45</sup>

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<sup>40</sup> See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 495 (N.J. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979)).

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 821B.

<sup>42</sup> See, e.g., *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F. 2d 1222, 1234 (3d. Cir. 1980), *vacated*, 453 U.S. 1 (1981). In *National Sea Clammers Ass'n*, Plaintiffs, fisherman who fished the waters off the coast of New York and New Jersey, brought a claim against defendants in federal public nuisance for discharging or permitting the discharge of “nutrient-rich sewage and toxic wastes into the Atlantic Ocean or its tributaries.” *Id.* at 1224. Although the Supreme Court later vacated this decision because it determined that Plaintiffs’ federal public nuisance claims were displaced, the circuit court adopted the *Restatement* definition of public nuisance in the context of federal common law while holding in favor of the Plaintiffs. See *id.* at 1234.

<sup>43</sup> See *Am. Elec. Power Co.*, 582 F.3d at 350–52.

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 821B(2)(a).

<sup>45</sup> § 821B(2)(b), (c).



Not all would-be plaintiffs have standing to bring a claim against a defendant in tort for a public nuisance. In most instances, only a state (or a state's agent) or other public entity, such as a city, can initiate a claim for public nuisance, but individuals have standing in such cases if they can prove a "special" damage.<sup>46</sup> Thus, for individuals to plead a valid cause of action for public nuisance, they "must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."<sup>47</sup> On this basis, private land trusts have initiated federal-nuisance actions seeking damages and injunctive relief from emitters of GHGs.<sup>48</sup> States and other government entities have initiated similar public-nuisance actions in their representative capacity for the general public.<sup>49</sup> Because air pollution is partially regulated by the federal government, the question becomes whether plaintiffs in global-warming-as-public-nuisance actions still have a viable cause of action. Put another way, the issue is whether the federal common law of public nuisance is displaced by federal statutory and regulatory law in the context of GHG emissions.

### B. Displacement

As an initial matter, "the concept of 'displacement' refers to a situation in which 'federal statutory law governs a question previously the subject of federal common law.'"<sup>50</sup> On the other hand, "pre-emption" refers to "a circumstance in which a federal statute supercedes state law."<sup>51</sup> In the words of Chief Justice William Rehnquist, "determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal common law pre-empt state law."<sup>52</sup> Courts, however, often confuse these doctrines and use them interchangeably.

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<sup>46</sup> See, e.g., *In re Lead Paint Litig.*, 924 A.2d 484, 497–98 (N.J. 2007) (citing *Poulos v. Dover Boiler & Plate Fabricators*, 76 A.2d 808, 811–12 (N.J. 1950)).

<sup>47</sup> RESTATEMENT (SECOND) OF TORTS § 821C(1).

<sup>48</sup> See *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>49</sup> See *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009); *California v. GMC*, No. 06-05755, 2007 U.S. Dist. LEXIS 68547, at \*2 (N.D. Cal. Sept. 27, 2007); *Am. Elec. Power Co.*, 406 F. Supp. 2d at 267.

<sup>50</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 371 n.37 (2d Cir. 2009) (quoting *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 316 (1981)), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>51</sup> *Id.*

<sup>52</sup> *Milwaukee II*, 451 U.S. at 316.

bly.<sup>53</sup> All but one of the public- nuisance actions seeking relief for the effects of global warming that have been filed to date have been based on federal common law. The exception was *Comer*, where the plaintiffs' suit was based on, among other claims, *state* private and public nuisance causes of action.<sup>54</sup>

Federal common law is recognized only when state common law is inadequate to deal with the issue presented. As the United States Supreme Court has stated, "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."<sup>55</sup> Thus, federal and state common law are mutually exclusive—where state common law is sufficient, federal common law cannot be applied. In the air pollution context, "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale . . . ."

<sup>56</sup> State law is insufficient to address these concerns because states, in their sovereign capacity, would be seeking to enforce a cause of action outside their respective jurisdictions. With this in mind, courts recognize federal common law when they are "compelled to consider federal questions 'which cannot be answered from federal statutes alone.'"<sup>57</sup> Therefore, in the context of air pollution, if a state brings a cause of action in its sovereign capacity seeking redress for the emission of air pollution, the federal common law should apply unless federal statutory or regulatory law has displaced it.

The power of courts to recognize federal common law "is subject to the paramount authority of Congress."<sup>58</sup> Therefore, the legislative branch may limit the courts' ability to recognize federal common law. This is because concerns over separation of powers prevent the courts from determining what constitutes reasonableness when Congress

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<sup>53</sup> *Am. Elec. Power Co.*, 582 F.3d at 371 n.37 ("[C]ourts have also frequently used the word 'pre-emption' when discussing whether a statute displaces federal common law." (citing *Milwaukee II*, 451 U.S. at 317 n.9; *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 719 F.2d 525, 530 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985))).

<sup>54</sup> Although state public- nuisance claims were at issue in *Comer*, all other global-warming-as-public- nuisance actions have been brought under federal common law. As such, only federal common law and displacement jurisprudence will be discussed in this Comment.

<sup>55</sup> *Milwaukee II*, 451 U.S. at 314 n.7.

<sup>56</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907).

<sup>57</sup> *Milwaukee II*, 451 U.S. at 314 (quoting *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring)).

<sup>58</sup> *Id.* at 313–14 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)) (internal quotations omitted).

has already spoken on the issue.<sup>59</sup> In determining whether statutory law has displaced federal common law, the main inquiry is whether the problem presented to the court—previously governed by the common law—has been sufficiently addressed in the legislation.<sup>60</sup> Federal common law applies until the point at which “the field has been made the subject of comprehensive legislation or *authorized administrative standards*.”<sup>61</sup>

Unlike when determining whether an act of Congress has preempted state law, “evidence of a clear and manifest purpose is not required” when determining whether federal legislation or administrative action has displaced federal common law.<sup>62</sup> This is because displacement does not raise the issues of federalism present in a preemption analysis.<sup>63</sup> Beyond the foregoing, a “presumption favoring retention of existing law”<sup>64</sup> still applies, and “courts may take it as a

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<sup>59</sup> *Id.* at 315 (“Our ‘commitment to the separation of powers is too fundamental’ to continue to rely on federal common law ‘by judicially decreeing what accords with common sense and the public weal’ when Congress has addressed the problem.” (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

<sup>60</sup> *Id.* at 315 n.8 (“[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law.”). The Supreme Court has also held that “an agency regulation with the force of law can pre-empt conflicting state” law. *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). In such cases, a court should “perform[] its own conflict determination.” *Id.* Although the Supreme Court has not addressed whether agency regulation may displace federal common law, it stands to reason that agency regulation having the force of law should be given displacement effect when it “speaks directly” to the issue governed by the federal common law. Compare *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 381 (2d Cir. 2009) (holding global-warming-as-public-nuisance actions were not displaced because GHGs were not regulated under the CAA at the time of the decision), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174), with *New Eng. Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981) (holding that the CAA precluded the issuance of an injunction under federal common law when the pollutant at issue was currently regulated under the Act).

<sup>61</sup> *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971) (emphasis added). In *Pankey*, the State of Texas sued eight owners and operators of ranch land in New Mexico for their use of Toxaphene, a pesticide. *Id.* at 237. Plaintiffs argued that use of this pesticide interfered with its citizens’ right to make use of the Canadian River, which runs from New Mexico into Texas, by polluting this water. *Id.* at 237–38. The court held that the plaintiffs had a right to a federal common law cause of action in public nuisance. *Id.* at 241–42.

<sup>62</sup> *Milwaukee II*, 451 U.S. at 316–17.

<sup>63</sup> *Id.* (“[Federalism] concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required.”).

<sup>64</sup> *United States v. Texas*, 507 U.S. 529, 534 (1993).

given that Congress has legislated with an expectation that the [common law] principle will apply except ‘when a statutory purpose to the contrary is evident.’”<sup>65</sup> The ultimate question in a displacement analysis, however, is whether the legislative scheme has “spoken directly to the question.”<sup>66</sup> Further, all that matters is that the field is occupied, “not whether it has been occupied in a particular manner.”<sup>67</sup> In other words, the only question in determining whether federal statutory law displaces federal common law is whether the issue has been addressed in some manner. Whether the matter has been addressed to the courts’ or the plaintiffs’ liking is of no concern. The Supreme Court has noted, for example, that “speaking directly” to the question at issue may, in some cases, require that the “question” be as specific as a question of what damages are appropriate.<sup>68</sup> Federal common law can therefore exist only as a gap-filling measure in areas that the legislative or regulatory scheme has not previously addressed.<sup>69</sup>

In the landmark case *Illinois v. Milwaukee (Milwaukee I)*, the Supreme Court held that the City of Milwaukee had a valid cause of action in federal public nuisance against the State of Illinois for its pollution of interstate waters.<sup>70</sup> Eventually, this case again worked its way up to the Supreme Court in *Milwaukee v. Illinois (Milwaukee II)*.<sup>71</sup> In the interim, however, Congress had passed the Federal Water Pollution Control Act (FWPCA) Amendments of 1972.<sup>72</sup> This set the stage for the Court to determine whether these amendments displaced the federal common law in the area of water pollution. The Supreme Court concluded in *Milwaukee II* that Congress had “occupied the field” of federal public nuisance law in the context of water pollution “through the establishment of a comprehensive regulatory program [i.e., the FWPCA] supervised by an expert administrative agency” and thus, the federal common law was displaced.<sup>73</sup> As the Court noted, at

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<sup>65</sup> *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

<sup>66</sup> *Milwaukee II*, 451 U.S. at 315.

<sup>67</sup> *Id.* at 324.

<sup>68</sup> *Id.* at 315 (noting that the federal statute at issue in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), spoke to “the question of damages”).

<sup>69</sup> *See id.* at 324 n.18.

<sup>70</sup> *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 108 (1972).

<sup>71</sup> 451 U.S. 304.

<sup>72</sup> *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251 et seq. (2006)); *Milwaukee II*, 451 U.S. at 310.

<sup>73</sup> *Id.* at 317.

the time of *Milwaukee I*, the FWPCA was merely “another law touching interstate waters,” but the subsequent amendments “spoke directly” to the issue by the time of *Milwaukee II* by creating a comprehensive regulatory scheme.<sup>74</sup> The Second Circuit has stated the rule expressed in *Milwaukee II* as

a strict test for determining the [displacement] effect of a federal statute. Instead of inquiring whether ‘Congress ha[s] affirmatively proscribed the use of federal common law,’ we are to conclude that federal common law has been [displaced] as to every question to which the legislative scheme ‘spoke directly,’ and every problem that Congress has ‘addressed.’<sup>75</sup>

No Supreme Court case has ever held that the CAA displaces federal common law in regard to air pollution; nor has the Court addressed this issue. Two district courts, however, have held that the CAA displaces the federal common law in this area.<sup>76</sup> The Second Circuit Court of Appeals in *AEP*—the only circuit court opinion to address the displacement effect of the CAA on global-warming-as-public-nuisance claims<sup>77</sup>—explicitly rejected the conclusion of the two district courts and criticized one court’s analysis for “equating the CAA with the [FWPCA]—without further analyzing the two statutes.”<sup>78</sup> In an earlier case, the Second Circuit held that the CAA precluded the issuance of an injunction under federal common law, but this was only in regard to a pollutant currently regulated under the act.<sup>79</sup> This was a narrow holding. The court did “not reach the

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<sup>74</sup> *Id.*

<sup>75</sup> *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (quoting *Milwaukee II*, 451 U.S. at 315).

<sup>76</sup> *See Reeger v. Mill Serv. Inc.*, 593 F. Supp. 360, 363 (W.D. Pa. 1984); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982).

<sup>77</sup> The Fifth Circuit in *Comer* did not address the issue of displacement, and instead, the court focused its analysis on the issues of standing and the political question doctrine. *See Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009), *reh’g granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). Further, the plaintiffs in *Comer* brought a cause of action for public nuisance under state common law and therefore this would evoke a pre-emption, as opposed to a displacement, analysis. *See id.* (“The plaintiffs invoked the district court’s subject-matter jurisdiction based on diversity of citizenship. The plaintiffs do not assert any federal or public law actions and do not seek injunctive relief.” (internal citations omitted)).

<sup>78</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 378 n.47 (2d Cir. 2009) (criticizing the court’s analysis in *Kin-Buc, Inc.*, 532 F. Supp. 699), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>79</sup> *New Eng. Legal Found. v. Costle*, 666 F.2d 30, 32 (2d Cir. 1981). The Second Circuit, in *Costle*, determined that the plaintiffs had not pled a valid cause of action seeking an injunction against defendants, Long Island Lighting Company, from burning oil that contained sulphur. *Id.* at 33. The court reasoned that EPA’s approval of a State Implementation Plan (SIP) that included Long Island Lighting

broad question of whether the Clean Air Act totally [displaces] federal common law nuisance actions based on emission of chemical pollutants in the air.”<sup>80</sup> In *AEP*, however, the Second Circuit found the Supreme Court’s decision in *Massachusetts v. EPA* helpful to its analysis of the displacement issue.<sup>81</sup>

The first question on the merits that the Court faced in *Massachusetts* was “whether § 202(a)(1) of the Clean Air Act authorizes [the] EPA to regulate [GHG] emissions from new motor vehicles in the event that it forms a ‘judgment’ that such emissions contribute to climate change.”<sup>82</sup> The EPA argued that carbon dioxide is not an “air pollutant” within the meaning of the CAA and therefore it had no jurisdiction over its regulation.<sup>83</sup> The Court reasoned, however, that the statute is unambiguous and embraces all airborne compounds.<sup>84</sup> Thus, the Court concluded that the EPA has authority to regulate GHGs under the CAA.<sup>85</sup> This holding indicated to the Second Circuit that the CAA requires regulation of GHGs only when the EPA has decided that emission of GHGs presents a danger to human health and welfare and does not, *of necessity*, speak to the question of GHG emissions a priori.<sup>86</sup> The CAA, therefore, authorizes the EPA to regulate GHGs, but at the time *AEP* was decided no such regulations were in effect. The proposed regulations were just that, merely proposed. The CAA, along with its then-current regulations, did not speak to the issue of GHG emissions and thus did not displace federal public nuisance claims for the effects of global warming.<sup>87</sup> Such displacement, however, may occur at some future date.<sup>88</sup> Ultimately, the court determined that the CAA (absent an endangerment finding as to, and other regulation concerning, GHGs) was more akin to the state of the FWPCA at the time *Milwaukee I* was decided, as opposed

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Company’s use of the high-sulfur fuel precluded plaintiffs from maintaining a common law cause of action. *Id.* at 32–33.

<sup>80</sup> *Id.* at 32.

<sup>81</sup> *Am. Elec. Power Co.*, 582 F.3d at 378–80.

<sup>82</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>83</sup> *Id.* at 511–12.

<sup>84</sup> *Id.* at 528–29; *see also* 42 U.S.C. § 7602(g) (2006).

<sup>85</sup> *Massachusetts*, 549 U.S. at 532.

<sup>86</sup> *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 379 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>87</sup> *See id.* at 379–81.

<sup>88</sup> *Id.* (“We cannot say, therefore, that EPA’s issuance of proposed findings suffice to regulate greenhouse gases in a way that ‘speaks directly’ to Plaintiffs’ problems and thereby displaces Plaintiffs’ existing remedies under the federal common law.” (citing *Milwaukee v. Illinois*, 451 U.S. 304, 319–24 (1981))).

to the version of the FWPCA in place at the time of *Milwaukee II*, and therefore did not displace the federal common law.<sup>89</sup> The emphasis placed on the *possibility* of the CAA's displacement capacity in regard to global-warming-as-public-nuisance claims requires further consideration of the scope and structure of the CAA to determine the contours of what this displacement may be.

### C. *The Clean Air Act*

Congress enacted the CAA in 1955,<sup>90</sup> and the Act has since been amended on several occasions.<sup>91</sup> The purpose of the CAA is to, among other things, "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."<sup>92</sup> The CAA generally treats stationary and mobile sources, as well as fuel content, differently. "Broadly speaking, Title I of the statute regulates stationary sources of pollution and Title II regulates [fuel content and] mobile sources, most importantly motor vehicles."<sup>93</sup>

#### 1. Stationary Sources

Under the present framework of the CAA, in regulating stationary sources, the Administrator of the EPA is required to identify "criteria" air pollutants that are reasonably anticipated to "endanger public health or welfare."<sup>94</sup> Additionally, the EPA must find that "the presence of [the criteria pollutant] in the ambient air results from numerous or diverse mobile or stationary sources."<sup>95</sup> This is called an endangerment finding. Stationary sources are "generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle."<sup>96</sup> Once a criteria pollutant has

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<sup>89</sup> *Id.* at 380.

<sup>90</sup> See Pub. L. No. 84-159, 69 Stat. 322.

<sup>91</sup> See Pub. L. No. 88-206, § 1, 77 Stat. 392; Pub. L. No. 89-272, Title I, § 101(2), (3), 79 Stat. 992; Pub. L. No. 90-148, § 2, 81 Stat. 485; Pub. L. No. 101-549, Title I, § 108(k), 104 Stat. 2468; see also *Clean Air Act: History of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/air/caa/caa\\_history.html](http://www.epa.gov/air/caa/caa_history.html) (last visited Dec. 30, 2010).

<sup>92</sup> 42 U.S.C. § 7401(b)(1) (2006).

<sup>93</sup> *Sierra Club v. Larson*, 2 F.3d 462, 464 (1st Cir. 1993); see 42 U.S.C. §§ 7408–7513a (Title I), 7521–7590 (Title II) (2006).

<sup>94</sup> § 7408(a)(1)(A).

<sup>95</sup> § 7408(a)(1)(B).

<sup>96</sup> *Id.* § 7602(z). The sources excepted from the definition of "stationary source" are instead regulated under Title II of the CAA. See *id.* §§ 7521–7544.

been identified pursuant to an endangerment finding, the Administrator must then promulgate a primary and secondary National Ambient Air Quality Standard (NAAQS) for that criteria pollutant.<sup>97</sup> The EPA establishes NAAQSs based on the permissible concentration of each criteria pollutant in the ambient air measured by “parts per million (ppm) by volume, milligrams per cubic meter of air (mg/m<sup>3</sup>), and micrograms per cubic meter of air (µg/m<sup>3</sup>).”<sup>98</sup> The Administrator is then required to review these NAAQSs at least once every five years.<sup>99</sup> Primary NAAQSs must allow for an “adequate margin of safety” necessary to protect the public health.<sup>100</sup> Secondary NAAQSs must “protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air.”<sup>101</sup>

After NAAQSs are established for criteria pollutants, states—through a cooperative federalism framework—must submit “a plan which provides for implementation, maintenance, and enforcement of such . . . standards in each air quality control region (or portion thereof).”<sup>102</sup> These are known as State Implementation Plans (SIPs). The Administrator of the EPA then either accepts the SIP<sup>103</sup> or must promulgate a Federal Implementation Plan (FIP) if the SIP is rejected.<sup>104</sup> A FIP is meant to accomplish the goals of a SIP, but it is instead promulgated by the EPA as opposed to being promulgated by the state itself.<sup>105</sup> In addition to establishing the framework of SIPs, the CAA also regulates stationary sources by establishing a program for both pre-construction and operating permits.<sup>106</sup> Pre-construction

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<sup>97</sup> § 7409(a)(2). Primary NAAQS are meant to address dangers directly to human *health*, such as the possibility of disease by exposure to these pollutants. *See* 40 C.F.R. § 50.2(b) (2010). Secondary NAAQS, on the other hand, deal with matters of human *welfare*, which means protection “from any known or anticipated adverse effects of a pollutant.” *Id.* The EPA generally only issues one NAAQS, however, which is meant to satisfy both the primary and secondary NAAQSs. *See, e.g., id.* § 50.12.

<sup>98</sup> *Air and Radiation: National Ambient Air Quality Standards*, U.S. ENVTL. PROT. AGENCY, <http://epa.gov/air/criteria.html> (last visited Dec. 30, 2010).

<sup>99</sup> § 7409(d)(1).

<sup>100</sup> § 7409(b)(1).

<sup>101</sup> § 7409(b)(2).

<sup>102</sup> 42 U.S.C. § 7410(a)(1) (2006). Air quality control regions consist of the area within a state—possibly divided into two or more separate regions—that states must consider for purposes of developing and carrying out SIPs. *See id.* §7407.

<sup>103</sup> *See id.* § 7410(a)(3)(B).

<sup>104</sup> § 7410(c)(1).

<sup>105</sup> *See* § 7410(c).

<sup>106</sup> *See id.* §§ 7470–7492, 7501–7509a, 7511–7513a, 7661–7661f; *see also* discussion *infra* Part II.C.1.a–b.



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permits are further divided into two separate categories based on whether the air quality control region in which the source is located has reached attainment levels.<sup>107</sup> Combined, these pre-construction programs are called New Source Review (NSR).<sup>108</sup>

a. Pre-Construction Permits: Prevention of Significant Deterioration and Nonattainment New Source Review

After establishing NAAQSs, the CAA promulgates two separate pre-construction permitting programs. The first, called the Prevention of Significant Deterioration (PSD) program, applies to new major stationary sources and “major modifications” to existing major stationary sources found within attainment areas (i.e., areas that have met the NAAQSs on a pollutant-by-pollutant basis).<sup>109</sup> Determining whether the PSD program is applicable to a particular emitter of pollution requires an inquiry into “whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification.”<sup>110</sup> Major stationary sources are those that emit at least one hundred tons per year (tpy) of any pollutant “subject to regulation” by the CAA for a list of twenty-eight source categories<sup>111</sup> or, alternatively, any source that emits two hundred fifty tpy of any pollutant from any other unlisted source.<sup>112</sup> Major modifi-

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<sup>107</sup> See §§ 7470–7492, 7501–7509a, 7511–7513a.

<sup>108</sup> See 40 C.F.R. § 51 app. W(1.0)(a) (2010) (describing prevention of significant deterioration as part of new source review).

<sup>109</sup> §§ 7470–7492.

<sup>110</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,297 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>111</sup> These sources include

fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

§ 7479(1).

<sup>112</sup> *Id.*

cations, on the other hand, refer to any major physical changes that result in an increase in emissions that is “significant” (i.e., equal to or above the “significance” level as defined by the EPA).<sup>113</sup>

Recently, a debate has arisen over the interpretation of the words “subject to regulation” under the CAA. Some have argued that these words are synonymous with simply being subject to the monitoring and reporting requirements of the Act (which includes a much broader spectrum of pollutants) while others have argued that this phrase applies to those pollutants whose emissions are subject to control under other sections of the CAA (i.e., whose emission levels are regulated).<sup>114</sup> The Environmental Appeals Board (EAB) in *In re Deseret Power Electric Cooperative* rejected an argument by the EPA, region 8, that historic precedent bound its interpretation of “subject to regulation” to mean that only those pollutants already subject to control over emissions by other sections of the CAA are subject to the PSD program.<sup>115</sup> The EAB, however, also rejected the argument that the words “subject to regulation” require the application of the PSD program to any source subject to monitoring and reporting requirements.<sup>116</sup> Following this case, the EPA Administrator at that time, Stephen Johnson, issued a memorandum interpreting “subject to regulation” to mean “subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant.”<sup>117</sup> The EPA has since reconsidered this interpretation, but in early 2010 the EPA made clear that it agrees with its initial analysis that the words “subject to regulation” should be synonymous with actual control of emissions under the Act.<sup>118</sup>

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<sup>113</sup> 40 C.F.R. § 52.21(a)(2)(iv)(a) (2010).

<sup>114</sup> See *In re Deseret Power Elec. Coop.*, No. 07-03, 2008 EPA App. LEXIS 47, at \*1-3 (2008).

<sup>115</sup> *Id.* at \*5-6; see also Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535, 51,538 (Oct. 7, 2009).

<sup>116</sup> *In re Deseret Power Elec. Coop.*, 2008 EPA App. LEXIS 47, at \*4-5; see also Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. at 51,538.

<sup>117</sup> Memorandum from Stephen Johnson, Env'tl. Prot. Agency Adm'r, to Env'tl. Prot. Agency Reg'l Adm'rs 1 (Dec. 18, 2008), available at [http://www.epa.gov/NSR/documents/psd\\_interpretive\\_memo\\_12.18.08.pdf](http://www.epa.gov/NSR/documents/psd_interpretive_memo_12.18.08.pdf); see also Clean Air Act Prevention of Significant Deterioration (PSD) Construction Permit Program; Interpretation of Regulations that Determine Pollutants Covered by the Federal PSD Permit Program, 73 Fed. Reg. 80,300 (Dec. 31, 2008) (public notice of Dec. 18, 2008 memo).

<sup>118</sup> See Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,004 (Apr. 2,

Once it is determined that the PSD program applies to a particular source, to obtain a pre-construction permit, the regulated source must agree to construct the Best Available Control Technology (BACT) and make use of such technology once construction is complete.<sup>119</sup> What is considered to be the BACT is determined on a case-by-case basis.<sup>120</sup> Additionally, a source regulated by the PSD program is required to refrain from causing or contributing to pollution that results in levels prohibited by the CAA (i.e., results in nonattainment for the region on a pollutant-by-pollutant basis).<sup>121</sup>

The second pre-construction permitting program, called nonattainment NSR, is found in Part D of the CAA and governs sources within nonattainment areas (i.e., areas that have not met the NAAQSs).<sup>122</sup> Because GHGs are not currently regulated under Title I of the CAA (nor is regulation under Title I currently proposed), and thus, no NAAQSs are being proposed for GHGs, all areas in the country are therefore in attainment.<sup>123</sup> Accordingly, the nonattainment NSR program is irrelevant to this discussion.

#### b. Title V Operating Permits

Beyond the pre-construction permits under the PSD and nonattainment NSR programs, Title V of the CAA sets out the overarching permitting process for all stationary sources once a stationary source becomes operational.<sup>124</sup> Generally, the Title V program applies to major stationary sources, defined as those that emit one-hundred tpy of any pollutant, ten tpy of any “hazardous” pollutant, or twenty-five

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2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) (“After considering comments on alternate interpretations of [the term ‘subject to regulation’], EPA has decided to continue to interpret it to include each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant.”).

<sup>119</sup> 42 U.S.C. § 7475(a)(4) (2006).

<sup>120</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,298 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (describing the “top-down” approach taken by the EPA, in which all available control technologies are identified, technically infeasible options are eliminated, and a decision is then made from the remaining sources based on control and cost effectiveness); *see also* 40 C.F.R. § 52.21(b)(12) (2010).

<sup>121</sup> § 7475(a)(3).

<sup>122</sup> *Id.* §§ 7501–7509a, 7511–7513a.

<sup>123</sup> Perhaps more accurately, the attainment/nonattainment distinction simply does not apply, but this difference is merely one of semantics for the purposes of this discussion. What is important to understand is that the nonattainment NSR permitting program is not implicated by any of the proposed regulations concerning GHG emissions.

<sup>124</sup> 42 U.S.C. §§ 7661–7661f (2006).

typy of any combination of “hazardous” pollutants.<sup>125</sup> In addition, Title V regulation applies to any affected source subject to the acid rain sections of the CAA, any source requiring a permit under the PSD or nonattainment NSR program, or any other source designated by rule.<sup>126</sup> The substantive requirements for stationary sources under the CAA are found within the NAAQSs and the emission control technology requirements of the pre-construction permits.<sup>127</sup> The permitting program of Title V serves merely as a means of enforcement.<sup>128</sup> According to the EPA: “Title V generally does not add new substantive requirements for pollution control, but it does require that each permit contain all of a facility’s ‘applicable requirements’ under the CAA, and that certain procedural requirements be followed, especially with respect to compliance with these requirements.”<sup>129</sup> Without a permit, a source emitting a criteria pollutant above levels triggering application of Title V may not be in operation.<sup>130</sup>

## 2. Mobile Sources

Mobile sources, as defined under the CAA, include “any class or classes of new motor vehicles or new motor vehicle engines.”<sup>131</sup> To regulate mobile sources under the CAA, the Administrator of the EPA must make a finding that an “air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his [or her] judgment cause, or contribute to, air pollution . . . may reasonably be anticipated to endanger public health or welfare.”<sup>132</sup> This is called an endangerment and cause or contribute finding.<sup>133</sup> Once an endangerment and cause or contribute finding is made by the EPA Administrator pursuant to § 202, “[t]he CAA regulates mo-

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<sup>125</sup> § 7661(2)(A)–(B).

<sup>126</sup> § 7661a(a).

<sup>127</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,298 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>128</sup> See *id.*

<sup>129</sup> *Id.*

<sup>130</sup> § 7661a(a).

<sup>131</sup> *Id.* § 7521(a)(1).

<sup>132</sup> *Id.*

<sup>133</sup> See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,890 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1) (“Section 202(a) sets forth a two-part predicate for regulatory action under that provision: endangerment and cause or contribute.”).

bile sources primarily by requiring standards for tailpipe emissions.”<sup>134</sup> Furthermore, “[w]hile states have significant latitude in setting stationary source emissions limits to meet the NAAQS, the Act reserves to the federal government exclusive authority to regulate motor vehicle emissions.”<sup>135</sup>

### 3. Fuel and Fuel Additives

Similar to new motor vehicle and new motor vehicle engine regulation, the Administrator can regulate fuel and fuel additives

for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle

(A) if in the judgment of the Administrator any emission product of such fuel or fuel additives causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare, or

(B) if emission products of such fuel or additive will impair to a significant degree the performance or any emission control device or system.<sup>136</sup>

Under this provision, the EPA can “prohibit the manufacture, introduction into commerce, offering for sale, or sale” of any such regulated fuel.<sup>137</sup> Clearly, Congress intended separate means of regulation for stationary, mobile, and fuel sources under the CAA. Stationary sources are governed by the establishment of NAAQSs and a permitting program used to enforce such standards, along with requirements for the emission control technology used.<sup>138</sup> Mobile sources, on the other hand, are regulated by the adoption of tailpipe-emission standards and a prohibition on the sale of those mobile sources which do not meet those standards.<sup>139</sup> Lastly, fuel sources are regulated by prohibiting certain fuel content or additives.<sup>140</sup>

#### D. *Setting the Stage for New Regulation*

In 2007, the United States Supreme Court handed down its most important decision to date concerning the CAA and global climate

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<sup>134</sup> Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 376 n.45 (2d Cir. 2009) (citing § 7521), cert. granted, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>135</sup> *Id.* (citing § 7543).

<sup>136</sup> 42 U.S.C. § 7545(c)(1) (2006).

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* Part II.C.1.a–b.

<sup>139</sup> See *supra* Part II.C.2.

<sup>140</sup> § 7545(c)(1).

change, *Massachusetts v. EPA*.<sup>141</sup> Leading up to this case, in October 1999, nineteen environmental and renewable energy industry organizations filed a rulemaking petition to force the EPA to regulate carbon dioxide under the CAA.<sup>142</sup> When the EPA declined, suit followed.<sup>143</sup> The first issue that the Court had to decide in *Massachusetts v. EPA* was whether the plaintiffs had standing to sue.<sup>144</sup> The court decided that, yes, the plaintiffs did have the requisite standing necessary to challenge the EPA's denial of its rulemaking petition.<sup>145</sup> It then turned to the merits of the case.

The first question on the merits that the Court addressed was whether § 202(a)(1) of the CAA gives the EPA the authority to regulate GHGs from mobile sources if, in the judgment of the Administra-

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<sup>141</sup> 549 U.S. 497 (2007).

<sup>142</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,889 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>143</sup> See *Massachusetts*, 549 U.S. at 510–14.

<sup>144</sup> *Id.* at 516–28.

<sup>145</sup> *Id.* at 526. First, the Court stated that the case before it did not raise a political question, would not result in an advisory opinion, nor had it been mooted by subsequent developments, all of which would have been fatal to the plaintiff's standing. *Id.* at 516. Ultimately, the Court determined that the state of Massachusetts had standing to sue in its "quasi-sovereign," or *parens patriae*, capacity. *Id.* at 520 n.17. Litigating as *parens patriae* allows a state to protect "public or governmental interests that concern the state as a whole." *Id.* (quoting RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 289 (5th ed. 2003) (internal quotation marks omitted)). The Court reasoned that plaintiffs could prove an "injury in fact" based on the scientific evidence indicating that global warming would likely raise sea-levels and therefore, the state would permanently lose land by inundation, among other negative consequences. *Id.* at 521–23. The majority rebuffed the Chief Justice's argument in dissent that Massachusetts could not quantify its projected land loss and that therefore its submission was "conclusory." *Id.* at 523 n.21. Instead, the majority countered, the likelihood that "Massachusetts's coastline will recede has nothing to do with whether petitioners have documented the precise metes and bounds of their soon-to-be-flooded land." *Id.* Next, the Court rejected the EPA's argument that the necessary causation needed to confer standing was lacking. *Id.* at 523–25. The EPA argued that "its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to [Massachusetts's] injuries that the agency cannot be haled into federal court to answer for them." *Id.* at 523. The Court reasoned that the assumption that a small, incremental step can never be attacked in a federal court was erroneous because this would "doom most challenges to regulatory action." *Id.* at 524. Lastly, the Court concluded that, although the EPA could not reverse global warming, this did not mean that there was not sufficient standing for the Court to decide "whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* at 525. The EPA's own actions indicated its belief that it could in fact help slow or reduce global climate change. *Id.* at 526. Thus, with all three requirements of standing satisfied—injury in fact, causation, and redressability—the Court held that plaintiffs had the requisite standing to permit a decision on the merits. *Id.*

tor, such emissions detrimentally affect public health and welfare.<sup>146</sup> The EPA argued that carbon dioxide is not an “air pollutant” within the meaning of the CAA.<sup>147</sup> The Court reasoned, however, that the statute was unambiguous and that the plain meaning of the relevant CAA provision “embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word ‘any.’”<sup>148</sup> Under this interpretation, the CAA clearly allows for the regulation of GHGs under § 202 of the Act.<sup>149</sup>

The second question on the merits was whether the EPA’s reason for not regulating GHGs under the CAA—that even if it did have statutory authority, regulating GHGs under the CAA would be unwise—was a valid use of its discretion.<sup>150</sup> On this point, the Supreme Court held that the EPA “can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”<sup>151</sup> Thus, refusing to regulate GHGs under the CAA because other executive-branch programs already govern global warming, because regulating GHGs under the Act might impair the President’s diplomatic negotiations, or because the approach might be inefficient and piece-meal were not valid reasons for failing to regulate.<sup>152</sup> In other words, the Supreme Court mandated that the EPA must either decide that GHGs are dangerous to human health and welfare and therefore regulate them under the CAA, or it must decide that they are not dangerous to human health and welfare and not regulate them under the CAA. If there is not enough information to determine whether GHGs are a danger to human health and welfare, the EPA must say so unambiguously.<sup>153</sup>

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<sup>146</sup> *Id.* at 528.

<sup>147</sup> *Id.* at 513.

<sup>148</sup> *Id.* at 528–29; *see also* 42 U.S.C. § 7602(g) (2006) (“The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant . . .”).

<sup>149</sup> *Massachusetts*, 549 U.S. at 532.

<sup>150</sup> *Id.* at 532.

<sup>151</sup> *Id.* at 533.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 534.

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a rea-

The Court was also explicit in stating that it did not reach the question of whether the EPA must make an endangerment finding as to GHGs under the Act.<sup>154</sup> Regardless, because of the emerging consensus regarding human-induced global climate change throughout the scientific community,<sup>155</sup> the Court's decision essentially tied the EPA's hands, making it clear that regulation would soon follow.

### III. A FINAL ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDING, THE "LIGHT DUTY VEHICLE" RULE, AND THE "TAILORING" RULE

Following the Supreme Court's decision in *Massachusetts v. EPA*, the Administrator of the EPA under President George W. Bush, Stephen Johnson, issued an Advanced Notice of Proposed Rulemaking to seek public comment on how the EPA should respond to this decision.<sup>156</sup> Then, in April 2009, Lisa Jackson, the new Administrator of the EPA, promulgated a proposed endangerment and cause or contribute finding as to GHGs under the Act.<sup>157</sup> This rule became final in December of 2009.<sup>158</sup> In addition, the EPA has finalized the adoption of tailpipe emission standards for light-duty motor vehicles in accordance with this endangerment and cause or contribute finding.<sup>159</sup>

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soned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.

*Id.* (internal citations omitted).

<sup>154</sup> *Id.* at 534–35 (“We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event that it makes such a finding.”).

<sup>155</sup> See *supra* note 7.

<sup>156</sup> Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. 1).

<sup>157</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>158</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). Although this rule has been made final, court challenges await. Sixteen parties have filed suit against the EPA seeking to prevent the EPA's endangerment and cause or contribute finding from taking effect. Robin Bravender, *16 'Endangerment' Lawsuits Filed Against EPA Before Deadline*, N.Y. TIMES, Feb. 17, 2010, <http://www.nytimes.com/gwire/2010/02/17/17greenwire-16-endangerment-lawsuits-filed-against-epa-bef-74640.html>.

<sup>159</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536–38). Proposed standards have also been promulgated for medium- and heavy-duty vehicles. See Greenhouse Gas Emission Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152 (proposed November 30, 2010) (to be codified at C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068).



Furthermore, Administrator Jackson issued additional proposed regulations pursuant to which the EPA is seeking to regulate large stationary sources according to a new “tailoring” rule.<sup>160</sup> In June of 2010, this rule became finalized.<sup>161</sup> The “tailoring” rule restricts the application of the PSD and the Title V permitting programs to only those stationary sources that omit large amounts of GHGs.<sup>162</sup> These regulations are important to a displacement analysis because it is possible that they “speak directly” to the questions presented by global-warming-as-public-nuisance claims.

A. *Endangerment and Cause or Contribute Finding and the “Light-Duty” Vehicle Rule*

The final endangerment and cause or contribute finding takes action only under § 202 of the CAA.<sup>163</sup> This is the section of the Act that governs mobile sources (i.e., new motor vehicles and new motor vehicle engines), and the EPA is not proposing to regulate stationary sources or fuel content under this rulemaking. In the Administrator’s own words, “EPA is not proposing or taking action under any other provision of the Clean Air Act” besides under § 202 in this regulation.<sup>164</sup>

In this final endangerment and cause or contribute finding, the EPA will regulate six different GHGs, which include carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>).<sup>165</sup> More specifically, “the Administrator finds that the air pollution is the *combined mix* of six key directly-emitted, long-lived and well-mixed greenhouse gases . . . , which together, constitute the root cause of human-induced climate change and the resulting impacts on public health and welfare.”<sup>166</sup> Through a definition of air pollution as the

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<sup>160</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>161</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>162</sup> See *infra* Part III.B.

<sup>163</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,888 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>164</sup> *Id.*

<sup>165</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496, 66,516–17 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>166</sup> *Id.* at 66,516 (emphasis added).

mixture of these six GHGs, “the Administrator is identifying the fundamental and underlying driver of human-induced climate change, which, in turn, . . . poses risks to human health, society, and the environment.”<sup>167</sup> According to the court’s interpretation in *AEP*, the administrator was proposing to find (and since the final rulemaking, has found) four distinct things: (1) that GHGs endanger human health and welfare; (2) that this is caused specifically by the six named gases in the proposed rulemaking; (3) that four of these gases (CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, and HFCs) are emitted from motor vehicles and contribute to the concentration of GHGs in the air; and (4) that these emissions from motor vehicles therefore contribute to the endangerment of human health and welfare.<sup>168</sup>

This final endangerment and cause or contribute finding is only the first step in regulating GHG emissions from mobile sources. After the release of the proposed endangerment and cause or contribute finding but prior to the final rule, the EPA, along with the Department of Transportation, issued a joint proposed rulemaking.<sup>169</sup> The purpose of this joint rulemaking was, among other things, to set emission standards for light-duty vehicles.<sup>170</sup> In May of 2010, this proposed rulemaking was finalized and given effect.<sup>171</sup> This rulemaking is the final step in regulating GHG emissions for light-duty mobile sources. In November 2010, the EPA released proposed standards for medium- and heavy-duty vehicles, although these regulations have not been finalized.<sup>172</sup>

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<sup>167</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 18,896.

<sup>168</sup> *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 377 (2d Cir. 2009) (citing Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 18,886), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>169</sup> Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86, 600, 49 C.F.R. pts. 531, 533, 537, 538).

<sup>170</sup> *See id.*

<sup>171</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536–38).

<sup>172</sup> Greenhouse Gas Emission Standards for Medium- and Heavy-Duty Engines and Vehicles, 75 Fed. Reg. 74,152 (proposed Nov. 30, 2010) (to be codified at C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068).

*B. The “Tailoring” Rule*

The EPA has made clear that it considers promulgation of the light-duty vehicle regulations that have since been finalized as triggering pre-construction NSR and Title V permitting regulations for major stationary sources.<sup>173</sup> Because many sources emit GHGs above the level at which NSR and Title V are triggered (one hundred or two hundred fifty tpy, depending on the source) but do not emit other pollutants at significant levels (and therefore are not otherwise subject to the permitting scheme), many small sources would be newly burdened by regulation of GHGs under the CAA.<sup>174</sup> Recognizing that this would result in a large influx of new sources coming under the permitting regulation of the CAA that are not currently subject to this section of the Act’s reach, the EPA proposed a “tailoring” rule.<sup>175</sup>

Pursuant to the “tailoring” rule, the emission levels at which the PSD and Title V permitting schemes become applicable to stationary sources for their emission of GHGs is increased.<sup>176</sup> The EPA has adopted a two-step approach to phase in certain sources. During the first phase, the applicability threshold for both PSD and Title V regulation of GHGs is set at 75,000 tpy on a CO<sub>2</sub>-equivalent (“CO<sub>2</sub>e”)<sup>177</sup> basis, “but only if the project also significantly increases emissions of at

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<sup>173</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,300 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (“[A]s soon as GHGs become regulated under the light-duty motor vehicle rule, GHG emissions will be considered pollutants ‘subject to regulation’ under the CAA and will become subject to PSD and title V requirements.”). This is a result of the EPA’s interpretation of the words “subject to regulation,” discussed *supra* Part II.C.1.a. By defining “subject to regulation” to mean any control over emission levels, the light-duty vehicle regulation triggers the PSD program. Also as discussed *supra* Part II.C.1.a, only PSD, and not nonattainment NSR, is triggered for pre-construction permits because no endangerment finding has been promulgated pursuant to § 108 of the CAA and therefore all sources are, by necessity, in attainment.

<sup>174</sup> See *id.* at 55,294.

<sup>175</sup> See *id.* (recognizing that “many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications” and that this would “paralyze” state permitting authorities by “vastly exceed[ing] the current administrative resources of the permitting authorities”).

<sup>176</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>177</sup> All GHGs are scored according to their potential warming effect on global temperature. See *Clean Energy: Greenhouse Gas Equivalencies Calculator*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/cleanenergy/energy-resources/calculator.html> (last visited Dec. 30, 2010). Carbon dioxide (CO<sub>2</sub>) is used as a baseline measure and therefore this standard is referred to as a pollutant’s CO<sub>2</sub>-equivalent. See *id.*

least one non-GHG pollutant.”<sup>178</sup> The second phase begins on July 1, 2011, and during this phase, the applicability threshold is set at 100,000 tpy for all stationary sources regardless of whether the source emits other non-GHG pollutants.<sup>179</sup> Further, the PSD “significance” level is proposed to be set at 750,000 tpy CO<sub>2</sub>e.<sup>180</sup> This rule affects only the applicability threshold for GHGs and not other gases currently regulated under the CAA. Under the “tailoring” rule, the EPA is required to revisit these levels within five years in order to reevaluate their viability, along with the viability of streamlining techniques developed to better process permitting requirements.<sup>181</sup> The EPA claims to have the authority to promulgate this regulation based on the statutory text of the CAA,<sup>182</sup> which states in relevant part that the Administrator may “prescribe such regulations as are necessary to carry out his functions under [the CAA].”<sup>183</sup> The EPA also relies on the legal doctrines of “absurd results” and “administrative necessity” to justify its promulgation of the “tailoring” rule.<sup>184</sup> Although these doctrines are rarely used, the EPA believes that regulation of GHGs under the CAA presents a viable application of the doctrines.<sup>185</sup>

The power to promulgate administrative rulemakings pursuant to the “absurd results” doctrine is not found in any statutory text. According to the EPA, courts are reluctant to invoke the “absurd results” doctrine “because it entails departing from the literal application of statutory provisions.”<sup>186</sup> Generally, under a *Chevron* analysis, an agency (or a court reviewing an agency action) must take a two-step approach in its interpretation of statutory text.<sup>187</sup> First, the court or agency must determine whether the plain language of the statutory

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<sup>178</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* As discussed *supra* Part II.C.1.a, “significance” levels are important in determining whether a major stationary source has undertaken a “major modification” and therefore becomes subject to the PSD permitting program.

<sup>181</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

<sup>182</sup> *Id.*

<sup>183</sup> 42 U.S.C. § 7601 (2006).

<sup>184</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

<sup>185</sup> *See id.* at 31,533.

<sup>186</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,303 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>187</sup> *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

text is clear; if so, then the agency must follow the plain language.<sup>188</sup> Second, if the statutory text is unclear, the agency's interpretation of the statutory text must be "reasonable."<sup>189</sup> The "absurd results" doctrine, however, allows a deviation from the first step of a *Chevron* analysis. As the Supreme Court has stated, "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls."<sup>190</sup>

In addition, when applying the "absurd results" doctrine, an agency "may deviate no further from the statute than is needed to protect congressional intent."<sup>191</sup> Due to the large influx of permit applications that would result without the "tailoring" rule in place, the EPA argues that congressional intent would be disrupted.<sup>192</sup> Specifically, the EPA argues that it would be impossible to administer the permits within twelve months as required by the Act and that this would create a backlog that would disrupt administration for years to come.<sup>193</sup> Therefore, the "absurd results" doctrine is applicable to this situation.

Authority to promulgate the "tailoring" rule is also found, according to the EPA, in the doctrine of "administrative necessity."<sup>194</sup> This rule is different from the general rule that agencies may take administrative factors into consideration when establishing rules because the "administrative necessity" doctrine involves deviation from the statutory text.<sup>195</sup> The doctrine has largely developed within the D.C. Circuit, which stated in its seminal case *Alabama Power Co. v. Costle*,

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

<sup>191</sup> *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998).

<sup>192</sup> *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516, 31,533 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>193</sup> *Id.*

<sup>194</sup> *See id.* at 31,543–44.

<sup>195</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,312 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) ("While these cases support the general proposition that administrative considerations are important, they differ from the 'administrative necessity' doctrine because in those cases, the Agency's actions were within the ambit of the statutory language; whereas under the 'administrative necessity' doctrine, the Agency's actions depart from the statutory language.").

Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.

...

[There is] substantive authority [for an agency] to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute.<sup>196</sup>

Considerations that can be taken into account when deviating from the statutory text include the volume and the nature of the task, the agency's financial and personnel resources, and time constraints.<sup>197</sup> Demonstrating the applicability of the "administrative necessity" doctrine, however, involves a "heavy burden."<sup>198</sup> Of particular importance to the EPA in its argument for the applicability of the doctrine was that enforcement of the PSD program was at issue in *Alabama Power Co.*<sup>199</sup> The court stated, "EPA does have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity."<sup>200</sup>

Under this doctrine, the EPA must make the PSD and Title V permitting programs "administratable" by streamlining definitions and operative requirements. The EPA attempts to do this by refining the definition of "potential to emit" and by establishing presumptive BACTs.<sup>201</sup> Essentially, under the "tailoring" rule, the EPA is adopting the approach that only large emitters of GHGs should come under the permitting programs of the CAA and is attempting to exempt stationary sources that emit only small amounts of GHGs.

#### IV. THE DISPLACEMENT SCHEME

Regulation of GHGs under the CAA would arguably lead to displacement of the federal common law.<sup>202</sup> At least one commentator

<sup>196</sup> *Ala. Power Co. v. Costle*, 636 F.2d 323, 357-59 (D.C. Cir. 1980).

<sup>197</sup> *Id.* at 359.

<sup>198</sup> *Id.*

<sup>199</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,313.

<sup>200</sup> *Ala. Power Co.*, 636 F.2d at 400.

<sup>201</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. at 55,321-24.

<sup>202</sup> See, e.g., Dan Mensher, Comment, *Common Law on Ice: Using Federal Judge-Made Nuisance Law to Address the Interstate Effects of Greenhouse Gas Emissions*, 37 ENVTL. L.

has also pointed out that the CAA, without an endangerment finding officially adopted, does not, on its own, displace the federal common law in cases involving GHG emissions.<sup>203</sup> The Second Circuit in *AEP* seemed acutely aware of this dichotomy in holding that the CAA did not presently displace federal common law.<sup>204</sup> But the court made clear that it “expressed no opinion at th[e] time as to whether the actual regulation of greenhouse gas emissions under the CAA by the EPA, if and when such regulation should come to pass, would displace [a] cause of action under the federal common law.”<sup>205</sup> Because the EPA’s proposed and final regulations only regulate GHGs under certain sections of the CAA, however, the displacement scheme is not so simple.

To “speak directly to the question,” as required to displace federal public nuisance actions,<sup>206</sup> several issues must be addressed. First, and most importantly, GHGs must be regulated under the Act. This would require the necessary rulemaking by the EPA under its statutory authority. Under the final endangerment and cause or contribute finding, “light-duty vehicle” rule, and “tailoring” rule, this does not appear to be at issue, as the Administrator is proposing to do just that—regulate GHGs under the CAA. Second, the CAA and its regulations must address the specific source of emissions. This is a key distinction; without guidance as to what sources are to be regulated under the CAA, the resulting structure may constitute just “another law touching interstate [air pollution]”<sup>207</sup> akin to the FWPCA in place at the time of *Milwaukee I* (under which the federal common law was not displaced) as opposed to the comprehensive regulation governing at the time of *Milwaukee II* (which did displace the federal common law).<sup>208</sup> Lastly, any regulation of GHGs under the CAA must

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463, 484 (2007) (“Were . . . EPA to decide that the CAA did provide for the regulation of GHGs, this regulation would likely displace the common law.”).

<sup>203</sup> See, e.g., P. Leigh Bausinger, Note, *Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, the Clean Air Act and the Common Law of Public Nuisance*, 53 VILL. L. REV. 527, 550–54 (2008).

<sup>204</sup> See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 381 (2d Cir. 2009) (“In sum, at least until EPA makes the requisite findings, for purposes of our displacement analysis the CAA does not (1) regulate greenhouse gas emissions or (2) regulate such emissions from stationary sources.” (emphasis added)), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>205</sup> *Id.*

<sup>206</sup> See discussion *supra* Part II.B.

<sup>207</sup> *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 317 (1981).

<sup>208</sup> In other words, the difference between the FWPCA at the time of *Milwaukee I* and the FWPCA at the time of *Milwaukee II* was that prior to the 1972 Amendments, the FWPCA was merely “another law touching interstate water” and was not a com-

provide some sort of recourse for those injured by a violation of the regulation.<sup>209</sup>

The foregoing requires a displacement analysis to address two different concerns. First, the contours of the regulations and the different treatment of stationary, mobile, and fuel sources under the CAA must be addressed. Second, the difference between equitable and legal remedies must be analyzed, specifically in the context of remedies for past damages.

A. *Displacement as to Mobile Sources*

The ultimate contours of the regulation of tailpipe emission levels may change an analysis of displacement. Clearly, however, with the final endangerment and cause or contribute finding officially adopted and the “light-duty vehicle” rule put into effect, federal common law nuisance actions against mobile sources would be displaced.

Under Title II of the CAA, the EPA may—after making an endangerment and cause and contribute finding—“prescribe . . . standards applicable to the emission of any air pollutant” from mobile sources.<sup>210</sup> This is exactly what the “light-duty vehicle” rule carries out. Once standards such as the “light-duty vehicle” rule are established, the CAA provides a list of prohibitions in accordance with those regulations.<sup>211</sup> For example, manufacturers of new motor vehicles or new motor vehicle engines are prohibited from distributing in commerce, selling, offering for sale, or importing into the United States any such motor vehicle or motor vehicle engine that does not meet the requirements of the regulation.<sup>212</sup> The CAA goes further and provides a list of civil penalties for the violation of provisions under the Act.<sup>213</sup> The Act gives the Administrator the express authority to file civil actions for these violations,<sup>214</sup> or in lieu of filing a civil ac-

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prehensive scheme that “spoke directly to the question.” *Milwaukee II*, 451 U.S. at 317. If any regulations for GHGs are proposed pursuant to only some sections of the CAA, then they may only “touch” GHG regulation and may not speak directly to the question at issue. *See infra* Part IV.A–C.

<sup>209</sup> *See* *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) (stating that the federal statutory scheme did not speak to damages and therefore did not displace federal common law).

<sup>210</sup> 42 U.S.C. § 7521(a)(1) (2006).

<sup>211</sup> *See id.* § 7522.

<sup>212</sup> § 7522(a)(1).

<sup>213</sup> *Id.* § 7524(a).

<sup>214</sup> § 7524(b).



tion, the Administrator may assess a civil penalty under the Act.<sup>215</sup> Additionally, the CAA provides a citizen-suit provision under which any person may bring a civil action against any other person who has violated an emission standard under the Act or failed to comply with an order issued by “the Administrator or a State with respect to such a standard or limitation.”<sup>216</sup>

Thus, it would seem that any endangerment and cause or contribute finding for GHGs under § 202 of the CAA and subsequent emission standards (as in the “light-duty vehicle” rule) would “speak directly” to the harm caused by the release of GHG emissions by these sources. Importantly, as the Supreme Court stated, the test is “not whether [the field] has been occupied in a particular manner” but whether the field has been occupied at all.<sup>217</sup> Therefore, the fact that civil penalties are assessed as opposed to damages (a substantively different concept) is of no importance. The fact that these substantive differences are of little importance in a displacement analysis is further emphasized by the Supreme Court’s ruling in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>218</sup> In that case, the Supreme Court, faced with a citizen suit under the FWPCA, held that “voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case.”<sup>219</sup> In doing so, the majority argued that the appellate court misunderstood civil penalties.<sup>220</sup> The Court stated,

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.<sup>221</sup>

Thus, civil penalties can at times serve as a valid substitute for damages by redressing the identical harm. Providing statutory damages, therefore, is not a necessary prerequisite for a finding of displace-

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<sup>215</sup> § 7524(c).

<sup>216</sup> *Id.* § 7604(a)(1).

<sup>217</sup> *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 324 (1981).

<sup>218</sup> 528 U.S. 167 (2000).

<sup>219</sup> *Id.* at 174.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 185–86.

ment; statutory civil penalties are sufficient to displace the common law. The question of displacement then turns to whether the statutory language is sufficiently comprehensive to cover all sources.

In the same way that the FWPCA regulated all point sources and thus displaced federal nuisance actions in the water pollution context in *Milwaukee II*, all mobile sources would similarly be regulated under the CAA by a requisite endangerment and cause or contribute finding combined with subsequent regulation. Importantly, the emission standards are directly regulated as well, and thus the “issue” of global climate change (i.e., the emission of GHGs) is directly spoken to. This would seemingly immunize automobile and engine manufacturers from federal public-nuisance claims seeking redress for their contributions to the emission of GHGs. Nuisance suits, such as that initiated by the Attorney General of California,<sup>222</sup> against car manufacturers would therefore be displaced to the extent that they seek injunctive relief or damages for present and future (but not pre-regulation) harm.<sup>223</sup>

In *California v. GMC*, the People of the State of California sued six automakers seeking damages for their contribution to global warming.<sup>224</sup> Although the district court dismissed the suit on political-question grounds, a similar case would likely be dismissed on displacement grounds because tailpipe emission levels are capped pursuant to the final endangerment and cause or contribute finding and the “light-duty vehicle” rule. The Attorney General of California may have been aware that he would face a battle with respect to displacement. While this case was pending on appeal, the plaintiff-appellant, the People of the State of California, moved to voluntarily dismiss the appeal.<sup>225</sup> The plaintiff proffered two reasons for this voluntary dismissal. Although one reason for voluntarily dismissing the claim was that several of the defendant motor companies subsequently filed for bankruptcy, the other was that federal action had been taken, including the EPA’s acknowledgement that carbon dioxide and other GHGs pose a danger to public health and are soon to be regulated.<sup>226</sup> This regulation was enough to seemingly satisfy one litigant that suf-

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<sup>222</sup> *California v. GMC*, No. 06-05755, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 27, 2007).

<sup>223</sup> A suit seeking monetary relief for past damages (i.e., prior to regulation) caused by the release of GHGs may not be displaced. *See infra* Part IV.D.

<sup>224</sup> *GMC*, 2007 U.S. Dist. LEXIS 68547, at \*1.

<sup>225</sup> Unopposed Motion to Dismiss Appeal, *California v. GMC*, No. 07-16908 (9th Cir. filed June 19, 2009).

<sup>226</sup> *Id.*

ficient action had been taken by the federal government on the issue of GHG emissions. More importantly, however, it is likely to satisfy courts that federal legislation and administrative action has spoken directly to the issue of global climate change, at least in regard to new mobile sources, and therefore federal common law public nuisance actions are likely displaced as to those sources because final regulations have been put into place.

*B. Displacement as to Fuel Sources*

A gasoline producer seeking to dismiss a federal public-nuisance claim against it for its contribution to global warming on displacement grounds presents a tougher question for the courts. Under the CAA, the EPA has the authority to regulate any fuel or fuel additive.<sup>227</sup> Similar to regulation of mobile sources, the CAA prohibits certain activities and prescribes civil penalties and injunctive relief for violations of regulations promulgated for fuel and fuel additives under the Act.<sup>228</sup> Moreover, the content, and thus the resulting emissions, from burning that fuel or fuel additive are directly regulated.<sup>229</sup> Thus, if a regulation is promulgated under § 211, the statute would likely “speak directly” to questions presented in federal public-nuisance claims against fuel companies for their contributions to global warming. Again, this would draw on an analogy between point source regulation under the FWPCA at the time of *Milwaukee II* and comprehensive fuel regulation under the CAA. Importantly, however, the Administrator has not currently proposed regulations under this section of the Act.

Not all courts have recognized the difference between mobile source and fuel regulation under the CAA, but this distinction is an important one. The Second Circuit in *AEP*, for example, seemed to ignore the distinction between fuel and mobile source regulation when discussing the likely future displacement scheme under the proposed endangerment and cause or contribute finding and instead focused only on the distinction between stationary and mobile sources.<sup>230</sup> Why the Second Circuit ignored this distinction is unclear,

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<sup>227</sup> 42 U.S.C. § 7545(a) (2006).

<sup>228</sup> See § 7545(c)–(d).

<sup>229</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,396–25,543 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536–38).

<sup>230</sup> See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 376 n.45 (2d Cir. 2009) (citing 42 U.S.C. § 7521 (2006); § 7545) (stating that mobile sources are regulated through both tailpipe emissions standards and regulation of fuel content), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

but perhaps it was because the defendants in *AEP* were clearly stationary sources within the meaning of the CAA and the distinction was therefore not relevant to the case. Regardless, what is clear is that this distinction could have a significant legal impact on cases such as one recently decided in the Northern District of California, *Native Village of Kivalina v. ExxonMobil Corp.*<sup>231</sup>

In *Native Village of Kivalina*, the Plaintiffs, a Native American Inupiat tribe and an Alaskan city, sought damages in federal public nuisance tort against a number of private fuel companies who they claim have contributed to global warming.<sup>232</sup> Specifically, the plaintiffs claim that the “[i]mpacts of global warming have damaged Kivalina to such a grave degree that Kivalina is becoming uninhabitable and must now relocate its entire community.”<sup>233</sup> Because the Administrator has not sought to regulate fuel and fuel additives directly in the context of GHG emissions, at first blush the CAA would appear not to displace claims against fuel companies. An argument can be made by fuel companies, however, that the final endangerment and cause or contribute finding and subsequent regulation does in fact displace federal common law.

This argument would be based on the fact that fuel must be burned, such as in a vehicle engine, in order to emit GHGs into the air. Because of this, fuel companies could argue that regulation of tailpipe emissions “speaks directly” to their contribution to global warming as well. In other words, regulating the manner in which fuel is burned regulates the way in which it contributes to global climate change. So although the content of fuel is not itself regulated, the manner in which it is burned—and thus, the manner in which it contributes to GHG emissions—is. If a fuel company can frame the debate in this manner, it may be able to prevail in arguing that regulation of tailpipe emissions “speaks directly” to its contribution to global warming. A stronger argument, however, can be made for the other side of the issue.

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<sup>231</sup> No. 08-1138, 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009).

<sup>232</sup> *Id.* at \*1.

<sup>233</sup> Complaint for Damages at ¶ 7, *Native Village of Kivalina v. ExxonMobil Corp.*, No. 08-1138 (N.D. Cal. filed Feb. 26, 2008). This case was recently dismissed on standing and political question grounds, even though the opinion was handed down subsequent to the Second Circuit’s decision in *AEP*. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009). Thus this case seems destined for appeal to the Ninth Circuit, which never had the opportunity to address the political question issue in *California v. GMC* because the appeal in that case was voluntarily dismissed. Unopposed Motion to Dismiss Appeal, *California v. GMC*, No. 07-16908 (9th Cir. filed June 19, 2009).

A plaintiff is likely to prevail on the displacement issue regardless of how the argument is framed. “To speak ‘directly to the question’ and displace federal common law, a federal statute must provide some recourse for the problem at issue in the federal common law claim.”<sup>234</sup> Regulation of mobile sources under the CAA does not provide a means of recourse against fuel sources’ contribution to global climate change. Instead, regulation of mobile sources only provides recourse against those mobile sources and does not speak to damages that can be linked to the fuel or fuel content.<sup>235</sup> Several Supreme Court cases are on point in this matter. For example, the Supreme Court, in *County of Oneida v. Oneida Indian Nation*, held that a federal common-law claim for unlawful possession of native lands was not displaced because the Nonintercourse Act did “not speak directly to the question of remedies.”<sup>236</sup> Likewise, in *United States v. Texas*, the Supreme Court held that the federal common law right to collect prejudgment interest on debts owed to it by the states was not displaced by the Debt Collection Act of 1982 because the Act only provided for recourse against “people,” which under the express language of the Act did not include states.<sup>237</sup> The CAA, with the final endangerment and cause or contribute finding and emission standards officially adopted, only provides a remedy as against new motor vehicles or new motor vehicle engines and not against fuel companies. Therefore, the CAA would not have a displacement effect as to these fuel companies. Further regulation of fuel content would be needed pursuant to § 211 in order to displace the federal common law as to producers of fuel.

*C. Displacement as to Stationary Sources*

Under the regulations currently being considered or officially adopted by the EPA, stationary sources will be regulated but not to the full extent possible pursuant to the statutory text.<sup>238</sup> Because no GHG endangerment finding is being made under § 108 of the CAA, the EPA is not required to establish NAAQSs for GHG emissions by stationary sources.<sup>239</sup> In turn, this means that states will not have to

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<sup>234</sup> Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26 STAN. ENVTL. L.J. 77, 88 (2007).

<sup>235</sup> See 42 U.S.C. § 7524 (2006).

<sup>236</sup> *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985).

<sup>237</sup> *United States v. Texas*, 507 U.S. 529, 534–35 (1993).

<sup>238</sup> See *supra* Part II.C.1.

<sup>239</sup> See *supra* Part II.C.1.

regulate stationary sources through adoption of a SIP.<sup>240</sup> Although stationary sources will not be regulated in this manner, they do not avoid regulation entirely because they will come under the ambit of the pre-construction and operating permit requirements of PSD and Title V.<sup>241</sup> These permitting programs, however, will only be applicable to large stationary sources in accordance with the “tailoring” rule.<sup>242</sup>

Initially, worthy of mention is the fact that if the EPA were to make an endangerment finding and establish NAAQSs in accordance with Title I of the CAA, such regulatory actions would likely displace the federal common law for stationary sources.<sup>243</sup> Both SIPs and FIPs provide broad discretion to the requisite authority to regulate stationary sources, and both directly concern pollution levels.<sup>244</sup> Additionally, once a NAAQS is established, the EPA is required to propose New Source Performance Standards (NSPSs), which regulate the emission levels for new major stationary sources.<sup>245</sup> The CAA also provides a means of redress in the form of injunctive relief, criminal penalties, and civil penalties for violation of NSPSs and SIPs.<sup>246</sup> Under this statutory scheme and accompanying regulation, if enacted, GHG regulation would be directly spoken to, and therefore the federal common law would be displaced. This, however, is not being considered under any of the final or proposed rulemakings. The regulatory scheme involving the promulgation of NAAQSs and the adoption of SIPs is different from the permitting programs of PSD and Title V in several ways. Most importantly, NAAQSs and SIPs regulate the total emissions released into the ambient air,<sup>247</sup> while PSD regulates emissions only through mandating the technology used by the stationary source.<sup>248</sup> Title V adds no new substantive component but in-

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<sup>240</sup> See *supra* Part II.C.1.

<sup>241</sup> See *supra* Part II.C.1.

<sup>242</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>243</sup> The question may arise at which stage in the process will displacement occur; would displacement occur immediately upon promulgation of NAAQSs or only once a SIP (or FIP) is put into place? This question, however, is largely academic and would be of little concern to a litigant. Therefore, this question will not be fully addressed.

<sup>244</sup> See, e.g., 42 U.S.C. § 7410(a)(2)(A) (2006) (providing states with the ability to dictate control measures, means, techniques, and time tables).

<sup>245</sup> *Id.* § 7411(f).

<sup>246</sup> *Id.* § 7413(b)–(d).

<sup>247</sup> See *id.* § 7409.

<sup>248</sup> See *id.* § 7475(a)(4).

stead is merely the enforcement mechanism used to ensure stationary sources are performing in accordance with the Act.<sup>249</sup> Therefore, the question becomes whether regulation of stationary sources through the PSD and Title V permitting programs “speaks directly” to the damage caused by emission of GHGs from stationary sources.

In *Milwaukee II*, the Supreme Court found especially important the fact that “[e]very point source discharge is prohibited [by the FWPCA] unless covered by a permit.”<sup>250</sup> Regulation of stationary sources under SIPs would clearly meet this standard and take a comprehensive approach by covering all stationary sources. As one commentator has noted, “A significant indication that Congress has displaced federal common law through comprehensive legislation is the presence of an all-encompassing permitting scheme.”<sup>251</sup> In contrast, the permitting programs under PSD and Title V arguably are not sufficiently comprehensive, because they cover only large stationary sources in accordance with the “tailoring” rule and do not cover *every* stationary source. Whether the permitting scheme is sufficiently comprehensive, however, is not dispositive.

Another concept underpinning the Supreme Court’s reasoning in *Milwaukee II* was that courts should not be allowed to impose additional burdens on those falling under the jurisdiction of a federal act.<sup>252</sup> In the Court’s words, “[T]here is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory regime by reference to the federal common law . . . .”<sup>253</sup> This possibly weighs in favor of displacement of the federal common law of public nuisance by regulation pursuant to the permitting programs of PSD and Title V for stationary sources. One could argue that Congress and the EPA have established that only large stationary sources should be subject to these permitting schemes pursuant to the “tailoring” rule and that the BACT is the standard adopted by Congress for the PSD program. Therefore, courts should not be able to impose further regulation beyond requiring the adoption of the BACT for large stationary sources found in attainment areas. In other words, referencing the federal common law to allow small sources (i.e., below the threshold established in the “tailoring” rule) to be

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<sup>249</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,298 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>250</sup> *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 318 (1981).

<sup>251</sup> Alex, *supra* note 234, at 88.

<sup>252</sup> *Milwaukee II*, 451 U.S. at 320.

<sup>253</sup> *Id.*

sued or to hold the BACT insufficient would amount to impermissible judicial legislation.

Using BACT as the standard for GHG emissions in this context, however, poses a problem. A source's BACT is determined on a case-by-case basis.<sup>254</sup> Inherent in this determination then is a certain amount of variation in allowable emissions. It follows, therefore, that the judiciary cannot impose more stringent limitations than the CAA itself imposes because there is no statutorily mandated emission limitation in the first place. There is no bright-line emission standard inherent in the definition of BACT, and therefore, it is not sufficiently precise to prevent the judiciary from making reference to the federal common law. Thus, the federal common law would still be needed as a gap-filling measure to address the ultimate issue of GHG emissions (i.e., the total amount of emissions); adoption of a specific technology would not "speak directly" to this issue.

Another question to be addressed is what is reasonable in the context of GHG emissions. Like other actions in tort, one of the main questions at issue in a public-nuisance action seeking redress for the effects of global warming—assuming duty, causation, and damages have been established—is the reasonableness of GHG emissions and the remedies that are appropriate if emission levels are deemed unreasonable.<sup>255</sup> The CAA prescribes several remedies for violation of PSD and Title V permitting requirements.<sup>256</sup> Therefore, the displacement question then becomes whether Congress or the EPA has spoken directly to the issue of reasonableness.

The first possible source for such a proposition could be the EPA's proposed "tailoring" rule. Does the level at which the PSD and Title V permitting programs become applicable to GHG emissions according to the "tailoring" rule constitute a determination by the EPA that emissions below that threshold are reasonable? The EPA's reasoning behind the adoption of the "tailoring" rule is enlightening. The EPA indicates that the main reason why it proposed the "tailoring" rule was because it would be administratively infeasible to require permits for all stationary sources emitting 100 or 250 tpy (de-

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<sup>254</sup> See 40 C.F.R. § 52.21(b)(12) (2010).

<sup>255</sup> See *supra* Part II.A; *Milwaukee II*, 451 U.S. at 315 (noting that the federal statute at issue in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), spoke to "the question of damages").

<sup>256</sup> 42 U.S.C. §§ 7413(c)(1) (providing criminal penalties for "any person who knowingly violates" 42 U.S.C. § 7661a(a) (2006), among other provisions), 7413(d)(1)(B) (providing for civil penalties for violation of any permit requirement), 7477 (providing for injunctive relief for violation of PSD permit), 7661(i) (providing for sanctions for failure to meet Title V permitting requirements) (2006).



pending on the source) of GHGs.<sup>257</sup> Notably, the EPA is silent as to whether emissions above 25,000 tpy of GHGs (the minimum annual level of emissions in the “tailoring” rule that would trigger the rule’s application) are unreasonable. In fact, the EPA is likely without statutory authority to make such a determination under the proposed “tailoring” rule. The Administrator, when proposing the “tailoring” rule, relied on the legal doctrines of “absurd results” and “administrative necessity.”<sup>258</sup> These judicial doctrines are predicated on a lack of statutory authority. These doctrines are applied when the administrative action goes against the plain meaning of the statutory text. Thus, in the case of the “tailoring” rule the EPA did not rely on the statutory text itself.

Regardless of whether the EPA has the authority to prescribe the reasonableness of PSD and Title V application, it has not done so. To assume that merely applying BACT to these sources—while refraining from making an endangerment finding and proposing NAAQSs—is equivalent to the EPA insinuating that such emissions are unreasonable is a stretch. The PSD and Title V permitting programs require only the adoption of certain control technology. Unlike under § 202, the EPA is not required to promulgate emission standards under either the PSD or Title V permitting programs. To be sure, the PSD permitting program does establish a maximum level of emissions, but this is only in regard to administratively established standards, such as NAAQSs and SIPs.<sup>259</sup> Again, EPA is not attempting to regulate stationary sources through the adoption of NAAQSs under the CAA.<sup>260</sup> Thus, the applicability levels established by the proposed “tailoring” rule clearly cannot constitute a determination of what is reasonable and therefore do not speak directly to the question at issue.

Congress also has not spoken to the question of reasonableness in the context of GHG emissions. As an initial matter, whether Congress intended the CAA to apply to GHGs in the first place is not at all clear.<sup>261</sup> Even assuming that it did, however, it cannot be further

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<sup>257</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,516, 31,533 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

<sup>258</sup> See *id.* at 55,303.

<sup>259</sup> See 42 U.S.C. § 7475(a)(1), (3).

<sup>260</sup> See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,888 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

<sup>261</sup> See *Greenhouse Gas Regulation Under the Clean Air Act Before S. Comm. on Environment and Public Works*, 110th Cong. 1–2 (2008) (statement of Marlo Lewis, Senior Fellow, Competitive Enterprises Institute). *But cf.* *Massachusetts v. EPA*, 549 U.S. 497,

assumed that the 100 or 250 tpy applicability levels found in the statutory text in regard to PSD and Title V regulation stands for the proposition that emissions above that level are unreasonable for GHGs. There is simply a lack of congressional intent in this regard. Further, it would seem illogical for Congress to apply only BACT to an emission level that it considers unreasonable, as opposed to lowest achievable emissions rate (LAER)<sup>262</sup>—a stricter requirement—as Congress mandated in the preconstruction nonattainment NSR permitting program.<sup>263</sup> This dichotomy in the technology mandated under the Act indicates the inherent nature of NAAQSs and further underscores the notion that Congress intended these levels (i.e., NAAQSs) to be synonymous with a determination of reasonableness. In other words, a NAAQS established by the EPA serves as the level above which emissions giving rise to that level of pollution become unreasonable. This indicates that Congress essentially left the ultimate question of what pollution levels are unreasonable to the expert judgment of the EPA.

Additionally, this gives further credence to the assertion stated above that the “tailoring” rule cannot constitute a determination of reasonableness by the EPA. Because Congress gave authority to the EPA to determine reasonableness of pollution concentration levels through the promulgation of NAAQSs, it seems illogical that an administrative rulemaking concerning the PSD permitting program could also serve as a statement of what is reasonable. If the PSD permitting program applies and its requirements are met, a presumption that these emission levels are reasonable applies. This is because the PSD program prohibits new stationary sources from emitting pollutants that result in pollution levels resulting in non-attainment or above levels proscribed in a SIP.<sup>264</sup> Therefore, any change in this program cannot constitute a reasonableness determination because

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528–29 (2007) (holding that Congress intended the CAA to cover all airborne compounds based on the repeated use of the word “any” in the statutory text).

<sup>262</sup> 42 U.S.C. § 7501(3) (2006)

The term ‘lowest achievable emission rate’ means for any source, that rate of emissions which reflects (A) the most stringent emission limitation which is contained in the implementation plan or any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or (B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

*Id.*

<sup>263</sup> *Id.* § 7503(a)(2).

<sup>264</sup> *See id.* § 7475(a).

the fact that the program applies (assuming it is properly complied with) results in a presumption of reasonableness.

Furthermore, and perhaps most importantly, Congress did not speak directly to the ultimate question at issue in global-warming-as-public-nuisance suits because regulations under PSD and Title V deal only in terms of technology.<sup>265</sup> Use of particular technology touches on emissions levels, but does not prescribe them. No emissions standards are ever set. Therefore, a situation could develop in which Source A emits many times more GHGs than Source B, but both are employing the BACT available to them. Under this situation, the question of global climate change—and thus, total GHG emissions—is never directly spoken to. Rather, in this situation both Source A and Source B are meeting their statutory requirements under the permitting program, but Source A is presumably acting more unreasonably because it is contributing more to an increase in global warming due to its much higher emission levels.

Therefore, the PSD and Title V programs—by themselves and without a requisite endangerment finding pursuant to § 108 and promulgation of NAAQSs—are simply another set of regulations touching air pollution and not a comprehensive scheme that displaces the federal common law as to stationary sources. This leads to the conclusion that federal public nuisance actions against stationary sources for their contributions to global warming are not displaced under the currently proposed and finalized regulations.

*D. A Lack of Judicial Guidance for Determining Redress for Past Damages and a Common Sense Approach*

Another key distinction to address in a displacement analysis is the distinction between equitable and legal remedies. Equitable relief, in general, is meant to abate an ongoing injury—in this case an ongoing nuisance.<sup>266</sup> As such, assuming that an endangerment and cause or contribute finding for GHGs, the “light-duty vehicle” rule, and the “tailoring” rule are in place at the time of initiation of a public nuisance suit for global warming, injunctive remedies sought under public nuisance claims for ongoing harms would be displaced insofar as the source is subject to those regulations (e.g., displaced for

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<sup>265</sup> See § 7475(a)(4); see also Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292, 55,298 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (noting that the Title V permitting program adds no new substantive regulatory component).

<sup>266</sup> See, e.g., *City of Montgomery v. Del Monte Dunes*, 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring in part and concurring in the judgment).

mobile sources if tailpipe emission standards are established). Where this analysis becomes muddled, however, is when plaintiffs are seeking legal relief.

One purpose of damages in tort is “to give compensation, indemnity or restitution for harms.”<sup>267</sup> To achieve this redress, “[o]ne injured by the tort of another is entitled to recover damages from the other for all harm, *past*, present, and perspective, legally caused by the tort.”<sup>268</sup> Furthermore, “the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”<sup>269</sup> The CAA provides the means to adequately deal with damages in all three contexts (stationary, mobile, and fuel sources) on a forward-going basis. As noted above,<sup>270</sup> the CAA provides the Administrator the power to file civil actions against those who violate regulations promulgated under the Act.<sup>271</sup> Thus, Congress provides the means for remedial action under the CAA that was missing in the Nonintercourse Act during the time in question in *County of Oneida v. Oneida Indian Nation* where the Court held that the statute did not speak directly to the question of damages.<sup>272</sup> But the CAA, even with the requisite administrative regulation of stationary, mobile, and fuel sources, is silent as to remedies for past GHG emissions.

Little guidance is available from courts in the context of damages for pre-regulation torts committed when a statute currently displaces the federal common law. In fact, the district court in *California v. GMC* seemed cognizant of this lack of judicial direction. In discussing whether global-warming-as-public-nuisance cases present “a lack of judicially discoverable or manageable standards”<sup>273</sup> by which to resolve the plaintiff’s claim, the court noted that the present suit for damages was legally distinguishable from prior cases presenting a pollution-as-public-nuisance claim.<sup>274</sup> The court stated that “[l]egally, these cases are distinguishable because the remedies sought therein were equitable remedies to enjoin or abate the nuisance, rather than

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<sup>267</sup> RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

<sup>268</sup> *Id.* § 910 (emphasis added).

<sup>269</sup> *Id.* § 901 cmt. a.

<sup>270</sup> See *supra* Part IV.A–C.

<sup>271</sup> See, e.g., 42 U.S.C. §7524(b) (2006).

<sup>272</sup> *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985).

<sup>273</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>274</sup> *California v. GMC*, No. 06-05755, 2007 U.S. Dist. LEXIS 68547, \*46 (N.D. Cal. Sept. 27, 2007).

the legal remedy of monetary damages sought in the current case.”<sup>275</sup> By stating this, the court was implying that the question of displacement for the pre-regulation damages caused by inter-state pollution has never been adequately addressed by the federal judiciary.

This lack of judicial guidance is further complicated by the fact that the CAA only considers future activities in its statutory text. For example, in the context of mobile source regulation under the CAA, the EPA administrator has the authority to regulate only “*new* motor vehicles or *new* motor vehicle engines.”<sup>276</sup> Further, the CAA is devoid of remedies for the emission of pollution that occurs prior to the enactment of regulations under §§ 108 (stationary sources), 202 (mobile sources), or 211 (fuels). This is because those emissions that cause the alleged damage were not considered “criteria” pollutants under the CAA at the time of their release and are thus not subject to the Act’s jurisdiction. Therefore, harms caused by their release would go un-redressed were this statutory scheme to displace claims seeking damages for past torts. Therefore, the CAA—even if the requisite regulations were adopted under §§ 108, 202, or 211—likely would not displace global-warming-as-public-nuisance actions for pre-regulation damages (i.e., prior to a rulemaking under the requisite section) because the statute does not speak directly to past emissions of “criteria” pollutants.

Again, as the Supreme Court stated in *United States v. Texas*, “[M]ere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area.”<sup>277</sup> No language in the CAA indicates congressional intent to supplant the remedies available to litigants for the pre-regulation torts committed by emitters of GHGs; the Act is silent on the question of past damages. Furthermore, civil penalties could not be issued for past emissions because, as noted earlier, these emissions would not be under the jurisdiction of the statute. Therefore, the presumption favoring the continued existence of federal common law is not overcome.<sup>278</sup> As a result, language indicating that pre-regulation emission of “criteria” pollutants (in this case, GHGs) is not to be considered unreasonable—and thus such pollutants retroactively fall under the jurisdiction of the CAA—would need to be added to the statutory or regulatory

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<sup>275</sup> *Id.*

<sup>276</sup> 42 U.S.C. § 7521(a)(1) (2006) (emphasis added).

<sup>277</sup> *United States v. Texas*, 507 U.S. 529, 535 (1993) (citing Brief for the Petitioners at 16, *United States v. Texas*, No. 91-1729 (Nov. 19, 1992)).

<sup>278</sup> *See id.* at 534; *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

language in order to avoid a displacement scheme where pre-regulation damages are still recoverable under the federal common law.<sup>279</sup> By including language such as this, the statutory text would undercut any such argument against displacement by showing legislative intent to displace the federal common law. Language to this effect, however, is currently not in the CAA, the final endangerment and cause or contribute finding, or any of the proposed or finalized regulations. Thus, nothing in the current statutory or regulatory text would displace future federal public-nuisance claims seeking redress for the contribution to global warming from the pre-regulation emissions of GHGs by stationary and mobile sources or fuel producers.

#### V. PLOTTING THE COURSE AHEAD

Whether the regulatory regime currently proposed will be put into effect is not at all certain. Despite the significant opportunity for input, some individuals and industry groups opposed to regulation of GHGs will attempt to use the courts to stop these rulemakings. The U.S. Chamber of Commerce, for example, had threatened to bring legal action to prevent the official adoption of the proposed endangerment and cause or contribute finding.<sup>280</sup> In fact, before the required deadline for filing such suits, at least sixteen parties have filed suit against the EPA in order to prevent the endangerment and cause or contribute finding from taking effect.<sup>281</sup> But following the recent decision by the Second Circuit Court of Appeals in *AEP*, a change of heart is likely amongst industry groups. Industry groups would much more likely prefer to face a consistent regulatory scheme rather than a series of suits in district courts over public nuisance claims. In fact, prior to the Second Circuit's decision, several industry groups—including the U.S. Chamber of Commerce—were pressing for a full evidentiary hearing on the proposed endangerment finding, likely designed to delay regulation as long as possible.<sup>282</sup> After the Second

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<sup>279</sup> As the Supreme Court noted in *New Jersey v. New York*, federal common law is “subject to the paramount authority of Congress.” *New Jersey v. New York*, 283 U.S. 336, 348 (1931). Furthermore, the *Restatement (Second) of Torts* is enlightening in its provision stating that “court[s] may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation.” RESTATEMENT (SECOND) OF TORTS § 286 (1979).

<sup>280</sup> Jim Tankersley, *Vehicle Emissions Are Targeted; A Suit Seeks to Block the EPA Waiver that Allowed the State to Set Its Own Standards*, L.A. TIMES, Sept. 11, 2009, at B1 (“The Chamber of Commerce also has threatened to sue to stop a proposed climate-related ruling by the EPA: the ‘endangerment finding.’”).

<sup>281</sup> Bravender, *supra* note 158.

<sup>282</sup> See Petition of the Chamber of Commerce of the United States of America for EPA to Conduct Its Endangerment Finding Proceeding On The Record Using Ad-

Circuit's decisions, however, several industry titans renounced their membership in the U.S. Chamber of Commerce because of its position on global-climate-change legislation.<sup>283</sup> Furthermore, under the proposed Waxman-Markey Bill, the EPA would be stripped of its authority to find carbon dioxide an air pollutant under the CAA, although this would be in exchange for comprehensive climate-change legislation.<sup>284</sup> Such legislation, however, seems a long way off.<sup>285</sup>

What is clear after the recent decisions by the Second Circuit in *AEP* and the Fifth Circuit in *Comer* is that there is a heated debate and much uncertainty over how to address the issue of global climate change. The question now presented is how best to move forward in light of these circuit court decisions. A consistent, comprehensive scheme seems like the best option. Industry groups are now seemingly open to a vast amount of liability for their pre-regulation contributions to global climate change, at least in the Second and Fifth Circuits. The Second Circuit made the prospect of liability even more perilous to industry groups by upholding standing not only for states suing as *parens patriae*, but also by upholding Article III standing for the City of New York and private land trusts.<sup>286</sup> Therefore, a large number of prospective plaintiffs now exist to enforce their common law right to be free from unreasonable GHG emissions leading to global climate change. It is unlikely that industry groups would prefer to be subject to the sometimes varying and contradictory decisions of the judicial process. At least one commentator, for example, has compared these early global-warming-as-public-nuisance suits with the early litigation against asbestos and tobacco companies, which have cost those companies millions.<sup>287</sup> Thus, even though industry groups have resisted regulation in the past, they would most likely prefer to be subject to a consistent—although light—comprehensive legislative scheme in the future.

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ministrative Procedure Act §§ 556 and 557, EPA Docket ID EPA-HQ-OAR-2009-0171 (June 23, 2009), *available at* [http://www.uschamber.com/sites/default/files/comments/090623\\_epa\\_petition.pdf](http://www.uschamber.com/sites/default/files/comments/090623_epa_petition.pdf).

<sup>283</sup> Clifford Krauss & Kate Galbraith, *Climate Bill Splits Exelon and Chamber of Commerce*, N.Y. TIMES, Sept. 29, 2009, at B1.

<sup>284</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §§ 811, 831–835 (2009).

<sup>285</sup> *See, e.g.*, Galbraith, *supra* note 29.

<sup>286</sup> *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332–49 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (Dec. 6, 2010) (No. 10-174).

<sup>287</sup> *See* John Schwartz, *Courts as Battlefields in Climate Fights*, N.Y. TIMES, Jan. 26, 2010, at A1.

One possible solution would be to avoid regulation under the CAA altogether and let courts handle this matter strictly as a public nuisance, as discussed earlier.<sup>288</sup> The problem with this suggestion is that emitters of GHGs currently do not, and would not for a substantial period of time, have any indication of what is reasonable in the context of GHG emissions. Additionally, courts can often come to conflicting decisions, which would leave industry groups uncertain as to what measures are appropriate to avoid liability. Other questions are left to be addressed as well. For example, is the reasonableness of the amount of GHG emissions variable depending on what purpose those emissions achieve? Is it reasonable to allow companies producing electricity, and therefore furthering our energy independence, to emit more GHGs into the air than other industries that are less important to our national security? Or is reasonableness a per se measurement? These and other similar questions demonstrate that judicial regulation of GHG emissions proves to be an unworkable scheme in the short term because of its inherent uncertainty and a more comprehensive legislative system is needed to address all concerns raised in this complex area.

The question also must be asked whether the CAA is the proper place to provide this regulation or whether separate legislation is necessary to address the problem of GHG emissions. As explained above, the CAA supplies at least a partially viable tool for displacing the federal common law of public nuisance, alleviating the fear of industry groups likely to result from the *AEP* and *Comer* decisions.<sup>289</sup> This may serve as a temporary stop-gap measure while future comprehensive legislation is considered. The problems posed by the absence of language addressing pre-regulation emissions, however, make the CAA an incomplete tool for total regulation—and thus, total displacement. This concern can only be addressed by new statutory language indicating congressional intent to displace pre-regulation damages by retroactively making past emissions fall within the statute's jurisdiction. This is clearly an incredibly complex area and a comprehensive scheme seems to be the only plausible route to fully meeting the challenges posed by GHG emissions. Because of this, a new statutory scheme, similar to that being proposed in Congress,<sup>290</sup> must be adopted and put into place. Without a comprehensive scheme to displace the federal common law completely, inconsistent judgments and regulatory uncertainty on behalf of industry groups

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<sup>288</sup> See *supra* Part II.A.

<sup>289</sup> See *supra* Part IV.

<sup>290</sup> H.R. 2454.



will continue even after administrative action by the EPA to address global climate change under the CAA.

## VI. CONCLUSION

Sparked by seeming inaction in Washington to fully address the concerns about global climate change, plaintiffs over the last few years have taken matters into their own hands by filing federal common law nuisance claims against emitters of GHGs. Initially, such efforts were met with resistance in district courts, where several cases were dismissed on political question grounds. Until recently no appellate court had addressed the issue. Although this is not a settled question, the Second Circuit Court of Appeals was the first appellate court to address whether global-warming-as-public-nuisance claims present nonjusticiable political questions. The Second Circuit held that such claims are in fact justiciable. A panel decision in the Fifth Circuit has since followed suit. The Second Circuit in *AEP* further held that under the present configuration of the CAA, the Act did not displace federal common law for the public nuisance of global climate change. But the court was clear that the CAA *could* provide a vehicle for common law displacement pursuant to the EPA's rule-making power. The Supreme Court has since granted a writ of certiorari to potentially address several of the complicated issues presented by the litigants in *AEP*.

Currently, the EPA has adopted a final endangerment and cause or contribute finding under § 202 of the CAA, which regulates mobile sources. Further, the EPA has finalized the adoption of tailpipe emissions standards for "light-duty vehicles" in accordance with this finding. The EPA has also finalized a "tailoring" rule aimed at regulating large stationary sources. But, no regulation has been proposed under § 211 to regulate fuel content. An analysis of the CAA, with the final endangerment and cause or contribute finding under § 202, the "light-duty vehicle" rule, and the proposed "tailoring" rule all officially adopted, reveals that a unique displacement scheme would emerge.

Federal public-nuisance claims against fuel producers would not be displaced because no regulatory or statutory language would speak directly to those sources. Though an argument could be made that the contribution of fuel producers to global climate change has been displaced because the burning of fuel in mobile sources would be subject to emission standards, those arguments are likely to fail because the statutory language provides no means of redress without a requisite rulemaking under § 211. In contrast, public nuisance ac-

tions against mobile sources, such as car manufacturers, for their contribution to global warming would almost certainly be displaced because the EPA is seeking to regulate tailpipe emissions and the CAA provides a means of redress for violations of these regulations. Displacement as to stationary sources provides a tougher question.

If an endangerment finding is made pursuant to § 108 and NAAQs are developed, the common law would likely be displaced with respect to stationary sources. This is because NAAQs would directly regulate GHG emissions and provide a means of redress for violation of these standards. Furthermore, many more sources are addressed through SIPs because of the lower statutory threshold—as opposed to the regulation of only large stationary sources resulting from the “tailoring” rule—and pollution levels are dealt with directly. The EPA, however, has not proposed to do this. Rather, stationary sources—specifically large stationary sources—are going to be regulated pursuant to the permitting programs of PSD and Title V in accordance with the proposed “tailoring” rule. These permitting programs will regulate only the technology, as determined on a case-by-case basis, that is used by large stationary sources and do not directly regulate GHG emissions or establish the level above which GHG emissions are unreasonable. In addition, only some stationary sources will fall under the ambit of these permitting schemes, and therefore—absent a legislative or regulatory determination that they are not harmful—whether these permitting schemes are sufficiently comprehensive is questionable. Thus, regardless of the fact that these permitting programs provide means of redress for violations of these standards, no displacement is likely to occur. Regulating only some sources and only the technology used on a case-by-case basis, while not regulating the overall emissions, does not speak directly to the question at issue (i.e., total GHG-emission levels) and therefore does not displace the common law.

The CAA, even with the proposed and final regulations in place, does not provide redress for pre-regulation emissions. In fact, the reasonableness of pre-regulation emissions is not mentioned anywhere in the CAA or in any of the final or proposed regulations. Little judicial guidance is available in this area, but the CAA does not seem to speak directly to the issue of pre-regulation torts. As a result, federal public nuisance law would remain available to plaintiffs seeking damages for pre-regulation GHG emissions, as in the case of *Native Village of Kivalina*. Pre-regulation emissions must be addressed legislatively in order to displace the federal common law in this area.

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Industry groups will likely not be happy about the prospect of facing de facto regulation through the judicial process, which is the apparent reality that some industry groups now face after the decisions in *AEP* and *Comer*. Without thorough judicial precedent to guide them, much uncertainty remains for groups that will be subject to this de facto regulation. Many of the fears espoused in earlier district court cases relying on the political question doctrine reemerge in this context. For example, questions about what role national security should play in a determination of reasonableness are left unanswered. Such questions leave industry groups without reliable guideposts by which to regulate their GHG emissions or take other necessary steps in order to limit their possible liability. The prospect of de facto regulation seems even more perilous for large stationary sources under the emerging regulatory scheme. Assuming that these proposed regulations are all officially adopted, large stationary sources will not only be facing vast amounts of possible liability, but they also face increased regulatory costs pursuant to PSD and Title V. This makes partial regulation under the CAA seem incomplete and, in some sense, unfair. Still, these recent circuit decisions and final and proposed rulemakings by the EPA are a vital first step in fighting the battle against global climate change. Hopefully, the Second and Fifth Circuits have supplied the motivation for those in Washington to act and finally create a comprehensive approach to what is arguably the greatest challenge facing civilization in the coming decades.