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Common Law Remedies: A Refresher

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Editors' Summary: Recent lawsuits by state and local governments, public interest organizations, and private citizens against electric companies, automobile companies, and lead paint manufacturers signify the reemergence of the common law as a powerful tool for protecting the environment. In this Article, Denise E. Antolini and Clifford L. Rechtschaffen provide a broad introduction to various common law theories that can be used to protect the environment, including trespass, nuisance, strict liability, and public trust. They conclude with a discussion of when and how environmental statutes preempt federal and state common law claims.

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I. Introduction

Before the start of the modern environmental era approximately 35 years ago, common law remedies were the primary tool for protecting the environment. In those "old days," typical factual contexts for a common law pollution case included a hog sty, cement factory, or copper smelter.[1] The classic confrontation in court was between a burdened private property owner (or, less commonly, the government) and the rapidly developing enterprises that were essential to the industrial age, but which were largely unregulated and frothing with externalities.

Not only has the field of environmental law changed radically since that time, but so have the nature and complexity of our environmental challenges. Today, a large range of polluting activity has either ceased, been mitigated, or is directly regulated by federal or state statutory law. This does not, however, solve all environmental problems or eliminate the role of the common law. In fact, the areas "left behind" by the modern statutory era may be more stubborn, more subtle, and require (particularly for lawyers) even greater creativity and heroism to resolve.

Yet, after a flurry of environmental legislation was adopted in the early 1970s, common law theories were often relegated to an afterthought and hardly used at all by the rising national cadre of environmental advocates and public interest lawyers. At the local level, however, general practitioners and others not swept up in the national statutory era continued to use the common law as a tool in areas beyond the reach of statutes. Today, at the beginning of the new millennium, whether by necessity or choice, it appears that these old and new strategies are increasingly complementary. Recently, creative practitioners have breathed new life into common law approaches, seeking to fill gaps left by statutory and regulatory protections. As these practitioners have discovered and demonstrated, many common law tools remain vital and effective today, not just as interstitial or tag-on remedies, but as the best unitary solution for some kinds of difficult environmental challenges.

This Article provides a refresher on the various common law theories that can be used to protect environmental resources. These theories include trespass, public and private nuisance, negligence, public trust, and strict liability (both for products and abnormally dangerous activities).[2] We out-

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1. *See, e.g.*, Dubois v. Budlong, 23 N.Y. Sup. Ct. 700 (N.Y. Sup. Ct. 1863) (holding hog sty and slaughterhouse in New York City were prima facie common nuisance but refusing injunction); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904) (requiring copper smelters causing smoke that damaged region to pay damages but declining injunction); Riblet v. Spokane-Portland Cement Co., 274 P.2d 574 (Wash. 1954) (upholding award of damages from cement plant dust as a nuisance). *See also* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998 (1966) (providing examples of classic nuisance cases); and Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767-71 (2001) (citing public nuisance examples).

2. Other common law theories applicable to environmental problems, but not discussed in this Article, include riparian rights, littoral rights, and inverse condemnation. *See, e.g.*, Sundell v. Town of New London, 409 A.2d 1315 (N.H. 1979) (upholding lawsuit by littoral owners of lake-side lots and riparian owners along brook against

line the basic elements of these doctrines, and then briefly explore how they have been (or could be) adapted to address modern environmental problems. We discuss some of the features that make these tools well suited to dealing with current pollution or natural resources conflicts, as well as some of the obstacles (such as preemption) that presently limit their usefulness. The Article is not a comprehensive treatise on these causes of action, but rather lays a basic groundwork and serves as a research tool for our readers' future reference.

One more preliminary observation about the inherent contrast between statutory and environmental law is worth noting. By its nature, the common law is an incremental and evolutionary source of law, not necessarily the quickest or broadest solution for social ills, but perfectly suited for perpetuity. The common law's virtuoso Justice Oliver Holmes saw the common law as a synthesis of social-political history and judicial "legislation."[3] Although it is inherently reactive, judge-made law is developed in specific factual settings, case-by-case, site-by-site, and often with the wisdom of community juries. It is a type of law that is flexible and localized—well suited for certain kinds of context-specific challenges. In contrast, the modern administrative law era that began in the 1950s and culminated in the wealth of keystone federal environmental statutes of the 1970s, approached environmental law problems with a national or regional perspective, with noncontextual rules, and with a proactive purpose. The U.S. Congress responded to environmental problems with a much different role, agenda, and method than did individual judges for the prior hundreds of years. Thus, even if aimed at the same general environmental goal, statutory and common law are, in many ways, not commensurable. The gauntlet thrown down for the common law today is not to substitute for statutory law, or vice versa, but to remain a robust and complementary remedy for problems not addressed by the now-familiar statutory scheme.

II. Trespass: Torts Beyond Boundaries

The tort of trespass to land and its ancient twin, the tort of nuisance, are the oldest of the common law theories that extend readily to environmental problems. The traditional definition of trespass is "one who intentionally enters or causes direct and tangible entry upon the land in possession of another."[4] The trespasser is then liable for the harm that results, even if that harm is not physical, because the essential right violated is exclusive possession.[5] Trespass is an intentional tort, which has implications both for the burden of proof on a plaintiff and the possibly richer damages available. For this reason, and the weight of history, courts usually strictly construe its contours.

In the environmental context, a key issue in a trespass action is whether an appropriate "object" has indeed entered plaintiff's property. Traditionally, the thing has to be "tangible," that is visible—such as shrapnel from a bullet, a utility line, or an arm[6]—and it must have caused "direct" interference.[7] Some modern cases have loosened up on the directness requirement.[8] And, as scientific knowledge developed, the courts were faced with hard questions of whether light, microscopic dust, vibration, and smoke were in the nature of a trespass or were, instead, a nuisance, i.e., interfering with use and enjoyment more than with the right to exclusive possession.[9]

Many courts have been unwilling to extend trespass in this direction because it would "produce too much liability."[10] For example, smoke blowing across the plaintiff's land may be treated as a nuisance rather than the stricter tort of trespass. Some courts may be more comfortable with the reasonableness standard of nuisance in resolving disputes that involve less than serious or substantial invasions.[11]

Yet, trespass can stretch to cover modern air pollution problems. If the entry of particles is discernable and causes actual harm, a trespass action might succeed.[12] For the plaintiff, the advantage of trespass in these cases is that the defendant cannot argue that the invasion was "reasonable" (an argument that would be allowed in a nuisance case). In addition, the defendant's intent may set up a punitive damages claim.[13] On the other hand, if an invasion is character-

town over wastewater discharge into tributary of lake that caused increase in algae and reduced recreational opportunities, under private nuisance, riparian rights, littoral rights, and inverse condemnation theories). *See also* William H. Rodgers Jr., Environmental Law: Air and Water §2.17 (Inverse Condemnation) and §2.19 (Riparian Rights) (1986); Restatement (Second) of Torts §849(2) (1979) (pollution by riparian owner not a riparian right).

3. Oliver W. Holmes, The Common Law (Little, Brown & Co. 1923) (1881).

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

Id. at 36.

4. Dan B. Dobbs, The Law of Torts 95 (2000) (internal footnotes omitted).

5. *Id.* at 95-96. *See also* Restatement (Second) of Torts §158 (Liability for Intentional Intrusions on Land) and §163 (Intended Intrusions Causing No Harm) (1965).

6. *See* Dobbs, *supra* note 4, at 108 (citing examples).

7. *See id.* at 104.

8. *Id.* at 104-05. *See also, e.g.,* Bradley v. American Smelting & Ref. Co., 709 P.2d 782, 790, 16 ELR 20346 (Wash. 1985) (rejecting the distinction between direct and indirect invasions, and commenting: "We also should recognize the fallacy of clinging to outmoded doctrines.").

9. *See* Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 850 (Or. 1948) (finding that light from horse racing track that damaged drive-in movie business was not a trespass, and noting that the "dividing line between trespass and nuisance is not always a sharp one"); *cf.* Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) (finding invisible fluoride particulates and gases from aluminum production constituted trespass); *Bradley*, 709 P.2d at 782 (finding that deposit of microscopic particles from a copper smelter could constitute both trespass and nuisance). William Prosser notes that some courts have extended trespass to "the entry of invisible gases and microscopic particles, but only if harm results," suggesting that they are not true trespass cases. W. Page Keeton et al., Prosser and Keeton on Torts 71 (5th ed. 1984) (internal footnote omitted).

10. Dobbs, *supra* note 4, at 105.

11. *Id.*

12. *See, e.g.*, Ream v. Keen, 838 P.2d 1073 (Or. 1992) (holding smoke from burning field of grass stubble constituted trespass despite defendant's permit from the state environmental quality agency); *Bradley*, 709 P.2d at 782.

13. *See, e.g.*, Tyler v. Lincoln, 527 S.E.2d 180 (Ga. 2000) (allowing punitive damages from trespass of sediment and excess stormwater from subdivision development into plaintiffs' cypress ponds).

ized as a trespass, then something that is "utterly trifling" may be seen as falling below the trespass threshold.[14]

The issue of intent in trespass is less daunting for plaintiffs than it first seems. A defendant need have intended only to enter or to cause the entry, not necessarily to harm.[15] Even mistaken trespassers are liable.[16] The substantial certainty standard applies as well, allowing a broader sweep to the intent element.[17] However, if the defendant can show the trespass was merely negligent, accidental, or not of his or her own actions, then intent is not met. (Such a case can, nonetheless, still be brought as a negligence action but it is outside the realm of trespass.) For example, "[i]f the defendant's dam breaks, causing downstream flooding, the defendant may be liable for trespass if he intentionally caused the waters to enter the plaintiff's property," with nuisance or negligence theories waiting in the wings if intent cannot be shown.[18]

The interests protected by the tort include not only the right to exclusive possession but also the physical integrity of the land. As Prof. Dan Dobbs explains, this is "the right to prevent others from doing physical harm to or taking any part of the land such as trees or minerals."[19] In addition, the tort protects, to some extent, the airspace above plaintiff's land.[20] One intriguing potential application of trespass law is to the noise and annoyance caused by aircraft flights. Under the traditional view, the landowner owned "up to the heavens," yet that metaphor has found limits in the law. While very low overflights can obviously interfere with possession, higher flights have produced a volatile line in the case law.[21] Conversely, trespass does protect a landowner against subsurface intrusions onto her land.[22]

For plaintiffs, trespass offers strong remedies. A court can order the full range of damages (nominal, compensatory, and possibly punitive for intentional conduct) and, for threatened or continuing harm, an injunction.[23] Defendant can be liable not only for nominal damages for the intrusion itself, but potentially also for: (1) rental value of the time of occupation; (2) gains from occupation; (3) harm to the land, people, or things on the land; (4) injury to the landowner's interests (measured by diminution in value or by reasonable costs of making repairs or restoration); (5) emotional distress[24]; and (6) punitive damages.[25] In the environmental context, the court may award restoration damages even where the costs exceed the loss in land value. For example, in a Florida case where an air compressor company purchased the highly toxic solvent perchloroethylene and then disposed of the waste "by illegally dumping it onto the ground at the rear of their facility," which then reached a municipal well field, the appellate court upheld the damages award of approximately $9 million based on the costs of restoration.[26] Thus, in trespass, the defendant may be liable for losses "far beyond those normally imposed" under a negligence theory.[27]

The courts have not been consistent in approaching the question of assessing damages for temporary, continuing, and permanent trespass.[28] For permanent trespass, courts "assess all future damages in the one lawsuit."[29] In effect, this is a forced sale of land to defendant, a version of private eminent domain and not favored.[30] If the injury is temporary, then the plaintiff can recover for intrusions up to the trial, but not for future harm—leaving defendant open to a renewed lawsuit and providing an incentive to cease the offensive conduct.[31]

In summary, if the plaintiff can fit the defendant's intrusion into the rather tight framework of trespass, the potential remedies may be powerful. The number of post-1970 cases in the environmental area cited as examples in this section indicates that this ancient cause of action is still worthy of evaluation, and still frequently used, when the pollution physically crosses property boundaries.

III. Nuisance—Private and Public—Oldies but Goodies

The old nuisance cousins—private and public—are the true ancestors of environmental law. Nuisance is based on the well-accepted Anglo-American notion that private prop-

14. Dobbs, *supra* note 4, at 107.

15. *Id.* at 99.

16. Keeton et al., *supra* note 9, at 74.

17. *See Bradley*, 709 P.2d at 785 (upholding trespass action resulting from deposit of ASARCO smelter's "microscopic particles" of heavy metals blown onto plaintiffs' land on Vashon Island, four miles away, and relying on the *Restatement*'s standard of substantial certainty: "Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.").

18. Dobbs, *supra* note 4, at 106. Environmental cases in which the courts rejected trespass but left open nuisance and negligence claims include the following: Pan Am. Petroleum Co. v. Byars, 153 So. 616 (Ala. 1934) (holding that an underground leak of gasoline was not trespass because invasion was indirect); United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. Ct. App. 1953) (holding that oil and salt pollution of underground waters was either negligence or nuisance); Phillips v. Sun Oil Co., 121 N.E.2d 249 (N.Y. 1954) (holding that there was no trespass for gasoline storage tank leaks).

19. Dobbs, *supra* note 4, at 102.

20. Natural intrusions such as tree limbs are usually treated as a nuisance not a trespass. *Id.* at 108.

21. *Id.* at 109 & n.13. Professor Dobbs advocates treating such cases under nuisance law because it can better balance the conflicting uses and policies. *Id*. While trespass might bar all flights, nuisance would attempt to strike a balance and, perhaps, limit the flights over the plaintiff's land. *Id*. at 110. *See* Atkinson v. Bernard, 355 P.2d 229 (Or. 1960) (finding nuisance rather than trespass applied in airport overflight noise case and provided more flexibility in remedy).

22. Dobbs, *supra* note 4, at 110 & n.1. *See, e.g.*, Cassinos v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574 (Cal. Ct. App. 1993) (upholding lower court finding that off-site injection of wastewater from oil wells onto plaintiff's mineral estate constituted trespass).

23. Dobbs, *supra* note 4, at 112. *See, e.g.*, Citizens for a Safe Grant v. Lone Oak Sportsmen's Club Inc., 624 N.W.2d 796 (Minn. Ct. App. 2001) (upholding permanent injunction against gun club in favor of neighbors to restrain repeated threatened trespass of bullets and shotgun pellets).

24. In the environmental context, see, *e.g.*, McGregor v. Barton Sand & Gravel, Inc., 660 P.2d 175 (Or. Ct. App. 1983) (allowing emotional distress damages where spillage of pond water from gravel mining pits onto plaintiffs' land occurred over a long period of time and constituted intentional trespass); Lunda v. Matthews, 613 P.2d 63 (Or. Ct. App. 1980) (upholding emotional distress claim for husband and wife where clouds of cement dust and fumes from plant prevented plaintiffs from going outdoors).

25. *See supra* note 13 and accompanying text.

26. Davey Compressor Co. v. City of Delray Beach, 639 So. 2d 595, 24 ELR 21078 (Fla. 1994).

27. 75 Am. Jur. 2d *Trespass* §130 (1991).

28. Dobbs, *supra* note 4, at 115.

29. *Id*. at 115.

30. *Id.* at 115-16.

31. *See id*. *See also* Keeton et al. *supra* note 9, at 84 (discussing conflict in case law on this point).

erty, while of utmost value, should nonetheless not be used in a manner that creates unreasonable risks outside its boundaries, to neighbors or to the public at large.[32] The property rights bundle of sticks does not include the right to create harmful externalities: "A landowner cannot reasonably expect to put property to a use that constitutes a nuisance, even if that is the only economically viable use for the property."[33]

Although the two types of nuisance share many features, they have different historic roots, and there are very important distinctions between them, not only in terms of "who can sue," but also in terms of prima facie elements and defenses.[34] In general, because of the often direct and more identifiable injury to nearby private property, private nuisance is typically a more successful claim for plaintiffs, even if the remedy may be narrowly confined geographically. Successful private nuisance plaintiffs are relatively plentiful. However, while the potential scope of a public nuisance remedy is much broader and can approach the breadth of a statutory remedy for a particular site, it is much more difficult both for individual and group plaintiffs to overcome initial obstacles to bringing the lawsuit (such as the problematic different-in-kind rule) and, often, to prove the causation and extent of the more widespread injury. Unfortunately, there are not many successful reported public nuisance cases with private plaintiffs that can serve as guideposts for practitioners. This collection of cases should nonetheless be fully mined for ideas because the case theory has a powerful scope.[35] Government plaintiffs, on the other hand, have the upper hand in public nuisance cases. Their role as the modern-day king stepping in to eliminate public nuisances harkens back to the roots of the tort, and they usually have very good odds of winning such claims. Several of the case studies in this book illustrate just how broad and potent public nuisance cases can be.

As a creature primarily of state common law, nuisance is also a tort that is as elusive as it is ubiquitous in the environmental context. The factual situations addressed in such cases are as varied as human life, covering environmental problems as diverse as the pollution of a stream by manure[36] and the noise generated by a Chinese theater during the late 1800s in Honolulu.[37] The variation in fact patterns can be frustrating to practitioners seeking threads of precedent. Viewed together as a mosaic, however, the nuisance cases create a rich body of common law that has at its core a well-established set of principles that are just as alive today as a century ago.

One of those core principles that helps plaintiffs is that nuisance focuses the judicial process on the plaintiff's injuries rather than on the defendant's conduct. For private nuisance, the focus is on the plaintiff property owner's interests; for public nuisance, it is on the public health, safety, and welfare. Therefore, the motive of the defendant, whether defendant's operation is lawful, and the due care (or lack of) exercised in the activity are, technically, not relevant.[38] There are, however, many cases where statutes, zoning ordinances, or permits have "legalized" a nuisance and barred a lawsuit[39] (which itself can raise constitutional takings issues).[40] Many cases are to the contrary.[41] This potential trumping of nuisance by statutory law may be the largest modern intrusion into traditional common law remedies.[42]

32. *See* 61C Am. Jur. 2d *Pollution Control* §1966 (2004):

> Therefore, any business, although in itself lawful, which impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter may become a nuisance to those occupying adjacent property, when the atmosphere is contaminated to such an extent as substantially to impair the comfort or enjoyment of the adjacent occupants, or to injure vegetation, trees, or buildings.

(Footnotes omitted.) *See also* State v. The Mill, 887 P.2d 993, 1002 (Colo. 1994) (denying takings claim in a uranium mine contamination case, and finding that nuisance uses of property were "never part of the bundle of rights" of a property owner), *cert. denied*, 515 U.S. 1159 (1995).

33. Aztec Minerals Corp. v. Romer, 940 P.2d 1025, 1031-32 (Colo. Ct. App. 1996).

34. *See* 61C Am. Jur. 2d *Pollution Control* §2036 (2004) ("The characterization of a nuisance as either public or private may affect the availability of defenses based upon 'coming to the nuisance,' the statute of limitations, the acquisition of a prescriptive right, or public authorization.") (internal footnotes omitted).

35. *See infra* notes 71-93 and accompanying text.

36. *See, e.g.*, People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co., 40 P. 486 (1895) (finding that manure from stable and hog pen polluted stream and constituted nuisance).

37. Cluney v. Lee Wai, 10 Haw. 319, 323 (Haw. 1896) (allowing injunction in favor of nearby resident against a Chinese musical theater that featured military dramas "whose noise would disturb the complainant in the enjoyment of his quiet and rest").

38. *See, e.g.*, Iverson v. Vint, 54 N.W.2d 494 (Iowa 1952) (finding defendant liable in nuisance for dumping of spoiled molasses in ditch near plaintiff's house that resulted in well contamination, even if such act was customary and without intent to injure); Saadeh v. Stanton Rowing Found., 912 So. 2d 28, 32 (Fla. Dist. Ct. App. 2005) (finding, in a case involving a neighbor's claim against a college preparatory school's boathouse on the Arlington River, that "mere compliance with the zoning ordinance will not, in and of itself, absolve a property owner from any claim of nuisance").

39. *See, e.g.*, Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748 (S.D. 1996) (finding that rural electric cooperative was statutorily protected from nuisance suit arising from stray voltage on dairy farmers' lands); Pure Air & Water Inc. of Chemung County v. Davidsen, 668 N.Y.S.2d 248 (N.Y. App. Div. 1998) (finding that New York's right to farm law shielded hog operation from private nuisance lawsuit); Neuse River Found. v. Smithfield Foods, Inc., 574 S.E.2d 48 (N.C. Ct. App. 2002) (finding that authorized hog farming operation cannot be a nuisance). For an extensive discussion of the implications for plaintiffs of right-to-farm laws, see Andrew C. Hanson, *Concentrated Animal Feeding Operations and the Common Law: Fixing Wrongs Committed Under the Right-to-Farm*, *in* Creative Common Law Strategies for Protecting the Environment 287 (Clifford Rechtschaffen & Denise Antolini eds. 2007). *See also* Hager v. Waste Tech. Indus., 2002 Ohio 3466 (Ohio Ct. App. 2002) (finding that operation of waste incineration plant was authorized, and, therefore, its mere existence could not be a nuisance); Brown v. County Comm'rs of Scioto County, 622 N.E.2d 1153 (Ohio Ct. App. 1993) (finding that because a pollution control facility operates under the sanction of law, it cannot be a common law public nuisance, and that although it would be a nuisance at common law, conduct which is fully authorized by statute or administrative regulation is not an actionable tort, especially where a comprehensive set of legislative acts or administrative regulations governing the details on particular kind of conduct exists).

40. Keeton et al., *supra* note 9, at 632-33 ("authorizing someone to commit a private nuisance can be an authorization to take property unconstitutionally").

41. *Id.* at 633 ("Most courts hold that zoning ordinances do not protect the defendant from a claim by a particular plaintiff that the defendant's use is an unreasonable interference with the use and enjoyment by the plaintiff of his property."). *See, e.g.*, Wendinger v. Forst Farms, Inc., 662 N.W.2d 546 (Minn. Ct. App. 2003) (finding that a concentrated pig farm operation in an agriculture-zoned area is not entitled to an automatic defense to a nuisance claim); Flo-Sun Inc. v. Kirk, 783 So. 2d 1029, 1036 (Fla. 2001) (finding that a sugar cane operation could legally constitute a nuisance even if it complied with state pollution laws).

42. This issue is a complex one requiring a close reading of the statute at issue. *See* Rodgers, *supra* note 2, at 96-97 (discussing the "far-

Conversely, the common law has considerable room to roam in areas of pollution that are poorly addressed in modern statutes, such as odor, e.g., from a sewage treatment plant,[43] vibration,[44] light, e.g., from a race-track,[45] and noise, e.g., from air conditioning units.[46]

The simultaneous curse and promise of the two kinds of nuisance are also revealed in the potential damages and especially the flexibility of the equitable remedy. The remedies available for nuisance include compensatory damages, punitive damages, and injunctive relief.[47] In determining the relief, "the courts have to some extent considered the relative impact of abatement or continued operation upon the two properties, although in other cases consideration of this factor has been rejected. Courts have also weighed the social utility represented by the plant's operation in some instances, but have declined to do so in others."[48] From the watermark case of *Boomer v. Atlantic Cement Co.*,[49] where the court granted "permanent damages" that allowed a polluting cement plant to continue operations, to cases where courts have boldly shut down offending operations,[50] the law is rich in examples of the range of judicial choices in balancing outcomes.

Given this background, we now discuss some specific features of private and public nuisance, including their application in post-1970s environmental pollution cases.

A. Private Nuisance

Private nuisance offers a powerful remedy for plaintiffs who are private property owners. The *Restatement (Second) of Torts* defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[51] The basic elements of private nuisance are that (1) defendant's conduct is a legal cause of the invasion, and (2) "the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable" as negligence, recklessness, or an "abnormally dangerous condition[?] or activit[y]."[52] "Unreasonable" is defined by the *Restatement* §826 as a situation where "(a) the gravity of the harm outweighs the utility of the actor's conduct."[53]

For private nuisance, there must be an actual or threatened invasion of the plaintiff's property, but (unlike for public nuisance) the extent of that invasion need not always be substantial. "To entitle adjoining property owners to recover damages for the maintenance of a nuisance, it is not necessary that they should be driven from their dwellings, or that the defendant's acts create a positively unhealthy condition; it is enough that their enjoyment of life and property is rendered uncomfortable" for a person of ordinary sensibilities.[54] In some cases, "discomfort and annoyance may constitute a nuisance."[55] On the other hand, the test leaves wide discretion to the court.[56]

Who can bring a private nuisance action? In general, the right extends to adjacent or nearby property owners. In order to recover for an injury to property, the plaintiff must have

reaching" legislative limitations on traditional nuisance law, but noting that "[w]hile generalities are dangerous and always subject to the specifics of the legislation, it can be said that the courts are reluctant to embrace the concept of legalized nuisance").

43. Harris v. Town of Lincoln, 668 A.2d 321 (R.I. 1995) (upholding trial court findings that municipal sewage pump station constituted a private nuisance because of odor, noise, and vibration).

44. Prairie Hills Water & Dev. Co. v. Gross, 653 N.W.2d 745 (S.D. 2002) (upholding trial court judgment that a commercial sandblasting business in a residential neighborhood, which created vibration, noise, dust, and traffic, created a public nuisance.

45. Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847 (Or. 1948) (finding that light from horse racing track that damaged drive-in movie business was not a trespass). *See also* Prah v. Maretti, 108 Wis. 2d 223, 12 ELR 21125 (Wis. 1982) (allowing private nuisance claim by owner of a solar-heated residence for the obstruction of solar access by an adjoining landowner).

46. Estancias Dallas Corp. v. Schultz, 500 S.W.2d 217 (Tex. Civ. App. 1973) (upholding injunction against noisy air conditioning unit of neighboring apartment complex as a nuisance); *see also* Gruber v. Dodge, 205 N.W.2d 869 (Mich. Ct. App. 1973) (enjoining defendant's use of ranch land for airstrip that grew from personal to small commercial use, which disturbed adjoining cattle rancher through noise and vibrations, even though new use was permitted by federal and state authorities); Wilson v. Interlake Steel Co., 649 P.2d 922 (Cal. 1982) (holding that emission of sound waves alone, without damage to property, while not sufficient to maintain an action in trespass, could support a possible nuisance action).

47. For further discussion, see DOBBS, *supra* note 4, at 1338-42 (§468 Remedies).

48. 61C AM. JUR. 2D *Pollution Control* §2044 (2004) (internal footnotes omitted).

49. 257 N.E.2d 870 (N.Y. 1970) (issuing an injunction against defendant's cement plant conditioned on payment of permanent damages where investment in plant exceeded $45 million and employed over 300 people), *on remand*, 340 N.Y.S.2d 97 (N.Y. App. Div. 1972) (finding permanent damage to 283-acre dairy farm was $175,000), *aff'd*, 349 N.Y.S.2d 199 (N.Y. App. Div. 1973) (upholding award of permanent damages as not excessive). For a discussion of the importance of *Boomer*, see *Symposium on Nuisance Law: Twenty Years After* Boomer v. Atlantic Cement Co., 54 ALB. L. REV. 171 (1990).

50. *See, e.g.*, Scott v. Jordan, 661 P.2d 59, 64 (N.M. Ct. App. 1983) (acknowledging that an injunction was an "extraordinary remedy," but upholding lower court's permanent injunction of cattle feeding operation with up to 1,200 cattle due to noxious odors, flies, and dust, and finding monetary damages would be inadequate compensation for the continuing nuisance to neighboring plaintiffs).

51. RESTATEMENT (SECOND) OF TORTS §821D (1979). For a comprehensive collection of private nuisance cases, see Tracy A. Bateman, *Nuisance as Entitling Owner or Occupier of Real Estate for Personal Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct From, or in Addition to, Damages for Depreciation in Value of Property for Its Use*, 25 A.L.R. 5th 568 (1994).

52. RESTATEMENT (SECOND) OF TORTS §822 (1979).

53. The *Restatement*'s additional definition under §826(b), adopted in 1970, that considers the feasibility of continued operations in light of the financial burden of compensation, i.e., requiring compensation even for activities deemed reasonable, has not been broadly accepted. *See*, *e.g.*, Carpenter v. Double R Cattle Co., Inc., 701 P.2d 222, 227-28 (Idaho 1985) (refusing to adopt §826(b) and noting a "plethora" of cases in accord with the more traditional view that requires balancing).

54. 61C AM. JUR. 2D *Pollution Control* §2043 (2004) (internal footnotes omitted).

55. *Id.*

56. *See*, *e.g.*, Arnoldt v. Ashland Oil, Inc., 412 S.E.2d 795 (W. Va. 1991).

> [T]he existence of a nuisance must be ascertained on the basis of two broad factors, neither of which may in any case be the sole test to the exclusion of the other: (1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant. Both are to be considered in the light of all the circumstances of the case, including [1] the lawful nature and location of the defendant's business; [2] the manner of its operation; [3] such importance to the community as it may have; [4] the kind, volume, time and duration of the particular annoyance; [5] the respective situations of the parties; and [6] the character (including applicable zoning) of the locality.

Id. at 800 (quoting Louisville Ref. Co. v. Mudd, 339 S.W.2d 181, 186-87 (Ky. 1960)).

an interest therein, although the interest need not be in fee, nor is it necessary that the property be occupied.[57]

Even though private nuisance claims involving pollution have decreased since the adoption of environmental statutes, and although sometimes such claims are merely tagged onto the end of a statutory complaint without much enthusiasm,[58] there are still numerous modern cases where this common law claim took center stage and succeeded. A snapshot of several post-1970 air and water pollution cases illustrates how these actions fill gaps in the federal and state clean air and clean water laws and also provide a direct remedy that can be stronger than likely statutory relief.[59]

For example, in 1974, the Iowa Supreme Court strongly endorsed injunctive relief in favor of a group of private residential landowners who had sued a commercial ready-mix plant that caused fugitive emissions, excessive noise, and diesel odors during its unloading and loading processes. According to the plaintiffs (who sought only injunctive relief and not damages),[60] the cement dust covered their lawns and plants, outdoor furniture, clotheslines, and penetrated inside to sills, furniture, carpets, and drapes.[61] A few months later, the same court upheld a jury's award of permanent damages sought by adjacent private property owners against a municipality for odors from a sewage lagoon. The court found that the lagoons constituted a nuisance in fact by injuring plaintiffs' health, well-being, and property value.[62] Similarly, in 1975, the Arkansas Supreme Court upheld a lower court's injunction against a motorcycle race track where the dust and noise disturbed the local residents, but denied an injunction for automobile racing on the same track pending further proof of nuisance.[63]

On the other hand, in an unusual private nuisance case involving over 200 plaintiffs from West Virginia suing a major oil company with a refinery in Kentucky, the West Virginia Supreme Court overturned a $10.3 million damages verdict, which included $9 million in punitive damages, because Kentucky law required proof of diminished property value.[64]

Hog farms have been a favorite target of private nuisance lawsuits. An Oregon pig farm that produced noise, unpleasant odor, and a substantial increase in the number of large flies in a rural residential neighborhood constituted a nuisance, which warranted the entry of a permanent injunction.[65] Large chicken farms have been held to be private nuisances too.[66]

Contamination of groundwater is another area where private nuisance theory continues to succeed. In a 1987 Maryland case, a court allowed the plaintiff landowners to recover damages resulting from a nearby service station's leaking underground storage tank based on a private nuisance theory, even absent direct evidence of physical impact.[67] In 1998, a Washington State court found that even lawful operation of a business—a pulp mill operating with a Federal Water Pollution Control Act national pollution discharge elimination system (NPDES) permit allowing it to discharge treated process wastewater into the Columbia River—could support an award of $2.5 million in damages for nuisance to potato farmers drawing irrigation water from the aquifer contaminated by the defendant's operation.[68]

B. Public Nuisance

Public nuisance offers a community-oriented remedy when the defendant's polluting externalities affect the broader neighborhood, not just the nearby private property owners. Although compared to private nuisance, public nuisance is much harder to bring at the front end (that is, to meet the restrictions on who can sue and to prove the higher level of interference required), the potential back-end remedy (such as a broad injunction) can be very potent and approach the power of a statutory injunction.

Public nuisance occurs when, apart from any injuries to private property that may result from the defendant's activity, there is a "substantial and unreasonable interference with a right held *in common by the general public*, in use of public facilities, [or] in health, safety, and convenience."[69]

57. *See, e.g.*, Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004) (finding tenants had right to assert private nuisance claim against businesses near the Houston Ship Canal that created air pollution, odors, light, and noise); *cf. Arnoldt*, 412 S.E.2d at 804 (holding that adult children as well as other non-owners residing with relatives do not have sufficient ownership or possessory interest to bring a private nuisance action).

58. *See, e.g.*, Chemical Weapons Working Group, Inc. v. Department of the Army, 935 F. Supp. 1206, 1220 n.4, 27 ELR 20022 (D. Utah 1996) (noting that plaintiffs "failed to specify" how the emissions from the U.S. Army's chemical weapons incinerator would affect the individual plaintiffs' interest in land), *aff'd*, 111 F.3d 1485, 27 ELR 21130 (10th Cir. 1997). Because statutory and common law claims involve such different types of strategies, law, proof, and lawyering, they do not automatically mix well in federal environmental cases. With more forethought, however, they could be a powerful combination.

59. For examples of cases regarding other less traditional types of pollution, such as sound, noise, and light, see *supra* notes 43-46 and accompanying text.

60. Helmkamp v. Clark Ready Mix Co., 214 N.W.2d 126, 128 (Iowa 1974).

61. *Id.*

62. Hartzler v. Town of Kalona, 218 N.W.2d 608 (Iowa 1974).

63. Baker v. Odom, 529 S.W.2d 138 (Ark. 1975). *See also* Davis v. Izaak Walton League of Am., 717 P.2d 984 (Colo. Ct. App. 1985) (holding that evidence supported a finding that fugitive dust from the access road to a shooting range operated by the league constituted a public nuisance.

64. Arnoldt v. Ashland Oil, Inc., 412 S.E.2d 795, 800 (W. Va. 1991).

65. Jewett v. Deerhorn Enter., Inc., 575 P.2d 164 (Or. 1978).

66. Patz v. Farmegg Prod., Inc., 196 N.W.2d 557, 562 (Iowa 1972) (finding that a four-acre facility housing some 80,000 chickens that produced odors so strong that plaintiffs complained of extreme nausea, gagging, and vomiting was "not incidental to rural life" and constituted a private nuisance). *See also* Hobbs v. Smith, 484 P.2d 804 (Colo. Ct. App. 1971), *aff'd*, 493 P.2d 1352, 2 ELR 20380 (Colo. 1972) (keeping of horses, even if in compliance with zoning laws, was nuisance because of flies).

67. Exxon Corp. v. Yarema, 516 A.2d 990, 1003-05 (Md. Ct. Spec. App. 1986) (finding that contamination resulted in the imposition of "crippling restrictions" on the use of plaintiffs' land, including a prohibition on the use of groundwater, the building of homes, and the sale of land at even a reduced price).

68. Tiegs v. Watts, 954 P.2d 877, 883 (Wash. 1998). "The fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property." *Id.* at 884. *See also id.* at 890 (Talmadge, J., concurring) ("Boise Cascade cannot transform its NPDES permit, allowing pollutants into surface waters, into a generalized permit to pollute the groundwater or any and all other waters in the vicinity of its treatment facilities."); *see also* Miotke v. City of Spokane, 678 P.2d 803 (Wash. 1984) (finding that bypassing of raw sewage into river constituted private nuisance even if allowed by the State Department of Ecology).

69. Dobbs, *supra* note 4, at 1334 (emphasis added).

Section 821B of the *Restatement* defines unreasonable interference to include:

> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct 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.[70]

Defendant's conduct can be either intentional or negligent.[71] So long as the right affected is a public one, the number of people affected is not necessarily a limitation imposed by the courts.[72] The interference need not be related to land, but can be much broader, affecting virtually any public resource or place.[73] Public nuisances can be "per se" or "in fact."[74] The interference, however, must be "substantial" and not trivial.[75]

The remedies available for public nuisance are compensatory damages, punitive damages, a "compensated injunction,"[76] and injunctive relief. Injunctive relief is allowed when damages are inadequate and will be "tailored narrowly to fit the nuisance."[77] For governmental plaintiffs, public nuisances can be prosecuted as crimes[78] or declared unlawful by ordinance or statute under the police power.[79] Even today, governmental entities continue to bring both criminal and civil public nuisance cases to supplement their statutory authorities.[80] On the other hand, private parties' ability to use public nuisance has long been restricted by the "special injury rule," which requires that the plaintiff show special injury that is different in kind and not just degree from that of the general public.[81] Although the *Restatement* and some commentators find this restriction to be archaic, almost all courts continue to follow this conservative approach.[82] When private parties can show such common law "standing," however, they then have a potent quasi-attorney general avenue for redressing broad harm to the public interests.[83]

In numerous post-1970s cases, courts have found a wide variety of environmental harms to be public nuisances, including the following: contamination of subterranean waters[84]; noise from an automobile racetrack[85]; an unsanitary mobile home park[86]; obnoxious garbage odors[87]; quarry blasting[88]; common cesspools[89]; fumes from an asphalt storage facility[90]; release of hazardous chemicals into the environment[91]; emission of hydrogen sulfide gases and

70. Restatement (Second) of Torts §821B (1979).

71. *See* Physicians Plus Ins. Corp. v. Midwest Mutual Ins. Co., 646 N.W.2d 777, 792 (Wis. 2002).

72. *Id.* at 789:

> The number of people affected does not strictly define a public nuisance . . . . [T]he court considers many factors, including, among others, the nature of the activity, the reasonableness of the use of the property, location of the activity, and the degree or character of the injury inflicted or right impinged upon. (footnote omitted)).

73. *See* Restatement (Second) of Torts §821B cmt. b (1979).

74. City of Sunland Park v. Harris News, Inc., 124 P.3d 566 (N.M. Ct. App. 2005):

> New Mexico common law more specifically defines public nuisance as either nuisances per se or nuisances in fact. A nuisance per se is "an activity, or an act, structure, instrument, or occupation which is a nuisance at all times and under any circumstances, regardless of location or surroundings." [A] nuisance in fact is described as "an activity or structure which is not a nuisance by nature, but which becomes so because of such factors as surroundings, locality, and the manner in which it is conducted or managed."

Id. at 577 (citations omitted).

75. *See, e.g.,* Breeding ex rel. Breeding v. Hensley, 519 S.E.2d 369, 372 (Va. 1999) ("More than sporadic or isolated conditions must be shown; the interference must be 'substantial.'") (citation omitted).

76. The unusual idea of a compensated injunction comes from *Spur Indus., Inc. v. Del E. Webb Dev. Co*., 494 P.2d 700 (Ariz. 1972), where the private housing developer was granted an injunction under a public nuisance claim against a feed lot on the condition that the developer paid the costs of relocation.

77. Dobbs, *supra* note 4, at 1338.

78. For a brief history of public nuisance law, see Antolini, *supra* note 1, at 767-71.

79. *See* Bal Harbour Village v. Welsh, 879 So. 2d 1265, 1267 (Fla. Ct. App. 2004) ("The legislature has broad discretion to declare a particular activity to be a public nuisance and enact legislation to abate the same in the exercise of its police power.").

80. *See, e.g.*, the public nuisance case brought by several states for global warming, discussed in Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, *in* Creative Common Law Strategies for Protecting the Environment, *supra* note 39, at 107. *See also* Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. Ct. App. 1996), *and* Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. Ct. App. 1999) (finding that state was acting under its public nuisance authority in ordering remediation of pollution from a gold mine; landowner was not entitled to pollute a stream that was part of the headwaters of the Rio Grande River, even if the gold mine was the only economically viable use of the property). For a thorough discussion of governmental-plaintiff public nuisance cases, see Louise Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ELR 10292 (Oct. 1986) and Louise Halper, *Public Nuisance and Public Plaintiffs: Ownership, Use, and Causation (Part II)*, 17 ELR 10044 (Feb. 1987).

81. *See* Antolini, *supra* note 1, *passim*.

82. *See* Restatement (Second) of Torts §821C (1979); Antolini, *supra* note 1, at 759-60 ("Commentators have long criticized the traditional rule and test as unduly restrictive and illogical, barring worthy tort cases and preventing judicial inquiry into the merits of the plaintiffs' allegations of injury to the community values the tort protects."); *id.* at 784-86 (discussing the exception of Hawai'i).

83. Dobbs, *supra* note 4, at 1335.

84. *See*, *e.g.*, California v. Campbell, 138 F.3d 772, 28 ELR 21020 (9th Cir. 1998) (upholding lower court injunction and finding that the pollution of subterranean percolating waters caused by the defendant's dumping of hazardous chemicals onto the ground at its metal tube manufacturing plant in Chico, California, was a public nuisance).

85. Hoover v. Durkee, 622 N.Y.S.2d 348, 349 (N.Y. App. Div. 1995) (finding that an automobile racetrack constituted a public nuisance).

86. Union County v. Hoffman, 512 N.W.2d 168, 170 (S.D. 1994) (finding that a mobile home park with inadequate sewage system, accumulated garbage and junk, impassable roadways, and undrinkable water was a public nuisance).

87. Southeast Arkansas Landfill, Inc. v. State, 858 S.W.2d 665, 674-75 (Ark. 1993) (finding that a landfill company's off-loading of rail cars of waste creating strong odors that disturbed nearby residents constituted a public nuisance).

88. Tinicum Township v. Delaware Valley Concrete, Inc., 812 A.2d 758 (Pa. Comm. Ct. 2002) (upholding injunction against a quarry operator's blasting operation).

89. Crane Point Assocs. v. State, 805 So. 2d 26, 27 (Fla. Dist. Ct. App. 2001) (finding a resort's unsanitary cesspools to be a public nuisance).

90. State v. Monoco Oil Co., 713 N.Y.S.2d 440, 446 (N.Y. App. Div. 2000) (finding that fumes from asphalt storage facility that affected nearby residents' school, work, health, and enjoyment constituted a public nuisance).

91. New York v. Shore Realty Corp., 759 F.2d 1032, 1051, 15 ELR 20358 (2d Cir. 1985) (holding that storage of hazardous waste on private property was a public nuisance claim by commercial fishers on Hudson River).

polychlorinated biphenyl (PCB) leachate from solid waste management facility[92]; and PCB pollution of a river by an electric company, which injured and killed fish.[93]

IV. Negligence: A Not So Useful Chameleon?

Negligence is the chameleon of modern tort law, adjusting to virtually any factual situation involving injury to persons or property with its highly flexible definition and focus on changing social standards of conduct. Broadly defined, negligence occurs when the defendant fails to exercise the degree of care required by law and engages in conduct that causes foreseeable harm to the plaintiff. The proposed *Restatement (Third) of Torts: Liability for Physical Harm* sets forth the primary elements of negligence:

> A person acts with negligence if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.[94]

Remedies for negligence include compensatory and, rarely, punitive damages,[95] but no injunctive relief.

Although negligence is the predominant type of tort law action litigated today,[96] in the environmental context, it is not often used as a stand-alone theory. Usually, negligence is mentioned among a laundry list of claims or is the underlying theory for other more specific causes of action, e.g., negligently caused nuisance.[97] Negligence is a key cause of action, however, in toxic tort claims for personal injury and property damage.[98] Despite the relatively minor use of negligence claims in the environmental injury context, there are several particular aspects of negligence claims that have special significance for environmental practitioners.

First, on the key element of duty, an issue that can arise in environmental cases is whether the defendant's violation of a statute will control the finding of negligence. There are two basic kinds of statutory noncompliance situations. On the one hand, there may be a civil statute that expressly addresses the defendant's conduct. In this case, courts simply enforce the statute, as long as it is constitutional.[99] On the other hand, if a plaintiff is seeking to enforce a criminal statute, then the question is negligence per se, i.e., whether the defendant's violation of a criminal safety statute can be imported into the torts context as the standard of care and evidence of breach.[100] Some courts apply the negligence per se doctrine in light of civil regulatory statutes, municipal ordinances, or administrative regulations.[101]

Second, the defendant's compliance with a statute may be invoked as a defense. In general, defendants lose this argument. According to Dobbs: "[A]lthough the defendant complied with the statutory directives, [the trier of fact may find] he should have done even more to attain reasonable levels of safety."[102] Yet, the defendant's compliance with a statute that "thoroughly regulates the behavior in question" may undermine the negligence claim.[103]

Third, bringing a negligence claim presents some particular challenges to environmental plaintiffs because it opens the door to defenses that otherwise are not common in environmental cases. Defendants have a host of affirmative defenses to negligence, including contributory/comparative negligence, assumption of the risk (express and, in some states, implied), immunity, and statutes of limitation.[104] Moreover, statutory controls on damages, such as pain and suffering caps and punitive damages restrictions, can undercut any victory secured by a successful plaintiff. Often these defenses or limitations are restricted to "negligence" by common law or statutory language and, therefore, can be avoided by pleading a non-negligence cause of action.

Fourth, a subtle and related point, which arises in cases where plaintiffs use negligence as the underlying theory in a cause of action such as nuisance (as opposed to as a stand-alone theory), is the risk that these defenses will come into play when they otherwise would not, e.g., if the claim were based on intentional nuisance. As Prof. Bill Rodgers explains:

> The problem nuisance cases are those where liability is based upon negligence, that in the ordinary course presupposes a defense of contributory negligence. Some of these cases, usually instances of single-incident misconduct, shouldn't even be called nuisances and ought to be treated as conventional negligence cases. . . .
>
> An excellent example of making an easy nuisance case hard by introducing ideas of negligence can be found in the New York Court of Appeals' decision in *Copart Industries, Inc. v. Consolidated Edison Co.* There, an auto servicing business claimed it was forced out of business because emissions from a power plant repeatedly damaged the exteriors of stored automobiles. The court sustained a judgment for defendant under a confused jury charge allowing the defense of contributory negligence

92. State v. Ferro, 592 N.Y.S.2d 516, 518 (N.Y. App. Div. 1993).

93. Leo v. General Elec. Co., 538 N.Y.S.2d 844, 846 (N.Y. App. Div. 1989) (allowing public nuisance claim by commercial fishers on Hudson River).

94. Restatement (Third) of Torts: Liability for Physical Harm §3 (Tentative Draft No. 1, 2001).

95. For an example of punitive damages awarded in a pollution case, see Tant v. Dan River, Inc., 345 S.E.2d 495 (S.C. 1986) (upholding punitive damages award in case where black sooty material from defendant's boiler system contaminated plaintiffs' homes and defendant knew its operations violated air pollution laws).

96. Dobbs, *supra* note 4, at 257 (noting that an "overwhelming number" of tort cases turn on negligence claim).

97. Ravan v. Greenville County, 434 S.E.2d 296, 307 n.4 (S.C. Ct. App. 1993) ("A nuisance presupposes negligence in many instances, if not in most, and the two torts may be coexisting and practically inseparable if the acts or omissions constituting negligence create a nuisance.").

98. Ann Taylor, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. Envtl. Aff. L. Rev. 753, 757 (1994).

99. Dobbs, *supra* note 4, at 311.

100. *Id. See*, *e.g.*, Sheila G. Bush, *Can You Get There From Here?: Noncompliance With Environmental Regulations as Negligence Per Se in Tort Cases*, 25 Idaho L. Rev. 469 (1988/1989).

101. Bush, *supra* note 100, at 471. *See also* Rodriguez v. American Cyanamid Co., 858 F. Supp. 127 (D. Ariz. 1994) (applying Arizona law and holding that there is no negligence per se for violation of FIFRA where "bug bombs" ignited by pilot light destroyed mobile home).

102. Dobbs, *supra* note 4, at 572.

103. *Id.*

104. *See, e.g.*, Bradford v. State, 396 N.W.2d 522 (Mich. Ct. App. 1986), *vacated*, 423 N.W.2d 36 (1988) (finding that in a case where the state facilitated site cleanup, but continued to receive shipments of wastes, allegations of negligence were insufficient to overcome immunity defense).

> if the nuisance were based upon negligence. A more convincing analysis would describe this conflict as an example of nuisance by intentional tort, with the facts clearly not supporting any defenses based on bargaining, such as consent or assumption of risk.[105]

A review of the post-1970s environmental cases involving negligence claims confirms that this highly flexible cause of action is, ironically, perhaps the least productive of all tort law theories for environmental practitioners. Courts often fail to analyze the negligence claim in any depth as a distinct part of the case, making analysis difficult. There are a few cases involving successful claims.106 In a negligence case brought by the Oklahoma Pollution Control Coordinating Board against the Kerr-McGee Corporation for dumping deleterious substances into the Cimarron River that resulted in the death of over 160,000 fish, for example, the Oklahoma Supreme Court upheld the jury verdict in favor of the state, finding that "[t]here was competent evidence defendants violated the Water Quality Standards and also were guilty of common law negligence."[107] However, plaintiffs also lose environmental negligence claims on the threshold issue of duty.[108] In short, negligence does not appear to be frequently alleged as an independent or even primary theory of the case in environmental lawsuits. When it is used, plaintiffs seem to have a difficult time winning. When negligence is used to undergird another theory, it can create as many difficulties for plaintiffs as it solves. Thus, practitioners have wisely relied on the myriad other claims available in environmental lawsuits.

105. Rodgers §2.4 (Private Nuisance), *supra* note 2, at 46-47 (internal footnotes omitted).

106. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 311, 17 ELR 20081 (W.D. Tenn. 1986) (finding Velsicol "guilty of common law negligence in the creation, implementation, operation and closure of its chemical waste burial site in Hardeman County, Tennessee," which was one of four tort theories that supported the compensatory damages totaling $5.273 million and punitive damages of $7.5 million), *aff'd in part*, *rev'd in part*, 855 F.2d 1188, 19 ELR 20404 (6th Cir. 1988).

107. State ex rel. Pollution Control Coordinating Bd. v. Kerr-McGee Corp., 619 P.2d 858, 864, 11 ELR 20458 (Okla. 1980). *See also* Pennsylvania Glass Sand Corp. v. Ozment, 434 P.2d 893 (Okla. 1967) (allowing lessee of land to recover from operator of factory for pollution of farm pond and pasture that resulted in death and damage to cattle).

108. *See, e.g.*, Steilacoom Lake Improvement Club, Inc. v. State, 128 Wash. App. 1063 (Wash. Ct. App. 2005) (confirming the dismissal of a negligence claim in a case where plaintiffs sued the state of Washington when Steilacoom Lake became fouled by excessive aquatic growth due to the state's ban on the use of herbicidal agents alleging nuisance, trespass, negligence, inverse condemnation, and violations of the State Water Pollution Control Act; trial court dismissed all claims except for nuisance; the appellate court found that the state did not owe a special duty to the plaintiffs to take any corrective action); Strand v. Neglia, 649 N.Y.S.2d 729, 730 (N.Y. App. Div. 1996) (finding for plaintiffs only on strict liability in a case where plaintiffs asserted personal injuries and property damage—pled as negligence, strict liability, trespass, public and private nuisance, and treble damages for forcible dispossession— due to release of petroleum products from defendant's property, and concluding on negligence issue that "defendant may not be found to have breached a duty of care in favor of plaintiffs absent evidence of his actual or constructive notice of defects in the underground storage tanks during the period of his superintendence"); Rosenblatt v. Exxon Co., 642 A.2d 180, 189 (Md. 1994) (stating that court was "unwilling to impose upon a lessee of commercial property a duty to remote successor lessees" in action by current tenant against former tenant, a gasoline station operator, for negligence, strict liability, trespass, and nuisance, seeking economic damages incurred as result of contamination of property by toxic chemicals during former tenant's occupancy).

V. Strict Liability—Abnormally Dangerous Activities

Another theory that may be usefully employed to protect environmental resources is strict liability for abnormally dangerous activities—a theory embraced in one form or another by the majority of states.[109]

The concept of strict liability for abnormally dangerous activities can be traced to the 19th-century English case *Rylands v. Fletcher.*[110] In *Rylands*, an adjoining property owner sued his neighbor when the neighbor's large reservoir of water broke through a containment wall and flooded the property owner's mine. The House of Lords held that the owner of the reservoir could be held liable, even without proof of negligence, because his conduct of backing up the river and creating the reservoir was a "non-natural" use. U.S. courts eventually adopted the idea that a responsible party may be liable, even without a showing of fault, for conducting certain especially dangerous activities.

The *Restatement of Torts*, widely influential in shaping the development of state law, has adopted two different formulations of strict liability. The first *Restatement* provided that strict liability would be found for "ultrahazardous activities," defined as activities that necessarily involve a risk of serious harm and cannot be made safe even by the exercise of the utmost care, and that are not a matter of common usage.[111] The *Restatement (Second)* changed both the terminology of activities subject to strict liability—describing them as abnormally dangerous activities rather than ultrahazardous activities—and the test for determining whether an activity should be so characterized. Many states have since adopted the formulation found in the *Restatement (Second)*.[112]

The *Restatement (Second)* provides that a person is liable for an abnormally dangerous activity that causes harm to persons or property, despite having exercised the "utmost care to prevent the harm."[113] Thus, where the doctrine applies, reasonable care by the defendant is not a defense. Strict liability is limited to the type of harm that makes the activity abnormally dangerous in the first place.[114] For example, the doctrine does not extend to a product that becomes dangerous when used in a particular way after it is manufactured, but does extend to the danger inherent in an instrumentality/product at all times.[115]

As is clear from the above formulation, unlike nuisance or trespass, to prevail on an abnormally dangerous activity strict liability theory, a plaintiff must demonstrate actual personal injury or property damage. However, while nuisance theory requires that defendant's activities continually interfere with the plaintiff's possession and enjoyment of land, strict liability can apply to ongoing as well as past activities by a defendant.

109. Daniel Selmi & Kenneth Manaster, State Environmental Law §4.5, at 4-16 (2005). For a detailed discussion, see Alexandra Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 Wake Forest L. Rev. 903 (2004).

110. L.R. 3 H.L. 330 (1868).

111. Restatement of Torts §520 (1938).

112. Dobbs, *supra* note 4, at 954.

113. Restatement (Second) of Torts §519 (1977).

114. Id.

115. Traube v. Freund, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002).

Section 520 of the *Restatement (Second)* lists six factors that courts should consider in determining whether an activity is "abnormally dangerous":

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.[116]

These factors incorporate a type of risk-benefit analysis, comparable in some ways to a negligence analysis. There is no set formula for weighing these factors; rather, the courts evaluate them on a case-by-case basis, examining the characteristics of the activity as conducted in a particular instance and location.[117]

The leading case concerning abnormally dangerous activity, strict liability, and environmental contamination is *State Department of Environmental Protection v. Ventron Corp.*,[118] a 1983 New Jersey Supreme Court decision. Applying the *Restatement* factors, the court found that various owners of a mercury processing plant, who had disposed of mercury waste that contaminated a tidal creek, were strictly liable for the cleanup and removal of the mercury. While other cases similarly have imposed strict liability for chemical contamination resulting from industrial activities, such as leaking gas tanks and oil wells, the case law in these circumstances is not uniform.[119] As demonstrated in a recent analysis by Prof. Alexandra Klass, however, the trend in most jurisdictions appears to be toward extending the doctrine of strict liability to activities resulting in environmental contamination.[120]

One critical factor in these cases is whether the activity can be made safe through the exercise of reasonable care. Thus, for instance, some courts have held that the handling or transportation of hazardous substances are not abnormally dangerous activities because the risks involved can be eliminated through the exercise of due care.[121] A number of commentators have noted that this is the single most difficult criterion for plaintiffs to satisfy.[122] Another important consideration is how the activity in question is characterized by the courts; as Professor Dobbs notes, this "foreordains the outcome because, depending on how you describe the activity, it may or may not seem to be abnormally dangerous or uncommon."[123] For example, if a court focuses on the general handling, use, or manufacture of a toxic chemical, it is more apt to find the activity is commonplace; if it emphasizes the particular circumstances under which a specific defendant has used, handled, or disposed of the chemical, i.e., in unsafe tanks or in a landfill, it will be more inclined to find that it is uncommon.[124] In one New Jersey case, the defendant's die-casting machines required the use of hydraulic fluid, containing high levels of PCBs, and the fluid constantly spilled from the machines. The court characterized the activity in question not as the defendant's manufacturing process, but as the leakage of hydraulic fluids from the machinery, concluding that it was an abnormally dangerous activity.[125] On the other hand, a number of courts have found that leaks from gas tanks are commonplace rather than abnormally dangerous activities. [126]

The New Jersey Supreme Court has extended the strict liability doctrine to include predecessor owners to title who were responsible for the contamination.[127] In 1991, the court ruled that the policy rationales underlying the doctrine—that those who engage in dangerous and inappropriate activities should bear the risks of harm associated with it, and that such enterprises can more easily bear the costs of administering such risks by passing them onto the public—are not limited to situations where the plaintiff and defendant are neighboring landowners.[128] The majority of other courts, however, have refused to allow landowners to bring strict liability claims against prior owners of their property. For example, in *Futura Realty v. Lone Star Building Centers*,[129] a Florida court held that the strict liability doctrine covered only harms to neighboring land, and that a seller had no duty for damage to its land as it related to the land's sale because the buyer can protect itself in other ways, including "careful inspection and negotiation."[130]

116. Restatement (Second) of Torts §520 (1977).

117. *See id.* §520 cmt. f.

118. 468 A.2d 150 (N.J. 1983).

119. Cases imposing strict liability include Prospect Indus. Corp. v. Singer Co., 569 A.2d 908, 910 (N.J. Super. Ct. Law Div. 1989) (disposal of PCBs at manufacturing plant); Branch v Western Petroleum, Inc., 657 P.2d 267, 13 ELR 20362 (Utah 1982) (waste water from oil wells); Shell Oil Co. v. Meyer, 705 N.E.2d 962 (Ind. 1998) (leaking underground storage tanks); Yommer v. McKenzie, 257 A.2d 138 (Md. 1969) (leaking underground storage tanks). Some cases to the contrary include Arawana Mills Co. v. United Techs. Corp., 795 F. Supp. 1238, 1252 (D. Conn. 1992) (storage and handling of hazardous substances at facility that overhauls and services jet planes); Avemco Ins. Co. v. Rooto Corp., 967 F.2d 1105 (6th Cir. 1992) (release of vapors from the storage of hydrochloric and sulfuric acid from chemical plant); Fletcher v. Conoco Pipe Line Co., 129 F. Supp. 2d 1255, 1261 (W.D. Mo. 2001) (leaks from underground oil pipeline); Grube v. Daun, 570 N.W.2d 851, 857 (Wis. 1997) (leaking underground storage tanks). *See also* Klass, *supra* note 109, at 937 n.140 (listing cases pro and con involving releases of petroleum and natural gas), 940-58 (describing cases in which courts found strict liability for environmental contamination).

120. Klass, *supra* note 109, at 957-58. Professor Klass argues that for many courts, a significant justification for doing so is the existence of federal and state statutes imposing strict liability for the release of hazardous substances, most notably the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* at 942-57.

121. Hawkins v. Evans Cooperage Co., 766 F.2d 904, 907 (5th Cir. 1985).

122. *See* Klass, *supra* note 109, at 916 & n.52 (citing commentary).

123. Dobbs, *supra* note 4, at 967.

124. Selmi & Manaster, *supra* note 109, §4.7, at 4-21 to 4-22.

125. Prospect Indus. Corp. v. Singer Co., 569 A.2d 908, 910 (N.J. Super. Ct. 1989).

126. Arlington Forest Assocs. v. Exxon Corp., 774 F. Supp. 387, 392 (E.D. Va. 1991) (rejecting plaintiff's characterization of the activity as "storage of gasoline in *moribund* underground tanks" because that is not the normal condition of the tanks) (emphasis in original); *see also* Grube v. Duan, 570 N.W.2d 851, 857 (Wis. 1997) ("[W]e reject the plaintiffs' assertion that the leakage and resulting contamination attributable to [an] UST is the appropriate activity to be analyzed under the *Restatement*. The contamination is the resulting harm, not the alleged ultrahazardous activity itself.").

127. T&E Indus. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991).

128. *Id.* at 1257.

129. 578 So. 2d 363 (Fla. Dist. Ct. App. 1991).

130. *Id.* at 365. *See also* Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731 (8th Cir. 2004) (interpreting Minnesota law and listing cases

On a final note, the American Law Institute's Tentative Draft No. 1 of the *Restatement (Third) of Torts*, published in 2001, would simplify the six-part test of the *Restatement (Second)*. It defines an abnormally dangerous activity as one that creates "a foreseeable and highly significant risk of physical harm even when reasonable care is exercised" and that is not a matter of common usage.[131] The draft *Restatement* includes, as an illustration of a potentially abnormally dangerous activity, the storage and airborne release to the surrounding community of a toxic chemical byproduct generated by a computer manufacturer located in a residential community.[132] If adopted, this revised standard could make it easier for plaintiffs to prevail in abnormally dangerous activity cases, particularly by eliminating the inquiry into the relative value of the underlying activity called for by the *Restatement (Second)*.

VI. Products Liability

A related branch of tort law is products liability (dealing with products rather than activities), which permits the award of damages from manufacturers of defective products that injure persons or property. Although largely developed outside the context of environmental law, creative practitioners are now using this theory to recover against the manufacturers of products that cause environmental damage. An excellent example of a "new wave" strict liability case is the successful litigation brought by the South Lake Tahoe Water District against the manufacturers of the gasoline additive methyl tertiary butyl ether (MTBE). Moreover, in response to the unique product identification problems posed in cases involving MTBE contamination, at least one court has developed a modified form of market share liability known as "commingled product market share liability."[133]

There are a number of theories under which product liability claims may be brought, including negligence, breach of warranty, and strict liability. Negligence requires the plaintiff to show defendant's failure to comply with a standard of care. Breach of warranty requires privity between plaintiff and defendant, and in some instances a seller may be able to limit or disclaim a warranty entirely. Strict liability is the most plaintiff-friendly theory. In contrast to the other approaches, it focuses on the condition of the product itself, not the fault of the defendant. The remainder of this section discusses strict liability theory.

In general, the *Restatement of Torts* provides that sellers are strictly liable for personal or property damage caused by any product "in a defective condition unreasonably dangerous" to the user or consumer of the product. Liability attaches even if the seller has exercised all possible care, and even if there is no privity between the injured party and seller or manufacturer. The defendant must be an ordinary seller of the product in question, and the product must reach the plaintiff without substantial change. There are three ways in which a product may be defective: a design defect; a defect due to a flaw in the manufacturing process; or a defect in the product warnings or instructions for use.[134]

A manufacturing defect refers to a product that was produced out of conformity with the manufacturer's intended design.[135] A design defect occurs when the intended product line itself is defective. In design defect cases, two tests have been used to determine whether a product is unreasonably dangerous. One is the "consumer expectation test," which examines if the article sold is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[136] The other test, favored increasingly by courts in recent years and advocated by the 1998 *Product Liability Restatement*, is the risk-utility test. This test evaluates whether the product's dangers outweigh its benefits, with an emphasis on whether alternatives were available that would have eliminated the risks of the product.[137] A product may also be defective if it does not include adequate warnings about its dangers or instructions needed for safe use (failure to warn is also sometimes treated as a separate theory of liability).

There are a number of important defenses to product liability claims. One is the so-called state-of-the-art-defense—where a defendant claims that it did not know, and could not reasonably have known, the hazards of the product at the time that the plaintiff was exposed to it.138 Some courts have refused to allow this defense, arguing that it improperly injects negligence elements into the strict liability case by focusing on defendant's fault at the time of a product's manufacture, but this is a minority view.[139]

Likewise, sellers are liable only for the foreseeable uses of their products. In the environmental context, some courts have found that the ultimate method of disposal of products containing toxic substances or the recycling or dismantling of such products is not reasonably foreseeable.[140] On the other hand, in the recent wave of MTBE litigation, courts have found that groundwater contamination was a foreseeable result of the defendants' production of gasoline containing MTBE. In the multidistrict federal MTBE litigation, for example, the court concluded that "[d]efendants were aware that mixing MTBE with gasoline would result in massive groundwater contamination. They knew that there was

from other jurisdictions that have reached similar results); Klass, *supra* note 109, at 938 n.142 (listing cases pro and con).

131. Restatement (Third) of Torts: Liability for Physical Harm §20 (Tentative Draft No. 1, 2001).

132. *Id*. cmt. k, illus. 2.

133. In re MTBE Prods. Liab. Litig., 379 F. Supp. 2d 348, 377-79 (S.D.N.Y. 2005), *vacated and remanded on other grounds*, 488 F.3d 112 (2d Cir. 2007).

134. Restatement (Third) of Torts: Product Liability §2 (1998).

135. In the environmental context, this could, for example, involve a situation in which contaminants are inadvertently introduced into a product. Duane Miller, *Toxic Torts and Environmental Litigation*, *in* Kenneth Manaster & Daniel Selmi, California Environmental Law and Land Use Practice §3.02, at 3-6 (2005).

136. Restatement (Second) of Torts §402A cmt. i (1965).

137. Dobbs, *supra* note 4, at 985-87, 996-97.

138. *See* Anderson v. Owens-Corning Fiberglass Corp, 53 Cal. 3d 987 (Cal. 1991) (upholding state-of-the-art defense in strict product liability action based upon failure to warn).

139. *See* Sternhagen v. Dow Co., 282 Mont. 168 (Mont. 1997) (rejecting state-of-the-art defense in strict product liability actions generally).

140. *See* United States v. Union Corp., 277 F. Supp. 2d 478 (E.D. Pa. 2003) (finding that discharge of PCBs from electrical transformers and capacitors drained to salvage various metal parts, after they were used by consumers for twenty to thirty years, was not an intended or reasonably foreseeable use of the product); Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631, 17 ELR 20879 (W.D. Pa. 1987) (finding that use of junk electrical components containing PCBs that alleged resulted in injuries to plaintiffs was not reasonably foreseeable use to manufacturer of new electrical components).

a national crisis involving gasoline leaking from multiple sources, such as underground storage tanks, and that gasoline enters the soil from gas stations due to consumer and jobber overfills."[141]

Courts also have recognized a "sophisticated user" defense, which provides that a manufacturer's duty to warn can be satisfied by providing information about a product's risks to a third party upon whom it can reasonably rely to communicate the information to the end user of the product. This defense, for instance, has been successfully applied where bulk suppliers of chemicals are sold to knowledgeable intermediaries.[142]

Also, certain products that cannot be made completely safe for their intended and ordinary use may be designated as "unavoidably unsafe" (the classic examples are guns or knives). Under the *Restatement*, an unavoidably unsafe product is not considered defective or unreasonably dangerous where its usefulness outweighs the dangers of its use, provided that the product includes sufficient instructions and warnings.[143] This defense, however, is not likely to arise often in the environmental context.

Having canvassed the most commonly used tort approaches, we now turn to an old, yet potent, resource protection theory—the public trust doctrine.

VII. Public Trust—Modern Revival of Ancient Arts

The venerable public trust doctrine is another ancient common law theory that has been increasingly used, with some significant success, since the 1970s to achieve environmental conservation goals. Prof. Joseph Sax is widely recognized as the catalyst for the modern-day revival of the public trust doctrine through his landmark 1970 article: *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.[144] While not easy to define, the doctrine generally holds that certain natural resources are held by the government in special status, that the government may neither alienate those resources nor permit private parties to injure them, and that the government has an ongoing, affirmative duty to safeguard those resources for the benefit of the public.[145]

As Professor Sax explained more recently:

> The public trust is of special importance, as the states have expressly recognized, because it invokes not just authority but a duty on the part of government to protect public rights. Agencies of the state have an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust. Moreover, the public trust is a continuing obligation. In trust waters there can be no such thing as a permanent, once-and-for-all allocation of trust waters or land. That principle is essential to acknowledge government responsibilities to respond to changing public needs and changing roles for water in the economy.[146]

The American origins of the public trust doctrine can be traced to an 1821 New Jersey case[147] and the more famous U.S. Supreme Court decision in *Illinois Central Railroad Co. v. Illinois*.[148] The basic tenet of the doctrine is that "the land underlying navigable waters could never be privatized to the detriment of fundamental public rights in the lands and in the water overlying them. The trust is old, but its application to water diversions and to environmental protection is new."[149]

The public trust doctrine received its major modern endorsement in the landmark California *National Audubon Society v. Superior Court of Alpine County*[150] decision in 1983. This case, which involved the diversion of water for the city of Los Angeles from the Sierra Nevada streams that fed Mono Lake, expressly applied the public trust doctrine to limit stream diversions that were harming the environment. The court found that in administering the public trust, "[t]he state has an *affirmative duty* to take the public trust into account . . . and to protect public trust uses whenever feasible."[151] Shortly thereafter, the Idaho Supreme Court followed *Mono Lake* in principle, finding that even though a state agency's permit to a yacht club for construction of slips on Lake Coeur d'Alene did not violate the public trust, "the state is not precluded from determining in the future that the conveyance is no longer compatible with the public trust."[152]

In 2000, the public trust doctrine reached what is perhaps its broadest application, in Hawai'i through the "Waiāhole" water rights case.[153] As they explain, in the *Waiāhole* case, the Hawai'i Supreme Court recognized a newly defined and expansive "state water resources trust."[154] Based on Hawaiian law, the court concluded that this public trust extended to "all water resources without exception or distinction."[155] Under the trust, the state has a "duty to promote the reason-

141. In re MTBE Prods. Liab. Litig., 379 F. Supp. 2d 348, 365 (S.D.N.Y. 2005).

142. *See* Adams v. Union Carbide Corp., 737 F.2d 1453 (6th Cir.), *cert. denied*, 469 U.S. 1062 (1984).

143. Restatement (Second) of Torts §402A (1965); *see also* Restatement (Third) of Torts: Products Liability §2 (1998).

144. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

145. Richard Frank, *Public Trust Doctrine, in* California Environmental Law and Land Use Practice, *supra* note 135, §2.02, at 2-4 to 2-5.

146. Joseph Sax, Presentation, Proceedings of the 2001 Symposium on Managing Hawaii's Public Trust Doctrine, U. Haw. L. Rev., Winter 2001, at 21, 31, *available at* http://www.hawaii.edu/uhreview/publictrust.pdf.

147. Arnold v. Mundy, 6 N.J.L. 1 (1821).

148. 146 U.S. 387 (1892).

149. Sax, *supra* note 146, at 28.

150. 658 P.2d 709, 13 ELR 20272 (Cal. 1983) (commonly referred to as the "Mono Lake" case) [hereinafter *Mono Lake*]. *See also* the earlier landmark case of Marks v. Whitney, 491 P.2d 374, 2 ELR 20049 (Cal. 1971).

151. *Mono Lake*, 658 P.2d at 728 (emphasis added).

152. Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983). *See also* Mineral County v. Nevada, 20 P.3d 800, 807-09 (Nev. 2001) (Rose, J., concurring) (affirming the existence and role of the public trust doctrine in Nevada).

153. In re Waiāhole Ditch Combined Contested Case Hearing, 94 Haw. 97 (Haw. 2000), *appeal after remand*, 105 Haw. 1 (Haw. 2004) [hereinafter *Waiāhole*]. *See* D. Kapua`ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa`a O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* Creative Common Law Strategies for Protecting the Environment, *supra* note 39, at 247.

154. *See* Haw. Rev. Stat. §§445, 451 (2005).

155. *Id.* at 445-47. The Hawai`i Supreme Court recognized the traditional public trust uses of "navigation, commerce, and fishing," as well as the more modern recreational uses such as "bathing, swimming, boating, and scenic viewing." *Id.* at 448. The court also recognized "domestic uses, particularly drinking" and "Native Hawaiian and traditional and customary rights" as public trust uses. *Id.* at 449.

able and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state,"[156] which includes waters "in their natural state"[157] and includes an additional duty to protect traditional and customary rights of Native Hawaiians.[158] According to the court, this means that "the [Water] Commission must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process."[159]

The ultimate result of the application of the public trust doctrine in the *Waiãhole* case was the first-ever restoration of streams in the history of Hawai'i. For over 100 years, major sugar cane operations had diverted water from streams and small farmers on the windward side of O'ahu (as on other islands), decimating native stream life and the long tradition of kalo (taro) farming by native Hawaiians and others. As Sproat and Moriwake conclude:

> The public trust's limitation on alienation, therefore, did not directly control the water allocation decisions in *Waiãhole*. Nonetheless, the state's enduring public trust interest in water resources laid the foundation for the entire case, validating the Commission's authority to make its allocation decisions and the windward community's call for stream restoration notwithstanding existing diversions.[160]

Thus, even while the *Waiãhole* case continues today to be tangled up in administrative hearings, appeals, and remands, the decision should embolden environmental advocates' consideration of the public trust doctrine as an advocacy tool.

While the public trust doctrine is historically associated with tidal and navigable waters, it has been applied to numerous other public natural resources, including fish and wildlife, habitat, and recreational resources.[161] In New Jersey and Connecticut, the courts have focused attention on beach access, recognizing the vastly increased importance of recreational use of water in modern times.[162] Another case, in Wisconsin, found that a conveyance of lakeside docks to private owners violated the public trust.[163] Similarly, in Vermont, a railroad's attempt in 1989 to claim littoral title to land used for the construction of wharves 140 years earlier, in 1849, was rejected on the basis of the enduring public trust.[164] Thus, practitioners should also think about the public trust doctrine more broadly than just in the context of traditional water law.

VIII. The Problem of Preemption

A final key issue in any examination of the viability of a common law remedy is whether the post-1970s federal statutory scheme has preempted the common law claim. Defendants often seek to mount preemption defenses to common law claims. In general, claims based on federal common law involving areas directly addressed by federal statutes are likely to be preempted. By contrast, if a claim is based on state common law, preemption by either federal or state statutes is far less likely, primarily because of "savings" clauses in the statutes that preserve these supplemental remedies.[165]

The leading case involving federal common law preemption is the 1981 Court decision, *Milwaukee v. Illinois* (*Milwaukee II*).[166] There the Court found that federal common law nuisance claims for water pollution were preempted by the Clean Water Act's (CWA's) establishment of a comprehensive regulatory program governing water discharges.[167] Six years later, in *International Paper Co. v. Ouellette*,[168] the Court held that the CWA also preempted state common law nuisance claims for trans-state water pollution brought under the law of the receiving state. However, *Ouellette* and other post-*Milwaukee II* cases made clear that state common law claims based on the law of the "source state" were preserved as a viable remedy.[169]

Thus, if a federal legislative scheme directly addresses an issue—for example if a permit has been issued pursuant to federal law governing the polluting activity—federal common law claims will be preempted.[170] On the other hand, if federal regulation does not directly address a polluting activity, such as nonpoint water pollution or carbon dioxide emissions contributing to global warming, federal common law claims arguably are not preempted.[171]

As noted above, the courts generally have allowed *state* common law claims to continue as a viable remedy despite

156. *Id*. at 451.

157. *Id*. at 452.

158. *Id*.

159. *Id*. at 455.

160. *See* Sproat, *supra* note 153.

161. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 2 ELR 20049 (Cal. 1971); State v. Superior Court of Placer County, 625 P.2d 256, 11 ELR 20483 (Cal. 1981) (protecting ecology and scenic beauty of "shorezone" of Lake Tahoe under public trust doctrine).

162. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 2 ELR 20519 (N.J. 1972); Leyden v. Town of Greenwich, 777 A.2d 552, 564 n.17 (Conn. 2001) ("public trust doctrine . . . is a well established part of our common law and . . . applies both to privately and publicly owned shorefront property").

163. ABKA Ltd. Partnership v. Wisconsin Dep't of Nat. Resources, 635 N.W.2d 168 (Wis. Ct. App. 2001) (rejecting public marina's conveyance of docks for "dockominiums" as violating the state public trust, which overlays riparian owners rights to reasonable use of lake).

164. State v. Central Vt. Ry., 571 A.2d 1128 (Vt. 1989).

165. *E.g.*, Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1365(e) (2005); Clean Air Act, 42 U.S.C. §7604(e) (2005).

166. 451 U.S. 304, 11 ELR 20406 (1981). *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21-22, 11 ELR 20684 (1981) (reiterating that the CWA completely preempted the federal common law of nuisance for water pollution).

167. *Milwaukee II*, 451 U.S. at 304.

168. 479 U.S. 481 (1987).

169. In *Ouellette*, Vermont property owners claimed that the pollution discharged into Lake Champlain by a paper company located in New York constituted a nuisance under Vermont law. The Court held that the FWPCA taken "as a whole, its purposes and its history" preempted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is "the law of the State in which the point source is located." *Id*. at 493, 487.

170. *See, e.g.*, Mattoon v. City of Pittsfield, 980 F.2d 1, 23 ELR 20361 (1st Cir. 1992) (finding that Safe Drinking Water Act preempts federal common law of nuisance with respect to claims for injuries allegedly caused by drinking water supplied by a city); United States v. Kin-Buc, Inc., 532 F. Supp. 699, 12 ELR 20459 (D.N.J. 1982) (finding that where a utility was granted a variance by the U.S. Environmental Protection Agency to burn fuel with a sulfur content higher than that allowed by the Clean Air Act, a federal common law nuisance claim seeking an equitable remedy proscribing the permitted conduct is barred).

171. *See* New England Legal Found. v. Costle, 666 F.2d 30, 32 n.2, 11 ELR 20888 (2d Cir. 1981). *See* Pawa, *supra* note 80.

the federal and state statutory schemes in place to address the same issues.[172] The determination of whether state common law claims are preempted also is statute-specific, depending on legislative intent and the particular language used in the relevant statute.

In its most recent environmental law preemption case, *Bates v. Dow Agroscience, Ltd. Liability Co.*[173] the Court decisively rejected arguments for broad preemption of state common law claims. The Court interpreted narrowly the preemption provision in the Federal, Insecticide, Fungicide, and Rodenticide (FIFRA) labeling clause and held that state common law claims for strict or negligent product liability, breach of warranty, and others were not preempted by FIFRA. The Court rejected the view of numerous circuit courts and state appellate courts that such claims were preempted on the theory that if successful, they would likely induce manufacturers to change their labels. The Court reiterated its historic presumption against preempting state law in areas of traditional state regulation absent clear and manifest congressional intent to do so. It explained that if there are two equally plausible interpretations of a preemption clause, the Court must follow the reading that disfavors preemption.[174] The Court further embraced the positive, complementary role that tort litigation can play alongside federal environmental statutes, noting that it can serve as a catalyst for improving the safety of pesticide labels and furthering the underlying goals of federal pesticide law.[175]

Particularly in the area of federal common law, however, the precise contours of the preemption doctrine in environmental law are still unfolding. In the context of the Clean Air Act, the preemption issue is likely to be pressed all the way to the Court either in the New York global warming case mentioned above or a similar action filed by California against the six largest automakers operating in the United States.[176]

In short, preemption is not a full bar to common law remedies. While practitioners must carefully examine potential overlap between their common law claims and statutory law, there is still significant opportunity for arguing that these are complementary and not competing remedies.

IX. Conclusion

As this overview suggests, the environmental common law provides many promising avenues for enterprising practitioners. Despite the advent of modern environmental statutes in the 1970s, most common law remedies remain viable and vital, and have been used with significant success over the past three decades. There is no better way to understand the common law's potency, however, than to observe it in action, as we think will become clear by reading the compelling case studies in Chapters 5 through 13 of *Creative Common Law Strategies for Protecting the Environment*.

172. *See, e.g.*, Biddix v. Henredon Furniture Indus., Inc., 331 S.E.2d 717, 725 (N.C. Ct. App. 1985) (finding that common law suit for private nuisance and trespass was not preempted under the FWPCA and North Carolina water pollution control statute where furniture company's upstream discharge of hazardous and toxic chemicals and substances in stream adversely affected plaintiff's property); Sullivan v. Leaf River Forest Prods., Inc., 791 F. Supp. 627, 633 (S.D. Miss. 1991) (holding state common law nuisance claims against in-state sources were not preempted by the CWA); Idaho v. Hanna Mining Co., 699 F. Supp. 827, 833-34, 35 ELR 20087 (D. Idaho 1997), *aff'd*, 882 F.2d 392, 19 ELR 21358 (9th Cir. 1989) (finding that Idaho's state Environmental Protection and Health Act did not preempt the state's common law nuisance action against the current owners of a mine for water pollution caused by historical mining operations).

173. 125 S. Ct. 1788, 35 ELR 20087 (2005).

174. *Id.* at 1801.

175. *Id*. at 1802; *see* Alexandra B. Klass, *Pesticides, Children's Health Policy, and Common Law Tort Claims*, 7 MINN. J.L. SCI. & TECH. 89 (2005) (noting significant opening provided by *Bates* decision for common law claims involving pesticides and children's health).

176. California v. General Motors Corp., 2007 WL 2726871, 37 ELR 20239 (N.D. Cal.) (granting defendant's motion to dismiss). Another nuisance action likely raising preemption issues under the CAA was filed in 2006 by the Attorney General of North Carolina against the Tennessee Valley Authority (TVA), seeking to force reductions in emissions from TVA's operations in North Carolina and other states. *See* Editorial, *New Strategy on Clean Air*, N.Y. TIMES, Mar. 4, 2006, at 12, *available at* http://www.nytimes.com/2006/03/04/opinion/04sat3.html. *See* Kenneth P. Alex, *California's Global Warming Lawsuit: The Case for Damages*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT, *supra* note 39, at 165.