

ARTICLES

THE INTERSECTION OF TORT AND ENVIRONMENTAL LAW: WHERE THE TWAINS SHOULD MEET AND DEPART

Mark Latham,* Victor E. Schwartz,** & Christopher E. Appel***

The explosion of environmental statutes over the past forty years, giving rise to the field of environmental law, has created a critical and evolving question in our legal system as to how this comparatively new field of law intersects with the common law of torts. Defining the proper role of tort law in remedying environmental injuries is an important matter of public policy; the answer will determine what the tort system can and cannot achieve, inform what it should and should not achieve, and clarify which common law enforcement areas are actually voids. This information assists the judiciary on its role in addressing alleged injuries to the environment, and guides the legislative and executive branches as to whether and when action is required to fashion a legal remedy.

Tort law has historically provided the principal mechanism for remedying harms to the environment. The complexities of many modern environmental harms and the actual or perceived inadequacies of the common law, however, have led policy makers such as Congress to enact wide-ranging laws that provide legal remedies. This Article analyzes how these laws operate in relation to the common law of torts, and provides guidelines for judges to determine whether tort law provides a remedy for an alleged environmental harm. The Article thus seeks to answer a basic, yet largely unexplored, question in the legal system, namely the intersection of tort and environmental law.

* Mark Latham is a Professor of Law at Vermont Law School where he teaches torts, environmental law, and business law. He received his B.S.N. from Illinois Wesleyan University and his J.D. from the University of California at Berkeley (Boalt Hall).

** Victor E. Schwartz is chairman of the Public Policy Group in the Washington, D.C. office of the law firm Shook, Hardy & Bacon L.L.P. He coauthors the most widely used torts casebook in the United States, *Prosser, Wade & Schwartz's Torts* (12th ed. 2010). He has served on the Advisory Committees of the American Law Institute's Restatement (Third) of the Law Torts: Products Liability, Apportionment of Liability, General Principles, Liability for Physical and Emotional Harm projects. Mr. Schwartz received his B.A. summa cum laude from Boston University and his J.D. magna cum laude from Columbia University.

*** Christopher E. Appel is an associate in the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. He received his B.S. from the University of Virginia's McIntire School of Commerce and his J.D. from Wake Forest University School of Law.

TABLE OF CONTENTS

INTRODUCTION.....	738
I. THE INTERSECTION OF TORT AND ENVIRONMENTAL LAW	
PRINCIPLES.....	740
A. <i>The Challenge of Defining Environmental Law</i>	740
B. <i>Tort Law's Well-Defined Purpose and Boundaries</i>	746
II. THE OVERLAP OF TORT AND ENVIRONMENTAL LAW	749
A. <i>Remedying Environmental Harms Through Tort Law</i>	750
B. <i>Remedying Environmental Harms Through Statutes and Tort Law</i>	754
C. <i>Where Environmental Law Stands on Its Own</i>	758
D. <i>Should Tort Law Fill the Gaps?</i>	759
III. DRAWING A PRINCIPLED LINE TO GUIDE COURTS AND POLICY MAKERS	764
A. <i>An Actual Injury to a Person or Property Is Required for Any Environmental Tort Action or Intersecting Environmental Law</i>	764
B. <i>The Harm in an Environmental Tort Action or Intersecting Environmental Law Must Be Caused by Objectively Wrongful Conduct that Places Blame on Another for the Injury</i>	766
C. <i>Any Intersection Between Tort and Environmental Law Must Be Designed to Promote Corrective Justice and Not Policies Outside of Tort Law</i>	768
D. <i>Governmental Regulatory Policy Does Not Implicate the Tort System or Tort Remedies Unless Expressly Stated in the Environmental Law</i>	769
E. <i>An Environmental Law Intersecting with the Tort System Should Provide for Either Dual Enforcement Through a Statutory Liability Scheme or Preempt or Displace Tort Remedies</i>	770
CONCLUSION	772

INTRODUCTION

The past four decades have seen an explosion of law affecting environmental interests.¹ While today the legal landscape is robust with targeted federal legislation governing hazardous wastes, water and air pollution, species extinction, ocean dumping, oil pollution, and toxic spills,²

1. See Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 76 (2001).

2. See, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006); Clean Water Act of 1977, 33 U.S.C. §§ 1251–1387 (2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (RCRA); Clean Air Amendments of 1970, 42 U.S.C. §§ 7401–7671q; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (CERCLA).

and an Environmental Protection Agency (EPA) empowered to establish, implement, and enforce regulatory standards,³ such laws were virtually nonexistent prior to 1970.⁴ Before this time, the legal system relied principally on tort law to right environmental wrongs.⁵ Over time, and as a result of the enactment of other, more defined laws remedying alleged environmental harms, tort law has increasingly become relegated to what some courts and legal scholars have characterized as a “gap-filling” role.⁶ These developments raise a critical, yet largely unaddressed and evolving question in the legal system—namely, the intersection of tort and environmental law.

At first glance, one might ponder why a distinction between tort and environmental law matters so long as some mechanism exists to address environmental harms. But as this Article explains, well-defined fields of law are vital for a variety of reasons. First, the tort system and environmental laws do not always further the same objectives.⁷ Defining the proper role of tort law in remedying environmental injuries is necessary to identify the scope of available common law remedies for certain types of harms. This clarifies what the tort system can and cannot achieve, informs what it should and should not achieve, and reveals which current legal “gaps” are actually voids. Second, such information can assist the judiciary on its proper role in addressing alleged injuries to the environment, and guide the legislative and executive branches as to where action is required to fashion a legal remedy.

The objective of this Article is to develop clear lines and a comprehensive, neutral framework for analyzing how the tort system can and should respond to environmental injuries. As a corollary, this Article seeks to show how the tort system is not designed or equipped to address certain environmental harms, and why tort law should not be reshaped to permit recovery for harm that, although adverse to environmental interests,

3. The EPA was created pursuant to an Executive Order issued by President Nixon and empowered to develop environmental regulatory standards. *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted as amended in* 42 U.S.C. § 4321 note, *and in* 84 Stat. 2086 (1970).

4. *See* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 48 (2004) (summarizing significant environmental law milestones beginning in 1970, including enactment of the first group of modern environmental statutes, the creation of the President’s Council on Environmental Quality, the first nationwide celebration of Earth Day, and the creation of the EPA).

5. *See* Palma J. Strand, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 576–78 (1983).

6. *See* *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309, 330 (2d Cir. 2009), *rev’d*, 131 S. Ct. 2527 (2011); Marshall S. Shapo, *Tort Law and Environmental Risk*, 14 PACE ENVTL. L. REV. 531, 531 (1997) (“When there is a meaningful regulatory base, tort plays a ‘gap-filling’ role.”); *see also* THOMAS J. SCHOENBUAM ET AL., ENVIRONMENTAL POLICY LAW 74 (4th ed. 2002) (“[S]tatutes and regulations have overtaken the common law as the primary mechanism for controlling environmental harm.”); John Murphy, *Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation*, in ENVIRONMENTAL PROTECTION AND THE COMMON LAW 51–76 (John Lowry & I. R. Edmonds eds., 2000).

7. *See infra* Part I.

is not tortious in nature. The goal of the Article is not only to examine the intersection of tort and environmental law based on the present state of the law, and the key issues of the day that implicate each field of law, but also to develop an analytical framework for addressing unknown future attempts to apply tort law to alleged environmental harms.

Part I begins by examining the intersection of tort and environmental law principles. It discusses the considerable difficulty legal commentators have had in crafting a uniform definition for the field of environmental law, or even agreeing upon the core purpose and objectives of environmental law. It then analyzes the comparatively well-developed guiding principles of the tort system, identifying the common ground between them. Part II moves beyond the theoretical goals to the practical application of environmental laws, distinguishing areas where the tort system serves as the primary remedy for environmental harm, where tort law and other environmental laws co-exist to provide an effective remedy, and where environmental laws outside the tort system provide the exclusive remedy. Part III incorporates both theory and practice to develop neutral principles for where the proper intersection is for tort and environmental law.

This Article concludes that the intersection of environmental law and the tort system is and should be a narrowly tailored one, given the expansive range and varying objectives of environmental laws, many of which were born directly out of an inability of the tort system to address a particular environmental harm.⁸ This Article further concludes that sound public policy counsels against courts distorting traditional tort law principles to address environmental harms. Rather, this Article demonstrates that certain environmental harms do not and should not have an intersection with tort law, and if a remedy is to exist under the law, it should only come from the political process. The principles set forth can guide judges and policy makers in this important determination, and remove the ambiguity in the relationship between these two fields of law.

I. THE INTERSECTION OF TORT AND ENVIRONMENTAL LAW PRINCIPLES

A. *The Challenge of Defining Environmental Law*

A critical first step in analyzing the intersection of tort and environmental law is to examine the foundational principles and public policy objectives underlying each area of law. With regard to environmental law, this presents a considerable challenge.⁹ While almost universally

8. See, e.g., *Tucker v. S. Wood Piedmont Co.*, 28 F.3d 1089, 1091 (11th Cir. 1994) (noting that Congress enacted CERCLA “in part to address what was perceived as the inadequacy of the laws of some states in dealing with the delayed discovery of the effect of toxic substance pollution”); see also H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.A.N. 2835, 3276, 3354 (same).

9. See Elizabeth Fisher et al., *Maturity and Methodology: Starting a Debate About Environmental Law Scholarship*, 21 J. ENVTL. L. 213, 219 (2009) (“Environmental law, as a subject, is ad hoc, a conceptual hybrid, straddling many fault lines, and presumed to have no philosophical underpinnings.”).

acknowledged by courts, legal scholars, policy makers, and even the public as a distinct field of law, environmental law lacks a generally accepted definition.¹⁰ Rather, the label “environmental law” has come to encompass the universe of statutes, regulations, and actions at common law impacting environmental interests.¹¹ These interests include both harm to humans from hazardous substances introduced into an environment, and harm to the natural habitat irrespective of direct injury to a person or other legally recognized entity. They may implicate a wide range of public policy, such as resource conservation,¹² pollution control and prevention,¹³ education,¹⁴ scientific research,¹⁵ rehabilitation,¹⁶ deterrence,¹⁷ and corrective justice.¹⁸

Presently, there is an ongoing debate within the academic community over where lines should be drawn to add form and substance to the burgeoning field of environmental law. Several commentators have sought to develop a unifying definition or framework,¹⁹ or at least distill the merits of, and concerns with, competing formulations.²⁰ A threshold question is whether environmental law includes any environmental interest being affected or applies only to certain environmental harms.²¹ For example, a law setting forth the number of hunting permits available in an area during a season affects environmental interests, such as the number of a particular species being hunted and the impact on other species in that ecosystem. Similarly, a law limiting the type or number of firearms a person may carry, or any gun registration law, can be said to implicate environmental interests because it also relates to that hunter’s ability to impact the natural state of

10. See Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 223, 226 (2010) (characterizing the field of environmental law as “highly fragmented” and stating that “[t]here are no core principles that unify all of substantive environmental-law doctrine”); see also Uwe M. Erling, *Approaches to Integrated Pollution Control in the United States and the European Union*, 15 TUL. ENVTL. L.J. 1, 11–12 (2001); Daniel A. Farber, *Foreword*, 32 ECOLOGY L.Q. 383, 386 (2005); Robert L. Fischman, *The Divides of Environmental Law and the Problem of Harm in the Endangered Species Act*, 83 IND. L.J. 661, 662 (2008). This lack of clear guiding principles is also not exclusive to the field of environmental law. See, e.g., Theodore W. Ruger, *Health Law’s Coherence Anxiety*, 96 GEO. L.J. 625, 628 (2008).

11. See generally Aagaard, *supra* note 10.

12. See, e.g., Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2006).

13. See, e.g., Clean Air Amendments of 1970, 42 U.S.C. §§ 7401–7671q (2006).

14. See, e.g., National Environmental Education Act, 20 U.S.C. §§ 5501–5510 (2006).

15. See, e.g., Environmental Research, Development, and Demonstration Authorization Act of 1976, 42 U.S.C. § 4365 (establishing the Scientific Advisory Board, which among other duties reviews the scientific basis of EPA regulations and evaluates research undertaken by the agency).

16. See, e.g., National Park Service Organic Act, 16 U.S.C. §§ 1–4.

17. See, e.g., Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k.

18. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675.

19. See Aagaard, *supra* note 10, at 221; David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 621–24 (1994).

20. See Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583, 586–96 (2008); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 214–15 (2004).

21. See Aagaard, *supra* note 10, at 259–64.

the environment. But should something like a hunting permit or gun registration law really be considered an environmental law? This is just one basic issue confronting the field, which helps to explain why a clear definition is difficult to agree upon.

A widely accepted premise is that environmental law is principally concerned with the prevention or correction of environmental harm.²² What constitutes such harm, however, is similarly problematic to define. For instance, a law prohibiting the discharge of raw sewage or toxic chemicals into a waterway would likely be viewed as a law designed to prevent or correct an obvious environmental harm. After all, these substances can cause severe harm to humans, aquatic species, and wildlife.²³ But what about a law establishing a nature preserve? Presumably, the purpose of such law is to create a protected area for wildlife to flourish, prohibit any artificial development, and prevent future harm to the environment. Is this an environmental law? What about a law providing for a public park? It too has the effect of quarantining an area to preserve a natural state and prevent further development, which could threaten or otherwise be said to harm the environment. Should this also be regarded as an environmental law? And if it is to be included in the field of environmental law, what about other laws, such as zoning laws, which can produce similar effects?²⁴

The difficulty in exactly defining the type of environmental harm to be prevented or corrected risks an overbroad, and ultimately unhelpful, definition. This difficulty carries over to pinpointing the principles and public policies that the field of environmental law is intended to support.²⁵ Nevertheless, if one is willing to temporarily suspend the exercise as to the potential limits of the field of environmental law and focus on the history and development of many of the landmark laws impacting the environment,²⁶ a few common, core environmental law principles emerge.

The consensus regarding the origins of what today is recognized as the field of environmental law is that it began approximately forty years ago.²⁷

22. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 346 (4th ed. 2003).

23. See Joel A. Tarr et al., *Water and Wastes: A Retrospective Assessment of Wastewater Technology in the United States, 1800–1932*, 25 TECH. & CULTURE 226, 230–46 (1984) (discussing the serious health problems—including typhoid fever and cholera—caused by early dumping of wastewater into the ground or in open gutters on the street, and the regulatory response).

24. The difficulty in articulating a coherent definition of environmental law is further illustrated by the distinction in the academy between “environmental law” and “natural resources law,” which are typically treated as distinct courses with separate casebooks and materials. These difficulties are compounded when one also considers the emerging fields of international environmental law and environmental law and human rights.

25. See Michael Anderson, *Transnational Corporation and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 399 (2002) (noting that most environmental regulation and enforcement of environmental law takes place at the national level).

26. See Aagaard, *supra* note 10, at 226.

27. See Lazarus, *supra* note 1, at 76 (“During the final three decades of the twentieth century, federal and state governments enacted a series of increasingly ambitious, complex,

More precisely, on January 1, 1970, the first in a series of modern federal environmental statutes, the National Environmental Policy Act of 1969²⁸ (NEPA), was signed into law. NEPA requires federal agencies to conduct an assessment of the environmental impacts of proposed major federal agency action and identify possible alternatives.²⁹ Thus, the law is designed to inform federal agencies of the environmental consequences of their actions and disclose environmental impacts and alternatives to the public, with the goal that decision makers will prevent, minimize, or mitigate future environmental harms. NEPA, however, imposes no substantive requirements or penalties, and does not address a specific injury to the environment. Rather, it is a procedural law intended to impact government cost-benefit decision making.³⁰

Much of the seminal substantive federal legislation impacting the environment similarly implicates a cost-benefit determination. For instance, the Clean Air Amendments of 1970³¹ (CAA) requires the Administrator of the EPA to implement nationally uniform primary and secondary ambient air quality standards for “criteria” pollutants. To date, the EPA has done so for six pollutants: carbon monoxide, nitrogen dioxide, sulfur oxides, ozone, lead, and particulate matter.³² This law is regulatory in nature; it establishes a floor below which ambient air is deemed unsafe for humans and hazardous to the environment. The CAA’s stated purpose is “to protect the public health” from “any known or anticipated adverse effects,” and provide “an adequate margin of safety.”³³ This adequate margin of safety represents a policy trade-off between protecting the public health and welfare from any potentially harmful pollutants in the air and adversely impacting other interests, such as industrial production and development.³⁴

The policy goals furthered by the CAA are primarily prevention and deterrence of future harm to humans and the environment. With regard to

and often dense laws aimed at reducing pollution and promoting resource conservation.”); *see also supra* note 5.

28. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4370(f) (2006)).

29. *See* 42 U.S.C. § 4332.

30. *See id.* § 4331(a) (stating the federal government’s policy “to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare”).

31. *See* Pub. L. No. 91-604, 84 Stat. 1676. The precursor to the CAA was the Air Pollution Control Act of 1955. Pub. L. No. 84-159, 69 Stat. 322. It funded research into the scope and sources of air pollution. The initial Clean Air Act was passed in 1963, establishing a national program to address air pollution within the U.S. Public Health Service and authorizing additional research into techniques for monitoring and controlling air pollution. It was significantly amended in 1970 to include substantive provisions and has been subsequently amended, most notably in 1977 and 1990. *See History of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/air/caa/caa_history.html (last visited Oct. 20, 2011).

32. *See* 40 C.F.R. pt. 50 (2011).

33. 42 U.S.C. §§ 7408(a)(2)(C), 7409(b)(1).

34. *See id.* § 7409(d) (providing for EPA review and revision of air quality criteria and standards at least every five years and an independent scientific review committee to advise the agency on “any adverse public health, welfare, social, economic, or energy effects which may result from various strategies”).

the law's deterrent effect, the CAA provides administrative, civil, and criminal penalties for violators,³⁵ and is the first modern environmental law to include a private citizen right of action.³⁶

Another watershed substantive federal law is the Clean Water Act (CWA), which was enacted as the Federal Water Pollution Control Act Amendments of 1972.³⁷ The CWA is also regulatory in nature and involves a cost-benefit decision. Congress enacted the CWA with the express objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"³⁸ by imposition of technology-based effluent limitations that would result in the reduced discharge of pollutants into "navigable waters" from "point sources."³⁹ While the CWA states a goal of zero discharge,⁴⁰ and authorizes the prohibition of certain pollutant discharges,⁴¹ the law can more accurately be described as imposing standards on the direct and indirect discharge of substances into waterways. The CWA establishes a permit system for regulating discharges below a specified, scientifically determined level for a given pollutant.⁴² Like the CAA, the CWA also provides administrative, civil, and criminal penalties for violators,⁴³ and includes a private right of enforcement.⁴⁴ Thus, the CWA is principally a regulatory law supporting the policy goals of prevention and deterrence.

A fourth law enacted during the initial "wave"⁴⁵ of major federal environmental reforms in the early 1970s is the Endangered Species Act of 1973⁴⁶ (ESA). The ESA shares similarities with the CWA, CAA, and NEPA, incorporating significant procedural and substantive provisions. Regulatory in nature, the ESA authorizes the determination and listing of species as "endangered" and "threatened,"⁴⁷ as well as the designation of "critical habitat,"⁴⁸ and provides civil and criminal penalties if an unpermitted "take" occurs of a listed species or for trafficking in such

35. *See id.* § 7413; *see also* Jenna Greene, *BP Pays Record Penalty for Clean Air Act Violations*, THE BLT: THE BLOG OF LEGAL TIMES (Sept. 30, 2010, 4:06 PM), <http://legaltimes.typepad.com/blt/2010/09/bp-pays-record-penalty-for-clean-air-act-violations.html>.

36. *See* 42 U.S.C. § 7604(a).

37. *See* Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)).

38. 33 U.S.C. § 1251(a).

39. *Id.* §§ 1311(b), 1362(11), 1362(14).

40. *See id.* § 1251(a)(1) (stating "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").

41. *See id.* § 1317(a)(2).

42. *See id.* §§ 1342, 1344.

43. *See id.* § 1319.

44. *See id.* § 1365.

45. Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 410 (1995); Oliver A. Houck, *Tales from a Troubled Marriage: Science and Law in Environmental Policy*, 17 TUL. ENVTL. L.J. 163, 165 (2003).

46. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2006)).

47. *See* 16 U.S.C. §§ 1531(b), 1533.

48. *See id.* § 1533(a)(3)(A)(i).

species.⁴⁹ In addition, the law, similar to NEPA, mandates that federal agencies ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of their habitat.⁵⁰

The principal policy objectives supported by the ESA are also prevention and deterrence of future environmental harm. While the ESA is unlike the CWA, CAA, and NEPA in that it does not directly prevent or deter physical harm to humans, it functions to prevent physical injury and potential extinction of other species that could potentially adversely affect humans.⁵¹ Although the listing determination requires an assessment of the “best scientific and commercial data,”⁵² the ESA, like the other federal statutes discussed, also involves a cost-benefit determination by the federal government (i.e., how few remaining species should there be to trigger the law’s application). This is true also with respect to the designation of critical habitat, which allows for “consideration [of] economic impact,” among other factors.⁵³

Although not an exhaustive sampling of statutes designed to impact the environment directly, these seminal laws, which ushered in the new field of environmental law, are instructive. They show that prevention and deterrence are core principles underlying environmental law, or at least the first generation of environmental law. They also illustrate how such laws are a product of complex policy judgments and scientific standard-setting, which permit certain harms to the environment to occur. Many more modern environmental laws, including subsequent amendments to the CWA,⁵⁴ CAA,⁵⁵ and ESA,⁵⁶ retain this general regulatory form and prophylactic function.⁵⁷

Even so, and as explained at the beginning of this section, the diversity of environmental law does not easily lend itself to a uniform set of guiding principles.⁵⁸ While prevention and deterrence of future harm underlie many laws implicating the environment, there are exceptions where such laws are principally designed to further other objectives. Several of these

49. *See id.* § 1540.

50. *See id.* § 1536.

51. For example, the extinction of a species could impair developments in numerous scientific fields, including sociology, anthropology, zoology, biology, and pharmacology.

52. *See* 16 U.S.C. § 1533(b)(1)(A).

53. *See id.* § 1533(b)(2).

54. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1387).

55. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401–7671q (2006)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401–7671q).

56. *See* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. §§ 1531–1544).

57. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 134–136 (2006); Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2692 (2006); Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101–10270; Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101–13109.

58. *See supra* notes 10–12 and accompanying text.

types of laws and common law actions will be discussed in Part II, as they are instrumental in determining where and how tort law intersects with environmental law. For now, the important takeaway is that much of what is widely regarded as the core of environmental law tends to be grounded in principles of prevention and deterrence.

B. Tort Law's Well-Defined Purpose and Boundaries

The same challenges of defining the field of environmental law and pinpointing its guiding principles do not exist with tort law. While tort law is similarly broad in scope, impacting many other areas and fields of law, its fundamental purpose has remained constant: corrective justice.⁵⁹ Stated plainly, tort law is intended to provide “a peaceful means” by which “to restore injured parties to their original condition” for harm caused by another’s wrongful conduct.⁶⁰ It is, at its core, a fault-based compensation system for vindicating individual rights.⁶¹

In providing such compensatory redress, and depending on the degree of wrongful conduct potentially allowing for punitive recovery, tort law also promotes other policy objectives, namely deterrence.⁶² This deterrent effect of the tort system, however, is a secondary goal. Tort law is principally concerned with “righting [a] wrong.”⁶³ This core purpose drives the development and evolution of tort law, and instructs what alleged harms tort law can and should address.

Over the centuries of tort law development, first through English common law and later under distinctly American traditions and legal theory, the boundaries of tort law have expanded, yet in a very well-defined manner. Tort law, with few exceptions,⁶⁴ is consistent in requiring a degree of fault or objectively wrongful conduct, particularly when entering and

59. See generally John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).

60. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 1–2 (12th ed. 2010); see also Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 73 (1942) (“[H]arm is the tort signature.”).

61. See Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954, 965 (1918).

62. See SCHWARTZ ET AL., *supra* note 60, at 2.

63. See DAN B. DOBBS, THE LAW OF TORTS § 9, at 14 (2000).

64. One notable exception in tort law is the imposition of strict liability for “abnormally dangerous activities.” There, the “essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.” RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1976). The *Second Restatement* provided a six-factor test for such activities, examining the (1) high degree of risk of some harm; (2) likelihood that the harm will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes. See *id.* § 520. The doctrine has, on occasion, been applied in an environmental context. See Jim C. Chen & Kyle E. McSarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 BUS. LAW 1031, (1992); Douglas A. Henderson & Mack McGuffey, *Leaking Underground Storage Tanks as Abnormally Dangerous Activities*, 14 PENN ST. ENVTL. L. REV. 643 (2006).

expanding into new territory.⁶⁵ For example, even strict products liability law, which gained near-universal acceptance across state jurisdictions during the 1960s and 1970s,⁶⁶ today incorporates the concept of fault both with respect to the design and warning of products.⁶⁷ Similarly, regardless of whether the product maker breaches any duty of care in the manufacturing process, the product maker is still culpable for any manufacturing defect produced while under its control.⁶⁸

More recent examples of the growth and development of tort law further illustrate its well-defined, unbending purpose. Perhaps the most recent and dramatic expansion of common law tort theory in the past century relates to so-called “bad faith” law.⁶⁹ This area of law, which involves an intersection of tort and contract law, has over the past forty years developed into a newly recognized common law tort cause of action in many states.⁷⁰ It is specifically intended to provide corrective justice by authorizing tort law damages for the strife and economic injury inflicted when one party willfully or recklessly engages in conduct violating the terms of an agreement.⁷¹

In contrast, tort law principles have not extended to areas where the objective of corrective justice is more ambiguous or suspect. The common law of nuisance, for example, has been replete with attempts to expand the scope of tort law.⁷² Over the past several decades, lawsuits have been filed under public nuisance theory for a variety of alleged harms, most notably against gun makers for the harms caused by gun violence⁷³ and against

65. See DOBBS, *supra* note 63, at 10–11 (stating that although tort law is a “large” and “diverse” field, its coherence lies in the fault concept).

66. See Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 553–55 (2011) (discussing the development and recognition of fault elements in “strict” products liability law).

67. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998); *see also* Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,723, 62,725 (1979) (stating that “[n]o court, in spite of some loose language that has been used, has imposed true strict or absolute liability on manufacturers for products which are unreasonably unsafe in design,” and that for defective warnings, “[t]he standard is reasonableness, not absolute or strict liability”).

68. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a; RESTATEMENT (SECOND) OF TORTS § 402A (1965).

69. See Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1482–86 (2009).

70. *See id.* at 1478.

71. *See id.* at 1485.

72. See Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 940–45 (2009) (analyzing attempts to expand nuisance law); *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 552–61 (2006).

73. *See, e.g.,* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421 (3d Cir. 2002) (dismissing public nuisance claims under Pennsylvania law); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 540 (3d Cir. 2001) (same under New Jersey law); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 133 (Conn. 2001) (same

paint and pigment manufacturers for harms caused by the presence of deteriorated lead paint in private residences.⁷⁴ Courts have appreciated that such attenuated alleged injuries are outside the scope of the corrective justice public nuisance is designed to provide.⁷⁵ They have declined to extend the law of nuisance, and have recognized that such actions against product manufacturers more appropriately fit within the remedies available under product liability law.⁷⁶

Nuisance theory, and attempts to expand it, is particularly relevant to a discussion of the intersection between tort law and environmental law. It has been one of the primary common law tort law theories used to remedy an environmental harm.⁷⁷ Public nuisance theory has also, as will be discussed in greater detail in Part II, emerged as one of the most controversial recent issues in the intersection of tort law and environmental law, as courts have considered whether such a theory could apply to automobile manufacturers, oil refineries, electric power utilities, and other entities for harms associated with alleged anthropogenic climate change.⁷⁸ While courts thus far have denied such attempts,⁷⁹ it remains to be seen whether this theory will be foreclosed entirely as with other alleged harms

under Connecticut law); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (same under Florida law); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (same under Illinois law); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203 (App. Div. 2003) (same under New York law). A few courts, however, did allow public nuisance claims against gun manufacturers to proceed. *See City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1232 (Ind. 2003); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143–44 (Ohio 2002); *see also* David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1174 (2000).

74. *See, e.g.*, *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *see also* *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005); *City of Toledo v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000, 2007 WL 4965044, at *1 (Ohio Ct. Com. Pl. Dec. 12, 2007). Thus far, public nuisance claims in Wisconsin and California have survived initial appeal. *See County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Ct. App. 2006); *City of Milwaukee v. NL Indus., Inc.*, 691 N.W.2d 888 (Wis. Ct. App. 2004).

75. *See* Schwartz et al., *supra* note 72, at 940–45.

76. *See, e.g.*, *City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003) (“[Plaintiff] deliberately framed its case as a public nuisance action rather than a product liability suit . . .”), *aff’d*, 823 N.E.2d 126.

77. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.1, at 29 (1986) (“[N]uisance law continues to be the fulcrum of what is called today environmental law.”); Richard A. Epstein, *The Harm Principle—And How It Grew*, 45 U. TORONTO L.J. 369, 400 (1995) (“[C]oncern with environmental harms can be traced back to the venerable tort of nuisance . . .”).

78. *See* *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev’d*, 131 S. Ct. 2527 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *see also* *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639 (Ct. App. 1971) (failed attempt to blame companies for smog in Los Angeles).

79. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Does the Judiciary Have the Tools to Regulate Greenhouse Gas Emissions?*, 46 VALPARAISO L. REV. (forthcoming 2012).

such as gun violence and deteriorated lead paint in homes.⁸⁰ This determination will likely have an important effect on how the traditional boundaries and purpose of tort law function in the future with regard to the environmental injury claims.

So what does the discussion up to this point mean for the intersection of tort law and environmental law? First, a comparison of the core principles underlying tort law and environmental law shows room for overlap; tort law is mainly supported by principles of corrective justice or compensation based on fault, and deterrence, while much of environmental law is supported by principles of prevention, which include environmental protection and conservation, and deterrence. It therefore follows that where an environmental law or action principally furthers corrective justice and deterrence, the underlying principles would appear to support overlap with tort law most fully. In areas where an environmental law or interest is principally concerned with other policy determinations, for instance prevention and conservation, tort law would appear less suited or appropriate for overlap.

Such a formulation helps to explain why a law establishing a nature preserve, which many courts and commentators might consider an environmental law, does not implicate or overlap with tort law. The principles and policy objectives supporting the law are entirely distinct from that of tort law. Conversely, a law imposing liability for the cleanup of hazardous substances, which is law designed to mete out corrective justice and compensate for a direct injury, would overlap with tort law principles.⁸¹ As the next part explains, these policy distinctions have borne out in practice, historically providing surprisingly clear lines for where tort liability can and should intersect with environmental law and affected environmental interests.

II. THE OVERLAP OF TORT AND ENVIRONMENTAL LAW

While overlapping principles offer a foundation for how tort and environmental law can and should intersect in theory, it is the practical application of these fields of law that best illustrates the boundaries and dividing lines. Tort law has provided a means to address certain environmental injuries for centuries.⁸² In some areas, it remains the exclusive mechanism to resolve an environmental injury. Following the development of the field of environmental law, tort law has increasingly relinquished this responsibility where federal and state “environmental” statutes and regulations have been enacted.⁸³ Many of these laws have also established new legal remedies where none existed under the tort system. By analyzing these distinct areas of overlap and exclusivity, and the

80. See generally Victor E. Schwartz et al., *Why Trial Courts Have Been Quick to Cool “Global Warming” Suits*, 77 TENN. L. REV. 803 (2010).

81. See *infra* Part II.B.

82. See SCHOENBUAM ET AL., *supra* note 6, at 38–41.

83. See *id.* at 74.

policies supporting such laws, patterns develop from which to draw neutral principles for where and how these two fields should intersect.

A. *Remedying Environmental Harms Through Tort Law*

Tort law has traditionally provided a blunt instrument for remedying harms to the environment.⁸⁴ Indeed, the lack of a neat fit between certain harms to environmental interests and a remedy through the common law tort system has been a significant catalyst for the increase in environmental statutes and regulations over the past several decades.⁸⁵ Nevertheless, general tort law theories have been successfully applied to remedy numerous types of harm to the environment. This occurs in areas where the harm is to a well-defined area or specific person or class of persons, is readily supported by general and specific causation, and closely fits the traditional elements of a tort cause of action.⁸⁶

In addition, the interests remedied by the tort system are always direct harms to an individual or legally recognized entity. This requirement of a direct injury is necessary to establish standing to maintain a tort suit.⁸⁷ The tort system has never provided a remedy for harm to environmental interests in the absence of a direct injury, and has been reluctant to recognize a harm suffered where the injury alleged is marginal or highly attenuated from the plaintiff.⁸⁸ For example, courts have historically viewed with great skepticism claims brought by environmentalist groups or taxpayers solely alleging harm to the environment, often pointing to failure to satisfy standing or direct injury requirements.⁸⁹

The primary tort theories that have been successfully used to remedy alleged environmental harms are rooted in the law of nuisance and negligence.⁹⁰ Nuisance law has emerged as a widely used theory to address environmental interests, in part, because of the perceived vagueness and

84. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 283 (3d ed. 2004) (listing the inadequacies of the common law and noting that “many modern environmental problems are so complex and difficult to prove in the courtroom setting that common law cannot be relied upon to serve as society’s primary environmental law strategy”).

85. See Fisher, *supra* note 9.

86. See Schwartz & Goldberg, *supra* note 72, at 562–70 (discussing the tort elements of public nuisance).

87. See Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 915 (“Harm is not only a critical substantive element of environmental law, but is also a critical jurisdictional element of constitutional standing doctrine.”).

88. See *supra* notes 67–69 and accompanying text.

89. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60, 562–63, 568 (1992); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990); *Sierra Club v. Morton*, 405 U.S. 727, 731–32, 734–35 (1972).

90. Other tort law claims, such as trespass, are common in environmental tort actions, but are often derivative of nuisance or negligence actions. See RESTATEMENT (SECOND) OF TORTS § 217 (1965); see also Palma J. Strand, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 581 (1983) (“There are four common law tort causes of action by which a defendant might be held liable for personal injury: strict liability, negligence, trespass, and nuisance.”).

broad latitude of the tort action. As Deans William Prosser and W. Page Keeton famously observed, “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people”⁹¹

Despite potential ambiguity over the term, courts have developed a set of well-defined elements for both public and private nuisance claims.⁹² The tort of nuisance dates back to twelfth-century English common law where it was a criminal writ enforceable only by the Crown.⁹³ Since that time, the tort has been applied to a relatively narrow set of circumstances, namely, a class of common law crimes.⁹⁴ Because governments could not create criminal law for every offense, nuisance theory became a catch-all means of holding people accountable for low-level crimes.⁹⁵

Today, both public and private nuisance involves an “unreasonable interference” with another’s land and, like other tort actions, are primarily intended to provide corrective justice.⁹⁶ A public nuisance is the “unreasonable injury to a public right,” which includes, for example, the right to travel on a public road, to have unpolluted public waterways, or “to be free from the spreading of infectious diseases.”⁹⁷ Public nuisance has also been used to break up protests, gang activities, and vagrancy; over the past century, local governments have even enacted statutes and ordinances categorizing certain conduct as public nuisance activity.⁹⁸ A public nuisance action may be initiated by public authorities, or by private citizens who have suffered a physical injury “different in kind” from that suffered by the general public.⁹⁹ The remedy available for public nuisance is generally abatement of the nuisance, but damages can be awarded under certain circumstances—namely, where the special injury requirement is satisfied that would allow a private individual to bring a public nuisance claim.¹⁰⁰ For example, in a public nuisance action brought in response to a

91. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984).

92. See Schwartz et al., *supra* note 80, at 818.

93. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979); C. H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 3–5 (1949) (dating the roots of nuisance back to ancient writs in twelfth-century England); Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 767 (2001).

94. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (“[If conduct] does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard.”); see also KEETON ET AL., *supra* note 91, § 86, at 618 (explaining that the tort of public nuisance encompasses “a species of catch-all criminal offense[s]”).

95. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 743 (2003) (quoting William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966)).

96. See *supra* Part I.B.

97. Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 277 (2002).

98. See Antolini, *supra* note 93, at 768.

99. See RESTATEMENT (SECOND) OF TORTS § 821C cmt. d.

100. See *id.*; SCHOENBUAM ET AL., *supra* note 6, at 40; see also *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1203–04 (C.D. Cal. 2003) (stating that parties

barricade of a public road, the remedy would typically be abatement, that is, removing the barricade. If the barricade was not noticeable and a driver crashed into it, he or she would also be able to sue for damages resulting from that special injury not occurring to the public at large.

Private nuisance, in comparison, involves an unreasonable interference with another's right to the private use and enjoyment of land. Common examples are building a structure that obstructs a neighbor's view, emitting loud noises or foul odors, or conducting obnoxious or unlawful activities on adjacent property.¹⁰¹ Such activities affecting a possessory interest in land may also, very logically, implicate environmental interests, for example, polluting the air or releasing hazardous substances on land.¹⁰² The remedy available here is generally tort damages, although abatement is also possible.¹⁰³

The other theory commonly underlying environmental tort actions, negligence, is broader in scope, and also permits traditional tort damages as a remedy. Because negligence requires the breach of a duty of care and a duty may be created where a party creates an unreasonable risk of harm to another,¹⁰⁴ the law of negligence can potentially reach those environmental harms that do not implicate a possessory interest in the use and enjoyment of land. A negligence claim may be brought by essentially any party directly injured by another's failure to exercise reasonable care under the circumstances.¹⁰⁵

Examples of negligence actions with an environmental effect might include physical injuries sustained from exposure to hazardous substances released into the environment, the failure to adequately reduce or warn of such serious risks of injury, or perhaps the failure to promptly remediate an acknowledged harm to the environment, for example in the aftermath of an oil spill or a release of toxic chemicals following a train derailment.¹⁰⁶ A shared characteristic of negligence claims in the environmental context, similar to nuisance, is that they routinely involve some form of hazardous release into the environment by readily identifiable parties that causes direct harm to humans or property damage. Not coincidentally, this presents the area in which negligence, nuisance, and other common law tort actions function most effectively to remedy environmental harm.

alleging the existence of a continuing nuisance may not recover diminution in value damages where the nuisance can be abated).

101. See RESTATEMENT (SECOND) OF TORTS § 822 cmt. a (defining types of private nuisance conduct); see also DOBBS, *supra* note 63, at 1321–22.

102. See, e.g., *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996) (barium draining onto adjacent property); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (airborne cement dust); *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 965 P.2d 433 (Or. Ct. App. 1998) (odor polluting air).

103. See, e.g., *Goeke v. Nat'l Farms, Inc.*, 512 N.W.2d 626, 632 (Neb. 1994) (neighbors of swine-raising facility awarded injunctive relief and damages for offensive odors produced by facility).

104. See RESTATEMENT (SECOND) OF TORTS §§ 321, 322 (1965).

105. See DOBBS, *supra* note 63, at 275.

106. See, e.g., *In re The Exxon Valdez*, 239 F.3d 985, 987 (9th Cir. 2001).

In the “classic” environmental tort action involving negligence, or nuisance, or both, an accident occurs releasing a hazardous substance onto another’s land. The polluter is clearly identifiable, the impacted area relatively confined, the injuries caused and capable of being caused in the absence of remediation are known, and the extent of the damage both to persons and property are readily quantifiable. The elements of the tort actions are satisfied,¹⁰⁷ and the common law can provide an effective remedy.

But rarely in environmental tort actions are these issues quite so clear-cut. Problems and disputes among the parties often develop over the scope of the impacted area, the parties responsible, causation, and the potential long-term effects of a hazardous substance release.¹⁰⁸ Where there is no immediate accident or event giving rise to the action, but rather a gradual release involving multiple hazardous substances with differing degrees of potential toxicity and exposure routes, or multiple potential sources or defendants, the benefits of the tort system quickly begin to break down and can result in a very costly, protracted, and unsatisfactory resolution of the claim.¹⁰⁹ Virtually all modern environmental tort actions also involve dueling experts with competing views regarding causation and the scope of the harm and remediation necessary.¹¹⁰ It is in these more complex toxic tort cases where the tort system often becomes far less efficient and effective in responding to alleged environmental harms.¹¹¹

Regardless of the relative efficiency of the common law, tort law remains an important source of law to resolve harms to the environment. In the case of comparatively simple and straightforward harms, for instance flooding someone’s land and killing off plant life, tort law may provide the only means of redress available. Similarly, where a release of a substance onto another’s property or public land is not necessarily toxic in nature, for example dumping a dirt pile or causing unwanted vegetation,¹¹² the remedy

107. For example, traditional nuisance elements include: (1) the existence of a public right; (2) unreasonable conduct by the tortfeasor in interfering with that public right; (3) control of the public nuisance either at the time of creation or abatement, depending on the jurisdiction; and (4) defendant’s conduct must be the proximate cause of the public nuisance. See Schwartz et al., *supra* note 80, at 818.

108. See Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439 (2005) (detailing the difficult issues of proof in complex toxic tort cases); Robert L. Rabin, *Continuing Tensions in the Resolution of Mass Toxic Harm Cases: A Comment*, 80 CORNELL L. REV. 1037, 1038–39 (1995) (explaining how the traditional tort process is not well suited to handle scientific determinations of causation involving latent and sometimes intangible harms).

109. See William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981); Gary Milhollin, *Long-Term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1 (1979); Warren J. Hurwitz, Note, *Environmental Health: An Analysis of Available and Proposed Remedies for Victims of Toxic Waste Contamination*, 7 AM. J.L. & MED. 61 (1981).

110. See, e.g., *Collins v. Olin Corp.*, No. 3:03-cv-945, 2010 WL 1677764, at *7 (D. Conn. Apr. 21, 2010) (noting the importance of expert evidence in environmental tort actions).

111. See Rabin, *supra* note 108, at 1038–39.

112. See, e.g., *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 833 (N.D. Ill. 2002) (private nuisance action against distributor of genetically modified corn seeds alleging damages for cross-pollination with neighboring corn); see also *Moon v. Idaho Farmers*

will likely rest exclusively with the tort system. These are, again, areas where the tort elements readily fit and the scope of the injury is well defined and understood, as is the measure and form of corrective action. Where the situation is more serious and complex, numerous parties are involved, and the scope of alleged injury is more widespread, the common law has been less up to the task and environmental legislation has proved both helpful and necessary.

B. Remedying Environmental Harms Through Statutes and Tort Law

The challenges presented by many modern complex environmental tort actions have prompted Congress and state legislatures to enact statutes to limit or facilitate the remediation of certain harms to the environment. Their reasons for doing so have not only been to improve upon the common law actions and introduce greater precision in addressing complex litigation issues, but also to expand the scope of recovery to a wider range of potential harms. In addition, the legislative complement to the common law has enabled other policy objectives to be pursued, enhancing the overall effectiveness, efficiency, and availability of legal recourse for an environmental injury.

Under the common law of torts, such as through nuisance and negligence actions, the primary policy objective is, again, to provide corrective justice through compensation to the injured individual. The resulting benefit to the environment achieved by correcting the harm via tort remedies more closely resembles a secondary consideration or byproduct of such corrective justice. Put simply, the nuisance or negligence actions are not directly concerned with improving or preventing environmental conditions; the objective is to restore the parties to their original, pre-injury condition, regardless of how the environment was adversely impacted.

This highlights a major shortcoming of tort law as a reliable remedy for environmental harms. In general, for a plaintiff to succeed under a tort law theory of nuisance or negligence, a harm of some type must have occurred. This is inapposite to the preventative nature of environmental statutes and their implementing regulations.

The addition of statutory law allows for other policy objectives such as the precautionary principle to be included in the legal system. For example, a regulatory law such as the CAA establishes national ambient air quality standards that are intended to prevent air pollution levels that could cause harm to humans, and are deemed protective of the natural state of the environment.¹¹³ To further these policy objectives, the CAA, along with other environmental laws, includes permitting, monitoring, and reporting obligations that advise regulators and the public of polluting activities, as well as enforcement mechanisms if noncompliance is detected.

Ass'n, 96 P.3d 637, 640 (Idaho 2004) (area residents brought action against various grass seed growers for nuisance and trespass, claiming sensitivity to grass smoke created by growers' burning of post-harvest straw and stubble).

113. See *supra* notes 30–33 and accompanying text.

Environmental laws directed at minimizing the adverse impacts associated with polluting activities also typically authorize regulators to conduct inspections in order to determine if violations of regulatory standards are occurring.

These policy objectives are distinct from the tort system. The corrective justice of the common law tort system would only be implicated, presumably through a nuisance action, where such airborne impurities grow to a level that is objectively unreasonable to another's use and enjoyment of their land.¹¹⁴ Thus, this is not an example of an environmental statute overlapping coherently with the tort system, but rather two independently operating systems with separate objectives.¹¹⁵ Both may be said to impact environmental interests, yet the statute prospectively regulates conduct, mindful of minimizing harm to human health and the environment, while the tort system acts to remedy a harm that has occurred.

The true overlapping nature of the tort system and "environmental" statutes can be seen where the statute at issue is designed to further the same goals of the tort system, and the law modifies the scope of recovery. Perhaps the most salient example in all of environmental law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹¹⁶ (CERCLA). Originally enacted by Congress in 1980 in response to the Love Canal disaster,¹¹⁷ CERCLA establishes a comprehensive system for addressing releases or threatened releases of hazardous substances that may cause harm to individuals or the environment.¹¹⁸ CERCLA specifically requires the notification to federal authorities of any release of hazardous substances at or above certain threshold amounts,¹¹⁹ provides national response and remediation authority in the event of such a

114. See *supra* note 102.

115. See Jonathan C. Mosher, *A Pound of Cause for a Penny of Proof: The Failed Economy of an Eroded Causation Standard in Toxic Tort Cases*, 11 N.Y.U. ENVTL. L.J. 531, 610–11 (2003) ("[T]he toxic tort system and the regulatory systems serve fundamentally different purposes."); see also *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (describing different aims of regulatory law and tort law); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 592–98 (2005) (discussing how tort law and regulatory policy take different approaches to valuing loss of life).

116. See 42 U.S.C. §§ 9601–9675 (2006).

117. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675). CERCLA was reauthorized and amended in 1986 with the Superfund Amendments and Reauthorization Act of 1986 (SARA), which added additional definitions, requirements, and enforcement authority. See Pub. L. No. 99-499, 101 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675).

118. A precursor to CERCLA, the RCRA, also sought to address toxic waste by providing a stringent "cradle-to-grave" system of control over management of hazardous wastes. See 40 C.F.R. pt. 250 (2011). Unlike CERCLA, RCRA is a purely regulatory law and prospective in nature. See 42 U.S.C. § 6930(b); see also STAFF OF THE SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE & FOREIGN COMMERCE, 96TH CONG., 1ST SESS., HAZARDOUS WASTE DISPOSAL REPORT TOGETHER WITH ADDITIONAL AND SEPARATE VIEWS 31 (Comm. Print 1979) ("RCRA is basically a prospective act designed to prevent improper disposal of hazardous wastes in the future. The only tool that it has to remedy the effects of past disposal practices which were not sound is its imminent hazard authority.").

119. See 42 U.S.C. § 9603.

release,¹²⁰ and establishes a far-reaching liability framework for responsible parties.¹²¹ This liability system includes provisions for removal and remedial actions, abatement orders, site investigation and cleanup costs, and other response efforts.¹²² It establishes procedures for environmental impact assessments,¹²³ the determination of responsible parties,¹²⁴ imposition of response costs and limitations¹²⁵ and generally eliminates causation as an element of liability. It also codifies available legal defenses, rebuttable presumptions of liability, and claims procedures for both civil and criminal actions.¹²⁶ In essence, CERCLA answers many of the complexities and unresolved issues that the common law does not delve into, providing parties with greater information and clarity as to their responsibilities and liability in the aftermath of a hazardous substance release.¹²⁷

CERCLA also expands the scope of recovery by creating a federal enforcement action by the President for remediation costs and by creating executive branch authority to impose daily civil penalties for, among other things, failing to cooperate fully in the cleanup effort, or treble damages for failure to comply with an abatement order.¹²⁸ CERCLA expanded traditional notions of liability by allowing for the recovery of natural resource damages.¹²⁹ Injured parties may also file claims through an administrative proceeding,¹³⁰ which may help to ensure more prompt corrective justice than is available through a civil action in the tort system. Such claims are made against a fund created under CERCLA, known as the “Superfund.”¹³¹ One of the key purposes of the Superfund, which was once funded by a tax levied on the chemical and petroleum industries,¹³² is that it funds response actions where no responsible party can be identified,¹³³ a feature not permitted by the tort system.

Importantly, CERCLA does not in any way preempt state tort action.¹³⁴ It does, however, provide that anyone who receives compensation under it

120. *See id.* § 9604.

121. *See id.* § 9607.

122. *See id.* §§ 9606–9609.

123. *See id.* §§ 9605, 9621 (providing procedures for cleanup and remediation plan of hazardous substances).

124. *See id.* § 9603.

125. *See id.* § 9607(c).

126. *See id.* §§ 9612, 9613; *see also id.* § 9659 (authorizing private citizen lawsuit against party responsible for hazardous release or Federal government where provisions of the Act are not met).

127. *See* Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 48 (1993) (describing CERCLA as “perhaps the most prominent federal environmental statute”).

128. *See* 42 U.S.C. §§ 9607(c)(2), 9609(b)–(c).

129. *See id.* § 9607(a)(4)(C).

130. *See id.* § 9612.

131. *Id.* § 9611.

132. *See* Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVTL. L. 191, 195 (2009). The tax expired in 1995 and has not been reauthorized by Congress.

133. *See CERCLA Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/superfund/policy/cercla.htm> (last visited Oct. 20, 2011).

134. *See* 42 U.S.C. § 9614(a).

is precluded from receiving compensation for the same damages under any other state or federal claim.¹³⁵ Thus, while parties may file a complaint asserting a right to recover under CERCLA along with pendent state common-law-based claims, “double” recovery is not allowed. Accordingly, a claimant may only seek damages under CERCLA and tort law if the injuries for which recovery is sought are not the same.¹³⁶ In this regard, CERCLA provides an authentic and effective intersection of tort and environmental law, both in theory and in practice.

CERCLA is also not alone in injecting greater definition, and providing more efficient and effective remedies, than exists within the tort system. Enforcement provisions in other major federal environmental laws, for example the Toxic Substances Control Act of 1976¹³⁷ (TSCA), Safe Drinking Water Act¹³⁸ (SDWA), and Oil Pollution Act of 1990¹³⁹ (OPA) are similarly designed to provide corrective justice and improve upon tort law procedures and remedies in response to an environmental harm. They too do not preempt state tort liability, and only prohibit double recovery for the same injury, which is not allowed under any compensatory system.¹⁴⁰

These laws, and their implementing regulatory provisions, can be distinguished from other regulatory laws, such as the CAA discussed above. Although the CAA similarly contains a private citizen right of enforcement, that private action is to enforce any regulatory provisions which are not complied with and not subject to government enforcement. It is distinct from overlap with tort law, which does not necessarily find such action *tortious* or objectively wrong (hence the need for regulation in the first place). In contrast, the enforcement provisions of laws such as CERCLA, TSCA, SDWA, and OPA are to respond to *tortious* conduct for which the common law would otherwise apply.

While there are undoubtedly other examples of state and federal laws which overlap and intersect with the tort system to respond to an injury, such statutes represent a comparatively small subset of what has amassed as the separate field of environmental law. A shared characteristic of these laws is that they involve the same subject matter as the “classic” toxic tort case—the release of a hazardous and potentially deadly substance. Environmental statutes, generally speaking, do not appear to implicate or overlap with smaller, less complex tort actions affecting the environment (e.g., accidentally flooding another’s property). This may either be because the tort system continues to provide an effective means of resolution for such harms, negating the need for legislative help, or that environmental law has simply not developed enough, and is preoccupied with more serious

135. *See id.* § 9614(b).

136. *See* Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379, 386 (2002) (“[I]t is common for private tort actions to parallel CERCLA and state cleanup actions, and to base their claims at least in part on the same core facts as these actions.”).

137. *See* 15 U.S.C. §§ 2601–2692 (2006).

138. *See* 43 U.S.C. §§ 300f–300j (2006).

139. *See* 42 U.S.C. §§ 13101–13109.

140. *See* 15 U.S.C. § 2617.

and potentially catastrophic environmental hazards. Regardless, the actual intersection of environmental statutes and tort law remains a narrow one.

C. Where Environmental Law Stands on Its Own

The relatively narrow overlap between tort law and statutes designed to remedy environmental harm leaves a multitude of environmental laws and regulations operating outside of the tort system. Increasingly, this area is populated by regulatory laws intended to conserve resources or prevent future harms from occurring as opposed to responding to a harm that has already occurred.¹⁴¹ These laws fill the void left by a tort system that does not address harms, to the environment or otherwise, which are not objectively unreasonable or negligently caused.

Environmental regulatory laws exist to require conduct that furthers an environmental objective. In many instances, they provide a floor by which all parties are expected to meet, or a ceiling to not exceed.¹⁴² These thresholds are the product of science, public policy, and the political process.¹⁴³ They represent a legislatively determined trade-off between potential harm to either humans or the natural state of the environment, and a litany of other public policy concerns, such as stifling economic activity or impairing the beneficial use of land and natural resources.¹⁴⁴ Environmental regulatory laws also reflect political and philosophical differences among elected officials. The resulting environmental standards enacted through resolution of these competing values are artificial in the sense that they do not necessarily reflect what individuals would find to be a nuisance or tortious conduct.

The act of violating such a statutory standard, therefore, only triggers liability under the regulatory law, which may or may not provide an individual with a state or federal right of action. Many federal environmental regulatory laws, such as the Federal Insecticide, Fungicide, and Rodenticide Act,¹⁴⁵ provide only for executive branch enforcement, typically through a civil fine imposed by the EPA or other oversight agency.¹⁴⁶ Other environmental regulatory laws that do provide for private citizen enforcement in addition to federal agency oversight, like the Surface Mining Control and Reclamation Act,¹⁴⁷ also make clear that the private

141. *See, e.g.*, 42 U.S.C. § 7409(b)(1) (requiring that primary national ambient air quality standards allow “for an adequate margin of safety . . . requisite to protect the public health.”).

142. *See, e.g.*, 33 U.S.C. § 1311(b) (2006) (establishing technology-based effluent limits for the discharge of pollutants from point sources).

143. *See, e.g.*, 42 U.S.C. § 7409(d) (establishing a panel, the Clean Air Scientific Advisory Committee, to provide the EPA with scientific advice and expert recommendations regarding existing and proposed national ambient air quality standards).

144. *See, e.g.*, 16 U.S.C. § 1533(b)(2) (2006) (requiring a balancing of the benefits and burdens associated with the designation of critical habitat and allowing for the exclusion of habitat from such designation if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat”).

145. 7 U.S.C. §§ 134–136 (2006).

146. *See, e.g., id.* § 136.

147. 30 U.S.C. §§ 1201–1328 (2006).

enforcement action is merely to “compel compliance” with the Act’s provisions.¹⁴⁸ The violation of the regulatory standard at issue could be relevant to whether a tortious act has occurred, but it does not itself create common law tort liability in a civil lawsuit.

Examples of the types of environmental statutes and regulations that do not intersect with tort law, yet provide the exclusive means of remedying an environmental harm, are very common. For instance, the CAA, NEPA, and ESA, each set forth required conduct with a specific environmental objective that does not involve the common law of torts.¹⁴⁹ The CAA establishes air quality thresholds and provides for administrative, civil, and private enforcement of those statutory standards; NEPA compels disclosure of environmental impacts, consideration of alternatives to proposed actions and promotes more environmentally conscious government decision making; and the ESA deals with harms to species in the environment separate from the harms to humans addressed by tort law.¹⁵⁰

In addition, there is a substantial collection of environmental laws which endeavor to accomplish nothing more than fund conservation projects, research, studies, and monitoring of environmental concerns. For instance, at the federal level, the Coastal Zone Management Act,¹⁵¹ Federal Land Policy and Management Act,¹⁵² and Fisheries Conservation and Management Act¹⁵³ all serve primarily to fund projects and oversee and control environmental protection efforts. They undoubtedly promote important environmental policies, yet are wholly detached from tort law. The tort system simply does not and cannot provide a remedy for environmental issues such as allegedly underfunded or inadequate protection efforts, the failure to classify an area or species as protected, or what reasonable protection or conservation must entail. The environmental law stands here on its own.

D. Should Tort Law Fill the Gaps?

The separation between tort law and the bulk of statutes and regulations intended to promote environmental interests raises the question of whether, and if so how, tort law *could* be applied to areas where an environmental law supports tort law policies, but the common law has not traditionally provided a remedy. This would be the situation in which a statute or regulation supports corrective justice and deterrence, and is otherwise aligned with the core objectives of tort law, but the law at issue does not provide an enforcement mechanism. Can tort law come to the rescue? Should it?

While examples meeting these exact criteria are difficult to find, one useful proxy is the current effort to use the law of nuisance to deter

148. *Id.* § 1270(a).

149. *See supra* Part I.A.

150. *See supra* Part I.A.

151. 16 U.S.C. §§ 1451–1456 (2006).

152. 43 U.S.C. §§ 1701–1782 (2006).

153. 16 U.S.C. §§ 1801–1882.

emissions alleged to contribute to global climate change and seek corrective justice against large emitters.¹⁵⁴ Several tort lawsuits have been filed against both public and private companies alleging that their emission of carbon dioxide and other gases, collectively referred to as “greenhouse gases”¹⁵⁵ (GHGs), have significantly contributed to a “public nuisance of global warming.”¹⁵⁶ The plaintiffs in these actions have varied between state attorneys general and other public law enforcement officers seeking abatement of the alleged nuisance and private individuals seeking both abatement and monetary damages.¹⁵⁷ The abatement remedy sought in cases such as the one brought by state attorneys general, however, is not the immediate cessation of emissions as would be the case in a traditional public nuisance action, but rather a specified lower level of such emissions much like a regulation would achieve.¹⁵⁸

Part of the theory behind each of these lawsuits is that under the CAA, which has been interpreted as applying to the emission of select GHGs,¹⁵⁹ the EPA has failed to regulate carbon dioxide emissions adequately, and this lack of regulation is, therefore, the province of tort law to correct.¹⁶⁰ Although this is not the precise question presented above because the CAA is principally a regulatory law, and as explained previously, represents a policy trade-off and does not support the primary tort law objective of corrective justice, it does involve the issue of whether tort law could and should provide a remedy.

The discussion to this point instructs that tort law does not automatically intersect with environmental regulation.¹⁶¹ Again, environmental regulations are a product of complex and artificial standard-setting for required prospective conduct, incorporating many scientific, special interest, and public policy inputs; law that is distinct from tort law which examines whether a harm is tortiously caused by fault or unreasonable conduct. But this distinction is not necessarily fatal to the global climate

154. See *supra* notes 73–74.

155. Under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the following six gases have been categorized as GHGs: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, annex A, *opened for signature* Dec. 11, 1997, 2303 U.N.T.S. 148 (entered into force Feb. 16, 2005).

156. *Connecticut v. Am. Electric Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

157. See *id.* (public nuisance action brought by eight states, New York City, and three land trusts seeking abatement); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (public nuisance action filed on behalf of an Alaskan village seeking damages).

158. See *Connecticut v. Am. Electric Power Co.*, 406 F. Supp. 2d 265, 270 (S.D.N.Y. 2005) (stating that plaintiffs sought for defendants to reduce GHG emissions from operations by a specific percentage per year for a minimum of ten years), *vacated*, 582 F.3d 309, *rev'd*, 131 S. Ct. 2527.

159. See *Massachusetts v. EPA*, 549 U.S. 497, 505, 532 (2007) (holding that GHGs fit within Congress’s definition of pollutants, thereby giving the EPA the statutory authority to regulate emission of those GHGs under the CAA).

160. See, e.g., *Am. Electric Power*, 582 F.3d at 330.

161. See *supra* Parts II.B–C.

change public nuisance example because here the plaintiffs' claim is that the absence of preemptive regulation demonstrates that the remedy should come from the tort system.

Such an argument, however, must also fail. As discussed above, the common law of torts exists to provide corrective justice through liability where a harm has been caused by the fault or unreasonable conduct of another.¹⁶² Whether a statute or regulation exists or does not exist is immaterial, except in the event that the statute or regulation directly preempts or displaces tort action. Thus, that the EPA, pursuant to the CAA, has allegedly failed to act to establish certain emission regulations¹⁶³ does not by some alchemy create new tort liability. It simply means that the tort system remains in exactly the same place it was prior to the CAA or any other related law; if there is a bona fide common law cause of action, the claim may be brought.

The claim of global climate change as a public nuisance has no basis under the traditional application of tort law.¹⁶⁴ The assertion of public nuisance as a remedy for climate change starkly illustrates the serious problems that arise in efforts to expand the use of tort law beyond its traditional boundaries. As explained throughout this Article, tort law does not provide a remedy for just any alleged environmental injury under the sun. Indeed, this is partly why environmental statutes such as CERCLA were enacted.¹⁶⁵ The common law claim must neatly satisfy the tort elements, which in the case of environmental tort actions has traditionally required a well-defined affected area and clear evidence of causation and damages.¹⁶⁶ A public nuisance claim for alleged climate change harms does not meet any of these basic criteria. The literally global nature of such a claim precludes locating a specific affected area, and the alleged responsible parties, a few dozen companies located in the United States named as defendants, are among billions of other emitters of carbon dioxide around the world,¹⁶⁷ making the determination of both direct and proximate causation impossible without grossly distorting the meaning of these terms.¹⁶⁸

162. *See supra* Part I.B.

163. The argument can be made that the EPA has already taken action to regulate climate change, and consequently has addressed any alleged enforcement gap which the common law might in theory fill. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 40 C.F.R. pts. 85, 86, 600 (2011), 49 C.F.R. pts. 531, 536, 537, 538 (2011) (reducing allowable greenhouse gas emissions from light-duty vehicles); Mandatory Reporting of Greenhouse Gases, 40 C.F.R. pts. 86–90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1051, 1054, 1065 (requiring certain sources that annually emit more than 25,000 tons of greenhouse gases (and, in some instances, less) to report those emissions to EPA).

164. *See generally* Schwartz et al., *supra* note 80.

165. *See supra* note 127 and accompanying text.

166. *See supra* notes 104–08 and accompanying text.

167. *See* JANE A. LEGGETT ET AL., CONG. RESEARCH SERV., RL34659, CHINA'S GREENHOUSE GAS EMISSIONS AND MITIGATION POLICIES 8 (2008) (stating that the United States is accountable for only 17 percent of global man-made GHG emissions).

168. *See* Schwartz et al., *supra* note 80, at 834–44.

Further, given that sources of carbon dioxide and other GHGs are scattered around the globe, the remedy sought by the plaintiffs in the public nuisance climate change cases will provide little, if any, benefit in terms of compensating for, or abating, any of the harms associated with the defendants' alleged *tortious* conduct. Even if the plaintiffs were to prevail on the merits in these cases, coal-fired utilities in China, steel companies in India, automobiles in Brazil, planes in Russia, and refineries in the European Union would continue to emit billions of tons of GHGs annually into the atmosphere, as would similar sources around the globe. Thus, emissions of GHGs associated with the adverse impacts arising from climate change will continue unabated around the world. Consequently, one of the core reasons tort law exists—to provide a form of corrective justice through a remedy that can halt unreasonable conduct or compensate for fault-based harm—is utterly lacking in the public nuisance climate change cases.

Even more fundamental to the absence of the basis allowing for a true tort law claim is that the defendants were, and are all, engaging in lawful conduct that is subject to the terms and conditions of permits issued by the environmental regulatory authorities. The defendants have not violated any environmental regulatory law that, although distinct from common law tort liability, could suggest wrongful conduct. Rather, they are emitting the same carbon dioxide that virtually every car, plane, factory, and animal on Earth, including all humans, emit every day.¹⁶⁹ Moreover, it has never been the province of tort law, nor the law of public nuisance specifically, to suddenly and retroactively¹⁷⁰ impose liability on such commonplace, objectively reasonable, and immensely beneficial activities.¹⁷¹ Finally, even if the defendants' emissions were alleged to violate regulatory limits, the appropriate remedy would be found in the applicable statutory enforcement provisions of the CAA and not within the province of tort law.

Use of tort law in an effort to address climate change is misplaced for other reasons as well. The use of public nuisance in this particular policy space illustrates that, when attempting to address a problem with all the complexities of climate change, tort law is not up to the task. First, this particular application of tort law interferes with the complex policy-based and political judgments required to develop and implement an effective response to anthropogenic climate change. Second, tort law is simply too blunt an instrument to fashion a remedy that requires incredibly nuanced and complex considerations of the interstices of science, energy,

169. See *Natural Sources and Sinks of Carbon Dioxide*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/climatechange/emissions/co2_natural.html (last visited Oct. 20, 2011) (stating common natural sources of GHGs).

170. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to common law liability).

171. See, e.g., *Diamond v. Gen. Motors Corp.*, 97 Cal. Rptr. 639, 645 (Ct. App. 1971) (dismissing public nuisance action seeking to impose liability on automotive manufacturers for smog in Los Angeles, stating that the “[p]laintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county”).

transportation, politics, international relations, and economics. Third, the glacial pace of the case-by-case remedy that tort law provides is too slow to respond effectively to the varied alleged causes and effects of climate change. Fourth, use of a tort remedy such as public nuisance for climate-change-associated harms places judges in the difficult and untenable position of substituting their judgment for that of policy makers and regulators. Moreover, asking judges to serve essentially as regulators of GHG emissions, as well as to act as quasi-public utility commissioners lording over a substantial portion of the nation's electricity generating capacity, is beyond the expertise of the judicial branch.¹⁷² Justice Ruth Bader Ginsberg theoretically observed in the U.S. Supreme Court oral argument in *American Electric Power Co. v. Connecticut*, that this would “set up a district judge . . . as a kind of super EPA.”¹⁷³ The Justice's observation is sound. For example, what limits would the judiciary set for GHG emissions? Would the chosen levels require the shutdown of certain power plants or industries and, if so, which ones? Might that not adversely impact the reliability of the nation's entire electric power grid and negatively affect the economy? Such considerations led a unanimous Court in *American Electric Power* to conclude that “[f]ederal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”¹⁷⁴ Simply put, tort law never was intended as a remedy for the type of harms associated with a global environmental issue such as climate change, which requires an international collaborative approach that tort law does not provide.

All of this returns us to the issue of how tort law can and should “fill gaps” where a related environmental law exists. An analysis of how tort and environmental law intersect in theory and in practice suggests that this gap-filling function is and should be narrowly drawn to only the group of statutes that actually overlap with tort law. This determination is dependent upon several considerations, including: (1) whether the statute at issue intends to provide corrective justice for an injury that has occurred (as contrasted with only seeking to prevent such injury) and does not preempt or displace the common law in its enforcement; (2) whether the nature of the injury can satisfy traditional tort elements; and (3) whether application of tort law will provide an effective remedy.

Because it is challenging to predict new applications and potential expansions of tort law, as they are usually quite rare, it is important for courts to have a clear understanding of how boundary lines should be drawn. This can help identify areas where the tort system cannot be relied upon; prevent unsound attempts to broadly expand the scope of tort law,

172. See *Connecticut v. Am. Electric Power Co.*, 131 S. Ct. 2527, 2540 (2011) (stating that “[j]udges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators” in reaching their decisions).

173. Transcript of Oral Argument at 37–38, *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (No. 10-174).

174. *Connecticut*, 131 S. Ct. at 2539–40.

such as with climate change public nuisance claims; and assist in developing new law where the common law of torts provides an ineffective, incomplete, or nonexistent remedy. As the next section shows, there are several basic, neutral principles that courts can follow to guide this analysis.

III. DRAWING A PRINCIPLED LINE TO GUIDE COURTS AND POLICY MAKERS

Courts and policy makers, sensitive to any form of harm to persons or the environment, often are faced with an unenviable task of determining how the law may provide an effective remedy. Courts possess the authority to develop and shape the common law of torts in response to a given environmental harm, but at the risk of potentially creating unbounded, and ultimately unjust, tort liability that is untethered to traditional tort principles. Policy makers similarly possess the authority, typically through legislative action, to fashion a legal remedy for an environmental harm. They can share enforcement power with the common law tort system, preempt or displace the common law, or enact prophylactic measures that do not implicate the tort system. The executive branch, through the EPA and other administrative agencies, can further influence and develop remedies for environmental harms by administrative agencies' rulemaking function and the resulting regulations may or may not also incorporate tort law principles.

Each of these options may affect other important, even competing, public policies. If a remedy is to be established, these branches of government must work together to develop a clear, consistent, and fair legal response for specific environmental injury. To accomplish this task, courts and policy makers need to understand and respect the limits of the tort system and not rely on it where it is ill-suited or unequipped to provide a remedy.

The development of environmental statutes over the past several decades is a testament to the understanding of the limitations of the tort system, and the importance of legislative action not only to remedy certain harms, but also to prevent harms from occurring and conserve environmental resources, as well as to require scientific research into environmental concerns. Even so, attempts to derail what has been a surprisingly consistent, albeit narrow, overlap of tort and environmental law continue, as the most recent example of global climate change public nuisance lawsuits illustrate. Assuredly, there will be other unsound future attempts to push the law of torts into areas which should be resolved by elected legislators and regulators. The following principles are designed to curb such attempts to distort tort law, maintain clear boundary lines, and facilitate the cohesive intersection of tort and environmental law.

A. An Actual Injury to a Person or Property Is Required for Any Environmental Tort Action or Intersecting Environmental Law

A fundamental principle of tort law is that there must be an actual physical injury to person or property, or at least actual serious emotional

harm,¹⁷⁵ for a cause of action to exist at common law. In the context of an environmental tort action, there must likewise be an actual injury to a person or group of persons or to property. This is in contrast to many environmental laws that provide remedies or penalties where no actual injury has occurred. For instance, a company may be penalized where it fails to follow an environmental regulation, such as a regulation governing proper hazardous waste disposal practices; the company would not be subject to potential tort liability unless a physical injury or property damage takes place. This requirement may seem obvious to many courts and policy makers, but it is worth reiterating because courts continue to face environmental lawsuits in which a party seeks to impose tort liability in the absence of an actual injury.

For example, a minority of courts have used the common law to stretch the traditional injury requirement in tort law by authorizing “medical monitoring” damages without a clear, present injury.¹⁷⁶ This form of tort damages permits monetary damages for a plaintiff to monitor for future injury, regardless of whether such injury ever occurs.¹⁷⁷ The implications for environmental tort actions are profound; damages may be permitted based upon potential, not actual, harm.¹⁷⁸ This development has the potential to position tort law away from its historic moorings and re-emerge as the principal enforcement mechanism for environmental harms in spite of the considerable effort over the last several decades to design balanced, coherent, and effective environmental legislation and regulations. The well-defined procedures and remedial systems of statutes in which Congress expressly authorized medical monitoring among potential response costs, such as CERCLA,¹⁷⁹ would become considerably less necessary or useful were the tort system to allow liability without showing that any injury occurred. This development could also obviate the need to satisfy causation and other traditional tort elements. Fortunately, the vast majority of courts, including most of the state high courts that have recently considered the issue,¹⁸⁰ have maintained this traditional, common sense tort law requirement.

Without such an injury requirement grounding environmental tort actions and any intersecting environmental law, a range of serious legal and public

175. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 (2010); DOBBS, *supra* note 63, at 821.

176. See Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135, 138–46 (2007) (surveying medical monitoring decisions and discussing trend against recognition of such claims absent present injury).

177. See *id.* at 135–36.

178. See Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975, 1978–81 (2002); see also RESTATEMENT (SECOND) OF TORTS § 7 cmt. e (1965) (“The words ‘physical harm’ are used to denote physical impairment of the human body.”); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 54, at 330–33 (4th ed. 1971).

179. 42 U.S.C. § 9607(a)(4)(D) (2006).

180. See Behrens & Appel, *supra* note 176, at 138–46.

policy issues would arise. Courts would have to reassess standing, which has provided a principal means to dispense with the lack of an actual injury in an environmental claim.¹⁸¹ Instead, individuals not needing to show injury could potentially sue for alleged environmental “harms” such as another’s poor conservation habits (e.g., neighbor wasting water) or the government’s or a private entity’s inaction with regard to an environmental issue (e.g., failure to fund or convert to alternative energies). As much as these activities may have negative effects on the environment, they are not directly harming a potential plaintiff. To erase the injury requirement would open the door to environmental lawsuits based purely on individuals’ policy preferences, which in addition to invading individuals’ fundamental rights and freedoms, would broadly expand the scope of tort liability virtually without limit.¹⁸² Thus, to keep environmental tort actions from unraveling entirely and blurring together with the set of environmental actions in which no actual injury is required, such as a regulatory violation, an actual injury to a person or property must be required.

*B. The Harm in an Environmental Tort Action or Intersecting
Environmental Law Must Be Caused by Objectively Wrongful Conduct
that Places Blame on Another for the Injury*

Another fundamental tort law principle of significance to environmental tort actions and any potentially intersecting environmental law is that the conduct causing an alleged injury be wrongful.¹⁸³ This threshold requirement exists to ensure that one engaging in lawful activity, such as properly using Miracle-Gro or weed killer on their lawn, does not subject the user to tort liability for releasing a toxic or hazardous substance into the environment. An essential purpose of tort law, including environmental tort actions, is to provide corrective justice based upon the relative fault or blameworthiness of another. For example, where conduct is willful and wanton, such as the intentional dumping of toxic waste into a town’s drinking water supply, the wrongfulness of the offense will likely call for additional punitive damages under traditional tort law principles. But if there is no objectively wrongful conduct, and hence no blame to be allocated, a defendant is and should be free to continue to engage in the conduct.

Where environmental interests are specifically regulated, like lead levels in anything from drinking water to children’s toys,¹⁸⁴ a defendant who does not exceed these thresholds does not engage in wrongful activity. Put

181. *See supra* notes 87–89 and accompanying text.

182. It is noteworthy to distinguish the situation in which an activity or event results in injury to the purpose of an environmentalist organization, such as the Sierra Club. There, an injury can be said to have occurred. *See Sierra Club v. Morton*, 405 U.S. 727, 739–40 (1972) (noting that a longstanding interest could give rise to a tort claim).

183. *See supra* Part I.B.

184. *See* 42 U.S.C. § 300g-6 (prohibiting lead in pipes and other fixtures which could contaminate drinking water); 16 C.F.R. pt. 1303 (2011) (regulating lead levels in paint used on children’s toys, furniture, or other articles).

another way, it is not objectively wrongful to follow a regulation. Importantly, this is the case regardless of whether a regulation is overly burdensome or cautious, such as regulations which seek to provide an adequate margin for safety that regulators must consider in standard settings.¹⁸⁵

Where a certain level of conduct is not required or otherwise expressly regulated, the determination of wrongfulness is often determined by traditional tort standards for reasonableness. Perhaps the best recent example of allegedly unregulated conduct triggering potential tort liability is in the public nuisance cases discussed previously alleging harm resulting from climate change arising from GHG emissions.¹⁸⁶ There, the question is whether specific emissions of carbon dioxide and other gases by select companies are wrongful.¹⁸⁷ As stated before, it is difficult to envision how such activity could be objectively wrongful when juxtaposed with all the other types of emitters of such gases in the United States and throughout the world; the allegedly wrongful conduct is so pervasive that literally every person is engaging in the conduct. It is also difficult to rationally contend that such a highly regulated activity as electricity generation is wrongful under traditional notions of fault under tort law.

Nevertheless, the scope or intensity of conduct matters for tort purposes. For instance, everyone makes noise, but when one person's noise reaches a certain level it may become unreasonable and wrongful. This, however, is unlike the example of GHG emissions contributing to global climate change. First, individuals are generally on notice of the unreasonableness and wrongfulness of causing something like extreme noise; GHG emitters, in contrast, have no occasion to believe that their emissions, which in many instances have actually been decreasing over decades, are all of a sudden wrongful behavior. Second, the high utility of the challenged conduct, most notably generating electricity that is essential to life as we know it and that powers global economic growth and development, cuts sharply against any alleged wrongfulness associated with such emissions.¹⁸⁸ Lastly, the fact that Congress has, on many occasions dating back thirty years, considered legislation which would effectively limit GHG emissions,¹⁸⁹ yet has purposefully not acted to do so, suggests that such emissions are not wrongful, but rather are viewed as objectively reasonable by a majority of elected policy makers.

A similar factor that merits consideration when contemplating whether complained-of conduct is objectively wrongful, and thus appropriately remedied under tort law, is the question of whether there are existing

185. See, e.g., 42 U.S.C. § 7409(b)(1).

186. See *supra* Part II.D.

187. See Schwartz et al., *supra* note 72, at 826–29.

188. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 877 (N.D. Cal. 2009) (“Plaintiffs are in effect asking this Court to make a political judgment that the two dozen Defendants named in this action should be the only ones to bear the cost of contributing to global warming.”).

189. See Schwartz et al., *supra* note 72, at 830–34 (discussing some of the major efforts by Congress relating to carbon emissions).

alternatives to the conduct. The use of fossil fuels has received the brunt of the focus for the harms associated with climate change.¹⁹⁰ The expansion of tort law, through injunction and mass damages lawsuits, could require the United States to abandon use of fossil fuels throughout a multitude of industrial sectors, as well as eliminate their use by individuals by prohibiting, for example, home heating oil or conventional automobiles. To date, however, no commercially viable source of alternative energy has been developed that can wholesale replace fossil fuels. This is an area where the technology-forcing function often associated with tort law falls short as an incentive that can induce rapid and sudden technological change.

Courts should consider such factors in determining the objective wrongfulness and blameworthiness associated with an alleged environmental tort. They must also be cautious not to gloss over this basic tort requirement and allow attempted uses of the common law to remedy conduct that, although it may be viewed as adverse to environmental interests, is not tortious in nature. Policy makers, for their part, must understand that tort law is not intended to provide a remedy for certain types of conduct that may produce adverse environmental impacts, and therefore, legislation or regulation is necessary to protect that environmental harm from occurring.

*C. Any Intersection Between Tort and Environmental Law
Must Be Designed to Promote Corrective Justice and Not Policies
Outside of Tort Law*

A related principle to the prerequisite of wrongfulness for the imposition of tort liability is that the remedy sought in an environmental tort action must further the tort law objective of corrective justice. This principle applies equally to where an environmental law is intended to intersect and overlap with the tort system. As explained in Part I, the paramount policy objective and principal purpose of the tort system is to vindicate individual rights and restore parties to their original pre-injury condition.¹⁹¹

Tort actions that primarily further a different policy, such as preventing future harms to the environment or conserving scarce environmental resources, should be viewed with great skepticism by courts. While undoubtedly important to the cause of environmentalism, extending tort liability in such a subjective manner would remove the lynchpin from tort law; it would create unpredictable and unwieldy liability based upon any public policy goal. For example, common law nuisance lawsuits could spring up alleging that any person or business is not “doing enough” to conserve and protect the environment, and that this lack of action constitutes a nuisance and entitles a person to tort damages. Similarly, an

190. *See, e.g.*, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS—CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2 (Susan Solomon et al. eds., 2007) (“The primary source of the increased atmospheric concentration of carbon dioxide . . . results from fossil fuel use . . .”).

191. *See supra* Part I.B.

environmental law, such as a law providing for a nature preserve or funding of an environmental protection initiative, could form a basis for new tort liability. Moreover, without the objective of corrective justice, tort law is effectively left hollow and undefined.

Ultimately, and ironically, allowing the application of tort law in the absence of corrective justice could result in a detriment to the environmentalist movement. Policy makers likely would be less willing to enact new legislation to respond to environmental issues and newly discovered harms. Instead, they might be more concerned about reigning in expansions of the tort system and repealing legislation that was never anticipated to intersect with tort.

Over the past forty years, courts and policy makers have done a commendable job of rejecting such efforts to expand the scope of tort law for alleged environmental harms based on causes or goals outside of the tort system. This has enabled environmentalists to identify areas and harms devoid of any legal remedy, and pursue new laws, which in many cases offer greater protections than the tort system, acting alone, ever could.

D. Governmental Regulatory Policy Does Not Implicate the Tort System or Tort Remedies Unless Expressly Stated in the Environmental Law

A critical point addressed throughout this Article is that environmental regulatory law is not and should not be a gateway to common law tort liability. Environmental regulations often support policies unrelated to corrective justice, do not involve a specific injury to a person, and, because they are the product of government standard-setting which combines varying scientific and public policy judgments, along with the give and take inherent in a representative democracy, may not implicate objectively wrongful conduct. Hence, a regulatory law is unlikely to satisfy any of the basic criteria for intersection with the common law of torts. Rather, exclusive enforcement of a regulatory violation is, and should be, accomplished pursuant to the statute by government officials or by private citizens as authorized by one of the express citizen suit provisions that Congress included in many of the environmental statutes,¹⁹² or through the judicial review provisions of the Administrative Procedure Act.¹⁹³

An exception to this principle could exist where a statute expressly states that a tort remedy is available under the regulatory provisions of the statute.¹⁹⁴ For instance, if the CWA expressly provided that any pollutant discharge exceeding regulatory levels was to be remedied through a state's tort law system, there would then be a clear intersection with the tort

192. See, e.g., 33 U.S.C. § 1365 (2006) (CWA citizen suit provision); 42 U.S.C. § 6972 (2006) (RCRA citizen suit provision); *id.* § 7604 (CAA citizen suit provision).

193. 5 U.S.C. § 706 (2006).

194. See, e.g., 33 U.S.C. § 2718(a)(1)–(2) (“Nothing in this Act . . . shall—affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability . . . including common law.”).

system.¹⁹⁵ In effect, the regulatory statute would codify a new tort remedy for a specific harm to a person. It is analogous to a state or local government passing a law classifying certain activity as a nuisance.¹⁹⁶

A corollary to this exception is where the regulation at issue preempts or displaces any tort action. Such a situation would necessarily require the regulatory law to intersect with tort law because it bars future tort liability for a harm. Using the public nuisance example, it would be as if the CAA included an express provision that the law preempts all tort action, such as nuisance, involving any of the air pollutants regulated by the Act. The Supreme Court in *American Electric Power* reached a similar result applying a displacement analysis: Congress's action in delegating authority to the EPA to set GHG emission limits displaced any federal common law right of action that might have existed.¹⁹⁷

Where an intersection of tort law is not explicitly referenced or impliedly preempted or displaced in an environmental regulatory law, the fields of law should remain separate. Regulatory law serves a prophylactic function to require specific conduct based on a deliberative democratic process that requires the opportunity for public notice and comment;¹⁹⁸ it is distinct from the tort system, which serves to compensate a party for personal injury or property damage. It should not be used to create new and unchartered tort liability or implied causes of action.¹⁹⁹ By maintaining this clear line of separation, courts and policy makers can curb unsound attempts to graft a common law tort action onto a regulatory violation, potentially opening the door to broad, unprecedented, unpredictable, and unjust tort liability. A clear separation also ensures that policy makers proceed in a careful manner, as they traditionally have, in fashioning new tort liability, and are explicit when they resolve to do so.

E. An Environmental Law Intersecting with the Tort System Should Provide for Either Dual Enforcement Through a Statutory Liability Scheme or Preempt or Displace Tort Remedies

A final principle guiding the consistent intersection of tort and environmental law is that an overlapping environmental law should be clear as to how its enforcement relates to any remedy provided under the tort system. An intersecting environmental law will generally accomplish this goal by establishing some form of statutory liability scheme to operate in

195. See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (finding that the CWA did not expressly preempt nuisance claims, so long as the applicable law was that of the discharger's state).

196. See RODGERS, JR., *supra* note 77, § 2.2, at 35 (1986) ("Virtually every state has a sizable list of statutes branding as public nuisances a wide range of activities.").

197. See *Connecticut v. Am. Electric Power Co.*, 131 S. Ct. 2527, 2538 (2011).

198. See 5 U.S.C. § 553 (imposing an obligation upon administrative agencies to provide public notice and comment as part of their rulemaking procedures).

199. See Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. MARSHALL L. REV. 319, 330–36 (2011) (arguing that the approach taken in the new *Restatement* of recognizing new common law affirmative duties from statutes is unsound).

conjunction with, or in place of, the common law. Such a scheme helps to ensure that the legislative intent of an environmental law is, indeed, to overlap with the tort system, and instructs courts in determining precisely how the statute intersects with the tort system.

Here, CERCLA again provides the archetypal example. It created a comprehensive statutory enforcement system for hazardous releases that expanded the scope of recovery for claimants, while expressly maintaining the alternative of relief through a common law tort action.²⁰⁰ In precluding double compensatory recovery,²⁰¹ the statute also made explicit its intended purpose to operate in tandem with the tort system.

The OPA is another salient example of an environmental law expressly providing a dual enforcement system through statute and common law. Similar to CERCLA, the OPA provides a comprehensive statutory liability system in the event of an oil spill, which, among other things, defines responsible parties,²⁰² the elements necessary to impose liability,²⁰³ available defenses for responsible parties,²⁰⁴ limits on liability,²⁰⁵ and claims procedures.²⁰⁶ The OPA also significantly expands the scope of recovery by establishing federal enforcement authority, including intervention and site remediation paid for by responsible parties, and a fund which may be used to pay costs incurred by the state or federal government in any cleanup effort.²⁰⁷ The OPA further states that it does not affect potential liability under the Solid Waste Disposal Act or state law, “including common law.”²⁰⁸

A comparison of CERCLA and the OPA shows that they are both environmental laws providing a separate statutory liability scheme for remediation following a release of hazardous substances or oil that expressly allows for enforcement overlap through the tort system. They demonstrate a clear legislative intent to intersect an environmental statute with the tort system to provide more defined procedures and remedies for what would otherwise likely be a complex toxic tort action at common law. Indeed, the OPA was enacted as a direct response to the Exxon Valdez oil spill and the challenges and inefficiencies presented by seeking recovery under the common law tort system alone.²⁰⁹

These legislative examples should prove instructive to both policy makers and courts. They demonstrate not only the importance of expressly stating the scope and intended effect of an environmental law, but also the relatively narrow set of circumstances in which a statute’s overlap with tort

200. 42 U.S.C. § 9652(d) (2006).

201. *Id.* § 9614(b).

202. See 33 U.S.C. § 2701 (2006).

203. See *id.* § 2702.

204. See *id.* § 2703.

205. See *id.* § 2704.

206. See *id.* §§ 2713, 2717.

207. See *id.* § 2712.

208. See *id.* § 2718(a)(2).

209. See *Oil Pollution Act Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/oem/content/lawsregs/opaoever.htm> (last visited Oct. 20, 2011).

law would be appropriate. A simple test for policy makers in constructing an environmental law, and for courts in interpreting a law that is alleged to intersect with tort law, is first whether the law provides a separate statutory liability scheme, and if not, whether the law would be conducive to such a liability scheme. For example, an environmental law providing for the increased study of mercury emissions would not lend itself to a statutory liability system, but an environmental law designed to remedy damage to property owners caused by such emissions could be suitable for such a separate statutory liability system.

In enacting future environmental laws, legislators should indicate how any intersection with tort law is to be accomplished. For instance, legislators should provide some form of liability system, or in the alternative, preempt or displace tort liability so that it is clear that the law is intended to overlap with or supplant the common law of torts. In the absence of such provisions or intentions, courts should be reluctant to recognize any overlap.²¹⁰

Where each of the principles discussed in this section are satisfied, there is likely a compelling case to be made that an environmental law does and should intersect with the common law tort system. The environmental law at issue will adequately reflect the principles and policies supporting tort law, and conform to the traditional elements of a tort cause of action. Again, a point emphasized throughout this Article is that the area of overlap and intersection is and should be narrow, at least relative to the current landscape of environmental laws affecting a broad range of interests.²¹¹ In the future, particularly as new environmental concerns arise or other current harms become too complex to pursue adequately under the common law, greater overlap between environmental law and tort law may be needed. Nevertheless, when the common law of torts simply does not provide a remedy, those who believe environmental harms should be addressed can and should make their case before policy makers in the executive and legislative branches of government. Of critical importance is that tort law, at all times, develop in a clear and consistent manner, as traditionally has been the case throughout its evolution.²¹²

CONCLUSION

The rapid expansion of the field of statutory environmental law has addressed wide-ranging environmental interests and the prevention of serious environmental harms. At the same time, however, it has posed an important question in the law as to how this evolving field intersects with the law of torts, which has historically provided the principal means in which to remedy environmental harms. The answer to this question is vital to determining where tort law can and should be effectively relied upon to

210. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (refusing to extend liability under federal common law of public nuisance for water pollution finding that the comprehensive nature of the CWA precluded a federal common law nuisance tort remedy).

211. *See supra* Part I.A.

212. *See supra* Part I.B.

remedy a harm, and where legislatures should address concerns about potential environmental harms. In this pursuit by courts and policy makers to establish clear lines, the guiding and fundamental principles of tort law must not be sacrificed to afford short-sighted relief and distort the basics of the common law of torts. Both theory and practice indicate that the intersection between tort law and environmental law is and should be narrowly drawn. Where there is overlap, traditional tort law principles, as outlined in this Article, can result in statutory and common law working in harmony. It is fortunate that most judges have followed these guidelines. It is essential that dedicated and fair jurists now and in the future continue to do so.