



## A Deeper Dive on Potential Nuisance Suit Risks After EPA's Rescission of the Endangerment Finding

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On February 18, 2026, in what it declared to be “the single largest deregulatory action in U.S. history,” the Environmental Protection Agency (EPA or Agency) announced its final rule rescinding its 2009 “endangerment finding,” the scientific and legal determination that greenhouse gas (GHG) emissions cause or contribute to air pollution that endangers public health or welfare and repealing all federal GHG emissions standards for motor vehicles. The Agency has further [proposed to repeal](#) its GHG standards for fossil fuel-fired power plants and has signaled its intent to reconsider its endangerment finding for aircraft as well.

As we noted in our Environmental Team’s [initial analysis of the Final Rule](#), one consequence of EPA’s action is a potential increase in nuisance and other common law lawsuits and claims.

This Alert provides an in-depth view of how the EPA’s rescission of the endangerment finding may reinvigorate state common-law nuisance claims and may similarly provide additional arguments to plaintiffs seeking to advance federal common law nuisance actions and claims.

### BACKGROUND

The endangerment finding was grounded in CAA section 202(a), which directs EPA to prescribe emission standards for “any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the EPA Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” EPA has since used the 2009 endangerment finding as the foundation for regulation of GHG emissions from stationary sources as well.

The Supreme Court’s 2011 decision in *American Electric Power v. Connecticut* held that the Clean Air Act delegates authority to EPA that “displaces” federal common-law public nuisance claims over GHG emissions. This case has effectively shielded companies responsible for significant GHG emissions from federal common law nuisance claims for 15 years.

Many legal analysts now expect the displacement shield to erode: with EPA rescinding the endangerment finding and withdrawing tailpipe GHG standards, plaintiffs will argue there is no “comprehensive statutory scheme” to displace federal common law nuisance claims, allowing suits to proceed. Multiple outlets report experts anticipating a “new front” of nuisance litigation precisely because EPA “abandoned that regulatory effort.”

Similarly, defendants have argued, with mixed success, that federal regulation of GHG emissions preempts state law nuisance and consumer protection claims. And on February 22, 2026, the Supreme Court granted certiorari to review a Colorado Supreme Court ruling in which it refused to dismiss a state tort action brought by the county and city of Boulder, Colorado against ExxonMobil and Suncor Energy. The Court also asked for briefing on its jurisdiction to hear the case.

With respect to stationary sources, courts before and after *AEP v. Connecticut* have found that state common-law nuisance claims are not preempted by the CAA. The CAA's savings clause found in section 116 expressly preserves states' ability to adopt and enforce air emissions limitations on stationary sources that are at least as stringent as any national standards. Courts have recognized that this savings clause, in conjunction with the Supreme Court's decision in *International Paper Co. v. Ouellette*, preserves claims against sources based on that source's state common law.

State common-law nuisance claims face other challenges, including hurdles in linking specific in-state sources to specific harms, which often make claims based in state common law less attractive to plaintiffs.

### **CLEARING THE PLAYING FIELD FOR INCREASED NUISANCE CLAIMS?**

Whether the EPA's rescission of the endangerment finding effectively clears or at least opens a portion of the field for federal common-law nuisance claims remains to be seen, but by any measure the litigation risks associated with potential nuisance actions have increased. EPA, in its Final Rule preamble, included a number of statements that suggested that the federal government was stepping back from any type of role in regulating GHG emissions:

- [T]he interpretation of CAA section 202(a)(1) that we are finalizing in this action reverses the basis for the Endangerment Finding by concluding that global climate change concerns cannot satisfy the statutory standard for regulation under CAA section 202(a)(1).
- [T]he EPA is finalizing these changes to comply with limits on our statutory authority under the best reading of CAA section 202(a)(1), adhere to the legal limits on our power to set national policy within our constitutional system of democratic government, and realign Agency resources to prioritize core statutory responsibilities that protect human health and the environment.
- Because the Endangerment Finding and the regulations that rely upon it exceed the EPA's authority in multiple respects, fundamental legal principles underpinning our constitutional system compel corrective action.
- The futility of GHG emission standards in addressing the health and welfare impacts attributed to global climate change further reinforces this interpretation.

These statements strongly indicate that EPA interprets the CAA section 202(a)(1) as not allowing regulation of GHG emissions from new motor vehicles or engines. And because the Endangerment Finding is also the predicate for regulation of stationary sources under CAA Section 111 and aircraft under CAA Section 231, one could infer that EPA believes that the CAA does not allow regulation of any major sources of GHG emissions.

EPA's reasoning likely will be challenged as inconsistent with the Supreme Court's rulings in *Massachusetts v. EPA* (which held that GHGs are "air pollutants" under the Clean Air Act and that the EPA must decide whether or not GHGs from new motor vehicles and engines endanger public health or welfare), and in *AEP v. Connecticut* (which held that the CAA speaks directly to regulation of GHG emissions and, together with EPA's actions, displaces federal common law). Proponents of the final rule will likely point out that the Court's decision in *AEP v. Connecticut* recognized that if, at the conclusion of its rulemaking process, EPA declined to regulate GHG emissions altogether, federal courts would not be able to use federal common law to upset EPA's expert determination.

Courts will be faced with parsing these two interpretations of the Final Rule and the Supreme Court's earlier statements about the scope of the CAA's displacement of federal common law. It is unclear how courts will reconcile EPA's strongly worded statements about its specific lack of authority to set GHG emission standards under the Clean Air Act with its assertions about the retention of its broad regulatory authority and about the ongoing preemption of state common law claims. There is also some doubt about the status of federal common law claims after the rescission of the endangerment finding. One thing can be predicted with confidence: these issues will be vigorously contested and may, alongside any direct challenges to the EPA's Final Rule, be on a fast track to the U.S. Supreme Court.

Notably, the Final Rule does not engage with the sufficiency of the science underlying the Endangerment Finding. It is likely that plaintiffs pursuing common law nuisance claims will continue to point to the findings in the original 2009 Endangerment Finding and more recent scientific findings as evidence of harm to human health and the environment from GHG emissions.

Elsewhere in the preamble, EPA asserts that state-law claims have not been revived by the Final Rule, stating that "[t]he CAA also continues to preempt state common-law claims and statutes that seek to regulate out-of-state emissions, independently of CAA section 209(a)'s express preemption provision for mobile-source emissions." (The Final Rule is silent as to state common-law claims and statutes regulating in-state emissions. As noted above, application of a source state's common law has long been recognized as preserved by the CAA. The CAA, conversely, does not preserve extraterritorial application of a state's common or statutory law.)

EPA further states that "[w]e retain our authority to prescribe emission standards for any air pollutant that, in the Administrator's judgment, causes or contributes to air pollution that may reasonably be anticipated to endanger public health or

welfare.” And, in its Response to Comments, the Agency says it “agrees with commenters that interpret preemption under CAA section 209(a) as broader than the scope of our authority to regulate in section 202(a)(1) or the way that we choose to exercise it.”

In addition to pointing out EPA’s position, preemption arguments seeking to dismiss nuisance claims would likely be centered on the fact that the Clean Air Act remains in effect and that the EPA’s Final Rule did nothing to affect Congress’s delegation of authority under the Clean Air Act. In addition, it may be argued that EPA retains the authority and statutory tools to enact further regulations.

### POTENTIAL SECTORS AT RISK AND TYPES OF RELIEF THAT MAY BE SOUGHT

Particularly if rules repealing stationary source and airplane GHG standards are finalized, significant emitters of GHGs may face increased risks of nuisance claims, including utilities operating GHG emitting facilities, companies operating methane-emitting oil and gas operations, and aircraft-operating companies. Such companies should be prepared to respond to and defend against such claims.

With respect to vehicle and engine emissions and the automotive industry, CAA section 209 still prohibits states and local governments from adopting their own standards for vehicle emissions absent a waiver from EPA. Furthermore, the indelible scientific relationship between tailpipe GHG emissions and fuel economy may present an additional complication to any nuisance suits. Federal fuel economy standards remain in place, though NHTSA has proposed to loosen them. Like the Clean Air Act, the Energy Policy and Conservation Act of 1975 contains preemption provisions.

Plaintiffs pursuing nuisance actions are likely to seek one or more of the following types of relief:

- **Abatement and/or adaptation.** In a number of nuisance actions, plaintiffs seek to require defendants to abate or fix the underlying condition caused by the nuisance. In climate cases that might translate to funding for specific infrastructure (e.g., seawalls, stormwater systems), wildfire mitigation investments, cooling systems, and other resilience projects.
- **Injunctive relief.** Plaintiffs may seek injunctive relief requiring emissions reductions, monitoring, or mitigation measures.
- **Compensatory damages for past harms.** Some state nuisance claims have sought compensation for property damages, reimbursement for emergency response costs, infrastructure repairs, and public costs resulting from excessive heat, floods, fires, and severe storms.
- **Restitution and/or unjust enrichment.** Where plaintiffs allege deceptive and/or unfair practices as part of a nuisance action, they may seek disgorgement or restitution, along with attorneys’ fees (under some state consumer protection statutes).

### MANAGING ONGOING (AND POTENTIALLY INCREASED) LITIGATION RISKS

The likely increase in nuisance litigation exposure suggests that entities operating facilities that emit a significant amount of GHGs should consider the following steps to manage or mitigate litigation risk:

- **Track cases and regulatory activities at all levels.** With EPA stepping back in a very public way, it is expected that there will be marked increase in state and local activities. This may include new regulatory actions and/or filed cases. All developments should be tracked for potential impacts on litigation exposure.
- **Monitor existing cases, particularly for appellate developments.** We can expect new motions and filings in existing cases, and potentially expedited consideration of preemption and displacement arguments. Again, specific case developments should be closely tracked.
- **Develop a record related to causation.** Given courts' overall skepticism about evidence purporting to trace specific harms to specific GHG emitters, companies with nuisance litigation risk should consider preparing a record of company documents, data, and materials related to emissions, mitigation efforts, and industry-standard emission practices. A robust record may be used to defeat causation arguments and avoid successful abatement or damages claims.
- **Develop a record related to reasonableness.** Public nuisance claims often turn on whether an action is "reasonable" based on a totality of the circumstances. Good corporate governance and recordkeeping of the costs of reducing GHG emissions can support a claim that a party acted reasonably.

Van Ness Feldman has a team of environmental and litigation specialists that are representing a number of clients in ongoing regulatory issues and potential litigation risks. For further details or assistance with these important issues, please contact [Mike Farber](#), [Anne Lynch](#), [Britt Speyer Fleming](#), [Kyle Danish](#) or any member of VNF's Litigation and Environmental Teams.