An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine

Andrew H. Sharp
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Andrew H. Sharp*

I. INTRODUCTION

Consider the following scenario: a middle-aged couple, the Jacksons, buys a sprawling six-acre plot of land in scenic western Massachusetts. The purchase of this land is the culmination of years of saving and shrewd financial management.

Upon the land the Jacksons build a large colonial house, strategically situated to overlook the brook that bounds through their property. The source of the brook is a small river that flows into it one mile away.

Shortly after moving into their dream house, the Jacksons learn that a national paint manufacturing company will soon complete a factory being built two miles upstream from their home. In fact, the plant will begin manufacturing paint in three weeks. Concerned about possible contamination to the brook, the Jacksons contact the company in order to find out how the plant will dispose of its waste. They learn that some waste from the manufacturing process will be put into steel drums and buried two hundred yards from the river’s edge. Less toxic waste will flow from the plant directly into the river.

Appalled at the planned manner of waste disposal, the Jacksons look for a way to prevent the impending damage both to their property’s value and also to their health. There are no local ordinances that restrict the plant’s disposal methods.

Anticipatory nuisance,¹ a seldom-used common law doctrine, is a potentially effective method of preventing the kind of environmental

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¹ See, e.g., Olsen v. City of Baton Rouge, 247 So. 2d 889, 894 (La. App. 1st Cir.), application 627
harm described above. It enables courts of equity to act in antici-
pation of a threatened nuisance. Many courts, however, have re-
sisted granting injunctions on the basis of this doctrine for a variety
of reasons. While judicial restraint is justified in some respects,
there are a number of situations in which the doctrine should apply.
This Comment argues for a reassessment of anticipatory nuisance
and suggests instances where its use is appropriate to prevent en-
vironmental harm.

Section II of this Comment articulates the mechanics of an antic-
ipatory nuisance action and explains the traditional rationale for its
use. Section III reviews the doctrine's use in both federal and state
courts. Section IV discusses the limited statutory versions of antic-
ipatory nuisance and their interpretations by state courts. Finally,
section V argues that anticipatory nuisance is an appropriate way
for plaintiffs to prevent environmental harm. This Comment argues
further that courts and legislatures can and should fashion a standard
of application that promotes equity and predictability in anticipatory
nuisance actions.

II. ANTICIPATORY NUISANCE: ITS UTILITIES AND LIMITATIONS

Anticipatory nuisance is an equitable doctrine that is recognized
in the common law of most states. The doctrine gives courts "the
power to interfere by injunction to restrain a party from so using
his own property as to destroy or materially prejudice the rights of
his neighbor . . . ." Courts have used the doctrine of anticipatory
nuisance to prevent many types of harmful activities, ranging from
the operation of waste disposal plants to mining. While as a general

denied, 259 La. 755, 252 So. 2d 454 (1971); King v. Hamill, 97 Md. 103, 111, 54 A. 625, 627
(1903).


6 Adams v. Michael, 38 Md. at 125.

7 See, e.g., Olsen v. City of Baton Rouge, 247 So. 2d 889; Village of Wilsonville v. SCA Services, 86 Ill. 2d 1, 426 N.E.2d 824 (1981).

rule courts enjoin only existing nuisances, courts may enjoin a present action though no nuisance currently exists, where it is obvious that the completed act will result in a nuisance.9

A. The Benefits of Using Anticipatory Nuisance

The anticipatory nuisance doctrine enables courts of equity to provide a more speedy, complete, and permanent remedy than a court at law could provide.10 Courts of equity act in situations where a legal remedy is either inadequate or inappropriate. Without this power, parties would suffer extreme harm that courts of law could not redress adequately.11 Courts particularly stress the need to prevent permanent harm that will affect the environment. For example, in Attorney General v. Jamaica Pond Corporation,12 the Massachusetts Attorney General sought to prevent the defendants from lowering the water level of a public pond.13 The Attorney General claimed that such lowering would injure fish in the pond and expose the shores to slime and offensive vegetation, thereby endangering public health.14 The Massachusetts court held that neither an injunction after-the-fact nor an indictment would protect the pond:

Neither of these remedies can be evoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land and the underground currents to the same condition in which they are now . . . . The preventative force of the decree in equity, restraining the illegal acts before any mischief is done, clearly gives a more efficacious and complete remedy.15

Once some kinds of harm occur, it may be difficult or impossible to restore the environment. Anticipatory nuisance thus enables courts of equity to prevent permanent harm.

Anticipatory nuisance has additional value because it is flexible enough to allow defendants the opportunity to conduct the questioned acts in such a way so as not to constitute a nuisance. In Cardwell v. Austin,16 a homeowner sought an injunction to prevent

9 See Adams v. Michael, 38 Md. at 129; King v. Hamill, 97 Md. 103, 111, 54 A. 625, 627 (1903).
11 Adams v. Michael, 38 Md. at 125; see also King v. Hamill, 97 Md. at 111, 54 A. at 627.
12 133 Mass. 361 (1882).
13 Id. at 362.
14 Id. at 362–63.
15 Id. at 363.
Bay City from building a septic tank that would be 18 feet wide, 60 feet long, and 8 feet deep. The Texas Court of Civil Appeals enjoined that particular septic tank as a prospective nuisance because a tank that large would give off annoying odors, whereas a smaller tank would not. The Cardwell court, however, denied a permanent injunction so as to allow the defendants to construct a smaller septic tank.

The anticipatory nuisance doctrine has an added benefit in that it prevents the defendant’s economic waste. If a nuisance was clearly going to occur but only an after-the-fact injunction was available, such an injunction, if granted, would render the defendant’s building or equipment useless. The anticipatory nuisance doctrine prevents such economic waste because plaintiffs need not wait until the defendant completes the questioned act to seek a remedy. Anticipatory nuisance theory is, therefore, a common-sense approach to the problem of threatened environmental harm. The doctrine offers a remedy that is both speedy and flexible. Judicial limitations, however, severely inhibit viable application of the doctrine.

B. Judicial Limitations on Using Anticipatory Nuisance

Despite the utility of anticipatory nuisance injunctions for plaintiffs seeking to prevent irreparable environmental harm, courts have used the doctrine sparingly and only within established guidelines. The most limiting guideline is the requirement that an enjoinable prospective nuisance be a “nuisance per se,” sometimes referred to as a “nuisance at law.” A “nuisance per se” is an act that is a nuisance “at all times and under any circumstances, regardless of location or surroundings . . . .” Conversely, a “nuisance per acci-

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17 Id. at 386.
18 Id. at 387.
19 Id.
20 See, e.g., Adams v. Michael, 38 Md. at 129 (a court may enjoin a prospective nuisance if it can “form an opinion as to the illegality of the acts complained of, and the irreparable injury which will ensue”); King v. Hamill, 97 Md. at 111, 54 A. at 627 (the court denied an injunction against the construction of a stable because the stable was not a nuisance “per se”); Davis v. Miller, 212 Ga. 836, 839, 96 S.E.2d 498, 502 (1957) (the court refused to enjoin the construction of an automobile service station because a service station was not a nuisance per se and the feared harm was too speculative).
21 For examples of cases where courts followed this guideline, see King v. Hamill, 97 Md. at 111, 54 A. at 627; Cooper v. Whissen, 95 Ark. 545, 549, 130 S.W. 703, 704 (1910); see also West v. Ponca City Milling Co., 14 Okla. at 649–50, 79 P. at 102 (1904).
"dens" is an action that becomes a nuisance by reason of circumstances and surroundings.\(^{23}\) According to courts adhering to the per se requirement, no court could enjoin a future act unless the act was, in and of itself, a nuisance, or would almost certainly result in one.\(^{24}\) Unlike courts with no per se requirement, courts using the per se requirement will not enjoin a nuisance per accidens.\(^{25}\)

Sometimes courts place limitations on anticipatory nuisance actions that relate to the kind of harm that can be avoided through preliminary injunctive relief.\(^{26}\) Usually, courts require that the future harm must materially diminish the value and the ordinary enjoyment of the complainant's property, and the ordinary enjoyment thereof.\(^{27}\) Courts, however, impose other requirements. For exam-

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\(^{23}\) See supra note 22.


\(^{25}\) See, e.g., West v. Ponca City Milling Co., 14 Okla. at 649-50, 79 P. at 102 (the court refused to enjoin the construction of a frame building within the fire limits of the city of Guthrie, Oklahoma because the building would not be a legal nuisance); Brammer v. Housing Authority of Birmingham Dist., 239 Ala. 280, 284, 195 So. 236, 259 (1940) (the court denied an injunction against low income housing projects for blacks regardless of whether the projects were a nuisance per accidens).

\(^{26}\) See Adams v. Michael, 38 Md. 123, 128 (1873) (the court required that the questioned activity must threaten material harm to the complainant, and that the allegations of harm be specific and definite); West v. Ponca City Milling Company, 14 Okla. at 649-50, 79 P. at 101 (the construction of a wooden frame building would not result in "special" or "irreparable" harm to the plaintiffs who owned a nearby lot).

\(^{27}\) Adams v. Michael, 38 Md. at 129.
Courts may also require plaintiffs to allege specific and definite harm. The differing requirements regarding harm limit the use of anticipatory nuisance because they each restrict the range of situations in which a prospective injunction is appropriate.

Early anticipatory nuisance cases did not establish a clear standard of certainty that a given act would result in a nuisance. Early courts used phrases such as "clear and satisfactory" and "sufficient" to describe the evidence required. The vagueness of this language enables courts to base their reasoning loosely on prior cases while deciding a case according to the equity of the facts involved. Restated, phrases such as "clear and satisfactory" and "sufficient" are broad enough to accommodate differing interpretations of the same set of facts.

Judicial limitations on anticipatory nuisance, and the per se requirement in particular, discourage plaintiffs from using the doctrine. Similarly, the lack of a clear certainty of harm standard contributes to a lack of predictability with anticipatory nuisance cases. Accordingly, unpredictability also discourages the doctrine's use. The limitations placed upon anticipatory nuisance are evident in both federal and state court decisions.

III. THE USE OF ANTICIPATORY NUISANCE IN FEDERAL AND STATE COURTS

Federal and state courts treat anticipatory nuisance cases differently. Federal courts have established a federal common law of anticipatory nuisance that is a more coherent and consistent construction of the doctrine than the state courts' version. This is attributable largely to the fact that fewer anticipatory nuisance cases reach the federal courts. Many more such cases are brought on the state level because, by their nature, anticipatory nuisance claims arise from disputes between property owners. Anticipatory nuisance

28 See Davis v. Miller, 212 Ga. at 839, 96 S.E.2d at 502; West v. Ponca City Milling Company, 14 Okla. at 648-49, 79 P. at 101; King v. Hamill, 97 Md. at 111, 54 A. at 627.
29 See Adams v. Michael, 38 Md. at 128.
30 Mugler v. Kansas, 123 U.S. at 673.
31 See King v. Hamill, 97 Md. at 111, 54 A. at 627; Marlin v. Holloway, 192 S.W. at 624.
32 See West v. Ponca City Milling Company, 14 Okla. at 650, 79 P. at 102 (injunction denied because of "conflicting" evidence); St. James Church v. Arrington, 36 Ala. 546, 548, 76 An. Dec. 332 (1860) (injunction denied where injury was "uncertain"); Attorney General v. Jamaica Pond Aqueduct, 133 Mass. 361, 364 (1882) (the "necessary effect" of the defendant's act was to create a nuisance).
cases rarely involve residents of different states, as was the case in *Missouri v. Illinois*. Accordingly, in anticipatory nuisance cases there is seldom the diversity of citizenship necessary in order to allow such a case to be brought in federal court. Federal courts’ interpretation of anticipatory nuisance, therefore, remains fairly consistent. In contrast, state courts’ interpretations vary from state to state and are often inconsistent within individual states. The inconsistency of state court interpretations of anticipatory nuisance inhibits expanded use of this valuable doctrine. Therefore, more uniform treatment of anticipatory nuisance on the state court level is needed to make the doctrine practicable.

A. Federal Courts

Two pre-1900 federal cases established the basis for the use of anticipatory nuisance in both federal and many state courts. The United States Supreme Court in *Mugler v. Kansas* declared that courts of equity could act prospectively to provide a more complete and appropriate remedy than was available at law. In *Coosaw Mining Company v. South Carolina*, the Court issued an injunction against the mining of phosphate from the Coosaw River. The Court observed that proceedings at law could not always protect future public interests. Therefore, in certain cases, only through a prospective injunction could the Court secure the public interests adequately. Both of these cases show recognition of anticipatory nuisance claims on the federal level.

Federal courts have addressed anticipatory nuisance specifically only three times since 1900. In *Missouri v. Illinois*, Illinois wanted
to build a sewage channel from the Chicago River to the Des Plaines River. The Des Plaines River empties into the Illinois River which, in turn, empties into the Mississippi River at a point forty-three miles above St. Louis. Missouri thus sought to prevent construction of the channel, which it claimed would impair its citizens' health. Missouri charged that Illinois' threatened action would be a direct and continuing nuisance and therefore sought preliminary injunctive relief. The United States Supreme Court recognized Missouri's anticipatory nuisance claim and found that if the defendant's acts would naturally and necessarily cause damage and irreparable injury, a prospective injunction was appropriate. The test applied in Missouri v. Illinois required "determinate and satisfactory evidence" for the prospective enjoining of a nuisance. Moreover, the Court held that the facts must show "real and immediate" danger. The defendant argued the Court lacked jurisdiction, but the Court refused to sustain the demurrer and required the defendant to appear and to answer the complaint. Thus, the Supreme Court discussed the dynamics of anticipatory nuisance theory without applying it to the facts of the case.

In Texas v. Pankey, Texas sought to enjoin the use of toxaphene, a pesticide spray. While the Tenth Circuit Court of Appeals recognized that such a threatened activity could be enjoined, it did not discuss the anticipatory nuisance doctrine and its accompanying standards. However, the Tenth Circuit did, in fact, enjoin an anticipated nuisance. The fact that it did not discuss "anticipatory" or "threat-
ened” nuisance is an example of how the doctrine lacks a clear identity.

In California Tahoe Regional Planning Agency v. Jennings, the Ninth Circuit Court of Appeals applied the “determinate and satisfactory evidence” requirement of Missouri v. Illinois. In California Tahoe, California and a local planning agency sought to enjoin prospectively the construction of four hotel-casinos. After finding that congressional action did not preclude the common law nuisance doctrine, the court held that the state failed to establish that the danger of nuisance was “real and immediate” as required by Missouri v. Illinois. While the Ninth Circuit affirmed the doctrine of anticipatory nuisance, the court distinguished high-rise hotels from untreated sewage, noxious gases, and poisonous pesticides, and concluded that the former was not the sort of injury that can be enjoined as a potential nuisance. The court thus implicitly distinguished between types of environmental harm without drawing a line between the two types of harm.

Because so few anticipatory nuisance cases reach federal courts, it is difficult to draw sweeping conclusions from federal courts’ treatment of anticipatory nuisance. A few observations, however, can be made. First, none of the above cases require a nuisance per se in order for a prospective injunction to issue. In Missouri v. Illinois, the Supreme Court found it sufficient that a nuisance would necessarily result from pouring sewage into the Mississippi River. In California Tahoe, the Ninth Circuit denied an injunction not because there was no nuisance per se but because the harm threatened was uncertain and insufficiently severe. Taken together, these cases suggest that federal courts may apply a standard that is less strict

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53 594 F.2d 181 (9th Cir. 1979).
54 Id. at 193–94.
55 Id. at 184. California Tahoe represents several individual cases combined for appeal. Id. at 186. Various plaintiffs challenged the construction of the hotel-casinos on various grounds, including violation of an ordinance and the invalidity of the builders’ building permit. Id. at 187–89. The anticipatory nuisance action reflected the fear of the California Tahoe Regional Planning Agency and the State of California that the hotel-casinos would attract many people and cars to the area, thereby creating a nuisance. Id. at 193.
56 Id. at 193.
57 Id.
58 Id. at 194.
59 Id.
60 Missouri v. Illinois, 180 U.S. at 248. In Missouri v. Illinois the Supreme Court did not discuss whether pouring sewage into the Mississippi River was a nuisance per se. The Court’s analysis focused on whether a nuisance would necessarily result from such an activity.
61 California Tahoe v. Jennings, 594 F.2d at 193–94.
than the nuisance per se standard used by many state courts. By considering certainty of harm as in *Missouri v. Illinois*, and degree of harm as in *California Tahoe*, federal courts display a willingness to enjoin otherwise legal activities that create a nuisance because of the circumstances involved.

Federal courts have also indicated that potential health-related environmental harm is an appropriate occasion for a prospective nuisance action. The *California Tahoe* case implies that, although an aesthetic nuisance would not be enjoined prospectively, courts would enjoin health-related harm resulting from sewage and gases. Finally, it is surprising that, given the *California Tahoe* court’s affirmation of the doctrine of anticipatory nuisance, no subsequent cases have been brought relying on the court’s ruling.

Although federal courts are more consistent than state courts in applying anticipatory nuisance theory, there remain problems with federal use of the doctrine. *Pankey* highlights the fact that anticipatory nuisance as a doctrine suffers from an identity crisis. In that case, the Tenth Circuit never once used the phrase “anticipatory nuisance.” Also, the reluctance of the *California Tahoe* court to establish a test for distinguishing between types of harm underscores the need for clear guidelines for applying anticipatory nuisance theory. As this Comment will argue, however, it is possible for courts and legislatures to cure these deficiencies.

**B. State Courts**

State courts treat anticipatory nuisance in a variety of ways. The instances where it can be used and the elements required by the courts indicate no clear standard of application.

Many courts have expressed openly a reluctance to apply the doctrine at all. In a “note” to *West v. Ponca City Milling Co.*, the court, however, added that “we cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides.”

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62 Id. at 194. Although the *California Tahoe* court recognized that not every injury to the environment is a nuisance under federal common law, it did not establish guidelines to determine what type of harm constituted an enjoinable nuisance. *Id.* The court, however, added that “we cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides.” *Id.*

63 See, e.g., *Cooper v. Whissen*, 95 Ark. 545, 549, 130 S.W. 703, 704 (1910); *Swaim v. Morris*, 93 Ark. 362, 368, 125 S.W. 432, 434 (1910).

64 The “note” referred to did not appear in the official state reporter, but was cited in *Cooper v. Whissen*, 95 Ark. at 549, 130 S.W. at 704.

65 14 Okla. 646, 79 P. 100 (1904). In *West v. Ponca City*, the plaintiffs were property owners seeking to prevent the defendant from constructing a frame building within the fire limits of the city of Guthrie, Oklahoma. *Id.* at 648-49, 79 P. at 101. The plaintiffs feared that the
the Supreme Court of Oklahoma declared that normally it would refuse to enjoin the construction of a lawful structure solely on the basis that it would be used so as to constitute a nuisance. The complainant could, however, always receive legal and equitable redress if a nuisance did in fact result. The court would issue an injunction only to enjoin a nuisance per se. Similarly, in Brammer v. Housing Authority of Birmingham Dist., an Alabama court denied an injunction against building low income housing projects for blacks because the projects did not create a nuisance per se. In Brammer, the plaintiffs failed to establish that Birmingham's projects would naturally or inevitably result in a nuisance. The Brammer court also recognized a general rule against anticipatory injunctions based upon the availability of legal redress once the harm materialized.

The reluctance of some courts to issue prospective injunctions is understandable. It is difficult for a plaintiff to prove that a given harm will result from a proposed activity. Accordingly, there is a presumption that an activity will be conducted in a non-offensive manner. This presumption exacerbates the plaintiff's already heavy burden of proof.

Courts that disdain prospective injunctions do not view the denial of relief to be a calculated risk. Rather, as in the cases discussed...
above, courts rely on the fact that the plaintiffs could always have waited for an injunction after the nuisance actually occurred. In none of the above cases, however, did the courts confront the threat of irreparable injury, and thus it was reasonable to give the defendant the benefit of the doubt.

As discussed above, many state courts require a nuisance per se in order to enjoin an anticipatory nuisance. A nuisance per se is an act that will be a nuisance at all times and under any circumstances. Courts that use the per se requirement seldom dismiss an action without considering other factors. It is often difficult, however, to determine whether courts weigh one factor more heavily than another.

Several cases suggest that the difference between a nuisance per se and a nuisance resulting from circumstances is at least partly a matter of whether the harm is irreparable. In *King v. Hamill*, the Maryland Court of Appeals denied an injunction to restrain the building of a stable in part because the plaintiffs failed to establish that the stable would be a nuisance per se. In deciding the per se issue, the court considered the fact that the erection of such a structure would not result in irreparable injury. Similarly, in the Maryland case of *Leatherbury v. Gaylord Fuel Corporation*, the plaintiff presented insufficient evidence to establish that a limestone quarry would be a nuisance per se. The *Leatherbury* court discussed the lack of irreparable injury and the conflicting testimony of expert witnesses as the basis for finding for the defendant on the per se issue. These cases suggest that a finding of irreparable harm is at least one important factor that courts consider in elevating a nuisance per accidens to the status of nuisance per se.

Other courts have distinguished between nuisance per se and nuisance per accidens according to the illegality of the proposed

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76 *See*, e.g., Cooper v. Whissen, 95 Ark. at 549, 130 S.W. at 704; Brammer v. Housing Authority of Birmingham Dist., 239 Ala. at 284, 195 So. at 259; Olsen v. City of Baton Rouge, 247 So. 2d at 894.
77 *See* supra notes 69–73 and accompanying text; *see also* King v. Hamill, 97 Md. 103, 111, 54 A. 625, 626 (1903); Wallace v. Andersonville Docks, 489 S.W.2d 532 (Tenn. App. 1922).
78 *See* supra note 22.
80 Id. at 111, 54 A. at 627.
81 Id. at 111, 54 A. at 627.
82 276 Md. 367, 347 A.2d 826 (1975).
83 Id. at 377–79, 347 A.2d at 833.
84 Id. at 377–79, 347 A.2d at 832–33.
activity. For example, in another Maryland case, *City of Bowie v. Board of County Commissioners*, the Maryland Court of Appeals illustrated this difference by comparing the proposed construction of a bordello with the proposed construction of an airport. The bordello would have been a nuisance from the very moment it opened. In contrast, the airport might or might not have become a nuisance.

The distinction reveals a stricter interpretation of the definition of nuisance per se based upon the proposed activity’s actual illegality. While this per se requirement is by definition less ambiguous and more easily relied upon, it can contribute to unfair outcomes. For example, in *Wallace v. Andersonville Docks, Inc.*, the Tennessee Court of Appeals reversed an injunction to restrain the operation of a motorcycle scrambles course. In its reversal the court held that if “the thing complained of is a nuisance per accidens, that is, a nuisance in fact which by reason of circumstances, surroundings or operations, may cause injury but the harm is uncertain or contingent, such nuisance will not be enjoined anticipatory to its going into operation.” Because noise is usually not a nuisance per se, the *Wallace* court refused to enjoin the nuisance despite its admission that the motorcycles would emit “considerable” noise.

A few courts have adopted a dual standard that requires either a nuisance per se or that a nuisance will necessarily result from the activity. In *Brammer*, the Supreme Court of Alabama confused its attempt to reconcile nuisance per se and non-nuisance per se cases. The *Brammer* court held that, as a general rule, when a plaintiff seeks an injunction to prevent the building of a lawful structure whose use will constitute a nuisance, the court will not enjoin

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86 Id. at 127–28, 271 A.2d at 663.
87 Id. at 127–28, 271 A.2d at 663.
88 Id. at 127–28, 271 A.2d at 663.
89 489 S.W.2d 532 (1972).
90 Id. at 535.
91 Id.
92 Id. at 534.
93 Id. at 533–34.
94 See, e.g., Phillips v. Allingham, 38 N.M. 361, 365, 33 P.2d 910, 914 (1934); Koeber v. Apex-Albuq. Phoenix Express, 72 N.M. 4, 5–6, 380 P.2d 14, 16 (1963). Some courts require both that the action be a nuisance per se and necessarily result in a nuisance. See, e.g., Brammer v. Housing Authority of Birmingham Dist., 239 Ala. 280, 284, 195 So. 256, 259 (1940).
95 239 Ala. 280, 195 So. 256.
96 Id. at 283–84, 195 So. at 258–59.
its construction or completion. Thus, the Brammer court recognized a general rule against enjoining nuisances per accidens. The Brammer court admitted, however, that the rule is different when the injury will be an inevitable consequence of the act. It is strange for a court to distinguish between inevitable consequences and nuisance per se when the definition of nuisance per se inherently entails inevitability. Thus, the dual standard, in effect, enjoins those nuisances that necessarily result from threatened acts regardless of whether the act is a nuisance per se.

New Mexico courts provide a clearer application of the dual standard. For example, in Phillips v. Allingham, the state supreme court denied an anticipatory injunction of a gasoline storage site because storing gasoline neither was a nuisance per se nor would it necessarily result in one. In contrast, in Koeber v. Apex-Albuq. Phoenix Express, the court granted an injunction against the construction of a truck terminal. Although the terminal was not a nuisance per se, the construction, operation, and maintenance of the terminal “[made] it manifest” that it would necessarily become a nuisance, or made it highly probable that it would become one. What is immediately confounding about the dual standard the court employed in this case is that a “necessarily results” requirement obviates a per se requirement. Thus, nuisances per se are included within the set of actions that would “necessarily result” in a nuisance. In other words, if a “necessarily results” test is used, a per se requirement is redundant.

The “necessarily results” standard is more favorable to plaintiffs than the strict per se standard. This is because the “necessarily results” standard encompasses a larger range of circumstances than a strict per se standard. In reality, those courts that adopt a dual standard are, therefore, using the broader “necessarily results” standard.

Some courts that grant injunctions for non-nuisance per se situations do so as a matter of fairness according to the particular facts.

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97 Id.
98 Id. at 284, 195 So. at 259.
100 38 N.M. 361, 33 P.2d 910.
101 Id. at 365, 33 P.2d at 914.
103 Id. at 5–6, 380 P.2d at 16.
104 Id. at 5–6, 380 P.2d at 16.
in the case. For example, in *City of Marlin v. Holloway*, plaintiff homeowners sought an injunction to prevent the city from constructing a sewage plant. The homeowners alleged that the plant would inflict irreparable injury upon them. In a sparse opinion, the Texas Court of Civil Appeals found that the plant would emit foul and obnoxious odors that would especially annoy the plaintiffs. Simply stated, the defendant had no right to create a nuisance. The Supreme Court of Arkansas offered similarly simple reasoning in *Hudleston v. Burnett*. In that case, the prospective nuisance was a filling station and public garage. The court held that the honking of horns and the starting and stopping of cars would create an intolerable nuisance to nearby residents. In granting the injunction, the court hinted that the lack of a showing of public necessity for the garage and gas station contributed to the decision.

Most courts, however, do not decide non-per se anticipatory nuisance cases on such simple grounds. Often courts bring into play a variety of factors such as the certainty of harm, the definiteness of the injury, and the immediacy of the danger. Typically, courts treat these factors according to nebulous standards such as "practically certain" and "clear and convincing" evidence. Accordingly, these standards leave courts with little more to guide them than common sense.

Curiously, courts seldom incorporate the level of the anticipated harm's severity into court-fashioned standards for anticipatory nuis-

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105 192 S.W. 623.
106 Id.
107 Id. at 624.
108 Id.
109 172 Ark. 216, 287 S.W. 1013 (1926).
110 Id. at 216, 287 S.W. at 1013.
111 Id. at 217, 287 S.W. at 1014.
112 See, e.g., Pennsylvania Co. for Insurance, Inc. v. Sun Co., 290 Pa. 404, 413, 138 A. 909, 912 (1927) (court used a "necessarily results" test and required that injury be actually threatened, practically certain, and irreparable; the court established this test as part of a joint per se/necessarily results test); Lauderdale County Board of Education v. Alexander, 269 Ala. 79, 85, 110 So. 2d 911, 916 (1959) (injury to result from alleged anticipatory nuisance must be definite and inevitable); Fink v. Board of Trustees of Southern Illinois University, 71 Ill. App. 2d 276, 218 N.E.2d 240, 244 (1966) (nuisance must necessarily result from the contemplated act or thing, and the danger must be real and immediate).
113 See Pennsylvania Co. for Insurance v. Sun Co., 290 Pa. 404, 413, 138 A. 909, 912 (1927) (the plaintiff landowner failed to prove that harm from the defendant's storage tanks was practically certain to occur).
114 See Otto Seidner, Inc. v. Ralston Purina Co., 67 R.I. 436, 481, 24 A.2d 902, 909 (1942) (the plaintiff landowner failed to present clear and convincing evidence that the defendant's proposed coalyard would constitute a nuisance upon completion).
ance. For example, in *Wilsonville v. SCA Services, Inc.*, the Village of Wilsonville, Illinois sought an injunction to prevent the operation of a chemical waste disposal plant. The Illinois Supreme Court granted the injunction, finding it highly probable that the chemical waste disposal site would bring about a substantial injury. In arriving at this conclusion, the court observed that a balancing is necessary between public benefit and individual rights. In a concurring opinion, Justice Ryan argued that the court’s test, as adopted from *Fink v. Board of Trustees*, was unnecessarily narrow. In Justice Ryan’s view, “there are situations where the harm that is potential is so devastating that equity should afford relief even though the possibility of the harmful result occurring is uncertain or contingent.” Thus, according to Justice Ryan, if the resulting harm would be severe, a lesser probability of it occurring should be required. In this way, courts can consider a wider range of factors and thereby avoid the absurdity of a court waiting until disaster has occurred before providing relief.

Justice Ryan’s argument is a rare statement of the view that the public is entitled to protection not only from the nearly certain effects of a proposed activity, but also from the catastrophic, yet less certain, effects of a proposed activity. Strangely, courts that have considered the harm’s severity have not discussed this argument. The advancement of technology, however, makes ascertaining the far-reaching environmental impact of a given activity more realistic. Accordingly, it may be only now that plaintiffs can argue fairly for the need to consider future catastrophic harm. Yet, it is a common sense approach to environmental nuisance law for courts to deem a moderate risk of catastrophic harm as serious as the absolute risk of a lesser harm.

Individual states are inconsistent in their application of the anticipatory nuisance doctrine. Accordingly, there is a general lack of

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115 86 Ill. 2d 1, 426 N.E.2d 824 (1981).
116 *Id.* at 6–7, 426 N.E.2d at 827. The Village of Wilsonville believed that the operation of the defendant’s chemical waste disposal site would entail spillage of waste, odors, and dust. *Id.* at 15–16, 426 N.E.2d at 831.
117 *Id.* at 26–27, 426 N.E.2d at 836–37.
118 *Id.* at 23–24, 426 N.E.2d at 835.
120 *Wilsonville v. SCA Services*, 86 Ill. at 37–38, 426 N.E.2d at 842.
121 *Id.* at 37–38, 426 N.E.2d at 842.
122 *Id.*
123 See infra notes 124–37 and accompanying text.
predictability as to which factors courts will give the most weight. For example, while Maryland courts concur in their use of the per se requirement, they differ as to its application. While the Leatherbury and King courts both interpreted nuisance per se as requiring a need for certainty of injury, the Bowie court interpreted a nuisance per se as an activity which by its mere existence constituted a nuisance.

Similarly, Alabama courts have differed in their interpretation of Alabama’s anticipatory nuisance statute. Most Alabama courts will enjoin a contemplated structure or action if it will be a nuisance per accidens and it will result in sufficient injury. In Gilmore v. City of Monroeville, however, the Alabama Supreme Court denied an injunction against a proposed building in which the city would fuel city vehicles and garbage trucks. The court refused the injunction despite evidence from nearby property owners that the building’s operation would entail noise, odors, vermin, flies, and traffic problems.

To further illustrate, in the 1971 Louisiana case of Olsen v. City of Baton Rouge, the Court of Appeals refused to issue an injunc-

125 276 Md. 367, 347 A.2d 826. In Leatherbury, a farming family sought to enjoin the construction of a limestone quarry. Id. at 367-70, 347 A.2d at 828. The Leatherburys alleged that limestone dust would destroy vegetation and kill fish on their nearby 80 acre farm. Id. at 367-70, 347 A.2d at 828. The Maryland Court of Appeals denied an injunction because the Leatherburys “failed to establish with reasonable certainty that a nuisance will result.” Id. at 379, 347 A.2d at 833.
126 97 Md. 103, 54 A. 625. In the early case of King, the plaintiff sought an injunction to prevent the construction of a stable near the plaintiff’s home. Id. at 104, 54 A. at 626. The court held that the plaintiff did not prove with certainty that a nuisance would result. Id. at 111, 54 A. at 627. The King court also emphasized that the stable would not result in irreparable injury to the plaintiff. Id. at 111, 54 A. at 627.
127 260 Md. 116, 271 A.2d 657. Bowie involved a suit by the city of Bowie to prevent the development and construction of an airport. Id. at 118, 271 A.2d at 658. The Maryland Court of Appeals declined to enjoin the airport and cited Adams v. Michael for the proposition that if a business is lawful the court will not enjoin it prospectively. Id. at 125-26, 271 A.2d at 662-63; see Adams v. Michael, 38 Md. at 125.
128 See supra notes 80, 82, and 86 and accompanying text.
129 See ALA. CODE § 6-5-125 (1975).
130 See infra note 158.
131 384 So. 2d 1080 (Ala. 1980).
132 Id. at 1081.
133 Id.
134 247 So. 2d 889.
tion against a proposed garbage transfer facility because the facility would not be a nuisance per se. 135 Three years later, in Salter v. BWS Corporation, Inc., 136 a Louisiana court held that while the defendant could conduct its waste disposal plan safely and legally, a qualified injunction was appropriate because of the disastrous consequences of improper waste disposal. 137

There are several explanations for this inconsistency within state courts. One reason is that because anticipatory nuisance cases arise so infrequently, predictability is not of paramount importance. A second explanation is that concepts such as nuisance per se and nuisance per accidens are malleable enough to support varying interpretations. A third explanation is that the lack of one phrase to describe nuisances enjoined prospectively inhibits a uniform application of anticipatory nuisance theory. It is possible, too, that some of the inconsistency stems from a continually evolving awareness of environmental issues that leads courts to find previous standards unacceptable.

Overall, there is both an initial reluctance of state courts to embrace the anticipatory nuisance doctrine 138 and an inconsistency in its application within certain states. 139 Courts that apply the doctrine often require that the questioned activity be a nuisance per se. 140 Courts use the per se requirement in a variety of ways. 141 For example, some courts employ a per se standard based upon the illegality of the proposed activity. 142 A few courts apply a combination of the per se and “necessarily results” tests. 143 Still other courts

135 Id. at 894. The Court of Appeals agreed with the trial court's finding that a garbage transfer facility was not a nuisance per se. Id. at 894. The court added:

This determination is correct inasmuch as the proposed facility under the facts cannot be classified as one which will be a nuisance at all times and under any circumstances regardless of its location or surroundings, such as a bawdy house operated in violation of the law. Id. at 894.

136 290 So. 2d 821 (1974). The defendant BWS Corporation proposed to bury the industrial waste in trenches fifteen feet deep by thirty feet wide by one hundred fifty feet long. Id. at 823. The waste would be covered by ten feet of clay. Id. The Louisiana court held that the defendant could operate its disposal site safely if it lined the trenches with impermeable material, as recommended by the defendant's own experts. Id. at 824–25. Thus, the court enjoined the defendant to conduct its operations in compliance with its experts' recommendations. Id. at 825.

137 Id. at 825.

138 See supra note 64.

139 See supra notes 123–37.

140 See supra note 77.

141 See supra notes 79–93.

142 See supra notes 85–92 and accompanying text.

143 See supra notes 94–104.
grant injunctions for non-per se situations and do so as a matter of fairness according to the facts in the case.\textsuperscript{144} Often courts use a laundry list of other variables to decide anticipatory nuisance cases, such as definiteness of injury, immediacy of injury, and the severity of injury.\textsuperscript{145}

For plaintiffs to view anticipatory nuisance as a feasible and predictable doctrine, courts and legislatures must adopt a more coherent approach to its use. A restructuring of anticipatory nuisance standards is appropriate because injunctive relief based upon nuisance law can be an effective way to prevent threatened environmental harm, while affording defendants the opportunity to conform to higher standards of safety. Moreover, a restructuring is warranted because legislative efforts to codify the doctrine have failed to provide predictability and consistency in application.

IV. STATUTORY USE AND INTERPRETATION OF ANTICIPATORY NUISANCE

Currently, two states have statutes that provide injunctive relief for anticipatory nuisances: Alabama\textsuperscript{146} and Georgia.\textsuperscript{147} The statutes are remarkably similar. Yet, the differing judicial interpretations given to them by their respective state courts mirrors the uneven judicial interpretation of the common law doctrine.

Alabama state law provides: “[W]here the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a court may interfere to arrest a nuisance before it is completed.”\textsuperscript{148} On its face the statute resembles the same definition of anticipatory nuisance developed in the early case of \textit{Adams v. Michael}.\textsuperscript{149} That is, courts may enjoin an act that upon completion will obviously be a nuisance.\textsuperscript{150}

\textsuperscript{144} See supra notes 105–11.
\textsuperscript{145} See supra notes 112–37.
\textsuperscript{146} ALA. CODE § 6-5-125 (1975).
\textsuperscript{147} GA. CODE ANN. § 41-2-4 (1980) (formerly GA. CODE ANN. § 72-204).
\textsuperscript{148} ALA. CODE § 6-5-125 (formerly 7 § 1083).
\textsuperscript{149} 38 Md. at 123. In \textit{Adams}, the plaintiff homeowner sought to enjoin the defendant from building a felt-roofing factory. \textit{Id.} at 125. The plaintiff feared that dirt, odor, and smoke from the factory would render his property unusable. \textit{Id.} The court held that the allegations were too general for the court to conclude that the factory would be a nuisance. \textit{Id.} at 128–29. In the court’s opinion, the plaintiff needed to show the proximity of the factory to his own buildings, which combustible materials the defendant planned to use, and the quantity of smoke likely to be emitted from the factory. \textit{Id.}
\textsuperscript{150} \textit{Id.} at 129.
The Alabama statute, as well as the early definition, leaves plenty of room for creative interpretation. Alabama courts have disagreed as to the degree of certainty required by the statute. For example, the *Rouse v. Martin* court required "no reasonable doubt of injury."\(^{151}\) The *Bellview Cem. Co. v. McEvers* court used a negative approach by denying an injunction because the nuisance complained of was "dubious or contingent."\(^{152}\) Thus, the *Rouse* and *Bellview* courts interpreted the statute differently with regard to certainty of harm.

Alabama courts also established the kind of injury that would be appropriate for a prospective injunction. In *Clifton Iron Co. v. Dye*,\(^{153}\) for example, the court denied an injunction because the court found that while the washing of ores would constitute a nuisance, the resulting damages would be merely nominal.\(^{154}\) Similarly, in *Shell Oil Co. v. Edwards*,\(^{155}\) the decrease in property value to nearby residences because of a service station's proximity was an insufficient injury to merit a prospective injunction.\(^{156}\) Thus, some Alabama courts interpret the state's anticipatory nuisance statute to account for the extent of injury.

The Alabama Code does not on its face require a nuisance per se for a prospective injunction.\(^{157}\) Accordingly, most Alabama courts find that, if a contemplated structure or action will, by reason of location or circumstances be a nuisance per accidens and results in sufficient injury, it states a case for an injunction.\(^{158}\) At least one Alabama court, however, used a per se requirement.\(^{159}\) Thus, Ala-

\(^{151}\) 75 Ala. 510 (1883). In *Rouse*, the target of injunctive relief was the construction of a cotton gin to be built nearby the plaintiffs' houses. *Id.* at 513. The *Rouse* court found that the gin would cause smoke, odors, and noise, thereby creating a nuisance. *Id.* at 515.

\(^{152}\) 168 Ala. 535, 53 So. 2d 272 (1910). In *Bellview Cemetery*, the plaintiff landowners sought to enjoin the establishment of a cemetery near their property. *Id.* at 537, 53 So. at 273. The plaintiffs alleged that a cemetery built on such porous soil would eventually contaminate their land. *Id.* at 537, 53 So. at 273. The court held that the plaintiffs did not prove that the feared harm would result. *Id.* at 545–46, 53 So. at 275.

\(^{153}\) 87 Ala. 468, 6 So. 192 (1889).

\(^{154}\) *Id.* at 471–72, 6 So. at 193.

\(^{155}\) 263 Ala. 4, 81 So. 2d 535, cert. denied, 350 U.S. 885 (1955).

\(^{156}\) 263 Ala. 4, 81 So. 2d 535. In *Edwards*, residents of Birmingham wanted to prevent the defendant from building a filling station. *Id.* at 6, 81 So. 2d at 537. The plaintiffs, however, failed to prove any harm other than the decrease in property values. *Id.* at 8–9, 81 So. 2d at 539. Moreover, the court rejected the plaintiffs' argument that a filling station was a nuisance per se. *Id.* at 11, 81 So. 2d at 541.

\(^{157}\) ALA. CODE § 6-5-125 (1975).


\(^{159}\) Gilmore v. City of Monroeville, 384 So. 2d 1080 ( Ala. 1980). In *Gilmore*, property owners
bama courts exhibit some inconsistency with respect to whether the Alabama statute requires a nuisance per se.

Despite the existence of an anticipatory nuisance statute, Alabama courts have little guidance in deciding anticipatory nuisance cases. This lack of guidance is illustrated by the fact that the Alabama courts have had to fashion their own standards regarding both the certainty of harm and the weighing of the severity of the injury threatened, and have differed as to whether the statute requires a nuisance per se. Accordingly, the Alabama statute is in need of an overhaul to the same extent as the common law of other states with regard to anticipatory nuisance.

Georgia state law reads "[W]here the consequence of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed." This language is remarkably similar to the Alabama statute. The Georgia courts, like those in Alabama, have established criteria for certainty and sufficiency of injury. Georgia courts agree that mere anticipation or apprehension of injury from the operation of a business or from some other lawful activity is insufficient to warrant injunctive relief. The injury must be irreparable and certain to warrant the issuance of an injunction.

Like Alabama courts, Georgia courts have found it necessary to fill in the considerable gaps left by their state's anticipatory nuisance statute. Like the Alabama statute, the Georgia statute offers the state courts nothing more than a minimal common law definition of anticipatory nuisance. Accordingly, the Georgia statute needs to be more specific in order to achieve consistency and uniformity of application.

These codifications of anticipatory nuisance do little to avoid the ambiguity inherent in the common law doctrine. This is inevitable because the statutory language offers no clear standards or guidelines. It would be helpful for state legislatures to codify the doctrine along with specific standards of certainty of harm, level of harm, and so forth.

filed suit to enjoin the city of Monroeville from erecting a building to be used for fueling city vehicles. *Id.* The plaintiffs presented evidence that the operation of the public works shop would cause odors, noise, vermin, and traffic. *Id.* at 1081. The Alabama Supreme Court, however, refused to issue an injunction because the public works shop was not a nuisance per se. *Id.*

161 ALA. CODE § 6-5-125 (1975).
163 See *Farley v. Gate City Gas Light Co.*, 105 Ga. 323, 327, 31 S.E. 193, 198 (1898).
and some mention of a balancing of public and private interests. Given the ad hoc creation of standards of applicability by most state courts, only by codifying the doctrine can states achieve true predictability in anticipatory nuisance.

V. REHABILITATING THE ANTICIPATORY NUISANCE DOCTRINE

A. In Defense of Anticipatory Nuisance

The common law reluctance to embrace anticipatory nuisance stems from two primary criticisms of the doctrine. One criticism is that, if an anticipated harm is uncertain or contingent, it is unfair to assume that defendants will conduct their businesses or activities so as to create a nuisance. Courts are understandably hesitant to force industry to conform with the speculative future scenarios created by overly sensitive individuals. It is unrealistic to compel industry to conform to standards that may never be relevant.

In a great many situations, uncertainty of harm should be sufficient to quell anticipatory claims. For instance, in the early case of Adams v. Michael, a Maryland court denied an injunction to prevent the construction of a felt roofing factory because the allegations of harm were not specific or definite. Without full disclosure of specific factors that would cause the harm, and disclosure of the harm itself, there is no way to conclude that the factory would have constituted a nuisance to the plaintiffs.

Inability to project specific harm and its causes, however, is less of an obstacle today in the environmental context. Today, experts can predict with relative certainty the result of potentially harmful activities such as the disposal of hazardous wastes. The use of experts is evident in Salter v. BWS Corporation, in which a Louisiana court granted an injunction to prevent the defendant from building a disposal plant for acid and other chemicals. At trial the plaintiff relied on the testimony of a chemist, a sanitary engineer, a civil engineer, and an expert in water pollution to establish the probability of harm. The potential unfairness of enjoining an activity to pre-

164 In fact, most courts assume that the defendant will conduct the questioned activity so as not to create a nuisance. See supra note 74 and accompanying text.
165 38 Md. at 128.
166 Id. at 129.
167 290 So. 2d 821 (1974).
168 Id. at 825.
169 Id. at 829-24.
vent a plaintiff's vague notion of harm is thus removed when experts from the scientific and technological community testify to the specific and definite nature of the future harm.  

The second primary objection to anticipatory nuisance injunctions is that the plaintiff seeking the injunction will have an adequate remedy at law after the harm occurs. This argument is viable when the harm at issue will not result in permanent injury. Thus, if the plaintiff fears the odor resulting from the proposed garbage transfer facility will be harmful, it is not unreasonable to make the plaintiff wait until the odor materializes before enjoining the facility's use. When the injunction is finally issued, all the plaintiff has endured is a finite period of inconvenience and perhaps slight health impairment for which courts at law can award compensation.

There are occasions, however, particularly in the environmental law area, where a remedy at law cannot provide adequate compensation. Such occasions include catastrophic damage causing widespread impairment of health, permanent damage to natural resources, and latent damages which may or may not be detectable in later years.

Moreover, the anticipatory nuisance doctrine is not unduly harsh to defendants even when harm is not absolutely certain. Two arguments exist to support this view. First, certain types of environmental harm that are permanent and far-reaching warrant injunctive relief even if the harm is not certain. Courts' discussions of the importance of the level of harm have been cursory. As Justice Ryan's concurring opinion in Wilsonville asserts, the level of harm is a more important consideration than courts have recognized. Accordingly, because the policy of protecting the public from severe

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170 While expert testimony is invaluable for proving definiteness of harm, the cost of procuring experts is prohibitive. Accordingly, this expense discourages potential plaintiffs who cannot afford expert witnesses from bringing anticipatory nuisance suits.

171 See, e.g., Missouri v. Illinois, 180 U.S. 208, 244 (1900) (the defendant argued unsuccessfully that "the law furnishes a plain, adequate and complete remedy for this nuisance"); Olsen v. City of Baton Rouge, 247 So. 2d at 894 ("the general rule is that courts will not grant injunctions of anticipatory nuisances, the reason being that such relief is premature and the complaining party has available the possibility of obtaining injunctive relief if the facility once constructed and in operation is proven to be a nuisance in fact").

172 See Olsen v. City of Baton Rouge, 247 So. 2d at 893-94.

173 See, e.g., Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361, 363 (1882) (a remedy at law could not restore a pond, the land, and underground currents to their condition prior to the defendant's actions).

174 See, e.g., Village of Wilsonville v. SCA Services, 86 Ill. 1, 426 N.E.2d 824 (1981); see also Seacord v. People, 121 Ill. 623, 13 N.E. 194 (1887).

175 Village of Wilsonville v. SCA Services, 86 Ill. at 37-38, 426 N.E.2d at 842.
and permanent harm outweighs the hardship defendants may suffer from prospective injunctions, it is reasonable to stop defendants from risking a high degree of future harm. Such prospective injunctions are not overly harsh to defendants, but are rather the result of a thoughtful balancing of the interests involved.

Second, when used in the form of a qualified injunction, anticipatory nuisance is flexible so as to give defendants the opportunity to conform to satisfactory safety standards. This approach recognizes that anticipatory nuisance actions do not have to stifle industrial growth in order to ensure necessary public health safeguards.

Injunctive relief’s utility and flexibility in the environmental context are particularly evident in cases where courts issue qualified anticipatory injunctions for nuisances. A qualified injunction is one which a court issues contingent upon the defendant’s actions. Suppose, for example, a defendant planned to erect a building lacking an essential safety feature. A court might enjoin the defendant to continue building only if it remedies the defective aspect. Thus, if the defendant conforms to the court-ordered safety standard in the building of the structure, construction may continue. The qualified injunction’s utility is that it recognizes both the potential severity of prospective relief and the severe ramifications of some types of environmental harm. It allows defendants the opportunity to conform their plans with state of the art safety standards even though the proposed plan is legal.

In Cardwell v. Austin, the plaintiff wanted to enjoin the defendant from building a septic concentration tank on the defendant’s land. The Texas Court of Civil Appeals found that the proposed tank was too small and would not purify the sewage flowing into it. Such a tank would give off foul odors and create a nuisance. A septic tank of proper dimensions and construction, however, would emit only minimal odors. The court thus granted an injunction that did not enjoin perpetually the defendant from building a septic tank, but rather enjoined only construction of the tank as the defendant origi-
inally proposed. The defendant was still free to redesign and build a better and cleaner tank.

The import of compelling builders to conform to non-statutory safety standards is even more evident in Salter v. BWS Corporation. In that case the defendant planned to bury various kinds of industrial waste. The plaintiffs, fearing pollution of their wells and pond, sought an injunction. The Louisiana Supreme Court found that this waste disposal operation could be conducted safely; however, the consequences of failure to exercise great care to prevent the escape of poisonous materials were so serious that a qualified injunction was appropriate. The court enjoined the defendant from burying wastes according to the original plan, but left the defendant free to adopt a new disposal scheme that adhered to safety standards cited by the plaintiffs.

Another possible argument against expanded use of the anticipatory nuisance doctrine is that it is more appropriate for a legislature to set safety standards rather than rely on the expert witnesses called by parties in individual cases. Scientific recognition of the long-reaching effects of various industrial activities is, however, a constantly evolving process. It is unrealistic to expect legislatures to keep step with advancing technology. Anticipatory nuisance's utility is that it can fill in the gaps left when the legislature cannot keep pace with the rapid scientific recognition of harm.

The anticipatory nuisance doctrine can survive the traditional objections of uncertainty of harm and the adequacy of future relief. It is uniquely sensitive to environmental harm and flexible enough to avoid being unduly harsh to defendants. Moreover, anticipatory nuisance enables plaintiffs to act against environmental harm without having to wait for statutory recognition of that harm. Inconsistency of application, however, remains a drawback to expanded use of anticipatory nuisance. Therefore, courts and legislatures can and should fashion a coherent and practical construction of the doctrine in order to further its use.

B. Towards Fashioning A Standard Of Application

The most practical version to date of anticipatory nuisance is the "necessarily results" standard as applied in Koeber v. Apex-Albuq.
Phoenix Express.\textsuperscript{191} The "necessarily results" test enjoins proposed activities that necessarily result in a nuisance, or proposed activities where it is highly probable that a nuisance will result.\textsuperscript{192} This test avoids the rigidity of the approach used in City of Bowie v. Board of County Commissioners,\textsuperscript{193} which enjoined a proposed activity only if the activity was, in and of itself, illegal.\textsuperscript{194} Such a mechanical application of the nuisance per se standard fails to consider the irreparable damage that lawful activities can cause.\textsuperscript{195}

Conversely, a standard based upon "fairness," as used in Marlin v. Holloway,\textsuperscript{196} is defective because it allows too much flexibility. Fairness is an elusive concept and is susceptible to creative interpretation. Such a standard would offer little guidance to courts and litigants.

For a "necessarily results" test to be complete it must allow for a reasonable standard of certainty of harm. How probable must harm be to justify injunctive relief? Courts cannot make this judgment in a vacuum, but rather must consider the extent of harm as well. Court-fashioned standards fail to consider the anticipated harm's severity. This deficiency is highlighted aptly by Justice Ryan's concurring opinion in Wilsonville v. SCA Services.\textsuperscript{197} For a workable standard of anticipatory nuisance application, there must be a balancing between the probability of harm and the severity of anticipated harm. Courts should not ignore a moderate risk of catastrophic or widespread harm merely because it is not highly probable that such harm would result.

This Comment therefore recommends that courts and legislatures adopt a "necessarily results" version of anticipatory nuisance. It is important that courts allow for a reasonable standard of certainty of harm. Moreover, courts must balance certainty of harm with the severity of harm. Courts can construct a consistent and workable version of anticipatory nuisance through the application of the "necessarily results" standard.

These suggestions apply with equal weight to the state legislatures that have codified the anticipatory nuisance doctrine. To date, the

\textsuperscript{192} Id. at 5–6, 380 P.2d at 16.
\textsuperscript{194} Id. The Bowie court used a bordello as an example of an activity that was, in and of itself, a nuisance.
\textsuperscript{195} See supra notes 90–93 and accompanying text.
\textsuperscript{196} 192 S.W. 623.
\textsuperscript{197} 86 Ill. 1, 426 N.E.2d 824 (1981).
codified versions of the doctrine do little to avoid the ad hoc creation of standards by state courts. There is little point in having an anticipatory nuisance statute if it cannot offer guidance to courts and lawyers regarding its interpretation.

Therefore, this Comment suggests the following as a model anticipatory nuisance statute:

Where the consequences of an activity about to commence will necessarily result in a nuisance, or if it is highly probable that a nuisance will result, a court may enjoin the nuisance before the activity is completed.

Where the threatened harm is catastrophic, widespread, or irreparable, a court may enjoin the proposed activity even though it may be merely probable that the harm will occur.

A court may issue a qualified injunction when appropriate so as to allow a defendant to alter the proposed activity in conformity with such modifications as the court deems necessary, provided such modifications are sufficient to eliminate the potential for a nuisance.

This model statute offers the opportunity for consistent guidelines for applying the anticipatory nuisance doctrine. It allows for a balancing of severity of harm with certainty of harm, and it explicitly offers courts the option of issuing a qualified injunction. Admittedly, phrases like "highly probable," "probable," and "necessarily" are inexact. More narrowly tailored language, however, may be impractical. This model statute offers more predictability while allowing courts the flexibility to decide the gamut of factual situations.

VI. CONCLUSION

While anticipatory nuisance is a potentially viable route to prevent severe environmental damage, it is not surprising that plaintiffs use it infrequently. While traditional criticisms of the doctrine wield less force today, both statutory and common law offer little predictability and stability. Because the utility of a practicable anticipatory nuisance theory is considerable, however, a reassessment of the doctrine by environmental lawyers, courts, and legislatures is appropriate.

This Comment recommends a "necessarily results" test that accounts for levels of both certainty and harm. Such a test utilizes the flexibility inherent in the doctrine of anticipatory nuisance.