Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes

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INTRODUCTION

Leaking underground storage tanks (USTs)\(^1\) containing petroleum products are now recognized to be a widespread problem, causing threats to health and welfare,\(^2\) endangering the environment,\(^3\) and forcing numerous entities to incur unexpected cleanup costs.\(^4\) There are currently 1.4 million USTs in the United States being used to store retail motor fuel and chemical products; 84% of all tanks are bare steel, and 60% of all leaks result from corrosion.\(^5\) In establishing an extensive UST regulatory scheme in the Resource Conservation and Recovery Act (RCRA),\(^6\) Congress determined that: "[D]isposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." Furthermore, Congress found that: "[U]nderground storage tanks are considered the source or probable source of a substantial number of groundwater contamination cases."\(^7\)

In May 1986, the Environmental Protection Agency (EPA) released the results of a study that found that 35% of the USTs tested

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1. An "underground storage tank" is defined in the Resource Conservation and Recovery Act (RCRA) as: "[A]ny one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground." 42 U.S.C. § 6991(1) (1988 & Supp. 1993).

2. See infra notes 132-33 and accompanying text.

3. See infra notes 135-36 and accompanying text.

4. See infra notes 13-14 and accompanying text.


7. Id. § 6901(b)(2) (1988).

were leaking. Fifty-five percent of the leaks discovered in the survey involved leakage of motor fuel into the groundwater, and 75% involved leakage into the surrounding soil. Similarly, in 1991, EPA officials observed:

Over 2 million USTs containing hazardous substances or petroleum products are in use at more than 750,000 sites in the United States. Over 100,000 confirmed leaks have already been discovered at these sites. Additional leaks will probably be discovered in the near future at more than 300,000 other sites. Products released from leaking tanks not only threaten groundwater but also damage sewer lines and buried cables, poison crops, and lead to sudden fires and explosions.

Approximately 33 percent of existing motor-fuel storage tanks are over 20 years old or of unknown age and nearing the end of their useful lives. About 80 percent of existing tank systems are constructed of uncoated steel, which makes them likely to corrode and perforate. Many old tank systems have already developed leaks or will do so soon unless they are upgraded or removed.

The State of California has more than its fair share of contamination problems resulting from leaking USTs. It is estimated that approximately 170,000 USTs are located in the state, and of those more than 20 years old, 50% may be leaking.

The environmental and health problems associated with leaking USTs have led both Congress and the California Legislature to vest federal and state officials with the power to force current property owners to clean up the soil and groundwater contamination caused by leaking USTs.

A property owner ordered by government agencies to remediate UST contamination often faces intimidating compliance costs. The regulatory system disfavors owners with limited financial resources. Particularly galling to many owners is the fact that they did not know that either the tank or the contamination existed at the time they purchased their property.

10. Id. at 263.
13. See infra notes 17-19, 28 and accompanying text.
A landowner with limited resources has a significant financial incentive to attempt to shift either the costs of remediation, or the responsibility for the remediation itself, to other parties, especially to the parties who originally buried and maintained the USTs. Unfortunately, none of the federal or state environmental statutes provides an adequate means for owners of property contaminated by leaking USTs to recover cleanup costs or to obtain injunctions.

This article focuses on California nuisance law and its role in plugging the statutory gap. This state's nuisance law is especially progressive in its provision of relief to property owners burdened with contamination from leaking USTs caused by prior owners. California's development of nuisance law doctrines to deal with leaking UST contamination problems provides a valuable national precedent.

This article concludes that, under California law, soil and groundwater contamination caused by a leaking underground petroleum storage tank may often constitute a public nuisance, a public nuisance per se, and a private nuisance. The authors of the article believe that prior owners who buried or maintained the tanks can be compelled to abate the contamination, regardless of how long ago they divested themselves of title. In addition, prior owners should be held liable for environmental testing costs, remediation costs, and other consequential damages caused by the nuisance they created or maintained.

This article discusses how a current owner may bring a public and private nuisance action against a prior owner of the property for abatement of soil and groundwater contamination and for damages resulting from such contamination—remedies that are often unavailable to the owner under current federal and California environmental statutes.

Part I briefly describes the limitations of existing environmental statutes to provide relief to an innocent owner of land contaminated by a leaking UST.

Part II discusses how a landowner may use current California public nuisance case law against prior owners when her property has been contaminated by leaking underground petroleum storage tanks. This part describes the two nuisance per se tests that apply in California and analyzes why contamination caused by leaking petroleum storage tanks may be a public nuisance per se under both tests. It also explains how a private owner may meet all of the required elements for bringing a public nuisance per se action against a prior owner.

14. See, e.g., Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796 (Ct. App. 1993) (involving private nuisance and trespass actions brought by the current owner/purchaser against the seller and the seller's lessee, for damages and remediation costs associated with a leaking petroleum UST on the property).
Part III discusses the specific common law bar against private nuisance suits against prior owners and details the sharp departure of recent California court decisions from that line of case law in the context of leaking USTs.

Finally, part IV discusses the advantages and drawbacks of nuisance actions against prior owners. It describes how landowners who bring public nuisance abatement actions avoid many of the limitations that litigants encounter in seeking relief under federal and state environmental statutes, and similarly prevail over many of the defenses available in private nuisance actions or in public nuisance actions solely seeking damages.

I
LIMITATIONS OF STATUTORY REMEDIES

Several federal and state statutory schemes provide some degree of relief to landowners required to clean up properties contaminated by hazardous wastes when prior owners of the property caused the contamination. As discussed below, however, these statutory actions have some ambiguities and disadvantages.

Specifically, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 15 while otherwise living up to the "comprehensive" part of its name, expressly excludes petroleum products from its ambit. 16 The Resource Conservation and Recovery Act contains no such exclusion and usually applies to leaking USTs. Nonetheless, RCRA is of limited utility for plaintiffs, principally due to its procedural complexities, its limits on injunctive relief, and its bar on damages. California statutes prevent citizens from suing over leaky USTs unless authorized to do so by the state and contain a petroleum exclusion similar to CERCLA’s.

A. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Congress enacted CERCLA “to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.” 17 As part of this comprehensive scheme, CERCLA created a cause of action for private parties who incur hazardous waste cleanup costs against statutorily defined responsible par-

16. See infra notes 22-27 and accompanying text.
ties. Parties liable under the statute include any prior owners or operators of a property who owned or operated the property when hazardous substances were disposed of there.

To establish a CERCLA private cost recovery claim against a prior owner of the plaintiff's property who installed or maintained a leaking UST, the plaintiff must prove three elements: (1) that the waste disposal site is a "facility" under CERCLA; (2) that a "release" or "threatened release" of a "hazardous substance" has occurred; and (3) that such release has caused the plaintiff to incur response costs that are "consistent with the national contingency plan." An owner of property with UST contamination problems caused by prior owners or operators would seemingly have no difficulty in establishing these prerequisites. Unfortunately, other provisions of CERCLA limit the efficacy of a private cost recovery action.

First, CERCLA contains a petroleum exclusion that bars many plaintiff landowners from recovering. Causes of action under CERCLA only apply to releases of contaminants that fall within CERCLA's definition of "hazardous substances." The definition of hazardous substance explicitly excludes the following:

[P]etroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance [by EPA], and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

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20. Wiegmann & Rose Int'l Corp., 735 F. Supp. at 959 (applying § 9607(a)).

21. CERCLA defines a facility, in pertinent part, as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9) (1988). This would include property with a leaking UST. The term "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." Id. § 9601(22). Hazardous substances leaking from a UST are generally held to constitute a release. See, e.g., Emhart Indus. v. Duracell Int'l Inc., 665 F. Supp. 549, 574 (M.D. Tenn. 1987).


23. Id. See generally Cose v. Getty Oil Co., 4 F.3d 700, 704-05 (9th Cir. 1993) (discussing CERCLA's petroleum exclusion).
This petroleum exclusion often exempts situations involving petroleum products leaking from a UST from CERCLA's ambit. Although there is no absolute rule as to the scope of the exclusion, federal courts have generally applied the exclusion to unadulterated petroleum and its constituents. Courts in the Ninth Circuit have held that the petroleum exclusion extends to contamination resulting from UST leaks of unadulterated refined and unrefined gasoline, as well as to petroleum-laden soil surrounding a leaking UST.

Another problem with the utility of CERCLA for private landowners with leaking USTs is that its remedies are limited to out-of-pocket costs. First, injunctive relief is unavailable to private plaintiffs.


25. Federal courts have held that the petroleum exclusion is limited and does not apply in three general situations. First, the exclusion does not cover waste oil containing CERCLA hazardous substances that are not petroleum constituents. See Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1384 (E.D. Cal. 1991) ("[W]aste oil containing CERCLA hazardous substances does not fall under the CERCLA petroleum exclusion.").

Second, the exclusion does not apply to contamination involving petroleum constituents that are CERCLA hazardous substances and that exist in an amount exceeding the amount that would have occurred in petroleum during the refining process. See id. at 1385; see also Southern Pac. Transp. Co., 790 F. Supp. at 984 (holding that the petroleum exclusion covers all forms of petroleum, including CERCLA-listed hazardous substances that are indigenous to petroleum or that are normally added to petroleum during the refining process).

Third, the petroleum exclusion does not apply to crude oil tank bottoms. Case, 4 F.3d at 705-08.

For more discussion of this matter, see generally David E. Bellack, Distilling a Useful Petroleum Exclusion, 6 Nat. Resources & Env't 25, 54 (1992).

26. See Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989) ("We rule that the petroleum exclusion in CERCLA does apply to unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA.").

27. See Southern Pac. Transp. Co., 790 F. Supp. at 986 ("[The Court rejects the Plaintiffs' argument that the mixing of petroleum with soil somehow removes the protection of the petroleum exclusion . . . . Were the Court to embrace Plaintiffs' reasoning, the petroleum exclusion would be gutted because every underground storage tank that leaked petroleum would produce petroleum-laden soil, and thereby trigger CERCLA."); see also Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 982 (E.D. Mich. 1991) (including within the petroleum exclusion contamination from a gasoline station's leaking USTs), aff'd, 973 F.2d 1296 (6th Cir. 1992).

A petroleum exclusion is also found in California's Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA), Cal. Health & Safety Code §§ 25300-25395 (West 1992 & Supp. 1994), which establishes state authority to clean up hazardous substance releases, compensates persons injured by exposure to hazardous substances, and provides funds for payment of the state's mandatory 10% share of cleanup costs under CERCLA. The HSAA also excludes refined petroleum from its definition of hazardous substances. See infra notes 99-101 and accompanying text.
CERCLA entitles the federal government to injunctive relief "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment" due to a release of hazardous substances.\textsuperscript{28} However, the injunctive relief that CERCLA grants to the federal government under the "imminent and substantial endangerment" provision is not available to state governments\textsuperscript{29} or private parties.\textsuperscript{30} Thus, a current landowner cannot invoke this provision to require a prior owner or operator who buried or maintained a leaking UST on the property to clean up contamination caused by the UST. Moreover, other damages, such as punitive damages or damages for lost rental value, are not available under CERCLA.\textsuperscript{31}

These factors effectively block most property owners from using CERCLA as a means to compel prior owners to remediate contamination caused by leaking petroleum USTs or as a grounds to recover the cost of such remediation.

\textbf{B. The Resource Conservation and Recovery Act (RCRA)}

RCRA represents "an attempt by Congress to deal with problems posed by the general disposal of wastes in this country, as well as the particular problems associated with the disposal of hazardous substances."\textsuperscript{32} In general, RCRA authorizes EPA to identify hazardous

\textsuperscript{28}See 42 U.S.C. § 9606(a) (1988).
\textsuperscript{29}New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985) (holding that injunctive relief under CERCLA was not available to states); see Manor Care, Inc. v. Yaskin, 950 F.2d 122, 126-27 (3d Cir. 1991) (stating that, while CERCLA § 106(a) does not authorize a state to seek relief in federal court to abate a covered release of a hazardous substance, a state may seek relief under state law).

[While this Court acknowledges the fact that CERCLA does not provide private litigants with a cause of action by which they may require others to clean up hazardous sites, it nevertheless does not prohibit other forms of injunctive relief to private litigants. Other forms of injunctive relief could be granted to compel defendants to 'comply with their obligation,' which may be limited to simply reimbursing plaintiff for 'necessary costs.']

\textit{Id.}

\textsuperscript{31}See Daigle v. Shell Oil Co., 972 F.2d 1527, 1535 (10th Cir. 1992) (stating that private damages including medical expenses are not available under CERCLA); Ohio v. United States Dep't of the Interior, 880 F.2d 432, 474 (D.C. Cir. 1989) (discussing CERCLA's provision allowing punitive damages where a potentially responsible party fails to comply with a remedial action order). In comparison, a much wider range of damages are available in tort actions. See infra note 107 and accompanying text.

\textsuperscript{32}United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1376 (8th Cir. 1989).
wastes, promulgate standards for transporters of hazardous wastes and operators of hazardous waste facilities, and issue permits for the operation of hazardous waste disposal facilities. Subchapter IX of RCRA constitutes the primary federal legislation designed to deal with the UST problem. Additionally, RCRA includes citizen suit provisions that may provide some relief to innocent landowners burdened with leaking USTs. Private rights of action under RCRA's citizen suit provisions, however, are limited in both scope and remedy.

1. RCRA Citizen Suit Provisions

Unlike CERCLA, RCRA specifically authorizes a private plaintiff to obtain injunctive relief, in specified circumstances, to compel a defendant to remediate contamination caused by the defendant's activities. RCRA includes two provisions for actions by private citizens seeking such injunctive relief.

First, section 6972(a)(1)(A) permits “any person” to “commence a civil action on his own behalf... against any person alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA].” Subsection (a)(1)(A) citizen suits are similar to the citizen suit provisions in the Clean Air Act and the Clean Water Act.

A citizen suit based on subsection (a)(1)(A) must contain allegations of either “continuous or intermittent violations” to state a

33. Id. at 1377.
38. See id. § 7604 (1988).
Violations that occurred prior to the enactment of RCRA in 1976 are not actionable. Moreover, "wholly past" violations of RCRA are not actionable under subsection (a)(1)(A). However, if a defendant's post-1976 conduct caused a condition in which there is a current "disposal" (i.e., an ongoing "leaking" of hazardous substances), a continuous or intermittent violation of RCRA may exist. This may occur even if the defendant is no longer the owner or operator of the contaminated property.


41. See Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1158-59 (9th Cir. 1989) (holding that an oil company did not violate any standard that became effective pursuant to RCRA where the oil company's relevant operations ceased in 1972, four years prior to RCRA's enactment); Coburn v. Sun Chem. Corp., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,256 (E.D. Pa. Nov. 9, 1988) (holding that the prior owners' RCRA violations were wholly past since these owners had not operated or owned the site since 1986).

42. Coburn, 19 Envtl. L. Rep. (Envtl. L. Inst.) at 20,256; see, e.g., Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1315 (2d Cir. 1993) ("This claim alleges a 'wholly past' RCRA violation and is dismissed."); Harris Bank Hinsdale, 1992 WL 396295 at *2 (dismissing a claim against a defendant who was "no longer either an owner or operator of the tanks").

43. "RCRA includes in its broad definition of 'disposal' the continuous leaking of hazardous substances." ACME Printing Ink Co., 812 F. Supp. at 1512 (discussing 42 U.S.C. § 6903(3)).

44. See Fallowfield Dev. Corp. v. Strunk, No. CIV.A.89-8644, 1993 WL 157723, at *14 (E.D. Pa. May 11, 1993). In Fallowfield, the court stated that:

'Because improperly disposed of hazardous waste remains a remediable threat to the environment, this Court believes that Congress intended to allow citizen suits under section 6972 of RCRA for past violations where the effects of the violation remain remediable. To conclude otherwise would allow an owner or operator of a hazardous waste facility to avoid liability under section 6972 by claiming that the last improper disposal of hazardous waste prior to the commencement of the suit was the last disposal, making the violations wholly past.'

Id. (quoting Fallowfield Dev. Corp. v. Strunk, No. CIV.A.89-8644, 1990 WL 52745, at *11 (E.D. Pa. 1990)); accord Gache v. Town of Harrison, N.Y., 813 F. Supp. 1037, 1041-42 (S.D.N.Y. 1993) ("[T]he disposal of wastes can constitute a continuing violation as long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable."); ACME Printing Ink Co., 812 F. Supp. at 1512 ("[The] leaking of hazardous substances may constitute a continuous or intermittent violation of RCRA.").

In 1984 RCRA was amended to add a second, and relatively unusual citizen suit provision in section 6972(a)(1)(B). In an attempt to "invigorate citizen litigation," Congress permitted citizen suits against the following parties:

Any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Unlike subsection (a)(1)(A) citizen suits, which depend upon a violation of a RCRA standard, subsection (a)(1)(B) citizen suits do not require a violation of a RCRA standard or order. In essence, subsection (a)(1)(B) represents a codification of common law public nuisance.

This second type of citizen suit parallels the right to seek injunctive relief that is granted to EPA in section 6973 of RCRA. Indeed, section 6972(a)(1)(B) citizen suits were intended to augment, not replace, EPA's authority to commence an action to abate an imminent and substantial endangerment to health or the environment under sec-


47. Although other federal environmental statutes permit the EPA Administrator to abate an "imminent and substantial endangerment" to health and the environment, see, e.g., Safe Drinking Water Act, 42 U.S.C. § 300i (1988); Clean Water Act, 33 U.S.C. § 1364 (1988), only RCRA permits private plaintiffs to pursue such actions, see ADAM BABICH, ALI-ABA, THE FEDERAL LAW OF ENVIRONMENTAL PUBLIC NUISANCE: CITIZEN IMMEDIATE HAZARD SUITS UNDER RCRA 987, 989 (1993).


50. See supra notes 37-45 and accompanying text.


52. See Middlesex County Bd. of Chosen Freeholders v. N.J., 645 F. Supp. 715, 721-22 (D.N.J. 1986) ("The legislative history notes that the amendment [to § 6972(a)] was meant to be like those in other environmental statutes . . ., all of which are imminent and substantial endangerment provisions, and to act as a codification of 'common law public nuisance remedies.'").

53. 42 U.S.C. § 6973 (1988); see Middlesex County Bd. of Chosen Freeholders, 645 F. Supp. at 721 ("[T]his recent amendment to § 7002 [42 U.S.C. § 6972] is designed to provide a private means of obtaining the same relief that the EPA Administrator has previously been authorized to seek under RCRA by § 7003 [42 U.S.C. § 6973].").
Like section 6973 suits, actions under section 6972(a)(1)(B) may be based on past actions. In order to obtain injunctive relief pursuant to section 6972(a)(1)(B), a plaintiff must establish three elements: "(1) That the conditions at the site may present an imminent and substantial endangerment; (2) That the endangerment stems from the handling, storage, treatment, transportation or disposal of any solid or hazardous waste; and (3) That the defendant has contributed or is contributing to such handling, storage, treatment, transportation or disposal." These three requirements will be discussed in turn below.

a. "Disposal" of Petroleum Contaminants

A plaintiff must demonstrate that the dangerous condition stems from the "handling, storage, treatment, transportation or disposal of any solid or hazardous waste." Petroleum products leaking from a UST will most likely constitute a "disposal" of "solid wastes" pursuant to subsection (a)(1)(B).

RCRA defines the term "disposal" as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.


55. The legislative intent behind § 6973 is described as follows:

[This section] focuses on the abatement of conditions threatening health and the environment and not particularly human activity. Therefore, it has always reached those persons who have contributed in the past or are presently contributing to the endangerment . . . . The [1984] amendment reflects the long-standing view that generators and other persons involved in the handling, storage, treatment, transportation or disposal of hazardous wastes must share the responsibility for the abatement of the hazards arising from their activities. The section was intended and is intended to abate conditions resulting from past activities.


The mere creation of "solid waste" and the subsequent abandonment of it in the soil will satisfy the disposal requirement. Moreover, depositing and placing wastes into subsurface storage facilities, such as buried USTs, constitutes "disposal" if the "solid wastes" eventually enter the environment.

b. Petroleum Contamination Constitutes "Solid Waste"

While petroleum products leaking from USTs do not fall within the CERCLA definition of "hazardous substances," they do fall within the RCRA definition of "solid wastes." RCRA’s definition of "solid waste" includes: "[D]iscarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." Moreover, unlike CERCLA, RCRA does not contain any petroleum exemption. In fact, federal courts in California have recently held that petroleum products leaking through the soil can be "solid wastes."

59. See Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) (Zands I) ("[T]he mere creation of solid waste, and the subsequent abandonment of it in the ground, will support a cause of action under section 6972(a)(1)(B)."); see also Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993) ("[U]nder an imminent hazard citizen suit, the endangerment must be ongoing, but the conduct that created the endangerment need not be."); cf. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) ("Whether the context is one of prospective enforcement of hazardous waste removal under RCRA or an action for reimbursement of response costs under CERCLA, a requirement conditioning liability upon affirmative human participation in contamination equally frustrates the statutory purpose."). cert. denied, 113 S. Ct. 377 (1992).

60. See Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1278 (W.D.N.Y. 1990) (deeming a former gas manufacturing facility operator's deposit of hazardous substances into subsurface receptacles "disposal," even though the substances would not have been released but for subsequent construction activities by the purchaser of the property), aff'd, 964 F.2d 85 (2d Cir. 1992).

61. Under RCRA, soil contaminated by petroleum products leaking from USTs probably does not fall within the subset of solid wastes designated as hazardous wastes. The Code of Federal Regulations states: "A solid waste . . . is a hazardous waste if: (1) it is not excluded from regulation as a hazardous waste under § 261.4(b)." 40 C.F.R. § 261.3(a) (1990). Section 261.4(b)(10) states: "The following solid wastes are not hazardous wastes: . . . (10) Petroleum-contaminated media and debris that fail the test for the Toxicity Characteristic of § 261.24 (Hazardous Waste Codes D018 through D043 only) and are subject to the corrective action regulations under part 280 of this chapter." Id. § 261.4(b)(10) (1990).

62. 42 U.S.C. § 6903(27) (1988). In the regulations promulgated pursuant to RCRA, the term "discarded material" is defined as including any material that is "abandoned." 40 C.F.R. § 261.2(a)(2) (1993). A material is abandoned by being "disposed of." Id. § 261.2(b).


64. See, e.g., id at 1262. The Zands I court held that subsequent purchasers of property can maintain private civil actions under § 6972(a)(1)(B) against prior owners based on gasoline leakage from USTs on the property occurring while the property was in the hands of the prior owners. The court reasoned that the contamination of soil by gasoline leaking from USTs constitutes a prohibited disposal of a solid waste. "[G]asoline is no longer a
c. Defendant Must Be a “Contributor to” the Endangerment

A party may be liable under subsection (a)(1)(B) if it has “contributed” or is “contributing to the past or present . . . disposal” of a solid waste that presents an imminent and substantial endangerment to health or the environment. Since “RCRA is a remedial statute, which should be liberally construed,” courts have given a “‘broad, rather than a narrow, construction’” to the meaning of “contributed to.”

Therefore, a complaint under subsection (a)(1)(B) “need not explicitly allege control on the part of the . . . defendants.” Rather, a cause of action lies under this subdivision “if it alleges that the . . . defendants had the authority to control . . . waste disposal.” Moreover, if a plaintiff shows that the contamination occurred prior to the plaintiff’s acquisition of the property and names as defendants all prior owners and operators who may have contributed to the contamination, the burden of proving exactly when contamination or leakage occurred shifts to the defendants. Finally, since courts interpreting subsection (a)(1)(B) have applied RCRA retroactively, such citizen suits may be brought against persons who contributed to the contamination prior to the Act’s enactment in 1976.

useful product after it leaks into, and contaminates, the soil. . . . As a result, it must be said that the gasoline has been abandoned via the leakage (even if unintentional) into the soil.”

Id.

65. 42 U.S.C. § 6972(a)(1)(B). Defendants in subsection (a)(1)(B) citizen suits are not limited to property owners; they may also be lessees who are responsible for the contamination. See Petropoulos v. Columbia Gas of Ohio, Inc., 840 F. Supp. 511 (S.D. Ohio 1993) (holding that a lessee who buried and maintained USTs on property purchased by the plaintiff may be liable as a “person” under subsection (a)(1)(B)).


67. Id. (quoting Aceto Agric. Chem. Corp., 872 F.2d at 1383).

68. Id. at 1513.

69. Id. at 1512-13.


In Petropoulos v. Columbia Gas of Ohio, Inc., the court, relying on dicta in the Ninth Circuit Court of Appeals decision in Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1159 (9th Cir. 1989), held that: “[T]he language of Section 6972(a)(1)(A) authorizes only prospective relief while the language of Section 6972(a)(1)(B) provides for retroactive liability. . . . Thus, the language of Section 6972(a)(1)(B) provides a remedy for either past or present actions.” Petropoulos, 840 F. Supp. 511, 515 (S.D. Ohio 1993).
d. "Imminent and Substantial Endangerment"

While RCRA does not specifically define what constitutes an "imminent and substantial endangerment," federal courts have held that "[a]n "imminent hazard" may be declared at any point in a chain of events which may ultimately result in harm to the public.'"72 Furthermore, "it is not necessary that the final anticipated injury actually have occurred prior to a determination that an [i]mminent hazard' exists."73 The United States District Court for the Northern District of California recently found that a complaint pleading "merely potential harm" was sufficient to raise a section 6972(a)(1)(B) claim.74

In Lincoln Properties, Ltd. v. Higgins,75 the District Court for the Eastern District of California set forth the criteria establishing what constitutes an imminent and substantial endangerment where there is actual or potential groundwater contamination.

First, the court held that under section 6972 courts have the authority "to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."76 Therefore, section 6972's application is not limited to emergency situations. Rather, "endangerment" "means a threatened or potential harm and does not require proof of actual harm."77 In fact, actual harm need never occur.78

Second, the court addressed what constitutes "imminence," holding that "a finding of 'imminence' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present."79 The court clarified that "[a]n endangerment is 'im-

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73. Id.
76. Id. at *12 (emphasis added) (quoting Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991)).
77. Id.
78. Id.
79. Id. at *13.
minent’ if factors giving rise to it are present, even though the harm may not be realized for years.”80

Finally, the court addressed the word “substantial,” holding that the requirement that an endangerment be substantial “does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that ‘excess deaths’ will occur, or that a water supply will be contaminated to a specific degree).”81 Rather, “endangerment is substantial if there is some . . . risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken.”82

In light of the significant public health threat posed by leaking petroleum USTs,83 many innocent owners of property with leaking USTs should be able to meet the “imminent and substantial endangerment” test in a private RCRA action seeking an injunction, even if the potential injury to public health is only threatened. For example, in Zands II,84 the court held that there was an imminent and substantial endangerment to health or the environment when at least 3000 gallons of gasoline leaked from USTs into the soil and groundwater.85

2. Limitations of RCRA “Imminent and Substantial Endangerment”

Citizen Suits

Although there are benefits to bringing subsection (a)(1)(B) citizen suits under RCRA,86 there are significant disadvantages as well. First, subsection (a)(1)(B) does not authorize citizen suits against persons operating hazardous waste facilities within the limits of valid RCRA permits.87

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82. Id. Other courts have also recognized that the word “substantial” requires the court to have a reasonable cause for concern that a risk of harm exists. See Kaufman & Broad-South Bay v. Unisys Corp., 822 F. Supp. 1468, 1476 (N.D. Cal. 1993) (merely requiring potential harm); B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 95-97 (D. Conn. 1988) (finding imminent and substantial endangerment under CERCLA where harm was latent).

83. See supra notes 7-8, infra notes 132-33 and accompanying text.
85. Plaintiffs' expert stated that he believed 30,000 to 40,000 gallons of contamination had occurred, while defendant's consultant estimated only 3000 to 10,000 gallons. Id. at 808-09.
86. An important advantage of RCRA citizen suits is that, under RCRA’s provisions, a court has discretion to award litigation expenses, including attorney’s fees, to successful plaintiffs. 42 U.S.C. § 6972(e) (1988); see, e.g., Orchard Lane Road Ass'n v. Pete Lien & Sons, Inc., No. 93-1245, 1994 WL 18031, at *1-2 (10th Cir. Jan. 24, 1994).
87. 42 U.S.C. § 6972(a)(1)(B); see also Greenpeace, Inc. v. Waste Technologies Indus., 9 F.3d 1178, 1181 (6th Cir. 1993); cf. Palumbo v. Waste Technologies Indus., 989 F.2d 156,
Second, plaintiffs bringing a subsection (a)(1)(B) citizen suit are limited to equitable relief. Courts have held that damages are not available under this citizen suit provision. This bars any recovery of damages for costs that private plaintiffs may have incurred (either voluntarily or as a result of governmental compulsion) in testing or remediating a site.

Third, the standing requirements of a subsection (a)(1)(B) citizen suit may block many innocent landowners burdened with leaking USTs from using this provision. While "any person" may bring a subsection (a)(1)(B) citizen suit, private plaintiffs must be "genuinely acting as private attorneys general rather than pursuing a private remedy." However, one court has stated that a plaintiff may seek remedies that benefit itself as well as the general public.

Fourth, a subsection (a)(1)(B) citizen suit can be procedurally burdensome, especially since a Notice of Intent to file a RCRA action must be served ninety days prior to the commencement of the action on EPA, on the state where the leaking UST is located, and on every defendant to be named in the action. The primary purpose of RCRA's notice requirement is "to give the EPA an opportunity to

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90. See Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 337 (4th Cir. 1983) (discussing RCRA citizen suits prior to the enactment of subsection (a)(1)(B)); Fallowfield Dev. Corp., 1993 WL 157723, at *13. The majority of courts that have interpreted the citizen suit provision in § 6972(a)(1)(B) "have determined that relief is appropriate where the individual plaintiff is acting as 'a private attorney general' on behalf of the community or the general public." Fallowfield Dev. Corp., 1993 WL 157723, at *13.

91. See ACME Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1510 (E.D. Wis. 1992). In Acme, a company that was potentially liable for cleanup of a former landfill brought suit against other potentially liable parties under subsection (a)(1)(B). The court stated that it was "aware of no policy or language within § 6972 which prevents a party from seeking remedies which are to its benefit as well as the benefit of others." Id.

resolve issues regarding the interpretation of complex environmental standards by negotiation, unhindered by the threat of an impending private lawsuit,' and thereby reduce the volume of costly private environmental litigation."93 The 90-day notice requirement does not apply, however, where there are violations of RCRA hazardous waste management and disposal standards.94 The notice requirement provides an early warning to defendants who may seek ways to avoid or delay liability through bankruptcy or other imaginative strategies. The requirement also delays the initiation of a suit by a landowner who is often already under governmental regulatory pressure to remediate contamination.

Fifth, a citizen plaintiff may not bring a private RCRA suit if either EPA or the state is already taking action to "restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment."95 For many reasons, a private litigant may be dissatisfied with the diligence or result of governmental litigation. Indeed, the governmental actor often may focus on the present landowner, who presents the most obvious target from whom to compel remediation.

Thus, although a landowner can invoke RCRA's citizen suit provisions to compel a prior owner to remediate UST petroleum contamination constituting an "imminent and substantial endangerment to health or the environment," the statutory limitations on remedies and the hurdles that a private plaintiff must overcome can be prohibitive.

C. California Hazardous Waste Laws

California's hazardous waste cleanup laws do not contain any citizen suit provisions like those found in CERCLA and RCRA.96 Rather, privately incurred cleanup costs are only recoverable in actions for contribution or indemnity under the Hazardous Substance Account Act (HSAA) under limited circumstances.97 The California statutes do not authorize private parties to seek injunctive relief.98

94. See 42 U.S.C. § 6972(b)(2)(A) (referencing provisions found in subchapter III of RCRA that establish national hazardous waste management and disposal standards).
95. Id. § 6972(b)(2)(B)-(C).
96. See California's Hazardous Waste Control Act, CAL. HEALTH & SAFETY CODE §§ 25100-25250.25 (West 1992 & Supp. 1994), which provides state "cradle to grave" regulation of hazardous wastes, in coordination with the federal RCRA. See also California's Hazardous Substance Account Act, CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1992 & Supp. 1994), which is analogous to CERCLA.
98. Id.
Further, a petroleum exclusion under the Hazardous Substance Account Act excludes from the definition of "hazardous waste" "crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance." The California Court of Appeal for the Second District recently held that the petroleum exclusion makes the HSAA inapplicable to refined petroleum products, including gasoline. Moreover, the court reasoned that the petroleum exclusion in the state statute should have the same coverage as the similarly worded exclusion in CERCLA.

Thus, private actions based on the HSAA provide little relief to innocent landowners burdened with leaking USTs.

II

USING THE PUBLIC NUISANCE CAUSE OF ACTION TO ABATE SOIL AND GROUNDWATER CONTAMINATION CAUSED BY LEAKING USTs

A. Public Policy Favors Application of State Nuisance Laws To Fill Gaps in Federal and State Environmental Statutes

As the foregoing discussion illustrates, private landowners may encounter prohibitive substantive and procedural difficulties in relying solely upon existing federal and California environmental statutes to compel prior owners to remediate contamination caused by leaking petroleum USTs. However, in keeping with the maxim of California jurisprudence that "for every wrong there is a legal remedy," fundamental notions of fairness dictate that innocent private landowners burdened with leaking UST contamination caused by prior owners should be provided a remedy. This remedy should require prior owners and operators of a property who caused leaking UST contamination to remediate the contamination.

99. Id. § 25317 (West 1992).
100. KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 680-83 (Ct. App. 1994).
101. Id. In so holding, the court overruled the California Environmental Protection Agency, Department of Toxic Substances Control's longstanding interpretation that the HSAA exclusion did not apply to gasoline. Id. at 681-83.
102. California has been granted final authorization by EPA pursuant to 40 C.F.R. pt. 271 to operate its own hazardous waste program. 57 Fed. Reg. 32,726 (1992) (to be codified at 40 C.F.R. pt. 271 (1993)). Based on this authorization, private parties may bring RCRA § 6972(a)(1)(A) citizens' suits for violations of the state's current hazardous waste regulations. Cf. Sierra Club v. Chemical Handling Corp., 824 F. Supp. 195, 197 (D. Colo. 1993) (stating that since Colorado's hazardous waste program has been authorized by RCRA, the citizen suit provision in RCRA § 6972(a)(1)(A) may be applied to enforce Colorado's hazardous waste regulations.). Although there presently is no similar authority permitting RCRA section 6972(a)(1)(B) citizen suits for "imminent and substantial endangerment" caused by "disposal" of "solid waste" in violation of state hazardous waste disposal regulations, the authors believe such suits should be permitted as a logical extension of current authority.
103. CAL. CIV. CODE § 3523 (West 1970).
tion to compensate innocent current owners for damages caused by the contamination. As the United States Court of Appeals for the Seventh Circuit has aptly stated: "[T]he right of environmentally aggrieved parties to obtain redress in the courts serves as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside." 104

California nuisance law provides a legal mechanism well-tailored to make whole an innocent property owner who is injured by leaking UST contamination caused by a prior owner of the property. 105 While relief under statutory remedies is limited, 106 if a responsible prior owner is found liable under nuisance law, the injured landowner may, in addition to abatement, be able to recover damages caused by the contamination, such as loss of use or rental of the property, and loss of property value incurred because of the stigma placed on the property by the contamination. 107

B. California Nuisance Law

California nuisance law is a "creature of statute." 108 The general nuisance statute, Civil Code section 3479, defines a "nuisance" as:

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . . 109

The statutory definition in section 3479 "is broad enough to encompass almost every conceivable type of interference with the enjoy-

104. Harrison v. Ind. Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1976).
105. See David R. Hodas, Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm, 16 ECOLOGY L.Q. 883, 887 (1989) ("[C]ourts and private citizens have an opportunity to transform the public nuisance doctrine into a powerful and influential common law tool that could fill regulatory gaps left by environmental statutes."); Comment, Hazardous Wastes: Preserving the Nuisance Remedy, 33 STAN. L. REV. 675, 691 (1981) ("[N]uisance law supplements limited or ineffective regulatory programs and should be retained.").
106. See supra notes 22-31, 87-95 and accompanying text.
ment or use of land or property.” Nonetheless, not every activity that is actually “offensive to the senses . . . so as to interfere with the comfortable enjoyment of life” has been held a nuisance by the courts. As professors Prosser and Keeton note:

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, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.

In order to practically utilize this ephemeral nuisance statute, the California courts have turned to the common law. Since the definition of nuisance in Civil Code section 3479 has been held “declaratory of the common law,” the practical application of section 3479 is only possible by dovetailing it with the common law requirements for a nuisance claim.

In fact, many California courts have utilized the common law balancing approach to determine whether a condition or activity constitutes a nuisance under the provisions of section 3479. Under this approach, the plaintiff must establish that the harm of a nuisance outweighs the benefits of the defendant’s conduct. In addition, the plaintiff must demonstrate that the injury is substantial and not nominal. Whether a particular use of land constitutes a nuisance must be determined on a case-by-case basis in light of all the circumstances. The relevant balancing factors include the priority of the use, the locality and surroundings of the property, the nature and extent of the

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110. Mangini I, 281 Cal. Rptr. at 833 (quoting Stoiber v. Honeychuck, 162 Cal. Rptr. 194, 201 (Ct. App. 1980)).
114. See, e.g., 1 Kenneth A. Manaster & Daniel P. Selmi, California Environmental and Land Use Practice § 1.02[1], at 1-13 (1994).
115. The common law balancing approach results in a finding of nuisance only where the harm of the alleged nuisance outweighs the utility of the nuisance-causing conduct. See Keeton et al., supra note 112, § 88A, at 630-31. However, conduct can still be a nuisance even if its utility outweighs its harm, “if a reasonable person would conclude that there was a feasible way, economically and scientifically, to avoid a substantial amount of the harm without material impairment of the benefits.” Id.
nuisance and the injury caused thereby, whether the nuisance is con-
tinual or occasional, and the number of people affected.118

Not only one who creates a nuisance, but also one who maintains
it, can be held responsible; one who assists in its creation or mainte-
nance can also be held responsible.119 The reason that each joint
tortfeasor is held responsible for the whole damage caused by a nui-
sance is "the practical unfairness of denying the injured person redress
simply because he cannot prove how much damage each did, when it
is certain that between them they did it all."120

C. California Public Nuisance Law

There are two fundamental types of nuisance in California. First,
a "public nuisance" is statutorily defined in Civil Code section 3480 as
a nuisance "which affects at the same time an entire community or
neighborhood, or any considerable number of persons, although the
extent of the annoyance or damage inflicted upon individuals may be
unequal."121 Second, a private nuisance is defined in Civil Code sec-
tion 3481 as "[e]very nuisance not included within the definition [of
public nuisance in section 3480]."122

118. See Shields, 316 P.2d at 13 ("Whether a particular use is a nuisance cannot be
determined by any fixed general rule; it depends upon the facts of each particular case,
such as the nature of the use, the extent and frequency of the injury, the effect upon the
enjoyment of health and property, and other similar factors."); McIntosh v. Brimmer, 230
P. 203, 204 (Cal. Ct. App. 1924) ("Whether or not a use which in itself is lawful is a nui-
sance depends upon a number of circumstances: locality and surroundings, the number of
people living there, the prior use, whether it is continual or occasional, and the nature and
extent of the nuisance and of the injury caused thereby. No hard and fast rule controls the
subject."); KEETON ET AL., supra note 112, § 88, at 630 (listing six of the many factors
weighed to determine whether the plaintiff or the defendant should be required to bear the
loss of substantial interference to the plaintiff from the defendant's reasonable conduct).

The so-called doctrine of coming to the nuisance is not a bar to a nuisance action in
California; rather, it is one of the factors to be considered by the court. See Hellman v. La
Cumbre Golf & Country Club, 8 Cal. Rptr. 2d 293, 297 (Ct. App. 1992); see also 11 B.E.
WITKIN, SUMMARY OF CALIFORNIA LAW Equity § 150 (9th ed. 1990); cf. Mangini I, 281
Cal. Rptr. 827, 836 (Ct. App. 1991) ("[W]e have no occasion to quarrel with the rejection
of the doctrine of 'coming to a nuisance.'").

119. Hardin v. Sin Claire, 47 P. 363, 364 (Cal. 1896) (holding liable in nuisance persons
who maintained an obstruction in a roadway); Selma Pressure Treating Co. v. Osmose
Wood Preserving Co., 271 Cal. Rptr. 596, 607 (Ct. App. 1990) (holding that a cause of
action existed against persons who assisted in and contributed to the creation of a nuisance
affecting soil and water); Shurpin v. Elmhirst, 195 Cal. Rptr. 737, 741 (Ct. App. 1983)
(holding liable in nuisance a contractor who caused water, mud, and debris to obstruct the
free use of the property), cited in Mangini I, 281 Cal. Rptr. at 834.

120. Ingram v. City of Gridley, 224 P.2d 798, 803-04 (Cal. Ct. App. 1950) (quoting
Summers v. Tice, 199 P.2d 1, 3-4 (Cal. 1948)).

121. CAL. CIV. CODE § 3480 (West 1970).

122. Id. § 3481 (West 1970). The common law also distinguishes between public and
private nuisances. The Restatement Second of Torts defines public nuisance as "an unreas-
sonable interference with a right common to the general public." RESTATEMENT (SEC-
Under section 3480, it has specifically been held that not every member of a community needs to be affected by a nuisance before it can be deemed a public nuisance. The determinative factor is not how many people are affected at the same time, but whether a nuisance affects a public right. Moreover, not all members of the public must be affected by a nuisance in the same way for it to be deemed a public nuisance.

The California courts have further held that a public nuisance may exist even if no actual injury to the public has yet occurred but the dangerous condition gives rise to an apprehension or threat of in-
jury. A prospective nuisance "may be enjoined, yet facts must be alleged to show the danger is probable and imminent."127

D. Soil and Groundwater Contamination Caused by Leaking USTs Constitutes a Public Nuisance

1. Contamination Caused by Leaking USTs Is Injurious to the Public Health

It has repeatedly been held that soil and groundwater contamination by toxic chemicals constitutes a public nuisance because it poses a potential harm to public welfare.128 As discussed above, in order to constitute a public nuisance, a nuisance must impinge upon a "right common to the general public."129 Groundwater contamination that is dangerous to public health infringes upon such a right.130 Indeed,

126. See Buchanan v. L.A. County Flood Control Dist., 128 Cal. Rptr. 770, 777 (Ct. App. 1976) (stating that a continuing flow of water and its effects were a dangerous condition constituting a nuisance); McIvor v. Mercer-Fraser Co., 172 P.2d 758, 762-63 (Cal. Ct. App. 1946) (holding that an excavation that had not caused any actual damage nevertheless was a dangerous and deleterious condition creating a nuisance).

Prosser and Keeton state that the remedy available may vary with the magnitude of the threat of harm:

One distinguishing feature of equitable relief is that it may be granted upon the threat of harm which has not yet occurred. The defendant may be restrained from entering upon an activity where it is highly probable that it will lead to a nuisance, although if the possibility is merely uncertain or contingent [the plaintiff] may be left to his remedy of damages until after the nuisance has occurred. KEETON ET AL., supra note 112, § 89, at 640-41 (footnote omitted).

Additionally, note the similarities to the amount of threatened harm that is allowable in a RCRA imminent and substantial endangerment suit. See supra part I.B.1.d.


128. See supra notes 7-8, infra notes 132-33 and accompanying text; see also Conrad G. Tuohey, Toxic Torts As Absolute Nuisances, 16 W. ST. U. L. REV. 5, 53 (1988) (asserting that "[i]t is hard to imagine any public nuisance more detrimentally affecting the public health and safety, than a toxic one").

129. See supra notes 121-25.

130. Groundwater contamination has often been held a nuisance. See Carter v. Chotiner, 291 P. 577, 578 (Cal. 1930) (stating, in the groundwater context, that "[t]here is no doubt that pollution of water constitutes a nuisance and in a proper case will be enjoined").

Moreover, groundwater contamination often constitutes a public nuisance. See Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 381 (Ct. App. 1993) (determining that pollution of water constitutes a public nuisance); Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 607 (Ct. App. 1990) ("[It does not] seem improper to characterize a nuisance as consisting of chemical products in the soil which are affecting, and threaten to affect to a much greater degree, the quality of water near Selma . . . ."); 1 MANASTER & SELMI, supra note 114, § 1.04[1]-[2], at 1-19 to -20; Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Mass. 1986) ("The right to be free of contamination to the municipal water supply is clearly a 'right common to the general public,' thus interference with that right would be a public nuisance."); Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1281 (W.D.N.Y. 1990) ("[T]he release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law.") (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985), aff'd, 964 F.2d 85 (2d Cir. 1992); cf. 9 HARRY D. MILLER & MARVIN B. STARR,
groundwater contamination that threatens public health constitutes a public nuisance even if such contamination currently exists only under a private plaintiff's property.\(^\text{131}\)

In most cases, private plaintiffs should be able to demonstrate that soil and groundwater contamination caused by petroleum products leaking from USTs is dangerous to public health and thus constitutes a public nuisance.\(^\text{132}\) One commentator notes:

Motor fuel contains benzene, a carcinogen, and xylene, a toxic chemical, as well as other hydrocarbons on the EPA list of organic priority pollutants.

The potential for damage to the environment from these leaks is obvious. The unchecked release of these substances into the soil and groundwater threatens both plant and animal life and, over time, the ecological balance in affected areas. Further, since approximately fifty percent of the United States population obtains drinking water from underground wells, there is also cause for concern about the risks to human health posed by such a high level of leakage.\(^\text{133}\)

\begin{quote}
CURRENT LAW OF CALIFORNIA REAL ESTATE 2d § 29:82, at 209 (1990) ("[A]ny significant release of hazardous substances generally will be a nuisance."). But see Donahue v. Stockton Gas & Elec. Co., 92 P. 196, 198 (Cal. Ct. App. 1907) (holding that contamination of soil and groundwater on the plaintiff's property is "not shared by the public at all" and therefore is not a public nuisance).

The authors believe that it is highly unlikely that a California court, in light of society's current knowledge and concern about releases of hazardous and solid wastes into the environment and the movement of such wastes in the soil and groundwater, would hold as the Donahue court did in 1907. See Westwood Pharmaceuticals, Inc., 737 F. Supp. at 1282. The court in Westwood Pharmaceuticals stated that: "Knowledge about the hazards to public health and to the environment posed by hazardous wastes is increasing constantly, and this court is not willing to assume that the New York law of public nuisance is too inflexible to meet the growing public need for avenues to address these hazards, including lawsuits where public interests are being protected through a cause of action brought by a private party." Id.

131. See Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 380-81 (holding that allegations that contamination in the form of heavy metals and other volatiles was found in the water table beneath the property supported a cause of action for public nuisance).

132. In United States v. Ottati & Goss, Inc., the New Hampshire district court defined public nuisance as "behavior which unreasonably interferes with health, safety, peace, comfort or convenience of the general community." 630 F. Supp. 1361, 1406 (D.N.H. 1985) (quoting Robie v. Lillis, 299 A.2d 155, 158 (N.H. 1972)). To constitute a public nuisance, the interference or harm complained of must be substantial, which means that it must be "in excess of the customary interferences a land user suffers in an organized society." Id. Additionally, the utility and harm of an activity must be balanced to determine whether it is a public nuisance. Id.

In Ottati & Goss, the court held that contamination of a facility's soil and groundwater by hazardous wastes that are undisputedly recognized as dangerous to the public health and safety constitutes a public nuisance: "Groundwater contamination and the harm that results certainly outweigh any economic benefit the defendants would gain from this operation." Id. at 1407.

133. Gauthier, supra note 9, at 263 (citations omitted). Gauthier also discusses the fire and explosion hazards associated with leakage of motor fuel. She reports, however, that the number of cancer cases expected each year from such exposure is low. Id.
In fact, even if the contaminants leaking from a UST only threaten injury to the public health, such a condition can be deemed a public nuisance.\textsuperscript{134}

2. \textit{Contamination Caused by Leaking USTs Is Injurious to the State's Natural Resources}

In addition to arguing that petroleum contamination from a leaking UST threatens public health, a plaintiff may assert that the leaking UST contamination injures the state's natural resources. In California acts injurious to the state's natural resources may constitute public nuisances.\textsuperscript{135} It has been established that unreasonable groundwater pumping may constitute a public nuisance because such pumping interferes with the common public right to use water.\textsuperscript{136} A direct analogy can be drawn between cases involving unreasonable pumping of groundwater and cases involving ground water contamination. Both occur on a single property, and both interfere with the public's right to use water; thus, both actions constitute public nuisances.

E. \textit{Soil and Groundwater Contamination Caused by Leaking USTs Constitutes a Public Nuisance Per Se}

1. California Nuisance Per Se Doctrine

California courts have established a special doctrine for certain public nuisances that are considered nuisances as a matter of law: the doctrine of nuisance \textit{per se}.\textsuperscript{137} Plaintiffs obtain several significant litigational advantages under the doctrine of nuisance \textit{per se}.\textsuperscript{138} See supra notes 126-27 and accompanying text.

\textsuperscript{134} See People v. K. Hovden Co., 8 P.2d 481, 482 (Cal. 1932) ("[T]he property right in the fish of our waters is in the state in trust for the whole people. This fact is not disputed nor is it denied that the use of excess quantities of edible fish in a reduction plant may be declared an actionable nuisance by the legislature because of its interference with the well-recognized property right of the People."); CEEED v. California Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315, 324 (Ct. App. 1974) ("The power of the state to declare acts injurious to the state's natural resources to constitute a public nuisance has long been recognized in this state."); Cal. Coastal Comm'n v. Alves, 222 Cal. Rptr. 572, 583 (Ct. App. 1986) (opinion ordered depublished (Apr. 24, 1986)) ("Contemporary environmental legislation such as the Coastal Act represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance."); see also Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 380 ("Pollution of water constitutes a public nuisance.").

\textsuperscript{135} See Bandini Petroleum Co. v. Superior Ct., 293 P. 899, 905 (Cal. Ct. App. 1930) ("Whenever a landowner exceeds this reasonable use [of groundwater] he is appropriating to himself which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480, Civil Code, is declared to be a public nuisance."), aff'd, 284 U.S. 8 (1931); cf. Henderson v. Wade Sand & Gravel Co., 388 So. 2d 900, 903 (Ala. 1980) (holding that nuisance law will apply where the defendant's activities on its land incidentally interfere with the plaintiff's use of groundwater).

\textsuperscript{136} Under the common law, a nuisance \textit{per se} is "an act, structure, or occupation, which is a nuisance at all times and under any circumstances, regardless of location or surroundings." 58 AM. JUR. 2D Nuisances § 18 (1989) (footnotes omitted); see Harrison v.
gation advantages if they can establish that a nuisance is a public nuisance as a matter of law (i.e., a nuisance per se or absolute nuisance\textsuperscript{138}), rather than a public nuisance as a matter of fact (i.e., a nuisance per accidens\textsuperscript{139}).

First, a court does not engage in a balancing of equities\textsuperscript{140} where a nuisance per se is involved; an order of abatement may issue without an allegation or proof of irreparable injury that outweighs the benefit of the nuisance-causing activity.\textsuperscript{141}

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Ind. Auto Shredders Co., 528 F.2d 1107, 1121-22 (10th Cir. 1976) ("Some activities, occupations, or structures are so offensive at all times and under all circumstances, regardless of location or surroundings, that they constitute 'nuisance per se.'"); Vickridge Homeowners Ass'n v. Catholic Diocese, 510 P.2d 1296, 1302 (Kan. 1973) (stating that a nuisance per se "is an act, instrument, or structure in which is a nuisance at all times and under any circumstances"); Bluemer v. Saginaw Cent. Oil & Gas Serv., 97 N.W.2d 90, 96 (Mich. 1959) ("A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.") (quoting 66 C.J.S. Nuisances § 3 (1950)); Koeber v. Apex-Albuq Phoenix Express, 480 P.2d 14, 15, 16 (N.M. 1963) ("A nuisance per se is generally defined as an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings . . ."). (quoting Denny v. United States, 185 F.2d 108, 110 (10th Cir. 1950)). See generally Keeton et al., supra note 112, § 88C, at 636-37.

138. See generally Keeton et al., supra note 112, § 88C, at 636-37 (discussing the meaning of absolute nuisance).

139. Nuisances "are sometimes classified as nuisances per se or at law, and nuisances per accidens or in fact." Bluemer, 97 N.W.2d at 95-96 (quoting 66 C.J.S. Nuisances § 3 (1950)). The difference between a nuisance per se and a nuisance per accidens is as follows: In a nuisance per se, "injury in some form is certain to be inflicted," while in a nuisance per accidens, "the injury is uncertain or contingent until it actually occurs." State ex rel. Cunningham v. Feezell, 400 S.W.2d 716, 719 (Tenn. 1966). The determination of whether something is a nuisance per se or a nuisance in fact is a question for the trier of fact. Hellman v. La Cumbre Golf & Country Club, 8 Cal. Rptr. 293, 297 (Ct. App. 1992).

140. See supra notes 115-18 and accompanying text for a discussion of the common law balancing test.

141. See City of Costa Mesa v. Soffer, 13 Cal. Rptr. 2d 735, 737 (Ct. App. 1992) ("Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.") (quoting McClatchy v. Laguna Lands Ltd., 164 P. 41, 44 (Cal. Ct. App. 1917)); accord Ex parte Schrader, 33 Cal. 279, 284 (1867) ("A nuisance per se is a nuisance which the Judge can declare to be such without inquiry into extrinsic facts; that is to say, nuisance by enumeration rather than by definition."); Bluemer, 97 N.W.2d at 96 ("The difference between a nuisance per se and one in fact is not in the remedy but only in the proof of it. In the one case the wrong is established by proof of the mere act and becomes a nuisance as a matter of law, in the other by proof of the act and its consequences.") (quoting 66 C.J.S. Nuisances § 3 (1950) (footnotes omitted)).

Specifically regarding statutorily defined nuisances, see City of Bakersfield v. Miller, 410 P.2d 393, 398 (Cal. 1966) ("The function of the courts in such circumstances is limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid."); cert. denied, 384 U.S. 988 (1966); People ex rel. Dep't of Pub. Works v. Adco Advertisers, 110 Cal. Rptr. 849, 852 (Ct. App. 1973) ("A legislatively declared public nuisance constitutes a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury."); cf. 11 Witkin, supra note 118, Equity § 123 ("Where the conduct or activity done does not fall within these established classes [of nuisances per se], the determination is made by the court by weighing the utility of the defendant's conduct against the gravity of the harm.").
Second, a defendant who created or maintained a nuisance \textit{per se} is indefinitely liable for its effect.\textsuperscript{142} Thus, there is no applicable statute of limitations for a nuisance \textit{per se}.

Third, a court has greater flexibility in fashioning an injunctive remedy to abate a nuisance \textit{per se}. If a condition constitutes a nuisance \textit{per se}, there is no requirement, unlike for a nuisance in fact, that the injunctive relief be limited only to those measures that are absolutely necessary to protect the lawful rights of the party seeking such injunction.\textsuperscript{143}

Current California cases appear to utilize two separate methods to determine whether a condition or activity constitutes a public nuisance \textit{per se}. First, a nuisance \textit{per se} occurs when an act or condition is specifically defined by statute or regulation as a nuisance.\textsuperscript{144} Under this "specific statute" method,\textsuperscript{145} courts do not undertake any balancing of equities, but simply determine "whether a statutory violation in fact exists, and whether the statute is constitutionally valid."\textsuperscript{146}

Second, even if an act or condition is not specifically designated a nuisance by statute, courts may apply the common law balancing approach and determine that a condition that falls within the scope of

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\textsuperscript{142} See McClatchy, 164 P. at 44 ("All parties to a nuisance \textit{per se}, he who creates it and he who maintains it, are responsible for its effect, without limitations of condition or time.").

\textsuperscript{143} In a long line of cases . . . it has been held that where the defendant's business is not a nuisance \textit{per se}, the scope of the injunction should be limited so as to not absolutely enjoin the defendant's entire business, if a less measure of restraint will afford the relief to which the plaintiff is entitled." Wade v. Campbell, 19 Cal. Rptr. 173, 178 (Ct. App. 1962); accord People v. Mason, 177 Cal. Rptr. 284 (Ct. App. 1981) (holding that because the defendants' business was not a nuisance \textit{per se}, the injunction "should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction"); Anderson v. Souza, 243 P.2d 497, 507-08 (Cal. 1952) (holding that where a nuisance exists, the relief granted should be confined to the elimination of the nuisance, "unless under the particular circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners"); Vowinckel v. N. Clark & Sons, 13 P.2d 733, 736 (Cal. 1932) (stating that the court would not enjoin the conduct of the defendant's business where it was not a nuisance \textit{per se}, if a smaller measure of restriction would afford the plaintiff relief); McCaslin v. City of Monterey Park, 329 P.2d 522, 528 (Cal. Ct. App. 1958); Morton v. Superior Court, 269 P.2d 81, 85 (Cal. Ct. App. 1954).

\textsuperscript{144} See City of Costa Mesa, 13 Cal. Rptr. 2d at 737 ("The legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance \textit{per se.}") (citations omitted); see, e.g., People ex rel. Dep't of Pub. Works, 110 Cal. Rptr. at 852. But cf. Fallen Leaf Protection Ass'n v. California, 120 Cal. Rptr. 538, 543 (Ct. App. 1975) (stating that, "even though something may not be a nuisance per se, it is still within the police power to declare it a nuisance for regulatory purposes").

\textsuperscript{145} The term "specific statute" is the authors'.

\textsuperscript{146} City of Bakersfield v. Miller, 410 P.2d 393, 398 (Cal. 1966), \textit{cert. denied}, 384 U.S. 988 (1966). The rationale given by the \textit{Miller} court is: "Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant." \textit{Id.}
\end{footnotesize}
section 3479 is a nuisance \textit{per se}.\footnote{See, e.g., Shurpin v. Elmhirst, 195 Cal. Rptr. 737, 741 (Ct. App. 1983) ("[T]he violation of section 3479 constitutes a nuisance \textit{per se}."); Portman v. Clementina Co., 305 P.2d 963, 968 (Cal. Ct. App. 1957) ("A violation of this section [3479] constitutes a nuisance \textit{per se}."); Curtis v. Kastner, 30 P.2d 26, 28 (Cal. 1934) ("The projecting eaves and rafter constituted an obstruction to the alleyway in the nature of a nuisance . . . . The obstruction in the case herein is \textit{per se} a wrongful encroachment on a public street."); People v. Amdur, 267 P.2d 445, 450-51 (Cal. Ct. App. 1954) (holding that any obstruction of public streets or sidewalks that is not temporary or not properly authorized by ordinance or otherwise \"constitutes a public nuisance \textit{per se}.\") L.A. Brick & Clay Prods. Co. v. City of L.A., 141 P.2d 46, 51 (Cal. Ct. App. 1943) (holding that facts demonstrating that the defendants sent impounded flood waters from public streets onto the plaintiff's private property alleged a nuisance \textit{per se}, which entitled the plaintiff to an injunction).} Essentially, the "section 3479" nuisance \textit{per se} method is a codification of the common law nuisance \textit{per se} approach.\footnote{Miller and Starr implicitly recognize both tests in their discussion of nuisance \textit{per se}: "Certain activities or conduct are declared by law to be nuisances \textit{per se} which can be enjoined without proof of their injurious nature or effect. For example, anything which unlawfully obstructs the free passage or use, in the customary manner, of any street is a nuisance \textit{per se}." 9 MILLER & STARR, \textit{supra} note 130, § 29:2, at 48. In support of this proposition, Miller and Starr cite \textit{Portman v. Clementina Co.}, which held that a violation of § 3479 constitutes a nuisance \textit{per se}. 305 P.2d at 968.} Under the section 3479 method, courts should adopt the common law approach to determine whether an activity or condition falling within the criteria in section 3479 is so injurious to the public that it is a nuisance wherever and whenever it exists.\footnote{Miller and Starr cite \textit{Portman v. Clementina Co.}, which held that a violation of § 3479 constitutes a nuisance \textit{per se}. 305 P.2d at 968.}


\footnote{See supra notes 137-39 and accompanying text. Although some California courts apparently adopted the common law approach to nuisances \textit{per se}, see, e.g., Allen v. Stowell, 79 P. 371, 372 (Cal. 1905), \textit{cited in Heil v. Sawada}, 10 Cal. Rptr. 61, 63 (Ct. App. 1960); Morton v. Superior Court, 269 P.2d 81, 85 (Cal. Ct. App. 1954); McClatchy v. Laguna Lands Ltd., 164 P. 41, 43-44 (Cal. Ct. App. 1917), current California courts are unable to determine the existence of a nuisance \textit{per se} solely on the basis of the common law, see \textit{City of Bakersfield}, 410 P.2d at 397 (citing People v. Lim, 118 P.2d 472, 476 (Cal. 1941)). Nonetheless, § 3479 itself is a codification and embodiment of common law nuisance principles. Levine v. City of L.A., 137 Cal. Rptr. 512, 515 ("The definition of nuisance which is included in section 3479 is declaratory of the common law . . . .").}

Although the provisions in § 3479 themselves do not describe the level of danger necessary for a finding that an activity or condition is a nuisance, courts are capable of determining that an activity is so injurious to public health or welfare as to amount to a nuisance whenever and wherever it exists. If the common law recognized such judicial power and ability, current California law should do the same.

\footnote{See generally 9 \textit{MANASTER \& SELMI}, \textit{supra} note 114, § 320.02, at 320-6 to -7 ("A condition created or maintained by a defendant is a nuisance \textit{per se} if the condition is a nuisance wherever and}
Consistent with the common law approach, a court deciding whether an activity constitutes a section 3479 nuisance *per se* should consider public policy as well as "the locality, the quantity, and the surrounding circumstances." The authors believe that soil and groundwater contamination caused by a leaking UST may, depending upon the nature and extent of the contamination, constitute a nuisance *per se* under both the specific statute and section 3479 methods.

2. *Petroleum-Contaminated Soil and Groundwater Constitute a Public Nuisance Per Se Under the "Specific Statue" Method*

As discussed above, the specific statute nuisance *per se* test would be met if petroleum products leaking from USTs is designated a nuisance by statute. In section 13050(m) of the Water Code (the Porter-Cologne Water Quality Control Act), a "nuisance" is defined as:

> (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
> (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
> (3) Occurs during or as a result of the treatment or disposal of wastes.

whenever it exists. . . . When a legislative determination has been made that a defined condition or use is a nuisance, that condition or use becomes a nuisance *per se.*") 11 WITKIN, *supra* note 118, Equity § 123 ("Certain kinds of conduct or activity are classed as nuisances by statute. Some of these, and others, have long been regarded as nuisances ‘per se,’ under settled case law.") (emphasis added); 58 Am. Jur. 2d *Nuisances* § 18 (1989).

150. *See, e.g.,* Jardine v. City of Pasadena, 248 P. 225, 228 (Cal. 1926) ("‘A well-conducted, modern hospital, even one for the treatment of contagious and infectious diseases, is not such a menace, but, on the contrary, one of the most beneficent institutions.’") (quoting San Diego Tuberculosis Ass’n v. East San Diego, 200 P. 393, 394 (Cal. 1921)); Judson v. L.A. Suburban Gas Co., 106 P. 581, 583 (Cal. 1910) ("A gas factory does not constitute a nuisance *per se*. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people."); Kleebauer v. Western Fuse & Explosives Co., 71 P. 617, 620 (Cal. 1903) ("[D]ynamite and gunpowder are in daily use, and have become indispensable to the convenience of the public, and for the public defense."); City of Pasadena v. Stimson, 27 P. 604, 608 (Cal. 1891) ("A sewer in the neighborhood of dwellings may be an evil, but it is evident that the legislature regards it as a necessary evil . . . .").


153. *Id.* § 13050(m) (West 1992). The definition of nuisance in the context of California’s sewage and waste laws is similar to the definition in Water Code § 13050(m). California Health & Safety Code § 5410(f) provides: "‘Nuisance’ means anything which: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, and (2) affects at the same time an entire community or neighborhood, or any considerable
Thus, in substance, a condition constitutes a nuisance pursuant to Water Code section 13050(m) if the condition is a public nuisance and is the result of the treatment or disposal of wastes. In addition, the public policy underlying the Water Code appears to add the requirement that a nuisance can be found under section 13050(m) only if the condition affects the quality of the waters of the state.

Groundwater contamination caused by petroleum products leaking from a UST appears to meet all of the section 13050(m) criteria. First, such a condition satisfies the definition of a public nuisance under Civil Code sections 3479 and 3480. The chemical effects that petroleum products have on the groundwater constitute impairment of the quality of the waters of the state. Such an impairment of the state’s waters is injurious to public health and affects a considerable number of people. Second, petroleum products that leak from USTs constitute “wastes” because they are liquid substances of human origin from a producing, manufacturing, or processing operation. Third, a “disposal” of such wastes occurs when petroleum products leak from USTs.

number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal, and (3) occurs during, or as a result of, the treatment or disposal of wastes.” CAL. HEALTH & SAFETY CODE § 5410(f) (West 1970).

154. The definition of nuisance in § 13050(m) is identical to the definition of a public nuisance in Civil Code §§ 3479 and 3480, see supra notes 109, 121 and accompanying text, with the added requirement that the nuisance occur “during or as a result of the treatment or disposal of wastes.” CAL. WATER CODE § 13050(m)(3).

155. The legislative policy underlying the Act is “that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.” CAL. WATER CODE § 13000 (West 1992) (emphasis added).

156. See text of §§ 3479 and 3480, supra notes 109, 121 and accompanying text.

157. The term “waters of the state” is defined to include “any . . . groundwater . . . within the boundaries of the state.” CAL. WATER CODE § 13050(e). The term “quality of the water” refers to “chemical, physical, biological, bacteriological, radiological, and other properties and characteristics of water which affect its use.” Id. § 13050(g).

158. The term “waste” is defined in the Porter-Cologne Act as including “sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.” Id. § 13050(d) (West Supp. 1994).

159. The Act does not define the term “disposal.” However, in analogous provisions in California’s hazardous waste laws, disposal is defined as either of the following: “(1) The discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste so that the waste or any constituent of the waste is or may be emitted into the air or discharged into or on any land or waters, including groundwaters, or may otherwise enter the environment. (2) The abandonment of any waste.” CAL. HEALTH & SAFETY CODE § 25113(a) (West 1992) (emphasis added); see also CAL. CODE REGS. tit. xxvi, § 22-66260.10 (1990). A virtually identical definition of disposal is found in RCRA. See supra notes 43, 58-60 and accompanying text.
Indeed, the Court of Appeal for the Fifth District recently recognized that a violation of section 13050(m) involving hazardous substances (although not petroleum products) leaching into the groundwater constitutes a public nuisance *per se*.

The authors believe that California courts will similarly hold that groundwater contamination caused by petroleum products leaking from a UST constitutes a "nuisance" under section 13050(m), and that, therefore, such a condition is a public nuisance *per se*.

Where petroleum products have leaked from a UST, contaminating the soil and groundwater under conditions that constitute a violation of RCRA's imminent and substantial endangerment provisions, there is also likely a statutory nuisance *per se*. RCRA does not explicitly define a violation of its provisions as a nuisance. However, it is generally recognized that current environmental and ecological protection "constitutes but 'a sensitizing of and refinement of nuisance law.'" In fact, the imminent and substantial endangerment provision in RCRA is essentially "a codification and expansion of the common law of public nuisance." Thus, in the view of the authors courts should find that a condition constituting an "imminent and substantial endangerment" under RCRA also constitutes a statutory nuisance *per se* under California law. UST leaks meet this requirement.

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160. See Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 381 (Ct. App. 1993) (stating the rule of Water Code § 13050(m) that "water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13000, et seq. is a public nuisance *per se*").

161. For a discussion of when the imminent and substantial endangerment RCRA threshold is met, see *supra* part I.B.1.d.


164. See *supra* notes 83-85 concluding that USTs meet the imminent and substantial endangerment requirement; see also Zands II, 797 F. Supp. 805, 809 (S.D. Cal. 1992) (finding that an imminent hazard existed due to the leakage of gasoline from USTs).
3. Petroleum-Contaminated Soil and Groundwater Constitute a Public Nuisance Per Se Under the “Section 3479” Method

Although there is no reported decision on point, soil and groundwater contamination caused by a leaking UST should also constitute a nuisance \textit{per se} under the section 3479 common law balancing method. As noted above,\textsuperscript{165} when applying section 3479,\textsuperscript{166} courts may balance the equities according to common law criteria to determine whether a public nuisance falling within the scope of the section is also a nuisance \textit{per se}. Courts will so hold when, considering public policy and the particular characteristics of the condition, they find the condition so injurious to the public that it is a nuisance wherever and whenever it exists.\textsuperscript{167} Because petroleum contamination of soil and groundwater serves no purpose,\textsuperscript{168} the potential harm is often quite great,\textsuperscript{169} and California courts have recognized that such contamination “is a legitimate subject of grave concern to society as a whole,”\textsuperscript{170} there can be little doubt that the contamination would usually qualify as a public nuisance \textit{per se} under section 3479.

\textbf{F. Property Owners Who Sustain Environmental Cleanup Costs As a Result of Leaking Petroleum USTs May Bring Public Nuisance Causes of Action}

1. The Special Injury Rule

To bring a successful public nuisance claim against prior owners or operators of property who installed or maintained a leaking UST, a plaintiff landowner will have to establish a special injury to herself. While government officials are generally charged with suing to abate public nuisances,\textsuperscript{171} Civil Code section 3493 permits a private person to “maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.”\textsuperscript{172} In substance, “the purpose of the

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  \item \textsuperscript{165} \textit{See supra} notes 115-49.
  \item \textsuperscript{166} \textsc{Cal. Civ. Code} § 3479 (West 1970).
  \item \textsuperscript{167} \textit{See supra} note 150.
  \item \textsuperscript{168} For a discussion regarding the element of utility, see \textit{supra} note 115 and accompanying text.
  \item \textsuperscript{169} \textit{See supra} notes 7-8, 132-33, 135-36 and accompanying text.
  \item \textsuperscript{170} \textit{E.g.}, Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796, 805 (Ct. App. 1993).
  \item \textsuperscript{171} Diamond v. General Motors Corp., 97 Cal. Rptr. 639, 642 (Ct. App. 1971) (“Ordinarily the abatement of [a continuing public nuisance] is the business of the sovereign, acting through its law officers.”); \textit{see also} 47 \textsc{Cal. Jur. 3d Nuisances} § 51 (1979) (“To abate a public nuisance, as defined in Civil Code § 3480, a civil action may be brought in the name of the people of the state by the district attorney of any county in which the public nuisance exists.”).
  \item \textsuperscript{172} \textsc{Cal. Civ. Code} § 3493 (West 1970). Prosser and Keeton state:
    \begin{quote}
    \[I\]t is uniformly held that a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from
  \end{quote}
special injury requirement is to empower the executive and legislative branches of our government to determine which ventures are socially useful without undue interference on the part of the judiciary.”  

On the one hand, the special injury to the plaintiff’s property generally must be of a character different in kind, and not merely in degree, from that suffered by other members of the general public. Courts refuse to take into account the varying degrees of interference and inconvenience on different members of the public due to “the difficulty or impossibility of drawing any satisfactory line for each public nuisance at some point in the varying gradations of degree.”

that sustained by other members of the general public. It is not enough that he suffers the same inconvenience or is exposed to the same threatened injury as everyone else.

Keeton et al., supra note 112, § 90, at 646.

By comparison, Restatement Second Torts § 821C provides:

(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference. (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must (a) have the right to recover damages, as indicated in subsection (1), or (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or (c) have standing to sue as a representative of the general public, as a citizen’s action or as a member of a class in a class action.

Restatement (Second) of Torts § 821C (1979).


Another purpose of the special injury rule is to “reduce the inconveniences and inconsistencies which a multiplicity of suits might otherwise bring.” Miles Tolbert, The Public As Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation, 14 Harv. Envtl. L. Rev. 511, 514 (1990) (footnote omitted).

Yet another reason that has been articulated in support of the special injury rule is that “any harm or interference shared by the public at large will normally be, if not entirely theoretical or potential, at least minor, petty and trivial so far as the individual is concerned.” Restatement (Second) of Torts § 821C cmt. a (1979).

Nonetheless, the special injury rule has been criticized. One commentator argues that the rule is illogical because it “actually requires that these representatives be as unrepresentative of the public as possible.” See Tolbert, supra, at 514. Another commentator criticizes the rule because it denies a private right of action where the harm from the nuisance is universal, creating the untenable assumption that in conditions of universal harm, public officials will always act. Tuohy, supra note 128, at 42-43.


175. Restatement (Second) of Torts § 821C cmt. b (1979). The Restatement points to the following example:

Normally there may be no difference in the kind of interference with one who travels a road once a week and one who travels it every day. But if the plaintiff traverses the road a dozen times a day he nearly always has some special reason to do so, and that reason will almost invariably be based upon some special interest of his own, not common to the community. Significant interference with that interest may be particular damage, sufficient to support the action in tort. Deprivation of immediate access to land . . . , which is clearly a special kind of harm, shades off by imperceptible degrees into the remote obstruction of a highway, which is just as clearly not.
On the other hand, the different-in-kind rule does not have to be met if the nuisance involved also constitutes a private nuisance to the plaintiff. The reasoning behind this exception is that a landowner "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree." 

California courts have sometimes fused the two distinct grounds for giving a private party standing to seek abatement of a public nuisance into a single rule: "Under our state's current law, a private person has no remedy against a public nuisance 'unless he is injuriously affected; in other words, unless, it is a private nuisance also as to him.'" In such a circumstance, the plaintiff landowner has the option of bringing a suit in public nuisance, private nuisance, or both.

Although the special injury that gives a private litigant standing may also constitute a private nuisance injury, the determination as to whether a special injury exists is made without looking at whether the

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Restatement (Second) of Torts § 821C cmt. c (1979).


177. Venuto, 99 Cal. Rptr. at 355 (quoting William L. Prosser, Handbook of the Law of Torts § 89, at 609 (3d ed. 1964)); see Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 381 (Ct. App. 1993) ("[A] plaintiff may maintain a private nuisance action based on a public nuisance when the nuisance causes an injury to plaintiff's private property, or to a private right incidental to such private property.").

In the Restatement Second of Torts, the American Law Institute reasoned as follows:

When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one. In this case the harm suffered by the plaintiff is of a different kind and he can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance.

Restatement (Second) of Torts § 821C cmt. e (1979).

178. People ex rel. Van de Kamp v. American Art Enters., 656 P.2d 1170, 1176 (Cal. 1983) (Reynoso, J., dissenting) (footnote omitted) (quoting 7 B.E. Witkin, Summary of California Law Equity § 104 (8th ed. 1974)); see also Fritts v. Charles, 78 P. 1057, 1058 (Cal. 1904) ("It is the settled rule that a private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be preserved or protected by the aid of this process, independent of that which he holds with the public at large."); Hargo v. Hodgdon, 26 P. 1106, 1107 (Cal. 1891) (holding that where special injury results to the plaintiff from a public nuisance, "[t]he result is the same as though it had been held that it constituted both a public and a private nuisance").

179. See Mangini I, 281 Cal. Rptr. 827, 835 (Ct. App. 1991). Discussing the consent defense to a nuisance claim, the Mangini I court stated: "Where special injury to a private person or persons entitles such person or persons to sue on account of a public nuisance, both a public and private nuisance, in a sense, are in existence." Id. (quoting 47 Cal. Jur. 3d Nuisances § 24 (1979)). Prosser and Keeton also state that plaintiffs can bring both claims: "This makes the nuisance a private as well as a public one; and since the plaintiff does not lose his rights as a landowner merely because others suffer damage of the same kind or even of the same degree, there is general agreement that he may proceed upon either theory, or upon both." Keeton et al., supra note 112, § 90, at 648.
private litigant's potential private nuisance cause of action might otherwise be barred.180

The special injury to the private plaintiff seeking to abate a public nuisance should involve a right that "is neither technical nor unsubstantial but a valuable property right."181 The injury to the plaintiff's property must be substantial.182 In *Lind v. City of San Luis Obispo*, the California Supreme Court discussed the type of injury to property necessary for a private plaintiff to establish standing to sue for abatement of a public nuisance:

The injury which may entitle a private person to maintain an action to abate a public nuisance must be an injury to plaintiff's private property, or to a private right incidental to such private property; and where the injury is of this nature, the injured person may maintain the action, although the private rights of an indefinite number of other persons may be infringed and injured in the same way by the same nuisance . . . .

"... [A]n injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause."184

In other words, without a showing of an injury to the use and enjoyment of the private plaintiff's land, "the fact of personal injury, or the interference with a purely personal right, does not establish a nuisance."185 "[S]uch things as fear, anxiety, and emotional distress which are not caused by an interference with a specific private prop-

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181. Lane *v*. San Diego Elec. Ry., 280 P. 109, 111-12 (Cal. 1929) (holding that the plaintiff was entitled to an injunction because the nuisance impinged upon a valuable property right); Institoris *v*. City of L.A., 258 Cal. Rptr. 418, 424 (1989) (stating that, in a public and private nuisance action brought by a private party, "a private nuisance will support recovery not simply for a disturbance of land, but also for interference with any interest sufficient to be dignified as a property right").

182. See Shields *v*. Wondries, 316 P.2d 9, 13 (Cal. Ct. App. 1957) (stating that "[a] basic principle of the law of private nuisance is that substantial harm is required"); KEETON ET AL., supra note 112, § 90, at 651 (stating that a plaintiff landowner would be entitled to relief only if pollution affects the plaintiff "in a substantial way, such as if the market value of the land was affected"); cf. Smith *v*. David, 176 Cal. Rptr. 112, 119 (Ct. App. 1981) (holding that "[a] de minimis interference with the enjoyment of land does not constitute a nuisance").

183. 42 P. 437 (Cal. 1895).

184. Id. at 438-39 (quoting Wesson *v*. Washburn Iron Co., 13 Allen 95, 90 Am. Dec. 181, 186 (Mass. 1866)).

erty right and which are common to the general population will not support a private action for nuisance.”

2. An Owner of Property with a Leaking Petroleum UST Will Often Sustain a Special Injury Sufficient to Support a Public Nuisance Cause of Action

The owner of a property with a leaking petroleum UST should have little difficulty meeting the “special injury” requirement to establish a public nuisance, for several reasons.

a. Testing and Mitigation Costs

First, a property owner sustains a special injury if the owner incurs expenses relating to site testing and mitigation required by regulatory authorities. Although one federal district court in California held in 1989 that a landowner was not entitled to bring a public nuisance claim to recover remediation costs associated with the cleanup of that landowner’s property, the California Court of Appeal for the Third District held to the contrary in Mangini v. Aerojet-General Corp. (Mangini I). Mangini I involved the hazardous waste pollution of land at a rocket testing facility operated by Aerojet-General, who leased the land from the former owners from 1969 to 1970. In 1975, the plain-

186. Id. In Akins, the plaintiffs failed to present evidence to show that “SMUD released legally excessive levels of radioactive materials or that they were exposed to harmful and legally cognizable levels of radiation on their properties.” Id. The court continued:

The claim of nuisance is based upon alleged fear and anxiety from the operation of Rancho Seco [a nuclear power plant]. To the extent such fear and anxiety is based upon the mere existence and operation of a nuclear power plant it will not support a claim for nuisance since that activity is legally sanctioned.


Courts in other states have also adopted the reasoning in PECO. See, e.g., Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 809 (D.N.J. 1989) (holding that a private property owner does not have standing to sue for a public nuisance if such property owner suffered only cleanup costs and property value depreciation resulting from toxic waste disposal on the property); Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1265 (D.N.J. 1987) (holding that the plaintiff’s claims of damages, including preclusion from use and development of its property and pecuniary loss in complying with a State Department of Environmental Protection order, were insufficient as a special injury to confer standing to sue for relief from a public nuisance).
tiffs acquired the property from the estate of the former owners. Subsequently, the Sacramento County Air Pollution Control District ordered the plaintiffs to conduct testing of the property to determine if they were required by state and federal law to abate hazardous waste conditions on the property.

The plaintiffs in Mangini I filed suit against Aerojet, alleging nine causes of action, including public nuisance and private nuisance. Aerojet demurred to each claim on the ground that it did not state a cause of action and on the ground that it was barred by the statute of limitations. The trial court sustained the demurrer without leave to amend, and the plaintiffs appealed. The Third District Court of Appeal held that the plaintiff landowner had standing to bring a public nuisance action because the waste materials and other hazardous substances disposed of on the property by the prior owner's lessee caused the plaintiff to incur expenses related to remediation of the contamination. The appellate court expressly found that the incurrence of environmental testing costs was "sufficient to constitute 'special injury' to plaintiff under section 3493."

The California Court of Appeal for the Fifth District issued a similar holding in Newhall Land & Farming Co. v. Superior Court. In Newhall, the appeals court held that the complaint pled facts that supported the existence of a public nuisance where prior the property owners were alleged to have discharged hazardous substances onto the property in violation of California law, those substances were alleged to have leached through the soil and polluted the groundwater, and the plaintiff had incurred costs to investigate the contamination. Since the contamination also constituted a private nuisance to the current property owner, the court permitted the owner to raise both a public and a private cause of action against the prior owners.

190. Id. at 830-31.
191. Id.
192. Id.
193. Id.
194. Id. at 834.
195. Id. at 834-35. The Mangini I court relied on Westwood Pharmaceuticals, Inc. v. National Fuel Gas District, which found that "incurred response costs consistent with the National Contingency Plan" were sufficient to meet the special injury criterion for bringing a public nuisance action. Westwood Pharmaceuticals, Inc., 737 F. Supp. 1272, 1281 (W.D.N.Y. 1990), aff'd, 964 F.2d 85 (2d Cir. 1992); see also New York v. SCA Servs., Inc., 754 F. Supp. 995, 1002-03 (S.D.N.Y. 1991) ("Allegations of pecuniary injury are sufficient if they allege damages for injuries not common to the entire community exercising the same public right."); KEETON ET AL., supra note 112, § 90, at 649-50 ("Pecuniary loss to the plaintiff has been regarded as different in kind when the defendant's obstruction has prevented the plaintiff from performing a particular contract, . . . or when it has put him to additional expense, or expensive delay, in performing it.").
196. 23 Cal. Rptr. 2d 377 (Ct. App. 1993).
197. Id. at 381.
b. Property Damage Caused by Contamination

A second reason why a property owner whose land is injured by the existence of soil and groundwater contamination may bring a public nuisance cause of action is that when a public nuisance causes physical harm to the plaintiff's use of his property, the harm is normally different in kind from that suffered by other members of the public.198

c. Interference with the Intended Use of the Property

Third, a property owner may bring a public nuisance action because the contaminated soil and groundwater on the property will interfere with his intended use of the property.199 A condition that prevents a landowner from legally improving his property constitutes a private nuisance to that landowner since it amounts to an obstruction to the free use of the property and interference with his comfortable enjoyment.200 If the existence of contamination requires a property owner to change his use of the property, or causes public authorities to order the property owner to remediate the contamination prior to development or further use of the property, then the contamination's presence undoubtedly constitutes interference with the intended use of the property.

3. Relief Available in a Public Nuisance Action

In a public nuisance action, a private plaintiff with standing may seek recovery of damages caused by the existence of the private nuisance as well as abatement of the public nuisance.201 In public nu-

198. RESTATEMENT (SECOND) OF TORTS § 821C cmt. d (1979); see also Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 381 (basing its finding of special injury on both the incurrence of investigation costs and the adverse effect on the marketability of the contaminated property); cf. Donahue v. Stockton Gas & Elec. Co., 92 P. 196, 198 (Cal. 1907) (holding that poisonous gas seeping onto private property from a neighboring gas works, which resulted in polluted soil and groundwater, constituted an “invasion of plaintiff's property and his property rights,” i.e., a private nuisance); cf. KEETON ET AL., supra note 112, § 88, at 627 (stating that measurable economic loss suffered as a consequence of physical damage to a property is a significant enough interference with the comfortable enjoyment of property as to constitute a nuisance).


200. See, e.g., Kafka v. Bozio, 218 P. 753, 754 (Cal. 1923) (finding a nuisance where the defendant’s building encroached upon the plaintiff’s property, rendering it impossible for the plaintiff to construct a foundation for its building); Meyer v. Metzler, 51 Cal. 142 (1875) (holding that the projection of a wall of the defendant’s building onto the plaintiff’s lot is a nuisance since it prevents the plaintiff from improving his own building); cf. United States v. Causby, 328 U.S. 256, 264 (1946) (holding that a landowner's right to full enjoyment of the land includes the ability to be able to improve the property).

201. California Code of Civil Procedure § 731 provides, in pertinent part:

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in
sance abatement actions, the California courts are empowered to award damages, including damages for the special injury that gives a private plaintiff standing to bring a public nuisance cause of action. In *Wolford v. Thomas*, the court noted that, in an action to abate a private nuisance, a court sitting in equity has the authority to award damages for legal claims that are incidental to the equitable claim of abatement. Thus, a private plaintiff in a public nuisance abatement action may request: (1) abatement of the nuisance; and (2) damages incidental to the nuisance, including damages constituting the plaintiff’s special injury.

Since the special injury damages are, in essence, private nuisance damages, the rules governing the recovery of private nuisance damages may govern the private plaintiff’s recovery of special injury damages in a public nuisance action. These incidental damages may include damages for injuries that are not compensable under the various statutory private remedies.

III

UNLIKE THE COMMON LAW, CALIFORNIA DOES NOT BAR LANDOWNERS FROM BRINGING PRIVATE NUISANCE ACTIONS AGAINST PRIOR OWNERS

In many common law jurisdictions, a current landowner is barred from bringing a private nuisance cause of action against a prior owner or occupier of the property. Indeed, two federal district courts in...
California found this common law rule applicable to California nuisance claims.  

Recent California courts of appeals decisions, however, have rejected the common law rule and have permitted a landowner to bring a private nuisance cause of action against a prior owner or its lessee, if the current landowner sustains pecuniary loss associated with the remediation of soil and groundwater contamination caused by the actions of the prior owner or its lessee.  

A. In California, the Fact That the Condition Creating the Nuisance Exists on the Current Owner’s Property Is No Bar to a Private Nuisance Action

In 1991, the Court of Appeal for the Third District rejected the defendant’s argument that a nuisance does not exist where the condition creating the nuisance is located on the plaintiff’s property.  

"The critical fact of this case is that the claim of nuisance is being made by a present owner of property for alleged injury to that property resulting from acts of a defendant committed on that very property. This takes it entirely outside the area of nuisance . . . . In other words, conduct committed on a piece of land cannot be attacked as a

(D. Me. 1990) (holding that there is no cause of action for private nuisance between vendors and vendees under Maine law); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 98-99 (D. Mass. 1990); Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 737 F. Supp. 1272, 1282-84 (W.D.N.Y. 1990) (rejecting the vendee’s claim that the defense of caveat emptor is inapplicable to a private nuisance claim brought by a commercial purchaser of land who “had many years to discover and to take steps to abate an alleged nuisance”), aff’d, 964 F.2d 85 (2d Cir. 1992); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 808-09 (D.N.J. 1989) (following PECO); see also Susan M. Cooke, 3 Law of Hazardous Waste: Mgmt., Cleanup, Liability, & Litig. (MB) § 17.01[2][b], at 17-22 (1993) (“[N]uisance is not an action that may be used in disputes between successive owners. That is, the present owner of a site may not recover from a former owner who created the conditions on the site in a nuisance action.”).  

209. First, the court in Cadillac Fairview/California, Inc. v. Dow Chemical Co. held that a current landowner may not sue prior owners of the property under California private nuisance law for the costs of environmental cleanup on the property “because there is no unreasonable use of one’s property to the detriment of a neighbor’s property.” 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,965, 20,966 (C.D. Cal. Jan. 18, 1989). Second, the court in Pinole Point Properties, Inc. v. Bethlehem Steel Corp. similarly precluded recovery against a prior owner. 596 F. Supp. 283 (N.D. Cal. 1984). The plaintiff in Pinole Point Properties, Inc. had purchased property from the defendant, who had released hazardous substances into a pond on the property. Id. at 285. In dicta, the court stated: “The plaintiff does not allege any facts which would demonstrate that the defendant ever interfered with the property rights of another; only that the defendant disposed of waste on its own land and then sold the land. These allegations would not ordinarily state a claim in nuisance.” Id. at 283.  


211. Mangini I, 281 Cal. Rptr. at 831-34.
nuisance to that land or the owner of it. Nuisances are committed by 'neighbors' to the land claimed to have been damaged. Apart from special statutory definitions of specific situations, to be assailable as a 'nuisance' the acts causing the claimed injury must be committed by someone outside the land.\textsuperscript{212}

In support of its argument, the defendant cited numerous authorities following the common law doctrine that a nuisance consists of a defendant's use of its own property in such a manner as to unreasonably interfere with the plaintiff's use of another property.\textsuperscript{213}

The \textit{Mangini I} court rejected the defendant's argument because, as the court explained, "the authorities on which it is premised do not correctly reflect California law."\textsuperscript{214} The court reasoned:

In particular, defendant fails to recognize that California nuisance law is a creature of statute. The California nuisance statutes have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by a nuisance created on the owner's property. Under California law, it is not necessary that a nuisance have its origin in neighboring property.\textsuperscript{215}

In support of its position, the \textit{Mangini I} court noted that California authorities "make clear that the California [nuisance] statutes [including Civil Code sections 3479 to 3493] do not limit recovery for nuisance to instances where there is an offensive use of neighboring lands."\textsuperscript{216} The court concluded that "the broad language of section 3479 sanctions recovery for direct injury to a plaintiff's property constituting 'an obstruction to the free use of property.'"\textsuperscript{217} Thus, expressly contrary to common law authorities, the \textit{Mangini I} court held that a nuisance can be created by a defendant's act or omission on a plaintiff's own land.

\textsuperscript{212} \textit{Id.} at 831-32 (quoting defendant's brief).
\textsuperscript{213} The defendant in \textit{Mangini I} cited the following authorities: \textit{Keeton et al., supra} note 112, § 87, at 622 ("The distinction which is now accepted is that trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it... [P]rivate nuisance... is committed only... in the absence of an intrusion on land amounting to an intentional entry and a trespass."); \textit{47 Cal. Jur. 3d Nuisances} § 1 (1979) ("[T]he principle that one must so use his own right as not to infringe on the rights of another—seems to be the basic concept underlying the law of nuisances."); \textit{58 Am. Jur. 2d Nuisances} § 2 (1989) ("[N]uisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property..."); \textit{PECO}, 762 F.2d 303, 313-14 (3d Cir. 1985) (applying Pennsylvania law to conclude that a successor owner of property could not sue a prior owner for nuisance because, \textit{inter alia}, the historical role of private nuisance law was limited to resolution of conflicts between neighboring contemporaneous land uses), \textit{cert. denied}, 474 U.S. 980 (1985); Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 807 (D.N.J. 1989) (following the rule in \textit{PECO}).
\textsuperscript{214} \textit{Mangini I}, 281 Cal. Rptr. at 832.
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.} at 834.
\textsuperscript{217} \textit{Id.}
The Mangini I decision was followed by the Court of Appeal for the Second District in Wilshire Westwood Associates v. Atlantic Richfield Co.\(^{218}\). In Wilshire Westwood, the current owner of contaminated real property on which a gasoline service station was located filed an action against the seller's lessee and its sublessee.\(^{219}\) However, the Mangini I and Wilshire Westwood courts did not directly address whether an owner of a contaminated property could bring a nuisance action against a prior owner of the same property for recovery of remediation costs or for abatement of the contamination.

The Court of Appeal for the Fifth District took this next step in the recent case of Newhall Land & Farming Co. v. Superior Court.\(^{220}\) In Newhall, the current owner of real property filed an action against the prior owners of the property who had operated a natural gas processing plant on the property from 1950 to about 1970 and had allegedly discharged hazardous substances onto the ground in violation of California law.\(^{221}\) Defendants Mobil and Amerada raised four basic arguments in support of the trial court's order sustaining a demurrer without leave to amend.

First, Mobil and Amerada argued that the plaintiff landowner's nuisance claim failed because it did not "allege an interference with an existing property interest, i.e., an interference which occurs contemporaneously with the creation or maintenance of the nuisance."\(^{222}\) Mobil and Amerada reinforced this argument by stating: "[L]iability for a private nuisance requires an invasion of another's interest in the use and enjoyment of land. In other words, one cannot commit a nuisance to one's own property."\(^{223}\) Citing the arguments and reasoning set forth in the Mangini I decision, the court of appeals rejected the defendants' arguments and held that: "Newhall is not precluded from stating a cause of action for nuisance on the ground that Mobil and Amerada could not cause a nuisance to their own property."\(^{224}\)

Second, the Newhall court considered the argument that: "[O]ne cannot be guilty of a nuisance unless one is in the position to abate it, i.e., currently has a possessory interest in the property."\(^{225}\) Mobil and Amerada had argued that a nuisance must interfere with an existing

\(^{218}\) 24 Cal. Rptr. 2d 562 (Ct. App. 1993).

\(^{219}\) Id. at 564-65. The Wilshire Westwood court rejected the defendants' argument that Mangini I was wrongly decided because it allegedly disregarded "the general California law of caveat emptor." Id. at 569-70. The court found Mangini I "well reasoned, and fully applicable to our case." Id. at 570.

\(^{220}\) 23 Cal. Rptr. 2d 377 (Ct. App. 1993).

\(^{221}\) Id. at 380.

\(^{222}\) Id. at 381.

\(^{223}\) Id.

\(^{224}\) Id. at 381-82.

\(^{225}\) Id. at 382.
property interest. They asserted that "because Newhall had no property interest at the time of the allegedly illegal conduct, Newhall [could not] state a nuisance cause of action against them." 226 Following Mangini I, 227 the court of appeals quickly disposed of this argument by noting that: "[U]nder California law, both the parties who maintain the nuisance and the parties who create the nuisance are responsible for the ensuing damages." 228

Mobil and Amerada relied on dicta in Pinole Point Properties v. Bethlehem Steel Corp., 229 where the court noted that: "The plaintiff does not allege any facts which would demonstrate that the defendant ever interfered with the property rights of another; only that the defendant disposed of waste on its own land and then sold the land. These allegations would not ordinarily state a claim in nuisance." 230

The court of appeals responded that the discussion in Pinole Point Properties did not support Mobil and Amerada since, "contrary to the statement in Pinole Point Properties, under California law, an owner of property may sue for damages caused by a nuisance created on the owner's property." 231

In addition to rejecting Mobil's and Amerada's specific arguments, the Newhall court completely rejected the basic rationale behind these arguments:

The basic premise underlying Mobil and Amerada's position is that, since they were the owners of the property at the time of the contamination, they could not be found liable to themselves for creating a nuisance. Consequently, Mobil and Amerada argue that Newhall, as a successor in interest, cannot state a nuisance claim against them aris-

226. Id. at 381-82.
227. 281 Cal. Rptr. 827 (Ct. App. 1991); see infra notes 262-67 and accompanying text.
228. Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 381-82.
229. 596 F. Supp. 283 (N.D. Cal. 1984), cited in Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 382; see supra notes 208-10 and accompanying text.
230. Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 382. The Newhall court described Pinole Point Properties as follows:

[In Pinole Point Properties] the defendant used a waste disposal pond located on property which it owned and then sold that property to plaintiff. Plaintiff acquired the property with full knowledge of the existence of the waste disposal pond. The United States District Court for the Northern District of California dismissed plaintiff's state nuisance claim on the ground it was barred by the statute of limitations.

Id.

231. Id. (citing Mangini I, 281 Cal. Rptr. at 838-39). The Newhall court also argued that the consent issues (see infra part IV.C.) were different in the two cases:

[I]n Pinole Point Properties, the plaintiff knew of the existence of the contamination before acquiring the property. Thus, the damage to the property caused by the defendant's use of the waste disposal pond could be factored into the terms of the purchase. In contrast here, Mobil and Amerada did not disclose the existence of the contamination when the property was sold. Consequently, the effect of Mobil and Amerada's unlawful discharge of hazardous materials into the soil could not be considered when the purchase was negotiated.

Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 382.
ing out of that contamination. According to Mobil and Amerada, there cannot be a continuing nuisance where no nuisance existed at the inception of the wrongful condition. However, there is a fundamental flaw in this argument. Regardless of whether a potential plaintiff existed at the time of the contamination, the fact remains that Mobil and Amerada’s conduct created a condition on the property which was, and which remains, injurious to health. Once Mobil and Amerada sold their interests without disclosing the contamination, other parties became involved who, upon discovery of the contamination, could bring a claim against Mobil and Amerada in an attempt to force them to accept responsibility for their creation of a nuisance. As noted above, in the context of this case, the time of the creation of the nuisance is immaterial with respect to Mobil and Amerada’s liability.\textsuperscript{232}

Recently, the Court of Appeal for the Second District in \textit{KFC Western, Inc. v. Meghrig}\textsuperscript{233} expressly adopted the \textit{Newhall} approach. In \textit{KFC Western}, the current property owner brought an environmental cost recovery action under Health and Safety Code section 25363,\textsuperscript{234} as well as an action for private and public nuisance, against the former owners of the property. The current property owner sought to recover costs incurred in cleaning soil that had been contaminated by the release of petroleum products during the former owners’ operation of a gas station.\textsuperscript{235} The prior owners argued that “\textit{Newhall} is inconsistent with California law and should not be followed,”\textsuperscript{236} and that: “KFC cannot state a cause of action for private nuisance because the [prior owners] consented to the use of their own land. In other words, the [prior owners] submit they were entitled to contaminate their own property.”\textsuperscript{237}

Following the \textit{Newhall} ruling that “a landowner may state a cause of action for a private continuing nuisance against a previous owner whose activity contaminated the property,”\textsuperscript{238} the court in \textit{KFC Western} rejected the prior owners’ arguments and held that: “[T]he [prior owners’] status as former owners does not immunize them from a nuisance action arising from their activity on the property.”\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{232} \textit{Newhall Land & Farming Co.}, 23 Cal. Rptr. 2d at 382-83.
\item \textsuperscript{233} 28 Cal. Rptr. 2d 676 (Ct. App. 1994).
\item \textsuperscript{234} \textit{CAL. HEALTH & SAFETY CODE} § 25363(e) (West Supp. 1994). The cost recovery action failed since the court found that refined gasoline falls within the petroleum exclusion. \textit{See supra} notes 99-101 and accompanying text.
\item \textsuperscript{235} \textit{KFC Western, Inc.}, 28 Cal. Rptr. 2d at 679.
\item \textsuperscript{236} \textit{Id.} at 684.
\item \textsuperscript{237} \textit{Id.} at 683.
\item \textsuperscript{238} \textit{Id.} at 683-84.
\item \textsuperscript{239} \textit{Id.} at 684. The court noted that Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796 (Ct. App. 1993), “also permitted a nuisance claim against a former owner for contamination caused by leaking underground fuel storage tanks. However, the decision is not
Thus, after Newhall and KFC Western, and in the absence of any contrary California appellate authority, it is clear that in California the fact that the condition creating the nuisance exists on a plaintiff’s property is not a bar to a private nuisance action.240

B. The Fact That the Defendant Is No Longer in Possession of the Land Is No Bar to a Private or Public Nuisance Action

In Preston v. Goldman,241 the California Supreme Court articulated the rule that former property owners who negligently constructed improvements on their private property are not liable based on a negligence cause of action for personal injuries sustained on the property after they have relinquished ownership and control of the property.242 Preston involved an action against former property owners who constructed a pond and fountain in their backyard in 1972 and sold the property in 1973, for injuries sustained by an infant who fell into the pool in 1976.243 The California Supreme Court affirmed a special jury verdict in favor of the former owner, following the rule that: ‘‘A defendant cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control.’’244

helpful because it did not set forth the court’s rationale for allowing the nuisance claim.”
KFC Western, Inc., 28 Cal. Rptr. 2d at 683.

240. At least one commentator has argued that Newhall, along with Mangini I and Capogeannis, signals the creation of a new common law tort in California, namely, “the tort of having been an owner of contaminated property.” Sandra Ikuta, Landowners May Sue Their Predecessors for Tortious Use, S.F. DAILY J., Nov. 29, 1993, at 5. Ikuta argues that “plaintiffs may rely on Newhall Land to bring actions against prior owners that owned contaminated property for neglecting to abate a latent nuisance,” even if the prior owners did not create the nuisance. Id.

However, liability under a nuisance cause of action for such owners requires more than merely being in the chain of title, as Ikuta asserts. Although California Civil Code § 3483, upon which Ikuta relies, imposes liability on “[e]very successive owner of property who neglects to abate a continuing nuisance,” CAL. CIV. CODE § 3483 (West 1970), the term “neglects” does not denote mere negligence. Instead, § 3483 requires the successive owner of the property to have both knowledge of the continuing nuisance and an intent not to abate the nuisance. See Reinhard v. Lawrence Warehouse Co., 107 P.2d 501, 504-05 (Cal. 1940) (“The words ‘neglect’ and ‘omit’ are not synonymous. The former imports intent and intent presupposes knowledge.”); City of Turlock v. Bristow, 284 P. 962, 965 (Cal. Ct. App. 1930) (finding that knowledge of the nuisance, which is required under § 3483, is presumed where the nuisance is continuing and visible).

Liability of a property owner who creates the nuisance, on the other hand, does not require a finding of knowledge and intent. See Reinhard, 107 P.2d at 504-05 (holding that a finding of knowledge is not required of the creator of a nuisance since “[t]he creator of a nuisance is presumed to have knowledge of his own acts”).

242. Id. at 478-83.
243. Id. at 476-77.
244. Id. at 482 (quoting Isaacs v. Huntington Memorial Hosp., 695 P.2d 653, 664 (Cal. 1985)).
In *Preston*, the court treated "ownership and control as a fundamental requirement for ascribing liability."

The court discussed the ownership and control rationale as follows: "[O]ne who has transferred ownership and control is no longer held liable because (1) he no longer has control and thus may not enter the property to cure any deficiency, and (2) he cannot control the entry of persons onto the property or provide safeguards for them." Since the *Preston* doctrine is based on principles of foreseeability, due care, and negligence, California courts have thus far applied the *Preston* rule only to negligence causes of action to recover personal injury and property damages to third parties (i.e., parties other than the owners) resulting from defects in or on the property. Indeed, these negligence principles may not apply in strict liability actions.

The authors have found no reported California decisions that have ever expressly held that the *Preston* rule directly applies to a nuisance cause of action. However, one case, *Locklin v. City of*...
Lafayette,\textsuperscript{251} did arguably apply the \textit{Preston} rule to an action based on various tort theories, including nuisance. In reviewing the lower court's decision, the California Supreme Court noted that the plaintiffs argued "that ownership and control are not essential to their nuisance and trespass causes of action."\textsuperscript{252} Nonetheless, the court never addressed this issue, holding that, as a factual matter, defendant public agencies never owned the property and no nuisance was created.\textsuperscript{253} Moreover, the \textit{Locklin} decision is of limited value in the leaking UST context since \textit{Locklin} involved a patent defect, while leaking USTs are nearly always latent. In fact, the authors believe that the rule articulated in \textit{Preston} should not apply to private and public nuisance actions brought against prior owners by private landowners seeking remediation of, and damages resulting from, soil and groundwater contamination caused by leaking USTs. Several reasons support this conclusion.

First, in \textit{Preston} the defect was patent, whereas in most nuisance actions involving leaking USTs, the soil and groundwater contamination is latent.\textsuperscript{254} Therefore, most UST cases will fall within an exception to the \textit{Preston} rule, namely, that: "'[T]he vendor is under a duty to disclose to the vendee any hidden defects which he knows or should know may present an unreasonable risk of harm to persons on the premises, and which he may anticipate that the vendee will not discover.'"\textsuperscript{255} In other words, where a prior owner negligently or fraudulently fails to disclose the existence of a latent defect, the \textit{Preston}
rule will not apply. Soil and groundwater contamination should generally be considered such a defect.256

Second, the Preston rule is based upon presumptions that the purchaser knows, or reasonably should know, of the dangerous condition on the property at the time of sale, and that it is the purchaser's responsibility to correct the dangerous condition after the sale.257 In most nuisance cases involving USTs, however, current owners (especially those who purchased prior to the mid-1980s) were unaware of the contamination at the time of purchase.258 Indeed, land owners often bring such nuisance actions to do the very thing contemplated by the Preston rule (i.e., remedy the dangerous condition).259

Even if the purchaser were aware, or should have been aware, of the contamination from a leaking UST at the time of the sale, recent California case law seems to indicate that this alone does not bar the purchaser's private nuisance action against the former occupier of the property responsible for the contamination. In Wilshire Westwood, the court permitted a current owner of property containing leaking USTs to bring a private continuing nuisance action against the former lessees, even though the court found that, "through the exercise of reasonable diligence, any existing soil contamination could and should have been discovered" prior to the date the current owner took title to the property.260

Third, the negligence principles underlying the Preston rule do not apply in a nuisance action brought by a current owner against a prior owner. Preston recognizes that current owners' negligence in failing to make the property safe for third persons constitutes a superseding cause that cuts off any negligence on the part of the former

256. See KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 679 (Ct. App. 1994) (finding a latent nuisance where the current owner was not aware of a release of gasoline from USTs or from the operation of a gasoline station on the property).

257. This is implicit in the caveat emptor approach taken by Prosser and Keeton and cited in Preston, though not expressly adopted there: "'The emerging view is that the vendor is no longer liable once the vendee has had a reasonable time to discover and remedy the condition, unless the vendor has actively concealed it.'" Preston, 720 P.2d at 480 (quoting Keeton et al., supra note 112, § 64) (footnotes omitted).

258. Cf. Newhall Land & Farming Co., 23 Cal. Rptr. 2d at 380 (finding that Newhall could reasonably have been unaware of the contamination because there was no visible evidence); Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796, 797 (Ct. App. 1993) (finding no knowledge of contamination at the time of purchase).

259. This article does not examine the due diligence requirements placed on current purchasers of real property. On this topic, see generally Roseann C. Stevenson, Environmental Due Diligence: Hazardous Waste and Substance Issues in Real Property Transactions, in Handling Land Use and Environmental Problems of Real Estate, Real Property Transactions 625-32 (PLI Real Estate Law & Practice Course Handbook Series No. 367, 1991), available in WL 367 PLI/Real 625.

owner as being a cause of the third person’s injuries. Most UST cases, on the other hand, involve the liability of former owners to successive owners for the creation of a nuisance; the issue of superseding cause does not arise.261

Fourth, the California Court of Appeal for the Third District has held that a defendant may be liable for a nuisance condition even if the defendant no longer has possession and control of the contaminated property.262 In Mangini I, the court held that it was not material that the defendant “allegedly created the nuisance at some time in the past but does not currently have a possessory interest in the property.”263 The court rejected the defendant’s assertion that “‘one cannot be guilty of committing a nuisance unless it [sic] is in the position to abate it.’”264 The court reasoned: “[N]ot only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages.’”265 In support of the above rule, the Mangini I court cites California decisions that involve claims for both private and public nuisances.266 Other California courts have recently followed Mangini I in holding that plaintiffs do not have to prove that defendants have possession of the premises in order to bring a nuisance cause of action.267

Fifth, strong public policy reasons argue in favor of holding liable a prior owner who buried or maintained a UST that is now leaking contaminants into the soil and groundwater, despite the ownership and possession rationale articulated in Preston. The court in Newhall

261. Furthermore, nuisance cases involving leaking USTs may be based on strict liability doctrines, to which the Preston rule does not apply. See Pfleger v. Superior Court, 218 Cal. Rptr. 371, 375-76 (Ct. App. 1985) (“Civil Code section 3479 [addressing ultrahazardous or abnormally dangerous activities] ... covers nuisances whether arising from intentional, negligent, reckless or ultrahazardous acts.”); Hellman v. La Cumbre Golf & Country Club, 8 Cal. Rptr. 2d 293, 296 (Ct. App. 1992) (stating that a private nuisance “may result from an abnormally dangerous activity for which there is strict liability”).


263. Id.

264. Id. at 834 n.7.

265. Id. at 834 (quoting Shurpin v. Elmhirst, 195 Cal. Rptr. 737, 741 (Ct. App. 1983)).


recognized the fundamental error of allowing prior owners to be relieved of nuisance liability simply because no one complained about the health and environmental hazard during the prior ownership: "[T]he fact remains that [the prior owners'] conduct created a condition on the property which was, and which remains, injurious to health." Counsel for the plaintiffs in *Wilshire Westwood* said it well: "[The prior lessee and sublessee] therefore cannot escape liability merely because they were lucky enough (or perhaps shrewd enough) to conceal the contamination until after the property was sold to [the subsequent owner]."

The whoever-creates-the-nuisance-cleans-it-up policy underlying California nuisance law is analogous to the policy underlying CERCLA, namely, "persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up." Indeed, public policies underlying federal environmental statutes have led courts to hold that prior owners or operators should *not* be relieved of their responsibility for environmental hazards that they created solely because they do not currently possess the contaminated property.

### IV

**BENEFITS OF LITIGATING PUBLIC NUISANCE ACTIONS**

Plaintiffs in public nuisance cases have an advantage over those pressing private nuisance claims, in that certain defenses are unavailable to public nuisance defendants. Not only are time-related defenses less available, but so is the comparative negligence defense. Moreover, in nuisance cases involving successive owners of the same property, the consent defense is greatly restricted.

#### A. Limited Availability of Time-Related Defenses

1. **Characterization of a Nuisance As Continuing or Permanent**

   With regard to time-related defenses, public nuisance abatement actions are treated differently than all other nuisance actions. Civil Code section 3490 provides that: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." Therefore, "[n]either prescriptive rights, laches, nor the statute of lim-

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268. 23 Cal. Rptr. 2d at 382-83.
271. *See supra* notes 19, 45, 65-71 and accompanying text.
limitations is a defense against the maintenance of a public nuisance."273 This rule has been construed to mean that the statute of limitations is no defense to an action to abate a public nuisance whether brought by a public entity274 or a private party.275 Such a litigation benefit is critical in those instances where a prior owner who created or maintained a leaking UST relinquished title to the property years ago, and where the three-year statute of limitations in Code of Civil Procedure section 338276 might otherwise bar the action.277

However, statutes of limitation defenses may apply where a landowner brings a public nuisance cause of action and prays for special injury damages, real property injuries, or damages incidental to the abatement of the public nuisance, or where the landowner brings a private nuisance cause of action.278

In such actions, the court in its findings must characterize the nuisance as either "continuing" or "permanent."279 Whether a nuisance will be classified as continuing or permanent "depends not on the offending party's interest in continuing the nuisance, but on the type of harm suffered."280

If the nuisance is permanent, a plaintiff must bring one action for all past, present, and future damage within the three-year statute of limitations in Code of Civil Procedure section 338 after the permanent nuisance is created.281 If, on the other hand, the nuisance is a continuing one, the following rules apply:

"Every repetition of [the] continuing nuisance is a separate wrong," subject to a new and separate limitation period, "for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred" ([citation omitted]), but "[r]ecovery is limited . . . to actual injury suffered [within the three years] prior to commencement of

274. See, e.g., Town of Cloverdale v. Smith, 60 P. 851, 852 (Cal. 1900).
276. CAL. CIV. PROC. CODE § 338 (West Supp. 1993) (providing that "[a]n action for trespass upon or injury to real property" must be brought within three years).
277. See generally Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796, 800-02 (Ct. App. 1993).
278. See Mangini I, 281 Cal. Rptr. 827, 837-38 (Ct. App. 1991). Since special injury damages in a public nuisance action often constitute private nuisance damages, see supra note 178 and accompanying text, special injury damages in a public nuisance action are treated the same as private nuisance damages with respect to the statute of limitations defense.
279. Mangini I, 281 Cal. Rptr. at 838; see, e.g., Wade, 19 Cal. Rptr. at 175-77.
281. Capogeannis, 15 Cal. Rptr. 2d at 800; see Mangini I, 281 Cal. Rptr. at 838; KFC Western, Inc. v. Meghrig, 28 Cal. Rptr. 2d 676, 684-85 (Ct. App. 1994).
each action” ([citations omitted]) and “[p]rospective damages are un-
available.” [Citation omitted.]282

California courts have distinguished continuing from permanent
nuisances primarily by determining whether a nuisance can be discon-
tinued or abated at any time.283 This “abatability” test is ordinarily a
question of fact turning on the nature and extent of the
contamination.284

Contaminated soil and groundwater caused by a leaking UST
will, in most cases, be deemed a continuing nuisance under the abata-
bility test since the contamination is abatable. In Mangini v. Aerojet-
General Corp. (Mangini I),285 the court stated that a plaintiff’s land
“may be subject to a continuing nuisance even though defendant’s of-
fensive conduct ended years ago” because “the ‘continuing’ nature of
the nuisance refers to the continuing damage caused by the offensive
condition, not to the acts causing the offensive condition to occur.”285
In Capogeannis v. Superior Court, the court rejected, as a matter of
law, the defendants’ argument that the nuisance was permanent, bas-
ing its holding on policy considerations.286 A similar result was
reached in KFC Western, Inc. v. Meghrig.287

Even if the contamination resulting from a UST presents a close
question as to whether a continuing or permanent nuisance exists, the
plaintiff should be given the option of deciding which it is.288

2. Allocating the Burden of Proof

In Mangini v. Aerojet-General Corp. (Mangini II),289 the Court of
Appeal for the Third District recently reversed a $13.2 million jury

282. Capogeannis, 15 Cal. Rptr. 2d at 800.
283. See, e.g., Baker, 705 P.2d at 870; Capogeannis, 15 Cal. Rptr. 2d at 801; Mangini I,
281 Cal. Rptr. at 840; KFC Western, Inc., 28 Cal. Rptr. 2d at 685.
284. Capogeannis, 15 Cal. Rptr. 2d at 805; Mangini I, 281 Cal. Rptr. at 841; KFC West-
ern, Inc., 28 Cal. Rptr. 2d at 685.
285. Mangini I, 281 Cal. Rptr. at 840-41. This language was also quoted in KFC West-
ern, Inc., 28 Cal. Rptr. 2d at 685.
286. Capogeannis, 15 Cal. Rptr. 2d at 804; see also Miller v. Cudahay Co., 858 F.2d
1449, 1454-56 (10th Cir. 1988) (finding salt pollution of a freshwater aquifer resulting from
a salt manufacturer’s operations to be a continuing nuisance since the damage to the aqui-
fer was remediable, even if there was no conclusive timeframe for cleaning the aquifer).
287. 28 Cal. Rptr. 2d at 685.
288. Capogeannis, 15 Cal. Rptr. 2d at 802 (“[I]n a case in which the distinction between
permanent and continuing nuisance is close or doubtful the plaintiff will be permitted to
elect which theory to pursue.”); Mangini I, 281 Cal. Rptr. at 839 (“In case of doubt as to
the permanency of the injury the plaintiff may elect whether to treat a particular nuisance
as permanent or continuing.’”)(quoting Baker v. Burbank-Glendale-Pasadena Airport
Auth., 705 P.2d 866, 871 (Cal. 1985), cert. denied, 475 U.S. 1017 (1986)).
(Not December 1994) (31 Cal. Rptr. 696 does not include part II.B pursuant to California Rules of
Court rule 976.1).
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award in a private nuisance action for damages. The court found that plaintiff property owners failed to meet their burden of proving by substantial evidence that hazardous substances contaminating the soil and groundwater were "abatable" (defining abatable as remediable at a "reasonable cost by reasonable means") and held that the plaintiffs had therefore not proven a continuing nuisance. Accordingly, the court concluded that the nuisance arising from the contamination alleged by the plaintiffs was not continuing and that the three-year statute of limitations provided in Code of Civil Procedure section 338 had expired before the plaintiffs brought their action.

The categorization of a private nuisance as permanent or continuing has long been crucial when the statute of limitations provides a potential defense. The basic premise of Mangini I—that the statute of limitations on a private nuisance cause of action for damages begins to run upon manifestation and discovery of a permanent nuisance—is well established. However, the court's discussion in Mangini II regarding which party has the burden of proving that a private nuisance is continuing rather than permanent when the defendant raises the statute of limitations as a defense seems destined to create substantial confusion where none before existed. The confusion arises from the unique procedural background of Mangini II.

The Mangini II court upheld jury instructions that placed on the plaintiffs the burden of proving a continuing nuisance. In an unpublished portion of the opinion, the court asserted that the plaintiffs had accepted this burden in their briefs in the Mangini I appeal, and

291. 31 Cal. Rptr. 2d at 707.
292. Id.
293. Id. at 708.
294. Id. at 698, 708-09.
295. See, e.g., Mangini I, 281 Cal. Rptr. 827, 842-43 (Ct. App. 1991) ("The traditional rule is that a statute of limitations begins to run upon the occurrence of the last element essential to the cause of action, even if the plaintiff is unaware of his cause of action.") (citing Leaf v. City of San Mateo, 163 Cal. Rptr. 711, 715 (Ct. App. 1980)).

Even if the nuisance is permanent, a plaintiff may invoke the discovery rule to delay commencement of the statute of limitations until either: (1) the plaintiff actually discovers her injury and its cause; or (2) the plaintiff could have discovered her injury and its cause through the exercise of reasonable diligence. Id. at 843; Mortkowitz v. Texaco, Inc., 842 F. Supp. 1232, 1238 (N.D. Cal. 1994). "The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry." Mangini I, 281 Cal. Rptr. at 843.

296. Mangini II, 31 Cal. Rptr. 2d at 703.
297. The court stated:

Indeed, in the first appeal plaintiffs themselves took the position that they would have the burden to prove the continuing nature of any nuisance at trial. . . . In their supplemental brief plaintiffs stated "the Manginis are prepared to prove that
noted that the court in *Mangini I* had stated that the plaintiffs would have the burden of proving a continuing nuisance at trial.\(^{298}\) Under the law of the case doctrine, the burden of proof was thus placed on the plaintiffs at the trial that occurred after *Mangini I*.\(^{299}\) The court stated: "Since we rely on the doctrine of law of the case to resolve the issue, we have no occasion to determine how we might allocate the burden of proof if the issue had been presented to us without the benefit of our prior opinion."\(^{300}\) Defendants in private nuisance actions can be expected to seize upon the *Mangini II* decision as authority for placing the burden of proof on the plaintiff to establish a continuing nuisance as an element of its cause of action in order to overcome any statute of limitations defense.

This allocation of the burden of proof would be directly contrary to the general rule that places upon the defendant the burden of affirmatively pleading and proving all facts necessary to establish a defense based upon the statute of limitations, unless the defense appears on the face of the complaint and is raised and sustained by demurrer or motion for judgment on its pleadings.\(^{301}\) In the view of the authors, because of *Mangini II*'s express refusal to decide how the burden of proof should have been allocated (albeit in the unpublished portion of the case), and because the issue had never been properly raised in the case (but was, in the view of the court, conceded by the plaintiffs), the opinion should not be interpreted to change the general rule that in private nuisance actions the defendant has the burden of proving that the nuisance is permanent in order to sustain a defense based on the

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\(^{298}\) *Id.* at 9548. The court then noted: Despite our pronouncement in *Mangini I* that plaintiffs would have the burden of proving a continuing nuisance at trial, plaintiffs did not petition for rehearing or otherwise seek review of the matter.

\(^{299}\) *Id.* “In essence the doctrine [of law of the case] provides that when an appellate court has rendered a decision and states in its opinion a rule of law necessary to the decision, that rule is to be followed in all subsequent proceedings in the same action.” People v. Scott, 546 P.2d 327, 330 (Cal. 1976).


\(^{301}\) The statute of limitations defense constitutes “new matter” under California Code of Civil Procedure § 431.30(b)(2), which must be affirmatively invoked in the lower court via very specific pleading rules, or it is waived. Philbrick v. Huff, 131 Cal. Rptr. 733, 739-40 (Ct. App. 1976); 5 B. E. WITKIN, CALIFORNIA PROCEDURE Pleading §§ 1039-1042 (3d ed. 1985). The defendant has the affirmative duty to prove each fact that is essential to the defense. *See Cal. Evid. Code* § 500 (West 1966).
statute of limitations. The general rule comports with "the law's clearly stated preference for continuing nuisance." The allocation of the burden of proof as to whether a nuisance is permanent or continuing can have immense practical consequences at trial. The cost of determining the extent of contamination and developing a remediation plan, or of determining that the contamination cannot be remediated, can be substantial, and the time required can be lengthy. In the view of the authors, the initial burden of assuming these costs in order to prove a statute of limitations defense should, as a matter of public policy, be placed upon the party who caused the nuisance.

The plaintiffs in Mangini II also argued that they had met their burden of proof to establish a continuing nuisance because the contamination proved in that case varied over time. Here again, the Mangini II court held that the plaintiffs waived reliance on the "vary-

302. See Capogeannis v. Superior Court, 15 Cal. Rptr. 2d 796, 803 (Ct. App. 1993) (stating that, once the plaintiff asserts that a nuisance is continuing, the defendant is "required to establish as a matter of law either that the nuisance was in fact permanent or that the [plaintiff] ha[s] irreversibly bound [himself] to a theory of permanent nuisance"); Arcade Water Dist. v. United States, 940 F.2d 1265, 1269 n.2 (9th Cir. 1991) (noting that, upon remand in a continuing nuisance cause of action, "the [defendant] government may be able to prove that the nuisance is, in fact, permanent"), ordered depublished, 28 F.3d 104 (1994).

303. Capogeannis, 15 Cal. Rptr. 2d at 805.

304. Mangini II, 31 Cal. Rptr. 2d 696, 707 (Ct. App. 1994). The "varying impact" test, which is an alternative to the abatability test in determining whether a nuisance is continuing, was first articulated by the Court of Appeal for the Second District in Field-Escandon v. DeMann: "The salient feature of a continuing trespass or nuisance is that its impact may vary over time." 251 Cal. Rptr. 49, 53 (Ct. App. 1988). The Field-Escandon court applied the varying impact test by examining whether the nuisance "repeatedly disturbs the property" and whether its impact on the property "gradually increase[s] over time." Id. Several California courts have recognized the varying impact test. See, e.g., Capogeannis, 15 Cal. Rptr. 2d at 801; Spar v. Pacific Bell, 1 Cal. Rptr. 2d 480, 483 (Ct. App. 1991); Mangini I, 281 Cal. Rptr. 827, 841 (Ct. App. 1991).

Contaminants leaking from a UST should qualify as a continuing nuisance under the varying impact test as well, since the continued migration of petroleum contaminants will impact the public health and the environment in different ways over time. See, e.g., Mangini I, 281 Cal. Rptr. at 841; see also Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 666-67 (E.D. Cal. 1990) (holding that under the varying impact test, a continuing nuisance exists where "the migration or seepage or leaking" of a hazardous substance "has been a continuous process which is continuing even today even though the actions which caused the [hazardous substance] to get into [the property] so it could migrate ended some years ago"); cf. Arcade Water Dist. v. United States, 940 F.2d at 1268 (stating that "[i]n determining under California law whether the nuisance is continuing, the most salient allegation is that contamination continues to leach [into the groundwater]"), ordered depublished, 28 F.3d 104 (1994). Recently, the Capogeannis court noted: "Subsequent Court of Appeal opinions have acknowledged Field-Escandon's proposal but have explicitly or implicitly recognized that "[m]ost cases . . . analyze the condition to determine whether the nuisance/trespass may be discontinued." Capogeannis, 15 Cal. Rptr. 2d at 801 (quoting Spar v. Pacific Bell, 1 Cal. Rptr. 2d 480, 482-83 (Ct. App. 1991)).
ing impact” test by failing to properly raise it in their pleadings, at trial, and on appeal.  

B. Limited Availability of the Comparative Negligence Defense

The availability of the comparative negligence defense, like the time-related defenses, depends upon whether the nuisance action is for damages or for abatement.

The comparative negligence defense may be available in actions for damages. In Tint v. Sanborn, the court held that contributory negligence is permitted as a defense in the limited circumstance where the defendant’s conduct in creating the private nuisance amounts to negligence, and the plaintiff seeks damages.

The Tint court applied comparative negligence to nuisance actions as a logical extension of Li v. Yellow Cab Co., which replaced all-or-nothing contributory negligence with a system of comparative negligence in California. Thus, when liability for a nuisance is based on a negligence theory, defenses such as comparative negligence may apply to actions for damages.

While there appear to be no California cases that discuss the comparative negligence defense in a public nuisance abatement action, at least one California court refused to apply the defense in several private nuisance abatement cases. In Kafka v. Bozio, the trial court ruled in favor of the defendant in an action for damages and for injunctive relief to abate a private nuisance. On appeal, the appellants waived all claims for damages and asked that the action be regarded as solely one for the abatement of a nuisance. The nuisance in Kafka was allegedly the result of the encroachment of defendant’s building due to the negligent manner in which it had been constructed. In his answer, the defendant stated, in effect, that the nuisance was due to the negligence of the plaintiffs in adding the weight of their building to a common wall. The court stated: “The parties thus confuse the issues herein by importing into the case questions of

307. Id. at 907-08. The court distinguished Kafka v. Bozio on the grounds that “[t]he instant case, of course, seeks damages, not abatement.” Id. at 904. The Tint court did not decide whether comparative negligence applies to a nuisance that all parties concede arose from intentional or reckless conduct, or to an ultrahazardous activity as to which strict liability in tort might be applied. Id. at 908 n.3.
308. 532 P.2d 1226 (1975).
309. Tint, 259 Cal. Rptr at 906 (quoting Li, 532 P.2d at 1243).
311. Id.
312. Id. at 754.
negligence and contributory negligence, which are wholly irrelevant to the action insofar as it seeks an abatement of the nuisance.”\(^\text{313}\)

It has been suggested that in nuisance abatement actions courts should adopt a “comparative nuisance” scheme whereby abatement costs would be allocated according to the parties’ relative responsibility in creating the nuisance.\(^\text{314}\) However, as discussed above, this is not the law in California. Furthermore, comparative nuisance should never be available in a private action to abate a public nuisance, since the plaintiff in such a case is defending the rights of the public,\(^\text{315}\) and since injunctive relief cannot be contrary to the interests of the public.\(^\text{316}\)

### C. Limitations on the Consent Defense

The consent defense is of limited or no value to defendant prior owners in nuisance actions brought by current users and involving leaking USTs. The consent defense is based on Civil Code section 3515, which provides: “He who consents to an act is not wronged by it.”\(^\text{317}\) The principles involved in the consent defense are closely related to the elements of the assumption of the risk defense.\(^\text{318}\) Generally, a plaintiff does not consent to a nuisance if the plaintiff

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313. *Id.* at 754-55.
315. See *supra* notes 121-25 and accompanying text.
317. CAL. CIV. CODE § 3515 (West 1970). See generally Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 383 (Ct. App. 1993) (holding that consent is not a defense to a nuisance action against a prior owner); Mangini I, 281 Cal. Rptr. 827, 835-36 (Ct. App. 1991) (finding that a lessee’s disposal of waste was not done with the consent of the lessor).
318. In general, where a public nuisance is involved, the assumption of risk doctrine usually does not apply. See 6 WITKIN, *supra* note 118, *Torts* §§ 1104-1113; see also Finnegan v. Royal Realty Co., 218 P.2d 17, 30-32 (Cal. 1950) (declining to apply the assumption of risk doctrine to a private plaintiff to bar him from bringing an action for damages against one who maintained a nuisance in violation of a public safety statute merely because the private plaintiff knew of the existence of the nuisance); Friedman v. Pacific Outdoor Advertising Co., 170 P.2d 67, 71 (Cal. Ct. App. 1946) (holding the doctrine of *volenti non fit injuria* inapplicable where the injury arises from a violation of an ordinance or where a public nuisance is maintained unless the aggrieved party contributed to such maintenance); Merrick v. Murphy, 371 N.Y.S.2d 97, 99-101 (App. Div. 1975) (allowing a nuisance cause of action against the former owner of land who had negligently created the dangerous condition before selling the land, and stating that public policy forbids waiving the duty that the defendant owes to the plaintiffs’ mere passive acquiescence); Warren A. Sea-vey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 994-95 (1952) (arguing that recovery is barred by assumption of risk only when a knowledgeable plaintiff has been unreasonable or careless).
continuously objects to the defendant's activity giving rise to the nuisance, or if the plaintiff does not expressly assent to the nuisance.

Recent California cases have held that the consent defense is not available to a prior owner who, unbeknownst to the current owner, illegally discharged hazardous wastes on the property. Neither is the consent defense applicable to a nuisance action by a landowner against a prior owner who created or maintained the nuisance on the same property. California cases have not reached the issue of whether the consent defense would apply if the prior owner can demonstrate that the current owner expressly consented to the nuisance condition in unambiguous terms. Especially where the current landowner is not aware of the soil and groundwater contamination caused by a leaking UST at the time of purchase, the consent defense should be limited in application.

In actions to abate a public nuisance, the consent defense should never apply. In Churchill v. Baumann, the Supreme Court indicated that the consent defense does not apply where the public is injured:

Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. . . .

But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds.

In summary, very few defenses are available to a prior owner in a public nuisance abatement action brought by a present owner of con-
taminated property, where such plaintiff can successfully demonstrate that the contamination constitutes a public nuisance and that such plaintiff has been specially injured by the public nuisance. Most of the defenses described above would apply only if the landowner sought to recover damages in a public nuisance action, or if the landowner brought a private nuisance action.

CONCLUSION

Current environmental statutes fail to provide private landowners with adequate remedial relief against prior owners or operators who buried or maintained leaking petroleum storage tanks on the property. Recent California decisions have permitted current landowners to bring public nuisance, public nuisance *per se*, and private nuisance actions to compel prior owners to abate nuisances caused by environmental contamination by prior owners or operators, and to seek damages caused by the existence of the contamination. Current environmental policy deems it fair to pass the burden of remediating contamination caused by leaking USTs on to prior owners who were responsible for creating or maintaining the leaking UST and who benefitted from the establishment of a condition that now threatens public health. As Carol Browner, the current Administrator of EPA, stated: “We should be careful to preserve the principle of site-specific polluter pays. The parties that contribute to the contamination should be responsible for the cleanup.”
