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Chemical Contamination in California: 
A Continuing Nuisance? 

Robert E. King†

Nuisance claims have emerged as a controversial method of combating environmental pollution. Plaintiffs often rely upon continuing nuisance claims in cases of soil and groundwater contamination. Such charges allow for successive suits with the statute of limitations running from the time of the last injury. In contrast, defendants prefer to characterize the same types of chemical pollution as permanent nuisances. Permanent nuisances trigger typical three-year statutes of limitations and preclude future litigation after the initial suit. As a result, courts have become embroiled in determining whether chemical contamination constitutes a permanent or continuing nuisance.

California has emerged as a leader in the chemical contamination nuisance controversy. Favoring continuing nuisances on both equity and public policy grounds, California courts employ a "reasonably abatable" standard to adjudicate environmental nuisance claims. Despite its preference for continuing nuisances, however, California's lack of standards in chemical contamination nuisance cases causes considerable legal confusion. The state's failure to establish uniform criteria to distinguish continuing from permanent nuisances leads to inconsistent judicial outcomes, creates expensive litigation delays, and ultimately hinders environmental protection. In response, California should continue its national environmental leadership by adopting straightforward and workable standards to define permanent and continuing nuisances.

This Comment contains three parts. Part I provides an overview of nuisance claims and California's progressive support for chemical contamination nuisance claims. Part II discusses the need for standards based upon the issue's importance and California's muddled jurisprudence. Part II also furnishes a "Plaintiff's Checklist" to summarize what California courts deemed as sufficient evidence to prove environmental continuing

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nuisance claims. Finally, Part III proposes uniform standards in an effort to eliminate current confusion. Definitive, consistent standards clarify the law and promote equitable outcomes; litigants, the courts, and the public deserve nothing less in protecting the environment.

I. BACKGROUND

California has emerged as a leader in environmental nuisance litigation. With its large geographic area and increasing development, California boasts a disproportionate number of chemical contamination sites. In response to its burgeoning environmental problems, the state utilizes its progressive nuisance statute, together with common law jurisprudence, to adjudicate pollution disputes.

California defines a nuisance as “[a]nything 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 . . . .” A public nuisance is a nuisance “which affects at the same time an entire community or neighborhood, or any considerable number of persons,” while a private nuisance, the topic which this Comment will examine, is any nuisance not included within the public nuisance definition. Although laying a broad foundation suitable for chemical contamination claims, the expansive statute provides little specific guidance to courts for distinguishing between permanent and continuing nuisances. Consequently, California courts turn to the common law for further clarification on the

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1 James B. Brown and Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes*, 21 Ecol L Q 643, 646 (1994) (“The State of California has more than its fair share of contamination problems resulting from leaking USTs [underground storage tanks, a leading cause of groundwater contamination]. 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.”).
3 Cal Civ Code § 3479.
4 Cal Civ Code § 3480.
5 Cal Civ Code § 3481.
6 In discussing California’s sweeping nuisance definition, one court noted that “[t]he statutory definition of nuisance appears to be broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property.” *Stoiber v Honeychurch*, 101 Cal App 3d 903, 919, 162 Cal Rptr 194 (Cal App 1980).
thorny distinction between permanent and continuing nuisances.\(^7\)

The common law starkly contrasts permanent and continuing nuisances. In California, "a permanent nuisance is considered to be a permanent injury to property for which damages are assessed once and for all, while a continuing nuisance is considered to be a series of successive injuries for which the plaintiff must bring successive actions."\(^8\) The California Supreme Court has consistently adhered to this distinction between permanent and continuing nuisances.\(^9\)

Abatability is the essential element\(^10\) of a continuing nuisance.\(^11\) "If an encroachment . . . is abatable, the law does not presume that such an encroachment will be permanently maintained. The maintenance of such an encroachment is a continuing . . . nuisance."\(^12\) Plaintiffs may bring successive actions for actual, but not prospective, damages until the defendants abate the nuisance.\(^13\) Some examples of continuing nuisances include noise,\(^14\) noxious odors,\(^15\) and even solid structures such as a leaning wall.\(^16\)

California courts define a permanent nuisance as an action where "by one act a permanent injury is done," leading to damages assessed "once [and] for all."\(^17\) Courts developed the perma-

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\(^7\) See Brown and Hansen, 21 Ecol L Q at 664 (cited in note 1) ("In order to practically utilize this ephemeral nuisance statute, the California courts have turned to the common law. . . . [T]he practical application of section 3479 is only possible by dovetailing it with the common law requirements for a nuisance claim.").

\(^8\) Beck Development Co., Inc. v Southern Pacific Transportation Co., 44 Cal App 4th 1160, 1216, 52 Cal Rptr 2d 518 (Cal App 1996).


\(^10\) A less commonly used test suggests that "[t]he salient feature of a continuing . . . nuisance is that its impact may vary over time." Field-Escandon v DeMann, 204 Cal App 3d 228, 234, 251 Cal Rptr 49 (Cal App 1988). However, the California Supreme Court has affirmed that the integral difference between a permanent and continuing nuisance is the ability to abate the nuisance at any time. Baker, 39 Cal 3d at 868-70. Consequently, while courts may utilize the varying impact test to confirm the initial abatability decision, most courts employ the abatability test. Spar v Pacific Bell, 235 Cal App 3d 1480, 1485-86, 1 Cal Rptr 2d 480 (Cal App 1991).

\(^11\) Kafka v Bozio, 191 Cal 746, 751, 218 P 753 (1923).

\(^12\) Id.

\(^13\) Baker, 39 Cal 3d at 869.

\(^14\) Vowinckel v N. Clark & Sons, 216 Cal 156, 156-59, 13 P2d 733 (1932) (pottery factory blaring noise and spewing soot).

\(^15\) Tracy v Ferrera, 144 Cal App 2d 827, 828, 301 P2d 905 (Cal App 1956) (neighbor's pipes and furnaces emitting foul smells).

\(^16\) Kafka, 191 Cal at 751-52 (deeming wall tilting after earthquake to be a continuing nuisance because the defendant could have braced or removed the offending structure altogether).

\(^17\) Williams v Southern Pacific R.R. Co., 150 Cal 624, 626, 89 P 599 (1907), quoting
nent nuisance category as an exception to the rule that all nuisances are abatable and therefore continuing. In practice, courts strictly limit permanent nuisances to situations where injunctive relief is impractical or where repeated lawsuits are undesirable. Plaintiffs may obtain past, present, and future damages in permanent nuisance claims. Prior permanent nuisances include sewer lines buried under a plaintiff's land, a railroad operating across a plaintiff's property, or a public utility company's operations.

The running of the statute of limitations is perhaps the most important difference between permanent and continuing nuisances. For permanent nuisances, the statute runs from the creation of the nuisance, barring any claims asserted after a three-year period. In contrast, "each repetition of a continuing nuisance is considered a separate wrong which commences a new period in which to bring an action for recovery based upon the new injury." As these disparities indicate, the classification of a nuisance as permanent or continuing can have a substantial effect upon a party's damages and the claim's outcome.

Most California courts allow nuisance claims for the chemical contamination of soil and groundwater. In allowing chemical contamination nuisance claims, courts emphasize the individual nature of each situation. One California appellate court high-

18 Capogeannis v Superior Court, 12 Cal App 4th 668, 677-78, 15 Cal Rptr 2d 796 (Cal App 1993).
19 Spaulding, 38 Cal 2d at 267.
20 Rankin v DeBare, 205 Cal 639, 641, 271 P 1050 (1928).
21 Field-Escandon, 204 Cal App 3d at 231-32.
22 Williams, 150 Cal at 624.
23 Spaulding, 38 Cal 2d at 267.
24 Phillips v City of Pasadena, 27 Cal 2d 104, 107, 162 P 2d 625 (1945).
25 Cal Civ Proc Code § 338(b) (West 1982).
26 Beck Development, 44 Cal App 4th at 1217.
27 See G. Nelson Smith III, Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion, 36 Santa Clara L Rev 39, 57 (1995) ("In reality, the primary purpose of determining whether a nuisance or trespass is continuing or permanent is to establish the outcome of a particular case or the legal effects of certain defenses . . . .").
28 Martin Marietta Corp. v Insurance Co. of North America, 40 Cal App 4th 1113, 1132, 47 Cal Rptr 2d 670 (Cal App 1995) ("(N)uisance claims may include wrongful entry or invasion by pollutants. . . . The migration of pollutants from one property to another may constitute . . . a nuisance . . ."); Resolution Trust Corp. v Rossmoor Corp., 34 Cal App 4th 93, 99, 40 Cal Rptr 2d 328 (Cal App 1995) ("(F)ailure to clean up contamination causing ongoing damage to property has been held to constitute . . . a nuisance."). See also Brown and Hansen, 21 Ecol L Q at 696 (cited in note 1).
29 Beck Development, 44 Cal App 4th at 1217 ("(E)ach case must be determined upon
lighted the unique and complex aspects that pollution brings to traditional nuisance law, acknowledging that chemical contamination cases "do not fit easily into the continuing-use/permanent-encroachment dichotomy because the harmful effects of the pollution may continue beyond the termination of the activity that gave rise to the harm."

In response to the imprecise criteria for permanent and continuing nuisances, California courts honed their standard of review to a "reasonably abatable" test. If the plaintiff can reasonably abate the nuisance, considering time, expense, the potential harm the cleanup itself may cause, and any other interests, then the nuisance is classified as continuing; otherwise, courts deem it permanent.

Previously, courts wrestled with a literal abatability standard, as in the case of *Spar v Pacific Bell*. In *Spar*, the plaintiff claimed that the defendant's underground power lines constituted a continuing nuisance. The plaintiff contended that because the defendant could and did remove its telephone lines from under the plaintiff's property, the nuisance was abatable and therefore continuing. The court rejected such reasoning, examining the totality of the circumstances, including the lines' underground location, the cables' one-hundred-year lifespan, and the significant chore of removal. California courts later characterized the *Spar* ruling as the "practical qualification of a too-literal abatability rule," and adopted its reasonably abatable standard to examine claims.

The California Supreme Court confirmed the reasonably abatable criteria in *Mangini v Aerojet-General Corp.*, a case involving contamination from hazardous waste dumping. The court endorsed the requirement that "plaintiffs had to prove the condition could be removed 'by reasonable means and without

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its own peculiar circumstances with guidance from, but not straightjacket conformance with, earlier decisions.'). The California Supreme Court held that "[w]hether contamination by toxic waste is a permanent or continuing injury... turn[s] on the nature and extent of the contamination." *Mangini*, 12 Cal App 4th at 1097, quoting *Mangini v Aerojet-General Corp.*, 230 Cal App 3d 1125, 1148, 281 Cal Rptr 827 (Cal App 1991).

31 *Capogeannis*, 12 Cal App 4th at 678.
32 Id.
34 Id at 1482.
35 Id at 1486.
36 Id at 1486-88 (finding a permanent nuisance).
37 *Capogeannis*, 12 Cal App 4th at 678.
unreasonable expense' and that 'hardship and cost' were factors. Moreover, the court held that in cases where the evidence could support either a permanent or continuing nuisance, the plaintiff could select which type of nuisance to pursue.

Beck Development Co., Inc. v Southern Pacific Transportation Co., another case of soil contamination, elaborated upon California's sympathetic yet demanding stance toward continuing nuisances. The court emphasized that while the plaintiff may elect to characterize the nuisance as either permanent or continuing when either classification could apply, the evidence must reasonably support the plaintiff's choice.

Although mandating significant evidentiary support, California courts favor continuing nuisance claims on both equitable and public policy grounds. The California Supreme Court highlighted such equitable concerns in Baker v Burbank-Glendale-Pasadena Airport Authority, a case where the plaintiffs claimed noise from a nearby airport constituted a continuing nuisance. In upholding the claim, the court empathized with the plaintiff's objections to litigating the action as a permanent nuisance, including the potential res judicata bar to later suits and California's three-year statute of limitations.

Eight years later, a California appellate court echoed the Supreme Court's equitable concerns, finding it advisable to protect "the plaintiff from 'contingencies' such as unforeseen future injury and the statute of limitations itself.

Courts also place a heavy emphasis on public policy in preferring continuing nuisance claims. Capogeannis v Superior Court, a case involving underground storage tanks contaminating soil and groundwater, exemplifies the courts' awareness of environmental issues. In reaching its decision, the Capogeannis court acknowledged the primacy of policy considerations, particularly the goal of remediating existing pollution and preventing future damage:

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39 Id at 1099.
40 Baker, 39 Cal 3d at 870.
41 44 Cal App 4th 1160, 52 Cal Rptr 2d 518 (Cal App 1996).
42 Id at 1217.
44 Id at 865.
45 Id at 870.
46 Capogeannis, 12 Cal App 4th at 678.
48 Id at 682 ("Our conclusion is influenced primarily by policy considerations.").
Today’s environmental awareness establishes . . . [that the absence of a legitimate interest in permitting the contamination to exist and the contamination’s tendency to migrate] support application, in this case, of the courts’ general preference for a finding of continuing nuisance. . . . Such a finding will tend to encourage private abatement, and perhaps monetary cooperation in abatement efforts, if only to limit successive lawsuits.49

_Capogeannis_ stands as an example of the considerable importance of environmental nuisance claims and California’s new emphasis on encouraging private remediation.

II. CALIFORNIA NEEDS UNIFORM STANDARDS

Despite California’s preference for classifying chemical contamination as a continuing nuisance, amorphous evidentiary requirements hinder plaintiffs’ claims. California’s muddled jurisprudence, with each court relying upon different criteria, has created confusion, conflicting judicial results, and costly delays. By compiling existing evidentiary requirements, the “Plaintiff’s Checklist” attempts to ameliorate litigants’ plight and serve as the basis for future nuisance criteria.

A. The Need for Standards

California courts have yet to define standards for distinguishing permanent and continuing nuisance claims in chemical contamination cases. In _Beck Development Co., Inc. v Southern Pacific Transportation Co._50 the court’s lament that “[t]here is no short and all-inclusive rule for distinguishing between permanent and continuing nuisances” illustrates California’s situation.51 The California Supreme Court’s most recent nuisance contamination decision, _Mangini v Aerojet-General Corp._52 echoed the formless criteria facing plaintiffs. The court’s guidance that “something less than total decontamination may suffice to show abatability,”53 fell far short of the precise criteria plaintiffs need. The court’s attempt to define a continuing nuisance by

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49 Id.
50 44 Cal App 4th 1160, 52 Cal Rptr 2d 518 (Cal App 1996).
51 Id at 1217.
53 Id at 1098.
what it is not, noting "we do not agree that mere technological feasibility proves abatability," also left plaintiffs without sufficient standards. One commentator recently summarized the vexing dilemma of distinguishing permanent and continuing nuisances:

Unfortunately, without any sort of statutory guidance, courts have been unable to fully articulate exactly what information must be provided by a plaintiff to meet his legal burden. . . . [Courts are often] forced to hypothesize how much evidence they believe is sufficient to present the case to the jury. Requiring the courts to make such technical decisions for purposes of assessing damages extends many courts beyond their expertise and further establishes why a uniform statutory standard for environmental nuisance . . . claims needs to be established.55

Although commentators have identified the need for standards, they, like the courts, have failed to articulate precise guidelines. California's lack of standards for the continuing/permanent nuisance controversy leads to conflicting judicial outcomes. Two leading California Appellate Court cases, Beck Development and Capogeannis v Superior Court, illustrate the differing results courts have reached under similar circumstances. In Beck Development, the plaintiff argued that subsurface oil contamination under property intended for residential development constituted a continuing nuisance.7 In rejecting this claim, the court focused on the lack of harm the contamination caused the plaintiffs and the uncertainty of remediating the pollution.59

The plaintiffs in Capogeannis fared considerably better. Like Beck Development, Capogeannis dealt with subsurface contamination, specifically, fuel leaking from underground storage tanks.60 Raising almost identical concerns as Beck Development, Capogeannis also critically noted the lack of harm the contamina-

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54 Id at 1099.
56 12 Cal App 4th 668, 15 Cal Rptr 2d 796 (Cal App 1993).
57 44 Cal App 4th at 1216.
58 Id at 1221 ("There is no evidence that the substance, in situs, is injurious or offensive to persons on the property.").
59 Id. ("The record is also sparse about the feasibility and burdens of abatement.").
60 12 Cal App 4th at 672.
tion caused the plaintiffs and the uncertainty of remediation efforts. The cases' parallels end with the courts' discordant judgments. Whereas Beck Development denied the plaintiff's claim due to insufficient evidence, Capogeannis endorsed the basis of the plaintiff's claims. Instead of emphasizing the lack of evidence, as did Beck Development, Capogeannis focused on policy concerns, lauding the importance of decontaminating the property and providing incentives for private remediation efforts. The courts also diverged on the abatability issue, with Capogeannis downplaying the plaintiff's uncertain cleanup plans, highlighting instead the importance of swift remediation. The Capogeannis court ultimately rested its holding not upon the harm, or lack thereof, to the individuals, but upon the damage to the environment.

Even in claims against activities conducted under the auspices of a public utility, described as the clearest cases of permanent nuisance, California courts produce inconsistent results. In Spar v Pacific Bell and Field-Escandon v DeMann, plaintiffs claimed that public utility pipes buried beneath their properties constituted continuing nuisances. The plaintiff in Spar particularly noted the defendant's removal of the buried lines as a clear sign of an abatable and therefore continuing nuisance. Nevertheless, both the Spar and Field-Escandon courts found the utilities' pipes to be permanent nuisances, in each case noting the intrusion's public benefit.

61 Id at 683 ("[W]e find no indication that in and of itself the contamination was in any sense harmful (or that its continuation would be harmful) to the Capogeannises or to their property interests . . . .")
62 Id at 682 ("[I]t may be inferred from the record as a whole that the reduction will be a slow and uncertain process.").
63 44 Cal App 4th at 1222-23.
64 12 Cal App 4th at 683-84.
65 Id at 682.
66 Id ("That in this case abatement efforts may take considerable time and may never be wholly successful should not be permitted to dictate a result that would lessen incentives to proceed as promptly and effectively as possible to abate the contamination.").
67 Id.
68 Spaulding v Cameron, 38 Cal 2d 265, 267, 239 P2d 625 (1952).
70 204 Cal App 3d 228, 251 Cal Rptr 49 (Cal App 1988).
71 Spar, 235 Cal App 3d at 1482-83; Field-Escandon, 204 Cal App 3d at 231.
72 235 Cal App 3d at 1486.
73 Id ("The [buried telephone lines with useful lives estimated at one hundred years] were intentionally placed to provide service to the public indefinitely."); Field-Escandon, 204 Cal App 3d at 234 ("[T]he sewer pipe was intended to be a permanent structure for sewage disposal [and the only source of plumbing facilities] from the DeManns' house to
Other courts, however, do not accord special status to public endeavors and have refused to classify all governmental actions as permanent nuisances. In *Baker v Burbank-Glendale-Pasadena Airport Authority*, the plaintiffs asserted that the local airport was a continuing nuisance. While acknowledging the importance and permanence of the airport's functions, the court criticized the use of public benefit as the sole criterion for determining nuisance claims, stating that "public policy militates against defining a nuisance as permanent or continuing on the basis of privilege alone." Ultimately, the court found that although it could not enjoin the airport operations entirely, the facility's public nature did not prevent the court from classifying it as a continuing nuisance.

In *Phillips v City of Pasadena*, the California Supreme Court reviewed another case of public action, the city's roadblock of a private lane. The plaintiff argued that Pasadena's obstruction of the only access to his property constituted a continuing nuisance because the barrier could be removed at any time. Despite the municipality's arguments of public necessity, the court agreed with the plaintiff. Thus, even activities under public auspices are not immune from the confusion California's ambiguous nuisance jurisprudence has produced. Courts characterized a nuisance that had already been abated, the sewer line in *Spar*, as permanent, while classifying persistent airport noise, the sounds in *Baker*, and a confining solid structure, the barrier in *Phillips*, as continuing nuisances.

In addition to incongruous rulings, California's ill-defined criteria often result in expensive delays. *Mangini* exemplified the effects of bureaucratic procrastination: "[The] governmental investigation [in this case] has not yet reached the point where a health risk assessment can be performed to determine acceptable cleanup levels for the particular site. Thus, plaintiffs cannot rely on any regulatory agency as setting the standard for abatement ..." The consequent additional trial preparations and

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74 39 Cal 3d 862, 218 Cal Rptr 293 (1985).
76 Id at 865.
77 Id at 871.
78 Id at 873.
79 27 Cal 2d 104, 162 P2d 625 (1945).
80 Id at 106.
81 Id at 107.
82 Mangini, 12 Cal 4th at 1098.
postponements also result in escalating costs, further debilitating plaintiffs’ ability to continue litigation.\(^{63}\)

California’s vague standards most severely prejudice plaintiffs who fail to fulfill courts’ amorphous criteria. Both *Beck Development*\(^{64}\) and *Mangini*\(^{65}\) demonstrate courts’ intolerance of unsubstantiated charges, barring claims lacking substantial evidence.

In short, the pervasive lack of standards causes erratic results, prolongs expensive proceedings, and ultimately may doom plaintiffs’ efforts to litigate chemical contamination nuisance claims. California needs clear, workable standards to resolve this muddled jurisprudence and ensure equitable, efficient, and effective outcomes.

\section*{B. A “Plaintiff’s Checklist” of Existing Standards}

While uniform standards may not exist at present, California courts consider numerous factors in evaluating continuing nuisance claims.

Courts have adopted three minimal standards. First, plaintiffs must prove by a preponderance of the evidence all the necessary facts to establish a continuing nuisance.\(^{66}\) Second, courts hold any insufficiency of evidence against the plaintiff.\(^{67}\) Third, the plaintiff’s ultimate burden is to prove “that the nuisance can be remedied at a reasonable cost by reasonable means.”\(^{68}\) As the above criteria illustrate, many terms remain to be defined in developing appropriate standards.

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\(^{63}\) One commentator noted that “[t]he cost of determining the extent of contamination and developing a remediation plan, or of determining that the contamination cannot be remedied, can be substantial, and the time required can be lengthy.” James B. Brown and Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes*, 21 Ecol L Q 643, 699 (1994).

\(^{64}\) In *Beck Development*, the court argued that the plaintiff’s failure to present compelling evidence of ongoing damage barred the continuing nuisance claim: “Under the abatability test we find insufficient evidence to support the claim that the contamination under Beck’s property should be characterized as a continuing rather than permanent nuisance. . . . [T]he evidence does not establish that the buried substance is migrating to other properties or into public water supplies, or that it is otherwise injurious or offensive to the public. 44 Cal App 4th at 1221.

\(^{65}\) In *Mangini*, the California Supreme Court also critically reviewed the plaintiff’s evidence, concluding: “On this record, there is no substantial evidence that the nuisance is abatable.” 12 Cal 4th at 1103.

\(^{66}\) *Mangini*, 12 Cal 4th at 1096-97.

\(^{67}\) *Beck Development*, 44 Cal App 4th at 1221.

\(^{68}\) Id at 1222, quoting *Mangini*, 12 Cal 4th at 1102-03.
Beck Development provides some insight into the important considerations for assessing the sufficiency of the evidence. In evaluating chemical contamination as a permanent or continuing nuisance, the court highlighted the "feasible means of, and alternatives to, abatement, the time and expense involved, legitimate competing interests, and the benefits and detriments to be gained by abatement or suffered if abatement is denied." While failing to specify exact tests or dollar figures, the Beck Development guidelines emphasize those areas in which plaintiffs must provide evidence to prosecute their claims.

1. Plaintiffs' pitfalls.

In continuing nuisance cases, plaintiffs' pitfalls include presenting minimal evidence, defining a nuisance by negative implication, and gathering only rudimentary information on injuries or abatement.

California courts require more than minimal levels of evidence to prove chemical contamination as a continuing nuisance. Bare allegations do not sustain a continuing nuisance claim, nor do simple showings that the property is contaminated and that technology exists to decontaminate the property. Even demonstrating interference with the use that the plaintiff desires, without any further detriment, does not establish a continuing nuisance. Such minimally supported suits have drawn a sharp rebuke from the California Supreme Court: "[T]he plaintiff's complete failure to offer substantial evidence of the cost and reasonableness of remediation leads ineluctably to the conclusion that the nuisance at issue is 'permanent.'"

The second category of unsuccessful litigation strategy involves attempts to establish a continuing nuisance by negative
implication. In *Spar v Pacific Bell*, the defendant actually removed the offending underground telephone lines before the trial.96 The plaintiff seized upon the defendant’s action, arguing that because the lines were removable, the nuisance could not be permanent and therefore had to be continuing.97 The court disagreed, stating that the defendant’s removal of the lines, standing by itself, did not establish the necessary aspects of a continuing nuisance and denied plaintiff’s claim.98 This tactic of definition by negative implication remains common99 because courts have failed to establish appropriate, workable criteria for permanent and continuing nuisances; consequently, plaintiffs and defendants alike are left to grope for standards in the intellectual dark.

The final admonition to plaintiffs is very simple: Gather as much information before trial as possible, since conceding uncertainty about the extent, harm, or future nature of the pollution may undermine a case. *Mangini* features a cavalcade of admissions that ultimately doomed the plaintiff’s case.100 Plaintiffs confessed in their briefs, at trial, in closing arguments, and on appeal that they had no evidence of the extent of the pollution.101 In rebuking the plaintiffs’ unsubstantiated claim on appeal, the California Supreme Court shed further light upon the factors necessary to prove chemical contamination as a continuing nuisance:

The result of the uncertainty regarding the extent of decontamination is that it is uncertain whether the nuisance is abatable. Thus, we do not know how much land or water has to be decontaminated. We do not know how deep the contamination would have to go. We

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96 235 Cal App 3d at 1482.
97 Id at 1486.
98 Id.
99 In addition to *Spar*, see *Mangini*, 12 Cal 4th at 1102. The decision in *Mangini*, where the defendant allegedly disposed of toxic waste illegally, offers another example in which a plaintiff attempted to define a continuing nuisance by negative implication. The plaintiffs claimed that nuisances that were illegal or violative of government standards could not be permanent, and that consequently courts must classify the nuisances as continuing. 12 Cal 4th at 1102. The court rejected both arguments, holding first that illegality did not define the type of nuisance, and second that pollution levels above government standards did not automatically create a continuing nuisance, but rather presented a question of fact. Id.
100 12 Cal 4th at 1097-98.
101 Id. Even the plaintiffs’ own expert admitted that “[t]he heart of the situation is that there’s not enough known about the site yet to assess [sic] what remedial measures need to be done [ ] [and] can be done out there effectively.” Id at 1097.
have no idea how much it would cost but know only that it would cost unascertainable millions of dollars. On this record, there is no substantial evidence that the nuisance is abatable.\(^{102}\)

In short, because nuisance cases are fact-sensitive, plaintiffs should be particularly diligent in amassing as much evidence as possible about the extent of the contamination and cost of remediation, as later admissions about deficiencies in such evidence could defeat the plaintiff's claim.

2. Plaintiff's checklist.

Despite California's amorphous nuisance law, courts consistently look to government standards, expert testimony, and cost-benefit analysis in determining permanent/continuing nuisance cases. This "Plaintiff's Checklist" compiles existing evidentiary standards to aid current litigants and serve as the basis for future criteria.

The single most important factor among existing standards in establishing chemical contamination as a continuing nuisance is compliance with government standards. Courts consistently look to the responsible government agency to define excessive pollution levels, and plaintiffs who use government findings favorable to their cause usually emerge triumphant,\(^{103}\) while those who attempt to go against the grain frequently lose.\(^{104}\)

Capogeannis illustrates both courts' reliance on government standards and the standards' persuasive weight: "We are satisfied to presume that cleanup standards set by responsible public agencies sufficiently reflect expert appraisal of the best that can be done to abate contamination in particular cases. As judges we will not presume to insist upon absolutes these agencies do not require."\(^{105}\) In essence, courts believe that government standards are ideal, institutionally superior to a court's own ad hoc guidelines, and even preferable to outside expert opinions.

Consequently, courts often treat government findings as a deciding factor in nuisance cases. Wilshire Westwood Associates v Atlantic Richfield Co.\(^{106}\) illustrates the potent effect of agency

\(^{102}\) Id at 1103.


\(^{104}\) See Mangini, 12 Cal 4th at 1098; Beck Development, 44 Cal App 4th at 1222-23.

\(^{105}\) 12 Cal App 4th at 683.

\(^{106}\) 20 Cal App 4th 732, 24 Cal Rptr 2d 562 (Cal App 1993).
In Wilshire, the plaintiff alleged that defendant Atlantic Richfield's gasoline contamination constituted a continuing nuisance. The court found the Department of Health Services' findings, set forth in a letter, that "the cleanup of the gasoline spill... [was] adequate and complete, and [ ] appellants could proceed with their construction project," conclusive. It held, "This letter demonstrates that the nuisance was abatable, and for this reason can be characterized as a continuing nuisance..." The court thus relied on the agency's assessment as the determinative issue in evaluating the continuing nuisance claim.

In light of the deference courts afford to agency standards, plaintiffs who ignore or contravene these bureaucratic guidelines usually do not prevail. For example, in Beck Development, the plaintiffs requested cleanup relief not only in excess of government mandates, but actually against the local agency's wishes. The only type of decontamination that the plaintiffs wanted involved excavation of the entire property and removal of the polluted soil. Yet the two responsible government units opposed bringing the polluted soil to the surface. In objecting to the plaintiff's proposal, the agencies raised concerns regarding "the handling, treatment and disposal of the excavated soil [which would] require close regulatory supervision." The court ultimately barred the plaintiff's planned undertaking, holding that "remediation as demanded by Beck would be significantly burdensome and from a public and regulatory point of view may not be the most advisable option."

In addition to the preeminence of government regulations, other factors, including expert testimony and the reasonable cost of abatement, also play an important role in evaluating nuisance claims. While government findings are often conclusive, courts require at least some expert testimony to support the plaintiff's case. For example, in Capogeannis, the plaintiffs relied success-

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107 See also Capogeannis, 12 Cal App 4th at 683 ("When [the] demands [of the regulatory agencies] have been met, so far as the Capogeannis are concerned the nuisance will be abated.")
109 Id at 745.
110 In addition to Beck Development, see Mangini, 12 Cal 4th at 1103-04.
111 44 Cal App 4th at 1221-23.
112 Id at 1221.
113 Id at 1221-22.
114 Id at 1222.
115 44 Cal App 4th at 1222.
fully upon the declarations of a registered geologist and registered environmental assessor for expert testimony.\textsuperscript{116} Arcade Water District \textit{v} United States similarly affirmed the value of expert testimony.\textsuperscript{117} Capogeannis and Arcade demonstrate that, in contrast to plaintiff's bare allegations in \textit{Beck Development}\textsuperscript{118} or the minimal levels of proof in \textit{Mangini},\textsuperscript{119} when plaintiffs offer significant, credible, and professional evidence, courts accord substantial weight to such expert testimony.

Beyond expert testimony, courts particularly emphasize cost in assessing the reasonableness of abatement. \textit{Beck Development} illustrates this attention to cost. There, plaintiff's exorbitant demand to excavate the entire property did not fare well when the court weighed the relative expenses and benefits of the situation:

It was generally agreed that the cost of remediation would greatly exceed the value of the land after remediation. In considering the relative benefits and burdens of remediation, the comparison must be between the costs of remediation and the actual detriment to the plaintiff from a failure to remediate.\textsuperscript{120}

Affirming the importance of cost to the continuing nuisance equation, the California Supreme Court in \textit{Mangini} urged the plaintiff to provide an estimate "to prove the condition could be removed 'by reasonable means and without unreasonable expense' and that 'hardship and cost' were factors."\textsuperscript{121} The court also emphasized the importance of quantifying the cost of remediation.\textsuperscript{122}

Thus, although no court has articulated comprehensive standards, the current "Plaintiff's Checklist" includes government standards favorable to a continuing nuisance, expert testimony establishing the extent and abatability of the pollution, and detailed cost estimates for remediation.

\textsuperscript{116} 12 Cal App 4th at 680.
\textsuperscript{117} 940 F2d 1265, 1268 (9th Cir 1991). In Arcade, a California water district sued the U.S. for a military laundry's alleged pollution of a local well and water supply. The plaintiff prevailed in part because it provided an affidavit from its engineer attesting to the potentially abatable nature of the well's contamination.
\textsuperscript{118} 44 Cal App 4th at 1221-22.
\textsuperscript{119} 12 Cal 4th at 1097-98.
\textsuperscript{120} 44 Cal App 4th at 1222.
\textsuperscript{121} 12 Cal 4th at 1099.
\textsuperscript{122} Id.
III. Uniform Standards Should Combine Government Evaluation and Private Remediation to Protect the Environment

California has emerged as a leader in chemical-contamination nuisance litigation. It should continue this leadership by passing uniform statutory standards to define when environmental pollution constitutes a continuing or permanent nuisance. Courts need clear, cohesive, and practical standards. Delays in establishing nuisance criteria are unacceptably costly to litigants and the environment.

The California legislature should adopt uniform statutory standards emphasizing government evaluation and private remediation. This Comment suggests a two-part scheme: first, mandatory and prompt government assessment of the pollution, its extent, and the possibility of abatement; and second, testimony from private experts on the overall costs and benefits of remediation in accordance with pre-determined monetary limits. This proposal conforms with the underlying policy standards articulated in *Beck Development v Southern Pacific Transportation Co.* of evaluating the significance of the injury, the practicability of abatement, and the project's cumulative cost. By combining evidence from the public and private sectors, courts can use comprehensive, timely, and standardized information to decide the nuisance issue.

A. Government Assessment

Timing poses perhaps the most difficult issue facing plaintiffs. Unlike typical nuisances such as blaring noise or pungent odors, environmental contamination, often unseen and underground, is particularly difficult to identify. Furthermore, the harm may not appear for years after the incident, existing technology may not be able to identify ongoing damage, or presently benign chemicals may become toxic. All of these elements may combine to make damage undetectable for prolonged periods.

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125 Id at 1220-21.
126 A recent California appellate court decision acknowledged the plaintiff's timing dilemma in continuing/permanent nuisance cases. *Santa Fe Partnership v ARCO Products Co.*, 46 Cal App 4th 967, 982, 54 Cal Rptr 2d 214 (Cal App 1996) ("An attempt to classify
Consequently, plaintiffs often err in timing chemical contamination cases, waiting too long to bring their suits and exceeding California's three-year statute of limitations.\textsuperscript{127} In other cases, courts rebuff plaintiffs who attempt to bring their claims too soon. Courts often refuse on quasi-ripeness grounds to pass judgment until the appropriate government entity has assessed the site.\textsuperscript{128} Consequently, plaintiffs must deftly time their litigation to catch this shifting and shrinking window of opportunity between often slow bureaucratic procedures and the immovable statute of limitations.

Uniform government standards could alleviate this timing problem. A California statute could mandate government test results within a certain time period and toll the statute of limitations until the assessment concluded. A plaintiff could trigger the government evaluation by filing papers notifying the court and the defendant of the plaintiff's intention to litigate. Under this approach, the government would have sufficient, but not unlimited, time to conduct a thorough analysis of the contaminated site. As the courts have demonstrated, such neutral, informed findings are often decisive in assessing the scope and abatability of environmental contamination.\textsuperscript{129} Further, rather than engaging in expensive and confusing partisan battles of experts, courts simply could receive the unbiased opinion of responsible agencies. These local agencies generally have extensive knowledge of the surrounding terrain and substantial experience evaluating chemical contamination claims, making them ideally suited and perhaps even more knowledgeable than so-called "experts" hired by litigants. Outside expert testimony could add to, but not supplant, the required government findings. Government standards, set by trained professionals, are superior not only to each side's often conflicting results, but also to each court's own ad hoc or non-existent standards.

Admittedly, mandating government testing for every nuisance claim still may result in delays and escalating public costs.

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\textsuperscript{127} Cal Civ Proc Code § 338(b) (West 1982).

\textsuperscript{128} See Mangini v Aerojet-General Corp., 12 Cal 4th 1087, 1098, 51 Cal Rptr 2d 272 (1996).  

Environmental activists might attack the statute on the grounds that while government officials dicker over test results, the pollution will continue to harm the environment. Although some delay may occur until the agencies report their conclusions, uniform standards could minimize even this procrastination with earlier deadlines. At least under the proposed government evaluation, the review tolls the statute of limitations, preserving the opportunity for a permanent nuisance claim and affording the possibility of some remediation. Currently, the all-or-nothing approach with California's three-year statute of limitations may permanently bar unsuspecting plaintiffs. Mandatory government investigation would create a bright-line rule, ensuring that plaintiffs would not commence the trial before the government findings were complete, while avoiding the delays and court costs of premature litigation.

Some critics may contest the compulsory government intervention and concomitant spending that will result. Again, although the cost to the public trough may increase, the gains from a faster response and a cleaner environment could offset the initial public detriment. Furthermore, in comparison to the private costs that litigants already bear in attempting to decipher the current amorphous standards, such public costs probably would appear minimal.

Other detractors may contend that the costs of nuisance claims should remain internalized because the public should not pay for the potentially frivolous claims that will not prove detrimental to the environment. Further, critics may contend that the proposal forces the government to bolster every plaintiff's case. For example, opponents may assert that the only factor distinguishing the environmental review from a law requiring the government to investigate personal injury cases is the possible public benefit from abatement on private land. In response, the statute could mandate a calculation of government costs and either divide those costs equally between each litigant in reasonable but unsuccessful claims, or assess the entirety to the losing party in frivolous litigation. Such cost shifting may ameliorate the strain upon limited government resources.

On a broader level, despite the private nature of the litigation, many would argue that it is both the government's responsibility and in its interest to protect the environment. Groundwater and air quality represent common goods appropriate for government management. Furthermore, the migratory nature of contamination could threaten not only public lands and resources,
but also public health, which is certainly an area of government concern. The court in *Capogeannis v Superior Court* recognizes pollution's dangerous migratory nature and broader public implications, noting that "environmental contamination is no respecter of property lines and is a legitimate subject of grave concern to society as a whole..." Since the government has demonstrated a willingness to mandate environmental cleanups on private land, increasing an agency's evaluative authority seems a logical and beneficial progression. Additionally, by facilitating private parties' nuisance suits, perhaps the public agencies would have less of an enforcement burden under environmental regulations, thereby resulting in budgetary savings.

On balance, the uniform statutory standard should mandate government testing of the extent and abatability of chemical contamination within a specified period and toll the statute of limitations for the duration of the government's assessment.

B. Private Sector

While the government should evaluate the contamination upon notice of the plaintiff's intention to file suit, the standards should require the litigants to submit their plans to a cost-benefit analysis. Although local agencies may be more skilled in considering objective pollution levels, the affected parties may be better suited to estimate subjective valuations such as the landowner's inability to utilize the property. California's nuisance statute should compel plaintiffs and defendants to provide estimates from professionals summarizing both the remediation's cost and the property's value before and after decontamination.

A cost estimate is crucial to analyze equitably the plaintiff's detriment and the fiscal prudence of remediation. As *Beck Development* illustrates, the latter is a particularly important criterion in cleanup efforts. The statute could set fixed limits on what constitutes a "reasonably" abatable continuing nuisance. For example, the legislature could decide that a remedy exceeding 150 percent of the decontaminated land's value would be excessive and therefore fail to qualify as reasonably abatable.
Likewise, the statute could state that the costs of remediation could not exceed twice the monetary detriment to the plaintiff for the nuisance to qualify as reasonably abatable. At a minimum, the plaintiff could recover for the actual detriment, while the statute could allow the remediation costs to exceed the detriment to the plaintiff as both a punitive measure and as a policy statement to emphasize the importance of a toxic-free environment. 

*Beck Development* also serves as precedent for reasonable limits, denying the plaintiff's claim where "the costs of remediation would far exceed, by many multiples, the actual detriment that would be suffered if remediation is denied."135 The preset limits would afford a measure of balance and efficiency by not permitting exorbitant remediation costs to result in cases involving minor detriments or land of little value.

This method of allowing private cost-benefit analyses would also foster another policy interest stated in *Beck Development*, flexible remedies.136 Instead of advocating uncompromising and often unduly expensive cleanups, the standards would encourage plaintiffs to pursue more reasonable approaches to comply with the proposed statute's cost requirement. Effective yet fiscally responsible efforts would achieve the goal of decontaminating the property in a more economical manner. By conserving a defendant's resources, this approach might permit a net increase of additional cleanups at other sites.

Critics of this approach may argue that if the government really wants to make policy statements and impose punitive measures, it should punish the perpetrators at any cost. However, the proposed statute only addresses civil suits; the criminal penalties perpetrators would face provide additional deterrence. Other non-governmental punishments such as stigma damages,137 shame, economic boycotts, and a potential public relations disaster also would discourage polluters. Furthermore, government punishment must have limits, otherwise it risks destroying excess of the land's value. Id.

135 Id.

136 44 Cal App 4th at 1221 (encouraging plaintiff Beck to consider alternate development plans).

137 Some jurisdictions allow stigma damages, monetary awards to compensate for a site's injured reputation and consequent reduced marketability, but only for indefinite, permanent nuisances. See *FDIC v Jackson-Shaw Partners No. 46, Ltd.*, 850 F Supp 839 (N D Cal 1994). However, other courts are reluctant to award such damages "due to the amorphous nature of public fears of contaminated land and the inherent uncertainty and speculativeness of the extent, as well as the existence, of the stigma." *Santa Fe Partnership*, 46 Cal App 4th at 984.
the defendant from whom it wishes to extract compensation and, more importantly, rehabilitate the defendant into an environmentally friendly entity.

Other opponents may assert that a court cannot place a "value" on land, especially considering the variability of aesthetic qualities. Admittedly, determining a land's overall "value," including its subjective, commercial, aesthetic, and environmental worth, is challenging. However, courts already must establish some assessment of a land's value to determine culpability. While it may be imprecise to assess a property's subjective qualities, without any valuation at all courts could never estimate damages and compensate successful plaintiffs. Further, plaintiffs may facilitate courts' estimates through their own expert testimony and cost-benefit analyses to ameliorate the valuation problem. Entities outside the litigation also could file amicus curiae briefs to support the land's environmental valuation.

Lastly, detractors may assert that the government simply should preserve the environment at any price. While preservation at any cost may send a message to polluters, it may have unintended effects. If excessive judgments bankrupt companies, no decontamination might ever occur. Alternatively, such large damage awards might have a chilling effect on industry, discouraging the economic growth that generates the tax dollars the government expends to monitor and protect the environment. The proposed standard would promote conservation of both the environment and the economic resources needed to preserve it.

CONCLUSION

Nuisance claims are an effective weapon in the growing struggle to prevent chemical contamination. California courts are at the forefront of this movement, broadly supporting plaintiffs' litigation in continuing nuisance claims. Unfortunately, despite the state's favorable stance toward continuing nuisance suits, California's lack of criteria for distinguishing between permanent and continuing nuisances has created inconsistent judicial out-

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138 Some courts also calculate land's "existence value." See Texas Committee on Natural Resources v Bergland, 433 F Supp 1235, 1249 (E D Tex 1977); Minnesota Public Interest Research Group v Butz, 401 F Supp 1276, 1311 (D Minn 1975). Courts define existence value as "that feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands . . . ." Butz, 401 F Supp at 1311. In chemical contamination cases, environmentalists may contend that existence value encompasses knowing that pristine land exists even if they themselves do not use the property or even know of its location.
comes, expensive delays, and ineffective environmental protection. Issues of ripeness, insufficient evidence, and amorphous guidelines plague plaintiffs’ efforts to remediate migrating pollution.

California should continue its leadership in the environmental arena by enacting a uniform statutory standard for distinguishing chemical contamination as a permanent or continuing nuisance. This standard would mandate government testing within a specified period and toll the statute of limitations until the responsible local agencies complete their assessments. The local governmental units’ conclusions would represent trained and experienced analysis and alleviate the confusion of courts’ reliance upon their own ad hoc criteria. Next, the standard would require litigants to hire professionals to assess the costs of remediation and the land’s value after decontamination. The court would then apply statutory limits to determine whether the proposed cleanup efforts were “reasonable” and whether the nuisance was continuing. On balance, this method would combine the government’s expert, neutral assessment with the litigants’ ability to fashion flexible, effective remedies. California’s chemical contamination nuisance statute would provide clarity to the legal system, deter potential violators, and ensure environmental protection into the twenty-first century.