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Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes

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BACK FROM THE MARGINS: AN ENVIRONMENTAL NUISANCE PARADIGM FOR PRIVATE CLEANUP COST DISPUTES

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ABSTRACT

The law governing private cleanup cost disputes is in disarray. For over twenty years, owners of contaminated property voluntarily cleaned up pollution caused by others in reliance on a federal law right under CERCLA to recover from those who contributed to the contamination their fair share of cleanup costs. That changed with the U.S. Supreme Court's decision in Cooper Industries v. Aviall Services, Inc. Aviall *held that liable persons under CERCLA (such as the current owners of contaminated property) who voluntarily incur cleanup costs cannot sue for contribution under CERCLA, calling into question any future role for federal law in most private cleanup cost disputes. Current state law fails to offer a meaningful alternative to federal law for allocating cleanup costs at many of the nation's hundreds of thousands of contaminated sites. This need not be so.*

Private nuisance is a flexible doctrine that is potentially well-suited for resolving cleanup cost allocation disputes. Doctrinal limitations and inter-state inconsistencies, however, currently shackle private nuisance law and prevent its application to many common problems involving contaminated property. CERCLA has pushed nuisance and other state law theories to the margins of private cleanup cost litigation. After Aviall, *private nuisance could emerge to play a major role in resolving private cleanup cost disputes, but only if states seize the opportunity to re-examine and modernize the law of private nuisance in soil and groundwater contamination cases. This article analyzes the deficiencies that currently riddle private nuisance law and proposes an environmental nuisance paradigm. The paradigm would expand private nuisance law to address contamination created by prior property owners and encourage site cleanup through a rebuttable presumption that chemical contamination constitutes a continuing nuisance that remains actionable until the contamination is abated.*

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INTRODUCTION

The law governing private cleanup cost disputes is in disarray. The U.S. Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc. (Aviall)*,[1] called into question the availability of federal cleanup cost contribution rights under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[2] In *Aviall*, the Court held that a potentially responsible party (PRP)[3] who voluntarily spent millions of dollars in cleanup costs could not use CERCLA's contribution provision[4] to recover from another PRP who caused much of the contamination its fair share of cleanup costs.[5] In so doing, *Aviall* cast doubt on the future role of federal law in private cleanup cost disputes.[6]

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1. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

2. Pub. Law No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601-9675 (West 2006)). CERCLA is sometimes referred to as the "Superfund" statute. *See infra* notes 42-63 and accompanying text.

3. Individuals or entities falling within one of the four categories of "covered persons" set forth in (CERCLA sections 107(a)(1)-(4)), are often referred to as PRPs. *See infra* notes 46-51 and accompanying text.

4. 42 U.S.C.A. § 9613(f)(1).

5. *Aviall*, 543 U.S. at 167. *See infra* notes 77-83 and accompanying text; *see also* Ronald G. Aronovsky, *Federalism and CERCLA: Re-Thinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L. Q. 1, 45-50 (2006) (discussing the *Aviall* decision).

6. As used in this article, the phrase "private cleanup cost disputes" refers to disputes between private parties regarding the allocation of contaminated property cleanup cost responsibilities. These disputes may concern reimbursement (by a direct action for damages or a derivative action for contribution) by a PRP of its fair share of cleanup costs already expended by a current landowner or

The absence of a federal cleanup cost contribution right, of course, would not implicate major national environmental policy concerns if PRPs could recover cleanup costs from other PRPs under state law. Often, however, no such state law remedy is available.[7] It should be. Private nuisance is *potentially* well suited for resolving contaminated property cleanup cost allocation disputes. Doctrinal limitations and interstate inconsistencies, however, currently shackle private nuisance law by restricting its application to neighboring land use disputes and shielding from liability a defendant's continued failure to abate long-standing contamination.

Indeed, the inadequacies of nuisance law (and other state law theories) helped inspire CERCLA's passage in 1980 to provide for the remediation of contaminated sites.[8] For over two decades, CERCLA pushed nuisance and other state law theories to the margins of private cleanup cost litigation as the owners of contaminated property and other PRPs voluntarily incurred cleanup costs in reliance on CERCLA cleanup cost contribution rights. *Aviall* proved this reliance was misplaced. The states should seize the opportunity created by *Aviall* to modernize the law of private nuisance by eliminating anachronistic limitations that currently prevent it from playing a vital role in common cleanup cost allocation disputes.

States should not ignore this opportunity. The underlying problem is significant: there are hundreds of thousands of contaminated sites across the United States[9] that will cost hundreds of billions of dollars to remediate.[10] Voluntary cleanup of these sites is essential because state and federal government agencies lack the resources either to directly remediate the pollution at these sites or force private parties to clean them up by prosecuting thousands of regulatory cleanup obligation enforcement lawsuits.[11] Cleanup cost recovery rights are crucial to promoting voluntarily remediation[12] because at most sites more than one PRP contributed to site contamination.[13]

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other PRP. They may also concern the allocation of future cleanup cost responsibilities, including claims for (a) damages covering future cleanup costs, (b) declaratory relief allocating future cleanup cost responsibilities, or (c) injunctive relief directing one or more PRPs to remediate contamination.

7. *See infra* notes 150-360 and accompanying text.

8. *See infra* notes 35-41 and accompanying text.

9. *See infra* notes 20-23 and accompanying text.

10. *See infra* notes 24-25 and accompanying text.

11. *See* Aronovsky, *supra* note 5, at 42-43, 56-57. As used in this article, the phrase "voluntary cleanups" refers to remediation undertaken by a private party short of a court order, i.e., at the party's own initiative or at the direction of a regulatory agency.

12. *See* James B. Brown & Michael V. Sucaet, *Environmental Cleanup Efficiency: Private Recovery Actions for Environmental Response Costs*, 7 T.M. COOLEY L. REV. 363, 387 (1990) ("A liable party is more likely to expend cleanup funds if it is reasonably certain that response costs expended on contamination may be recovered. Moreover, a PRP armed with knowledge of legal rights against others is more likely to initiate a prompt cleanup."); *cf.* Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21

Cleanup cost contribution is particularly important for owners of contaminated property. Current landowners typically bear regulatory responsibility to clean up their property, including pollution caused by others.[14] Cleanup cost contribution rights thus can affect both the incentive of current property owners to voluntarily take the lead in site cleanup short of government enforcement action and the fairness of cleanup cost responsibility allocation.

This article proposes an environmental nuisance paradigm[15] that would allow private nuisance to play a significant role in allocating the costs of cleaning up the nation's polluted soil and groundwater. This paradigm, if adopted by state courts or legislatures, would transform the ancient law of nuisance to meet the realities of modern contamination disputes in the following respects. First, it would permit private nuisance claims against the former owners of contaminated property, not just neighboring owners. Second, it would eliminate the antiquated doctrine of *caveat emptor* as a defense to former owner nuisance liability while continuing to allow market-related factors to affect nuisance remedies. Third, it would revitalize the continuing nuisance doctrine by basing it on a defendant's continued failure to abate the soil or groundwater contamination caused by the defendant. Finally, it would create a rebuttable presumption that soil and groundwater contamination constitutes a continuing nuisance by placing on any party contending that the contamination was a permanent nuisance the burden of proving that the contamination could not reasonably be abated.

Under this paradigm, private nuisance claims would compliment any private cleanup cost remedies remaining under CERCLA after *Aviall*. The inadequacy of current state law requires a uniform federal remedy to ensure nationwide availability of contribution rights for PRPs who voluntarily incur cleanup costs.[16] Such a CERCLA "safety net" remedy,

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HARV. ENVTL. L. REV. 337, 346 (1997) (noting that "[j]oint and several liability, in particular, can lead to PRPs facing exposure far out of proportion to any damage they actually caused").

13. *See, e.g.*, ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50 STATE STUDY, 1998 UPDATE 33 ("Most hazardous substance sites have more than one potentially responsible party."); *see also* Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume financial responsibility of cleanup by allowing them to seek recovery from others."); Atl. Research Corp. v. United States, 459 F.3d 827, 836 (8th Cir. 2006) ("Contribution is crucial to CERCLA's regulatory scheme.").

14. For example, CERCLA section 107(a)(1) imposes response cost liability on the current owner of contaminated property even if the current owner did not cause any of the site contamination. 42 U.S.C.A. § 9607(a)(1) (West 2006).

15. As used in this article, the phrase "environmental nuisance paradigm" refers to a model framework for private nuisance claims regarding the allocation of remediation or cleanup cost responsibilities for soil or groundwater contamination of plaintiff's property.

16. In Aronovsky, *supra* note 5, from which some background information in this article is drawn, I argue that while significant litigation and remedial efficiency and flexibility interests could be served if state law provided the primary source for rules of decision in private cleanup cost disputes (as described *infra* at notes 133-48 and accompanying text), a federal "safety net" cleanup cost remedy for all PRPs is necessary because of the inconsistencies and doctrinal limitations of current state law. Aronovsky, *supra* note 5 at 68-79. This article addresses how private nuisance law, as

however, would not necessarily provide a rule of decision superior to private nuisance law in contaminated property disputes. To the contrary, the proposed paradigm for private nuisance law could: (a) facilitate prompt site remediation through the presumption that the contamination can be abated; (b) create incentives for informal cleanup cost dispute resolution by expanding current landowner cleanup cost rights; (c) promote efficiency by permitting all contaminated property related claims be resolved under a common body of state law; and (d) encourage flexibility by allowing PRPs to pursue technically sound, cost-effective cleanups.[17] The paradigm's benefits thus extend far beyond addressing the aftermath of *Aviall*. At some point, the uncertainty created by *Aviall* about the availability of PRP cost recovery rights under CERCLA will be resolved by federal legislation or case law.[18] Whether or not all PRPs ultimately come to enjoy a federal right to cleanup cost contribution, states should adopt the proposed environmental nuisance paradigm to promote litigation and remedial efficiency and flexibility.

This article argues that states should adopt this proposed paradigm by statute or case law. Part I describes the contaminated property problem facing the United States, the emergence of CERCLA in the 1980s as the primary rule of decision in private cleanup cost disputes, and the uncertain future role of federal law in contaminated property litigation after *Aviall*.[19] Part II evaluates current nuisance law as applied to private cleanup cost disputes (including an analysis of its doctrinal and practical limitations) and argues that states should seize the opportunity caused by post-*Aviall* uncertainty to claim a significant role for private nuisance law in cleanup cost disputes. Part III proposes the means to accomplish this goal through adoption of the proposed environmental nuisance paradigm, and analyzes how the paradigm would expand cleanup cost remedies for the current owner of contaminated property, encourage prompt and efficient site remediation, and promote the informal resolution of cleanup cost disputes.

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revitalized by adoption of the proposed environmental nuisance paradigm, could serve these efficiency and flexibility goals and offer a meaningful (if not superior) alternative to a CERCLA "safety net" remedy for current owners of contaminated property.

17. For example, the right to recover cleanup costs under a private nuisance theory would not be dependent on a current landowner plaintiff proving that claimed costs were incurred in a manner consistent with the National Contingency Plan (NCP), 40 C.F.R. pt. 300 *et seq.*, (2005), a set of U.S. Environmental Protection Agency (EPA) regulations setting forth the often costly and time-consuming procedures required for conducting a cleanup under CERCLA. *See* 42 U.S.C.A. § 9607(a)(4)(B) (private party may only recover response costs that are consistent with NCP). *See infra* notes 54, 63, 140-45 and accompanying text.

18. *See infra* notes 88-121, 133-48 and accompanying text.

19. As used in this article, the phrase "primary rule of decision" refers to the body of law most frequently relied on by private parties to resolve disagreements regarding the allocation of cleanup costs. For a discussion of the emergence of federal law as the primary rule of decision in private cleanup cost disputes, see Aronovsky, *supra* note 5, at 9-35.

I. BACKGROUND

A. The Scope of the Problem

Soil and groundwater contamination is an enormous national problem.[20] Estimates of the number of contaminated sites throughout the country reach into the hundreds of thousands,[21] from seriously contaminated National Priorities List (NPL)[22] sites to properties presenting relatively discrete remediation issues. All levels of government—federal, state and local—are involved in regulating the investigation and cleanup of contaminated sites. The United States Environmental Protection Agency (EPA) is actively involved at only a small percentage of the nation's contaminated sites;[23] state and local government authorities serve as the lead agency at the vast majority of sites.[24] It will take decades to remediate these sites, costing hundreds of billions of dollars.[25]

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20. *See* Aronovsky, *supra* note 5, at 7-9.

21. The EPA has estimated that approximately 77,000 contaminated sites have been discovered throughout the United States, and that approximately 217,000 additional sites across the country will eventually be identified. EPA, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS viii (2004), *available at* http://www.clu-in.org/download/market/2004market.pdf [hereinafter EPA, CLEANING UP THE NATION'S WASTE SITES]. The EPA estimates that there are "more than 450,000 brownfields" in the United States. EPA, Brownfields Cleanup and Redevelopment, http://www.epa.gov/swerosps/bf/about.htm (last visited Aug. 31, 2006); *accord* U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 118 (2000), *available at* http://www.gao.gov/new.items/rc00178.pdf. CERCLA section 101(39)(A) defines "brownfield" as property, "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C.A. § 9601(39)(A) (West 2006).

22. *See* 42 U.S.C.A. § 9605(a)(8)(B) (requiring that EPA list "national priorities among the known or threatened releases of hazardous substances throughout the United States" and "revise the list no less than annually"). As of October 2006, 1,243 sites were listed on the NPL, with another 61 sites proposed for addition to the NPL. *See* EPA, NPL Site Totals by Status and Milestone, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last visited Nov. 19, 2006).

23. According to the EPA, the "vast majority" of contaminated sites will be cleaned up under state (rather than federal) regulatory authority oversight. *See* EPA, State and Tribal Response Programs, http://www.epa.gov/swerosps/bf/state_tribal.htm (last visited Nov. 7, 2006) (quoting S. REP. NO. 107-2 (2001)) [hereinafter EPA, State and Tribal Response Programs]; *see also* EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 21, at viii (estimating that 90% of contaminated sites will likely be managed under state or underground storage tank programs).

24. EPA, State and Tribal Response Programs, *supra* note 23; *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 596–98 (2001) (describing state regulatory agency role at most contaminated sites); Roger D. Schwenke, *Applying and Enforcing Institutional Controls in the Labyrinth of Environmental Requirements - Do We Need More Than the Restatement of Servitudes to Turn Brownfields Green?*, 38 REAL PROP. PROB. & TR. J. 295, 297 (2003) ("[S]tates are responsible for the bulk of environmental enforcement activities, including contamination detection, site remediation, and notification requirements."); Philip Weinberg, *Local Environmental Laws: Forging a New Weapon in Environmental Protection*, 20 PACE ENVTL. L. REV. 89, 107 (2002) (discussing use of local environmental controls to fill state and federal regulatory gaps).

25. *See, e.g.*, EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 21, at viii (estimating that 294,000 sites will need cleanup during the next three decades at a cost of $209 billion).

At most of the nation's sites more than one PRP contributed to site contamination.[26] A site may have been contaminated by the activities of successive owners or operators of that property. For example, several companies may have operated businesses disposing of hazardous wastes on a parcel of industrial property. Similarly, hundreds or thousands waste generators may have sent hazardous substances to a landfill. At other sites, contamination on one parcel may have been caused by the migration (e.g., in groundwater or surface water, or through the air) of contaminants from a neighboring parcel. An environmental regulatory agency will often name the current owner as a respondent on a cleanup order at multi-PRP sites, requiring the current owner to comply with regulatory requirements, or risk administrative or judicial enforcement proceedings as well as severe penalties for non-compliance.[27] Private cleanup cost disputes arise when the current owner or another PRP at a multi-PRP site incurs cleanup costs in excess of what the PRP perceives to be its fair share, but is unable to informally obtain reimbursement or contemporaneous cost contribution from other PRPs.

B. Private Cleanup Cost Disputes Before CERCLA

Before CERCLA was enacted in 1980, federal law did not provide a private cleanup cost dispute remedy.[28] Instead, state law provided the sole rule of decision governing private disputes regarding the allocation of responsibility for soil or groundwater contamination.[29] Four common law theories provided the primary potential bases for private cleanup cost claims[30]: negligence,[31] nuisance,[32] trespass,[33] and strict liability for ultra-hazardous activity.[34]

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26. ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50 STATE STUDY, 1998 UPDATE 33 ("Most hazardous substance sites have more than one potentially responsible party.").

27. *See, e.g.*, 42 U.S.C.A. § 9606(b)(1) (West 2006) (imposing $25,000 per day fines for non-compliance absent "sufficient cause"); 42 U.S.C.A. § 9607(c)(3) (authorizing treble cost punitive damages for failure "without sufficient cause" to "properly provide removal or remedial action upon order of the President" under CERCLA sections 104 or 106).

28. *See* Aronovsky, *supra* note 5, at 9-12 (discussing legal framework of pre-CERCLA private cleanup cost disputes); *see also* Robert B. Mckinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83, 86 (1994) ("Prior to 1980, no federal legislation existed which addressed past disposals of hazardous wastes; all existing laws were directed only at regulating current activity."); Steven T. Singer, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117, 147 (1980) (before CERCLA, no federal statute "would support a claim for damages from toxic chemicals").

29. *See, e.g.*, Theodore Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980) (discussing common law theories potentially applicable to the Love Canal site); Singer, *supra* note 28, at 122–38 (reviewing available common law theories of recovery).

30. Cleanup cost claims (e.g., claims for breach of contract, waste, misrepresentation) also can arise as a consequence of contractual privity. *See* Klein, *supra* note 12, at 374 ("The cause of action that most directly protects 'vertical' landowners in hazardous waste litigation is fraud."); *see also* Ronald G. Aronovsky, *Liability Theories in Contaminated Groundwater Litigation*, 1 J. ENVTL. FORENSICS 97, 111-113 (2000) (discussing common law theories).

31. *See, e.g.*, Ewell v. Petro Processors of La., Inc., 364 So.2d 604, 606 (La. Ct. App. 1978) (defendants negligently permitted toxic waste to leak from disposal pits onto plaintiff's property); P.

With growing awareness in the 1970s about the extent of the nation's soil and groundwater contamination problems, the perception grew that existing state law could not adequately address site remediation and the allocation of cleanup responsibilities.[35] Tort law varied dramatically from state to state. Moreover, for reasons equally applicable today, common law tort theory often fit poorly with the realities of private cleanup cost disputes. First, nuisance, trespass, and negligence all required proof of culpability,[36] while strict liability for ultra hazardous activity required an unpredictable multi-factored analysis of whether the defendant's activity was abnormally dangerous.[37] Second, common law tort theories typically required proof that the defendant's conduct caused plaintiff's damage (e.g. cleanup costs)—a potentially significant evidentiary problem at older contaminated sites.[38] Third, a range of liability defenses could prevent recovery under common law tort theories.[39] The

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Ballantine & Sons v. Pub. Serv. Corp. of N.J., 91 A. 95, 96 (N.J. 1914) (tar products escaping from defendant's plant leached through soil to groundwater that migrated to plaintiff's well).

32. *See, e.g.*, Assoc. Metals & Minerals Corp. v. Dixon Chem. & Research, Inc., 197 A.2d 569, 580 (N.J. Super. Ct. App. Div. 1963) (escape of sulfur dust to neighboring property); Helms v. E. Kan. Oil Co., 169 P. 208, 208-09 (Kan. 1917) (migration of refinery oil and other hazardous materials to neighboring property).

33. *See, e.g.*, Curry Coal Co. v. M.C. Arnoni Co., 266 A.2d 678, 683 (Pa. 1970) (sludge dumped on ground surface seeped into mine); Burr v. Adam Eidemiller, Inc., 126 A.2d 403, 405-08 (Pa. 1956) (water from defendant's spraying slag pile contaminated plaintiff's underground water supply); Elsey v. Adirondack & St. Lawrence R.R. Co., 161 N.Y.S. 391, 393 (Sup. Ct. 1916) (subsurface migration of pollutants from defendant's railroad embankment to plaintiff's property).

34. *See, e.g.*, Cities Serv. Co. v. State, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975) (breach of waste reservoir damaging public waters); Atlas Chem. Indus., Inc., v. Anderson, 514 S.W.2d 309, 314-15 (Tex. App. 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975) (contaminants released into stream that crossed plaintiff's land), *abrogated by* Neely v. Cmty. Prop., Inc., 639 S.W.2d 452 (Tex. 1982). *See generally* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 917-18, 934 (2004) (discussing pre-CERCLA strict liability environmental contamination cases).

35. A House of Representatives report on the CERCLA legislation concluded that: "Existing state tort laws present a convoluted maze of requirements under which a victim is confronted with a complex of often unreasonable requirements with regard to theories of causation, limited resources, statutes of limitations and other roadblocks that make it extremely difficult for a victim to be compensated for damages." H.R. REP. NO. 96-1016, at 63-64 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6140-41.

36. *See infra* notes 151, 153, 174 and accompanying text.

37. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977) (engaging in an activity which is abnormally dangerous subjects the actor to strict liability for harm caused to his neighbors resulting from the abnormally dangerous character of the activity, even though the actor has exercised the utmost care and has acted without negligence). The Restatement identifies six factors as guidelines to determine whether an activity is abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

38. *See* Gary Milhollin, *Long-Term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1, 6 (1979) ("Whether the theory is negligence, nuisance or strict liability, the plaintiff must prove that it was the defendant's act which caused the harm.").

39. These potential liability defenses included the doctrine of *caveat emptor*, discussed *infra* at notes 222-46 and accompanying text.

statute of limitations in particular often barred private cleanup cost claims at many sites where contamination occurred decades ago.[40] In sum, by the end of the 1970s, the nation had begun to appreciate the magnitude of its soil and groundwater contamination problem, and the inadequacy of the existing state law framework for addressing the problem. In December 1980, Congress passed CERCLA, which for the next twenty-five years provided a uniform, nationally applicable rule of decision for private cleanup cost disputes.[41] That is, until the U.S. Supreme Court decided the *Aviall* case in 2004.

C. CERCLA

1. CERCLA Liability

The liability scheme established by CERCLA in 1980 dramatically departed from state law governing cleanup cost disputes.[42] CERCLA liability does *not* require proof of causation.[43] It imposes status-based, strict,[44] and retroactive[45] liability on four categories of "covered per-

40. *See infra* notes 247-59 and accompanying text. The "discovery rule" (tolling the statute of limitations until plaintiff knows or has reason to know of her claim) may preserve otherwise time-barred claims involving older contamination problems. *See, e.g.*, McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 1999) (under California law, the period of limitations runs "without regard to whether the plaintiff is aware of the specific facts . . . , provided that he has a 'suspicion of wrongdoing,' which he is charged with once he has 'notice or information of circumstances to put a reasonable person on inquiry.'" (citations omitted)).

41. *See* Aronovsky, *supra* note 5 at 12-35 (discussing evolution of pre-*Aviall* PRP cleanup cost claim case law under CERCLA).

42. *See* Atl. Research Corp. v. United States, 459 F.3d 827, 830 (8th Cir. 2006) (CERCLA, enacted to encourage timely cleanup of hazardous waste sites and place cleanup costs on those responsible for contamination, "effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others."); *see also* Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 425-26 (1990) (describing enactment of CERCLA).

43. *See, e.g.*, Kalamazoo River Study Group v. Menosha Corp., 228 F.3d 648, 656–57 (6th Cir. 2000). However, a defendant may show a lack of causation as part of a divisibility affirmative defense. *Id.*; *see also infra* notes 60, 71 and accompanying text. CERCLA section 107(b) provides a "covered person," including the current landowner who did not contribute to site contamination, with only three affirmative defenses to liability: (1) act of God; (2) act of war; or (3) act of a third party. 42 U.S.C.A. §§ 9607(b)(1)-(4) (West 2006). Equitable defenses (e.g., laches, estoppel) do not bar CERCLA liability. *See, e.g.*, W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 692–93 (9th Cir. 2004) ("[E]quitable defenses such as laches are not available as a bar to section 107(a) liability"). CERCLA also exempts certain activities from liability. *See, e.g.*, 42 U.S.C.A. § 9607(j) (federally permitted releases); 42 U.S.C.A. § 9607(i) (federally registered pesticide discharges); 42 U.S.C.A. § 9607(d) (persons acting pursuant to the NCP or following orders given by an on-site response coordinator appointed under the NCP). In 2002, Congress added two narrow affirmative defenses to CERCLA liability, found in sections 107(o) (*de micromis* generators of waste at NPL sites before April 1, 2001) and 107(q) (certain owners or operators of properties contiguous to up-gradient contamination sources).

44. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable . . . .").

45. *See, e.g.*, United States v. Alcan Aluminum Corp., 315 F.3d 179, 188-89 (2d Cir. 2003) (holding that CERCLA liability is retroactive and that application of retroactive CERCLA liability is constitutional), *cert. denied*, 540 U.S. 1103 (2004).

sons:"[46] (1) the current owner and operator[47] of contaminated property;[48] (2) anyone who owned or operated contaminated property when it was polluted;[49] (3) anyone who arranged to dispose of hazardous substances on another's property;[50] and (4) anyone who transported a hazardous substance to the contaminated property.[51] CERCLA applies to the release or threatened release of "hazardous substances," a broadly defined term covering a wide variety of pollutants.[52] Petroleum, however, is expressly excluded from CERCLA's definition of "hazardous substances."[53] The national contingency plan (NCP),[54] a set of EPA regulations, sets forth the procedure for responding to a release of hazardous substances under CERCLA.[55]

2. Cost Recovery

CERCLA provides regulatory agencies with several enforcement remedies. EPA may issue a unilateral administrative order requiring a PRP (i.e., a CERCLA covered person[56]) to undertake specific remedia-

46. CERCLA section 107(a)(1)-(4) identifies the four categories of covered persons. 42 U.S.C.A. § 9607(a)(1)-(4).

47. CERCLA defines the "owner or operator" of a facility as "any person owning or operating such facility," excluding "a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C.A. § 9601(20)(A).

48. Section 107(a)(1) imposes liability on the current owner or operator of a "facility." 42 U.S.C.A. § 9607(a)(1). Section 101(9)(B) broadly defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located [except] any consumer product in consumer use or any vessel." 42 U.S.C.A. § 9601(9)(B). Liability under section 107(a)(1) applies to a current owner of contaminated property without regard to whether the current owner caused any site contamination. 42 U.S.C.A. §§ 9601(9)(B), 9607(a)(1).

49. Section 107(a)(2) imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C.A. § 9607(a)(2). Section 101(21) defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C.A. § 9601(21). Section 101(29) incorporates the definition of "disposal" used in section 1004 of the Solid Waste Disposal Act, 42 U.S.C.A. § 6903(3) (West 2006), which provides that: "[t]he term 'disposal' means the 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." 42 U.S.C.A. § 9601(29).

50. 42 U.S.C.A. § 9607(a)(3). Courts have expansively interpreted the scope of "arranger" liability to include such persons as those who arrange to dispose of hazardous substances at landfills, toll formulators, and persons who send material containing hazardous substances to recyclers with the knowledge that some of the material will not be returned. *See* Aronovsky, *supra* note 5, at 13 n.48.

51. 42 U.S.C.A. § 9607(a)(4).

52. 42 U.S.C.A. § 9601(14)

53. *Id.*

54. National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. pt. 300 (2005).

55. 42 U.S.C.A. § 9605. *See* 40 C.F.R. § 300.1 (the purpose of NCP is "to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants").

56. *See supra* notes 46-51 and accompanying text.

tion tasks.[57] The government may also conduct the cleanup itself,[58] and then sue under section 107(a), CERCLA's direct cost recovery provision, to recover its costs of responding to the release or threatened release of hazardous substances (response costs).[59] Under section 107(a)(4)(A), a PRP is jointly and severally liable[60] for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."[61] Section 107(a)(4)(B) permits a private party who incurs response costs to bring a cost recovery action,[62] providing that PRPs are liable for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan."[63]

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57. 42 U.S.C.A. § 9606(a).

58. 42 U.S.C.A. § 9604(a)(1).

59. 42 U.S.C.A. § 9607(a)(4)(A). CERCLA refers to cleanup costs incurred in response to the release or threatened release of hazardous substances as "response costs." *See* 42 U.S.C.A. § 9601(25) (defining "response"); 42 U.S.C.A. § 9607(a)(4) (referring to "costs of response").

60. 42 U.S.C.A. § 9607(a)(4)(A). CERCLA is silent regarding the scope of response cost liability. By the mid-1980s, courts generally concluded that liability to the government under CERCLA section 107(a) was joint and several. *See* John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA*, 21 HARV. ENVTL. L. REV. 137, 150–60 (1997) (discussing evolution of CERCLA joint and several liability case law). The courts similarly came to hold that liability under section 107(a) for costs incurred by private parties was joint and several. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998) (explaining section 107(a)(4)(B) claim imposes joint and several liability at sites with indivisible harm); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1240 (7th Cir. 1997) (explaining section 107(a)(4)(B) claim imposes joint and several liability and may be maintained by current landowner who did not add contamination to site).

61. 42 U.S.C.A. § 9607(a)(4)(A). Defendants can argue as an affirmative defense that liability should be apportioned severally if the harm at the contaminated site is divisible. *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 270-71 (3d Cir. 1992) (explaining several liability appropriate if PRP proves divisibility and reasonable basis for apportionment).

62. Claims for personal injury or property damages caused by hazardous substance contamination are not available under CERCLA. *See, e.g.*, Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1285 (D. Del. 1987) ("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances.").

63. 42 U.S.C.A. § 9607(a)(4)(B) (emphasis added). The phrase "any other person" refers to persons other than the United States, States, or Indian tribes who have a right of cost recovery under section 107(a)(4)(A). Post-*Aviall* decisions have disagreed about whether the term "other" in the phrase "any other person" also excludes PRPs, i.e., "covered persons" falling within the categories of liable parties set forth in § 9607(a)(1)-(4). *Compare, e.g.*, *Atl. Research*, 459 F.3d 827 at 835-36. ("'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" (citation omitted)), *and* Consol. Edison Co. v. UGI Utils., 423 F.3d 90, 99-100 (2d Cir. 2005) (holding that a PRP who voluntarily incurred cleanup costs could state a section 107(a)(4)(B) direct cost recovery claim, reasoning that it would be inappropriate to impose an "innocence" condition on the "any other person" language of section 107(a)(4)(B)), *with* Aviall Servs., Inc., v. Cooper Indus., Inc., No. 3:97-CV-1926-D, 2006 U.S. Dist. LEXIS 55040, at *21-25 (N.D. Tex. Aug. 8, 2006) (granting Cooper's motion for summary judgment following remand from U.S. Supreme Court, holding that Aviall as PRP could not maintain a section 107(a)(4)(B) claim and reasoning after "examining CERCLA holistically" that the phrase "any other person" in section 107(a)(4)(B) refers to any person other than section 107(a)(1)-(4) covered persons as well as section 107(a)(4)(A) entities). *See also* Aronovsky, *supra* note 5, at 82, n.350.

3. The Section 107 / Section 113 Conundrum

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA).[64] The SARA amendments included two express CERCLA contribution provisions: (1) section 113(f)(1), which provides that any person may seek contribution during or after an EPA administrative order judicial enforcement action[65] or cost recovery action,[66] and (2) section 113(f)(3)(B), which provides that any person may seek contribution after settling its CERCLA liability with the government.[67] Section 113(f) was intended to "clarify" and "confirm" CERCLA contribution rights.[68] Section 113(f) did not, however, expressly address the most common CERCLA "contribution" plaintiff: a current landowner (or other PRP) who voluntarily incurs cleanup costs but has neither been sued in an EPA judicial enforcement action or cost recovery action,[69] nor settled its CERCLA liabilities with the government.[70]

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64. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

65. CERCLA section 106 authorizes the federal government to (a) issue unilateral administrative orders directing parties to investigate and remediate site contamination and (b) initiate a judicial enforcement action in the event of non-compliance. 42 U.S.C.A. § 9606. Few private plaintiffs would have contribution rights triggered by a section 106 action. Section 106 actions may only be brought by the federal government, which is actively involved at only a handful of the nation's contaminated sites. *See supra* note 23 and accompanying text; *see also* Larry Schnapf, *Impact of* Aviall *on Real Estate and Corporate Transactions*, 20 TOXICS L. REP. (BNA) 607, 610 (2005) ("[S]tates bring over 70 percent of enforcement actions and the vast majority of contaminated sites are remediated under [state Superfund] programs . . . ."). Even at sites where the EPA plays an active role, there would be no reason to initiate a section 106 action unless a PRP was not in compliance with a section 106 administrative order or otherwise was not adequately responding to site contamination.

66. 42 U.S.C.A. § 9613(f)(1). Section 113(f)(1) provides that:

> [a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title [EPA administrative order enforcement action] or under section 9607(a) [cost recovery action] of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C.A. § 9613(f)(1).

67. 42 U.S.C.A. § 9613(f)(2)-(3). Section 113(f)(2) contemplates a settlement by a "person who has resolved its liability to the United States or a State " while section 113(f)(3)(B) allows the settling PRP to pursue CERCLA contribution against non-settling PRPs. 42 U.S.C.A. § 9613(f)(2)-(3).

68. S. REP. NO. 99-11, at 4 (1985) (objective of proposed new contribution provision was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"); H.R. REP. NO. 99-253, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

69. A PRP, rather than a government agency or non-PRP private party, usually takes the lead in site cleanup; accordingly, a PRP seeking contribution likely would not first have been sued for cost recovery under section 107(a). A PRP may be sued under section 107(a) by a non-PRP (1) in the rare circumstance where an "innocent" private party incurs cleanup costs, 42 U.S.C.A. § 9607(a)(4)(B); *cf.* City of Bangor v. Citizens Comm'ns Co., 437 F. Supp. 2d 180, 222-23 (D. Me.

This statutory interpretation issue, however, did not appear to trouble the courts or PRPs. After the SARA amendments, the issue before the courts was not whether a PRP could recover cleanup costs from other PRPs. Rather, litigation arose across the country about which provision of CERCLA provided the basis for such an action—the direct cost recovery provision of section 107(a)(4)(B) or the contribution provisions of section 113(f)(1).[71] By the time the Supreme Court decided *Aviall* in December 2004, each court of appeals to have addressed this section 107 / section 113 conundrum had held that a plaintiff who was a liable party under CERCLA could not bring a direct action for cost recovery under CERCLA section 107(a)(4)(B).[72] These courts assumed, expressly or

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2006) (holding that a PRP may bring a section 107(a) action and noting that "it is hard to imagine many cases in which purely 'innocent parties' would ever be motivated to initiate an action under section 107"); or (2) where a government agency seeks to recover its direct cleanup costs or its costs of overseeing a private cleanup. 42 U.S.C.A. § 9607(a)(4)(A); United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 179 (3d Cir. 2005) (en banc) (federal government oversight costs recoverable under section 107(a)(4)(A)).

70. The last sentence of section 113(f)(1) provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [sections 106 or 107(a)]." 42 U.S.C.A. § 9613(f)(1). CERCLA and its legislative history, however, say nothing about what "contribution" rights (e.g., direct or implied contribution rights under CERCLA section 107(a), state contribution law contribution rights) were left "undiminished" by section 113(f)(1).

71. *See* Aronovsky, *supra* note 5, at 24-33 (discussing the section 107/section 113 conundrum). This issue mattered to CERCLA defendants, who argued that claims by one CERCLA-liable party against another sounded in contribution and thus should be brought under section 113(f)(1). They reasoned it would be unfair for a liable plaintiff to impose a joint and several liability direct cost recovery section 107(a) claim, *see supra* note 60, which would place on defendants (a) the burden of showing the divisibility of environmental harm caused by the defendant's conduct, *see, e.g.*, Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 & n.4 (4th Cir. 1998) (instructing district court under section 113(f) to allocate costs according to appropriate equitable factors but, unlike a joint and several liability action under section 107(a), not to impose a divisibility of harm allocation burden on defendants); and (b) the risk of any "orphan shares" of liability. *See* Aronovsky, *supra* note 5, at 24-26. An "orphan share" is the equitable share of cleanup cost liability attributable to a PRP that is unable to pay, such as a PRP who cannot be located or who is insolvent, deceased or bankrupt. *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1303 (9th Cir. 1997) (holding that a PRP cannot assert a joint and several section 107(a) claim against other PRPs, because "those defendant-PRPs would end up absorbing all of the cost attributable to 'orphan shares'—those shares attributable to PRPs who either are insolvent or cannot be located or identified").

72. As of December 2004, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits each had held that a PRP could *not* bring a section 107(a) cost recovery action against another PRP, and that a PRP seeking to recover cleanup costs from another PRP under CERCLA was limited to a contribution action for several liability under section 113(f). *See, e.g.*, United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100-01 (1st Cir. 1994); Bedford Affiliates v. Sills, 156 F.3d 416, 425 (2d Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120 (3d Cir. 1997); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1239–40 (7th Cir. 1997) (section 107(a) action also available to current landowner PRP who did not contribute to site contamination; all other PRPs limited to section 113(f) contribution action); Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1306 (9th Cir. 1997); United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995); Redwing Carriers v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996). The Fifth Circuit's three-judge panel in *Aviall* concluded that "a PRP cannot file a section 107(a) suit against another PRP; it must pursue a contribution action instead." Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 137 (5th Cir. 2001), *reh'g en banc*, 312 F.3d 677 (2002), *rev'd*, 543 U.S. 157 (2004).

implicitly, that the PRP plaintiff instead could and should sue for contribution under section 113(f).[73] As a result, a current owner of contaminated property or other PRP who had taken the lead cleaning up a multi-PRP site typically filed a section 113(f)(1) cleanup cost contribution action, and CERCLA contribution law became the primary rule of decision in private cleanup cost disputes.[74] Owners of contaminated property, other PRPs, and government agencies alike came to rely on the nationwide availability of a CERCLA cleanup cost remedy.[75] CERCLA contribution rights provided an incentive for PRPs to voluntarily comply with regulatory agency cleanup orders. Similarly, businesses factored the potential for obtaining cleanup costs from PRPs in deciding whether to acquire or develop brownfield or other real property that was or might be contaminated.[76] All this was changed when the U.S. Supreme Court decided *Aviall*.

This decision was supplanted by the Fifth Circuit's *en banc* decision in *Aviall* that ultimately was reversed by the Supreme Court. *Id.*; *see also* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) ("When one liable party sues another to recover its equitable share of response costs, the action is one for contribution, which is specifically recognized under CERCLA" (citing section 113(f)). *But see* OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1582 n.1 (5th Cir. 1997) ("We express no opinion . . . whether a PRP may seek to hold other parties jointly and severally liable under section 107(a) for response costs."); *Aviall*, 2006 U.S. Dist. LEXIS 55040, at *11-14 (granting Cooper's motion for summary judgment following remand from the U.S. Supreme Court, holding that Aviall as PRP could not maintain a section 107(a)(4)(B) claim, reasoning that the Fifth Circuit's *en banc* decision in *Aviall* was not binding on the district courts after the U.S. Supreme Court's *Aviall* decision so that in light of *OHM* no binding Fifth Circuit decision had yet addressed whether a PRP could bring a section 107(a) action against another PRP).

73. *See* Aronovsky, *supra* note 5, at 26-35. These courts implicitly or explicitly assumed that a section 113(f)(1) contribution would be available to a PRP, regardless of whether the PRP first had been sued under CERCLA section 106 or 107(a) or had settled its CERCLA liabilities with the government. *See, e.g.*, *Atl. Research*, 459 F.3d at 832-33 (describing as judicial "[t]raffic-directing" the pre-*Aviall* cases that limited PRPs to a section 113(f) contribution action, noting that "[i]n the pre-*Aviall* analysis, section 113 was presumed to be available to all liable parties including those which had not faced a CERCLA action"); City of Waukesha v. Viacom, Inc., 221 F. Supp. 2d 975, 979 (E.D. Wis. 2002) (explaining absence of reported decisions on the section 113(f)(1) standing issue may reflect the common understanding among the bench and bar that such an action was available to any PRP); Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1076 (E.D. Cal. 2006) (permitting PRP plaintiff to proceed with section 107(a) action and noting that "the Ninth Circuit's pre-*Aviall* precedents assumed a cost recovery suit was not a prerequisite for a § 113(f) contribution action").

74. *See* Aronovsky, *supra* note 5, at 33-35. Sometimes plaintiffs would join state law claims to fill gaps in the CERCLA statutory framework. For example, state law cleanup cost claims might be asserted under an alternative state law liability scheme or to provide a vehicle for recovering petroleum remediation or other cleanup costs that could not be recovered under CERCLA. *See, e.g.*, William W. Watts, *Common Law Remedies in Alabama for Contamination of Land*, 29 CUMB. L. REV. 37, 39 (1999) (describing use of common law theories for cost claims regarding Alabama sites as alternative to CERCLA); Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 37-42, 63-82 (1987) (describing California common law and statutory theories potentially applicable to landowners). Similarly, claims for property damage (e.g., diminution in value, stigma, lost use of property) or personal injury could not be asserted under CERCLA and thus could only be brought under state tort law.

75. *See* Aronovsky, *supra* note 5, at 33-36.

76. *See id.* at 54 n.248.

4. The *Aviall* Decision

Aviall Services, Inc., the buyer of contaminated properties from Cooper Industries, Inc., brought a section 113(f) contribution claim against Cooper to recover costs Aviall incurred after it was directed by a state regulatory agency to clean up contamination to which both companies contributed.[77] In December 2004, the U.S. Supreme Court held that section 113(f) permitted a PRP to bring a contribution action only if (1) the PRP plaintiff had first been sued by the federal government under CERCLA section 106 to enforce a CERCLA administrative order, or by a government or private party under CERCLA section 107(a) for cost recovery; or (2) the PRP plaintiff had first settled her CERCLA liability with the government.[78] Because Aviall had neither been sued under CERCLA nor settled with the government, the Court held that Aviall could not maintain a section 113(f) contribution action.[79]

The Court, however, did not go so far as to hold that Aviall was barred from stating any response cost claim under CERCLA. Aviall had urged the Court in the alternative to find that Aviall could state a direct cost recovery claim under section 107(a)(4)(B) as "any other person" incurring response costs.[80] The Court chose not to decide the issue,[81] and instead remanded the case to the Fifth Circuit to address whether Aviall had waived any section 107(a)(4)(B) claim[82] and, if not, whether a PRP could assert a direct cost recovery claim under section 107(a)(4)(B).[83]

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77. *Aviall*, 543 U.S. at 163-64. For a detailed discussion of the *Aviall* litigation, see Aronovsky, *supra* note 5, at 35-49.

78. *Aviall*, 543 U.S. at 167-68. In 2000, the District Court had granted Cooper's motion for summary judgment, holding that the first sentence of section 113(f)(1) limited contribution claims to plaintiffs (unlike Aviall) who had been first been sued under sections 106 or 107(a). Aviall Servs. Inc. v. Cooper Indus., Inc., No. Civ.A.397CV1926D, 2000 WL 31730, at *2-4 (N.D. Tex. Jan. 13, 2000). The court declined to exercise supplemental jurisdiction over Aviall's state law claims. *Id.* at *5. In 2001, a divided three-judge panel of the Fifth Circuit affirmed the district court's ruling. *Aviall*, 263 F.3d at 134. Rehearing the case *en banc* in 2002, the Fifth Circuit by a 10-3 vote reversed the district court's decision. *Aviall*, 312 F.3d at 677 (en banc).

79. *Aviall*, 543 U.S. at 171.

80. *Id.* at 168.

81. *Id.* at 168-70. In a dissenting opinion joined by Justice Stevens, Justice Ginsburg argued that the Court should have proceeded to decide whether Aviall as a PRP could state a claim under section 107(a)(4)(B). *Id.* at 170, 173-74 (Ginsburg, J., dissenting).

82. The Fifth Circuit ultimately concluded that no such waiver had occurred and remanded the case to the District Court for further proceedings. *See infra* note 88.

83. *Aviall*, 543 U.S. at 168-70. The Court noted that among the issues that might be considered on remand was whether Aviall "may pursue a section 107 cost recovery action for some form of liability other than joint and several." *Id.* at 169-70. The Court also declined to decide whether Aviall had an implied right to contribution under section 107(a) or federal common law. *Id.* at 170-71. On February 15, 2005, the Fifth Circuit ordered the case remanded to the district court with instructions to permit Aviall to amend its complaint to assert a section 107(a) claim without prejudice to Cooper's defense that such an amendment would fail to state a claim for which relief may be granted. *Aviall*, 2006 U.S. Dist. LEXIS 55040, at *7-8. On August 8, 2006, the district court granted Cooper's motion for summary judgment, holding that Aviall as PRP could not maintain a direct section 107(a)(4)(B) claim because the phrase "any other person" in section 107(a)(4)(B) referred to persons other than section 107(a)(1)-(4) covered persons as well as section 107(a)(4)(B)

Aviall caused a sea change in contaminated property law. It upset years of reliance by the regulated community that a PRP could always obtain cleanup cost contribution under CERCLA.[84] It created widespread uncertainty about the availability of federal cleanup cost recovery rights by leaving unresolved whether the lower federal courts in their pre-*Aviall* decisions had correctly barred PRPs from bringing direct cost recovery actions.[85] *Aviall* also effectively extended an invitation, which this article accepts, to evaluate how state law may enter center stage in private cleanup cost disputes by overcoming the current inconsistencies and doctrinal limitations of common law tort theory.

D. The Aftermath of Aviall

Was the *Aviall* decision a reasonable interpretation of a muddled statute? Perhaps. Should the bench, bar, and regulatory agencies have assumed for nearly twenty years that it was beyond peradventure that a PRP who had not first been sued under CERCLA could bring a section 113(f)(1) contribution action? Perhaps not. Nevertheless, the *Aviall* decision stunned environmental cleanup cost dispute stakeholders—they simply did not see it coming.[86]

1. Uncertain Future of PRP Contribution Claims

By declining to decide whether a PRP could maintain a section 107(a)(4)(B) action, the Supreme Court created profound uncertainty about whether most PRPs could recover from other PRPs their fair share of cleanup costs under CERCLA. Every court of appeals to have addressed the issue before *Aviall* had held that a PRP could not maintain a section 107(a)(4)(B) action—but did so under the express or implied assumption that the PRP instead could bring a section 113(f) contribution action.[87]

Following *Aviall*, federal courts across the country began to grapple with whether appellate decisions barring section 107(a)(4)(B) claims by PRPs retained their precedential value after *Aviall*. Some district courts (including the district court upon remand in *Aviall*) relied on pre-*Aviall* case law to hold that a PRP could not recover costs under section

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governmental and Indian tribe plaintiffs, *id.* at *24, 29, and that there was no implied contribution right under section 107(a)(4)(B), *id.* at *36.

84. *See* E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 523 (3d Cir. 2006) (noting the "understanding at the time [before the *Aviall* decision was that] . . . a PRP that voluntarily cleaned up a contaminated site *sua sponte* could seek contribution from other PRPs without waiting for an enforcement action, a Government or innocent landowner cost recovery suit, or a settlement of liability. [¶] In *Cooper Industries*, the Supreme Court significantly altered this understanding."); *see also supra* note 72 and accompanying text.

85. *See supra* notes 71-73 and accompanying text.

86. *See supra* note 72; *see also* Aronovsky, *supra* note 5, at 33-58.

87. *See* Aronovsky, *supra* note 5, at 50-54.

107(a)(4)(B).[88] Other district courts after *Aviall* held that a PRP could assert a direct[89] or implied[90] claim under CERCLA section 107(a), or permitted amended pleadings adding a section 107(a) claim pending guidance from its circuit court of appeals.[91] The United States government, which had filed an *amicus curiae* brief in *Aviall* arguing that a PRP who had not first been sued under CERCLA was barred from bringing a section 113(f)(1) contribution action,[92] contended in CERCLA cases

88. *See, e.g.*, *Aviall*, 2006 U.S. Dist. LEXIS 55040, at *24, 29, 36 (granting Cooper's motion for summary judgment following remand by U.S. Supreme Court based on the "plain meaning" of the statute and pre-*Aviall* case law); Amcal Multi-Housing, Inc. v. Pacific Clay Products, No. EDCV-06-280-SGL, 2006 WL 3016326, at *12 (C.D. Cal. Oct. 10, 2006) (holding that a PRP "cannot bring a free-standing section 107 implied contribution claim [in light of pre-*Aviall* Ninth Circuit precedent], and cannot bring a section 107 cost recovery claim as it has failed to allege sufficient facts to bring it within one of the statutorily defined defenses to PRP designation status."); ITT Indus. v. Borgwarner, Inc., No. 1:05-CV-674, 2006 WL 2460793, at *3-5 (W.D. Mich. Aug. 23, 2006) (granting motion to dismiss because *Aviall* did not undermine prior Sixth Circuit precedent barring PRPs from bringing section 107(a) actions); Columbus McKinnon Corp. v. Gaffey, No. H-06-1125, 2006 WL 2382463, at *4 (S.D. Tex. Aug. 16, 2006) (granting defendant's motion to dismiss a PRP's section 107(a) claim because "under the prevailing law at this time [plaintiff] as a PRP does not have a viable claim for cost recovery under § 107(a) of CERCLA"); Spectrum Int'l Holdings, Inc. v. Universal Coops., Inc., Civ. No. 04-99 (MJD/AJB), 2006 WL 2033377, at *5 (D. Minn. July 17, 2006) (granting defendant's motion for summary judgment based on pre-*Aviall* Eighth Circuit precedent that a PRP is barred from asserting a section 107(a) claim). *See also* Aronovsky, *supra* note 5, at 51 n.244 (identifying pre-May 2006 cases holding that, notwithstanding *Aviall*, PRPs could not recover response costs under section 107(a)).

89. *See, e.g.*, Glidden Co. v. FV Steel & Wire Co., Nos. 05C1355, 05C1356, 2006 WL 2724049, at *4-5 (E.D. Wis. Sept. 21, 2006) (reversing bankruptcy court ruling that PRP claimants could not assert section 107(a) claims against bankruptcy estate); City of Martinsville v. Masterwear Corp., No. 1:04-cv-1994-RLY-WTL, 2006 WL 2710628, at *2, 3 (S.D. Ind. Sept. 20, 2006) (holding current landowner could maintain section 107(a) claim under Seventh Circuit's "innocent landowner exception," discussed in Aronovsky, *supra* note 5, at 30-33, permitting section 107(a) claims by landowners who did not contribute to site contamination); City of Bangor v. Citizens Comm'ns Co., 437 F. Supp. 2d 180, 222-23 (D.Me.2006) (holding that a PRP may bring a section 107(a) action and noting that "it is hard to imagine many cases in which purely 'innocent parties' would ever be motivated to initiate an action under section 107."); *see also* Aronovsky, *supra* note 5, at 52 n.245 (identifying pre-May 2006 cases holding that, after *Aviall*, PRPs could recover costs under section 107(a)).

90. *See, e.g.*, Raytheon Aircraft Co. v. United States, 435 F. Supp. 2d 1136, 1141-1151 (D. Kan. 2006) (holding that a PRP who incurred cleanup costs pursuant to an administrative order on consent should recover those costs under section 113(f)(3)(B), and as to other cleanup costs a PRP who cannot state a claim under section 113(f) nonetheless has an implied contribution claim under section 107(a)); Aggio v. Aggio, No. C 04-4357 PJH, 2005 WL 2277037, at *6 (N.D. Cal. Sept. 19, 2005) (holding that PRP has an implied right of contribution under section 107(a)).

91. *See, e.g.*, Gen. Motors Corp. v. United States, No. Civ.A. 01-CV-2201, 2005 WL 548266, *4-5 (D.N.J. Mar. 2, 2005) (dismissing plaintiff PRP's section 113(f)(1) claim in light of *Aviall* but granting leave to amend complaint to add section 107(a) claim because defendant would suffer no prejudice until Third Circuit decided whether to revisit holding in *New Castle County v. Haliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997), that a PRP may not bring a section 107(a) cost recovery action).

92. *See* Aronovsky, *supra* note 5, at 43-45. The United States is itself a PRP facing claims by PRPs at sites across the country for billions of dollars in cleanup costs. *Id.* at 44. Aviall had argued to the Supreme Court that the federal government in its capacity as a multi-site PRP could avoid paying its fair share of cleanup costs at sites nationwide if PRPs could not sue the United States or other PRPs for cost recovery under section 107(a) or contribution under section 113(f). *Id.* at 44 n.212. *See also infra* notes 106-12 and accompanying text.

across the country (both as a defendant and as *amicus curiae*) that PRPs could not recover cleanup costs under section 107(a).[93]

The issue remained muddled as courts of appeals began to weigh in on the debate and conflicts arose among the circuits. The Second Circuit, the first court of appeals after *Aviall* to address the issue, chose to evaluate PRP section 107(a) claims on a case-by-case basis, focusing on whether the PRP plaintiff "voluntarily" incurred claimed cleanup costs.[94] In *Consolidated Edison Co. v. UGI Utilities*,[95] the Second Circuit held that a PRP who incurred cleanup costs before entering into a voluntary cleanup agreement with a state agency—without first having been sued, allocated response costs by a court, or made to participate in an administrative proceeding—could bring a section 107(a)(4)(B) action.[96] Shortly thereafter, in *Schaefer v. Town of Victor*,[97] the Second Circuit held that a contaminated landfill owner could assert a CERCLA section 107(a) claim[98] against defendants who disposed of waste at the landfill even

93. *See, e.g.*, Brief of Appellee United States of America, Atl. Research Corp. v. United States, No. 05-3152, 2005 WL 3568541 (8th Cir. Dec. 5, 2005) (argument by appellee United States that district court properly dismissed CERCLA claims of PRP plaintiff under sections 107(a) and 113(f)); Brief of the United States as Amicus Curiae, Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing and Coatings, Inc., No. 05-3299, 2006 WL 1354188 (7th Cir. May 1, 2006) (brief of Department of Justice and Environmental Protection Agency arguing, in light of a "reexamination" of government's position after *Aviall*, a PRP cannot bring a section 107(a)(4)(B) claim because (1) the phrase "any other person" in section 107(a)(4)(B) refers to persons other than section 107(a) "covered persons" as well as state, federal and tribal governments referenced in section 107(a)(4)(A); (2) section 113(f) provides the exclusive authorization for CERCLA contribution claims; and (3) there should be no exception permitting current landowners who did not contribute to site contamination to assert section 107(a)(4)(B) claims); Brief for the Federal Appellees, E.I. DuPont de Nemours & Co. v. United States, No. 04-2096 (3d Cir. Apr. 22, 2005) (PRP could not assert a cleanup cost contribution claim against the government pursuant to section 107(a) because (1) a cleanup cost claim by a PRP is necessarily a contribution claim, *id.* at 24–26; (2) section 107(a)(4)(B) standing alone does not provide an express right to contribution, *id.* at 27–28, 48–50; (3) there is no implied right to a contribution under section 107(a)(4)(B), *id.* at 28–47; and (4) the federal government's sovereign immunity bars any federal common law cleanup cost contribution claim against it, *id.* at 51–52); *see also Atl. Research*, 459 F.3d at 836-37 (8th Cir. 2006) (holding that PRP may assert section 107(a) claim against the United States, noting that a contrary ruling would result "in an absurd and unjust outcome" because "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle"). *But see* E. I. DuPont de Nemours and Company v. United States, 460 F.3d 515, 541 n. 31 (3d Cir. 2006) (holding that PRP DuPont may not bring section 107(a) action against the United States despite argument that such a ruling could allow the federal government to avoid contribution liability at sites where it is a PRP, observing that "DuPont does not, however, provide evidence that the EPA actually uses its enforcement discretion to avoid subjecting other federal agencies to potential liability in a later contribution suit").

94. Consol. Edison Co. v. UGI Utils., 423 F.3d 90, 100-02 (2d Cir. 2005).

95. 423 F.3d 90 (2d Cir. 2005).

96. *Consol. Edison*, 423 F.3d at 100-02. The court found it inappropriate to impose an "innocence" condition on the "any other person" language of section 107(a)(4)(B). *Id.* at 99. The court distinguished its pre-*Aviall* decision in *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998) (holding that a CERCLA claim by a PRP who had entered into CERCLA consent decrees was "a quintessential claim for contribution" which could be brought only under section 113(f)), on the ground that the *Bedford Affiliates* plaintiff had incurred response costs only *after* having entered into a consent decree). *Id.* at 100-03.

97. 457 F.3d 188 (2d Cir. 2006).

98. *Schaefer*, 457 F.3d at 201-02. The court went on to hold, however, that Schaefer's CERCLA claim was barred by the statute of limitations. *Id.* at 210.

though the owner had entered into a series of consent orders regarding his site.[99] The court reasoned that because the owner had started incurring response costs *before* entering into the consent orders, his response costs were not incurred *solely* due to a court or administrative order imposing liability.[100]

The Eighth Circuit took a different approach by directly addressing the section 107(a) issue in *Atlantic Research Corp. v. United States*.[101] The district court had granted the United States' motion to dismiss Atlantic's section 107(a) claim based on *Dico, Inc. v. Amoco Oil Co.*,[102] a pre-*Aviall* Eighth Circuit decision holding that a PRP could not bring an action under section 107(a).[103] The Eighth Circuit reversed, concluding that *Dico's* "analytic is undermined by *Aviall*"[104] and holding that a PRP who voluntarily incurred cleanup costs for which it may be held liable may bring a direct cost recovery action under section 107(a).[105]

The Third Circuit came to the opposite conclusion in *E. I. DuPont de Nemours and Company v. United States*.[106] DuPont voluntarily undertook to clean up a site it owned in New Jersey that formerly had been

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99. *Id.* at 192.

100. *Id.* at 201-02. By drawing such fine distinctions, the Second Circuit created new uncertainty regarding PRP cleanup cost claims. After *Consolidated Edison* and *Schaefer,* district courts in the Second Circuit wrestled with whether a PRP incurred response costs in a sufficiently "voluntary" manner to permit their recovery under a section 107(a) claim. *Compare, e.g.*, Seneca Meadows, Inc. v. ECI Liquidating, Inc., 427 F. Supp. 2d at 284-88 (W.D.N.Y. 2006) (holding that a PRP who incurred cleanup costs in connection with consent order with state agency could assert a several liability section 107(a)(4)(B) claim because the PRP had not been sued, admitted liability or fault, or been threatened with an imminent judicial or administrative liability finding), *and* City of New York v. N.Y. Cross Harbor R.R. Terminal Corp., No. 98CV7227ARRRML, 2006 WL 140555, at *4 n.6 (E.D.N.Y. Jan. 17, 2006) (holding that although plaintiff if sued would be held liable under section 107(a), it could maintain a section 107(a) claim because it conducted a voluntary investigation and cleanup without first having been sued or made to participate in an administrative proceeding), *with* Niagara Mohawk Power Corp. v. Consol. Rail Corp., 436 F. Supp. 2d 398 at 402-04 (N.D.N.Y. 2006) (dismissing section 107(a) claim because costs were incurred pursuant to consent orders, and dismissing section 113(f) claim because consent orders did not constitute settlements triggering contribution rights under section 113(f)(3)(B)).

101. 459 F.3d 827 (8th Cir. 2006).

102. 340 F.3d 525 (8th Cir. 2003); *see also supra* note 72.

103. *Atl. Research*, 459 F.3d at 830.

104. *Id.*

105. *Id.* at 836-37. The court concluded that the phrase "any other person" in section 107(a)(4)(B) meant any person other than the statutorily enumerated United States, States, or Indian tribes referenced in section 107(a)(4)(A), and that pre-*Aviall* restrictions of section 107(a)(4)(B) to "innocent" plaintiffs represented nothing more than judicial "traffic directing" light of the pre-*Aviall* analysis that "§ 113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action." *Id.* at 832. The court noted that section 107(a)(4)(B) does not compel full recovery of response costs incurred by a PRP plaintiff, observing that "CERCLA, itself, checks overreaching liable parties: If a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f)." *Id.* at 835. The court also held that "a right to contribution may be fairly implied from the text of section 107(a)(4)(B)," *id.* at 835, stating that "[c]ontribution is crucial to CERCLA's regulatory scheme." *Id.* at 836. In light of these holdings, the court did not address Atlantic's argument that it had an implied right to contribution as a matter of federal common law. *Id.* at 836 n.9.

106. 460 F.3d 515 (3d Cir. 2006); *see also supra* note 93 and accompanying text.

owned and allegedly contaminated by the United States.[107] DuPont brought a CERCLA response cost action against the United States.[108] The Third Circuit affirmed by a 2-1 vote the district court's order granting the United States' motion for judgment on the pleadings on DuPont's CERCLA claims.[109] The Third Circuit concluded that *Aviall* did not give it cause to reconsider its pre-*Aviall* precedents holding that a PRP could only seek contribution under section 113(f),[110] reasoning further that CERCLA's settlement scheme was inconsistent with an interpretation of section 107(a)(4)(B) that would permit direct cost recovery actions by PRPs.[111] Accordingly, the Third Circuit held that DuPont, as a PRP, could not bring a section 107(a) cost recovery action and that, because DuPont had neither settled its CERCLA liabilities with the government nor been sued under CERCLA, DuPont also could not bring a section 113(f) contribution claim in light of *Aviall*.[112]

Similarly, both the Fifth and the Tenth Circuits indicated in post-*Aviall* decisions that they would not permit a PRP to bring a section 107(a) claim. The Fifth Circuit in *Elementis Chromium L.P. v. Coastal States Petroleum Co.*[113] baldly stated in *dicta* that a PRP could not bring a section 107(a) claim.[114] In *Elementis*, the court held that a district court erred by imposing joint and several contribution liability on third-party defendants in a CERCLA contribution action.[115] In reaching this decision, the court cited a pre-*Aviall* Eleventh Circuit decision[116] for the proposition that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a), and the imposition of joint and several liability is inappropriate."[117]

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107. *DuPont*, 460 F.3d at 525.

108. *Id.*

109. *Id.* at 543-44.

110. In dissent, Judge Sloviter contended that *Aviall* "clearly undermined" the Third Circuit's pre-*Aviall* precendents barring section 107(a) claims by PRPs because those decisions assumed that all PRPs could assert a section 113(f) contribution action. *Id.* at 546-47. Noting that "[t]here is nothing in the relevant language of § 107 that compels the result the majority reaches," *id.* at 546, the dissent concluded that "permitting parties who voluntarily incur cleanup costs to bring suit under § 107 comports with the fundamental purposes of CERCLA," *id* at 548, because "[v]oluntary cleanups are vital to fulfilling CERCLA's purpose." *Id.* at 549.

111. *Id.* at 541.

112. *Id.* at 543-44.

113. 450 F.3d 607 (5th Cir. 2006).

114. *Elementis*, 450 F.3d at 612-13.

115. *Id.* at 613.

116. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996).

117. *Elementis*, 450 F.3d at 613 quoting *Redwing Carriers*, 94 F.3d at 1513). *Elementis* did not decide whether a PRP could sue for cost recovery under section 107(a), nor did it even reference *Aviall*. *See Atl. Research*, 459 F.3d at 834 n.7 (dismissing *Elementis* language as an "isolated quotation" regarding an issue that the Fifth Circuit was not asked to decide); *Aviall*, 2006 U.S. Dist. LEXIS 55040, at *14 (granting Cooper's motion for summary judgment following remand from U.S. Supreme Court, holding that Aviall as PRP could not maintain a section 107(a)(4)(B) claim, but observing that *Elementis* "did not squarely decide whether a private PRP can bring a cost recovery action against another PRP under § 107(a)"). Nevertheless, this passing sentence in the *Elementis* opinion underscored post-*Aviall* uncertainty about PRP cleanup cost rights. For example, the Third Circuit in *DuPont*, 460 F.3d at 542 n.32, in the course of holding that a PRP may not bring a section

In *Young v. United States*,[118] the Tenth Circuit affirmed a district court order granting summary judgment in favor of the defendant on the plaintiffs' section 107(a) claim. The district court reasoned that the plaintiffs could not maintain a section 107(a) claim because they were PRPs.[119] The Tenth Circuit affirmed, concluding that plaintiffs' claimed response costs were unnecessary and not consistent with the NCP.[120] As a result, the court observed that it did not need to "determine whether Plaintiffs are PRPs under section 107(a) and thus unable to assert a cost-recovery claim under the rule in this Circuit that a Plaintiff-PRP must proceed under the contribution provisions of CERCLA section 113(f) when the Plaintiff-PRP sues another PRP for response costs."[121] In short, after *Aviall* the availability of PRP cleanup cost rights under CERCLA likely will remain uncertain until the Supreme Court or Congress resolves the issue.

2. Impact on Voluntary Cleanups

The uncertainty *Aviall* created presented a series of stark choices to owners of contaminated property (as well as other PRPs) faced with agency remediation directives.[122] The landowner could cooperate by voluntarily (i.e., short of judicial enforcement action) complying with a regulatory cleanup directive. A landowner conducting a voluntary cleanup, however, risks incurring cleanup costs without a well-settled

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107(a) action, cited *Elementis* for the proposition that "at least one other Circuit Court has agreed with our interpretation of § 107(a) . . . ." The district court in Columbus McKinnon Corp. v. Gaffey, No. H-06-1125, 2006 WL 2382463, at *4 (S.D. Tex. Aug. 16, 2006), granted defendant's motion to dismiss a PRP's section 107(a) claim, relying in part on the "May 2006 statement of the Fifth Circuit in *Elementis*" to conclude that "under the prevailing law at this time [plaintiff] as a PRP does not have a viable claim for cost recovery under § 107(a) of CERCLA." Defendants in other cases also pointed to *Elementis* as evidence of a circuit split regarding the availability of a section 107(a) claim for a PRP plaintiff. For example, *Elementis* was cited by the United States in *Atl. Research*, 459 F.3d at 834 n.7 as support for the proposition that a PRP may not maintain a section 107(a) action, and by UGI Industries, Inc. (the defendant in *Consolidated Edison*) in connection with its petition to the U.S. Supreme Court for a writ of certiorari as evidence of a circuit split requiring the Court to decide whether a PRP could assert a section 107(a) claim. Reply Brief of Petitioner UGI Utilities, Inc. on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 4, UTI Utilities, Inc. v. Consol. Edison Co. of New York, Inc., No. 05-1323, 2006 WL 1621796, at *4 (U.S. June 12, 2006) ("The Fifth Circuit now also has ruled that, contrary to the decision below, PRPs have no §107(a) cost recovery claim, but PRPs continue to litigate that issue across the Nation."); *see also* David Ledbetter, Kathy Robb, Andrew Skroback, Cooper Industries v. Aviall*: The Aftermath*, 26 ANDREWS ENVTL. LITIG. REP. 5 n.9 (July 14, 2006) ("Elementis Chromium cannot be reasonably read as foreshadowing of how the 5th Circuit will rule if it revisits the Section 107 issue. Frenzied parsing and speculation concerning this language say much, however, about the huge stakes in play concerning the Section 107 issue.").

118. 394 F.3d 858 (10th Cir. 2005).

119. *Young*, 394 F.3d at 860.

120. *Id.* at 863.

121. *Id.* at 862. *See* Raytheon Aircraft Co. v. United States, 435 F. Supp.2d 1136, 1145 (D. Kan. 2006) (quoting the statement from *Young* that "a PRP is unable to assert a cost recovery claim "); *Columbus McKinnon*, 2006 WL 2382463, at *4 (citing *Young* for the proposition that the Tenth Circuit after *Aviall* "implicitly recognized that the law in that circuit remained that a PRP could not maintain a § 107 claim").

122. *See* Aronovsky, *supra* note 5, at 50-57.

CERCLA right to recover from other PRPs their fair share of cleanup costs.[123] In the alternative, the landowner could refuse to comply with agency directives and instead require the agency to initiate a judicial enforcement action.[124] Such a strategy could result in a CERCLA lawsuit that would trigger section 113(f)(1) contribution rights. On the other hand, this strategy could also reduce the landowner's negotiation power with the agency, generate substantial litigation costs, expose the landowner to potentially severe penalties for non-compliance with agency directives,[125] and delay site remediation. A landowner could attempt to settle with the EPA or a state agency, giving rise to CERCLA section 113(f)(3) contribution rights;[126] however, neither the EPA nor state regulatory agencies with the power to order cleanups have the resources to negotiate settlements at tens (if not hundreds) of thousands of contaminated sites.[127]

3. *Aviall* and the Role of State Law Cleanup Cost Claims

After *Aviall*, most owners of contaminated property could no longer count on a federal cleanup cost remedy under CERCLA. Because current owners are liable parties under CERCLA, they may not, after *Aviall*, obtain cleanup cost contribution under section 113(f) unless they first have been sued under CERCLA or settled their CERCLA liabilities with the government, and may not have a right to cost recovery under section 107(a).[128] *Aviall*, of course, addressed only federal law claims. In the-

123. Commentators expressed concern that *Aviall* would have a significant chilling effect on PRPs cooperating with regulatory agencies in the absence of a CERCLA contribution remedy. *See, e.g.*, Charles F. Helsten et al., *The Effect of* Aviall *on the Vitality of Brownfields Programs*, A.B.A. ENVTL. TRANSACTIONS & BROWNFIELDS COMM. NEWSL., Mar. 2005, at 4 (*Aviall* decision "has raised many questions that may make developers leery of brownfields projects" in light of uncertain cleanup cost contribution rights); Richard G. Leland & Toni L. Finger, *The Supreme Court's Limitation on Private Cost Recovery Actions Under Superfund: No Good Deed Goes Unpunished - Part II*, METRO. CORP. COUNS., May 2005, at 8 (parties may choose not to enter into voluntary cleanup agreements, particularly in states without state Superfund statute contribution rights); *see also* NAT'L GOVERNORS ASS'N, POLICY POSITION STATEMENT NR-04: SUPERFUND POLICY § 4.4 (2000) (revised Winter Meeting 2005) ("[A] recent U.S. Supreme Court decision [*Aviall*] has the potential to diminish a significant incentive under CERCLA for responsible parties to properly perform voluntary cleanups under state oversight.").

124. *See, e.g.*, Daniel M. Steinway, *The Ramifications of the Aviall Decision: Where Do We Go From Here?*, 20 TOXICS L. REP. (BNA) 190, 194–95 (2005) (potential techniques for a PRP to obtain CERCLA contribution rights include inviting a "friendly" lawsuit from a regulatory agency).

125. *See, e.g.*, 42 U.S.C.A. § 9606(b)(1) (West 2006) (imposing $25,000 per day fines for non-compliance absent "sufficient cause"); 42 U.S.C.A. § 9607(c)(3) (authorizing EPA to seek punitive damages of up to three times the response costs incurred as a result of failure to take proper action); *see also supra* note 27 and accompanying text.

126. *See supra* note 67 and accompanying text.

127. *See* Schnapf, *supra* note 65, at 612 ("[P]arties may have to offer some sort of 'carrots' to state agencies to justify diverting limited resources by performing a more comprehensive cleanup than normally would be required or perhaps implementing a supplemental environmental project."); Albert M. Cohen, *Certainty and Uncertainty in the Post* Cooper v. Aviall *Superfund World*, 20 TOXICS L. REP. (BNA) 73, 77 n.15 (2005) ("EPA could be cooperative and enter into such agreements. On the other hand, it may see the lack of a right to contribution as a means to put additional pressure on parties which refuse to settle.").

128. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004).

ory, landowners could always look to state law as an alternative to a CERCLA claim. Indeed, PRPs often had joined state law claims to CERCLA cleanup cost claims, for a variety of reasons. First, CERCLA does not provide a petroleum cleanup cost recovery remedy;[129] state law is not so limited. Second, CERCLA does not provide damages for property or personal injury caused by contamination;[130] state law could. Third, CERCLA limits private cleanup cost recovery to "necessary" response costs that are "consistent with the national contingency plan;"[131] state common law theories are free of the complicated, time-consuming and often expensive requirements of the NCP.

So why does *Aviall* matter? It matters because state law often provides no remedy at all, especially for current landowners faced with contamination left by their predecessors or contamination that occurred years ago. The hundreds of thousands of contaminated sites across the country represent a significant national problem requiring a comprehensive solution. Voluntary cleanups are essential to solving this problem, and contribution rights greatly facilitate voluntary cleanups. A federal cleanup cost contribution remedy under CERCLA would ensure the availability of contribution claims for sites in every state. But a federal cleanup cost remedy is not necessarily preferable to a state law remedy. To the contrary, state law remedies, in many ways, could be superior to CERCLA. A federal "safety net" remedy is necessary, however, because current state law fails to provide a coherent nationwide response to a nationwide problem.[132]

II. AN INCOHERENT PATCHWORK QUILT: THE CURRENT STATE OF PRIVATE NUISANCE LAW AS APPLIED TO PRIVATE CLEANUP COST DISPUTES

This section analyzes the unrealized potential of private nuisance as a meaningful rule of decision in private cleanup cost disputes. It first looks at the efficiencies and remedial flexibility that could be realized through application of private nuisance law to contaminated property disputes. This section then analyzes the doctrinal and policy limitations of current private nuisance law that dramatically limit opportunities for it to provide these benefits. Part IIII of the article proposes an environmental nuisance paradigm for soil and groundwater contamination disputes that would eliminate shortcomings in current law and make reliance on state law a meaningful alternative to a uniform private federal remedy.

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129. 42 U.S.C.A. § 9601(14) (West 2006).

130. *See, e.g.*, Artesian Water Co. v. Gov't of New Castle County, 659 F.Supp. 1269, 1285 (D. Del. 1987) ("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances.").

131. 42 U.S.C.A. § 9607(a)(4)(B); *see also supra* note 54 and accompanying text.

132. *See* Aronovsky, *supra* note 5, at 68-79 (arguing that a federal "safety net" remedy is necessary in light of the inter-state inconsistencies and doctrinal limitations of current state law).

A. Flexibility and Efficiency: The Potential Benefits of State Law as the Primary Rule of Decision in Private Cleanup Cost Disputes

1. Efficiency

State law could provide a more attractive source for the rules of decision governing private cleanup cost disputes than federal law.[133] Use of state law to resolve all contamination dispute issues would promote litigation efficiency. First, state law contamination disputes would be heard in state courts[134] before state court judges more likely to be familiar with applicable state law than federal court judges.[135] Second, using state law as the primary rule of decision in private cleanup cost disputes would permit the application of a common body of state law to all contaminated property dispute questions, including claims for petroleum cleanup costs,[136] property damages (beyond cleanup costs), and personal injury damages that are not recoverable under CERCLA. Third, applying a common body of state law to all cleanup cost disputes would avoid conflicts between federal and state law regarding alternative cleanup cost allocations among PRPs, and differing measurements of recoverable damages between costs that were and were not consistent with the NCP.[137] Fourth, a common body of law in multi-party contamination disputes would promote settlements by avoiding potential complications that could arise from inconsistent rules governing settlements not involving all disputants.[138] Fifth, in light of the fact that state or local govern-

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133. *See id.* at 60-68 (discussing potential flexibility and efficiency benefits of state law as primary rule of decision in private cleanup cost disputes).

134. By contrast, CERCLA section 113(b) provides that federal courts have exclusive subject matter jurisdiction over claims "arising under" CERCLA. 42 U.S.C.A. § 9613(b). State law claims can be joined to CERCLA claims pursuant to a federal court's original (i.e., diversity) or supplemental subject matter jurisdiction. *See, e.g.*, Arawana Mills Co. v. United Techs. Corp., 795 F. Supp. 1238, 1247-49 (D. Conn. 1992) (analyzing under 28 U.S.C.A. § 1367(c) retention of supplemental jurisdiction over state law claims joined with CERCLA claims).

135. A private cleanup cost or other contamination-related dispute based solely on state law always could, of course, be filed in or removed to federal court based on diversity of citizenship jurisdiction. 28 U.S.C.A. §§ 1332, 1441 (West 2006).

136. CERCLA excludes petroleum from the definition of the "hazardous substances" governed by CERCLA. 42 U.S.C.A. § 9601(14) (West 2006).

137. *See* Aronovsky, *supra* note 5, at 89 n.369.

138. Partial settlements (i.e., settlements involving fewer than all defendants) in multi-defendant cleanup cost litigation typically are conditioned on issuance by the court of a "contribution bar order" providing contribution protection for a settling defendant. A contribution bar order prohibits contribution claims against the settling defendant by reducing any judgment against the non-settling defendant in an amount corresponding to the settling defendant's fair share of liability. This reduction in judgment can either be *pro tanto* (reducing the non-settling defendant's liability by the amount paid in settlement), ordered by the court after a "fairness" hearing on the settlement, or *pro rata,* reducing the non-settling defendant's liability by the settling defendant's equitable share of liability as determined at trial. Federal courts are split as to whether to give *pro tanto* or *pro rata* contribution protection in private cleanup cost cases. *See, e.g.*, Eric DeGroff, *Raiders of the Lost ARCO: Resolving the Partial Settlement Credit Issue in Private Cost Recovery and Contribution Claims Under CERCLA*, 8 N.Y.U. ENVTL. L.J. 332, 397 (2000) (arguing for *pro rata* protection in CERCLA contribution claims and *pro tanto* protection in cost recovery claims). Complications can arise when the applicable federal claim contribution protection rule differs from the state law rule. Using a common body of state law in private cleanup cost disputes would eliminate this problem.

ment agencies take the regulatory lead at most sites, the availability of state law claims would facilitate coordination of cost claim elements and regulatory agency remediation requirements. Finally, tort-based state law cleanup cost claims could be asserted against government entity PRPs because federal and state tort claims statutes authorize private tort-based cleanup cost claims.[139]

2. Flexibility

Using state law as the primary rule of decision in private cleanup cost disputes would also promote flexibility in addressing the nation's many contaminated sites. For example, CERCLA limits private cleanup cost recovery to only those response costs consistent with the NCP.[140] Compliance with NCP requirements[141] for conducting an appropriate investigation into the extent of the pollution and evaluating the feasibility of remedial alternatives,[142] as well as affording a meaningful opportunity

139. The federal government has been identified as a PRP at thousands of sites across the country, potentially involving billions of dollars in cleanup costs. Several *amicus curiae* briefs filed with the U.S. Supreme Court in *Aviall* argued that a PRP right of contribution under CERCLA was necessary to promote cost recovery from the federal government at sites where the United States was a PRP. *See* Aronovsky, *supra* note 5, at 44 n.212. State tort law claims may be asserted against the federal government pursuant to the Federal Tort Claims Act (FTCA). 28 U.S.C.A. §§ 2671-2680 (West 2006); *see* Hoery v. United States, 324 F.3d 1220, 1224 (10th Cir. 2003) (holding landowner timely filed FTCA claim for continuing trespass and nuisance under Colorado tort law arising from groundwater contamination); *see also* Elizabeth Ann Coleman, *In Re* Hoery v. United States*: Compensating Homeowners For Loss of Property Value Due to Toxic Pollution Under the Continuing Tort Doctrine*, 16 VILL. ENVTL. L.J. 35, 44-47 (2005) (discussing application of FTCA to continuing tort claim relating to groundwater contamination). Similarly, state law claims may be asserted against state governments pursuant to comparable state tort claim act statutes or other state statutes waiving sovereign immunity. *See, e.g.*, Ayers v. Jackson Tp., 525 A.2d 287, 291-92 (N.J. 1987) (affirming in part nuisance personal injury damage award in action brought by local residents against municipality regarding contaminants leaching from town landfill into aquifer). By contrast, the Eleventh Amendment and state sovereign immunity protect state government entities from CERCLA claims which can only be brought in federal court because CERCLA section 113(b) provides exclusive federal court jurisdiction for claims "arising under" CERCLA. 42 U.S.C.A. § 9613(b) (West 2006); *see, e.g.*, Burnette v. Carothers, 192 F.3d 52, 60 (2d Cir. 1999) (holding private CERCLA action against state barred by the Eleventh Amendment).

140. A private party response action is consistent with the NCP if it is in "substantial" compliance with applicable requirements of the NCP. 40 C.F.R. § 300.700(c)(3)(i) (2005).

141. Private cleanup actions that result in a "CERCLA-quality cleanup" are considered consistent with the NCP. *See* Regional Airport Authority of Louisville v. LFG, LLC, 460 F.3d 697, 707 (6th Cir. 2006) (holding cleanup is consistent with NCP if, taken as a whole, it is in substantial compliance with NCP and results in a CERCLA-quality cleanup). For a private response action to constitute a "CERCLA-quality cleanup," the selected remedy must: (1) protect human health and the environment; (2) employ permanent solutions and alternative treatment technologies to the maximum extent practicable; (3) be cost effective; (4) identify and attain applicable or relevant and appropriate requirements (ARARs, i.e., cleanup standards) for the site; and (5) provide for meaningful public participation in the remedy selection process. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8793 (Mar. 8, 1990); Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 543 (6th Cir. 2001) (identifying "CERCLA-quality cleanup" NCP factors).

142. The NCP requires preparation of a remedial investigation and feasibility study (RI/FS), which involves, *inter alia*, a thorough analysis of contamination conditions and remedial alternatives. 40 C.F.R. § 300.430(e)(9) (2005). *See* Carson Harbor Vill., Ltd. v. County of Los Angeles, 433 F.3d 1260, 1268–69 (9th Cir. 2006) (holding feasibility study fully analyzing only one remedial

for public participation in the remedial process,[143] can be time consuming and expensive.[144] The additional costs and delays required for NCP consistency (and for CERCLA cost recovery from polluters) can discourage prospective purchasers from acquiring and developing brownfield or other properties contaminated by others.[145]

State common law theories, while imposing culpability and causation proof requirements inapplicable to CERCLA claims, do not condition cleanup cost recovery on consistency with the NCP.[146] State law, therefore, could provide an attractive cost claim alternative for current landowners hoping to conduct a technically sound cleanup without the delay and expense often resulting from NCP requirements.[147] Similarly,

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alternative did not substantially comply with NCP). The final remedy selected by the lead regulatory agency is documented in a Record of Decision (ROD). 40 C.F.R. § 300.430(f)(1).

143. Public participation requirements include creation of a public information and community relations plan and providing sufficient opportunity for public comment on the RI/FS and a proposed remedy. 40 C.F.R. § 300.700(c)(6). Failure to comply with NCP public participation requirements may bar cost recovery. *See, e.g.*, *Regional Airport Authority*, 460 F.3d at 703-08 (affirming summary judgment for prior owner because plaintiff current landowner's claimed costs were not "necessary" within the meaning of section 107(a)(4)(B) and were not consistent with the NCP because, *inter alia*, plaintiff failed to permit public comment on the selected remedy); *Carson Harbor Vill.*, 433 F.3d at 1266–67 (holding plaintiff failed to show compliance with public participation requirement; "minor and ministerial" involvement of public agency did not provide effective substitute for public participation); Union Pac. R.R. Co. v. Reilly Indus., 215 F.3d 830, 835 (8th Cir. 2000) ("Failure to provide a meaningful opportunity for public participation and comment in the selection of a remedial action at a particular cleanup site is inconsistent with the NCP.").

144. *See, e.g.*, Richard G. Opper, *The Brownfield Manifesto*, 37 URB. LAW. 163, 182-83 (2005) (noting that NCP requirements apply on their face to all sites regardless of their complexity, and arguing for amending the NCP to streamline brownfield and other low-risk site regulation); *see also* WILLIAM H. RODGERS, JR., 4 RODGERS' ENVIRONMENTAL LAW § 8:9 (2006 Update) ("It deserves emphasis that the remedial implementation process for NPL sites can be slow (10 to 12 years from initiation of the RI to site cleanup), ponderous (an average of 8 years of study before cleanup begins), expensive (RI/FS cost $750,000 on average with a high of $7 million; remedies average $25 million, several have exceeded $100 million, and a few are approaching $ 1 billion), legally profuse (139 RODs and 4 ROD amendments were signed during Fiscal Year 1989), labor consumptive (some sites will go through 4 or 5 Remedial Project Managers in the years of implementation), and unfailingly complex (single sites can generate multiple RI/FSs and multiple RODs (as many as twenty) for each piece of the cleanup pie." (footnotes omitted)).

145. *See* Opper, *supra* note 144, at 183 ("The NCP needs to be updated to fit the new brownfields paradigm, or else it should adopt language to allow a finding of 'consistency' after little or no elaborate process for certain types of common urban projects."); Schwenke, *supra* note 24, at 297 ("The potential liability for environmental contamination continues to stand as a major impediment to acquisition, financing, and development of these vacant or abandoned sites.").

146. In *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617–18 (7th Cir. 1998), the Seventh Circuit held that a plaintiff unable to recover response costs under CERCLA section 113(f)(1) because of inconsistency with the NCP could not recover those costs derivatively under the Illinois Contribution Act, reasoning that plaintiff PMC's attempted "invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed." *See* Aronovsky, *supra* note 5, at 93-99 (discussing *PMC* decision and arguing that the NCP should not provide basis for CERCLA to preempt state statutory or common law direct cleanup cost remedies).

147. *See, e.g.*, Richard G. Opper, *Managing Risks at Brownfield Sites*, 20 NAT. RESOURCES & ENV'T 32, 36 (2006). Mr. Opper observed that:

> There is sometimes less risk, and a greater chance of success, for private cost-recovery plaintiffs in a common law nuisance case than there is in using CERCLA. The use of a continuing nuisance theory, incepting after mitigation measures are complete, can be efficient and effective in state court. It can be a cheaper and faster path through the litiga-

without the specter of NCP consistency hovering over current landowners looking to recover the costs of voluntary cleanup from other PRPs, states could have greater flexibility with which to experiment and promote effective alternative site cleanup policies.[148]

B. Theory Meets Reality: Current Doctrinal Limitations Prevent State Law from Solving the National Problem of Encouraging Voluntary Cleanups

In theory, state law remedies could encourage the voluntary cleanup of contaminated sites as well as or better than a PRP cleanup cost remedy under CERCLA. In fact, current state law is not up to the task.[149] The doctrinal limitations of current state statutory and common law theories, and the significant variations among state law tort regimes, make meaningful state law cleanup cost remedies unavailable at many multi-PRP sites across the country.

Nuisance casts the widest liability and remedial net among state law claims potentially applicable to private cleanup cost disputes[150] because it is not subject to limitations that constrict other state law theories. For example, a trespass claim requires proof of intentional conduct and can be defeated by a possessor consent defense.[151] Moreover, because the tort of trespass is based on the unauthorized invasion of the possessory interest of another in real property, trespass cannot be asserted by a cur-

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tion than federal court, and it does not require compliance with the National Contingency Plan, providing for cost savings during the cleanup.

Id.

148. *See* Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 221 (1996) ("[s]tate and local laws are better than federal laws at reflecting local preferences for environmental quality and at encouraging valuable environmental policy experimentation" (citing Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1210 (1977) ("[s]tate and local governments can better reflect geographical variations in preferences for collective goals like environmental quality."))).

149. *See* Aronovsky, *supra* note 5, at 68-79.

150. *See supra* notes 30-34 and accompanying text; *infra* notes 151-61 and accompanying text; *see also* WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY 121 (1992) ("[N]uisance is a more reliable theory of liability than trespass or negligence for the hazardous waste disposal situation."); Klein, *supra* note 12, at 353-54 (noting that "[i]n light of CERCLA's failures, legal commentators have increasingly suggested that courts supplement or replace the legislative regime through an expanded use of common law tort actions—in particular, nuisance law," and citing the observation of RODGERS, *supra* note 144, at 112–13, that "[t]here is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse."); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 926 (1999) ("The nuisance cause of action provides the backbone of common law environmental (pollution) litigation."). More than one common law theory, of course, may apply to a private cleanup cost dispute. *See, e.g.*, Joseph F. Falcone III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law In Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 88 (2000) (noting that "cases have recognized that invasions of property that amount to a trespass may also constitute a nuisance").

151. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 158 cmt. e (1965) (intentional conduct is required for trespass, but intrusion with consent of a possessor is privileged); Edgcomb v. Lower Valley Power and Light, Inc., 922 P.2d 850, 859 (Wyo. 1996) (consent of possessor is an absolute defense to a trespass action under Wyoming law).

rent landowner seeking to recover cleanup costs from a prior owner or tenant who disposed of contaminants while possessing the property.[152] Negligence claims require proof that the defendant's conduct did not conform to an applicable standard of care[153] and may not fall within the continuing tort doctrine in order to avoid a statute of limitations defense.[154] Strict liability for an abnormally dangerous activity can be unpredictable because of the multi-factored balancing analysis required to show that an activity is abnormally dangerous,[155] and in some states this doctrine is inapplicable to contaminated property disputes.[156] None of these limitations generally apply to a nuisance claim.

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152. *See, e.g.*, Wellesley Hills Realty Trust v. Mobil Oil Corp. 747 F. Supp. 93, 99 (D. Mass. 1990) ("Mobil owned and was in possession of the property when it allegedly released the oil causing the contamination. Thus, Mobil's releases of oil were not unprivileged, and Mobil clearly was not intruding on land in the possession of another. Mobil's releases of oil on its own land, therefore, cannot constitute a trespass."); Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 674 (Cal. Ct. Ap. 1993) ("Manifestly one cannot commit an actionable interference with one's own possessory right."); RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1965) ("A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it."); *see also* Falcone & Utain, *supra* note 150, at 100 ("While a small minority of jurisdictions are willing to permit current landowners to sue previous owners for contamination under claims of nuisance and strict liability, there are an even smaller number of jurisdictions willing to allow them to sue under a claim for trespass under similar conditions.").

153. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."). Contamination caused by waste disposal practices that at the time reflected state of the art technology may not be actionable years late under a negligence theory. *See* Aronovsky, *supra* note 5, at 70 n.304.

154. *See, e.g.*, Andritz Sprout-Bauer, Inc. v. Beazer E., Inc., 12 F. Supp. 2d 391, 417 (M.D. Pa. 1998) (finding current landowner's negligence claim against former owner and operator of site time-barred; continuing tort doctrine applies only to trespass and nuisance, not negligence); Church v. General Elec. Co. 138 F. Supp. 2d 169, 174 (D. Mass. 2001) (under Massachusetts law, continuing tort doctrine is limited to nuisance and trespass claims and does not apply to negligence or strict liability claims). *But see* Nat'l. Tel. Co-op. Ass'n. v. Exxon Corp., 38 F. Supp. 2d 1, 6-7 (D.D.C. 1998) (holding under District of Columbia law that continuing tort theory applied to toll five year limitations period on commercial property owner's negligence and strict liability for ultra-hazardous activity claims alleging that gasoline leaking from a neighbor's underground storage tanks). Application of the discovery rule, coupled by a tolling of the statute of limitations following discovery of contamination during site evaluation could reduce the risk that a negligence-based cleanup cost claim could become time barred. *See* Melanie R. Kay, *Environmental Negligence: A Proposal for a New Cause of Action for the Forgotten Innocent Owners of Contaminated Land*, 94 CAL. L. REV. 149, 172 (2006) (proposing environmental negligence cause of action that would toll statute of limitations during pendency of site investigation).

155. *See* RESTATEMENT (SECOND) OF TORTS § 520 (1977); *supra* note 37 (identifying the six factors to consider in determining whether an activity is abnormally dangerous); *see, e.g.*, Nnadili v. Chevron U.S.A., Inc., 435 F. Supp. 2d 93, 103 (D.D.C. 2006) (applying District of Columbia law and section 520 balancing factors to grant defendant's motion for summary judgment on the ground that storage of gasoline in defendant's underground storage tanks did not constitute an abnormally dangerous activity); *cf.* Klass, *supra* note 34, at 963 (noting the continued problem of unpredictability in applying section 520 multi-factor analysis).

156. *See, e.g.*, Nat'l Tel. Coop. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 8 (D.D.C. 1998) (observing that strict liability for abnormally dangerous activity had not yet been explicitly adopted in the District of Columbia); Jones v. Texaco, Inc., 945 F. Supp. 1037, 1050 (S.D. Tex. 1996) (noting Texas courts have rejected doctrine of abnormally dangerous activities as a basis for strict liability in the context of hazardous wastes); Arawana Mills Co. v. United Techs. Corp., 795 F. Supp. 1238, 1251 (D. Conn. 1992) (concluding Connecticut law would not recognize storage and use of hazardous materials as abnormally dangerous).

Nuisance law similarly avoids many of the limitations of "state Superfund" statutes. For example, some of these statutes limit private cost recovery to costs consistent with the NCP.[157] Some state Superfund statutes apply only to releases occurring after the statute was enacted.[158] Like CERCLA,[159] some state Superfund statutes do not apply to petroleum.[160] Finally, like CERCLA section 113(f), some State Superfund statutes only permit contribution claims during or after judicial or administrative proceedings against a PRP.[161]

As discussed below, nuisance law has great promise as a rule of decision in private cleanup cost disputes because its flexibility corresponds well to the complexity of soil and groundwater contamination problems.[162] Moreover, nuisance law avoids doctrinal limitations presented

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157. *See, e.g.*, KY. REV. STAT. ANN. § 224.01-400 (West 2006); N.J. STAT. ANN. § 58:10-23.11f3 (West 2006). Some state Superfund statutes do not require NCP consistency for cost recovery. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49-285(B) (West 2006); DEL. CODE ANN. tit. 7, § 9105 (West 2006); FLA. STAT. § 403.727 (West 2006); GA. CODE ANN. § 12-8-96.1 (West 2006); MICH. COMP. LAWS ANN. § 324.20126 (West 2006). Because state Superfund statutes often largely mirror the structure and liability scheme of CERCLA, *see infra* notes 159-61, state Superfund statutes permitting contribution for cleanup costs that are not consistent with the NCP could be subject (properly or otherwise) to a preemption challenge on the ground that using a "state version of CERCLA" to permit recovery of non-NCP costs would undermine the goals of CERCLA. Such an overbroad preemption analysis would be ill-considered. *See* Aronovsky, *supra* note 5, at 90-98.

158. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25366(a) (Deering 2005) (no liability for actions before January 1, 1982 if the actions were not in violation of then-existing state or federal law); HAW. REV. STAT. § 128D-6 (2005) (no private recovery of costs arising from a release occurring before July 1, 1990).

159. State Superfund statutes often adopt or incorporate provisions from CERCLA. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25323.5 (Deering 2005) (incorporating CERCLA definitions of "responsible party" and "liable person"); IND. CODE ANN. § 13-25-4-8 (West 2006) (incorporating CERCLA definition of liable parties); UTAH CODE ANN. § 19-6-302(20) (West 2006) ("remedial investigation" means a remedial investigation and feasibility study as defined in the NCP).

160. *See, e.g.*, ALASKA STAT. § 46.09.900 (2005); CAL. HEALTH & SAFETY CODE § 25317 (Deering 2005); KY. REV. STAT. ANN. § 224.01-400(1)(a) (West 2006); VA. CODE ANN. § 10.1-1400 (West 2006).

161. *See, e.g.*, Wacker Chem. Corp. v. Bayer Cropscience, Inc., No. 05-72207, 2006 WL 2404502, at *5 (E.D. Mich. Aug. 18, 2006) (relying on *Aviall* to interpret Mich. Comp. Laws § 324.20129(3) to permit contribution actions only during or after civil actions brought under Michigan state Superfund statute); 35 PA. STAT. ANN. § 6020.705(a) (West 2006). Amending state Superfund statutes to ensure cleanup cost contribution rights for all PRPs, including current landowners, could serve the same "safety net" function as confirming a similar right under CERCLA. Attempting to amend a state Superfund statute, however, could be frustrated by the same risk of "opening Pandora's box" and confronting the often competing demands of contaminated property dispute stakeholders that have frustrated efforts to amend core provisions of CERCLA for the past twenty years. *See* Aronovsky, *supra* note 5, at 81. In any event, state Superfund statute cleanup cost contribution rights (like CERCLA contribution rights) would not provide the litigation efficiency and remedial flexibility benefits available under the proposed private nuisance paradigm, such as the application of a common body of tort law to both cleanup cost and other claims raised in private contaminated property disputes and the absence of the NCP consistency and petroleum exclusion limitations sometimes found in state Superfund statutory schemes.

162. *See infra* note 175 and accompanying text; *see also* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 771 (2001) ("Although amorphous in definition, all nuisance actions have in common three important doctrinal aspects that provide unique scope to their application by the courts: substantiality of interference, unreasonableness of the defendant's conduct, and equitable flexibility."); Kuhnle, *supra* note 148, at 221-23 (arguing that nuisance liability is more contextual, less predictable than CERCLA, not limited by legislative line-drawing).

by other state law theories.[163] Nevertheless, the current state of nuisance law fails as a meaningful alternative to a uniform federal rule of decision in private cleanup cost disputes for the promotion of voluntary cleanups. Simply put, nuisance law has not evolved to meet the realities of modern contaminated property problems.[164]

C. *The Inadequate State of Current Nuisance Law*

1. Nuisance—A Brief Overview

Nuisance law dates back to the twelfth century;[165] its well-documented history[166] does not require repetition here. William Prosser famously observed that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[167] As one court observed, "in order to alleviate some of the confusion [surrounding the use of the term "nuisance"], it is important to distinguish 'private' and 'public' nuisance, which 'bear little relationship to each other. Although some rules apply to both, other rules apply to one but not the other."[168]

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163. *See infra* notes 151-61 and accompanying text; *cf.* Kay, *supra* note 154, at 162-68 (arguing for an "environmental negligence" cause of action because, among other things, doctrinal limitations make current nuisance law unavailable or inadequate to meet common contamination problems); Klein, *supra* note 12, at 339 (arguing that "shifting costs through nuisance law is no more efficient than shifting costs through CERCLA-created liability" and proposing instead a broad-based system of revenue collection to fund cleanups).

164. *See, e.g.*, G. Nelson Smith III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39 (1995). Mr. Smith argued that:

> The use of common law nuisance and trespass claims to address environmental problems is an outdated method since much of the case law relied upon precedes the enactment of many of the environmental statutes. Consequently, the cases do not direct the courts on how to confront the complicated problems that are associated with pollution.

Id. at 70.

165. *See, e.g.*, *id.* at 41 (describing twelfth century origins of nuisance); Falcone & Utain, *supra* note 150, at 65 ("The legal theory of nuisance dates back to the twelfth century.").

166. *See, e.g.*, Antolini, *supra* note 162, at 767-68; Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101, 1139-41 (1986); H. Marlow Green, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT'L L.J. 541, 545-46 (1997); Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present and Future*, 54 ALB. L. REV. 189, 192-96 (1990); William A. McRae, Jr., *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948); William H. Wilson, Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47, 54-55 (1970).

167. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971).

168. United States v. Hooker Chems. & Plastics Corp., 722 F. Supp. 960, 964 (W.D.N.Y. 1989) (quoting State of New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir.1985)).

Public and private nuisance differ in significant respects.[169] A public nuisance is "an unreasonable interference with a right common to the general public."[170] Government entities may bring an action to enjoin and compel the abatement of a public nuisance.[171] Private parties affected by a public nuisance (e.g., the owner of property impacted by a contaminated groundwater plume) must show an injury different than that suffered by other affected property owners to state a *prima facie* public nuisance claim.[172] Major contaminated groundwater problems affecting an entire neighborhood or public water supply would cause or threaten to cause harm to a common interest of the general public and thus qualify as a public nuisance. Most contaminated property disputes, however, do not involve a public nuisance. For example, contaminated soil problems (usually limited to a single parcel of polluted property) and discrete contaminated groundwater problems (i.e., those involving at most only a handful of properties down-gradient from the source property and not threatening a public water supply) likely would not be considered a public nuisance. The environmental nuisance paradigm proposed by this article focuses on private nuisance contaminated property disputes, rather than public nuisance.[173]

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169. *See, e.g.*, Antolini, *supra* note 162, at 774-75. Professor Antolini observed that:

> Public nuisance offers plaintiffs several important strategic advantages. Its primary advantage is a more direct focus on the merits—the existence of the nuisance, the injury, and the appropriate remedy—than is available in many statutory cases, where the focus is often on procedure or violations of permits or standards. Moreover, public nuisance gives plaintiffs the opportunity to obtain damages and injunctive relief, lacks laches and other common tort defenses, is immune to administrative law defenses such as exhaustion, avoids the private nuisance requirement that the plaintiff be a landowner/occupier of affected land, eliminates a fault requirement, and circumvents any pre-suit notice requirement.

Id. (footnotes omitted).

170. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

171. *Id.* § 821C(2)(b).

172. *See id.* § 821C(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."). Distinctions between public and private nuisance vary among the states, including the requirement that a private plaintiff suffer a "special injury" providing standing to bring a public nuisance claim, may further restrict the availability of private cleanup cost remedies at contaminated groundwater sites. *See* Antolini, *supra* note 162, at 761 (discussing the development and various applications of the special injury requirement for private standing to bring a public nuisance claim). For example, some courts have found that cleanup costs incurred by a current landowner constitute such a "special injury," *see, e.g.*, Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1281-82 (W.D.N.Y. 1990) (applying New York law to hold that incurring NCP-consistent response costs constituted special injury providing standing to maintain public nuisance action), while others do not, *see, e.g.*, Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 316 (3d Cir. 1985) (applying Pennsylvania law and holding that a current landowner lacked standing to maintain a public nuisance claim because cleanup costs incurred to remediate contamination for which plaintiff is liable as current property owner did not constitute injury suffered exercising right common to general public); Hamlin Group, Inc. v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925, 935 (D. Me. 1990) (applying Maine law and holding that response costs incurred by current landowner to cleanup own property did not constitute special injury suffered exercising right common to general public).

173. Public and private nuisance address different interests (rights common to the general public as compared to the use and enjoyment of private property) and employ a variety of different

Section 822 of the Restatement (Second) of Torts addresses the scope of private nuisance:

> [o]ne is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[174]

Courts have considerable flexibility in fashioning private nuisance remedies, including money damages or injunctive relief tailored to the nature and scope of the underlying invasion.[175]

Soil or groundwater contamination often results in a substantial interference with the use and enjoyment of property and thus falls squarely within the definition of private nuisance.[176] For example, the current

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rules (e.g., private actions to enjoin a public nuisance generally are not barred by statutes of limitations and can be brought by a current owner against the former owner of the same property). A detailed analysis of public nuisance is beyond the scope of this article. A large proportion of contaminated property disputes would fall within the scope of private nuisance law; the environmental nuisance paradigm proposed by this article addresses the application of private nuisance to contaminated property disputes.

174. RESTATEMENT (SECOND) OF TORTS § 822 (1979). Private nuisance requires proof of culpability, i.e., intentional and unreasonable, negligent, reckless, or "abnormally dangerous" conduct by the defendant. *Cf.* RODGERS, *supra* note 144, § 2.4 ("Nuisance law is continuing on the road to becoming a strict liability tort although there is more than a little meander in the chosen path."). In some jurisdictions, culpable conduct by the plaintiff may present an obstacle to recovery. *See, e.g.*, Copart Indus., Inc. v. Consol. Edison Co. of N.Y., 362 N.E.2d 968, 970 (N.Y. 1977) ("[A]lthough contributory negligence may be a defense where the basis of the nuisance is merely negligent conduct, it would not be where the wrongdoing is founded on the intentional, deliberate misconduct of defendant."); *see also* RESTATEMENT (SECOND) OF TORTS § 840E cmt. d (explaining that where plaintiff contributes to pollution and, if the harm is capable of apportionment, the apportionment will be made and the defendant will be held liable to the extent of his own contribution, but where apportionment cannot be made the plaintiff's own responsibility for the entire harm will bar recovery). Under the proposed environmental nuisance paradigm, plaintiff's culpability would be relevant to fashioning an appropriate remedy under comparative responsibility principles. *See infra* notes 440-41 and accompanying text.

175. *See,* RODGERS *supra* note 144, § 2.13 (describing available private nuisance remedies and observing that "[t]he balancing associated so prominently with nuisance law comes to the fore in the fashioning of remedies" (footnote omitted)); *see also* James B. Brown & Michael V. Sucaet, *Environmental Cleanup Efficiency: Private Recovery Actions for Environmental Response Costs*, 7 T.M. COOLEY L. REV. 363, 381 (1990) ("The common-law action of nuisance encompasses a wide variety of injuries. This type of action is particularly significant in the environmental context due to the availability of both equitable relief and damages."). When available, the flexibility of private nuisance remedies can tailor the allocation of cleanup cost responsibilities to specific remediation dispute circumstances. The severe doctrinal limitations of current private nuisance law, however, bar its application to many common contaminated property dispute problems. *See infra* notes 177-360 and accompanying text.

176. *See, e.g.*, Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1330 (S.D. Iowa 1997) (stating that under Iowa law, "[c]hemical contamination of land, such as underground gasoline, can qualify as a nuisance."); MSOF Corp. v. Exxon Corp, 934 So. 2d 708, 721 (La. Ct. App. 2005) (reversing the trial court's granting of summary judgment for the defendant and holding that potential contamination and health advisories arising from defendant's waste disposal support private nuisance claim); Wood v. Picillo, 443 A.2d 1244, 1248 (R.I. 1982) (maintaining hazardous waste dump site constituted public and private nuisance where "defendants' dumping operations have already caused substantial injury to defendants' neighbors and threaten to cause incalculable

owner of a contaminated site may need to incur cleanup costs to comply with regulatory requirements, restore the value and utility of the property, or pursue property development opportunities. Private nuisance, therefore, would appear well-suited to provide a basis for a current landowner to recover from other PRPs who caused or contributed to site contamination their fair share of cleanup costs. An analysis of private nuisance law across the United States, however, reveals four significant doctrinal limitations that severely limit the effectiveness of nuisance as a rule of decision in private cleanup cost disputes: (1) most states limit private nuisance claims to disputes involving neighboring property uses; (2) in many states the doctrine of *caveat emptor* bars private nuisance claims against predecessor owners; (3) many states employ an anachronistic interpretation of the continuing nuisance doctrine to render time-barred private nuisance claims at older contamination sites; and (4) the misplacement of the burden of proof regarding whether a nuisance is permanent or continuing can extinguish claims for unabated contamination and create a series of perverse incentives against proactive site investigation and informal cleanup cost dispute resolution. The following subsections will analyze each of these doctrinal limitations. Part III describes an environmental nuisance paradigm that solves each problem.

2. Geographic Limitations: Same Property Pollution Disputes

Many private cleanup cost disputes concern contamination caused or contributed to by former occupants of the contaminated property, as opposed to contamination that originated on neighboring property. "Same property" pollution arises in many settings, such as former landfills and properties that once housed manufacturing facilities or retail establishments (such as dry cleaners or service stations) that handled hazardous substances. Current landowners at these sites are left with "predecessor pollution" that impairs the value of the property and requires compliance with regulatory cleanup requirements. Most states, however, bar same property private nuisance claims by a current landowner seeking damages or equitable relief for contamination originating on her property.[177]

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damage to the general public. The Picillos' neighbors have displayed physical symptoms of exposure to toxic chemicals and have been restricted in the reasonable use of their property. Moreover, expert testimony showed that the chemical presence on defendants' property threatens both aquatic wildlife and human beings with possible death, cancer, and liver disease.").

177. *See, e.g.*, Evans v. Lochmere Recreation Club, Inc., 627 S.E.2d 340, 342 (N.C. Ct. App. 2006) ("[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor."); Pestey v. Cushman, 788 A.2d 496, 502 (Conn. 2002) (quoting Nailor v. C.W. Blakeslee & Sons, Inc., 167 A. 548 (Conn. 1933)) ("The law of private nuisance springs from the general principle that '[i]t is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor.'"); Demont v. Abbas, 32 N.W.2d 737, 738 (Neb. 1948) ("Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property to their damage that an owner's use may be restricted."); Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957 (R.I. 1994) ("Under

a. Majority View: No Same Property Private Nuisance Claims

The vast majority of states restrict private nuisance claims to disputes between neighboring landowners.[178] The seminal case barring

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Rhode Island law it is well settled that a cause of action for a private nuisance 'arises from the unreasonable use of one's property that materially interferes with a neighbor's physical comfort or the neighbor's use of his real estate.' The offensive condition therefore must originate outside the plaintiff's land." (quoting Weida v. Ferry, 493 A.2d 824, 826 (R.I. 1985))); Sans v. Ramsey Golf & Country Club, Inc., 149 A.2d 599, 605 (N.J. 1959) ("The question is not simply whether a person is annoyed or disturbed, but whether the annoyance or disturbance arises from an unreasonable use of the neighbor's land or operation of his business."); Beckman v. Marshall, 85 So. 2d 552, 554 (Fla. 1956) (quoting Antonik v. Chamberlain, 78 N.E.2d 752, 758 (Ohio Ct. App. 1947) for the proposition that "Nuisance, in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor . . . ."); Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160, 1171-72 (W.D. Ark. 2002) (granting summary judgment for defendant on same property private nuisance claim, citing Southeast Arkansas Landfill, Inc. v. State, 858 S.W.2d 665, 667 (Ark. 1993) for the proposition that "the Arkansas Supreme Court defines nuisance to contemplate separate parcels of property"); State v. Jacob Decker & Sons, 196 N.W. 600, 601 (Iowa 1924) ("The essential element in nuisance is the injury to one's neighbors, and involves an invasion of the legal rights of persons sustaining peculiar relations to the property or thing in question, or threatening or impending danger to the public."). Some states that bar "same property" private nuisance claims will nevertheless permit a private plaintiff who has suffered the "special injury" required for standing to seek recovery for "same property" contamination constituting a public nuisance. *See, e.g.*, Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1282 (W.D.N.Y. 1990) (applying New York law); *see also infra* notes 378-79 and accompanying text. In *Moore v. Texaco*, Inc., 244 F.3d 1229 (10th Cir. 2001), the Tenth Circuit affirmed summary judgment under Oklahoma law in favor of defendant former landowner against public and private nuisance claims brought by a current landowner in connection with soil contamination caused by petroleum. The court noted that while a public nuisance claim could be asserted against Texaco, the former landowner, plaintiff Moore had adduced no evidence that Texaco had either caused the pollution on the property or failed to abate prior pollution about which it had knowledge prior to selling the property to Moore. *Moore*, 244 F.3d at 1231-32. The Tenth Circuit further held that Moore could not maintain a private nuisance claim based on the petroleum pollution and the construction of berms on the property, finding it "likely that Oklahoma would reach the same conclusion reached by nearly every other court to consider the issue: that an action for private nuisance is designed to protect neighboring landowners from conflicting uses of property, not successor landowners from conditions on the land they purchased." *Id.* at 1232. Similarly, some courts have recognized an exception to the private nuisance neighboring property limitation for private nuisance claims by a landlord against a tenant. *Compare, e.g.*, Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716, 725 (W.D. Pa. 1994) (denying motion to dismiss private nuisance claim under Pennsylvania law brought by landlord against tenant who operated gas station that allegedly caused contamination on leased property), *with, e.g.*, Patton v. TPI Petroleum, Inc., 356 F. Supp. 2d 921, 931-32 (E.D. Ark. 2005) (dismissing landlord's private nuisance claim against commercial tenant because under Arkansas law nuisance claims limited to neighboring property disputes).

178. *See, e.g.*, Falcone & Utain, *supra* note 150, at 78-84 (describing restriction of nuisance claims disputes between neighboring landowners as the "majority approach"); *see also* 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64.02[3] (Michael Allan Wolf ed., 2000) ("Unreasonableness has a role to play in private nuisance law in that plaintiffs are not expected to tolerate unreasonable interference with use and enjoyment of their real property . . . . The conclusion of 'unreasonableness' depends then upon liability-inviting conduct of the defendant plus a finding that this conduct violates a protected interest of the neighbor-plaintiff."); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1319 (1977) ("An interference is not a nuisance unless, among other things, it *substantially* interferes with the use and enjoyment of neighboring land."); Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403, 406 (1997) ("Nuisance actions to abate interferences with an owner's interest in land have existed for over eight hundred years. The pre-Revolutionary body of American nuisance law accepted the oft-repeated maxim, sic utere tuo ut alienum non laedes ('one should use his own property in such a manner as not to injure that of another')." (footnotes omitted)). By contrast, CERCLA makes the owner or operator of contaminated

private nuisance claims for same property hazardous substance contamination is the Third Circuit's 1985 decision in *Philadelphia Elec. Co. v. Hercules, Inc.*[179] Philadelphia Electric Company (PECO) acquired property in Chester, Pennsylvania, that had once been used as a hydrocarbon resin manufacturing plant and at which a former owner had disposed of resins and by-products.[180] Following discovery of the contamination, the Pennsylvania Department of Environmental Resources directed PECO to remediate the site.[181] PECO sued Hercules (as successor to the former owner of the PECO property), asserting public and private nuisance claims under Pennsylvania law.[182] PECO sought to recover cleanup costs and lost property rentals caused by the contamination, and obtain an injunction directing Hercules to abate any remaining contamination.[183] A jury awarded cleanup cost and delay damages to PECO and the district court issued the requested injunction against Hercules.[184] On appeal, the Third Circuit reversed, holding that Pennsylvania law did not permit a same property private or public nuisance claim.[185]

The Third Circuit started its private nuisance analysis by turning to the Restatement (Second) of Torts. The court assumed that the prior owner had created a nuisance within the meaning of section 821D of the Restatement (Second) of Torts, which "defines a 'private nuisance' as 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.'"[186] The court found that "[t]he crucial and difficult question for us is *to whom* Hercules may be liable."[187] The court concluded that while Hercules might be liable in nuisance for a claim brought by a neighboring property owner, Hercules owed no duty under nuisance law to a successor owner of the Chester site, such as PECO.[188] The court reasoned that barring same property nuisance claims "is consonant with the historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses."[189] The court noted that:

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property at the time of disposal of a hazardous substance liable for response costs without limiting direct or derivative private response cost recovery rights to neighboring property owners. 42 U.S.C.A. § 9607(a)(2), (4) (West 2006).

179. Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985).

180. *Phila. Elec. Co.*, 762 F.2d at 306.

181. *Id.* at 307.

182. *Id.* at 307-08.

183. *Id.* at 308.

184. *Id.*; *see also* Phila. Elec. Co. v. Hercules, Inc., 587 F. Supp. 144, 147 (E.D. Pa. 1984).

185. The Third Circuit affirmed that Hercules was the successor to the prior owners of the PECO property under a *de facto* merger theory, but held that PECO could not state a same property nuisance claim under Pennsylvania law. *Phila. Elec. Co.*, 762 F.2d at 312-14.

186. *Phila. Elec. Co.*, 762 F. 2d at 313.

187. *Id.*

188. *Id.* at 314. The court noted that while "PECO also owned an adjoining piece of land, and thus was a neighbor of Hercules . . . . [PECO did] not, however, allege that pollution of the Chester site interfered with its use and enjoyment of this adjoining site." *Id.* at 314 n.8.

189. *Id.* at 314.

> [A]ll of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to achieve efficient and equitable solutions to problems created by *discordant* land uses. In this light nuisance law can be seen as a complement to zoning regulations, . . . and not as an additional type of consumer protection for the purchasers of realty. Neighbors, unlike the purchasers of land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation. The record shows that PECO acted as a sophisticated and responsible purchaser—inquiring into the past use of the Chester site, and inspecting it carefully. We find it inconceivable that the price it offered Gould did not reflect the possibility of environmental risks, even if the exact condition giving rise to this suit was not discovered.[190]

The court concluded that to "extend private nuisance beyond its historical role would render it little more than an epithet, 'and an epithet does not make out a cause of action.'"[191] Finally, the court underscored its discomfort with extending private nuisance to same property disputes by referencing the nascent state of federal and state environmental statutes, observing that "[s]uch an extension of common law doctrine is particularly hazardous in an area, such as environmental pollution, where Congress and the state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities."[192]

The court also found PECO's public nuisance claim unavailing. On the one hand, the court rejected Hercules' contention that the neighboring property dispute limitation on private nuisance claims applied equally to public nuisance claims,[193] noting that the "doctrine of public nuisance protects interests quite different from those implicated in actions for private nuisance, . . . [and that] an action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property rights."[194] The court nevertheless concluded that under Pennsylvania law spending money to remediate predecessor pollution did not constitute the "special injury" or "particular damage"

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190. *Id.* (citation omitted). The court further held that the doctrine of *caveat emptor* barred PECO's claim. *Id.* at 312-13. *See infra* notes 221-43 and accompanying text. The court also found analogous a series of Pennsylvania cases (later overruled) that did not permit "*tenants* to circumvent traditional limitations on the liability of *lessors* by the expedient of casting their cause of action for defective conditions existing on premises (over which they have assumed control) as one for private nuisance." *Phila. Elec. Co.*, 762 F.2d at 313. The court noted that although these tenant-landlord cases had been overruled by the time of the *Philadelphia Electric* decision, they nevertheless reflected "sound tort theory." *Id.* at 314 n.8.

191. *Id.* at 315 (citation omitted).

192. *Id.* at 315 n.13; *see also infra* notes 379-82 and accompanying text.

193. *Phila. Elec. Co.*, 762 F.2d at 315 n.13.

194. *Id.* at 315.

different in kind from that suffered by the general public required for PECO to assert a public nuisance claim.[195]

Over the next two decades, courts around the country embraced the reasoning of *Philadelphia Electric* to reject same property pollution private nuisance claims under the laws of other states.[196] These decisions tended to rely on the traditional role of private nuisance as a vehicle for resolving disputes between neighboring land uses; they typically neither identified nor rested on positive law that barred same property private nuisance claims.

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195. *Id.* at 316.

196. *See, e.g.*, Lilly Indus., Inc. v. Health-Chem Corp., 974 F. Supp. 702, 706-08 (S.D. Ind. 1993) (applying Indiana law); Truck Components, Inc. v. K&H Corporation, No. 94 C 50250, 1995 WL 692541, at *12 (N.D. Ill., Nov. 22, 1995) (applying Illinois law); Metro. Water Reclamation Dist. of Greater Chicago v. Lake River Corp., 365 F. Supp. 2d 913, 918–19 (N.D. Ill. 2005) (stating that under Illinois law the purpose of private nuisance action is to resolve disputes between neighboring, contemporaneous landowners); Amland Props. Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 808 (D.N.J. 1989) ("Because New Jersey courts have read private nuisance to encompass only instances of danger to the public or interference with the use of adjoining land, Amland's claim here must fall."); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 98-99 (D. Mass 1990) ("Because the law of private nuisance requires that the interference be to persons outside the land upon which the condition is maintained, the Massachusetts Court of Appeals has held that a vendee of land does not have a private nuisance action against a vendor for its contamination prior to the sale."); Hanlin Group, Inc. v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925, 935 (D. Me. 1990) (applying Maine law); Berry v. Armstrong Rubber Co., 780 F. Supp. 1097, 1103 (S.D. Miss. 1991) (applying Mississippi law to grant summary judgment on private nuisance claim, stating that "[t]he common law of nuisance does not protect a landowner from interference or harm resulting from a previous use of his property by a prior landowner."); Rosenblatt v. Exxon Co., U.S.A., 642 A.2d 180, 190 (Md. 1994) (affirming summary judgment on ground that Maryland law was consistent with holding in *Philadelphia Electric* and other courts that "a cause of action for private nuisance requires an interference with a *neighbor's* use and enjoyment of the land."); Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957 (D.R.I. 1994) (applying Rhode Island law); Dartron Corp. v. Uniroyal Chem. Comp., Inc., 893 F. Supp. 730, 741 (N.D. Ohio 1995) (applying Ohio law); Cross Oil Co. v. Phillips Petroleum Co., 944 F. Supp. 787, 792-93 (E.D. Mo. 1996) (stating that "[t]he law of nuisance evolved as a means of resolving conflicts between neighboring contemporaneous land users" and holding that under Missouri law a current property owner may not recover against a prior owner under a private nuisance theory for a condition created on the property by the prior owner); Reg'l Airport Auth. of Louisville & Jefferson County v. LFG, LLC, 255 F. Supp. 2d 688, 691 (W.D. Ky. 2003) ("We believe that were a Kentucky court to consider this issue, it would follow the lead of the majority of the courts, which have consistently rejected allowing a subsequent landowner to recover in private nuisance from a prior land owner [sic]."); Rudd v. Electrolux Corp., 982 F. Supp. 355, 368 (M.D.N.C. 1997) (noting that under North Carolina law, "a nuisance is the improper use of one's own property in a way which injures the land or other right of one's neighbor"); Middlebury Office Park Ltd. P'ship. v. Timex Corp., No. 3:95-CV-2160 (EBB), 1998 WL 351583, at *4 & n. 2 (D. Conn. June 16, 1998) (dismissing private nuisance claim because "[i]n Connecticut, the tort of nuisance is only applicable where a person is 'making use of his own property so as to occasion unnecessary damage or annoyance to his neighbor'" and because "claims asserted by a landowner against a former owner of property are barred by the doctrine of caveat emptor unless they fall within two limited exceptions: first, the defects existing in the property were not discoverable upon reasonable inspection by the purchaser, and, second, the seller was chargeable with knowledge of the defects").

b. Minority View: Same Property Nuisance Claims Permitted

A small minority of states recognize same property private nuisance pollution remediation claims.[197] Indeed, reported decisions applying the law of just two states—California and Minnesota—have recognized such claims.[198] In 1991, the California Court of Appeal in *Mangini v. Aerojet-General Corp.* (*Mangini I*)[199] held that a current owner could sue a prior lessee for contamination originating on the current owner's property.[200] In *Mangini I*, the owners of 2,400 acres of land near Sacramento, California sued Aerojet-General, which had leased the property years before from the prior owner, for allegedly contaminating the property with waste rocket fuel materials.[201] Plaintiffs asserted claims under nine legal theories, including private nuisance.[202] The trial court sustained defendant's general demurrer without leave to amend.[203] The California Court of Appeal reversed.[204]

Aerojet-General, relying on general tort law principles, tort law treatises, and *Philadelphia Electric*,[205] argued that private nuisance law did not permit a claim by a current owner for injuries resulting from acts by a defendant committed on the same property.[206] The Court of Appeal rejected these arguments as not reflective of California law, noting that

197. *See* Falcone & Utain, *supra* note 150, at 84-91 (describing as the minority view that a property owner may sue predecessors-in-interest of the same property for private nuisance).

198. Indiana law regarding same property private nuisance claims is unclear. In *Gray v. Westinghouse Electric Corp.*, 624 N.E.2d 49 (Ind. Ct. App. 1993), plaintiffs lived next to a former landfill site at which they alleged that defendant Westinghouse disposed of PCBs. Plaintiffs sued Westinghouse, asserting, among other things, a claim for private nuisance. *Id.* at 51-52. Westinghouse argued that it could not be liable to abate the nuisance because it did not own the landfill. *Id.* at 52-53. The Indiana Court of Appeals reversed the trial court's order granting a motion to dismiss, holding that "the creator of a nuisance of land which it does not own can be required to abate the nuisance." *Id.* at 53. The court also stated that "[w]e hold that the party which causes a nuisance can be held liable, regardless of whether the party owns or possesses the property on which the nuisance originates." *Id.* Subsequently, the federal district court in *Lilly Industries, Inc. v. Health-Chem Corp.*, 974 F. Supp. 702 (S.D. Ind. 1993) held that Indiana law did not recognize same property private nuisance claims, citing to and relying on the reasoning in *Philadelphia Electric*. *Id.* at 706-08. The court found *Gray* distinguishable because it did not involve a same property nuisance claim. *Id.* at 706. *See also* Wickens v. Shell Oil Co., No. 1:05-CV-645-SEB-JPG, 2006 WL 3254544, at *6 (S.D. Ind. Nov. 9, 2006) (citing *Lilly Industries* and granting summary judgment for defendant on a same property private nuisance claim and observing that "[r]ecently, heretofore undiscovered environmental pollution on real property seems to have fostered imaginative attempts to construct or expand on a common law tort theory of recovery. But these efforts have not found support under Indiana law since the state courts have declined to utilize trespass or nuisance doctrines to resolve environmental clean-up disputes.").

199. Mangini v. Aerojet-Gen. Corp. (*Mangini I*), 230 Cal. App. 3d 1125 (Cal. Ct. App. 1991).

200. *Mangini I*, 230 Cal. App. 3d at 1133-37.

201. *Id.* at 1131-32.

202. *Id.* at 1132-33.

203. *Id.* at 1133.

204. *Id.* at 1156.

205. *Id.* at 1133-34.

206. *Id.*

"California nuisance law is a creature of statute."[207] California Civil Code section 3479 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, 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, is a nuisance.[208]

The court traced the origins of section 3479 to nineteenth century statutes enacted during California's Gold Rush, which "recognized that a property owner could sue for nuisance where miners entered the owner's property without consent and dug ditches that interfered with the free use of the property."[209] The court acknowledged that California's statutory definition of nuisance might be broader than the traditional scope of common law nuisance, noting that "[t]he statutory definition of nuisance appears to be broad enough to encompass almost every conceivable type or interference with the enjoyment or use of land or property."[210] The court concluded that "[t]he 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."[211] Subsequent California cases extended *Mangini I* to private nuisance claims against former property owners as well as former tenants.[212]

Minnesota law similarly has been interpreted to permit same property private nuisance claims. In *Union Pacific Railroad Co. v. Reilly Industries, Inc.*,[213] Union Pacific, the owner of real property in Minnesota, sued Reilly Industries, the successor of Republic Creosoting Company, to recover the past and future costs of cleaning up contamination caused by Republic's former creosoting operations on the property.[214] Union Pacific included a private nuisance claim in its complaint. Reilly moved for summary judgment on that claim, arguing that private nui-

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207. *Id.* at 1134.

208. CAL. CIV. CODE § 3479 (West 2006). California Civil Code section 3480 provides that "[a] public nuisance is one 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." *Id.* § 3480. Civil Code section 3481 provides that "[e]very nuisance not included in the definition of the last section is private." *Id.* § 3481.

209. *Mangini I*, 230 Cal. App. 3d at 1135.

210. *Id.* at 1136 (citations omitted).

211. *Id.* at 1134.

212. *See, e.g.*, Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 672-73 (Cal. Ct. App. 1993) (allowing private nuisance claim by current owner against former owner and tenant); Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4th 334, 340-43 (Cal. Ct. App. 1993) (allowing private nuisance claim by current owner against former owner).

213. Union Pac. R.R. Co. v. Reilly Indus., Inc., 4 F. Supp. 2d 860 (D. Minn. 1998).

214. *Id.* at 862-63.

sance applies only to neighboring property use disputes.[215] The court denied Reilly's motion.[216]

The court acknowledged that, "as a general matter," a claim for "private nuisance resolves conflicts between neighboring or adjacent landowners," but observed that Minnesota law imposed no such limitation.[217] The court noted that under Minnesota's nuisance statute:

> Anything which is injurious to health, or 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, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.[218]

Based on the broadly-worded Minnesota statute, the court concluded that "Union Pacific may maintain a nuisance claim even though the claim does not involve adjacent property of neighboring property holders."[219]

No other state has recognized a same property private nuisance claim brought by the current owner of property against a former owner or tenant.[220] Accordingly, in the vast majority of states, the owner of contaminated property cannot use nuisance law to recover a PRP's fair share of cleanup costs regarding contamination that originated on the property rather than on a neighboring property. Under this rule, the current owner of most brownfield sites, former industrial facilities, and former landfills would be barred from recovering cleanup costs under a private nuisance theory and, after *Aviall*, could have no right to cleanup cost contribution at all.

3. Market-Based Limitations: The Doctrine of *Caveat Emptor*

The neighboring property requirement bars landowners in most states from recovering cleanup costs from predecessor PRPs under a private nuisance theory. A closely related barrier to recovery also faced by landowners is the ancient doctrine of *caveat emptor*.[221] The commentary

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215. *Id.* at 863, 867.
216. *Id.* at 867.
217. *Id.*
218. MINN. STAT. ANN. § 561.01 (West 2006).
219. *Union Pac. R.R.*, 4 F. Supp. 2d at 867.
220. Some courts have permitted a landlord to recover cleanup costs from a tenant under a private nuisance theory. *See, e.g.*, Arawana Mills Co. v. United Techs. Corp., 795 F. Supp. 1238, 1250 (D. Conn. 1992) (applying Connecticut law). Other relationship-based theories may also be available to a landlord for recovery of cleanup costs from a tenant, including waste (failure to restore property to pre-leasehold condition) or breach of contract (e.g., breach of warranty regarding property usage or breach of lease provision requiring restoration of property to pre-leasehold condition).
221. *See, e.g.*, Klein, *supra* note 12, at 356 (observing that historically "private nuisance has had virtually no application in cases where current waste site owners and operators seek contribution

to the Restatement (Second) of Torts, section 352, summarizes the application of *caveat emptor* ("let the buyer beware") to the vendor of land:

> Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the vendor of the land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer.[222]

Caveat emptor proponents embrace economic arguments to support its application to cleanup cost claims by a vendee against a vendor of real property. They argue that the doctrine encourages: (a) thorough inspection of the property by the vendee; (b) full disclosure of property defects by the vendor to avoid misrepresentation liability; and (c) the clear, efficient shifting of risk regarding property conditions without wasteful litigation transaction costs.[223]

Indeed, many states recognize *caveat emptor* as a defense to claims by the purchaser of real property against the seller with regard to property conditions existing on the transferred land, including private nuisance claims relating to hazardous substance contamination.[224] For ex-

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from previous landowners for the costs of cleaning waste. The reason behind this lack of application is the adherence of the courts to the doctrine of caveat emptor.").

222. RESTATEMENT (SECOND) OF TORTS, § 352, cmt. a (1965).

223. *See, e.g.*, Klein, *supra* note 12, at 365-67 (arguing in favor of applying *caveat emptor* to private party nuisance claims); Michael Andrew O'Hara, *The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 149, 160 (1993) ("As a defense, caveat emptor completely disallows any recovery to a plaintiff who has had ample opportunity to examine the item under consideration. Allowing the defense of caveat emptor creates an incentive for the purchaser to inspect closely the good being purchased. This incentive is desirable from an equity standpoint because it promotes a true 'meeting of the minds' in transactions, placing the purchaser and seller on equal terms."); *see also* Truck Components, Inc. v. K-H Corp., No. 94-C 50250, 1995 WL 692541, at *12 (N.D. Ill. Nov. 22, 1995) (rejecting same property private nuisance claim and observing without expressly referencing *caveat emptor* that "[a] suit for private nuisance between successive owners of the same property would effectively displace the market's allocation of risks and subject sellers to unbargained for future liability to remote buyers.").

224. *See* Klein, *supra* note 12, at 356 ("Historically, however, private nuisance has had virtually no application in cases where current waste site owners and operators seek contribution from previous landowners for the costs of cleaning waste. The reason behind this lack of application is the adherence of the courts to the doctrine of *caveat emptor*."); *cf., e.g.*, James B. Brown & Glen C. Hansen, *Nuisance Law and Petroleum Underground Storage Tank Contamination: Plugging the Hole in the Statutes*, 21 ECOLOGY L. Q. 643, 683-94 (1994) (arguing in favor of predecessor owner liability for leaking underground storage tank contamination). *See also, e.g.*, Gordon v. Nat'l R.R. Passenger Corp., No. CIV. A. 10753, 1997 WL 298320, at *10 (Del. Ch. Mar. 19, 1997) (stating that under Delaware law, *caveat emptor* applied to private nuisance claim by vendee of contaminated property against vendor); Wilson Auto Enters., Inc. v. Mobil Oil Corp., 778 F. Supp. 101, 107 (D.R.I. 1991) (granting motion for judgment on the pleadings, because "[w]hen Wilson purchased

ample, the Third Circuit embraced *caveat emptor* as an alternative ground to bar PECO's private nuisance claim under Pennsylvania law in *Philadelphia Electric Co. v. Hercules, Inc.*[225] In *Philadelphia Electric*, the court recognized that Pennsylvania law had abolished the rule of *caveat emptor* as to the sale of new homes by a builder-vendor.[226] The court nevertheless concluded that where "corporations of roughly equal resources contract for the sale of an industrial property, and especially where the dispute is over a condition on the land rather than a structure, caveat emptor remains the rule."[227] Similarly, in *Amland Properties Corp. v. Aluminum Co. of America*,[228] a federal district court in New Jersey held that *caveat emptor* barred a property owner from asserting a private nuisance claim against the vendor / prior owner for the cost of remediating polychlorinated biphenyl (PCB) contamination.[229] Likewise, a New York federal district court in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*,[230] granted a motion to dismiss on the ground that New York courts would apply the doctrine of *caveat emptor* to preclude a private nuisance claim by a current property owner against a former owner for the costs of remediating soil and groundwater contamination.[231] The *Westwood* court, however, would not apply *caveat emptor* to dismiss the current owner's damages claim on a *public* nuisance theory. The court attempted to distinguish private nuisance *caveat emptor* cases by concluding that

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the property from LRRC in an arms-length transaction, he lost any possible standing to sue the previous owners and lessees in negligence, nuisance, trespass, or strict liability"); Rosenblatt v. Exxon Co., U.S.A., 642 A.2d 180, 188 n.7 (Md. 1994) (rejecting same property private nuisance claim, and noting that "the common law rule of caveat emptor, although legislatively abrogated in the context of residential property, is still applicable in Maryland with regard to the sale of commercial property"); Middlebury Office Park Ltd. P'ship. v. Timex Corp., No. 3:95-CV-2160 (EBB), 1998 WL 351583, at *4 n.2 (D. Conn. 1998) (dismissing private nuisance claim because "[i]n Connecticut, the tort of nuisance is only applicable where a person is 'making use of his own property so as to occasion unnecessary damage or annoyance to his neighbor'" and because "claims asserted by a landowner against a former owner of property are barred by the doctrine of caveat emptor unless they fall within two limited exceptions: first, the defects existing in the property were not discoverable upon reasonable inspection by the purchaser, and, second, the seller was chargeable with knowledge of the defects").

225. Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312-13 (3d Cir. 1985) (holding that *caveat emptor* barred current landowner's claim against successor to former owner).

226. *Phila. Elec. Co.*, 762 F. 2d at 312.

227. *Id.* at 313.

228. Amland Props. Corp. v. Aluminum Co. of Am., 711 F. Supp. 784 (D.N.J. 1989).

229. *Amland Props. Corp.*, 711 F. Supp. at 808.

230. Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990).

231. *Westwood Pharm. Inc.*, 737 F. Supp. at 1282-84. The *Westwood* court stated:

> While the New York Court of Appeals has abolished the defense of caveat emptor in cases involving contracts for the construction and sale of homes, . . . Westwood has provided no convincing reason for this court to assume that the Court of Appeals would likewise refuse to apply the doctrine where, as in the present case, the vendor and the vendee of the property at issue are both sophisticated commercial enterprises who agreed to a purchase price based, apparently in large part, on the condition of the property at the time of conveyance.

Id. (citation omitted).

> [i]n light of the different interests and public-policy concerns involved in public-nuisance actions, the court has not been convinced that New York courts would dismiss Westwood's claim. This conclusion is bolstered by the nature of the alleged public nuisance involved here, contamination of the environment by hazardous substances. 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.[232]

Some states have refused to apply *caveat emptor* to private nuisance claims relating to hazardous substance contamination.[233]

For example, in *Hanlin Group, Inc. v. International Minerals & Chemical Corp.*,[234] the purchaser of a chemical manufacturing plant sued the seller in a Maine federal court to recover cleanup costs under a variety of theories, including private nuisance.[235] The seller moved to dismiss the buyer's tort claims, arguing that sections 352[236] and 353[237] of the Restatement (Second) of Torts barred vendor liability to the

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232. *Id.* at 1282; *cf.* Klein, *supra* note 12, at 361-62 (noting that, while courts that apply *caveat emptor* to private nuisance claims will not do so to private claims for public nuisance, application of the special injury rule may have same limiting effect on actions against prior owner as *caveat emptor* does in private nuisance cases). Although public and private nuisance address different interests, a private party bringing a public nuisance claim nevertheless seeks a remedy (damages or injunctive relief) relating to a private injury (e.g., the "special injury" that gave the plaintiff standing to bring the claim). *Id.*

233. *See, e.g.*, Sealy Conn., Inc. v. Litton Indus., Inc., 989 F. Supp. 120, 125 (D. Conn. 1997) (holding that *caveat emptor* did not bar nuisance claim by lessor against lessee, but did bar nuisance claim by vendee against vendor); Hanlin Group, Inc. v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925, 932-33 (D. Me. 1990) (applying Maine law).

234. 759 F. Supp. 925 (D. Me. 1990).

235. *Hanlin Group, Inc.*, 759 F. Supp at 927.

236. RESTATEMENT (SECOND) OF TORTS § 352 (1965) (providing that: "[e]xcept as stated in § 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession").

237. RESTATEMENT (SECOND) OF TORTS § 353 (1965) provides:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
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> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
>
> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

Id.

vendee.[238] The court denied the motion to dismiss on the basis of *caveat emptor*.[239] The court noted that the Maine Law Court previously had declined to apply *caveat emptor* to the sale of new houses by a builder vendor and had not yet addressed a private nuisance claim for chemical contamination of land caused by a vendor.[240] The court concluded that it could not assume that Maine state courts would apply *caveat emptor* to contaminated property tort disputes.[241]

Buyers and sellers of real property should be able to expressly and knowingly allocate responsibility between them for addressing contamination found on transferred property.[242] Applying *caveat emptor* to same property contamination private nuisance cases accepts the primacy of the economic theory underlying the doctrine by automatically effecting a default allocation of cleanup cost risks to the buyer as a matter of law. There remains, however, an underlying tension between, on the one hand, economic theory assuming that a real property transfer resulting from arm's length, misrepresentation-free bargaining reflects an efficient allocation of risk that the law should respect, and on the other hand, environmental policy encouraging proactive remediation through the equitable allocation of cleanup cost responsibilities. The issue is not whether transactional circumstances and market forces are relevant to private cleanup cost disputes. They are. Instead, the question with which courts must wrestle is how these factors should affect the allocation of cleanup cost responsibilities, i.e., should *caveat emptor* (or related issues such as purchaser knowledge of site conditions reflected, perhaps, in a discounted purchase price) provide a complete defense to vendor liability or instead affect the nature and scope of any remedy.[243]

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238. *Hanlin Group, Inc.*, 759 F. Supp. at 932.

239. *Id.* at 933. The court nevertheless granted the seller's motion to dismiss on the ground that Maine law only permitted private nuisance claims in disputes involving neighboring properties. *Id.* at 935.

240. *Id.* at 932-33.

241. *Id.* at 933.

242. *See* 42 U.S.C.A. § 9607(e)(1) (West 2006) (nothing in subsection barring agreements to transfer liability under CERCLA "shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section"); SmithKline Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154, 158 (3d Cir. 1996) (business purchase agreement indemnification agreement enforceable against seller as "responsible parties can lawfully allocate CERCLA response costs among themselves while remaining jointly and severally liable to the government for the entire clean-up"); *see also infra* notes 404-07 and accompanying text.

243. *See, e.g.*, Seneca Meadows, Inc. v. ECI Liquidating, Inc., 983 F. Supp. 360, 364 (W.D.N.Y. 1997) (denying motion to dismiss private and public nuisance and trespass claims for property damage regarding contamination that migrated from neighboring property, rejecting defendant's argument that pre-purchase knowledge of contamination barred liability but noting that proof of such knowledge may be considered by the jury in determining damages); W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 691 (9th Cir. 2004) (buyer aware of environmental hazards as evidenced by reduced purchase price precluded from recovering entire cost of cleanup); *see also* Joseph Y. Ybarra, *Refining California's "Consent" Defense in Environmental Nuisance Cases: Determining the Proper Scope of Liability for Responsible Former Owners*, 74 S. CAL. L. REV. 1191, 1215-21 (2001) (analyzing role of "consent" defense to private nuisance claims in context of cases involving (a) release agreements in recent transfers of property, (b) older transfers of property; (c) "as is"

4. Temporal Limitations: The Doctrine of Continuing Nuisance

Many polluted sites were contaminated decades ago. Under CERCLA, the fact that a PRP contaminated a site long ago would not present a statute of limitations problem because (1) CERCLA imposes retroactive liability and (2) the limitations periods for recovering costs under CERCLA sections 107(a) and 113(f) are measured from the completion of remedial activity[244] or the date of a CERCLA settlement or judgment creating rights to contribution,[245] respectively. After *Aviall*, however, a federal law cleanup cost remedy may no longer be available to most PRPs.

Under state law, the statute of limitations can present insurmountable problems at older contamination sites. The limitations period for a nuisance claim generally begins to run when the nuisance is created[246] or, under the discovery rule, when the potential plaintiff knew or reasonably should have known of the claim.[247]

Because tortious injury to property is considered an injury to the property itself rather than to the property owner, the limitations period does not begin to run anew every time ownership of the property changes hands.[248] As a result, a current landowner who only recently discovered

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agreements; and (d) purchaser awareness of contamination at the time of sale); *cf., e.g.*, N.Y. Tel. Co. v. Mobil Oil Corp. 473 N.Y.S.2d 172, 174 (N.Y. App. Div. 1984) (under New York law, prior owner nuisance liability was terminated if there was reasonable opportunity for the new owner to discover harmful conditions on the property).

244. Section 113(g)(2) provides that a section 107(a) claim to recover the cost of a removal action must be brought within three years of the completion of a removal action and a section 107(a) claim to recover the costs of a remedial action must be brought within six years "after initiation of physical on-site construction of remedial action." 42 U.S.C.A. § 9613(g)(2) (West 2006); *see also* 42 U.S.C.A. § 9607(23) (defining "removal"); 42 U.S.C.A. § 9607(24) (defining "remedial").

245. Section 113(g)(3) provides that no action for response cost contribution may be commenced more than three years after the date of: (a) entry of judgment under CERCLA for recovery of response costs; (b) a *de minimis* settlement under CERCLA section 122(g); (c) a cost recovery settlement under CERCLA section 122(h); or (d) entry of a judicially approved response cost settlement. 42 U.S.C.A. § 9613(g)(3).

246. *See, e.g.*, *Mangini I*, 281 Cal. Rptr. 827, 838 (Cal. Ct. App. 1991) ("[W]here a private citizen sues for damage from a permanent nuisance, the statute of limitations begins to run upon creation of the nuisance.").

247. *See, e.g.*, McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645, 651 (Cal. Ct. App. 1999) (under California law, "the period of limitations will begin to run without regard to whether the plaintiff is aware of the specific facts necessary to establish his claim, provided that he has . . . 'notice or information of circumstances to put a reasonable person on inquiry.'" (citations omitted)). CERCLA section 309(a)(1) applies a "federally required commencement date" to state statutes of limitation when the state law commencement date would provide a shorter limitations period. 42 U.S.C.A. § 9658(a)(1) (West 2006). The "federally required commencement date" is defined in CERCLA section 309(b)(4) as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages [allegedly caused by a CERCLA hazardous substance, pollutant, or contaminant] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C.A. § 9658(b)(4); *see also* Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 196-97 (2d Cir. 2002) (federally required commencement date preempts state statute of limitations if state law otherwise would provide for earlier commencement date).

248. *See, e.g.*, Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 556 (Cal. Ct. App. 1996) ("In an action involving tortious injury to property, the injury is considered to be to the property itself rather than to the property owner, and thus the running of the statute of limitations against

contamination or learned of its significance may find a nuisance claim time-barred if a prior landowner had discovered the problem years before.

Otherwise time-barred nuisance claims for older contamination problems may survive depending on whether the nuisance is characterized as "continuing" rather than "permanent."[249] Broadly speaking, if an interference with the use or enjoyment of property "will not terminate or be abated, the nuisance is said to be permanent."[250] If a nuisance is characterized as permanent, the plaintiff must recover all past, present, and future damages from the activity in a single action.[251] Once the limitations period has expired, however, all claims for permanent nuisance damages are time-barred.

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a claim bars the owner and all subsequent owners of the property."); *see also* Bauer v. Weeks, 600 S.E.2d 700, 702 (Ga. Ct. App. 2004) (affirming summary judgment for the defendant on a property damage tort claim regarding defective synthetic stucco exterior cladding even though limitations period expired before the plaintiff purchased property because, under Georgia law, "if a homeowner sells a house after the statute of limitations has run, the conveyance does not revive the cause of action" for defects in the house); *cf.* Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 292-93 (N.D. Cal. 1984) (applying California law to dismiss private nuisance claim as time barred where the plaintiff, who acquired property beyond the three year California limitations period and four years after the release of pollutants ceased, failed to allege lack of knowledge about the state of property or justifiable delay in discovering contamination). For same property private nuisance claims, the statute of limitations presumably could not begin to run until the owner responsible for contaminating the site sold the property. The limitations period then would begin to run when the successor owner discovered or should have discovered the contamination under the applicable state or federal discovery rule. *See supra* note 247. Statutes of limitations applicable to nuisance claims traditionally look to historic conduct (when the last act constituting the cause of action occurred) or the consequence of historic conduct (when the contamination caused by defendant was abated). Alternatively, states could take a prospective approach to environmental nuisance statutes of repose, with the trigger for the limitations period based not on historic acts but on remedial conduct, e.g., a designated period of time after plaintiff first incurs cleanup costs. *Cf., e.g.*, 42 U.S.C.A. §9613(g) (West 2006) (CERCLA section 107(a) cost recovery statutes of limitations triggered by dates of removal or remedial expenditures); *see also* Kay, *supra* note 154, at 172 (proposing environmental negligence cause of action that would toll statute of limitations during pendency of site investigation). Under such an approach, subsequent property owners would still be able to assert a nuisance-based claim for cleanup costs if the statute of limitations began to run afresh for each landowner who incurred cleanup costs. On the other hand, this variation on the discovery rule would conflict with policies of finality underlying statutes of limitations and present complications arising from different statutes of limitations applying to nuisance claims depending on the nature of the damages sought.

249. *See infra* notes 272-349 and accompanying text. Some jurisdictions refer to a "continuing" nuisance as a "temporary" nuisance.

250. *See* DAN B. DOBBS, THE LAW OF TORTS § 468 (2000). The distinction between permanent and continuing nuisance can vary dramatically by state. *See supra* notes 259-334 and accompanying text.

251. JAMES M. FISCHER, UNDERSTANDING REMEDIES § 84(b)(ii) (permanent nuisance damages include diminution in property value and lost opportunity to sell the property); *see, e.g.*, Baker v. Burbank-Glendale-Pasadena Airport Auth., 218 Cal. Rptr. 293, 294 (Cal. 1985) (all past, present and future permanent nuisance damages to be recovered in single action); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 444 (Tex. Ct. App. 1997) (submitting claim for future damages to jury constituted election to proceed on permanent nuisance theory); City of Clanton v. Johnson, 17 So. 2d 669, 672 (Ala. 1944) (all permanent nuisance damages, including diminution in property value, must be sought in single suit).

In contrast, a "continuing nuisance" broadly speaking is an interference with the use and enjoyment of property that can be terminated.[252] A plaintiff may bring successive continuing nuisance actions so long as the harmful inference continues; new causes of action effectively continue to accrue until the inference comes to an end.[253] Because a continuing nuisance can stop or be abated at some point in the future, continuing nuisance remedies typically are limited to injunctive relief to abate the nuisance, an action for damages that accrued during the nuisance limitations period, or both.[254] As discussed below, characterization of a nuisance as

252. *See, e.g.*, Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 801 (Cal. Ct. App. 1993) (under California law, a nuisance is continuing if offensive condition can be discontinued or reasonably abated at any time); N. States Power Co. v. Franklin, 122 N.W.2d 26, 30-31 (Minn. 1963) (under Minnesota law, "[w]here a structure is erected or junk is stored and the harmful effect is 'one that may be abated or discontinued at any time,' there is 'a continuing wrong so long as the offending object remains,' and the courts regard such as a continuing trespass." (footnote omitted)).

253. *See, e.g.*, Wilshire Westwood Ass'n v. Atl. Richfield Co., 24 Cal. Rptr. 2d 563, 569 (Cal. Ct. App. 1993) ("[W]here the nuisance involves a use which may be discontinued at any time, it is characterized as a continuing nuisance, and persons harmed by it may bring successive actions for damages until the nuisance is abated."); Tri-County Inv. Group, Ltd. v. So. States, Inc., 500 S.E.2d 22, 25 (Ga. Ct. App. 1998) (quoting City Council of Augusta v. Lombard, 28 S.E. 994, 998 (Ga. 1897), to show that under Georgia law, "where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie").

254. *See, e.g.*, FISCHER, *supra* note 251, § 84(b)(i) ("For a temporary nuisance, i.e., a nuisance that a plaintiff may seek to abate or, at its election, seek damages, when the plaintiff elects damages, the award will cover losses only up to the date of the commencement of the action or the date of trial."). Continuing nuisance damages typically are limited to damages consistent with the non-permanent nature of the nuisance (e.g., abatement costs, lost rental, lost use) suffered during the limitations period. For example, in a state with a three year statute of limitations for nuisance, a continuing nuisance plaintiff could only recover damages suffered during the three years before the suit was filed. *See, e.g.*, Lyons v. Twp. of Wayne, 888 A.2d 426, 434 (N.J. 2005) ("One who suffers a continuing nuisance, therefore, is able to collect damages for each injury suffered within the limitations period." (citation omitted)); Silvester v. Spring Valley Country Club, 543 S.E.2d 563, 567 (S.C. Ct. App. 2001) (continuing nuisance damages limited to previously unrecovered damages suffered during limitations period). These courts typically hold that prospective damages (e.g., diminution in property value, stigma to property value) are unavailable to a continuing nuisance plaintiff. *See, e.g.*, Spaulding v. Cameron, 239 P.2d 625, 629 (Cal. 1952) (directing trial court to determine whether landslide onto plaintiff's property constituted a permanent nuisance; if so, the court should award diminution in property damages and if not, the court should award injunctive relief to abate the nuisance); Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866, 869 (Cal. 1985) ("[I]f a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. Recovery is limited, however, to actual injury suffered prior to commencement of each action. Prospective damages are unavailable." (citation omitted)). Some courts, however, have treated a nuisance as continuing only for statute of limitations purposes, choosing to award a "permanent" (i.e., prospective) nuisance damage remedy. *See, e.g.*, Cook v. Rockwell Int'l Corp., 358 F. Supp. 2d 1003, 1012 (D. Colo. 2004) (presence on plaintiffs' property of plutonium released from nearby nuclear weapons plant constituted continuing nuisance and trespass for statute of limitations purposes, and could provide basis for prospective, diminution in value damages effectively purchasing an easement for invasion to continue); Beatty v. Wash. Metro Area Transit Auth., 860 F.2d 1117, 1125 (D.C. Cir. 1988) ("[N]uisances may be classified for two distinct purposes, one for the assessment of damages, and the other for the application of the statute of limitations."); *cf.* Mangini v. Aerojet-Gen. Corp. (*Mangini III*), 912 P.2d 1220, 1230 (Cal. 1996) (holding that plaintiff failed to prove nuisance was continuing and, because permanent nuisance claim was time-barred, declining to decide whether the same characterization of a nuisance as permanent or continuing should apply for both limitations and damages purposes). *See infra* note 439 and accompanying text.

permanent or continuing thus has three distinct consequences: (a) when the claim accrues (i.e., is claim barred by the applicable statute of limitations); (b) whether a series of successive nuisance suits is permitted (i.e., whether the doctrine of *res judicata* bars a subsequent nuisance suit for later accruing damages caused by an unabated nuisance); and (c) whether damages are available for future or only past injuries.[255]

At first blush, the "continuing nuisance" doctrine would seem to eliminate statute of limitations problems for private nuisance claims arising from the remediation of older contamination. Closer examination, however, demonstrates dramatic variation regarding how courts define a continuing nuisance[256] and, indeed, whether the continuing nuisance doctrine is available at all.[257] These variations, in turn, can determine whether any state common law private cleanup cost remedy exists for older contamination conditions.[258]

A review of continuing nuisance law across the country reveals a range of different approaches to distinguishing between a "continuing" and a "permanent" nuisance. These standards vary depending on whether the focus of the inquiry is on: (a) the failure of the defendant to abate the offensive condition; (b) the nature of the conduct creating the

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255. *See, e.g.*, DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 5.11(1) (2d ed. 1993).

256. *See, e.g.*, Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 272-73 (Tex. 2004) ("in other jurisdictions there is no consensus as to where the line between permanent and temporary nuisances should be . . . or how it should be applied . . . ."); Kay, *supra* note 154, at 166-67 (discussing different definitions of continuing nuisance); *see also* Robert E. King, *Chemical Contamination in California: A Continuing Nuisance*, 1997 U. CHI. LEGAL F. 483, 489-90 (1997) (arguing that failure of California legislature or courts to define standards distinguishing between permanent and continuing nuisance in contaminated property cases has led to conflicting judicial outcomes); G. Nelson Smith, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 48-49 (1995) (noting that plaintiffs turn to common law nuisance and trespass actions to address petroleum contamination because of CERCLA and California state Superfund statute petroleum exclusion but that "what constitutes a nuisance or trespass is not defined in the California Code, particularly as applied to environmental matters. As a result, courts are compelled to hypothesize as to the true meaning of an environmental nuisance or trespass, and as to when a cause of action under such theories accrues. Such lack of statutory guidance has led to inconsistent interpretations, many times within the same jurisdiction, causing both plaintiffs and defendants in environmental nuisance and trespass litigation to question the actual availability of such remedies.").

257. *See infra* notes 330-34 and accompanying text.

258. Most states recognize both "continuing nuisance" and "continuing trespass" theories and apply a common distinction between "permanent" and "continuing" torts to each cause of action. *See, e.g.*, Mangini v. Aerojet-Gen. Corp. (*Mangini I*), 281 Cal. Rptr. 827, 841-42 (Cal. Ct. App. 1991) (applying common standard for distinguishing between permanent and continuing trespass and nuisance). Some states do not extend the "continuing tort" doctrine to negligence or strict liability for ultra-hazardous activity claims, thereby limiting the availability of these theories for disputes involving older contamination sites. *Compare, e.g.*, Church v. Gen. Elec. Co., 138 F. Supp. 2d 169, 174 (D. Mass. 2001) (under Massachusetts law, continuing tort doctrine is limited to nuisance and trespass claims and does not apply to negligence or strict liability claims), *with* Nat'l Tel. Co-op. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 6-7 (D.D.C. 1998) (under District of Columbia law, continuing tort theory applied to toll five year limitations period on commercial property owner's negligence and strict liability for ultra-hazardous activity claims alleging that gasoline leaking from a neighbor's underground storage tanks).

offensive condition; (c) any social benefit derived from the condition, or (d) the prospective impact or form of the condition.

a. Continued Abatable Harm

In some states, the "continuing" nature of a nuisance turns on whether the offensive condition is "abatable."[259] In these jurisdictions, a new cause of action accrues every day, in effect, because of the defendant's continued failure to abate a nuisance for which the defendant is liable, resulting in the continued presence of an offensive condition. The *Mangini* decisions illustrate the abatability standard.

As described above, in 1991, the California Court of Appeal in *Mangini I* held that California's broad statutory definition of private nuisance allows a current landowner to maintain a private nuisance action against the former tenant of a prior landowner.[260] That holding, however, did not clear the way for the plaintiff's nuisance claim to proceed because the defendant also argued that the plaintiff's claim should be dismissed as a time-barred permanent nuisance action.[261] The court agreed that a permanent nuisance claim was time-barred but allowed plaintiff to file an amended complaint alleging continuing nuisance.[262] The court stressed that under California law "the crucial distinction between a permanent and continuing nuisance is whether the nuisance may be discontinued or abated,"[263] and observed that:

> [P]laintiff's land may be subject to a continuing nuisance even though defendant's offensive conduct ended years ago. That is be-

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259. *See, e.g.*, Valdez v. Mtn. Bell Tel. Co., 755 P.2d 80, 84 (N.M. Ct. App. 1988) (presence of utility pole that could be "easily removed at a reasonable expense" constitutes a temporary nuisance); Fletcher v. City of Indep., 708 S.W.2d 158, 178 (Mo. Ct. App. 1986) (nuisance should be characterized as "temporary" if it is "scientifically possible and reasonably practicable" to abate); Knight v. City of Missoula, 827 P.2d 1270, 1277 (Mont. 1992) ("We have held that a nuisance is a continuing nuisance when: . . . at all times, the [defendant] could have abated the nuisance by taking curative action. Since the nuisance was so terminable, it cannot be deemed to be a permanent nuisance as of the creation date . . . ."); N. States Power Co. v. Franklin, 122 N.W.2d 26, 30 (Minn. 1963) ("[T]he harmful effect is 'one that may be abated or discontinued at any time.'"); Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077, 1086 (N.J. 1996) ("[N]uisance is continuing when it is the result of a condition that can be physically removed or legally abated. In such a case, it is realistic to impute a continuing duty to the defendant to remove the nuisance, and to conclude that each new injury includes all elements of a nuisance, including a new breach of duty."); Caron v. Margolin, 147 A. 419, 420 (Me. 1929) (describing continuing nuisance as a nuisance that "is not of such a permanent nature that it can not readily be removed and thus abated"); City of Phoenix v. Johnson, 75 P.2d 30, 34-35 (Ariz. 1938) ("If it is within the power of the person by the exercise of skill and labor to abate the nuisance, he must do so. If he fails in his duty, but allows the same to continue, he is responsible for maintaining a continuing nuisance . . . . If one responsible for maintaining a nuisance is unable by the exercise of skill and labor to abate it, then it is to be regarded as permanent, because it will continue indefinitely without change . . . .").

260. *See supra* notes 199-211 and accompanying text.

261. *Mangini I*, 281 Cal. Rptr. at 837.

262. *Id.* at 841. The court also held that the continuing/permanent distinction applies equally to private nuisance claims and to private suits for damages based on public nuisances. *Id.* at 839, 842 n.15.

263. *Id.* at 840.

> cause 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.[264]

Mangini I held that a nuisance was continuing if it was "abatable."[265] The court, however, did not define what it meant for a nuisance to be "abatable." This issue was not clarified until after the remanded case proceeded to trial and a jury awarded plaintiffs $13.2 million in damages.[266] The California Court of Appeal overturned the jury's verdict in *Mangini II*, ruling that the trial court should have granted defendant's motion for judgment notwithstanding the verdict because the plaintiffs had failed to prove that the contamination was a continuing nuisance, i.e., that it was "abatable."[267] In 1996, the California Supreme Court affirmed the Court of Appeal (*Mangini III*).[268] The court concluded that evidence of "mere technological feasibility" alone could not prove abatability.[269] Instead, the court held that a nuisance was "abatable"—and thus continuing—if it could be "remedied at a reasonable cost by reasonable means."[270] No such evidence was offered at trial; indeed, there was no evidence of how the site actually would be remediated.[271] The court concluded that defendant was entitled to judgment notwithstanding the verdict because:

> [W]e do not know how much land or water has to be decontaminated. We do not know how deep the decontamination would have to go. We 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.[272]

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264. *Id.* at 841. The court applied the same "abatability" standard to conclude that plaintiff could file an amended complaint alleging a continuing trespass claim. *Id.*; *see also supra* note 258.

265. *Id.* at 840.

266. Mangini v. Aerojet-Gen. Corp. (*Mangini III*), 912 P.2d 1220, 1221 (Cal. 1996).

267. *Id.* at 1224; *see also* Mangini v. Aerojet-Gen. Corp. (*Mangini II*), 31 Cal. Rptr. 2d 696, 708 (Cal. Ct. App. 2004). Pursuant to California Rule of Court 976(d)(1), the Court of Appeal decision in *Mangini II* could not be considered published once the California Supreme Court granted Mangini's petition for review. *See* CAL. RULES OF COURT R. 976(d)(1).

268. *Mangini III*, 912 P.2d at 1221.

269. *Id.* at 1227.

270. *Id.* at 1229.

271. The Plaintiffs' own experts testified that there was not enough known yet to assess what remedial measures would be necessary or effective, and the plaintiffs' counsel in closing argument acknowledged a lack of evidence about the extent of site contamination or what it would take to decontaminate plaintiff's property. *Id.* at 1225, 1227. The court also noted that there was no evidence that a government regulatory agency had set cleanup levels for the site. *Id.* at 1227. Some courts have looked to site cleanup levels set by a regulatory agency as evidence that site contamination presumptively was abatable and as evidence of the degree of cleanup required to effect reasonable abatement. *See, e.g.*, Wilshire Westwood Assocs. v. Atl. Richfield Co., 24 Cal. Rptr. 2d 562, 569 (Cal. Ct. App. 1993) (agency letter advising that cleanup satisfied agency concerns demonstrated that nuisance was abatable and thus continuing); Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 805 (Cal. Ct. App. 1993) ("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.").

272. *Mangini III*, 912 P.2d at 1230.

Absent evidence that the contamination could be abated at a reasonable cost and by reasonable means, the court deemed the plaintiffs' claim to be a claim for permanent nuisance and thus barred by the statute of limitations.[273]

b. Continued Presence of Harmful Condition

Some courts have held that contamination constitutes a continuing nuisance as long as it remains on the plaintiff's property, without regard to whether the contamination is reasonably abatable. For example, in *Hoery v. United States*,[274] the plaintiff sued the United States in a Colorado federal court under the Federal Tort Claims Act alleging that toxic chemicals negligently released into the ground at an Air Force base had migrated onto the plaintiff's residential property.[275] The government moved to dismiss the plaintiff's nuisance and trespass claims as time-barred under Colorado's two year statute of limitations, arguing that all government operations causing the release of the chemicals had stopped by 1994 and that while the plaintiff knew or should have known about

273. *Id.* at 1221. Other states have similarly embraced reasonable abatability as the standard for continuing nuisance. *See, e.g.*, Traver Lakes Cmty. Maint. Ass'n v. Douglas Co., 568 N.W.2d 847, 853 (Mich. Ct. App. 1997) (continuing nuisance is "abatable by reasonable curative or remedial action"); Hudson v. Peavey Oil Co., 566 P.2d 175, 179 (Or. 1977) ("Temporary injury, or injury which is reasonably susceptible of repair, justifies damages measured by the loss of use or rental value during the period of the injury, or the cost of restoration, or both, depending on the circumstances."); City of Sioux Falls v. Miller, 492 N.W.2d 116, 118 (S.D. 1992) ("[I]f a structure, even though permanent, can be changed, repaired, or remedied at a reasonable expense to abate a nuisance, the condition is temporary." (quoting 58 AM. JUR. 2D § 30)); Pate v. City of Martin, 614 S.W.2d 46, 48 (Tenn. 1981) ("A nuisance which can be corrected by the expenditure of labor or money is a temporary nuisance. Where the nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated." (citation omitted)); Hedgepath v. Am. Tel. & Tel. Co., 559 S.E.2d 327, 337 (S.C. Ct. App. 2001) ("A continuing nuisance is defined as a nuisance that is intermittent or periodical. It is described as one which occurs so often that it is said to be continuing although it is not necessarily constant or unceasing. A nuisance is continuing if abatement is reasonably and practically possible."); Valdez v. Mtn. Bell Tel. Co., 755 P.2d 80, 83 (N.M. Ct. App. 1988) ("Courts have also distinguished between a permanent or temporary structure or nuisance. A permanent structure or nuisance is one that may not be readily remedied, removed or abated at a reasonable expense, or one of a durable character evidently intended to last indefinitely, costing as much to alter as to build."); Taylor v. Culloden Pub. Serv. Dist., 591 S.E.2d 197, 203 (W. Va. 2003) ("A nuisance is temporary or continuing where it is remediable, removable, or abatable, or if abatement is reasonably and practicably possible, or, according to some cases, where it is abatable at a reasonable cost, or by the expenditure of labor or money, by the defendant, or by legal process at the instance of the injured party, against the will of the person creating it."); Campbell v. Anderson, 866 S.W.2d 139, 143 (Mo. Ct. App. 1993) ("When a nuisance can be reasonably and practicably abated, it is a temporary nuisance."); Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 22 P.2d 147, 150-51 (Idaho 1933) (discharge of oil and grease into waterway constituted permanent nuisance where jury could conclude that abatement would be impractical); *cf.* Isnard v. City of Coffeeyville, 917 P.2d 882, 889 (Kan. 1996) (nuisance was not abatable and thus permanent); *accord* KY. REV. STAT. ANN. § 411.530 (West 2006) (defining permanent nuisance as "any private nuisance that: (a) cannot be corrected or abated at reasonable expense to the owner; and (b) is relatively enduring and not likely to be abated voluntarily or by court order"); KY REV. STAT. ANN. § 411.540 (West 2006) ("Any private nuisance that is not a permanent nuisance shall be a temporary nuisance.").

274. 64 P.3d 214 (Colo. 2004).

275. *Hoery*, 64 P.3d at 215-16.

the release by 1995, the suit was not filed until 1998.[276] The court granted the government's motion, rejecting the plaintiff's argument that the continued presence and migration of chemicals constituted a continuing nuisance.[277] The plaintiff appealed, and the Colorado Supreme Court accepted a request by the Tenth Circuit Court of Appeals to answer two questions pertaining to Colorado state law: "(1) Does the continued migration from defendant's property to plaintiff's property, allegedly caused by chemical releases by the defendant, constitute continuing trespass and/or nuisance under Colorado law? (2) Does the ongoing presence of those toxic chemicals on plaintiff's property constitute continuing trespass and/or nuisance under Colorado law?"[278] The court answered both questions in the affirmative.[279]

The Colorado Supreme Court concluded that:

> [i]f the defendant causes the creation of a physical condition that is of itself harmful, even after the activity that created it has ceased, a person who carried on the activity that created the condition is subject to continuing liability for the physical condition. [¶] For continuing intrusions – either by way of trespass or nuisance – each repetition or continuance amounts to another wrong, giving rise to a new cause of action. The practical significance of the continuing tort concept is that for statue of limitation purposes, the claim does not begin to accrue until the tortuous conduct has ceased.[280]

In contrast, the court distinguished cases characterizing irrigation ditches and the location of railway lines as permanent nuisances[281] because those structures were designed to promote the state's economic develop-

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276. *Id.* at 216-17.
277. *Id.* at 217.
278. *Id.* at 215.
279. *Id.* at 218.
280. *Id.* (citations omitted). The court relied on comment (e) to section 834 of the Restatement (Second) of Torts, which provides, in pertinent part, that:

> Activities that create a physical condition differ from other activities in that they may cause an invasion of another's interest in the use and enjoyment of land after the activity itself ceases. When the invasion continues only so long as the activity is carried on, a person who ceases to have any part in the activity is not liable for the continuance of the invasion by others. But if the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm. His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. This is true even though he is no longer in a position to abate the condition and to stop the harm. If he creates the condition upon land in his possession and thereafter sells or leases it to another, he is subject to liability for invasions caused by the condition after the sale or lease as well as for those occurring before. When the vendor or lessor has created the condition his liability continues until the vendee or lessee discovers it and has reasonable opportunity to take effective precautions against it.

RESTATEMENT (SECOND) OF TORTS § 834 cmt. e (1965).
281. *Hoery*, 64 P.3d at 219-20.

ment.[282] Accordingly, the court concluded that the only exception under Colorado law to a continuing nuisance where a defendant fails to eliminate an ongoing harmful physical condition wrongfully placed on plaintiff's land is where the invasion serves a "socially beneficial" purpose intended to be permanent.[283] The court found the exception inapplicable in *Hoery*. The court reasoned that:

> public policy favors the discontinuance of both the continuing migration and the ongoing presence of toxic chemicals into Hoery's property and irrigation well. Under Colorado law, a tortfeasor's liability for continuing trespass and nuisance creates a new cause of action each day the property invasion continues. Hence, the alleged tortfeasor has an incentive to stop the property invasion and remove the cause of damage.[284]

Unlike the *Mangini III* decision, the *Hoery* analysis did not further require a showing that contamination could be abated by reasonable means at a reasonable cost as a condition to characterizing it as a continuing nuisance.[285]

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282. *Id.* at 220.

283. *Id.*; *accord* Cook v. Rockwell Int'l Corp., 358 F. Supp. 2d 1003, 1007 (D. Colo. 2004) (applying *Hoery* and Colorado law and holding that a tort based on property invasion that continues in fact is a continuing tort unless the invasion will continue indefinitely and the invasion "is integral to an enterprise vital to the development of the state."); *see also infra* note 354. The *Hoery* court also recognized as a separate basis for finding a continuing nuisance the fact that the toxic pollution continued to migrate unabated onto plaintiff's land. *Hoery*, 64 P.3d at 222. *See infra* notes 315-24 and accompanying text. Other courts have focused on the continued presence of a harmful condition to characterize a nuisance as continuing. *See, e.g.*, Bradley v. Am. Smelting and Ref. Co., 709 P.2d 782, 791-92 (Wash. 1985) (applying Washington law); Kulpa v. Stewart's Ice Cream, 534 N.Y.S.2d 518, 520 (N.Y. App. Div. 1988) (continuing nuisance claim stated where contamination that migrated from underground storage tanks removed from neighboring property remained in plaintiff's well). Applying Ohio law, the Sixth Circuit in *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997), also employed a continued presence approach in the context of a continuing trespass case. The court reversed a district court order granting a motion to dismiss a continuing trespass claim based on continued presence of contaminants on plaintiff's property because "under Ohio law, a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct" and noted that defendants "may be ordered to remove the uranium waste if the trespass is determined to be continuing and abatable." *Nieman*, 108 F. 3d at 1559. In dissent, Judge Krupansky argued that under Ohio law the dumping of waste constitutes a permanent trespass and nuisance, contending that the majority opinion "unjustifiably licenses the plaintiff to assert a stale permanent tort claim which could and should have been litigated within four years of Nieman's constructive discovery of the alleged radiation emissions caused by the defendants." *Id.* at 1568 (Krupansky, J., dissenting).

284. *Hoery*, 64 P.3d at 223. In a dissenting opinion, Justice Kourlis argued that a continuing tort "theory that concentrates on the nature of the conduct of the tortfeasor is the one that comports best with general tort law and the concepts of predictability and deterrence." *Id.* at 224.

285. The court did observe that "the record at this stage of the litigation indicates that the contamination is not permanent - that is, it is remediable or abatable. Although the United States did not address the factual issue, Hoery's expert opined under oath that Hoery's property could be remediated." *Id.* at 222-23 (footnote omitted). *See* Coleman, *supra* note 139, at 53-54 ("In summary, the [*Hoery*] court noted five reasons for reaching its conclusion. First, the TCE pollution is an ongoing presence and migrates continuously onto Hoery's property. Second, the daily migration and presence of TCE on Hoery's property constitute the continuing tort. Third, the undisputed record shows that the contamination is not permanent because it is abatable and remediable. Fourth, the pollution is neither socially nor economically beneficial. Finally, public policy favors termination of the

c. Continued Harmful Conduct

Other courts find that a continuing nuisance standard based on the continued presence of contamination "would clearly undermine the purposes behind statutes of limitations."[286] Instead, these courts focus on the defendant's continued polluting conduct or instrumentalities (e.g., a currently leaking underground storage tank) as the basis for characterizing a nuisance as continuing rather than permanent.[287] For example, in *Union Pacific Railroad Company v. Reilly*,[288] the current owner of Minnesota property brought a nuisance action in a Minnesota federal court against the successor to the former property owner, alleging creosote that had leached from storage tanks previously located on the property constituted a nuisance.[289] The defendant moved for summary judgment on the ground that the nuisance claim was time-barred.[290] The court found a genuine issue of material fact regarding whether the plaintiff discovered the contamination within the limitations period,[291] but ruled that the continued presence of the creosote contamination did not constitute a continuing nuisance.[292] The court concluded that under Minnesota law:

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continued migration and ongoing presence of TCE in Hoery's property." (footnote omitted)); Dana L. Eismeier, *Continuing Trespass and Nuisance for Toxic Chemicals*, 32 COLO. LAW. 107, 110 (2003) (observing that the Colorado Supreme Court left unanswered in *Hoery* whether it "will adopt a 'reasonableness' legal standard regarding what nuisances or trespasses can be abated"); *cf.* Tatum v. Basin Res., Inc., 141 P.3d 863, 867 (Colo. Ct. App. 2005) (stating, without supporting citation or elaboration, that *Hoery* identified reasonable abatability as a permanent injury claim factor).

286. Breiggar Props. L.C. v. H. E. Davis & Sons, Inc., 52 P.3d 1133, 1136 (Utah 2002) (granting summary judgment for defendant contractor on ground that continued presence of debris dumped on plaintiff landowner's property beyond the limitations period constituted a permanent rather than continuing trespass). *See infra* notes 287-300 and accompanying text.

287. *See, e.g.*, Hicks Family Ltd. Partnership v. 1st Nat. Bank of Howell, No 268400, 2006 WL 2818514, at *9 (Mich. App. Oct 3, 2006) (stating that under Michigan law a plaintiff alleging continuing nuisance or trespass must show "continuing tortious *acts*, not merely continual harmful effects from a completed act"); Wilson v. McLeod Oil Co., Inc., 398 S.E.2d 586, 594-95 (N.C. 1990) (under North Carolina law, continued harm from migration of gasoline from present or former USTs is a "renewing" nuisance rather than a "continuing," i.e., permanent, nuisance.); Soo Line R.R. Co. v. Tang Indus., Inc., 998 F. Supp. 889, 896-97 (N.D. Ill. 1998) (private nuisance claim against a tenant for contamination arising from tenant waste disposal time barred because under Illinois law continuing tort is occasioned by continuing unlawful acts or conduct, not continued harm, so nuisance became permanent when lease expired and tenant vacated site); Blake v. Gilbert, 702 P.2d 631, 639-40 (Alaska 1985) *overruled on other grounds by* Bibo v. Jeffrey's Rest., 770 P.2d 290, 292 n.9 (Alaska 1989) (continuing nuisance (or trespass) only where "repeated and continued tortious acts are committed."); Anderson v. State, 965 P.2d 783, 789 (Haw. Ct. App. 1998) ("[A] continuing tort is defined as one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation, and for there to be a continuing tort there must be a continuing duty."); Carpenter v. Texaco, Inc., 646 N.E.2d 398, 399 (Mass. 1995) ("[A] continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct.").

288. 4 F. Supp. 2d 860 (D. Minn. 1998).

289. *Union Pac. R.R. Co.*, 4. F. Supp. 2d. at 862-63.

290. *Id.* at 863.

291. *Id.* at 865.

292. *Id.* at 867.

> [t]he continuous presence of the contaminants is insufficient to constitute a recurring damage. The disposal of creosote was in the nature of a permanent tort, rather than a continuing tort. To the extent that leakage from storage tanks or basins could constitute a continuing wrong, such wrong ceased when the storage tanks and settling basins no longer existed. There is no evidence of contamination or damage as a consequence of conduct or events which recurred on or after December 22, 1988. Thus, the court agrees with defendant that the "continuing wrong" doctrine is inapplicable to plaintiff's claims.[293]

Similarly, in *Carpenter v. Texaco, Inc.*,[294] the Supreme Judicial Council of Massachusetts held that the continued presence of gasoline contamination on the plaintiffs' property did not constitute a continuing nuisance. In *Carpenter*, the plaintiffs' property was contaminated by gasoline that had leaked from an underground storage tank formerly located on a nearby property.[295] Defendant Texaco had owned a gas station on that property but sold the station in 1980; the tank was removed in 1981 and no continuing release of gasoline from the gas station property had occurred after 1984.[296] The plaintiffs discovered the contamination in 1982 but did not bring their consolidated actions until 1991 and 1992.[297] The defendant moved for summary judgment on the ground that the plaintiffs' claims were time-barred under Massachusetts' three-year statute of limitations for permanent nuisance; plaintiffs contended that the ongoing presence of the gasoline on their property constituted a continuing nuisance.[298] The trial court granted the defendant's motion for summary judgment. The trial court's ruling was affirmed by the Supreme Judicial Council, which held that "a continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct."[299] The court viewed the gasoline seepage as a single encroachment that had stopped by 1985 and thus became a permanent nuisance.[300]

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293. *Id.*
294. 646 N.E.2d 398 (Mass. 1995).
295. *Carpenter*, 646 N.E.2d at 399.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.* at 400 & n.4. The *Carpenter* court distinguished *Sixty-Eight Devonshire, Inc. v. Shapiro*, 202 N.E.2d 811, 815 (Mass. 1964) (gutter repeatedly poured water onto the plaintiff's property); and *Asiala v. Fitchburg*, 505 N.E.2d 575, 577 (Mass. App. Ct. 1987) (continuing damage from ongoing encroachment by defective retaining wall) as cases where "rights were being invaded from time to time, and thus there were continuing trespasses or continuing nuisances" Carpenter, 646 N.E.2d at 400 n.4. The *Carpenter* court also distinguished *Wishnewsky v. Saugus*, 89 N.E.2d 783, 786 (Mass. 1950) (recurrent drainage system flooding harmed plaintiff's land); *Wells v. New Haven & Northampton Co.*, 23 N.E. 724 (Mass. 1890) (culvert repeatedly channeled water onto plaintiff's property); and *Prentiss v. Wood*, 132 Mass. 486, 487 (1882) (dam repeatedly set water back on

d. Predictability of Future Damage

Texas takes a "fairly unique"[301] approach to distinguishing between permanent and "temporary" nuisances by looking at the predictability of future harm arising from the nuisance rather than abatability or continued harmful conduct. In 2004, the Supreme Court of Texas discussed this standard at length in *Schneider National Carriers, Inc. v. Bates*.[302] In *Schneider National Carriers*, nearby residents sued industrial plant operators, alleging that air contaminants, odors, lights, and noise emitted from the plants for many years interfered with the use and enjoyment of the plaintiffs' property.[303] The trial court granted the defendants' motions for summary judgment on the ground that the plaintiffs' nuisance claims were time-barred because these long-standing conditions constituted a permanent nuisance.[304] The court of appeals reversed, finding issues of fact regarding the frequency of nuisance conditions and the feasibility of injunctive relief.[305] The Texas Supreme Court reversed the court of appeals after granting a petition for review in order "to try to clarify the distinction [between permanent and temporary nuisance], one of the oldest and most complex in Texas law."[306]

The court found that the distinction between a temporary and a permanent nuisance "must take into account the [three] reasons for which that distinction is drawn,"[307] i.e., when a nuisance claim accrues, whether a series of nuisance suits should be permitted, and whether damages for future as well as past harm should be allowed.[308] The court held that:

> [I]f a nuisance occurs several times in the years leading up to a trial and is likely to continue, jurors will generally have enough evidence of frequency and duration to reasonably evaluate its impact on neighboring property values. In such cases, the nuisance should be treated as permanent, even if the exact dates, frequency, or extent of future damage remain unknown. Conversely, a nuisance as to which any future impact remains speculative at the time of trial must be deemed "temporary."[309]

Based on this distinction, the court found that a nuisance should be deemed permanent "if it is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably

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plaintiff's property) as cases involving "continuing nuisances that were not barred by the statute of limitations because of the recurring nature of the harm." *Id.* at 400 n.4.

301. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 271 (Tex. 2004).
302. 147 S.W.3d at 264.
303. *Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 268.
304. *Id.* at 269.
305. *Id.*
306. *Id.* at 268.
307. *Id.*
308. *Id.* at 275.
309. *Id.* at 280 (footnote omitted).

evaluated."[310] Under this standard, there would be no need for a series of successive suits if future damages could be reasonably ascertained in one action.[311] The court also held that "the characterization of a nuisance as temporary or permanent should not depend on whether it can be abated."[312] The court reasoned that a nuisance should be enjoined only if the plaintiff did not have an adequate legal remedy (i.e., damages); to award both future damages and enjoin the nuisance would amount to a double recovery by the plaintiff.[313] It further reasoned that abating an otherwise permanent nuisance would not necessarily render its effects temporary, observing that harm such as stigma arising from the nuisance might impact the value of plaintiff's property for the foreseeable future.[314]

e. Impact of Harmful Condition Varies Over Time

Some courts have based the distinction between a continuing and permanent tort on whether the form or effect of the offensive condition changes over time so that, in effect, a new cause of action accrues with every change in condition.[315] For example, the California Court of Appeal in *Field-Escandon v. DeMann*[316] observed that "[t]he salient feature of a continuing trespass or nuisance is that its impact may vary over time."[317] In *Field-Escandon*, the plaintiff argued that because a sewer pipe buried on the plaintiff's property years before plaintiff acquired the land could be removed at any time, it constituted a continuing trespass.[318] The court affirmed summary judgment in favor of defendants on the ground that the trespass was permanent and the plaintiff's claim was

310. *Id.* at 281.
311. *Id.* at 283.
312. *Id.* at 284.
313. *Id.*
314. *Id.* at 285-86.
315. *See, e.g.*, Field-Escandon v. DeMann, 251 Cal. Rptr. 49, 53 (Cal. Ct. App. 1988) ("The salient feature of a continuing trespass or nuisance is that its impact may vary over time."); *see also* Kuhnle, *supra* note 148, at 197 n.61 (changing over time standard "appears to be controlling in hazardous waste cases"); *cf.* Briggs & Stratton Corp. v. Concrete Sales & Servs., 29 F. Supp. 2d 1372, 1378 (D. Ga. 1998) (granting summary judgment for counterclaim defendant on ground that presence of 300 barrels of chemical waste on property no longer owned by counterclaimant and without evidence of continued leaching from barrels did not support claim for continued nuisance, observing that "[a] cause of action for continuing nuisance is limited to situations where the contamination has continued to spread: the fact that Briggs & Stratton's barrels remained on the PMI property is insufficient to constitute a continuing nuisance."); City of Phoenix v. Johnson, 75 P.2d 30, 35 (Ariz. 1938) ("Permanent nuisance expresses the idea that a nuisance may continue in the same state, unless the person obligated to abate it performs his duty and changes its form so as to destroy its character as a nuisance.").
316. 251 Cal. Rptr. 49 (Cal. Ct. App. 1988).
317. *Field-Escandon*, 251 Cal. Rptr. at 53. The Supreme Court of California in *Mangini III* quoted this language from *Field-Escandon* but did not question or overrule its continuing nuisance standard in the course of affirming entry of judgment notwithstanding the verdict for defendant on the ground that plaintiff failed to meet its burden of offering substantial evidence that the nuisance was reasonably abatable. *See* Mangini v. Aerojet-Gen. Corp. (*Mangini III*), 912 P.2d 1220, 1223 (Cal. 1996); *see also supra* notes 337-45 and accompanying text.
318. *Field-Escandon*, 251 Cal. Rptr. at 52.

time-barred because the pipe's impact on the property did not vary or increase over time.[319] In *Spar v. Pacific Bell*,[320] the court took the reasoning of *Field-Escandon* one step further to hold that utility lines that the defendant already had voluntarily removed from plaintiff's property nevertheless constituted a permanent nuisance and trespass.[321] The court noted that "because defendant is a public utility, it might have been able to keep the facilities on plaintiff's property by paying just compensation to plaintiff."[322]

Under the "varying impact over time" standard, whether a private nuisance (or trespass) claim for older contamination is timely as a continuing tort or time-barred as a permanent tort could depend on the media contaminated by the defendant. Groundwater contamination conditions vary over time, as a plume of contaminated groundwater migrates and spreads through plaintiff's property and, perhaps, beyond.[323] Unlike groundwater contamination, soil contamination from a now-terminated source may not change materially over time. For example, some hazardous substances, such as DDT or PCBs, are relatively insoluble in water, readily sorb to soil and, absent the introduction of a chemical solvent or other catalyst, rarely will leach or migrate in the subsurface.[324] Even though abatement of soil contamination typically is much faster and less expensive than groundwater remediation, under a "varying over time" standard an older groundwater contamination nuisance claim could survive a statute of limitations challenge as a continuing tort while an older soil contamination claim would likely be dismissed as time-barred.

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319. *Id.* at 53.

320. 1 Cal. Rptr. 2d 480 (Cal. Ct. App. 1991).

321. *Spar*, 1 Cal. Rptr. 2d at 484.

322. *Id.* at 483.

323. In *Hoery v. United States*, 64 P.3d 214 (Colo. 2004), the Colorado Supreme Court ruled that the continued migration of contaminated groundwater onto plaintiff's property constituted a continuing nuisance. *Hoery*, 64 P.3d at 222. The court also found that the continued presence of wrongfully placed contaminants on plaintiff's property provided an alternative basis for characterizing the nuisance as continuing for statute of limitations purposes. *Id.*; *see also supra* notes 272-85 and accompanying text. Similarly, in *Arcade Water Dist. v. United States*, 940 F.2d 1265 (9th Cir. 1991), the Ninth Circuit reversed a district court order granting a motion to dismiss as time barred a private nuisance claim based on California law brought under the Federal Tort Claims Act, alleging that contamination of a water district well from the operations of a former military laundry constituted a nuisance. *Arcade Water Dist.*, 940 F.2d at 1267. The court held that continuing damage rather than continuing wrongful activity was required to establish a continuing nuisance but, without expressly stating that changing nuisance conditions were relevant to determining whether a nuisance was permanent or continuing, stressed that "the most salient allegation is that contamination continues to leach into Arcade's Well 31." *Id.* at 1268; *see also* Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 665-67 (E.D. Cal. 1990) (denying defendant's statute of limitations summary judgment motion on plaintiff's groundwater contamination continuing nuisance claim based on disposals that occurred years before, observing "[t]he fact that the area of contamination is getting bigger as the years go by does not convert the nuisance into a permanent nuisance. As noted above, 'the salient feature of a continuing trespass or nuisance is that its impact may vary over time.'" (quoting *Field-Escandon*, 251 Cal. Rptr. at 53)).

324. *See, e.g.*, ROBERT D. MORRISON, ENVIRONMENTAL FORENSICS: PRINCIPLES AND APPLICATIONS § 1.5 (2000) (describing immobility of hydrophobic compounds like DDT and PCBs and their remobilization through cosolvency by the introduction of a solvent such as gasoline or oil).

f. Multi-Factor Balancing

Given the wide range of tests applied by courts across the country, it is not surprising that some courts have concluded that no one factor should be determinative of whether a nuisance is continuing or permanent. Instead, a number of courts have employed a multi-factored balancing test to arrive at a case-by-case determination of whether a nuisance is continuing or permanent.[325] The California Court of Appeal's decision in *Beck Development Co. v. Southern Pacific Transportation Co.*,[326] illustrates such a multi-factored approach. In *Beck*, the owner of contaminated property sued the former owner to recover cleanup costs and obtain an injunction compelling remediation of oil contamination placed on the property decades before.[327] In determining that the nuisance was permanent rather than continuing, the California Court of Appeal considered a variety of different factors: (a) whether the defendant's offending activities had been discontinued (it had); (b) whether the nuisance would vary or change over time (tar-like petroleum contamination in the soil would not); (c) whether the contaminants would continue to migrate and cause new damage (it would not); (d) whether the nuisance could be abated at any time (it could) and, if so; (e) whether abatement was the best alternative in light of its cost (more than the value of the property), technical feasibility (excavation was feasible), legitimate competing interests (local agencies opposed excavation in light of minimal risk to groundwater or human receptors), benefits of abatement (remediated property), and risk of abatement (transporting contaminants to another location for disposal).[328] After balancing each of these factors, the court concluded that the contamination constituted a permanent nuisance and that Beck's claim was time-barred.[329] Multi-factored balancing on a case-by-case basis permits the court substantial flexibility in determining whether a claim should be time-barred as a permanent nuisance; it also is an unpredictable standard that does not promote consistent adjudication.

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325. *See, e.g.*, Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518 (Cal. Ct. App. 1996) (multi-factor balancing test under California law); City of Sioux Falls v. Miller, 492 N.W.2d 116, 118 (S.D. 1992) (applying South Dakota law and defining continuing nuisance by whether nuisance can be discontinued at any time, is intermittent or periodical in character, or involves a solid structure or a structure that can be modified); L'Enfant Plaza E., Inc. v. John McShain, Inc., 359 A.2d 5, 6 (D.C. 1976). ("Three factors for determining permanency are articulated in *D. Dobbs, Remedies* § 5.4 (1973): '(1) is the source of the invasion physically permanent, i.e., is it likely, in the nature of things, to remain indefinitely? (2) is the source of the invasion the kind of thing an equity court would refuse to abate by injunction because of its value to the community or because of relations between the parties? (3) which party seeks the permanent or prospective measure of damages?'").

326. 52 Cal. Rptr. 2d 518 (Cal. Ct. App. 1996).

327. *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 526.

328. *Id.* at 557-60.

329. *Id.* at 560.

g. Continuing Nuisance Unavailable

Finally, in some states the continuing tort doctrine is simply unavailable to address property contamination problems. For example, in *Citizens & Southern Trust Co. v. Phillips Petroleum Co.*,[330] the Georgia Court of Appeals affirmed summary judgment for the defendants in an action alleging that gasoline leaking from defendants' underground storage tanks had contaminated plaintiff's commercial property, ruling that the continuing tort doctrine only applied to cases involving personal injury and was inapplicable to cases involving only property damage.[331] In New York, the state legislature in Civil Practice and Rules section 214-c effectively abolished the doctrine of continuing torts for any "action to recover damages for . . . injury to property caused by the latent effects of exposure to any substance or combination of substances" by imposing an absolute discovery rule-based three-year statute of limitations for such claims.[332] In *Jensen v. General Electric Co.*,[333] the New York Court of Appeals interpreted section 214-c to bar a continuing nuisance money damages claim brought by property owners against an electric utility that allegedly released hazardous substances that contaminated the plaintiffs' property, but not to bar a continuing nuisance claim for injunctive relief.[334]

The absence of a continuing tort doctrine dramatically limits the availability of a tort-based cleanup cost claim for sites at which the contamination was created years ago. The discovery rule could preserve a nuisance-based cleanup cost claim for landowners at sites recently sold by parties who caused the contamination years before. Otherwise, without a continuing tort doctrine, a current property owner who is voluntarily cleaning up an older contamination site could not turn to state tort law to obtain from other PRPs their fair share of cleanup costs.

5. Procedural Limitations: Burden of Proving Continuing Nuisance

The continuing nuisance doctrine theoretically can preserve private cleanup cost claims for older contamination otherwise barred by the stat-

330. 385 S.E.2d 426 (Ga. Ct. App. 1989).

331. *Citizens & S. Trust Co.*, 385 S.E.2d at 427-28.

332. N.Y. C.P.L.R. § 214-c (McKinney 2006). Section 214-c states, in pertinent part:

> Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

Id.

333. 623 N.E.2d 547 (N.Y. 1993).

334. *Jensen*, 623 N.E.2d at 548-49; *see also* Syms v. Olin Corp., 408 F.3d 95, 110 (2d Cir. 2005) (under *Jensen* and section 214-c, continuing tort doctrine is unavailable for Federal Tort Claims Act nuisance claim for cleanup cost and diminution in value damages).

ute of limitations. In application, however, the ability of a current landowner to recover cleanup costs from other PRPs may turn on which party has the burden of proof (i.e., the burden of production and burden of persuasion) about whether a nuisance is permanent or continuing. The significance of the burden of proof, in turn, depends on the continuing nuisance standard employed by the court.

Few reported cases address the burden of proving whether a nuisance is permanent or continuing. Perhaps this is because the burden of proof on the issue of continuing nuisance is less likely to present a challenge to a plaintiff in jurisdictions that employ a continued harmful activity standard. Absent a dispute regarding the source of contamination, in these jurisdictions once defendant's conduct or structure causing the contamination on plaintiff's property has stopped or been removed, the continuing nuisance doctrine would no longer apply. Similarly, in courts that focus on whether the nuisance has changed over time, evidence of the basic characteristics of the contamination (e.g., immobile soil contamination as compared to ongoing leaching or contaminated groundwater migration) should resolve whether the nuisance is continuing.

The burden of proof, however, can be determinative in continuing nuisance cases in courts that employ an abatability of harm standard (or include abatability as part of a multi-factored balancing analysis), particularly those that require proof that a nuisance can be abated by reasonable cost and by reasonable means. To address the abatability of soil or groundwater contamination, a court may well require at least three types of evidence.

First, the court may expect evidence of what a cleanup that is minimally acceptable to relevant government regulatory agencies would look like. This would require evidence of an adequate site characterization, i.e., identifying the extent and nature of the contamination. It would also require evidence of applicable cleanup standards, i.e., at what point would regulatory agencies consider the site remediated.[335] In the absence of applicable government cleanup standards, the court may turn to the testimony of expert witnesses regarding appropriate cleanup levels.

Second, the court may expect evidence of whether it is technologically feasible to remediate the site to the court's satisfaction. This would require evidence of a detailed plan for accomplishing the cleanup and the

335. In theory, abatement of a chemical contamination nuisance could mean complete removal of all detectable contaminants. It is unlikely that a regulatory agency would require such a cleanup in most instances; moreover, complete removal of all contaminants at sites with groundwater or extensive soil contamination could prove technically impossible as well as unnecessary to protect public health and the environment. *See* Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 805 (Cal. Ct. App. 1993) ("[W]e 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.").

likelihood that the contemplated technique would effect the desired remediation.

Third, the court may expect evidence of the cost of remediation. To the extent that the court will be evaluating the "reasonableness" of the proposed abatement, the court may also require evidence about the current value of the contaminated property as compared to the property's value after remediation.

A party cannot satisfy this burden of production unless (a) environmental professionals have adequately characterized the site; and (b) a regulatory agency has participated in developing a cleanup plan. At a small site with discrete soil contamination that will require only excavation and proper disposal, this burden of production could easily be met. At a larger site with complicated contamination problems, however, the burden of production could present a significant challenge. For example, development of cleanup standards could be delayed because of regulatory agency inattention or understaffing. At sites involving contaminated groundwater, fully characterizing the nature, extent, and source(s) of groundwater contamination and developing a remediation plan could take years.[336] The party who must produce evidence that the contamination constitutes a continuing nuisance runs the risk of not having necessary evidence to present at trial or to defeat summary judgment, or to persuade the court for a trial date continuance (or perhaps multiple continuances) in order to gather the necessary abatability evidence.

Courts have commonly placed the burden of proving a continuing nuisance on plaintiffs.[337] Two California appellate decisions illustrate the consequences of plaintiffs' failure to meet this burden. In *Mangini v. Aerojet-General Corp.* (*Mangini III*),[338] the Supreme Court of California affirmed a Court of Appeal decision overturning a $13.2 million jury verdict[339] for the plaintiffs-owners of contaminated property on the ground that plaintiffs failed to meet their burden of producing evidence that the contamination constituted a continuing nuisance, i.e., that it was reasonably abatable.[340]

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336. *See, e.g.*, EPA, CLEANING UP THE NATION'S WASTE SITES, supra note 21, at 49-57 (describing remediation techniques used at NPL sites); *id.* at 269-83 (describing source location and remediation problems at contaminated groundwater sites where dense non-aqueous phase liquid contamination is present).

337. *See* Coleman, *supra* note 139, at 46 ("To establish a continuing tort, the plaintiff must show a 'substantial nexus' between the violations outside and within the limitations period. If the violations are 'sufficiently related' they are treated as one continuous violation and the statute of limitations will not be tolled because the tortious act has not ceased." (footnote omitted)).

338. 912 P.2d 1220 (Cal. 1996); *see also supra* notes 266-73 and accompanying text.

339. *Mangini III*, 912 P.2d at 1230; Mangini v. Aerojet-Gen. Corp. (*Mangini II*), 31 Cal. Rptr. 2d 696, 700 (Cal. Ct. App. 1994) (damage award was not for cleanup costs but for "a reduction in the value of the use of the property within the limitations period").

340. Plaintiffs had won the right to proceed with a same property continuing nuisance claim in Mangini v. Aerojet-General Corp. (*Mangini I*), 281 Cal. Rptr. 827 (Cal. Ct. App. 1991). *See supra* notes 199-211 and accompanying text.

The court rejected the plaintiffs' argument that they had met their burden by offering evidence that the property was contaminated and that the technology existed to decontaminate the property.[341] Instead, the court required the plaintiffs to have offered evidence that the property could be remediated by reasonable means and without unreasonable expense.[342] The court agreed that something less than total decontamination could suffice to show abatability but found that plaintiffs had failed to submit evidence of cleanup levels acceptable to or ordered by agencies for the property,[343] or expert evidence about the means and cost of site remediation.[344] Because the plaintiffs failed to prove that the nuisance was reasonably abatable, it was deemed permanent and their nuisance claim was time-barred.[345]

Less than one month after the Supreme Court of California decided *Mangini III*, the California Court of Appeal in *Beck Development Co. v. Southern Pacific Transportation Co.*[346] held that the plaintiff had failed to carry its burden of proving that a nuisance was continuing.[347] Beck had attempted to develop a large tract of land in Tracy, California, on which Southern Pacific, a prior owner, had built a reservoir to store up to 3,000,000 barrels of oil.[348] Beck sued Southern Pacific for an injunction and damages relating to oil contamination on the property. The trial court found that the oil contamination constituted a continuing nuisance, issued an injunction requiring Southern Pacific to determine the extent of contamination and remediate the contamination identified to standards provided by regulatory agencies, and ordered Southern Pacific to pay Beck $1,205,613.18 in damages.[349] The California Court of Appeal reversed Beck's continuing nuisance judgment against Southern Pacific.[350]

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341. *Mangini III*, 912 P.2d at 1227.

342. *Id.*

343. *Id.* at 1226-27. Indeed, no such evidence was available. Although the EPA and state agencies had entered into a consent decree with Aerojet-General in 1988 to complete a remedial investigation and feasibility study to identify and evaluate remedial alternatives for the site, the study had not been prepared by the time of trial, and apparently was not expected to be ready until 1998. *Id.* at 1231 (Mosk, J. dissenting).

344. *Id.* at 1224. To the contrary, plaintiffs' expert testified that the site had not been sufficiently characterized to know what remedial measures would be necessary or whether they could be effectively accomplished, describing the potential range of cleanup costs as over $20 million and perhaps as high as $75 million. *Id.* The court also noted that plaintiffs' counsel had acknowledged to the jury during closing argument that "'[N]obody really knows how much is there, where it is, what the chemicals are, or how much it's going to cost to abate the chemicals . . . . So I guess the bottom line, if you ask yourself the question, how bad really is this site, the answer's got to be you just don't know.'" *Id.* at 1224-25.

345. *Mangini III*, 912 P.2d at 1230. Plaintiffs apparently did not object to bearing the burden that the nuisance was continuing as an element of their cause of action, but did object to proving that the contamination could be remediated by reasonable means and at a reasonable cost. *Id.* at 1226.

346. 52 Cal. Rptr. 2d 518 (Cal. Ct. App. 1996).

347. *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 560.

348. *Id.* at 526-27.

349. *Id.* at 533.

350. *Id.* at 560. Beck also sued both the California Department of Toxic Substances Control (DTSC), seeking a writ of mandate compelling the DTSC to make a determination regarding

The court employed a multi-factor balancing analysis to determine whether the oil contamination constituted a continuing nuisance.[351] Relying on *Mangini III*, the court included in that analysis whether the contamination could be abated at "reasonable cost by reasonable means."[352] The court emphasized the testimony of Beck's experts that the site had been insufficiently characterized to draw firm conclusions about either the extent of contamination or the cost of remediation, and that the range of remediation costs (between $6,500,000 and $16,200,000) estimated by Beck's consultant exceeded the value of the land after remediation.[353] The court also noted that a regulatory agency had concluded that nothing further needed to be done with the contamination and instead had cautioned that excavating, treating, and disposing of the contaminated soil at an off-site location "would be significantly burdensome and from a public and regulatory point of view may not be the most advisable option."[354] The court found that "the result of the uncertainty in the record is that there is no substantial evidence of abatability,"[355] and that because Beck had the burden to prove reasonable abatability the oil contamination was deemed to constitute a permanent nuisance and Beck's private nuisance claim was time-barred.[356]

Few authorities place the burden of proving whether a nuisance is permanent or continuing on the defendant.[357] An Iowa Supreme Court

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whether the property constituted a hazardous waste site or a site presenting no known environmental hazard, and the City of Tracy (the "City"), seeking an order that the City accept and process Beck's proposed development plan. *Id.* at 526. For several years, Beck had submitted technical reports to the DTSC at its request only to have the DTSC respond with requests for still more reports, while the City refused to process Beck's development plan until the DTSC had made a determination about the environmental condition of the property. *Id.* at 528-32. The trial court issued the requested writ to the DTSC but refused to order the City to process Beck's development plan. *Id.* at 526-27. The California Court of Appeal affirmed the judgment against the DTSC and reversed the judgment in favor of the City. *Id.* at 540, 547.

351. *Id.* at 560; *see also supra* notes 325-29 and accompanying text.

352. *Id.* at 559 (quoting *Mangini III*, 51 Cal. Rptr. at 281).

353. *Id.* at 560. The court noted that the record lacked an estimate of the actual detriment that Beck would suffer if the property was not remediated. *Id.* For example, the court's opinion does not address the potential profitability that Beck would have derived from development of remediated property.

354. *Id.* at 559-60. In *Hoery v. United States*, 64 P.3d 214, 220 (Colo. 2004), the Colorado Supreme Court held that the presence of contaminants on plaintiff's property constituted a continuing nuisance unless the contamination could and should be removed. In the abstract, the presence of contaminants in soil or groundwater does not serve any socially beneficial purpose. On the other hand, the court's concerns in *Beck* might reflect an instance where, under the *Hoery* standard, leaving the soil contamination in place would serve such a purpose, i.e., when removing the contamination would create a greater risk of harm than leaving it alone.

355. *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 560.

356. *Id.* at 560. The court also concluded that the oil contamination was not a nuisance *per se* under California statutes, *id.* at 551, and that Beck failed to prove that the contamination posed a risk to drinking water supplies or other pathways to the public in order to constitute a public nuisance. *Id.* at 554.

357. *See* Brown & Hansen, *supra* note 224, at 698-99 (arguing that defendants should bear burden of proving that underground storage tank contamination constitutes a permanent nuisance rather than plaintiffs bearing the burden that the site constitutes a continuing nuisance, likening the issue to the defendant's burden of proving an affirmative defense that a claim is barred by the statute of limitations); *see also* Smith, *supra* note 164, at 60 (noting that, while plaintiffs typically bear

decision in 1903 regarding whether an improperly placed building constituted a permanent or continuing nuisance turned on which party bore the burden of proof. In *Pettit v. Incorporated Town of Grand Junction, Greene County*,[358] the court held that a private landowner could maintain a public continuing nuisance action for an injunction ordering the removal of public buildings improperly located in a street:

> As the statute did not authorize the construction of the buildings in the streets, the intention to permanently locate them there is not, in the absence of evidence to the contrary, to be inferred; that is, the burden is upon the party asserting that an obstruction in the highway is a permanent nuisance, instead of a continuing one, to establish the fact by proof. This was not done. These buildings were frame, and such as could readily have been removed by the use of modern machinery, practically without injury. The character of the foundation was not shown, and no evidence concerning the feasibility of removal was introduced. Moreover, as already observed, they were placed in a situation where the municipality had no right to locate them; and in this respect the case is distinguishable from most of those cited, where the nuisance consisted in negligently making an improvement where the party at fault had the right to construct it.[359]

Pettit, however, appears to be the exception. Plaintiffs typically bear the burden of production that a nuisance is continuing—a burden that can be determinative in cases involving a current landowner who voluntarily cleans up older contamination and wants to obtain from other PRPs their fair share of cleanup costs.[360]

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burden of proving damages within continuing tort limitations period, statute of limitations usually is an affirmative defense).

358. 93 N.W. 381 (Iowa 1903).

359. *Pettit*, 93 N.W. at 383.

360. *See e.g.*, Morsey v. Chevron, USA, Inc., 94 F.3d 1470, 1476-77 (10th Cir. 1996) (applying Kansas law to hold that the plaintiff failed to carry burden of proof that harm to leasehold was remediable, removable, or abatable and thus constituted temporary rather than time-barred permanent nuisance damages). Some courts will presume in the face of ambiguous pleading that an alleged nuisance is continuing (or temporary). For example, in *King v. City of Independence*, 64 S.W.3d 335, 339-40, 343 (Mo. Ct. App. 2002), *overruled on other grounds*, George Ward Builders, Inc. v. City of Lee's Summit, 157 S.W.3d 644, 650 (Mo. Ct. App. 2004), the court directed a temporary nuisance judgment for plaintiff notwithstanding plaintiff's failure to specify in the complaint whether the nuisance was permanent or temporary. The court concluded that:

> If allegations are doubtful as to whether the pleaded cause of action is for a permanent nuisance or a temporary nuisance, courts should treat the nuisance as temporary. This is so "because adjudication of a permanent nuisance amounts to a grant of an easement to the wrongdoer to continue to interfere with the plaintiff's land.

King, 64 S.W.3d at 339-40 (quoting Scantlin v. City of Pevely, 741 S.W.2d 48, 50 (Mo. Ct. App. 1987)).

D. *Uncertainty and Opportunity after Aviall: The Unrealized Potential of Private Nuisance Law in Cleanup Cost Allocation Disputes*

Private nuisance has the potential to provide a flexible legal framework well-suited to resolving cleanup cost allocation disputes between the current owners of contaminated property and others who contributed to site contamination. Providing current landowners with the means to require other PRPs to pay or contribute to cleanup costs is essential to helping solve the national problem of encouraging voluntary cleanups at the nation's hundreds of thousands of contaminated sites. The current state of private nuisance law, however, is not up to the task. The dramatic variations in nuisance law among the states and significant doctrinal limitations affecting the application of nuisance law to many common contamination problems make current nuisance law an unsatisfactory response to this national problem. Moreover, the incoherent patchwork quilt of private nuisance law across the country undermines the ability of state law to restore the reliance interest equilibrium among contaminated property dispute stakeholders upended by *Aviall*, and, of perhaps greater importance, the capacity for state law to offer flexible, efficient rules of decision in contaminated property disputes that federal law cannot provide.

States can respond in one of two ways to the current deficiencies in private nuisance law. The first is to do nothing. State courts and legislatures can simply stand by and let the uncertainties created by *Aviall* about the role of federal law in private cleanup cost disputes sort themselves out. Perhaps Congress will amend CERCLA to ensure cleanup cost contribution rights for all PRPs, not just PRPs who have already been sued under CERCLA sections 106 or 107(a) or settled with the government. Or perhaps the United States Supreme Court will definitively resolve whether a PRP may recover from other PRPs their fair shares of cleanup costs under CERCLA section 107(a)(4)(B).

If all PRPs ultimately are found to lack a federal right to recover cleanup costs from other PRPs, then private cleanup cost disputes will descend into a Balkanized state of confusion, with the cleanup cost recovery rights of a PRP who voluntarily cleans up property dependant on which of 50 differing rules of decision happens to apply to a particular dispute by happenstance of geography. In the vast majority of states, no private nuisance action will be available for same property cleanup cost disputes, either because of traditional interpretations of ancient nuisance law or because of the operation of the similarly ancient doctrine of *caveat emptor*. In many states, the availability of cleanup cost claims relating to older contamination sites will turn on which of the many competing "continuing nuisance" tests a state may happen to employ. Current landowners in states with nuisance doctrine inhospitable to cleanup cost claims will be discouraged from voluntarily taking the lead in site cleanup. Instead, cleanup cost allocation disputes will increasingly shift

from direct to derivative claims, as current property owners wait for—or seek out—litigation against them as a trigger for cleanup cost contribution rights under federal or state law.

On the other hand, the chilling effect on voluntary cleanups created by *Aviall* will largely disappear if federal legislation or court decisions provide all PRPs with CERCLA cleanup cost contribution rights. Confirmation of CERCLA cleanup cost rights, however, would do nothing to effect the efficiency and flexibility benefits that potentially could be available under nuisance law, including: (a) application of a common body of state law to the cleanup cost and other issues raised in contaminated property disputes; (b) encouragement of technically sound, efficient cleanups; and (c) avoidance of the remediation and litigation transaction costs associated with NCP consistency requirements under CERCLA.[361]

The second option is for states to seize the initiative and re-examine the current state of nuisance law in their jurisdictions. Limiting private nuisance claims to disputes between contemporaneous neighboring property owners, employing overly-restrictive continuing nuisance standards, and applying outmoded interpretations of nuisance that undermine prompt site remediation ignore the realities of environmental contamination problems and private cleanup cost disputes. States should adopt a new environmental nuisance paradigm that applies to all private cleanup cost disputes faced by the current owners of contaminated property. The next section of this article proposes such a paradigm.

III. AN ENVIRONMENTAL NUISANCE PARADIGM FOR PRIVATE CLEANUP COST DISPUTES

Before *Aviall*, states allowed federal law to serve as the primary rule of decision in private cleanup cost disputes in large part by clinging to narrow, anachronistic interpretations of private nuisance law. The uncertain status of current landowner federal law cleanup cost contribution rights after *Aviall* has provided an opportunity for states to make private nuisance law relevant to a wide range of contaminated property disputes. State courts and legislatures can revitalize private nuisance law by revisiting unnecessary doctrinal limitations barring its application to same property and older contamination problems through adoption of the environmental nuisance paradigm described below. Combining such a modernized liability framework with its traditional remedial flexibility would transform private nuisance into a valuable tool for allocating remediation responsibilities at sites across the country. Moreover, it can assure cleanup cost contribution rights to CERCLA-liable but non-culpable

361. *See supra* notes 140-45 and accompanying text.

current owners of contaminated property.[362] This section identifies and analyzes the environmental nuisance paradigm components required to bring the efficiency and flexibility of private nuisance law to virtually all cleanup cost disputes faced by the current owners of contaminated property.

A. The Proposal

Every state, whether by statute or case law, should modernize its law of private nuisance as applied to contaminated property disputes in accordance with the following environmental nuisance paradigm:

> (1) A claim for private nuisance should be available in same property as well as neighboring property contamination disputes.
>
> (2) The doctrine of *caveat emptor* should be abolished as a defense to private nuisance liability in environmental nuisance cases, but the underlying circumstances surrounding a plaintiff's acquisition of contaminated property should be relevant to awarding and fashioning a private nuisance remedy.
>
> (3) Soil and groundwater contamination should presumptively constitute a continuing nuisance capable of abatement.
>
> (4) The burden of proof as to both liability and damages regarding whether a nuisance is permanent or continuing should be on the party (plaintiff or defendant) contending that a nuisance is permanent.
>
> (5) A party seeking to meet this burden of proving that an environmental nuisance is permanent would be required to show that the contamination cannot be abated by reasonable means and at a reasonable cost as measured against the highest and best potential use of the property as remediated.

This environmental nuisance paradigm serves several goals. First, it creates a template that allows every state to adopt a nuisance-based cleanup cost remedy, providing current landowners with an incentive to initiate prompt characterization and remediation efforts.[363] Second, it

362. Because the current owner of contaminated property is a liable party under CERCLA section 107(a)(1) regardless of whether she contributed to site contamination, she may not after *Aviall* obtain cleanup cost contribution from other PRPs under section 113(f) unless she first has been sued under CERCLA or settled with the government, and may not have a right to cost recovery at all under section 107(a). *See supra* notes 72-121 and accompanying text. Current private nuisance law would bar this non-culpable but CERCLA-liable current owner from recovering cleanup costs in same property or many older contamination disputes. The paradigm proposed by this article would provide cleanup cost recovery rights for this non-culpable current owner.

363. A nuisance-based paradigm requires that a plaintiff seeking to recover cleanup costs must have a property interest in the contaminated site. It thus would provide a remedy for current property owners at multi-PRP sites but would not benefit PRPs who incur cleanup costs but who are not current landowners, e.g., former owners, arrangers, transporters, neighbors. This paradigm nevertheless should address most private cleanup cost disputes. Regulatory agencies often look to the current owner of property to take the lead in site cleanup. Agencies would look to PRPs other than the current site owner to take the lead in cleaning up a site in a limited set of circumstances, e.g., the

encompasses same property contamination problems, not just neighboring property disputes. Third, it encourages site cleanup rather than payment of prospective damage awards that effectively constitute the purchase of permanent contamination easements. Fourth, it encourages informal resolution of cleanup cost disputes by allowing equitable cost allocation and presumptively making available successive continuing nuisance actions if abatable contamination is not remediated. Finally, it is consistent with the basic structure and tradition of nuisance law. Although it could most efficiently be implemented by statute, courts in many states could adopt the paradigm by interpreting the existing common law of private nuisance law to reflect the realities of soil and groundwater contamination.[364] The following discussion looks in more detail at each component of the proposed paradigm.

B. Same Property Environmental Nuisance Disputes

A private right of action for environmental nuisance should include same property contamination disputes. Properties often have been contaminated in whole or in part as a result of hazardous substance handling practices by prior site occupants, such as at former landfills, industrial facilities, gas stations, and abandoned brownfield sites. The contamination caused by these former occupants may significantly impair the current landowner's ability to develop or otherwise use the property and

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current landowner is insolvent or otherwise incapable of proceeding with the cleanup, or the current owner meets the requirements for a defense to remediation liability, such as the third party defense found in CERCLA section 107(b)(3). Non-current landowner PRPs who incur cleanup costs because they are named on a cleanup order or otherwise take the lead in site cleanup would need to rely on legal theories other than a direct private nuisance action (e.g., contract rights, state or federal cleanup cost statutes, derivative claims) to recover cleanup costs from other PRPs.

364. Some state appellate courts may not encounter significant *stare decisis* problems in order to embrace the paradigm because they have not specifically applied the common law of private nuisance to contaminated property disputes. Many decisions applying state nuisance law to private contaminated property disputes are from federal courts estimating how a state court of last resort would apply nuisance law to environmental contamination problems. *See, e.g.*, Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312 (3d Cir. 1985) (applying Pennsylvania law); Lilly Indus., Inc. v. Health-Chem Corp., 974 F. Supp. 702, 708 (S.D. Ind. 1997) (applying Indiana law); Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 98-99 (D. Mass. 1990) (applying Massachusetts law); Amland Props. Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 808 (D.N.J. 1989) (applying New Jersey law); Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1280 (W.D.N.Y. 1990) (applying New York law). State appellate courts which have not specifically addressed the application of private nuisance law to contaminated property disputes are not bound by federal court interpretations of state law. *See, e.g.*, Howard Contracting, Inc. v. G.A. MacDonald Constr. Co., Inc., 83 Cal. Rptr. 2d 590, 597 (Cal. Ct. App. 1998) ("[F]ederal decisional authority is neither binding nor controlling in matters involving state law"); SI Sec. v. Bank of Edwardsville, 841 N.E.2d 995, 1001 (Ill. App. Ct. 2005) (Illinois courts not bound by federal court interpretation of Illinois statutes not involving federal questions). Moreover, rather than assume that a state court will apply an anachronistic interpretation of nuisance law to a contaminated property dispute, federal courts may wish to follow the lead of the Tenth Circuit in *Hoery v. United States*, 324 F.3d 1220, 1222-23 (10th Cir. 2003), and certify nuisance law questions applicable to soil or groundwater contamination cases to state courts of last resort for resolution.

subject her to costly environmental regulatory obligations.[365] Nevertheless, the vast majority of states continue to ignore the realities of environmental contamination problems by restricting private nuisance claims to disputes involving neighboring property uses.[366] This majority rule should be abandoned for several reasons.

First, the neighboring use dispute limitation is not mandated by the fundamental structure of private nuisance law. On the contrary, private nuisance provides a remedy for significant interference with the use and enjoyment of another's property. It is well-recognized that "[p]rivate nuisance is traditionally a claim based upon activities outside the land by a stranger to the title, for instance, based upon a neighbor's noise or pollution."[367] Courts have bootstrapped this traditional role of private nuisance law into a doctrinal requirement barring same property claims. For example, in *Philadelphia Electric Company v. Hercules, Inc.*,[368] the Third Circuit in 1985 focused on "the historical role of private nuisance law as a means of efficiently resolving conflicts between *neighboring* contemporaneous land uses" to hold that the current owner of contaminated property could not assert a same property private nuisance claim.[369] Courts throughout the country, over the following two decades, have cited *Philadelphia Electric* and embraced the "traditional role" of private nuisance law—often without further analysis—to bar same property private nuisance claims involving hazardous substance contamination.[370]

The fact that private nuisance claims historically served as a common law zoning tool does not exclude other purposes that could be served well by private nuisance law. The hallmark of nuisance is its flexibility; the doctrine can and should adapt as a solution to modern environmental problems.[371] The current owner of property required to

365. *See* RESTATEMENT (SECOND) OF TORTS, § 821D & cmt. e (1975) (private nuisance is an invasion of another's use and enjoyment of property, including interference with possessory interest); *id.* § 821F (claim for private nuisance requires significant harm).

366. *See supra* notes 178-96 and accompanying text.

367. DAN B. DOBBS, THE LAW OF TORTS § 463 (2000) (noting also that a few recent cases had imposed same property liability for serious contamination or ultra-hazardous conduct).

368. 762 F.2d 303 (3d Cir. 1985); *see also supra* notes 179-96 and accompanying text.

369. *Phila. Elec. Co.*, 762 F.2d at 307, 314.

370. *See supra* note 196 and accompanying text.

371. *See, e.g.*, Vogel v. Grant-Lafayette Elec. Coop., 548 N.W.2d 829, 834 (Wis. 1996) (holding that Wisconsin private nuisance law supported damages judgment for dairy farmers against electric cooperative for damage to their dairy herd allegedly caused by stray electrical voltage, noting that "[The Wisconsin Supreme Court] has previously characterized the common law doctrine of private nuisance as being both 'broad' to meet the wide variety of possible invasions, and 'flexible' to adapt to changing social values and conditions." (citation omitted)); Cook v. Rockwell Int'l. Corp., 358 F. Supp. 2d 1003, 1012-14 (D. Colo. 2004) (presence on plaintiffs' property of plutonium released from nearby nuclear weapons plant constituted a continuing nuisance and trespass for statute of limitations purposes, and could provide basis for prospective diminution in value damages, effectively purchasing an easement for invasion to continue given Colorado's "adoption of a flexible approach to determining the appropriate measure of damages for injury to real property"); Carter v. Monsanto Co., 575 S.E.2d 342, 348 (W. Va. 2002) (Starcher, J., concurring) ("The cause of action

remediate the contamination caused by others experiences the same interference with the use and enjoyment of the property whether the contamination came from a prior owner or a predecessor. Indeed,

> [a]s Oliver Wendell Holmes commented on the development of the common law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[372]

Simply put, the historic pedigree of private nuisance law in neighboring property owner disputes should not pose an insurmountable barrier to its adoption as a tool for resolving same property contamination disputes.

Second, current common law or statutory definitions of nuisance do not compel courts to bar same property private nuisance claims. Section 821D of the Restatement (Second) of Torts defines a private nuisance as an "invasion of another's interest in the private use and enjoyment of land."[373] The *Philadelphia Electric* court, among many others, cited section 821D to define a private nuisance for purposes of conducting its Pennsylvania law analysis.[374] The section 821D definition is broad enough to encompass same property disputes where the continued presence of contamination caused by the prior owner invades and substantially interferes with the use and enjoyment of land by another, i.e., the current owner.

Some courts adopting the *Philadelphia Electric* analysis have distinguished California cases[375] recognizing same property private nuisance claims on the ground that (a) the law of nuisance is codified in California and (b) California's broad statutory definition of nuisance has

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for private nuisance has been for centuries a highly flexible one, giving courts substantial latitude to fashion appropriate and reasonable remedies, depending on the harm to be avoided or remedied."); Antolini, *supra* note 162, at 771 ("Although amorphous in definition, all nuisance actions have in common three important doctrinal aspects that provide unique scope to their application by the courts: substantiality of interference, unreasonableness of the defendant's conduct, and equitable flexibility.").

372. Antolini, *supra* note 162, at 790 (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

373. RESTATEMENT (SECOND) OF TORTS § 821D (1975); *see also id.*, cmt. e ("If the interference with the use and enjoyment of the land is a significant one, sufficient in itself to amount to a private nuisance, the fact that it arises out of or is accompanied by a trespass will not prevent recovery for the nuisance, and the action may be maintained upon either basis as the plaintiff elects or both.").

374. *Phila. Elec. Co.*, 762 F.2d 303, 313 (3d Cir. 1985).

375. The California state courts are the only state courts as of this writing to have recognized in a published opinion private nuisance same property claims. *See supra* notes 199-212 and accompanying text. A Minnesota federal district court in *Union Pacific Railroad Co. v. Reilly Industries, Inc.*, 4 F. Supp. 2d 860, 867 (D. Minn. 1998) interpreted Minnesota's nuisance statute to permit private nuisance same property claims. *See supra* notes 213-19 and accompanying text. Research conducted for this article revealed no reported Minnesota state court decision or state court decision from any jurisdiction other than California recognizing private nuisance same property claims.

been expansively interpreted by the California courts.[376] The breadth of California's statutory definition of nuisance, however, is immaterial because the definition of nuisance in most states (including those that adopt the section 821D definition from the Restatement (Second) of Torts is sufficiently broad to encompass same property private nuisance claims as well.[377]

Third, some courts that bar same property private nuisance claims nevertheless permit same property public nuisance claims brought by private parties with standing to sue because in exercising a common public right they have suffered a "special injury" different in kind or significant degree from that suffered by the general public.[378] However, "it is difficult to see any material difference between a public and a private nuisance in the context of a subsequent private landowner seeking to sue the previous owner for contamination of the property."[379] Permitting a current property owner to sue a predecessor for *damages* (e.g., cleanup costs) under a public nuisance theory while barring such a claim under a private nuisance theory cannot meaningfully be explained by the different interests protected by public and private nuisance and further demonstrates the need for courts to think afresh about the role of nuisance in contaminated property disputes.

Fourth, the *Philadelphia Electric* court was reluctant in its 1985 decision to "extend private nuisance beyond its historical role"[380] because "[s]uch an extension is particularly hazardous in an area, such as environmental pollution, where Congress and state legislatures are actively seeking to achieve a socially acceptable definition of rights and liabilities."[381] Two decades later, such concerns should no longer inhibit a court from recognizing same property private nuisance claims. Statutory

376. *See, e.g.*, Truck Components, Inc. v. K&H Corp, No. 94 C 50250, 1995 WL 692541, at *12 n.9 (N.D. Ill. Nov. 22, 1995) (California same property nuisance case law based on unique California statutory scheme).

377. *See* Lilly Indus., Inc. v. Health-Chem Corp., 974 F. Supp. 702, 707 (S.D. Ind. 1997) (noting that the breadth of California's statutory definition of private nuisance is not unique to California).

378. *See supra* notes 170-72 and accompanying text. *See, e.g.*, Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1281-84 (W.D.N.Y. 1990) (applying New York law to bar private nuisance claim under doctrine of *caveat emptor* but permitting public nuisance same property claim because of unspecified "different interests and public-policy concerns involved in public nuisance actions"); *cf., e.g.*, Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 957-58 (R.I. 1994) (citing *Philadelphia Electric* to bar same property private nuisance claim while recognizing same property public nuisance claim, but granting summary judgment for defendant because plaintiff failed to suffer "special damage").

379. Truck Components, Inc. v. K&H Corp., No. 94 C 50250, 1995 WL 692541, at *12 (N.D. Ill. Nov. 22, 1995) (applying Illinois law to bar both private nuisance and public nuisance same property claims and also observing that "[w]hile a public nuisance might be actionable against the prior owner if brought on behalf of the public, the present property owner cannot avoid the limitation against bringing a private nuisance action merely by converting his claim to one of public nuisance.").

380. *Phila. Elec. Co.*, 762 F.2d at 315.

381. *Id.*

environmental law has matured from its nascent stages in the mid-1980s. Legislatures have had an opportunity to develop statutory liability schemes addressing environmental regulatory liability and in the course of doing so have largely chosen not to preempt state common law tort theories of liability.[382] Moreover, same property private nuisance claims are consistent in structure with provisions of CERCLA and state Superfund laws that impose strict liability on prior property occupants responsible for site contamination.[383] Recognizing same property private nuisance claims in the early twenty-first century will not interfere with legislative environmental policy making; on the contrary, it would promote legislative goals of encouraging prompt, voluntary cleanups and promoting informal resolution of cleanup cost allocation disputes.

Fifth, courts should re-examine the propriety of same property private nuisance claims in light of the fact that the development of state nuisance law governing private cleanup cost disputes has disproportionately occurred in federal court.[384] Under the *Erie*[385] doctrine, "a federal court sitting in diversity must apply the state substantive law as pronounced by the state's highest court or, if there has been no such decision, must predict how the state's highest court would decide were it confronted with the problem."[386] A federal court presented with a question of first impression regarding whether to permit a same property private nuisance claim involving hazardous substance contamination damages might be reluctant to re-examine the "historical role" of private nuisance as a tool to resolve neighboring property use disputes. For exam-

382. *See, e.g.*, 42 U.S.C.A. §§ 9614(a), 9652(d), 9659(h) (West 2006) (CERCLA "savings clauses" regarding liability under state law theories); Edwards v. First Nat. Bank of Ne., 712 A.2d 33 (Md. Ct. Spec. App. 1998) (trial court erred by granting motion to dismiss groundwater contamination common law claims against lender on ground that Maryland environmental code lender liability exemption preempted nuisance, trespass, negligence, and strict liability claims); City of Lodi v. Randtron, 13 Cal. Rptr. 3d 107, 119-22 (Cal. Ct. App. 2004) (holding that local ordinance modeled after CERCLA preempted as conflicting with and unauthorized by California Hazardous Substance Account Act (HSAA) but noting that HSAA preserved common law liabilities for parties responsible for hazardous substance contamination). *But see* City of Modesto Redevelopment Agency v. Dow Chem. Co., No. 999345, 999643, 2005 WL 1171998, at *18-19 (Cal. Super. Ct., April 11, 2005) (barring common law damage claims that conflicted with HSAA); *see also* Aronovsky, *supra* note 5, at 85-86.

383. *See, e.g.*, 42 U.S.C.A. § 9607(a)(2) (definition of "covered persons" includes persons who owned or operated a facility at the time of disposal of a hazardous substance); CAL. HEALTH & SAFETY CODE § 25323.5 (West 2005) (incorporating CERCLA definitions of "responsible party" and "liable person"); IND. CODE ANN. § 13-25-4-8 (West 2006) (incorporating CERCLA definition of liable parties).

384. Federal courts have exclusive subject matter jurisdiction over claims "arising under" CERCLA. 42 U.S.C.A. § 9613(b). CERCLA plaintiffs have often joined state law cleanup cost and other contamination damage claims, such as private nuisance claims, to CERCLA claims pursuant to a federal court's supplemental jurisdiction to hear state law claims for which the court otherwise would lack subject matter jurisdiction. 28 U.S.C.A. § 1367(a) (West 2006). Private nuisance claims also could be brought in federal court (either joined to a CERCLA claim or as an independent claim) pursuant to diversity of citizenship federal court subject matter jurisdiction. 28 U.S.C.A. §§ 1331-1332.

385. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

386. Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 149 (3d Cir. 1988) (citation omitted).

ple, in *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*,[387] the plaintiff argued to a New York federal district court that the doctrine of *caveat emptor* did not bar a same property private nuisance claim brought under New York law, pointing to a series of New York state court decisions recognizing various exceptions to the doctrine.[388] The court declined to accept plaintiff's argument, stating that:

> [w]ithout a more definitive indication from New York's courts that the state's common law doctrine of caveat emptor does not apply to cases such as the one at bar, well-established principles of federalism dictate that this court refrain from extending the scope of private nuisance liability beyond its traditional bounds.[389]

These federal court decisions[390]—particularly *Philadelphia Electric*—came to form many of the building blocks for the majority rule that private nuisance contaminated property claims must involve a neighboring property dispute. State (as well as federal) courts need to re-examine the majority rule rather than further enable the development of a body of same property contamination private nuisance jurisprudence created largely by happenstance because of the *Erie* doctrine.

Finally, as a matter of policy, "expanding" private nuisance law beyond its traditional role in neighboring property use disputes also is consistent with the traditional flexibility of nuisance law to address and adapt to changing societal and economic conditions.[391] The "traditional" role of private nuisance law—as a vehicle for resolving neighboring property disputes—was established long before the development of modern environmental law, the creation of contaminated property regulatory obligations, and growth of scientific knowledge and invention of technical tools necessary to discover (or begin to discover) the presence of health risks and environmental problems presented by hazardous substance contamination. Private nuisance law is broad and flexible enough to meet today's modern contamination problems and can apply with equal force to interference with the use and enjoyment of property caused by same property as well as neighboring property contamination.

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387. Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990); *see also supra* notes 231-32 and accompanying text.

388. *Westwood*, 737 F. Supp. at 1283-84.

389. *Id.* at 1284. The court also cited to the Third Circuit's decision in *Philadelphia Electric*, barring a same property private nuisance claim under Pennsylvania law. *Id.* at 1284 n.12.

390. *See supra* note 195.

391. For example, economic disruption occasioned by the issuance of injunctive relief in private nuisance cases has evolved from an irrelevant consideration to a component in a balancing analysis (comparing the social utility of the actor's conduct and the total amount of economic and other harm that would result from enjoining an offending use) employed to determine whether an injunction should issue at all and, if so, under what conditions. *See, e.g.*, Jeff L. Levin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 793-803 (1986) (describing development of modern nuisance law and economic theory). There is a wide range of scholarship discussing in detail the evolution of nuisance law from its twelfth century origins to the present. *See, e.g.*, *supra* note 166.

C. *Abolish the* Caveat Emptor *Defense to Environmental Nuisance Liability*

Along with adherence to the "traditional role" of private nuisance as a rule of decision only for neighboring property use disputes, the doctrine of *caveat emptor* has presented a second barrier to same property private nuisance cleanup cost dispute claims.[392] *Caveat emptor* should not provide a defense to private environmental nuisance liability; instead, the circumstances surrounding the current landowner's acquisition of the property should remain relevant to the nature and scope of any remedy ordered by the court.

Several arguments could be advanced in support of *caveat emptor* as a defense in contaminated property disputes: (a) it provides a bright line for risk allocation in real property transactions;[393] (b) it encourages full disclosure by sellers and diligent property investigations by buyers, promoting a true "meeting of the minds" regarding risk allocation in real property transactions;[394] and (c) it prevents wasteful transaction costs associated with vendor/vendee litigation about property conditions that are better addressed by the allocation of risk by market forces.[395] These arguments, however, fail to justify allocating exclusively to current landowners all of the costs of remediating contamination to which they may have made little or no contribution.

First, any benefits of a *caveat emptor* bright line for allocating risk[396] are outweighed by the inequity of allowing sellers of contami-

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392. *See supra* notes 221-43 and accompanying text. *See also* Kay, *supra* note 154, at 170-71 (proposing that *caveat emptor* should not provide a defense to a same property contamination damages claim brought under a proposed theory of environmental negligence, arguing that Restatement (Second) of Torts sections 352 (*caveat emptor* exception when seller knows of harmful condition but conceals or fails to disclose it to seller) and 840A (seller remains liable as if still in position for physical harm caused by nuisance condition) provide a "strong foundation on which to rest liability for land sellers who polluted the property before sale.").

393. *See* Albert G. Besser, *Caveat Emptor - Where Have You Gone?*, 4 HOFSTRA PROP. L.J. 203, 226-27 (1992) (noting the unfairness of allowing a buyer of contaminated property to sue a seller notwithstanding "as is" clause but barring a seller from shifting risk to a buyer or enforcing an indemnity clause if contamination is unknown at time of purchase).

394. *See, e.g.*, Klein, *supra* note 12, at 366 (by encouraging seller disclosure and buyer investigative diligence, "[t]he rule of caveat emptor, therefore, encourages parties to reach a true meeting of the minds in real estate transactions."); Besser, *supra* note 393, at 210-11 (purchaser of contaminated property not a "mere bystander" injured by circumstances outside his control; rather, "[t]he purchaser can and, in this environmentally conscious era, should inspect the property or subject it to environmental investigations.").

395. *See, e.g.*, Besser, *supra* note 393, at 215-16 (changing common law allocation of risk between successive owners is better left to legislatures); Klein, *supra* note 12, at 365 ("using nuisance law to shift cleanup costs to intermediate landowners will cause such entities to expend resources in unproductive litigation-related activities.").

396. The *caveat emptor* risk allocation line is not always as bright as its proponents might suggest. For example, in some states risks associated with undisclosed site conditions do not shift until the buyer has had a "reasonable opportunity" to discover undisclosed conditions. *See, e.g.*, New York Tel. Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172, 174 (N.Y. App. Div. 1984) (under New York law, the owner of land ceases to be liable in tort after the conveyance at such time as the new owner has had a reasonable opportunity to discover the condition by making prompt inspection and necessary repairs).

nated property to avoid common law remediation liability as a matter of law. The doctrine's underlying economic theory—that the market should allocate risks associated with real property conditions—assumes that the buyer (and, for that matter, the seller) has the technical and financial capacity to discover site contamination and understand its regulatory, economic and health significance during the narrow window of opportunity available for inspection of commercial or residential real estate. This assumption is unrealistic. Until relatively recently, few buyers fully understood the consequences of soil or groundwater contamination. A properly conducted invasive (e.g., Phase II) site inspection can be expensive and, without information about past waste disposal practices to guide investigators, potentially fruitless. Moreover, discovery of contamination does not necessarily mean that all potential environmental problems at the site have been identified much less understood. A site assumed to present one set of risks based on data collected years ago may prove to present additional concerns in light of newly developed contaminant detection techniques.[397] It is not realistic to assume that the market can efficiently or fairly allocate responsibility for such unknown and unknowable risks.

Second, applying the doctrine is likely to have little or no material impact on expanding the scope of seller disclosures. In many jurisdictions, the scope and content of real estate disclosure obligations, particularly those involving the use or disposal of hazardous substance on the property, are now often mandated by statute or regulation.[398] In addition, under the proposed paradigm a seller would not be tempted by a prospective *caveat emptor* liability defense to minimize disclosures about past property use and avoid scaring away potential buyers. Similarly, *caveat emptor* is likely to have little effect on whether a buyer diligently investigates the property in question. To the contrary, the scope of a potential buyer's site investigation likely would be determined by the buyer's interest in identifying any potential risk of assuming the environmental liabilities and regulatory requirements that arise from owning contaminated property.

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397. *See, e.g.*, RANDALL L. ERICKSON & ROBERT D. MORRISON, ENVIRONMENTAL REPORTS AND REMEDIATION PLANS: FORENSIC AND LEGAL REVIEW § 8.3 (1995) (discussing risks of misidentification of compounds as a result of analytical testing method selected and how high detection limits can mask the presence of a compound in a soil or groundwater sample).

398. *See, e.g.*, MD. CODE ANN., REAL PROP. § 10-702(e)(2)(vii) (West 2006) (mandatory disclosure form shall include a list of defects in relation to hazardous or regulated materials); CAL. HEALTH & SAFETY CODE § 25359.7 (West 2006) (mandatory disclosure by owners to buyers, lessees or renters of real property in writing of release of any hazardous substance that has "come to be located on or beneath that real property"); NEB. REV. STAT. ANN. § 76-2, 120(4)(g) (West 2006) (mandatory disclosure of "[a]ny hazardous conditions, including substances, materials, and products on the real property which may be an environmental hazard"); *see also* N.J. STAT. ANN. 13:1K-9 (West 2006) (absent alternative contractual arrangements between buyer and seller of industrial property, seller must provide buyer with a no further action letter from state environmental regulatory agency or an approved remediation plan to be funded by seller).

Third, litigation expenses are not "wasteful transaction costs" when they serve to equitably reallocate the costs of cleaning up contamination to the party creating it. The potential for same property private nuisance litigation could further encourage pre-dispute agreements expressly allocating cleanup cost risks. Indeed, the threat or prosecution of litigation also can encourage post-dispute resolution that efficiently allocates remediation and cleanup cost responsibilities between vendor and vendee.

Finally, market forces can still efficiently allocate risk through contract. A seller can (and should) be able to avoid liability to a buyer for site contamination cleanup costs if the buyer contractually agrees to accept such responsibility.[399] A contractual allocation of responsibility by the buyer, however, must reflect a clear assumption of a known or knowable risk, in contrast (particularly in connection with agreements that predate CERCLA) to a generic "as is" clause unaccompanied by disclosures about site hazardous substance use or waste disposal history.[400] Accordingly, without *caveat emptor*, a seller seeking to avoid site contamination liability would have the additional incentive to fully disclose the site's hazardous substance history in order to obtain an enforceable contractual release of liability from the buyer.[401]

Just as many courts have now rejected "coming to the nuisance" as a defense to adjoining property dispute nuisance liability,[402] they should

399. *See, e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1461 (9th Cir. 1986) (buyer barred from asserting CERCLA claims against seller pursuant to prior agreement resolving and releasing claims relating to sale of property and business).

400. *See, e.g.*, Ybarra, *supra* note 243, at 1216-19 (arguing for a "standard of clear awareness of the specific contamination by the purchaser before rights against the responsible party (seller) are relinquished" and distinguishing among cases involving release agreements in recent transfers of property, older transfers of property, "as is" agreements, and purchaser knowledge of site contamination).

401. Similarly, because a seller's agreement to indemnify a buyer regarding hazardous substance liabilities can be enforceable, *see, e.g.*, 42 U.S.C.A. §9607(e)(3) (West 2006) ("[n]othing in this subsection [of CERCLA] shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section"), buyers have additional incentive to conduct thorough pre-acquisition site investigations to determine whether contamination issues may be present that warrant negotiation of an indemnification agreement.

402. *See* 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2:9 (1986 & Supp. 2006) ("The priority in time of conflicting uses is pertinent to the question of whether a nuisance is proven. The issue arises typically as a defense to a nuisance claim on the theory that plaintiff has 'come to the nuisance.'"); RESTATEMENT (SECOND) OF TORTS § 840D, cmt. b (1979) ("The rule generally accepted by the courts is that in itself and without other factors, the "coming to the nuisance" will not bar the plaintiff's recovery. Otherwise the defendant by setting up an activity or a condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land. The defendant is required to contemplate and expect the possibility that the adjoining land may be settled, sold or otherwise transferred and that a condition originally harmless may result in an actionable nuisance when there is later development."); *cf., e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706, 708 (Ariz. 1972) (granting private nuisance injunction requested by developer who purchased property located near cattle feeding operation on condition that developer indemnify cattle feeder for the reasonable cost of moving or shutting down); Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n, 337 N.W.2d 427, 432 (N.D. 1983) (plaintiff that comes to an alleged nuisance has heavy burden to establish liability); Green, *supra* note 166, at 583-84

also turn away from *caveat emptor* as a liability defense to private nuisance claims.[403] Nevertheless, the circumstances surrounding a plaintiff/current landowner's acquisition of contaminated property should remain relevant to the nature and scope of any nuisance remedy. A wide range of transactional factors could impact the shaping of private nuisance relief, including: (a) a current landowner's knowledge about past on-site waste disposal practices before acquiring the property; (b) contractual language relating to but not directly addressing remediation cost risk allocation; (c) purchase price reduction or other consideration adjustment related to site contamination; and (d) post-transactional behavior by the current owner (e.g., contributing to site contamination, failing to promptly and effectively address discovered contamination).

These factors should not bar liability for a defendant who created contamination conditions constituting a nuisance. They should, however, be taken into account at the remedy stage of private nuisance litigation. For example, a court may consider such factors in deciding whether to grant an injunction,[404] fashioning the terms under which injunctive relief should be granted,[405] calculating damages to avoid any "double recovery" by a current owner who received a purchase price discount because of known or suspected contamination problems,[406] or evaluating the extent to which cleanup cost or other contamination damages should be borne by plaintiff rather than defendant under a "comparative respon-

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(arguing that coming to the nuisance should be an affirmative defense if pollution costs have become capitalized into surrounding land values).

403. *See* T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249, 1258 (N.J. 1991) (rejecting application of *caveat emptor* to same property ultra-hazardous activity contamination claim, observing that "the rule of *caveat emptor* has not retained its original vitality. With time, and in differing contexts, we have on many occasions questioned the justification for the rule."). Courts have turned away from *caveat emptor* as a matter of public policy in a variety of contexts, such as claims by the buyer of a new home against the developer-seller. *See, e.g.*, Hanlin Group, Inc. v. Int'l Minerals & Chem. Corp., 759 F. Supp. 925, 932-33 (D. Me. 1990) (applying Maine law and holding that *caveat emptor* did not bar private nuisance claim and noting that Maine courts previously had declined to apply the defense in cases involving the sale of new homes); 17 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:26, at 352-53 (4th ed. 2000) ("Over the years, however, the number of cases which have strictly applied the rule of caveat emptor appears to be diminishing, and there is a distinct tendency to depart from the rule, either by way of interpretation, or exception, or by simply refusing to adhere to the rule where it would work injustice."). Sound public policy similarly requires that courts reject *caveat emptor* as a liability defense in same property private nuisance cases involving soil or groundwater contamination.

404. *Cf.* Kellogg v. Village of Viola, 227 N.W.2d 55, 58 (Wis. 1975) ("While coming to the nuisance may properly be considered while weighing the equities in an abatement action, it is irrelevant in a damage suit.").

405. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev., Co., 494 P.2d 700, 706, 708 (Ariz. 1972) (granting private nuisance injunction requested by developer who purchased property located near cattle feeding operation on condition that developer indemnify cattle feeder for the reasonable cost of moving or shutting down).

406. *See, e.g.*, W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 691 (9th Cir. 2004) (buyer aware of environmental hazards as evidenced by reduced purchase price precluded from recovering entire cost of cleanup).

sibility" approach to environmental nuisance damages.[407] Economics and market forces thus should continue play a role in private nuisance disputes. That role, however, should be at the remedy rather than the liability phase of the case.

D. A Different Approach to Continuing Environmental Nuisance

Whether a nuisance is characterized as continuing or permanent implicates several critical issues in private environmental nuisance cases: (a) identifying when a cause of action accrues and the applicable statute of limitations begins to run; (b) determining the appropriate nature and scope of available legal and equitable relief; and (c) resolving whether a plaintiff may bring successive actions to address future harm and conduct.[408] The current status of private nuisance law is a hopeless jumble largely because of the widespread inconsistency among (and sometimes within) states regarding the definition of a continuing nuisance and its application to soil and groundwater contamination cases. This inconsistency must be eliminated so that private nuisance law can become a meaningful alternative to a federal rule of decision in private cleanup cost disputes across the country.

To begin with, under the proposed paradigm every state should recognize a tort of continuing environmental nuisance. The concept of continuing tort may seem inconsistent with the policies of finality, predictability and encouraging prompt prosecution of claims that underlie statutes of repose. Closer examination, however, reveals that a continuing nuisance is not an open-ended exception to the statute of limitations; it should be viewed as a tort of wrongful inaction—a defendant's failure to abate a condition that continues to harm plaintiff and the environment. Viewed this way, defendant's ongoing refusal to abate continues to accrue a new cause of action based on defendant's ongoing inaction. Moreover, soil and groundwater contamination presents statute of limitations challenges significantly different in degree (if not in kind) from those presented by other torts. For example, a property owner may have noticed discolored soil decades ago but not understood its health, environmental or regulatory significance. Similarly, recent changes in technology (e.g., development of laboratory equipment capable of identifying increasingly smaller concentrations of contaminants)[409] may provide a far more complete understanding of the harm and regulatory obligations triggered by contamination caused by the defendant. Without a continu-

407. For a thorough discussion of "comparative nuisance" and the equitable allocation of cleanup costs based on the comparative responsibility of the parties under a nuisance cause of action, see generally Jeff L. Lewin, *Comparative Nuisance*, 50 U. PITT. L. REV. 1009 (1989).

408. *See, e.g.*, Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 275-76 (Tex. 2004) (discussing issues implicated by nuisance characterization).

409. ERICKSON & MORRISON, *supra* note 397, at 161 (discussing risks of misidentification or non-identification of compounds because of analytical testing methods and laboratory equipment detection limitations).

ing tort doctrine, a current owner who only recently learned the significance of older contamination may find a state law cleanup cost claim (and with it the incentive voluntarily to remediate contamination caused by others) time-barred by applicable statutes of limitations, even under a discovery rule.[410]

1. Defining Continuing Nuisance—Reasonable Abatability

The definition of "continuing nuisance" in contaminated property cases should reflect the circumstances of the underlying environmental problem. The definition of a "continuing nuisance" should arise from the defendant's failure to remediate the soil and groundwater contamination she caused or to which she contributed. Viewed this way, the defendant is responsible for the continued contamination even after the cessation of her conduct that contaminated the environment (e.g., disposal activity, installation and maintenance of a leaking underground storage tank). It is the unabated contamination, not the acts creating it, that constitutes the continuing interference with the plaintiff's use and enjoyment of property.[411] The defendant thus should have an ongoing duty to abate the contamination; the repeated failure to perform this duty constitutes a separate cause of action that continues to accrue until the defendant performs its duty or the contamination is otherwise abated.

An ongoing duty to abate through remediation assumes that remediation is practicable. Under the proposed paradigm, the definition of a continuing nuisance requires that the contamination reasonably be capable of remediation. "Reasonable abatability" contemplates that (a) the contamination could be abated to an appropriate level; (b) abatement to such a level is technically possible; and (c) the abatement could be accomplished at a reasonable cost.[412]

a. Abatement to an Appropriate Level

An appropriate abatement level could be determined in one of two ways. First, site-specific regulatory agency cleanup levels could set a presumptive level of abatement.[413] The California Court of Appeal accepted such a role for agency approved cleanup levels in *Capogeannis v.*

410. *See supra* notes 248-49 and accompanying text.

411. *See* Mangini v. Aerojet-Gen. Corp. (*Mangini I*), 281 Cal. Rptr. 827, 838 (Cal. Ct. App. 1991) (continuing unabated harm is basis for continuing nuisance claim under California law); Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 804 (Cal. Ct. App. 1993) ("[T]he continuing nature of nuisance refers to the continuing but abatable damage caused by the offensive condition, not the acts causing the offensive condition to occur." (citation omitted)).

412. In Mangini v. Aerojet-Gen. Corp. (*Mangini III*), 912 P.2d 1220, 1229 (Cal. 1996), the Supreme Court of California embraced a "reasonableness" limitation on an abatability standard for continuing nuisance, concluding that a nuisance was continuing for limitations purposes if it "can be remedied at a reasonable cost by reasonable means." *See supra* notes 267-73 and accompanying text.

413. *See supra* note 271 and accompanying text.

Superior Court.[414] The court rejected the defendants' "essentially semantic argument that because it does not appear that the contamination [leakage from a removed underground storage tank] can ever be *wholly* removed the nuisance must be deemed permanent."[415] Instead, the court was "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 on absolutes these agencies do not require."[416] Similarly, the court noted that because "as a practical matter the only impact of the contamination on the Capogeannises is by way of the regulatory agencies demands,"[417] once those "demands have been met, so far as the Capogeannises are concerned the nuisance will be abated."[418]

Second, expert testimony could be used to address site cleanup standards. The characterization of a nuisance as permanent or continuing may come before the court at trial or by summary judgment motion before a regulatory agency has set cleanup standards for the site.[419] If so, the court will require expert evidence regarding site conditions to evaluate the abatability of site contamination. Similarly, a party may turn to expert testimony to rebut any presumption that agency cleanup standards demonstrate that site contamination is abatable.[420]

b. Reasonable Means of Abatement

The concept of "reasonable abatability" should include a two-fold technical component. First, means must exist to accomplish the contemplated remediation. Merely because an agency (or an expert witness) has proposed a cleanup standard does not mean that the standard can be met with current technology. For example, a proposed standard may contemplate reduction of groundwater contamination pollution levels to a specified level of X parts per billion (ppb) for a particular compound. It may be impossible, however, to meet the X ppb standard: the subsurface source of groundwater contamination may not have been lo-

414. 15 Cal. Rptr. 2d 796 (Cal. Ct. App. 1993).
415. *Capogeannis*, 15 Cal. Rptr. 2d at 805.
416. *Id.*
417. *Id.*
418. *Id.*
419. There may be many reasons why a contamination dispute could reach such advanced stages of litigation without establishment of agency cleanup levels. For example, it may take years to fully characterize large or technically complicated sites, and substantial time after completion of site characterization activities to determine site cleanup levels. Moreover, limited resources can substantially delay an environmental regulatory agency's determination of cleanup standards for sites of any size or complexity.
420. In *Mangini III*, the California Supreme Court held that the contamination of plaintiff's property constituted a permanent nuisance in part because there was no evidence of agency cleanup standards or expert testimony proposing appropriate cleanup levels for the site. *Mangini III*, 912 P.2d at 1221.

cated;[421] the technology may not yet exist to clean up the contaminated groundwater to the desired level; or laboratory equipment or available analytical methods may not be capable of determining whether the cleanup standards has been met.[422]

Second, even if the means exist to remediate the site contamination, other environmental regulatory factors may argue against remediation. For example, in *Beck Development Co. v. Southern Pacific Transportation Co.*,[423] the court concluded that excavating oil-contaminated soil, while technically possible, might not be reasonable in light of a regulatory agency's concern that the contamination presented no risk if left in place but would raise other environmental concerns if it was excavated and transported away from plaintiff's property for off-site disposal.[424]

c. Reasonable Cost of Abatement

For contamination to be deemed "abatable," the remediation must be possible at a reasonable cost. The essence of private nuisance is interference with the plaintiff's use and enjoyment of property.[425] Whether the cost of abatement is reasonable, therefore, should be viewed from the plaintiff's perspective. In other words, abatement costs should be balanced not against the value of the property as contaminated or, for that matter, the value of the property after cleanup. Instead, it should be balanced against the value of the remediated property *to the plaintiff* after the cleanup, including the present value of profits that could be generated from the remediated property. As a result, if a parcel of contaminated property has no net value as contaminated, a fair market value of $5,000,000 as remediated, and the capacity to generate an additional $5,000,000 in profit if remediated (e.g., the present value of profits generated from developing the site for single family residences), the baseline for measuring the reasonableness of remediation should be $10,000,000, the overall value of the highest and best use of the property as uncon-

421. For example, at some sites the presence of dense non-aqueous phase liquids (DNAPLs)—in effect, a volumetrically small but high-concentration collection of the contaminant in a subsurface water-bearing soil zone—can serve as a continuing source of groundwater contamination. *See* ERICKSON & MORRISON, *supra* note 397, §7.4 (describing how, as groundwater flows past the DNAPL, a portion of the DNAPL "will dissolve into the groundwater" at a rate dependent on groundwater velocity and DNAPL solubility). Unless the DNAPL can be located and its effect eliminated or significantly reduced, near-source concentrations of groundwater contamination may not be capable of remediation to proposed cleanup levels.

422. *See supra* note 396 and accompanying text.

423. 52 Cal. Rptr. 2d 518 (Cal. Ct. App. 1996).

424. *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 559-60; *see also* 40 C.F.R. § 300.430(f)(ii)(E) (2006) (NCP requires that selection of remedial action include consideration of "the preference for treatment as a principal element and the bias against off-site land disposal of untreated waste."); JENNIFER L. MACHLIN & TOMME R. YOUNG, MANAGING ENVIRONMENTAL RISK: REAL ESTATE AND BUSINESS TRANSACTIONS § 4-103 (2004) (noting NCP preference in connection with preparation of RI/FS for on-site treatment and cost-effectiveness).

425. RESTATEMENT (SECOND) OF TORTS § 821D (1979) (defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land").

taminated. Viewed this way, a $7,000,000 cleanup would represent abatement at a reasonable cost and thus a continuing nuisance.[426]

Why should cost matter at all? Why should a defendant be "rewarded" with a statute of limitations defense when she causes technically abatable harm that is so extensive that the cost of abating it exceeds the value of cleanup to plaintiff? Cost should matter because at some point the harm is so great that the law should no longer permit a private plaintiff to demand that the defendant abate the nuisance in a direct action premised on interference with the use and enjoyment of property. As comment f to section 839 of the Restatement (Second) of Torts provides, "[t]he law does not require the unreasonable or the fantastic, and therefore even though it might conceivably be possible to abate a particular condition, it is not 'abatable' within the meaning of this Section unless its abatement can be accomplished without unreasonable hardship or expense."[427] Moreover, factoring costs to determine whether a nuisance is continuing or permanent reflects a policy choice that preserves a role for statutes of limitations. Without cost as a factor, almost any technically abatable contamination would support a claim for continuing nuisance, all but eliminating the statute of limitations as a defense in environmental nuisance cases. An analysis into the means and cost of abatement would involve a case-by-case analysis regarding site conditions requiring the expenditure of additional party and judicial resources. These resources likely would be expended anyway, however, in fashioning a nuisance remedy,[428] examining the reasonableness of abatement

426. The highest and best use of the property, viewed objectively, would take into account both plaintiff's planned use and any other, more profitable use that could be employed by plaintiff or a future purchaser (who presumably would pay plaintiff for the potential development opportunity). A court may also consider the reason why plaintiff seeks to recover from defendant abatement costs exceeding the value of the property to plaintiff. On the one hand, plaintiff may be required by a regulatory agency to conduct such a cleanup. On the other hand, the plaintiff may choose to remediate for purely business reasons. *See, e.g.*, *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 559 (evaluating plaintiff's private nuisance claim for remediation of a development site in light of regional water board conclusion that contaminated soil could have remained in place). In the former situation, a court may take into account whether the plaintiff has any choice in remediating defendant's pollution as part of a "reasonableness" analysis; in the latter situation, the economics of remediation may assume determinative significance regarding whether the nuisance is permanent or continuing.

427. RESTATEMENT (SECOND) OF TORTS, § 839 (1979) (addressing liability of possessor of land who fails to abate an artificial condition constituting a nuisance). In addition to evidence of technical abatability, courts may also consider the selection of site-specific cleanup levels as relevant to whether abatement can be achieved at a reasonable cost, at least in those instances where the agency is required to take cost-effectiveness into account in setting cleanup levels. *See, e.g.*, 40 C.F.R. § 300.430(f)(ii)(D) (requiring lead agency under NCP to take cost-effectiveness into account in selecting remedial action); *see also supra* note 271 and accompanying text.

428. It is possible that a plaintiff at an older contamination site will be required by a regulatory agency to cleanup contamination of her property to which she made little or no contribution at a cost that exceeds the value of the remediated property to plaintiff. A court may take into account any regulatory directives imposed on plaintiff in deciding whether the cost is reasonable and thus whether the nuisance is continuing. Moreover, in contrast to a direct private nuisance claim based on plaintiff's interest in freedom from a substantial interference with the use and enjoyment of her property, derivative claims (e.g., if state law permits actions for contribution or equitable indemnity upon issuance of a cleanup order or in the event of enforcement action) may be available against the defendant with regard to cleanup costs arising from such a duty imposed on the current owner.

costs sought as damages by the plaintiff,[429] allocating cleanup costs based on a comparative responsibility analysis, and the crafting of abatement injunctive relief.

d. Comparison with Other Continuing Nuisance Standards

The "reasonable abatability" standard rests on a defendant's inaction in the face of a reasonably abatable harm that continues to interfere with a plaintiff's use and enjoyment of property. It also would preserve cleanup cost claims at many older contamination sites at which the statute of limitations would bar claims for permanent nuisance. The reasonable abatability standard is superior to other continuing nuisance standards currently used by courts around the country, which fail to adequately serve the policy considerations that support preservation of cleanup cost claims at older contamination sites.

The continuing harmful conduct standard[430] does nothing to address the problem of a defendant's inaction in the face of the reasonably abatable harmful condition that remains on a plaintiff's property. Moreover, although the discontinuance of a defendant's conduct creates something of a bright line to determine when the permanent nuisance statute of limitations begins to run, it provides no relief at older contamination sites where a defendant's polluting conduct may have ceased years ago but the offensive condition it created remains unabated.

The predictability of future harm standard employed by the Texas courts[431] looks away from both a defendant's conduct and the abatability of pollution, focusing instead on the predictability of future damages. In effect, the predictability of harm standard constitutes a presumption that a nuisance is permanent by limiting "temporary" nuisance actions to those where future damages cannot reasonably be determined and thus a single action would be unable to fully compensate the plaintiff. It creates no incentives for abatement; indeed, the Texas standard creates a perverse incentive for a plaintiff to argue that the nature of a contamination problem cannot yet be characterized and for a defendant to argue that because the problem can be abated by reasonable means and at a cost capable of a current reliable estimate the contamination must constitute a permanent nuisance and plaintiff's claim should be time-barred.

Other types of property damages, e.g., lost rental or other use of the property, would presumably not be available under a derivative theory of liability.

429. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 929(1) (1979) (stating that "[i]f one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred, (b) the loss of use of the land, and (c) discomfort and annoyance to him as an occupant.")

430. *See supra* notes 286-300 and accompanying text.

431. *See supra* notes 301-14 and accompanying text.

The courts that use a "changing over time" standard effectively equate a "continuing nuisance" with a "different-looking nuisance."[432] In other words, if the harmful condition changes over time, it is a different nuisance and therefore a new cause of action should accrue. This approach ignores both the defendant's failure to abate harm and ongoing active causation of harm as the basis for a continuing nuisance analysis. It also draws arbitrary remedial lines, permitting a continuing nuisance claim for groundwater contamination (which changes form over time as groundwater continues to migrate) while relegating to permanent nuisance status discrete, easily removed soil contamination (which generally remains immobile and does not change form or environmental impact over time).

The continued presence standard[433] comes closest to serving the goals achieved by the proposed reasonable abatability standard. On its face, however, the continued presence standard does not address either the technical means of abatement or its cost, transforming all soil and groundwater contamination that does not serve a socially beneficial purpose by remaining in place into a continuing nuisance. Such a broad standard would support a nuisance-based cleanup cost claim in almost all contaminated property cases but would virtually eliminate the statute of limitations as a defense at these sites and in theory permit perpetual successive continuing nuisance actions concerning contamination that cannot practicably be abated.[434] If soil or groundwater contamination is not practicably abatable, it properly should be viewed as a permanent problem for which the rules of permanent nuisance should apply.

Finally, the multi-factored balancing approach[435] has the benefit of flexibility. It also has the significant disadvantages of unpredictability and unreliability regarding whether a given contamination problem constitutes a continuing nuisance. Moreover, it shifts the focus of continuing nuisance law from abating contamination to a case-by-case bundling of issues to be weighed in a potentially inconsistent manner from court to court.

In sum, states should re-examine the law of continuing nuisance as applied to soil and groundwater contamination problems by viewing the definition of continuing nuisance through the lens of the public policy that this tort should serve. The proposed paradigm promotes prompt, efficient cleanups by preserving cleanup cost claims based on a defen-

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432. *See supra* notes 315-24 and accompanying text.

433. *See supra* notes 274-85 and accompanying text.

434. Even if a state court found the continued presence test more attractive than a reasonable abatability approach, a court might decline to embrace a standard that would all but eliminate the statute of limitations (even with a "social utility" exception) as a liability defense and instead defer such a policy choice to the state legislature.

435. *See supra* notes 325-28 and accompanying text.

dant's continued failure to reasonably abate the soil or groundwater contamination she caused or to which she contributed.

2. Rebuttable Presumption of Continuing Nuisance

The proposed paradigm is designed to encourage (a) abatement of soil and groundwater contamination, (b) voluntarily cleanup by current property owners of contamination caused in whole or in part by others, and (c) informal resolution of private cleanup cost allocation disputes among PRPs. The default characterization of a nuisance in the event of evidentiary equipoise can play a substantial role in serving these goals. Accordingly, the proposed paradigm would create a rebuttable presumption[436] that soil or groundwater contamination constitutes a continuing rather than permanent nuisance.[437]

An environmental nuisance framework that presumes soil and groundwater contamination constitute a continuing nuisance would provide a number of benefits. First, abatement-related private nuisance claims (e.g., claims for cleanup cost damages or injunctive relief ordering defendant to abate a nuisance) presumptively would not be time-barred.

Second, equitable relief directed to abating the nuisance presumptively would be available. Under a reasonable abatability standard for

436. Some courts have articulated a preference for finding a continuing nuisance to protect plaintiffs from the statute of limitations, unforeseen future injuries, and to encourage the abatement of nuisances. *See* Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 804-05 (1993) (holding that issues of material fact whether contaminants from former owner and tenant underground storage tank constituted a continuing or permanent nuisance barred summary judgment for defendants on statute of limitations). This preference, however, often manifests itself by allowing plaintiffs in close or doubtful cases to elect which nuisance theory to pursue. *Id.* at 801. This election, of course, is illusory in connection with older contamination problems where a permanent nuisance claim would be time-barred.

437. Not all soil or groundwater contamination, of course, constitutes a nuisance. *De minimus* concentrations of contaminants on a plaintiff's property, for example, might not constitute a nuisance. A plaintiff thus would still be required to prove that the contamination substantially interfered with the use and enjoyment of her property and that the defendant's negligent, intentional and unreasonable or ultra-hazardous activity conduct proximately caused the contamination. *See supra* note 174 and accompanying text; *see also* Jezowski v. City of Reno, 286 P.2d 257, 260-61 (Nev. 1955) (private nuisance claim requires proof of "material annoyance, inconvenience, discomfort or hurt"); Robie v. Lillis, 299 A.2d 155, 158 (N.H. 1972) (interference with use and enjoyment of property must be substantial); Energy Corp. v. O'Quinn, 286 S.E.2d 181, 182 (Va. 1982) (condition "substantially impairing the occupant's comfort, convenience, and enjoyment of the property" may constitute private nuisance); Brown & Hansen, *supra* note 224, at 664-65 (noting that "many California courts have utilized the common law balancing approach to determine whether a condition or activity constitutes a nuisance under the provisions of [California Civil Code] 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 nuisance and the injury caused thereby, whether the nuisance is continual or occasional, and the number of people affected."). Assuming, however, that the presence of contaminants does constitute a nuisance, under the proposed paradigm it would presumptively constitute a continuing rather than permanent nuisance.

continuing nuisance, soil and groundwater contamination presumptively would be capable of abatement by reasonable means and at reasonable cost.[438] A plaintiff also would be entitled to recover damages consistent with the continuing (i.e., non-permanent) nature of the nuisance sustained during the limitations period (e.g., abatement costs, damages arising from the lost use of the property).[439] A defendant would typically

438. Sites that already are the subject of a regulatory agency cleanup order may present primary jurisdiction concerns. Under the doctrine of primary jurisdiction, a court has the discretion to refer certain matters to a specialized administrative agency. It is "a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts." Syntek Semiconductor Co. v. Microchip Tech., Inc., 307 F.3d 775, 780 (9th Cir. 2002). Courts may consider a variety of factors in deciding whether to exercise the doctrine, including whether (a) the court is being called on to decide factual issues which are not within the conventional experience of judges or are instead issues of a sort that a court routinely considers; (b) the defendant could be subjected to conflicting orders of both the court and the agency; (c) relevant agency proceedings have been initiated; (d) the agency has proceeded diligently or allowed the proceedings to languish; and (e) the plaintiff is seeking injunctive relief requiring technical or scientific expertise for the courts to craft. Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 857 F. Supp. 838, 841-43 (D.N.M. 1994) (applying primary jurisdiction doctrine to stay landowner's claim for injunctive relief where EPA had already begun process of initiating remedial investigation and feasibility study). Some courts have deferred consideration of injunctive relief under the primary jurisdiction doctrine where an environmental regulatory agency actively was involved in site characterization or remediation, *see id.*; Liss v. Milford Partners, 39 Conn. L. Rptr. 216 (Conn. Super. Ct. 2005) (unpublished) (denying motion to dismiss claim seeking injunction under Connecticut law that defendants remediate soil and groundwater contamination but postponing further judicial proceedings pending completion of administrative action by state Department of Environmental Protection); White Lake Improvement Ass'n. v. City of Whitehall, 177 N.W.2d 473, 485 (Mich. Ct. App. 1970) (affirming dismissal of complaint seeking injunction to abate nuisance caused by discharge of waste into lake on ground that plaintiff should pursue administrative remedies through state water agency before court should further entertain action to abate nuisance), while others have rejected the primary jurisdiction argument and permitted claims to abate a nuisance, *see, e.g.*, Attorney Gen. of Mich. v. Thomas Solvent Co., 380 N.W.2d 53, 67-68 (Mich. Ct. App. 1986) (doctrine of primary jurisdiction did not require court to defer jurisdiction over contaminated site to EPA in light of limited agency resources, lack of emergency situation, and absence of agency objection); Meinders v. Johnson, 134 P.3d 858, 867 (Okla. Civ. App. 2005) (affirming injunction that defendants remedy surface and subsurface pollution from mineral exploration and production on plaintiff's property where Corporation Commission had not yet exercised jurisdiction over matter).

439. *See supra* note 252 and accompanying text. Some courts have treated a nuisance as continuing for statute of limitations purposes only but nevertheless awarded "permanent" nuisance (i.e., prospective) damages. *See, e.g.*, Cook v. Rockwell Int'l Corp., 358 F. Supp. 2d 1003, 1012 (D. Colo. 2004) (presence on plaintiffs' property of plutonium released from nearby nuclear weapons plant constituted a continuing nuisance and trespass for statute of limitations purposes but could provide basis for prospective, diminution in value damages effectively purchasing an easement for invasion to continue); Beatty v. Washington Metro. Area Transit Auth., 860 F.2d 1117, 1125 (D.C. Cir. 1988) ("[N]uisances may be classified for two distinct purposes, one for the assessment of damages, and the other for the application of the statute of limitations."); *cf.* Briscoe v. Harper Oil Co., 702 P.2d 33, 36-37 (Okla. 1985) (affirming temporary nuisance damage award for cost of repairing well and permanent nuisance damage award for unabatable diminution in farmland property value caused by oil and gas lessee). Such an inconsistent approach to continuing nuisance would all but eliminate the statute of limitations as a defense in environmental nuisance cases and fail to serve any unifying policy except maximizing plaintiff's financial recovery. Under the proposed paradigm, a presumption against prospective damages would keep the policy focus of continuing nuisance actions on remediation and cooperation. Whether stigma damages are more consistent with a permanent or continuing nuisance theory presents a challenging conceptual problem. (A detailed discussion of stigma damages is beyond the scope of this article.). On the one hand, diminution of property value caused by stigma of prior contamination that has been abated arguably is consistent with a continuing nuisance theory and thus could be recoverable. On the other hand, diminution in property value caused by contamination stigma could be viewed as prospective harm

bear sole responsibility for these damages at sites where the defendant was the sole cause of the contamination. At sites where the plaintiff had partial responsibility for the contamination,[440] damages (including the cost of complying with any injunction issued by the court) could be allocated proportionately.[441] By contrast, contamination that cannot reasonably be abated should not be enjoined[442] and would constitute a permanent nuisance.[443]

Third, plaintiffs presumptively would have a right to bring successive actions until the nuisance was abated. In each action, a plaintiff would be able to seek injunctive relief and damages sustained during the preceding limitations period. The right to bring successive actions protects a plaintiff against unforeseen future remediation costs and temporary harm occasioned by a defendant's continued failure to remediate the contamination (e.g., lost property use damages, abatement costs). It also provides powerful incentives for the parties to cooperate in promptly remediating the property. A plaintiff would want to get the site cleaned

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and thus reserved only for permanent nuisance actions. For example, in *Santa Fe Partnership v. Arco Products Co.*, 54 Cal. Rptr. 2d 214, 224 (Cal. Ct. App. 1996), a California Court of Appeal felt constrained by California Supreme Court precedent holding that prospective damages are unavailable for a continuing nuisance action to hold that stigma damages were unavailable in a continuing nuisance case.

440. Even if a plaintiff did not contribute to site contamination, a court may consider as part of a comparative responsibility analysis whether the plaintiff acted diligently to mitigate harm upon discovery of the contamination or its significance, or instead allowed site conditions to worsen and abatement costs to increase through inattention or indifference.

441. *See generally* Lewin, *supra* note 407, at 1053-69 (advocating nuisance remedial scheme contemplating proportional allocation of nuisance damages and cost of performing abatement injunction based on the comparative responsibility of plaintiff and defendant for creating or maintaining the nuisance). Courts also could freely experiment with alternative remedial schemes consistent with the fundamental nature of the continuing nuisance analytical framework. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 65 & n.8 (4th ed. Aspen 1992) (citing William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J. L. & ECON. 1 (1972), as basis for proposal, in context of noise pollution, of "time-limited easements," limiting successive continuing tort actions to periodic suits (e.g., every 10 years) in order to limit administrative costs and provide extended platform for bargaining in exchange for payment by defendant of prospective damages covering the temporary pollution easement period). For an extensive discussion regarding the evolution of nuisance remedies, see generally Lewin, *supra* note 166.

442. *See, e.g.*, Spaulding v. Cameron, 239 P.2d 625, 629 (Cal. 1952) (directing the trial court to determine whether a landslide onto the plaintiff's property constituted a permanent nuisance; if so, the court should award diminution in property damages and if not, the court should award injunctive relief to abate the nuisance).

443. By filing a timely claim for permanent nuisance, a plaintiff could recover all past, present, and future damages caused by the contamination, in effect representing the price of a permanent easement for the pollution on plaintiff's property. *Cf.* Cook v. Rockwell Int'l Corp., 358 F. Supp. 2d 1003, 1012 (D. Colo. 2004) (presence on plaintiffs' property of plutonium released from nearby nuclear weapons plant constituted a continuing nuisance and trespass for statute of limitations purposes, and could provide basis for prospective, diminution in value damages effectively purchasing an easement for invasion to continue). If the permanent nuisance claim is not timely filed, plaintiff could not recover damages because of the statute of limitations and "because the nuisance is deemed permanent, the plaintiff may not abate the nuisance by an injunction; rather she is limited to her time-barred claim for damages. In effect, defendant has acquired a right to damage, and continue to damage, plaintiff's land at no cost to defendant!" FISCHER, *supra* note 251, §84(d). The presumption of continuing nuisance created by the proposed paradigm would reduce the risk of the latter result.

up promptly to restore the value of her asset and satisfy regulatory obligations. A defendant (who likely would be precluded from re-litigating her liability in a subsequent action) would want to mitigate delay or lost use damages arising from the continued presence of contaminants on plaintiff's property. A defendant thus would be encouraged to actively participate in site remediation to promote a cost-effective cleanup (which the defendant is paying for, in whole or in part) and to avoid an argument in a subsequent action that the defendant should pay punitive damages for intentionally failing to abate a nuisance for which it has been previously found liable.[444]

In the alternative, a defendant who is found liable for continuing nuisance and subject to successive suits until the nuisance is abated has an incentive to negotiate an informal resolution of remediation and cleanup cost allocation issues.[445] For example, the defendant could enter into a settlement agreement establishing a contract-based set of duties to directly conduct or financially participate in the cleanup and avoid future litigation transaction costs. Similarly, the defendant may attempt to negotiate a settlement by paying the plaintiff to liquidate the defendant's continued obligation to remediate the contamination.

The presumption that soil or groundwater contamination constitutes a continuing nuisance would be rebuttable. Accordingly, whether a nuisance ultimately was found to be continuing or permanent would turn on the intersection of three components of the paradigm: (a) the standard (reasonable abatability) by which a court would determine whether the objecting party satisfied its burden; (b) the default presumption that the nuisance is continuing; and (c) the placement of the burden of proof on any party *objecting* to characterization of the nuisance as continuing, i.e., any party contending that the nuisance is permanent. It is to this shifted burden of proof that we now turn.

E. Burden of Proof on the Party Advocating for Permanent Nuisance

The presumption that soil or groundwater contamination constitutes a continuing nuisance is effected by the allocation of the burden of proof. If the evidence regarding the reasonable abatability of contamination conditions is in equipoise, under the proposed presumption the nuisance would be deemed continuing. This presumption could only be overcome if a party—whether defendant *or plaintiff*—who argues that a nuisance is

444. *See, e.g.*, Sumitomo Corp. of Am. v. Deal, 569 S.E.2d 608, 615-16 (Ga. Ct. App. 2002) (affirming as consistent with due process $250,000 continuing nuisance and trespass punitive damage award against upstream developer who knew of damage caused by water leaving its detention ponds but did nothing to abate the flow of water).

445. *See* Capogeannis v. Super. Ct., 15 Cal. Rptr. 2d 796, 804 (Cal. Ct. App. 1993) (finding of continuing nuisance "will tend to encourage private abatement, and perhaps monetary cooperation in abatement efforts, if only to limit successive lawsuits").

permanent can demonstrate that the contamination likely cannot be abated by reasonable means and at a reasonable cost.[446]

Courts that have addressed the issue generally place the burden of proof on a plaintiff to show that a nuisance is continuing.[447] Because the question commonly arises only when a permanent nuisance claim would be time-barred, the burden of proof issue traditionally is framed as whether continuing nuisance characterization is an element of a plaintiff's cause of action[448] or part of a defendant's statute of limitations affirmative defense.[449] Nuisance characterization, however, affects not only the statute of limitations but the right to bring successive nuisance actions and the nature of available relief. The burden of proof, thus, should turn on the policy considerations and consequences arising from nuisance characterization.[450]

Characterizing contamination as a continuing nuisance would promote the paradigm's policy objectives to (a) expand the availability of current landowner common law rights to recover from other PRPs their fair share of cleanup costs, (b) encourage prompt characterization and remediation of contamination, and (c) promote settlement of private cleanup cost disputes. On the other hand, if a nuisance is deemed permanent, landowners would be unable to recover cleanup costs at many older contamination sites and defendants would have no obligation or incentive under common law to help remediate contamination that oc-

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446. The party advocating for a permanent nuisance would bear both the burden of production (i.e., the obligation to produce sufficient evidence to avoid summary judgment or entry of judgment as a matter of law) and the burden of persuasion at trial.

447. *See, e.g.*, Mangini v. Aerojet-Gen. Corp. (*Mangini III*), 912 P.2d 1220, 1230 (Cal. 1996); *see also supra* notes 337-60 and accompanying text.

448. *See, e.g.*, *Mangini III*, 912 P.2d at 1226 (noting that the parties did not dispute that the characterization of nuisance was an element of plaintiff's cause of action); *Beck Dev. Co.*, 52 Cal. Rptr. 2d at 556 (finding a private nuisance claim time-barred because the plaintiff failed to meet its burden to prove continuing nuisance).

449. *See* Brown & Hansen, *supra* note 224, at 698-99 (arguing that defendants should bear burden of proving that contamination from an underground storage tank constitutes a permanent nuisance, rather than plaintiffs bearing the burden that the site constitutes a continuing nuisance, likening the issue to the defendant's burden of proving an affirmative defense that a claim is barred by the statute of limitations); *see also* Smith, *supra* note 164, at 60-61 (noting that, while plaintiffs typically bear burden of proving damages within continuing tort limitations period, the statute of limitations usually is an affirmative defense).

450. *See* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 209 (1973) (finding of intentionally segregative school board actions shifted to school authorities the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent, observing that "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" (citation omitted)); David S. Cohen, *The Evidentiary Predicate For Affirmative Action After* Croson*: A Proposal for Shifting the Burdens of Proof*, 7 YALE L. & POL'Y REV. 489, 499 (1989) ("Courts, however, are not hesitant to reallocate both burdens in order to achieve the purposes of the underlying substantive law and to fulfill notions of good public policy."); Martin J. LaLonde, *Allocating the Burden of Proof to Effectuate The Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438, 449 (1993) ("Courts often do not hesitate to allocate the burden to realize the purposes of the substantive law and to promote public policy goals.").

curred long ago. Moreover, at sites where a permanent nuisance claim would not be time-barred, an award of prospective permanent nuisance damages would effectively purchase a pollution easement for defendant and undermine the current landowner's incentive to use a damage award to fully remediate her property, leaving the environment polluted and potentially useful property unavailable for fully productive use.[451]

Placing the burden of proof on the party advocating that contamination constitutes a permanent nuisance would eliminate a series of perverse incentives under current practice. First, defendants arguing that a nuisance claim should be time-barred because the contamination constitutes a permanent nuisance currently need only point to the absence of data regarding contamination abatability.[452] Under the proposed paradigm, defendants would need to proffer site characterization data if they wished to show that a nuisance cannot be abated by reasonable means and at reasonable cost.[453] Second, defendants would have an incentive to become actively involved in the site investigation and remediation process, either to control abatement costs for which they may be liable or to demonstrate that they were prepared to participate in nuisance abatement but were deterred from doing so by unreasonable plaintiff demands.[454] Third, plaintiffs seeking to pocket a one-time potential "windfall" of past, present, and future money damages for permanent nuisance rather than use their recovery to remediate their property would have to prove that their property is not subject to reasonable abatement. Plaintiffs would be deterred taking this position by the risks of harming prospects for future site development (e.g., the risk of creating by their own argu-

451. Where the statute of limitations defense is unavailable, the risk of a substantial damages award for permanent nuisance could lead a defendant to argue that a nuisance is continuing. The risk of such an award also could encourage greater care in hazardous substance handling and disposal practice.

452. *See supra* notes 338-56 and accompanying text.

453. The burden of proof regarding nuisance characterization also has a significant impact on litigation timing. A plaintiff bearing the burden of proving that a nuisance is continuing cannot proceed to trial until sufficient site condition data has been generated to meet its burden of production. As a result, a plaintiff may be forced to try to delay trial until the information becomes available. A defendant, on the other hand, currently has the incentive to accelerate trial in the hope that the plaintiff cannot meet his or her burden of proving that contamination is reasonably abatable. Under the proposed paradigm and re-allocated burden of proof, until a site has been adequately characterized the defendant would need to obtain a delayed trial date or else risk a failure of proof that the contamination cannot be reasonably abated. Similarly, a defendant also would have an incentive to become involved in the regulatory process and urge agencies to proceed promptly with approval of site investigation and remediation plans and issuance of cleanup standards. The proposal further would eliminate the risk that a plaintiff would be unable to recover cleanup costs for contamination created by another because an agency failed to generate the site cleanup standards necessary for plaintiff to prove that the contamination was reasonably abatable.

454. Defendants thus could argue that delays or unreasonable demands imposed on them by plaintiffs in abatement activities (e.g., demanding that defendants pay without meaningful input about how the money would be spent, preventing defendants from communicating with regulatory agencies) would support equitable liability defenses of waiver, laches, or estoppel, *see, e.g.*, Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676-77 (Tex. App. 1978) (laches may bar or qualify relief in private continuing nuisance claim), or reduce defendant's share of abatement cost responsibility.

ment a future stigma on property value), compromising potentially available insurance coverage for site remediation, and undermining arguments to regulatory agencies about site-specific, cost-effective remediation strategies.

The proposed re-allocated burden of proof, by increasing the chance that the contamination will be considered a continuing nuisance and thus subject to reasonable abatement, also would encourage a cooperative approach to site characterization and settlement of cleanup cost responsibilities. A defendant may wish to avoid litigation transaction costs associated with the threat of a series of continuing nuisance lawsuits, the risk of an injunction ordering participation in a cleanup, the specter of prospective damages for plaintiff's lost use of the property until the contamination is abated, and the possibility that a plaintiff would demand punitive damages for defendant's alleged willful failure to abate a continuing nuisance. Similarly, a plaintiff would have an incentive to negotiate settlement because of the reduced chance of a large prospective damage award, the risk of regulatory compliance obligations, and the desire to avoid litigation transaction costs.

Finally, the proposed re-allocation of the burden of proof should be accompanied by a presumption that the only remedies available to a plaintiff are those consistent with the abatability of the nuisance.[455] These remedies would include (a) injunctive relief for abatement of contamination and its source (if still actively polluting) and (b) damages consistent with an abatable nuisance suffered by plaintiff during the limitations period,[456] such as abatement costs and damages arising from lost opportunity costs associated with unabated contamination (e.g., lost rents, delayed development profits).[457] Damages that assume permanent

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455. This presumption would be consistent with the perspective of most courts that permanent nuisance claims permit a plaintiff to recover in one action all past, present, and future damages caused by the nuisance, and that continuing nuisance claims permit injunctive relief directed toward nuisance abatement as well as past damages suffered within the limitation but not future damages based on a nuisance that could be discontinued or abated at any time. *See generally* FISCHER, *supra* note 251, §84[b]-[e].

456. *See, e.g.*, Hoery v. United States, 64 P.3d 214, 219 n.7 (Colo. 2004) (damages available for continuing torts up to time of suit); Anderson v. State, 965 P.2d 783, 792 (Haw. Ct. App. 1998) ("[A] continuous tortious act should not be subject to a limitations period until the act ceases. The doctrine also recognizes that though the statute of limitations is tolled by a continuing tortious act, 'in such a case[,] a recovery may be had for all damages accruing within the statutory period before the action, although not for damages accrued before that period.' (quoting Wong Nin v. City & County of Honolulu, 33 Haw. 379 (1935))); Lyons v. Township of Wayne, 888 A.2d 426, 430 (N.J. 2005) ("One who suffers a continuing nuisance, therefore, is 'able to collect damages for each injury suffered within the limitations period.'" (citation omitted)). To promote efficiency, continuing nuisance damages incurred to the time of trial (rather than to the time the continuing nuisance action was commenced) also could be recoverable. *See, e.g.*, Renz v. 33rd Dist. Agric. Ass'n., 46 Cal. Rptr. 2d 67 (Cal. Ct. App. 1995) (permitting recovery of continuing nuisance damages between commencement and conclusion of action notwithstanding California Supreme Court *dicta* that damages available during limitations period preceding commencement of action).

457. *See, e.g.*, Kathan v. Bellows Falls Village Corp., 223 A.2d 470, 472 (Vt. 1966) (cost of repair rather than diminution in property value is appropriate measure of damages in this continuing

property impairment, such as diminution in property value, would be presumptively unavailable under the proposed paradigm.[458] Such a remedial presumption would further promote the policies of site remediation and voluntary cleanup on which the proposed paradigm is based by keeping the focus of continuing nuisance litigation on cleanup rather than on calculating the price of a permanent nuisance pollution easement.

CONCLUSION: NUISANCE LAW AND THE FUTURE OF PRIVATE CLEANUP COST DISPUTES

The uncertainty regarding the future role of federal law in private cleanup cost disputes caused by *Aviall* has created an opportunity for private nuisance to play a significant role in private cleanup cost disputes. Private nuisance law can fill significant gaps in the CERCLA private enforcement scheme by providing a private cleanup cost remedy at petroleum contamination sites[459] and encourage voluntary remediation by owners of contaminated property by allowing them to obtain from those who caused most or all of the pollution their fair share of cleanup costs.[460] Moreover, private nuisance law can promote litigation and remedial efficiency and flexibility by providing a common body of state law for resolution of all contamination-related claims[461] and encouraging technically sound, prompt, and cost-efficient remediation whether or not in compliance with the often time-consuming and expensive procedural requirements of the NCP.[462]

In its current state, however, private nuisance law remains a theory of unrealized potential inapplicable to many common types of private cleanup cost disputes. In most states, a landowner cannot bring a private nuisance claim to address same property contamination problems. The responsible parties' failure to remediate long-standing contamination continues to substantially interfere with current owner's use and enjoyment of her property, yet in many jurisdictions nuisance claims to obtain cleanup costs from or an abatement injunction against the polluter would

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trespass case); *see also* FISCHER, *supra* note 251, §84(b)(i) (temporary nuisance damages include diminished rental value and lost use damages).

458. *See supra* note 439 and accompanying text.

459. CERCLA does not provide a cleanup cost remedy for petroleum contamination because petroleum is expressly excluded from the definition of "hazardous substances" covered by the statute. 42 U.S.C.A. § 9601(14) (West 2006). *See supra* note 136 and accompanying text.

460. The current owner of contaminated property is a "covered person" liable under CERCLA section 107(a)(1). 42 U.S.C.A. § 9607(a)(1). Under *Aviall*, the landowner would be unable to bring a section 113(f) contribution action unless it first had been sued under CERCLA or settled with the government, while under pre-*Aviall* case law the current owner as a PRP also would be barred from asserting a section 107(a)(4)(B) cost recovery claim. *See supra* notes 72-83 and accompanying text.

461. Private remedies under CERCLA only address recovery of "necessary costs of response" to a release or threatened release of hazardous substances. 42 U.S.C.A. §§ 9607(a)(4)(B), 9613(f). CERCLA does not authorize private claim injunctive relief, nor does it provide for personal injury damages, lost profit or other economic damages, lost use or diminution in value property damages. *See supra* note 63 and accompanying text. Some or all of these contamination-related damages may be available to a current owner under a continuing or permanent nuisance theory.

462. *See supra* notes 140-45, 429 and accompanying text.

be time-barred. Finally, the doctrinal limitations of current nuisance law are underscored by the dramatic state-by-state variations in the scope of nuisance law, reflecting a patchwork quilt of random environmental protection rather than a coherent body of law responding to the nationwide problem of remediating contaminated properties.

The environmental nuisance paradigm proposed by this article would solve these problems by (a) expanding the scope of nuisance liability to include same property private nuisance disputes, (b) eliminating *caveat emptor* and other common law market-based risk allocation tools as defenses to liability,[463] (c) adopting a reasonable abatability of harm standard for continuing nuisance, (d) creating a rebuttable presumption that a soil or groundwater contamination nuisance was continuing (i.e., the contamination was reasonably abatable), and (e) placing the burden of proof on the party contending that a nuisance was permanent to show that the contamination was not reasonably abatable. This proposed paradigm would allocate cleanup cost obligations on the basis of comparative responsibility for site conditions, encouraging voluntary cleanups by current landowners and the informal resolution of cleanup cost allocation disputes.

This paradigm could be adopted by the states in several ways. First, state appellate courts could embrace the principles underlying the paradigm through the case-by-case evolution of common law. The definition of nuisance under the Restatement (Second) of Torts and most state law is broad enough to encompass same property cleanup cost disputes, and many state appellate courts have not yet directly addressed whether soil or groundwater contamination constitutes a continuing or permanent nuisance.[464]

Second, state legislatures may find that legislation represents a faster and more efficient solution. Some state appellate courts may be unable to implement the paradigm because of *stare decisis* concerns or limitations imposed by existing state statutes. Moreover, the evolution of state private nuisance case law could take years. To avoid these potential obstacles, state legislatures could enact an environmental nuisance statute codifying the elements of this paradigm. Whether accomplished by statute or case law, however, the goal of meaningfully addressing the nation's soil and groundwater pollution problem will be served by each state that chooses to embrace the paradigm.

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463. An express contractual release constituting a knowing waiver of nuisance-based rights would remain enforceable under the proposed paradigm. *Caveat emptor* and other common law market-based risk allocation tools would remain relevant to fashioning a remedy against a liable defendant. *See supra* notes 399-407 and accompanying text.

464. *See supra* note 364 and accompanying text.

Other bodies of law, of course, remain applicable to private cleanup cost disputes.[465] To the extent that after *Aviall* a landowner can still recover cleanup costs from other PRPs under CERCLA, she may choose to proceed with a cleanup consistent with the NCP in order to take advantage of CERCLA's retroactive, status-based strict liability scheme[466] as well as comparable private claims possibly available under state Superfund laws. Buyers of contaminated property may have contract or fraud-based claims against sellers, newly-discovered contamination may give rise to a negligence claim, and contamination from a neighboring property could provide the basis for a trespass or traditional private nuisance action. None of these legal theories, however, provide the breadth and flexibility that would be available under the proposed private nuisance paradigm.[467]

A modernized law of private nuisance would assure the availability of a cleanup cost remedy to the owner of property contaminated in whole or in part by others. The sea change in contaminated property law occasioned by *Aviall* has shined a spotlight on the need to modernize the law of private nuisance. State courts and legislatures should seize the opportunity to bring a revitalized law of private nuisance law back from the margins as a significant rule of decision in private cleanup cost disputes.

465. *See supra* note 363.

466. CERCLA should not broadly preempt direct actions under nuisance or other state law theories for cleanup cost damages or abatement injunctive relief (at least in the absence of an EPA or court order issued under RCRA or CERCLA). For a discussion of CERCLA preemption of state law direct and derivative claims, see Aronovsky, *supra* note 5, at 90-104.

467. *See supra* notes 150-61 and accompanying text.