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Moving a Mountain: The Struggle for Environmental Justice in Southeast Los Angeles

by Richard T. Drury

Editors' Summary: Environmental protection frequently requires creative legal strategies, and operating solely through the court system is not always the most effective means for protecting the environment and public health. In this Article, Richard T. Drury offers a case study of a public nuisance suit against a concrete-crushing facility in southeastern Los Angeles County. The facility, which was causing pollution and health concerns for the surrounding Latino low-income community, was challenged through an administrative public nuisance complaint to the city council. The case study demonstrates the importance of community organizing and scientific research, as well as the continued power of the common law.

In late 1994, Linda Marquez, a lifelong resident of the small city of Huntington Park in southeastern Los Angeles County, contacted Carlos Porras, the new southern California director of Communities for a Better Environment (CBE), an environmental justice organization. Marquez complained that a concrete-crushing facility called Aggregate Recycling Systems, Inc. (ARS), located across the street from her apartment, was creating massive clouds of dust that were making her and other residents of the area sick.

When Porras visited the area, he was shocked to find an 80-foot-high mountain of concrete debris towering over Cottage Street, a largely Latino, low-income community of small single-family homes and two-story apartment buildings.[1] Porras did not even need directions to find the mountain—it was taller than anything in the area and visible from miles away.

The concrete mountain, called "La Montaña" (Spanish for "the mountain") by local residents, created billowing clouds of dust from ARS' around-the-clock concrete-crushing operations. Area residents complained of chronic nosebleeds, sinus headaches, and difficulty breathing. Many children suffered from these same ailments as well as frequent asthma attacks, chronic bloody noses, and respiratory difficulties.[2] To avoid the constant dust, residents became virtual prisoners in their own homes.

Many other environmental organizations had declined to help the Cottage Street residents in their effort to fight the "recycling" facility. Porras, a former labor union president who came to environmental struggles through representing workers exposed to pollution from a nearby refinery, recognized that La Montaña was both a significant environmental problem and an embodiment of the political and environmental transformations that were affecting much of southern California. He pledged to direct CBE's legal, science, and community organizing teams to address the problem, but quickly learned that the legal and political issues were far more complex than they appeared on his first visit.

Porras created a unique three-pronged approach for CBE, combining community organizing, scientific research, and legal strategies to achieve environmental justice for the Cottage Street community. By starting with community organizing, it was possible to ensure that the community directly affected by La Montaña was in charge of the campaign. Solid scientific research created a firm technical basis to identify the source of the problems and potential solutions, and prevented the community from being dismissed by hired experts paid to obscure the problem. Finally, legal strategies based on the common-law theory of public nuisance enabled the community to translate their personal stories and scientific research into legally binding judgments. It is unlikely that any one of these approaches alone would

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1. William B. Fulton, *The Mountain That Should Have Been a Molehill*, CAL. LAW. MAG., Nov. 1996, at 13; WILLIAM B. FULTON, THE RELUCTANT METROPOLIS 67-97 (Johns Hopkins Univ. Press 1997) [hereinafter FULTON, RELUCTANT METROPOLIS].

2. In the Matter of Huntington Park, Declaration of Public Nuisance Aggregate Recycling Systems, 6208 Alameda Street, Huntingon Park, Findings of Fact and Conclusions of Law, Colin Lennard, City of Huntington Park Hearing Officer (Feb. 7, 1997) [hereinafter *In the Matter of Huntington Park*]. (This order and other case documents discussed in this Article are on file with the author.)

have been sufficient to achieve the ultimate result, but together the three-part approach was able to move a mountain.

History of the Concrete Mountain

It is difficult to understand the significance of La Montaña without understanding the complex history of Southeast Los Angeles County, and particularly the region's fractured politics of race. La Montaña is often discussed as a classic example of environmental racism. But as with most cases of environmental racism, race alone provides too narrow a lens through which to understand the problem, which also involved economic, political, and geographic divisions.

The Rise of Latino Political Power in Huntington Park

Huntington Park is one of eight tiny, separately incorporated cities in southeastern Los Angeles County. All eight cities fit into an eight-mile by five-mile area, yet are home to over 300,000 people. The cities were incorporated in the early 1900s to provide an industrial base to produce tires and other products for the growing city of Los Angeles.[3]

Historically, Huntington Park was the wealthiest of these small cities, and longtime residents recall the days when they were known as the "lily whites."[4] However, a combination of factors in the l960s and 1970s, including the migration of heavy industry overseas, the Watts riots, and a national wave of suburban "white flight" led to the closure of many of the area's factories and the departure of large numbers of the "lily whites."[5]

In their place came a wave of new Latino immigrants. By 1980, the population of Huntington Park was 81% Latino and 17% Anglo.[6] Nevertheless, until 1991, due largely to extremely low voter turnout among the new Latino residents, the minority Anglo population continued to maintain control over Huntington Park's city government. In 1991, however, three Latinos were elected to the five-member city council.[7] Three years later, this majority grew to four out of five members, with longtime Huntington Park Mayor Tom Jackson being the only remaining Anglo on the council.[8]

Despite international media attention on the rise of Latino political power in Huntington Park and other nearby cities, voters soon learned that changing faces in city hall did not necessarily translate into more responsive government. Local real estate investor and Jaycees member Raul Perez and Republican Rosario Marin (later to become U.S. Treasurer under President George W. Bush) formed a pro-business faction with local business owner Tom Jackson. Democratic party activists Ric Loya, a popular local high school teacher, and Jessica Maes allied themselves as a progressive minority. This composition of the city council would ultimately allow ARS to continue its pollution unabated for years.

Aggregate Recycling Systems Comes to Town

In November 1993, when ARS approached the city of Huntington Park with a proposal for a lot that had been vacant a long time, it seemed like a perfect opportunity for the new Latino-controlled city council to prove that it was business-friendly. ARS' owner, Sam Chew, proposed to take concrete debris and crush it for reuse as aggregate for roadbeds and for mixing with cement for new roads and structures. His application represented to the city that the concrete operation would be conducted in an environmentally responsible manner with several measures to reduce impacts on nearby residents, including keeping the concrete pile below the eight-foot cinder block wall surrounding the facility, conducting crushing indoors in a building with air traps, and installing spray bars to minimize dust.[9]

At the hearing on the permit application, several council members thanked ARS for helping to create jobs for local residents with its environmentally friendly recycling facility. The council unanimously approved a permit for ARS. In its enthusiasm for the project, the council imposed few conditions on the conditional use permit and required no environmental review.

Two months later, the Northridge earthquake devastated Los Angeles, drastically increasing the size of ARS' operation.

The Northridge Earthquake Shakes Los Angeles and Transforms ARS Into La Montaña

On January 17, 1994, the magnitude 6.7 Northridge earthquake struck Los Angeles. One of the most expensive natural disasters in U.S. history, the earthquake's total damage was estimated at $15 billion, and it exacted a toll of 57 deaths and 1,500 serious injuries.[10]

A casualty of the earthquake was the heavily traveled Santa Monica Freeway, just west of Huntington Park. Prior to the earthquake, the Santa Monica Freeway was the busiest freeway in the world, carrying 341,000 vehicles each day.[11] The earthquake caused two bridges to collapse, one at the La Cienega-Venice underpass, the other at the Fairfax-Washington underpass.[12] For the most automobile-dependent city in the nation, the result was devastating.

Determined not to follow the example of San Francisco, which had still not completed the reconstruction of the Bay Bridge that was damaged in the 1989 Loma Prieta earthquake despite the passage of five years,[13] Los Angeles set out to rebuild the Santa Monica Freeway in record time. CalTrans, the agency in charge of highways in California, set an ambitious target of 140 days for reconstruction, offered financial incentives of $200,000 per day for each day that the contractor completed construction early, and set a financial penalty of $205,000 per day for late completion. The result was dramatic. Construction began immediately, and

3. Fulton, Reluctant Metropolis, *supra* note 1, at 70-72.
4. Interview with Linda Marquez, Huntington Park resident (Sept. 16, 1996).
5. Fulton, Reluctant Metropolis, *supra* note 1, at 76.
6. *Id.* at 81.
7. *Id.* at 87.
8. *Id.* at 90.
9. *In the Matter of Huntington Park*, *supra* note 2, at 2-3.
10. Earthquake Museum, *The 1994 Northridge Earthquake*, http://www.olympus.net/personal/gofamily/quake/famous/northridge.html (last visited Mar. 28, 2008).
11. Ann K. Deakin, *Potential of Procedural Knowledge to Enhance Advanced Traveler Information Systems* (Transp. Research Record 1573, Paper No. 971213, 1994).
12. *Id.*
13. As of early 2008, the Bay Bridge reconstruction has still not been completed.

the Santa Monica Freeway was open to traffic in a mere 66 days, 74 days ahead of schedule.[14]

In its haste to complete the project, CalTrans had left itself little time to consider how to dispose of the huge amount of debris that used to be the Santa Monica Freeway. As low bidder on the disposal contract, ARS took in much of the debris, and its formerly small recycling operation quickly became the massive La Montaña, an 80-foot-tall mountain containing 600,000 tons of concrete debris. Dump trucks lined up at the facility at all hours of the day and night, while bulldozers and front-end loaders pushed the new material ever higher on the mountain.[15] With its entire yard full of concrete debris, ARS moved its crushing equipment to the top of the mountain, and began operating the crushers around the clock in a futile attempt to keep up with the incoming loads.

The continuous crushing operations from the top of the mountain created a massive plume of particulate matter (PM) that blanketed streets up to an inch deep, and covered nearby homes, cars, furniture, food, dishes, and lawns, particularly on the downwind Cottage Street side of the facility, with a layer of sticky concrete dust.[16] Residents of the low-income community, many without air conditioning, were forced to keep their doors and windows closed even in the squelching heat of the Los Angeles summer, and many had to abandon outdoor activities entirely.[17] The highly caustic concrete dust caused many residents to suffer from respiratory problems, including bloody noses, sinus headaches, and irritated noses, eyes, and throats.[18] Many area children suffered increased asthma episodes, frequent bloody noses, and breathing difficulty.[19] Some nearby businesses also experienced problems. Commercial Enameling, a longtime business engaged in the production of porcelain sinks, had to scrap more than $3,000 worth of damaged sinks per day because dust from the ARS site damaged them.[20] Dust from ARS also damaged wood moldings produced by Saroyan Lumber, located on the other side of ARS.[21] The vibrations from the crushing operations also forced Saroyan to abandon one of its buildings.[22]

The Community Fights Back

To remove La Montaña from Huntington Park and shut down the ARS facility, CBE undertook to organize the community, to marshal scientific evidence of the deleterious health effects of the pollution from ARS, and ultimately to take legal action.

Organizing the Community, Finding Allies

Porras understood that any lasting solution to the problems would have to involve community empowerment. He knew that even if ARS were shut down, if the Cottage Street community did not develop an organized political presence, the facility could be replaced by a new, possibly even more hazardous polluter. Porras' instincts have since been affirmed by academic research confirming that communities such as Huntington Park, which are in ethnic transition and lack established community organizations, are the most likely to become home to undesirable polluting facilities, especially when compared to more stable low-income communities of color that have established community groups.[23] These studies showed what Porras knew instinctively—it was critically important for the community to develop organized institutions to defend its quality of life.

Porras' first step was to hire veteran community organizer Alicia Rivera, a former immigrant and environmental organizer. Rivera went door to door through the Cottage Street neighborhood to hear complaints directly from the people who were affected, and to encourage the neighbors to band together. In a short time, the neighbors were holding weekly house meetings, usually at Marquez's home across the street from ARS.

The residents, now known as the Los Angeles Comunidades Asembleadas y Unidas Para un Sostenible Ambiente, or Los Angeles Communities Assembled and United for a Sustainable Environment (LA CAUSA), decided to begin attending meetings of the Huntington Park City Council to raise their concerns. The collegial and formerly sparsely attended council meetings were now packed with sometimes over 100 Spanish-speaking residents, creating standing-room-only conditions. Sometimes, the residents even conducted pre-meeting rallies outside of City Hall.

LA CAUSA urged the city to require ARS to pay for an environmental impact report (EIR) under the California Environmental Quality Act (CEQA), California's version of the National Environmental Policy Act (NEPA). An EIR would require the city to retain an independent expert to analyze the facility's environmental impacts and to implement feasible mitigation measures. CBE's lawyers informed the residents that it would be difficult to force the city to prepare an EIR, since the council had initially allowed the facility to operate without any CEQA review and the 35-day statute of limitations under CEQA had long since passed. Also, CEQA generally applies only to new projects. One sign of hope, however, was that a provision in CEQA would allow the city to exercise its discretion to require review upon annual reissuance of ARS' conditional use permit, given that significant new information concerning the project's environmental impacts was not known at the time of the initial permitting.[24]

Residents also urged the council members to visit the facility to see for themselves the types of problems it was creating. Word of the popular uprising spread quickly, and soon local newspapers, radio, and television were covering the demonstrations outside the formerly sleepy Huntington Park City Council chambers.

Mayor Ric Loya, an enthusiastic initial supporter of ARS' proposal, was the first to take up the residents' invitation for a site visit. He was shocked to find that what had been por-

14. C.C. Myers, Inc., *Past Projects: I-5 at State Rte 14—Tunnel/Truck Bypasss*, http://www.ccmyers.com/completedprojects.cfm?ID=8 (last visited Mar. 18, 2008).

15. *In the Matter of Huntington Park*, *supra* note 2, at 4.

16. *Id.* at 4, 7.

17. *Id.*

18. *Id.* at 5.

19. *Id.* at 6.

20. *Id.*

21. *Id.*

22. *Id.*

23. Manuel Pastor et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. Urb. Aff. 1, 19 (2001).

24. Cal. Pub. Res. Code §21166 (Deering 2001); Security Envtl. Sys. v. South Coast Air Quality Mgmt. Dist., 229 Cal. App. 3d 110 (Cal. Ct. App. 1991).

trayed as a small, unobtrusive recycling operation had been transformed into La Montaña. During the site visit, Loya began to cough from the caustic cement dust. He ultimately had to leave the site due to uncontrollable coughing and breathing, and check himself into a local hospital. Not surprisingly, he became the residents' most reliable supporter in their increasingly vocal crusade against ARS.

Despite the sustained community pressure and ongoing media attention, the city council repeatedly voted in favor of ARS, voting 3-2 in favor of allowing the company to continue operations without an EIR, with the pro-business faction of former Mayor Jackson, as well as Perez and Marin outvoting progressives Loya and Maes.

The city council majority allowed ARS to continue its operations, while imposing only two ineffective additional mitigation measures. One required installation of an 11-foot dust screen, and the other limited operations to between 7:00 a.m. and 7:00 p.m. The residents soon discovered that the short dust screen did little to abate dust from the 80-foot mountain.

Despite the failure to get the council to act in its favor, LA CAUSA had achieved something important: the community was now organized, and the issue of La Montaña had been injected into the politics of Huntington Park.

Building the Technical Case Against ARS

The scientists of CBE, led by researcher Shipra Bansal, compiled a compelling mountain of evidence almost as high as La Montaña itself. CBE retained an independent test lab to gather dust samples upwind and downwind of ARS. The company conducted polarized light microscopy on the samples, finding that 70% of the downwind samples were composed of concrete dust, while only 16% of the upwind samples were concrete.[25]

Mayor Loya obtained support from local doctors and the American Lung Association to test Cottage Street residents for respiratory problems. The study revealed that over one-half of the residents suffered from chronic obstructive pulmonary disease.[26]

LA CAUSA members, supported by CBE staff, demonstrated at the South Coast Air Quality Management District (SCAQMD) to demand air testing by the agency. After meeting initial resistance, the SCAQMD agreed to conduct some tests. Despite giving ARS advance notice of the test dates, the results of the downwind test revealed levels of total suspended particulates (TSP) higher than any ever recorded in central Los Angeles during the entire calendar year.[27]

CBE also retained Los Angeles Unified School District atmospheric scientist Bill Piazza, who conducted sophisticated air quality modeling to demonstrate that PM levels generated by ARS were even higher than those measured by the SCAQMD. Piazza found that the SCAQMD had failed to place its monitors at the point of maximum impact, which was one block away from the facility. Dean Hickman, a resident of the apartment located at the point of maximum impact, was one of the community group leaders. The modeling conducted by the atmospheric scientist merely affirmed what Hickman already knew—the adverse health effects he and his family had been suffering were directly caused by the ARS operation.

Developing a Legal Strategy

Despite the growing weight of the independent scientific evidence and the success of the community's organizing efforts, the city council continued to support ARS.[28] Porras and the Cottage Street residents agreed that it was time to try legal strategies even if the legal options were limited.

Weakness of Statutory Procedures

For relief in a situation like that presented by the pollution from ARS, most California environmental lawyers would first look to CEQA because it applies to almost every project that needs a permit in the state. CEQA requires thorough independent analysis of a project's impacts and implementation of all feasible mitigation measures.[29] However, CEQA applies only to new projects—and, as discussed above, the city had initially exempted ARS from CEQA review based on the company's representations that the project would have minimal environmental impacts. Moreover, CEQA's 35-day statute of limitations had long since passed. The residents' efforts to persuade the city council to require discretionary CEQA review for renewal of ARS' conditional use permit had also been unsuccessful. CBE's lawyers concluded that it would be difficult to force the city to conduct CEQA review through litigation.[30]

Options under the federal Clean Air Act were also limited. The SCAQMD had granted ARS a "mobile source" air permit because ARS used movable crushing equipment. The SCAQMD's mobile source permitting rules were far more lenient than stationary source rules because they assumed that a mobile source would not remain in one location for more than a few weeks. Thus, the SCAQMD's rules allowed mobile sources to create significant short-term annoyances. However, ARS' mobile source equipment was more accurately described as a stationary source. The company conducted its crushing operations for months and years at the same location. In elevating form over substance, the SCAQMD focused only on the fact that the ARS crusher had wheels, not on the fact that it almost never used those wheels.

Working with the Santa Monica Baykeeper, Terry Tamminen (later to become Secretary of the California Environmental Protection Agency under Gov. Arnold Schwarzenegger (R-Cal.)), CBE's attorneys turned to another federal statute, the Clean Water Act (CWA). ARS did not have a stormwater pollution prevention plan in place, as required by the Act.[31] As a result, during rainfall, storm-

25. *In the Matter of Huntington Park*, *supra* note 2, at 5.

26. Fulton, Reluctant Metropolis, *supra* note 1, at 93.

27. *In the Matter of Huntington Park*, *supra* note 2, at 5.

28. As noted above, the city council had previously voted 3-2 in favor of allowing the company to continue operations without an EIR.

29. Cal. Pub. Res. Code §21000.

30. *See* Bloom v. McGurk, 26 Cal. App. 4th 1307, 1315 (Cal. Ct. App. 1994), holding that CEQA review would not be required for permit renewal for a preexisting incinerator even though the incinerator had originally been permitted to operate without CEQA review. The court held that CEQA concerns only changes from the preexisting environment, and the preexisting environment now included the incinerator.

31. 33 U.S.C. §1342(p)(6); *see also* 40 C.F.R. §§122.21(a), 122.26(c)(1), 122.26(b)(14)(iii) (2005).

water runoff would carry cement dust into storm drains and ultimately into the ocean. CBE sued ARS in federal court for violations of the CWA.[32] In July 1998, Chief Judge Mathew Byrne of the U.S. District Court for the Central District of California ruled in favor of CBE. The remedy ordered by the court, however, required ARS merely to prepare and implement a plan to prevent stormwater pollution. While promising improvements in water quality, the ruling did not solve the community's concerns about air quality and noise.

Turning to Common-Law Options: The Principle of Nuisance

Recognizing that the options for legal action under environmental statutes were limited, CBE's attorneys turned to the common law. The California Civil Code §§3479 and 3480 contain an expansive public nuisance provision. Section 3479 defines a nuisance as:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.[33]

Section 3480 defines a "public nuisance" to be 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."

CBE was aware of a long line of older California cases finding operations very similar to ARS' to be nuisances. In the 1907 case *Donahue v. Stockton*,[34] the court held that the operation of a plant with gas works and reservoirs in Stockton that polluted the atmosphere, soil, and groundwater was a nuisance. In *Morton v. Superior Court*,[35] noise and dust created by a stone quarry and rock-crushing operation near Redwood City was deemed a public nuisance because it interfered with the neighbors' comfortable enjoyment of their property. In another early case, the court found dust from a clay factory that was deposited on nearby homes to be a nuisance, and held that dust constitutes a nuisance if it "causes perceptible injury to the property, or so pollutes the air as to sensibly impair the enjoyment thereof."[36] In *Hulbert v. California Portland Cement Co.*,[37] the California Supreme Court held that dust from a cement factory on Slover Mountain, in San Bernardino County, interfered with comfortable enjoyment of nearby property, and was a nuisance. The court upheld an injunction to stop operations at the facility despite the company's showing that the injunction would severely impact its business.[38] The court held:

> There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land.[39]

Although it has largely fallen into disuse, this line of cases remains good law. CBE's legal team therefore concluded that it had a good argument that ARS' noise and dust constituted a nuisance, despite any economic benefit generated by the operation.

CBE also looked at the utility of common-law nuisance to address the other environmental impacts from the ARS operation, such as stormwater pollution. In some other early cases, the California courts had held that industrial operations that polluted waters and harmed fish were a public nuisance.[40] CBE was encouraged.

The common-law approach was also advantageous because of the breadth and vagueness of the definition of nuisance under California law: if a nuisance action were brought in trial court, the judge would have broad discretion to determine whether the ARS facility was creating a nuisance and, if so, to balance the equities in determining the appropriate remedy. CBE was aware that some courts had shut down operations deemed to be creating a public nuisance.[41] Others had held that injunctive relief should be no more restrictive than necessary to reduce the polluter's behavior to below the level of a nuisance.[42] And some courts had simply awarded monetary relief for the diminution of property value without any injunctive relief at all.[43]

CBE's attorneys therefore cautiously advised the clients that even if they were able to prevail in a nuisance lawsuit, the court still might not shut down the ARS facility, and it might not impose adequate injunctive relief to satisfy the community's concerns. Also, if CBE were to proceed in state court, it would need to file a private, rather than a public nuisance, action. California law was clear that public nuisances must be prosecuted by governmental entities unless private parties could show they had suffered special injuries.[44]

In assessing ARS' potential defenses, CBE again saw some advantages to a common-law approach. The California courts had held that a company may not claim a "permit defense."[45] That is, a company may not create a nuisance even if it is operating its business under valid governmental permits.[46] The courts had reasoned that a permit does not tacitly allow the company to create a nuisance even though the government has granted it a permit to operate.[47] Thus CBE felt that the common-law claim effectively knocked out what would likely be a primary defense of ARS to legal

32. Communities for a Better Env't et al. v. Aggregate Recycling Sys., Inc. et al., No. CV 96-7837 WMB (BQRx) (C.D. Cal. 1996).

33. Cal. Civ. Code §3479 (Deering 2001).

34. 6 Cal. App. 276, 280-81 (Cal. Ct. App. 1907).

35. 124 Cal. App. 2d 577, 579 (Cal. Ct. App. 1954).

36. Centroni v. Ingalls, 113 Cal. App. 192, 195 (Cal. Ct. App. 1931) (citing Tuebner v. California St. R.R. Co., 66 Cal. 171 (Cal. 1884); California Orange Co. v. Riverside Portland Cement Co., 50 Cal. App. 522 (Cal. Ct. App. 1920); McIntosh v. Brimmer, 68 Cal. App. 770 (Cal. Ct. App. 1924)).

37. 161 Cal. 239, 254 (Cal. 1911).

38. *Id.* at 244-45.

39. *Id.* at 248.

40. People v. Stafford Packing Co., 193 Cal. 719, 726-27 (Cal. 1924).

41. *Hulbert*, 161 Cal. at 254.

42. Morton v. Superior Court, 124 Cal. App. 2d 577, 581-82 (Cal. Ct. App. 1954).

43. Boomer v. Atlantic Cement Co., 340 N.Y.S.2d 97, 107-08 (N.Y. 1972).

44. Diamond v. General Motors, 20 Cal. App. 3d 374, 378 (Cal. Ct. App. 1971) (quoting Cal. Civ. Code §3493).

45. Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116, 128-29 (Cal. Ct. App. 1971).

46. *Id.* at 128-29.

47. *Id.*

action. ARS would not be able to raise its city permits as a shield to the nuisance claim.

On balance, CBE concluded that California's expansive nuisance-law statutes and case law made it particularly well suited to address modern industrial environmental hazards such as the ARS problem.[48] Unfortunately, despite the strength of the old nuisance cases, there was, and still is, very little case law applying nuisance to industrial hazards in the last 50 years. This absence of recent case law may be explained by the enactment of environmental statutes since the 1970s and the fact that most environmental law practitioners have been trained to think that the common law is old-fashioned and not adequate to address modern environmental problems. Even to a brave lawyer, the lack of favorable case law from recent decades is disconcerting, and the gap in the law makes it all the more difficult to persuade a reluctant judge to take action based on common-law theories.

Nuisance With a Twist

The CBE legal team then discovered an interesting twist that offered the advantages of the common law of nuisance but eliminated many of the uncertainties of a nuisance lawsuit. Rather than sue ARS in California Superior Court, the residents and CBE could bring an administrative complaint for public nuisance before the city of Huntington Park. If the city could be persuaded to declare ARS to be a public nuisance, then ARS, not the residents, would have the burden of suing the city in the California Superior Court to attempt to reverse the decision. But the result had some risks—the court would apply a highly deferential standard of review and likely support the city's determination either way, as long as it was supported by "substantial evidence."[49]

Largely because of the vagueness of the nuisance law, California courts have long granted significant deference to governmental entities to deem activities to be nuisances and to take any reasonable action to abate the nuisances. In *City of Bakersfield v. Miller*,[50] the city of Bakersfield deemed a hotel to be a public nuisance because it was a fire hazard.[51] The California Supreme Court held:

> In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature.[52]

The court also held that it would defer to Bakersfield's determination of the measures necessary to abate the nuisance, even if the abatement required destruction of the building.[53]

Fortunately for CBE and LA CAUSA, the city of Huntington Park had adopted a public nuisance ordinance, creating an administrative process for the determination and abatement of public nuisances.[54] Such statutes are common among California cities and have been applied to a broad range of nuisances, from vacant lots overgrown with weeds to "crack houses" and industrial facilities. Under the city's nuisance ordinance, any resident could petition to have a facility deemed a public nuisance. The matter would be assigned to an administrative law judge assigned by the city manager, and a decision could be appealed to the city council.

The challenge had once again become political. How would CBE and LA CAUSA persuade a city council that had consistently ruled in favor of ARS to declare the facility a public nuisance?

The Public Nuisance Hearing

As a result of CBE's extensive review of the legal options, LA CAUSA launched a new organizing campaign to convince the city to institute a quasi-judicial administrative proceeding to determine whether ARS was creating a public nuisance pursuant to the city's nuisance ordinance. A California court of appeal had recently held that a facility's conditional use permit, like the one possessed by ARS, could not be revoked until it was given notice and a public hearing was held to establish substantial evidence showing the facility to be a public nuisance.[55] Once this due process was afforded to the facility, however, the court would defer to the city's finding that the facility was a nuisance so long as it was supported by substantial evidence in the record.[56]

Reinvigorated by the new strategy, LA CAUSA members began once again to attend and protest at city council meetings. Another community organization called United Neighborhood Organization (UNO), based in the largest Catholic church in the area and led by Father Rody Gorman, also joined the effort. Without the support of LA CAUSA, Father Gorman persuaded council members Marin and Perez, who were his parishioners, and Jackson to support a deal under which ARS would be required to close entirely within one year, during which time it would be required to grind down the rubble and sell it for use in concrete. CBE warned the city attorney and council that the deal would be illegal under the *Goat Hill Tavern v. City of Costa Mesa*[57] case because the court there held that a conditional use permit could not be terminated without a public nuisance hearing. Nevertheless, Jackson, Marin, and Perez voted for the proposal. Almost immediately, the city was sued by ARS, which sought $1 million in damages. In an effort to rescind the legally vulnerable deal, CBE also sued the city for violating California's sunshine law, the Ralph Brown Act,[58] by deliberating over the proposal in closed session. In the face of the two lawsuits, the city rescinded its decision, mooting the lawsuits. Unfortunately for the community, however, the botched deal allowed ARS to continue its operations unabated.

48. *See* Ernest Getto & James Arnone, *Nuisance Law in the Modern Industrial Setting: Confusion, Misinformation Can Prove Dangerous*, *Part I*, Toxics L. Rep., Feb. 6, 1991, at 1118 and *Part II*, Toxics L. Rep., Feb. 13, 1991, at 1148.

49. Goat Hill Tavern v. City of Costa Mesa, 6 Cal. App. 4th 1519, 1529-31 (Cal. Ct. App. 1992).

50. 64 Cal. 2d 93, 99 (Cal. 1966).

51. *Id.* at 99.

52. *Id.*

53. *Id.* at 103-04.

54. Huntington Park Mun. Code §5-35.04 (2000).

55. Goat Hill Tavern v. City of Costa Mesa, 6 Cal. App. 4th 1519, 1529-31 (Cal. Ct. App. 1992).

56. *Id.* at 1531; Mohilef v. Janovici, 51 Cal. App. 4th 267, 278-80 (Cal. Ct. App. 1996).

57. 6 Cal. App. 4th 1519, 1529, 1531 (Cal. Ct. App. 1992).

58. Cal. Gov't Code §54950 (Deering 2005).

After the stinging rebuke of the city's actions, which was covered extensively in the media, the city's attorney, Steven Skolnick, recommended that the city invoke its nuisance ordinance and commence a quasi-judicial public nuisance proceeding, as recommended by CBE and LA CAUSA. Finally, the city council agreed and retained the respected environmental lawyer Colin Lennard to preside as its hearing officer.

Lennard conducted five days of administrative hearings between September 17, 1996 and October 9, 1996. At the initial hearing, he granted CBE intervenor status to represent Cottage Street residents. CBE's in-house attorneys were joined by the students of the Environmental Law Clinic at the University of California at Los Angeles School of Law. The city was represented by outside counsel Bonnie Yates. ARS appeared without counsel, represented only by its owner, Sam Chew.

CBE's strategy was to combine real-life community experiences with scientific evidence and legal authority. CBE began the proceedings with almost a dozen area residents who testified to their personal experiences living near ARS—breathing problems, nosebleeds, asthma attacks, and hospitalizations. This testimony was supported by an atmospheric scientist, a respiratory health expert, an environmental scientist, and others, who testified that ARS was the likely source of the residents' health problems and that the health problems were consistent with high-level exposure to concrete PM.

CBE's legal staff filed pretrial briefs providing the legal framework for the nuisance claim, and post-trial briefs applying the law to the facts shown at trial. Although dated, the *Morton* and *Hulbert* cases, mentioned above,[59] were particularly helpful because they both involved public nuisances created by concrete dust. During the course of the proceedings, hearing officer Lennard took a particular interest in the recent California case of *Mohilef v. Janovici*,[60] which involved an ostrich farm that was declared a public nuisance in an administrative proceeding under the city of Los Angeles' nuisance ordinance. The case reaffirmed the old case law granting broad discretion to cities to declare facilities to be public nuisances, and also set forth the procedural requirements for an adequate quasi-judicial proceeding.[61] While the court in *Mohilef* held that a quasi-judicial proceeding was required before a facility could be determined a nuisance and abated, the court also held that the proceeding did not need to follow formal evidentiary rules or allow for cross-examination.[62] Lennard was careful to comply with the guidance set forth in *Mohilef*, *Goat Hill*, and other cases in this regard.[63]

For five days, Lennard heard testimony in the city council's chambers in a trial-like proceeding, heavily attended by Huntington Park residents. A long line of residents testified as to their personal experiences with the dust, noise, and related health problems. Marquez and other residents testified about the constant noise, dust, breathing problems, nosebleeds, and other problems. Many of the residents testified to having to abandon outdoor activities altogether, and becoming virtual prisoners in their own homes. One of the few remaining Anglo residents, Thomas Lunde, testified to spitting up dirt he described as the consistency of grits every morning.

CBE also called several expert witnesses. Staff researcher Bansal testified about the polarized light microscopy showing ARS to be the major source of particulate pollution in the neighborhood. Bansal also explained the results of the health study that showed over one-half of the area residents to be suffering from chronic obstructive pulmonary disease. Atmospheric scientist Piazza testified that the 11-foot-tall dust screen was inadequate to mitigate dust from the 80-foot-tall mountain. He also testifed that PM tests taken by the SCAQMD underestimated the amount of TSP due to improper placement of monitors.[64] Santa Monica Baykeeper Tamminen testified that ARS' inadequate stormwater control measures allowed concrete dust from the site to contribute to serious pollution in the Santa Monica Bay, adversely affecting fish and plant life.

ARS called an SCAQMD witness to testify concerning tests taken by its air district. On cross-examination, the witness admitted that although the tests did not show high levels of particulate matter with a diameter of 10 microns or less (PM_{10}),[65] they did reveal extremely high TSP levels downwind of the ARS facility. The witness testified that he did not report the high TSP data because the SCAQMD did not have regulations governing TSP. The witness also admitted that he provided ARS with advance notice prior to each test and that as a result ARS was not operating at all during any of the tests. In response, ARS made a primary jurisdiction argument that the hearing officer should defer to the SCAQMD as the lead air quality agency. Ruling against ARS, Lennard found that the SCAQMD's evidence was largely irrelevant because the harm at issue concerned TSP, a pollutant that was unregulated by the SCAQMD. Lennard also found that the tests lacked credibility because the monitors were placed in the wrong location, ARS was given advance notice of the tests, and ARS was not operating during the tests.

CBE's star witness was Prof. Michael Kleinman of the University of California at Irvine. Professor Kleinman had been the chair of the California Air Resources Board's Science Advisory Committee and had written extensively on the health effects of inhaling PM. Professor Kleinman testified that the levels of PM measured downwind of the ARS facility would create significant adverse health risks. He also testified that the symptoms identified by the Cottage Street residents were precisely those one would expect to see from high-level PM exposure.

The city called its own inspectors as witnesses to testify about the numerous notices of violation issued by the city against ARS for, among other violations, excessive noise during the middle of the night, double-parked debris trucks blocking streets, the collection of concrete dust in public streets at levels several inches thick, and vibrations that interfered with neighboring residents and businesses. Even though the city and CBE often relied on each other's evidence, the parties were careful to maintain a reasonable degree of independence since it was possible that their inter-

59. *Morton*, 124 Cal. App. 2d at 577; *Hulbert*, 161 Cal. at 239.

60. 51 Cal. App. 4th 267 (Cal. Ct. App. 1996).

61. *Id.* at 278-80.

62. *Mohilef*, 51 Cal. App. 4th at 297-304.

63. *Id.*; *Goat Hill*, 6 Cal. App. 4th at 1529.

64. TSP is all of the PM that is airborne, regardless of size. This includes PM_{10} and PM less than 2.5 microns in diameter, as well as larger airborne PM.

65. PM_{10} is PM under 10 microns in diameter.

ests could change later in the proceedings, should the hearing officer or city council decide not to declare the facility to be a public nuisance.

In defense, Chew primarily argued that the dust was created by Saroyan Lumber. His legal argument hinged almost entirely on the partial SCAQMD tests results, which found ARS not to be in violation of air district regulations. ARS argued that under the doctrine of primary jurisdiction, the hearing officer should defer to the SCAQMD as the agency with jurisdiction over air quality issues in the region. As noted above, hearing officer Lennard found the SCAQMD's test results largely unpersuasive for a variety of reasons and rejected ARS' arguments.

After closing arguments, Lennard deliberated over the evidence for four months. On February 7, 1997, he issued an 11-page findings of fact and conclusions of law holding ARS to be creating a public nuisance and issuing an order abating the nuisance. Lennard found ARS to be creating a nuisance per se because it was violating several provisions of the Huntington Park municipal code, including provisions prohibiting the deposition of dust on neighboring properties, vibrations that disturb neighboring properties, loud noises at night, trash and debris visible from public streets, and standing water, among other provisions. He also found ARS' operations to constitute a public nuisance within the definitions of California Civil Code §§3479 and 3480 because its operations were injurious to the health of its neighbors, were offensive to the senses, and interfered with the comfortable enjoyment of property.

Lennard's order required ARS to render all of its equipment inoperable immediately and to cease all deliveries of new material to the site. ARS was required to hire an independent consultant to develop a plan to remove all debris from the site in an environmentally responsible manner that included controls for dust, noise, and vibrations, and which would eventually decrease the pile's height to a maximum of eight feet. ARS was to remove the debris within 60 days.

ARS immediately appealed Lennard's decision to the city council. This time ARS was represented by attorney Anthony Weber. Chew believed that he might still be able to win the support of Jackson, Perez, and Marin—his three previous supporters.

The city council heard the appeal on March 3, 1997. The council chambers were sweltering, both from the standing room audience that overflowed out into the hallway and from the hot lights of several television cameras. Weber had walked into an extremely hostile environment, and responded defensively. At one point, he suggested that many of the audience members were probably not even in the country legally. That statement prompted outrage from steadfast ARS supporter Marin, herself an immigrant from Mexico who speaks English with a Spanish accent. Marin dressed Weber down at the council meeting for suggesting that people were not legal residents simply because their native language was Spanish. That night, Marin switched her position and joined Loya and Maes in voting to affirm Lennard's nuisance abatement order. The crowd was ecstatic.

Despite the Win, Victory Was Elusive . . . for Seven Years

But ARS stubbornly continued its resistance. The company sued the city in superior court in an attempt to set aside the nuisance abatement order as an abuse of discretion. ARS brought a defamation case simultaneously against CBE, Father Gorman, several named individual residents, and several CBE staff members and supporters.[66] CBE considered the action to be a Strategic Lawsuit Against Public Participation (SLAPP) suit, and promptly filed a SLAPP-back action under the Calfornia anti-SLAPP statute.[67] The anti-SLAPP statute allows defendants to file for quick dismissal of actions that challenge protected free speech activities unless the plaintiff can prove a probability of success.[68] By reversing the typical burden in a motion to dismiss, the anti-SLAPP statute allows most frivolous SLAPP suits to be dismissed at an early stage without trial.[69]

Within months, good news arrived for the community. First, Superior Court Judge Thomas McKnew ruled against ARS in its suit against the city, finding that the city clearly had substantial evidence to support its nuisance determination.[70] Second, after CBE filed its SLAPP-back motion, ARS voluntarily withdrew its SLAPP suit.

In an amazing act of defiance, ARS still refused to clean up the concrete mountain, even though it had lost all of its legal challenges. The city then brought a criminal enforcement action against ARS, but the company pled poverty. ARS claimed that without any revenues from the receipt of new aggregate debris or from the sale of crushed material, it did not have funding to comply with the cleanup order. Mysteriously, ARS could not account for the substantial sums of money that it had received from dumping debris from the Santa Monica Freeway and other debris that it had been receiving until the date of the hearing officer's abatement order.

La Montaña, now idle, loomed over the community for the next seven years. In an almost poetic act of self-healing, after several months without activity, the concrete began to crust over, which greatly reduced the dust problems. In time, plants and even trees began to grow on La Montaña. But the mountain was still an eyesore towering over Cottage Street, and it posed a latent threat so long as it existed.

Then in 2004, Marin, who had returned from serving as U.S. Treasurer, was appointed by Governor Schwarzenegger to the California Integrated Waste Management Board (CIWMB). This time, the one-time ARS supporter responded to requests from the city of Huntington Park, CBE, and Huntington Park community members to secure $2 million in state funding to clean up La Montaña. To the great relief of the community, the cleanup began in November 2004, pursuant to strict dust and noise abatement measures. At the urging of local community members, the city has since purchased the property and will turn it into a park. Thanks to a uniquely powerful combination of community organizing, scientific advocacy, and legal action, followed by a change in key players, Huntington Park will, at long last, be rid of La Montaña.

66. ARS v. Environmental Group, No. 024248 (Los Angeles Super. Ct. filed Apr. 4, 1997).

67. Cal. Civ. Proc. Code §425.16 (Deering 2005).

68. *Id.*

69. *Id.*

70. Goat Hill Tavern v. City of Costa Mesa, 6 Cal. App. 4th 1519, 1529-31 (Cal. Ct. App. 1992).

Lessons Learned

The story of Huntington Park's struggle to remove La Montaña suggests that hybrid legal-political strategies are often most effective for achieving environmental justice. It is possible to achieve results by combining sound legal strategies with direct community organizing that might not be possible through either approach alone.

If CBE had addressed this problem simply as a legal matter and filed a nuisance lawsuit, it is quite possible that a trial judge would not have found the facility to be a nuisance, or might not have ordered adequate nuisance abatement remedies. By bringing the legal strategy into the political arena of a quasi-judicial proceeding before the city council, it was possible to bring political pressure on elected officials to declare what had been obvious for so long—that the ARS facility was a public nuisance and had to close immediately. Elected officials can be swayed by media attention, direct pleas from their constituents, pickets, and other forms of organizing. Such pressures rarely come into play in a judicial proceeding. Once the city was persuaded to declare ARS to be a public nuisance, the procedural burdens on the community radically shifted. Then ARS, not the community, bore the burden to bring a legal challenge in court, and the strong deference in favor of the city's nuisance findings further aided the community's cause.[71]

Sound science is also critically important in most environmental justice disputes. Without the documented opinions of scientific experts such as public health expert Professor Kleinman, atmospheric scientist Piazza, environmental scientist Bansal, and others, it is likely that hearing officer Lennard and the media would have written off the community's concerns as unfounded. Hard science gave the residents credibility in the eyes of the media and the elected officials, and created the "substantial evidence" required by the courts.[72]

Incorporating community organizing into the overall strategy has the important additional benefit of building strong bases of power in the community. Strong community organizations are essential in enabling residents to have a voice in land use and environmental decisions affecting their communities. Communities without strong organizations are much more likely to be targeted for undesirable land uses.

Yet, community organizing alone would not have been sufficient to "move the mountain." Despite months and years of community organizing, the city consistently voted in favor of ARS. The legal framework of a nuisance proceeding allowed the residents to make their legitimate public case for a nuisance finding and gave city decisionmakers a level of assurance that the city was on firm legal ground in shutting down the operation. The case of La Montaña thus demonstrates the continued vitality of the common law in a novel, but nonetheless powerful, community context.

71. *Mohilef*, 51 Cal. App. 4th at 286-87.

72. *Goat Hill*, 6 Cal. App. 4th at 1529-31.