STORAGE TANK LITIGATION UPDATE - 2001

I. STORAGE TANK SPILL PREVENTION ACT

A. Private Right of Action

1. In Centolanza v. Lehigh Valley Dairies, Inc., 658 A.2d 336 (Pa. 1995), the Supreme Court held that the Pennsylvania Storage Tank Spill Prevention Act ("STSPA"), 35 P.S. § 6021.101 et seq., affords a private cause of action to collect costs for clean up and diminution in property value.

a. The Supreme Court reviewed § 6021.1305(c), which permits a person to file an action to "compel compliance" with the Act by any owner, operator, landowner or occupier alleged to be in violation of the Act. The Court found that permitting a private cause of action to collect costs for cleanup and diminution of property value would "give the section teeth to realize the goals of the General Assembly". Id. at 340.

b. In its decision finding a private cause of action for damages, the Superior Court held that the same measures and recoveries available to DEP should be equally available in a private action. Centolanza v. Lehigh Valley Dairies, 430 Pa. Super. 463, 65 A.2d 143 (1993).

2. In Wack v. Farmland Industries, Inc., 1999 Pa. Super. 327, 744 A.2d 265 (1999), the Superior Court concluded that “private actions for personal injury claims are permitted under the Act:"

a. The Court based its conclusion on the Act’s stated purpose to protect public health and safety and “provide liability for damages sustained within this Commonwealth as a result of a release,” 35 P.S. § 6021.102(b), and on “the Supreme Court’s directive to interpret Section 6021.1305 liberally”.

b. In the case before it, the Court concluded that the plaintiff could not establish the necessary causal link between benzene (a constituent of gasoline) and the particular cancer plaintiff suffered from, adenocarcinoma. The

opinion of plaintiff's expert and the studies he relied on failed the test of general acceptance in the scientific community.

3. In Gerald Schatz v. Laidlaw Transportation, Ltd., 1997 U.S. Dist. LEXIS (E.D.Pa. April 10, 1997), the court confirmed that the STSPA provides a private cause of action to recover costs already incurred, characterizing the argument that the statute only authorizes payment for future costs as a "hair-splitting interpretation" which ran afoul of the statute's broad remedial purpose.

4. Pennsylvania Real Estate Investment Trust v. SPS Technologies Inc., No. 94-CV-3154 (E.D. Pa. November 20, 1995). A person must own or operate a "storage tank" governed by the STSPA in order to violate its provisions and in order for a private action to be brought thereunder. See also Pierre Darbouze, M.D. v. Chevron Corp., 47 ERC 11480, 1998 U.S. Dist. LEXIS 12744 (E.D. Pa. 1998).

5. Triangle Center Assoc. v. Stillman, et al., No. 2117 of 1991 (C.P. Lancaster, January 26, 1995). The private right of action under § 6021.1305(c) was established as of the effective date of the STSPA, August 6, 1989, and not as of the date of the Superior Court's Centolanza decision. The language of § 6021.1305(c) is clear and free of any ambiguity in affording a private right of action.

6. In Bell Atlantic-Pennsylvania v. Maxi Mart Corporation, 60-94-01718 (C.P. Allegh. June 17, 1996), the court granted summary judgment to the owner of a telephone vault into which gasoline flowed from leaking lines at a service station, causing the incurrence of costs to remove product from and clean and flush the vault.

B. Standing to Bring Private Action.

1. In Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650 (Pa. Super. 1999), the Superior Court held that a successor owner of property has a sufficient interest to recover damages under the STSPA from a former owner. Martin Oil operated tanks on the property until 1989, when it sold the property to a partnership. Juniata Bank became the owner through foreclosure after the

partnership filed for bankruptcy. In evaluating the Bank's standing to bring a claim, the Court noted that §1305(c) "contains few limitations as to who may sue to compel compliance and recover response costs under the act." Here, the Court found that the Bank's standing derived from its ownership of contaminated property that Martin Oil had contaminated.

a. The Court's holding rejected the rationale of Murdoch v. Atlantic Richfield Co., 145 P.L.J. 530 (Allegh. 1997), which held that a landowner ordered to perform a cleanup could not assert a private action under § 1305(c) against a predecessor-in-title.

2. Ability of Subsequent Purchaser to Proceed with §1305(c) Claim Notwithstanding "As Is" Clause

In Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650 (Pa. Super. 1999), the Court found that an "as is" provision in a sales agreement did not preclude a subsequent purchaser from asserting a § 1305(c) claim against a predecessor-in-title.

(a) When Martin Oil sold its gasoline station to a partnership, the agreement included an "as is" clause. The agreement also stated that all tanks had been removed from the property. After the partnership was bankrupt, the Bank foreclosed, found contamination, and sued Martin. Martin contended it was shielded from liability by the "as is" clause.

(b) First, the Court found the principal that a foreclosure purchaser steps into the shoes of the prior owner applicable only to the quality of the title held by the foreclosure purchaser. The quality of title was not in dispute. Rather, the Court found that the bank was seeking "to enforce a statutory duty Martin Oil owes to the citizens of the Commonwealth to rectify any harm caused to the environment."

(c) Second, the Court found inapplicable PBS Coal, Inc. v. Burhnam Coal Co., 558 A.2d 562 (Pa. Super. 1989), in which it had found that:

> An "as is" clause in a contract insulated the seller from any liability to subsequent purchasers for subsequently discovered mine drainage problems. Unlike the unambiguous contract in PBS, the Court found the contract or issue ambiguous in part because it asserted that all tanks had been removed, when indeed they had not.

(d) However, even if the language had not been ambiguous, the Court stated "This Court seriously questions whether the "as is" provision could bind any party other than the partnership and Martin Oil. It is a well established principle of law that a contract cannot impose obligations upon one who is not a party to a contract". Unlike an obligation that runs with the land, the Court found Martin Oil's attempt to be relieved of liability an attempt to avoid a statutory obligation imposed by the STSPA. "The Bank's STSPA claim is an attempt to enforce a statutory duty to comply with the act, a duty owed to the citizens of the Commonwealth". The Court held that "where public policy requires the observance of a statute, it cannot be waived by an individual or denied effect by Courts." Thus, the "as is" clause did not preclude the subsequent purchaser from seeking relief under the STSPA.

C. 2,500 Foot Presumption

1. Availability in Private Action

In Centolanza v. Lehigh Valley Dairies Inc., supra, the Supreme Court also held that the 2,500 foot presumption of liability set forth in § 6021.1311(a) of the STSPA is available in a private action. The Supreme Court agreed with the Superior Court's reasoning that because a private action brought under the STSPA is no different than one brought by the Commonwealth, the presumption is equally available in a private action. The Court noted that § 6021.1311(a) specifically provides that the presumption is available "in civil. . . proceedings". Since a private action is a civil proceeding, the Court found the presumption clearly available in civil proceedings instituted by private citizens.

2. Presumption Applies Only Where Substance in Tank Is The Type That Caused the Damage.

In Wack v. Farmland Industries, Inc., supra, the Superior Court noted that the presumption applies only where the substance contained in the tank "is of the type that caused the damage." The Court stated that this causal link must first be established for the presumption to apply. Thus, in Wack, the plaintiff was required to establish that a product of the same type contained in the tank caused the cancer she contracted. If plaintiff there could establish that benzene caused adenocarcinoma, the presumption would apply. This holding suggests that a plaintiff would not need to prove that their particular cancer was caused by the release in order for the presumption to apply and for Plaintiff to get to the jury.

3. Limitation of Applicability Only Against Current Owners

a. In Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650 (Pa. Super. 1999), the Superior Court held that the 2,500 presumption may be invoked only against current owners and operators of tanks, and not former owners.

(i) Martin Oil operated a station until 1989, when it removed the tanks and sold the property to a partnership. After the partnership filed for bankruptcy, Juniata Bank became the owner and sued Martin for contamination found on the property.

(ii) The Court's decision was based on a comparison of the language of § 1305, which authorizes suit against "any owner, operator" and § 1311, which imposes the presumption on "a person who owns or operates." According to the Court, "1311 does not impose a presumption of liability against any 'owner' or 'operator', but limits application of the statutory presumption to 'a person who owns or operates'. The legislature's use of the present tense connotes that the presumption applies only to current owners and operators of storage tanks. To rule otherwise would be to ignore the linguistic differences in sections 1305 and 1311."

(iii) The Court's reliance on differences in tense between the sections bears scrutiny. First, its analysis ignores the following additional language in § 1311: "of a storage tank containing *or which contained* a regulated substance." This language clearly includes the past tense, and thus must apply to tanks which in the past "contained a regulated substance." Under the Superior Court's analysis, the presumption would only apply to tanks which are still in the ground and currently owned, but no longer contain the regulated substance, or tanks which now contain one substance, e.g. gasoline, but once contained a different one.

(iv) By limiting the language "which contained" in this fashion to exclude tanks that were in the ground and which contained regulated substances after November 8, 1984, yet have since been removed, the Court appears to have contravened the Supreme Court's directive to interpret the act liberally, an instruction noted elsewhere in its decision.

(v) Second, the language at the beginning of § 1311, "a person who 'owns or operates'" should be construed in the context of the statutory definitions of those terms. "Owns" means "owner", which is defined to include any person who owned an underground storage tank which held regulated substances on or after November 8, 1984. 35 P.S. § 6021.103. The statute does not limit that class to situations where the tank remains in the ground. Moreover, the definition of "owner" includes the owner of an underground storage tank at the time all regulated substances were removed when removal occurred before November 8, 1984. The Court recognized this definition when it held that although Martin Oil was an "owner" since it owned a tank which held regulated substances after 1984, the presumption was not available since it didn't presently own the tank. It is difficult to reconcile the Court's analysis with the statute, and the decision eliminates half the definition of owner from the statute.

4. Evidence Required to Rebut Presumption

a. In Bell Atlantic-Pennsylvania, supra, the common pleas court noted that defendant failed to present any evidence to rebut the presumption that it caused the damage.

b. In Lehigh Gas and Oil Co. v. DER, EHB Docket No. 91-552-MR (June 1, 1994), the Environmental Hearing Board applied the 2,500 foot presumption to gasoline contamination allegedly caused by underground storage tanks located at a gasoline service station. Since the appellant in that case failed to rebut the presumption, the Board held that the presumption alone was sufficient to carry DER's burden of proof on the issue of liability, but not on the reasonableness of the remediation measures DER had ordered.

c. In W.N., Stevenson Co. v. Oslou Corp., 1999 U.S. Dist. LEXIS 1750 (E.D. Pa. 1999), the court rejected a motion for summary judgment brought by a defendant landowner who claimed there was no evidence that USTs located on the property had leaked, while there was evidence that its tenant had dumped barrels of diesel fuel on the property. Although plaintiff had submitted "scant evidence" that the USTs leaked, the court denied summary judgment finding that defendant "has failed to present the necessary quantum of evidence to overcome the statutory presumption".

D. Ownership of Abandoned Underground Storage Tanks

A question which frequently arises in litigation concerning contamination emanating from abandoned underground storage tanks is whether the landowner may be considered an "owner" of the UST within the meaning of the STSPA. Where the landowner was unaware at the time of purchase of the tank's existence, the issue turns on whether the tanks are fixtures, ownership of which passes with title to the property.

1. Smith v. Weaver, 665 A.2d 1215 (Pa. Super. 1995) addressed the ownership of abandoned underground tanks. In sum, the court held that whether ownership of an abandoned underground storage tank passes with title to the property is a question of fact and may ultimately be a matter for the jury.

The Smiths purchased property in August 1981 on which a gasoline station had been operated. The sales agreement specifically listed as equipment three 4,000 gallon underground storage tanks. In 1991, the Smiths removed those storage tanks and during excavation found two additional storage tanks that were leaking water and waste materials. After receiving notice of a release, DER required the Smiths to collect and analyze soil samples and dispose of the tanks and contaminated soil. The cleanup costs exceeded $70,000. Thereafter, the Smiths filed suit against the Weavers, from whom they had purchased the tanks. The complaint stated several claims for relief, including a claim under the STSPA and claims in negligence, public and private nuisance, contribution and indemnification. Preliminary objections filed by the Weavers were granted by the Court of Common Pleas of Allegheny County resulting in dismissal of the action. The Superior Court reversed.

The trial court had concluded that the agreement was adequate to accomplish the sale of all tanks, including those not specifically listed. Finding that the list of equipment was not a representation of the number of tanks, the court rejected a misrepresentation claim. Since the agreement conveyed the tanks, the defendant/seller was no longer the owner of the tanks and therefore owed no duty to anyone with respect to those tanks. The absence of any duty precluded the tort claims of negligence and private nuisance.

The Superior Court disagreed that the sales agreement unambiguously effected the sale of the two unidentified tanks. This ambiguity precluded a finding as a matter of law as to whether the seller knew, or had reason to know, of the tanks, and whether the buyers could reasonably rely upon the representations in the sales agreement about the number of tanks being sold. Thus, the misrepresentation claim survived the demurrer.

The Superior Court next concluded that the question of who owned the tanks also could not be determined at the demurrer stage. First, the agreement was ambiguous since the two abandoned tanks were unidentified. Second, whether the tanks should be considered fixtures was a question of fact which

could also not yet be determined. "A fixture is an article in the nature of personal property which has been so annexed to the realty that it is regarded as part and parcel of the land". To determine the relationship of an article to the land, the Superior Court quoted from Clayton v. Lienhard, 312 Pa. 433, 167 A. 321, 322 (1933).

> Chattels used in connection with real estate are of three classes: First, those which are manifestly furniture, as distinguished from improvement, and not peculiarly fitted to the property with which they are used; these always remain personalty. Second, those which are so annexed to the property that they cannot be removed without material injury to the real estate or to themselves; these are realty even in the face of an expressed intention that they should be considered personalty. . .Third, those which, although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, depending upon the intention of the parties at the time of annexation; in this class falls such chattels as boilers and machinery affixed for the use of an owner or tenant but readily removable.

The defendant/seller argued that storage tanks fit within the second category of chattels which were part of the property since they could not be removed without damaging the real estate. The Superior Court rejected this argument as there was no evidence as to what effect removal of the tanks would have on the tanks themselves or the property. In the absence of such evidence, the court was unable to rule as a matter of law whether the tanks were fixtures and found the grant of preliminary objections to be inappropriate.

The defendant/seller further argued that even if the tanks fell within the third category of chattels, the only reasonable conclusion was that they were intended to be placed there as fixtures and must be considered part of the realty. Since whether a chattel in the third category is considered part of the realty depends on the intent of the parties, the court held that the intent of the parties in the case was uncertain. Although the tanks were apparently annexed to the property, they were

also listed as part of the "equipment" being transferred for a set price in the overall transaction, which indicated an intention that the tanks be considered personalty. Nonetheless, since the issue was not ripe for final determination at the preliminary objection stage, dismissal of the various common law claims was reversed.

Note that the Superior Court stated that a subjective analysis of the parties' intent "may be more appropriate in this situation", and appeared to be the type of test applied by other courts in the past as opposed to an objective intent standard. See Royal Store Fixture Co. v. Patten, 183 Pa. Super. 249, 130 A.2d 271 (1957) (the determination that a frozen custard stand and cooler were intended to be personalty turned on the parties' intent).

2. Impact of Smith v. Weaver.

Smith v. Weaver has ramifications for all litigation regarding abandoned underground storage tanks that were not identified at the time the property was sold. Liability will depend on the development of facts.

a. Peculiarly fitted to the property. One question is whether storage tanks should be considered "peculiarly fitted to the property with which they are used". Underground storage tanks arguably could be placed anywhere and might not be considered "peculiarly fitted" to the property. On the other hand, underground storage tanks may be considered peculiarly fitted to a parcel of land which has been or continues to be used as a gasoline service station or other location for the dispensing of petroleum products.

b. Annexation to property. Another question is whether tanks should be considered so annexed to the property that they cannot be removed without material injury to the real estate or themselves. Could underground storage tanks be deemed to cause material injury to real estate where removal is somewhat routine and the land may be restored to its original condition? Storage tanks can be removed from the ground in a manner that would not cause material injury to the tanks, and indeed underground storage tanks have been known to be reused. Should storage tanks be considered capable of being removed without destroying or material

injuring the chattel or the property to which it is annexed, the determination of whether they are fixtures would be dependent upon the intention of the parties. One issue is whether a buyer can have any intention about storage tanks that were unknown to exist at the time of purchase.

c. Liability of sellers of land as "owners" under the STSPA. Smith v. Weaver has significant ramifications for persons who sold property before the effective date of the STSPA where the USTs contained regulated substances. Assume a sale took place before November 8, 1984 on which storage tanks containing product existed. If the abandoned tanks are considered personalty, the ownership of which does not pass with the real estate, the seller would continue to be the "owner" of the tank, as that term is defined in the STSPA, since that person would own a tank which contained regulated substances on or after November 8, 1984. The STSPA would apply to the seller/owner of the tank even if the tank was removed prior to the effective date of the STSPA so long as the contaminating condition continued thereafter. Delaware Coca Cola Bottling Co., Inc. v. Petroleum Service Inc., 894 F. Supp. 862 (M.D. Pa. 1995).

d. Impact on DER enforcement. Smith v. Weaver has the potential to affect DEP's enforcement strategy. DEP has in the past taken the position that abandoned underground storage tanks are fixtures which pass with title to the property. This position has enabled DEP to contend that a landowner who finds abandoned tanks on their property owns those tanks. If the tanks contained regulated product after November 8, 1984, DEP has contended that the landowner is an "owner" as that term is defined in the STSPA. The only EHB decision to address this question appeared to reject DEP's position. In Gabig's Service v. DER, 1991 EHB 1856, the Board noted in its synopsis that the presence of two previously unknown and abandoned underground steel tanks at a service station did not by itself establish ownership or operation of those tanks by the station's owner/operator under the STSPA. Where the service station owner/operator had not actually purchased those tanks and had never used those tanks, the Board held that DER would be required to offer evidence in rebuttal or present an alternative legal theory for

liability. Oddly, the Board did not discuss this issue in the body of its opinion, instead limiting its discussion to § 316 of the Clean Streams Law, pursuant to which DEP's order was affirmed. Nonetheless, DEP may no longer be able to contend that a landowner on whose property abandoned underground storage tanks are found is an "owner" within the meaning of the STSPA and in the absence of the evidence required under Smith v. Weaver to establish the tanks as fixtures which pass with the realty.

E. Ownership of tanks removed prior to effective date of STSPA

In Circuit City Stores, Inc. v. Citgo Petroleum Corp., No. 92-7394 (E.D. Pa. December 16, 1994)[1994 U.S. LEXIS 18078], the court held that a person who owned a tank which contained regulated substances on or after November 8, 1984 would be considered an "owner" of that tank under the STSPA even where the tank had been removed from the ground before the effective date of the STSPA. The case involved a party-defendant who owned a parcel of property from 1968 to 1989 and also owned and operated three 10,000 gallon underground storage tanks between 1984 and 1985, when the tanks were removed. Ownership of those three tanks, which contained regulated substances for a period of time after November 8, 1984, rendered defendant an "owner" notwithstanding that the tanks were removed before the STSPA became effective.

F. Operator Status

In a case of apparent first impression with potential ramifications for Pennsylvania law, the Indiana Supreme Court held that a refiner is not an “operator” of an independent station bearing its brand merely because the refiner’s brand creates practical leverage over the station’s owner or operator. Shell Oil Co. v. Richard and Kim Myer et al, 705 N.E.2d 962 (Ind. 1998). The case involved the liability of refiners under Indiana’s Underground Storage Tank Act for costs of corrective action of leaks in tanks at retail gasoline stations owned by independent retailers. The principal issue was under what circumstances a major oil company is an “operator” of USTs located at an independent station that bears its brand. Under Indiana’s Act,

"operator" is defined to mean persons "in control of or having responsibility for the daily operation" of a tank. The court focused on the phrase "daily" as implying "at least some continuous level of activity as opposed to installation, repair or removal of a storage tank, or performance of some other irregular or infrequent action with respect to it". Second, the statute clearly required that the "control" or "responsibility" relate to the "operation" of the underground storage tank itself and not to other aspects of the station's operation or management. The landowners seeking to impose liability argued that the refiner should be liable because it had the ability to control operations of the station, relying upon cases decided under CERCLA. The court rejected this "practical ability to influence" operations for several reasons, principally because it found no language in the statute nor its limited legislative history suggested that the oil companies supplying gasoline to the distribution system, without more, are operators. The court noted, however, the statute contemplated not only those people who literally "operate" the tanks are liable, but also those entities who are liable for those individuals under conventional principles, such as derivative and vicarious liability. In the case at issue, from 1946 to 1963, a commissioned driver for Shell delivered gasoline to the station. Acting on Shell's behalf, this driver dispensed gasoline owned by Shell into the tanks and took measurements each time he filled them. The Court found the driver to be an operator of the tanks. Although a principal is generally not liable for the acts of an independent contractor, the court found Shell derivatively liable for the acts of its independent contractor driver because based on an exception to the general rule since the work was inherently dangerous and created a nuisance.

In the companion case of Shell Oil Co. v. The Lovold Co., 705 N.E.2d 981 (Ind. 1998), the Supreme Court of Indiana rejected Shell's argument that it was entitled to summary judgment that it was not an "operator" even though the undisputed facts showed that Shell never owned the station, an independent distributor sold Shell's gasoline and had the right to use Shell's trademark, and Shell retained no right to direct operations regarding the tanks at the station. Although those facts demonstrated that Shell did not retain the contractual right to operate the station's tanks, "they do not negate the possibility that Shell is liable for the actions

of those who did perform the daily operation of the tank". Since Shell did not designate evidence sufficient for the court to determine what activities were associated with the daily operation of the tank for the time period its was operated as a Shell station, nor who performed such activities, the court stated it could not find anything to negate the possibility that the person responsible for such activities was acting on Shell's behalf.

In Delaware Coca-Cola Bottling Co. v. S&W Petroleum Serv., 894 F. Supp. 862 (M.D. Pa. 1995), the court held that a company that removed old tanks and installed new tanks was an operator within the meaning of the STSPA. Under an agreement, defendant removed two underground tanks from plaintiff's property and installed a new 10,000 gallon heating oil tank in October 1988. After plaintiff activated a furnace attached to the new tank, fuel was released onto the property, resulting in a cleanup costing over $1,000,000. Plaintiff sued under the STSPA to recover the costs of cleanup. Defendant moved to dismiss on the grounds it could not be liable under the Act because it was not one of the persons who could have liability, i.e. an owner, operator or landowner.

The court's decision to find the defendant an operator was based on an interpretation of several words contained in the statute. "Operator" is defined as "any person who manages, supervises, alters, controls or has responsibility for the operation of a storage tank." Plaintiff argued that defendant altered the tank through the removal of the old tanks and the installation of the new tank. The court looked to the term "substantial modification", defined in the Act as "an activity to construct, refurbish, restore or remove from service an existing storage tank piping or storage tank facility which alters the physical construction or integrity of the tank or tank facility". According to the court, defendant's work fit that definition. Next, the court noted that the term "alter" in the definition of operator was not defined, and referred to the dictionary definition: "to make different in some particular, as size, style, course, or the like; modify . . . to change." In effect, the terms "alter" and "modify" were deemed synonymous. According to the court, use of the word "modification" in the defined term "substantial modification" showed that it is one type of

modification or alteration, and one that the defendant performed. Moreover, the definition of "substantial modification" fit within the meaning of the word "alter" in ordinary usage.

G. Retroactive Application

The STSPA was enacted on July 6, 1989 and became effective 30 days later. In Delaware Coca Cola Bottling Co., Inc. v. S & W Petroleum Serv., supra, the court had the occasion to address whether a claim under the STSPA could be maintained where the release from the underground storage tank occurred between October 8 and October 10, 1988. Defendant contended that applying the Act to a situation where both the installation of the tank and the time of the release entirely occurred before the effective date of the Act constituted an impermissible retroactive application. Pursuant to 1 Pa. C.S.A. § 1926, "no statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly". No provision in the STSPA suggests that it is intended to have retroactive application.

The court held that a finding of liability did not constitute a retroactive application of the statute because plaintiff was attempting to recover for a condition existing at the time the cleanup costs were incurred. The release caused an ongoing nuisance, i.e. the presence of the released heating oil, which continued after the effective date of the Act, and because of which plaintiff then incurred costs.

> Stated another way, the plaintiff was able to recover because the condition continued to exist after the effective date of the Act, and it was the condition, and not any transaction or occurrence which caused the condition, which formed the basis for the recovery.

Under Pennsylvania law, a statute is not retroactively construed when applied to a condition which exists on the effective date of the act even though that condition results from events which occurred prior to that date. See Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957); R & P Services Inc. v. Commonwealth, Dept. of Revenue, 541 A.2d 432, 434 (Pa. Cmwlth. 1988). The

court also cited to Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974) in which the Supreme Court found application of the Clean Streams Law appropriate to discharges of mine drainage which had existed prior to the statute since it was being applied to a condition which existed on and after the date of the statute. The court saw the release of regulated substances prior to the effective date of the STSPA which causes contamination continuing after the date as analogous, since the condition which gives rise to liability is the public nuisance which results from a violation of the act (§ 6021.1304) given that the suit itself is one to abate a nuisance (§ 6021.1305(a)).

> It is not a release itself that gives rise to a cause of action under the Act. . . ; it is the remedial action taken to abate the nuisance which gives rise to the cause of action. Since it is the nuisance which is the basis for the cause of action, and the nuisance existed at the time of the Act's effective date, there is not retroactive application of the Act."

The Court in Two Rivers Terminal, L.P. v. Chevron U.S.A. Inc., 96 F.Supp.2d 432 (M.D. Pa. 2000) found that a private claim under §1305(c) cannot apply retroactively to conduct occurring before its enactment, disagreeing with Delaware Coca-Cola Bottling. Having already dismissed the Tank Act Claim as time barred, this ruling was unnecessary. The Court relied on the language of §1305 which authorizes an action against any person "in violation of any provision of this act or any rule, regulation, order or permits issued pursuant to this act." Borrowing from caselaw construing similar language in §6972 of RCRA, the Court held that since their could be no violation of the Tank Act before the act was passed, it could not be applied retroactively. The Court rejected the reasoning of Delaware Coca-Cola that the STSPA reaches conditions continuing after the date of the Act, thereby ignoring §1310 which makes it a violation to allow pollution resulting from a storage tank, language which reaches conditions continuing after the effective date of the Act.

H. Pre-Suit Notice

Section 6021.1305(d) of the STSPA provides that no private action may be commenced prior to 60 days after the plaintiff has given notice, in writing, of the violations to the Department and any alleged violator. Section 6021.1035(e) provides that the 60-day notice provision can be waived when the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff. In such a case, an action may be initiated immediately upon written notification to the Department.

In Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716 (W.D. Pa. 1994), a landlord filed suit against its former tenant arising out of contamination of the property resulting from a tenant's operation of three 10,000 gallon underground storage tanks which were removed in 1992. The tenant/defendant sought dismissal of the action for the landlord's failure to provide a 60-day notice prior to filing suit. The court found that the 60-day notice requirement was waived permitting the initiation of the action immediately upon written notice to the Department for two reasons. First, the landlord alleged that the contamination constituted an imminent threat to human health and safety, one of the enumerated exceptions to the 60-day requirement. Second, the court held that ownership of the contaminated property "may be enough in and of itself to show that [the landlord's] legal interest have been immediately affected". Id. at 721.

A similar result was reached in Smith v. Weaver, supra. That case also involved owners of property attempting to recover cleanup costs from a prior owner. The court discussed the purpose of the notice requirement.

> The purpose of this notice requirement is to bring about a prompt cleanup. By requiring notification, it is hoped that a cleanup program will begin before a private action is commenced in an effort to force such cleanup. However, in a case such as this, where the cleanup is being done by another, the property owner, no purpose is served by requiring notice.

Similar to the Graham court, the Superior Court noted the two exceptions to providing 60-day prior notice of suit and noted that the complaint alleged both that DER had been notified of the contamination and that the owners had been ordered to clean up the site. The court found these allegations sufficient to permit the suit to go forward without the 60-day notice.

The courts have liberally interpreted the type of notice to be supplied. In Two Rivers Terminal, L.P. v. Chevron U.S.A. Inc., 96 F.Supp.2d 246 (M.D. Pa. 2000), a notice provided to Chevron Corporation alone, and not specifically addressed to Chevron USA Inc., an independent subsidiary which operated the oil terminal at issue, was adequate to put the subsidiary on notice where a lawyer responded to the notice for the subsidiary. The court noted that STSPA does not detail how the notice must be given, and is pragmatically applied by the courts. In Darbouze v. Chevron Corp., No. 97-2970 (E.D. Pa. January 8, 1998) (1998 U.S. Dist. LEXIS 81), a letter which merely stated an intent to sue under the STSPA was deemed adequate in the absence of any state regulation specifying the type of notice required. In Graham, supra., the court held that submission of the closure report by the tenant to the Department in 1992 constituted requisite notice of the violation, even though a separate letter advising of the suit had not been filed.

I. Statute of Limitations

In Buttzville Corp. v. Gulf Oil Corp., 25 Pa. D.&C.4th 172 (C.P. Lancaster, 1995), the court held that the STSPA provides a 20-year statute of limitations for private actions brought under § 6021.1305(c). The court noted that the only statute of limitations in the Act was a 20-year limitation for "actions for civil or criminal penalties". § 6021.1314. Notwithstanding this provision's apparent application only to actions for civil or criminal penalties, the court found that a 20-year statute would be appropriate, rather than a two-year statute of limitation under 42 Pa. C.S.A. § 5524(4) for actions for waste or trespass of real property. First, the STSPA requires a liberal construction of its provisions to fully protect the residents of the Commonwealth. § 6021.109. The Act afforded a private action under § 6021.1305(c) to compel compliance, and any such action would be filed only in the

event of a violation of the Act. Sections 1306 and 1307 of the STSPA provide criminal and civil penalties for such violations. Thus, the court found it logical to assume that the General Assembly intended that the 20-year limitation for "civil and criminal penalties" would apply to private actions which also would be based on the same violations. The court also relied upon the Superior Court's reasoning in Centolanza that the General Assembly intended that the measures available to DER be equally available in a private action, including the 2,500 presumption. Since private actions should be on an equal footing with those brought by the Commonwealth, and in the absence of any specific limitation for private actions, the court found that the same 20-year statute of limitations available to the Commonwealth should apply to private actions.

In Two Rivers Terminal, L.P. v. Chevron, U.S.A. Inc., 96 F.Supp.2d 432 (M.D. Pa. 2000), the Court rejected Buttzville and held that private claims under the STSPA are akin to the tort of private nuisance, and therefore the two year statute of limitations set forth at 42 Pa. C.S.A. §5524(7) for any injury to person or property founded on negligent conduct applied. The Court refused to consider the policy considerations underlying the STSPA, or the Supreme Court's directive to interpret the Act liberally. Consequently, the claim was time barred.

J. Civil Penalty Assessments

1. Prepayment of civil penalty

a. In Pilawa v. Department of Envir. Prot., 698 A.2d 141 (Pa. Cmwlth. 1997), Commonwealth Court reversed the EHB's dismissal of an appeal of a civil penalty based on appellant's failure to prepay the penalty. The Board had held that the failure to provide security for the appeal by prepaying the proposed penalty or posting an appeal bond as required by § 1307(b) of the STSPA deprived it of jurisdiction over an appeal from the civil penalty assessment. Stanley T. Pilawa & Disposal, Inc. v. Commonwealth of Pennsylvania, DEP, Docket No. 96-108-MR (Opinion and Order July 19, 1996). The Board also held that since appellant had not alleged a financial inability to comply during the 30-day appeal period, the

Board had no jurisdiction over that issue, and dismissed the appeal, citing Black Rock Exploration Co., Inc. v. DER, 1993 EHB 1390. Reversing the EHB's decision, Commonwealth Court held that appellant's failure to raise its financial inability to prepay the penalty as a separate issue was not required since the inability to pay is not a factual or legal objection to DEP's action in the notice of appeal. The court noted that the EHB's rules of procedure do not specifically require an appellant to allege economic inability to pay or post a bond nor prove payment. Finally, the court likened DEP's motion to dismiss for failure to prepay to a rule to show cause, finding that the EHB must hold a hearing on the factual issue of ability to pay once raised. [Note: After remand to the Board, DEP conceded that Pilawa was unable to prepay the civil penalty and, following its independent review of supporting documentation, the Board allowed the appeal to proceed. See Stanley T. Pilawa and Disposal, Inc. v. Commonwealth, DEP , EHB Docket No. 96-108-MR (Adjudication September 25, 1998]

2. Standard to determine financial inability to pay

a. In its first attempt to articulate a standard for determining whether an appellant is financially unable to prepay a civil penalty, the Board in Hrivnak Motor Co. v. Com., DEP, Docket No. 99-052-L, 1999 Pa.Env. Lexis 44 (June 21, 1999) held that an appellant will be excused from the prepayment/bonding obligation if making the prepayment would result in undue financial hardship. "An undue financial hardship occurs if making the prepayment or submitting the bond would interfere with appellant's ordinary and necessary expenses, considering the appellant's current and reasonably anticipated future needs."

(i) In so holding, the Board balanced the "fundamental, deep-seated right grounded in our state and federal constitutions that parties should have access to the courts and be afforded with due process of law", with the important policies served by prepayment.

(ii) The Board noted that it would not define financial inability in the literal sense alone, whereby individuals and businesses would be required to sell assets to produce the money to prepay.

b. In She-Nat, Inc. v. Commonwealth, DEP, EHB Docket No. 95-145-C (Opinion and Order May 7, 1996), the Board dismissed an appeal of an assessment of civil penalties based on appellant's failure to prepay the proposed penalty required by § 1307 of the Act.

3. Automatic civil penalty for failure to comply with order

a. In 202 Island Car Wash, L.P. et al v. Commonwealth, DEP, Docket No. 98-023-MG (Opinion and Order December 18, 1998), the Board granted appellants motion for summary judgment finding a provision in a compliance order which imposed automatic civil penalties for violation of the order to be arbitrary as a matter of law. DEP included a provision in the compliance order which provided that any violation of any provision of the order would result in a penalty of $1500 per day per violation, due to be paid automatically and without notice. Appellants claimed that the automatic assessment of a penalty was not authorized by the STSPA because DEP could not consider all of the statutorily required factors, such as willfulness of the violation, damage to the environment, cost of abatement and savings to the violator of noncompliance.

The Board first held that in order to calculate a reasonable civil penalty, DEP must consider the facts surrounding the violation itself, and not simply the facts underlying the order which was violated. "The assessment of a penalty in advance of a violation is necessarily made without adequate information concerning the nature and effect of the specific violation. Under the circumstances the determination of a reasonably penalty is purely speculative". Second, the Board noted that it was unclear from the STSPA whether DEP has the authority to assess civil penalties automatically in advance of a specific violation. "We believe that if the General Assembly intended the Department to have the authority under the Storage Tank Act to assess a specific civil penalty without considering the facts

surrounding a particular violation it would have explicitly so provided". Finally, the Board noted that automatic penalties create serious procedural dilemmas since the Act contemplates a scenario where a civil penalty would be calculated after a violation and then "prescribes an orderly fashion by which either the fact of the violation charged or the amount of the penalty could be appealed and considered by the Board." Prospective assessments could give rise to multiple appeals burdening appellants and the Board.

b. In Thomas Wagner v. Commonwealth, DEP, EHB Docket No. 98-184-116 (Opinion and Order August 23, 1999), the Board reaffirmed its 202 Car Wash decision that an Order which contains an automatic penalty provisions is an abuse of discretion.

4. Appropriateness of Particular Civil Penalty Assessments

The EHB has carefully reviewed civil penalty assessments made by DEP. DEP uses a Penalty Assessment Matrix to arrive at civil penalties for violations of the STSPA based on the factors set forth in the Act, including violation seriousness, duration and willfulness. See generally Stanley T. Pilawa and Disposal, Inc. v. Commonwealth, DEP , EHB Docket No. 96-108-MR (Adjudication Sept. 25, 1998).

Seriousness depends on the risk to the environment and/or human health from the violation. The matrix has three levels of seriousness: a low risk violation is one which is not associated with a release or potential release to the environment, such as failure to register tanks or submit closure reports. A medium risk violation is one that is associated with a release or potential release to the environment, such as failing to install or upgrade equipment or failing to perform preventive maintenance. A high risk violation is one associated with a significant release to the environment. Whether a release is significant depends on the aerial extent of the contamination, offsite impacts, impacts on water resources, explosion potential and the quantity, mobility and characteristics of the substance.

Willfulness relates to whether the violator knew his act was a violation of law. The matrix sets forth three levels of willfulness: deliberate, negligent or reckless, and basis liability. A violation is deliberate where the violator knew the law and consciously violated it. The civil penalty amount is tripled where the violation is deemed to be deliberate. A violation is negligent or reckless where the violator should have known the law and acted contrary thereto. The civil penalty is doubled where the violation is found to be negligent or reckless. Finally, where no level of willfulness is found, a basic penalty is imposed.

a. Pickelner Fuel Oil, Inc. v. Commonwealth, DEP, EHB Docket No. 94-238-MG (Adjudication May 28, 1996). Board upholds a $33,800 assessment of a civil penalty under the STSPA for failure to submit a site characterization report over a period of 169 days as required by a DEP order. Appellant owned and operated a gasoline station and storage tank facility in Williamsport. While investigating reports of gasoline odors in the vicinity of the station, DEP inspectors encountered strong gasoline vapors in the vicinity of the site and inside a private residence adjacent to the site, as well as the presence of free gasoline product in storm sewers adjacent to the site. Excavation and removal of three 4,000 gallon underground storage tanks show that one of the tanks was leaking and contamination was present. The DEP required Pickelner to perform a site characterization. The appellant did not perform a site characterization during the 3½ year time period after DEP's request, despite an additional twelve communications by DEP, including a notice of violation and an order. The Board found that Pickelner's failure to obey DEP's order was at least negligent, and found the penalty appropriate for the duration and seriousness.

b. Stanley T. Pilawa and Disposal, Inc. v. Commonwealth, DEP , EHB Docket No. 96-108-MR (Adjudication Sept. 25, 1998). The Board reduced the civil penalty assessed by DEP finding that the Appellant's failure to retain certified inspector/installers was only negligent, not deliberate, where he testified to contacting a certified outfit to do the work, and the workers who actually performed the work were employed by that outfit. The Board also found

that allowing a small amount of product to leak during removal of the tank was neither negligent or reckless in light of testimony from a DEP section chief that small spills are routine during removal activities. The Board therefore reduced the amount of the penalty for that violation. Finally, the Board sustained the penalty imposed by DEP for the violator's failure to properly cover contaminated soils piled on the site.

c. 202 Island Car Wash L.P. v. DEP, Docket No. 98-023-146 (Adjudication May 19, 2000). Penalties assessed as follows: (1) $2,100 for failing to register newly installed tanks; (2) $10,000 for failing to maintain financial responsibility; and (3) $67,500 for operating unregistered tanks. Appellant argued that all three penalties were duplicative. The Board agreed that the penalties for failing to register the tanks and failing to maintain financial responsibility were duplicative and eliminated the $2,100 penalty. However, the penalty for operating the unregistered tanks was a wholly separate violation. The Board reduced the $67,500 penalty because there was no evidence of an intrinsic problem with the tanks that created any risk and because appellant's failure to register was not wilful. The civil penalty for failure to perform proper leak detection was reduced. Finally, the Board held that an appellant's remediation costs are not relevant to the violations and assessed penalties.

K. Enforcement Orders

1. Supersedeas

The circumstances under which the EHB might supersede a DEP order issued in the face of a confirmed release of gasoline from USTs was addressed in *202 Island Car Wash, L.P. et al v. DEP*, EHB Docket No. 98-023-MG (May 13, 1998). As a result of complaints of gasoline odors in a private drinking water well in a home in the Conestoga Farms plan, DEP conducted an investigation of the 202 Island Car Wash, which had three 10,000 gallon underground storage tanks. That investigation determined that the three tanks were not properly registered and that leak detection was not being performed as required by the rules and regulations. DEP wrote a letter to the station in July 1997 asking it to perform a site assessment

investigation under 25 Pa. Code § 245.309. The car wash did not respond, but instead had a preliminary sub-surface investigation conducted, which showed elevated levels of benzene, toluene, ethyl benzene, xylenes and MTBE. As a result of these findings indicating a release, DEP requested by letter a work plan for a site characterization. Since no action was taken on DEP's request, DEP issued an order on February 5, 1998.

Paragraph 1 of the order required the Facility to immediately cease operations and remove product from the tanks at the Facility until DEP had determined that leak detection had been properly conducted and the Facility had arranged for third-party inspections (paragraphs 7 and 8 of the Order). Paragraph 2 of the order required performance of a complete site characterization by February 27, 1998. Paragraph 3 of the Order required submission of a remedial action plan by April 17, 1998. Paragraph 5 required the Facility to sample and analyze well water of the residences in the plan, and provide and maintain water treatment systems so that potable water was provided. Paragraph 10 imposed a civil penalty of $1500 per day per violation for any provision of the Order.

The facility sought a supersedeas contending that all of the challenged portions of the order were unlawful. With respect to paragraph 1, the Appellants submitted evidence of tightness tests having been performed on the tanks and lines showing they were tight, and thus continued operation of the station would not result in an ongoing release. (DEP had temporarily stayed the requirements of paragraph 1 of the order, but that stay expired). The Board granted a supersedeas of Paragraph 1 finding that the Appellants evidence showed no ongoing release and it would suffer "irreparable harm in that they would have a substantial financial loss if they could not operate the gasoline pumps at the Facility".

The Board refused to supersede DEP's order with respect to the development of the site assessment report before February 27, 1998 even though Appellant's consultant testified that it would not be possible to submit the report in such a short time. The Board found that Appellant had been on notice since July 1997 that DEP wanted a work plan, and had been notified in November 1997 of

DEP's request for a site characterization. There was no evidence that a site characterization could not have been prepared in the time period from November to February. That Appellants chose not to begin preparation of a site characterization in November after having been requested to do so was no reason to supersede DEP's time frame. "We view the Department's Order as a forceful reaffirmation of the Department's proper request in November 1997 to which Appellants were required to respond." The Board also refused to supersede the requirement that a remedial action plan be submitted by April because Appellants had not made a strong showing that such a time period was not adequate.

The Board also refused to supersede Paragraph 5 of the Order. Appellant had complied with respect to four residences on a particular road. But Appellant vigorously objected to an extensive water sampling program for all other 52 water wells in the plan based on a lack of evidence that the contamination was that extensive. Based on DEP testimony that MTBE was found in many wells, that MTBE may be an indicator of the flow of a plume of other gasoline constituents, the Board found a significant risk that some of the wells designated by DEP for sampling might become contaminated. Thus, the Board found that the extensive sampling program was justified, at least for the first one or two rounds of sampling, was reasonable to protect residents.

Finally, the Board refused to rule on the validity of the automatic penalty provision, leaving it for determination at a final hearing.

A similar result was reached in Wagner v. Commonwealth, DEP, EHB Docket No. 98-184-MG (October 9, 1998), in which the Board superseded the provision in a DEP order which required a service station to cease operations based on a past release to groundwater in light of evidence that there was no ongoing release. In an order issued in August 1998 by the same regional office that issued the order at issue in 202 Island Car Wash using similar language, DEP required the facility to cease operations until it could conduct a suspected release investigation and demonstrate that the system was tight. Appellants took steps to comply with the order, and in October 1998 filed a petition for temporary supersedeas and petition for

supersedeas. Appellants submitted evidence that they had complied with the order but DEP refused to allow them to open. Specifically, Appellants contended that (1) they had submitted all leak detection records which established there was no ongoing leak (2) tightness test had been performed on the system showing no leak and (3) leak detectors had been installed which would assured immediate detection of any future leak. DEP's position was that the facility should not be allowed to reopen because of concerns over its financial ability to perform the required remediation.

The Board rejected DEP's position. First, the Board found that the Appellant had met the requirements of the order which were established as conditions to reopening. Second, while the Board expressed sympathy with DEP's concerns about the financial ability of the station to clean up contaminated groundwater, the Board found no authority in the STSPA, the rules or regulations or DEP's order which would require that the facility remain closed until it supplied proof of its financial responsibility. Indeed, the Board noted that the STSPA does address financial responsibility for remediation of petroleum products by requiring all owners of USTs to participate in the USTIF.

The Wagner saga continued. On January 19, 1999, DEP suspended the stations operating permits for the tanks due to its failure to continue corrective action. On February 11, 1999, the Board superseded the order due to DEP's failure to present sufficient evidence that the order was necessary for enforcement of the Act. Thomas Wagner d/b/a Blue Bell Gulf v. DEP, No. 98-184-146 (Opinion and Order February 11, 1999).

In its Adjudication of the matter, the Board upheld DEP's suspension order. Thomas Wagner d/b/a Blue Bell Gulf v. DEP, Docket No. 99-184-146 (Adjudication, August 28, 2000). Based on additional evidence, the Board found that DEP set its burden of establishing that the suspension order was reasonable, appropriate and necessary to aid in enforcement of the Act because of appellant's failure to act properly to prevent injury to his neighbors from his business and failure to continue corrective action. Further, appellant was found legally responsible for the clean up of the release performed by DEP. Appellant cannot use his limited

financial resources as a defense because the focus is not on the appellant's ability to pay, but on whether DEP's action was reasonable and appropriate.

In M.W. Farmer Co. v. Commonwealth, DEP, EHB Docket No. 98-055-MR (Opinion and Order May 5, 1998), the Board denied a petition for supersedeas of DEP's order suspending for 90 days the company's installer/inspector certification. The financial loss was deemed inadequate to show irreparable harm. The EHB also found that petitioner was not likely to succeed on the merits of the appeal finding a violation justifying suspension.

2. Revocation orders

DEP is allowed to support the revocation of a certification to perform tank tightness testing under the Storage Tank Act with violations discovered after issuance of the order. Tanknology - NDE, Int'l, Inc. v. DEP, EHB Docket No. 200-027-K (Opinion and Order May 3, 2000).

L. Underground Storage Tank Indemnification Fund Claims

1. Eligibility requirements

In Southeast Deleo School Dist. v. Underground Storage Tank Indemnification Board, 708 A.2d 881 (Pa. Cmwlth. 1998) Commonwealth Court affirmed the USTIF Board's ruling that a school district was ineligible for payment of cleanup costs under the Fund because it failed to meet its burden of proving that the release occurred after February 1, 1994. The School District owned a 30,000 gallon UST. A maintenance worker discovered a pool of oil on the ground on March 11, 1994. After the area was excavated, a leak was found in a pipe, and the cleanup cost was $147,000. The school district paid the required tank capacity fee only after the oil leak was discovered. The school district's claim was denied both by the Fund Director and the USTIF Board on appeal for the district's failure to pay the required tank capacity fees required under the Act. The USTIF Board Hearing Officer concluded that the evidence of when the release occurred was inconclusive.

On appeal, the school district challenged the Board's finding that it had not proven the release occurred after February 1, 1994. The district also argued that denied of the claim for failure to pay the tank capacity fee was erroneous since the district had paid the fees, albeit late.

Commonwealth Court disposed of the appeal by finding that the district had not borne its burden of proving that the release occurred after February 1, 1994. The evidence was that there was no change in the level of oil in the tank from January 28 through March 11, coupled with the fact that the district used natural gas during that period, and thus no oil would have been carried along that pipe during that period. Since the spill could have occurred at any time before or after February 1, the Court found that the district had failed to meet its statutory burden of proof. The Court declined to address the question of whether late payment of the required tank fees justify denial of an otherwise valid claim.

II. CERCLA AND USTs

A. Waste Oil Tanks

Pierre Darbouze, M.D. v. Chevron Corp., 47 ERC 11480, 1998 U.S. Dist. LEXIS 12744 (E.D. Pa. 1998) is an example of the use of CERCLA to recover cleanup costs involving waste oil tanks found to contain hazardous substances in addition to those normally associated with petroleum products. At issue was a waste oil tank and fuel oil tank left on the property in the mid-1970's. A subsequent landowner learned of the tanks in 1995 and sued Chevron under CERCLA. The court rejected Chevron's motion for summary judgment and allowed the CERCLA claim to proceed as to the waste oil tank upon finding the petroleum exclusion inapplicable. The petroleum exclusion applies to those "hazardous substances" normally found in petroleum, such as benzene, toluene and xylenes. However, "if the hazardous substance is at a level exceeding what is normally found in petroleum, or if the hazardous substance is not normally found in petroleum, then the petroleum exclusion does not apply and the substance is a hazardous one under CERCLA." Here, the waste oil tank contained barium, cadmium and chromium, which plaintiff's

expert testified would not normally be found in gasoline. Although Chevron's expert disagreed, the court denied summary judgment in light of conflicting expert opinion.

III. RESOURCE CONSERVATION AND RECOVERY ACT

A. Private Right of Action to Seek Injunctive Relief

It is well established that the citizen's suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), provides a private action for mandatory injunctive relief against any person who contributed to the handling, treatment, storage or disposal of solid or hazardous waste which presents an imminent and substantial endangerment to health or the environment. See, e.g. Graham Oil Co. v. BP Oil Co., 885 F. Supp. 716 (W.D. Pa. 1994).

1. It is also well established that the citizen suit provision of RCRA applies to any solid waste, including gasoline or other petroleum hydrocarbon contaminated soils. Zands v. Nelson, 779 F. Supp. 1254 (S.D. Cal. 1991); Petropoulos v. Columbia Gas of Ohio, Inc., 840 F. Supp. 511 (S.D. Ohio 1993).

2. Mandatory injunctive relief includes requiring the contributor to actively participate in the investigation and remediation of the resultant conditions, including the expenditure of money to perform those acts mandated by the injunction. See e.g. U.S. v. Price, 688 F.2d 204, 214 (3d Cir. 1982); Lincoln Properties Ltd. v. Higgins, 36 ERC 1228 (E.D. Cal. 1993).

3. RCRA authorizes the court to award "costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or substantially prevailing party whenever the court determines such an award is appropriate." § 6972(e).

A. Section 6972(a)(1)(B) Does Not Create An Action to Recover Past Cleanup Costs

In Meghrig v. KFC Western, Inc., 116 S.Ct. 1251, 134 L.Ed 2d 121 (1996), the Supreme Court held that § 6972(a)(1)(B) does not provide a cause of

action to recover past cleanup costs as a form of equitable restitution. The Supreme Court held that § 6972 is not directed at providing compensation for past cleanup efforts. Rather, the plain meaning of that section authorizes district courts to 'restrain' persons who have contributed to contamination or to 'order such persons to take such other action as may be necessary,' i.e., mandatory injunctive relief. The term "may present an imminent and substantial endangerment" clearly applies to a threat that is present now, and "clearly excludes waste that no longer presents a danger."

IV. COMMON LAW REMEDIES

Plaintiffs often append various common law theories to actions under the STSPA.

A. Strict Liability

In Smith v. Weaver, supra, the Superior Court held that the operation of underground storage tanks at a gasoline service station is not an abnormally dangerous activity subjecting one to strict liability under Restatement (Second) of Torts § 519. Plaintiffs asked the court to consider not whether underground tanks were abnormally dangerous, but rather whether underground storage tanks which are leaking are abnormally dangerous. By phrasing the issue in that fashion, plaintiff sought to have the court view the results of the activity, rather than the activity itself, as dispositive. The court disagreed with that approach, stating that the proper focus is on the activity itself, the storage of potentially hazardous substances in an underground tank. The court held that gasoline and other petroleum products can be stored and dispensed safely with reasonable care, and noted that the storage of such materials and tanks is a common use and is valuable to a modern society. Consequently, the factors to be considered in determining whether an activity is abnormally dangerous set forth at Restatement (Second) of Torts § 520 were not met. See also Melso v. Sun Pipeline Co., 576 A.2d 999 (Pa. Super. 1990), appeal denied, 527 Pa. 667, 593 A.2d 842 (1991) (transmission on land of natural gas and petroleum products was a common activity in a highly industrialized society and not an

abnormally dangerous activity). Contra Graham Oil Co. v. BP Oil. Co., supra distinguishing Melso by concluding that while "the transmission on land of natural gas and petroleum products by pipeline . . . is a common activity", the same could not be said for the dispensing of gasoline from "large storage tanks". A plaintiff might prove a set a facts justifying treatment of the activity as abnormally dangerous.

B. Public Nuisance and Private Nuisance

Two cases have discussed the availability of public and private nuisance theories to underground storage tank contamination.

1. In Graham Oil Co. v. BP Oil Co., supra, the court declined to dismiss a public nuisance claim brought by the owner of contaminated property against its former tenant. The defendant/tenant sought to dismiss the claim contending that the landlord had not alleged that it had suffered any damage in the exercise of a right common to the general public, relying upon Philadelphia Electric Co. v. Hercules Inc., 762 F.2d 303 (3d Cir. 1995) (private individuals may not recover damages in an individual action for a public nuisance unless they have suffered harm of a different kind from that suffered by the general public and the harm was suffered while exercising a right common to the general public). Hercules was deemed distinguishable. The owner was able to establish harm of a different kind since it was "uniquely affected by the alleged contamination to its property". Secondly, the owner alleged that it made commercial use of its property and that any present or future commercial use would be affected by the contamination, and further alleged that the contamination had diminished the value of the premises and disrupted its contractual relationships.

2. A public nuisance claim stated in a third-party complaint was dismissed in Pennsylvania Real Estate Investment Trust v. SPS Technologies Inc., supra. Pennsylvania Real Estate Investment Trust ("PREIT") owned property which was discovered to be contaminated with volatile organic compounds, including trichloroethane. PREIT sued SPS, whose predecessor conducted manufacturing operations. SPS then filed a third party complaint against

Caleche & Soffa Industries, whose predecessor had leased a portion of the site from SPS' predecessor. SPS contended that the contamination on the site was caused by Caleche & Soffa, and included a public nuisance claim in its third-party complaint. The court dismissed the claim because SPS' pecuniary harm was derived from injuries to PREIT's private property rights over the site. Consequently, SPS could not allege that it was "uniquely affected" by the alleged contamination, as could a current owner of property.

3. In Graham Oil Co v. BP Oil Co., supra, the court also addressed whether an action in private nuisance would be available to a landlord seeking reimbursement for contamination caused by its tenant. Defendant/tenant contended that the doctrine of private nuisance applied only to adjoining landowners, and that it was unavailable to the plaintiff who was a dispossessed landlord on the alleged contamination incurred and not a neighboring landowner. Although it is a general rule that private nuisance is designed to resolve conflicts between neighboring landowners, Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985), the court noted that there are several exceptions. The court referred to Restatement (Second) of Torts § 821E, comment f, which states that in most cases the owner of a nonpossessory estate in land has no rights or privileges in respect to the present use or enjoyment thereof, and therefore has no action for an interference with it. However, that comment continues

> in some cases, however, an interference with the present use or enjoyment of land has a permanent, detrimental effect on the usability of the land and thus affects the rights and privileges of the owner of the nonpossessory estate in respect to the future use and enjoyment of the land.

The court accepted the reasoning of the only case which addressed the question of whether a landlord could recover from a tenant in an action for public nuisance, Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238 (D. Ct. 1992). There, the court held that there was nothing in the relationship between a

landlord and tenant that would prevent a landlord from proving each of the elements of a public nuisance.

A. Trespass

The decision in Graham Oil Co. v. BP Oil Co., supra, also addressed the question of whether the landlord could assert a trespass claim. The issue was whether the contamination of the property constituted a permanent injury rather than continuing trespass. Pennsylvania courts have adopted those sections of the Restatement (Second) of Torts addressing continuing trespass and permanent injury. See e.g. Mancia v. Dept. of Transportation, 102 Pa. Cmwlth. 279, 517 A.2d 1381, 1384 (1986). In Sustrik v. Jones & Laughlin Steel Corp., 413 Pa. 324, 197 A.2d 44 (1964), the Pennsylvania Supreme Court clarified the distinction between a continuing trespass and a permanent injury.

> [A] trespass must be distinguished from a trespass that affects a permanent change in the condition of the land. [A permanent trespass], while resulting in a continuing harm, does not subject the actor to liability for a continuing trespass.

For example, in Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984 (E.D. Pa. 1992), the district court concluded that the deposition of drums and associated waste on property did not constitute a continuing trespass because the disposal of the waste was a completed act at the time the property was conveyed.

Similarly, in Graham Oil Co. v. BP Oil Co., supra, the court held that the act of contamination was "completed" on January 27, 1992, when BP had the three 10,000 gallon underground storage tanks removed from the leased premises. Since BP's lease did not expire until November 30, the act of contamination had been completed 10 months before plaintiff's repossession of the property. The court concluded that the contamination was a completed act at the time the underground storage tanks were removed and that the contamination was, therefore, a permanent

injury rather than a continuing trespass. Consequently, since the contamination occurred while BP was in possession of the property, any acts committed on the property by BP during the term of the lease occurred while it was in lawful possession of the premises, thereby negating the landlord's action for trespass which requires that a plaintiff have the right to the exclusive use and possession of the property at issue.

A. Statute of Limitations

In Circuit City Stores, Inc. v. Citgo Petroleum Corp., No. 92-7394 (E.D. Pa. June 29, 1995) [1995 U.S. Dist. LEXIS 9483], the court applied the discovery rule to tort claims asserted in a case involving leaking underground storage tanks. Citing Merry v. Westinghouse Elec. Corp., 684 F. Supp. 852 (M.D. Pa. 1988), the court held that Pennsylvania's two-year statute of limitations on negligence in a pollution case begins to run when plaintiff knew or should have known of the contamination and that it was caused by the conduct of others. In Gerald Schatz v. Laidlaw Transportation, Inc., 1997 U.S. Dist. LEXIS 4967 (E.D. Pa. April 10, 1997), the court rejected the argument that the leakage from tanks was a continuing act; a suit filed more than two years after receipt of a report identifying the leakage was untimely.