IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSHUA HILL, INC., et al.	:	CIVIL ACTION
v.	:	
WHITEMARSH TOWNSHIP AUTHORITY, et al.	:	NO. 96-5648

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the pleadings, trial testimony, exhibits and submissions of the parties, the court hereby makes and enters the following findings of fact and conclusions of law.

I BACKGROUND

This action was originally filed in the bankruptcy case of plaintiff Joshua Hill, Inc. ("Joshua Hill") and was a component of the confirmed Plan of Reorganization in the bankruptcy case of plaintiff Marc A. Zaid ("Zaid"). Plaintiffs' claim is brought pursuant to the Pennsylvania Hazardous Sites Clean-Up Act, 35 P.S. § 6020.101, et seq. (hereinafter "HSCA"). Plaintiffs seek to recover under the HSCA for the costs of responding to the presence of hazardous substances on the Joshua Hill Property, including their prospective clearing and remediation.

II FINDINGS OF FACT

A. The Parties

1. Joshua Hill is a Pennsylvania corporation with a principal place of business located in Pennsylvania; Zaid is an

individual resident of the Commonwealth of Pennsylvania (collectively "Plaintiffs"). Defendant Whitemarsh Township Authority is an authority organized under the laws of the Commonwealth of Pennsylvania; Defendant Whitemarsh Township is a political subdivision of the Commonwealth of Pennsylvania (collectively "Defendants").

2. Joshua Hill owns a parcel of land consisting of approximately 11.36 acres located on Joshua Road, Whitemarsh Township, Pennsylvania (the "Property"). (Ex. P-1.)

B. The History of the Joshua Hill Property

3. Defendant Whitemarsh Township operated the Joshua Hill Property as a landfill from the early 1960s to the early 1970s. During this period, the Property was owned by defendant Whitemarsh Township Authority.

4. On June 3, 1987, Zaid entered into an Agreement of Sale with the Whitemarsh Township Authority in order to purchase the Property. (Ex. P-3.)

5. Defendant Whitemarsh Township Authority sold the Property pursuant to an Agreement of Sale dated June 3, 1987, by and between Whitemarsh Township Authority, as Seller, and Marc A. Zaid, an individual, as Buyer. Id.

6. Zaid subsequently conveyed the Property to Joshua Hill.

7. At the time of the purchase, the Property was undeveloped and remains so today.

8. In proximity to the Property is a sewage treatment plant owned and operated by the Defendants, as well as the site

of a trash incinerator formerly operated by Defendants.

9. The incinerator accepted refuse from Whitemarsh Township, Cheltenham Township and some commercial entities. (Tr. 1/19/00 at 23; Ex. P-24.)

10. When the incinerator was operating, materials accepted at the incinerator were burned and the resulting incinerator ash was deposited in the landfill at the Property. (Tr. 1/19/00 at 30.)

11. The incinerator did not work continuously. When the incinerator was not operational, waste intended to be incinerated was deposited directly into the landfill on the Property. Id.

12. The landfill was unlined and operated pursuant to a "trench" method, whereby trenches were excavated, filled with refuse, and covered with soil. (Tr. 1/18/00 at 152-3). It contains approximately 118,000 tons of waste material. Id. at 153.

13. During the operation of the landfill by Defendants, it was inspected periodically by officials from the Pennsylvania Department of Environmental Resources ("DER"). (Tr. 1/19/00 at 23-24; Ex. P-18.)

14. DER inspection reports from 1972 and 1973 show that there was disposal of solids, liquids, or hazardous waste without approval of the DER. (Tr. 1/18/00 at 155; Ex. P-18 at item 21.)

15. The inspection reports note that incinerator residue, as well as sewage plant, pumping station and household waste were deposited at the landfill. (Ex. P-18.)

16. Household and industrial wastes often contain numerous organic chemicals that can be hazardous substances. (Tr. 1/18/00 at 161.)

17. During the period that the landfill operated, there was no limit on what substances Whitemarsh Township residents could set out for curbside collection. Id. at 160.

18. Incinerator residue is an ash residue consisting of concentrated amounts of chemicals that are not burned off into the air. Id. at 157.

19. Sewage sludge consists of the solid material removed from sewage after treatment at a sewage treatment plant. Id. at 158.

20. Both sewage sludge and incinerator ash commonly contain concentrated levels of metals left over from the treatment processes. Id. at 157 & 163-64.

21. Donald White has worked at Whitemarsh Township since 1962 and is familiar with the operations of the landfill located on the Joshua Hill Property. (Tr. 1/19/00 at 14.)

22. Mr. White confirmed that the landfill received incinerator ash, sewage sludge, and waste which, for one reason or another, could not be burned in the incinerator. Id. at 20 & 30.

23. The landfill was never fenced to prevent access from Joshua Road. Id. at 30-31.

24. National Label Company ("National Label") operates on property adjacent to the landfill and its property was also used

as a landfill in the past.

C. Past Test Results from the Joshua Hill Property

25. When Plaintiff acquired the Joshua Hill Property, Zaid was informed of a study conducted by National Label regarding environmental conditions at the Property. See Ex. P-4 (containing reports of testing done on behalf of National Label by Quality Control Laboratories ("QC Labs")).

26. QC Labs employed "direct sampling" to test the Joshua Hill Property. These samples were not filtered. (Tr. 1/18/00 at 120).

27. At the time, the testing method approved by the federal Environmental Protection Agency and by the American Society for Testing Materials was the EP Toxicity Test. Id. at 120; Tr. 1/19/00 at 73.

28. Because they are "filtered" through a laboratory solution, samples subjected to the EP Toxicity test would have yielded lower results than the "direct sample" method, which does not utilize a filter process. (Tr. 1/18/00 at 86-89 & 119-20).

29. The "direct sample" tests by QC Labs revealed the presence of the following materials in the landfill samples: arsenic; barium; cadmium; chromium; lead; silver; acenaphthene; anthracene; 2,4-dimethylphenol; phenol; toluene; ethylbenzene; naphthalene and pyrene. (Ex. P-4.)

30. Those test results were conveyed to Lawrence Gregan, Township Manager of Whitemarsh Township, in January 1984. Id.

31. Gregan was not employed by Whitemarsh Township during

the period in which it operated the landfill on the Joshua Hill Property. (Tr. 1/19/00 at 52.)

32. In July 1984, the Township retained Valley Forge Laboratories ("VFL") to inspect the site. (Tr. 1/18/00 at 86; Ex. P-10.)

33. VFL utilized an EP toxicity test called Toxicity Characteristics Leaching Potential. (Tr. 1/18/00 at 86.)

34. The 1984 VFL test, utilizing the EP method, indicated the presence in the landfill of: barium; lead; mercury; anthracene; pyrene; chrysene, benzo (a) anthracene; benzo (b) flouranthene; benzo (k) flouranthene; benzo (a) pyrene; indeno (1,2,3-c,d) pyrene; and benzo (g,h,i) perylene. (Ex. P-10, Tables I & II). These samples were taken from the soil/refuse interface of the landfill. (Tr. 1/18/00 at 138; Ex. P-10 at 2.)

35. However, samples tested by VFL were non-toxic for the parameters tested according to federal regulations. (Tr. 1/18/00 at 121.)

36. VFL's laboratory analysis indicated that there was no migration of hazardous substances from the landfill and that the chances of future migration were low. Id. at 122; Ex. P-10.

37. In 1987, VFL performed a second set of tests on the site. (Tr. 1/18/00 at 122; Ex. P-11.) In those tests, VFL took 11 samples over 11 acres. (Tr. 1/18/00 at 123.)

38. VFL concluded that none of the samples tested for RCRA characteristics (ignitability, corrosivity, reactivity, and toxicity) exhibited any of the characteristics of a hazardous

waste. Id. at 126; Ex. P-11 at i & 9.

39. Furthermore, none of the concentrations of priority pollutants exceeded the minimum detection limits, indicating that no priority pollutants were present in either of the two samples tested. (Tr. 1/18/00 at 126; Ex. P-11 at i & 9.)

40. VFL's 1987 report indicated that there had been no migration of hazardous substances from the landfill up until 1984. (Ex. P-11 at i & 9.)

41. In November 1987, Kaselaan & DeAngelo Associates ("K & D") performed a soil gas survey on the Property. K & D tested three pits and determined that methane gas was the most abundant material in their samples. (Tr. 1/18/00 at 92; Ex. P-12.) No other combustibles or volatile organic compounds ("VOCs") were detected. (Ex. P-12 at 5.)

42. In 1994, National Label expressed an interest in acquiring the Joshua Hill Property. (Tr. 1/18/00 at 44.)

43. As part of its investigation into that acquisition, National Label engaged Roy F. Weston, Inc. ("Weston") to perform a Phase II Environmental Assessment of the Property. Id.; Ex. P-25.

44. As part of its investigation, Weston drilled five groundwater monitoring wells on the Property in order to assess potential contamination of the groundwater underlying the former landfill site. (Ex. P-25 at 1 & 2; Tr. 1/18/00 at 94.) The previous environmental consultants did not test for groundwater. (Tr. 1/18/00 at 93.)

45. Monitoring well No. 1 (“MW-1") is the most upgradient well, located between 10 and 50 feet upgradient of the closest landfill cell and outside of the landfill area. (Ex. P-25 at 2-1; Ex. D-1.)

46. Monitoring wells Nos. 2 and 3 (“MW-2,” “MW-3") are the most downgradient wells on the landfill site. (Ex. P-25 at 2-5; Ex. P-26, figure 2, site plan.)

47. The Weston testing detected elevated levels of PCE in MW-1 and elevated levels of lead in MW-3. (Ex. P-25 at 3-2 & 4-1.)

48. The elevated levels of lead detected were most likely the result of laboratory contamination. (Tr. 1/18/00 at 133; Ex. P-25 at 4-1.)

49. Weston did not detect any VOCs in MW-2 or MW-3. (Ex. P-25 at 4-1.)

50. Weston also detected low levels of the following substances in MW-1: 1,2 dichloroethene; chloroform; trichloroethene (“TCE”); toluene; ethylbenzene; and xylene. Id. at 3-2, Table 2.

51. All other analytes tested for by Weston were either not detected or were detected in concentrations that are typical of groundwater in this type of hydrogeologic setting. Id. at 3-1.

52. Zaid transmitted the 1994 Weston Report to the Township. As a result of the report, Lawrence Gregan sought the advice of Theodore Sobieski of Tri-State Engineers concerning Weston’s findings. (Tr. 1/19/00 at 52; Ex. P-42.)

53. Sobieski noted that the Weston testing indicated some impact on MW-3 from the landfill. (Ex. P-42 at ¶¶ 8 & 4.) However, he also noted that the results were inconclusive as to whether the landfill was impacting MW-1. Id. at ¶¶ 1,6,9 & 11.

D. Groundwater and the Wissahickon Schist

54. The next testing at the Joshua Hill Property was conducted by Blazosky Associates, Inc. ("BAI") on behalf of Joshua Hill. (Ex. P-26.) BAI reviewed the previous studies and conducted groundwater testing from the wells Weston installed.

55. The bedrock underlying the Joshua Hill Property consists of two primary formations. The Wissahickon Schist, a metaphoric rock, underlies the bulk of the Property and the landfill itself. Towards its south end, the Property is underlain by the Conestoga Limestone.[1] In addition, there is an igneous intrusion that transects the Property in a northeast-southwest direction. (Tr. 1/18/00 at 80-81; Tr. 1/19/00 at 111.)

56. The Wissahickon schist contains clay material that acts like a lining and has a progressive weathering profile, meaning that it becomes less weathered the greater the depth.[2] (Tr. 1/19/00 at 112-113.)

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[1] The Conestoga formation is primarily a limestone sedimentary formation. (Tr. 1/18/00 at 80.)

[2] This weathering profile is supported by the fact that K & D penetrated to a depth of 90 feet with hollow stone mortar, approximately 60-70 feet into this weathered Wissahickon schist. (Tr. 1/19/00 at 112.)

57. Geologist Andrew Sokol was one of the investigators from BAI who examined the Joshua Hill Property.[3] (Tr. 1/18/00 at 74-75.) As part of his investigation, Sokol reviewed aerial photos of and historic data regarding the Property, and conducted a site visit. Sokol also reviewed the studies conducted by other parties. Id. at 77-79 & 81-83.

58. Sokol opined that the bedrock underlying the landfill is likely fractured. He based this opinion on his own experience and from reviewing descriptions of the bedrock in the region around the Joshua Hill Property. Id. at 104. However, Sokol never cut the bedrock below the Joshua Hill Property or specifically below MW-1. Id. at 114.

59. Bedrock fracturing usually occurs at depths below which groundwater occurs.[4] (Tr. 1/19/00 at 114.)

60. No data indicates that the bedrock below the Joshua Hill Property is fractured. Id. at 111. Despite the fact that it is common practice for consultants and contractors to note where fracturing occurs in bedrock, none of the previous environmental consultants hired to inspect the Property indicated that fracturing was present. Id. at 112.

61. At the Joshua Hill Property, the groundwater is located at depths between 135 and 137 feet below ground surface and flows

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[3] Mr. Sokol holds a Bachelor of Science in geology. (Tr. 1/18/00 at 75.)

[4] Groundwater is the water that occurs in the subsurface area.

in a south to north direction. (Tr. 1/18/00 at 97-98).

62. The grade of the Property drops 80 feet from its southerly to its northerly border. The contours along Joshua Road on its south side are 220 feet above sea level, and the north side of the Property is 140 feet above sea level. (Tr. 1/19/00 at 173.)

63. Sokol also testified that because he believed the bedrock below the Joshua Hill property to be fractured, water could travel through the landfill and then through the fractures in a southerly direction. In his opinion, this would allow leachate from the landfill to travel from north to south, upgradient to MW-1. (Tr. 1/18/00 at 104-08.) He concluded that leachate had in fact traveled from the landfill to MW-1. Id. at 102.

64. John J. Blazosky of BAI is an engineer with particular expertise in landfills. Id. at 150. He testified that, based on his experience and the results of an investigation by BAI, the contaminants found in the groundwater originated from the landfill. Id. at 162.

E. The BAI Investigation

65. BAI set out to sample monitoring wells MW-1, MW-2 and MW-3. It could not locate wells MW-2 and MW-3, but it did locate MW-1 and one additional well (MW-4) installed by Weston in 1994. That well is described in materials obtained from Tetrahedron Consultants, Inc. relating to the 1994 Weston work. Id. at 97; Ex. P-32.

66. BAI obtained underground water samples from MW-1 and MW-4 in November 1998 that indicated the presence of VOCs in MW-1 and lead in MW-4.[5] (Ex. P-33.)

67. BAI did not establish any background levels for the soil or the groundwater. BAI did not have any data regarding what naturally occurs in the area of the landfill, including the areas adjacent to the landfill or on the other side of Joshua Road. (Tr. 1/18/00 at 174-75.)

68. Sokol did not see any sign of stressed vegetation when he visually inspected the site. Id. at 131. Nor were there signs of leachate seeps, or any evidence of physical containers on the property. Id. at 132.

69. The BAI tests revealed no concentrated elevations of TOC or COD. Id. at 133. There was no evidence of phenols present in the BAI samples. Id.

70. TOC, COD, and phenols are all common elements of landfill leachate. Id.

71. The concentrations of lead revealed in filtered samples taken by BAI were below regulatory standards. Id.

72. BAI performed no offsite testing, had no wells off the property and did no testing with regard to potential receptors for groundwater on Cedar Grove Road. Id. at 134-35.

F. The Tri-State Engineers, Inc. Investigation

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[5] The locations of the sampled wells are shown on figure 2 to the BAI Report. (Ex. P-30.)

73. Richard Habrukowich, Ph.D[6] and Theodore Sobieski are associated with the firm of Tri-State Engineers, Inc. ("Tri-State"), Defendants' expert consulting firm in this matter.

74. Habrukowich was the Senior Project Manager and Technical Engineer for Tri-State and has experience with landfills in the areas of hazardous and solid wastes. (Tr. 1/19/00 at 66.)

75. Habrukowich evaluated the Plaintiffs' reports and conducted his own inspection of the landfill area, including review of historical documents.

76. Habrukowich testified to a reasonable degree of scientific certainty that the evidence is inconclusive as to whether any leachate presumably produced in the landfill is in the groundwater samples. Id. at 82 & 84-85.

77. Habrukowich opined that the materials deposited in the landfill, such as refuse and sludge, consist of about 60-70% organic material. Id. at 83. When this material breaks down, it produces measurable amounts of organic material and phenols, as well as carbon dioxide and water. Id. These materials were not present in the groundwater testing in measurable amounts. Id.

78. Habrukowich testified that if there was significant leaching of substances from the landfill, groundwater samples taken from below the landfill would reveal elevated levels of the

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[6] He maintains a Bachelors of Science in Chemical Engineering, a Masters Degree in Environmental Science and a Ph.D. from the Department of Environmental Sciences at Rutgers University. (Tr. 1/19/00 at 64-65.)

target compounds of TOC, COD and phenol. Id. at 82.

79. Neither Weston's report nor BAI's sampling indicated elevated levels of TOCs, CODs or phenols. Id. at 82.

80. Although PCE was detected in the groundwater under MW-1, Habrukowich stated that if it were leaching from the landfill, he would have expected to see measurable levels of TOCs and phenolic compounds as well. Id. at 84.

81. Habrukowich concluded that, based on the levels of indicator compounds, the materials in the landfill were not impacting on the groundwater. Id. at 83-84.

82. Sobieski, an expert in geology, particularly in the occurrence, characterization and fate of contaminants in soil and groundwater, reviewed existing projects, documentation and land use in the surrounding areas, conducted site inspections and heard the testimony of Plaintiffs' experts. Id. at 104. Sobieski concluded that there has been no demonstrated release of hazardous substances from the landfill and no threat of such a release. Id. at 106.

83. Sobiesky based his conclusion on the lack of downgradient interceptors, lack of exposure to the buried contents of the landfill, the present use of the property, and the results from the two downgradient monitoring wells which do not show confirmable material impacts from the landfill. Id. at 106-07.

84. With regard to the PCE detected in MW-1, Sobieski determined that it has not been demonstrated whether this

originates from the landfill or some offsite source. Id. at 114. Sobieski noted that a potential source of PCE was a dry-cleaner located about 4,000 feet from MW-1. However, he did not investigate whether PCE was actually used at that site. Id. at 130-31.

85. Sobieski testified that the toluene detected in MW-1 could have come from the adjacent National Label property, which had a toluene tank on it in the past. Id. at 119; Ex. P-19.

86. Sobieski opined that the occurrence of hazardous substances reported in the testing by BAI can be discounted as sampling procedure artifacts, misplotting on the data table, or of no statistical significance. (Tr. 1/19/00 at 109.)

87. With regard to Exhibit P-3, setting forth the presence of VOCs and lead in the groundwater as detected by BAI and Weston, Sobieski stated that except for the PCE detected, the results could be discounted as misreporting or mistranscription. He also stated that it does not show any impact on the groundwater from hazardous substances in the landfill. Id. at 114-15; Ex. D-1 at unnumbered p.3.

88. With the exception of the elevated concentration of PCE in the groundwater, none of the testing done at the Property indicates an impedance of any regulatory standard, including Pennsylvania Act II, Residential Direct Contact Standard for Soil. (Tr. 1/19/00 at 107-09.)

89. Sobieski concluded to a reasonable degree of scientific certainty that based on the data reviewed by Tri-State, there is

no threat to human health or the environment from the landfill as it is presently maintained. Id. at 107.

G. Plaintiffs' Expenses Allegedly Related to Testing and Remediation of the Joshua Hill Property

90. Zaid testified that Joshua Hill incurred a total of $24,364.17 in expenses related to the testing at the Joshua Hill Property. (Tr. 1/18/00 at 48; Exs. P-27 & P-28.) This total includes:

a) $7,225.00 paid to VFL for solid waste sampling and soil gas sampling in 1987;

b) $2,785.00 to K & D for follow up testing;

c) $4,290.48 to Spires Engineering Company ("Spires") for follow up testing and consultation;

d) $8,994.26 to BAI for testing;

e) $890.00 to Chemspec Analytical Laboratories, Inc. ("Chemspec") for testing done under BAI's supervision; and

f) $179.43 to Tetrahedron Consultants, Inc. ("Tetrahedron") for providing materials related to Weston's testing.

(Tr. 1/18/00 at 48; Exs. P-27 & P-28.)

91. Before Joshua Hill took possession, VFL was hired to assess the Property so that Zaid could determine whether he wished to proceed with the purchase. (Tr. 1/18/00 at 57.)

92. Spires was hired for professional engineering services related to the proposed Joshua Hill development. None of the

bills from Spires mention environmental testing and none of Spires' reports were produced in this litigation. Id. at 67.

93. Plaintiffs hired BAI to serve as an expert in this case. Id. at 69.

94. Zaid testified that he expended 150 hours of his own time in connection with the environmental testing investigation matters. Id. at 51. As Zaid is an attorney who normally bills $175.00 per hour, he estimated the value of his time at $26,250.00. Id. at 51-52. He did not keep any records of his time. Id. at 65.

95. BAI estimates the cost of future remediation at the Property to exceed $6,000,000.00. Id. at 52-54.

H. Potential Remedial Measures

96. Blazosky and Sobieski testified that any remedial measures must be based on a risk assessment - i.e. an evaluation of the release or threatened release against the likelihood of it impacting human health or the environment. (Tr. 1/18/00 at 178-79; Tr. 1/19/00 at 122.) This risk assessment is a prerequisite to approval of a remedial plan by DER. (Tr. 1/18/00 at 179.) As of yet, no risk assessment has been undertaken for the Property. Id. at 180.

97. Blazosky stated that clean closure[7] is an appropriate remedial measure for the Property. Id. at 169 & 177-78.

98. Sobieski testified that based on the levels of

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[7] Clean closure involves the removal of the waste from the site. (Tr. 1/18/00 at 169.)

contaminants detected at the Joshua Hill Property, DER will not require a cleanup of the Property, nor is one required under any Pennsylvania law or regulation. (Tr. 1/19/00 at 108-09.)

III DISCUSSION

The HSCA provides standards of liability and remedies associated with the clean-up of sites that are releasing or threatening to release hazardous substances into the environment. 35 P.S. § 6020.102. A "release" of a hazardous substance from a "site" constitutes a public nuisance, and the person responsible for allowing the release is liable for response costs. Id. § 6020.1101. The person responsible for a release is strictly liable for certain enumerated response costs. Id. § 6020.702. Together, these two provisions have been read to create a private cause of action for response costs. Bethlehem Iron Works v. Lewis Indus., 891 F. Supp. 221, 226 (E.D. Pa. 1995); Smith v. Weaver, 665 A.2d 1215, 1220-1221 (Pa. Super. Ct. 1995).[8] The Third Circuit has held that pre-suit notice is not required in a private cause of action under the HSCA. In re Joshua Hill, Inc., No. 97-1588, slip op. at 12 (3d Cir. April 28, 1998).

To recover under the HSCA, Plaintiffs must demonstrate that:

(1) Defendants are "responsible" parties;

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[8] The Pennsylvania Supreme Court has not yet ruled on whether the HSCA creates a private cause of action for response costs. Cf., Smith, 665 A.2d at 1220.

(2) there has been an actual or threatened "release" of a "hazardous substance" from a "site";

(3) "response costs" were or will be incurred; and

(4) the response costs were "reasonable and necessary or appropriate."

Barbouze v. Chevron Corp., No. 97-CV-2970, 1998 U.S. Dist. LEXIS 12744, at *27 (E.D. Pa. Aug. 19, 1998). Once a plaintiff has demonstrated that the defendant is a responsible party and that there has been an actual or threatened release of a hazardous substance from a site, the burden shifts to the defendant to prove by a preponderance of the evidence that the release or threatened release was caused solely by an act of God, an act of war or the conduct of an unrelated third party. 35 P.S. § 6020.703(a) & (f); F.P. Woll & Co. v. Fifth and Mitchell St. Corp., No. 96-CV-5973, 1999 U.S. Dist. LEXIS 894, at *23 (E.D. Pa. 1999). These elements are substantially similar to the elements of a cause of action under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA" or the "Federal Superfund Act").

A. "Responsible" Parties

A person is "responsible" for a release or threatened release of a hazardous substance if they own or operate a "site":

(1) when a hazardous substance is placed or comes to be located on a site;

(2) when a hazardous substance is located in or on the

site, but before it is released;

(3) during the time of the release or threatened release.

35 P.S. § 6020.701. The HSCA imposes liability on every owner or operator within the chain of title. Andritz Sprout-Bauer v. Beazer East, 12 F. Supp. 2d 391, 408 (E.D. Pa. 1998).

The definition of a "site" includes a "landfill or area . . . where a contaminant or hazardous substance has been deposited, stored, treated, released, disposed of, placed or otherwise come to be located." 35 P.S. § 6020.103.

A "hazardous substance" includes any material defined as a hazardous substance pursuant to CERCLA. Id. Neither the HSCA nor CERCLA refer to a threshold concentration level in their definition of a hazardous substance, and thus a substance is hazardous simply by being listed as such in regulations promulgated under CERCLA. See United States v. Alcan Aluminum Corp., 964 F.2d 252, 260-61 (3d Cir. 1992)(stating that CERCLA does not "impose any quantitative requirement or concentration level on the definition of 'hazardous substances'"); United States v. Wade, 577 F. Supp. 1326, 1340 (E.D. Pa. 1983) (same). The definitions of "hazardous substances" under CERCLA and the HSCA are identical. Barbouze, 1998 U.S. Dist. LEXIS 12744, at *34. The list of "hazardous substances" under CERCLA is found at 40 C.F.R. § 302.4, Table 302.4 (2000).

B. "Release" or "Threatened Release"

The principal dispute between the parties is whether

the Defendants caused a "release" of hazardous substances from a "site." The HSCA defines a "release" as:

> [s]pilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposal into the environment.
>
> 35 P.S. § 6020.103.

As noted above, a "site" includes, inter alia, "any . . . landfill . . . or area where a . . . hazardous substance has been deposited." Id. This definition is ambiguous as to whether the landfill itself (i.e. the trenches of waste) is the "site," or whether the entirety of the Joshua Hill Property is a "site." For the reasons that follow, the court determines that regardless of whether "site" is defined broadly or narrowly, the mere presence of hazardous substances in the groundwater below the landfill is insufficient to constitute a "release" under the HSCA.

Plaintiffs correctly note that their burden is simply to "prove that the defendant's hazardous substances were deposited at the site from which there was a release," and that the HSCA, like CERCLA, effectively places the burden on the defendant to disprove causation. (Pls.' Proposed Findings of Fact and Conclusions of Law at 25 (quoting Alcan, 964 F.2d at 266 (construing CERCLA)).) However, the HSCA only shifts the burden to the defendant after the plaintiff has demonstrated a "release from" the site.

Plaintiffs appear to argue that because elevated

concentrations of PCE and low levels of other hazardous substances were found in the groundwater below the Joshua Hill Property, there has necessarily been a "release" of hazardous substances from the Joshua Hill "site." Indeed, as one court noted in construing CERCLA, "it is nearly impossible to conceive of a situation where hazardous substances are found in the soil and not ipso facto 'released' into the environment." HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 341 (D.Md. 1993); see also Northwestern Mut. v. Atlantic Research, 847 F. Supp. 389, 396 (E.D.Va. 1994) (quoting same).

However, liability under the HSCA is triggered when a hazardous substance is released "from" a site. 35 P.S. § 6020.701. The use of the term "from" rather that "at," "in," or "on" implies that the initial release into the environment of a hazardous substance found in the groundwater or soil at a particular site have actually occurred at that site. In other words, the plaintiff must show that the hazardous substance is not only present in the "environment" at the site, but also that the hazardous substance made its initial entrance into the "groundwater, . . . land surface or subsurface strata" at some location on that property. See id. § 6020.103 (defining "environment").

Some caselaw interpreting CERCLA could be read to imply that when a defendant's waste contains hazardous substances and those substances are found at a site, the plaintiff has necessarily established the release element (which is identical

to the release element of an HSCA cause of action). See Artesian Water Co. v. Gov. of New Castle County, 659 F. Supp. 1269, 1282 (D. Del. 1987) (stating that plaintiff need not prove beyond dispute that contaminants found near site actually flow from site); Wade, 577 F. Supp. at 1332-33 (noting that plaintiff need not prove that wastes released from site are those of particular defendant). However, in these two cases, there was evidence of a release from the defendants' respective sites. In Artesian, the plaintiff had adduced sufficient evidence that hazardous substances were released from the defendant's landfill, but the court was addressing the question of whether it had to be shown that contaminants found in the plaintiff's groundwater actually emanated from the defendant's landfill or from another nearby landfill which was concurrently releasing hazardous substances. Artesian, 659 F. Supp. at 1281-82. In Wade, there was apparently no dispute that a release had occurred from a hazardous waste dump, and the court was addressing whether the plaintiff needed to show that a particular defendant's waste located at that site actually contributed to the release from that site. Wade, 577 F. Supp. at 1332-33.

A reading of the statute that equates the mere presence of a hazardous substance with its release from that particular property would effectively render the release element of an HSCA cause of action superfluous. For example, such a reading would impose prima facie liability on a small business owner, who keeps cleaning supplies in closed containers on premises, simply

because contaminants found in those supplies were found in the groundwater below the business property after migrating from somewhere else. An HSCA plaintiff would not need to prove that the business owner ever opened those containers, let alone released the contents into the surrounding environment.

The court finds Stewman v. Mid-South Wood Products of Mena, Inc., involving a claim for response costs under CERCLA, particularly instructive. Stewman, 993 F.2d 646 (8th Cir. 1993). In that case, the trial court determined that substances listed as hazardous under CERCLA were found in groundwater near the defendant's superfund site, a former wood treatment facility. Id. at 647. One of the substances detected, PCP, was found in quantities above what naturally occurred in the groundwater and had been commonly used at the site. Id. at 647-48. The appellate court upheld the trial court's conclusion, based on expert testimony, that plaintiffs failed to demonstrate a "release" of hazardous substances from the site. Id. at 649. It agreed with the Third Circuit that no quantitative requirement was necessary to establish a release under CERCLA. Id. (citing Alcan, 964 F.2d at 259). However, it noted that in Alcan, the parties stipulated that a release from the site had occurred, whereas in Stewman "the issue was whether or not there had been a release at all." Id.

C. Response Costs

Once a plaintiff has proven a release, it must show that its expenses were response costs within the meaning of the

HSCA and that they were reasonable and necessary or appropriate.

1. Costs already incurred

Private actions under the HSCA allow only for "costs of response." Redland Soccer Club v. Dept. of Army, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992). Response costs must be "reasonable and necessary or appropriate." 35 P.S. § 6020.702(a)(2). A response is defined to include "action taken in the event of a release or threatened release" to "study [or] assess . . . the release in order to protect the present or future public health, safety or welfare of the environment." Id. § 6020.103. Costs of response do not include attorneys' fees or expert witness fees. Redland Soccer Club, 801 F. Supp. at 1437. The provisions of the HSCA requiring development of an administrative record regarding response costs are not relevant to private actions. Smith, 665 A.2d at 1222 (discussing 35 P.S. §§ 6020.505 & 6020.506).

2. Future response costs

In addition to being reasonable, remedial measures taken in response to a release or threatened release must be cost effective. 35 P.S. § 6020.504.

The HSCA allows for declaratory relief, and declaratory relief as to future response costs is not per se improper. Commonwealth v. Delta Chems., 721 A.2d 411, 419 (Pa. Commw. Ct. 1998). However, declaratory judgment as to future response costs would effectively declare those costs to be reasonable without giving the defendants an opportunity to dispute that determination. Id. (declining to award future response costs

because there was as yet no record sufficient to determine whether they would be reasonable).

IV CONCLUSIONS OF LAW

1. This court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334.

A. Defendants are Responsible Parties

2. The court finds that it is more probable than not that some materials listed as "hazardous substances" under 40 C.F.R. § 302.4 are present in the landfill proper on the Joshua Hill Property. (Ex. P-4.)

3. Each of the substances detected in the landfill by QC Labs, and in the groundwater by Weston and BAI, are listed. The testimony of both Plaintiffs' and Defendants' witnesses indicated that these substances were probably disposed of, and can be the byproducts of waste disposed of, at the landfill. Thus, Defendants were owners or operators of a site where a hazardous substance was placed or came to be located. 35 P.S. § 6020.103. Accordingly, Defendants are "responsible" parties within the meaning of the HSCA. Id. § 6020.701.

B. There Has Not Been a Release or Threatened Release From the Landfill Into the Environment

4. The court finds that Plaintiffs' evidence is insufficient to establish that hazardous substances are leaching from the landfill into the groundwater.

5. First, with the exception of PCE and lead, the levels

of chemicals detected in testing conducted on the Joshua Hill Property have not been shown to be above background levels. In fact, neither the previous investigators nor Plaintiffs' experts tested for background levels of these chemicals in order to establish the level at which they occur in the area surrounding the Joshua Hill Property. (Tr. 1/18/00 at 174-75.) Thus Plaintiffs have not demonstrated that these substances are leaching from the landfill.

6. Second, the court finds that the detection of elevated levels of lead is most likely the result of laboratory contamination or of mistranscription by BAI. (See infra II.C., ¶ 48 & II.F., ¶ 87; Ex. D-1 at unnumbered p.3.)

7. Third, while PCE was detected in above-normal quantities in the groundwater below MW-1, Plaintiffs have not shown that it was released from the landfill on the Joshua Hill Property.

a) The court finds persuasive Habrukowich's testimony that if hazardous substances were leaching from the landfill, other VOCs such as TOC, COD and phenol compounds would have been discovered in the groundwater taken from directly below the landfill in measurable amounts. Those VOCs were not detected in that groundwater in measurable amounts.

b) Additionally, the evidence indicates that for leachate to have migrated from the landfill to the

groundwater below MW-1, it would have had to flow upgradient, against the normal flow of groundwater on the property. Sokol's testimony that leachate traveled upgradient through fractures in the Wissahickon schist is unreliable, unconvincing, and speculative, as BAI took no samples of the rock below the landfill to determine whether it actually was fractured.

c) Furthermore, testing of the groundwater below the wells downgradient of the landfill (MW-2, MW-3) did not indicate the presence of hazardous substances in detectable quantities or in concentrations above what is normal for areas of similar hydrogeologic makeup. (Ex. P-25 at 3-2.)

d) Lastly, QC Labs' direct samples and VFL's samples did not reveal the presence of PCE in the landfill. (Ex. P-4; see supra at II.C., ¶¶ 29 & 34.)

8. Here, Plaintiffs may have established that a release of PCE occurred somewhere, but the mere presence of PCE in the groundwater does not establish that it was "released from" the Joshua Hill Property.[9]

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[9] In this case, the VFL samples were taken from the soil/landfill interface, essentially part of the landfill itself rather than the surrounding environment. Therefore the existence of hazardous substances in these samples is insufficient to constitute a release into the environment(or even a threat of release, given the low levels at which they were detected).

9. In light of Plaintiffs' failure to demonstrate that substances are leaching from the landfill into the environment, the court concludes that although hazardous substances were present in the groundwater, a release "from" the site has not occurred.

10. Because the court finds the testimony of Habrukowich and Sobieski persuasive, Plaintiffs also failed to establish that there is a threat of release from the landfill.

11. Accordingly, Plaintiffs failed to establish by a preponderance of evidence that hazardous substances are being "released" into the environment or that there is a "threat of release" from the Joshua Hill site. 35 P.S. § 6020.103.

C. Plaintiffs' Claim for Response Costs

12. Assuming, arguendo, that a release occurred from the landfill, the court would not grant Plaintiffs' request for past or prospective response costs.

1. The costs incurred by Plaintiffs are not "response costs"

13. The costs already incurred by Plaintiffs' in this case were largely if not wholly related either to the proposed development of the Joshua Hill Property or to this litigation, rather than as a response to a perceived release of hazardous substances.

14. VFL, K & D and Spires were hired for purposes of

Also, QC Labs' direct samples and VFL's samples did not even reveal the presence of PCE in the landfill. (Ex. P-4; supra at II.C., ¶¶ 29 & 34.)

evaluating the Property for potential development, not in order to respond to or remedy a potential environmental hazard. Likewise, the time Zaid spent testing the Property was for the purpose of assessing its development potential.[10]

15. BAI, Chemspec and Tetrahedron appear to have been hired for the purposes of developing Plaintiffs' evidence in this case. These are litigation expenses, and are not recoverable. See Redland Soccer Club, 801 F. Supp. at 1437.

16. Accordingly, the expenses that Plaintiffs incurred for testing and evaluation of the Joshua Hill Property are not "response costs" within the meaning of the HSCA. 35 P.S. §§ 6020.103 & 6020.1115(b).

2. Future remedial measures are not warranted

17. The uncontradicted testimony establishes that based on the levels of contaminants detected at the Joshua Hill Property, DER will not require a cleanup of the Property, nor is one required under any Pennsylvania law or regulation. (Tr. 1/19/00 at 108-09.) The court agrees with Defendants' experts that clean closure is not appropriate because the volume of materials would make it cost prohibitive.[11] Id. at 119-20.

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[10] In any event, there is no evidence supporting this claim aside from Zaid's recollection.

[11] In his experience, Sobieski could not recall any project involving over 100,000 cubic yards of this type of material where clean closure was considered the most appropriate remedy. Normally, some type of "cap," such as a building or soil, would be placed over the landfill. (Tr. 1/19/00 at 120-21.)

18. As no risk assessment has been undertaken for the Property, the nature of a remedy for the Property and the amount of expenses related to it are necessarily speculative. As such, the court is unable to determine the cost-effectiveness or reasonableness of any future remedy.

19. Accordingly, Plaintiffs have not established that they would be entitled to declaratory judgement awarding them costs for future remedial measures because they have not demonstrated by a preponderance of evidence that remedial measures are necessary or appropriate, or that the clean closure remedy which they seek is cost effective. 35 P.S. §§ 6020.504 & 6020.702(a)(2).

Judgement will be entered against Plaintiffs and in favor of Defendants in this matter. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSHUA HILL, INC., et al.	:	CIVIL ACTION
v.	:	
WHITEMARSH TOWNSHIP AUTHORITY, et al.	:	NO. 96-5648

ORDER

AND NOW, TO WIT, this day of October, 2000, after consideration of the pleadings, trial testimony, exhibits and submissions of the parties, IT IS ORDERED that judgement is entered in favor of defendants Whitemarsh Township Authority, et al. and against plaintiffs Joshua Hill, Inc., et al. on all counts.

LOUIS C. BECHTLE, J.