

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

F.P. WOLL & CO., : CIVIL ACTION
Plaintiff :
 :
v. :
 :
FIFTH AND MITCHELL STREET, :
CORP., et al., :
Defendants : NO. 96-5973

MEMORANDUM AND ORDER

McLaughlin, J.

June 28, 2006

This case involves a dispute over who caused and who should pay for soil and groundwater contamination that was discovered in and around Lansdale, Pennsylvania. The plaintiff, a former owner of an industrial facility in Lansdale, asserts that it has had to pay some response costs and will have to pay significantly more in the future for contamination that was caused by one of its tenants, defendant Eaton Laboratories, Inc. The plaintiff has also brought claims against another previous owner, defendant Fifth and Mitchell Street Corp. which later changed its name to Fifth and Mitchell Street Co.

After nearly nine years of litigation, a bench trial was held from July 11 to July 14, 2005. The plaintiff has brought claims against both Eaton Laboratories, Inc. and Fifth and Mitchell Street Co./Corp. under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Pennsylvania Hazardous Sites Clean-Up Act (the "HSCA").

The plaintiff has also brought a claim against Eaton Laboratories, Inc. under the Pennsylvania Storage Tank and Spill Prevention Act (the "Storage Tank Act").

I. Findings of Fact

A. Background¹

1. In September of 1981, the plaintiff purchased real property located at 5th Street and Mitchell Street in Lansdale, Pennsylvania (the "Site").

2. The plaintiff owned the Site from September of 1981 until 2002.

3. In 1968, defendant Fifth and Mitchell Street Corp. acquired the Site and later transferred it to Fifth and Mitchell Street Co. Fifth and Mitchell Street Co. owned the Site until it was sold to the plaintiff in 1981.²

4. From 1970 to January of 1978, the Eaton Division of Jetronics, Inc. ("Jetronics") operated at the Site and manufactured and distributed dry cleaning products.

5. In January of 1978, Jetronics sold its Eaton Division and defendant Eaton Laboratories, Inc. ("Eaton") was

¹There are no material disputes regarding the background facts in this case and thus for some of these undisputed facts, the Court has not provided a citation to the record.

² The Court will refer to both Fifth and Mitchell Street Corp. and Fifth and Mitchell Street Co. as "Fifth and Mitchell."

formed. (Pl.'s Ex. 64C).

6. Eaton operated at the Site and manufactured and distributed dry cleaning products from January of 1978 to 1985.

7. Eaton stopped operating at the Site when it filed for bankruptcy and its assets were ultimately sold to D.C. Filter & Chemical Inc. ("D.C. Filter"). (Trial Tr. 55:15-20, July 11, 2005).

B. Contamination at and Around the Site

1. Soil Contamination

8. On August 11, 1988, TSD Environmental Services, Inc. ("TSD") collected twelve soil samples from the Site which were labeled as B-1 through B-12. All of the soil samples were taken from a depth of eighteen to twenty-four inches. Samples B-1 through B-3 were taken from the lower parking area which is northeast of the building where Eaton operated. Samples B-4 through B-7 were taken from the upper parking area which is east of the building where Eaton operated. Samples B-8 through B-12 were taken from alongside of Mitchell Avenue, directly adjacent to the building that housed Eaton. (Pl's Ex. 17).

9. Samples B-1, B-3, B-5, B-6, B-7 and B-12 detected no volatile organic chemicals ("VOCs"). Sample B-2 detected 1,1,1, trichloroethane ("TCA") at a level of 8 parts per billion and total VOCs at a level of 1,578 parts per billion. Sample B-4

did not detect any TCA, trichloroethylene ("TCE") or perchloroethylene ("PCE")³, but found other VOCs at a level of 188 parts per billion. Sample B-8, found TCA at a level of 42 parts per billion, TCE at a level of 72 parts per billion, PCE at level of 40 parts per billion, 1,2-dichloroethane ("1,2-DCA") at level of 2,100 parts per billion, 1,1-dichloroethane ("1,1-DCA") at a level of 19 parts per billion and total VOCs at a level of 327,773 parts per billion. Sample B-9 detected TCA at a level of 10 parts per billion, 1,2-DCA at a level of 6,640 parts per billion, 1,1-DCA at a level of 32 parts per billion and total VOCs at a level of 6,923 parts per billion. Sample B-10 did not detect any TCA, TCE or PCE but found 1,2-DCA at a level of 7 parts per billion and total VOCs at a level of 27 parts per billion. Sample B-11 found TCA at a level of 13 parts per billion and total VOCs at a level of 27 parts per billion. (Pl's Ex. 17, pp. 2-5).

10. Environmental Resources Management, Inc. ("ERM") was retained by the plaintiff to conduct an environmental

³ Perchloroethylene and tetrachloroethylene are synonyms. Thus, the Court will use the abbreviation "PCE" to refer to both perchloroethylene and tetrachloroethylene. Some of the witnesses also refer to a chemical called "perc." Perc is an alternate abbreviation for perchloroethylene. (Bixler Dep. 22:15-17, Aug. 14, 2002).

Additionally, it makes no difference whether a chemical ends in -ethylene or -ethene as these two words are synonyms as well. For example, trichloroethylene is the same thing as trichloroethene.

assessment of the Site in late 1989. ERM took soil samples from twelve different boring locations, labeled as SB-1 through SB-12. All of these soil samples were taken at a depth of between approximately three and five feet. In addition, two soil samples were taken from the boring for a monitoring well (MW-1) that was installed. One of these samples was taken from a depth of zero to two feet and the other was taken from a depth of six to seven and a half feet. The soil samples from MW-1 and samples SB-1 through SB-9 were taken from alongside Mitchell Avenue. Samples SB-10 through SB-12 were taken from the lower parking area. Both of the soil samples taken from MW-1 and three of the other soil samples, SB-2, SB-8 and SB-12, were submitted for testing. (Pl's Ex. 20).

11. No VOCs were detected in sample SB-8 or sample SB-12. Both soil samples taken from MW-1 each detected total VOCs at a level of 9 parts per billion but did not detect any PCE or TCE.⁴ Sample SB-2 found PCE at a level of 70 parts per billion and total VOCs at a level of 223 parts per billion. (Pl's Ex. 20, pg. 3-4).

12. From August 9, 1993 to October 1, 1993, Black & Veatch Waste Science, Inc. ("Black & Veatch") took soil samples at various locations around Lansdale as part of their

⁴ It is not clear if ERM tested for TCA. ERM did not report finding any TCA in any of the soil or groundwater samples taken from the Site.

investigation done in preparing a Remedial Investigation Feasibility Study Report that was published in December of 1994 (the "1994 RIFS") and that was made for the United States Environmental Protection Agency (the "EPA"). Black & Veatch took nine soil samples from the Site identified as SB01 through SB09. Samples SB01 through SB04 and samples SB08 and SB09 were taken from a small alley that runs directly adjacent to the northeast of the building that housed Eaton. Samples SB05 through SB07 were taken from alongside Mitchell Avenue. (Pl's Ex. 28, pp. ES-1-3, pg. 3-7, fig. 3-2).

13. Only two of the samples, SB01 and SB08 showed any VOC contamination. No PCE, TCE or TCA was detected in sample SB01, but 1,2-dichloroethylene ("1,2-DCE") was detected at a level of 14 parts per billion and other contaminants were found at a level over 1000 parts per billion. PCE was the only VOC detected in sample SB08 and it was detected at a level of 17 parts per billion. (Pl's Ex. 28, pg. 3-7, fig. 3-2).

14. The plaintiff arranged for ENVIRON to take split soil samples at the locations sampled by Black & Veatch. (Pl's Ex. 26, pg. 1).

15. ENVIRON detected TCA and PCE in some of the soil samples, but only in trace amounts. Several other VOCs were also detected in trace amounts. (Pl's Ex. 26, pg. 3).

2. Groundwater Contamination

16. The primary groundwater contaminants of concern to the EPA are TCE, PCE, 1,2-DCE and vinyl chloride. (Pl's Ex. 42, pg. ES-x).

17. In 1979, the North Penn Water Authority ("NPWA") found that eight of its production wells were contaminated with VOCs. The EPA contracted with the NUS Corporation to provide a report (the "NUS report"). NUS divided the NPWA area up into twelve separate areas and the Site was located in Area 6. One of the wells that was tested in Area 6 was NPWA well L-8, which was located near the Site. (Pl's Ex. 14, pg. 1-1, pg. 4-21).

18. Testing on well L-8 detected TCE between 300 and 2,000 parts per billion, PCE between 150 and 800 parts per billion, TCA between 15 and 50 parts per billion, vinyl chloride between 15 and 45 parts per billion, 1,2-DCE between 200 and 1,200 parts per billion and 1,1-dichloroethylene ("1,1-DCE") between 10 and 15 parts per billion. (Pl's Ex. 14, pg. 4-21).

19. In addition to its soil sampling, TSD collected groundwater samples from two of the samples, B-1 and B-7, which were located in the lower parking area and upper parking area, respectively. No VOCs were detected in either of these samples. (Pl's Ex. 17, pp. 2-3).

20. ERM collected a groundwater sample from MW-1. Testing on that groundwater sample detected PCE at a level of 6

parts per billion, TCE at a level of 260 parts per billion and vinyl chloride at a level of 35 parts per billion. Additionally, ERM found 1,1-DCA at a level of 6 parts per billion and 1,2-DCA at a level of 10 parts per billion. (Pl's Ex. 20, pg. 3-4, table 3-2).

3. Degradation of Chemicals

21. If PCE is released into the environment it will breakdown into other chemicals. Degradation of PCE can create TCE then DCE and then vinyl chloride. Thus a release of PCE could lead to contamination of TCE, DCE and vinyl chloride. (Pl's Ex. 42, pg. ES-vii; Trial Tr. 24:1-4, July 12, 2005).

22. Degradation of TCA creates DCA and thus a release of TCA could lead to contamination of DCA. (Trial Tr. 30:4-7, July 12, 2005).

C. Eaton's Operations at the Site

23. From 1973 to 1985, although some new products were developed, there were no major changes in the nature of the business conducted by Eaton or Jetronics at the Site. (Judelsohn Dep. 12:8-20, Feb. 18, 2000).

24. Generally, Eaton's operations at the Site consisted of receiving raw materials and then making dry cleaning products out of those raw materials. (Bixler Dep. 13:19-19:14,

Aug. 14, 2002).

25. The finished products would generally be sold in one, five or twenty gallon containers. (Bixler Dep. 8:14-20).

26. Most of the time, the raw materials would arrive at the Site in fifty-five gallon drums, though Eaton also received some raw materials in bulk. (Bixler Dep. 13:23-14:3).

27. The fifty-five gallon drums would be stored at the Site until they were used. (Bixler Dep. 17:10-24).

28. When they were used, the raw materials would generally be placed in a mixing tank using a forklift and/or pumps. (Bixler Dep. 18:14-19:2).

29. Eaton would then mix the raw materials in one of three mixing tanks to make its dry cleaning products. (Bixler Dep. 15:6-16:5).

30. After being processed in a mixing tank, the resulting product would generally be pumped into cans. (Bixler Dep. 19:3-19:12).

31. The cans would then be labeled and placed in boxes. (Bixler Dep. 19:15-20:3).

32. The finished products were shipped from a loading dock that was located in an alleyway off Mitchell Street. (Bixler Dep. 20:4-24).

D. Hazardous Substances Used by Eaton

33. TCA was used by Eaton in compounds that were made to assist dry cleaners in removing spots from articles of clothing. (Judelsohn Dep. 40:20-41:11).

34. Eaton would buy PCE and it was used as a component in some of its detergents. (Bixler Dep. 21:13-23).

35. Sometimes PCE would arrive at Eaton in bulk. When PCE did arrive in bulk, it would be put into storage tanks. (Bixler Dep. 22:21-23:12).

36. Eaton did not use TCE.⁵

37. Eaton did not use ortho-dichlorobenzene. (Judelsohn Dep. 22:3-13).⁶

38. Eaton did not use para-dichlorobenzene. (Judelsohn Dep. 24:2-7).⁷

⁵ David Judelsohn worked as a chemist for Eaton and was in charge of the formulas for each of Eaton's products. (Bixler Dep. 36:2-8). Mr. Judelsohn has never heard of TCE. (Judelsohn Dep. 19:23-20:3).

⁶ Eaton's chemist, Mr. Judelsohn has no recollection of whether that chemical was used or not. (Judelsohn Dep. 22:3-7). Because no other credible evidence was introduced regarding Eaton's use of ortho-dichlorobenzene, the Court concludes that the plaintiff has not proved that chemical was used by Eaton.

⁷ Para-dichlorobenzene is generally used in the dry-cleaning trade as an anti-moth agent, though Eaton's chief chemist was not familiar with the product. (Judelsohn Dep. 24:8-18). Eaton's plant manager, Harold Bixler did not recall manufacturing any additives for repelling moths or a product called Moth Ex. (Bixler Dep. 28:9-15).

E. Eaton's Contribution to the Contamination Found at and Around the Site

39. PCE and TCA were disposed of by Eaton at the Site.⁸

1. Soil Contamination

40. The PCE and TCA contamination of the soil alongside Mitchell Avenue was caused in part by releases of PCE and TCA from the Site. (Trial Tr. 57:17-58:10, July 12, 2005).

41. Additionally, releases of PCE and TCA from the Site are partially responsible for the contamination of TCE, DCE, DCA and vinyl chloride around the Site. See Finding of Fact ("FOF") ¶¶ 21-22.

⁸ There is not sufficient direct evidence for the Court to reach any conclusions regarding specific instances of disposals of PCE and TCA by Eaton. However, the evidence shows that Eaton used PCE and TCA and that those same chemicals (and their daughter chemicals) were found in soil and groundwater samples on and directly adjacent to the Site. Additionally, the evidence shows that there were not significant changes in the operations at the Site, which consisted mostly of mixing and storing different chemicals during the time that Jetronics and later Eaton operated there. Thus, the Court concludes that there is sufficient circumstantial evidence from which to infer that Eaton disposed of PCE and TCA at the Site.

Additionally, because Eaton's operations did not change significantly over time, the Court concludes that PCE and TCA were disposed of by Eaton both when the site was owned by Fifth and Mitchell and when the Site was owned by the plaintiff.

2. Groundwater

42. Releases of PCE and TCA from the Site had a de minimis contribution to the contamination of PCE and TCA found in well L-8. (Trial Tr. 73:3-15, July 12, 2005; Trial Tr. 64:11-69:15, July 14, 2005).

43. Accordingly, releases of PCE and TCA from the Site had a de minimis effect on the TCE, DCE, DCA and vinyl chloride found in well L-8. See FOF ¶¶ 21-22.

F. Damages

44. On June 24, 2002, the plaintiff and the EPA entered into a consent decree by which the plaintiff paid the EPA \$40,708 and the EPA released the plaintiff from any liability for past response costs for soil contamination. (Pl's Ex. 81; Trial Tr. 99:6-9, July 11, 2005).

45. The plaintiff was not released from any liability for future response costs (incurred after June 24, 2002) or for any liability for groundwater or other natural resources damages. (Trial Tr. Pl's Ex. 81, pg. 7).

46. The plaintiff incurred \$23,957.75 in costs related to the discovery of contamination at the Site in addition to what was paid to the EPA. (Aff. of James Weiner, Esq., Dec. 7,

2005).⁹

47. Since 2002, the EPA had not made any demand for payment from the plaintiff. (Trial Tr. 99:14-16, July 11, 2005).

48. Except for a request that the plaintiff perform a site investigation relative to the closing of an underground storage tank, the plaintiff has not received any demand for payment or request to perform any investigation from the Commonwealth of Pennsylvania. (Trial Tr. 102:8-12, July 11, 2005).

49. The money expended by the plaintiff to close the underground storage tank at the Site would have been necessary regardless of any contamination caused by Eaton. (Trial Tr. 161:16-20, July 12, 2005).

50. The EPA's contractor, Black & Veatch concluded in the 1994 RIFS that the contamination found at the Site should not impact groundwater significantly. (Pl's Ex. 28, pg. 3-7).

51. Neither the 1994 or the 1999 RIFS mentioned Eaton when those reports discussed how contaminants may have made it into the groundwater and reached different wells in the Lansdale

⁹Originally, the plaintiff claimed it had paid \$37,426.57 in past response costs, in addition to what was paid to the EPA. See Pl's Proposed Findings of Fact ¶ 82 (citing Pl's Ex. 50). The defendants objected to this figure and after the conclusion of the trial, on December 8, 2005, the plaintiff submitted an affidavit from an attorney at Lavin O'Neil, Ricci, Cedrone and DiSipio which stated that the plaintiff had been billed for \$23,957.75 in response costs. The defendants have not objected to this figure.

area. (Trial Tr. 124:12-127:2, July 12, 2005; Pl's Ex. 28, Sec. 4.0; Pl's Ex. 42).

52. The EPA's Record of Decision for Area 6 issued on August 10, 2000, listed ten locations that the EPA believed to be contamination sources for groundwater. Neither Eaton or the Site were listed. (Pl's Ex. 73, pp. 13-14).

53. The Commonwealth of Pennsylvania concurred with the Record of Decision for Area 6 that was issued by the EPA. (Pl's Ex. 73, pg. 31).

54. The EPA has not made any demand for payment from the plaintiff for groundwater contamination. (Trial Tr. 99:14-16, July 11, 2005; Trial Tr. 146:24-147:6, July 12, 2005).

55. No demand had been made of the plaintiff or any other potentially responsible person for natural resources damages in the North Penn superfund area, which is where the Site is located. (Trial Tr. 99:14-16, July 11, 2005; Trial Tr. 156:4-8, July 12, 2005).

II. Conclusions of Law and Additional Findings of Fact

First, the Court will discuss the plaintiff's claims under CERCLA before turning to the plaintiff's state law claims under the HSCA and then the Storage Tank Act. Although the plaintiff must establish that response costs have been incurred to establish liability under CERCLA and the HSCA, the Court will

discuss the plaintiff's damages separately.¹⁰

A. CERCLA

CERCLA was enacted to deal with complex problems and dangers posed by hazardous waste sites. Under CERCLA, a plaintiff may bring a private right of action to recover response costs that relate to remedying environmental hazards. United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996).

There are two different relevant causes of action under CERCLA. First, a plaintiff who is an innocent party and who has undertaken hazardous waste cleanup may bring an action against a "potential responsible person" under section 107 of CERCLA for costs associated with cleanup and remediation. Second, section 113 of CERCLA provides for recovery by one potentially responsible person against another. To prove liability under section 113, a plaintiff must satisfy the elements of section 107, but need not be an innocent party. N.J. Tpk. Auth. v. PPG Indus., Inc., 197 F.3d 96, 103-04 (3d Cir. 1999)

Here, the plaintiff is asserting a contribution action under section 113 of CERCLA, 42 U.S.C. § 9613(f)(1). (Trial Tr.

¹⁰ Although there is much disagreement about the extent of the response costs incurred by the plaintiff, it is undisputed that if the Court otherwise finds the defendants liable, that the plaintiff incurred at least \$40,708 in response costs when the plaintiff reached a settlement with the EPA for costs related to soil contamination. See FOF ¶ 44.

39:16-24, July 11, 2005). In order to prove CERCLA liability under section 113, a plaintiff must prove:

- (1) that hazardous substances were disposed of at a "facility";
- (2) that there has been a "release" or "threatened release" of hazardous substances from the facility into the environment;
- (3) that the release or threatened release has required or will require the expenditure of "response costs"; and
- (4) that the defendant falls within one of four categories of responsible parties.

CDMG Realty Co., 96 F.3d at 712; N.J. Tpk. Auth., 197 F.3d at 103-04.

If the plaintiff is able to prove these elements, the burden then shifts to the defendants to prove by a preponderance of the evidence that any damages were the result of an act of God, an act of war or, if certain conditions are met, an act or omission of a third party. 42 U.S.C. § 9607(b). If the defendants are not able to satisfy this burden, then the Court will determine the proper allocation of response costs among the parties using appropriate equitable factors. 42 U.S.C. § 9613(f)(1); Beazer E., Inc. v. Mead Corp., 412 F.3d 429, 446 (3d Cir. 2005); N.J. Tpk. Auth., 197 F.3d at 104, n.7.

First, with respect to the prima facie case, it is uncontested that the Site is a facility and that TCE, TCA, PCE, DCA, DCE, vinyl chloride and dichlorobenzenes are all hazardous

substances under CERCLA. See 42 U.S.C. § 9601(9); 40 C.F.R. § 302.4.

Second, the Court has found that both PCE and TCA were used by Eaton and disposed of at the Site. FOF ¶¶ 33-34, 39. The Court also found that releases of hazardous substances from the Site contributed to the soil and groundwater contamination in and around the Site. FOF ¶¶ 40-43. However, the Court is unable to make any findings about when any specific instances of releases of hazardous substances occurred at the Site.

That said, such a finding is not required to establish a prima facie case under CERCLA. A plaintiff need not establish a direct causal connection between a defendant's hazardous substances and a release. Instead, a plaintiff need only establish that "hazardous substances were deposited at the site from which there was a release and that the release caused the incurrence of response costs." United States v. Alcan Aluminum Corp., 964 F.2d 252, 265-66 (3d Cir. 1992) (emphasis in the original); see also N.J. Tpk. Auth., 197 F.3d at 105.

Thus, although the plaintiff has not conclusively shown when any specific releases took place, the plaintiff has shown that hazardous substances were received, used, stored and shipped by Eaton at the Site and that those same hazardous substances and their daughter chemicals were found in soil and groundwater samples on and around the Site. FOF ¶¶ 8-35. Additionally, this

evidence was sufficient for the Court to conclude that Eaton disposed of hazardous substances at the Site and that some releases of hazardous substances from the Site contributed to the soil and groundwater contamination in and around the Site. FOF ¶¶ 39-43. Such a showing is sufficient to satisfy CERCLA's relaxed causation standard.

Finally, the plaintiff has proven that the defendants are potentially responsible parties. Section 9607(a) of CERCLA defines four different categories of potentially responsible parties. Only the second category is relevant here. It states that a potentially responsible party is:

any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C. § 9607(a)(2).

Here, Eaton operated at the Site and Fifth and Mitchell owned the Site during a portion of the time that Eaton operated there. FOF ¶¶ 3, 6. The defendants argue that any disposals of hazardous substances occurred prior to Eaton's formation when Jetronics operated at the Site, but the Court has found that Eaton used and disposed of some hazardous substances subsequent to Jetronics' operations at the Site. FOF ¶¶ 33-34, 39. Because the Court found that Eaton's operations did not change significantly over time, the Court concluded that Eaton disposed of hazardous substances during the time period when Fifth and

Mitchell owned the Site as well as when the plaintiff owned the Site. FOF ¶ 39, n.7. Therefore, both Eaton and Fifth and Mitchell are potentially responsible parties and, except for the issue of the extent of the response costs that have been incurred, the plaintiff has established a prima facie case against both defendants.

Finally, the defendants argue that any contamination around the Site was caused by unrelated third parties. Specifically, the defendants argue that releases from nearby facilities were solely responsible for the contamination around the Site. Although it is uncontested that releases from other sources caused much of the contamination around the Site and in Area 6, the Court concluded that releases from the Site caused some soil contamination and had a de minimis effect on groundwater contamination. FOF ¶¶ 40-43. Thus, the defendants cannot rebut the plaintiff's prima facie case.

B. The HSCA

In addition to the claim under CERCLA, the plaintiff is seeking contribution under the HSCA. The United States Court of Appeals for the Third Circuit has held that the elements for a prima facie case for response costs under the HSCA are analogous to those for a CERCLA claim. They are:

- (1) the defendants are responsible parties;

(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."

In re Joshua Hill Inc., 294 F.3d 482, 485-86 (3d Cir. 2002). If a prima facie case is established, the defendants can escape liability by showing that any release was caused by an act of God, an act of war or the conduct of an unrelated party. 35 Pa. Cons. Stat. § 6020.703.

Identical issues have been raised with respect to the plaintiff's HSCA claim as were raised with respect to the plaintiff's CERCLA claim. Again, setting aside the issue of the extent of any response costs, the Court finds that the plaintiff has established that the defendants are liable under the HSCA for the same reasons that the defendants are liable under CERCLA.¹¹

¹¹The Court notes that the HSCA's definition of a responsible party is different than CERCLA's. CERCLA imposes liability only upon the current owner or operator and those prior owners or operators at the time of the disposal of hazardous substances. 42 U.S.C. § 9607(a). The HSCA, in contrast, does not impose liability upon the current owner or operator per se, but upon the owner or operator at the time of disposal, and subsequent owners or operators prior to a release or during a release of hazardous substances. 35 Pa. Cons. Stat. § 6020.701(a); Dequssa Constr. Chem. Operations, Inc. v. Berwind Corp., 280 F. Supp. 2d 393, 406 (E.D.Pa. 2003). This distinction is not relevant here however because the defendants owned the Site or operated at the Site when hazardous substances were disposed of and released and thus, the defendants are responsible parties under both the HSCA and CERCLA.

C. Storage Tank Act

The plaintiff has also brought a claim against Eaton under the Storage Tank Act. In Centolanza v. Lehigh Valley Dairies, Inc., 658 A.2d 336 (Pa. 1995), the Pennsylvania Supreme Court held that private parties may bring suit under the Storage Tank Act. Centolanza, 658 A.2d at 340.

Section 1311 of the Storage Tank Act provides that:

it shall be presumed as a rebuttable presumption of law in civil and administrative proceedings that a person who owns or operates an aboveground or underground storage tank shall be liable, without proof of fault, negligence or causation, for all damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution.

35 Pa. Cons. Stat. § 6021.1311(a).

As an initial matter, both Eaton and the plaintiff are in agreement that the presumption laid out in 35 Pa. Cons. Stat. § 6021.1311 applies to Eaton. (Trial Tr. 19:1-7, 30:15-21, July 11, 2005). It is also undisputed that PCE was found within 2500 feet of storage tanks owned and operated by the plaintiff. Eaton contends that the plaintiff has not made out a prima facie case under the Storage Tank Act's presumption because the plaintiff did not produce evidence that regulated substances were stored in Eaton's storage tanks. However, the Court found that Eaton

stored PCE in a storage tank at the Site.¹² FOF ¶ 35. Thus, the plaintiff has established a claim under the Storage Tank Act's presumption.

The presumption can be overcome if Eaton proves by clear and convincing evidence either that:

(1) The damages, contamination or pollution existed prior to the use of any storage tank at the facility to contain an accumulation of regulated substances, as determined by surveys of the site and within 2,500 feet of the perimeter of the storage tank or facility.

(2) An adjacent landowner refused to allow the owner or operator of a storage tank at a new facility access to property within 2,500 feet of the perimeter of a storage tank facility to conduct a survey.

(3) The damage, contamination or pollution was not within 2,500 feet of the perimeter of a storage tank.

(4) The owner or operator did not contribute to the damages, contamination or pollution.

35 Pa Cons. Stat. § 6021.1311(b).

Eaton argues that the presumption is rebutted because any contamination did not come from Eaton, but as discussed with respect to the plaintiff's CERCLA and HSCA claims, the Court concludes that Eaton did contribute to at least some of the

¹² Eaton does not argue that PCE is not a regulated substance under the Storage Tank Act. There was some other evidence introduced which suggested other raw materials were stored in storage tanks, but the only specific chemical that was referenced was PCE.

groundwater and soil contamination (and this includes the PCE contamination) in and around the Site.

D. Damages

Thus, the Court concludes that the plaintiff has established that both Fifth and Mitchell and Eaton are liable under CERCLA and the HSCA and that Eaton is liable under the Storage Tank Act. What remains to be determined is the amount of damages the plaintiff is entitled to and how those damages should be allocated among the defendants and the plaintiff.¹³

Prior to making this determination, the Court will request some additional briefing and information from the parties. Accordingly, the Court has sent a letter to counsel discussing these requests and will hold a telephone conference with counsel to discuss how to proceed.

¹³ The plaintiff will be entitled to a jury trial to determine the amount of compensatory damages under the Storage Tank Act. F.P. Woll & Co. v. Fifth & Mitchell St. Corp., No. 96-5973, 2005 U.S. Dist. LEXIS 13194 at *19 (E.D. Pa. July 1, 2005).

IN THE UNITED STATES DISTRICT COURT
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FIFTH AND MITCHELL STREET, :
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Defendants : NO. 96-5973

ORDER

AND NOW, this 28th day of June, 2006, following a bench trial held before the Court on July 11, 12 and 14, 2005 and upon review of the proposed findings of fact and conclusions of law and other post-trial filings submitted by the parties, IT IS HEREBY ORDERED that for the reasons discussed in a Memorandum and Order of this date, the defendants are liable to the plaintiff under CERCLA and the HSCA in an amount to be determined by the Court at a later date. IT IS FURTHER ORDERED that defendant Eaton Laboratories, Inc. is liable to the plaintiff under the Storage Tank Act in an amount to be determined at a jury trial.

The Court will hold a telephone conference with counsel on July 21, 2006 at 3:00 P.M. to discuss scheduling the remainder of this case and to discuss the issues the Court raised in a letter that was sent to counsel today. Counsel for the plaintiff shall initiate the call. Judge McLaughlin's chambers telephone number is 267-299-7600.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. MCLAUGHLIN, J.