

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

PIERRE DARBOUZE, M.D.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 97-2970
	:	
CHEVRON CORPORATION, and	:	
CHEVRON USA INC., d/b/a	:	
CHEVRON PRODUCTS COMPANY and	:	
d/b/a CHEVRON USA PRODUCTS	:	
COMPANY,	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

AUGUST 18, 1998

Pierre Darbouze, M.D., ("Darbouze") has brought this action against Chevron U.S.A., Inc. ("Chevron") alleging violations of state and federal law stemming from the discovery of underground storage tanks ("USTs") on his property. Presently before the Court is Chevron's Motion for Summary Judgment. For the reasons that follow, that Motion is granted in part and denied in part.

I. FACTS.

The property in question is located at 6613 Chew Avenue in Philadelphia, Pennsylvania. Gulf Oil owned the property from January 31, 1938 until August 25, 1976, and operated an automobile service station and/or gas station on the premises. During this time period, Gulf Oil installed USTs on the property. Gulf Oil sold the property in 1976.

Arthur Kaneff ("Kaneff") and Malcolm P. Rosenberg ("Rosenberg") purchased the property from Gulf Oil. Kaneff and Rosenberg were aware of the existence of USTs and required Gulf Oil to remove any used for the storage of gasoline that remained on the property. Two tanks were not removed. One was a fuel oil tank used to heat the building (hereinafter "Tank #1"). The other was a waste oil tank used in the bay area of the gas station (hereinafter "Tank #2").

Kaneff and Rosenberg converted the gas station into a doughnut shop. As part of the conversion, the heating system was converted to natural gas and use of Tank #1 was discontinued, however, it was not removed or closed. Also, the parking lot was paved but the fill ports of the Tanks remained visible.

In 1978, Kaneff and Rosenberg sold the property to Dr. Roger Fore ("Dr. Fore") and his wife Elaine ("Mrs. Fore"). Dr. Fore converted the vacant doughnut shop into a physician's office. The property was used for the practice of family medicine, by Dr. Fore, until his death in 1981. At that time, Mrs. Fore put the property up for sale.

Darbouze purchased the property from Mrs. Fore. Neither Mrs. Fore nor Darbouze hired a realtor to handle the sale. Darbouze conducted an appraisal prior to purchase. The appraisal stated that the property was a converted gas station formerly owned by Gulf Oil and used a gas station lot as a price

comparison. Darbouze purchased the property in "as is" condition. Since its purchase, Darbouze has practiced family medicine on the property.

In 1995, Darbouze arranged to sell the property. Bob Elfant ("Elfant"), a real estate agent, told Darbouze that the property was former gas station and USTs could still be present. At Elfant's instruction, Darbouze conducted a records search and learned that Gulf Oil had owned the property but did no further investigation. At this time, Darbouze was unaware that all but two of the USTs had been removed from the property.

On April 18, 1995, Darbouze entered into an agreement of sale for the property. An environmental assessment performed by the potential purchasers revealed the existence of up to seventeen USTs on the property, rendering it unmarketable at fair market value. Based on this assessment, the potential purchasers were released from the agreement of sale.

On July 25, 1995, a survey and investigation of the property was performed by Alan R. Hirschfeld ("Hirschfeld"), a geologist. Hirschfeld's report did not confirm that USTs were present but indicated that based on documentation filed with the City of Philadelphia and the local Zoning and Planning Commission, more extensive subsurface investigations were warranted.

On April 27, 1997, Darbouze filed the Complaint in this

action.¹ On January, 8 1998, Chevron's Motion for Summary Judgment was granted as to Count III of the complaint because Darbouze failed to provide adequate notice of his intent to sue as required by the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 7002. As a result, the matter was stayed until April 27, 1998. Additionally, discovery in this matter was extended until April 27, 1998, because Darbouze's expert witness had not yet confirmed the existence of the USTs or determined their contents.

Chevron's Motion for Summary Judgment also addressed Darbouze's remaining claims, however, because Darbouze's expert witness was expected to provide information relevant to that Motion, the parties were directed to file Supplemental Memorandums. Presently, only Chevron has supplemented its Motion for Summary Judgment.

Plaintiff's expert, Allen M. Feldbaum ("Feldbaum"), a hydrogeologist, oversaw the excavation of several test pits to verify the existence of USTs on the property. The excavation

¹ Originally both Chevron U.S.A. and its wholly owned subsidiary, Chevron Corporation ("Chevron Corp."), were named as Defendants. Apparently, Darbouze mistakenly believed that both Chevron U.S.A. and Chevron Corp. could be held liable as corporate successors of Gulf Oil. By Memorandum and Order dated January 8, 1998 Chevron Corporation's uncontested Motion for Summary Judgment was granted because only Chevron U.S.A. assumed the debts and liabilities of the now extinct Gulf Oil Corporation. Darbouze v. Chevron Corp., No. 97-2970, 1998 WL 42278, (E.D. Pa. Jan. 8, 1998).

revealed that all but the two USTs previously discussed were removed from the property.

Feldbaum learned that Tank #1 contains 42 inches of product, of which 22 inches are water and 10 inches are kerosene/fuel oil including a petroleum compound. (Def.'s Supplemental Mot. for Summ. J. Ex. P at 6-7.) Tank #2 contains 11 inches of waste oil consisting of organic and petroleum compounds and high concentrations of lead. (Id.) In Feldbaum's opinion a release from either tank would present an environmental and a health risk. (Id. at 8-9.) Further, based on the age and construction of these tanks, Feldbaum opines that if the tanks are not already leaking they will leak if left in place. (Id. at 8.)

Additionally, a soil sample collected by Feldbaum indicates the presence of naphthalene exceeding 10,000 micrograms per kilogram. (Def.'s Supplemental Mot. for Summ. J. Ex. P at 6-2.) This amount is over two times the Pennsylvania Statewide Health Standard. (Id.)

No sampling or assessment of groundwater was performed. (Def.'s Supplemental Mot. for Summ. J. Ex. P at 2.)

II. STANDARD.

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v.

Liberty Lobby Inc., 477 U.S. 242, 247 (1986). Chevron, as the moving party, has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, the nonmoving party should go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). If the court, in viewing all reasonable inferences in favor of the nonmoving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81,83 (3d Cir. 1987).

In this case, Darbouze, the nonmoving party, has failed to supplement his Response to Chevron's Motion for Summary Judgment, however, this does not entitle Chevron to judgment automatically. Anchorage Assocs. v. Bd. of Tax Review, 922 F.2d 168, 175 (3d. Cir. 1990). Rather, the Motion must be evaluated on the merits, and judgment entered in favor of the movant only if "appropriate." Id.; FED. R. CIV. PRO. 56(e). In other words, the Motion may be granted only if Chevron is entitled to "judgment as a matter of law." Anchorage Assocs., 922 F.2d at 175.

III. DISCUSSION.

A. Count III - Resource Conservation and Recovery Act.

As previously stated, Darbouze's RCRA claim was dismissed for failure to provide Chevron with adequate notice of his intent to sue as required by the RCRA. 42 U.S.C. § 7002. At Darbouze's request, this matter was stayed for ninety days to allow time for Darbouze to adequately notify Chevron of his intent to sue. Despite Darbouze's request, the complaint has not been amended, therefore, Darbouze's RCRA claim is not before the Court at this time.

B. Counts I & II - Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

In Counts I and II Darbouze seeks (1) contribution for and (2) recovery of "response costs" he expended to address the "release or threatened release" of "hazardous substances" on his property. 42 U.S.C. § 9607 and 9613(f). As discussed below, these claims are inconsistent and ultimately Darbouze will only be able to recover on one of them. The issue is whether Chevron's Motion for Summary Judgment can be granted, as to either claim, on the facts of record.

In a cost recovery action, the plaintiff can not be a "potentially responsible party ("PRP")."² New Castle County v.

² The four categories of "responsible parties" are:

- (1) the owner and operator of a vessel or a facility,
- (2) 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,

Halliburton, 111 F.3d 1116, 1120 (3d Cir. 1997), reh'g denied, 116 F.3d 82 (3d Cir. 1997). Only an "innocent party"³ may bring an action to recover the costs of response. Id. Conversely, in a contribution action, the plaintiff must be a PRP seeking to recover costs from other PRPs. Id.

Chevron argues that Darbouze is a PRP pursuant to section 107(a)(1) as the current owner of the USTs, and therefore, his cost recovery action must fail. 42 U.S.C. § 9607(a)(1); Halliburton, 111 F.3d at 1122-23. Darbouze inconsistently argues that the "innocent landowner defense"

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

42 U.S.C. § 9607(a).

³ Innocent parties are "those who can legitimately claim one of the complete defenses to liability set forth in section 107(b) or someone with no legal responsibility for conditions on the property, such as, e.g., a neighboring landowner who acts out of concern that the contamination will spread to his or her property." 42 U.S.C. § 9607(b); Andritz Sprout-Bauer Inc. v. Beazer East, Inc., ___ F. Supp. 2d ___, No. 95-1182, 1998 WL 400379, at *5 (July 17, 1998 E.D. Pa. 1998)(citing Stearns & Foster Bedding v. Franklin Holding Corp., 947 F. Supp. 790, 801 (D.N.J. 1996)).

entitles him to bring an action to recover his response costs, while still maintaining an action for contribution should he nonetheless be found to be a PRP.

The Third Circuit Court of Appeals has recently held that a PRP under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a cost recovery action against another PRP. Darbouze is a PRP who claims to be entitled to the "innocent landowner defense." 42 U.S.C. § 9607(b)(3); 42 U.S.C. § 9601(35). To establish that he is an "innocent landowner," Darbouze must show:

1. Another party was the "sole cause" of the release of hazardous substances and the damages caused thereby;
2. The purchasing landowner did not actually know of the presence of the hazardous substance at the time of acquisition;
3. The purchasing landowner undertook appropriate inquiry at the time of acquisition, in order to minimize its liability; and
4. The purchasing landowner exercised due care once the hazardous substance was discovered.⁴

⁴ The elements of the "innocent landowner defense" are set forth in two separate sections of CERCLA. Section 107(b)(3), entitled "Defenses" provides in relevant part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -

. . . .

M&M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683, 687 (M.D. Pa. 1997)(citing 42 U.S.C. §§ 9607(b)(3), 9601(35)(A); In re Hemingway Transp., Inc., 993 F.2d 915, 932 (1st Cir. 1993), cert. denied, 510 U.S. 914 (1993); Westfarm Assoc. Ltd. Partnership v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 682 (4th Cir. 1995), cert. denied, 517 U.S. 1103 (1996)).

Material issues of fact exist regarding Darbouze's ability to

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or could foreseeably result from such acts or omissions;

42 U.S.C. § 9607(b)(3). The exception for "an act or omission" which "occurs in connection with a contractual relationship" would normally preclude use of the defense by a landowner purchasing contaminated property because of the contractual relationship between the purchaser and all prior owners. The definition of "contractual relationship" found in section 101 (35) solves this problem by defining a "contractual relationship," for purposes of section 107(b)(3), as "land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the [landowner] after the disposal or placement of the hazardous substance on, in, or at the facility" if it is also shown that "[a]t the time the [landowner] acquired the facility the [landowner] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." M & M Realty Co. v. Eberton Terminal Corp., 977 F. Supp. 683, 686-87 (M.D. Pa. 1997); 42 U.S.C. § 9601(35).

establish the elements of the "innocent landowner defense," therefore, Summary Judgment can not be granted as to either claim. Instead, both claims may proceed to trial at which time the availability of the defense will be determined and one of the claims necessarily dismissed.

Apart from the discussion above, Darbouze still must establish a prima facie case of CERCLA liability to survive summary judgment. To recover under CERCLA, Darbouze must show:

- (1) the property is a "facility"⁵;
- (2) Chevron is a "responsible party"⁶;
- (3) there is a "release or threatened release"⁷ of

⁵ USTs are "facilities" by definition. The term "facility" means (A) any building, structure, installation, equipment, pipe, or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. 42 U.S.C. § 9601(9).

⁶ See supra note 2.

⁷ The term "release" means any spilling, leaking, pumping, purging, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, . . . and (D) the normal application of fertilizer. 42 U.S.C. § 9601 (22).

"hazardous substances"⁸;

(4) which caused "response costs"⁹ to be incurred; and

(5) the response costs were necessary and consistent with the National Contingency Plan ("NCP").¹⁰

U.S. v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996); Tri-

⁸ The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. S 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). 42 U.S.C. § 9601(14).

⁹ (25) The terms "respond" or "response" means [sic] remove, removal, remedy, and remedial action; [sic] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto. 42 U.S.C. § 9601(25).

¹⁰ The National Contingency Plan ("NCP") is a set of regulations promulgated by the Environmental Protection Agency pursuant to the authority provided in section 105 of CERCLA. 42 U.S.C. § 9605. The NCP "establishes procedures and standards for responding to releases of hazardous substances, pollutants and contaminants." New Castle County v. Halliburton, 111 F.3d 1116, 1120 n.2 (3d Cir. 1997), reh'g denied, 116 F.3d 82 (3d Cir. 1997). The NCP is codified at 40 C.F.R. pt. 300 (1997).

County Bus. Campus v. Clow Corp., 792 F. Supp. 984, 988 (E.D. Pa. 1992). Chevron contends that Darbouze's CERCLA claims must fail (1) because he has not shown the USTs contain a "hazardous substance;" (2) because Chevron is not a "responsible party;" and (3) because his costs are not necessary and consistent with the NCP. Each argument is discussed below.

1. **Hazardous Substance.**

To survive Chevron's Motion for Summary Judgment Darbouze must show that the product in the Tanks is a "hazardous substance" as that term is defined by CERCLA.¹¹ CERCLA's definition of a "hazardous substance" indirectly makes reference to other federal environmental statutes.¹² 42 U.S.C. § 9601(14). Still, the statutory definition specifically excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically designated as a hazardous substance." Id. (hereinafter "the petroleum exclusion"). Chevron argues that because the "hazardous substances" contained in the Tanks are components of petroleum, the exclusion applies and summary judgment is proper.

The "petroleum exclusion" excludes both fuel oil and

¹¹ See supra note 8.

¹² Id. A complete list of CERCLA's "hazardous substances" is located at 40 C.F.R. § 302.4 Table 302.4.

kerosene from CERCLA's definition of "hazardous substance."¹³
Andritz Sprout-Bauer, Inc. v. Beazer E. Inc., __ F. Supp. 2d __,
No. 95-1182, 1998 WL 400379, at 17 (M.D. Pa. July, 17,
1998)(Kerosene is a mixture of liquid hydrocarbons obtained by
distilling petroleum, bituminous shale, or the like, and widely
used as a fuel, cleaning solvent etc.), quoting, RANDOM HOUSE
DICTIONARY OF THE ENGLISH LANGUAGE 1051 (2d ed. 1987). A sampling
showed that Tank #1 contains "petroleum constituents consistent
with kerosene and fuel oil." (Def.'s Supp. Mot. for Summ. J. Ex.
O page 108). Feldbaum testified that the product contained in
Tank #1 is "a petroleum product." Id. As such, the product in
Tank #1 is excluded from CERCLA's definition of a "hazardous
substance," thus, Darbouze has failed to present a prima facie
case under CERCLA for Tank #1 and Summary Judgment in favor of

¹³ "Petroleum" is defined as:

An oily flammable bituminous liquid that is essentially a
compound mixture of hydrocarbons of different types with
small amounts of other substances (as oxygen compound,
sulfur compounds, nitrogen compounds, resinous and asphaltic
components, and metallic compounds) and that is subjected to
various refining processes (a fractional distillation,
cracking, catalytic reforming, hydroforming, alkylation
polymerization) for producing useful products (as gasoline
naphtha, kerosene, fuel oils, lubricants, waxes, asphalt,
coke and chemicals).

United States v. Atlas Minerals and Chems., No. 91-5118, 1995 WL
510304 at *93 (E.D. Pa. Aug. 22, 1995)(citing Cose v. Getty Oil
Co., 4 F.3d 700, 705 (9th Cir. 1993) (quoting Willshire Westwood
Ass'n v. Atl. Richfield, 881 F.2d 801, 803 (9th Cir. 1989)).

Chevron is proper.

As for Tank #2, waste oil which has been mixed with "hazardous substances" does not fall within the "petroleum exclusion." U.S. v. Alcan Aluminum Corp., 964 F.2d 252, 266-67 (3d Cir. 1992), on remand, 892 F. Supp. 648 (M.D. Pa. 1996), aff'd, 96 F.3d 1434 (3d Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 2479 (1997). But, if those "hazardous substances" are normally found in petroleum, then the "petroleum exclusion" applies. Memorandum from Francis S. Blake, EPA General Counsel, to J. Winston Porter, Assistant Administrator for Solid waste and Emergency Response, 1987 WL 123926 (E.P.A.G.C. July 31, 1987)(discussing the Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)). Still, 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. Id.

Plaintiff's expert, Feldbaum, reported that Tank #2 contains "organic compounds such as naphthalene, ethyl benzene, toluene, xylene, as well as elevated lead which is consistent with the presence of waste oil" (Def.'s Supp. Mot. for Summary Judgment Ex. P page 7.) Naphthalene, ethyl benzene, toluene, xylene, and lead are "hazardous substances" as defined by CERCLA, however, they are also constituents of petroleum. Andritz

Sprout-Bauer, Inc., 1998 WL 400379, at *17 (Ethyl benzene, toluene, and xylene are the volatile organic compounds found if gasoline is present or when gasoline and other petroleum products begin to break down. Naphthalene is a colorless, volatile petroleum distillate, usually an intermediate product between gasoline and benzene, used as a solvent, fuel, etc.), quoting, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1277 (2d ed. 1987); Wilshire Westwood Assoc. v. Atl. Richfield, 881 F.2d 801, 802 (9th Cir. 1989)(Lead is an additive of gasoline that falls into the petroleum exclusion).

Additionally, Feldbaum testified that a chemical analysis of Tank #2 showed the presence of barium, cadmium, and chromium. Barium, cadmium and chromium are "hazardous substances" as defined by CERCLA. In Feldbaum's opinion, these metals are not normally be found in gasoline. To the contrary, Tyler E. Gass, Chevron's expert, opines that the barium, cadmium, and chromium found in Tank #2 are normally found in fuel or crude oil which is excluded from the definition of "hazardous substance." (Def.'s Supp. Mot. for Summ. J. p. 15.)

Summary Judgment cannot be granted because the record does not contain evidence of the concentrations of naphthalene, ethyl benzene, toluene, xylene, and lead in Tank #2. Without this information, the Court cannot determine whether Tank #2 contains "hazardous substances" normally found in petroleum at a

normal or high level. Further, there is conflicting expert opinion on whether barium, cadmium, and chromium are normally found in petroleum products and if so whether the concentrations of those metals in Tank #2 exceed normal levels. Thus, Summary Judgment cannot be granted as to the "hazardous substance" element of Darbouze's CERCLA claim for Tank #2.

2. **Responsible Party.**

To hold Chevron liable under CERCLA, Darbouze must show that it falls into one of four categories of responsible parties.¹⁴ CDMG Realty Co., 96 F.3d at 712. Darbouze claims that Chevron, as the corporate successor to Gulf Oil, is a "responsible party" under section 107(a)(2) which provides: "any person who at the time of disposal of any hazardous substance owned or operated any facility¹⁵ at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Chevron claims that is not a responsible party because it did not "dispose" of hazardous substances while owning the property.

CERCLA defines "disposal" with the definition given in section 6903(3) of the RCRA as follows:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or

¹⁴ See supra note 2.

¹⁵ USTs are "facilities" by definition. See supra note 5.

discharged into any waters, including ground waters.

42 U.S.C. § 9601(29). "Disposal" includes "the initial introduction of contaminants onto a property." CDMG Realty Co., 96 F.3d at 719 (citing Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342-43 (9th Cir. 1992)). Gulf Oil owned Tank #2 when it was filled with potentially "hazardous substances." This constitutes "disposal," thus, Darbouze has shown that Chevron is a "responsible party" within the meaning of CERCLA.

3. **Necessary and Consistent with the NCP.**

Under CERCLA, Darbouze is entitled to recover the "necessary costs of response"¹⁶ that are "consistent with the [NCP]."¹⁷ U.S.C. § 9607(a)(4)(B). Darbouze contends that he has incurred response costs investigating the existence of USTs on his property through (1) a survey and investigation and (2) a subsurface investigation including soil testing.¹⁸ Chevron contends that Darbouze is not entitled to recover sums expended for these response actions because they are neither necessary nor

¹⁶ See supra note 9.

¹⁷ See supra note 10.

¹⁸ Because Darbouze has not supplemented his Response to Chevron's Motion for Summary Judgment only Hirshfeld's survey and investigation is included in the request for response costs. Presumably, Darbouze considers the subsurface investigation and soil testing part of his response costs as well, therefore, it is addressed.

consistent with the NCP.

a. Necessary.

To show that his "response costs" were necessary, Darbouze must establish "(1) that the costs [were] incurred in response to a threat to human health or the environment and (2) that the costs were necessary to address that threat." Foster v. U.S., 922 F. Supp. 642, 652 (D.D.C. 1996) (quoting G.J. Leasing Co. v. Union Elec. Co., 854 F. Supp. 539, 562 (S.D. Ill. 1994), aff'd, 54 F.3d 379 (7th Cir. 1995)). Chevron argues that Darbouze's response actions did not address a specific threat to human health or the environment, but rather were taken to aid the sale of the property.

Chevron's argument is unavailing. Several courts have determined that an owner's motivation for the incurrence of "response costs" is irrelevant in determining whether those costs were necessary and therefore recoverable under CERCLA. Bethlehem Iron Works v. Lewis Indus., No. 94-0752, 1996 WL 557592 at *16-17 (E.D. Pa. Oct. 1, 1996); BCW Assocs. v. Occidental Chem Corp., No. 86-5947, 1988 WL 102641 at *17 (E.D. Pa. Sept. 29, 1988); Hatco Corp. V. W.R. Grace & Co. Conn., 849 F. Supp. 931, 963-64 (D.N.J. 1994); Channel Master Satellite Sys. v. JFD Elecs. Corp., 748 F. Supp. 373, 379 (E.D.N.C. 1990). Darbouze's "response costs" were necessary to address the threat that seventeen, abandoned, 30-year old USTs were leaking their hazardous contents

into the environment.

Darbouze has investigated the existence of these USTs in the only manner available. First, through a survey and investigation, historical documentation was reviewed and the site was surveyed externally. Second, a sub-surface investigation and soil testing were completed, but only after the initial investigation showed it was warranted. These tests revealed that one UST containing a potentially hazardous substance exists on the property. Darbouze was compelled to conduct these tests to determine what lay beneath his property, thus, Darbouze has shown the incurrence of "necessary" response costs.

b. Consistent.

Chevron argues that Darbouze's "response costs" are not recoverable because they are inconsistent with the NCP. Recoverable "response costs" are incurred by undertaking either "removal actions" or "remedial actions." Tri-County Bus. Campus, 792 F. Supp. at 991. "Generally speaking, a removal is a short-term limited response to a more manageable problem, while a remedial action involves a longer term, more permanent and expensive solution to a more complex problem." Id. (citing Ambrogi v. Gould, Inc., 750 F. Supp. 1233, 1240 (M.D. Pa. 1990)).

The statutory definitions of "removal" and "remedial action" help to determine how to classify a particular "response action." Bethlehem Iron Works, No. 94-0752 1996 WL 557592 at

*57(noting that the distinction between removal and remedial actions is not absolute). Darbouze's "response costs" were incurred by undertaking what is best characterized as "removal actions." CERCLA defines a "removal" action as:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as maybe necessary to monitor, assess and evaluate the release or threat of release of hazardous substances, the disposal of removed material or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23). The costs of the survey and investigation and the sub-surface investigation and soil testing were incurred while assessing and evaluating a threatened release of hazardous substances. Such costs fit directly within CERCLA's definition of "removal" actions. Id.

For private litigants, consistency with the NCP is determined by reference to Subpart-H entitled "Participation by other Persons." 40 C.F.R. § 300.700. Subpart-H allows private litigants' response actions to be considered consistent with the NCP despite "immaterial or insubstantial deviations" from the provisions of the NCP. 40 C.F.R. § 300.700(c)(4).

Darbouze incurred "response costs" when Hirschfeld was hired to investigate the existence of USTs on the property. Hirschfeld's survey and investigation is most compatible with a

"removal preliminary inspection" as provided for in the NCP. 40 C.F.R. § 300.410. A "removal preliminary inspection" includes "collection or review of data such as site management practices, information from generators, photographs, analysis of historical photographs, literature searches and personal interviews conducted, as appropriate." Id. It cannot be said that Hirschfeld's survey and investigation is materially or substantially inconsistent with a "removal preliminary inspection," therefore, Darbouze has incurred recoverable "removal costs" under CERCLA.

Darbouze also incurred "response costs" when Feldbaum was hired to perform sub-surface investigations and soil testing. Such an investigation is best characterized as a "removal site inspection," which is called for when a "removal preliminary inspection" reveals a need for more information. 40 C.F.R. § 300.410(d). A "site inspection" is defined as "an on-site investigation to determine whether there is a release or potential release and the nature of the associated threats." 40 C.F.R. § 300.5. "The purpose is to augment the data collected in the preliminary assessment and to generate, if necessary, sampling and other field data to determine if further action or investigation is appropriate." Id. The sub-surface investigation and soil testing performed at the site are materially and substantially consistent with a "site inspection"

as defined in the NCP, thus, the costs incurred by Darbouze are recoverable under CERCLA.

C. Counts IV and V - Hazardous Sites Cleanup Act ("HSCA").

The HSCA is Pennsylvania's version of CERCLA and was in fact modeled after the federal statute. General Elec. Envir. Serv. v. Envirotech Corp., 763 F. Supp. 113, 115 (M.D. Pa. 1991). CERCLA and the HSCA are similar, but not identical statutes. Darbouze's HSCA claims mirror his CERCLA claims, therefore, the parties' arguments and the analysis below is similar to the previous section. Bethlehem Iron Works, 1996 WL 557592, at *63.

Darbouze has brought both a cost recovery action, pursuant to sections 701 and 702 of the HSCA, and a contribution action, pursuant to section 705 of the HSCA. 35 Pa.C.S.A. §§ 6020.701, 6020.702, 6020.705. Although no court has directly addressed the issue, I hold that under the HSCA, as under CERCLA, Darbouze's claims are mutually exclusive. M & M Realty Co., 977 F. Supp. at 688-89 (addressing that under CERCLA a PRP is limited to contribution unless the "innocent landowner defense" is properly plead, but failing to differentiate between cost recovery and contribution under the HSCA).

Darbouze is potentially responsible under the HSCA,¹⁹ and therefore, is not entitled to recover costs unless he establishes that he is entitled to the "innocent landowner

¹⁹ See infra Part III.C.1.

defense."²⁰ If Darbouze is unable to establish that he is an "innocent landowner," then his recovery is limited to contribution. To hold otherwise would allow a "responsible party" found liable to recoup all of its expenditures from another "responsible party" regardless of its degree of fault. Halliburton, 111 F.3d at 1121. As set forth below, material issues of fact regarding whether Darbouze can establish that he is entitled to the "innocent landowner defense" preclude dismissal on either claim on the facts of record. Rather, both claims may proceed to trial at which time one will necessarily be dismissed.

To recover under the HSCA on either claim, Darbouze must show:

- (1) Chevron is a "responsible party"²¹;
- (2) there has been a "release or threatened release"²²

²⁰ Id.

²¹ See infra Part III.C.1.

²² "Release." Spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposal into the environment. The term includes the abandonment or discarding of barrels, containers, vessels and other receptacles containing a hazardous substance or contaminant. The term does not include:

- (1) any release which results in exposure to persons solely within a workplace which may be subject to the assertion of a claim against the employer of such persons;

- (2) combustion exhaust emissions from the engine of a motor vehicle, rolling stock, aircraft, vessel or pipeline

of "hazardous substances"²³ from a "site"²⁴;

compressor station;

(3) release of source material, by-product material or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 (68 Stat. 921, 28 U.S.C. §§ 2341(3)(A)-(C) and 2342(1)-(4) and 42 U.S.C. § 2014), if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of the Atomic Energy Act of 1954, or, for the purpose of section 104 of this act or any other response action, any release of source by-products, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978 (Public Law 95-604, 42 U.S.C. § 7901 et seq.); and

(4) the normal application of fertilizer or pesticides.

35 Pa.C.S.A. § 6020.103.

²³ "Hazardous substance."

(1) Any element, compound or material which is:

(i) Designated as a hazardous waste under the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act, and the regulations promulgated thereto.

(ii) Defined or designated as a hazardous substance pursuant to the Federal Superfund Act.

(iii) Contaminated with a hazardous substance to the degree that its release or threatened release poses a substantial threat to the public health and safety or the environment as determined by the department.

(iv) Determined to be substantially harmful to public health and safety or the environment based on a standardized and uniformly applied department testing procedure and listed in regulations proposed by the department and promulgated by the Environmental Quality Board.

(2) The term does not include petroleum or petroleum

(3) that caused "response costs"²⁵ to be incurred; and

products, including crude oil or any fraction thereof, which are not otherwise specifically listed or designated as a hazardous substance under paragraph (1); natural gas, natural gas liquids, liquefied natural gas or synthetic gas usable for fuel or mixtures of natural gas and synthetic gas usable for fuel; or an element, substance, compound or mixture from a coal mining operation under the jurisdiction of the department or from a site eligible for funding under Title IV of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95- 87, 30 U.S.C. § 1201 et seq.). The term shall also not include the following wastes generated primarily from the combustion of coal or other fossil fuels for the production of electricity: slag waste; flue gas emission control waste; and fly ash waste and bottom ash waste which is disposed of or beneficially used in accordance with the Solid Waste Management Act and the regulations promulgated thereto or which has been disposed of under a valid permit issued pursuant to any other environmental statute.

35 Pa.C.S.A. § 6020.103.

²⁴ "Site." Any building; structure; installation; equipment; pipe or pipeline, including any pipe into a sewer or publicly owned treatment works; well; pit; pond; lagoon; impoundment; ditch; landfill; storage container; tank; vehicle; rolling stock; aircraft; vessel; or area where a contaminant or hazardous substance has been deposited, stored, treated, released, disposed of, placed or otherwise come to be located. The term does not include a location where the hazardous substance or contaminant is a consumer product in normal consumer use or where pesticides and fertilizers are in normal agricultural use. 35 Pa.C.S.A § 103.

²⁵ "Response." Action taken in the event of a release or threatened release of a hazardous substance or a contaminant into the environment to study, assess, prevent, minimize or eliminate the release in order to protect the present or future public health, safety or welfare or the environment. The term includes, but is not limited to:

(1) Emergency response to the release of hazardous substances or contaminants.

(2) Actions at or near the location of the release, such as

(4) the response costs were reasonable and necessary or appropriate.²⁶

studies; health assessments; storage; confinement; perimeter protection using dikes, trenches or ditches; clay cover; neutralization; cleanup or removal of released hazardous substances, contaminants or contaminated materials; recycling or reuse, diversion, destruction or segregation of reactive wastes; dredging or excavations; repair or replacement of leaking containers; collection of leachate and runoff; onsite treatment or incineration; offsite transport and offsite storage; treatment, destruction, or secure disposition of hazardous substances and contaminants; treatment of groundwater, provision of alternative water supplies, fencing or other security measures; and monitoring and maintenance reasonably required to assure that these actions protect the public health, safety, and welfare and the environment.

(3) Costs of relocation of residents and businesses and community facilities when the department determines that, alone or in combination with other measures, relocation is more cost effective than and environmentally preferable to the transportation, storage, treatment, destruction or secure disposition offsite of hazardous substances or contaminants or may otherwise be necessary to protect the public health or welfare.

(4) Actions taken under section 104(b) of the Federal Superfund Act (42 U.S.C. § 9604(b)) and any emergency assistance which may be provided under the Disaster Relief Act of 1974 (Public Law 93-288, 88 Stat. 43).

(5) Other actions necessary to assess, prevent, minimize or mitigate damage to the public health, safety or welfare or the environment which may otherwise result from a release or threatened release of hazardous substances or contaminants.

(6) Investigation, enforcement, abatement of nuisances, and oversight and administrative activities related to interim or remedial response enforcement, abatement of nuisances, and oversight and administrative activities related to interim or remedial response.

35 Pa.C.S.A. § 6020.103.

²⁶ See infra Part III.C.3.

Bethlehem Iron Works, No. 94-0752 1996 WL 557592 at *63. Chevron contends (1) that it is not a "responsible party"; (2) that the tanks do not contain a "hazardous substance"; and (3) that the response costs were not reasonable and necessary or appropriate. Each argument is discussed below.

1. Responsible Party.

Section 702 entitles Darbouze to recover the costs of response from a "person who is responsible for a release or threatened release of a hazardous substance." 35 Pa.C.S.A. § 6020.702. Section 705 allows Darbouze to "seek contribution from a responsible person." 35 Pa.C.S.A. § 6020.705. Section 701 defines "responsible person" in relevant part as:

- (1) The person [who] owns or operates the site;
 - (i) when a hazardous substance is placed or comes to be located in or on a site;
 - (ii) when a hazardous substance is located in or on the site, but before it is released; or
 - (iii) during the time of the release or threatened release.

35 Pa.C.S.A. § 6020.701(a). The HSCA is broader than CERCLA in that it imposes liability on every person in the chain of title. Andritz Sprout-Bauer, Inc., 1998 WL 400379, at 14. Chevron is a responsible party as the owner of a site when a "hazardous substance" is placed on a site. Thus, Darbouze has established the "responsible party" element of a HSCA claim.

Darbouze is potentially subject to liability under the

HSCA as the owner of the site "during the time of release or threatened release." 35 Pa.C.S.A. § 6020.701(a)(1)(iii). As discussed above, Darbouze's recovery will be reduced if he is unable to establish the "innocent landowner defense." To establish the "innocent landowner defense," Darbouze must prove that he:

- (1) acquired the property after the disposal of a hazardous substance;
- (2) exercised due care with respect to the hazardous substance;
- (3) took precautions against the foreseeable acts or omissions of any third party;
- (4) owned the property when he obtained actual knowledge of the release or threatened release of a hazardous substance and did not subsequently transfer ownership of the property without disclosing such knowledge;
- (5) has not, by act or omission, caused or contributed to the release or threatened release of a hazardous substance;
- (6) undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property in order to minimize liability; and
- (7) is only liable through ownership of the land.

35 Pa.C.S.A. § 6020.701. Material issues of fact regarding whether Darbouze can establish that he is entitled to the "innocent landowner defense" will be determined at trial.

2. **Hazardous Substance.**

The CERCLA and HSCA definitions of "hazardous

substance" are identical. Compare 42 U.S.C. §§ 9601(22), 9601(9) with 35 Pa.C.S.A. § 6020.103. The preceding discussion of this element under CERCLA is applicable to Darbouze's claims under the HSCA as well.²⁷ Darbouze has failed to show that Tank #1 contains a "hazardous substance," therefore, Summary Judgment in favor of Chevron is proper. A genuine issue of fact regarding whether Tank #2 contains a "hazardous substance" precludes Summary Judgment, thus, Darbouze's HSCA claim may proceed to trial.

3. Reasonable and Necessary or Appropriate.

Unlike CERCLA, the HSCA does not require that response costs be necessary and consistent with the NCP prior to recovery. Bethlehem Iron Works, No. 94-0752 1996 WL 557592 at *65 (citing Reading Co. v. City of Phila., 823 F. Supp. 1218, 1243-44 (E.D. Pa. 1993)). The HSCA requires only that response costs be "reasonable and necessary or appropriate." 35 Pa.C.S.A. § 6020.702. As discussed in the preceding section, both the survey and investigation and the sub-surface investigation and soil testing were "reasonable and necessary," therefore, Darbouze's response costs are recoverable under the HSCA.²⁸

D. Count VI - Storage Tank and Spill Prevention Act.

The Tank Act was enacted by the Pennsylvania

²⁷ See supra Part III.B.1.

²⁸ See supra Part III.B.3.

legislature to protect "the public health and safety" by controlling "the storage of regulated substances in new and existing storage tanks." Centolanza v. Lehigh Valley Dairies, Inc., 658 A.2d 336, 338 (Pa. 1995). When the Pennsylvania Department of Environmental Protection ("PaDEP") fails to enforce the provisions of the Tank Act, private litigants may bring an action under section 1305 "to collect costs for cleanup and diminution in property value." Centolanza, 658 A.2d at 338; 35 Pa.C.S.A. § 6021.1305(c). Private litigants are also afforded the statutory rebuttable presumption that:

a person who owns or operates an above ground 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.C.S.A. § 6021.1311(a). This presumption may be overcome if it is shown that the owner or operator "did not contribute to the damage, contamination or pollution." Id.

To recover, Darbouze must show that Chevron is an "owner, operator, landowner or occupier" who is violating the Tank Act, or any rule, regulation, order, or permit issued pursuant to the Tank Act. 35 Pa.C.S.A. § 6021.1305(c). Chevron contends that it cannot be held liable because it is not the "owner" of the USTs. Darbouze contends that Chevron is the "owner" of the USTs because it used them last and, alternatively,

that Chevron is liable as an "operator" of the USTs.

The Tank Act defines "owner," in relevant part, as:

(3) In the case of an underground storage tank, the owner of an underground storage tank holding regulated substances on or after November 8, 1984, and the owner of an underground storage tank at the time all regulated substances were removed when removal occurred prior to November 8, 1984.

35 Pa.C.S.A. § 6021.103. Under this definition Darbouze is the statutory "owner" of the USTs as he owned them on November 8, 1984 while they contained regulated substances. Nothing in the Tank Act supports Darbouze's argument that Chevron is the "owner" or "operator" of the USTs.²⁹ 35 Pa.C.S.A. § 6021.103.

Additionally, as an "owner," Darbouze is in violation of section 502(c) of the STSPA which provides for the removal of discontinued or abandoned USTs. Thus, it is Darbouze, not Chevron, who is potentially liable under the STSPA and Summary Judgment in favor of Chevron as to Count VI is proper.

E. Count VII - The Clean Streams Law ("CSL").

Darbouze has brought a citizen suit pursuant to the

²⁹ In support of his argument, Darbouze relies upon Gabiq's Service v. Commonwealth of Pennsylvania Department of Environmental Resources, No. 91-042-E, 1991 WL 274581, (Pa.Env.Hrg.Bd. Nov. 27, 1991). In Gabiq's, the Environmental Hearing Board ("EHB") upheld a PaDEP Order imposing strict liability based on land ownership pursuant to section 316 of the Clean Streams Law. 35 Pa.C.S.A. § 619.316. The EHB specifically did not reach the issue of liability based on tank ownership under section 1305 of the Tank Act. 35 Pa.C.S.A. § 6021.1305. For this reason, Gabiq's does not support Darbouze's argument that Chevron is the "owner" of the USTs under the Tank Act.

CSL. 35 Pa.C.S.A. § 691.601. The CSL declares:

It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or to allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

35 Pa.C.S.A. § 691.401. Obviously, an element essential to a CSL cause of action is proof that "the waters of the Commonwealth" have been polluted. The groundwater below Darbouze's property was not tested for pollution. (Def.'s Supp. Mot. for Summ. J. Ex. P at 2.) Therefore, Summary Judgment in favor of Chevron is proper.

F. Count VIII - Public Nuisance.

Violations of Pennsylvania's Tank Act and CSL have been declared a public nuisance by the legislature. 35 Pa.C.S.A. §§ 6021.1304, 691.401. In Count VIII, Darbouze seeks to force Chevron to abate the public nuisance on his property. As set forth above, Darbouze has failed to allege a violation of either the Tank Act or the CSL, therefore, the public nuisance claim must fail as well. Summary Judgment in favor of Chevron as to Count VIII is granted.

G. Counts IX, X, XI - Trespass, Negligence Per Se, Negligence.

In Pennsylvania, actions for trespass, negligence, and negligence per se are governed by a two-year statute of

limitations. 42 Pa.C.S.A. § 5524(4)(7). Darbouze filed the complaint in this action on April 25, 1997. Chevron argues that this filing was too late because, at the latest, Darbouze's cause of action accrued on April 18, 1995. Darbouze claims that the complaint was timely under the discovery rule because he was reasonably unaware that he had been injured until July 1995, when Hirshfeld issued his report.

Generally, "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations." Haywood v. Med. Ctr. of Beaver County, 608 A.2d 1040, 1042 (Pa. 1992)(quoting Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)). The discovery rule tolls the statute of limitations until "the plaintiff knows or reasonably should know: (1) that he has been injured and (2) that his injury has been caused by another party's conduct." Cappelli v. York Operating Co., 711 A.2d 481, 485 (Pa. Super. 1998)(quoting Pearce v. Salvation Army, 674 A.2d 1123, 1125 (Pa. Super 1996)).

It is Plaintiff's duty "to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period." Haywood, 608 A.2d at 1042. Reasonable diligence is an objective measure of the effort taken to

investigate the cause of an injury, beginning with the happening of an event which would cause a reasonable person to begin an investigation. Cappelli, 711 A.2d at 485.

Chevron points to three events which should have alerted Darbouze and caused him to investigate whether he could maintain a cause of action against Chevron. First, in 1981 when Darbouze purchased the property, an appraisal stated that the building was a converted gas station and used a gas station lot as comparable and the deed to the property stated that the property was once owned by Gulf Oil. Second, in 1995, Darbouze hired Elfant, a real estate agent, who told him that the property was a former gas station, that USTs could still be present and instructed him to investigate the property records. Finally, on April 18, 1995, Darbouze entered into an agreement of sale for the property which was contingent upon the existence of USTs.

Drawing all reasonable inferences in favor of Darbouze, it is clear that a reasonable person would have begun investigating the existence of USTs in April of 1995 at the latest. By that time, Elfant had unequivocally told Darbouze that the property was a former gas station, that USTs could still be present, and that if USTs were still present the sale of the property would be detrimentally affected. Elfant told Darbouze to check the public records to determine if the USTs were removed. Had Darbouze done so "with all reasonable diligence" he

would have discovered that USTs remained on the property.

The issue of when the statute of limitations begins to run normally involves a question of fact and is reserved for the jury. Haywood, 608 A.2d at 1043. The issue may be determined as a matter of law "only where the facts are so clear that reasonable minds cannot differ." Id. In this case, it is clear that Darbouze had reason to know that he had been injured prior to April 25, 1995, thus, his actions for trespass, negligence and negligence per se are barred by the statute of limitations.

G. Count XII - Common Law Indemnification.

Darbouze's claim for indemnification is preempted by CERCLA, therefore, Chevron's Motion for Summary Judgment as to Count XII is granted. M & M Realty Co., 977 F. Supp. at 68.

IV. CONCLUSION.

To summarize, four of Darbouze's claims survive this Motion for Summary Judgment: Counts I and II seeking cost recovery and contribution under CERCLA and Counts IV and V seeking cost recovery and contribution under the HSCA. One CERCLA claim and one HSCA claim will be dismissed at trial depending on Darbouze's ability to establish the "innocent landowner defense." Of the two claims that remain, Darbouze will be entitled to only one recovery.³⁰

³⁰ Darbouze is not entitled to double recovery under both CERCLA and the HSCA. Bethlehem Iron Works v. Lewis Indus., No. 94-0752, 1996 WL 557592 at *657 (E.D. Pa. Oct. 1, 1996). Any

An Order follows.

costs that Darbouze recovers under CERCLA will not be recoverable under the HSCA. Likewise, any costs that Darbouze recovers under HSCA will not be recoverable under CERCLA.

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

_____	:	
PIERRE DARBOUZE, M.D.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 97-2970
	:	
CHEVRON CORPORATION, and	:	
CHEVRON USA INC., d/b/a	:	
CHEVRON PRODUCTS COMPANY and	:	
d/b/a CHEVRON USA PRODUCTS	:	
COMPANY,	:	
Defendants.	:	
_____	:	

ORDER

AND NOW, this 18th day of August, 1998, upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Response thereto, it is hereby ORDERED that said Motion is GRANTED as to Counts VI, VII, VIII, IX, X, XI, and XII, but DENIED as to Counts I, II, IV and V.

BY THE COURT:

Robert F. Kelly, J.