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COMMON LAW REMEDIES AVAILABLE FOR PETROLEUM CONTAMINATION OF SOIL AND GROUNDWATER IN KENTUCKY

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For anyone with a modicum of awareness of current events, it is unfortunately axiomatic that soil and groundwater contamination attributable to petroleum leaked from underground storage tanks (USTs) is widespread throughout the nation. The United States Environmental Protection Agency (EPA) has estimated the number of USTs nationally to be in excess of two million, involving more than 700,000 facilities.[1] Further, over seventy-five percent of the existing tanks were made of unprotected steel; twenty-five percent of these were estimated to be defective, and the average percent remediation cost per tank was placed at $70,000.[2] In Kentucky, as of 1995, the location of more than 38,529 tanks has been reported, and it is estimated that this number will likely increase. Assuming a twenty percent rate of failure and an average remediation cost of $100,000, estimates place aggregate remediation costs in Kentucky at between $444 million and $3.16 billion.[3] Though costs may be reduced somewhat with timely implementation based upon innovative remedial guidance, the rate of UST failure between 1995 and the end of the century is predicted to rise above twenty percent.[4]

Notwithstanding the fact that all USTs were to be upgraded to current standards by December 22, 1998,[5] petroleum contamination in the environment continues to be a problem affecting soils and groundwater on property which houses or may have housed one or more USTs and perhaps neighboring property as well. Persons seeking to

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[1] *See* Birge, Taylor, and Grant, "Risk Assessment Plan for Petroleum Underground Storage Tanks in Kentucky," School of Biological Sciences and Graduate Center for Toxicology, University of Kentucky (April, 1995) (hereinafter, "The UK Study") at B.3.

[2] *Id.*

[3] *Id.* (citing Blomquist, "Costs of Closure and Remediation for Petroleum Underground Storage Tanks," Research Reports from October 18, 1993, Status Report: Identification of Appropriate Standards for Corrective Action for a Release from Petroleum Underground Storage Tanks, L.V.A. Seindlein, ed., Kentucky Resources Institute, University of Kentucky).

[4] *Id.*

[5] 40 C.F.R. § 280.41 (1994); 401 KY. ADMIN. REG. § 42:040 (1995).

convey property upon which soil or underlying groundwater is contaminated from petroleum from neighboring sources will effectively find that such contamination operates as a cloud on the title, thereby making buyers and lenders alike reluctant to take title to or a mortgage upon such property until such time as the contamination is remediated.

This Article explores statutory and common law remedies available to persons whose property has been contaminated by petroleum attributable to leaks from or usage upon adjoining or nearby properties.[6] While the United States Congress may have ameliorated petroleum leaks into the environment from USTs with the underground storage tank provisions of the Hazardous and Solid Waste Amendments of 1984,[7] causes of action arising under other statutes are alive and well in the common law and continue to provide non-UST owners with the mechanisms to seek redress from leaks from USTs.[8]

To date, reported cases throughout the United States illustrate that plaintiffs seeking recovery for damages attributable to petroleum-based soil and groundwater contamination have generally alleged causes of action sounding in common law counts of nuisance, trespass, and negligence, as well as statutory causes of action under various state and federal laws and strict liability.[9] In light the recent interpretation of Kentucky law in *Hahn v. Chevron, U.S.A., Inc.*, by the Court of

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[6]The scope of this article is limited to analysis of those statutory and common law causes of action which an *adjoining* landowner may assert against an adjacent landowner. As the Kentucky courts have yet to rule upon the issue, no attempt is herein made to analyze whether a subsequent occupier of commercial property has a cause of action in strict liability, negligence or trespass against a former occupant whose activities during its occupancy allegedly caused the property to become contaminated by petroleum. However, it is likely that the Kentucky Supreme Court, when faced with claims brought by a subsequent occupier against a former occupier would adopt the reasoning of the Maryland Court of Appeals in Rosenblatt v. Exxon Co., 642 A.2d 180 (Md. 1994). The Rosenblatt court declined to extend strict liability to a claim for economic loss stemming from gasoline contamination by a lessee of commercial property against a former lessee. *Id.* at 187. The Rosenblatt court also granted defendant Exxon summary judgment on the negligence claim, finding that the company owed the plaintiff no legally cognizable duty. *Id.* at 188-89. The court also dismissed a trespass claim because Exxon did not cause any contamination to occur during plaintiff's occupancy of the property. *Id.* at 189-90.

[7]42 U.S.C. § 6991-6991i (1998).

[8]Litigation concerning petroleum contamination primarily attributable to leaking underground storage tanks is a relatively recent phenomenon. As a consequence, there are a limited number of reported cases in the area. In the author's experience, most of the major suits have been settled before trial with the result that the potential theories of liability have not been fully tested with a court or jury.

[9]*See, e.g.*, 325-343 E. 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669 (D.D.C. 1995). In its complaint, the plaintiff asserted the following claims: strict liability, trespass, common law indemnification, negligence, a violation of the District of Columbia UST Act, restitution, negligence per se for violations of the Resource, Conservation, and Recovery Act (RCRA) regulations contained at 40 C.F.R. §§ 280-81 and contractual indemnification. *Id.* at 671.

Appeals for the Sixth Circuit,[10] strict liability is not presently available in Kentucky as a theory upon which liability for contamination from storage of gasoline or petroleum in underground storage tanks may be predicated. However, as discussed in more detail, *infra*, ample Kentucky authority exists upon which plaintiffs may establish common law as well as statutory causes of action to seek relief from petroleum contamination attributable to actions undertaken by an adjoining or nearby land owner.

I. APPLICATION OF THE "DISCOVERY RULE" TO STATUTES OF LIMITATION APPLICABLE TO CAUSES OF ACTION PLAINTIFFS MAY ASSERT

Typically, an adjoining landowner may discover the possibility of soil or groundwater contamination attributable to petroleum leaked from an adjoining or nearby property when an investigation concerning environmental contamination on his/her property is undertaken, usually in advance of a proposed sale of the property and at the behest of a commercial lender.[11] As most of the causes of action available to plaintiffs under either Kentucky or federal law will be governed by the applicable five year statute of limitations,[12] plaintiffs face a threshold question concerning when applicable causes of action accrue; that is, when does the statute of limitations applicable to any cause of action plaintiffs may assert begin to run?

The opinion of the United States District Court for the Western District of Kentucky, in *Farm Credit Bank of Louisville v. United States*

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[10]Hahn v. Chevron, U.S.A., Inc., 60 F.3d 828 (6th Cir. 1995).

[11]Normally, commercial lenders will insist upon the performance of a "Phase I Environmental Site Assessment" pursuant to the standards set forth in ASTM-E-1527-94, the standard practice for environmental site assessments. Such investigations are usually limited to a review of pertinent records and regulatory data bases and a limited inspection of the site. Only in the event that the review of pertinent records and regulatory data bases discloses a release of petroleum on adjacent property or in the remote event a site inspection discloses soil staining on the property near the adjacent property boundaries will a Phase I site assessment provide information to the owner sufficient to form a conclusion that the property has been contaminated by petroleum utilized on adjacent property. More commonly, owners become aware of the existence of petroleum contamination when a Phase II environmental site assessment is performed. A Phase II assessment, conforming to sound engineering guidance, provides additional information beyond that conveyed in a Phase I analysis and generally includes undertaking soil borings, analyses of soil samples obtained and perhaps analyses of groundwater through the establishment of groundwater wells or "hydropunch" techniques.

[12]*See infra* notes 57-59, 104, 191 and accompanying notes

Mineral Products Co.,[13] is instructive in resolving this issue. In construing the "Discovery Rule" as applied by the courts in Kentucky, the court in *Farm Credit Bank* determined that the "Discovery Rule" applies to statutes of limitations applicable to claims alleging property damage in Kentucky.[14] As explained by the court, "The 'Discovery Rule' can be stated as follows: A cause of action will not accrue until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but that his injury may have been caused by the defendant's conduct."[15]

The court's opinion in *Farm Credit Bank* concludes that "the 'discovery rule' should apply equally as a matter of public policy, to property damage claims in situations where the claimant is unaware of the dangerous propensities of [the] product" [there, asbestos].[16]

To date, the Kentucky courts have yet to apply the "Discovery Rule" to cases of petroleum contamination. However, given that such contamination in soil or groundwater may remain undiscovered until detected through undertaking soil borings or groundwater monitoring, it would appear that the rationale of *Farm Credit Bank* applying the "Discovery Rule" to asbestos claims would apply equally well to claims of soil or groundwater contamination attributable to petroleum. Thus, as stated by the court in *Farm Credit Bank*, "until such time as the plaintiff can prove some harmful result..., his cause of action has yet to accrue."[17] Nevertheless, landowners presented with a Phase I environmental site assessment disclosing the existence of *possible* soil or groundwater contamination should consider undertaking further investigation of site conditions to avoid the risk that a court could subsequently rule that the Phase I environmental site assessment alone provided sufficient support to invoke the "Discovery Rule," thereby triggering the accrual of causes of action.[18]

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[13]Farm Credit Bank of Louisville v. United States Mineral Prods. Co., 864 F. Supp. 643 (W.D. Ky. 1994).

[14]*Id.* at 649.

[15]*Id.* (quoting Louisville Trust Co. v. Johns-Manville Prods., 580 S.W.2d 497, 501 (Ky. 1979).

[16]*Id.* at 650 (quoting Hopkins County Bd. of Educ. v. National Gypsum Co., CA No. 83-CI-306 (Hopkins Circuit Court, order dated July 12, 1984)).

[17]*Id.* (citing Capitol Holding Corp. v. Bailey, 873 S.W.2d 187, 195 (Ky. 1994)).

[18]*See supra* notes 16-17 and accompanying notes 16-17 (emphasis added).

II. COMMON LAW REMEDIES AVAILABLE TO PLAINTIFFS SEEKING REDRESS OF PETROLEUM-BASED SOIL AND GROUNDWATER CONTAMINATION IN KENTUCKY.

A. Nuisance

As noted by the Kentucky Court of Appeals in *City of Somerset v. Sears*,[19] nuisances are "that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage."[20] In addition, as held in the venerable case of *Louisville Refining Co. v. Mudd*,[21] whether a nuisance exists is determined on the basis of two factors: the gravity of the harm to the plaintiff and the reasonableness of the defendant's use of his property.[22]

Kentucky's law of nuisance was codified by the Kentucky General Assembly in 1991.[23] Citing KRS Section 411.550(2),[24] the United States District Court for the Eastern District of Kentucky stated in *Fletcher v. Tenneco, Inc.*[25] that "Kentucky's codification of the common law of nuisance frames the inquiry concerning the gravity of harm as a determination of whether a defendant's use of its property would 'substantially annoy or interfere with the use and enjoyment of property by a person of ordinary health and sensitivities.'"[26] In *Fletcher*, the court, in ruling on plaintiff's right to compensation in private nuisance for PCB[27] contamination on his property, held that, "as a matter of law, the contamination of plaintiffs' land by a substance widely accepted as hazardous constitutes a condition that would substantially annoy or interfere with the use and enjoyment of property by a person of ordinary sensitivities."[28] Whether the interfering conduct is unreasonable is determined by evaluating "all relevant facts and

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[19]Somerset v. Sears, 233 S.W.2d 530 (Ky. 1950).

[20]*Id.* at 532 (quoting 39 Am. Jur. *Nuisances* § 2).

[21]Louisville Refining Co. v. Mudd, 339 S.W.2d 181 (Ky. 1960).

[22]*Id.* at 186.

[23]KY. REV. STAT. ANN. §§ 411.500-.570 (Michie 1997).

[24]KY. REV. STAT. ANN. § 411.550(2) (Michie 1997).

[25]Fletcher v. Tenneco, Inc., No. 91-118, 1993 WL 86561, at *1 (E.D. Ky. Feb. 22, 1993) (opinion withdrawn at request of the court).

[26]*Id.* at *2.

[27]"PCB"s are the acronym for a category of polychlorinated biphenyls which are denominated " hazardous substances" pursuant to 40 C.F.R. § 302.4 (1998).

[28]*Fletcher*, 1993 WL 86561, at * 4.

circumstances," using a plethora of factors.[29] Evidence of negligence by the defendant is an important,[30] but not necessary factor in weighing reasonableness.[31] In addition to the court's holding in *Fletcher*, the Kentucky courts have long recognized that the pollution of groundwater by any means constitutes a private nuisance.[32]

Further, to the extent that soil and groundwater contamination is attributable to the unremediated depositing of petroleum substances on soil in the absence of a permit issued by the Kentucky Natural Resources and Environmental Protection Cabinet, such action on the part of a putative defendant may constitute nuisance *per se*.[33] In *Branch v. Western Petroleum, Inc.*,[34] the Utah Supreme Court reasoned that where the defendant had ponded oil well formation waters on its property in violation of Utah law, plaintiff could recover under the doctrine of nuisance *per se*, when such waters polluted plaintiff's well.[35] As the court explained, "When the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance *per se*, and the issue of the reasonableness of the defendant's conduct and the weighing of the relative interests of the plaintiff and defendant is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party."[36]

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[29]KY. REV. STAT. ANN. § 411.550 (1)(a)-(g) (Michie 1997). Such factors include the lawful nature of the defendant's use of his property, the manner in which defendant has used it, the importance of the defendant's use of the property to the community, and the influence of [his] use of property on the growth and prosperity of the community. The kind, volume, and duration of the annoyance or interference with the use and enjoyment of the claimant's property may also be considered, as well as the respective situations of the defendant and claimant, and the character of the area in which the defendant's property is located, including but not limited to, all applicable statutes, laws, or regulations. John S. Palmore, *Kentucky's New Nuisance Statute*, 7 J. MIN. L. & POL'Y 1, 3 (1991-92).

[30]Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146, 151-52 (Ky. 1965).

[31]George v. Standard Slag Co., 431 S.W.2d 711, 715 (Ky. 1968).

[32]*See* McCaw v. Harrison, 259 S.W.2d 457 (Ky. 1953) (cemetery seepage allegedly would pollute livestock well); Rogers v. Bond Bros., 130 S.W.2d 22 (Ky. 1939) (creosote allegedly polluted public water supply well); Davis v. Atkins, 35 S.W. 271 (Ky. 1896) (privy allegedly would pollute domestic spring); Louisville & Nashville R.R. Co. v. Simpson, 33 S.W. 395 (Ky. 1895) (buried cow polluted domestic spring); Livezey v. Schmidt, 29 S.W. 25 (1895) (manure pile seepage allegedly percolated to house cellar during rains); Miley v. A'Hearn, 18 S.W. 529 (Ky. 1892) (privy allegedly would pollute domestic well); Kinnaird v. Standard Oil Co., 12 S.W. 937 (Ky. 1890) (oil leak polluted domestic and livestock spring). *See also*, Peter N. Davis, *Groundwater Pollution: Case Law Theories for Relief*, 39 MO. L. REV. 117 (1974).

[33]*See infra* notes 12, 18 and accompanying text.

[34]*Id.*

[35]Branch v. Western Petroleum, 657 P.2d 267 (Utah 1982).

[36]*Id.* at 276.

In Kentucky, K.R.S. Section 224.40-100(1) provides the requisite statutory prohibition necessary for the imposition of nuisance *per se* in the petroleum contamination of soil and groundwater.[37] This section provides that "no person shall transport to or dispose of waste at any site or facility other than a site or facility for which a permit for waste disposal has been issued by the Cabinet."[38]

K.R.S. Section 224.01-405(1) imposes obligations on persons who own or operate a source from which a release of petroleum has occurred to characterize the effect of the release as necessary to determine the effect of the release on the environment and perform corrective action, including remedial actions to clean up contaminated groundwater, surface waters, sediment, and soil.[39]

Soil or groundwater contamination attributable to a person failing to undertake the remediation obligation statutorily imposed by K.R.S. Section 224.01-405 will be deemed to be the disposal of "waste at [a] site or facility other than a site or facility for which a permit for waste disposal has been issued by the cabinet," in violation of K.R.S. Section 224.40-100(1).[40] Therefore, utilizing *Branch* as persuasive authority, a Kentucky court could conclude that a defendant's unremediated contamination of soil and groundwater attributable to leaking petroleum constitutes a nuisance *per se*.[41]

Kentucky's codification of the common law of nuisance provides that a private nuisance is to be cast as either a permanent nuisance or a temporary nuisance, but not both.[42] A permanent nuisance is defined as a private nuisance that cannot be corrected or abated at a reasonable expense to the owner[43] and is relatively enduring

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[37]KY. REV. STAT. ANN. § 224.40-100(1) (Michie 1997).

[38]*Id.* The term "Cabinet" as utilized in K.R.S. § 224.40-100(1) means the Natural Resources and Environmental Protection Cabinet. KY. REV. STAT. ANN. § 224.01-010(9) (Michie 1997).

[39]KY. REV. STAT. ANN. § 224.01-405(1) (Michie 1997).

[40]KY. REV. STAT. ANN. § 224.40-100(1).

[41]*Branch*, 657 P.2d at 267. As will be discussed in more detail, *infra*, KY. REV. STAT. ANN. § 224.99-020(2) may provide a separate statutory cause of action that may be asserted against a defendant for its violation of KY. REV. STAT. ANN. § 224.40-100(1). KY. REV. STAT. ANN. § 224.99-020(2) provides that "[n]othing contained in this chapter shall abridge the right of any person to recover actual compensatory damages resulting from any violation of this chapter." *See infra* text and accompanying notes 195-201. As discussed therein, if asserted as a statutory cause of action, the five year statute of limitations applicable to statutory causes of action embodied in K.R.S. Section 413.120(2) would control.

[42]KY. REV. STAT. ANN. § 411.520(2) (Michie 1997).

[43]City of Ashland v. Kittle, 305 S.W.2d 768, 769 (Ky. 1957).

and not likely abated voluntarily or by court order.[44] Creation of a permanent nuisance results in damages amounting to the resulting loss in market value of the claimant's property.[45]

Similarly, "temporary nuisance" is defined as "[a]ny private nuisance that is not a permanent nuisance..."[46] As a consequence, a temporary nuisance is that category of nuisance that *can* be abated at a reasonable cost.[47] In such cases, KRS Section 411.540(2) provides that the measure of damages for temporary nuisance is to be determined by calculating the diminution in the value of use or the rental value of the claimant's property.[48] In the event that the claimant occupied the property during the continuance of the nuisance, damages are to be measured by the diminution in the value of the use of the property which resulted from the nuisance.[49] On the other hand, if the claimant did not occupy the property during the continuance of the nuisance, compensatory damages are to be measured by the diminution in the fair rental value of the property which resulted from the nuisance.[50]

However, to the extent that a claimant wishes to claim redress for annoyance, discomfort, sickness, emotional distress, or similar claims attributable to private nuisance, damages for such injuries must emanate from a claim for personal injury joined in an action for nuisance, but such damages will not be awarded predicated on the existence of the nuisance alone.[51]

A majority of courts will not uphold a cause of action in private nuisance by a current landowner against a prior owner,[52] reasoning that the court will not interfere where parties have prior contractual relationships.[53]

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[44]KY. REV. STAT. ANN. § 411.530(1)(a)-(b) (Michie 1997). *See* Kentucky-Ohio Gas Co. v. Bowling, 95 S.W.2d 1, 4-5 (Ky. 1936); *See also* Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659, 664 (Ky. 1974).

[45]*Kentland-Elkhorn Coal Co.*, 514 S.W.2d at 664.

[46]KY. REV. STAT. ANN. § 411.540(1) (Michie 1997).

[47]Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 759 (Ky. 1965).

[48]KY. REV. STAT. ANN. § 411.560(1)(b) (Michie 1997).

[49]KY. REV. STAT. ANN. § 411.560(1)(b)(1) (Michie 1997).

[50]*Id.* § 411.560(1)(b)(2).

[51]KY. REV. STAT. ANN. § 411.560(3) (Michie 1997). *See* Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659, 664 (Ky. 1974).

[52]*See* Lilly Indus., Inc. v. Health-Chem Corp., 974 F. Supp. 702, 706 (S.D. Ind. 1997); *cf.* Newhall Land & Farming Co. v. Superior Court., 23 Cal. Rptr. 2d 377, 381-82 (Cal. Ct. App. 1993) (sustaining a cause of action in nuisance even though the plaintiff had no property interest at the time of the defendant's conduct. The court premised the plaintiff's standing on his present inability to sell the property in question because of the contamination).

[53]*Lilly Indus., Inc.*, 974 F.Supp. at 706.

As most soil and groundwater contamination is of such a character that it is capable of being corrected or abated at a reasonable expense, claimants establishing the existence of a private nuisance predicated on contamination constituting an unreasonable and substantial annoyance to the occupants of the claimant's property would likely be awarded damages for temporary nuisance.[54] Alternatively, if the extent of contamination is so pervasive that it cannot be abated at a reasonable expense and it is relatively enduring,[55] damages to be awarded are to be measured by the reduction in the fair market value of the claimant's property, not to exceed the fair market value of such property.[56]

Whether the plaintiff's claim is deemed to constitute a permanent or a temporary nuisance is a critical distinction with respect to when the applicable period of limitations begins to run. As held by the Kentucky Court of Appeals in *Lynn Mining Co. v. Kelly*, the five year statute of limitations embodied in K.R.S. Section 413.120(4) governs the bringing of an action in nuisance.[57] Further, a claim for relief from a permanent nuisance accrues when a plaintiff first suffers an injury resulting from it.[58] However, in the case of a temporary nuisance, the court in *Lynn Mining Co.* analogized such an injury as tantamount to a "continuing trespass for which damages could be recovered for each recurring injury (subject to the limitation that damages could not be recovered for so much of the injury as occurred more than five years before the commencement of the action)."[59]

In summary, soil and groundwater contamination caused by an unremediated release of petroleum to soil and/or groundwater is clearly actionable in private nuisance and will likely constitute a nuisance *per se* in Kentucky.[60]

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[54]*See supra* notes 48-50 and accompanying text (this relates to the proper measure of damages for temporary nuisance).

[55]*See supra* note 45 and accompanying text (relating to the definition of permanent nuisance).

[56]*See* KY. REV. STAT. ANN. § 422.560(1)(a) (Michie 1997).

[57]Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965).

[58]*Id.* at 758. *See also* Huffman v. United States, 82 F.3d 703, 705 (6th Cir. 1996).

[59]*Lynn Mining Co.*, 394 S.W.2d at 757 (citing West Ky. Coal Co. v. Rudd, 328 S.W.2d 156 (Ky. 1959)).

[60]In addition to nuisance per se being predicated upon a violation of K.R.S. Section 224.40-100(1), to the extent that petroleum contamination is attributable to the defendant's violation of Kentucky regulations which prescribe the operation and maintenance of underground storage tanks (*see generally*, 401 KY. ADMIN. REGS. 42 (1995)), nuisance per se may be predicated upon violations of such administrative regulations.

B. Trespass

The tort of trespass will lie in Kentucky where one enters or remains upon the land in possession of another without the possessor's consent.[61] The interest protected is the right of exclusive possession of one's land.[62] The gravamen of the cause of action is the interference with the plaintiff's current possessory interest in the property.[63] Accordingly, standing to pursue a claim of trespass can be found in both the landowner and the tenant.[64]

However, Kentucky courts hold that a possessory interest supporting a trespass cause of action cannot *simultaneously* exist in the landowner and tenant.[65] The tenant must establish that the interference was to property in which he/she had a possessory interest at the time of the occurrence.[66] Similarly, an owner who is out of possession cannot maintain trespass.[67] Thus, a Kentucky landowner cannot sue for trespass to land his tenant occupies;[68] however, such landowner retains a future possessory interest in which he may base a claim for injury to the reversion.[69] In this regard, the landowner must aver damage to the property which affects the value of his interest.[70] Liability will extend to one who intentionally causes "a *thing* to [enter such land] or...fails to remove from the land a thing which he is under a duty to remove."[71]

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[61]Bradford v. Clifton, 379 S.W.2d 249 (Ky. 1964).

[62]RESTATEMENT (SECOND) OF TORTS § 157 (1963-64).

[63]*Id.*

[64]W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS § 13 at 77-78 (5th ed. 1984) (explaining that a tenant may bring an action up to the end of his term with any permanent damage beyond that time recoverable by the landlord).

[65]Walden v. Conn, 1 S.W. 537 (Ky. 1886) (emphasis added).

[66]*See, e.g.*, Carroll v. Litton Sys., Inc., No. B-C-88-253, 1990 WL 312969, at *56 (W.D. N.C. 1990).

[67]KEETON ET. AL., *supra* note 64, § 13, at 78.

[68]*Walden*, 1 S.W. at 538. *Cf.* Davis v. Nash, 32 Me. 411, Starr v. Jackson, 11 Mass. 519, where the courts held that where a tenant is merely a tenant at will, the landlord may bring trespass, as having "constructive possession."

[69]*Walden*, 1 S.W. at 78.

[70]*Id.* (holding that damage to sustain such an action may be found in loss of rents if the tenant is forced to leave as a result of the trespass, or damages in the destruction or dilapidation of the premises).

[71]RESTATEMENT (SECOND) OF TORTS § 158 (1963-64). *See also* RESTATEMENT (SECOND) OF TORTS § 160 (1963-64), which emphasizes that this form of trespass is based on the defendant's intentional violation of its duty of removal: "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land...with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated." *Id. See also infra* notes 73-82 and accompanying text.

Proof of causation is met where the plaintiff establishes a specific act carried out by the defendant.[72]

In the ancient case of *Chesapeake, Ohio & SouthWest Railroad Co. v. Etheridge,*[73] the court established a cause of action in trespass where a tree was the "thing" which blew upon the land of the plaintiff and the owner thereof refused to remove it after being notified.[74] Similarly, an environmental contaminant has consistently been held to be such a "thing," as where harmful "waste" was deposited on the plaintiffs' property and the defendant failed to remove it after the plaintiffs acquired the property.[75] Accordingly, courts have likewise held that invasions of land by crude oil and gasoline are trespasses.[76] Significantly, one's liability in trespass is not limited to surface encroachments, but it extends to invasions subterranean to the land in which the plaintiff has a possessory interest.[77] Indeed, courts have held that a trespass cause of action may be invoked where underground oil tanks leak, assuming all other elements of proof for the tort are met.[78] The aforesaid failure of the defendant to remove the contaminants from the plaintiff's land is traditionally held to be a "continuing trespass."[79] The gravamen of a "continuing trespass" also incorporates continued presence of contaminants on the plaintiff's property and may also give

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[72]Michael J. Maher & Sheila Horan, *Lessons in L.U.S.T.: The Complete Story of Liability for Leaking Underground Storage Tanks,* 16 N. ILL. L. REV. 581, 602 (1996).

[73]Chesapeake, Ohio & S.W. R.R. Co. v. Etheridge, 7 Ky. L. Rptr. 758 (Ky. 1886).

[74]*Id.*

[75]Mangini v. Aerojet-General Corp., 21 Envtl. L. Rep. (Envtl. L. Inst.) 21429 (Cal. Ct. App., June 19, 1991). Courts have further held intangible, invisible gases and microscopic particles to be "things" supporting a trespass cause of action where the Court obviated the requirement of tangible physical invasion to property in the case of alleged air pollution. The court said that the course of science had changed with the times, requiring the bench to reframe its concept of "things." Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (Or. 1959).

[76]Phillips v. Sun Oil Co., 121 N.E.2d 249 (N.Y. 1954) (gasoline seepage from defendant's pump into plaintiff's water well), *cited in* Page Keeton & Lee Jones, Jr., *Tort Liability in the Oil & Gas Industry,* 35 TEX. L. REV. 1, 9 (1956); *cf.* Burr v. Adam Eidemiller, Inc., 126 A.2d 403 (Pa. 1956) (acknowledging the leakage of slag from defendant's operations to be an intentional invasion of plaintiff's land, but categorizing the tort as a nuisance, the unreasonableness of which is a matter of fact for the jury). *See also supra* notes 20-60 and accompanying text for a discussion of the common law remedy of nuisance.

[77]RESTATEMENT (SECOND) OF TORTS §§ 158 cmt. g, 159, cmt. e (1963-64). "Subterranean" means those invasions "being or lying under the surface of the earth" and includes "geological structures found therein such as springs." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997). *See also* North Ga. Petroleum Co. v. Lewis, 197 S.E.2d 437 (Ga. Ct. App. 1973), where the court noted that contamination of subterranean waters by oil or gas renders a person liable in damages.

[78]Wilson v. McLeod Oil Co., 398 S.E.2d 586 (N.C. 1990); Kulpa v. Stewart's Ice Cream, 534 N.Y.S.2d 518, 520 (N.Y. App. Div. 1988); Hudson v. Peavy Oil Co., 566 P.2d 175 (Or. 1977).

[79]KEETON ET. AL., *supra* note 64, § 13, at 83.

rise to a cause of action against former owners and occupiers.[80] Consent granted by a former holder of a possessory interest is no defense as against a subsequent possessor if the actor fails to remove the thing after consent is terminated.[81] Hence, a demand by the owner that the offender remove the contaminant followed by the defendant's failure to do so manifests a purposeful intent to commit an intentional continuing trespass.[82] Abandonment of waste which may be traced to a defendant can analogously be argued to be active disposal without consent.[83] However, just as a continuing nuisance cause of action will not lie against an innocent current landowner for contamination by a prior owner,[84] lessor landowners cannot be held liable on a continuing trespass theory unless they actively caused or contributed to the contamination.[85]

Typically, in determining whether a plaintiff has established a *prima facie* case in trespass, the court's principal focus will be upon the element of intent.[86] It is not necessary to prove that the tortfeasor had an intention to effect the harm, but the tortfeasor merely had the requisite intention to do the act which, as a logical and natural result, brings about or results in the harm or damage.[87] Knowingly allowing oil to seep into soil or groundwater is sufficient to establish the element of intent, assuming the plaintiff establishes that the defendant was aware of the act leading to the contamination.[88] However, an actor's awareness of a high degree of likelihood that his activities will result in a trespass may be proved circumstantially.[89] Moreover, a defense of mistake will not be entertained.[90]

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[80]Newhall Land & Farming Co. v. Superior Court, 23 Cal. Rptr. 2d 377, 383-84 (Cal. Ct. App. 1993) (owner v. remote predecessor in title). *But see* Lilly Indus., Inc. v. Health-Chem. Corp., 974 F.Supp. 702, 709 (S.D. Ind. 1997) (owner v. immediate predecessor) (holding that actions the prior owner took while in "lawful possession of the property that are alleged to have continued to affect the same property after the change of possession" do not sustain a trespass cause of action).

[81]RESTATEMENT (SECOND) OF TORTS § 160 (1963-64).

[82]Maher & Horan, *supra* note 72, at 602.

[83]*Id.*

[84]*See supra* notes 52-53 and accompanying text.

[85]Resolution Trust Corp. v. Rossmoor Corp., 40 Cal. Rptr. 2d 328, 331 (Cal. Ct. App. 1995).

[86]Gary W. Napier & Samuel L. Perkins, *"Ownership" of Underground Storage Tanks*, 9 J. NAT. RESOURCES & ENVTL. L. 1, 6 (1993-94).

[87]Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956).

[88]Cooper v. Whiting Oil Co., 311 S.E.2d 757 (Va. 1984).

[89]Bradley v. American Smelting & Ref. Co., 709 P.2d 782, 786 (Wash. 1985).

[90]RESTATEMENT (SECOND) OF TORTS § 164 (1963-64).

Further, a defendant may be liable in trespass even where the trespassory invasion causes no damage to the plaintiff's property or interest in the property, as long as other elements of the tort are proved.[91] The action is founded in the vindication of a legal right,[92] but the plaintiff is limited to nominal damages in such situations unless title to or rights in real property are threatened.[93] Similarly, if the defendant's act causes no immediate harm but later contributes to damage, the action will lie.[94] Additionally, causal intervention of natural conditions, such as deterioration, wind or rain, in initiating or exacerbating the trespass will not absolve the defendant of liability.[95] Thus, by way of illustration, where the defendant intentionally dumped asphalt and asphalt-like matter on his own land in such a manner that it was carried onto the plaintiff's land by a contiguous stream, he was held liable for trespass.[96] The court emphasized the act must be done with knowledge that it will, to a substantial certainty, result in entry of the foreign matter onto the plaintiff's property.[97]

Kentucky law provides a five year statute of limitations for trespass to real property.[98] However, the designation of "continuing trespass" serves to relieve some of the strictures of limitations periods within which the possessor would have to bring a toxic tort claim.[99] Additionally, in trespasses which are temporary in nature but recurrent, as a periodical seepage, each identifiable incident of contamination will give rise to another cause of action.[100] Under these circumstances, it is important to note that the statute of limitations contained in K.R.S.

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[91] *Id.* § 158. *But see* Borland v. Sanders Lead Co., 369 So.2d 523 (Ala. 1979).

[92] KEETON ET AL., *supra* note 64, § 13, at 75.

[93] Cissell v. Grimes Invs., Inc., 383 S.W.2d 128, 129 (Ky. 1964).

[94] Rushing v. Hooper-McDonald, Inc., 300 So.2d 94 (Ala. 1974).

[95] RESTATEMENT (SECOND) OF TORTS § 158 cmt. *l* (1963-64).

[96] *Rushing*, 300 So.2d at 97.

[97] *Id.* at 97. *See also* Borland v. Sanders Lead Co., 369 So.2d 523, 529 (Ala. 1979) (requiring "reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest" and also "substantial damages to the *res*"). *See also* W. T. Ratliff Co. v. Henley, 405 So.2d 141, 145 (Ala. 1981). The "substantial certainty" standard imposes a heavy evidentiary burden on the plaintiff in underground contamination cases but must be met for the action to lie.

[98] KY. REV. STAT. ANN. § 413.120(4) (Michie 1997). An act characterized as a "continuing trespass" relieves the possessor of some of the strictures of limitations periods in which he would have to bring the claim. *See infra* note 101 and accompanying text.

[99] RESTATEMENT (SECOND) OF TORTS § 161 cmt. 6 (1963-64).

[100] Wimmer v. City of Fort Thomas, 733 S.W.2d 759 (Ky. Ct. App. 1987).

Section 413.120(4) will not present a bar to such actions, as long as the contamination is present at the time the action is filed.[101]

Kentucky law holds that the measure of damages for a trespass of temporary duration will be the cost of restoring plaintiff's property to as good a condition as it was prior to the trespass, in addition to diminution in the value of the use of the property, if any, during restoration to its original condition.[102] Courts in other states have required proof of abatability in continuing trespass actions wherein plaintiffs seeking to prevail must present substantial evidence that the condition can be removed at a reasonable cost and by reasonable means.[103] Without any evidence that the contamination is both subject to clean-up and that the remediation cost is reasonable, courts in these jurisdictions classify the trespass as "permanent" and hold that the traditional state law statute of limitations applies.[104] In Kentucky, the measure of damages where injury to land is permanent is the difference in fair market value immediately before the trespass and its fair market value immediately thereafter.[105] Finally, a jury is warranted in awarding punitive damages in the case of trespass if the act is attended by rudeness, wantonness, recklessness, or an insulting manner or is accompanied by circumstances of fraud and malice, oppression, aggravation, or gross negligence.[106]

C. Negligence

An individual injured by petroleum contamination will often combine a cause of action in negligence with causes of action in

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[101]*Id.* Further, in some recent decisions where the defendant has refused to remove the contaminating agents after demand has been made, the courts have classified the continual seepage of contaminants from the defendant's property at the time the action is filed to constitute a "renewing" rather than a "continuing" trespass. Wilson v. McLeod Oil Co., 398 S.E.2d 586 (N.C. 1990). The Court noted, "[T]ests revealed that [the plaintiff's] well remained contaminated with gasoline as of the filing of this action ... [and] [g]asoline was found in the dirt surrounding the [defendant's] tanks, indicating that the seepage from [the defendant's] property ... had not stopped at the time this suit was filed." *Id.* at 596. Accordingly, the Court held that where contaminants continued to leach at the time the action is filed, such a trespass was "recurrent" and thus not barred by the five year statute of limitations applicable to trespass and nuisance claims in North Carolina. *Id.*

[102]United Co-op Realty Co. v. Morrison, 89 S.W.2d 331 (Ky. 1935). *See also* B. & B. Oil Co. v. Townsend, 192 S.W.2d 953, 954 (Ky. 1946).

[103]Mangini v. Aerojet-General Corp., 21 Envtl. L. Rep. (Envtl. L. Inst.) 21,429, 21,434 (Cal. Ct. App. June 19, 1991).

[104]*Id.* at 21,433.

[105]Chapman v. Beaver Dam Coal Co., 327 S.W.2d 397, 399-400 (Ky. 1959).

[106]Rushing v. Hooper-McDonald, Inc., 300 So.2d 94, 98 (Ala. 1974).

nuisance and trespass. Whether property owners who are damaged from contamination originating on adjacent land can establish a *prima facie* case of negligence against the neighboring landowner turns on general negligence principles.[107]

1. Duty and Breach

The pertinent duty is traditionally framed as that standard of care which a reasonable person would exercise under the same or similar circumstances.[108] However, a defendant may additionally be charged with any specialized knowledge that he had or should have had in the conduct of his activities,[109] such as knowledge about the danger of tank corrosion, tank piping design, chemical reactions likely to result from normal tank usage, or affordable testing procedures.[110]

Prior to enactment of federal and state statutory provisions, there was no formally recognized, legislatively imposed duty to inspect or test tanks or piping for leaks.[111] However, courts, both before and subsequent to such legislative interventions, have judicially recognized a general duty to act in specified situations.[112] Thus, such a duty is identified where reasonable persons would foresee that property of another is at risk,[113] and where the UST should be periodically inspected for potential leaks.[114] Likewise, courts have established duties (1) to avoid infringement on neighboring ownership rights via contamination of groundwater,[115] (2) to maintain USTs in a reasonably safe condition,[116] and (3) to act upon actual or constructive notice of a

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[107]DENNIS L. GREENWALD & MICHAEL ASIMOW, REAL PROPERTY TRANSACTIONS, California Practice Guide § 5:171.1 (1995-97). Plaintiffs must show the defendant owed them a duty of care, that the defendant breached that duty, and that the plaintiff suffered injury which was proximately caused by the defendant's breach. *Id. See also* Exxon Corp. v. Amoco Oil Co., 875 F.2d 1085, 1090 (citing Jacques v. First Nat'l Bank, 515 A.2d 756 (Md. 1986)).

[108]RESTATEMENT (SECOND) OF TORTS § 283 (1963-64).

[109]Lerro v. Thomas Wynne, Inc., 301 A.2d 705, 707 (Pa. 1973).

[110]*Id.* at 707-708. The court stated that "[o]rdinary men know that large quantities of oil soaking into the ground, if uncontrolled, flow in unpredictable directions and therefore involve a risk of seriously affecting other properties." *Id.* at 708.

[111]Samuel L. Perkins, *Petroleum Storage Regulation in Kentucky*, 22 N. KY. L. REV. 59, 62 (1995).

[112]*See infra* notes 113-117 and accompanying text.

[113]Nischke v. Farmers & Merchants Bank & Trust, 522 N.W.2d 542, 550 (Wis. Ct. App. 1994) (holding that a bank with a security interest in a UST on the landowner's property may be negligent for failure to inform the landowner that the tank was to be abandoned).

[114]*Lerro*, 301 A.2d at 707.

[115]Exxon Corp. v. Yarema, 516 A.2d 990, 1005 (Md. Ct. Spec. App. 1986).

[116]Leone v. Leewood Serv. Station, Inc., 624 N.Y.S.2d 610 (N.Y. App. Div. 1984).

UST leak.[117] Breach of such duties is found whenever the conduct of the defendant falls below the relevant standard of care,[118] and the elements of duty and breach are often addressed together.[119]

Kentucky law has long recognized that a cause of action in negligence may lie for the pollution of groundwater. In *Long v. Louisville and Nashville Railroad Co.*,[120] the plaintiff sued the defendant railroad for contamination of her well alleged to have been caused by the defendant's burial of a dead cow in its right-of-way.[121] The court found a duty of "care and regard for the rights of others as a prudent and just man would and should have in the same situation."[122] The court elaborated that an absence of such care and regard would constitute a breach of duty if the injury was shown "plainly to be anticipated, and easily preventable with reasonable care and expense."[123] Although the court in *Long* did not find that defendant negligent, the case recognizes negligence as a cause of action available to plaintiffs upon proper proof.

While no cases in Kentucky have addressed a defendant's liability in negligence for leaking underground storage tanks or the generation of petroleum contamination by other means, the Maryland Court of Appeals, in *Exxon Corp. v. Yarema*,[124] held that leaking underground storage tanks, as well as Exxon's tardy remedial response to contain the contamination, constituted a breach of its duty to its neighboring landowners not to impair their ownership rights through water contamination.[125] Similarly, the Georgia Court of Appeals, in *North Georgia Petroleum Co. v. Lewis*,[126] explained that a landowner acting with negligent conduct may be liable to a neighboring landowner for pollution of percolating water, notwithstanding the fact that the defendant has been putting the land to reasonable use. The court noted that several states recognize oil and gas contamination of groundwater sufficient to render the person liable in damages to the aggrieved

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[117]New York Tel. Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172 (N.Y. App. Div. 1984).

[118]Tolin v. Terrell, 117 S.W. 290, 291 (Ky. 1909) (explaining that the standard of care required in Kentucky is an objective standard of knowledge and understanding held by members of the community).

[119]William B. Johnson, J.D., Annotation, *Tort Liability for Pollution from Underground Storage Tanks*, 5 A.L.R. 5th 11 (1993-97).

[120]Long v. Louisville & Nashville R.R. Co., 107 S.W. 203 (Ky. 1908).

[121]*Id.*

[122]*Id.* at 205 (quoting Collins v. Chartier's Valley Gas Co., 18 A. 1012 (Pa. 1890)).

[123]*Id.* (quoting *Collins*, 18 A. at 1012).

[124]Exxon Corp. v. Yarema, 516 A.2d 990, 1005 (Md. Ct. Spec. App. 1986).

[125]*Id.*

[126]North Ga. Petroleum Co. v. Lewis, 197 S.E.2d 437 (Ga. Ct. App. 1973).

landowner.[127] "Reasonableness of use" is for the fact finder to decide, utilizing factors such as the "nature of the watercourse, its adaptability for particular purposes, [and] the extent of injury caused to the lower riparian owner."[128]

Further, in *P. Ballentine & Sons v. Public Service Corp.*,[129] the New Jersey Supreme Court instructively identified a duty of landowners to prevent any future escape of contaminants from one's premises once a landowner is notified his tanks are a potential source of contamination.[130] In *Ballentine*, the landowner inspected and removed or repaired some of the petroleum tanks and connection pipes on his property after contamination of a neighbor's wells was brought to his attention.[131] However, his failure to inspect another receptacle to ascertain its imperviousness rendered him liable in negligence when it was found to be the culprit tank.[132] While Kentucky courts have held that although the law of negligence imposes no absolute duty to prevent the escape of contaminants,[133] there is, at a minimum, a duty imposed on a landowner to conduct activities with due care and in good faith.[134]

The duty established in *Ballantine* to maintain, inspect, test, or otherwise monitor one's tanks was reiterated by the New York courts in *New York Telephone Co. v. Mobil Oil Corp.*[135] There, the court emphasized that a defendant may be liable upon actual or constructive notice of the alleged dangerous condition if he fails to act to prevent injury or if he creates such a condition in his manner of maintenance or service of the tank.[136] Further, courts more heavily weigh a defendant's failure to act once notified of contamination than his inadequate manner of maintenance, as it has been held that a defendant who adequately maintained his gasoline UST was still negligent by filling the tank after it had knowledge of the leak.[137]

In contrast, a lessor landowner's obligation to adjacent property owners does not include a duty to enter and inspect the leased property at the outset of a lease merely because some leakage is inherent in the

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[127] *Id.* at 439.

[128] Long v. Louisiana Creosoting Co., 69 So. 281, 282 (La. 1915).

[129] P. Ballentine & Sons v. Public Serv. Corp., 70 A. 167, 168 (N.J. 1908).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Rogers v. Bond Bros., 130 S.W.2d 22, 24 (Ky. 1939).

[134] B. & B. Oil Co v. Townsend., 192 S.W.2d 952, 953 (Ky. 1946).

[135] New York Tel. Co. v. Mobil Oil Corp., 473 N.Y.S.2d 172, 175 (N.Y. App. Div. 1984).

[136] *Id.*

[137] Cooper v. Whiting Oil Co., 311 S.E.2d 757 (Va. 1984).

gas station business which is to be operated there.[138] The lessor neither has a duty to terminate a lease or even to perform rigorous testing after notification of leaks[139] but meets its duty by promptly remediating leaks of which he has knowledge.[140]

Where duties are not commonly understood by ordinary men, a court may require specific evidence regarding company policy or industry practice to be presented to establish the exact duties with which the defendant is charged. Thus, the Supreme Court of Virginia, in *Cooper v. Whiting Oil Company, Inc.*,[141] affirmed a judgment for the defendant oil company where the plaintiff failed to establish that the defendant had any duty to inspect and maintain tanks, and failed to demonstrate how leaks could be prevented or even detected by appropriate inspection or maintenance procedures.[142]

2. Injury

In addition to establishing duty and breach, the plaintiff must establish injury or damage.[143] Proof of injury from oil leakage is more straightforward than in other cases of toxic contamination because the contaminant is generally detectable by odor or taste.[144] Notwithstanding the fact that many injuries are manifested in an obvious manner,[145] some harms are not as apparent, and courts will hold the plaintiff to his obligation of proof of damage. Such was the case in *Exxon Corp. v. Amoco Oil Co.*,[146] where the plaintiff oil company had purchased property for a service station from the defendant oil company.[147] The plaintiff succeeded in proving a breach of the defendant's duty to see that its USTs did not contaminate groundwater,

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[138]Resolution Trust Corp. v. Rossmoor Corp., 40 Cal. Rptr. 2d 328, 333 (Cal. Ct. App. 1995).

[139]*Id.*

[140]*Id.* at 334.

[141]311 S.E.2d at 757.

[142]*Id.*

[143]Johnson, *supra* note 119, § 6(a).

[144]Allison Rittenhouse Hayward, *Common Law Remedies & the UST Regulations*, 21 B.C. ENVTL. AFF. L. REV. 619, 661 (1994). Other toxins are less readily detectable by the injured party yet may be harmful in minute doses, giving rise to latent manifestations of injury years after exposure. *Id.* at 666 n.263.

[145]Cornell v. Exxon Corp., 558 N.Y.S.2d 647 (N.Y. App. Div. 1990). (The plaintiffs' children were sickened after ingestion of gasoline traced to the defendant oil company's USTs. The court held that there was sufficient medical evidence in the record to sustain the claim of personal injury).

[146]Exxon Corp. v. Amoco Oil Co., 875 F.2d 1085, 1087 (4th Cir. 1989).

[147]*Id.* at 1087.

but the plaintiff had "failed entirely" in proving that it suffered any damages as a result of the breach.[148] Significant to the decision was the court's distinction that even though the groundwater in the *area* was contaminated, no damage had been shown to the specific property of the plaintiff.[149]

Exposure to uncertain but probable substantial risk will support a finding of injury in some jurisdictions, and a court has broad discretion in such cases,[150] so long as its results comport with the preponderance of the evidence.[151] It has thus been held that even a *potential* health threat can be actionable if sufficiently serious.[152] More conservative courts hold that the mere probability or likelihood of harm is not enough, and that the factfinder must also consider imminence and magnitude.[153]

3. Causation

It is generally accepted that tort liability is dependent on proof that the defendant's culpable conduct or activity was the proximate cause of the plaintiff's injury.[154] In petroleum related cases, the majority of courts have consistently required proof that the defendant's conduct was "more likely than not" the cause of the plaintiff's injury or that the injury would not have occurred "but for" that conduct.[155]

Proof of actual causation has been upheld where the plaintiff established the proximity of the tank to the contamination,[156] and there were no other sources in the area nor any contamination until the installation of the particular UST.[157] Results of leak tests performed to

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[148]*Id.* at 1090.

[149]*Id.* at 1091.

[150]Environmental Defense Fund v. EPA, 598 F.2d 62, 89 (D.C. Cir. 1978) (upholding EPA's prohibition of discharge of PCBs based on evidence that was "at least suggestive of carcinogenicity"). *See also* Ethyl Corp. v. EPA, 541 F.2d 1, 17 (D.C. Cir. 1976) (holding that no proof of actual harm was necessary to support regulation of lead in gasoline).

[151]National Lime Ass'n v. EPA, 627 F.2d 416, 453 (D.C. Cir. 1980).

[152]Reserve Mining Corp. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975); *cf.* Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1125 (7th Cir. 1975) (where the Reserve holding was cited to deny damages to plaintiffs based on unpredictable health consequences). *See also* Spannaus v. Maple Hill Estates, 317 N.W.2d 53, 55 (Minn. 1982).

[153]Sierra Club v. Sigler, 695 F.2d 957, 970 (5th Cir. 1983); Ayers v. Townwhip of Jackson, 525 A.2d 287 (N.J. 1987).

[154]Southern Bell Tel. & Tel. Co. v. Spears, 93 S.E.2d 659, 661 (Ga. 1956).

[155]*See infra* notes 156-162 and accompanying text.

[156]South Cent. Bell Tel. Co. v. Gaines Petroleum Co., 499 So.2d 521, 523 (La. Ct. App. 1986).

[157]Monroe "66" Oil Co. v. Hightower, 180 So.2d 8 (La. Ct. App. 1965).

determine if USTs were "tight" have also been held to be conclusive as to causation,[158] as has the expert testimony of a chemist that the material contained in the UST matched samples at the contaminated site.[159] Additionally, unexplained financial losses to a business where USTs were located were held definitive on the issue of causation,[160] as were unexplained losses of gasoline,[161] and results of regulatory agencies' investigations substantiating leakage.[162]

4. Proof

Proof of causation through the use of circumstantial evidence has been held to require more than a scintilla of circumstantial evidence,[163] although courts liberally allow inferences to suffice as the level of proof that the conduct did or did not cause the plaintiff's harm.[164] Thus, proof that groundwater flowed from the defendant's USTs in the direction of the plaintiff's land has been held to be sufficient to prove causation.[165] Likewise, the plaintiff's compounded evidence of test results from upgradient and downgradient monitoring wells, onset of gasoline odor one year after installation of the USTs, plaintiff's own sample results corroborating those of the state agency, and witness testimony of observance of soil contamination upon UST removal has been sufficient for courts to infer that the leak caused the plaintiff's harm.[166]

Alternatively, failing to conduct leakage testing of similar tanks used by other gas stations in the area caused the inference of causation from the defendant's tanks to likewise fail.[167] Similarly, the Kentucky Supreme Court, in *Maise v. Imperial Oil Co.*, refused to infer that the defendant oil company's tanks caused an explosion in a nearby residential well where there was no positive evidence of gasoline in the well.[168]

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[158]Malone v. Ware Oil Co., 534 N.E.2d 1003, 1004 (Ill. App. Ct. 1989).
[159]*Gaines Petroleum*, 499 So.2d at 523.
[160]*Id.*
[161]Sinclair Refining Co. v. Bennett, 123 F.2d 884, 885 (6th Cir. 1941).
[162]*Gaines Petroleum*, 499 So.2d at 523.
[163]Masten v. Texas Co., 140 S.E. 89, 90 (N.C. 1927).
[164]*In re* Tutu Wells Contamination Litig., 846 F. Supp. 1243, 1282 (D.V.I. 1993).
[165]Wilson v. McLeod Oil, 398 S.E.2d 586, 596 (N.C. 1990).
[166]Malone v. Ware Oil Co., 534 N.E.2d 1003, 1005 (Ill. App. Ct. 1989).
[167]Moore v. Mobil Oil Co., 480 A.2d 1012, 1019 (Pa. Super. Ct. 1984).
[168]Maise v. Imperial Oil Co., 137 S.W.2d 1104, 1106 (Ky. 1940).

Mere location was held to be sufficient to infer causation where the defendant admitted his tanks leaked, and they were situated over an aquifer supplying wells.[169] Consequently, the North Carolina Supreme Court in *Masten v. Texas Co.* relied on the well location in relation to the implicated UST in finding causation.[170] There, the gas tank was the only one within a half mile or more of the plaintiff's home, the contour of the ground sloped from the tank to the well, and a strata of rock ran from the tank to the well.[171] Even more significantly, the vein of water running to the well came from the direction of the pump associated with the tank.[172] All these geographic location factors led to an inference of causation.[173] Where several sources within the possession, control, and peculiar knowledge of a defendant may be implicated, it is not incumbent on the plaintiff to prove in which specific tank the leak occurred.[174] Indeed, in *Southern Co. v. Graham*, the court reached an inference of causation by the process of elimination.[175] There, the plaintiff negated other causes and showed that the presence of gasoline in a water system gradually diminished and had become practically eliminated, after the removal, testing, improvement and reinstallation of the tanks and its supportive structure.[176]

5. Negligence *per se*

Just as a violation of Kentucky statutes may support a claim for nuisance *per se*,[177] likewise a violation of Kentucky statutes may support a claim for negligence *per se*.[178] The cause of action arises irrespective of whether the defendant breaches the standard set out in a statute, ordinance, or administrative regulation.[179] The Kentucky Supreme Court has theorized that the action lies "because negligence *per se* 'is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.'"[180]

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[169]*In re Tutu Wells Contamination Litig.*, 846 F. Supp. at 1281.
[170]Masten v. Texas Co., 140 S.E. 89 (N.C. 1927).
[171]*Id.*
[172]*Id.*
[173]*Id.* at 90.
[174]P. Ballentine & Sons v. Public Serv. Corp., 70 A. 167, 168 (N.J. 1908).
[175]Southern Co. v. Graham, 607 S.W.2d 677, 679 (Ark. 1980).
[176]*Id.* at 678.
[177]*See supra* notes 34-41 and accompanying text.
[178]Real Estate Mktg., Inc., v. Franz, 885 S.W.2d 921, 926-27 (Ky. 1994).
[179]Maher & Horan, *supra* note 72, at 597.
[180]*Real Estate Mktg., Inc.* 885 S.W.2d at 927 (quoting court of appeals' opinion).

Standing to assert a cause of action sounding in negligence *per se* is contingent upon the plaintiff establishing that he/she is a member of the class of persons that the statute, ordinance or regulation was intended to protect,[181] and the injury suffered must be the type of harm that such enactment was designed to prevent.[182] Curiously, however, at least one court has refused to allow a statute, ordinance, or regulation to supply the standard of care in the absence of evidence that the enacting body intended to create a private cause of action.[183] In *Fortier v. Flambeau Plastics Co.*, the Wisconsin Court of Appeals illustrated these elements in holding that the class of persons envisioned to be protected by the statute were property "owners whose water supplies may be affected."[184] The court then ruled that the plaintiff's use of the water supplies placed him in the protected class,[185] giving him standing to sue the defendant whose deposit of waste at an unlicenced landfill had contaminated the water supply.[186] However, the court denied recovery because neither the solid waste disposal regulations which were violated nor the statutory chapter under which they were promulgated evinced an intent to provide a private cause of action.[187]

The negligence *per se* duty is not limited to injury to persons, but extends to property damage.[188] Thus, where the UST regulations, which were contained in the state fire code, resulted in gasoline in the plaintiff's soil, courts have upheld an action for negligence *per se*.[189] K.R.S. Section 446.070 elevates proof of violation of statutory standards to the status of negligence *per se* by providing that, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."[190]

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[181]Fortier v. Flambeau Plastics Co., 476 N.W.2d 593, 601 (Wis. Ct. App. 1991).

[182]*Id.*

[183]*Id.* at 602. *See also infra* notes 194-201and accompanying text (explaining the legislative intent to create a private cause of action in KY. REV. STAT. ANN. § 224.99-020(2)).

[184]*Fortier*, 476 N.W.2d at 601.

[185]*Id.*

[186]*Id.*

[187]*Id.* at 602. The court seems to have confused the notion that a statutory duty can supply an element of a common law cause of action with the prerequisites for establishing a statutory cause of action.

[188]Mini Mart, Inc. v. Direct Sales Tire Co., 889 F.2d 182, 185 (8th Cir. 1989).

[189]*Id.* The court opined that the statute was enacted to prevent not only fire and explosion, but also contamination of the soil and groundwater by a leaking tank. *Id. See also* Johnson, *supra* note 119, § 3[a].

[190]Real Estate Mktg., Inc., v. Franz, 885 S.W.2d 921, 927 (Ky. 1994) (quoting KY. REV. STAT. ANN. § 446.070 (Michie 1997)).

Finally, the five year statute of limitations embodied in K.R.S. Section 413.120(4) applies to an action for damages to real property resulting from negligence.[191]

III. STATUTORILY CREATED CAUSES OF ACTION

A. Kentucky Causes of Action

Notwithstanding the existence of the traditional common law remedies previously discussed, a plaintiff may be able to take advantage of a defendant's failure to conform his/her conduct to the requirements of Kentucky statutes and regulations, and thereby afford himself a remedy against the defendant to the extent that harm to the plaintiff can be shown to have been actually caused by the defendant's violation.[192] As many, if not most, petroleum leaks are attributable to leaks from either underground or aboveground storage tanks, a plaintiff should evaluate whether a leak from an underground or aboveground storage tank system has caused the petroleum contamination in question and, if so, whether the leak can be attributable to a failure on the part of the defendant to abide by Kentucky's statutes and regulations governing storage of petroleum in such tanks.

1. Statutory Obligations Respecting the Use of Underground Storage Tanks

In response to the federal mandate in Subtitle I of the Resource, Conservation, and Recovery Act,[193] (RCRA) that states adopt provisions regulating the storage and dispensing of petroleum from USTs, the Kentucky General Assembly adopted the K.R.S. Section 224.60-155, which empowers the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet") to promulgate regulations requiring the owner and operator of such tanks to register USTs as well as to undertake appropriate release response, site characterization, and corrective action regarding leaks from petroleum USTs.[194] However,

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[191]Kentucky Dep't of Highways v. Ratliff, 392 S.W.2d 913 (Ky. 1965).

[192]KY. REV. STAT. ANN. section 224.99-020(2) provides statutory recognition of a private right of action for utilizing the *per se* concept where the defendant can be shown to have violated an administrative regulation promulgated under any of its sections.

[193]42 U.S.C. §§ 6901-6992 (1988).

[194]KY. REV. STAT. ANN. section 224.60-155 (Michie 1997). These rules are embodied in Chapter 42 of the Kentucky Administrative Regulations. *See*, for example, 401 KY. ADMIN. REGS. 42:060 (1995) which charges owners and operators with responsibility to undertake

conceived as a regulatory, rather than a compensatory scheme, 401 KAR Chapter 42[195] contains no provision affording private persons a cause of action against one who violates its parameters.[196] However, K.R.S. Section 224.99-020(2) provides that violation of 401 K.A.R. Chapter 42 and other administrative regulations may serve as the basis for the assertion of claims pursuant to the doctrine of negligence *per se* and nuisance *per se* if any regulation or provision of K.R.S. Chapter 224 is violated.[197] That subsection provides, "Nothing contained in this chapter shall abridge the right of any person to recover actual compensatory damages resulting from any violation of this chapter."[198] The Kentucky courts have ruled that a violation of an administrative regulation is tantamount to a violation of the enabling statute which authorized the administrative agency to promulgate such administrative regulation.[199] Accordingly, to the extent that a plaintiff can adduce competent evidence that the defendant has violated any provision of 401 KAR Chapter 42 regarding USTs,[200] and to the extent that the

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corrective action for releases.

[195]401 KY. ADMIN. REGS. 42:005-42.200 (1995).

[196]*Id.* Indeed, the chapter contains no penalty provision.

[197]KY. REV. STAT. ANN. section 224.99-020(2) (Michie 1997).

[198]*Id.*

[199]Phillips Petroleum Co. v. Stokes Oil Co., 863 F.2d 1250 (6th Cir. 1988); Home Ins. Co. v. Hamilton, 253 F. Supp. 752, 755 (E.D. Ky. 1966). State statutes should be intricately reviewed as to whether they do indeed provide a private cause of action and, if so, to what degree. For example, Ohio UST regulations do not provide a private cause of action. *See* Lyden Co. v. Citgo Petroleum Corp., No. 1:91CV1967, 1991 WL 325786, at * 3 (N.D. Ohio Dec. 5, 1991). Some states only provide for declaratory or equitable relief, but no monetary damages. *See* Zoufal v. Amoco Oil Co., No. 91-CV-70895, 1993 WL 208812, at *4 (E.D. Mich. Mar. 19, 1993).

[200]401 KY. ADMIN. REGS. 42:005-42.200 (1995). The Cabinet, in promulgating regulations governing the operation of USTs, chose to adopt the federal regulations without significant modifications. The violation of any one of these technical or remedial requirements, embodied in Chapter 42, will subject the owner and operator of a UST to liability. Identification of ownership of USTs became critical upon promulgation of UST regulations because prior to that, the subject was relatively ignored. *See* Napier & Perkins, *supra* note 86, at 15. Promulgation of the UST regulations thrust the issue into the forefront of industry regulation because since the drafting of the Kentucky regulations adopted the wording of CERCLA, the terms "owner/ownership" were used. *Id.* at 16-17. In reality, the discernment between owner/operator appears to be merely semantical. There is no statutory definition for "owner," *id.* at 15, and there is usually no documentation from which one can clearly determine the ownership of a UST. *Id.* at 16. On the other hand, just who is an "operator" is clear from the explicit statutory definition. *Id.* at 17. Ultimately it makes no difference, as like duties are generally imposed on both the owners and operators. *Id.* Additionally, when duties and responsibilities as between the two are ambiguous, the court may hold the terms "owner/operator" to have their ordinary meanings rather than unusual or technical meanings. *See* Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988). Owners and operators are bound to performance standards and notification requirements, release response parameters, site characterization elements, and corrective action requirements for both new and existing systems. *See* 401 KY. ADMIN. REGS. 42: 020-080 (1995).

violation can be said to be causally related to the contamination for which the plaintiff seeks recovery of damages, such regulatory violation will, under the authority of *Home Insurance* and *Phillips Petroleum*, be tantamount to a violation of K.R.S. Section 224.99-020(2),[201] under which the person, utilizing common law or statutory theories of liability, is entitled to damages.

2. Statutory Obligations Respecting the Use of Aboveground Storage Tanks

An individual damaged by a release from an aboveground petroleum storage tank (AST) is afforded a more straightforward statutorily created cause of action than one harmed by a leaking UST. The Superfund Branch of the Kentucky Natural Resources and Environmental Protection Cabinet (KNREPC) is charged with regulatory oversight of petroleum releases from ASTs,[202] and authority to promulgate administrative regulations establishing standards and procedures for the performance of corrective action for releases from ASTs is granted to that Branch in K.R.S. Section 224.01-405.[203] Such regulations had not yet been promulgated at the time of this writing.[204] Alternatively, until such regulations are adopted, the Cabinet is to allow

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[201]KY. REV. STAT. ANN. § 224.99-020(3) (Michie 1997). Some classes of USTs are excluded from regulation. *See* 401 KY. ADMIN. REGS. 42:011 § 1(1) (a-f) (applicability exclusions); 401 KY. ADMIN. REGS. 42:011 § 1(1)(g) (definitional exclusions). Applicability exclusions are granted to certain tank systems according to their characteristics or uses. *Id.* These include tank systems holding hazardous wastes, or systems containing mixtures of hazardous wastes and other regulated substances as well as wastewater tank systems regulated under the Clean Water Act. *See* 401 KY. ADMIN. REGS. 42:011 § 1 (1)(a), (b). Equipment or machinery tanks used for operational purposes, USTs of less than one hundred ten gallon capacity, and tanks with a de minimis concentration of regulated substances are likewise excluded. *Id* § 1 (1)(d), (e). The regulations also offer exemption to emergency spill or overflow containment systems emptied immediately after use. *Id.* § 1 (1)(f). The second class of USTs which are not subject to regulation are those which are excluded by definition from Chapter 42. *See* 401 KY. ADMIN. REGS. 42:011 § 1(1)(g) (citing exclusions delineated in KY. REV. STAT. ANN. § 224.60-100). These are comprised of UST systems which do not fall within the definition of "UST" provided in K.R.S. Section 224.60-100: "an underground storage tank...or combination of tanks... used to contain an accumulation of regulated substance" *See* KY. REV. STAT. ANN. § 224.60-100 (1). "Regulated substance" excludes "any substance regulated as a hazardous waste under RCRA and petroleum, including crude oil or any fraction thereof." *See* KY. REV. STAT. ANN. § 224.60-100 (2). Therefore, a tank containing any substance listed as a "hazardous substance" in RCRA is not subject to Chapter 42, nor is petroleum, crude oil or any fraction of petroleum or crude oil contained in such a tank or tank system.

[202]Telephone interview with Eric Liebenauer, P.E., Environmental Assistant Chief, Superfund Branch, KNREPC (Aug. 10, 1998) [hereinafter "Liebenauer Interview"].

[203]KY. REV. STAT. ANN. § 224.01-405 (Michie 1997).

[204]Liebenauer Interview, *supra* note 202.

a person responsible for a release from an AST to use the provisions found in KRS Section 224.01-400 (18) to (21).[205]

KRS Section 224.01-400 (18) contains the substantive corrective action parameters,[206] and offers any responsible party four options from which to choose the corrective action he/she will take.[207] If the violator can demonstrate by use of UST regulation soil tables[208] that no action is necessary to protect human health, safety, and the environment, he may be absolved of the requirement to remediate the leak.[209] Alternatively, the responsible party may choose to either manage the release in a manner that controls and minimizes the harmful effects of the release and protects human health, safety, and the environment,[210] or restore the environment through the removal of the hazardous substance, pollutant, or contaminant.[211] Lastly, the individual may combine any of these options to fashion the corrective action.[212]

Failure to correct the chosen corrective action option would constitute a violation of K.R.S. 224.01-405 and give rise to a cause of action in negligence per se in the event actual compensatory damages are suffered.[213]

B. Federal Causes of Action

Any cause of action the plaintiff may have under federal law will be governed by RCRA Section 7002 (a)(1)(B).[214] Although the

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[205]KY. REV. STAT. ANN. § 224.01-405 (3). *See* KY. REV. STAT. ANN. § 224.01-400 (18) (requiring characterization of the release and corrective action); KY. REV. STAT. ANN. § 224.01-400 (19) (stipulating exemptions from the requirements of subsection (18)); KY. REV. STAT. ANN. § 224.01-400 (20) (eliminating the requirements of restoration through removal of the hazardous substance if the violator manages the release so as to minimize its harmful effects and manages the release so as to protect human health, safety, and the environment); KY. REV. STAT. ANN. § 224.01-400 (21) (delineating factors the violator is to use in implementation of corrective action).

[206]Liebenauer Interview, *supra* note 202.

[207]KY. REV. STAT. ANN. § 224.01-400 (18)(a)-(d) (Michie 1997).

[208]The "soil tables" are guidance standards developed by the Cabinet to determine if and to what degree a potentially responsible party must undertake steps to remediate the soil. Liebenauer Interview, *supra* note 202. (Liebenauer explains that the method by which one demonstrates that no action is necessary is by utilization of the soil tables to establish that the concentration of the hazardous substance is at a level below that necessary for action to render the soil suitable for residential, commercial, or industrial use).

[209]KY. REV. STAT. ANN. § 224.01-400 (18)(a) (Michie 1997).

[210]*Id.* § 224.01-400 (18)(b).

[211]*Id.* § 224.01-400 (18)(c).

[212]*Id.* § 224.01-400 (d).

[213]*See* text and accompanying *supra* notes 39-41.

[214] RCRA § 7002 (a)(1)(B); 42 U.S.C. § 6972 (a)(1)(B).

Comprehensive Environmental Response, Conservation, and Liability Act of 1980 (CERCLA) Section 107-06 allows recovery for injury from contamination by releases of hazardous substances, such recovery is limited.[215] Indeed, CERCLA contains a petroleum exclusion rendering that statute virtually inapplicable.[216] Moreover, even in the remote event that one is able to assert a cause of action for petroleum contamination pursuant to CERCLA Section 107, such as where the leaked substance is used oil, the section only provides a cause of action for recovery of response costs.[217] These costs, in all likelihood, are less inclusive than the kinds of damages provided by the common law, such as those for loss of use and loss of rental value.[218]

Costs incurred from past or ongoing remedial efforts are not available under RCRA Section 7002 (a)(1)(B), as clarified by the United States Supreme Court in *Meghrig v. KFC Western, Inc.*[219] There, KFC Western discovered petroleum contamination on property it purchased from the Meghrigs.[220] KFC Western remediated the contamination pursuant to a county order, then invoked RCRA Section 7002 (a)(1)(B) to recover costs, claiming the contamination had previously posed an "imminent and substantial endangerment to health or the environment."[221] The Ninth Circuit allowed recovery, interpreting the "imminent and substantial endangerment" clause to apply where harm was posed by the waste at issue at the time it was cleaned up.[222]

The United States Supreme Court, in reversing the Ninth Circuit, held that while CERCLA was passed to address many of the same toxic waste issues as RCRA, the remedies provided by the two statutes differ markedly.[223] The Court held that the language in RCRA Section 7002 (a)(1)(B), "may present," evinced an intent to provide recovery of response costs only where the endangerment "threaten[s] to occur immediately."[224] Therefore, the court concluded, a party may not undertake a cleanup, incur costs, and then proceed to recover those costs after the cleanup concludes.[225]

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[215]CERCLA § 107, 42 U.S.C. § 9607.
[216]40 C.F.R. § 280.12 (1997).
[217]CERCLA § 107, 42 U.S.C. § 9607.
[218] *Id. See also supra* notes 45-50 and accompanying text.
[219]Meghrig v. KFC W., Inc., 516 U.S. 479 (1998).
[220]*Id.* at 481.
[221]*Id.* at 482.
[222]*Id.* at 482.
[223]*Id.* at 485.
[224]*Id.* at 485.
[225]*Id.* at 487.

Neither is recovery for ongoing remedies available pursuant to RCRA.[226] Although RCRA Section 7002 (a)(1)(B) allows citizens to bring suit to require responsible parties to abate conditions that may present an "imminent and substantial endangerment" to health or the environment,[227] the court in *Express Car Wash Corp. v. Irinaga Brothers, Inc.* held that no costs incurred under a remedy that is "in place or substantially in place" prior to the filing of a RCRA citizen suit could be recovered under the act.[228] Even though the plaintiff alleged the imminent danger continued, and that injunctive relief and future costs should therefore be available, the court denied recovery, saying that state law provides the best avenue for recovering these costs, given CERCLA's petroleum exclusion.[229]

However, the invocation of a RCRA Section 7002 (a)(1)(B) cause of action is not barred where the plaintiff seeks current and future unexpended costs of remediation, even though response costs were incurred prior to the filing of the citizen suit.[230] Thus, in *Organic Chemicals Site PRP Group v. Total Petroleum, Inc.*, the court sustained an action where the plaintiffs alleged contamination of a different soil unit for which the cleanup would be "different in scope and duration," than the unit subject to existing EPA orders.[231] Thus the court left the door open to the use of Section 7002 (a)(1)(B) for mandatory injunctions to complete cleanup or initiate a different cleanup.[232]

IV. CONCLUSION

It is undisputed that the harm created by leakage from petroleum USTs is of utmost importance. Sheer numbers of such tanks, as well as the exorbitant costs associated with the remediation of leaks therefrom, escalate concerns about potential resultant harm. Concern is exacerbated by a realization that property already contaminated by a UST leak incurs a stigma which may cloud the title until remediation is effected.

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[226]Express Car Wash Corp. v. Irinaga Bros., Inc., 967 F. Supp. 1188, 1193 (D. Or. 1997).

[227]42 U.S.C. § 6972 (a)(1)(B).

[228]*Express Car Wash Corp.*, 967 F.Supp at 1193.

[229]*Id.*

[230]Organics Chems. Site PRP Group v. Total Petroleum, Inc., 6 F. Supp.2d 660, 666 (W.D. Mich. 1998).

[231]*Id.*

[232]*Hazardous Waste: Court Allows Plaintiff to Proceed with Suit for RCRA Injunctive Relief at Superfund Site*, 38 Env't Rep. (BNA) 2159, 2160 (Feb. 20, 1998).

Although CERCLA provides opportunity for redress to private parties in its citizen suit provision,[233] the exclusion of much petroleum-based contamination from the scope of its remedial provisions drastically reduces its effectiveness as a remedy for petroleum contamination. Moreover, RCRA based citizen suits are limited to recovery of current or future response costs. Consequently, state based causes of action in nuisance, trespass, and negligence serve a vital role in providing recourse to parties injured by petroleum contamination.

Further, the availability of a statutory cause of action under Kentucky law through the invocation of the provisions of K.R.S. Section 224.99-020 (2), obviates the need for much proof associated with establishing the common law causes of action, at least where a plaintiff can establish that one or more operative standards embodied in Chapter 42 of the Kentucky Administrative Regulations have been violated.

Therefore, plaintiffs injured from petroleum contamination can fortunately avail themselves of ample judicial remedies. The availability of such remedies serves to bolster the sound legislative purposes underlying the enactment of federal and state petroleum contamination remediation legislation.

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[233] *See supra* text and accompanying notes 215-225.