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Private Well Owners Pay Price as MTBE Contamination Exposes the Lack of Groundwater Protection in Federal and New York Law

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COMMENTS

Private Well Owners Pay Price as MTBE Contamination Exposes the Lack of Groundwater Protection in Federal and New York Law

TODD A. FRAMPTON*

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I. MTBE Has a Direct Effect on Well Users Dependent on Groundwater

Many Westchester County, New York landowners have long depended on water drawn from the aquifers directly under their own land as a source of clean, reliable drinking water. Recently, some of these dependent well users have experienced an unpleasant odor and taste from their well water.¹ A release of confirmed gasoline spills and leaks in Westchester County has many concerned about their own drinking water supplies.² Many of these well water contaminations may have been caused by the existence of a gasoline additive called methyl tertiary butyl ether (MTBE) in groundwater aquifers.³ This chemical compound, at high doses, can have an offensive taste and smell.⁴ Because of this groundwater contamination, some Westchester residents may have lost their ability to drink water drawn from their privately-owned wells.

In August 1999, a law firm publicized a list of gasoline spill contamination sites in New York, compiled by the New York State Department of Environmental Conservation (NYSDEC).⁵ This list shows how widespread the problem is and NYSDEC's slow reaction in beginning a public discussion about MTBE. More than 1500 MTBE spills have been reported in all sixty-two New York counties, including ninety-six contaminated sites in Westchester County.⁶ More than ninety percent of these sites statewide allegedly require remedial action.⁷ A class action lawsuit was filed in New York Supreme Court on January 14, 2000, on behalf of potentially thousands of New York well owners who may have MTBE contamination.⁸ A lawsuit has also been brought on behalf of re-

1. See *Gasoline Additive Polluting Wells*, THE JOURNAL NEWS, Aug. 25, 1999, at 2A.

2. See Christopher W. Mahoney & John H. Kazanjian, *Water Contamination Suits Likely to Hit N.Y. Vexing Issues Seen Arising in Claims Over MTBE*, N.Y.L.J., Oct. 25, 1999, at S2.

3. See *Gasoline Additive Polluting Wells*, *supra* note 1.

4. See U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, DRINKING WATER ADVISORY: CONSUMER ACCEPTABILITY ADVICE & HEALTH EFFECTS ANALYSIS ON METHYL TERTIARY-BUTYL ETHER (MTBE) (1997), available at <http://www.epa.gov/ost/drinking/mtbe.pdf> [hereinafter DRINKING WATER ADVISORY].

5. See Mahoney & Kazanjian, *supra* note 2.

6. See Mahoney & Kazanjian, *supra* note 2.

7. See Mahoney & Kazanjian, *supra* note 2.

8. See *60 Minutes: Gas Additive Used by Oil Companies to Meet Requirements of the Clean Air Act is Now Polluting Groundwater* (CBS television broadcast, Jan. 16, 2000).

sidents of Pound Ridge, New York against Shell Oil Company.⁹ These civil actions, in the absence of government action, suggest that no adequate statutes, federal or state, are in place to protect these citizens from groundwater contamination.

New York State has acted faster than most states in an effort to address MTBE use and contamination. Governor George Pataki ordered that New York adopt the nation's toughest safe drinking water limit for MTBE, lowering the current limit of fifty parts per billion to ten parts per billion (ppb) in underground aquifers, lakes and rivers.¹⁰ The Governor also signed the New York Legislature's proposed law to ban all sales of MTBE by 2004.¹¹ These latest developments leave many questions to be answered. How is MTBE getting into private wells? What laws are in place to protect groundwater from contamination? How can a citizen recover losses from MTBE contamination related injuries? How can citizens protect groundwater resources?

MTBE presents a serious problem to residents of rural areas, because "[m]ore than fifty percent of the United States population relies on groundwater for its drinking water supplies, with more than ninety-five percent of rural households dependent on groundwater as their source of drinking water."¹² The problem is nationwide and has gained the attention of the United States Environmental Protection Agency (EPA). The EPA Blue Ribbon Panel on Oxygenates in Gasoline, appointed to investigate the air quality benefits and water quality concerns associated with oxygenates in gasoline, delivered a report on July 27, 1999.¹³ The Panel reported that between five and ten percent of water supplies are contaminated with MTBE in areas with high use of oxygenated gasoline.¹⁴ The major source of groundwater contamination appears to be from gasoline underground storage

9. See Kimberly Janeway, *Shell Settlement Breaks Down*, THE RECORD REVIEW, Feb. 11, 2000, at 1.

10. See Richard Perez-Pena, *Stricter Ground Water Limit For Gasoline Additive is Set*, N.Y. TIMES, Nov. 10, 1999, at B6.

11. See Raymond Hernandez, *Pataki Signs Two Measures Aimed at Cutting Back Pollution*, N.Y. TIMES, May 25, 2000, at B1.

12. Lawrence Ng, *A Drastic Approach to Controlling Groundwater Pollution*, 98 YALE L.J. 773, 774 (1989); see also Sarah E. Lewis, *The 1986 Amendments to the Safe Drinking Water Act and Their Effect on Ground Water*, 40 SYRACUSE L. REV. 893, 894 (1989).

13. See *MTBE Panel Finds Increased MTBE Contamination in Water Sources*, MEALEY'S LITIG. REP.: TOXIC TORTS, Aug. 4, 1999, at 19.

14. See *id.*

tanks (USTs).¹⁵ Private wells are more prone to contamination because they are "less well protected than public drinking water supplies and not monitored for chemical contamination."¹⁶ Also, relatively few mandatory health safeguards exist for private wells, leaving the responsibility of water quality monitoring to individual well owners.¹⁷ On-site privately owned wells make up approximately fifty percent of the water supply for single family homes in the United States.¹⁸

Looking at the problem from a pollution source perspective, the issue breaks down into two competing legal rights: (1) The gasoline service station owner/operator has a right to store gasoline in underground storage tanks; and (2) the private land owner has the right to enjoy the use of his land, including the ability to draw clean, drinkable water from a private well, without the interference from another property owner. These competing legal rights set the stage for a complicated legal battle that may be beyond the financial means of an individual plaintiff.

This comment will discuss the inadequacies of existing federal and New York State statutes to protect groundwater as a resource. Further, this comment will explore the possible causes of action available to plaintiffs whose wells have been contaminated with MTBE from leaking USTs on the adjacent gasoline station property. Analysis of these tort actions will show the limitations of the common law remedies for groundwater contamination causation and ultimately the lack of protection of groundwater.

The following is the organizational format of this comment. Part II will discuss the background science of MTBE to show its chemical properties and its potentially harmful effects on humans. This issue is highly disputed among scientists, as well as litigants, and will be the high hurdle for tort law remedies. Part III will analyze the authority of federal statutes to protect groundwater from pollution and their inability to protect a private citizen's well. Part IV will analyze New York State law and its implementation of federal law. Part V will discuss the potential common law actions available to a private well owner suffering from MTBE contamination. Part VI will conclude the legal analysis and propose solutions. This analysis will include arguments from both sides of the issue, keeping in mind the legal rights of both parties.

15. *See id.*

16. *See id.*

17. *See* W. JESSE SCHWALBAUM, UNDERSTANDING GROUNDWATER 38 (1997).

18. *See id.* at 37.

II. Methyl Tertiary Butyl Ether

In response to aggressive industry lobbying and air pollution concerns, gasoline companies began adding MTBE to gasoline in the late 1970s as an octane enhancing replacement for lead, primarily in the high-grade gasolines.¹⁹ In 1990, the Clean Air Act (CAA) was amended, requiring gasoline to be reformulated with oxygenating additives, in an effort to decrease pollution emissions from mobile sources.²⁰ In response to the Act, "MTBE was first added to gasoline in the fall of 1992 for the purpose of reducing carbon monoxide emissions."²¹

MTBE is processed from methanol, is a by-product of the oil refining process, and is very inexpensive to produce.²² Oil companies have embraced MTBE as an oxygenating gasoline additive because they are the exclusive producers of the compound, and because gasoline containing MTBE makes up eighty-five percent of the reformulated gasoline market.²³ By 1992, MTBE production had exceeded nine billion pounds, reportedly a three billion dollar industry.²⁴

The chemical composition of MTBE makes it hydrophilic, or strongly attracted to water molecules, and it is thirty times more soluble in water than other toxic compounds of gasoline.²⁵ MTBE does not readily bind to soil particles and resists natural degradation, allowing the MTBE molecule to travel easily and quickly into underground water supplies.²⁶ "MTBE has [also] proven devilishly difficult to clean up when it leaks into groundwater because the chemical travels much farther and faster underground than other gasoline ingredients."²⁷ These properties make MTBE an especially dangerous component of gasoline. In addition to leaking USTs, there are many other potential sources of MTBE con-

19. See DRINKING WATER ADVISORY, *supra* note 4.

20. See Clean Air Act § 211(k)(2)(B), 42 U.S.C. § 7545 (1994); see also *About MTBE*, at <http://www.mtbecontamination.com/about> (last visited Feb. 18, 2000) [hereinafter *About MTBE*]; but see *New Report Dispels Oil Industry Spin—Gas Additive (MTBE)*, at <http://www.igc.org/cbesf/mtbeer2.html> (last visited Feb. 18, 2000) [hereinafter *New Report*].

21. Myron A. Mehlman, *Pollution by Gasoline Containing Hazardous Methyl Tertiary Butyl Ether*, ENVIRONMENTAL HEALTH, Jul./Aug. 1998, Vol. 53 Issue 4, at 245.

22. See *About MTBE*, *supra* note 20; see also *New Report*, *supra* note 20.

23. See Mahoney & Kazanjian, *supra* note 2.

24. See *About MTBE*, *supra* note 20.

25. See *About MTBE*, *supra* note 20.

26. See *About MTBE*, *supra* note 20.

27. Dan Fagin, *Tougher Gas-Additive Rule, State to Lower Amount of Permissible MTBE*, NEWSDAY, Nov. 9, 1999, at A5.

tamination. They include discharge of fuel from gasoline spills from automobile and tanker truck accidents, spills from refueling automobiles, and leaks from pipelines and aboveground storage tanks.²⁸ In addition, the widespread leakage of USTs presents serious environmental problems with the use of MTBE as a gasoline oxygenate. MTBE's physical and chemical characteristics make remedial actions costly and difficult. Therefore, a simple car accident could contaminate an entire underground aquifer.²⁹

A team of researchers from the University of California at Davis have cultured an MTBE-eating "bug," or bacteria that breaks down MTBE into carbon dioxide and water.³⁰ The microbe shows great promise for providing cleanup solutions for MTBE contamination in groundwater. However, the technology has yet to be used to cleanup an actual spill.³¹ Although cleanup technology is improving, gasoline spills and leaks containing MBTE pose a greater pollution risk to groundwater aquifers than ever before.

EPA lists the acute effects from exposure to gaseous MTBE as being "noticeable odor, headache, nausea or vomiting, burning sensation in the nose or mouth, coughing, dizziness, spaciness or disorientation, or eye irritation, among other symptoms."³² Moreover, "[MTBE] in gasoline causes respiratory illnesses (i.e., shortness of breath, asthma, bronchitis, and a variety of breathing problems) and allergic illnesses (i.e., sinus problems and nasal and upper respiratory irritation)."³³ Several studies have shown that MTBE is a "probable human carcinogen and causes cancers such as leukemia and lymphoma, as well as malignancies of the kidney, testes, and liver."³⁴ Because of its inherent properties and its potential health risks, the use of MTBE is being phased out in California and Maine,³⁵ and now New York.³⁶ The scientific data

28. See DRINKING WATER ADVISORY, *supra* note 4.

29. See *About MTBE*, *supra* note 20.

30. See Wendy Weirauch, *Microbe That 'Eats' MTBE Undergoes Testing in the Field*, HYDROCARBON PROCESSING, Apr. 1999, at 31.

31. See *id.*

32. *Id.*

33. Mehlman, *supra* note 21, at 245.

34. Mehlman, *supra* note 21, at 245 (citing Myron A. Mehlman, *Dangerous and Cancer-Causing Properties of Products and Chemicals in the Oil-Refining and Petrochemical Industry*, J. CLEAN TECH. ENVTL. SCI. 1994, at 37-57; F. Belpoggi et al., *Methyl Tertiary Butyl Ether (MTBE) a Gasoline Additive - Causes Testicular and Lympho-haematopoietic Cancers in Rats*, TOXICOL. IND. HEALTH 1995, at 119-149).

35. See *Maine - Governor Takes a Stand*, at <http://www.mtbecontamination.com/legalaction/meevents.asp> (last visited Feb. 18, 2000) [hereinafter *Maine-Governor*].

36. See Hernandez, *supra* note 11.

of MTBE has yet to prove toxic risk, however. While science searches for certainty, gasoline continues to contaminate groundwater and threaten the drinking water resources across the nation. MTBE in drinking-water sources is of concern, because it has low odor thresholds which can make a water supply unpotable even at low concentrations, even well below the observed cancer causing levels.³⁷

Despite the power of Congress and the authority of the EPA, no drinking-water regulation exists for MTBE.³⁸ The EPA has issued a drinking-water advisory of twenty to forty micrograms per liter (mg/L), or parts per billion (ppb) on the basis of taste and odor thresholds.³⁹ Both the Federal government and New York State Legislatures have the authority to enact laws to protect aquifers from further contamination by creating liability for disposal activities into groundwater.

III. Federal Pollution Statutes Fall Short of Protecting the Nation's Groundwater Resources

The federal statutes aimed at protecting water sources from pollution do not protect groundwater resources, nor do they protect private well owners from groundwater contamination. The most powerful federal statutes that address the release of gasoline and MTBE into the environment are the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Safe Drinking Water Act (SDWA).

A. The Clean Water Act

The CWA provides comprehensive protection of "the Nation's waters."⁴⁰ The strongest of the CWA's provisions is the prohibition of the "discharge of a pollutant"⁴¹ from a "point source"⁴² into "navigable waters"⁴³ without a permit.⁴⁴ Despite the Act's broad jurisdictional language, it makes no specific prohibitions against the pollution of groundwater.

37. See DRINKING WATER ADVISORY, *supra* note 4.

38. See DRINKING WATER ADVISORY, *supra* note 4.

39. See DRINKING WATER ADVISORY, *supra* note 4.

40. Clean Water Act (CWA) § 101(a), 33 U.S.C. § 1251(a) (1994).

41. *Id.* § 502(12) (meaning "any addition of any pollutant to navigable waters from any point source").

42. *Id.* § 502(14).

43. *Id.* § 502(7) (meaning "the Nation's waters").

44. See *id.* § 301(a).

The goals, set out in section 101 of the CWA, however, focus on the water quality necessary to protect and propagate fish, shellfish, wildlife and recreation.⁴⁵ From this goal, controversy has arisen surrounding the jurisdiction over groundwater connected to surface waters, differentiated from the groundwater not connected to surface waters. "No circuit court of appeals explicitly has decided the question."⁴⁶ Courts have even questioned the connection between groundwater and surface water.⁴⁷ Some circuit courts have generally rejected the jurisdiction of the CWA over the discharge of a pollutant into groundwater⁴⁸ because groundwater is not within the definition of navigable waters.⁴⁹ Other legal experts argue that the CWA jurisdiction should cover groundwater pollution prevention.⁵⁰ In fact, several "district courts have held that the CWA does encompass ground waters that are hydrologically connected to regulated surface waters."⁵¹ A tenth circuit court held that the CWA applies where intermittent creeks and underground aquifers flow into navigable waters.⁵²

District courts have also struggled with the causation issue of whether pollution into groundwater eventually migrates into navigable waters.⁵³ The issue for the private well owner, however, is not whether the pollutant migrated into navigable waters, but rather, whether groundwaters are "navigable waters" for the purpose of jurisdiction of the CWA. Because the courts have not been clear on this issue, the minimally-funded private well owner

45. See *id.* § 101.

46. *Mutual Life Ins. Co. v. Mobil Corp.*, 1998 WL 160820, at *3 (N.D.N.Y. 1998) (holding that a "general hydrological connection among all waters will be insufficient").

47. See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (discussing possibility rather than fact of connection between groundwaters and surface waters).

48. See *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

49. See CWA § 502(7).

50. See Mary Christina Wood, *Regulating Discharges to Groundwater: The Crucial Link in Pollution Control in the Clean Water Act*, 12 HARV. ENVTL. L. REV. 569, 624 (1988).

51. *Mutual Life Ins. Co. v. Mobil Corp.*, No. CIVA96CV1781RSP/DNH, 1998 WL 160820, at *2 (N.D.N.Y. 1998); see also *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993).

52. See *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (citing *United States v. Texas Pipeline Co.*, 611 F.2d 345 (10th Cir. 1979)).

53. See *Kelley v. United States*, 618 F. Supp. 1103, 1105-07 (W.D. Mich. 1985).

would probably be best advised not to take the risk of litigating a CWA violation, based on the premise that groundwater is within the jurisdiction of the CWA.

Groundwater acts as a filter and a recharge source for surface water bodies and also has direct effects on water quality.⁵⁴ Many environmental groups have made the argument that the CWA's jurisdiction includes the pollution of groundwater and its indirect effects on surface waters, but courts are not in agreement that groundwaters are included in the definition of waters of the United States.⁵⁵ The CWA does require federal and state agencies to "prepare or develop comprehensive programs for preventing, reducing or eliminating the pollution of the navigable waters and *groundwaters* and improving the sanitary condition of surface and *underground* waters."⁵⁶ Groundwaters are always described in the CWA separately from surface waters, such as the "comprehensive programs for water pollution control" in section 102(a).⁵⁷ The authority to protect groundwater is left to state control for implementation of programs.⁵⁸

Discharge of a pollutant like MTBE into groundwater is not prohibited by the CWA, because groundwater still remains outside of its jurisdiction. The CWA by itself is incapable of preventing groundwater from contamination. Therefore, those interested in protecting groundwater may need to rely on other federal environmental statutes or state laws.

B. The Safe Drinking Water Act

The Public Health Service Act, Safety of Public Water Systems, Chapter 6A, better known as the Safe Drinking Water Act

54. See SCHWALBAUM, *supra* note 17, at 27.

55. See *Village of Oconomoc Lake v. Dayton Hudson Corp.*, 24 F.3d at 965 (holding that the Clean Water Act does not provide jurisdiction over groundwater); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985) (holding that the Clean Water Act applies to discharge into tributary groundwater.); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (holding a Clean Water Act cause of action may be brought for discharge of pollutants into soils and groundwaters which contribute to a navigable waterbody); *Kelley ex rel. Michigan v. United States*, 618 F. Supp. 1103, 1106 (D.C. Mich 1983) (holding CWA did not extend federal authority to regulation of groundwater contamination).

56. CWA § 102(a) (emphasis added).

57. *Id.* § 102(a); see also JEFFREY G. MILLER ET AL., *INTRODUCTION TO ENVIRONMENTAL LAW: CASES AND MATERIALS ON WATER POLLUTION CONTROL* 170 (1999).

58. See CWA §§ 319(b), 402(b).

(SDWA),⁵⁹ speaks directly in Part C to groundwater in connection with underground public water supplies.⁶⁰ The purpose of this statute is to protect public water systems,⁶¹ and provide criteria and procedures to assure supplies of drinking water comply with maximum contaminant levels.⁶²

Part C of this subchapter on Safety of Public Water Systems provides protection of underground sources of public drinking water. Part C does not regulate leaking USTs, nor does it have protective force for non-public drinking water systems or wells.⁶³ A private home owner, dependent on a well for potable water, is not protected by this Act because a private well clearly does not fit within the definition of a public water system. This governmental regulation protects underground waters used for public consumption, but not the waters owned by private citizens.

Under Part C of the SDWA, the governor of each state shall adopt a "program to protect wellhead areas within their jurisdiction from contaminants which may have any adverse effect on the health of persons."⁶⁴ The program shall determine the wellhead protection area, identify all anthropogenic sources of contaminants, and include contingency plans for alternate drinking water supplies for each public water system in the event of a well or wellfield contamination.⁶⁵ A "wellhead protection area" is defined as "the surface and subsurface area surrounding a water well or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward and reach such water well or wellfield."⁶⁶ The SDWA mandates the states to regulate the underground sources of drinking water, much like the CWA. This statute protects underground water for public drinking water use, but not the waters used by private citizens.

59. See Safe Drinking Water Act (SDWA) §§ 1401-1465, 42 U.S.C. §§ 300f-300j-26 (1994).

60. See *id.* §§ 1421-1429.

61. Fifteen or more services or serving at least twenty-five individuals.

62. See SDWA § 1401 ("maximum contaminant levels are defined as the maximum permissible level of a contaminant in water which is delivered to any user of a public water system").

63. See *id.*

64. *Id.* § 1428.

65. See *id.*

66. *Id.* § 1428(e).

C. The Comprehensive Environmental Response,
Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides mechanisms to clean up past spills of hazardous waste.⁶⁷ CERCLA is retrospective and does not have the authority to prevent future spills and contamination,⁶⁸ but CERCLA does impose notification requirements and cleanup responsibilities on all potentially responsible parties (PRPs).⁶⁹

A community's "right to know" and the notification requirements put public pressure on state agencies and PRPs to clean up a spill, and therefore strengthen CERCLA's remedial powers.⁷⁰ The EPA is charged with the responsibility of enforcing the clean up, and a Remedial Investigation and Feasibility Study can be ordered as part of the National Contingency Plan.⁷¹ This means that a scientific analysis can be performed at the site to determine the severity of the contamination and the potential remedial options and to establish PRPs.⁷² The present and past owners of the property may be liable for the costs of removal and remedial action if they owned/operated the site at the time of disposal of any hazardous substance.⁷³ "Disposal" of a hazardous substance is quite broad and includes strict liability for leaking hazardous substances into the groundwater without the requirement of knowledge by the PRP.⁷⁴ CERCLA can provide clean up authority when a gasoline service station has gasoline contaminated soil. A citizen may bring a citizen suit against a PRP for violating one of the requirements or provisions set out in CERCLA. CERCLA's application of strict liability to PRPs provides some deterrence of wanton handling of hazardous substances. CERCLA does not provide a mechanism for prohibiting the disposal of MTBE into soil and groundwater. All USTs will eventually leak and contaminate groundwater, and many USTs have the potential to contaminate private wells.

67. See Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) §§ 101-505, 42 U.S.C. §§ 9601-9675 (1994).

68. See *id.* § 107.

69. See *id.* § 103.

70. See *id.*

71. See *id.* § 104 (b)(1).

72. See CERCLA § 104 (b)(1).

73. See *id.* § 107(a).

74. See *id.* § 107(a)(2).

Gas stations usually store their gasoline in underground tanks to reduce the risk of explosions and fires. Each station will have at least one tank for each type of gasoline (regular, super, etc.), so this amounts to millions of underground storage tanks (USTs) across the US. The problem with USTs is that after about 20 years they tend to spring leaks and this contaminates the groundwater below. As the tanks are underground, these leaks are hard to detect. Indeed, many leaks were not discovered until people living near gas stations found their water contaminated with gasoline. In 1984, federal legislation aimed at detecting these leaks sooner required service stations to monitor for leaks.⁷⁵

Some sources from the gasoline industry state there is no serious MTBE contamination of water systems because most of the "contamination data" was gathered before December 31, 1998, the federal deadline for upgrading USTs.⁷⁶

Private well owners are not required to have testing which would discover the contamination that CERCLA would address. CERCLA is a statute that requires the EPA to act and follow its administrative procedure to find liability for contaminated sites and enforce remediation, but it does not allow a private citizen to bring a suit against a neighborhood polluter.⁷⁷ Although CERCLA does provide checks and balances of the EPA's procedures and insures remediation with shared costs, CERCLA does not provide a direct remedy for a citizen injured by pollution.

D. The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) is a "cradle to grave" regulation of hazardous wastes.⁷⁸ A "hazardous waste" under RCRA is one that

because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the

75. See VOLVO CARS OF NORTH AMERICA, CARS AND THEIR ENVIRONMENTAL IMPACT (1998).

76. Terry Wigglesworth, *MTBE Will Continue to Play a Key Role in Reformulated Gasoline*, HYDROCARBON PROCESSING, Oct. 1999, Vol. 78 Issue 10, at 13.

77. See generally CERCLA § 310.

78. See Resource Conservation and Recovery Act (RCRA) §§ 1001-11012, 42 U.S.C. §§ 6901-6992k (1994).

environment when improperly treated, stored, transported or disposed of, or *otherwise managed*.⁷⁹

Based on this criteria, the Administrator shall identify and list hazardous wastes which, over a certain level, endanger human health.⁸⁰

RCRA's goals speak directly to the "disposal of hazardous waste in or on the land without careful planning and management"⁸¹ and to the "contaminants [of] drinking water from underground and surface supplies."⁸² RCRA also seeks to prevent improper management of hazardous waste in the first instance, because "corrective action is likely to be expensive, complex and time consuming."⁸³ These goals address the underground storage of a hazardous substance such as MTBE. By enacting RCRA, Congress intended to provide legal remedies to those injured by poorly managed hazardous wastes.⁸⁴

RCRA has a citizen suit provision providing to an aggrieved party the ability to sue "any person . . . who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an *imminent and substantial endangerment* to health or the environment."⁸⁵ A citizen suffering from MTBE contamination has a difficult task in establishing causation because it must show that gasoline is leaking from the defendant's UST into the groundwater, causing MTBE to be drawn into the citizen's water well, and that the presence of MTBE is an 'imminent and substantial endangerment' to the health of those using the well. Some studies have shown MTBE to be a probable human carcinogen.⁸⁶ This fact is highly disputed according to several health studies on MTBE which state "that [the substance] does not pose a health hazard to humans in concentrations and duration of exposure that could reasonably be anticipated."⁸⁷ However, "the operative word in section 6972(a)(1)(B) is 'may,' and a plaintiff 'need not establish an incontrovertible imminent and substantial harm to health and

79. *Id.* § 1004(5)(A) and (B) (emphasis added).

80. *See id.* § 3001(b)(1).

81. *Id.* § 1002(b)(2).

82. *Id.* § 1002(b)(4).

83. RCRA § 1002(b)(6).

84. *See generally id.* § 1002.

85. *See id.* § 7002(a)(1)(B) (emphasis added).

86. *See* DRINKING WATER ADVISORY, *supra* note 4.

87. David Littell, *MTBE or Not MTBE – Why Is That the Question?*, A.B.A., NAT. RES. & ENV'T, Spring 2000, at 249.

the environment.’”⁸⁸ This ruling states that a successful citizen suit under RCRA would not have to prove imminent and substantial endangerment within a scientific certainty.

A problem for the citizen bringing the suit is that RCRA does not provide a remedy for wholly past violations or for recovery costs of the citizen's expenses due to the contamination.⁸⁹ Costs for bottled water used for drinking and cooking, costs of bathing in alternative locations, and any costs incurred in efforts to find an alternative to the well water would not be covered under the RCRA citizen suit.

Subchapter IX of RCRA, Regulation of Underground Storage Tanks, provides regulation for the underground storage of hazardous wastes and petroleum, “including crude oil or any fraction thereof,” meaning gasoline.⁹⁰ This regulation scheme seeks to conserve valuable material and energy resources by establishing a viable federal-state partnership as contemplated by the RCRA goals.⁹¹

The programs created by RCRA require testing, monitoring and notification for leaks in existing USTs and standards for new USTs.⁹² This regulation, however, does not address the fact that tanks are prone to deterioration. Gasoline will leak into the groundwater as long as USTs are in operation. MTBE, as described above, behaves differently in groundwater than the other components of gasoline. “MTBE is more likely to contaminate ground and surface water than other components of gasoline.”⁹³ MTBE was not in common use when the federal statutes were enacted, and the difficult task of protecting groundwater from MTBE was therefore not contemplated. Because MTBE is contained in the most important fuel source in our society, and RCRA regulates, but does not prohibit, leaking USTs, the federal environmental laws as a whole cannot provide a sufficient legal remedy for a private citizen.

88. *Kara Holding Corp. v. Getty Petroleum Marketing, Inc.*, 67 F. Supp.2d 302, 310 (S.D.N.Y. 1999) (quoting *Gache v. Harrison*, 813 F. Supp. 1037, 1044 (S.D.N.Y. 1993)).

89. *See id.* at 309.

90. *See* RCRA § 9001(8).

91. *See id.* § 1003(a)(7).

92. *See id.* §§ 9002-9003.

93. *See MTBE Panel Finds Increased MTBE Contamination in Water Sources*, MEALEY'S LITIG. REP.: TOXIC TORTS, Aug. 4, 1999, at 19.

IV. Regulation of Groundwater Contamination Under New York Law

Many of the New York statutes directly regulating USTs and MTBE as a hazardous waste are promulgated as state implementation of federal laws such as the CWA, CERCLA and RCRA. The NYDEC has been designated the authority to implement federal programs such as the notification and inventory requirements of RCRA.⁹⁴ Article 12 of Chapter 37 of the Consolidated Laws of New York, known as the Navigation Law, is the State Legislature's recognition and declaration "that New York's lands and waters constitute a unique and delicately balanced resource. . . ."⁹⁵ This law also recognizes "that the storage and transfer of petroleum . . . is a hazardous undertaking and imposes risks of damage to persons and property within the state."⁹⁶ The legislative intent requires prompt cleanup and removal of oil spill pollution and provides a fund for cleanup compensation.⁹⁷ The law establishes strict liability for "any person who has discharged petroleum."⁹⁸ The liability of the discharger is equal to the amount of "two times the actual and necessary expense incurred by the fund for relocation."⁹⁹

This new law, although powerful authority to deter and cleanup petroleum spills including gasoline, does not include a citizen suit provision.¹⁰⁰ The purpose of the law is to "prevent the unregulated discharge of petroleum which may result in damage to lands, waters or natural resources of the state by authorizing the NYSDEC to respond quickly."¹⁰¹ New York State's legal strategy to create strict liability for the release of oil into the environment has been successful in cleaning up gasoline contamination from leaking USTs.¹⁰²

The problem remains that a private citizen cannot use this law to recover on claims of personal injury or injury to real or personal property. At best, compensation is available only after the NYSDEC has taken the initiative to cleanup a spill.¹⁰³ NYSDEC's

94. See RCRA § 9002-9003.

95. N.Y. NAV. LAW § 170 (McKinney 1999).

96. *Id.*

97. See *id.*

98. *Id.* § 181.1.

99. *Id.*

100. See N.Y. NAV. LAW. § 171.

101. *Id.* § 171.

102. See, e.g., *State v. Speonk Fuel Inc.*, 710 N.Y.S.2d 652 (3d Dep't 2000).

103. See N.Y. NAV. LAW § 171.

hesitancy to react to the widespread MTBE contamination of groundwater in New York is demonstrated by the fact that an out of state law firm published the NYSDEC's statewide gasoline spill information before NYSDEC did.¹⁰⁴ This law has no power if NYSDEC does not act. New York Navigation Law section 181 may provide some protection of navigable waters, but like the federal laws prohibiting pollution, there is little protection of the groundwater resources.¹⁰⁵

Private well owners in New York must use common law tort theories to initiate a lawsuit to recover losses for personal and/or property injury resulting from an MTBE contamination plume. New York common law governs water withdrawal from surface and groundwater and subsurface land use under the Reasonable Use Doctrine.¹⁰⁶ "[A]ny beneficial use on the overlying land (short of actual waste) was considered reasonable."¹⁰⁷ The Reasonable Use Doctrine addresses the amount and manner of withdrawal of groundwater, but does not directly focus on the addition of pollutants into groundwater and the subsequent effects on adjacent properties. There are no New York statutes that directly address groundwater protection. There are regulatory programs that study soil and groundwater, but there are no regulatory mechanisms on the state level to prevent a property owner from discharging pollutants directly into the ground.

The widespread use of USTs for gasoline storage, combined with the lack of groundwater protection in New York, has become a serious problem. Thirteen percent of the gasoline sold in the State of New York is reformulated with MTBE.¹⁰⁸ By no coincidence, NYSDEC has identified 1715 MTBE contaminated sites around the state, almost all of them from gasoline USTs at service stations.¹⁰⁹ MTBE is not a naturally occurring substance; it is a by-product of the oil refining process and exists only in reformulated gasolines at the oil refineries, on gasoline tankers and trucks, in USTs at service stations, and in the gasoline tank.¹¹⁰ "Of the approximately 5 million [USTs] in the U.S., an estimated

104. See Mahoney & Kazanjian, *supra* note 2.

105. See N.Y. NAV. LAW § 181.

106. See *Forbell v. City of New York*, 61 N.Y.S. 1005, 1006 (2d Dep't 1900); see also RESTATEMENT (SECOND) OF TORTS § 858 (1972).

107. DAVID H. GETCHES, WATER LAW - IN A NUT SHELL 256 (West Publishing Co. 1997).

108. See Fagin, *supra* note 27.

109. See Fagin, *supra* note 27.

110. See *About MTBE*, *supra* note 20; see also *New Report*, *supra* note 20.

30-35 percent are leaking, according to federal and state studies.”¹¹¹ In New York, MTBE can be found nearly everywhere. Although gasoline service stations are regulated, there is nothing prohibiting the operation of leaking USTs.¹¹²

On November 8, 2000, Governor George Pataki declared that New York will enforce the strictest limits on MTBE use and contamination levels in water.¹¹³ This address did not mention that MTBE is most likely to enter surface water by means of groundwater. “When a [public] water supply is found tainted, the state can order the polluter to clean it to the new standard.”¹¹⁴ The executive director of Scenic Hudson, Ned Sullivan, was quoted as saying, “What the governor has done is an important move to protect drinking water, but it should be accompanied by action to reduce MTBE in the gasoline supply. I believe he has that power.”¹¹⁵ The New York Legislature has responded by banning MTBE use in New York by 2004.¹¹⁶ This is a significant measure taken to end the controversial use of MTBE. It will eventually end the source of MTBE contaminations as service stations fill their USTs with something other than MTBE-gasoline. This ban will not, however, help a well owner affected by the same leaking UST. Instead of addressing the lack of statutory protection of groundwater or giving citizens the ability to sue for personal damages, this ban simply eradicated one substance. How many substances, previously deemed harmless, will contaminate drinking water sources only to be banned by law, before the legislature provides comprehensive statutory protection for groundwater?

John Cahill, the Commissioner of NYDEC, addressed the new rule with these words: “We still don’t have a good alternative to MTBE, so while we take a hard look at what other alternatives may be out there, we believe it’s appropriate to move forward and tighten up the standards.”¹¹⁷ Without a reasonable alternative to MTBE as a CAA mandated gasoline additive, the prospects of eliminating MTBE look sluggish. In the meantime, the citizens of New York are paying the price for the gasoline industry’s deci-

111. Peter Gerardo, *Hidden Tank Leaks Create Headaches for Property Owners*, N.Y. STATE BAR NEWS, Mar./Apr. 2000, at 40.

112. See generally RCRA §§ 9001-9010.

113. See Fagin, *supra* note 27.

114. Richard Perez-Pena, *Stricter Ground Water Limit For Gasoline Additive is Set*, N.Y. TIMES, Nov. 10, 1999, at B6.

115. *Id.*

116. See Hernandez, *supra* note 11.

117. Fagin, *supra* note 27.

sions. A private well owner has no statutory protection against contamination of the water he/she draws from the ground below. What remedy can the law provide for these citizens?

V. Common Law Causes of Action and Remedies for an Aggrieved Private Well Owner in New York

This comment has shown that the only federal and state laws that regulate the release of MTBE into groundwater are the laws regulating the underground storage of gasoline.¹¹⁸ These laws do not directly address the rights of a property owner who wants to draw clean, drinkable water from the aquifer below. Common law remedies can provide a landowner potential remedies against the owner/operator of an adjacent gasoline station with USTs containing MTBE.

The private landowner holds a right to enjoy the use of his land, without "unreasonable interference with the use or enjoyment of [the] property interest in land."¹¹⁹ This concept of invaded interest is encompassed in the tort action of nuisance.¹²⁰ Drawing clean, *drinkable* water from the aquifer below without unreasonable interference from another landowner should be encompassed in this action. There are several common law concepts that embrace interests of real property: public and private nuisance, trespass and negligence.

Landowners may also seek compensation for damages to their property under several theories of liability. This includes strict liability for failure to warn, negligent misrepresentation, deceptive trade practices, negligent representation, conspiracy and fraud.¹²¹ This second list of tort actions would address the actions of gasoline corporations in the processing and marketing of the product and its duty to warn UST operators and consumers. Due to the known water-soluble properties of MTBE, handlers of MTBE-containing-gasoline should know of its liabilities.

Although these recovery theories are poignant, this article will not address these complex issues beyond the tortious acts of an adjacent owner/operator of gasoline stations. This comment will also focus only on the property rights of private well owners

118. See RCRA §§ 9002-9003.

119. JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S TORTS - CASES AND MATERIALS 811 (9th ed. 1994); see also RESTATEMENT (SECOND) OF TORTS § 821D (1972).

120. See *id.* at 810.

121. See Mahoney & Kazanjian, *supra* note 2.

adversely affected by MTBE contamination and will not discuss the methods of recovery. For example, the rights of many similarly situated private well owners could be consolidated into statewide class action lawsuits, because individual issues of law and similar fact patterns usually predominate contamination issues.¹²²

The purpose here is to focus on the forgotten resource of groundwater and its lack of protection highlighted through the example of poor gasoline station operation and maintenance. Again the CWA does not protect the groundwater from discharge of toxic pollutants. RCRA begins to regulate the handling of toxic wastes such as MTBE and also regulates USTs. It falls short of protecting a private well owner from the unreasonable interference of MTBE contamination because the current fallible use of USTs will continue to result in release of toxins into the groundwater. Furthermore, these federal statutes not only fail to protect a private citizen from groundwater contamination, but they also do not even provide protection of groundwater as a natural resource.

Relying on common law damage theories, can a private well owner bring a successful suit under nuisance, trespass or negligence without actual personal injury or actual damage to property value? Is bad odor and taste in the drinking water sufficient for a common law tort action to be successful? In addition "tort law is designed primarily to award compensation for individual harms already suffered rather than to prevent harm to the broader environment. . . [and] even when tort law is available, it often presents special difficulties for environmental plaintiffs."¹²³ "As the Supreme Court noted, bacterial contamination of a water supply can be neutralized by the use of chlorine treatment, while gasoline contamination cannot be treated but must be prevented from entering the water supply."¹²⁴

Nuisance is potentially the most successful common law tort for a private well owner to bring against a gasoline service station owner or gasoline company for groundwater contamination. Nuisance is essentially an unreasonable interference to a property owner caused by another.¹²⁵

122. See Mahoney & Kazanjian, *supra* note 2.

123. MILLER ET AL., *supra* note 57, at 10.

124. Cornell v. Exxon, 558 N.Y.S.2d 647, 651 (3d Dep't 1990).

125. See ROGER W. FINDLEY & DANIEL A. FARBER, CASES & MATERIALS ON ENVIRONMENTAL LAW 290 (5th ed. 1999).

The term is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen in person, property, the enjoyment of property, or comfort; a 'nuisance' includes everything that endangers life or health, or obstructs the reasonable and comfortable use of property, as well as that which gives offense to the senses, or violates the laws of decency.¹²⁶

A nuisance action can be brought against the tortious party in three ways: public nuisance by the attorney general, public nuisance brought by a private plaintiff, and private nuisance.¹²⁷ Public nuisance is an invasion of a public right and is sometimes considered a criminal act.¹²⁸ "A defendant's conduct may create an actionable public nuisance where it either interferes with a public right or convenience, or the public health or safety."¹²⁹

New York State was not successful in bringing a public nuisance action against a defendant who was responsible for toxic waste that allegedly leaked from a site contaminating groundwater, thereby reducing the value of commercial and residential development in the town.¹³⁰ The court in *State v. General Electric Co.* held that there is a strong public policy consideration against recognizing losses sustained by municipalities in consequence of adverse effects on the general economy.¹³¹ A public nuisance action brought by the state does not provide an effective means for compensating injury sustained by the aquifers of the town, because economic interests of the town are not recognized and access to groundwater resources is not accepted as a public right, as the right to surface waters is. This again exposes the need for statutory protection and regulation of groundwater as a public natural resource.

"[A] public nuisance may also be a private one. . . if the plaintiff had suffered 'particular damage.'"¹³² The problem here is the same as public nuisance, because there is no direct unreasonable interference with a public right. The owner of a private well may

126. 58 AM. JUR. 2D *Nuisances* § 1 (1989) (Cumulative Supp. Apr. 1999).

127. See MILLER ET AL., *supra* note 57, at 12-13.

128. See WADE ET AL., *supra* note 119, at 810-811 (9th ed. 1994).

129. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 370 (1996). See RESTATEMENT (SECOND) OF TORTS § 821B (1972) (defining unreasonable interference with a public right).

130. See *State v. Gen. Elec. Co.*, 604 N.Y.S.2d 355, 358 (3d Dep't 1993).

131. See *id.* at 596.

132. William Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

have a "particular damage," but the leaching of groundwater contaminants into an aquifer does not fit into the category of interference with a public right.¹³³ The lack of case law concerning public nuisance actions for contamination of groundwater, indicates that the law does not recognize access to groundwater as a public right, as it recognizes other natural resources like the right to navigate and fish.

Private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land."¹³⁴ Applying this definition to the existence of MTBE in a private well would most likely result in a private nuisance. The contamination is an obstruction of the reasonable and comfortable use of the groundwater. There is potential endangerment of the health and lives of those drinking the water, and there is an offensive taste and smell from the well water.

Private nuisance may be intentional or unintentional.¹³⁵ An intentional invasion occurs when a person's conduct is unreasonable under the circumstances of the particular case.¹³⁶ An unintentional invasion occurs when a person's conduct is negligent, reckless or ultrahazardous.¹³⁷ Because of the reliance on USTs and gasoline stations in society, no court would hold that use of a UST is unreasonable, especially when its use has been approved by RCRA's UST requirements.¹³⁸ Therefore, the plaintiff must show that the defendant UST owner/operator's conduct is negligent, reckless or ultrahazardous by failing to prevent the UST from leaking. The argument should be made against the UST operator, that interference with a property right, use of groundwater, is a "substantially certain" result of the operation of a UST.¹³⁹ The private unintentional nuisance claim appears to be the only feasible action for a plaintiff in this instance.

An intentional nuisance can be described as an absolute nuisance, one grounded in intentional, not negligent, conduct.¹⁴⁰ An

133. *See id.* at 999.

134. RESTATEMENT (SECOND) OF TORTS § 821D (1972).

135. *See* RESTATEMENT (SECOND) TORTS (Scope and Introduction Note to Chapter 40) (1972).

136. *See id.*

137. *See id.*

138. *See* RCRA § 9003.

139. *See* RESTATEMENT (SECOND) OF TORTS § 825 (1972).

140. *See* 58 AM. JUR. 2D *Nuisances* § 24 (1989) (Cumulative Supp. Apr. 1999); *see also* *Dingwell v. Litchfield*, 496 A.2d 213 (Conn. App. Ct. 1985) (holding absolute public nuisance to require intentional conduct, rather than negligence and conduct must have caused the condition deemed to be a nuisance).

example of an absolute nuisance may include any point source pollution where the defendant is intentionally discharging the pollutant into a water body. If the act is intentional, the effects need not be intended by the defendant. A qualified nuisance, on the other hand, is dependent on a showing of negligence where the conduct is "carelessly done or permitted as to create a potential and unreasonable risk of harm that in due course, results in injury to another."¹⁴¹ These unreasonable risks must result in an actual injury.¹⁴²

The individual facts of a case will provide the foundation for the argument. A plaintiff will obviously have an easier argument if the evidence shows that the defendant was aware that the UST was leaking and that the operator intended to operate without repairing the leak. This argument is difficult.

It will be more likely that the plaintiff could show evidence of the defendant's negligent operation of a leaking UST. This argument is made easier because the defendant is obligated to test, monitor and report the UST under RCRA,¹⁴³ and a failure to meet this requirement is negligence per se.¹⁴⁴ A finding of negligence per se will secure the defendant's fault in discharging gasoline from the UST, fulfilling the plaintiff's burden of proof.

Proving MTBE contamination of private wells requires the use of scientific experts. First, the individual must suffer an injury or unreasonable interference with property owner rights.¹⁴⁵ In our hypothetical case, the well owner has lost the ability to drink and use the water drawn from the well because of the foul odor and taste. The claim here is that gasoline leaking from the defendant's UST has contaminated the groundwater, migrated into the well-owners groundwater supply and is now being drawn up the well and out of the tap.

The defendant will deny these facts and will attempt to put causation into question. The causation element of a nuisance claim can be difficult to prove, especially in groundwater claims because the mechanics of groundwater flow has been misunderstood for so long. MTBE contamination is different than most nuisance claims, because MTBE travels easily in groundwater and

141. 58 AM. JUR. 2D *Nuisances* § 25 (1989)

142. *See id.*

143. *See* RCRA § 9002-9003; *see also* N.Y. COMP. CODES R. & REGS. tit. 6, § 613.5 (1995).

144. *See* DIAMOND ET AL., *supra* note 129, at 87-88.

145. *See* 58 AM. JUR. *Nuisances* § 24.

has a chemical fingerprint that can be traced back to a leaking UST within a scientific certainty.¹⁴⁶ MTBE has only been on the market since 1992¹⁴⁷ and is not a naturally occurring substance.¹⁴⁸ MTBE has only one source, reformulated gasoline.¹⁴⁹ These factors make the factual analysis of nuisance straightforward for this situation.

The defendant will offer defenses despite an affirmative causal link. The defendant will contend that the statute of limitation has run on the plaintiff's ability to bring suit for leaking USTs that may have begun back in the early 1990s. The New York law for statute of limitation on tort actions is three years.¹⁵⁰ The statute of limitation raises another factual issue of whether the nuisance is permanent or temporary. A permanent nuisance would mean that the MTBE has contaminated the groundwater aquifer beyond remedial cleanup or natural cleansing. In the case of a permanent nuisance, the statute of limitation is started from the time when the plaintiff is aware or should be aware that the injury incurred was caused by the defendant's actions.¹⁵¹ A temporary nuisance means that if the polluting ends then the nuisance will end.¹⁵² The suit may be brought multiple times for a reoccurring injury from defendant's tortious actions within the three year statute of limitation.¹⁵³ The plaintiff here would have to show that the nature of the groundwater aquifer is such that even a large leak of gasoline will not permanently contaminate the aquifer. Again this is dependent on the testimony of scientific experts.

Even if the plaintiff can positively show that the defendant negligently allowed gasoline containing MTBE to leak into the groundwater and flow into the plaintiff's adjacent property and into the wellhead, the issue of injury and causation of injury remains.¹⁵⁴ In addition to actual injury, a plaintiff must present a strong showing that the actual injury was caused by the defen-

146. See DRINKING WATER ADVISORY, *supra* note 4.

147. See *About MTBE*, *supra* note 20.

148. See *About MTBE*, *supra* note 20.

149. See *About MTBE*, *supra* note 20.

150. See N.Y. C.P.L.R. 214-c (McKinney's 1999) ("caused by the latent effects of exposure to any substance or combination of substances").

151. See 58 AM. JUR. 2D *Nuisances* §§ 307-310; See also N.Y. C.P.L.R. 214-c(2) ("computed from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier").

152. See 58 AM. JUR. 2D *Nuisances* §§ 307-310.

153. See *id.* It is important to note that the statute of limitation begins to accrue on the date of discovery of the first injury.

154. See 58 AM. JUR. 2D *Nuisances* § 24.

dant's negligent act.¹⁵⁵ Purely emotional distress will not be compensated.¹⁵⁶ An unwanted change in condition of well water may be compensated, as was shown by a successful action for damages arising out of alleged contamination of plaintiff's well from a pile of salt on defendant's property, making the plaintiff's water salty.¹⁵⁷ As with all causation proof problems, this is expensive for the plaintiff.

The question remains whether foul odor and taste of the water is enough evidence for a successful nuisance claim. The *Le-one* court found that emotional distress was not enough to show an unreasonable interference with the plaintiff's property rights,¹⁵⁸ but the loss of ability to use well water might be. The plaintiff could show evidence of bottled water expenses, water samples exceeding EPA's recommended concentration of MTBE in potable water, and inability to sell the property because of water issues.¹⁵⁹

There are several ways to prevent groundwater contamination from migrating, however they are expensive and very difficult to employ.¹⁶⁰ For example, migration of groundwater contaminants can be stopped by an impermeable clay barrier.¹⁶¹ This is a potential remedial solution for leaking USTs that could be part of a temporary restraining order on the gasoline station's operation.

Before continuing, it is important to lay out the possible remedies that a successful tort claim could reap. The plaintiff's successful tort claims may result in compensatory damages, punitive damages and injunctive relief.¹⁶² The most common forms of damages are monetary, compensating for diminution in value of the property, and personal health injuries. Other damages include punitive damages and possibly an injunction of the defendant's action. These concepts assume that a fair market value can be placed on anything.¹⁶³ As part of compensatory damages, special damages must be pled.¹⁶⁴ These would compensate plaintiff for

155. See 79 N.Y. JURIS. 2D *Negligence* § 40 (2d ed., Lawyers Co-operative Publishing Company 1994).

156. See *Leone v. Leewood Service Station*, 624 N.Y.S.2d 610, 613 (2d Dep't 1995).

157. See *Flick v. Town of Steuben*, 605 N.Y.S.2d 602, 603 (4th Dep't 1993).

158. See *Leone*, 624 N.Y.S.2d at 613.

159. See DRINKING WATER ADVISORY, *supra* note 4.

160. See generally WENDY GORDON, A CITIZEN'S HANDBOOK ON GROUNDWATER PROTECTION 39-43 (Natural Resources Defense Council, Inc. 1984).

161. See *id.*

162. See R. LAWRENCE DESSEM, PRETRIAL LITIGATION-LAW, POLICY & PRACTICE 118 (West Publishing Co. 1996).

163. See *id.*

164. See FED. R. CIV. P. 9(g).

injuries that are not necessarily a consequence of defendant's actions.¹⁶⁵ For example, medical bills incurred from drinking and showering with MTBE contaminated water would be pled as special damages, because the harm was secondary to defendant's action of allowing gasoline to leak into the groundwater.

Plaintiff may also be entitled to punitive damages, particularly when compensatory damages provide little relief.¹⁶⁶ "Punitive damages are not to compensate the injured plaintiff, but instead are to punish the defendant and deter conduct such as defendant's in the future."¹⁶⁷ Often when monetary damages are sought, the relief will be liquidated in private settlements, possibly leaving the situation completely unchanged except for the plaintiff's standard of living.¹⁶⁸ Equitable relief can require a defendant to perform a specific act to change the current situation. Injunctive relief will require the defendant to stop a specific operation.¹⁶⁹ An injunction will be the main goal of bringing an MTBE groundwater contamination suit, because one party or the other will have to change its behavior. The plaintiff has a legal right to draw water from his/her groundwater without interference from another;¹⁷⁰ the UST operator has no legal right to discharge gasoline into groundwater.¹⁷¹

The plaintiff must ask for injunctive relief because monetary compensation does not by itself solve the problem of contaminated groundwater. In one groundwater contamination case, the court recognized that a biological contamination of groundwater could be treated but that gasoline contamination cannot be treated, except by preventing it from entering the water supply.¹⁷²

Nuisance law is an effective remedy for a private well owner injured by the leaking UST from a neighboring gasoline station. In *Leone*, the plaintiff was awarded \$235,000 for the diminution of the value of her home, plus \$50,000 for the loss of enjoyment of her land.¹⁷³ The compensatory and punitive damages may allow the plaintiff to ask for a sum of money to improve his or her own standard of living, however without enjoining the defendant's pol-

165. See DESSEM, *PRETRIAL LITIGATION - LAW, POLICY & PRACTICE*, at 118.

166. See *id.*

167. *Id.*

168. See *id.* at 119.

169. See *id.*

170. See 58 AM. JUR. 2D *Nuisances* § 24.

171. See *id.*

172. See *Cornell v. Exxon*, 558 N.Y.S.2d at 647.

173. See *Leone*, 624 N.Y.S.2d at 672.

luting actions and seeking a total clean up, the groundwater may remain contaminated.¹⁷⁴ A tort claim for alleged polluting actions may provide compensation for the immediate plaintiff, but is inadequate in protecting the environment and its resources.

The Restatement Second of Torts section 158 provides that trespass is the defendant's intentional act causing harm to a legally protected interest of the plaintiff by "(a) enter[ing] land in the possession of the [plaintiff]. . . or (b) remain[ing] on the land, or (c) fail[ing] to remove from the land a thing which he is under a duty to remove."¹⁷⁵ This definition of trespass seems to provide a viable legal theory to bring a MTBE groundwater contamination suit against a UST owner/operator. However, proof of the defendant's intentional act remains an enormous hurdle. A historic New York trespass case held that a trespasser's liability depends on the intent of the act.¹⁷⁶

Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damage in consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness.¹⁷⁷

Trespass should be brought along with a nuisance claim as further legal foundation. Trespass is very difficult to prove in a groundwater contamination case because it contains the element of intent. There is a high evidentiary hurdle to show that the gasoline service station owner intentionally released the gasoline into the groundwater.¹⁷⁸ The issue of whether the service station owner should have known that MTBE could travel far distances and could contaminate residential water wells is best addressed in negligence not trespass.

Even putting aside the causation hurdle of a negligent interference claim, the plaintiff would not be compensated for the economic injuries that were incurred unaccompanied by physical

174. See Paul Frisman, *Pollution Suit Targets Anti-Smog Additive*, CONN. L. TRIBUNE, Nov. 29, 1999, at 1.

175. RESTATEMENT (SECOND) OF TORTS § 158 (1972).

176. See *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 330 (1954).

177. *Id.* at 331.

178. See *id.*; see also *Kulpa v. Stewart's Ice Cream*, 534 N.Y.S.2d 518, 520 (3d Dep't 1988); *Chartrand v. State of New York*, 362 N.Y.S.2d 237, 239 (3d Dep't 1974).

damages.¹⁷⁹ Injunctive relief may be available for a successful trespass claim, but trespass seems to be more a strategic claim than a cogent legal argument. Although trespass seems to provide leverage at the negotiation stage, it can easily be defeated in court.¹⁸⁰

Negligence is generally also added to the list of common law claims made during a tort suit, and it becomes essential for a qualified nuisance claim.¹⁸¹ Negligence requires proof of: 1) defendant's duty owed to the plaintiff, 2) breach of defendant's duty, 3) injury sustained by the breach of duty, and 4) the causal link between the breach of duty and the injury.¹⁸² Causation is often the failing element of this cause of action for many plaintiffs. In *Cornell v. Exxon*, the plaintiff's water-well was contaminated with gasoline traced to USTs owned by Exxon and located at a gasoline station.¹⁸³ The court remanded for a jury resolution of whether plaintiff's were aware that drinking the well water would pose potential health risks.¹⁸⁴ *Cornell* shows us that even with clear proof of defendant's liability, negligence recovery is limited to the amount of injury. Negligence theory provides neither preventative, nor protective measures against a leaking UST.

Negligence liability is also difficult to prove in groundwater pollution cases because "the plaintiff must demonstrate that the defendant failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that he or she knew or should have known that such conduct could result in the contamination of the plaintiff's well."¹⁸⁵ The enormous evidentiary hurdle then becomes showing the UST owner/operator had knowledge or ability to ascertain the defects in the UST.

Remedies may actually compensate an injured plaintiff for damages and loss of use of the property, but seldom provide for remedial measures. The problem of groundwater contamination

179. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927).

180. See *Phillips*, 307 N.Y. at 330 (holding that expert testimony that gasoline traveled from defendant's leaking UST into plaintiff's water-well was insufficient because there was no evidence that defendant knew or should have known that gasoline would flow to plaintiff's land); see also *Cornell v. Exxon Corp.* 558 N.Y.S.2d at 649.

181. See 58 AM. JUR. 2D *Torts* § 24 (1989).

182. See 79 N.Y. JURIS. 2D *Negligence* § 8 (2d ed., Lawyers Co-Operative Publishing Company 1999).

183. See *Cornell*, 558 N.Y.S.2d at 647.

184. See *id.* at 647.

185. *Fetter v. DeCamp*, 600 N.Y.S.2d 340, 340 (3d Dep't 1993).

may still persist; worse is that the cause of the contamination may go unremediated. "[W]hen a defendant's conduct substantially interferes with the current possessory or use interest of another in land, the complainant should be permitted to receive not only damages for the interference but also an injunction against its continuation."¹⁸⁶ Other than the small burden of paying legal costs and damages to a very particular class of litigants, the gasoline station owners are not deterred in any way from the continued use of MTBE as a gasoline additive. The use of a utilitarian approach which "affords a great solicitude to the benefits a defendant's activities confer upon a community. . . in relationship to the magnitude of the economic harm suffered by the plaintiff," further frustrates the plaintiff's effort.¹⁸⁷ Some courts have rejected the utilitarian approach in favor of corrective justice,¹⁸⁸ refusing the defendant an opportunity to "exculpate himself by showing that the value of its conduct outweighed the gravity of harm to plaintiff."¹⁸⁹ Restatement section 826 provides guidance to the courts, stating that an injunction is necessary when "the gravity of the harm outweighs the utility of the conduct."¹⁹⁰ In order to receive injunctive relief, the plaintiff must show some present harm or at least an immediate threat of harm.¹⁹¹ The *Reserve Mining* court identified the important factors of balancing the equities to be:

a) the nature of the anticipated harm, b) the burden on [the defendant] and its employees from issuance of the injunction, c) the financial ability of [the defendant] to convert to other methods of waste disposal, d) a margin of safety for the public [and] [a]n additional crucial element necessary for a proper assessment of the health hazard rests upon a proper analysis of the probabilities of harm.¹⁹²

186. DIAMOND ET AL., *supra* note 129, at 377-378.

187. DIAMOND ET AL., *supra* note 129, at 378.

188. See *Crushed Stone Co. v. Moore*, 369 P.2d 811, 815-816 (Okla. 1962) (holding that stockpiling limestone was a nuisance); see also *Berg v. Reaction Motors Div.*, 181 A.2d 487, 492 (N.J. 1962) (holding compensatory damages from rocket engine testing was properly granted); *Boomer v. Atlantic Cement, Inc.*, 257 N.E.2d 870, 875 (N.Y. 1970) (refusing to enjoin cement crushing operations but granting permanent damages to the plaintiff).

189. See DIAMOND ET AL., *supra* note 129, at 379.

190. RESTATEMENT (SECOND) OF TORTS § 826(a) (1972).

191. See *Reserve Mining Co. v. Env'tl. Prot. Agency*, 514 F.2d 492, 500 (8th Cir. 1975).

192. *Id.* at 536.

When faced with the issue of liability in MTBE groundwater contamination, a court would look at the plaintiff's legal right to use and enjoy its property to draw drinking water from a well, against the utility of the defendant's operation as essential to the nation's transportation.¹⁹³ Using the *Reserve Mining* factors, an argument could be made that: a) the plaintiff is suffering from the loss of its private water-well, b) the burden on a UST owner/operator and its employees to move its operation is high but not insurmountable, c) the financial ability of the defendant to move its operations to a less residential area where similar injury will not occur to groundwater drinking supplies, d) continuation of current UST operation will result in a high risk to health and safety, and finally e) the probability of harm is high because water is essential to a residence and the use of MTBE contaminated water has a high certainty of harm.¹⁹⁴ To do this, the plaintiff must have a strong case of injury, possibly including monetary damages, alternative drinking water costs, real estate depreciation, medical bills related to water contamination and a list of neighbors who are similarly suffering.

The outcome of balancing the equities is uncertain, which is an impediment to the main purpose of bringing this suit: to stop the polluting and the unreasonable interference with property rights. Money from compensatory and punitive damages may help the plaintiff move away and increase his/her quality of life, while the court permits the "nuisance-creating but beneficial activities" to continue.¹⁹⁵ The new property owners obtain the property with a "servitude on land" imposed by defendant's nuisance,¹⁹⁶ and the property becomes increasingly more contaminated.¹⁹⁷ After a great deal of time, money and brainpower put into litigating the issue, the law leaves the problem for the next property owner. This may continue to render the private well useless, the property value depreciated and the residence undesirable. One purpose of the law is to protect legal interests from unreasonable invasions.¹⁹⁸ The long list of leaking USTs in Westchester County and the number of contaminated private wells is a clear indication that RCRA testing, monitoring and reporting re-

193. *See id.*

194. *See id.* at 492.

195. *See* DIAMOND ET AL., *supra* note 129, at 380.

196. *See* *Boomer*, 257 N.E.2d at 875.

197. *See id.* at 876 (Jasen, J. dissenting).

198. *See* RESTATEMENT (SECOND) OF TORTS § 821D (1972).

quirements among other federal environmental and New York statutes, are not enough to stop groundwater contamination from occurring.¹⁹⁹

VI. The Private Well Owners' Difficulty in Bringing a Successful Suit for MTBE Damages Shows the Lack of Groundwater Protection in the Law

The legal protection of private well owners dependent on groundwater for clean, potable water is limited to monetary compensation, medical monitoring and limited injunctive relief. Gasoline service stations, the main source of groundwater contamination by gasoline, are regulated by RCRA, but some leaking is allowed under the same statute, if reported.²⁰⁰ Because of MTBE's unique properties and industry use, causation is easier to prove than in previous gasoline groundwater contamination suits. Plaintiffs may be compensated handsomely in some cases for injuries incurred from MTBE contamination of well water, however, these damage payments may have little effect on the operation of service stations backed by deep-pocket gasoline companies. Lawsuits will not prohibit the use of MTBE, nor will they create incentives for gasoline companies to find a less harmful gasoline additive or to find fail-safe operations to prevent gasoline contamination of groundwater. A successful lawsuit for a private well owner, injured from MTBE contamination of groundwater, most likely will not have any impact on the gasoline industry. Gasoline will continue to be stored in USTs in neighborhoods and the gasoline industry will continue to use MTBE as a viable gasoline additive as long as statutes allow it.

Injunctive relief at best would shut down the liable gasoline service station. Injunctive relief may be the only leverage provided to the private plaintiff attempting to protect his property rights from negligent handling of a UST and the use of MTBE as a gasoline additive. The cry for the removal of MTBE from commerce has been opposed by industry, because the perceived benefits of MTBE and the cost to remove MTBE from gasoline (three to seven cents per gallon).²⁰¹ While MTBE remains at the pumps, plaintiffs should seek relief that includes sampling and analysis of untested wells, public warnings, educational outreach, and claims

199. See Mahoney & Kazanjian, *supra* note 2; see also RCRA § 9002-9003.

200. See RCRA § 9003.

201. See Wigglesworth, *supra* note 76, at 13.

for medical monitoring.²⁰² These types of relief require gasoline companies to become part of the solution and begin to remove the burden from the private well owner.

Beyond legal remedies, the plaintiff suffering from MTBE groundwater contamination must also lobby his politicians to write legislation that will create comprehensive groundwater protection law with citizen suit provisions. This problem cannot be solved by one successful litigant nor can a successful class action bring an end to the ongoing leakage of USTs.

Finally, citizens need to consider how important groundwater is. The law cannot speak for the interests of the private citizen unless legislators have heard the concerned voices. Groundwater is an invaluable resource that the nation cannot afford to contaminate and destroy. By using MTBE in gasoline, the gasoline industry has threatened groundwater as a natural resource and has injured many citizens dependent on private wells. The MTBE catastrophe has put the burden on these citizens, and has drawn attention to the lack of groundwater protection in our laws.

202. See Mahoney & Kazanjian, *supra* note 2.