UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and
DEANNA SCHNEIDER, Individually
and on behalf of all persons similarly
situated ,

Plaintiffs,

v.

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY,
UNITED STATES FIRE INSURANCE
COMPANY and ABC INSURANCE
COMPANIES 1 – 50,

Defendants,

--and--

MADISON-KIPP CORPORATION,

Cross-Claimant,

Case No. 11-cv-724-bbc

v.

CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY and
UNITED STATES FIRE INSURANCE
COMPANY,

Cross-Claim Defendants,

--and--

CONTINENTAL CASUALTY COMPANY and
COLUMBIA CASUALTY COMPANY,

Cross-Claimants/Third-Party Plaintiffs,

v.

MADISON-KIPP CORPORATION,

Cross-Claim Defendant,

and

LUUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MORTORISTS INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANIES 1-20,

Third-Party Defendants.

DEFENDANT MADISON-KIPP CORPORATION'S BRIEF IN IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Misunderstanding and confusion has led us to where we are today, with a lawsuit based on a collision between perception and reality. Understandably, when Plaintiffs Kathleen McHugh and Deanna Schneider as well as those similarly situated Class Members ("Plaintiffs") received news that there could be contamination under and even in their homes they became concerned. That concern, however, has led to the misinformed perception that Defendant Madison-Kipp Corporation ("Madison-Kipp") willingly and freely contaminated the environment on which its Waubesa Street facility (the "Facility") sits to levels that present an immediate and significant threat to Plaintiffs and their properties and that Madison-Kipp has delayed, prevented and hidden any investigation, results or remediation of the property. This perception presents Madison-Kipp as some evil company polluting freely without a care for who is injured and running from any responsibility for the consequences. This perception wilts when confronted with the facts of reality.

The reality is that Madison-Kipp is a local company that has been in Madison for more than 100 years and has, over that time, been a positive part of the community; providing hundreds of local jobs and tax revenue. Also, the reality is that Madison-Kipp is not a company that closed down leaving environmental issues for others to address, but instead is a functioning

manufacturing operation that plans to continue here long after this matter ends. Most importantly, the contamination does not present a reasonable prospect of future harm to Plaintiffs or their properties; and, since 1994, Madison-Kipp has worked hand-in-hand with the Wisconsin Department of Natural Resources (WDNR) to investigate and remediate the site, keeping the WDNR and the public, including Plaintiffs, on notice of what the investigation revealed, and what next steps would be taken. The reality is that Madison-Kipp functioned like other manufacturers in its historic chemical use and handling and has been working diligently to address any contamination resulting from long-discontinued actions.

From the Plaintiffs' misguided perspective springs this claim under the Resource Conservation and Recovery Act of 1976 (RCRA), alleging that Madison-Kipp's past handling, storage, or disposal of various chemicals has resulted in the threat of an imminent and substantial endangerment to health or the environment through vapor intrusion into Plaintiffs' homes. However, there are no facts to support Plaintiffs' perspective. Instead, (1) the test results from various samplings demonstrate that the level of vapors in or around Plaintiffs' properties are very low, if even detectable, (2) any remaining contaminants that could cause even a threat of additional vapors have been remediated and (3) those low levels actually detected present no risk to Plaintiffs. Therefore, there is no threat of an imminent and substantial endangerment to health or the environment and Madison-Kipp should be granted summary judgment on Plaintiffs' RCRA claim.

Plaintiffs' perspective also led them to file common law claims against Madison-Kipp for negligence, private nuisance, trespass and willful and wanton conduct. Again, the facts do not support their claims. The reality is Madison-Kipp certainly did nothing to willfully harm Plaintiffs and in fact acted in accordance with the standard of care for a reasonable company at

the time in its warning about potential contamination, in its handling of chemicals and in its investigation and remediation of contamination. Even assuming that Madison-Kipp failed to comply with the applicable standard of care (which it did not), there is no evidence that each Class Member has suffered any actual loss or damages from any alleged breach of a standard of care. Therefore, Madison-Kipp also is entitled to summary judgment as to all of Plaintiffs' common law claims.

BACKGROUND[1]

The Madison-Kipp site has been used as an industrial metal casting facility for more than 100 years. The company started operations in its current facility in 1902, originally manufacturing lubrication parts for farm tractors and power units. It now produces precision machined aluminum die cast components for transportation and industrial end users. The Facility is on the east side of the City of Madison, and is bound on the north by a bike path, on the south by Atwood Avenue, on the east by South Marquette Street, and on the west by Waubesa Street. The Facility's footprint has changed over the years but now the 130,000-square foot building occupies much of the site.

There are thirty-four (34) homes that share a property line with Madison-Kipp; these homes were all built after Madison-Kipp began operations. Given the residences' close proximity to the Facility, the company has paid particular attention over the years to neighbor relations. In fact, several neighboring property owners (now Class Members) have testified that Madison-Kipp has acted in the way of a good neighbor, such as addressing flooding problems quickly when raised.

[1] All background facts find their support in Madison-Kipp's proposed findings of fact.

Madison-Kipp's operations and chemical storage, use and handling procedures have changed over the years. For a period of time, Madison-Kipp used perchloroethylene ("PCE", also known as tetrachloroethylene or "Perc"). For much of the last century, PCE was believed to have low toxicity and was widely used in medicine, industry and household products. For example, PCE was widely used in metal degreasing operations at industrial facilities. PCE is not a banned substance and is readily available today at any local hardware store in numerous cleaning products. In fact, dry cleaners still use PCE in the dry cleaning process. Madison-Kipp used PCE primarily in a vapor degreaser to remove grease on aluminum materials in the manufacturing process to allow the diecast parts to adhere to each other. Madison-Kipp ceased use of PCE in the late 1980s.

For a period of time ending sometime in the 1970s, Madison-Kipp, like most other manufacturing operations, used hydraulic oils that contained polychlorinated biphenyls ("PCBs"). At that time and from time to time, like many industrial and municipal entities, Madison-Kipp would apply spent oils on its parking lot and driveway areas for dust suppression.

In July 1994, as part of WDNR's investigation of groundwater contamination at a neighboring manufacturing facility, Madison-Kipp was asked to investigate the detection of volatile organic compounds (or "VOCs") in shallow groundwater at a location to the northwest of the Facility. Within a month, Madison-Kipp had hired an environmental consultant to conduct the requested investigation, including soil and groundwater sampling. From that point forward, Madison-Kipp has worked with WDNR to investigate soil and groundwater contamination at and from the Facility. As with any other environmental cleanup site, Madison-Kipp's investigation and remediation activities have followed an iterative process proceeding in a step-wise fashion as

more data became available, more information known, and environmental sampling methods and remediation technologies evolved.

WDNR did not utter the words "soil vapor" to Madison-Kipp until 2004. In 2004, WDNR requested soil vapor monitoring be performed at the Site to assess the potential for migration of vapors off-site. Madison-Kipp installed soil vapor monitoring probes along its east property boundary, monitored these probes for several years, and reported the results to WDNR each time. When soil vapor data suggested that PCE was present in on-site soil gas, WDNR requested off-site sampling and Madison-Kipp installed soil vapor monitoring probes on three neighboring properties. By the time WDNR released its first vapor intrusion guidance document in 2010, Madison-Kipp had already been monitoring on-site and off-site soil vapors for six years. Data results demonstrated that PCE concentrations in soil vapor declined dramatically from on-site to off-site areas. Meanwhile, other on-site and off-site soil and groundwater investigation and remediation measures were on-going.

In 2011, when WDNR requested sub-slab soil gas and indoor air data be collected at the same three neighboring properties, Madison-Kipp conducted the sampling. When sub-slab data showed detectable levels of PCE, as a precautionary measure, Madison-Kipp installed mitigation systems in those three homes, as well as in the two homes on each end of the line of three. To date, the only elevated sub-slab detections of PCE have been at these initial three properties – providing further support for the appropriateness of Madison-Kipp's and WDNR's step-wise approach to site investigation.

Subsequently, WDNR requested that Madison-Kipp conduct additional indoor air and sub-slab testing in the Class Area. Throughout 2012, the WDNR and/or Madison-Kipp sampled the indoor air and sub-slab soil gas at 27 homes within the proposed Class Area, resulting in

more than 100 data points from which the vapor intrusion risk can be evaluated. The results of this extensive testing: no indoor air samples exceeded WDNR's current Indoor Air Action Level for PCE nor did any sub-slab soil gas samples exceed WDNR's current Vapor Risk Screen Level for PCE. These screening levels are used to determine whether additional action need be taken. Measured concentrations that are less than the applicable screening levels demonstrate there is no risk to human health. The WDNR has stated that its 2012 screening levels are "very protective of human health."

The same results (*i.e.*, no exceedances in sub-slab or indoor air) were found at more than 20 additional homes sampled by WDNR outside of the Class Area in the same neighborhood. Despite the fact that there were no exceedances of WDNR's current action levels or screening levels, the WDNR decided to install additional mitigation systems in over 20 homes, including in several homes beyond the Class Area.

In addition to Madison-Kipp's extensive sub-slab soil gas and indoor air sampling efforts, it has also taken over 400 soil samples from on-site and off-site locations in 2012. The result: no detection of VOCs at off-site locations above state or federal regulatory standards. Polychlorinated biphenyls ("PCBs") have been detected in a limited area on four adjacent properties on Waubesa Street and Madison-Kipp has submitted a workplan to WDNR and the U.S. Environmental Protection Agency ("USEPA") to address those detections. When regulatory approval is received, Madison-Kipp will proceed with remediating these off-site areas by complete excavation and removal. Polycyclic aromatic hydrocarbons ("PAHs") have been detected at most sampled off-site properties but such detections are the result of PAHs being ubiquitous in an urban environment and are not directly attributable to Madison-Kipp's activities.

Madison-Kipp has installed a nine extraction well soil vapor extraction system to prevent off-site migration of soil gas, excavated and properly disposed of on-site soils containing PCBs, and, over time, installed an on-site and off-site groundwater monitoring network that consists of 58 monitoring points from a depth of 13 feet to 235 feet below ground surface. These efforts have defined the extent of PCE, PCB and other site-related contaminants in soil, soil vapor and groundwater for the purpose of selecting remedial actions and such remedial actions have either already been implemented, workplans have already been submitted to the WDNR for implementation of the remedial action, or data leading to full-scale final remedial design is being collected.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

To succeed on summary judgment Madison-Kipp recognizes that it must demonstrate the absence of genuine disputes of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, because Plaintiffs carry the burden of proof on their RCRA and common law claims, to defeat Madison-Kipp's motion they must provide facts from which a reasonable fact finder could find in their favor. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) ("Summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'") (quoting *Celotex Corp.*, 477 U.S. at 322). Thus, Plaintiffs must come forward with their evidence that would persuade a fact finder to find in their favor on each element of their claims. *See Celotex Corp.* 477 U.S. at 325.

II. MADISON-KIPP IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' RCRA CLAIM

A. The "imminent and substantial endangerment to health or the environment" standard under 42 U.S.C. § 6972(a)(1)(B).

The primary purpose of the Resource Conservation and Recovery Act of 1976 (RCRA), "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). Under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), a citizen can enforce RCRA's purpose by bringing suit

> against any person, including . . . any past or present generator . . . who has contributed or 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.

To be successful on such a claim, the plaintiff must establish:

> (1) that the defendant has generated solid or hazardous waste, (2) that the defendant is contributing to or has contributed to the handling [or disposal] of this waste, and (3) that this waste may present an imminent and substantial danger to health or the environment.

Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002). Thus, at its core, the text of § 6972(a)(1)(B) "requires the presence of solid or hazardous waste that may present an 'endangerment' that is 'imminent' and 'substantial,'" as those terms have been interpreted. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009).

According to the Supreme Court, "[a]n endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,' and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger." *Meghrig*, 516 U.S. at 485-86 (quoting Webster's New International Dictionary of English Language 1245 (2d ed. 1934)). Moreover, the Court explained that the statutory language implied "'that there must be a

threat which is present *now*, although the impact of the threat may not be felt until later.'" *Id.*, 516 U.S. at 486 (emphasis in original) (quoting *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)).

Since *Meghrig* there has been further elaboration on the imminence requirement. While imminence does not require an existing harm, it does require "an ongoing threat of future harm." *Albany Bank & Trust Co.*, 310 F.3d at 972. Further, the harm must pose "a near-term threat." *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006). Thus, satisfaction of the imminence requirement necessitates a showing that a risk of threatened harm is present now. *See Crandall v. City & County of Denver*, 594 F.3d 1231, 1237 (10th Cir. 2010) and *Cordiano*, 575 F.3d at 210; *Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 695 (7th Cir. 1999) ("Thus, off-site contamination may very well present an imminent and substantial danger *at some time*, but it does not present such a danger *right now*.") (emphasis added).

With respect to the "substantial" component, courts agree that the endangerment must be serious and must require action. *Cordiano*, 575 F.3d at 210-11 (citing list of cases). Stated another way, "[a]n endangerment is 'substantial' where there is reasonable cause for concern that someone or something may be exposed to risk of harm if prompt remedial action is not taken." *Lewis v. FMC Corp.*, 786 F. Supp. 2d 690, 707 (W.D.N.Y. 2011); *see also Tilot Oil, LLC v. BP Prods. N. Am., Inc.*, No. 09-CV-201-JPS, 2012 U.S. Dist. LEXIS 5365, at *19 – 20 (E.D. Wis. Jan 17, 2012) ("As to substantial a danger, the threat must be serious and 'there must be some necessity for the action.'" (quoting *Price*, 39 F.3d at 1019)) and *Grace Christian Fellowship v. KJG Investments Inc.*, No. 07-C-0348, 2012 U.S. Dist. LEXIS 43421, at *48 (E.D Wis. Mar. 29, 2012) ("The courts also agree that the word 'substantial' implies serious harm.").

"As for endangerment, '[c]ourts have consistently held that 'endangerment' means a

threatened or potential harm and does not require proof of actual harm.'" *Cordiano*, 575 F.3d at 211 (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991)). As explained by the First Circuit, "the combination of the word 'may' with the word 'endanger,' both of which are probabilistic, leads [ ] to [the] conclu[sion] that a reasonable prospect of future harm is adequate to engage the gears of RCRA [42 U.S.C. § 6972(a)(1)(B)] so long as the threat is near-term and involves potentially serious harm." *Me. People's Alliance*, 471 F.3d at 296.

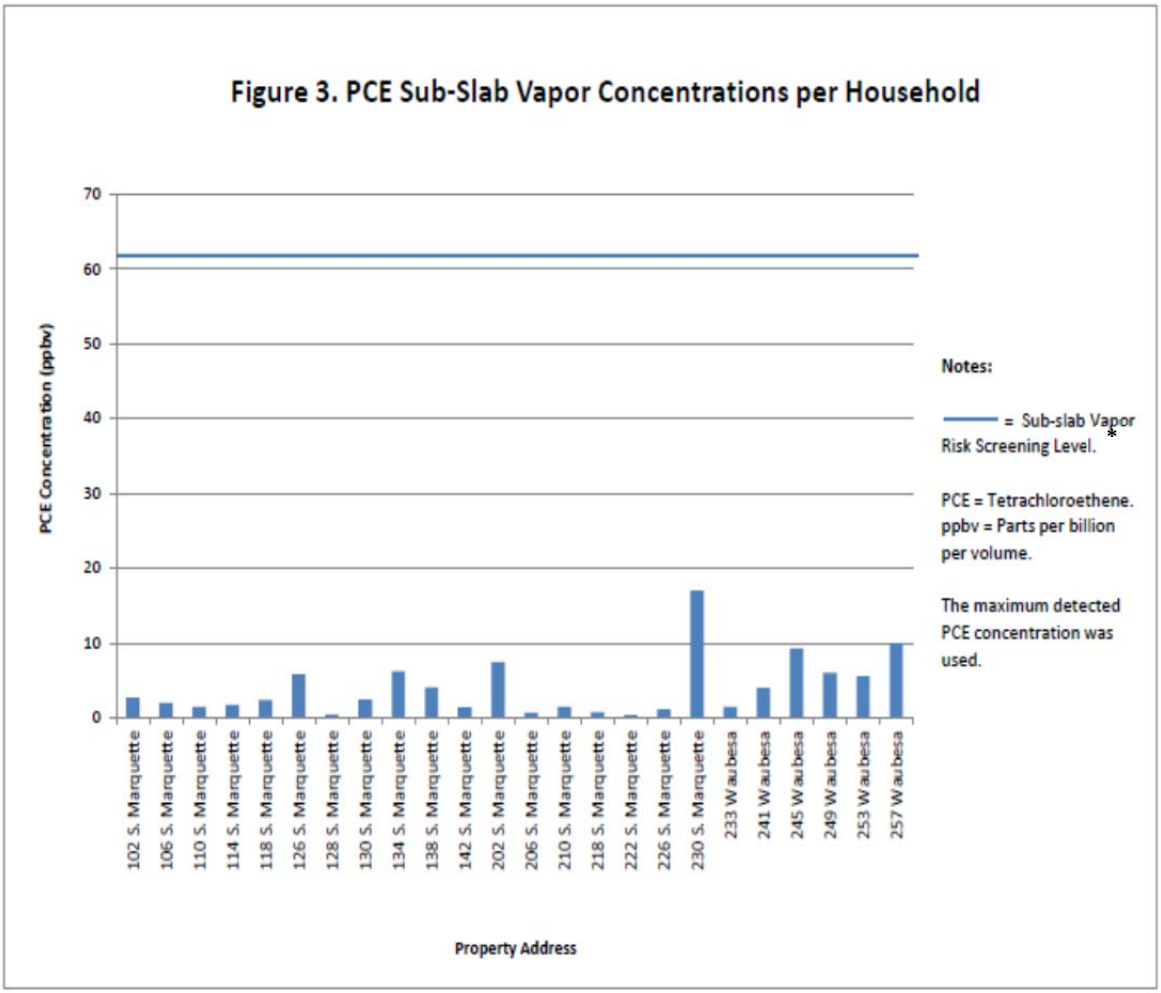
While the courts have generally provided for a broad interpretation of § 6972(a)(1)(B), "there is a limit to how far the tentativeness of the word *may* can carry a plaintiff." *Crandall*, 594 F.3d at 1238. For example, "*Meghrig* tells us that an endangerment cannot be merely possible, but must 'threaten[] to occur immediately.'" *Id.* (quoting *Meghrig*, 516 U.S. at 485). Moreover, "although the harm may be well in the future, the *endangerment* must be imminent." *Id.* Thus, there can be no relief under § 6972(a)(1)(B) "when the risk of harm is remote in time, completely speculative in nature, or de minimis in degree." *See Me. People's Alliance*, 471 F.3d at 289 (citation omitted); *see also Scotchtown Holdings LLC v. Town of Goshen*, No. 08-CV-4720 (CS), 2009 U.S. Dist. LEXIS 1656, at *6 - 7 (S.D.N.Y. Jan. 5, 2009) and *Sierra Club v. Gates*, No. 2:07-cv-0101-LJM-WGH, 2008 U.S. Dist. LEXIS 71860, at *109 (S.D. Ind. Sept. 22, 2008).

B. There is no evidence from which a reasonable fact-finder could conclude that there is any waste that "may present an imminent and substantial endangerment to health or the environment" at or from the Madison-Kipp site.

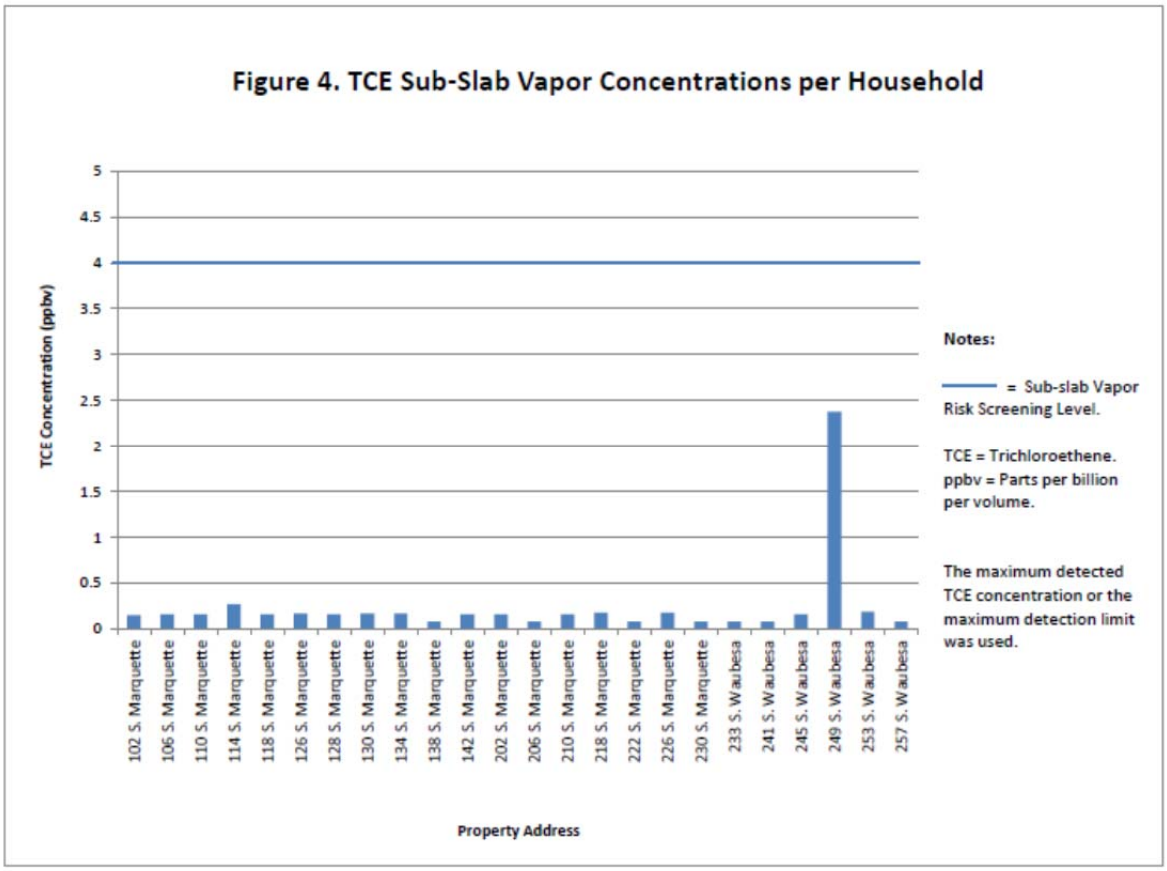
Underlying the mountain of data concerning the investigation and remediation of contamination both on and off-site of Madison-Kipp is the simple fact that, as the WDNR noted in December 2012, there are no exceedences of the WDNR's current conservative risk screening

standards governing levels of VOCs in indoor air or sub-slabs. (M-KPFOF ¶¶ 240; 244.)[2] Although, as will be discussed further below, simply having results that exceed regulatory standards is far from sufficient to support a RCRA claim, the fact that the results are well below the conservative standards is telling. This fact notwithstanding, the WDNR by its own admission has decided to afford those in the close proximity to MKC (including all of the Class Members) "… a 10-fold factor of safety to the current 2012 screening levels, which are already very protective of human health." (*Id.*, ¶ 241.) Below are displayed the sub-slab readings of PCE and its degradation product TCE in Class Members' homes.

[2] Madison-Kipp's citation to its proposed findings of fact, filed along with this brief, will follow the following citation form: M-KPFOF ¶ __.



***** By definition, exposures below a screening level do not pose a risk to human health. (M-KPFOF ¶¶ 547; 553; 599).



(*See* M-KPFOF ¶¶ 546-547; 555-561; Weinberg Expert Report, Figs. 3 & 4, dkt. #146 at 32-33).)[3] On top of test results showing such low levels, sub-slab depressurization systems have been installed in 17 Class Member homes, providing an additional level of protection against even any remote chance of minute levels of VOCs entering the indoor air in those homes. (*See* M-KPFOF ¶¶ 577-581; 630; Beck Expert Report, Fig. 2, dkt. #144 at 118.) The only reasonable conclusion from this information is that any possible vapor intrusion into the Class Members' properties does not present an imminent and substantial endangerment.

[3] The outlier result for 249 Waubesa is the result of a single anomalous detection. (M-KPFOF ¶¶ 569-570; 604-605.) Further, in the most recent indoor air sample, taken at 249 Waubesa on January 11, 2013 after a mitigation system had been installed, both PCE and TCE were not detected in the indoor air. (*Id.*)

A closer examination of the relevant evidence further establishes that there are no facts from which to find a threat of harm to Plaintiffs or their properties. Instead, the evidence in the record establishes the opposite. The extent of PCE and other VOCs in soil vapor, soil and shallow groundwater, both off-site at the Class Members' properties as well as at Madison-Kipp's Facility has been defined. (M-KPFOF ¶¶ 493; 495; 500; 516.) Any PCE contamination of the deep groundwater does not serve as a source of vapor intrusion and has no impact on neighboring properties as the groundwater is not used. (M-KPFOF ¶¶ 496; 507; 517-518.) The remedial actions being taken by Madison-Kipp, including active soil vapor extraction (SVE), in-situ treatment, and natural attenuation will continue to reduce VOCs in the groundwater, including in deep groundwater. (M-KPFOF ¶¶ 314-321; 330-344; 497; 511-513; 582.) Further, the installation of sub-slab depressurization systems (similar to radon systems), although overly conservative in most instances, will effectively prevent even the minimal level of VOCs in some of the sub-slabs from entering the indoor air in the Class Members' homes. (M-KPFOF ¶¶ 577-581.)

Moreover, there is no complete vapor intrusion pathway at the Class Members' properties. (M-KPFOF ¶¶ 498; 561-567.) As noted, with the limited historical exception of three homes, all sub-slab soil gas concentrations for PCE are well below WDNR's Vapor Risk Screening Levels of 62 ppbv.[4] (*See id.*, ¶¶ 131-237; 542; 554-555.) Even more important, the indoor air concentrations for PCE in all homes, including the three that had higher sub-slab

[4] Although the samples taken at 162, 154 and 150 South Marquette Street in 2011 had sub-slab soil concentrations that exceeded 62 ppbv, sub-slab depressurization systems were installed in those homes by Madison-Kipp, alleviating any even minor threat that the elevated levels posed. (M-KPFOF ¶ 630.) Furthermore, as will be discussed more below, merely having contamination levels that exceed government screening levels is insufficient to establish *ipso facto* an immediate and substantial endangerment. *See Cordiano*, 575 F.3d at 212-13 ("state environmental standards do not define a party's federal liability under RCRA" (internal quotation omitted)).

levels, were below the WDNR's indoor air action level of 6.2 ppbv. (*See id.*, ¶¶ 131-237; 541; 557; 568.) Thus, the data confirms that the vapor intrusion pathway between the Facility and the Class Members homes is not complete, meaning that PCE and TCE are not present in the sub-slab soil gas at levels that could be of concern for vapor intrusion. (*Id.* ¶¶ 561-567.) Indeed, the reasonable explanation for the above non-detect levels of VOCs is that such minor concentrations are consistent with typical background levels for PCE found generally arising from common indoor and ambient sources, such as dry cleaning and household chemicals. (*See id.*, ¶¶ 571-575; 616-617; 626-629.)

Plaintiffs' experts' opinions that any level of VOC above non-detect found in the indoor air or sub-slab presents a reasonable prospect of future harm cannot be correct (Bianchi Decl. Ex. 83; Ozonoff Dep., dkt. #142, 14:13-23.) Here, no indoor air samples have exceeded screening levels and only 3 sub-slab samples collected in 2011 have exceeded these levels. (*See* M-KPFOF ¶¶ 131-237; 541-542; 554-557; 568). Moreover, even contamination levels that exceed government screening or action standards do not alone establish the necessary near-term threat of serious harm. *See, e.g.*, *Cordiano*, 575 F.3d at 212-13 ("Even the most cursory review of Connecticut law, moreover, strongly suggest that the mere fact that some samples taken from the Metacon site may exceed Connecticut's RSR standards provides an insufficient basis for a jury to find a reasonable prospect of future harm that is both 'near-term and . . . potentially serious." (quoting *Me. People's Alliance*, 471 F.3d at 296)); *Lewis*, 786 F. Supp. 2d at 710 ("Without any evidence linking the cited standards to potential imminent and substantial risks to human health or wildlife, reliance on the standards alone presents merely a speculative prospect of future harm, the seriousness of which is equally hypothetical."). Thus, it would make no sense, and Plaintiffs

have no evidence to support, that detection of VOCs at levels below conservative regulatory standards would present a near-term serious threat to the Class Members or their properties.

Indeed, regulatory screening levels, as their names imply, are used to screen sampled levels that trigger further investigation from those that do not require further consideration. The district court in *Tilot*, confirmed the purpose of screening levels in evaluating RCRA claims when it noted that having results above the EPA screening levels and Wisconsin's vapor action levels provided little insight on whether a possible imminent and substantial endangerment exists because both levels are developed and used to merely determine whether further investigation or other action is required. *Tilot Oil*, 2012 U.S. Dist. LEXIS 5365 at *23 – 24. Risk screening levels are not regulatory standards that create any obligation but rather are an indicator that more assessment may be required to determine if there is an actual risk. Simply put, because of the conservative and early-detection nature of regulatory screening levels, results that are above screening levels cannot, alone, demonstrate that the potential threat at such levels is of a sufficient magnitude to be substantial or is near-term. Dr. Beck explains this concept:

> The aim of US EPA and other public health agencies is not to precisely define which effects are expected to occur, but to define the level at which health effects are unlikely to occur (*i.e.*, effects may in fact occur only at much higher concentration, but it is uncertain how to describe where the "safe" level begins). Thus, regulatory criteria are designed to "protect the health of everyone in general and no one in particular." Screening levels are conservative by design for several reasons. For example screening levels are based on toxicity criteria that are well below health effect levels and exposure factors that tend to represent high-end exposures (*e.g.*, exposure for 23 hours/day for 30 years). Thus, exceedance of a screening level is not an indication that an adverse health effect will occur.

(M-KPFOF ¶ 599; *see also* M-KPFOF ¶¶ 533-546 (discussing WDNR's vapor screening levels.) In light of the fact that even exceeding government screening standards is insufficient to establish the reasonable prospect of a near-term future harm, Plaintiffs' focus on Dr. Ozonoff's aspirational standard that any level of VOCs in sub-slab or indoor air, including those below

screening levels, presents an imminent and substantial endangerment is simply too far removed from scientific reality to permit a reasonable jury to find that such levels actually present an imminent and substantial endangerment under RCRA.

While it is clear that results above screening standards do not automatically establish the presence of an imminent and substantial endangerment, the standards do provide a relevant guideline to work from in analyzing results. In fact, when concentration results are below such conservative regulatory screening standards, as is the case here, the reasonable conclusion to draw is that, barring other contradictory evidence, there is no imminent and substantial endangerment. (*See* M-KPFOF ¶¶ 547.) The WDNR's guidance regarding vapor intrusion states:

> Measured vapor concentrations in the sub-slab that are less than the applicable screening levels (considering the appropriate risk exposure and AF) indicate there is not a risk to human health due to vapor intrusion. In this scenario, the vapor intrusion pathway will be considered adequately addressed.

(M-KPFOF ¶ 553 (emphasis added).) Further, WDNR has noted that its current 2012 screening levels are "very protective of human health." (*Id.*, ¶ 241.) Indeed, the concentrations in all but one home were below the average concentration of VOCs detected in background indoor air in EPA studies.[5] (*Id.*, ¶ 571.) In other words, if the contamination levels of VOCs found in the Class Members' sub-slab and indoor air are held to present a current and ongoing threat sufficient to meet RCRA's standard, then many homes throughout the United States face an "imminent and substantial endangerment" based on the background VOC levels found in those homes. (*See id.*, ¶¶ 616-617.) Thus, while, at best, Plaintiffs appear to assert some minor

[5] At 249 Waubesa, PCE was detected in indoor air in one out of four samples. (M-KPFOF ¶ 569.) While the one detection was less than the relevant current action level of 6.2ppbv, it was greater than 0.6 ppbv. (*Id.*) However, that one detection was anomalous. (*Id.*, ¶¶ 570; 604-605.) Indeed, in the most recent indoor air sample, taken at 249 Waubesa on January 11, 2013, both PCE and TCE were not detected in the indoor air. (*Id.*)

potential threat of harm, if any, in light of their experts' opinions, that threat is far too remote and miniscule to satisfy the imminent and substantial endangerment standard.

Plaintiffs' complaint clearly focuses on contamination in the form of vapor intrusion. (*See* dkt. #15, ¶¶ 1; 17; 19-21.) Thus, it is unclear whether they have even stated a claim for contamination caused by anything other than vapor intrusion. Nonetheless, even if they have, there is no imminent or substantial endangerment from any other type of contamination. First, Plaintiffs' experts do not even address any risk or threat to human health by any levels of PAHs or PCBs. To repeat, no Plaintiff expert has opined that any level of PCB or PAH contamination to which any Class Member may be exposed poses any imminent or substantial threat to health. (*See* Ozonoff Dep., dkt. #142, 11:21-24 ("Q. Is your opinion limited to the inhalation of chlorinated ethylene solvents in the MKC area? A. Well, yes.").) Because the burden is on Plaintiffs to present evidence from which a reasonable fact-finder could find that contamination presents an imminent and substantial endangerment, this absence of expert evidence should end the inquiry.

Even assuming that there was some semblance of evidence in the record regarding the threat posed by PAHs or PCBs, that evidence would not be sufficient to create a genuine dispute of material fact in light of Madison-Kipp's experts' opinions regarding the lack of any substantial threat posed by those contaminants. The initial problem Plaintiffs have regarding any alleged threat from PAH contamination is that Plaintiffs present no evidence that PAHs located on the Class Members' properties are anything more than background levels nor that those PAHs are from Madison-Kipp. In Dr. Brian Magee's investigation and analysis of PAHs, he found that off-site PAHs do not have the same forensic "fingerprint" as those found at Madison-Kipp's Facility, which means that Madison-Kipp is not the source of the off-site PAHs. (*See* M-KPFOF

¶¶ 632-634.) Also, the concentrations of PAHs found on the Class Members' properties are consistent with (and indeed less than) the normal background concentrations of PAHs found in Madison and other urban areas in the United States. (*Id.*, ¶¶ 631; 635.)

As for the level of threat, if any, resulting from the actual concentration levels of PAHs, PCBs and PCE, Dr. Barbara Beck performed a quantitative risk assessment to address those levels, something plaintiffs' expert did not do. (*See* M-KPFOF ¶¶ 591-618.) More specifically, Dr. Beck conducted a quantitative risk assessment for an adult and child resident at each Class Member property using all available data[6] to evaluate exposures to PCE, trichloroethylene ("TCE") and vinyl chloride ("VC") from indoor inhalation as well as exposures to PCE, TCE, VC, PAHs and PCBs from incidental ingestion and dermal contact in soils. (*Id.*, ¶ 596.) The conclusion from her quantitative risk assessment is that both the cancer and non-cancer risks for all properties is within or below recognized acceptable risk ranges. (*Id.*, ¶¶ 597; 600; 602; 606-614.) Thus, based on the undisputed evidence, a reasonable finder of fact could not find Plaintiffs to have established the necessary "imminent and substantial endangerment" to be able to find for Plaintiffs on their RCRA claim. (*See id.*, ¶¶ 591-593.)

Conversely, while Plaintiffs' expert, Dr. Ozonoff, parroted the statutory language in conclusory fashion asserting that there is an imminent and substantial endangerment, he failed to conduct any form of site-specific risk assessment. (*See* Ozonoff Dep., dkt. #142, 43:8-18; 43:21 – 44:2 ("Q. Did you perform a risk assessment in rendering your opinion as set forth in Exhibit 2? A. No, I didn't perform a quantitative risk assessment, that is to say a point or interval

[6] Dr. Beck noted that there was no soil or indoor air samples for 237 and 269 Waubesa and no indoor air samples for 214 S. Marquette and 261 and 265 Waubesa. (Beck Expert Report § 4.2, dkt. #144 at 38-39.) Thus, she did not calculate a risk assessment for the two unsampled properties and did not do an inhalation risk assessment for the three properties with no indoor air samples. (*Id.*) Sampling has not been conducted at these locations because access has not been granted by the property owners. (M-KPFOF ¶ 251.)

estimate of average risk.") This failure undermines the validity of his opinion and is a failure by Plaintiffs to meet their burden.[7] *See, e.g., City of Fresno v. United States*, 709 F. Supp. 2d 888, 928 (E.D. Cal. 2010) (noting that expert opinion failed to establish that contamination presented an imminent and substantial endangerment because "[t]he opinion was also qualified and did not state with specificity the degree of potential exposure to risk to humans and the environment or provide any evidence that anyone was subject to long-term exposure to TCP contamination or that there were realistic pathways of exposure"). Dr. Ozonoff's opinion that there is no level of exposure below which there would not be any appreciable human cancer concern is simply unsupported by factual detail, the scientific or regulatory literature or specific exposure evidence. Again, if Dr. Ozonoff's opinion was the law, then any detection of a VOC in indoor air would trigger an "imminent and substantial endangerment" claim under RCRA. This would mean that a majority of buildings (including a majority of residences) in the United States would present an "imminent and substantial" threat to health since, according to the EPA, the presence of PCE in ambient indoor air is typical. (*See* M-KPFOF ¶¶ 573; 616.) The only reasonable conclusion from those facts is that no imminent and substantial endangerment to Plaintiffs' health exists here.

Additionally, past and current remediation efforts by Madison-Kipp solidify the absence of any imminent and substantial endangerment to health or the environment because the remediation prevents any ongoing threat of future harm. Madison-Kipp's use of in-situ chemical oxidation ("ISCO") successfully reduced VOC concentrations in soils and its SVE has effectively removed substantial quantities of VOCs from soil and groundwater. (M-KPFOF ¶¶ 314-321; 330-344; 497; 509; 511-513; 582.) Also, Madison-Kipp's choice of ISCO to treat PCE

[7] Madison-Kipp intends to separately move to exclude the testimony of Plaintiffs' experts, Drs. Everett and Ozonoff, but even if their testimony were accepted, their opinions fail to establish that there is a near-term threat of a serious-harm.

and other VOCs in groundwater is proper as ISCO is a proven technology that is much more efficient and effective than groundwater extraction and treatment. (*See id.*, ¶¶ 509; 512.) Thus, the ongoing remedial actions at the site, including SVE, in-situ treatment, ISCO and natural attenuation will continue to reduce dissolved-phase VOC concentrations. (*Id.*, ¶ 513.) The result: not only is there no current imminent and substantial endangerment to health or the environment, but there is not even the possibility of a future threat.

Although Plaintiffs' RCRA claim focuses on the contamination's impact on health and the environment through soil vapor, as has been noted, there is no threatened or potential near-term serious harm from contamination in soil, shallow groundwater or deep groundwater either. The extent of contamination in soil, soil vapor and shallow groundwater has been defined, is limited and appropriate remediation is underway to remove any such contamination. (M-KPFOF ¶¶ 493; 495; 498; 500-501; 503-505; 516.) The threat from any deep groundwater contamination is also neither present nor ongoing.

First, the groundwater under the site and extending to the Class Members' properties is not used. (M-KPFOF ¶¶ 506-507; 517.) Also, there has not been any PCE detected in the City of Madison Unit Well 8, which is the closest water supply well to the site. (*Id.*, ¶ 519.) Nonetheless, even if PCE were detected tomorrow in Unit Well 8, that detection would provide at least several years before actionable levels would be present in the well. (*Id.*, ¶¶ 522-523.) Moreover, taking the fact that Unit Well 8 is used only seasonally and that it has a protective casing and annular seal and natural barriers along with the routine monitoring conducted by the City of Madison for contamination from any source, not just Madison-Kipp, makes any threat from deep groundwater contamination too remote and speculative to satisfy the imminent and substantial endangerment standard. (*See id.*, ¶¶ 520-523.)

In the end, the undisputed evidence in the record overwhelming favors granting Madison-Kipp summary judgment on Plaintiffs' RCRA claim. Not only are the concentration levels of VOCs present at the Class Members' properties well below conservative regulatory agency screening levels and those minimal levels of VOCs being remediated in both the shallow groundwater and in the sub-slabs, but the fact of the matter is that the specific, existing levels of contaminants detected at the properties, if any, are well below concentrations associated with any risks of adverse health effects. The only reasonable conclusion to draw from these facts is that any existing contamination does not present even a potential near-term threat of serious harm to the Class Members or the environment. Because the undisputed evidence in the record establishes that Madison-Kipp's disposal and handling of chemicals does not even threaten to present an imminent and substantial endangerment to health or the environment, Madison-Kipp's summary judgment motion should be granted.

III. MADISON-KIPP IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' STATE LAW CLAIMS.

A. Negligence

Under Wisconsin common law, "to establish a negligence claim, a plaintiff must prove: (1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the injury." *Dyer v. Blackhawk Leather LLC*, 2008 WI App 128, ¶ 18, 313 Wis. 2d 803, 758 N.W.2d 167; *see also Walker v. Covance Clinical Research Unit Inc.*, No. 08-cv-493-slc, 2008 U.S. Dist. LEXIS 80136, at *4 (W.D. Wis. Sept. 26, 2008).

"Duty is a question of law, and in Wisconsin 'everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.'" *Tilot*

Oil, LLC, 2012 U.S. Dist. LEXIS 5365, at *49 (quoting *Tesar v. Anderson*, 2010 WI App 116, ¶ 5 n.8, ¶ 6, 329 Wis. 2d 240, 789 N.W.2d 351). The Wisconsin Supreme Court has explained how to properly analyze duty in a negligence case:

> [T]he essence of that duty is not to do, or refrain from doing, a particular act, but rather to act in a particular way – to exercise reasonable care – whenever it is foreseeable that one's conduct may cause harm to another. Thus within the framework of a negligence case the particular conduct of a defendant is not examined in terms of whether or not there is a duty to do a specific act, but rather whether the conduct satisfied the duty placed upon individuals to exercise that degree of care as would be exercised by a reasonable person under the circumstances.

Walker v. Bignell, 100 Wis. 2d 256, 263, 301 N.W.2d 447 (1981). Thus, "[d]uty and breach are best understood in the context of the applicable standard of care. Potential tortfeasors must 'conform to a certain standard of conduct to protect others against unreasonable risks.'" *Lees v. Carthage College*, No. 10-C-86, 2011 U.S. Dist. LEXIS 98368, at *8 (E.D. Wis. Aug. 29, 2011) (quoting *Tesar*, 2010 WI App 116, ¶ 5).

Plaintiffs carry the burden of establishing the applicable standard of care. *Carney-Hayes v. Northwest Wis. Home Care, Inc.*, 2005 WI 118, ¶ 37, 284 Wis. 2d 56, 699 N.W.2d 524. Expert testimony is needed to establish the standard of care on "'those matters involving special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study or experience.'" *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶ 43 n.22, 300 Wis. 2d 1, 728 N.W.2d 693 (quoting *Payne v. Milwaukee Sanitarium Found., Inc.*, 81 Wis. 2d 264, 276, 260 N.W.2d 386 (1977)). Whether expert opinion is required on a certain question is a question of law. *See, e.g., Kinnick v. Schierl, Inc.*, 197 Wis. 2d 855, 862, 541 N.W.2d 803 (Ct. App. 1995) (expert testimony required to prove contaminants migrated from one property to another). "When expert testimony is required and is lacking, the evidence is insufficient to support a claim." *Id.*

With respect to damages, even where damages may be difficult to prove "the burden rests on the [plaintiff] to prove by credible evidence to a reasonable certainty that damages were suffered and to establish at least to a reasonable probability the amount of these damages." *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977). "Neither a court nor a jury as the trier of the facts can determine damages by speculation or guess work." *De Sombre v. Bickel*, 18 Wis. 2d 390, 398, 118 N.W.2d 868 (1963). Thus, to establish the amount of damages with enough certainty to survive summary judgment, Plaintiffs needs to show that a reasonable jury could award them damages in an amount that is supported by the evidence. *See AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶ 19 n.8, 308 Wis. 2d 258, 746 N.W.2d 447.

Plaintiffs allege that Madison-Kipp has acted negligently by breaching (1) a duty to warn of vapor intrusion; (2) a duty to prevent the impact of hazardous substances on Plaintiffs' properties; and (3) a duty to investigate and remediate the release of hazardous substances. (*See* Amend. Complt., dkt. #15, ¶¶ 38 – 40.) Plaintiffs' negligence claim must be dismissed because there is no evidence from which a reasonable jury could find that Madison-Kipp breached any of the above duties or even if there was some breach, that Plaintiffs suffered any actual amount of loss or damage as a result of the breach.

1. No breach of the duty to warn

Even accepting that Madison-Kipp would have a duty to warn neighbors of actual and potential vapor intrusion moving from Madison-Kipp's facility to their properties, there is not sufficient evidence in the record from which a reasonable jury could find that Madison-Kipp breached that duty. Plaintiffs' initial failure is the absence of evidence regarding the standard of care governing notification of actual or potential vapor intrusion.

First, Madison-Kipp regularly notified neighbors of its investigations, including shortly after it discovered soil vapor migrating off-site. (*See* M-KPFOF ¶¶ 106; 114-120; 128; 132; 245;

361.) It initially notified some Class Members in 2004 when it began sampling soil on their properties for vapor contamination. (*See* M-KPFOF ¶ 102.) There is also no evidence even suggesting that Madison-Kipp ever withheld information. Instead, Madison-Kipp worked with WDNR to investigate the contamination issues in accordance with WDNR's guidance, which included public notification when necessary. (M-KPFOF ¶¶ 14-101; 245; 248.) Moreover, the Class Members fail to provide any expert testimony or other facts to contradict evidence showing that Madison-Kipp acted as a reasonable company in its circumstances at the time would have acted in its notification of the Class Members regarding the vapor intrusion issues. Accordingly, Madison-Kipp is entitled to summary judgment on Plaintiffs' claim for negligent breach of the duty to warn.

2. No breach of the duty to prevent impact of hazardous wastes

In light of Plaintiffs' expert opinion, it appears that Plaintiffs are asserting that Madison-Kipp breached its duty to prevent chemicals from impacting Plaintiffs' properties by failing to exercise the proper standard of care in its handling, disposal and release of hazardous chemicals. However, as before, there is no evidence from which a reasonable jury could find that Madison-Kipp failed to exercise the degree of care as would be exercised by a reasonable company at the time and under the circumstances Madison-Kipp faced.

Madison-Kipp used PCE to clean metal parts before manufacturing and to clean grease and dust from die cast machines. (M-KPFOF ¶ 637.) Madison-Kipp employed the use of a PCE vapor degreaser that produced a vapor cloud to clean parts. (*Id.*, ¶¶ 638-639.) The vapor degreaser was vented to the outside of the building. (*Id.*, ¶¶ 650; 656.) When PCE was used to clean die cast machines, if PCE dropped to the floor it would be cleaned up using "oil-dri." (*Id.*, ¶ 646.) Additionally, there were no floor drains in the area of the die cast machines. (*Id.*, ¶ 660.)

PCE was stored in an above-ground storage tank located on a concrete pad. (*Id.*, ¶¶ 651;

653.) PCE was delivered by tanker truck, which used a hose system to fill the tank. (*Id.*, ¶ 655.) PCE was transferred from the tank to the degreaser by employees using pails wheeled on a metal cart to transfer them into the facility. (*Id.*, ¶ 652; 654)

As of 1956, all spilled waste liquids, including those containing PCE, were transferred into a container for removal from the site. (*Id.*, ¶¶ 646; 648.) No employees recall ever seeing such waste being thrown out on the ground. (*Id.*, ¶¶ 643-645.) Additionally, Madison-Kipp employees would recover used PCE from the degreasers and reuse the PCE. (*Id.*, ¶¶ 640-642.) According to the ASTM International Vapor Degreaser Handbooks governing vapor degreasers like those used by Madison-Kipp, the methods Madison-Kipp used to receive, store and handle PCE were consistent with industry standards and practices at the time. (*See id.*, ¶¶ 467-471; 484.) Indeed, the handbooks even suggested that a proper disposal of used chlorinated solvent waste, such as PCE, would be to pour the "sludge" on the ground. (*see id.*, ¶¶ 472-473.) Therefore, a reasonable company using PCE as Madison-Kipp did until the 1980's would have used the same degree of care Madison-Kipp did under the circumstances.

Madison-Kipp also previously used hydraulic oils containing PCBs, with its last recorded purchase of such oils having been in 1971. (*Id.*, ¶ 636.) The hydraulic oils were stored in above-ground storage tanks and the oils would have been delivered to the tanks via a tanker truck that would have used a hose to fill the tanks. (*Id.*, ¶ 647.) Any waste or spills would have been suctioned into an industrial vacuum and transferred to a container for removal offsite. (*Id.*, ¶ 648.)

Until the parking lots at Madison-Kipp's facility were paved in 1976 or 1977, spent oils that may have contained PCBs or PCE were periodically applied to the parking lot areas as a dust suppressant. (*Id.*, ¶¶ 661-662.) The spent oils were applied using an industrial vacuum. (*Id.*)

This use of spent oils was consistent with industry standards and the standard of care at the time. (*Id.*, ¶¶ 483; 663.) Also, the use of spent oils – which usually contained various contaminants, such as heavy metals, organic solvents, and PCBs – for dust control has been commonplace for decades throughout the United States. (*Id.*, ¶¶ 475-478; 481.) Indeed, Wisconsin was one of the states that used the largest quantities of waste oil on roads for dust suppression. (*Id.*, ¶¶ 479-480; 482.)

While Plaintiffs attempt to paint Madison-Kipp as acting far outside the standard of care, its expert fails to show what the proper standard of care would have been during the relevant time period. Madison-Kipp was not required to act to a level of perfection in its handling of PCE or PCBs. *See, e.g.*, *Schuster v. Altenberg*, 144 Wis. 2d 223, 245, 424 N.W.2d 159 (1988) ("Obviously we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances." (internal quote omitted)) and *Lees*, 2011 U.S. Dist. LEXIS 98368, at *12 ("Carthage cannot be held liable in tort simply because its security measures aren't the best they can possibly be or don't live up to the aspirational standard posited by Dr. Kennedy."). However, Plaintiffs proposed standard of care suggests as much.

Indeed, Plaintiffs' expert fails to cite examples of other similar companies in the industry acting in accordance with the standard of care it suggests or even any example of another company's handling of PCE during the relevant time frame. Instead, Plaintiffs' expert throws out various studies that had addressed the disposal of industrial chemicals generally and the possible contamination such disposal could cause. Studies authored well before the advent of the internet to allow the instantaneous transmission of information. In other words, Plaintiffs' expert

opines that failure to be on the cutting edge of environmental dangers regarding PCE and PCB, to read obscure articles or to be on top of the growing awareness about the effects chemical handling and disposal demonstrates a breach. Dr. Everett's failure to link the standard of care he proposes to the actual industry practices of reasonable companies at the relevant time makes his proposed standard of care inapplicable here.

Moreover, as Thomas Johnson noted, the literature to which Dr. Everett cites as that which would have provided Madison-Kipp with knowledge early on regarding the effects of chlorinated solvents, such as TCE, in groundwater in fact did not trigger any general recognition of the problem in the scientific, engineering, or regulatory community. (M-KPFOF ¶¶ 524-525.) The study received very little notice at the time and was not cited at all in the 1970s or 1980s literature regarding increasing concerns in the United States regarding solvents in groundwater. (*Id.*)

In the end, Madison-Kipp exercised the proper standard of care in its handling, disposal and release of chemicals. There is no evidence from which a jury could find that Madison-Kipp failed to comply with the proper standard of care in its handling, disposal and release of PCE and PCB during the relevant time period. Accordingly, Madison-Kipp should be granted summary judgment on Plaintiffs' claim that Madison-Kipp negligently breached its duty to prevent hazardous wastes from impacting Plaintiffs' properties.

3. No breach of the duty to investigate and remediate the release of hazardous substances.

Madison-Kipp's conduct in investigating contamination on and offsite at its Facility as well as its implementation of various remedial activities satisfies the duty placed upon it to exercise that degree of care as would be exercised by a reasonable company under similar circumstances. Since 1994, Madison-Kipp has maintained continuous communications and

interactions with WDNR throughout the site investigation process. (*See* M-KPFOF ¶¶ 14-135; 143; 238-253; 259; 261-266; 268-269; 271-284; 289-292; 295-299; 302; 305; 311; 314; 317; 320; 322; 326; 329-330; 334; 340.) These communications and interactions included preparation and submission of required reports of site investigation and remediation activities, routine status reports and regular meetings, correspondence, and telephone communications with the WDNR project manager and other agency representatives. (*Id.*) As WDNR correctly noted, Madison-Kipp's investigations and remedial actions since 1994 were "appropriate and adequate" at the time they were conducted. (*Id.*, ¶ 487.) Thus, Madison-Kipp has not breached its duty to investigate and remediate as its conduct has been consistent with the standard of care for potentially responsible parties in environmental cleanup matters. (*Id.*, ¶¶ 485-493; 498; 500-501; 510.)

Plaintiffs' expert's opinion that Madison-Kipp has failed to comply with the applicable standard of care is wrong and unsupported by any evidence. As before, Dr. Everett sets out an aspirational or perfect standard of care which is not applicable here. For example, Dr. Everett suggests that Madison-Kipp should have begun investigating possible vapor intrusion right away in the early 1990s. However, even the 2003 paper Dr. Everett cites in support of his opinion states that vapor intrusion had not been considered to be a pathway of significant concern until around when the paper was written and that the science of vapor intrusion was still in its infancy in 2003. (M-KPFOF ¶ 584.) Also, there was no regulatory guidance available from the EPA or WDNR in the 1990's. (*Id.*, ¶¶ 95; 489; 532; 553; 583.) Indeed, in a paper Dr. Everett published in 2011 he recognized that investigation of vapor intrusion pathways was a relatively new phenomenon. (*Id.*, ¶ 585.) Thus, to suggest that the standard of care required Madison-Kipp to investigate vapor intrusion before 2004, when WDNR requested such investigation, lacks factual

support.

As Madison-Kipp continued its phased or step-wise investigation, technical knowledge evolved resulting in an increased awareness of the significance and impacts of contamination on and off-site. (*Id.*, ¶ 486; 488-489.) Madison-Kipp responded appropriately as its awareness increased, such as conducting soil vapor sampling and sub-slab and indoor air sampling when awareness of those issues was raised. (*See id.*, ¶¶ 95; 100-102; 128-130; 488.) To suggest that the proper standard of care would require Madison-Kipp to have been aware of investigative or remedial concepts that were not readily available until later in the process or ahead of WDNR's suggestion of the process (and any guidance related to the same) is legally incorrect and unsupported by the evidence.

Moreover, that Madison-Kipp sought to investigate other possible sources of contamination and keep costs reigned in or had disagreements with WDNR on work plans or technical interpretations does not establish a breach of the proper standard of care. Instead, the process between WDNR and Madison-Kipp, or any party responsible for investigation and remediation of a site, is necessarily an interactive and collaborative process that involves the submittal of work plans and reports by Madison-Kipp and review and approval of those plans and reports by WDNR. (M-KPFOF ¶ 531.) Thus, disagreements and differences in opinion will arise, searches for more cost effective methods of remediation will appear as will searches for other possible sources of contamination and none of those actions put Madison-Kipp in breach of the standard of care for investigation and remediation.

Finally, Dr. Everett's suggested remediation program for soil, soil vapor and groundwater is not supported by the facts or data. In light of the WDNR's sampling data for the homes, no further remediation or mitigation is required to address off-site VOCs. (M-KPFOF ¶¶ 493-495;

500-505; 516; 562-567.) Also, ISCO is properly remediating any groundwater contamination. (*Id.*, ¶¶ 341-342; 511-513.) Accordingly, Madison-Kipp is entitled to summary judgment on Plaintiffs' claim for negligent breach of the duty to investigate and remediate.

4. Plaintiffs cannot show that a reasonable jury could award them damages in an amount that is supported by the evidence.

As this Court noted, each Class Member must prove his or her damages individually. (*See* dkt. #76, at 4 ("Questions related to whether defendant caused damages to particular class members, and the extent of those damages, will not be resolved on a classwide basis.").) However, Plaintiffs have no specific facts for each Class Member from which a reasonable jury could award each of them, individually, damages for any injury caused by a breach of one of the duties discussed *supra*. Because "actual loss or damage resulting from the injury" is a necessary element to Plaintiffs' negligence claims, failure to establish such damages entitles Madison-Kipp to summary judgment on those claims. *See Celotex Corp.*, 477 U.S. at 322.

Although each Class Member suggests that his or her property has lost all its value there is no admissible evidence to support this conclusory statement. Instead, the evidence in the record establishes that each home is still assessed as carrying a significant value. (*See* M-KPFOF ¶¶ 348-350; 355-356; 364-366; 369; 373-374; 386-387; 392; 396-397; 400; 403-404; 413-416; 418; 420; 422-423; 427-428; 432-433; 435-437; 439-440; 449-451; 457; 461; 463.) Indeed, various Class Members who refinanced their homes after learning of the alleged contamination or even while this lawsuit was pending were still able to obtain refinancing and assessments establishing that their homes still have significant value. (*Id.*, ¶¶ 353; 361-362; 377; 408; 420-421.) Also, various Class Members admitted that they had done nothing to determine the current value of their properties or to determine the effect, if any, alleged vapor intrusion would have on the value. (*Id.*, ¶¶ 358; 368; 372; 378; 384; 395; 399; 401-402; 412; 426; 430-

431; 456.) Moreover, several Class Members who rent their homes out have maintained tenants at fair rental values, even those tenants who signed leases after the commencement of this lawsuit. (*Id.*, ¶¶ 405-406; 409-411; 441-446; 459-460; 465-466.)

As noted, it is each Class Member's individual burden to establish that he or she has suffered actual loss or damage from an injury caused by an alleged breach of one of the duties already discussed. Now, at summary judgment, each Class Member must come forward with evidence of such loss or damage. *Eberts v. Goderstad*, 569 F.3d 757, 766-67 (7th Cir. 2009) ("As we have said many times before, a motion for summary judgment requires the responding party to come forward with the evidence that it has--it is the 'put up or shut up' moment in a lawsuit." (internal quotation omitted)). Because there is no such evidence, Madison-Kipp is entitled to summary judgment on all Plaintiffs' negligence claims.[8]

B. Private Nuisance

To establish a claim for private nuisance, a plaintiff must show the defendant's "conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent [ ] conduct." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 32, 277 Wis. 2d 635, 691 N.W.2d 658 (quoting Restatement (Second) of Torts § 822)). There is no evidence, or even allegations, that any invasion of Plaintiffs' interest in the private use and enjoyment of land was intentional. Accordingly, Plaintiffs are left with a private nuisance claim based on negligent conduct.

"[I]n order to prevail on a claim of nuisance based on negligence, the plaintiff must prove

[8] Because, as discussed *infra*, both Plaintiffs' private nuisance and trespass claims are based on negligence, failure to provide specific facts from which a reasonable jury could find that each Class Member suffered actual loss or damage entitles Madison-Kipp to summary judgment on those claims as well.

the following elements: 1) The existence of a private nuisance—the interference with another's interest in the private use and enjoyment of land; 2) The defendant's conduct is the legal cause of the private nuisance; and 3) The defendant's conduct is otherwise actionable under the rules governing liability for negligent conduct, including notice." *Id.*, ¶ 63. In determining the existence of a private nuisance the Wisconsin courts have followed the Restatement which states that "[t]here is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Krueger v. Mitchell*, 112 Wis. 2d 88, 106, 332 N.W.2d 733 (1983) (quoting Restatement (Second) of Torts § 821F). In the comments elaborating on significant nature of the harm the Restatement states:

> c. Significant harm. By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance . . . Likewise in the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action.
>
> d. Hypersensitive persons or property. When an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion. When, however, it involves only personal discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant. The standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant. If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him. Rights and privileges as to the use and enjoyment of land are based on the general standards of normal persons in the community and not on the standards of the individuals who happen to be there at the time.

Id. at 107 (quoting Restatement (Second) of Torts § 821F cmts. c & d).

Plaintiffs have failed to establish that they each suffered a significant harm as a result of

Madison-Kipp's contamination. Most of the Class Members merely parrot that they have suffered the loss of use and enjoyment of their property without providing any specific harm. (*See* M-KPFOF ¶ 345.) Indeed, some of the Class Members continue to use their homes the same as before learning of the contamination. (*Id.*, ¶¶ 351; 357.) Others also continue to obtain a fair and reasonable rental value for use of the property. (*Id.*, ¶¶ 409; 444-445; 459-460; 466.) Thus, these Class Members have failed to offer evidence from which a reasonable jury could find that they suffered a significant harm from any alleged contamination.

For those Class Members who provided more specifics regarding their changed use of their properties, those harms fall under the hypersensitive persons comment cited above. More specifically, although under the WDNR and EPA standards it is safe for class members to continue using their properties, including their yards and basements, same as they did before, some class members have chosen to change their use of their properties because of their specific idiosyncrasies or feelings. (*See, e.g., id.*, ¶ 258 (On February 7, 2012, WDNR noted that it was safe to come in contact with contaminated soil in Class Members' backyards.) and ¶ 388 (Class Member Bernhardt's statement that her personal preference was not to come in contact with the soil in her backyard.) and ¶ 363 (Class Member Berg's statement that he stopped gardening because he feels that it is unsafe.); *see also* ¶¶ 354; 370; 379; 382-383; 389; 398; 417.) Simply put, because normal persons living near Madison-Kipp would not be substantially annoyed or disturbed by minor contamination (which has been or is being remediated), the invasion is not a significant one, even though the idiosyncrasies of the particular Class Members make the invasion unendurable for themselves.

Finally, because Madison-Kipp is entitled to summary judgment on Plaintiffs' negligence claims (as discussed *supra*), Madison-Kipp is also entitled to summary judgment on Plaintiffs'

private nuisance claim. *See Milwaukee Metro. Sewerage Dist.*, 277 Wis. 2d 635, ¶ 44 ("Where an alleged nuisance is not based upon intentional conduct, it necessarily follows that if there was no negligence there was no nuisance." (internal quotation omitted)).

C. Trespass

A trespass "may be either an intentional intrusion or an unintentional intrusion resulting from reckless or negligent conduct or from an abnormally dangerous activity." *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 677, 476 N.W.2d 593 (Ct. App. 1991) (citing Restatement (Second) of Torts §§ 158 & 165). As with Plaintiffs' private nuisance claim, there is no evidence, or even allegations, that Madison-Kipp engaged in an intentional intrusion of Plaintiffs' land. Neither is there evidence or allegations that the intrusion was the result of an abnormally dangerous activity. Accordingly, Plaintiffs are left with an unintentional trespass claim based on negligent conduct.

In following the Restatement, to establish an unintentional trespass Plaintiffs must establish the following:

> One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protect interest.

164 Wis. 2d at 677 (citing Restatement (Second) Torts § 165). Plaintiffs must establish that the vapor intrusion on their properties causes harm to them. As with Plaintiffs' private nuisance claim, there is no evidence from which a reasonable jury could find such a harm. Moreover, Plaintiffs carry the burden of establishing that the vapor intrusion is the result of Madison-Kipp's negligence. However, as already explained, Plaintiffs' negligence claims fail. Accordingly, Madison-Kipp is entitled to summary judgment on Plaintiffs' trespass claim.

D. Willful and Wanton Misconduct

Plaintiffs assert a claim against Madison-Kipp for its allegedly having "acted in a willful and wanton manner and in reckless indifference to Plaintiffs' and the Class's health and property, and to the safety of the general public." (Am. Compl., dkt. #15, ¶ 53.) This is a claim seeking an award of punitive damages. The rub for Plaintiffs is that the common law standard of conduct governing the imposition of punitive damages has been superseded by Wis. Stat. § 895.85, which states:

> STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

Strenke v. Hogner, 2005 WI 25, ¶¶ 14-15, 279 Wis. 2d 52, 694 N.W.2d 296.

The relevant change is the legislature's replacement of the "wanton, willful and reckless" language with the term "intentional." *Id.*, ¶ 16. The Wisconsin Supreme Court recognized that "the legislature tried to make it harder to recover punitive damages by passing Wis. Stat. § 895.85(3). *Id.*, ¶ 22. Thus, "the legislature intended to require an increased level of consciousness and deliberateness at which the defendant must disregard the plaintiff's rights in order to be subject to punitive damages." *Id.*, ¶ 34. This increased level of consciousness requires "that the defendant act with a purpose to disregard the plaintiff's rights or be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded." *Id.*, ¶ 36.

There is simply no evidence that Madison-Kipp acted with the necessary purpose or substantial certainty about disregarding Plaintiffs' rights to find that Plaintiffs would be entitled to punitive damages. Because of the void of such evidence, Madison-Kipp is entitled to summary judgment on Plaintiffs' claim for punitive damages.

CONCLUSION

Based upon the foregoing, Madison-Kipp asks this Court to grant Madison-Kipp summary judgment on Plaintiffs' RCRA and common law claims and to grant Madison-Kipp's attorneys' fees.

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