

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

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

Plaintiffs,

-v-

Case No. 11-cv-724-bbc

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

Defendants.

**PLAINTIFFS' ADDITIONAL PROPOSED FINDINGS OF FACT THAT WARRANT
THE DENIAL OF SUMMARY JUDGMENT**

Plaintiffs, Kathleen McHugh and Deanna Schneider, by their undersigned attorneys, and pursuant to Federal Rule of Civil Procedure 56 and this Court's "Procedures To Be Followed On Motions For Summary Judgment," submit the following additional proposed findings of fact that warrant the denial of the summary judgment motion (Doc. 147) filed by Defendant Madison-Kipp Corporation ("MKC").

1. James Lenz, MKC's former 31-year employee (1980-2011) and Environmental Manager (1996-2006), and current litigation consultant, testified as follows concerning the company's historical attitude toward disposal of PCE:

- A. The attitude of the time. You just throw it wherever the closest place to throw it is.

- Q. Throw what?
A. Whatever you want to get rid of.
Q. Including PCE?
A. Yeah.
Q. That was the attitude at the time?
A. Yes.
Q. Is throw it wherever?
A. Yes. (Doc. 187, at pp. 8, 13-17, 72-73, 82-84)¹

* * * *

- Q. ... So the general knowledge around the plant was that operators of the vapor degreaser would scoop the spent PCE out of the bottom of the vapor degreaser and walk it outside a door and dump it on the ground outside the building, correct?
A. Correct.

* * * *

- Q. ... And this was, according to the general understanding around the plant, this was multiple operators of the vapor degreaser; perhaps 10 or 20, correct?
A. Correct.
Q. ... And, it was general understanding around the plant that this had gone on for some number of years, correct?
A. Correct. (Id. at p. 53)

* * * *

- A. Back then there were spills all the time and they (the spills) weren't worried about.
Q. When you say back then, when do you mean?
A. Early '80's. (Id. at p. 58)

2. Until 1989, MKC used the chlorinated degreasing solvent PCE at its Facility.

(Doc. 195, Exhibit 1 at p. 2)

3. The PCE was used inside a tank known as a "vapor degreaser." (Doc. 187 at pp. 37-38)

4. Parts to be cleaned, or "de-greased," were inserted into the vapor degreaser. At the base of the degreaser was a deep pan, like a "bathtub," which contained some 75-100 gallons of pure PCE. The PCE had been poured there by MKC maintenance personnel, who had carried

¹ Deposition testimony, expert reports, and other documents and materials, like Lenz's transcript, that have been previously filed in this case, and are thus available to the Court by the docket number assigned by the CM/ECF filing system, shall be referenced herein as "Doc. _ at _."

the PCE in buckets from a PCE storage tank, where the buckets were filled. (Doc. 187 at pp. 38-41)

5. MKC had two PCE storage tanks. Each had a capacity of 250 gallons, and was periodically re-filled from a PCE truck with a nozzle, similar to how a fuel company delivers fuel oil. (Doc. 87 at p. 43)

6. The PCE storage tanks each had been placed on concrete pads, but there was no secondary containment around either tank that might have contained spills or leaks. Any spill from one of the storage tanks would wash down a slope toward a grassy area. (Doc. 187 at p. 69)

7. When the vapor degreaser was operating, the PCE which had been poured into the pan was heated into a vapor, which would condense on the cold parts and then drip off, thereby cleaning the parts of any residual grease or oil. (Doc. 187 at p. 37)

8. The spent PCE which had dripped off the parts re-collected in the pan at the bottom of the degreaser; PCE in vapor form was vented to the outside of the plant, by means of a duct and fan at the top of the degreaser, which blew the vapors outside. (Doc. 187 at p. 38; Doc. 185 at pp. 13-14)

9. Over the years, after the degreasing process described above was completed, some 10-20 vapor degreaser operators would scoop spent PCE out of the bottom of the degreaser into buckets, and then dump it onto the ground outside the MKC plant. (Doc. 187 at pp. 46-53)

10. PCE which had been heated into a vapor as part of the degreasing process was intentionally vented out of the MKC plant's window. According to Lenz, who is an engineer, whenever that PCE vapor was vented to outdoor air that was below room temperature (72°) – a frequent circumstance in Madison, Wisconsin – the PCE vapor condensed, and fell to the ground below in the form of liquid. (Doc. 187 at pp. 38; 77-81)

11. Both Lenz and DNR Project Manager Schmoller have testified that, during the “1970’s or 1980’s,” a leak or spill from one of MKC’s 250-gallon PCE storage tanks occurred, and “ran down along ... the east side of the building.” (Doc. 187 at pp. 44; 66-69; Doc. 118 at pp. 280-281)

12. PCE was spilled when MKC maintenance workers turned on the spigots of the 250-gallon PCE storage tanks, in order to fill the 5-6 gallon buckets with the PCE that was to fill the bottom pan of the vapor degreaser as part of the degreasing operation described above. (Doc. 187 at pp. 66-68)

13. PCE was also spilled out of the buckets being carried by maintenance workers between the 250-gallon storage tanks and the vapor degreaser. (Doc. 187 at pp. 62-63)

14. MKC maintained a tank (“chemical tank”) inside its plant into which hydraulic oils, containing PCB’s, and other chemicals were dumped. (Doc. 187 at pp. 55-56; 71-75)

15. It is likely that this chemical tank also contained spent PCE. (Doc. 187 at pp. 56, 75)

16. These chemicals were then taken periodically out of the chemical tank and spread out onto plant property – on what was originally a gravel parking lot. This was done not only to settle dust, but also as a means to simply “get rid of” these chemicals. (Doc. 187 at pp. 74-75)

17. After the gravel parking lot was paved, MKC hired a septic truck operator (“Max”) to suction the chemicals out of the chemical tank into his truck about 20 feet away from the tank. During this operation, “there were spills all the time and they weren’t worried about.” (Doc. 187 at pp. 56-58)

18. According to Lenz, such PCE releases were “common practice” and “general knowledge” around the MKC plant. (Doc. 187 at pp. 48; 58-60, 70-71, 143-146, 151-153; Doc. 187 at pp. 13-19)

19. MKC no longer has any records related to PCE purchased and disposal. It has produced none in this case in response to Plaintiffs’ requests for them. (Doc. 195 at ¶ 43) Lenz “doubts” that such records still exist, surmising that they may have been destroyed by flooding between 2003 and 2005. (Doc. 187 at pp. 97-98)

20. Lenz recalls no effort by the company to search for records concerning how much PCE had been used or stored by MKC (Doc. 187 at pp. 97-98), nor any effort to determine how much PCE had been dumped onto the ground outside the plant. (Id. at pp. 53-55).

21. In a letter to MKC dated November 1, 2012, DNR stated that:

“the state has determined that chemicals originating from the manufacturing process at MKC, including (PCE), polychlorinated biphenyls (PCBs) and polyaromatic hydrocarbons (PAHs) have been released to the environment. These releases occurred, at a minimum, during the spreading of liquid waste for parking lot dust control and the dumping of free liquids on the ground as a general waste disposal practice (as former MKC employee Mr. Lenz states in his sworn deposition).”

(Doc. 195 at Ex. 2)

22. Also, Plaintiffs’ expert, Dr. Lorne Everett, after comprehensive examination of existing environmental test data, concludes that “... the PCE contamination in the deep groundwater (underneath the plant and Class Area) was caused by employees dumping PCE by buckets out of the door and by leakage from the PCE (250-gallon) above ground storage tanks...

(Doc. 188 at p. 48)

23. “The first PCE contamination discovered was a narrow strip of impacted soil along the building which is exactly where Mr. Lenz indicated that waste PCE was purposely dumped when employees serviced the vapor degreaser.” (Doc. 185 at p. 17)

24. Based upon his 40 years of work as an environmental scientist examining the behavior of companies, Plaintiffs’ expert, Dr. Everett has concluded that the “environmental persistence and toxicity of (PCE was) documented at least as early as the 1950’s,” and that MKC’s behavior concerning its disposal of PCE and other chemical violated applicable standards of care, specifically including:

containment and capture measures for vapor degreasers, so that spent PCE is re-captured for reuse, and not released to the environment

containment for PCE storage tanks, so that chemicals escaping the tanks are not released to the environment

prohibition of dumping and spilling PCE and other dangerous chemical wastes onto bare ground, for any reason, including to control dust or save money

disposal of spent PCE and other dangerous chemical wastes in an approved facility

(Doc. 185 at pp. 19-25)

25. According to Dr. Everett, these standards applied with particular force when, as in MKC’s case, there were people living in homes immediately next door. (Doc. 185 at p. 20)

26. As Dr. Everett testified: “(MKC) shouldn’t take hazardous waste – hazardous industrial chemicals and dump them right next to someone’s home. And I’m talking within a couple feet of someone’s yard. So what’s egregious about that is not just that (the chemicals) were dumped but they were dumped next to peoples’ yards where kids play.” (Doc. 188 at p. 78)

27. As Dr. Everett also observed: “(w)hat is particularly remarkable here is that, even when strict environmental protection statutes and regulations were enacted in the 1970’s and 1980’s, (MKC) nonetheless continued to spill and dump these chemicals.” (Doc. 185 at p. 20)

28. In July of 1994, DNR directed MKC to determine the “horizontal and vertical extent” of contamination and to clean it up. (Doc. 195 at Ex. 3)

29. On September 28, 2012, the State of Wisconsin, through its DOJ, sued MKC (Doc. 195 at Ex. 4).

30. DNR has alleged that MKC:

... on or before 1994 to present, failed to take those actions necessary to investigate and restore the environment or minimize the harmful effects to the environment caused by its discharge of industrial chemicals, and for an extended period of time failed to notify the DNR of its unauthorized discharge of polychlorinated biphenyls (PCBs) to the environment.

(Doc. 195 at Ex. 5)

31. In a 2012 letter from DNR to MKC, DNR stated:

“MKC has not been forthcoming in clearly articulating to (DNR) and the public a clear, comprehensive and timely path forward to resolve the environmental contamination issues on and off your property.”

(Doc. 195 at Ex. 6)

32. DNR’s Project Manager on this site (Michael Schmoller) testified in 2012:

Q. ... (I)s it fair to say... that there is a history at this site of Madison-Kipp delaying and dragging its feet on addressing potentially serious environmental problems... is the answer to my question yes?

A. Yes. (Doc. 117 at pp. 209-210)

* * * *

Q. Isn’t it true that today, today in 2012, the (DNR) and Madison-Kipp still do not know the horizontal and vertical extent of the groundwater contamination?

A. True. (Id. at pp. 64-65)

* * * *

A. That’s true. The – From 1994 to today, the investigative activities have not fully defined the extent of contamination.

Q. And there hasn't been anything approaching an adequate cleanup during that same period of time, true?

* * * *

Q. True?

A. Yeah. The remediation efforts to date have not fully addressed the contamination. (Doc. 118 at pp. 296-297)

33. MKC's former Environmental Manager Lenz, testified:

Q. ... Let me ask it this way. Mr. Lenz, isn't it true to say that you don't believe Madison-Kipp has adequately addressed the PCE contamination problem?

* * * *

A: I would say that that's probably true. (Doc. 187 at p. 237)

34. On July 18, 1994, DNR wrote to MKC concerning PCE contamination recently discovered by the agency. DNR's letter states that:

Recently detected PCE contamination in groundwater "contains concentrations of (PCE) which exceed the enforcement standard as listed in Wisconsin Administrative Code."

DNR has concluded "that the contamination is emanating from Madison Kipp property."

Wisconsin's "Hazardous Substance Spill Law" requires MKC "to determine the horizontal and vertical extent of contamination and clean up/properly dispose of the contaminants."

MKC's "legal responsibilities" are set forth in Wisconsin statutes and administrative rules, and include, *inter alia*, "tak(ing) the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands, or waters of the state."

DNR's letter also warned that:

"It is important that an investigation begins at your site as soon as possible. The longer contamination is left in the environment, the farther it can spread and the more difficult and costly it becomes to clean up."

(Doc. 195 at Ex. 3)

35. On October 18, 1994, three months after DNR's letter to MKC, the company's then-Environmental Manager, Jack Schroeder, wrote an internal memo to members of MKC's upper management, including company president, Tom Caldwell:

"Enclosed are the results of tests conducted by Dames & Moore (D&M, MKC's environmental consultant) regarding our groundwater contamination investigation."

"No obvious source (of the contamination) was found and the recommendation by D&M was to have a few soil samples gathered around the area by hand auger. This would be tested by pid detector in their office and would not be reportable to the DNR."

"I reminded D&M that our goal is to conduct just enough investigation to support the theory to the DNR that the source of contamination is from off-site so that our cost for investigation is held to a minimum."

(Doc. 195 at Ex. 7)

36. Lenz, who worked at MKC at the time this memo was prepared and who would himself become the company's Environmental Manager two years later, testified about MKC's "goal" to have its consultant conduct environmental testing so as to convince DNR that the contamination's source was not MKC:

Q. Well, would (this goal) have been acceptable when you were environmental manager (two years later, in 1996) ...?

A. Not if I'm signing my name to (the memo), no.

Q. You wouldn't sign your name to that, would you?

A. No.

Q. Okay. Why wouldn't you? That's not right, is it? That's not right to – to be doing that, is it?

* * * *

A. I agree it's not right.

(Doc. 187 at p. 134)

37. The communications between DNR and MKC since DNR's letter of July 18, 1994 shows DNR on multiple occasions advising MKC that its efforts to determine the extent of contamination, and to clean it up, were inadequate, or non-existent. These communications,

38. In a DNR letter to MKC dated June 30, 1999, DNR stated:

“To date, the vertical and horizontal degree and extent of groundwater contamination has not been determined at the site... Within (180) days you must have fully determined the full vertical and horizontal extent of groundwater contamination at the site.”

(Doc. 195 at Ex. 8)

39. In DNR’s November 7, 2000 letter to MKC, DNR stated:

“The monitoring well network which currently exists does not adequately monitor the solvent contaminant plume emanating from the Madison-Kipp site... Additional monitoring wells are necessary to determine the vertical extent of contamination... The horizontal extent of groundwater contamination has not been determined... Additional monitoring wells are necessary to determine the extent of contamination off-site.”

(Doc. 195 at Ex. 9)

40. In an internal DNR memo dated December 13, 2000, DNR stated that:

“... the extent of groundwater PCE contamination had not been defined nor had the groundwater flow direction been determined... There is also a potential for multiple groundwater flow within the bedrock aquifer and there is a municipal well with solvent contamination hits that could affect groundwater flow direction; neither of these issues (has) been addressed by Madison Kipp or (its) consultant Dames & Moore.”

Doc. 195 at Ex. 10)

41. In DNR’s September 28, 2006 letter to MKC, DNR stated that:

“Site investigations and remediation activities necessary to address the release of PCE at the Madison-Kipp site have not been moving in a timely manner... (DNR) considers the investigation and remediation activities and associated timeframes outlined in this letter as critical for compliance with (Wisconsin’s Hazardous Substance Spill Law) in addressing the release of PCE contamination from Madison-Kipp Corporation.”

(Doc. 195 at Ex. 11)

42. As Schmoller testified concerning this September 28, 2006 DNR letter:

Q: Isn't the State in 2006 telling Madison-Kipp essentially the same thing that it's been telling Madison-Kipp since 1994?

* * * *

A: Yeah. Again, the – the 2006 letter reiterates Kipp's requirement under (the Hazardous Substance Spill Law) to investigate and remediate the contamination problem.

(Doc. 118 at pp. 291-292)

43. DNR's Schmoller testified:

Q: Those wells which are going to be drilled in 2012 on company property are being drilled to determine, among other things, the horizontal and vertical extent of groundwater contamination, right?

A: Correct.

Q: They're being drilled 18 years after the State told Madison-Kipp to determine the horizontal and vertical extent of groundwater contamination, right?

A: Yes.

(Doc. 118 at p. 300)

44. As for MKC's behavior concerning its obligation since at least 1994 to investigate and clean-up, Schmoller testified:

Q. ... (I)s it fair to say... that there is a history at this site of Madison-Kipp delaying and dragging its feet on addressing potentially serious environmental problems... is the answer to my question yes?

A. Yes.

(Doc. 117 at pp. 209-210)

45. DOJ publicly described its suit against MKC as follows:

... has filed a lawsuit against Madison-Kipp Corporation (Madison-Kipp) alleging that it violated Wisconsin's hazardous substance spill law at its City of Madison facility. According to the civil complaint, filed at the request of the Wisconsin Department of Natural Resources (DNR), Madison-Kipp from on or before 1994 to present, failed to take those actions necessary to investigate and restore the environment or minimize the harmful effects to the

environment caused by its discharge of industrial chemicals, and for an extended period of time failed to notify the DNR of its unauthorized discharge of polychlorinated biphenyls (PCBs) to the environment.

(Doc. 195 at Ex. 5)

46. MKC repeatedly disagreed with DNR over the need to conduct comprehensive testing for vapor contamination throughout the immediately adjacent neighborhood (*i.e.*, what would become the Class Area), and appears to have approached the office of the Governor of the State of Wisconsin seeking assistance in resisting the testing. (Doc. 117 at pp. 163-164, 180-183)

47. When the testing was finally completed, the “sub slab” of virtually every home tested – some 47 in all, including for every Class Area home tested – was found to have PCE vapor contamination emanating from MKC’s site. (Doc. 195 at Ex. 12) Further, 21 homes had PCE vapors detected inside them in indoor air samples. (*Id.*)

48. Beginning in February of 2005, MKC began testing for, *inter alia*, PCE vapor contamination in the soil at the boundary between MKC’s site and Class Area homes. (Doc. 117 at pp. 185-190)

49. This testing continued until at least September of 2009. (Doc. 117 at pp. 185-190)

50. The PCE concentrations detected during this time period were, in many instances, well over 1,000 parts per billion by volume (ppbv). One was as high as 51,000 ppbv. (Doc. 195 at Ex. 13)

51. These concentrations were being detected, according to Schmoller, “in the backyards of those three residences which would put (the very high vapor contamination concentrations) within, you know, 20, 25 feet or so of the house, roughly.” (Doc. 117 at p. 187)

52. Based upon these test results, Schmoller concluded that it was necessary to begin testing underneath Class Area homes, *i.e.*, the “sub-slabs” of the homes, to determine if PCE vapor concentrations from MKC’s site were threatening to invade, or invading, the homes. (Doc. 117 at pp. 187-189)

53. In 2011, Schmoller asked MKC to test for vapor in the sub-slabs of additional Class Area homes. MKC resisted; it either did not want to do the testing at all, or did not want to do it as quickly as Schmoller wanted it to be done. (Doc. 117 at pp. 176-177)

54. MKC claimed that it had already determined the full geographical extent (*i.e.*, just four or five homes) of the vapor contamination in the neighborhood, and believed that there should be no more sub-slab testing. (Doc. 117 at pp. 177-178)

55. Schmoller disagreed. He believed more comprehensive testing to be warranted. (Doc. 117 at p. 177)

56. After encountering this resistance from MKC, Schmoller concluded that DNR should conduct the testing itself, as it needed to be done right away, in his judgment. (Doc. 117 at p. 178)

57. However, when Schmoller asked DNR’s upper management to fund the vapor testing, he began to encounter resistance. DNR’s Bureau Director, Mark Giesfeldt – at least two levels above Schmoller in the DNR hierarchy – repeatedly questioned why the residential vapor testing was necessary at all. “(T)here was a lot of why are you doing this. Why do you need this. It was always are you sure, are you sure...?” (Doc. 117 at p. 179-181)

58. It was about this same time – in September of 2011 – that a lawyer for MKC approached the Chief Counsel to the Governor of the State of Wisconsin, asking for the State to take legal action against MKC that would pre-empt or prevent neighboring families (who would

59. Schmoller testified that, in his 30 years with DNR, he has never heard of a DNR-regulated company asking the state to sue it, in order to block a citizens' suit. (Doc. 117 at pp. 150-151)

60. It was also about this same time that Schmoller was approached either by his immediate supervisor, Linda Hanefeld, or by Hanefeld's Supervisor, Giesfeldt, to advise Schmoller that MKC had approached the Governor's office, complaining about the environmental testing and investigation that Schmoller was requiring of MKC. (Doc. 117 at pp. 162-165)

61. The required testing at the time consisted significantly of off-site testing for vapor contaminants in the sub-slabs of neighboring homes. (Doc. 117 at pp. 163-166)

62. As Schmoller testified:

"I think there were issues raised at the Governor's Office about what we were asking them to do, how much we wanted them to do, you know, why isn't the site done, that sort of thing."

(Doc. 117 at pp. 163-164, 180-183)

63. In 30 years of working at DNR, Schmoller could recall no instance where a company went to the Governor's office complaining about Schmoller's decisions regarding investigation and clean-up of contamination. (Doc. 117 at pp. 168-170)

64. Shortly thereafter, in November of 2011, Schmoller offered to resign his position as Project Manager at the MKC site. In an e-mail to his supervisors, Schmoller explained that his frustration and disappointment had been caused by the lack of progress on the MKC Site investigation:

(F)or me, there is now a bad stress with the job. It comes from the lack of confidence in my methods and requirements shown by administration, the guys who (are) on our sidelines. This stress is the kind you take with you on the ride home at night, sits with you at night and stays with you on the ride to work the next morning. This is bad stress and the last thing I need is more bad stress... The disappointment in work progress at both Kipp (and another site) is real.

(Doc. 195 at Ex. 15)

65. In his deposition, Schmoller explained the message he intended to convey to his DNR supervisors when he offered to resign his responsibilities at the MKC site:

“Find somebody who’s more than happy to let somebody else control the site, because I hate that as a project manager. You can assign it to somebody who would be more than happy to let it dog along. If that’s what administration wants, fine.” (Doc. 117 at p. 180)

* * * *

This was at the time when we were talking a lot about off-site vapor issues, where to sample, who to sample, should (DNR) be out sampling. Towards the end of 2011 there was a lot of frustration on my part at the pace at which work was being done, and one of the tasks that I thought I needed to get done a lot faster than was getting done was sampling in sub-slabs of people’s homes for vapor. We had indications that we had off-site problems, and, you know, we are dealing with PCE, a carcinogen, and all that sort of thing. Things weren’t getting done. I didn’t think I was getting the support from the administration.

(Id. at 173-174)

66. Ultimately, Schmoller did not resign from the MKC Project Manager’s position, and vapor testing in residential sub-slabs was conducted. Testing throughout what would become the 33-home Class Area, and beyond, was conducted. Contamination was found in the sub-slabs of some 47 homes, including every Class Area home tested. (Doc. 195 at Ex. 12)

67. As Schmoller concluded from this testing:

“Those tests show elevated readings in almost all the sampled locations indicating a completed vapor migration pathway from the (MKC) property to most every adjacent residential lot (in the Class Area).”

(Doc. 195 at Ex. 16)

68. The principal environmental consultants working on MKC's contamination issues since 1994 – Robert Nauta (originally of Dames & Moore) and ARCADIS – were hired not by MKC, but by MKC's law firm, under contracts which provide that the consultants are performing “confidential services” for the law firm, working “solely for the purpose of assisting” the law firm. (Doc. 195 at Ex. 17 and 18)

69. Dames & Moore was hired in 1994, specifically, *inter alia*, “in anticipation of litigation” by “third parties (citizen suits).” (Doc. 195 at Ex. 17)

70. ARCADIS was hired in 2012, specifically, *inter alia*, to provide “defense of lawsuits” resulting from the contamination. (Doc. 195 at Ex. 18)

71. Confirming this contractual arrangement, ARCADIS' Project Manager on the MKC Site (Jennine Trask) agreed in her deposition that ARCADIS is helping MKC's lawyers “defend this lawsuit;” that, in her work as Project Manager, she is working “under the direction” of MKC's lawyers; and that, for example, before she communicates with DNR, she must first obtain the MKC lawyers' “approval.” (Doc. 190 at pp. 70; 90-91)

72. MKC and its lawyers have repeatedly asserted in this case that the work of Dames & Moore, Nauta and ARCADIS is “counsel directed.” Citing the 1994 Dames & Moore contract and the 2012 ARCADIS contract, MKC and its lawyers have withheld from production on claims of work product or attorney-client privilege some 3,000 documents responsive to Plaintiffs' request for environmental documents, including more than 2,400 documents created or received by ARCADIS and its sub-contractors since ARCADIS was hired 13 months ago. (Doc. 195 at Ex. 19 and 20)

73. As “counsel-directed” consultants for MKC’s lawyers, ARCADIS has not performed some of the basic tasks of environmental investigation. For example, as Project Manager Trask acknowledged in her deposition, ARCADIS:

never attempted to interview operational employees, or consult operational documents, to determine how chemicals were used or disposed;

never calculated the amount of PCE used or disposed by MKC, even though it is possible to do so;

has not determined the extent of groundwater contamination, or of vapor contamination; and

has not determined all of the sources of on-site PCE soil and groundwater contamination.

(Doc. 190 at pp. 101-102; 120-121; 140; 160)

74. Plaintiffs’ expert, Dr. Everett, has opined that the manner in which ARCADIS is being used is a violation of applicable standards of environmental investigation, stating that ARCADIS “is engaging in advocacy at the expense of good science.” (Doc. 185 at pp. 35-37)

75. Plaintiffs’ expert Dr. Everett has opined that a variety of legal and environmental authority – including Wisconsin “Hazardous Substance Spill Law,” enacted in 1977 – required MKC to do as it had been instructed in 1994 by DNR, *i.e.*, “determine the horizontal and vertical extent of contamination and clean-up/properly dispose of the contaminants,” and to “do so as soon as possible,” to prevent the “spread” of the contamination. (Doc. 185 at p. 25)

76. However, as Dr. Everett opines, MKC violated those standards of care, as follows:

Madison-Kipp not only has failed to investigate the extent of the contamination, but, to the contrary it has spent the years since the chemical discharges (1) ignoring the problem altogether; (2) trying to blame someone else for it; (3) invoking its political ties to support the company’s desire to do as little as possible; and (4) portraying the problem as one that is not as serious as it really is. Also, and not surprisingly given its attitude toward

competent and timely investigation, Madison-Kipp has yet to determine (let alone implement) a comprehensive remedy for their contamination, which continues to spread... The unfortunate, but predictable, result of this behavior is that the contamination has been allowed to spread unchecked over the decades since discharge, and has infiltrated the properties of Madison-Kipp's neighbors in the immediately adjacent Class Area and beyond.

(Doc. 185 at pp. 25-40)

77. On November 1, 2012, DNR wrote to MKC, advising that it was the source of soil contamination in Class Area yards, which posed health threats to the families living there:

(T)he state has determined that chemicals originating from the manufacturing processes at MKC, including tetrachloroethene (PCE), polychlorinated biphenyls (PCB) and polyaromatic hydrocarbons (PAHs) have been released to the environment... These releases have led to site-related contaminants migrating off-site to the backyard soils of properties adjoining the MKC property.

There are detectable concentrations of PCE, PCBs and PAH compounds in some residential surface soils. Some of the detected compounds exceed the health-based direct contact health guidelines concentrations the state uses, meaning potentially unacceptable health risks exist for land owners at certain properties. The Department is particularly concerned about the off-site PAH direct contact exceedances and the VOC direct contact exceedance documented as part of MKC's investigative efforts.

Based on the currently known contamination extent and the past waste disposal practices, the PCE, PCB and PAH off-site soil contamination on the residences adjacent to the MKC property along South Marquette and Waubesa Streets is the responsibility of MKC.

(Doc. 195 at Ex. 2)

78. Environmental testing reveals the widespread presence on MKC's property of high concentrations of PCE, PCBs and PAHs. (Doc. 195 at Group Ex. 21)

79. Over the years, this contamination has spread, and continues to spread, into the immediately adjacent Class Area via "windblown dust, exhaust fallout and by sediment transport during rain and flooding events... (and also via direct discharge) from Madison Kipp's vents and stacks..." (Doc. 185 at p. 12).

80. This migration has been confirmed through DNR's testing during the last six months of 31 Class Area homes for the presence of VOCs, PCBs and PAHs. These are the results of that testing:

VOCs: detected in the soils at 22 of the Class Area homes tested.

PCBs: detected in the soils at 23 of the Class Area homes tested.

PAHs: detected in the soils of all 31 Class Area homes tested.

(Doc. 195 at Ex. 22, 23, and 24)

81. The groundwater aquifer which underlies the MKC Site also underlies every Class Area home. The aquifer is shallow – it begins just 10 feet below the basements of Class Area homes. (Doc. 117 at p. 44)

82. At all depths (above and below 75 feet) this groundwater is highly contaminated with industrial chemicals – mostly “volatile organic compounds,” principal among them being PCE – originally spilled, dumped and leaked years earlier by MKC. (Doc. 193 at ¶ 3, Ex. A and B)

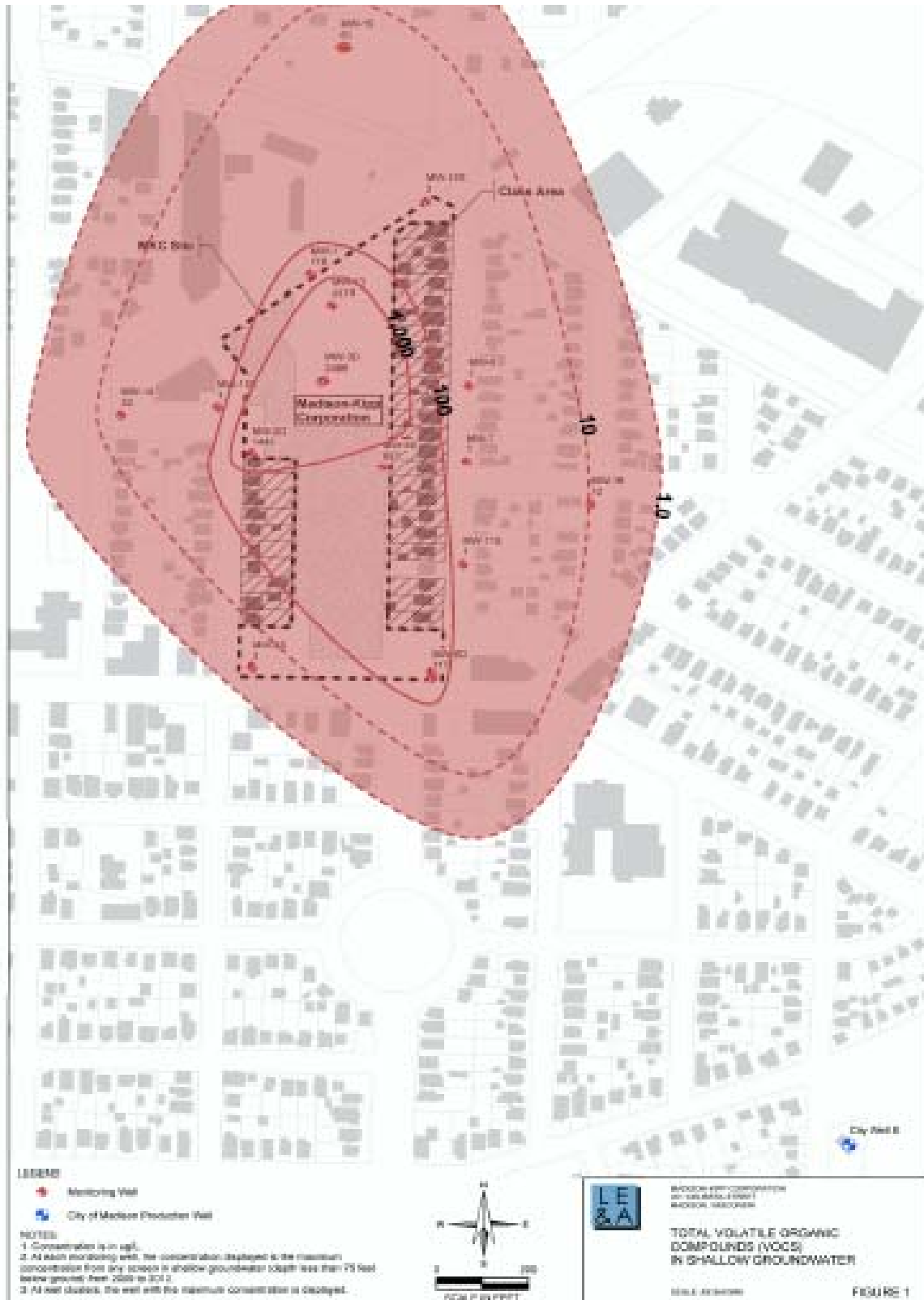
83. Dr. Everett explains how this contamination occurred:

The principal contaminant now invading the immediately adjacent Class Area, PCE, was first dumped and spilled on the Madison-Kipp property decades ago. ... As there was no clean-up of the PCE, it was allowed to migrate through the soil layers, ultimately contaminating at least two subsurface groundwater aquifers which transport contamination into the Class Area.

(Doc. 185 at p. 11)

84. The following are Dr. Everett's depictions, based upon all data made available to him by MKC, of the geographical extent (or “plume”) of the PCE contamination in both the area's deep groundwater (Doc. 193 at Ex. A) and shallow groundwater (Doc. 193 at Ex. B). As





85. This extensive groundwater contamination was confirmed by sampling conducted and reported in the last 3 months on MKC's site and off-site in every direction. The sampling revealed very high levels of MKC's primary degreasing solvent, PCE, and its daughter products, trichloroethene ("TCE"), cis-1, 2 – dichloroethene ("DCE"), and vinyl chloride ("VC"), as well as high levels of PCB's. (Doc. 188 at Exs. 2(a) and (g-k))

86. At MW-13, located on the north end of the MKC property adjacent to a local community center, the groundwater was tested to a depth of almost 170 feet. According to an Arcadis report dated October 31, 2012, PCE contamination was discovered at every single depth tested, and at levels as high as 9,400 parts per billion ("ppb"). (Doc. 188 at Ex. 2(g))

87. By way of comparison, the maximum contaminant level allowable (MCL) for PCE under the Federal Safe Drinking Water Act is 5 ppb (Doc. 195 at Ex. 25 at p. 2), meaning the levels just discovered on the MKC property are almost 2000 times higher than the federal MCL. The maximum contaminant level goal (MCLG) for PCE, which is the level considered safe from a human health perspective, is zero. (Id. at p. 1)

88. MW-13 was not drilled until 2012 – 12 years after DNR told MKC to test for groundwater contamination on the northern portion of its site. (Doc. 195 at Ex. 9)

89. Another well, MW-15 is located off-site to the north of the MKC property on the north side of the community center. Results from sampling of that well, reported December 18, 2012, again revealed PCE contamination from MKC at every depth tested, and as high as 3,600 ppb, 720 times the federal MCL. (Doc. 188 at Ex. 2(i)).

90. Results from sampling of well MW-16, reported December 19, 2012, also showed contamination at every level tested, and revealed levels of PCE as high as 430 ppb, 86 times the

91. Results from MW-14, also one block further away from the MKC Site than the Class Area, but to the west, reported December 19, 2012, showed PCE contamination at every level, and showed levels of PCE as high as 780 ppb, 156 times the federal MCL. (Doc. 188 at Ex. 2(j)).

92. Results from MW-17, reported December 18, 2012, showed PCE contamination at every level tested, with levels of PCE as high as 1,700 ppb, 340 times the MCL. (Doc. 188 at Ex. 2(h))

93. MW-17 is located south of the MKC site, along Atwood Avenue. It is approximately 1000 feet from the City of Madison Water Supply Well No. 8. (Doc. 193 at Ex. A)

94. Recent groundwater and soil sampling on the MKC property has revealed that VOCs, PAHs and PCBs are present in groundwater and soils in excess of regulatory levels. (Doc. 195 at Ex. 26 at p. 11)

95. As Dr. Everett has opined in his report and in his deposition testimony, PCE levels this high indicate the presence of PCE in its purest form, referred to as "DNAPL" (which stands for dense non-aqueous phase liquid). PCE in this form is much heavier than water. Therefore, it sinks, and settles, and very slowly releases its toxic molecules into the groundwater. It will do so until it is located and removed. (Doc. 185 at pp. 38, 47; Doc. 188 at pp. 27-28).

96. Dr. Everett has testified that PCE DNAPL is in the bedrock groundwater on the MKC Site. It is also in the bedrock off the MKC site (e.g. to the north, near MW-13 and the local community center). MKC has, to date, done no DNAPL investigation to identify the other

97. Nor, according to its own environmental consultant (ARCADIS), has MKC developed an approved plan to clean up the groundwater. (Doc. 190 at p. 156)

98. DNR's Schmoller believes that, even after a remedial option is selected for groundwater clean-up – and none had even been proposed as of the date of his deposition in the fall of 2012 – the contamination of the groundwater will not be remediated to acceptable levels for at least 20 years. (Doc. 117 at pp. 45, 50-51)

99. The City of Madison relies on groundwater for its domestic water supply. Among Madison's public water supply wells is Well No. 8. This well is located approximately 1000 feet south of the MKC site. (Doc. 188 at pp. 28-29)

100. According to the Madison Water Utility Wellhead Protection Plan dated March, 2011, the MKC site is within the zone of influence of Well No. 8, meaning Well No. 8 pulls the groundwater it distributes to the population of Madison from the area of the MKC site. (Doc. 185 at p. 42; Doc. 188 at pp. 18-29, 37, 41-42, 129-130 and Ex. 2(c))

101. As of March, 2011, almost 2 years before the high concentrations of off-site groundwater contamination above was revealed, the Wellhead Protection Plan for Well No. 8 categorized MKC's Estimated Threat To Supply Well as "High." (Doc. 188 at Ex. 2(c) at spreadsheet page)

102. City Well No. 8 draws water from the MKC site. Water level transducers were placed in a monitoring well on the MKC site (MW-5) and measurements were taken in that well while City Well No. 8 was turned on and off. The results of that test proved conclusively that

103. DCE, one of the daughter products of PCE which is on the MKC site, has already been detected in Well No. 8. (Doc. 188 at p. 37) Well No. 8 was taken out of service by the City in September, 2012 for this reason, among others. (Doc. 188 at p. 42)

104. Testing in 2011 and 2012 underneath and inside the homes in the Class Area (and beyond) revealed the extensive presence of PCE vapors. (Doc. 195 at Ex. 12)

105. Dr. Everett explained how this vapor contamination was caused by MKC:

(B)ecause the toxic chemicals in the groundwater evaporate (called “volatilization”), they move upward in a gaseous state through the soil and into the air above it. Some of the PCE now being found in vapor under neighborhood homes migrates laterally through the soil from the highly contaminated soil on Madison-Kipp property and some migrates vertically from underlying VOC-contaminated groundwater. This soil vapor contamination can seep through cracks and utility penetrations in floors and basements, resulting in the introduction of contaminated air into homes.

(Doc. 185, at p.12)

106. DNR’s Schmoller confirmed that the vapor contamination detected throughout the Class Area had migrated there from the MKC Site:

Those tests show elevated readings in almost all the sampled locations indicating a completed vapor migration pathway from the (MKC) property to most every adjacent residential lot (in the Class Area).

(Doc. 195 at Ex. 16)

107. Schmoller also confirmed that this vapor contamination is dangerous to Class Area families, particularly when its risks are viewed in combination with the risks posed by the soil contamination in their yards:

Chlorinated vapor contamination caused by contaminant releases from past operations at Madison-Kipp have introduced a probable carcinogen (PCE) into the breathing space of up to 47 homes adjacent to and near the Kipp

facility. None of the detected concentrations exceed current sub-slab or indoor air Department guidance criteria. However, 26 of the vapor impacted homes also have detectable concentrations of one or more (of) the site related soil contaminants making for multiple exposure pathways.

(Doc. 195 at Ex. 12)

108. Because the sub-slab samples demonstrate a complete migration pathway from the MKC site, which is highly contaminated with these dangerous chemicals, and because MKC has yet to fully identify or clean up the sources of these chemicals, DNR has offered sub-slab mitigation systems to every home in the Class Area where sub-slab vapors – at any level at all – have been detected, to prevent the vapors from invading the homes where families, including families with young children, spend the bulk of their days. (Doc. 118 at p. 235)

109. Most of the 33 homes have had, or will have, such systems installed. (Doc. 195 at Ex. 27)

110. Dr. Everett has opined that vapor measurements for volatile compounds like PCE are “highly variable meaning they can (and do) go up and down dramatically...” As he explained, “concentrations under the home will vary temporally, just as the weather changes dramatically from one season to another and even one day to another.” The vapors found under (and in some cases inside) Class Area homes prove the completed pathway or “route” from the MKC site to the homes, and the fact that high concentrations of PCE and other VOCs have been found on site “indicates that Class Members will continue to be exposed to and/or threatened by PCE vapors.²” (Doc. 185 at p. 45)

² MKC’s own project manager has admitted that she does not know how long the toxic vapors will continue to invade these properties. She does not know in what concentrations they will appear. (Doc. 190 at p. 172)

111. Dr. Everett has also opined that additional and significant investigation is required to determine the extent of vapor contamination and to identify the sources of the contamination. (Doc. 185 at pp. 53-55; Doc. 188 at pp. 99-100).

112. PCE, PCBs and PAHs are dangerous chemicals. They are considered to be human carcinogens, which disrupt and damage the functioning of human immune systems and organs, especially in children. (Doc. 195 at Ex. 28, 29, 30)

113. According to DNR, exposure to VOCs can cause an increased risk of adverse health effects and the levels of PCE found in the Class Area pose an increased cancer risk. (Doc. 195 at Ex. 1 and Ex. 31)

114. Similarly, Wisconsin's public health officials are "most concerned about low level chemical exposures over many years, as this may raise a person's lifetime risk for developing cancer." (Doc. 195 at Ex. 32, p. 1)

115. In November, 2012, DNR warned that the PCE, PCBs and PAHs detected in Class Area soils pose "potentially unacceptable health risks" for certain Class Area residents. (Doc. 195 at Ex. 2).

116. DNR's Schmoller also wrote to MKC in June, 2011 on this same subject, observing that, even though the detections of PCE in Class Area soils (at that time) "do not exceed current health based direct contact guidelines," nonetheless, "remediation and elimination of any level of direct contact risk is justified," because of "the exposure scenario of young children on very small residential lots." (Doc. 195 at Ex. 33)

117. Addressing the soil contamination in the Class Area, an official of the Wisconsin Department of Public Health warned Class members:

one family's two-year old son should not play in the dirt in the family yard, and instead should only play in a raised sandbox. (Doc. 119 at pp. 35-36)

the soil contamination may impact the vegetables grown in the family garden (causing the family to cease its gardening). (Doc. 126 at pp. 37–39)

one family should not eat the food grown in the family garden. (Doc. 191 at pp. 22-23)

118. According to DNR’s Schmoller, the levels of contamination in the aquifer underlying both the MKC Site and Class Area – in some instances by only 10 feet – have for at least 20 years violated Wisconsin State regulations (Doc. 117 at pp. 44, 51-53); they also exceed by hundreds of times, and in one case nearly 2,000 times, the federally “acceptable” level of contamination in groundwater. (Doc. 188 at Ex. 2(g); Doc. 195 at Ex. 25).

119. The groundwater contamination serves as a continuing source of vapor contamination for Class Area homes. (Doc. 185 at pp. 42-43)

120. Plaintiffs expert, Dr. Everett, has opined that this aquifer is “hugely compromised” and “severely damaged,” presenting an “imminent and substantial endangerment.” (Doc. 188 at pp. 90, 107)

121. The City of Madison has discontinued the use of its Well #8, fearing that contamination from MKC would reach the well. (Doc. 188 at p. 42)

122. According to Schmoller, it will be “a single digit number of decades” (at least 20 years) from the choice of a groundwater remedy (a choice not yet made) before the aquifer may be cleaned to acceptable levels. (Doc. 117 at pp. 47-51)

123. Schmoller concluded in 2012 that “contamination caused by contaminant releases from past operations at (MKC) have introduced a probable carcinogen (PCE) into the breathing space of up to 47 homes (including those in the Class Area).” (Doc. 195 at Ex. 16)

124. This prompted DNR in 2012 to fund, with taxpayer money, the installation of vapor mitigation systems designed to prevent contaminated vapors from entering Class Area homes. (Doc. 195 at Ex. 12 and 16).

125. Madison and Dane County Public Health official, John Hausbeck, concluded as follows on the Class Area families' need for these mitigation systems: "If I owned one of those (Class Area) homes, I would have a system in my house already." (Doc. 195 at Ex. 34, p. 1).

126. A Wisconsin public health official warned Class Representative Deanna Schneider that the "basement is the least safe" part of her house, recommending that the Schneider family "limit the time" it spends there. (Doc. 192 at pp. 14-15)

127. Plaintiffs' expert, Dr. David Ozonoff, an epidemiologist, physician and government researcher who has spent decades researching and reporting on, *inter alia*, the harmful health effect of PCE, opines regarding the Class Area vapor contamination that:

"exposures to PCE in the residential environment present a public health risk to Class Area residents" and that "there are reasonable and supportable scientific grounds for residents of the Class area to believe that the measured levels of PCE, TCE and VC contamination of their groundwater, soil, soil vapor and indoor air presents them with an excess risk of cancer, not balanced by any benefit and could be considered unacceptable by a reasonable person."

(Doc. 186 at pp. 2, 138)

128. Even MKC's Chairman, Reed Coleman, testified to the reasonableness of the Class Members' concerns for their health due to his company's vapor contamination in their neighborhood:

Q. Have you ever thought about whether you might think it was a serious problem if you lived in one of those homes immediately adjacent to your company?

A. I think it would be a logical thing for someone to think.

* * * *

Q. Do you have any reason to believe that it is not reasonable for (Class Representative) Deanna Schneider and her neighbors to want one of those systems affixed to their home?

A. I think they would want one and should want one and I believe in most cases either have them or are getting them.

Q. And do you believe it's reasonable for them to feel that way?

A. Yes.

(Doc. 189 at pp. 37, 39)

129. Schmoller testified that these mitigation systems are not enough; in order to protect Class Area families, MKC's property, which is the source of the vapor contamination, must be cleaned up:

Q. And you are concerned about how far into the residential area (the vapor contamination) may have spread, right?

A. You know, how far has it spread and also I was – my fear was that we didn't want to get into the decision making where we relied on mitigation alone, that we wanted to remediate the source of the problem. As an agency we have two responsibilities, public health protection and restore the environment. So that note to me is to keep pounding it in my head that we just can't put 100 mitigation systems around Kipp and say we did the job. That's what that is all about.

Q. Okay. Because the 100 mitigation systems are, so to speak, treating the symptoms and not getting at the – what's causing it, right?

A. Contamination avoidance as opposed to remediation.

(Doc. 117 at p. 204)

130. As stated by Plaintiffs' expert, Dr. Ozonoff, "the concentrations of the chlorinated ethylene organic solvents (VOCs) in the indoor air to which residents have been, are currently, and in the future could be, exposed present an imminent and substantial long term health danger." (Doc. 186 at p. 2).

131. As stated by Plaintiffs' expert, Dr. Everett:

"... the abundant toxic chemical contaminants in both the Class Area (and beyond), and on Madison-Kipp's own property, easily satisfy the standard articulated in RCRA, *i.e.*, "may present an imminent and substantial endangerment to health or the environment."

(Doc. 185 at p. 41)

132. The most “scientifically significant facts” which support Everett’s opinion of an “imminent and substantial endangerment” under RCRA are these:

- (1) Throughout the relevant time period, Madison-Kipp’s neighbors in the Class Area lived immediately adjacent to the facility – literally just feet away.
- (2) Each of the relevant chemicals is either a known or potential carcinogen, and thus poses a potentially serious threat to humans, especially children. The Expert Report of Dr. David Ozonoff, on which I explicitly rely here, articulates very clearly that, for example, PCE is potentially dangerous to humans in any concentration.
- (3) Each chemical has long ago reached the neighborhood properties, often via multiple means. In environmental terms, this means that the “pathway” is complete, *i.e.*, the chemicals have found a way – via groundwater, gas, wind, water run-off, etc. – to travel from Madison-Kipp to neighborhood properties. Also, since Madison-Kipp has thus far failed to foreclose any of these pathways, the large volume of toxic chemicals today contaminating Madison-Kipp’s property continue to travel one or more of these pathways to the Class Area and beyond.
- (4) The concentrations of chemicals remaining on Madison-Kipp’s property, which continue to travel via already well-travelled pathways to the Class Area and beyond, are both very high, in some cases dangerously so (in soil, soil gas and groundwater).

(Doc. 185 at pp. 40-46)

- (5) The public drinking water aquifer is “severely damaged and contaminated for the foreseeable future.”

(Doc. 188 at pp. 90, 107)

Dated: March 25, 2013

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CERTIFICATE OF SERVICE

Michael D. Hayes, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiffs' Additional Proposed Findings of Fact that Warrant the Denial of Summary Judgment** was on March 25, 2013 electronically served on all counsel of record as a result of the CM/ECF filing of this document.

s/ Michael D. Hayes