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' RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANT MADISON-KIPP CORPORATION'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendant Madison-Kipp Corporation ("MKC") seeks to deny 33 Class Area families a trial in this case, claiming that they are "hypersensitive" and have overreacted to a very minor environmental problem that is now completely under control. The truth, however, is that the grossly contaminated, unremediated MKC property (the "MKC Facility") for decades has spewed dangerous levels of various types of contamination into the Class Area and into the environment. Far from a problem that is now "under control," testing performed in just the past six months has revealed dangerous levels of contamination both on the MKC Facility, in the Class Area and elsewhere in the area. MKC begins its summary judgment brief by asserting that "[m]isunderstanding and confusion has led us to where we are today." (MKC Br. at p. 1)[1] However, the only misunderstanding and confusion truly involved here is MKC's own (feigned) misunderstanding and confusion concerning the magnitude of the environmental havoc it has caused, as well as on basic Rule 56 summary judgment principles it disregarded in filing its motion.

This is a motion that, had MKC seriously considered the Rule 56 requirement that there have to be "no genuine dispute as to any material fact," would not have been filed. MKC rests its motion on a selective and badly incomplete presentation of the "facts," yet omits any mention of the mountain of evidence Plaintiffs have developed which is contrary to and directly disputes MKC's positions on all case issues, and particularly on how pervasive and serious the contamination is here. These facts, conveniently omitted by MKC in its summary judgment presentation to this Court, consist of testimony from MKC's own employees, Wisconsin Department of Natural Resources ("DNR") documents and deposition testimony, environmental

[1] References to Defendant Madison-Kipp Corporation's Brief in Support of its Motion for Summary Judgment (Doc. 160) shall be cited to herein as "MKC Br. at p. ___."

test results, and expert opinions and testimony. MKC knew of all of this evidence when it filed its motion yet decided to ignore it, as if this evidence somehow does not exist. When all of the relevant evidence is considered, however, it is clear that disputed issues of material fact here do exist, indeed they abound. MKC's summary judgment motion is fundamentally dishonest in claiming that the facts in this case are undisputed when they clearly are, and substantially so.

Worse yet, the factual positions MKC advances in its motion are not just refuted by substantial contrary evidence (that MKC chose to ignore and omit from its filings), they are flat out false. The central premise of MKC's motion is that the vapor contamination under Class Area homes is at levels too low to merit this Court's attention, and that the company has so competently addressed this contamination in the past that it should be trusted in the future to keep Class Area families out of harm's way. MKC grotesquely understates the threats these families and their environment face from all aspects of the company's contamination. MKC also ignores its determined, decades-long environmental misconduct, which should categorically disqualify the company from ever being trusted to protect the health and safety of its neighbors and their environment.

To begin with, the MKC Facility is, today, grossly contaminated. Its soil, groundwater and soil gas are dangerously impacted with toxic chemicals from decades of the company's admitted "throw it wherever" chemical disposal policy. "Throw it wherever" meant, literally, that MKC employees regularly dumped bucket loads of a carcinogenic chemical (perchloroethylene, or "PCE") out the back door, even into the 1980's, after the toughest environmental protection laws were passed. This practice was accompanied by the ritual spreading on company's grounds of tanks full of another carcinogen (polychlorinated biphenyls, or "PCBs"), because it was just cheaper to get rid of PCBs that way. And all of this went on right

next door to MKC's neighbors (now, the Class Area families), whose children played in yards separated from the MKC Facility by only a chain-link fence.

The utter recklessness of this behavior was aggravated by what MKC did next for many, many years: nothing. MKC just let the chemicals bleed into the ground. They sank and spread as the years passed, ultimately with these disturbing results for MKC's 33 next-door neighbor families:

1. ***Contamination of the soil*** in Class Area yards has, for example, caused a Wisconsin Department of Health and Family Services Division of Public Health ("DPH") official to advise one family to not allow it's 2-year old to play in the dirt, and another to not eat the vegetables grown in the family garden. Also, just 4 months ago, DNR concluded that the soil contamination posed "potentially unacceptable health risks" for Class Area families.

2. ***Contamination of the aquifer*** underlying Class Area homes is up to 2,000 times greater than "acceptable" limits, in gross violation of Wisconsin groundwater regulations since at least the middle 1990's. The contamination has so severely damaged this shared water resource that it cannot be cleaned up for at least 20 years, if ever. The contamination has also caused the City of Madison to shut down a municipal well which drew from this aquifer, because the City feared distributing MKC-contaminated water to its citizens (including Class residents).

3. ***Contamination of vapor*** migrating through Class Area soil, and collecting underneath each home, has caused a DNR official to conclude that MKC's conduct "introduced a probable carcinogen into the breathing space of" Class Area homes, and prompted DNR to use taxpayer funds for the installation on Class Area homes of mitigation systems designed to keep the contaminated vapors out. One local public health official offered that, if he lived in the Class Area, he'd "have one of these systems on his house right now." Even MKC's Chairman, Reed Coleman, testified that Class families "would want [a mitigation system] and should want one."

This evidence, and much more as set forth in this brief, easily satisfies the RCRA standard, *i.e.*, that contamination at and from the MKC Facility "may present an imminent and substantial endangerment to human health or the environment." Preposterously, MKC argues not only that there is no such endangerment, but that there is not even any evidence of it. Clearly, this argument is more than just wrong. It is deceitful – because the evidence proving the endangerment comes from sources quite familiar to MKC. Sources like DNR and DPH – cited extensively in MKC's motion – and long-time MKC environmental manager and current

litigation consultant, James Lenz, who testified in this case for more than 100 pages about the rampant dumping, spilling and leaking of toxic chemicals at MKC. But MKC's motion does not even acknowledge Lenz's existence, and his deposition transcript is not among the dozens that MKC filed with this Court.

Likewise preposterous is MKC's refrain that Class Area families do not need this Court to protect them, because MKC may be trusted to do so, having worked "hand-in-hand" with DNR for nearly 20 years, accomplishing a supposedly "adequate" environmental investigation. There is abundant evidence available to expose this falsehood, including this:

Late last year, the Wisconsin Department of Justice (DOJ), at the request of DNR, sued MKC for not doing the very thing that MKC repeatedly assures this Court that it had done and could be trusted in the future to do, *i.e.*, work "hand-in-hand" with DNR to investigate and clean up contamination. ***As DOJ and DNR assert in their lawsuit: "from on or before 1994 to present, [MKC] 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."*** There is no mention of this, either, in MKC's summary judgment papers.

DOJ's lawsuit is just among the most recent evidence of MKC's lack of trustworthiness. There is much more. MKC was first told by DNR in 1994 to "investigate the extent of contamination" on its property, and to "clean it up"… "as soon as possible" before it "spreads." However, MKC's very first response was to try to rig environmental testing to make it appear as though the contamination was coming from someone else's property. This scheme was followed by years of what DNR's Project Manager, Michael Schmoller, testified was MKC's "history of delaying and dragging its feet on addressing potentially serious environmental problems." Then, in 2011, MKC's misconduct reached a new low, when it asked the Governor's office to help it

resist Schmoller's call for more testing for vapor contamination underneath Class Area homes. This request made its way to DNR's upper management, which then dutifully peppered Schmoller with questions such as, "Why isn't the site done?," and so exasperated Schmoller that he offered to resign. (Schmoller did not resign, and the subsequent vapor testing that MKC and his DNR bosses had resisted showed contamination under 47 area homes, including all Class Area homes tested.)

Although MKC has filed tens of thousands of pieces of paper in connection with its summary judgment motion (*See*, Doc. 117-168), MKC somehow failed to put in the record the expert reports of Plaintiffs' two environmental experts (Drs. Everett and Ozonoff). These experts have rendered express opinions on the RCRA "imminent and substantial endangerment" and common law standard of care issues on which MKC seeks summary judgment. Without telling this Court that Plaintiffs' experts' have rendered these opinions or showing the Court the reports which in great detail explain and justify these opinions, MKC instead lobbies the Court to accept the views of its experts (whose reports MKC, of course, does furnish) without so much as a whisper that all of these imminent and substantial endangerment and standard of care issues are vigorously disputed at the expert level.

Plaintiffs and the certified Class deserve their day in court. They have not just some, but rather substantial evidence to support each of their legal claims. MKC's motion for summary judgment should be denied in its entirety.

II. FACTS WARRANTING THE DENIAL OF SUMMARY JUDGMENT

As noted above, MKC's summary judgment papers omit the mountain of evidence -- test results, memos, DNR letters and legal notices, expert reports, expert testimony, fact witness testimony, and more -- that contradicts each and every assertion MKC asks this court to find as

undisputed and ripe for summary judgment. MKC instead advances a selective and badly incomplete presentation of the "facts," and then outright spin about the meaning of these facts, all contrary to the "no genuine dispute as to any material fact" requirements and presumptions in Plaintiffs' favor specified in Federal Rule 56.

MKC does not even present a clear and concise statement of the undisputed facts that purportedly support the summary judgment findings it requests. MKC has filed a blunderbuss 663 paragraph statement of proposed findings of fact (Doc. 161) that does not even present a coherent statement of the basic facts, supposedly not in dispute, which obviate the need for a trial in this case. MKC's "kitchen sink" presentation of facts (hundreds of which have no bearing on any summary judgment issue) has imposed an unnecessary and unfair burden on Plaintiffs -- who are required to respond item-by-item to these factual assertions -- and an even worse burden on this Court in having to review all these unnecessary assertions and Plaintiffs' responses to them.

MKC's summary judgment papers, despite their heft, are badly incomplete. They do not fairly present the evidence concerning 1) how MKC caused the contamination this case is about, 2) how MKC has stalled, delayed and mishandled the (still ongoing) environmental investigation it was directed to undertake nearly two decades ago and, most critically, 3) the fact that the grossly contaminated, unremediated MKC Facility is currently a most significant environmental hazard which continues to threaten area residents and the environment. As a result of MKC's incomplete and inadequate presentation on these important case issues, Plaintiffs are compelled to provide here a lengthy and thorough presentation of the mountain of evidence that MKC has

omitted, [2] evidence that substantially supports Plaintiffs' claims and compels the denial of MKC's summary judgment motion.

A. How MKC Caused The Contamination At Issue In This Case

1. MKC dumped, spilled and leaked PCE and other chemicals

a. MKC's attitude toward PCE disposal: "throw it wherever"

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.

* * * *

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.

[2] The facts that follow in this section of Plaintiffs' brief are all presented, with required evidentiary support, in the separately filed "Plaintiffs' Additional Proposed Finding of Facts That Warrant the Denial of Summary Judgment." (Doc. 196) Citations to this proposed additional facts document and the factual statements contained therein shall be designated herein as "Doc. 196 at ¶ _." The cited evidence supporting these proposed additional facts is of record via filings already made in this case (and can be reviewed by accessing the cited CM/ECF docket entry), including documents and other information placed of record in the separately filed Declaration of Michael D. Hayes. (Doc. 195) Plaintiffs have also, as is required by this court's summary judgment procedures, separately filed a response to MKC's proposed findings of fact (Doc. 197) which responds to each of MKC's 663 paragraphs of factual assertions and provides citations to the evidence on the many disputed factual findings proposed by MKC.

Q. … And, it was general understanding around the plant that this had gone on for some number of years, correct?
A. Correct.

* * * *

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.

(Doc. 196 at ¶ 1)

b. MKC used PCE to clean, or "de-grease," parts it had manufactured

Until 1989, MKC used the chlorinated degreasing solvent PCE at its Facility. (Doc. 196 at ¶2) The PCE was used inside a tank known as a "vapor degreaser." (*Id.* at ¶ 3) Parts to be cleaned, or "de-greased," were inserted into the vapor degreaser. (*Id.* at ¶ 4) At the base of the degreaser was a deep pan, like a "bathtub," which contained some 75-100 gallons of pure PCE. (*Id*.) The PCE had been poured there by MKC maintenance personnel, who had carried the PCE in buckets from a PCE storage tank, where the buckets were filled. (*Id*.) 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. (*Id.* at ¶ 5)

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. 196 at ¶ 6)

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. 196 at ¶ 7) 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. (*Id*. at ¶ 8)

c. <u>MKC released chemicals into the environment in several ways</u>

According to MKC's former Environmental Manager, Lenz, based on interviews he conducted with at least four MKC employees involved in MKC's maintenance operations (Doc. 187 at pp. 51-61, 143-146, 151-154), MKC released chemicals into the environment in at least 7 different ways:

(1) ***Dumping of spent PCE onto the ground***. 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. 196 at ¶ 9)

(2) ***PCE was vented out the window***. 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. (*Id*. at ¶ 10)

(3) ***PCE leaked from the 250-gallon storage tank***. 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." (*Id*. at ¶ 11)

(4) ***PCE was spilled during bucket filling***. 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. (*Id*. at ¶ 12)

(5) ***PCE was spilled from buckets***. PCE was also spilled out of the buckets being carried by maintenance workers between the 250-gallon storage tanks and the vapor degreaser. (*Id*. at ¶ 13)

(6) ***Chemicals, including PCE and PCB's, were spread on the ground to control dust and save money***. MKC maintained a tank ("chemical tank") inside its plant into which hydraulic oils, containing PCB's, and other chemicals were dumped. (*Id*. at ¶ 14) It is likely that this chemical tank also contained spent PCE. (*Id*. at ¶ 15) 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. (*Id*. at ¶ 16)

(7) ***PCE spilled during the process of transporting chemicals off-site***. 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" them. (*Id*. at ¶ 17) According to Lenz, such PCE releases were "common practice" and "general knowledge" around the MKC plant. (*Id*. at ¶ 18)

MKC no longer has any records related to PCE purchases or disposal. It has produced none in this case in response to Plaintiffs' requests for them. (Doc. 196 at ¶ 19) Lenz "doubts" that such records still exist, surmising that they may have been destroyed by flooding between 2003 and 2005. (*Id*.) Lenz recalls no effort by the company to search for records concerning how much PCE had been used or stored by MKC, nor any effort to determine how much PCE had been dumped onto the ground outside the plant. (*Id*. at ¶ 20)

2. Environmental testing corroborates that PCE and other chemicals were dumped, spilled and leaked by MKC

Recent environmental testing and investigation confirms that PCE and other chemicals were released to the environment at MKC, as described by Lenz and others. For example, DNR, in a letter to MKC dated November 1, 2012, concluded 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. 196 at ¶ 21)

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.

- "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. 196 at ¶¶ 22, 23)

3. MKC's dumping, spilling and leaking of PCE and other chemicals violated applicable standards of care

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. 196 at ¶ 24)

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. 196 at ¶ 25) 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."

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. 196 at ¶¶ 26, 27)

B. MKC Has Failed To Do What The State Of Wisconsin Directed It To Do In 1994: Determine The Extent Of Contamination And Clean It Up

1. MKC's woeful track record on environmental investigation and clean-up

As detailed below, in July of 1994, DNR directed MKC to determine the "horizontal and vertical extent" of contamination and to clean it up. (Doc. 196 at ¶ 28) Nearly two decades later, MKC has failed to do either, as documented by those who have carefully examined its behavior:

On September 28, 2012, the State of Wisconsin, through its DOJ, sued MKC (Doc. 196 at ¶ 29), alleging 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. 196 at ¶ 30)

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. 196 at ¶ 31)

DNR's Project Manager on this site (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.
>
> *** * * ***
>
> 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.

*** * * ***

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. 196 at ¶ 32)

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. 196 at ¶ 33)

2. DNR directs MKC to determine the extent of contamination, and clean it up "as soon as possible;" MKC responds by attempting to blame the contamination on someone else, to save money

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. 196 at ¶ 34)

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. 196 at ¶ 35)

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. 196 at ¶ 36)

3. MKC's approach towards investigation and clean-up: "A history of delay and dragging its feet"

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, some of which are identified below, culminated in 2012 with Wisconsin's DOJ – at the request of DNR – suing MKC (Doc. 196 at ¶ 37) for failure to investigate the extent of the contamination and restore the environment:

DNR's June 30, 1999 Letter to MKC:

> 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. 196 at ¶ 38)

DNR's November 7, 2000 Letter to MKC:

> 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. 196 at ¶ 39)

DNR's December 13, 2000 Internal Memo

> "… 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. 196 at ¶ 40)

DNR's September 28, 2006 Letter to MKC:

> 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. 196 at ¶ 41)

As Schmoller testified concerning this 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. 196 at ¶ 42)

2012 Testimony of DNR's Schmoller

> 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. 196 at ¶ 43)

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. 196 at ¶ 44)

DOJ/DNR September 28, 2012 Lawsuit vs. Madison-Kipp

> Less than six months ago, DOJ announced to the public that it:
>
> … 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. 196 at ¶ 45)

4. MKC delayed comprehensive testing for Class Area vapor contamination; the testing ultimately revealed "a probable carcinogen (PCE) in the breathing air space of up to 47 homes"

As shown below, 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. 196 at ¶ 46) 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. Further, 21 homes had PCE vapors detected inside them in indoor air samples. (*Id*. at ¶ 47)

2005-2009 Vapor Testing on MKC Property Boundary Shows Very High Vapor Concentrations

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. 196 at ¶ 48) This testing continued until at least September of 2009. (*Id*. at ¶ 49) The PCE concentrations detected during this time period were, in many instances, well over 1,000 parts per billion by volume (ppbv). (*Id*. at ¶ 50) One was as high as 51,000 ppbv. (*Id*.) 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." (*Id*. at ¶ 51)

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. 196 at ¶ 52)

Schmoller Encounters Resistance, Including Apparently Politically-Induced Resistance, From MKC and Within His Own Department; Offers to Resign

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. 196 at ¶ 53) 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. (*Id*. at ¶ 54) Schmoller disagreed. He believed more comprehensive testing to be warranted. (*Id*. at ¶ 55) After encountering this resistance from MKC, Schmoller concluded that DNR should conduct the testing itself, as in his judgment it needed to be done right away. (*Id*. at ¶ 56)

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. 196 at ¶ 57)

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 later be certified by this Court as Class Members) from pursuing a claim against MKC under the federal Resource Conservation and Recovery Act (RCRA). (Doc. 196 at ¶ 58) 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. (*Id*. at ¶ 59) No explanation of which Plaintiffs are aware

has been offered for why MKC's lawyer approached the Governor's office, rather than DNR or DOJ, with this request.

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. 196 at ¶ 60) The required testing at the time consisted significantly of off-site testing for vapor contaminants in the sub-slabs of neighboring homes. (*Id*. at ¶ 61) 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. 196 at ¶ 62)

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. 196 at ¶ 63)

Shortly thereafter, in November of 2011, Schmoller offered to resign his position as Project Manager at the MKC Facility. 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 Facility 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. 196 at ¶ 64)

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 Facility:

> "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."
>
> * * * *
>
> 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.

(Doc. 196 at ¶ 65)

Vapor Test Results: 47 Homes Contaminated with PCE Vapor

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. 196 at ¶ 66) 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]."

(*Id*. at ¶ 67)

5. MKC's environmental investigation has been directed by MKC's lawyers, not by environmental scientists

MKC's response to the contamination on its property and in the Class Area – including whatever investigation thereof which MKC has done, or not done – has been directed not by environmental scientists protecting public health, but rather by MKC's lawyers, who are trying to protect their client's legal interests against the interests of MKC's neighbors, *i.e.*, the members of the Class.

For example, both of 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. 196 at ¶ 68) Dames & Moore was hired in 1994, specifically, *inter alia*, "in anticipation of litigation" by "third parties (citizen suits)," (*Id*. at ¶ 69) and ARCADIS was hired in 2012, specifically, *inter alia*, to provide "defense of lawsuits" resulting from the contamination. (*Id*. at ¶ 70)

Confirming this contractual arrangement, ARCADIS' Project Manager on the MKC Facility (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. 196 at ¶ 71)

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. 196 at ¶ 72)

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. 196 at ¶ 73)

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. 196 at ¶ 74)

C. MKC's Failure To Investigate And Clean-Up Violated Applicable Standards Of Care

Plaintiffs' expert Dr. Everett has opined that a variety of legal and environmental authority – including the 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. 196 at ¶ 75)

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. 196 at ¶ 76)

D. The Status Of The Contamination At The MKC Facility Today: A Toxic Mess That Threatens Class Area Families And Their Environment

Those chemicals (PCE, PCBs and PAHs) dumped, spilled and leaked for decades at MKC were not cleaned up, despite DNR's written admonition to MKC in 1994 that, "[t]he longer contamination is left in the environment, the farther it can spread and the more difficult and costly it becomes to clean up." The result, as shown below, is that the MKC Facility is pervasively contaminated with these three (and more) chemicals, and that this contamination has migrated, and continues to migrate, throughout the entirety of the Class Area, in soil, groundwater and vapor.

1. The soil at the MKC Facility and throughout the Class Area is contaminated with PCE, PCBs, and PAHs

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. 196 at ¶ 77).

Environmental testing has revealed the widespread presence at the MKC Facility of high concentrations of PCE, PCBs and PAHs. (Doc. 196 at ¶ 78) 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…" (*Id*. at ¶ 79) 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:

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

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

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

(*Id*. at ¶ 80)

2. The groundwater underlying the entirety of the MKC Facility and Class Area is highly contaminated with chemicals from MKC; this contamination has destroyed the area's aquifer, and caused the shut-down of a municipal well

The groundwater aquifer which underlies the MKC Facility also underlies every Class Area home. The aquifer is shallow – it begins just 10 feet below the basements of Class Area homes. (Doc. 196 at ¶ 81) At all depths (above and below 75 feet below ground surface), 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. (*Id*. at ¶ 82)

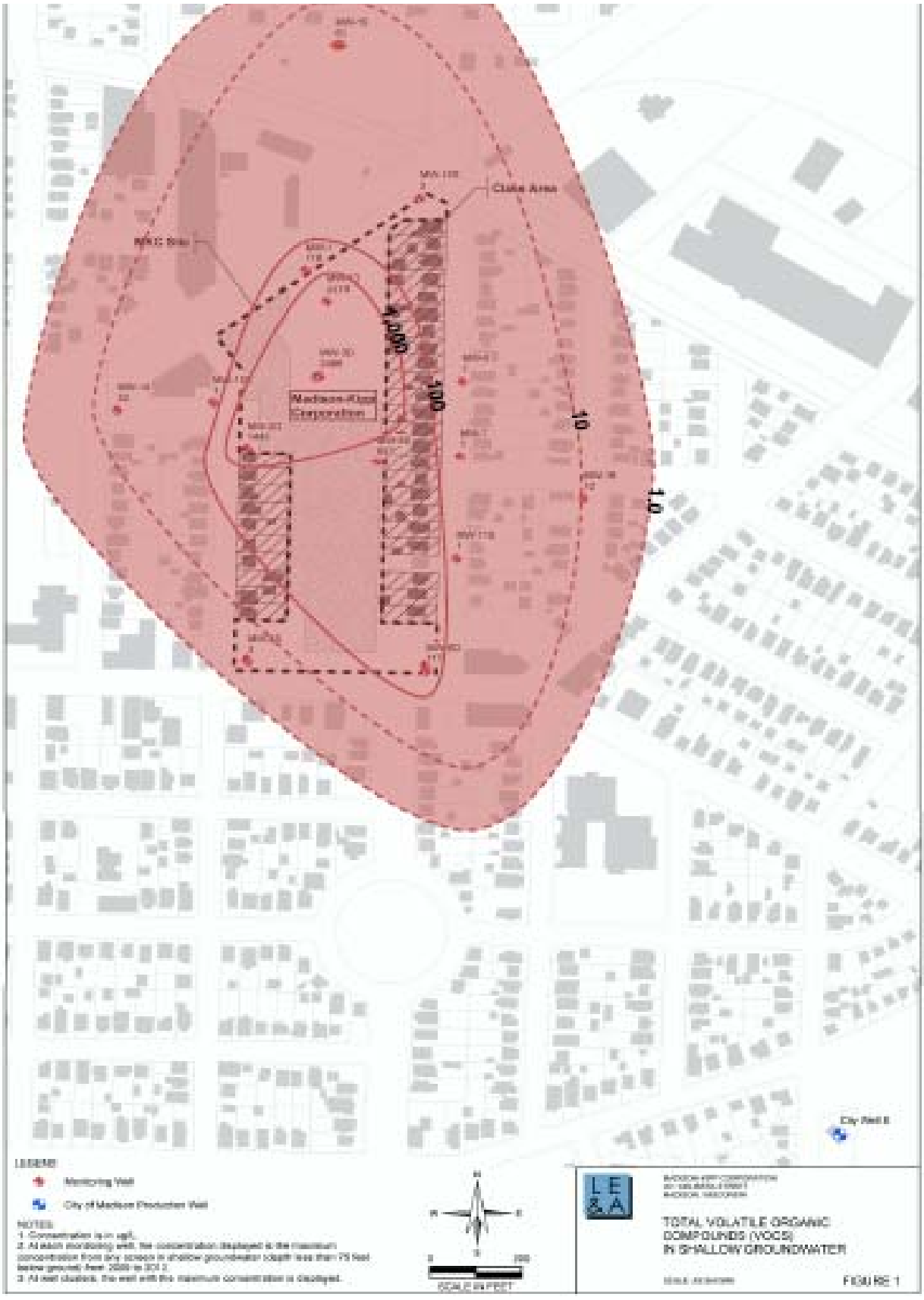
Dr. Everett explains how this contamination occurred:

> 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. 196 at ¶ 83)

The following are Dr. Everett's depictions, based upon all data made available to him (some of it first produced by MKC after his expert report was prepared), of the geographical extent (or "plume") of the PCE contamination in both the area's deep groundwater and shallow groundwater. (Doc. 196 at ¶ 84) As Dr. Everett's graphics show, each of these contaminant plumes underlies the entirety of the MKC Facility and Class Area (and even extends far beyond):


MMC Site
Class Area
10,000
1,000
100
10
1.0
Madison-Kipp Corporation
TOTAL VOLATILE ORGANIC COMPOUNDS (VOCS) IN DEEP GROUNDWATER


Clarke Area
MMC Site
Madison-Kipp Corporation
1,000
100
10
1.0
City Well 8
Monitoring Well
City of Madison Production Well
NOTES:
1. Concentration is in ug/L.
2. At each monitoring well, the concentration displayed is the maximum concentration from any screen in shallow groundwater (depth less than 75 feet below ground) from 2009 to 2012.
3. At well clusters, the well with the maximum concentration is displayed.
0
200
SCALE IN FEET
LE&A
TOTAL VOLATILE ORGANIC COMPOUNDS (VOCS) IN SHALLOW GROUNDWATER
FIGURE 1

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. 196 at ¶ 85)

For example:

- 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. 196 at ¶ 86) By way of comparison, the maximum contaminant level allowable (MCL) for PCE under the Federal Safe Drinking Water Act is 5 ppb, 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 ¶ 87) 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. (*Id.* at ¶ 88)

- 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. 196 at ¶ 89)

- 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 MCL. That well is located approximately one block further away from the MKC Facility than the Class Area, to the east. (Doc. 196 at ¶ 90)

- Results from MW-14, also one block further away from the MKC Facility 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. 196 at ¶ 91)

- 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. 196 at ¶ 92) MW-17 is located south of the MKC Facility, along Atwood Avenue. It is approximately 1000 feet from the City of Madison

Moreover, 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 standards. (Doc. 196 at ¶ 94)

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. 196 at ¶ 95)

Dr. Everett has testified that PCE DNAPL is in the bedrock groundwater on the MKC Facility. It is also in the bedrock off the MKC Facility (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 locations of DNAPL, which is continuing to release chemicals into, and to destroy, the aquifer. MKC has not determined the vertical or lateral extent of the groundwater contamination in any direction. (Doc. 196 at ¶ 96) Nor, according to its own environmental consultant (ARCADIS), has MKC developed an approved plan to clean up the groundwater. (*Id*. at ¶ 97)

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. 196 at ¶ 98)

3. MKC's destruction of the Madison public water supply

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 Facility. (Doc. 196 at ¶ 99) According to the Madison Water Utility Wellhead Protection Plan dated March, 2011, the MKC Facility 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 Facility. (*Id*. at ¶ 100) 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." (*Id*. at ¶ 101) City Well No. 8 draws water from beneath the MKC Facility. Water level transducers were placed in a monitoring well on the MKC Facility (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 there is a direct hydraulic connection between Well No. 8 and MKC groundwater. (*Id*. at ¶ 102) Put simply, City Well No. 8 draws MKC's contaminated water. DCE, one of the daughter products of PCE which is on the MKC Facility, has already been detected in Well No. 8. Well No. 8 was taken out of service by the City in September, 2012 for this reason, among others. (*Id*. at ¶ 103)

4. The MKC-contaminated groundwater and the highly contaminated soil on MKC's site have caused vapor contamination throughout the Class Area

As noted above, testing in 2011 and 2012 underneath and inside the homes in the Class Area (and beyond) revealed the extensive presence of PCE vapors. (Doc. 196 at ¶ 104) 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. 196 at ¶ 105)

DNR's Schmoller confirmed that the vapor contamination detected throughout the Class Area had migrated there from the MKC Facility:

> 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. 196 at ¶ 106)

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. 196 at ¶ 107)

Because the sub-slab samples demonstrate a complete migration pathway from the MKC Facility, 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. 196 at ¶ 108) Most of the 33 homes have had, or will have, such systems installed. (*Id*. at ¶ 109)

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 Facility 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."[3] (Doc. 196 at ¶ 110)

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. 196 at ¶ 111)

5. PCE, PCBs and PAH contamination caused by MKC threatens Class Area residents and their environment

The PCE, PCBs and PAHs that pervasively contaminate both MKC's Site and the Class Area 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. 196 at ¶ 112) 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. (*Id*. at ¶ 113) 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." (*Id*. at ¶ 114)

Also, the specific threats posed to Class Area families, and to their environment, by these chemicals are embodied in both federal and State (Wisconsin) law, and in the statements and

[3] 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. 45)

actions of DNR and other government officials, as the extent of the contamination has slowly been revealed:

Threats from Soil Contamination: 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. 196 at ¶ 115) 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." (*Id*. at ¶ 116)

Addressing the soil contamination in the Class Area, a Wisconsin public health official 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.
- the soil contamination may impact the vegetables grown in the family garden (causing the family to cease its gardening).
- one family should not eat the food grown in the family garden.

(Doc. 196 at ¶ 117)

Threats from Groundwater Contamination: According to DNR's Schmoller, the levels of contamination in the aquifer underlying both the MKC Facility and Class Area – in some instances by only 10 feet – have for at least 20 years violated Wisconsin State regulations; they also exceed by hundreds of times, and in one case nearly 2,000 times, the federally "acceptable" level of contamination in groundwater. (Doc. 196 at ¶ 118) Additionally, as described above, the groundwater contamination serves as a continuing source of vapor contamination for Class Area homes. (*Id*. at ¶ 119) Moreover, Plaintiffs' expert, Dr. Everett, has opined that this aquifer is

"hugely compromised" and "severely damaged," presenting an "imminent and substantial endangerment." (*Id*. at ¶ 120) The City of Madison discontinued the use of its Well #8, fearing that contamination from MKC would reach the well. (*Id*. at ¶ 121) 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. (*Id*. at ¶ 122)

Threats from Vapor Contamination: 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. 196 at ¶ 123) 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. (*Id*. at ¶ 124) 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." (*Id*. at ¶ 125)

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. 196 at ¶ 126)

Plaintiffs' expert, Dr. David Ozonoff, an epidemiologist, physician and government researcher who has spent decades researching and reporting on, *inter alia*, the harmful health effects 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. 196 at ¶ 127)

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. 196 at ¶ 128)

However, as DNR's Schmoller testified, 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. 196 at ¶ 129)

E. The Contamination At The MKC Facility And Released Into The Class Area And Beyond From MKC's Site Constitutes An Imminent And Substantial Endangerment To Human Health And The Environment Under RCRA

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. 196 at ¶ 130)

As stated by Plaintiffs' other 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. 196 at ¶ 131) 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).

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

(*Id*. at ¶ 132)

III. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate where the movant can establish that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." (F.R.C.P. 56(a)) As the Seventh Circuit has summarized:

> In determining if there was an issue of material fact . . . the court views the record in the light most favorable to the non-moving party, and draws all inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Antonetti v. Abbott Labs*, 563 F.3d 587, 591 (7th Cir. 2009). The court may not weigh the evidence or decide which testimony is more credible. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Kodish v. Oakbrook Terrace Fire Protection Dist.*, 604 F.3d 490, 507 (7th Cir. 2010); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). Even if one side's story is more believable, the court must "avoid the temptation to decide which party's version of the facts is more likely true." *Payne*, 337 F.3d at 770; *Kodish*, 604 F.3d at 507. "As we have said many times, summary judgment cannot be used to resolve swearing contests between litigants." *Payne*, 337 F.3d at 770.

McCann v. Iroquois Memorial Hospital, 622 F.3d 745, 752 (7th Cir. 2010).

Applying this standard to the facts of this case, MKC's motion for summary judgment should be denied in its entirety. On each of Plaintiffs' claims, there are disputed issues of material fact.

IV. ARGUMENT: MKC'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED

A. MKC Is Not Entitled To Summary Judgment On Plaintiffs' RCRA Citizen's Suit Claim

Count I of Plaintiffs' First Amended Complaint (Doc. 15 at ¶¶ 29-36) asserts a claim against MKC under 42 U.S.C. §6972(a)(1)(B), one of RCRA's citizen's suit provisions. In this claim, Plaintiffs allege that releases of hazardous wastes from the MKC Facility have resulted in soil, groundwater and air contamination, and that these conditions present an "imminent and substantial endangerment to health and the environment."

MKC requests summary judgment on this claim, asserting that the levels of vapor contamination on Plaintiffs' properties are too low to be actionable, that MKC has adequately investigated the contamination it has caused, that MKC's contamination no longer poses any threat to humans or the environment, and that MKC is committed to performing such future remediation as may be required by DNR. Plaintiffs dispute each and every one of these propositions, and have substantial evidence supporting their contrary positions. MKC is fully aware of this evidence, yet has chosen to ignore it and file what at best can be viewed as a spin piece short on the truth and long on advocacy and rhetoric. As discussed below, genuine issues of material fact are present such that summary judgment is not appropriate on Plaintiffs' RCRA claim.

1. Plaintiffs' RCRA claim is broadly focused on the grossly contaminated MKC Facility, an unremediated source of contamination which has and continues to present an imminent and substantial endangerment to both health and the environment

MKC's summary judgment papers falsely seek to spin the RCRA citizen's suit claim in this case as one which has a very narrow focus -- the levels of PCE vapors measured to date on Class Area properties. Ignoring all the high levels of contamination still present at the MKC Facility, the highly contaminated groundwater that extends from the MKC Facility underneath the entire Class Area all the way to a Madison drinking water supply well, and the PCE, PAH and PCB soil contamination present throughout the Class Area, MKC asserts that these residential vapor levels are too low to meet the "imminent and substantial endangerment" requirement under RCRA §6972(a)(1)(B). But MKC's attempt to narrowly construe Plaintiffs' RCRA claim is unavailing; the claim as pled here is much broader.

Plaintiffs' RCRA claim is broadly focused on *all* of the environmental contamination present at the MKC Facility and off-site areas. The key RCRA allegations in Plaintiffs' First Amended Complaint are as follows:

> 32. MKC engaged in the handling, storage, treatment, transportation or disposal of hazardous wastes in a manner which has contributed to and is contributing to the contamination *of the Facility, the Class Area, other properties in the area, and the environment.*
>
> 33. During the period of MKC's ownership, operation, and control of the Facility, various hazardous wastes, including PCE and TCE, which had been disposed of at the Facility, migrated off of the Facility property and contaminated the soil, groundwater and air in the surrounding environment. Those *releases from the Facility* have been determined to have contaminated and/or threatened properties throughout the Class Area. MKC is responsible for the subject soil, groundwater and air contamination, by failing to properly handle, dispose, and contain the hazardous wastes at and released from the Facility, and by failing to properly investigate and abate the *contamination that has migrated from the Facility* onto Class Area properties and other properties in the area. The *releases from the Facility* present an imminent and substantial endangerment to *health* and the *environment* as defined in RCRA. As a contributor to this hazardous condition, MKC is subject to suit pursuant to RCRA §7002(a)(1)(B), 42 U.S.C. §6972(a)(1)(B). (Emphasis added)

(See Doc. 15, at ¶¶ 32, 33) (emphasis added) Thus, the central focus of Plaintiffs' RCRA claim is the MKC Facility itself, which is substantially contaminated and is a past and continuing source of significant contamination in the Class Area and well beyond.

Plaintiffs' RCRA claim is about much, much more than just the vapor contamination detected in the sampling performed to date on Plaintiffs' properties; rather, as expressly alleged in their pleading, Plaintiffs' RCRA claim seeks to address "soil, groundwater and air contamination" at the MKC Facility, in the Class Area, on other properties in the area, and in the environment generally. Indeed, Plaintiffs in their RCRA claim specifically request that the court enter injunctive relief "compelling MKC to abate the soil, groundwater and air contamination it has caused at the Facility, on Plaintiffs' property, on Class Area properties, and other impacted

properties in the area." (*Id.* at ¶36). MKC's summary judgment motion ignores these allegations, and the substantial evidence that supports them.

Even on the vapor levels issue MKC narrowly focuses its summary judgment motion upon, disputed issues of fact preclude summary judgment. MKC presents no explanation for why, if these levels are completely non-threatening, DNR has installed sub slab mitigation systems in homes throughout the Class Area. MKC also fails to acknowledge DNR's public statements regarding the increased threat of cancer these levels present, and Dr. Ozonoff's opinion that these vapor levels present an increased risk of cancer to area residents. And, perhaps most importantly, the detections in the Class Area of any levels of these chemicals MKC released prove that a completed pathway exists that will continue to permit future migration of contamination from the MKC Facility into the Class Area, at potentially much higher levels. Plaintiffs' expert, Dr. Everett, has expressly opined that Class Members are threatened by future vapor migration at higher levels than have been detected thus far; MKC's experts disagree. These are disputed factual issues which require the denial of MKC's summary judgment motion, even accepting MKC's cramped and incorrect presentation concerning the scope of Plaintiffs' RCRA claim.

MKC also argues that the presence of sub slab mitigation systems in most (but not all) Class Area homes removes any threat to these persons and requires summary judgment on the imminent and substantial endangerment issue. (*See* MKC Br., at p. 15) This argument is baseless. As DNR's Schmoller has testified, these mitigation systems do not remediate the contamination problem, they are merely an interim measure to avoid human inhalation of the PCE vapors until the contamination can be abated. Plaintiffs' experts, Dr. Ozonoff and Dr. Everett, have opined that an imminent and substantial endangerment exists in the Class Area,

despite the presence of these mitigation systems. Significantly, the court in *Grace Christian Fellowship v. KJG Investments Inc.*, 2012 WL 1069023 (E.D. Wis. Mar. 29, 2012) (hereinafter "*Grace*") denied the defendant's summary judgment request on an (a)(1)(B) RCRA claim involving vapor contamination, despite the fact that a sub slab mitigation system had been installed by DNR on plaintiff's property. *Id*. at ** 12, 14-19. In that case, as here, the parties contested whether there was a "completed exposure pathway" for vapor contamination, and the court denied summary judgment based on the parties' expert and factual disputes on this issue. *Id*.

Further, Plaintiffs would be able to bring suit to enforce RCRA even if there were not a single molecule of contamination from the MKC Facility on their properties. The law is well settled that environmental plaintiffs do not have to own impacted property to bring citizen suits. *See 1100 West, LLC v. Red Spot Paint & Varnish Co., Inc*., 2007 WL 3036876, *3 (S.D. Ind. 2007) (finding that plaintiff had standing in its RCRA action and stating that "legal ownership of the contaminated site at issue is not necessary to bring a citizen suit pursuant to RCRA."). Pursuant to RCRA, Plaintiffs have standing to sue when they are denied the use and enjoyment of the environment. The Supreme Court has held that environmental plaintiffs sufficiently show an injury-in-fact when they use the affected area and the "aesthetic and recreational values of the area will be lessened" by the challenged activity. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 183 (2000), (citing *Sierra Club v. Morton*, 405 US 727, 735 (1972)). Courts have also held that a local community organization and individual plaintiffs who don't own the contaminated property have standing to bring their RCRA citizen suits. *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 255 - 257 (3rd Cir. 2005).

Hence, Plaintiffs clearly have standing to assert their RCRA claim (and MKC has not challenged same) as they live immediately adjacent to the contaminated MKC Facility, live in the surrounding contaminated environment, and their full use and enjoyment of their properties has been impaired. They also are directly in harm's way from the massive contamination still present at the MKC Facility. The undisputed fact that contamination from the MKC Facility has destroyed the public drinking water aquifer for the foreseeable future, and, as Dr. Everett has testified, made it onto and beneath all Class Area properties, proves that there is a pathway for the continued and future migration of contamination. Thus, even if Plaintiffs presently had no contamination on their properties, they would be entitled under RCRA to seek to compel MKC to sufficiently remediate the MKC Facility to ensure that the threats this contamination poses to them are alleviated. MKC's fundamental summary judgment premise -- that Plaintiffs must presently have high levels of vapor contamination on their properties to proceed under RCRA -- is false and contrary to RCRA case authority.

2. The facts are disputed on the "imminent and substantial endangerment" issue, thus precluding summary judgment on Plaintiffs' RCRA claim

In order to prevail on their RCRA claim, Plaintiffs must establish three elements: (1) that MKC has generated solid or hazardous waste, (2) that MKC 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." *See*, 42 U.S.C. §6972(a)(1)(B). MKC's motion does not contest the first two elements, but exclusively focuses on the "imminent and substantial endangerment" element.

MKC is plainly not entitled to summary judgment on this issue. MKC's motion ignores the significant evidence concerning very high levels of contamination still present at its Facility, contamination which has in the past and will continue to migrate into the Class Area and other

off site areas. Until it is adequately remediated, the MKC Facility threatens all area residents and the environment. The parties and their experts disagree about what sampling results are relevant, how serious the contamination is, what the potential health effects are, whether MKC has properly characterized the contamination, whether MKC has contained the contamination, whether MKC has sufficiently remediated the contamination, and what future measures still need to be taken. The parties' environmental experts have directly conflicting opinions on all of these issues and on the threshold imminent and substantial endangerment issue itself.[4] Plainly, there are disputed issues of material fact on the RCRA imminent and substantial endangerment issue which make summary judgment inappropriate here.

Although Plaintiffs have abundant evidence that MKC has already contaminated its own property at dangerous levels, destroyed the groundwater quality in the area, exposed Plaintiffs to contamination on their properties, and caused DNR to install mitigation systems in homes throughout the area, Plaintiffs' RCRA suit claim actually requires a much lesser showing. Plaintiffs need only establish that MKC's contamination "may" present an imminent and substantial endangerment to health or the environment. Courts looking at this element emphasize the preeminence of the word "may" in the statute when determining the degree of risk needed to satisfy the claim. *Grace*, *supra* at *17; *Interfaith*, *supra* at 258; *Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 258 (3rd Cir. 2005); *Burlington Northern & Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (stating that it is well established that the operative word is "may"). Here, Plaintiffs can prove that MKC has

[4] MKC's summary judgment motion papers do not dispute the qualifications of either of Plaintiffs' experts, and while MKC at several places in its brief disagrees with Plaintiffs' experts' opinions (without stating precisely what they are) and urges the court to instead adopt the contrary opinions expressed by MKC's experts, MKC has not moved to strike or challenged the admissibility of any aspect of these experts' opinions. Both of Plaintiffs' experts, as noted earlier, have express opinions on the imminent and substantial endangerment issue. Hence, Plaintiffs' experts' opinions and explanatory testimony are properly before the court on this motion and clearly demonstrate the existence of genuine issues of disputed material fact which compel the denial of MKC's motion.

already caused both on and off-site contamination that threatens human health and the environment, and that the MKC Facility needs to be comprehensibly remediated to alleviate against threats of additional harm that "may" result in the future from existing conditions.

The RCRA "imminent" element only requires an ongoing threat of harm, not an existing harm. *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir. 2002). The language implies that the threat must be present now, but the threat's impact may not be felt until later. *Grace*, *supra* at *17; *Meghrig v. KFC Western, Inc.*, 516 US 479, 486 (1996). Further, imminent refers to the nature of the threat and does not refer to determining the time when the endangerment first arose. *Burlington*, *supra* at 1021. Here, the threat of harm exists now; it has manifest itself in the substantial contamination already present at the MKC Facility and in off-site areas.

The RCRA "substantial" element "does not necessitate quantification of endangerment, as an endangerment is substantial where there is *reasonable cause for concern* that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken." *Burlington*, *supra* at 1021 (emphasis added). This "reasonable cause for concern" standard is easily met here, where the families in the Class Area already have contamination on their properties, and DNR has installed mitigation systems in most Class Area homes. Plaintiffs' expert Dr. Ozonoff has opined that the contamination in the Class Area presents these families with an excess risk of cancer not balanced by any benefit and could be considered unacceptable by a reasonable person. Reasonable persons certainly will be concerned about contamination in their homes that prompt response measures by environmental authorities. Even MKC's own chairman, Mr. Coleman, testified that the Class Members' concerns about contamination in their homes is reasonable.

Proof of actual harm to health or the environment does not have to be given to meet the RCRA "endangerment" requirement. Rather, "endangerment" means threatened or potential harm. *Burlington*, *supra* at 1020. While the threat that created the endangerment does not have to be ongoing, the endangerment does. *Burlington*, *supra* at 1020. That requirement is met here by the evidence showing the continued presence of very high levels of contamination in the soils and groundwater at the MKC Facility, and the potential for same to continue to migrate onto Class Area properties.

The RCRA citizen's suit provision is expansive and intended to give courts the authority to grant relief to remove any risk resulting from toxic wastes. *Dauge v. City of Burlington*, 935 F.2d 1343, 1355 (2nd Cir. 1991)(reversed in part on other (attorneys' fee issue) grounds, 505 U.S. 557 (1992)); *See also Interfaith*, *supra* at 260 (stating that although there is no definition of "substantial," Congress intended for RCRA to give courts the power to eliminate any risks posed by toxic wastes). "There is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately." *Grace*, *supra* at 17. Moreover, Courts have held that if they are going to make an error in determining the endangerment of the site, "the error must be made in favor of protecting public health, welfare and the environment." *Interfaith*, *supra* at 259 (citing *US v. Conservation Chemical Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985)).

Although MKC's summary judgment position is predicated on the levels of vapor contamination detected to date in Class Area sampling, the RCRA caselaw is clear that contamination in excess of regulatory levels is not the touchstone for the RCRA imminent and substantial endangerment analysis. "Proof of contamination in excess of state standards may support a finding of liability, and may alone suffice for liability in some cases, but its required

use is without justification in the statute." *Interfaith*, *supra* at 261. On this point, the Second Circuit affirmed the district court's finding of an "imminent and substantial endangerment" where all but one test well around a landfill generally showed lead concentrations well below the applicable regulatory levels. *Dague v. City of Burlington*, 732 F. Supp. 458, 463-464 (D. Ver. 1989). Moreover, as shown above, soil contamination (VOCs, PCBs, and PAHs) and groundwater contamination throughout and underneath the entire Class Area do indeed exceed regulatory levels.

Finally, Plaintiffs' RCRA claim is about the environment, too, not just human health. The RCRA statute expressly references that the subject matter of an (a)(1)(B) claim is health *or* the environment. The Tenth Circuit has held that the district court erred when it only considered the injury to persons and failed to consider the imminent and substantial endangerment to the environment because the statute's phrasing "indicates proof of harm to a living population is unnecessary to succeed on the merits." *Burlington*, *supra* at 1021. Thus, MKC's exclusive focus on vapors invading Plaintiffs' properties is misguided, as actual destruction and threat of future damage to environmental resources such as a public drinking water aquifer alone supports a RCRA claim such as this one.

3. Most courts have denied summary judgment challenges on the imminent and substantial endangerment issue, particularly where, as here, disputed expert testimony is involved

The overwhelming majority of courts that have confronted the RCRA imminent and substantial endangerment issue in the summary judgment context have denied such motions, based on the presence of factual issues inherent in this inquiry. *See, e.g.*, *Davis v. Sun Oil Company*, 148 F.3d 606, 609-10 (6th Cir. 1998); *Grace*, *supra*; *Forest Park National Bank & Trust v. Ditchfield*, 881 F. Supp.2d 949, 975-76 (N.D. Ill. 2012); *Hernandez v. Esso Standard Oil*

Co., 597 F. Supp.2d 272, 287 (D. Puerto Rico 2009); *Clems Ye Olde Homestead Farms Ltd. v. Briscoe*, 2008 WL 5146964 at *4 (E.D. Texas Dec. 8, 2008); *K-7 Enterprises, L.P. v. Jester*, 562 F.Supp.3d 819, 829 (E.D. Texas 2007); *U.S. v. Apex Oil Co.*, 2007 WL 809641 at **4-5 (S.D. Ill. Mar. 15, 2007); *Potomac Riverkeeper, Inc. v. National Capital Skeet and Trap Club, Inc.*, 388 F. Supp. 2d 582, 588-89 (D. Maryland 2005); *Degussa Construction Chem. Operations, Inc. v. Berwind Corp.*, 280 F. Supp.2d 393, 404-406 (E.D. Pa. 2003); *California Department of Toxic Substances Control v. Interstate Non-Ferrous Corp..*, 298 F. Supp.2d 930, 980-983 (E.D. Cal. 2003); *Hudson Riverkeeper Fund, Inc. v. Atlantic Richfield Co.*, 138 F. Supp.2d 482, 488-491 (S.D. N.Y. 2001); *Raymond K. Hoxsie Real Estate Trust v. Exxon Education Foundation*, 81 F. Supp.2d 359, 365, 368 (D. R.I. 2000); *Kara Holdings Corp. v. Getty Petroleum Marketing, Inc.*, 67 F. Supp.2d 302, 309-312 (S.D. N.Y. 1999); *Citizens For a Better Environment v. Caterpillar, Inc.*, 30 F. Supp.2d 1053, 1072-1075 (C.D. Ill. 1998); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 42 (D. Me. 1994); *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003, 1028-29 (S.D. N.Y. 1994). These cases recognize that the imminent and substantial endangerment standard is a highly factual one, inherently involving technical judgments concerning levels of contamination and the threat of future harm to persons or the environment. As the court stated in the *Raymond K. Hoxsie* case:

> The Exxon defendants' argument simply highlights the factual nature of the imminent and substantial endangerment inquiry. The emphasis placed upon the standards will be for the fact finder to determine. For now, it is sufficient for plaintiff to come forward with undisputed (or genuinely disputed) evidence that could reasonably lead a fact finder to determine that an imminent and substantial endangerment exists.

(81 F. Supp.2d at 366) MKC's motion fails to confront any of these cases, or that the RCRA imminent and substantial endangerment issue is a particularly fact intensive inquiry.

In many of the above cited cases denying summary judgment on the imminent and substantial endangerment issue, the courts did so in whole or in part because the parties had conflicting opinions from their environmental experts on the imminent and substantial endangerment question. *See, Davis, supra; Hernandez, supra; Clems Ye Olde Homestead Farms, supra; Apex Oil, supra; Potomac Riverkeeper, supra; California Department of Toxic Substances Control, supra; Hudson Riverkeeper, supra, Kara Holding, supra; Citizens for a Better Environment, supra; Orange Environment, supra.* In denying the defendant's summary judgment motion on an imminent and substantial endangerment RCRA claim in the *Orange Environment* case, that court held that "we are uncomfortable granting summary judgment at this juncture in light of the disputes between the various experts as to the effect of the landfill on health and the environment." (860 F. Supp. at 1029) Similarly, the court in the *Hudson Riverkeeper* case held that "summary judgment on a RCRA claim is infrequently granted" and "where, as here, there are conflicting expert reports presented, courts are wary of granting summary judgment." (138 F. Supp.2d at 488)

Here, Plaintiffs' experts, Dr. Ozonoff and Dr. Everett, have opined that the contamination released from the MKC Facility and found in the Class Area presents an imminent and substantial endangerment to both human health and to the environment. Dr. Ozonoff has specifically opined that "the contaminations of 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." Dr. Everett's opinion, similarly, is that "the abundant toxic chemical contaminants in both the Class Area (and beyond) and on Madison-Kipp's own property, easily satisfy the [imminent and substantial endangerment] standard articulated in RCRA." Dr. Ozonoff's and Dr. Everett's extensive qualifications have

not been challenged by MKC, nor has MKC challenged the admissibility of these experts' opinions. That MKC disagrees with these opinions and has retained experts to dispute them means only that there are issues of fact for trial on the imminent and substantial endangerment issue, not that summary judgment is proper. MKC has improperly ignored Dr. Ozonoff's and Dr. Everett's opinions and the substantial factual underpinnings of them, in requesting summary judgment.

4. MKC's summary judgment RCRA authorities are distinguishable

The two RCRA summary judgment cases that MKC primarily relies upon on in its brief are off-point and easily distinguished. In *Tilot Oil, LLC v. BP Products North America, Inc.*, 2012 WL 124395 (E.D. Wis. Jan. 17, 2002), the owner of an industrial property brought suit under RCRA against the former owner of an adjacent industrial property. The portion of the plaintiff's property that was alleged to be contaminated consisted of a basement in one building that was rarely used by the plaintiff. (*Id*. at 8) The defendant had installed and was operating a remediation system on the plaintiff's property and the "WDNR approved the system and determined no additional remediation is necessary." (*Id*. at *3) Also, the court found that the plaintiff "has not shown or alleged here that a source of contamination is *continuing* to further contaminate the groundwater" or was causing new and expanded contamination elsewhere. (*Id*. at *10, emphasis in original) Finally, it was undisputed that the on-site contamination had been contained and was not threatening any nearby water resource. (*Id*. at *9; "the current contaminant plumes do not threaten the nearby Fox River.")

The *Tilot* case is not applicable here, for several reasons. First, unlike here, *Tilot* involved contamination in an infrequently used oil operations industrial building, not contamination in and on people's homes, many of which are occupied by children. Second,

unlike here where the sources of the contamination on the MKC Facility remain and are continuing, in *Tilot* the source of the contamination had been remediated and the remaining problem contained to a discrete area. Third, again unlike here where there is massive groundwater contamination emanating from the MKC Facility underlying Class Area homes and threatening the municipal drinking water well, in *Tilot* there was no future threat of harm to the environment or to any water resource. The facts in *Tilot* are most dissimilar to the facts here. The RCRA case with facts much more similar to this case is the Eastern District's decision in *Grace, supra*, where summary judgment was denied concerning a property used by children which already had a sub slab mitigation system in place.

The other RCRA summary judgment case MKC relies upon, *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2nd Cir. 2009), is also distinguishable. In *Cordiano*, a RCRA claim was filed against a gun club related to the discharge and accumulation of lead munitions at the gun club's property. The district court granted summary judgment for the gun club, and the court of appeals affirmed. In this case, the *Cordiano* plaintiffs made no showing that any of the lead from the gun club property had migrated to their properties, and the gun club established that it periodically cleaned up spent munitions and had a plan in place to recover and contain all future lead wastes. (*Id*. at 202-204) Moreover, the *Cordiano* plaintiffs failed to present any evidence concerning the likelihood of future contamination or of the severity of such contamination to either humans or the environment. (*Id*. at 211-215) The *Cordiano* decision is neither applicable nor instructive here. This case did not involve an unremediated site which continues to be a source of off-site contamination. This case did not involve massive levels of on and off-site groundwater contamination, various types of contamination already present on,

inside and beneath the plaintiffs' properties, and destruction of natural resources like a municipal drinking water supply.

5. DNR's ongoing oversight of MKC does not bar Plaintiffs' RCRA claim

Finally, MKC's rhetoric about how it has cooperatively worked "hand-in-hand" with DNR (MKC Br. at p. 3) is gross spin, belied by the testimony of DNR's Schmoller that MKC has engaged in foot dragging and delay and eviscerated by the fact that DNR (just recently and well after this suit was filed) sued MKC for failing to fulfill its investigation and remediation obligations. Yet, MKC asks this Court to bar Plaintiffs from going forward with their RCRA claim because any future remediation that is necessary will result from WDNR's oversight involvement. But this proposition runs afoul the applicable RCRA citizen's suit provision, which grant Plaintiffs an absolute right to be heard on their RCRA claims irrespective of the WDNR's involvement and future determinations.

In enacting RCRA, Congress granted enforcement powers to the United States government to specifically address environmental conditions which "may present an imminent and substantial endangerment to health or the environment." (See, 42 U.S.C. §6973) Recognizing that owners and operators of hazardous waste facilities may not act responsibly, and that the federal government may not always enforce against failures, Congress enacted RCRA §6972(a)(1)(B) to vest citizens with important rights that parallel the federal government's "imminent and substantial endangerment" powers under RCRA §6973. In this citizen's suit provision, Congress also identified those limited circumstances in which prior involvement by a state agency would bar a RCRA (a)(1)(B) citizen's suit claim. On this subject, RCRA §6972(b)(2)(C) provides:

> (C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or

> conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –
>
> (i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;
>
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42] U.S.C.A. §9604]; or
>
> (iii) has incurred costs to initiate a Remedial Investigation and Feasibility study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. §9604] and is diligently proceeding with a remedial action under the Act [42 U.S.C.A. §9601 et seq.].

The DNR's involvement, indisputably, does not implicate any of these types of state action which would preclude Plaintiffs' RCRA claim. The State has not filed an action against MKC under RCRA (the State's suit against MKC is brought in state court under state law) and the State has also not taken any actions under the federal CERCLA statute. Plaintiffs thus have the absolute right under federal law to seek relief under RCRA, irrespective of the DNR's past and future involvement. *See, e.g., PMC, Inc. v. Sherwin-Williams Company*, 151 F.3d 610, 619 (7th Cir. 1998) (deferral to a state agency on primary jurisdiction grounds based on agency involvement not specifically enumerated in the statute would be an improper "end run around RCRA"); *City of Waukegan v. Arshed*, 2009 WL 458621 (N.D. Ill. Feb. 23, 2009); *Spillane v. Commonwealth Edison Co.*, 241 F. Supp.2d 728 (N.D. Ill. 2003); *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyoming 1998).

Therefore, that DNR is involved and overseeing MKC's current investigation provides no defense to MKC on Plaintiffs' RCRA claim, and MKC's dubious and self-serving assertion that it will (after two decades of foot dragging) cooperate in the future with DNR to adequately address all contamination issues does not support MKC's request for summary judgment.

Plaintiffs' views about what needs to be done to remediate the MKC Facility, the Class Area and the environment generally are materially different and more exacting than MKC's views on these subjects. Plaintiffs have the right under RCRA to advance in this federal court their views about what needs to be done to remove the threats to humans and the environment posed by the MKC Facility, irrespective of DNR's continuing oversight of MKC.

For all of the above reasons, MKC's request for summary judgment on Plaintiffs' RCRA claim should be denied.

B. MKC Is Not Entitled To Summary Judgment On Plaintiffs' Common Law Claims

MKC has moved for summary judgment on each of Plaintiffs' common law negligence, private nuisance, trespass and willful and wanton misconduct claims. (*See*, MKC Br. at pp. 23-37) As it did with its RCRA summary judgment argument, MKC ignores substantial evidence -- fact and expert -- that is directly contrary to each of its assertions. MKC ignores (as if it somehow did not exist) Lenz's graphic and disturbing testimony about MKC's cavalier dumping and other disposal practices that took place literally just feet away from family homes. MKC ignores (again, as if they somehow did not exist) Plaintiffs' expert's express opinions that MKC violated applicable standards of care concerning how MKC should have handled its chemicals, safeguarded its residential neighbors from environmental harm, and responded with timely and thorough investigation and remediation. MKC even goes so far as to ask for summary judgment because it has and continues to work "hand-in-hand" with the DNR, without mentioning the problematic fact that the DNR has actually sued MKC based on its insufficient response efforts, which DNR's Schmoller has characterized as foot dragging and delay.

None of the above omitted from MKC's motion papers is new, surprise evidence that Plaintiffs are just now springing on MKC to defeat summary judgment. MKC's counsel

represented Lenz (who is currently a consultant to MKC) at his deposition, and was there with him in the room when he testified about MKC's brazenly indifferent waste handling and disposal practices. MKC received Plaintiffs' experts' reports months ago, and deposed both of Plaintiffs' experts before MKC filed this motion. MKC obviously knows well that it has been sued by the State concerning its inadequate environmental investigation and remediation. MKC's counsel was in the room when DNR's Schmoller gave his deposition testimony critical of MKC's response to this environmental problem.

In view of the above, and as discussed further below, MKC's summary judgment motion on Plaintiffs' common law claims should be denied in its entirety. Issues of disputed fact do not just exist here, they abound. MKC had no legal basis under Rule 56 to file this motion, knowing of all the contrary evidence that supports Plaintiffs' common law claims.

1. Plaintiffs' negligence claim

Plaintiffs' negligence claim, alleged in Count II of their First Amended Complaint (Doc. 15 at ¶¶ 37-41)), asserts that MKC violated duties it owed to Plaintiffs and Class Members, in several ways. First, Plaintiffs allege that MKC improperly handled and disposed of its hazardous wastes, releasing them into the Class Area. (*Id*. at ¶¶ 38-39) Second, Plaintiffs allege that MKC has failed to properly respond to and abate the contamination it has caused. (*Id*.) Third, Plaintiffs allege that MKC failed to warn Plaintiffs and Class Members about the actual and threatened harm posed to them by MKC's contamination. (*Id*. at ¶ 40) Plaintiffs have not just some, but rather substantial, evidence supporting each of these allegations.

At the outset, MKC fails to recognize that negligence claims under Wisconsin law are very rarely appropriate for summary judgment determinations. In *Grace*, *supra*, an environmental case similar in several ways to this one, the court stated that "Wisconsin courts

have recognized that generally 'negligence is a question for the fact finder" and 'is almost always inappropriate for summary judgment.'" 2012 WL 1069023 at *9 (citing *Casper v. Am. Int'l Ins. Co.*, 800 N.W.2d 850, 856 (Wis. Ct. App. 2008)) *See also, Van Den Eng. v. The Coleman Co., Inc.*, 2006 WL 1663714 at **2-3 ("summary judgment is seldom granted" in negligence cases due to the "multitude of factual issues which need to be resolved by the jury"). As stated by the court in *Alvarado v. Sersch*, 662 N.W.2d 350 (Wis. 2003):

> Summary judgment is uncommon in negligence actions, 'because the court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that [the defendants] failed to exercise ordinary care.' The concept of negligence is particularly elusive, and requires the trier of fact to pass upon the reasonableness of the conduct in light of all of the circumstance, even where historical facts are concededly undisputed. Ordinarily, this is not a decision for the court.

(*Id.* at 356-57, citations omitted)

MKC's assertions that it always has properly handled and disposed of PCE wastes (MKC Br. at pp. 26-29) are not just disputed, in view of the undisputedly large quantities of contamination at its property and Lenz's testimony, they are utter fantasy. Lenz, MKC's former environmental manager, testified that he performed an internal investigation after MKC received DNR's 1994 notice letter to determine how the PCE contamination at the MKC's Facility had been caused. Based on interviews with numerous long-time MKC employees, Lenz determined that MKC's practice with respect to PCE waste had been to "throw it wherever" and that PCE was dumped, spilled, leaked and released in a number of different ways at a number of different areas at the MKC Facility. This testimony of reckless waste handling practices clearly precludes MKC's request for summary judgment on Plaintiffs' negligence claim.

Lenz's testimony, although based on what other MKC employees told him as part of his investigation, is not hearsay and is admissible evidence. Federal Rule of Evidence 801(d)(2)(D)

provides that a statement is not hearsay if the statement is offered against a party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Rule 801(d)(2)(D) plainly applies to Lenz's testimony: the statements he recounts were made to him by MKC employees, concerned matters within the scope of their employment (the persons Lenz interviewed were maintenance personnel at the MKC Facility) and were made while they were employees of MKC. In *Pillsbury Co. v. Cleaver-Brooks Division of Aqua-Chem, Inc.*, 646 F.2d 1216 (8th Cir. 1981), the court held that statements made by employees of the defendant to a person investigating the accident at issue in the case were not hearsay and were admissible. (*Id*. at 1217-18) That is precisely what happened here with Lenz: he conducted an investigation into how PCE contamination had been caused at MKC, and several MKC employees related information to Lenz on this subject. Lenz's testimony is thus admissible; and alone precludes MKC's request for summary judgment on Plaintiffs' negligence claim.

MKC simply ignores Lenz's testimony[5] and instead puts forth affidavits from two former MKC employees who claim that they never saw dumping and that PCE was always properly handled.[6] These assertions (made by persons Lenz swore under oath provided him with significantly different information years back) are irreconcilable with the undisputed fact that the MKC Facility is grossly contaminated with multiple contaminants, including PCE, at levels which, as Dr. Everett has opined, had to require significant historic releases and disposals. In any event, MKC's new and improperly proffered evidence about its chemical and waste handling

[5] MKC filed dozens of other depositions in this case for use in its summary judgment motion, (*See*, Doc. 117-142) yet conveniently omitted filing Lenz's transcript.

[6] These two former employees -- Marvin Jellings (Doc. 148) and George Schluter (Doc. 149) -- were not identified in MKC's Rule 26(a)(1) disclosures. (Doc. 195 at ¶ 42) Federal Rule 37(c)(1) specifies that if a party fails to identify a witness in its Rule 26 disclosures, "the party is not allowed to use that ..witness to supply evidence on a motion." Hence, these persons' affidavits are not properly before the Court and should be disregarded. In any event, these affidavits at best create issues of fact, as they conflict with Jellings' and Schluter's prior statements to Lenz and with the information provided to Lenz by the other MKC employees he interviewed (for whom MKC offers no affidavits).

practices is directly contradicted by Lenz's testimony. The result -- an issue of fact precluding summary judgment.

MKC's brief correctly notes that "expert testimony is needed to establish the standard of care" on claims involving technical issues, and that "when expert testimony is required and is lacking, the evidence is insufficient to support a claim." (MKC Br. at p. 24) But MKC blithely ignores that Plaintiffs have an expert -- Dr. Everett -- who has rendered the following opinion: "Madison-Kipp violated applicable standards of conduct in its handling, disposal and releases of hazardous chemicals." (Doc. 185 at p. 7) While MKC disagrees with Plaintiffs' expert, and has retained an expert (Johnson) who has rendered the opposite opinion, this results in nothing more than a disputed issue of fact that precludes the entry of summary judgment.

On the failure to warn aspect of Plaintiffs' negligence claim, the facts are disputed as well. Lenz's testimony about MKC employees dumping PCE and other chemicals literally feet from Class Area homes is sufficient evidence upon which a jury could reasonably conclude that MKC owed and breached a duty to area residents to warn them that chemicals were being mishandled in such a fashion that families and children might be at risk. Dr. Everett has also opined that MKC delayed testing in the Class Area for years after being on notice of the possibility of off-site contamination, yet Plaintiffs and the Class were left in the dark about this. This evidence creates triable issues of fact for the jury on the failure to warn allegations.

On the negligence issue concerning the timeliness and sufficiency of MKC's environmental response, there are disputed fact issues here, too, which make summary judgment improper. Nearly two decades have elapsed since MKC was first told by DNR to take action, during which most of this time period (e.g., until after this suit was filed in 2011) MKC did very little to investigate or remediate. Testing performed in just the past six months -- that Plaintiffs'

expert contends should have been performed soon after MKC received the 1994 DNR notice -- has revealed the environmental problem here is much more pervasive and serious than ever acknowledged by MKC or DNR. Dr. Everett has expressly opined that "Madison-Kipp violated applicable standards of care in its failure to promptly and thoroughly investigate and remediate the contamination and protect the people and environment threatened by it." (Doc. 185 at p. 7) DNR has frequently criticized and then sued MKC for its inadequate response. DNR's Schmoller has testified to MKC's foot dragging and delay and insufficient investigation and response measures. While MKC is free at trial, supported by its experts, to try to argue that MKC's efforts in this investigation have been timely and adequate, summary judgment is not appropriate given the directly conflicting evidence on this issue.

MKC's final challenge to Plaintiffs' negligence claim -- that Plaintiffs and the Class have no evidence that they have suffered damages -- is ludicrous. Plaintiffs have contamination on their properties and in their homes that has caused the DNR to install remediation systems throughout the Class Area. A reasonable, properly instructed jury could certainly conclude that contamination and the presence of an active remediation system impairs the value of a home. Members of the Class have individually submitted sworn interrogatory answers in which they assert to have suffered various types of damages, including property value loss, due to the contamination in their homes. (*see* Doc. 162 at Exhibits 1 -27, response to Interrogatory Nos. 2-5) In their interrogatory answers, Plaintiffs have also asserted that they have suffered inconvenience, aggravation and annoyance -- recoverable damages under Wisconsin law[7] -- as a result of living in contaminated homes in a contaminated environment. (*Id.*) These facts are more than sufficient to place the damages issue before the jury.

[7] *See*, *LeVake v. Zawistowski,* 2003 WL 23200367 at *5 (W.D. Wis. Oct. 10, 2003)(Crabb, J.), citing *Krueger v. Mitchell*, 106 Wis.2d 450, 458-60 (Ct. App. 1982).

MKC's assertion that summary judgment should be granted because Plaintiffs and the Class have not yet quantified their damages also is legally baseless. MKC fails to cite any case -- as there is none -- that holds that at the summary judgment stage the plaintiff must establish the exact amount of her damages. Indeed, the only case that MKC cites in its brief involving a summary judgment determination about damages – *AccuWeb, Inc. v. Foley & Lardner*, 308 Wis.2d 258 (2008) (MKC Br. at p. 25) -- reversed the trial court's grant of summary judgment, finding that issues of fact on the damages issues required resolution at trial. The legal requirement is only that a plaintiff come forward with evidence upon which a reasonable jury could award damages in an amount supported by the evidence. Plaintiffs have done so here.

Besides distorting the applicable legal requirements concerning damages, MKC criticizes Plaintiffs for not knowing the exact amount of their property value loss attributable to environment contamination. This is a subject on which Plaintiffs intend to offer expert testimony, and the deadline for Plaintiffs to disclose their damages experts, April 29, 2013 (*See*, Doc. 95 at ¶ 4), has not even passed. Plaintiffs have retained an expert, Dr. John Kilpatrick, on the subject of property value loss associated with environmental contamination. This expert has determined that Class Area property values have been negatively impacted as a result of the contaminated MKC Facility and the contamination that is present in the Class Area. (Doc. 194 at ¶ 8) Plaintiffs' experts will quantify the loss in value component of Plaintiffs' damages claims in the upcoming expert damages phase of this case, on the schedule set by this Court. (*Id*. at ¶ 10)

MKC's other arguments to the effect that Plaintiffs have not been damaged are meritless, and in any event are disputed. For instance, MKC argues that the assessed value (for local real estate tax purposes) of Class Area properties show that these properties still are "carrying a significant value" (MKC Br. at p. 32), but makes no showing that the local assessor even

considers contamination issues in determining taxable value. MKC's arguments concerning the fact that some Class Members have been able to refinance mortgages, or rent their properties, are similarly deficient, as neither of these circumstances show that property values have not declined due to the contamination.

Plaintiffs have ample evidence to meet their burden of establishing that they have suffered damages. The amounts of their damages, a significant component of which will be established via upcoming expert testimony, is a question for the jury to determine after hearing the parties' conflicting evidence. Summary judgment is not appropriate on this issue.

2. Plaintiffs' private nuisance claim

Count III of Plaintiffs' First Amended Complaint asserts a private nuisance claim. (Doc. 15, at ¶¶ 42-46) Plaintiffs allege that MKC has contaminated their properties, thus resulting in an unlawful interference with Plaintiffs' "reasonable use and enjoyment" of their properties. (*Id.* at ¶¶ 43-45)

MKC requests summary judgment on Plaintiffs' private nuisance claim on two grounds, both of which lack merit. First, MKC asserts that the presence of "minor" levels of contamination at issue here cannot support a private nuisance claim because anyone concerned about such levels must be "hypersensitive." (MKC Br. at pp. 34-35) This is an offensive, baseless argument. Environmental contamination is obviously a matter of legitimate concern to any reasonable person, particularly in a residential setting where numerous children are present. Here, Dr. Ozonoff has opined that exposure to the levels of contamination present in the Class Area homes presents an increased cancer risk, which obviously is a legitimate concern to any reasonable person. DNR was concerned enough about this contamination that it has used taxpayer funds to install sub slab mitigation systems throughout the Class Area. The fact that

these Class Area homes are contaminated, and that their residents have been forced to live in homes with remedial systems constantly running in them, are sufficient to allow a jury to determine whether Plaintiffs' reasonable use and enjoyment of these homes has been unlawfully interfered with.

Second, MKC repeats its assertions concerning its conduct not being negligent. Plaintiffs addressed in the above section of this brief the numerous disputes of fact on the negligence issues, and so will not repeat them here. Summary judgment on the private nuisance claim is not appropriate.

3. Plaintiffs' trespass claim

Count IV of Plaintiffs' First Amended complaint asserts a trespass claim, predicated on MKC's contamination being released onto and invading Plaintiffs' properties without their consent. (*See*, Doc.15, at ¶¶ 47-51) MKC's summary judgment challenge to this claim is based exclusively on its negligence arguments. (*See*, MKC Br. at p. 36) For the reasons discussed above, MKC's negligence arguments lack merit and its derivative request for summary judgment on Plaintiffs' trespass claim should also be denied.

4. Plaintiffs' willful and wanton misconduct claim

Finally, summary judgment is also improper on Plaintiffs' willful and wanton misconduct claim (Doc. 15, at ¶¶ 52-56), which seeks punitive damages. Whether, on the disputed facts of this case, MKC acted "maliciously toward the Plaintiff or in an intentional disregard of the rights of the Plaintiff," the standard for the assessment of punitive damages under Wisconsin law (*See*, Wis. Stat. § 895.043), is a question for the jury that cannot be determined on summary judgment.

Plaintiffs have evidence of gross and large scale dumping of toxic cancer-causing chemicals by MKC just feet away from homes occupied by families with children. A

reasonable, properly instructed jury could determine that these facts constitute "intentional disregard of the rights" of Class Area families. As Lenz attests, MKC knew in 1994 that this dumping had taken place along the property lines MKC shared with its residential neighbors, yet MKC stalled and delayed for years performing any investigations in the Class Area. MKC did not tell its neighbors what it knew about the spillage and dumping of these hazardous substances. For just under twenty years, Class Area families lived in this contaminated environment without any protections, their kids playing in the contaminated back yards that abut the MKC Facility, and all family members breathing air potentially contaminated with PCE. A reasonable, properly instructed jury could easily determine that these facts constitute intentional disregard of the rights of Class Area families.

MKC's summary judgment brief fails to cite any cases supporting its request for summary judgment on Plaintiffs' willful and wanton misconduct claim. The only case it cites on this issue, *Strenke v. Hogner*, 279 Wis. 2d 52 (2005), involved review of a punitive damages award following trial, not on summary judgment.

V. CONCLUSION

Based on the above, Plaintiffs respectfully request that MKC's motion for summary judgment be denied, in its entirety.

Dated: March 25, 2013

By: s/Michael D. Hayes
One of the Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE

Michael D. Hayes, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiffs' Response Memorandum in Opposition to Defendant Madison-Kipp Corporation's Motion for 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