UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

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

Defendants,

--and--

MADISON-KIPP CORPORATION,

Case No. 11-cv-724-bbc

Cross-
Claimant,

v.

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

Cross-Claim Defendants,

--and--

CONTINENTAL CASUALTY COMPANY and
COLUMBIA CASUALTY COMPANY,

Cross-Claimants/Third-Party Plaintiffs,

v.

MADISON-KIPP CORPORATION,

Cross-Claim Defendant,

and

LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANIES 1-20,

Third-Party Defendants.

MADISON-KIPP CORPORATION'S RESPONSE TO PLAINTIFFS' ADDITIONAL PROPOSED FINDINGS OF FACT

Madison-Kipp Corporation, by their undersigned attorneys, respond to Plaintiffs' Additional Proposed Findings of Fact[1] (Dkt. #196) with respect to the summary judgment motion (Dkt. #147) filed by Defendant Madison-Kipp Corporation ("Madison-Kipp").

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

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

* * * *

[1] Plaintiffs' Additional Proposed Findings of Fact will be referred to as "PAPFOF" herein.

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

* * * *

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

* * * *

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

RESPONSE: Disputed. Plaintiffs' additional proposed finding relies on the inadmissible hearsay testimony of Mr. James Lenz for matters that he does not have personal knowledge of as required under Federal Rule of Evidence 602. According to Mr. Lenz, he never saw any PCE being spilled or dumped, and never saw the removal of spent PCE from the vapor degreaser. (Lenz Dep., Dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.)[2] Thus, Mr. Lenz has absolutely no firsthand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp. Further, Mr. Lenz's testimony is inadmissible hearsay under Rule 801(c) because it purportedly summarizes second and even third hand out-of-court statements. (*See* Madison-Kipp Reply Br., at 6-12.) Those that do have

[2] In citing depositions, Madison-Kipp's citations are to the actual deposition page and line numbers, not the page numbers provided upon docketing the transcript.

firsthand knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. Both affiants unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility (Dkt. #148, ¶ 10; dkt. #149, ¶ 19 – 20.)

2. Until 1989, MKC used the chlorinated degreasing solvent PCE at its Facility. (Doc. 195, Exhibit 1 at p. 2)

RESPONSE: Disputed. All unused PCE was sent for off-site disposal in August, 1989. (Second Meunier Decl., Ex. 2.)

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

RESPONSE: No genuine issue of material fact exists. (Affidavit of Jellings, Dkt. #148, at ¶ 6 & Affidavit of Schluter, Dkt. #149, at ¶ 7; M-KPFOF ¶¶ 637 – 639.)

4. Parts to be cleaned, or "de-greased," were inserted into the vapor degreaser. At the base of the degreaser was a deep pan, like a "bathtub," which contained some 75-100 gallons of pure PCE. The PCE had been poured there by MKC maintenance personnel, who had carried the PCE in buckets from a PCE storage tank, where the buckets were filled. (Doc. 187 at pp. 38-41)

RESPONSE: Disputed. Plaintiffs rely on inadmissible evidence that does not support the proposed finding. Mr. Lenz did not testify that PCE was transported to the vapor degreaser by Madison-Kipp maintenance personnel but referred only to "personnel in that area". (Dkt. #187 at 39:5-6.) Mr. Lenz never carried PCE to the vapor degreaser (Dkt. #187 at 30:7-10). Any PCE transport was done by vapor degreaser operators themselves and PCE was transported to the vapor degreaser by using pails that were wheeled on a metal cart from the oil shed to the vapor degreaser and then PCE was

poured into the degreaser by the vapor degreaser operator. (Affidavit of Schluter, Dkt. #149 at ¶¶ 11, 13.)

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

RESPONSE: Disputed as incomplete. (Dkt. #149 at ¶ 14.) Storing PCE in an aboveground storage tank on a concrete pad, receiving PCE by tanker truck using a hose system to fill the tank and transferring PCE from the tank to the degreaser are all methods of receiving, storing, and handling PCE that are consistent with industry standards and practices at the relevant time. (M-KPFOF ¶ 471.)

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

RESPONSE: Disputed. The cited testimony does not support the finding. Further, Mr. Lenz's testimony related to one of the PCE storage tank locations, not both. (Dkt. #187 at 69:24-25.) Storing PCE in an aboveground storage tank on a concrete pad, receiving PCE by tanker truck using a hose system to fill the tank and transferring PCE from the tank to the degreaser are all methods of receiving, storing, and handling PCE that are consistent with industry standards and practices at the relevant time. (M-KPFOF ¶ 471.)

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

RESPONSE: No genuine issue of material fact exists. (Affidavit of Jellings, Dkt. #148 at ¶ 7 & Affidavit of Schluter, Dkt. #149 at ¶ 9.)

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

RESPONSE: Madison-Kipp does not dispute that spent PCE re-collected in the pan at the bottom of the degreaser. Madison-Kipp does dispute the characterization of the vapor degreaser vent. The Lenz testimony cited by plaintiffs refers to a "vent" not a "duct and fan." (Dkt. #187 at p. 38:18-20.) Plaintiffs also attempt to rely on the expert report of Dr. Lorne Everett to support its proposed finding but Plaintiffs have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 12-13 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Additionally, Dr. Everett does not have personal knowledge of the facts included in his expert report and has no personal knowledge of Madison-Kipp's vapor degreaser vent. (M-KPFOF ¶¶ 32, 650, 656.) Madison-Kipp's use of PCE solvent for degreasing meets the standard of care recognized in the industry at the time. (M-KPFOF ¶ 470.)

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

RESPONSE: Disputed. Plaintiffs' additional proposed finding relies on the inadmissible hearsay testimony of Mr. James Lenz for matters that he does not have

personal knowledge of as required under Federal Rule of Evidence 602. According to Mr. Lenz, he never saw any PCE being spilled or dumped, and never saw the removal of spent PCE from the vapor degreaser. (Lenz Dep., dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.) Thus, Mr. Lenz has absolutely no firsthand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp. Further, Mr. Lenz's testimony is inadmissible hearsay under Federal Rule of Evidence 802 because it purportedly summarizes second and even third hand out-of-court statements. (*See* Madison-Kipp Reply Br. at 6-12.) Those that do have firsthand knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. Both affiants unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility (Dkt. #148, ¶ 10; dkt. #149, ¶ 17 – 20; M-KPFOF ¶¶ 643 – 645.) Moreover, Madison-Kipp's use of PCE solvent for degreasing meets the standard of care recognized in the industry at the time. (M-KPFOF ¶¶ 470, 484.)

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 8, above. Moreover, Mr. Lenz's very general testimony fails to address the portion of PCE vapor that would volatilize and, as a result, not "fall" to the ground in "form of liquid." Madison-Kipp's use of PCE solvent for degreasing meets the standard of care recognized in the industry at the time. (M-KPFOF ¶ 470.)

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

RESPONSE: Disputed. Plaintiffs' additional proposed finding relies on the inadmissible hearsay testimony of Mr. James Lenz for matters that he does not have personal knowledge of as required under Federal Rule of Evidence 602. According to Mr. Lenz, he never saw any PCE being spilled or dumped, and never saw the removal of spent PCE from the vapor degreaser. (Lenz Dep., dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.) Thus, Mr. Lenz has absolutely no firsthand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp.

Further, Mr. Lenz's testimony is inadmissible hearsay under Federal Rule of Evidence 802 because it purportedly summarizes second and even third hand out-of-court statements. (*See* Madison-Kipp Reply Br. at 6-12.) Those that do have firsthand knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. Both affiants unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility (Dkt. #148, ¶ 10; dkt. #149, ¶ 17 – 20; M-KPFOF ¶¶ 643 – 645.)

Mr. Lenz's inadmissible testimony does not even support the proposed finding as he does not testify to a specific leak or spill, does not testify to a time frame and does not testify to a location of any alleged spill or leak. (*See* dkt. #187 at 66-69.) Moreover, Mr. Schmoller's testimony is not as Plaintiffs have outlined. Mr. Schmoller explained

that it was his understanding that there was a leak or spill from an aboveground storage tank that stored PCE in the northeast portion of the site. (Dkt. #118 at 279-280.) When asked if the leak or spill was a "single event," Mr. Schmoller was unsure – saying "I think there's a known single event. I don't know – I don't think it's reported that it happened repeatedly." (Dkt. #118 at 280:7-12.) Thus, Plaintiffs' characterization of this alleged spill is not accurate.

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

RESPONSE: Disputed. Plaintiffs rely on inadmissible evidence that does not support the proposed finding. Mr. Lenz did not testify that PCE was transported to the vapor degreaser by Madison-Kipp maintenance personnel but referred only to "personnel in that area". (Dkt. #187 at 39:5-6.) Mr. Lenz never carried PCE to the vapor degreaser (Dkt. #187 at 30:7-10.) Any PCE transport was done by vapor degreaser operators themselves and PCE was transported to the vapor degreaser by using pails that were wheeled on a metal cart from the oil shed to the vapor degreaser and then PCE was poured into the degreaser by the vapor degreaser operator. (Affidavit of Schluter, dkt. #149 at ¶¶ 11 & 13.)

Further, Plaintiffs' additional proposed finding relies on the inadmissible hearsay testimony of Mr. James Lenz for matters that he does not have personal knowledge of as required under Federal Rule of Evidence 602. According to Mr. Lenz, he never saw any PCE being spilled or dumped, and never saw the removal of spent

PCE from the vapor degreaser. (Lenz Dep., Dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.) Thus, Mr. Lenz has absolutely no firsthand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp.

Finally, Mr. Lenz's testimony is inadmissible hearsay under Federal Rule of Evidence 802 because it purportedly summarizes second and even third hand out-of-court statements. (*See* Madison-Kipp Reply Br. at -12.) Those that do have firsthand knowledge refute Mr. Lenz's testimony and have signed affidavits regarding the same. Both affiants unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility. (Dkt. #148, ¶ 10; dkt. #149, ¶ 17 – 20; M-KPFOF ¶¶ 643 – 645.) Moreover, Madison-Kipp's use, handling, and disposal of industrial products, including PCE and oils, was consistent with the standard of care in the industry at the time. (M-KPFOF ¶ 484.)

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

RESPONSE: Disputed. See response to PAPFOF ¶ 12, above.

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

RESPONSE: Madison-Kipp disputes the characterization. Spilled or dripped liquids, including those containing PCE, were collected used either an industrial vacuum or swept up with "oil-dri" and transferred into a 500-gallon container or dumpster for off-site disposal. (M-KPFOF ¶ 646; dkt. #148 ¶ 11; dkt. #149 ¶ 21.) Madison-Kipp's use,

handling, and disposal of industrial products, including PCE and oils, was consistent with the standard of care in the industry at the time. (M-KPFOF ¶ 484.)

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 14, above.

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

RESPONSE: Madison-Kipp disputes the characterization. Spent oils were applied to the parking areas for dust suppression using an industrial vacuum from at least 1971 until 1976 or 1977. (M-KPFOF ¶ 661.) Material used for dust suppression came from facility spills of hydraulic oils, PCE, water, or other liquids. (M-KPFOF ¶ 662.) Use of spent oils for dust suppression was very common in the area in the 1960s and 1970s. (M-KPFOF ¶ 663.) Use of waste oils for dust suppression was common in the area and allowed under state and federal regulations at the time. (M-KPFOF ¶¶ 475 – 483.)

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

RESPONSE: Disputed. Plaintiffs' additional proposed finding is not supported by evidence. In addition, Plaintiffs' additional proposed finding relies on the inadmissible hearsay testimony of Mr. James Lenz for matters that he does not have personal knowledge of as required under Federal Rule of Evidence 602. According to Mr. Lenz, he never saw any PCE being spilled or dumped, and never saw the removal of spent

PCE from the vapor degreaser. (Lenz Dep., Dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.) Thus, Mr. Lenz has absolutely no firsthand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp.

Further, Mr. Lenz's testimony is inadmissible hearsay under Federal Rule of Evidence 802 because it purportedly summarizes second and even third hand out-of-court statements. (*See* Madison-Kipp Reply Br. at 6-12.) Those that do have firsthand knowledge refute Mr. Lenz's testimony and have signed declarations regarding the same. Both declarants unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility (Dkt. #148, ¶ 10; dkt. #149, ¶ 19-20.)

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

RESPONSE: Disputed. See response to PAPFOF ¶ 17, above.

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

RESPONSE: Disputed. Madison-Kipp has produced all purchase and disposal records in its possession, custody or control in response to Plaintiffs' discovery request. (*See*, *e.g.*, Second Meunier Decl., Exs. 1, 2, 3 and 7.)

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

RESPONSE: Disputed. Mr. Lenz's testimony regarding what he does/does not recall does not establish that the event at issue never occurred. Mr. Lenz is not an expert in contamination investigations, nor does he have the requisite experience to be an expert in contamination investigations. The environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; dkt. #145 at 7-8.)

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

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

(Doc. 195 at Ex. 2)

RESPONSE: Disputed. See response to PAPFOF ¶ 18, above.

22. Also, Plaintiffs' expert, Dr. Lorne Everett, after comprehensive examination of existing environmental test data, concludes that "… the PCE contamination in the deep groundwater (underneath the plant and Class Area) was caused by employees dumping PCE by buckets out of the door and by leakage from the PCE (250-gallon) above ground storage tanks… (Doc. 188 at p. 48)

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on the testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*,

965 F.2d 160, 173 (7th Cir. 1992).) Additionally, Dr. Everett does not have personal knowledge of the facts included in his expert report or testified to at his deposition. Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs' additional proposed finding of fact is disputed with admissible evidence by people with personal knowledge. (Dkt. #148 at ¶ 10 & dkt. #149 at ¶ 17 – 20; M-KPFOF ¶¶ 470, 471, 472, 643, 644, 645.)

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

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs' additional proposed finding of fact is disputed with admissible evidence by people with personal knowledge. See Response to PAPFOF ¶ 22, above.

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

> containment and capture measures for vapor degreasers, so that spent PCE is re-captured for reuse, and not released to the environment
>
> containment for PCE storage tanks, so that chemicals escaping the tanks are not released to the environment

> prohibition of dumping and spilling PCE and other dangerous chemical wastes onto bare ground, for any reason, including to control dust or save money
>
> disposal of spent PCE and other dangerous chemical wastes in an approved facility

(Doc. 185 at pp. 19-25)

RESPONSE: Disputed as not based on admissible evidence. See Response to PAPFOF ¶ 22, above. Madison-Kipp's behavior concerning its disposal of PCE and other chemicals met the applicable standard of care. (M-KPFOF ¶¶ 470, 483, 484, 492.)

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

RESPONSE: Disputed as not based on admissible evidence. See Response to PAPFOF ¶ 22, above. Madison-Kipp's behavior concerning its disposal of PCE and other chemicals met the applicable standard of care. (M-KPFOF ¶¶ 470, 483, 484, 492.)

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

RESPONSE: Disputed as not based on admissible evidence. See Response to PAPFOF ¶ 22, above. Madison-Kipp's behavior concerning its disposal of PCE and other chemicals met the applicable standard of care. (M-KPFOF ¶¶ 470, 483, 484, 492.)

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

RESPONSE: Disputed as not based on admissible evidence. See Response to PAPFOF ¶ 22, above. Madison-Kipp's behavior concerning its disposal of PCE and other chemicals met the applicable standard of care. (M-KPFOF ¶¶ 470, 483, 484, 492.) Further, Dr. Everett is not a fact witness and he does not have personal knowledge of what occurred at Madison-Kipp. His observations are meaningless.

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

RESPONSE: No genuine issue of material fact exists.

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

RESPONSE: No genuine issue of material fact exists.

30. DNR has alleged that MKC:

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

(Doc. 195 at Ex. 5)

RESPONSE: Plaintiffs cite a Wisconsin Department of Justice press release, not the complaint filed by the State of Wisconsin and the complaint's allegations are not identical to the proposed finding. Madison-Kipp has responded to the State of Wisconsin's allegations in its filed answer. (*See* Ziemba Decl., Ex. 1.)

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

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

(Doc. 195 at Ex. 6)

RESPONSE: Madison-Kipp does not dispute that the referenced document is correctly quoted but does dispute the characterization. (M-KPFOF ¶¶ 490, 491, 492.)

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

Q. …(I)s it fair to say… that there is a history at this site of Madison-Kipp delaying and dragging its feet on addressing potentially serious environmental problems… is the answer to my question yes?
A. Yes. (Doc. 117 at pp. 209-210)

* * * *

Q. Isn't it true that today, today in 2012, the (DNR) and Madison-Kipp still do not know the horizontal and vertical extent of the groundwater contamination?
A. True. (Id. at pp. 64-65)

* * * *

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

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

* * * *

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

RESPONSE: Disputed. The environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; dkt. #145 at 7-8.)

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

> Q. … Let me ask it this way. Mr. Lenz, isn't it true to say that you don't believe Madison-Kipp has adequately addressed the PCE contamination problem?
>
> * * * *
>
> A: I would say that that's probably true. (Doc. 187 at p. 237)

RESPONSE: Madison-Kipp does not dispute that Mr. Lenz said as much but disputes that Mr. Lenz's personal opinion establishes that Madison-Kipp did not adequately address the PCE contamination. Mr. Lenz is not an expert in contamination investigations, does not have the requisite experience to be an expert in contamination investigations and does not provide the standard of care relied on in making such a conclusory statement. Plaintiffs' own purported expert opined that Mr. Lenz had no groundwater contamination training and no remediation training. (Dkt. #185 at 24.) Finally, the environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; dkt. #145 at 7-8.)

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

> Recently detected PCE contamination in groundwater "contains concentrations of (PCE) which exceed the enforcement standard as listed in Wisconsin Administrative Code."
>
> DNR has concluded "that the contamination is emanating from Madison Kipp property."
>
> Wisconsin's "Hazardous Substance Spill Law" requires MKC "to determine the horizontal and vertical extent of contamination and clean up/properly dispose of the contaminants."

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

DNR's letter also warned that:

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

(Doc. 195 at Ex. 3)

RESPONSE: No genuine issue of material fact exists.

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

> "Enclosed are the results of tests conducted by Dames & Moore (D&M, MKC's environmental consultant) regarding our groundwater contamination investigation."
>
> "No obvious source (of the contamination) was found and the recommendation by D&M was to have a few soil samples gathered around the area by hand auger. This would be tested by pid detector in their office and would not be reportable to the DNR."
>
> "I reminded D&M that our goal is to conduct just enough investigation to support the theory to the DNR that the source of contamination is from off-site so that our cost for investigation is held to a minimum."

(Doc. 195 at Ex. 7)

RESPONSE: Madison-Kipp does not dispute that the referenced document is correctly quoted but does dispute the characterization. Mr. Lenz testified to the company's interest in conducting all matters in a "cost effective" manner. (Dkt. #187 at p. 183) The

environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; Dkt. #145 at 7-8)

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

> Q. Well, would (this goal) have been acceptable when you were environmental manager (two years later, in 1996) …?
> A. Not if I'm signing my name to (the memo), no.
> Q. You wouldn't sign your name to that, would you?
> A. No.
> Q. Okay. Why wouldn't you? That's not right, is it? That's not right to – to be doing that, is it?
>
> * * * *
>
> A. I agree it's not right.

(Doc. 187 at p. 134)

RESPONSE: Disputed. Madison-Kipp does not dispute that Mr. Lenz said as much but dispute that Mr. Lenz's personal opinion establishes that Madison-Kipp investigation was improper. Mr. Lenz is not an expert in contamination investigations, does not have the requisite experience to be an expert in contamination investigations and does not provide the standard of care relied on in making such a conclusory statement. Plaintiffs' own purported expert opined that Mr. Lenz had no groundwater contamination training and no remediation training. (Dkt. #185 at 24.) The environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; dkt. #145 at 7-8.)

37. The communications between DNR and MKC since DNR's letter of July 18, 1994 shows DNR on multiple occasions advising MKC that its efforts to determine the extent of contamination, and to clean it up, were inadequate, or non-existent. These communications, some of which are identified below, culminated in 2012 with Wisconsin's DOJ – at the request of DNR – suing MKC for failure to investigate the extent of the contamination and restore the environment. (Doc. 195 at Ex. 4)

RESPONSE: Disputed. The environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490, 491, 492.) Madison-Kipp denied the allegations filed by the State of Wisconsin. (Ziemba Decl., Ex. 1.)

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

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

(Doc. 195 at Ex. 8)

RESPONSE: Madison-Kipp does not dispute that the referenced document is correctly quoted but does dispute the characterization. The environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490, 491, 492.)

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

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

monitoring wells are necessary to determine the extent of contamination off-site."

(Doc. 195 at Ex. 9)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

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

Doc. 195 at Ex. 10)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

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

(Doc. 195 at Ex. 11)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

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

* * * *

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

(Doc. 118 at pp. 291-292)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

43. DNR's Schmoller testified:

Q: Those wells which are going to be drilled in 2012 on company property are being drilled to determine, among other things, the horizontal and vertical extent of groundwater contamination, right?
A: Correct.
Q: They're being drilled 18 years after the State told Madison-Kipp to determine the horizontal and vertical extent of groundwater contamination, right?
A: Yes.

(Doc. 118 at p. 300)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

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

(Doc. 117 at pp. 209-210)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

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

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

(Doc. 195 at Ex. 5)

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 38, above. Further, any communications with the office of the Governor of the State of Wisconsin, or any other elected or appointed local, state or federal official, is not improper and is immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Disputed. The cited document does not support the Plaintiffs' additional proposed finding of fact (no information to support how many homes were tested as of the date of the document; no information to support how many of the tested homes were within the Class Area; no information upon which WDNR concluded the detections were "emanating from MKC's site"). The cited document also notes that "[n]one of the detected concentrations exceed current sub slab or indoor air [WDNR] guidance criteria." (Dkt. #195-12.) Not only does the cited document not provide the necessary information for WDNR to conclude that the vapor subslab or indoor air

detections were from Madison-Kipp, but the indoor air data collected from all homes within the Class Area are consistent with typical background levels for PCE. (M-KPFOF ¶ 572.)

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

RESPONSE: Disputed. In December 2004, Madison-Kipp installed four shallow soil vapor monitoring probes (VP-1S, VP-2S, VP-1N and VP-2N) along the east property boundary. (M-KPFOF ¶ 102.)

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

RESPONSE: No genuine issue of material fact exists.

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

RESPONSE: Madison-Kipp does not dispute the sample results. Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway because it has followed standard and accepted practices for investing and evaluating the vapor intrusion pathway. (M-KPFOF ¶¶ 548 – 551.)

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

RESPONSE: Disputed. The vapor probes identified in PAPFOF ¶ 49 are on Madison-Kipp's property so the detection noted in PAPFOF ¶ 50 was not on a residential

property. (Dkt. #117 at 189:7-8.) Further, Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway because it has followed standard and accepted practices for investing and evaluating the vapor intrusion pathway. (M-KPFOF ¶¶ 548 – 551.)

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

RESPONSE: Disputed. The finding is not based on admissible evidence. Mr. Schmoller has not been offered or qualified as a vapor intrusion expert. Further, Mr. Schmoller does not provide the standard of care relied on in making such a conclusory statement. Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway. (M-KPFOF ¶¶ 548 – 551)

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

RESPONSE: Disputed. Mr. Schmoller testified there was a delay in getting sub-slab data in part because the "it took a long time [for Madison-Kipp] to get access [to Class Members' properties]. (Dkt. #117 at 176:9-13.) Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway. (M-KPFOF ¶¶ 486, 548 – 551.)

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

RESPONSE: Disputed. The cited document does not support Plaintiffs' additional proposed finding of fact. Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway because it has followed standard and accepted practices for investing and evaluating the vapor intrusion pathway. (M-KPFOF ¶¶ 548 – 551.)

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 54, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 54, above.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Additionally, Madison-Kipp objects to the finding as relying on inadmissible hearsay under Federal Rule of Evidence 802.

58. It was about this same time – in September of 2011 – that a lawyer for MKC approached the Chief Counsel to the Governor of the State of Wisconsin, asking for the State to take legal action against MKC that would pre-empt or prevent neighboring families (who would 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. 195 at Ex. 14)

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Additionally, Madison-Kipp objects to the finding as relying on inadmissible hearsay under Federal Rule of Evidence 802.

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

RESPONSE: Disputed. The cited document does not support Plaintiffs' additional proposed finding of fact. Madison-Kipp followed the applicable standard of care for obtaining and evaluating data related to the vapor intrusion pathway because it has followed standard and accepted practices for investing and evaluating the vapor intrusion pathway. (M-KPFOF ¶¶ 548 – 551.)

62. As Schmoller testified:

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

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Further, the environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490, 491, 492.) Additionally, Madison-Kipp objects to the finding as relying on inadmissible hearsay under Federal Rule of Evidence 802.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 62, above.

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

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

(Doc. 195 at Ex. 15)

RESPONSE: Disputed. See Response to PAPFOF ¶ 62, above.

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

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

* * * *

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

(Id. at 173-174)

RESPONSE: Disputed. See Response to PAPFOF ¶ 62, above.

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

RESPONSE: Madison-Kipp does not dispute that extensive testing within the Class Area has been completed but disputes the characterization that "contamination" has been found in the sub-slabs of every Class Area home tested. The cited document does not support the Plaintiffs' additional proposed finding of fact (no information to support how many homes were tested as of the date of the document; no information to support how many of the tested homes were within the Class Area; no information upon which WDNR concluded the detections were "emanating from MKC's site"). The

cited document also notes that "[n]one of the detected concentrations exceed current sub slab or indoor air [WDNR] guidance criteria." (Dkt. #195-12.) Concentrations of VOCs in sub-slab soil gas and indoor air do not present or threaten an imminent or substantial endangerment to health or the environment. (M-KPFOF ¶ 576.)

67. As Schmoller concluded from this testing:

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

(Doc. 195 at Ex. 16)

RESPONSE: Disputed. See Response to PAPFOF ¶ 66, above.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Further, Plaintiffs' additional proposed finding of fact distorts Ms. Trask's testimony.

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion.

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

> never attempted to interview operational employees, or consult operational documents, to determine how chemicals were used or disposed;
>
> never calculated the amount of PCE used or disposed by MKC, even though it is possible to do so;
>
> has not determined the extent of groundwater contamination, or of vapor contamination; and
>
> has not determined all of the sources of on-site PCE soil and groundwater contamination.

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

RESPONSE: Disputed. Plaintiffs' additional proposed finding of fact distorts Ms. Trask's testimony. A summary of Madison-Kipp's Site Investigation and Interim Remedial Actions for February 2012 through January 2013 has been reported to WDNR. (*See* Dkts. ## 203 – 217-1 at ARCADIS027577-ARCADIS037639.) The environmental site investigations and remedial activities conducted by Madison-Kipp have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 492; dkt. #145 at 7-8.)

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

RESPONSE: Disputed as immaterial to deciding Madison-Kipp's summary judgment motion. Further, the environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490 – 492.)

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

RESPONSE: Disputed. The environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490, 491, 492.) Moreover, Dr. Everett's expert report and testimony,

and thus, this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett, which was filed concurrently herewith, and incorporated herein by reference.

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

> Madison-Kipp not only has failed to investigate the extent of the contamination, but, to the contrary it has spent the years since the chemical discharges (1) ignoring the problem altogether; (2) trying to blame someone else for it; (3) invoking its political ties to support the company's desire to do as little as possible; and (4) portraying the problem as one that is not as serious as it really is. Also, and not surprisingly given its attitude toward competent and timely investigation, Madison-Kipp has yet to determine (let alone implement) a comprehensive remedy for their contamination, which continues to spread… The unfortunate, but predictable, result of this behavior is that the contamination has been allowed to spread unchecked over the decades since discharge, and has infiltrated the properties of Madison-Kipp's neighbors in the immediately adjacent Class Area and beyond.

(Doc. 185 at pp. 25-40)

RESPONSE: Disputed. See Response to PAPFOF ¶ 75, above.

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

> (T)he state has determined that chemicals originating from the manufacturing processes at MKC, including tetrachloroethene (PCE), polychlorinated biphenyls (PCB) and polyaromatic hydrocarbons (PAHs) have been released to the environment… These releases have led to site-related contaminants migrating off-site to the backyard soils of properties adjoining the MKC property.
>
> There are detectable concentrations of PCE, PCBs and PAH compounds in some residential surface soils. Some of the detected compounds exceed the health-based direct contact health guidelines concentrations the state uses, meaning potentially unacceptable health

> risks exist for land owners at certain properties. The Department is particularly concerned about the off-site PAH direct contact exceedances and the VOC direct contact exceedance documented as part of MKC's investigative efforts.
>
> Based on the currently known contamination extent and the past waste disposal practices, the PCE, PCB and PAH off-site soil contamination on the residences adjacent to the MKC property along South Marquette and Waubesa Streets is the responsibility of MKC.

(Doc. 195 at Ex. 2)

RESPONSE: Although Madison-Kipp does not dispute that WDNR sent a November 1, 2012 letter to Madison-Kipp, Madison-Kipp disputes the Plaintiffs' characterization. Specifically, the letter concludes that "[u]nless it can shown otherwise, the state believes MKC is the responsible party for the contamination documented on and around the 201 Waubesa Street site…"). (Dkt. #195-2.) Madison-Kipp has "shown otherwise" with respect to, at a minimum, the PAH off-site soil contamination referenced in the November 1, 2012 letter. (Dkt. #143; M-KPFOF ¶¶ 261 – 265; 631 – 635.)

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

RESPONSE: Disputed. The cited document does not support Plaintiffs' additional proposed finding of fact. (*See* dkt. #203-3 & dkt. #203-4 (Table 5-1 at ARCADIS027742 – ARCADIS027846); dkt. #203-8 (Figures 5-1 to 5-12 at ARCADIS028069 – ARCADIS028080).)

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

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on the testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Additionally, Dr. Everett does not have personal knowledge of the facts included in his expert report or testified to at his deposition.

Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett, which was filed concurrently herewith, and incorporated herein by reference.

In addition, forensic analysis showed that the PAHs found off-site on the Class Members' properties were background PAHs (Dkt. #143; M-KPFOF ¶¶ 261 – 265; 631 – 635.)

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

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

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

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

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

RESPONSE: Disputed. The soil investigation that Plaintiffs are referencing was not completed by WDNR. Further, the cited documents do not accurately depict the results

of Madison-Kipp's soil investigation for VOCs, PCBs or PAHs. (*See* dkt. #203-2 at ARCADIS027666 – ARCADIS027668); dkt. #203-4 & dkt. #203-5 (Table 5-2 at ARCADIS027847 – ARCADIS0277887); dkt. #203-8 (Figures 5-13 to 5-16 at ARCADIS028081 – ARCADIS028084) & dkt. #203-9 (Figures 5-17 and 5-18 at ARCADIS028088).)

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

RESPONSE: Disputed as unsupported by the cited document.

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

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on a supplemental declaration from Dr. Lorne Everett that amounts to an impermissible attempt to supplement his expert report. Dr. Lorne Everett has failed to submit any independent admissible evidence to support his opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert

Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

Further, both Exhibit A and B to Dkt. #1 are factually inaccurate, misrepresent the actual circumstances and are misleading. (*See* Dkt.# #203-5 & dkt. #203-6 at ARCADIS027896 – ARCADIS027940 (Table 5-5).) For example, Plaintiffs depict a plume of "total volatile organic compounds" in "deep groundwater" in Exhibit A but conveniently omit that the map's depiction likely includes detections of disinfection by-products from the City of Madison's chlorination efforts (including chloroform, bromodichloromethane, bromoform, etc. which are "volatile organic compounds") (*See* Dkt. #167-40.) These constituents are in no way related to Madison-Kipp. Because of this misleading depiction, Exhibit A appears to show a contaminant plume (emanating from Madison-Kipp) *past* Unit Well #8. This cannot be factually accurate because there has been no detection of PCE in Unit Well #8 and the only PCE breakdown product of PCE that has been detected (1,2-Dichloroethylene) has only been detected below the level of quantification (laboratory detection limits). Despite the fact that 1,2-Dichloroethylene has been detected at less than 1 µg/L (0.16 µg/L), the plume map depicts Unit Well #8 within the iso-concentration contours of 1 µg/L.

Moreover, Plaintiffs incorrectly rely on vertical aquifer profiling data to create the Exhibit A plume map. Vertical aquifer profile data is reconnaissance level sampling that occurs *before* the monitoring well is installed and vertical aquifer profile data must be confirmed with samples from properly installed monitoring wells. Here, the sampling from properly installed monitoring wells did not confirm the vertical aquifer

profiling data (and, in at least one case, the actual monitoring well results were more than 10 times lower). In addition, despite the fact that monitoring wells 7, 8, and 11S do not have detections of PCE (or any of its associated breakdown products), Exhibit B depicts these wells as being within the iso-concentration contours of 10 µg/L. Thus, the plume depiction is not only factually inaccurate but misleading. Further, Exhibit B (which purportedly depicts "shallow groundwater" includes data from MW-14 and MW-16, despite the fact that these wells are not the shallowest groundwater wells and data from the shallow zone was not generated at these locations. As a result, Plaintiffs have a "shallow groundwater" map that depicts water from very shallow levels all of the way to 75 feet below ground surface without making a distinction between the data depths. Again, this information should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett.

83. Dr. Everett explains how this contamination occurred:

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

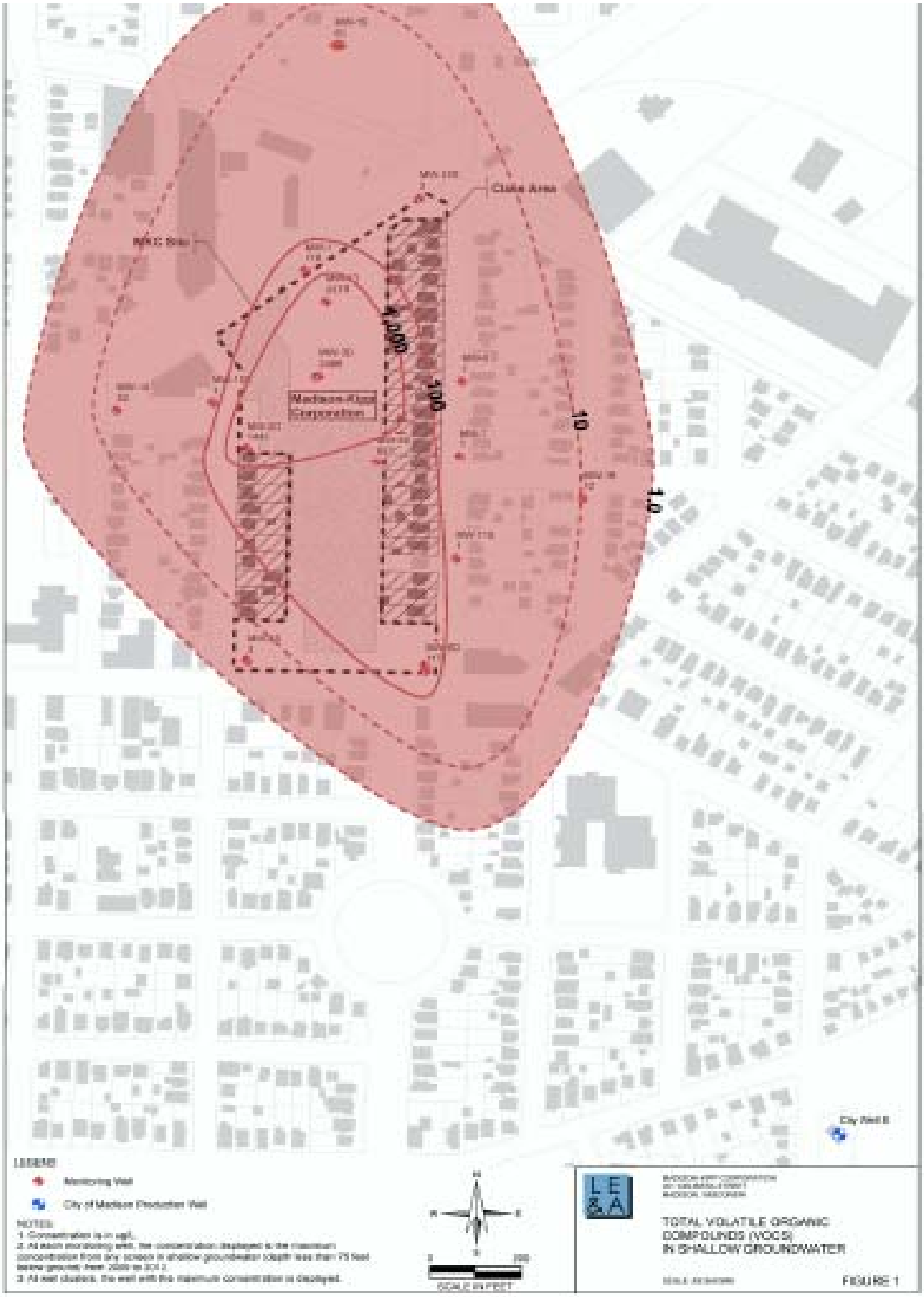
(Doc. 185 at p. 11)

RESPONSE: Disputed. See Response to PAPFOF ¶ 82, above.

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

contaminant plumes underlies the entirety of the MKC Site and Class Area (and even extends well beyond).

RESPONSE: Disputed. See Response to PAPFOF ¶ 82, above.



85. This extensive groundwater contamination was confirmed by sampling conducted and reported in the last 3 months on MKC's site and off-site in every

direction. The sampling revealed very high levels of MKC's primary degreasing solvent, PCE, and its daughter products, trichloroethene ("TCE"), cis-1, 2 – dichloroethene ("DCE"), and vinyl chloride ("VC"), as well as high levels of PCB's. (Doc. 188 at Exs. 2(a) and (g-k))

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on the testimony of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).)

Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference. Further, Plaintiffs' characterization regarding extent of contamination is factually inaccurate. (Dkt. #203-2 at ARCADIS027696 – ARCADIS027697.)

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

RESPONSE: Disputed. The cited document relates to the results of groundwater VOC data from the vertical aquifer profiling efforts undertaken by ARCADIS before the installation of MW-13. The vertical aquifer profile data is not equivalent to a

groundwater sampling. The groundwater sampling at MW-13 did not confirm the vertical aquifer profiling data (highest level was 6,800 ppb). (Dkt. #203-5 at ARCADIS027926.)

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

RESPONSE: Disputed. The cited document does not support Plaintiffs' additional proposed finding of fact. The federal MCL applies only to *drinking water* provided by utilities via a public water supply. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").) The Class Area is served by a series of municipal wells. (M-KPFOF ¶ 48 (area is served by a series of municipal wells rather than private wells).) The MCL is not applicable to the groundwater below the Class Area.

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

RESPONSE: Madison-Kipp does not dispute that MW-13 was drilled in 2012 but disputes Plaintiffs' characterization regarding Madison-Kipp's investigation. The environmental site investigations and remedial activities conducted by Madison-Kipp, as well as Madison-Kipp's communications with the WDNR, have been consistent with the standards of practice for such activities at the time. (M-KPFOF ¶ 490, 491, 492.)

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

RESPONSE: Disputed. The cited document relates to the results of groundwater VOC data from the vertical aquifer profiling efforts undertaken by ARCADIS before the installation of MW-15. The vertical aquifer profile data is not equivalent to a groundwater sampling. The groundwater sampling at MW-15 did not confirm the vertical aquifer profiling data (highest level was 1,100 ppb). (Dkt. #203-5 at ARCADIS027929, ARCADIS027932.) Moreover, the federal MCL applies only to drinking water provided by utilities via a public water supply. The MCL is not applicable to the groundwater below the Class Area. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").)

90. Results from sampling of well MW-16, reported December 19, 2012, also showed contamination at every level tested, and revealed levels of PCE as high as 430 ppb, 86 times the MCL. That well is located approximately one block further away from the MKC Site than the Class Area, to the east. (Doc. 188 at Ex. 2(k)).

RESPONSE: Disputed. The cited document relates to the results of groundwater VOC data from the vertical aquifer profiling efforts undertaken by ARCADIS before the installation of MW-16. The vertical aquifer profile data is not equivalent to a groundwater sampling. The groundwater sampling at MW-15 did not confirm the vertical aquifer profiling data (highest level was 23 ppb). (Dkt. #203-5 at ARCADIS027932.) Moreover, the federal MCL applies only to drinking water provided by utilities via a public water supply. The MCL is not applicable to the groundwater below the Class Area. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").)

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

RESPONSE: Disputed. The cited document relates to the results of groundwater VOC data from the vertical aquifer profiling efforts undertaken by ARCADIS before the installation of MW-14. The vertical aquifer profile data is not equivalent to a groundwater sampling. The groundwater sampling at MW-15 did not confirm the vertical aquifer profiling data (highest level was 1.7 ppb). (Dkt. #203-5 at ARCADIS027929) Moreover, the federal MCL applies only to drinking water provided by utilities via a public water supply. The MCL is not applicable to the groundwater below the Class Area. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").)

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

RESPONSE: Disputed. The cited document relates to the results of groundwater VOC data from the vertical aquifer profiling efforts undertaken by ARCADIS before the installation of MW-17. The vertical aquifer profile data is not equivalent to a groundwater sampling. The groundwater sampling at MW-15 did not confirm the vertical aquifer profiling data (highest level was 1,300 ppb). (Dkt. #203-5 at ARCADIS027932.) Moreover, the federal MCL applies only to drinking water provided by utilities via a public water supply. The MCL is not applicable to the groundwater

below the Class Area. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").)

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

RESPONSE: MW-17 is located south of Madison-Kipp, along Atwood Avenue. Madison-Kipp disputes the remainder of PAPFOF ¶ 93 as not based on admissible evidence. (M-KPFOF ¶ 519 (Unit Well # 8 located approximately 1,500 feet southeast of the site).) As to Plaintiffs' reliance on Exhibit A of Dkt. #193, *see* Response to PAPFOF ¶ 82, above.

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

RESPONSE: Disputed. (Dkt. #203-1 at ARCADIS027591 – ARCADIS027599; dkt. #203-2 at ARCADIS027695 – ARCADIS027697; Ziemba Decl., Ex. 2.)

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

RESPONSE: Disputed. (Dkt. #203-2 at ARCADIS027693 – 027694); Schmoller Dep., dkt. #117 at p. 115:14 – 116:1 ("Q. Do you believe this [is a] DNAPL site? A. No, I don't. I don't think there's DNAPL out there.").) See also Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of

Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

96. Dr. Everett has testified that PCE DNAPL is in the bedrock groundwater on the MKC Site. It is also in the bedrock off the MKC site (e.g. to the north, near MW-13 and the local community center). MKC has, to date, done no DNAPL investigation to identify the other 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. 188 at pp. 30, 37, 50)

RESPONSE: Disputed. See Response to PAPFOF ¶ 95, above.

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 330-344; dkt. #203-2 at ARCADIS027682 – ARCADIS027686 & ARCADIS027698 – ARCADIS027704.)

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

RESPONSE: Disputed. Mr. Schmoller's testimony is entirely speculative and site investigation and remediation has continued after Mr. Schmoller's testimony. Further, Mr. Schmoller discussed the remedial pilot test at his deposition. (Dkt. #118 at 266:23 – 269:6; dkt. #203-2 at ARCADIS027682 –ARCADIS027686 & ARCADIS027698 – ARCADIS027704.)

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 519 – 523.) Plaintiffs' additional proposed finding of fact is not based on admissible evidence. Dr. Everett's expert

report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 99, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 99, above. Note that Madison-Kipp is not the only site categorized as a "High" threat and there are multiple other potential sources in the vicinity. In addition, Unit Well #8 contains "fairly high levels of both iron and manganese." (Dkt. #167-40.)

102. City Well No. 8 draws water from the MKC site. Water level transducers were placed in a monitoring well on the MKC site (MW-5) and measurements were taken in that well while City Well No. 8 was turned on and off. The results of that test proved conclusively that there is a direct hydraulic connection between Well No. 8 and MKC groundwater. (Doc. 188 at pp. 41-42, 129-130)

RESPONSE: Disputed. See Response to PAPFOF ¶ 99, above.

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

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on Dr. Everett's deposition testimony based on a hearsay statement made by someone at the City of Madison to Dr. Everett. (*See* Madison-Kipp Reply Br. at 12-13; dkt. #188, at 41:21 – 42:15.) The underlying fact, i.e., that the Madison Water Utility is reportedly not using the well in light of a risk from new data, is not admissible and thus, cannot be considered in ruling on Madison-Kipp's summary judgment motion.

Dr. Lorne Everett has failed to submit any independent admissible evidence to support his opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

Finally, even if the City of Madison detected PCE in Unit Well 8 tomorrow, there would be enough time for appropriate remedial actions to be taken, such that there would be no threat of an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶¶ 521 –523.)

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557 & 561 – 567.)

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

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

(Doc. 185, at p.12)

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557; 561 – 567.) The deep groundwater is not a source of sub-slab soil vapors. (M-KPFOF ¶ 518.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

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

(Doc. 195 at Ex. 16)

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557; 561 & 567.) Plaintiffs' additional proposed finding of fact is not supported by the cited document. Mr. Schmoller has not been offered or qualified as a vapor intrusion expert. Further, Mr. Schmoller does not provide the standard of care relied on in making such a conclusory statement.

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

> Chlorinated vapor contamination caused by contaminant releases from past operations at Madison-Kipp have introduced a probable carcinogen (PCE) into the breathing space of up to 47 homes adjacent to and near the Kipp facility. None of the detected concentrations exceed current sub-slab or indoor air Department guidance criteria. However, 26 of the vapor impacted homes also have detectable concentrations of one or more (of) the site related soil contaminants making for multiple exposure pathways.

(Doc. 195 at Ex. 12)

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557; 561 – 567; 591 – 593, 596 – 597, 600 – 617.)

Mr. Schmoller has not been offered or qualified as a vapor intrusion expert or a toxicology expert. Further, Mr. Schmoller does not provide the standard of care or underlying analysis relied on in making such a conclusory statement.

108. Because the sub-slab samples demonstrate a complete migration pathway from the MKC site, which is highly contaminated with these dangerous chemicals, and because MKC has yet to fully identify or clean up the sources of these chemicals, DNR has offered sub-slab mitigation systems to every home in the Class Area where sub-slab

vapors – at any level at all – have been detected, to prevent the vapors from invading the homes where families, including families with young children, spend the bulk of their days. (Doc. 118 at p. 235)

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557; 561 – 567; 591 – 593, 596 – 597, 600 – 617.) The cited document does not support Plaintiffs' additional proposed finding of fact. Further, Mr. Schmoller has not been offered or qualified as a vapor intrusion expert or a toxicology expert. Further, Mr. Schmoller does not provide the standard of care or underlying analysis relied on in making such a conclusory statement.

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

RESPONSE: Disputed because the cited document does not support Plaintiffs' additional proposed finding of fact.

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 564 – 567 & 586 – 588.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and

testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 110, above.

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

RESPONSE: Disputed. Exposure to PCE, TCE, PAHs and PCBs in soil via incidental ingestion at the plaintiff properties does not present an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶ 591.) Exposure to PAHs and PCBs in soil via dermal contact at the plaintiff properties does not present an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶ 592.) Exposure to PCE, TCE and VC via inhalation of indoor air at the plaintiff properties does not present an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶ 593.) Unlike Plaintiffs' conclusory statements, Dr. Beck's opinion is supported by admissible underlying facts. (M-KPFOF ¶¶ 591 – 593, 596 – 618.)

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 112, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 112, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 112, above.

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

RESPONSE: Disputed. See Response to PAPFOF ¶ 112, above.

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

> one family's two-year old son should not play in the dirt in the family yard, and instead should only play in a raised sandbox. (Doc. 119 at pp. 35-36)
>
> the soil contamination may impact the vegetables grown in the family garden (causing the family to cease its gardening). (Doc. 126 at pp. 37–39)
>
> one family should not eat the food grown in the family garden. (Doc. 191 at pp. 22-23)

RESPONSE: Disputed. The various facts are not based on admissible evidence but inadmissible hearsay under Federal Rule of Evidence 802. (*See* Madison-Kipp Reply Br. at 12-13.)

118. According to DNR's Schmoller, the levels of contamination in the aquifer underlying both the MKC Site and Class Area – in some instances by only 10 feet – have

for at least 20 years violated Wisconsin State regulations (Doc. 117 at pp. 44, 51-53); they also exceed by hundreds of times, and in one case nearly 2,000 times, the federally "acceptable" level of contamination in groundwater. (Doc. 188 at Ex. 2(g); Doc. 195 at Ex. 25).

RESPONSE: The cited document does not support Plaintiffs' additional proposed finding of fact. The federal MCL applies only to *drinking* water provided by utilities via a public water supply. The MCL is not applicable to the groundwater below the Class Area. (Dkt. #195-26 (relating to "National Primary Drinking Water Regulations" and "public water systems").)

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557 & 561 – 567.) The deep groundwater is not a source of sub-slab soil vapors. (M-KPFOF ¶ 518.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

RESPONSE: Disputed. (M-KPFOF ¶ 521 – 523.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

RESPONSE: Disputed as not based on admissible evidence. Plaintiffs rely on Dr. Everett's deposition testimony based on a hearsay statement made by someone at the City of Madison to Dr. Everett. (*See* Madison-Kipp Reply Br. at 12-13; dkt. #188, at 41:21 – 42:15.) The underlying fact, i.e., that the Madison Water Utility is reportedly not using the well in light of a risk from new data, is not admissible and thus, cannot be considered in ruling on Madison-Kipp's summary judgment motion.).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to

Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference.

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

RESPONSE: Disputed. Mr. Schmoller's testimony is entirely speculative and site investigation and remediation has continued after Mr. Schmoller's testimony. (*See* Dkt. #203-2 at ARCADIS027682 –ARCADIS027686 & ARCADIS027698 – ARCADIS027704.)

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

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557, 561 – 567, 591 – 593, 596 – 597 & 600 – 617.) Mr. Schmoller has not been offered or qualified as a vapor intrusion expert or a toxicology expert. Further, Mr. Schmoller does not provide the standard of care or underlying analysis relied on in making such a conclusory statement.

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

RESPONSE: Madison-Kipp does not dispute that WDNR installed vapor mitigation systems in the Class Area but disputes the inference that such systems were technically justified. (M-KPFOF ¶¶ 241, 579, 580, 581, 582.)

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

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Moreover, while Madison-Kipp does not dispute that Mr. Hausbeck wrote the above sentence in an email, Madison-Kipp disputes that Mr. Hausbeck's personal opinion establishes the standard of care for the installation of mitigation systems. Mr. Hausbeck has not been offered or qualified as an expert in vapor intrusion or a toxicology expert and does not provide the standard of care relied on in making his conclusory statement. (M-KPFOF ¶¶ ¶¶ 548 – 551, 576 – 580.)

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

RESPONSE: Disputed. (M-KPFOF ¶ 593.) Additionally, the finding is not based on admissible evidence but inadmissible hearsay under Federal Rule of Evidence 802. (*See* Madison-Kipp Reply Br. at 12-13.) Further, Plaintiffs have not offered or qualified such public health official as an expert in vapor intrusion or a toxicology expert and do not provide the standard of care relied on in making his conclusory statement.

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

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

(Doc. 186 at pp. 2, 138)

RESPONSE: Disputed. Exposure to PCE via inhalation of indoor air at the plaintiff properties does not present an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶ 593; dkt. #144 at 3.) Moreover, Dr. Ozonoff's expert report and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert David M. Ozonoff, which was filed concurrently herewith, and incorporated herein by reference.

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

> Q. Have you ever thought about whether you might think it was a serious problem if you lived in one of those homes immediately adjacent to your company?
> A. I think it would be a logical thing for someone to think.
>
> * * * *
>
> Q. Do you have any reason to believe that it is not reasonable for (Class Representative) Deanna Schneider and her neighbors to want one of those systems affixed to their home?
> A. I think they would want one and should want one and I believe in most cases either have them or are getting them.
> Q. And do you believe it's reasonable for them to feel that way?
> A. Yes.

(Doc. 189 at pp. 37, 39)

RESPONSE: Madison-Kipp disputes the proposed finding of fact as immaterial to deciding Madison-Kipp's summary judgment motion. Further, Mr. Coleman's idea of "reasonableness" does not set the applicable standard of care for Madison-Kipp's

investigation, remediation or mitigation activities (M-KPFOF ¶¶ ¶¶ 548 – 551, 576 – 580.)

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

> Q. And you are concerned about how far into the residential area (the vapor contamination) may have spread, right?
> A. You know, how far has it spread and also I was – my fear was that we didn't want to get into the decision making where we relied on mitigation alone, that we wanted to remediate the source of the problem. As an agency we have two responsibilities, public health protection and restore the environment. So that note to me is to keep pounding it in my head that we just can't put 100 mitigation systems around Kipp and say we did the job. That's what that is all about.
> Q. Okay. Because the 100 mitigation systems are, so to speak, treating the symptoms and not getting at the – what's causing it, right?
> A. Contamination avoidance as opposed to remediation.

(Doc. 117 at p. 204)

RESPONSE: Disputed. (M-KPFOF ¶¶ 552 – 557, 561 – 567, 591 – 593, 596 – 597 & 600 – 617.) Mr. Schmoller has not been offered or qualified as a vapor intrusion expert or a toxicology expert. Further, Mr. Schmoller does not provide the standard of care or underlying analysis relied on in making such a conclusory statement.

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

RESPONSE: Disputed. Exposure to PCE via inhalation of indoor air at the plaintiff properties does not present an imminent and substantial endangerment to health or the environment. (M-KPFOF ¶ 593; dkt. #144 at 3.) Moreover, Dr. Ozonoff's expert report

and testimony, and Plaintiffs' additional proposed finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert David M. Ozonoff, which was filed concurrently herewith, and incorporated herein by reference.

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

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

(Doc. 185 at p. 41)

RESPONSE: Disputed. (M-KPFOF ¶¶ 515, 521 – 523, 552 – 557, 561 – 567, 576, 591 – 593, 596 – 597 & 600 – 617.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 14-15 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett, which was filed concurrently herewith, and incorporated herein by reference.

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

(1) Throughout the relevant time period, Madison-Kipp's neighbors in the Class Area lived immediately adjacent to the facility – literally just feet away.

(2) Each of the relevant chemicals is either a known or potential carcinogen, and thus poses a potentially serious threat to humans, especially children. The Expert Report of Dr. David Ozonoff, on which I explicitly rely here, articulates very clearly that, for example, PCE is potentially dangerous to humans in any concentration.

(3) Each chemical has long ago reached the neighborhood properties, often via multiple means. In environmental terms, this means that the "pathway" is complete, *i.e.*, the chemicals have found a way – via groundwater, gas, wind, water run-off, etc. – to travel from Madison-Kipp to neighborhood properties. Also, since Madison-Kipp has thus far failed to foreclose any of these pathways, the large volume of toxic chemicals today contaminating Madison-Kipp's property continue to travel one or more of these pathways to the Class Area and beyond.

(4) The concentrations of chemicals remaining on Madison-Kipp's property, which continue to travel via already well-travelled pathways to the Class Area and beyond, are both very high, in some cases dangerously so (in soil, soil gas and groundwater).

(Doc. 185 at pp. 40-46)

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

(Doc. 188 at pp. 90, 107)

RESPONSE: Disputed. (M-KPFOF ¶¶ 515, 521 – 523, 552 – 557, 561 – 567, 576, 591 – 593, 596 – 597 & 600 – 617.) Further, Plaintiffs rely on the expert report of Dr. Lorne Everett and have failed to submit any independent admissible evidence to support Dr. Everett's opinion testimony. Plaintiffs cannot backdoor inadmissible evidence into facts for summary judgment through the opinion testimony of Dr. Everett. (*See* Madison-Kipp Reply Br. at 12-13 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).) Moreover, Dr. Everett's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in

Madison-Kipp's Motion to Exclude Plaintiffs' Expert Lorne G. Everett and Motion to Strike Supplemental, Oral Opinions of Plaintiffs' Expert Lorne G. Everett, which are filed concurrently herewith, and incorporated herein by reference. Further, Dr. Everett explicitly relies on Dr. Ozonoff in Plaintiffs' additional proposed finding of fact and Dr. Ozonoff's expert report and testimony, and Plaintiffs' response to this finding of fact, should be stricken and disregarded, as fully set out in Madison-Kipp's Motion to Exclude Plaintiffs' Expert David M. Ozonoff, which was filed concurrently herewith, and incorporated herein by reference.

Dated this 4th day of April, 2013.

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